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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
The Honorable Edward W. Miller, Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Opinion No. 5820 (S.C.Ct.App. filed May 12, 2021)
Court of Appeals Appellate Case No. 2018-001465

THE STATE,

PETITIONER,

v.

ERIC DALE MORGAN,

RESPONDENT.

Appellate Case No: 2021-000790

STATE'S REPLY TO THE RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

Petitioner, State of South Carolina, presents a brief reply to points raised in Morgan's Return. Petitioner submits that Morgan's position is untenable.

Much of the return simply reiterates that Morgan's second sentencing pre-dated *Aiken v. Byars*[1] and its cornerstone, *Miller v. Alabama.*[2] That is not in question. The question has consistently been whether Morgan received a proceeding where his "youth and attendant characteristics" were fairly considered before his life without parole sentence was imposed. *See Jones v. Mississippi,* 141 S.Ct. 1307, 1314 (2021) ("in *Miller* in 2012, the Court allowed life-without-parole sentences for defendants who committed *homicide* when they were under 18, but only so long as the sentence is not mandatory—that is, only so long as the sentence has discretion to 'consider the mitigating qualities of youth' and impose a lesser punishment") (quoting *Miller,* at 476). While Morgan correctly asserts that his second sentencing in 2006 pre-dated *Aiken* from 2014 and *Miller* from 2012, he does not, indeed cannot, show constitutional error in the actual sentencing. Morgan did not show a limitation on evidence, or a failure to allow consideration of any particular evidence presented, including evidence related to his youth. Morgan did not proposed or show any evidence at the motion hearing that he argued could have been submitted in addition to the wealth of evidence presented in Morgan's prior proceedings.[3] While Morgan relies on time alone to secure yet another proceeding, this is, at its heart, a "form over substance" argument. Morgan fails to show a constitutional infirmity in his actual re-sentencing.

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1 410 S.C. 534, 765 S.E.2d 572 (2014).

2 567 U.S. 460 (2012).

3 In fact, the only specific reference was to current incarceration records, which, of course, would not have been available previously. (See App. pp. 74-75).

Further, Morgan does not address this Court's mandate in the order for remand within the direct appeal opinion. This Court specifically directed:

> …on remand, the trial court may receive additional evidence on the question of whether appellant is entitled to receive a sentence less than life imprisonment and decide on a sentence that ranges from a mandatory minimum imprisonment term of thirty years to life imprisonment.

State v. Morgan, 367 S.C. 615, 619, 626 S.E.2d 888, 889 (2006). Consequently, Morgan was allowed even more opportunity to present any additional evidence at that time. Of note, his counsel remained the same. (See App. p. 10). Counsel was thoroughly familiar with the case presented and the heavy reliance on youth.

Further still, Morgan does not address or even acknowledge the wealth of evidence presented at the capital sentencing specifically on background and underscoring youth – evidence that was incorporated into the resentencing. He argues instead it is simply "irrelevant." (Return, p. 10). The heart of the disagreement on appeal is highlighted later in his argument when Morgan suggests: "no matter how much evidence was presented at Morgan's pre-*Aiken* sentencing hearings and no matter how many of the *Miller* factors Judge Cole recalled considering (before they were announced), Morgan's sentencing hearings still suffer from the 'constitutional defect' identified in *Aiken*." (Return, pp. 10-11). In an attempt to show some support for this stark conclusion, Morgan prefaced the assertion with complaints that defense attorneys at the time generally were uneducated as to what should be done in investigation and presentation of mitigation. (Return, p. 9). The impact of that assertion quickly dissipates when considering that this was a capital case. Defense counsel originally investigated and presented this case in capital proceedings where mitigation was in focus. The defense relied upon youth in mitigation. The defense requested the jury be informed of the statutory mitigation factors regarding youth. Without question, youth was a focus in mitigation. And, as a more general point, background and youth

would be a focus of capital case mitigation preparation much more so than non-capital sentencing preparation. That is evident in the ABA guidelines[4] that the defense so often relies upon as relevant to show proper investigation for capital cases.[5] In this case, the guidelines undermine Morgan's position that counsel generally did not appreciate how to prepare for juvenile sentencing.

For instance, the guidelines expressly distinguished between capital and non-capital case representation, recognizing that "death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases." ABA Guidelines § 10.11(F)(2), *reprinted in* 31 Hofstra L. Rev. 913, 923 (2003), Commentary to § 1.1. Those guidelines additionally make specific reference to historical investigation into the defendant's background and circumstances, and noted the importance of the elements of youth even in preparing a request for commutation. ABA Guidelines § 10.11(F)(2), *reprinted in* 31 Hofstra L. Rev. at 1056. Commentary to § 10.15.2 (noting "personal characteristics of the condemned, such as youth" as persuasive in clemency). Similarly, the 1989 guidelines placed emphasis on medical and social history, including the "[r]ehabilitative potential of the client." See 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (americanbar.org), Guideline 11.8.6. The fact that Morgan's case was investigated and prepared as a capital case provides more support that in these circumstances Morgan is not due another re-sentencing. The State again brings to the Court's attention that

[4] The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

[5] Courts, too, have cited the ABA material as a relevant guide, but not as establishing mandates in representation. *See, e.g., Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (rejecting acceptance of guidelines as "inexorable commands," but acknowledging they may be consulted as "guides"); *Stone v. State*, 419 S.C. 370, 397, 798 S.E.2d 561, 576 n.6 (2017) (noting court's reference to the guidelines).

counsel's performance was challenged in PCR and Morgan failed to show error and or prejudice in any claim presented. (See C/A2007-cp-42-00543).

Morgan also argues that he did not need to show more was available to be discovered and presented in another resentencing. (Return, p. 9 n. 4). While he may not have had to present a full sentencing case, Morgan did most certainly have to respond to the motion to dismiss. His response was insufficient to show *any* possibility of a constitutional infirmity in sentencing, while the State presented ample evidence of fair and constitutional resentencing.

The record before Judge Miller, and now before this Court, shows Morgan received two individualized sentencing proceedings where the hallmarks of youth and his background were thoroughly investigated, presented, and considered. He is entitled to no more. Consequently, Judge Miller did not abuse his discretion in granting the Solicitor's motion to dismiss in these circumstances. His ruling was based upon careful consideration of the evidence presented at the motion hearing.[6] His legal conclusion that the facts and circumstances contemplated in *Miller* and *Aiken* were considered at sentencing was sound and well-supported by the record. (See App. p. 4). The Court of Appeals erred in reversing Judge Miller's decision.

Here, the only result from the Court of Appeals resolution was to grant a windfall opportunity to undo Judge Cole's carefully considered sentence. It neither protects nor promotes constitutional soundness in sentencing. This Court should grant the State's petition, reverse the

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[6] Morgan also indicates the State was under some obligation to "mov[e] to preserve the records" from the prior re-sentencing. (Return, p. 2 n. 2). He cites no support for the assertion. None is apparent. Even so, Morgan's admission of the fact that a transcript was not available implicitly supports the need for reconstruction. Thus, contrary to Morgan's protests, Judge Miller did not abuse his discretion in settling the record by receipt of testimony. *See generally China v. Parrott,* 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968) ("Where there is a disagreement as to what the record on appeal should contain, the duty and responsibility of settling the question rests upon the trial judge."). That Morgan chose not to participate in reconstruction and presented no witness, affidavit, or other evidence, is not a reflection of the denial of an opportunity to do so.

Court of Appeals, and affirm Judge Miller's well-reasoned decision finding Morgan already received that which *Miller* affords.

CONCLUSION

For all the foregoing reasons, and those set out more fully in the Petition, the State of South Carolina, respectfully requests this Court grant its petition, vacate the Court of Appeals opinion, and affirm the lower court.

Respectfully submitted,

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