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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable Edward W. Miller, Circuit Court Judge
Appellate Case No. 2018-001465

Opinion No. 5820 (S.C.Ct.App. filed May 12, 2021)

THE STATE,

RESPONDENT,

v.

ERIC DALE MORGAN,

APPELLANT.

PETITION FOR REHEARING

On May 12, 2021, this Court issued an opinion in the captioned case that reversed the lower court's dismissal, and remanded the matter for another resentencing hearing. Pursuant to South Carolina Appellate Court Rules 221 and 240, Respondent, the State of South Carolina, petitions for rehearing and asks the Court to consider the following points that Respondent submits the Court misapprehended or overlooked.

Summary of Argument

In essence, Respondent submits that this Court failed to consider the quality of the review provided in the prior resentencing which incorporated Morgan's prior capital sentencing hearing. Youth was in sharp focus in the capital proceeding – a wealth of evidence and argument had been presented touching not just on age, but on background, upbringing, supports, risks, and a bevy of other factors that accompany individualized capital sentencing. Judge Cole confirmed that the capital sentencing hearing evidence – which he heard as the judge assigned the capital case – was

reviewed and considered for resentencing. This is critical as it is, after all, the process of individual sentencing that is protected; a process specifically derived from capital sentencing protections. Further, this Court erred in its interpretation of the "constitutional meaning" of mitigation based on youth. There is no constitutional guarantee for weight of the evidence – if it had been so, the Supreme Court would have found an exemption, which it did not. In sum, Morgan failed to show a deprivation or violation of any constitutional right. The grant of a second resentencing is not constitutionally mandated. This Court should grant rehearing, reverse, and affirm the ruling of the lower court.

Relevant History

Appellant, Eric Dale Morgan, murdered convenience store clerk, Jerry Smith, on May 3, 2000. Morgan shot Mr. Smith in the head, then took a bag from him that held over $7,000.00. At the time, Morgan was "16 days short of being 18 years old." (R. p. 15, lines 9-11). The murder was carefully planned with his sixteen-year-old co-defendant: "Appellant and his accomplice, who had been hired at the store a week before the incident, had originally planned to blow a hole in the back wall of the store with a pipe-bomb after it closed." *State v. Morgan*, 367 S.C. 615, 617, 626 S.E.2d 888, 888 (2006). As this Court found, "[t]his crime was senseless and tragic." (Opinion, p. 2).

The State noticed the case for capital proceedings. Jury trial proceedings began on February 28, 2004. On Saturday, March 6, 2004, the jury convicted Morgan of murder, armed robbery, and possession of an explosive device. An individual sentencing proceeding began on Monday, March 8, 2004. At sentencing, the defense relied on three statutory mitigating circumstances, and the judge instructed that those three statutory mitigating circumstances "shall" be considered:

> (1) that the defendant has no significant history or convictions for crimes involving the use of violence against any person;

(2) the age or mentality of the defendant at the time of the crime; and,

(3) that the defendant was below the age of 18 years at the time of the commission of the crime.

(R. p. 366).

The defense presented evidence related to Morgan's youth, including, specifically, a background review and assessment by an expert in social work – one with experience working with "emotionally and behaviorally disturbed children," with an emphasis on "child welfare and working with families and children," and "child maltreatment" – who presented a "psychosocial assessment" which attempted to explain "how somebody could get in the current situation." (R. p. 222-27). Defense counsel also argued youth and immaturity. (See, for example, R. p. 346 ("a 17-year-old universe that was limited by certain things that he had been exposed to in his past and the chances that he had coming up")). On March 9, 2004, a Spartanburg County jury resolved that death was the appropriate sentence for this defendant and his crimes. (R. p. 381). The Honorable J. Derham Cole imposed a death sentence pursuant to the jury's determination. (R. p. 17).

On March 1, 2005, the Supreme Court of the United States decided *Roper v. Simmons*, 543 U.S. 551 (2005), holding that the Eighth and Fourteenth Amendments prohibit the execution of defendants who were under eighteen years old at the time of the crime. 543 U.S. at 578-79. Of note, the Court in *Roper* reasoned, "[t]he differences between juvenile and adult offenders *are too marked and well understood* to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Id.,* at 572-73 (emphasis added).

By Opinion published on February 21, 2006, the Supreme Court of South Carolina vacated Morgan's death sentence pursuant to *Roper*. Rejecting the State's argument that Morgan should be sentenced to life imprisonment given the jury had previously found statutory aggravating

circumstances, the Court remanded to the circuit court for resentencing. The Court provided that "the trial court may receive additional evidence on the question of whether appellant is entitled to receive a sentence less than life imprisonment," and directed that the circuit court "decide on a sentence that ranges from a mandatory imprisonment term of thirty years to life imprisonment," consistent with the non-capital sentencing range. *Morgan,* 367 S.C. at 618–19, 626 S.E.2d at 889. The Court left undisturbed the sentences for armed robbery (thirty years) and possession of an explosive device (fifteen years consecutive to the armed robbery sentence). *Id.,* at 617, 629 S.E.2d at 889.

Judge Cole heard the resentencing for the murder conviction. On March 17, 2006, at the conclusion of the hearing, Judge Cole sentenced Morgan to life imprisonment. (R. p. 24). Morgan did not appeal and it appears that a transcript was not generated and is no longer available. (Opinion, p. 2).

Morgan sought resentencing again following *Miller v. Alabama*, 567 U.S. 460 (2012). The Supreme Court of South Carolina appointed the Honorable Edward W. Miller to hear additional proceedings. *Morgan v. State*, 417 S.C. 69, 70, 789 S.E.2d 41 (2016). The State moved to dismiss in these discrete circumstances given that Judge Cole not only considered all the evidence presented at the former individualized sentencing process, he also considered, per the Supreme Court's direction, "a sentence that range[d]from a mandatory imprisonment term of thirty years to life imprisonment." *Morgan,* 367 S.C. at 618–19, 626 S.E.2d at 889. The State called Judge Cole to review the evidence before him at resentencing, and the areas of consideration[1] in the court's analysis. Judge Cole testified that he reviewed the evidence that was presented to him regarding

[1] The State did not ask, nor did Judge Cole testify, regarding the actual deliberative process.

the youth and background, noted that the "entire record" of the prior individualized sentencing preceding was entered, and also noted that he was "certain" that the prospect of rehabilitation was considered. (See R. pp. 54-61).

Judge Miller granted the State's motion to dismiss finding that the facts contemplated by *Miller* and *Aiken v. Byars*, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014) (recognizing *Miller*), "were considered" and to hold another resentencing would be inappropriate. (R. p. 4).

This Court's Opinion

In reversing the lower court, this Court looked to *Miller* and *Aiken* for the law that recognized the importance of the facets of youth in sentencing, but failed to consider the intent of the relief secured: individualized sentencing. *Aiken*, 410 S.C. at 545, 765 S.E.2d at 578 ("*Miller* requires that before a life without parole sentence is imposed upon a juvenile offender, he must receive an individualized hearing where the mitigating hallmark features of youth are fully explored."). This court also overlooked that *Miller relied upon and looked to capital sentencing* as an example of how to conceptualize the consideration of youth:

> …*Miller* repeatedly described youth as a sentencing factor akin to a mitigating circumstance. And *Miller* in turn required a sentencing procedure similar to the procedure that this Court has required for the individualized consideration of mitigating circumstances in capital cases such as *Woodson v. North Carolina*, 428 U.S. 280, 303–305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion), *Lockett v. Ohio*, 438 U.S. 586, 597–609, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion), and *Eddings v. Oklahoma*, 455 U.S. 104, 113–115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

Jones v. Mississippi, 141 S. Ct. 1307, 1315–16 (2021).

In fact, even while embracing *Miller*, our Supreme Court still expressly declined to order similarly exhaustive proceedings as those required in capital cases: "While we do not go so far as some commentators who suggest that the sentencing of a juvenile offender subject to a life without parole sentence should mirror the penalty phase of a capital case, we are mindful that

the *Miller* Court specifically linked the individualized sentencing requirements of capital sentencing to juvenile life without parole sentences." *Id*, 410 S.C. at 544–45, 765 S.E.2d at 577.

This Court further overlooked, that "individualized sentencing" does not mean that individual findings are necessary. In recent precedent, the Supreme Court of the United States has clarified:

> …*Miller* followed the Court's many death penalty cases and required that a sentencer consider youth as a mitigating factor when deciding whether to impose a life-without-parole sentence. *Miller* did not require the sentencer to make a separate finding of permanent incorrigibility before imposing such a sentence.

Jones, 141 S. Ct. at 1316. The Supreme Court explained:

> *First*, and most fundamentally, an on-the-record sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth. Jones's argument to the contrary rests on the assumption that meaningful daylight exists between (i) a sentencer's discretion to consider youth, and (ii) the sentencer's actual consideration of youth. But if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily *will* consider the defendant's youth, especially if defense counsel advances an argument based on the defendant's youth. Faced with a convicted murderer who was under 18 at the time of the offense and with defense arguments focused on the defendant's youth, it would be all but impossible for a sentencer to avoid considering that mitigating factor.

Id., at 1319.

Respondent submits that these overlooked, critical points, led the Court to an incorrect conclusion.

This Court is correct that *Miller* and *Aiken* did not exist at the time of the resentencing. (Opinion, p. 6). However, this Court is incorrect in its conclusion that "*Aiken* added new things for the sentencing court to consider." (Opinion, p. 6). The quality of youth has not changed. The acknowledgement of differences is not new. The Supreme Court, in banning capital punishment for juveniles in *2005*, spoke in terms of established factors: "The differences between juvenile and adult offenders *are too marked and well understood* to risk allowing a youthful person to

receive the death penalty despite insufficient culpability." *Roper*, 543 U.S. at 572–73 (emphasis added). In *Miller*, the Court relied on the protections afforded the presentation and consideration of the " 'mitigating qualities of youth' " in its capital jurisprudence. *Miller*, 567 U.S. at 477 ("In meting out the death penalty, the elision of all these differences would be strictly forbidden. And once again, *Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison.").

Additionally, while Respondent agrees with this Court's observation that the majority in *Aiken* made reference to the "constitutional weight" of the evidence, (Opinion, p. 8, referencing *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577), Respondent disagrees with the sway afforded that phrasing. Our Supreme Court was expressly placing the term in context of giving effect to *Miller*. Consequently, this, too, goes back to procedure and allowing a more expanded view of the hallmarks of youth, *i.e.,* individualized sentencing. Indeed, if the weight of youth was "constitutionally protected," *Miller* and *Aiken* would have required exemption, not consideration. The Court misapprehended the protections and requirements of *Milller* and *Aiken*.

Further, the Court failed to appreciate the extent and focus of the evidence of youth, background, functioning, development, and requests for mercy in Morgan's capital sentencing proceeding, which became part of the resentencing, all of which is directly relevant to the issue presented. In fact, as Judge Miller found, it is dispositive.

Judge Cole testified he recalled having before him evidence of appellant's age, evidence of his premeditation and planning (which spanned days and included preparations so he would not to be identified), and indicated those were factors he considered before resentencing. (R. pp. 52 - 54). Judge Cole also testified he recalled the defense presentation of witnesses (from the capital sentencing proceeding) such as appellant's mother, a teacher, and others that gave him a "relatively

complete picture" of appellant's youth, including a presentation of social history by a "sociologist, a mititgation expert." (R. pp. 54-55 and 60). Judge Cole acknowledged he dealt with issues related to youth in and out of the courtroom whether it was from defendants or his own children, that young defendants do not always understand the risks and consequences of their actions, and that is something he "always" considers during trial. (R. pp. 56-57). The judge testified he considered appellant's family life and home life prior to resentencing appellant. (R. p.57). Judge Cole also considered appellant's interactions with his peers which revealed itself in his statement and his interactions with police and attorneys from his statement and actions at trial. (R. pp. 57-59). The judge also considered the circumstances of the crime when determining the proper sentence for appellant. (R. p. 58). The judge recalled he was "certain" that the defense in resentencing "brought up" rehabilitation prospects. (R. p. 59).

This Court drew a distinction, though, finding that another resentencing was warranted even if there are no actual significant differences in the evidence and arguments, because "a sentencing hearing where youth is but one of the many considerations is different than conducting a sentencing proceeding where youth is a special consideration and where specific factors related to youth are mandatory guideposts." (Opinion, p. 6). While agreeing with the State that "[t]here is no questions Judge Cole considered Morgan's youth when resentencing Morgan in 2006," this Court resolved that the prior resentencing was insufficient largely based on what it perceived to be the alignment of facts from the rejected position in the *Aiken* dissent. (Opinion, pp. 7-8). A clear distinction is that the dissent was not referencing a capital procedure. *Id.,* at 550, 765 S.E.2d at 580. In contrast, the record here soundly shows *youth was a special consideration.* Indeed, it was a *focus* of the capital sentencing proceeding. Further, resentencing occurred because of *Roper* which was premised *solely on defendant differences stemming from youth.* While true Morgan may

constitute a universe of one, that singular position does not deny him any protection that the Eighth Amendment affords.

It is undeniable that youth and background were the focus of the capital sentencing mitigation presentation; it is undeniable that the prior resentencing was only ordered *because* of youth; and, it is undeniable that Judge Cole, with the evidence from the capital sentencing proceeding, carefully considered the mitigating weight of the defendant's youth, in context and not as a mere passing factor, in individualized sentencing. Morgan is entitled to no more.

Conclusion

For all the foregoing reasons, Respondent respectfully requests this Court grant rehearing, reconsider and reverse its ruling, and affirm the lower court.

Respectfully submitted,

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May 27, 2021
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CERTIFICATE OF SERVICE

I, Angela Brown, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Petition for Rehearing, and Certificate of Service has been forwarded to Appellant's counsel, Lindsey S. Vann, Esquire and Hannah L. Freeman, Esquire via email today, May 27, 2021 to lindsey@justice360sc.org and hannah@justice360sc.org.

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

This 27th day of May, 2021.

s/ Angela Brown

Angela Brown
Legal Assistant to Melody J. Brown
Senior Assistant Deputy Attorney General

Angela Brown

From: Angela Brown
Sent: Thursday, May 27, 2021 3:26 PM
To: 'lindsey@justice360sc.org'; hannah@justice360sc.org
Cc: Melody Brown
Subject: The State v. Eric Dale Morgan
Attachments: 02590807.pdf

Follow Up Flag: Worldox

Counsel, please find attached the State's Petition for Rehearing in the matter of The State v. Eric Dale Morgan. The Petition will be filed with the South Carolina Court of Appeals on today's date.

Thank you,

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