THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge
Appellate Case No. 2020-001292

Theodore Harrison,Jr. #155651, Appellant,

v.

South Carolina Department of Probation, Parole, and Pardon Services, Respondent.

INITIAL BRIEF OF APPELLANT

Theodore Harrison,Jr.
SCDC# 155651
Perry C.I., Q4A 211
430 Oaklawn Road
Pelzer, S.C. 29669

Matthew C. Buchanan,
Esquire
General Counsel, SCDPPPS
P.O. Box 207
Columbia, S.C. 29202

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

STATEMENT OF ISSUES ON APPEAL

1. DID THE ADMINISTRATIVE LAW COURT ERR IN FAILING TO FIND APPELLANT WAS RESENTENCED BY JUDGE HAYES TO THE SAME SENTENCE ANNOUNCED BY JUDGE RUSHING IN 1990. A SENTENCE OF LIFE WITH PAROLE ELIGIBILITY AFTER THE SERVICE OF THIRTY (30) YEARS?

2. DID THE ADMINISTRATIVE LAW COURT ERR IN FAILING TO FIND THAT THE RESENTENCING HEARING WHICH APPELLANT RECEIVED BEFORE JUDGE HAYES PURSUANT TO AIKEN V. BYARS, DID NOT MEET THE REQUIREMENT OF GEER V. SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES, THAT BEFORE §24-21-640 CAN BE APPLIED TO A PRISONER DENYING HIM PAROLE ELIGIBILITY ON A PAROLE ELIGIBLE LIFE SENTENCE AS A SECOND OR SUBSEQUENT VIOLENT OFFENDER, FOR CRIMES COMMITTED AS A JUVENILE, THE PAROLE BOARD MUST FIRST TAKE THE PRISON'S YOUTH AND ITS ATTENDANT CHARACTERISTICS AND CIRCUMSTANCES INTO ACCOUNT BEFORE DOING SO ?

3. DOES THE LAW OF SOUTH CAROLINA REQUIRE THAT ANY DECISION TO APPLY §24-21-640 TO A PRISONER'S SENTENCE AS A SECOND OR SUBSEQUENT VIOLENT OFFENDER MUST BE MADE BY THE SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES; AND AS SUCH, DOES THIS SAME REQUIREMENT EXTEND TO THE PAROLE BOARD TAKING A PRISONER WHO WAS SENTENCED TO LIFE WITH PAROLE FOR CRIMES COMMITTED AS A JUVENILE, YOUTH AND ITS ATTENDANT CHARACTERISTICS AND CIRCUMSTANCES INTO ACCOUNT BEFORE APPLYING §24-21-640 TO HIS PAROLE ELIGIBLE LIFE SENTENCE, TURNING IT INTO A SENTENCE OF LIFE WITHOUT PAROLE ?

STATEMENT OF THE CASE

This case is before the South Carolina Court of Appeals pursuant to the appeal of Theodore Harrison, Jr. of the Order of Administrative Law Judge Deborah Brooks Durden dated September 9, 2020 affirming the final decision of the Respondent.

In November 1990 after pleading guilty in exchange for the State to drop it's intent to seek the death penalty, the Honorable Judge Don S. Rushing, after having found an aggravating circumstance, sentenced Appellant to "life, without eligibility of parole until the service of thirty (30) years."

In 1996, the Respondent notified Appellant that pursuant to §24-21-640 of the S.C. Code of Law, as a second or subsequent violent offender, he was ineligible for parole on his life sentence.

In 2014, after the Court's decision in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), Appellant was notified by lawyers that because he was listed in South Carolina Department of Corrections (SCDC) records as serving life without parole for crimes committed when he was a juvenile, he was eligible to receive a resentencing hearing pursuant to the Court's decision in Aiken v. Byars.

After a two day hearing, Circuit Judge Mark Hayes issued an Order dated June 14, 2018, resentencing Appellant to the same sentence as announced by Judge Rushing in 1990, which was life with parole eligibility after the service of thirty (30) years.

In November of 2018, after writing to the Respondent notifying them that in accord with the Court's holding in Miller v. Alabama 132 S.Ct. 2455 (2010); Aiken v. Byars; and Montgomery v. Louisiana, 136 S.CT. 718 (2016) their decision to deny him parole eligibility pursuant to §24-21-640, rendered his life sentence with parole eligibility after the service of thirty (30) years, to a life without parole sentence for crimes which occurred when Appellant was sixteen (16) years old; and that in accord with the Order of Chief Administrative Law Judge Ralph King Anderson,III in the case Geer v. South Carolina Department of Probation,

Parole and Pardon Services, their decision violated Appellant's Eighth Amendment right to the U.S. Constitution and Article 1§15 of the South Carolina Constitution.

In December of 2018 the Respondent notified Appellant that in accord with the decision of the Administrative Law Court in Geer, Appellant can no longer be considered a subsequent violent offender under §24-21-640, and that because of this change, Appellant is eligible for parole on his 1990 life sentence.

In December of 2019 Appellant was interviewed by the Parole Examiner for the pre-parole interview, at which he was told to expect a letter notifying him of the date on which he would be appearing before the Parole Board. While awaiting this date, in February 2020, Appellant instead received a letter from the Respondent stating that again they had changed Appellant's parole eligibility to ineligibility as a second or subsequent violent offender pursuant to §24-21-640. The Respondent stated this change was based on their learning of Judge Hayes' Order.

In February 2020 Appellant appealed this final decision of the Respondent to the Administrative Law Court. On September 9, 2020 Administrative Law Judge Durden issued an Order affirming the Respondent's final decision.

ARGUMENT

1. THE ADMINISTRATIVE LAW COURT ERRED IN CONCLUDING THAT IN 1990 APPELLANT WAS SENTENCED BY HONORABLE JUDGE DON S. RUSHING TO A SENTENCE OF LIFE WITHOUT PAROLE; AND THAT THE PORTION OF JUDGE RUSHING'S SENTENCE WHICH MENTIONED PAROLE ELIGIBILITY WAS NOT PART OF APPELLANT'S SENTENCE AT ALL.

Appellant submits that in 1990 the S.C. Code of Law which laid out the sentence for one convicted of or pleads guilty to murder is §16-3-20(A). The statute in effect when Appellant committed the crimes in 1988 specifically stated that a person who was convicted of or pleads guilty to murder was required to be

sentenced to (1) death; (2) life imprisonment with the possibility of parole after twenty years imprisonment; or (3) life imprisonment with the possibility of parole after thirty years imprisonment if the state sought the death penalty and an aggravating circumstance was found but a recommendation of death was not made. State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988). Therefore, on November 12, 1990 Judge Rushing, after accepting Appellant's guilty plea in exchange for the state dropping its intent (recommendation) to seek the death penalty, sentenced Appellant to the only sentencing option available to him, life without eligibility of parole until the service of thirty (30) years. Judge Rushing simply stated what the statute itself stated in 1990, which also mentions parole eligibility. There is no ambiguity about this.

It was the Respondent in 1996 who turned Appellant's life with parole eligibility sentence after thirty (30) years into a life without parole sentence by applying S.C. Code §24-21-640 to the sentence which Judge Rushing imposed within statute. Had it not been for the Respondent's application of §24-21-640 to his life sentence, Appellant would have not even been eligible to receive a resentencing hearing pursuant to Aiken v. Byars. State v. Finley, Appellate Case No. 2016-002480 (July 17, 2019).

It was S.C. Code §16-3-20(A) in 1990 which stated Appellant's parole eligibility after the service of thirty (30) years. The Administrative Law Judge is correct when she stated it is the Respondent and it's Parole Board responsibility to look to the statute to determine whether a defendant is eligible for parole separate and apart from the Court's authority to sentence a defendant, Major v. South Carolina Dept. of Probation, Parole and Pardon Services, 384 S.C. 457, 682 S.E.2d 795 (2009), but then absolve the Respondent of this duty and responsibility in Appellant's case by erroneously concluding that Judge Rushing and Judge Hayes both made the decision that Appellant is not eligible for parole.

2. THE ADMINISTRATIVE LAW COURT ERRED IN CONCLUDING THAT APPELLANT WAS RESENTENCED TO LIFE WITHOUT PAROLE BY CIRCUIT JUDGE MARK HAYES AFTER HIS 2018 RESENTENCING HEARING PURSUANT TO AIKEN V BYARS.

Appellant submits that in 1990 Judge Rushing did not have the option of sentencing him to life without parole, and that this same holds true of Judge Hayes in 2018. For Judge Hayes to have resentenced Appellant to a sentence which was not available to Judge Rushing in 1990, Judge Hayes would have been an ex post facto violation. State v. Matthews, supra., "the United States Supreme Court held as violative of the ex post facto prohibition any "law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed."" In 1990 S.C. Code §16-3-20(A) did not permit a sentence of life without parole to be imposed on Appellant, and for this reason Judge Hayes resentenced Appellant "to the same sentence as announced by Judge Rushing in 1990." Life with parole eligibility after the service of thirty (30) years.

3. THE ADMINISTRATIVE LAW COURT ERRED IN CONCLUDING THAT APPELLANT'S AIKEN V. BYARS HEARING BEFORE JUDGE HAYES SATISFIED THE REQUIREMENT OF GEER V. SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES, THAT BEFORE §24-21-640 CAN BE APPLIED TO A PRISONER DENYING HIM PAROLE ELIGIBILITY ON A PAROLE ELIGIBLE LIFE SENTENCE AS A SECOND OR SUBSEQUENT VIOLENT OFFENDER, FOR CRIMES COMMITTED WHEN HE WAS A JUVENILE THE PAROLE BOARD MUST FIRST TAKE THE PRISONER'S YOUTH AND ITS ATTENDANT CHARACTERISTICS AND CIRCUMSTANCES INTO ACCOUNT BEFORE DOING SO.

Appellant submits that his hearing before Judge Hayes was to determine if Appellant would receive a lesser sentence or the same sentence for his 1990 convictions, and not to determine if the Respondent correctly applied §24-21-640 to Appellant's parole eligible life sentence, turning it into a life without

parole sentence for crimes committed as a juvenile. This was not the issue of and nor was it addressed at Appellant's resentencing hearing before Judge Hayes. If it is the responsibility and sole authority of the Respondent and its Parole Board to determine a prisoner's parole eligibility, as the Court correctly concluded, how then can Appellant's resentencing hearing before Judge Hayes satisfy the requirement of Geer that before the Respondent can apply §24-21-640 to a prisoner denying him parole eligibility on a parole eligible life sentence as a second or subsequent violent offender for crimes committed as a juvenile, the Parole Board must first take the prisoner's youth and its attendant characteristics and circumstances into account before doing so. State v. McKay, 300 S.C. 113, 386 S.E.2d 623 (1989)("We conclude that §24-21-640 specifically provides for the Board to consider the complete record of a prisoner and delegates to the Board the responsibility of determining if and when a prisoner meets the prerequisites of parole eligibility." "...separate and independent from the court's authority to sentence an offender."). Major v. SCDPPPS, supra., ("In effectuating a sentencing court's order, the Department has the sole authority to look to the statutes to determine whether a defendant is eligible for parole separate and apart from the court's authority to sentence a defendant.").

Therefore, as the Courts precedent leads, it is the responsibility of the Respondent's Parole Board to look at the statute and consider Appellant's complete record, his youth and its attendant characteristics and circumstances, to determine if he meets the prerequisites of parole eligibility under §24-21-640 for crimes which he committed as a juvenile, as Chief Judge Anderson intended in Geer. This determination was not an issue being addressed at Appellant's resentencing hearing before Judge Hayes and nor was it decided or ruled on by Judge Hayes. Judge Hayes addressed and decided one issue, whether to resentence Appellant to a lesser sentence or to the same sentence as announced by Judge Rushing on November 12, 1990. Unfortunately Judge Hayes chose the latter of the two, even after he concluded Appellant "has shown the possibility of rehabilitation", and

commended him on his efforts of rehabilitation.

As Appellant has shown, Judge Hayes resentenced him to the same sentence announced by Judge Rushing in 1990, because his option to impose a lesser sentence, a greater sentence would have been an ex post facto violation. This placed Appellant in the same position of being sentenced to a life sentence with parole eligibility after the service of thirty (30) years, which has been turned into a life without parole sentence by the Respondent's application of §24-21-640 to him as a second or subsequent offender, for crimes committed as a juvenile. The same position which Geer was in. The fact that Appellant was given a resentencing hearing pursuant to Aiken v. Byars is immaterial when considering the fact that the issue of the Respondent's application of §24-21-640 to Appellant's life sentence, turning it into a life without parole sentence for crimes committed as a juvenile, without first taking Appellant's youth and its attendant characteristics and circumstances into account before doing so, was not an issue addressed and/or ruled on at his resentencing hearing before Judge Hayes. As a sentencing Court, Judge Hayes could not make this determination. Major v. SCDPPPS, supra.,("Our law; however, is well-established that a sentencing judge does not have the authority to determine parole eligibility through sentencing.")

Under the S.C. Code of Law, the application of §24-21-640 is the Respondent's responsibility and not that of the sentencing court. An analysis of the plain language of the statute and its placement in the Code makes this clear. The application of §24-21-640 to an imposed sentence takes place after the sentence itself has been issued by the court. Furthermore, the statute is located in Title 24 of the Code "Corrections, Jails, Probation, Parole and Pardon", which means that any hearing which is to take place concerning the application of §24-21-640 , must be conducted by the Respondent's Parole Board.

Judge Anderson in Geer focuse on the Parole Board not taking Geer's youth and its attendant characteristics and circumstances into account in its application of §24-21-640 to Geer's life sentence. Judge Anderson made no discussion that this was the

responsibility of the sentencing court. In his order, no.6, Judge Anderson stated:

> "...that statute cannot be applied in a way that fails to take Appellant's youth and its attendant characteristics and circumstances into account. The Parole Board in this case could not have taken Appellant's youth and its attendant characteristics and circumstances into account.."

Appellant realizes that Geer is an unpublished opinion, and respectfully begs the Court to take judicial notice of Judge Anderson's Order. The issue involved is the same.

The Respondent's Parole Board has not taken Appellant's youth and its attendant characteristics and circumstances into account before it applied §24-21-640 to his life sentence with parole eligibility after thirty (30) years, turning it into a life without parole sentence for crimes committed as a juvenile.. Cooper v. South Carolina Department of Probation, Parole and Pardon Services, 377 S.C. 489, 661 S.E.2d 106 (2008)(a "court's final judgment in a criminal case is the pronouncement of the sentence. The parole board, however, has the sole authority to determine parole eligibility separate and apart from the court's authority to sentence a defendant."). The Administrative Law Court has absolved the Respondent of this authority and responsibility by erroneously concluding that the sentencing Court of Judge Rushing and Judge Hayes have already made the determination that Appellant is ineligible for parole on the life sentence which was imposed pursuant to §16-3-20(A) of the S.C. Code of Law which was in effect when the crimes were committed in 1988.

CONCLUSION

Based on the foregoing reasons and legal authorities, Appellant prays for an Order reversing and vacating the Order of Administrative Law Judge Deborah Brooks Durden affirming the Respondent's final decision denying Appellant parole eligibility as a second or subsequent violent offender , on his life sentence with parole eligibility after the service of thirty years for crimes committed as a juvenile, without the Respondent's Parole Board taking Appellant's youth and its attendant characteristics and circumstances into consideration.

Respectfully submitted,

November 3, 2020
DATE

Theodore Harrison, Jr.
SCDC# 155651
Perry C.I., Q4A 211
430 Oaklawn Road
Pelzer, S.C. 29669
Appellant

Other Counsel of Record:
Matthew C. Buchanan, Esquire
General Counsel, SCDPPPS
P.O. Box 207
Columbia, S.C. 29202

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge
Appellate Case No. 2020-001292

Theodore Harrison,Jr. #155651, Appellant,

v.

South Carolina Department of Probation, Parole, and Pardon Services, Respondent.

PROOF OF SERVICE

I, Theodore Harrison,Jr., hereby certify that I have served the **INITIAL BRIEF OF APPELLANT** and the **DESIGNATION OF MATTER** in the above-captioned appeal to the Respondent's Counsel of record Matthew C. Buchanan, Esquire, by depositing a copy of same in the U.S. Mail, postage prepaid and addressed as follows:

Matthew C. Buchanan, Esquire
General Counsel S.C. Dept. of Probation,
Parole and Pardon Services
P.O. Box 207
Columbia, S.C. 29202

on the 3rd day of November, 2020.

Theodore Harrison,Jr.
Appellant

Theodore Harrison,Jr. #155651
Perry C.I., Q4A, 211
430 Oaklawn Road
Pelzer, S.C. 29669

November 3, 2020

S.C. Court of Appeals
Jenny Abbott Kitchings, Clerk
Post Office Box 11629
Columbia, S.C. 29211

Re: Theodore Harrison,Jr. #155651 v. SCDPPPS
Appellate Case No. 2020-001292

Dear Honorable Clerk:

Enclosed, please find the **INITIAL BRIEF OF APPELLANT** and the **DESIGNATION OF MATTER** in the above referenced case, for filing in your office and with the court.

By copy of this letter and a **PROOF OF SERVICE** I have also served a copy to the Respondent's Counsel of record, Matthew C. Buchanan.

Sincerely,

Theodore Harrison,Jr.

cc:Matthew C. Buchanan
P.O. Box 207
Columbia, S.C. 29202

Theodore Harrison,Jr. #155651
Perry C.I., Q4A, 211
430 Oaklawn Road
Pelzer, S.C. 29669

RECEIVED
NOV 06 2020
SC Court of Appeals

Received
NOV 03 2020
P.C.I. MAILROOM

S.C. COURT OF APPEALS
Jenny Abbott Kitchings, Clerk
Post Office Box 11629
Columbia, S.C. 29211

SCDC
NOV 04 2020
LEGAL
COMMISSARY