

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Robert Hood., Circuit Court Judge

Appellate Case No. 2020-000188

ANTHONY A. JONES, II.....Petitioner,

v.

STATE OF SOUTH CAROLINA.....Respondent.

PETITIONER'S BRIEF

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QUESTION PRESENTED

- I. Whether the automatic waiver provision of *S.C. Code Ann.* §63-19-20 (2010) is unconstitutional.

STATEMENT OF THE CASE

Anthony Jones pleaded guilty to armed robbery, 2015A1010202785 for an offense committed in Charleston County. He also pleaded guilty to burglary, 1st degree, 2015A1820500477 for an offense committed in Dorchester County. Petitioner pleaded guilty to both charges in Charleston county and received a sentence of 10 years for the armed robbery and 15 years for the burglary. The sentences were ordered to be served concurrently. He was represented by David Aylor of the Charleston County bar. Petitioner did not appeal the judgment of conviction or the imposition of his sentences. He then filed an application for post-conviction relief on April 14, 2017 with the assistance of undersigned counsel and alleged ineffective assistance of plea counsel, that the automatic waiver provision of *S.C. Code Ann.* §63-19-20 (2010) is unconstitutional (the juvenile waiver provision), and that his 15-year active sentence violated his right to be free from cruel and unusual punishment under the 8th Amendment of the US Constitution and the South Carolina Constitution, Article I, §§3 and 15.

An evidentiary hearing was held in Charleston County before the Honorable Robert Hood on November 18, 2019. The order of dismissal was filed on January 31, 2020.

This Court granted Petitioner's petition for writ of certiorari on April 19, 2021 and this Petitioner's brief timely follows.

ARGUMENT

I. The automatic waiver provision of *S.C. Code Ann.* §63-19-20 is unconstitutional.

Petitioner was automatically treated as an adult pursuant to *S.C. Code Ann.* §63-19-20 (2010) which provides, in pertinent part: "‘Child’ or ‘juvenile’ does not mean a person 16 years of age or older who is charged with a Class A, B, C, or D felony ... or a felony which provides for a maximum term of imprisonment of 15 years or more."¹ Petitioner was 16 years old at the time of his crimes. This statutory provision is unconstitutional because it does not allow discretion in the sentencing options for a defendant who was a juvenile at the time of the crime in violation of his right to due process. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).

In recent years the Supreme Court of the United States has dramatically altered the legal framework governing the sentencing of juvenile offenders. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court held that the Eighth Amendment’s prohibition against cruel and unusual punishment prevented States from sentencing juveniles to death. In *Graham v. Florida*, 560 U.S. 48 (2009), the Court went a step further, holding that sentencing juvenile offenders to life imprisonment without the possibility of parole for non-homicide offenses was also barred by the Cruel and

¹ Effective July 1, 2019, this provision now reads “Child” or “juvenile” does not mean a person *seventeen years* of age or older . . .” (emphasis added).

Unusual Punishment Clause. In 2012, the Court determined in *Miller v. Alabama*, 567 U.S. 460 (2012), that even in homicide cases, states are precluded from imposing mandatory life without parole sentences on juvenile offenders. Most recently, in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), the Court held *Miller* to be “a new substantive rule that, under the Constitution, must be retroactive” and effectively ordered new sentencing proceedings for hundreds of individuals who had been sentenced to mandatory life without parole as juveniles. All four cases were grounded in one core Eighth Amendment principle: “children are constitutionally different from adults for purposes of sentencing.” *Miller*, 567 U.S. at 471.

In *Aiken v. Byars*, 410 S.C. 534, 542-43, 765 S.E.2d 572, 576 (S.C. 2014), the South Carolina Supreme Court embraced the reasoning of the United States Supreme Court that “youth has constitutional significance” and “must be afforded adequate weight in sentencing.” After examining the sentencing hearings in cases where juveniles were sentenced to life without parole in this State in light of these decisions, the South Carolina Supreme Court concluded that the Eighth Amendment required resentencing. The key defect noted in *Aiken* was the failure to “fully explore the impact of the defendant’s juvenility on the sentence rendered.” 410 S.C. at 543; 765 S.E.2d at 577.

In *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), the South Carolina Supreme Court vacated all life without parole sentences imposed on juvenile offenders concluding that such sentences violated the Eighth Amendment’s ban against cruel and unusual punishment. The Court further held that all such

defendants were entitled to new sentencing hearings that must be “individualized” and at which “courts [must] fully explore the impact of the defendant's juvenility on the sentence rendered.” *Id.* at 545, 765 S.E.2d at 578. The *Byars* Court set forth five key factors that must be taken into consideration when juvenile life without parole is a possible sentence:

- (1) 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.”

410 S.C. at 544, 765 S.E.2d at 577 (citing *Miller v. Alabama*, 132 S. Ct. at 2468).

The Court in *Miller* explained that all its recent holdings regarding juveniles hinged on the now established constitutional maxim that juveniles have both “diminished culpability and greater prospects for reform” and are thus “less deserving of the most severe punishments.” *Id.* at 471 (quoting *Graham*, 560 U.S. at 68). The lessened culpability and possibility of rehabilitation are grounded in three constitutionally significant differences between juveniles and adults:

- ◆ Children are less mature and developed than adults, leading to “recklessness, impulsivity, and heedless risk-taking,” *id.* at 471;

- ◆ Children are more “vulnerable . . . to negative influences and outside pressures,” and have “limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings,” *id.* at 471 (internal quotation marks omitted);
- ◆ Children’s actions are “less likely to be evidence of irretrievable depravity” because “a child's character is not as well formed as an adult's” and “his traits are less fixed,” *id.* at 471 (internal quotation marks omitted).

These differences, *Miller* noted, result in part from a growing body of social science and neuroscience research conclusively establishing that: a) only a small percentage of adolescents who commit crimes, even serious crimes, “develop entrenched patterns of problem behavior,” *id.* at 471 (quoting *Roper*, 543 U.S. at 570), and, b) there are fundamental differences between the brains of juveniles and adults in areas “involved in behavior control.” *Id.* at 471-72 (quoting *Graham*, 560 U.S. at 68). Because the brains of juveniles are not “fully mature in regions and systems related to higher executive functions such as impulse control, planning and risk avoidance,” juveniles have a constitutionally different level of moral blameworthiness and, for that reason, the penological justifications for any criminal punishment—deterrence and retribution—are inconsistent with life without parole sentences. *Id.* at 472 n.5 (quoting Brief of the American Psychological Association et al.). The same characteristics that make this category of offenders less culpable necessarily mean that “an irrevocable judgment about a [juvenile] offender’s value and place in society, [is] at odds with a child’s capacity for change.”² *Id.* at 472.

² Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 *BRAIN AND COGNITION* 160, 162 (2010) (“From this

Miller reaffirmed what the Court had previously established in *Graham* and *Roper*: “Children are constitutionally different from adults for the purposes of sentencing.” *Id.* at 471. That difference led the Court in *Roper* to declare that juveniles may not be sentenced to death regardless of the circumstances of the crime, and in *Graham* to ban life without parole for juveniles convicted of non-homicide offenses, again regardless of the underlying facts of the case. In *Miller*, the Court simply took the next logical step and held that the Eighth Amendment also bars mandatory life without parole sentences in cases involving juveniles found guilty of murder.

The same constitutional infirmity that existed in the sentencing of children prior to the line of cases just described also infects our state’s juvenile waiver provision. *S.C. Code Ann.* §63-19-20 (2010) is unconstitutional because it cabins a judge’s ability to consider these *Miller* factors before a juvenile is automatically waived to adult court where the sentences are much more severe. Instead, as in this case, it was both the General Assembly and the prosecutor who determined that Petitioner’s crimes were deserving of such a long sentence. This statute prevents judges from exercising their full constitutional authority by “fully explor[ing] the

perspective, middle adolescence (roughly 14–17) should be a period of especially heightened vulnerability to risky behavior, because sensation-seeking is high and self-regulation is still immature. And, in fact, many risk behaviors follow this pattern, including unprotected sex, criminal behavior, attempted suicide, and reckless driving.”); Sarah-Jayne Blakemore, *Imaging Brain Development: The Adolescent Brain*, 61 *NEUROIMAGE* 397 (2012) (“The plentiful data that consistently paint a picture of the adolescent brain as relatively immature might speak against the relatively young age of criminal responsibility and harsh sentences for adolescents.”).

impact of the defendant’s juvenility on the sentence rendered.” 410 S.C. at 543; 765 S.E.2d at 577. For this reason, it is unconstitutional.

Subsequent Developments

In the last few years, some state courts have addressed the issue that is raised in this appeal. Broadly speaking, they have denied the claim that the provisions are unconstitutional but have done so based on findings that their state legislatures have not provided inmates with a protected liberty interest in being charged or tried as a juvenile. The opinions do not take note that their statutory provisions pre-date *Graham* (the same is true in South Carolina). The dissents in two of these cases recognize that the courts’ knowledge of the developing juvenile brain has evolved over the past two decades and notes that under recent Supreme Court jurisprudence, a defendant’s youth possesses constitutional significance. The logic of the dissents comports with this Court’s opinion in *Aiken*.

In *State of Idaho v. Orozco*, 483 P.3d 331 (Idaho 2021) the Idaho Supreme Court rejected the appellant’s claim and deferred to the legislature.

In this case, 15-year-old Orozco was automatically transferred to adult court for his charges of robbery and burglary. On appeal, he argued the automatic waiver statute violated due process because a juvenile has a “liberty interest in the individualized treatment available in juvenile court.” *Id.* at 334. He argued the automatic waiver provision did not afford him the process that is constitutionally due before depriving him of that liberty interest. *Id.* at 334. In its opinion, the court found, essentially, that Orozco did not have a protected liberty interest in being

treated as a juvenile because the statute did not provide him any expectation that he would be treated as a juvenile:

“Accordingly, the Court of Appeals held that under Idaho’s statutory scheme,” [Jensen] was never entitled to be charged or tried as a juvenile, [therefore] he never had a liberty interest in being placed in the juvenile court system. Without a liberty interest deprivation, the Fourteenth Amendment is not implicated. *Id.* Although not controlling authority, we find the reasoning of the Court of Appeals in *Jensen* and *Anderson* to be sound and persuasive.”

Id. 337-38.

The court also rejected appellant’s argument that the United States Supreme Court’s Eighth Amendment jurisprudence created a liberty interest in one’s status as a juvenile. “They neither explicitly nor implicitly create a protectable liberty interest in being *charged* as a juvenile” (emphasis in original). *Id.* at 339.

Justice John Stegner dissented, noting that the state legislature set forth its stated purposes for its Juvenile Corrections Act that includes individualized treatment and control of the juvenile offender for the benefit of that offender. He noted that the United States Supreme Court has articulated three distinct traits attributable to juveniles that differentiate them from adults: 1) a lack of maturity and underdeveloped sense of responsibility, 2) that juveniles are more susceptible to negative influences and outside pressures, including peer pressure, and 3) that the character of a juvenile is not as well formed as that of an adult. *Id.* at 340.

In his dissent, Judge Stegner additionally notes that the United States Supreme Court and the Idaho Supreme Court have recognized the existence of liberty interests in a number of areas. For example, in *Vitek v. Jones*, 445 U.S. 480 (1980)

the Court found an inmate subject to an involuntary transfer to a mental hospital possessed a liberty interest implicating the right to due process. In the Idaho case of *Smith v. State*, 445 U.S. 480, 493 (1980), the Idaho Supreme Court recognized a liberty interest in an individual being classified as a violent sexual predator. The Idaho Supreme Court also recognized liberty interests in labels which render someone “dangerous” or “changes his legal status.” *Id.* at 342. As the United States Supreme Court held, the first step in a procedural process protection analysis is whether “an individual will be ‘condemned to suffer grievous loss.’” *Morrissey v. Brewer*, 408 U.S. 471 (1972) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951)). The dissent found that automatically stripping Orozco of his status at 15 years old, without providing him a hearing to determine if he should be waived into adult court constitutes a “grievous loss.” *Id.* In South Carolina, this Court has recognized protected liberty interests in sentence-related credits for inmates. *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). It has also recognized a protected liberty interest in how the parole board conducts its assessments. *Cooper v. South Carolina Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008). This Court has recognized a student’s standing with fellow pupils and teachers is a protected liberty interest. *Floyd v. Horry County School Dist.*, 351 S.C. 233, 569 S.E.2d 343 (2002).

The dissent argues that the purpose of criminal punishment is different for juveniles than for adults. For juveniles, the focus is on punishment, but also to ensure that offenders can reintegrate back into their communities and become productive

members of society. Juvenile services include services for rehabilitation and to prevent future crime. Alternatively, for adults, criminal punishment serves to protect society, punishment, and deterrence, with less emphasis on rehabilitation. As the dissent notes, a loss of these benefits without the opportunity for a hearing “runs afoul of basic procedural due process principles.” *Id.* at 342.

The dissent concluded that Idaho’s automatic waiver is unconstitutional because it runs afoul of the United States Supreme Court’s recognition that “youth matters” and that juveniles are inherently more likely to reform their behavior with age. For this reason, “the Legislature has exceeded its power and overstepped the Constitution, effectively determining that youth does not matter. This is not to say that Orozco should not have faced consequences for his participation in this crime, but only to point out that legislative policy decisions cannot outweigh the protections afforded by the United States Constitution, here the Fourteenth Amendment’s Due Process Clause.” *Id.* at 343.

In *State of Alabama v. B.T.D.*, 296 So. 3d 343 (2019) the Alabama Court of Criminal Appeals addressed several challenges to its automatic waiver statute—due process, equal protection, and whether it violates the doctrines of vagueness and overbreadth.

Regarding the procedural due process claim, as in *Orozco*, the court deferred to the legislature. The court reasoned, it is “widely recognized that “treatment as a juvenile is not an inherent right but one granted by the state legislature[;] therefore, the legislature may restrict or qualify that right as it sees fit, so long as no arbitrary

or discriminatory classification is involved.” (quoting *Woodward v. Wainwright*, 556 F.2d 781, 785 (5th Cir. 1977)). In its view the United States Supreme Court holdings in *Roper*, *Graham*, and *Miller* are “narrow” and are not “directly relevant” to a determination whether automatic waiver provision is unconstitutional. *Id.* at 361.

The court dismissed the equal protection claim because the statute’s classification system is not based on sex or illegitimacy, and age is not a suspect class. *Id.* at 363. The court also dismissed the vagueness and overbreadth claims.

The Washington Supreme Court in *State of v. Watkins*, 191 Wash. 2d 530 (2018), similarly held that the issue is one of legislative deference. Contrary to the practice in South Carolina, however, Washington state allows sentencing courts to sentence juveniles below standard sentencing ranges because “children are different.” *Id.* at 545. In Washington state, judges have “complete discretion” to consider mitigating circumstances associated with youth, whether the individual is in the juvenile or adult system. Then, they have the discretion to impose “any” sentence below the applicable range and/ or sentencing enhancements that apply. *Id.* In Petitioner’s case, the judge lacked that level of discretion.

Despite that significant distinction, Justice Mary Yu of the Washington Supreme Court still dissented and argued that she “would hold that before a juvenile is transferred to adult court there must be a hearing where a juvenile court considers whether proceeding in adult court is appropriate in the particular juvenile’s case. *Id.* at 547. Justice Yu acknowledged that our understanding of juvenile culpability has changed dramatically over the past 20 years and that this “new knowledge” has

resulted in a marked shift in how we treat accused juvenile offenders. *Id.* at 840.

Justice Yu succinctly identifies the crux of the issue at heart here:

It is the status of being a juvenile, and not the specific offending behavior at issue, that triggers differing protections for youth. Auto-decline statutes, however, require certain accused juvenile offenders to be treated as adults based on their alleged crimes, without any opportunity for a discretionary judicial determination that the particular juvenile at issue should, in fact, be treated as an adult.

Id. at 552.

The dissents in *Orozco* and *Watkins* cohere closely with this Court's analysis in *Aiken*. While the issue in this appeal is different from the status of juvenile LWOP that this Court addressed in *Aiken*, the principles that animate that decision are applicable here. This Court has, consistent with the relevant United States Supreme Court cases, appreciated the constitutional significance of youth and, "[a]s such, it must be afforded adequate weight in sentencing." *Id.* at 543. This Court held that "it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution" and that there is "an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." *Id.* at 576-77. The statute being challenged in this case is unconstitutional because it expressly limits the courts' ability to consider and "fully explore" the impact of the defendant's juvenility in sentencing. In this case, Judge Jefferson was unable to meaningfully consider "the hallmark features of youth" prior to sentencing Anthony to the mandatory minimum of 15 years in prison.

The recent United States Supreme Court opinion in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) does not preclude this Court from finding the juvenile waiver

provision to be unconstitutional. In finding that a factual finding of incorrigibility is not required before sentencing a juvenile to life without parole, the Court has not retreated from the core proposition of this line of cases which is that “youth matters in sentencing.” *1314. That is the fundamental fault of the automatic waiver provision at issue here. By categorically treating any offender as an adult without individualized consideration of the child, the statute unconstitutionally cabins the judge’s discretion in determining an appropriate sentence. A judge is simply incapable of meaningfully considering the recognized traits of youth that he or she is constitutionally obligated to consider. For this reason, this Court should hold *S.C. Code Ann.* §63-19-20 unconstitutional and remand Petitioner for resentencing.

CONCLUSION

This Court should hold *S.C. Code Ann.* §63-19-20 unconstitutional and remand Petitioner for resentencing.

Respectfully submitted,

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May 18, 2021.