STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge
Docket Number 20-ALJ-15-0004-AP

Appellant Case No.: 2020-001292

THEODORE HARRISON, JR., #155651,.....APPELLANT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....RESPONDENT

BRIEF OF RESPONDENT

Matthew C. Buchanan
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ATTORNEY FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. **Did the Administrative Law Court err when it determined the Department of Probation, Parole and Pardon Services properly denied the Appellant parole eligibility pursuant to S.C. Code § 24-21-640 when the circuit court performed an individualized sentencing hearing where the mitigating hallmark features of youth were fully explored, as required by *Miller v. Alabama* and *Aiken v. Byars,* and found that life in prison without the possibility of parole was appropriate?**

2. **Did the Administrative Law Court err when it ruled that the Department of Probation, Parole and Pardon Services or the Parole Board did not need to conduct its own individualized hearing to explore the mitigating hallmark features of youth?**

STATEMENT OF THE CASE

On August 12, 1988, Appellant, who was sixteen at the time, and his co-defendant Robert Moore (Moore) approached two people who were just finishing their grocery shopping at the Kroger on Decker Boulevard in Richland County. Moore and Appellant produced a shotgun, ordered the two in the car, and drove off with Moore driving and the Appellant in the back seat with the shotgun. The two victims managed to escape when Moore had to stop for gas.

Appellant and Moore were found in New Jersey driving the victim's car after a BOLO was issued. They were extradited back to South Carolina where they confessed to the armed robbery and kidnapping. Appellant appeared before the Honorable William Thomas Smith, Jr. and pled guilty to the armed robbery, receiving a sentence of twenty years.

In July, 1989, an informant at the Department of Corrections told investigators that Appellant and Moore knew several details about an unsolved double murder in Chester County, which made them suspects in the crime.

Two young people disappeared the night of February 8, 1988, after last being seen at a car wash just outside the city limits of Chester. Their cars were found early on February 9 at the interchange of I-77 and 277 in Columbia, wrecked and abandoned. The bodies, however, were not found until March 19 that same year. Both victims appeared to have been shot.

After investigators met with the Appellant and Moore, the two each gave statements about their participation. They both stated that they approached the two victims at the car wash, presented firearms they were carrying, and ordered the victims into one of the cars and had them drive away with Appellant and Moore in the backseat. They instructed them to drive to a wooded area where the victims were walked into a secluded area and shot. Both Appellant and Moore accused the other with pulling the trigger, but otherwise their stories were significantly the same. After killing

the victims, Appellant and Moore returned to the car wash and picked up the other victim's vehicle and drove around until they crashed the vehicles at the intersection where they were found.

On November 12, 1990, Appellant appeared before the Honorable Donald S. Rushing where he pled guilty to the murder, armed robbery, and kidnapping of the two Chester victims. Because of the prior conviction for armed robbery, Respondent Department of Probation, Parole and Pardon Services (PPP) determined Appellant to be a subsequent violent offender pursuant to S.C. Code § 24-21-640 and informed him he would not be considered for parole.

In 2012, the U.S. Supreme Court decided *Miller v. Alabama*,[1] which ruled that the Eighth Amendment prohibits a statutory scheme that mandates life without parole (LWOP) for juvenile homicide offenders. Subsequent to that ruling, the South Carolina Supreme Court issued *Aiken v. Byars*[2] in 2014, which applied the reasoning of *Miller* to all juvenile LWOP sentences in South Carolina.

Appellant filed a motion on July 11, 2016 for resentencing pursuant to *Aiken*. On July 16, 2016, Chief Justice Costa Pleicones issued an order assigning the Honorable J. Mark Hayes II with exclusive jurisdiction over Appellant's motion and directing him to have a hearing. On February 12 and 16, 2018, the resentencing hearing was held in Chester County.

On June 14, 2018, Judge Hayes issued a resentencing order finding that after performing the individualized review as required by *Miller* and *Aiken*, the court was resentencing him to the same sentences as announced in 1990 by Judge Rushing. Appellant filed a timely notice of appeal of Judge Hayes' decision, and his case was assigned to an appellate attorney from the Office of Indigent Defense. Judge Hayes' order was not sent to Respondent.

[1] 567 U.S. 460 (2012).
[2] 410 S.C. 534, 765 S.E.2d 572 (2014)

On December 4, 2018, in response to a letter from Appellant asking about the unpublished case *Geer v. SCDPPPS*, but failing to mention the June 14, 2018 order from Judge Hayes, an attorney from PPP confirmed that, in light of the reasoning behind the opinion in *Geer*, the Appellant would be considered parole eligible, though not until after thirty years because of the aggravating factors in the offense.

On April 9, 2019, Appellant moved to withdraw his appeal of Judge Hayes' sentencing order, which was granted by the Court of Appeals on April 11, 2019.

In January, 2020, during Appellant's routine pre-parole investigation, contact was made with the victims and the Sixth Circuit Solicitor's Office. The PPP investigators received a copy of Judge Hayes' order for the first time.

On February 3, 2020, an attorney for Respondent sent the Appellant a letter explaining that per Judge Hayes' order, the original sentence would be in place, and its earlier determination that Appellant was eligible for parole would not have happened if it had been aware of Judge Hayes' ruling.

Upon receiving the letter, Appellant filed a notice of appeal before the Administrative Law Court (ALC). Within his appeal Appellant alleged that the Department failed to take his youth and its attendant characteristics into account when it applied § 24-21-640 to his sentence, thus violating his Eighth Amendment rights. The Honorable Deborah Brooks Durden, ALC judge, affirmed the decision of the Respondent on September 9, 2020.

Appellant filed his notice of appeal with this Court on September 16, 2020. In his brief, Appellant contends that the ALC erred in its determination that Judge Hayes' order met the requirements of *Aiken v. Byars*. This brief of Respondent follows.

ARGUMENTS

1. **The Appellant received an individualized sentencing hearing where the mitigating hallmark features of youth were fully explored; therefore, the sentencing court's imposition of a life without parole sentence as a function of applicable statues was appropriate, and the Department properly denied parole eligibility pursuant to that sentence.**

In South Carolina, an inmate may not receive parole for a violent offense if that inmate has been convicted of a prior separate violent offense. S.C. Code § 24-21-640 (Supp. 1986).

The Appellant is appealing the Department's determination that he is not eligible for parole due to the plain language of § 24-21-640, because he was a juvenile when he committed both violent offenses. He points to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014) and relies heavily on the reasoning in the unpublished opinion of the Court of Appeals in *Geer v. South Carolina Department of Probation, Parole and Pardon Services*, Op. No. 2018-UP-216 (S.C. Ct. App. filed May 23, 2018), *certiorari denied* November 9, 2018.[3]

In *Aiken*, the South Carolina Supreme Court applied the U.S. Supreme Court's ruling in *Miller v. Alabama*, 567 U.S. 460 (2012) to all juvenile offenders sentenced in South Carolina to life without parole, regardless of whether the no parole sentence was mandatory. No juvenile offender, the Court ruled, could be sentenced to life without parole unless a sentencing court considered various factors in an individualized hearing. Those factors are "(1) the chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate risk 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;

[3] *Geer* is unpublished and thus has no precedential value except as provided by Rule 268(d)(2), SCACR. However, Appellant relies almost exclusively on the reasoning within the opinion, and Respondent admittedly originally relied upon that same reasoning until it learned of Judge Hayes' order. For this reason, this argument explores that reasoning without relying upon the opinion as authoritative.

(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, 577 (quoting *Miller*, 567 U.S. at 477-478).

The ruling of *Aiken* was first applied to juvenile inmates sentenced to LWOP sentences by a circuit judge at the time of sentencing. *Geer*, however, involved a juvenile who was initially sentenced to life *with* parole. The Department later determined inmate Nicholas Geer was serving a sentence for a second or subsequent violent offense. Because Geer committed a prior violent offenses for which he was convicted separately, the Department determined him to be ineligible for parole under § 24-21-640.

The Administrative Law Court reversed the Department's decision pursuant to *Aiken*. Because *Aiken* did not address the unusual situation when S.C. Code § 24-21-640 makes a juvenile ineligible for parole, the Department appealed the ALC's decision to the Court of Appeals. In the unpublished opinion, the appellate court decided that there was no evidence that Geer's youth was taken into consideration when his parole eligibility was denied. The Supreme Court later denied certiorari when the Department appealed.

Geer is not published and therefore has no precedential value. In that it may be considered persuasive, however, *Geer* should be considered distinguishable from Appellant's case because the Appellant in this case has had an individualized hearing in which the factors set forth in *Aiken* were fully explored.

The Court of Appeals in *Geer* found no evidence of an *Aiken v. Byars* hearing. Here, however, Appellant has had an extensive hearing before Judge Hayes in which he had the opportunity to present experts and witnesses to show those *Aiken* factors such as his family and

home environment, the circumstances of the offense, and his possibility of rehabilitation. After the hearing, Judge Hayes resentenced Appellant to the same sentence as announced by Judge Rushing in 1990, which, by operation of Section 24-21-640, is a sentence of life without parole. Therefore, this Court should affirm the decision of the ALC.

2. The Administrative Law Court did not err when it concluded that the hearing conducted by Judge Hayes was sufficient to meet the requirement of an "individualized hearing." [4]

Appellant argues the purpose for the hearing before Judge Hayes was to "determine if Appellant would receive a lesser sentence or the same sentence for his 1990 convictions." This assertion mischaracterizes the *Aiken* hearing conducted by Judge Hayes.

At the time the Appellant's case was assigned to Judge Hayes pursuant to *Aiken*, the Appellant had been determined to be ineligible for parole. Consequently, in order to meet the Constitutional requirements Judge Hayes conducted an exhaustive examination into the offense and the mitigating factors – including the "hallmark features of youth." *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577.

Admittedly, Judge Hayes did not fully describe the law in place regarding the Appellant's sentence. In his order, Judge Hayes stated, "Because at the time of his sentencing, he was already serving a felony sentence arising from the carjacking and abduction by gunpoint of two people in Richland County, his life sentences were deemed to be without the possibility of parole (LWOP)." Tr. p. *.

In his conclusion, Judge Hayes wrote, "This Court realizes given the consecutive nature of these sentences, this Defendant will serve the remainder of his life in prison." Tr. p. *.

[4] Respondent will address issue 2 and 3 of the Appellant's argument in this section.

Clearly, Judge Hayes understood, when he conducted the *Aiken* hearing, that imposing the same sentence as Judge Rushing would mean Appellant was not eligible for parole. Simply because Judge Hayes referred to Appellant's second sentence as "consecutive" rather than a "subsequent violent offense" does not negate his thorough and exhaustive analysis, and certainly does not preclude the operation of § 24-21-640 of the Code.[5]

Indeed, it was always because of § 24-21-640 that the Appellant was ineligible for parole. Had he not had prior convictions for violent offenses, he would be parole eligible on his life sentence, and therefore not one of the inmates to whom *Aiken* applies. See *State v. Finley*, 427 S.C. 419, 831 S.E.2d 158 (Ct. App. 2019) (finding that an inmate who is parole eligible is not one of the class of inmates contemplated by *Aiken*).

Appellant asserts that the hearing before Judge Hayes simply reinstated Judge Rushing's original sentence. Appellant further argues that *Geer* requires an additional *Aiken* hearing conducted by either the Department or the Parole Board before the Department can determine an inmate to be ineligible for parole pursuant to § 24-21-640. This is incorrect. The application of § 24-21-640 is not discretionary. The Court in *Aiken* held that "the sentencing authority" must consider the five factors enumerated in *Miller*. *Aiken* at 544, 577.

Respondent's authority is to apply the statutes to the sentences issued by the courts, but Respondent is not a sentencing authority. "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." *Major v. South Carolina Department of Probation, Parole and Pardon Services*, 384 S.C. 457, 466, 682

[5] The Appellant makes an argument that Judge Hayes, by reinstating Judge Rushing's sentence and determining him to be serving a life without parole sentence, violated the Ex Post Facto clause. This is incorrect. The subsequent violent offense clause in § 24-21-640 was enacted in 1986, two years before the Appellant committed his offenses.

S.E.2d 795, 800 (2009) (citations omitted). Thus, because the Respondent's role is "separate and apart" from the sentencing authority of the court, the Respondent is not required to conduct an *Aiken* analysis of an inmate who committed his crimes as a juvenile. That, per *Aiken*, remains solely the province of the sentencing authority. Here, Judge Hayes acted within that scope and exercised his discretion to impose a life without parole sentence as a function of § 24-21-640. Therefore, this Court should affirm the ruling of the ALC.

CONCLUSION

Admittedly, the Appellant's parole eligibility appears to have changed multiple times during his incarceration. The Respondent had initially determined him to be ineligible for parole, which placed him in the category contemplated by *Aiken v. Byars*. The fact that his case was similar to the underlying facts of *Geer* led the Respondent to change him to parole eligibility status – though unbeknownst to the Respondent the Appellant had received a resentencing hearing as required by *Aiken*. After conducting an exhaustive evidentiary hearing and applying the *Miller* factors, Judge Hayes found life without parole in the Appellant's case would be constitutional and appropriate, and upheld/re-imposed the original sentence of Judge Rushing. Consequently, the Respondent reinstated the Appellant's original status as ineligible for parole pursuant to § 24-21-640. The Administrative Law Court properly affirmed the Department's decision, and this Court should uphold its finding.

Respectfully submitted,

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Attorney for Respondent

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November 30, 2020

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IN THE COURT OF APPEALS

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v.

S.C. DEPARTMENT OF PROBATION, PAROLE AND
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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant to counsel for Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter dated November 30, 2020, on Appellant this 30th day of November, 2020, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Theodore Harrison, Jr., 155651
Perry Correctional Institution-Q4A 211
430 Oaklawn Road
Pelzer, S.C. 29669

I further certify that all parties required by Rule to be served have been served.

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November 30, 2020

The Honorable Jenny Kitchings
Clerk of the S.C. Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

Re: **Theodore Harrison v. SCDPPPS**
20-**001292**

Dear Ms. Kitchings:

Please find enclosed the Initial Brief of Respondent and Designation of Matter dated November 30, 2020, along with proof of service in the above referenced case.

Sincerely,

Matthew C. Buchanan
General Counsel

MCB:dn

Enclosures

cc: Theodore Harrison

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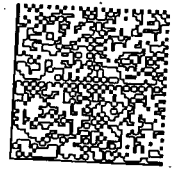

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