

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
In The Court of Common Pleas

Honorable Kristi L. Harrington,
Common Pleas Judge of the Ninth Judicial Circuit

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Jun 04 2020

SC Court of Appeals

Case No.: 2017-000800

State of South Carolina,

Respondent,

v.

Eric D. McCall,

Appellant.

PETITION FOR REHEARING

On May 20, 2020, this Court affirmed the order dismissing Appellant’s motion for resentencing pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012), and *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). *See* 2020-UP-136 (S.C. App. 2020). Petitioner hereby requests that this court rehear and reconsider its opinion in this case.

ARGUMENT

- I. Appellant respectfully submits that this Court’s opinion is based on an error of law because it reads *Miller v. Alabama* as only allowing individualized sentencing hearings to persons under the age of 18.

“[Y]outh is more than a chronological fact.” *Miller*, 567 U.S. at 476 (quoting *Eddings*). Young people lack maturity and responsibility; thus, they are more likely to act with “recklessness, impulsivity, and needless risk-taking.” *See id.* at 471. Therefore, in considering the appropriate sentences for young

people the courts should look at the following:

In addition to the chronological age of an individual, Court must examine their emotional development and the “hallmarks of youth.” (1) the chronological age of the offender and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence; (2) the family and home environment that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender’s participation in the conduct and how familial and peer pressures may have affected him; (4) the incompetencies associated with youth—for example, the offender’s inability to deal with police officers or prosecutors (including on a plea agreement) or the offender’s incapacity to assist his own attorneys; and (5) the possibility of rehabilitation.

Aiken, 410 S.C. at 544, 765 S.E.2d at 577 (internal quotations omitted). Young People have “diminished culpability and greater prospects for reform,” and therefore, “they are less deserving of the most severe punishments.” *See Graham*, 560 U.S. at 68.

The United States District Court in Connecticut granted §2255 habeas to a 18 year-old’s *Miller* claim. *Cruz v. United States*, No. 11-CV-787 (JCH), (D. Conn. Mar. 29, 2018).¹ Cruz was 18 years and 20 weeks old at the time of his crimes. In *Cruz*, the Government argued that *Miller*, was a bright line test that prohibited a *Miller* type sentencing hearing to defendants under 18 years old at the time of the crime. This was the same position taken by this court in Appellant’s case. R. 266, ll. 13-18.

However, the *Cruz* court found the following:

The Government argues nonetheless that *Miller* drew a bright line at 18 years old, which prevents this court from applying the rule in *Miller* to an 18-year-old. See Post-Hr’g Mem. in Opp. at 8; see also *Roper v. Simmons*, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (recognizing that the line may be over- and under-inclusive, but stating nonetheless that “a line must be drawn”). However, in so arguing, the Government fails to recognize that there are different kinds of lines. By way of illustration, in *Thompson v. Oklahoma*, 487 U.S. 815, 108 S. Ct. 2687,

¹ Appellant is cognizant of Rule 268, SCACR. However, Appellant would submit that Rule 268, SCACR is not violated by citing unpublished federal opinions. Unpublished federal opinions are embraced by the Federal Courts. *See* Rule 32.1, FRAP.

101 L. Ed. 2d 702 (1988), the Supreme Court held that the death penalty was unconstitutional for offenders under the age of 16. *Id.* at 838. It was not until *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989), rev'd by *Roper*, 543 U.S. at 574, however, that the Supreme Court held that the Eighth Amendment did not prohibit the execution of offenders ages 16 to 18. *Id.* at 380. In *Stanford*, the Court did not say that the ruling it set forth was found in the *Thompson* holding. Indeed, *Stanford* was not redundant of *Thompson* because the line drawn in *Thompson* looked only in the direction of offenders under the age of 16 and found them to be protected by the Eighth Amendment. *Thompson's* line did not simultaneously apply in the other (i.e. older) direction to prohibit the Eighth Amendment from protecting those over the age of 16. In contrast, *Stanford's* line did.

This distinction between the type of line drawn in *Thompson* and the type of line drawn in *Stanford* is reflected in the difference in the Supreme Court's treatment of these two cases in *Roper v. Simmons*. In deciding that the death penalty was unconstitutional as applied to offenders under the age of 18, the *Roper* Court considered itself to be overturning *Stanford*, but not *Thompson*. Compare *Roper*, 543 U.S. at 574 ("*Stanford v. Kentucky* should be deemed no longer controlling on this issue."); with *id.* ("In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18."). If the Government's argument that the line drawn in *Miller* prevents this court from applying its rule to an 18-year-old were correct, the same logic applied to the line drawn in *Thompson* would have required *Roper* to overturn *Thompson* rather than relying on and endorsing it. The language in *Roper*, however, makes clear that the court endorsed, rather than overturned, *Thompson*. See *Roper*, 543 U.S. at 574.

In drawing the line at 18, then, *Roper*, *Graham*, and *Miller* drew lines similar to that in *Thompson*, protecting offenders that fall under the line while remaining silent as to offenders that fall above the line. In the case of mandatory life imprisonment without parole, no Supreme Court precedent draws a line analogous to that in *Stanford*. **Therefore, while this court recognizes that it is undoubtedly bound by Supreme Court precedent, it identifies no Supreme Court precedent that would preclude it from applying the rule in *Miller* to an 18-year-old defendant.**

Cruz.

In finding that Cruz was entitled to resentencing, the Court examined legislative enactments, the use of life without parole sentences, and trends. The court noted, "that very few of the courts that declined to apply *Miller* to 18-year-olds had before them a record of scientific evidence comparable to the one that this court now has before it." *Cruz*.

II. Appellant respectfully submits that Refusal to provide Appellant a *Miller* Resentencing hearing would violate the Equal Protection Clause because there is no rational basis to treat a nineteen-year-old differently than a seventeen-year-old.

Equal protection under U.S. Const. Amend. XIV requires “all persons similarly situated to be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

The *Miller* decision did not categorically deem life without parole sentences unconstitutional for youthful offenders rather it provided youthful offenders the additional protection of an individualized sentencing hearing. The Equal Protection Clause of the Fourteenth Amendment would require all similarly situated defendants to have that same protection.

As stated by the opinion of the court in *House*, there is no rational basis to find that a seventeen-year-old should receive a *Miller* hearing but a nineteen-year-old should not. Therefore, to summarily dismiss Appellant’s request for a *Miller* hearing would be a denial of his right to equal protection.

CONCLUSION

Based upon the foregoing, and the arguments previously raised in briefing, Appellant respectfully requests that this Court rehear and reconsider this case.

June 4, 2020



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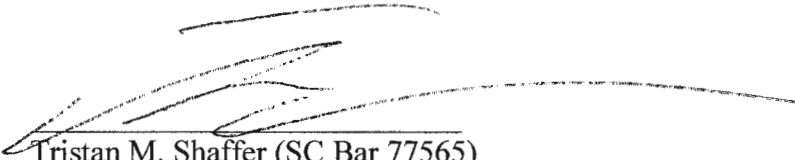
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CERTIFICATE OF SERVICE

I certify that on the date below I served the Petition for Rehearing on Petitioner by emailing a copy to mbrown@scag.gov.

June 4, 2020


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