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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ARTHUR JASON BOWERS,

APPELLANT

APPELLATE CASE NO. 2018-000868

Appeal from Laurens County

Donald B. Hocker, Circuit Court Judge

Opinion No. 2020-UP-196

PETITION FOR REHEARING

On June 24, 2020, this Court affirmed Appellant's sentence. State v. Bowers, 2020-UP-196 (S.C. Ct. App. filed June 24, 2020). As explained by this Court, Appellant was sentenced to fifty years' imprisonment for murder, thirty years' imprisonment for armed robbery, and five years' imprisonment for conspiracy. Id. All offenses occurred when Appellant was seventeen-years old. Id. On appeal, Appellant argued his sentence was unconstitutional because the trial court imposed the functional equivalent of a life sentence without conducting an individualized sentencing proceeding to allow for consideration of his youth. Id. This Court affirmed Appellant's sentence relying solely upon its flawed interpretation of State v. Slocumb, 426 S.C.

297, 827 S.E.2d 148 (2019). Id. According to this Court, the Supreme Court determined that Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014) did not apply to sentences that were the functional equivalent of life sentences; rather, the individualized sentencing proceedings were required only if a defendant received a literal life sentence. Id. Appellant respectfully requests this Court rehear the matter pursuant to Rule 221(a), SCACR, because this Court misapprehended the Supreme Court's holding in Slocumb.

While this Court appeared to accept that Appellant was sentenced to the functional equivalent of a life sentence, it bears repeating what happened when the judge sentenced him. After the jury returned its verdicts of guilt, the state requested the judge impose a sentence that was a term of years equivalent to a life sentence on Appellant, who was thirty-two years old at the time. The prosecutor referred to a discussion among the parties in chambers concerning sentencing:

> And, Your Honor, as we discussed in chambers, I understand based on the U.S. Supreme Court case given [Appellant's] age at the time of this event, he is not eligible for life without parole; however, we would request that Your Honor sentence him to a substantial number of years that would achieve the same effect.

R. 395, ll. 1-7. Thereafter, the judge gave the state exactly what it asked for by sentencing Appellant to fifty years imprisonment for murder. R. 397, ll. 6-7; R. 406. In fact, the judge made his intent to sentence Appellant to a term of years equivalent to Appellant's life when he informed Appellant that "now [his] life has been taken away" as well. R. 396, ll. 2-8. This was an unconstitutional sentence.

"[C]hildren are constitutionally different from adults for purposes of sentencing." Miller v. Alabama, 567 U.S. 460, 471 (2012). Using this basic premise, on June 25, 2012, the United States Supreme Court held mandatory sentences of life without parole (LWOP) imposed upon juveniles violated the Eighth Amendment to the United States Constitution. Id. at 479. Not long

after the Court's opinion in Miller, the South Carolina Supreme Court reviewed non-mandatory life sentences for juveniles in South Carolina through the lens of Eighth Amendment jurisprudence. Aiken v. Byars, 410 S.C. 534, 540-541, 765 S.E.2d 572, 575-576 (2014). The Supreme Court held that Miller applied retroactively and to juveniles who were sentenced to non-mandatory terms of life without parole. Id. Finding that "Miller does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered," the Court held the sentencing judge must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" and that this requirement "deserves universal application." Id. at 543, 765 S.E.2d at 577. The Court held the class of petitioners in the case "and those similarly situated" were "entitled to resentencing to allow the inmates to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight." Id. at 544, 765 S.E.2d at 577.

Following Miller, courts have confronted the question of what constitutes a "life without parole sentence," particularly, in light of the Court's mandate that juvenile offenders *must* be afforded a *meaningful opportunity* for release unless there has been a finding of irreparable corruption. When the South Carolina Supreme Court examined a similar question in Slocumb, it did so pursuant to the United States Supreme Court's mandate in Graham v. Florida, 560 U.S. 48, 58 (2010), that a juvenile could never be sentenced to life without parole for a non-homicide offense. State v. Slocumb, 426 S.C. 297, 306, 827 S.E.2d 148, 152 (2019). The Court held that Graham's explicit holding applied to de jure life sentences alone, and that its rationale may implicate de facto life sentences. Id. In declining to extend the rationale to Slocumb, the Court emphasized that "Slocumb committed multiple crimes at two different points in time – the

second set after he had escaped from custody and, in the short time he was free, committed another strikingly similar set of crimes to the first one three years earlier." Id. at 310, 827 S.E.2d at 155. Thereafter, the Court reasoned that "Slocumb received an average per-crime sentence of twenty-six years' imprisonment." Id. Thus, "[t]he only reason his aggregate sentence exceed[ed] his life expectancy [was] because he committed so many crimes, not because a single sentence [was] disproportionately lengthy." Id.

Contrary to this Court's interpretation that Slocumb stands for the proposition that the Eighth Amendment bars *only* literal LWOP sentences, the Supreme Court made clear that the *only* reason Slocumb's de facto life sentence passed constitutional muster was because it was an aggregate sentence for multiple crimes on multiple dates. In affirming Appellant's sentence, this Court read Slocumb too broadly. Appellant's fifty-year sentence was a single sentence related to a single crime, unlike the "so many crimes" committed by Slocumb and the multiple sentences imposed upon Slocumb as a result.

The Miller Court repeatedly focused on the notion that the character traits of children are "more transitory and less fixed." Id. at 471. Children by definition lack maturity and responsibility; thus, they are more likely to act with "recklessness, impulsivity, and needless risk-taking." Id. at 471-472. The Court eloquently explained that due to the innate characteristics of children at large, there is a "great difficulty … of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id. at 479-480. In fact, the Court stated "incorrigibility is inconsistent with youth." Id. at 472-473. The Court emphasized the potential for reform present in all juveniles and explained that youth "is a time of immaturity,

irresponsibility, 'impetuousness[,] and recklessness.'" Id. at 476 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

Focusing on the concept of individualized sentencing, the Court recognized "that children are constitutionally different from adults for purposes of sentencing." Id. at 471. Children "have diminished culpability and greater prospects for reform," and therefore, "'they are less deserving of the most severe punishments.'" Id. (quoting Graham, 560 U.S. at 68). "[T]he distinctive attributes of youth diminish penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Id. at 473. As a result, "[a]n offender's age is relevant to the Eighth Amendment." Graham, 560 U.S. at 76. In light of the relevance to the ban on cruel and unusual punishment, "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." Miller, 567 U.S. at 474.

Miller "unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole." Aiken v. Byars, 410 S.C. 534, 542, 765 S.E.2d 572, 576 (2014). Thus, the Court determined "an individualized sentencing proceeding before imposing a sentence of life without parole on a juvenile offender" was required. Id. The South Carolina Supreme Court found the Miller decision "clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution." Id. at 543, 765 S.E.2d at 576-577. Quite simply, the Court concluded "Miller does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." Id. at 543, 765 S.E.2d at 577. Accordingly, the Court held the requirement that a sentencing judge must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison"

"deserves universal application." Id. (internal quotations omitted). The Court held the class of petitioners in the case "and those similarly situated" were "entitled to resentencing to allow the inmates to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight." Id. at 544, 765 S.E.2d at 577.

The sentencing court must consider the following factors in crafting a sentence proportional to the offense and the juvenile offender:

> 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.

Id. at 544, 765 S.E.2d at 577 (internal quotations omitted).

Various courts around the country have recognized de facto life sentences specifically in the context of finding them unconstitutional if imposed without compliance with the requirements of Graham and Miller. See Budder v. Addison, 851 F.3d 1047 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 475 (2017) (on AEDPA review, concluding that aggregate sentence resulting in parole eligibility at age 131 was barred by Graham, stating: "we cannot read the Court's categorical rule as excluding juvenile offenders who will be imprisoned for life with no hope of release for nonhomicide crimes merely because the state does not label this punishment as 'life without parole'" and observing that "[l]imiting the Court's holding by this linguistic distinction would allow states to subvert the requirements of the Constitution by merely sentencing their offenders to terms of 100 years instead of 'life'" and "[t]he Constitution's protections are not so malleable"); McKinley v. Butler, 809 F.3d 908 (7th Cir. 2016) (on appeal

from denial of federal habeas relief, finding that Miller's "children are different" language "cannot logically be limited to de jure life sentences, as distinct from sentences denominated in number of years yet highly likely to result in imprisonment for life"); Moore v. Biter, 725 F.3d 1184 (9th Cir. 2013) (on AEDPA review, finding that aggregate sentence resulting in parole eligibility at age 127 was "irreconcilable with Graham's mandate that a juvenile nonhomicide offender must be provided 'some meaningful opportunity' to reenter society and thus unconstitutional under Graham."); People v. Caballero, 282 P.3d 291 (Cal. 2012) (sentence of 110-years-to-life unconstitutional under Graham); Casiano v. Commissioner, 115 A.3d 1031 (Conn. 2015) (Miller applicable to 50-year sentence); Henry v. State, 175 So.3d 675 (Fla. 2015) (Graham applicable to aggregate 90-year sentence); People v. Reyes, 63 N.E.3d 884 (Ill. 2016) (Miller applicable to aggregate 97-year sentence); Brown v. State, 10 N.E.3d 1 (Ind. 2014) (aggregate sentence of 150 years "forswears altogether the rehabilitative ideal" and exercising state constitutional authority to impose a lesser sentence); State v. Pearson, 836 N.W.2d 88 (Iowa 2013) (sentence of 55-years with parole eligibility after service of 35 years implicated Miller); State ex rel. Morgan v. State, 217 So.3d 266 (La. 2016) (Graham applicable to 99-year sentence and requiring parole eligibility in accordance with subsequently enacted juvenile parole eligibility statute); Carter v. State, 192 A.3d 695 (Md. Ct. App. 2018) (Graham applicable to aggregate sentence with parole eligibility after 50 years); State ex rel. Carr v. Wallace, 527 S.W.3d 55 (Mo. 2017) (Miller applicable to sentence of life with parole eligibility after 50 years); Steilman v. Michael, 407 P.3d 313 (Mont. 2017) (Miller applicable to de facto life sentences, but sentence with possible release after 31.33 years not prohibited); State v. Boston, 363 P.3d 453 (Nev. 2015) (Graham applicable to aggregate sentences of life with parole eligibility after 100 years); State v. Zuber, 152 A.3d 197 (N.J. 2017) (Miller applicable to

minimum sentences of 55 years and 68.25 years); Hawkins v. N.Y. DOC, 30 N.Y.S.3d 397 (N.Y. App. Div. 2016) (sentence of 22-years-to-life requires Miller considerations at parole hearing); State v. Moore, 76 N.E.3d 1127 (Ohio 2016) (Graham applicable to aggregate sentence of 112 years with parole eligibility after 77 years); Kinkel v. Persson, 417 P.3d 401 (Or. 2018) (upholding 111-year aggregate sentence, finding record from six-day sentencing hearing established that defendant was within the class of rare juveniles who, as Miller recognized, may be sentenced to life without possibility of parole for a homicide); State v. Ronquillo, 361 P.3d 779 (Wash. Ct. App. 2015) (Miller applicable to aggregate 51.3-year sentence); Bear Cloud v. State, 334 P.3d 132, 142 (Wyo. 2014) (Miller applicable to aggregate sentence with parole eligibility after 45 years).

Miller and Aiken do not rest upon the semantics of the sentence; thus, their reasoning requires resentencing for juvenile offenders sentenced to a term of years for a single offense that is the functional equivalent of LWOP. The prosecutor's request and the trial judge's expressed intent require holding the trial judge erred by imposing a de facto life sentence without first conducting an individualized sentencing hearing pursuant to Aiken. There is no practical distinction between a sentence of "life without parole" and a term of years sentence that will similarly result in a defendant's death in prison with no meaningful opportunity for release. Consequently, the imposition of such sentences against juvenile defendants are equally offensive to our federal constitution, absent an individualized sentencing hearing and reasoned finding that the defendant is "the rare juvenile offender whose crime reflects irreparable corruption." Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016).

In violation of the Eighth Amendment, the trial judge sentenced Appellant to fifty years imprisonment for a murder that occurred when he was seventeen years old. This Court affirmed

this functional equivalent life sentence based upon a flawed interpretation of State v. Slocumb, 426 S.C. 297, 827 S.E.2d 148 (2019). Based on the foregoing, Appellant respectfully requests this Court rehear this matter pursuant to Rule 221(a), SCACR.

Respectfully Submitted,

s/*Susan B. Hackett*
SUSAN B. HACKETT
Appellate Defender

This 9th day of July, 2020.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon Sherrie Butterbaugh, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is sbutterbaugh@scag.gov, Melody Brown, Esquire at the primary e-mail address listed in the Attorney Information System (AIS), which is mbrown@scag.gov, and Arthur Jason Bowers, #348252, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 9th day of July, 2020.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT