

STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )  
Kenneth Lee Brown, )  
Petitioner. )  
v. )  
The State of South Carolina, )  
Respondent. )

IN THE COURT OF GENERAL SESSIONS  
FOR THE SEVENTH JUDICIAL CIRCUIT

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SC Court of Appeals

ORDER GRANTING RESPONDENT'S MOTION  
TO DISMISS AND DENY PETITIONER'S  
MOTION FOR RESENTENCING

Indictment No.: 1983-GS-42-0006, 0010,  
0019, 0020, 0021, 0030, and 0031

On December 17, 2019, this Court held a motion hearing regarding Petitioner's *Aiken v. Byars* Motion for Resentencing and the State's related Motion to Dismiss and Deny. The State was represented by Barry Barnette, Solicitor for the Seventh Judicial Circuit. The Petitioner was represented by Robin File, Esq. Pamela Green was the Court Reporter for the hearing. Mr. File had been appointed to represent the Petitioner because the Seventh Judicial Circuit Public Defender's Office has a conflict with any representation of him. The Petitioner had previously testified as a witness for the State of South Carolina against a client that Clay Allen, the Seventh Circuit Public Defender, had represented. The Court appointed Mr. File to represent the Petitioner on June 12, 2019, after considering Mr. Allen's potential conflict of interest.

Prior to the hearing being scheduled for December 17, 2019, Mr. File notified the Court and the State that his client was waiving his presence at the hearing. At the start of the December 17<sup>th</sup> hearing, Mr. File also stated on the record that his client had notified him that he would waive his presence at the hearing. Additionally, Mr. File also notified the Court that he apprised his client of new case law from the South Carolina Court of Appeals decided since the filing of Petitioner's *Aiken v. Byars* Motion, and after doing so Mr. File had received another handwritten

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letter indicating the Petitioner wanted Mr. File relieved from representing him and new counsel appointed because Mr. File was not representing him as he should.

The Court first considered the history of this case as stated in the matters before the Court. The Petitioner pled guilty on January 28, 1983, and received the following sentences on each charge: on his Burglary First (1<sup>st</sup>) Degree charge (Ind. No.: 83-GS-42-0019) the Petitioner received a life sentence with parole consecutive; on his Burglary First (1<sup>st</sup>) Degree charge (Ind. No.: 83-GS-42-0021) the Petitioner received a life sentence with parole; on his Burglary First (1<sup>st</sup>) Degree charge (Ind. No.: 83-GS-42-0030) the Petitioner received a life sentence with parole; on his Burglary First (1<sup>st</sup>) Degree charge (Ind. No.: 83-GS-42-0031) the Petitioner received a life with parole sentence; on his Attempted Armed Robbery charge (Ind. No.: 83-GS-42-10) the Petitioner received a twenty (20) year with parole consecutive sentence; and on his Receiving Stolen Goods charge (Ind. No.: 83-GS-42-0006) the Petitioner received a ten (10) year with parole consecutive sentence from the Honorable Paul Moore in Spartanburg County General Sessions Court. The Petitioner was released on parole on May 1, 2002. Thereafter the Petitioner was charged with numerous offenses involving bank robberies in the state of Florida and was convicted of and sentenced for those federal offenses. The Petitioner is presently in federal custody at the United States Penitentiary Coleman I in Wildwood, Florida with a release date of February 10, 2058.

On August 18, 2017, the South Carolina Supreme Court ordered this resentencing matter be heard; Judge R. Keith Kelly was assigned exclusive jurisdiction to review this matter on August 24, 2017. The Court prior to this hearing had ordered a stay of this matter on October 10, 2017, because the Court learned from both parties that the Petitioner was a federal inmate housed at USP Coleman in Wildwood, Florida with a projected release date of February 10, 2058. The South Carolina Supreme Court on January 15, 2019, granted the Petitioner's request for extraordinary

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relief by his *pro se* petition. The South Carolina Supreme Court vacated the Court's orders imposing a stay and remanded the matter to Judge Kelly to rule on the merits of the Respondent's Motion to Dismiss and, if the Motion to Dismiss is denied, to consider the Petitioner's Motion for Resentencing.

At the December 17, 2019 hearing, prior to the hearing on the Motion to Dismiss, the Court heard on the record the Petitioner's Motion to Relieve Mr. File from representation and denied it because Mr. File was only keeping his client informed of current case law and properly representing him. The Court then considered the Motion to Dismiss and the Supplemental Motion to Dismiss made by the Respondent. The Court heard from both parties on the Respondent's motions and further considered the Motion for Resentencing made by the Petitioner with arguments made by Mr. File on the behalf of the Petitioner and arguments made by Mr. Barnette on behalf of the State.

After considering arguments made at the hearing and in submitted materials, the Court grants the Respondent's Motion to Dismiss and denies the Petitioner's Motion for Resentencing under *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). The Court finds the Petitioner is not entitled to a Motion for Resentencing because the life sentence the Petitioner received for his Burglary First (1<sup>st</sup>) Degree convictions is parole eligible. Under South Carolina law in 1983, a life sentence for Burglary First (1<sup>st</sup>) Degree is parole eligible after serving ten (10) years of the sentence. The law for Murder was changed in 1996 when the "Truth in Sentencing" bill was enacted and a life sentence since July 1, 1996, is actually a life sentence without parole. Under *Aiken v. Byars* our South Carolina Supreme Court determined that *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455 (2012), applied retroactively in South Carolina as stated in the Petitioner's Motion for Resentencing. However, it only applied to life without parole sentences. The

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Petitioner's sentences for Burglary First (1<sup>st</sup>) Degree in 1983 are for life with parole, therefore, neither *Aiken* nor *Miller* apply to this case. The Petitioner also received parole concerning these charges in 2002.

The Court also finds that the United States Supreme Court considered the retroactivity of its holding in *Miller* in *Montgomery v. Louisiana*, 136 S.Ct. 718, 193 L.Ed. 2d 599 (2016), as revised (Jan. 27, 2016). After concluding the holding of *Miller* should be applied retroactively, the majority in *Montgomery* addressed the dissent's claim that making *Miller* retroactive would overly burden State courts by requiring all juveniles sentenced to life be resentenced in accordance with the "new" mandate of *Miller*. In so holding, the United States Supreme Court stated,

Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity – and who have since matured – will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

*Id.* at 736 (citation omitted).

The Petitioner's original life sentence makes him eligible for parole pursuant to South Carolina law; he is not entitled to resentencing pursuant to *Miller* or *Byars*.

The Court holds that the case of *State v. Finley* also applies to this case. 427 S.C. 419, 831 S.E.2d 158 (Ct. App. 2019). In that case, Finley argued his mandatory sentence of life with the possibility of parole after service of thirty (30) years was a *de facto* LWOP, functionally equivalent to a sentence of life imprisonment without the possibility of parole (LWOP), and therefore a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. Finley also contended the mandatory sentencing scheme rendered his life sentence unconstitutional because it prevented consideration of his juvenile status as required by *Miller* and *Byars*.

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The South Carolina Court of Appeals found that the Appellant in *Finley* was not entitled to resentencing pursuant to *Miller* and *Byars*. The Court stated:

Although *Finley* received a mandatory life sentence for murder as a juvenile offender, the circuit court's sentence afforded *Finley* parole eligibility after the service of thirty years' imprisonment. See S.C. Code Ann. § 16-3-20(A) (1992) (providing that a person who is convicted of or pleads guilty to murder must be punished by (1) death; (2) life imprisonment with the possibility of parole after twenty years; or (3) life imprisonment with the possibility of parole after thirty years if the State sought the death penalty and an aggravating circumstance was found but a recommendation of death was not made). This sentence differs significantly from those at issue in *Graham*, *Miller*, and *Byars* in which the juvenile offenders received sentences of life imprisonment *without* the possibility for parole. See *Graham*, 560 U.S. at 82 ("The Constitution prohibits the imposition of a life *without* parole sentence on a juvenile offender who did not commit homicide." (emphasis added)); *Miller*, 567 U.S. at 479 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison *without possibility of parole* for juvenile offenders." (emphasis added)); *Byars*, 410 S.C. at 545 ("We hold the principles enunciated in *Miller* . . . apply . . . to all juvenile offenders who may be subject to a sentence of life imprisonment *without the possibility of parole*." (emphasis added)). As our supreme court recently noted in *Slocumb*, this court's review is confined by the parameters established by the United States Supreme Court. See 426 S.C. at 306, 827 S.E.2d at 153. Therefore, as it stands, *Finley* is not a member of the class of offenders contemplated by our precedent. Furthermore, the Supreme Court indicated in *Graham* and *Montgomery* that a sentencing court may remedy any potential Eighth Amendment violations by permitting a juvenile offender to be considered for parole. See *Graham*, 560 U.S. at 82 ("A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term."); *Montgomery*, 136 S. Ct. at 736 ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."). As *Finley*'s sentence afforded him parole eligibility, we find any potential Eighth Amendment violation was cured.

*Id.* at 427-428.<sup>1</sup>

The South Carolina Court of Appeals found that the circuit court did not err in denying *Finley*'s motion for resentencing and affirmed the circuit court's order.

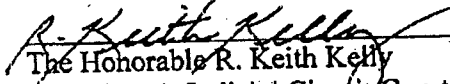
<sup>1</sup> Full case citations omitted in quote: *Graham v. Florida*, 560 U.S. 59 (2010); *State v. Slocumb*, 426 S.C. 297, 827 S.E.2d 148 (2019).

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IT IS THEREFORE ORDERED that the Respondent's Motion to Dismiss and Deny.  
Petitioner's Motion for Resentencing is granted based on the above findings of the Court.

AND IT IS SO ORDERED.

  
The Honorable R. Keith Kelly  
The Seventh Judicial Circuit Court

January 13, 2020  
Spartanburg, South Carolina

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