STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRY SHAIMEK TYLER,

APPELLANT.

APPELLATE CASE NO. 2021-001316

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. Whether Appellant's sentence to an aggregate term of sixty years imprisonment, a *de facto* life sentence, for non-homicide offenses he committed as a juvenile during a single incident is violative of the Eighth Amendment to the United States Constitution?

II. Whether Appellant's sentence of an aggregate term of sixty years imprisonment, a *de facto* life sentence, for non-homicide offenses he committed as a juvenile during a single incident is violative of the Article 1, Section 15 of the South Carolina Constitution?

STATEMENT OF THE CASE

On February 15, 2019, Appellant, was charged with the sexual assault, kidnapping, and robbery of E.P. Appellant was sixteen-years-old at the time of the incident and under then-existing law was automatically charged as an adult. CITE During the June 2019 term of the York County grand jury, Appellant was indicted for one count of criminal sexual conduct, first degree, one count of possession of a weapon during the commission of a violent crime, one count of kidnapping, one count of armed robbery, one count of grand larceny, $10,000 or more, and one count of unlawful possession of a firearm by a minor. R. (Indictments). On July 8, 2021, Appellant appeared before the Honorable William McKinnon to enter a guilty plea to the charges as indicted. PT. 1. The State was represented by Sharon Ohayon. Appellant was represented by Zachary Merritt. PT. 1. After a thorough plea colloquy, Judge McKinnon accepted Appellant's guilty plea. Sentencing was deferred to a later date. PT. 1-12.

On August 16, 2021, the parties[1] reconvened before Judge McKinnon for a sentencing hearing. ST.1. At the conclusion of the hearing, Judge McKinnon sentenced Appellant to thirty-year terms of incarceration on the criminal sexual conduct charge and the armed robbery charge, to be run consecutively. Concurrent to the two thirty-year sentences, Appellant was additionally sentenced to thirty-years' imprisonment on the kidnapping charge, ten-years' imprisonment on the grand larceny charge, and five years each on the two weapons charges. ST. 97, l. 19-ST. 98, l. 25.

Counsel Merritt filed a motion to reconsider and reduce Appellant's sentences on August 26, 2021, along with a memorandum in support of the motion which included numerous affidavits in support of resentencing. R. (Motion); R. (memorandum and affidavits). The State

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[1] In addition to Sharon Ohayon, the State was also represented by Christopher Epting and Betty Ann Miller during the sentencing hearing. ST. 1.

filed a motion in opposition on October 5, 2021. R. (State's motion). By written order filed on October 28, 2021, Judge McKinnon declined to disturb the original sentence and denied the motion to reconsider. R. (order).

STATEMENT OF THE FACTS

In the early morning hours of February 15, 2019, sixteen-year-old[2] Appellant kidnapped, sexually assaulted, and robbed E.P., a student enrolled at Winthrop University while armed with a handgun. Surveillance cameras captured portions of the incident, including the initial kidnapping and Appellant driving away in E.P.'s vehicle for approximately twenty to twenty-five minutes. ST. 5, l. 23-ST. 7, l. 19.

The Rock Hill Police Department was able to utilize license plate tag readers to track E.P.'s vehicle throughout the Charlotte area. When the vehicle was stopped around 11:00 a.m. that same morning, the driver was identified as Appellant. The occupants were several of his friends. Appellant was arrested, and during questioning about the incident stated that an individual named "Body-Bag" forced him to commit the sexual assault after he observed "Body-Bag" commit a murder. Detectives investigated Appellant's story but found no homicides that matched the description he had given. Detectives were able to identify "Body-Bag", a forty-something-year-old man who was well known in the Rock Hill area but denied knowing Appellant. ST. 7, l. 20-ST. 8, l. 20.

A Sexual Assault Nurse Examination (SANE) kit was performed on E.P. and Appellant. The forensic results from the SANE kits showed Appellant's D.N.A. inside of E.P. and E.P.'s D.N.A on Appellant's penis. Additionally, E.P. was presented with a six-person line up and was able to narrow the possible suspects down to two people, one of which was Appellant. ST. 12, ll. 19-25. The law at the time required Appellant be charged as an adult, even though he was only sixteen-years-old. Appellant ultimately pled guilty as indicted to the charges on July 8, 2021, with sentencing deferred until August 16, 2021. Tr. 1; Tr. 2, ll. 4-11; Tr. 10, l. 24-Tr. 11, l. 22.

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[2] Appellant was born in October 2002. His sixteenth birthday was four months prior to the incident.

The State began the sentencing hearing by providing a detailed recitation of the facts which included pictures[3] of E.P. after the assault as well as the playing of various video clips from the security cameras and the first responding officer's body camera. ST. 5, l. 10-ST. 11, l. 9. The State requested that Appellant be given consecutive sentences equaling sixty years, arguing that "[i]f these are the types of crimes he's committing at sixteen, I do not want to see what crimes he is committing as he gets older." ST. 14, l. 6-ST. 15, l. 7. Two of the investigating officers gave statements about the incident followed by victim impact testimony from E.P. and her parents. ST. 18-27. Finally, Deputy Solicitor Betty Ann Miller addressed the court and asked that Appellant "be separated from the rest of us until he is an old man and not a danger to anyone anymore." ST. 28, ll. 7-12.

Counsel Merritt made a motion for a sentencing hearing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572, arguing that the sentencing factors expressed in Aiken applied to all juvenile sentencing matters that arose after the case was decided. ST. 31-36. (R. Sentencing Motion). The State argued that the factors announced in Aiken did not apply to Appellant's case because he was not facing a life sentence. The State acknowledged that the factors announced in Aiken could have some significance in juvenile sentencing matters in the future, but that currently the factors were not proper considerations for the court to make in fashioning a sentence. ST. 43, l. 15-ST. 44, l. 2. Counsel Merritt ultimately requested that the sentencing court consider the Aiken factors against the seriousness of Appellant's crimes in fashioning a sentence and asked the court to sentence Appellant to twelve years for the armed robbery

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3 Neither the video clips nor the pictures of E.P. were entered into evidence. The State also played Appellant's statement in rebuttal to the testimony provided by Dr. Salas but did not enter the statement into evidence. Therefore, none of the evidence mentioned or referenced by the State during the sentencing hearing is included in the record on appeal before this Court.

followed by a sentence of fifteen years on the criminal sexual conduct charge suspended to probation to include rehabilitative treatment. ST. 30, l. 15-ST, 40, l. 7.

Dr. Amanda B. Salas, a board-certified Adult, Child and Adolescent, and Forensic Psychiatrist, was retained by Counsel Merritt to evaluate Appellant's juvenility and culpability. (R. Report by Dr. Salas). Dr. Salas provided a five-page written report that contained invaluable and insightful information about Appellant. Appellant had a fairly stable childhood, although his father was not always present in the home due to marital discord. Despite living in Rock Hill, Appellant often visited family in Aiken until his late middle school years when his mother ended the visits upon learning that Appellant had been experimenting with marijuana introduced by influences present during the visits. Appellant reported that his first sexual encounter occurred at age seven, when a female ten years older than him sexually abused him. Disturbingly, Appellant did not characterize the incident as abuse and did not see himself as a victim, instead seeing the experience from the viewpoint of being wanted or desired by a peer. As Dr. Salas concluded, touching and intercourse of a seven-year-old at the directive of a person ten years his senior constituted sexual abuse, but because Appellant does not recognize himself as having been abused it is unclear what emotional impact the experience has had on him. R. (Report pg. 2-3).

During the evaluation, Dr. Salas confirmed Appellant's prior diagnosis of ADHD. Appellant's mother reported that his ADHD improved with treatment through stimulant medications, making him calmer and easier to talk to. When not receiving treatment for his ADHD, Appellant was impulsive and more vulnerable to negative peer influence. Notably, once Appellant reached the age where he could decide for himself if he wanted take medication, he opted to stop taking his ADHD medication because kids at school picked on him calling him "crazy." Subsequently, Appellant went through "an increase in disruptive behaviors, many of

which reflected poor impulse control under negative peer influence." Appellant admitted to continued use of marijuana because it improved his feelings of anger and aggravation, allowing him to laugh and relax, and because it was acceptable to use marijuana within his peer group. R. (Report pg. 3).

Appellant's record reflected "circumstances typical of a juvenile in dentition with ADHD and substance use – situations arise in the context of being off effective treatment, away from adequate parental supervision, under the influence of alcohol and/or drugs, and under negative peer influence." The charges he had pled to occurred under a similar construct. Dr. Salas opined that Appellant's charges stemmed "from actions made not just by an adolescent brain, but **one wired to have more pronounced problems with impulse control and ability to manifest restraint in real time.**" She stated Appellant's brain immaturity was further impacted by him being acutely intoxicated on marijuana and encountering a past associate that he did not wish to affiliate with. R. (Report. Pg. 3) (emphasis added).

The report contained a factual recitation of the incident from Appellant's point of view. Appellant reported that an individual named "Eli" tricked him into meeting up, talked him into stealing a car, gave him a gun, and told him what type of vehicle to steal. E.P. was driving an SUV that was of interest to Eli, so Appellant followed her and presented the gun. He recounted that she complied with his directions, did not resist walking with him, and did not attempt to gain the attention of others, including police, in the parking lot. According to Appellant, when they arrived at the train tracks, he ordered E.P. to throw her purse on the ground, at which point she begged him not to hurt or kill her and offered to have sex with him. After the sexual encounter, he returned to the primary goal of getting a vehicle, took her phone and keys, got her SUV, and went looking for Eli. R. (Report pg. 3-4).

Dr. Salas stated that the factors shared in the account given by Appellant reflected his "immaturity and adolescent nature." She noted that he did not have a plan to accomplish the goal of getting a car and had no plan to use a gun. He in fact saw the gun as a means of protection that evolved into a tool that he could use to influence E.P. Regarding the sexual encounter, she wrote "in the heat of the moment, [Appellant] did not see this as a forced sexual encounter. He was not thinking of sex when they walked to the railroad track. He did not process her offer to have sex with him as a negotiation not to harm her. Instead, [Appellant] genuinely thought the victim was offering him voluntary sex." R. (Report pg. 4).

Appellant's "understanding of the criminal behavior in the moment of the crime [was] not sophisticated." His crime was "a reflection of an underdeveloped adolescent brain characterized by immaturity and impulsivity." Appellant's "aberrant impulsivity made it more challenging for him to demonstrate restraint in the thrill of the moment...In short, lack of brain development compounded by untreated ADHD and acute intoxication with marijuana clouded his perception and impaired his decision-making abilities." R. (report pg. 4). She wrote that Appellant's "account of the crime suggests a diminished real time recognition of his acts as wrong, although he recognizes the nature of the charges as serious and **reflects on his actions with remorse**." R. (report. Pg 5).

Regarding the sexual assault, Dr. Salas opined that the offense did not "reflect a youthful sex offense where there is probability for him to become an adult sex offender." Appellant does not have an underlying sexual deviation or antisocial personality construct. "His unrecognized history of sexual abuse and general biologic sex drive for which he thought there was an opportunity for consensual sex are more influential for his role in the act that characteristics found in an adult sex offender." Dr. Salas continued,

> The immaturity of [Appellant's] adolescent brain is evidence by his personal history and account of events. His diagnosis of ADHD compounds the immaturity of normal brain development. **This means that his 16-year-old brain is more compatible with the normal development of a brain two or three (or more) years younger such as that of a 13- or 14-year-old adolescent.** As an adolescent, [Appellant's] personality construct remains unfinished. His adolescent brain is weird to trust without question and act without thinking. He desires to be accepted by others, a fact that increases his vulnerability to peer influences. His personal sexual history sets him up to misread social sues surround sex. [Appellant] has low threshold to maintain ego resilience in the face of a perceived peer rejection.

R. (report pg. 5) (emphasis added).

Dr. Salas found that Appellant does have the ability and desire to conform to the bounds of the law, that he does not meet the diagnostic criteria for antisocial personality disorder, that he does not have an inherent nature to wrong or violate other people, and that he does have the ability to experience empathy and share in the perspective of another person. She found he has factors to consider for rehabilitation, including that his brain will continue to develop until his mid-twenties, that he does not have minimum, much less maximum, effective treatment of his ADHD and substance use disorders, and that his character is not fully formed. She found that he would benefit from counseling and mental health treatment and concluded that Appellant was "still impressionable with capacity to become a worthy citizen with positive contributions to society." She further noted that Appellant expressed "deep remorse for those affected by his actions." R. (report. Pg 5-6).

Dr. Salas's testimony in court mirrored the findings laid out in her written report. At the start of her testimony, the court questioned whether she had corroborated Appellant's statements about the incident or if she was accepting his statements as fact. Dr. Salas qualified that she does not settle the facts, and that the truthfulness of Appellant's statements was not up for her to decide. Her assessment was made based on her evaluation of Appellant, his history, and her

review of the discovery. Importantly, Dr. Salas testified that her conclusions were not based on a determination that Appellant's statements were true. The statements of Appellant were a way to "get into his brain" and the court could discount parts of the statements if they found them to be untrue. There were other factors that she relied on to reach her conclusion about Appellant's immaturity and adolescence, such as the fact that Appellant has an I.E.P. and does not think on the same level as his peers. She stressed that Appellant was "not just a sixteen-year-old. He's a sixteen-year-old with ADHD high on marijuana" and that made his brain different from the brain of a typical sixteen-year-old or even a sixteen-year-old with ADHD that was well medicated. ST. 45, l. 22-ST. 49, l. 19.

The court inquired about the impact of Appellant's marijuana use on his brain or actions. Dr. Salas explained that there was not much literature on the influence of marijuana because it is illegal and thus had not been extensively studied. However, she was able to inform the court that individuals who are exposed to marijuana at an early age have an increased risk of developing psychosis. She stated that marijuana use from an early age "definitely changes the brain on the negative trajectory." ST. 50, ll. 1-23. She further highlighted Appellant's susceptibility to peer pressure, highlighting that he would rather struggle with his symptoms of ADHD than take medication solely to avoid peer ridicule. ST. 53, ll. 12-13

Importantly, Dr. Salas testified

> He is not antisocial. He is not without the capacity to experience empathy. I don't think that there is a way that his brain has matured or even in his level of educational development and understanding has come to a point where he has the words to articulate some statement of remorse in a fashion that's going to be satisfactory to the community, to the victim. I just don't see that as part of what he's able to do. If he did, it would be in his own words, and it would probably be completely misread and misunderstood.

ST. 58, l. 17-ST. 59, l. 1.

Regarding premeditation, Dr. Salas explained that in her experience, adolescent offenders who premeditate their acts did not leave a trail of physical evidence against them. She noted that with premeditation, there is an element of secrecy, and you work to avoid consequences and not leave evidence behind. While teenagers may not hide evidence in the most sophisticated of ways, they typically did not leave a mountain of evidence behind, and in Appellant's case there was a mountain of physical evidence. ST. 61, ll. 1-25. Dr. Salas ultimately reiterated that Appellant was still an adolescent, and that his brain was one "worth saving in terms of having something that would give an aptitude for morality to contribute positive to society." ST. 65, l. 1-6.

In issuing its sentence, the circuit court touched briefly on the factors announced in Aiken v. Byars out of an abundance of caution. The court then stated it found Appellant's action to be premeditated, that he knew what he was doing was wrong, and that it was not an impulsive act at all. The court further noted and considered that it saw no evidence of remorse from Appellant. The court concluded "based on all of these -- all of these factors and the fact that with the -- this is the most heinous case the Court has ever seen with an adult victim other than a murder. And given these facts the Sentence of the Court is going to be 60 years. It's going to be consecutive sentences the state asks for." ST. 95, l. 1-ST. 97, l. 24.

STANDARD OF REVIEW

"When considering whether a sentence violates the Eighth Amendment's prohibition on cruel and unusual punishments, the appellate court's standard of review extends only to the correction of errors of law." State v. Finley, 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019). This court will not overturn a sentence absent an abuse of discretion. In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). A trial court commits an abuse of discretion when it commits an error of law, makes a factual finding that lacks evidentiary support, or fails to exercise any of its vested discretion. See State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006). When interpreting the Constitution, state courts must faithfully apply the Supreme Court's precedent without expanding its protections. See State v. Slocumb, 426 S.C. 297, 306, 827 S.E.2d 148, 153 (2019).

ARGUMENT

Appellant was sixteen-years-old when he committed the crimes for which he is now incarcerated. He has been in the continual custody of State of South Carolina since February 15, 2019. Should he live long enough to reach his release date[4] in 2070, Appellant will be in his late-sixties and will have spent the majority of his life incarcerated. Appellant's current sentence constitutes a *de facto* sentence of life without the possibility of parole. Appellant asserts that his sentence violates both the United States Constitution's prohibition of cruel and unusual punishment and the South Carolina Constitution's prohibition of cruel or corporal or unusual punishment because the sentence fails to give Appellant any realistic, meaningful opportunity to gain release based on maturity and rehabilitation.

I.

Appellant's sentence of an aggregate term of sixty-years' imprisonment, a *de facto* life sentence, for non-homicide offenses he committed as a juvenile during a single incident is violative of the Eighth Amendment to the United States Constitution.

In Roper v. Simmons, 543 U.S. 551 (2005), Graham v. Florida, 560 U.S. 48 (2010), and Miller v. Alabama, 567 U.S. 460 (2012), the United States Supreme Court methodically evolved the jurisprudence surrounding the propriety of applying an adult punishment to a juvenile offender. The Roper Court held that, under the Eighth Amendment, the execution of juveniles constituted cruel and unusual punishment. Five years later in Graham, the Supreme Court held that the Eighth Amendment prohibited life without parole (LWOP) sentences for juvenile offenders convicted of nonhomicide offenses **and** that States must give juvenile non-homicide offenders sentenced to LWOP a meaningful opportunity to obtain release. Then in Miller, the

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[4] This information is taken from the South Carolina Department of Corrections website and can be found at https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000385746

Court held that mandatory LWOP sentences for juvenile homicide offenders violated the Eighth Amendment.

In each of these cases, the Supreme Court issued a new categorical rule that banned the imposition of traditional adult sentencing schemes on juvenile offenders. While the rule in each case was tailored to the circumstances directly before the Court, the underlying analyses and rationales of the decisions were the same. Science, social science, and common-sense dictate that "children are constitutionally different from adults for purposes of sentencing." Miller at 471 (2012). The Supreme Court recognized that children are "categorically less culpable than the average criminal," Roper at 567 citing Atkins v. Virginia, 536 U.S. 304, 316 (2002), and their diminished culpability meant that children were "less deserving of the most severe punishments." Graham at 68 citing Roper, *supra*, at 569.

In reaching its decision, the Roper Court discussed in detail the differences between children and adults. First, unlike adults, children lack maturity and have an underdeveloped sense of responsibility resulting "in impetuous and ill-considered actions and decisions." The Court recognized "the comparative immaturity and irresponsibility of juveniles" observing that "almost every State prohibits those under eighteen years of age from voting, serving on juries, or marrying without parental consent." Second, children are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure...[t]his is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment." Id. Third, the character of a child is "not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." Roper at 569-570 (cleaned up). The Roper Court concluded,

> **These differences render suspect any conclusion that a juvenile [offender] falls among the worst offenders.** The susceptibility of juveniles to

> immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult. Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. **The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.** Indeed, the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.

Id. at 570 (cleaned up) (emphasis added). Importantly, the Court established that the reasoning it espoused in Roper applied to **all** juvenile offenders. Id. at 571 (emphasis added).

The Graham Court found itself once again determining the propriety of an adult punishment for offenses committed by a child. It held that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." Graham at 74. Reflecting on the framework established in Roper, the Court noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds...[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults." Graham at 68. The Court also distinguished the severity of the crime of murder from other offenses writing:

> **The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment** than are murderers. There is a line between homicide and other serious violent offenses against the individual. Serious nonhomicide crimes may be devastating in their harm ... but in terms of moral depravity and of the injury to the person and to the public, ... they cannot be compared to murder in their severity and irrevocability. This is because [l]ife is over for the victim of the murderer," but for the victim of even a very serious nonhomicide crime, "life ... is not over and normally is not beyond repair." Although an offense like robbery or rape is a serious crime deserving serious punishment, those crimes differ from homicide crimes in a moral sense. It follows that, when compared to an adult murderer, **a juvenile offender who did not kill**

> **or intend to kill has a twice diminished moral culpability.** The age of the offender and the nature of the crime each bear on the analysis.

Id. at 69 (cleaned up) (emphasis added).

Critically, the Graham Court also held that, while a State need not guarantee the juvenile offender eventual release, it **must** provide the juvenile offender with a **meaningful opportunity to obtain release** based on demonstrated maturity and rehabilitation. Graham at 75. The Court wrote "[t]he Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide **crimes** committed before adulthood will remain behind bars for life. **It does prohibit States from making that judgement at the outset that those offenders never will be fit to reenter society.**" Id. (emphasis added). The Graham Court explained that the categorical ban on LWOP sentences for juvenile non-homicide offenders was "necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." Id. at 75. The Court concluded

> Finally, a categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform. **The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.** In Roper, that deprivation resulted from an execution that brought life to its end. Here, though by a different dynamic, the same concerns apply. Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual.

Id. at 79.

The Miller Court continued the expansion of protections afforded to juvenile offenders under the Eighth Amendment by holding that mandatory sentences of life without parole for juvenile homicide offenders also violates the Eighth Amendment's prohibition on cruel and unusual punishment. Miller, 567 U.S. at 465. While the decision did not foreclose imposition of

a LWOP sentence on a juvenile convicted of a homicide offense, the Court required the sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 479-480.

The Court relied on the framework established in Roper and Graham to repeatedly emphasized the potential for reform in all juvenile offenders noting that children's "transient rashness, proclivity for risk, and inability to assess consequences both lessened a child's moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed." Id. at 472 (quoting Roper at 570).

The Miller Court further recognized that Roper and Graham emphasized that "the distinctive attributes of youth dimmish the penological justifications for imposing the harshest sentences on juvenile offenders even when they commit terrible crimes." Id. at 472. Touching on each of the traditional penological justifications the Court surmised:

> Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults - their immaturity, recklessness, and impetuosity - make them less likely to consider potential punishment. Similarly, incapacitation could not support the life-without-parole sentence in Graham: Deciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible - but incorrigibility is inconsistent with youth. And for the same reason, rehabilitation could not justify that sentence. Life without parole forswears altogether the rehabilitative ideal. It reflects an irrevocable judgment about an offender's value and place in society, at odds with a child's capacity for change.

Id. at 472-473 (cleaned up).

The Miller Court clarified that while "Graham's flat ban on life without parole applied only to nonhomicide crimes" the reasoning implicated "**any life-without-parole sentence imposed on a juvenile**, even as its categorical bar relates only to nonhomicide offenses." This is because "none of what it said about children—about their distinctive (and transitory) mental

traits and environmental vulnerabilities—is **crime-specific.**" Id. at 473. The Court determined that "[m]ost fundamentally, Graham **insists** that youth matters in determining the appropriateness of **a lifetime of incarceration without the possibility of parole.**" Based on everything said in the trilogy of cases "about children's diminished culpability and heightened capacity for change" the Miller Court observed that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty...of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id. at 479-480 (cleaned up).

In the wake of these decisions, numerous state courts have reached the conclusion that the protections and rationale set forth under Roper, Graham, and Miller apply with equal force anytime a child faces a lifetime in prison, regardless of the label the sentence is given. The relevant inquiry has been whether the sentence, be it a *de jure* or a *de facto* sentence of life, provides a realistic and meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. See e.g. Henry v. State, 175 So. 3d 675 (Fla. 2015), *cert. denied*, 577 U.S. 1217 (2016), (holding a 90-year aggregate sentence for multiple nonhomicide offenses unconstitutional because Graham is not limited to the "exclusive term of 'life in prison'" and a juvenile must have a meaningful opportunity to obtain release during his or her natural life); State v. Boston, 131 Nev. 981, 363 P.3d 453 (Nev. 2015), as modified (Jan. 6, 2016) (concluding that Graham prohibits aggregate sentences that constitute life without the possibility of parole for nonhomicide offenses committed by a juvenile); State v. Moore, 76 N.E.3d 1127 (Ohio 2016), *cert. denied*, 138 S. Ct. 62 (2017) (holding that term-of-years prison sentence that exceeds a defendant's life expectancy violates the Eighth Amendment to the United States Constitution

pursuant to Graham when it is imposed on a juvenile nonhomicide offender); Carter v. State, 192 A.3d 695, 736 (2018) (holding a sentence of 100 years, comprised of consecutive maximum sentences for assault convictions arising out of a single incident, under which a juvenile offender will not be eligible for parole consideration for 50 years is tantamount to a sentence of life without parole and violative of the Eighth Amendment, as interpreted by the United States Supreme Court in Graham); People v. Contreras, 411 P.3d 445 (Cal. 2018) (applying Graham to aggregate sentences of 50-years-to-life and 58-years-to-life, and remanding for resentencing to sentences that provide a meaningful opportunity for release).

Federal courts have also reached the same conclusion. See e.g. Budder v. Addison, 851 F.3d 1047 (10th Cir. 2017) (concluding that an aggregate sentence of three life with parole sentence and a twenty-year sentence run consecutively was barred by Graham, stating: "we cannot read the Court's categorical rule as excluding juvenile offenders who will be imprisoned for life with no hope of release for nonhomicide crimes merely because the state does not label this punishment as 'life without parole'" and observing that "[l]imiting the Court's holding by this linguistic distinction would allow states to subvert the requirements of the Constitution by merely sentencing their offenders to terms of 100 years instead of 'life'" and "[t]he Constitution's protections are not so malleable"); McKinley v. Butler, 809 F.3d 908 (7th Cir. 2016) (holding that Miller's "children are different" language "cannot logically be limited to *de jure* life sentences, as distinct from sentences denominated in number of years yet highly likely to result in imprisonment for life"); Moore v. Biter, 725 F.3d 1184 (9th Cir. 2013) (holding sentence of 254 years is materially indistinguishable from a life sentence without parole because defendant will not be eligible for parole within his lifetime. Such a sentence is irreconcilable

with Graham's mandate that a juvenile nonhomicide offender must be provided "some meaningful opportunity" to reenter society).

In Aiken v. Byars, 410 S.C. 534, 540-541, 765 S.E.2d 572, 575-576 (2014), our Supreme Court held that Miller applied retroactively and to juveniles who were sentenced to non-mandatory terms of life without parole. According to our Supreme Court, Miller "unequivocally held that **youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole.**" Id. at 542, 765 S.E.2d at 576 (emphasis added). Thus, our Supreme Court determined "an individualized sentencing proceeding before imposing a sentence of life without parole on a juvenile offender" was required. Id. Recognizing that Miller "did not expressly extend its ruling to states such as South Carolina whose sentencing scheme **permits** a life without parole sentence to be imposed on a juvenile offender but does not **mandate** it," the South Carolina Supreme Court held it "**must give effect to the proportionality rationale integral to Miller's holding – youth has constitutional significance.**" Id. at 542-543, 765 S.E.2d at 576 (emphasis added). In giving effect to the rationale in Miller, our Supreme Court found "whether their sentence is mandatory or permissible, any juvenile offender who received a sentence of life without the possibility of parole is entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment. Id. at 544, 765 S.E.2d at 577.

However, in State v. Slocumb, 426 S.C. 297, 827 S.E.2d 148 (2019), our Supreme Court appeared to reverse course, finding that the rationale of Miller and Graham did not apply to an aggregate 130-year sentence for multiple offenses committed on multiple dates. Id. at 299, 827 S.E.2d at 149. While acknowledging the "ostensible merit in Slocumb's argument" (Id.) and recognizing that "Graham may implicate *de facto* life sentences," our Court declined to extend

Graham to cases dealing with aggregate sentences arising from multiple offense committed on multiple dates absent further input from the Supreme Court for three distinct reasons. Id. at 306, 827 S.E.2d at 152-153. First, our Court found that Supreme Court precedent prohibited it from extending federal constitutional protections beyond the boundaries the Supreme Court itself has set. Id. at 306-307, 827 S.E.2d at 153. Second, our Court observed that while the original issue in Graham was a categorical challenge to a term-of-years sentence the Supreme Court answered a narrow question "by only holding that for a juvenile offender who did not commit homicide, the Eighth Amendment forbids the sentence of life without parole." Id. at 307-308, 827 S.E.2d at 153-154. Third, our Court stated that Slocumb's case was factually distinct from the circumstances presented in Graham. Most notably were the fact that Slocumb's charges arose from two distinct incidents, involving two distinct victims, one of which he intended to kill. Id. at 310-311; 827 S.E.2d at 154-155.

In reaching its decision in Slocumb, our Court noted that the debate on the issue of the constitutionality of an aggregate term-of-years sentence imposed on a juvenile offender was not at an end. "As the Supreme Court stated in *Graham* in the context of *de jure* life sentences for juveniles, **it is for the states, in the first instance, to explore the means and mechanisms for complying with the Eighth Amendment.**" Id. at 313, 827 S.E.2d at 156. Our Court then recognized that our General Assembly had introduced the "Youth Sentencing Act of 2019"[5]

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[5] It must be recognized that our General Assembly has yet to accomplish any sentencing reform regarding juvenile offenders since our Court issued Slocumb. The "Youth Sentencing Act of 2019" never made it past the Committee on Judiciary. The bill was reintroduced as the "Youth Sentencing Act of 2021" and again languished in Committee. A third version of the bill was pre-filed on December 7, 2022, and currently resides in the Senate Committee on Judiciary. https://www.scstatehouse.gov/sess125_2023-2024/bills/267.htm Meanwhile, the youth of our State continue to be subjected to excessive and disproportional sentences of imprisonment.

which would modify juvenile sentencing schemes in our State, and presumably, bring them in line with the rationale set forth in Roper, Graham, and Miller. Id. at 314, 827 S.E.2d at 157.

Discussion

As our Supreme Court did in Aiken, *supra*, Appellant requests that this Court give effect to the rationale integral to the holdings in Roper, Graham, and Miller, and hold that an aggregate term-of-years sentence that denies a juvenile non-homicide offender a realistic, meaningful opportunity for release is violative of the Eighth Amendment's prohibition on cruel and unusual punishment.

As a threshold matter, our Supreme Court has recognized the concept of a *de facto*, or "functional equivalent," life sentence in State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948).[6] The Court explained that, when a judge exercises his discretion in sentencing a defendant following a jury's recommendation of mercy, the judge must sentence the defendant to a term of years that will not exceed the life expectancy of the defendant, unless the record disclosed some reasonable basis for disregarding the jury's verdict. Id. at 356, 46 S.E.2d at 277. The jury's recommendation of mercy was a finding that the defendant should not receive the maximum punishment of life imprisonment; however, the judge's sentence of thirty-years' imprisonment was for "all intents and purposes the equivalent of a life sentence." Id. at 357, 46 S.E.2d at 277. Where the record revealed nothing to justify the trial court's disregarding the jury's recommendation, the Supreme Court held the sentence was "manifestly too severe." Id. Thus, our Court has recognized that consideration of a defendant's life expectancy is necessary when fashioning a sentence when the intent of the sentence is to allow the defendant a meaningful opportunity to obtain release.

[6] See also United States v. Pileggi, 703 F.3d 675, 678 (4th Cir. 2013) (referencing "a de facto life sentence" of fifty years); United States v. Garcia, 754 F.3d 460, 474 (7th Cir. 2014).

S.C. Code Ann. § 19-1-150 sets forth the life expectancy of an average person from any period in their life based on the 2001 Commissioners Standard Ordinary Mortality Table developed by the National Association of Insurance Commissioners. Under that actuarial scheme, an average sixteen-year-old male will live a period of 61.02 years. However, the statute informs the courts that it must consider evidence of a person's health, constitution, and habits in determining their life expectancy. To that end, in 2017 Vera Dolan, an epidemiologist, was hired by Counsel Merritt to examine the life expectancy of a teenage male in the department of corrections. Base on the data provided to her by SCDC, Dolan determined that the life expectancy of a male entering SCDC at sixteen-years-old was 40.1 more years. Applying that data further, Dolan determined that for a sixteen-year-old, any sentence over forty years was the functional equivalent of a LWOP sentence. (R. Affidavit and Data of V. Dolan). Unquestionably, Appellant's aggregate sentence of sixty-years without parole constitutes a *de facto* LWOP sentence. Thus, the question becomes does the reasoning espoused in Roper, Graham, and Miller apply to Appellant?

There is no debate that Appellant was juvenile at the time of the incident. Notably, the information provided by Dr. Salas was not only that Appellant had an adolescent brain, but "one wired to have more pronounced problems with impulse control and ability to manifest restraint in real time." R. (Report p. 3). In fact, Dr. Salas concluded that Appellant's brain was developmentally behind that of the average sixteen-year-old and more akin to the brain of a thirteen- or fourteen-year-old. R. (Report p. 5). Most importantly, Dr. Salas found that Appellant had not only the ability but the desire to conform his behavior to the bounds of the law but also to become a productive member of society.

However, the circuit court disregarded all of Dr. Salas's findings because it misapprehended the basis of her conclusions. Whether Appellant's recitation of the events of the evening was true or

not was not relevant – his statements were not used as a source of facts but as a "window into understanding the thoughts underlying his behaviors." R. (Affidavit of Salas). The fact that Appellant perceived any moment of the events that took place on February 15, 2019, as consensual underscores how underdeveloped his brain was on that night. Despite that the finding of the lower court, science in general, and as applied to Appellant, reveal that at the time of the incident he was immature and irresponsible, acting under the influences of an underdeveloped brain with untreated ADHD, high on marijuana. He was not an individual of irretrievably depraved character deserving of the most severe[7] punishment.

Slocumb, *supra*, is neither controlling nor dispositive of Appellant's claim. The reasons that counseled against finding that Graham applied to *de facto* life sentences do not apply to the case at hand. First, Appellant's case is factually more similar to Graham than Slocumb's case. Appellant's offenses arose from a single incident that lasted less than an hour and involved one victim that he did not try, or intend, to kill. Like the juvenile in Graham, Appellant has the twice-diminished moral culpability based on his age **and** the nature of his crime. Second, while the Supreme Court has not explicitly ruled on whether a *de facto* life sentence is violative of the holdings in Graham and Miller, it has repeatedly declined to consider cases where state courts have reached the issue. See e.g., State v Ramos, 387 P.3d 650 (Wash. 2017), *as amended* (Feb. 22, 2017), *reconsideration denied* (Feb. 23, 2017), *cert. denied* 138 S. Ct. 467 (2017) (applying Miller to defendant's aggregate 85-year sentence); State v. Zuber, 152 A.3d 197 (N.J. 2017), *cert. denied*, 138 S. Ct. 152 (2017) (applying Miller and Graham to defendants 110-year and 75-year sentences); State v.

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[7] While not an LWOP sentence in name, the solicitor admitted during sentencing that it was the first time in her twelve years of prosecuting that she made no offers and requested consecutive terms of incarceration. ST. 14, ll. 8-18. By the State's own admission, Appellant's sixty-year aggregate sentence is one of the most severe penalties handed down in York County for a sexual assault and robbery case in the last decade.

Moore, 76 N.E.3d 1127 (Ohio 2016) *cert. denied*, 138 S.Ct. 62 (2017) (holding that *Graham* applies to 112-year aggregate sentence for multiple nonhomicide offenses).

The Graham Court announced a categorical rule, not a fact-specific holding, that the Eighth Amendment prohibits the imposition of any life sentence without the possibility of parole on a juvenile offender. Notably, the sentence at issue in Graham was not termed LWOP but simply "life." The fact that it was without parole was because Florida had abolished its parole system. The categorical rule announced in Graham applies to an entire category of offenders – juveniles convicted of nonhomicide offenses – the factual distinctions within each specific case do not materially alter the application of the rule. If the sentencing practice at issue would see a juvenile offender incarcerated for their life, without meaningful and realistic opportunity for release, it is violative of the Eighth Amendment's prohibition on cruel and unusual punishment, regardless of what the sentence is labeled. Appellant was a juvenile sentenced for non-homicide crimes, and his sentence does not provide any meaningful opportunity for release.

To find that Appellant's sentence does not fall under the ambit of the Supreme Court precedent merely because it was not termed a "life sentence" is intellectually dishonest. By the time he qualifies for release, at approximately age sixty-seven, Appellant will have lived his entire life inside the walls of a penitentiary. He will have no knowledge or experience of the outside world, nor will he have a chance to raise a family, to pursue a career, or to become a contributing member to society. By imposing consecutive, thirty-year, no parole sentences on Appellant, the circuit court did what Graham expressly forbade and made the judgment that Appellant, at age sixteen, would never be fit to reenter society in a meaningful manner.

II.

Appellant's sentence of an aggregate term of sixty-years imprisonment', a *de facto* life sentence, for non-homicide offenses he committed as a juvenile during a single incident is violative of the Article 1, Section 15 of the South Carolina Constitution.

In Aiken, *supra*, our Supreme Court adopted the principles stated in Miller, *supra*, and by extension the principles in Roper and Graham, that "youth has constitutional significance." Aiken at 543, 765 S.E. at 576. In the trilogy of Supreme Court cases discussed above, the High Court determined that the Eighth Amendment to the United States' Constitution prohibited the imposition of certain punishments on juvenile offenders. Applying the same analytical framework and rationale of the decisions in Roper, Graham, and Miller, this Court should hold that any sentence which subjects a juvenile offender to a lifetime of incarceration with no realistic, meaningful opportunity to gain release based on maturity and rehabilitation, regardless of how the sentences is labeled, violates the probation against cruel or unusual punishment found in Article 1, Section 15 of the South Carolina Constitution.

Our Supreme Court wrote in State v. Gamble, 249 S.C. 605, 155 S.E.2d 916 (1967),[8] "[t]he Constitution of the United States and those of most states prohibit the infliction of 'cruel and unusual punishments.' These provisions are primarily intended to proscribe inhuman or barbarous treatment. However, **conventional punishment may be so grossly disproportionate to the offense committed as to be cruel and unusual in the constitutional sense.**" Gamble at 607, 155 S.E.2d at 917 *citing* State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948). Protection against disproportionate punishment is the **central substantive guarantee** of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence. See

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8 O*verruled is part by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Montgomery v. Louisiana, 577 U.S. 190, 206 (2016), as revised (Jan. 27, 2016) (emphasis added). In determining whether a punishment as applied to a class of offenders is so grossly disproportionate as to be cruel and unusual in a constitutional sense, the Supreme Court examines proportionally according to "the evolving standards of decency that mark the progress of a maturing society...because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment." Graham at 58 (cleaned up). Next, the Court determines whether there is a consensus against the sentencing practice at issue before determining "in the exercise of its own independent judgment whether the punishment in question violates the Constitution." Graham at 61 (cleaned up.)

Recently, our sister state of North Carolina considered whether a *de facto* sentence of life without parole was cruel and unusual under both the federal and North Carolina Constitutions. Although not controlling on this Court, it is highly informative and persuasive authority. In State v. Kelliher, 381 N.C 558, 873 S.E.2d 336 (2022), the North Carolina Supreme Court held

> [I]t violates both the Eighth Amendment to the United States Constitution and article I, section 27 of the North Carolina Constitution to sentence a juvenile homicide offender who has been determined to be "neither incorrigible nor irredeemable" to life without parole. Furthermore, **we conclude that any sentence or combination of sentences which, considered together, requires a juvenile offender to serve more than forty years in prison before becoming eligible for parole is a de facto sentence of life without parole within the meaning of article I, section 27 of the North Carolina Constitution because it deprives the juvenile of a genuine opportunity to demonstrate he or she has been rehabilitated and to establish a meaningful life outside of prison.**

Id. at 560, 873 S.E.2d at 370 (emphasis added). Kelliher was seventeen-years-old when, in 2001, he participated in the murders of Eric Carpenter and Carpenter's pregnant girlfriend, Kelsea Helton. At the time of the offense, juvenile offenders were still subject to the death penalty, and the State indicated its intent to try Kelliher capitally. Ultimately, Kelliher pled guilty to numerous charges, including two counts of first-degree murder. He was sentenced to

two consecutive sentences of life without parole. Subsequently, the United States Supreme Court decided Miller, *supra*, and Kelliher was given a resentencing hearing, during which the court expressly found that Kelliher was "a low risk to society" who was "neither incorrigible nor irredeemable." Still, the trial court resentenced Kelliher to two consecutive sentences of life with the possibility of parole which required Kelliher to serve a total of fifty years before becoming parole eligible at the age of sixty-seven. Id. at 559, 873 S.E.2d at 369-370.

A unanimous North Carolina Court of Appeals agreed that Kelliher's sentence violated the Eighth Amendment. In reaching the decision, the Court of Appeals relied on three main conclusions. First, after examining the relevant United States Supreme Court precedents, the Court of Appeals concluded that a substantive constitutional rule had been created: "Juvenile homicide offenders who are neither incorrigible nor irreparably corrupt, are—like other juvenile offenders—so distinct in their immaturity, vulnerability, and malleability as to be outside the realm of life without parole sentences under the Eighth Amendment." Second, the Court of Appeals found that "aggregate sentences may give rise to *de facto* life without parole punishment." Third, the Court of Appeals held that Kelliher's two consecutive life sentences with parole, which did not provide an opportunity for release for fifty or more years, were equivalent to *de facto* life without parole sentences and thus implicated by the Eighth Amendment. Id. at 565, 873 S.E.2d at 373. The Court of Appeals did not separately address Kelliher's state constitutional claim, but stated that "its analysis...applied equally to both Kelliher's federal and state constitutional claims" under a prior North Carolina Supreme Court decision. Id. at 566, 873 S.E.2d at 374. The North Carolina Supreme Court ultimately agreed with the Court of Appeals, reasoning and holding as applied to the federal Constitution. Id. at 578, 873 S.E.2d at 381. The NC Supreme Court then turned its attention to the state

constitutional claim and began its analysis by first finding that the State constitutional provision banning cruel or unusual punishment was distinct from the Eighth Amendment's ban on cruel and unusual punishment.

Article 1, section 27 of the North Carolina Constitution provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel **or** unusual punishments inflicted. N.C. Const. art. I, sec. 27 (emphasis added). In examining whether their State Constitution had to be interpreted in lockstep with the federal Constitution, the NC Supreme Court first observed the textual differences in the two clauses. The NC Supreme Court wrote that the North Carolina constitution "prohibits punishment that is "cruel *or* unusual," while the Eighth Amendment, prohibits punishment that is "cruel *and* unusual." The Court noted that it presumed "that the words of a statute or constitutional provision mean what they say" and it was therefore "reasonable to presume that when the Framers of the North Carolina Constitution chose the words "cruel *or* unusual," they intended to prohibit punishment that was *either* cruel *or* unusual, consistent with the ordinary meaning of the disjunctive term "or." Id. at 579, 873 S.E.2d at 382 (emphasis in original).

The NC Supreme Court continued

> "[t]hat article I, section 27 is textually distinct from the Eighth Amendment suggests that the people of North Carolina intended to provide a distinct set of protections in the North Carolina Constitution than those provided to them by the federal constitution. Cf. People v. Bullock, 440 Mich. 15, 31 n.11, 485 N.W.2d 866 (1992) ("[I]t seems self-evident that any adjectival phrase in the form 'A *or* B' necessarily encompasses a broader sweep than a phrase in the form 'A *and* B.' The set of punishments which are *either* 'cruel' or 'unusual' would seem necessarily broader than the set of punishments which are *both* 'cruel' and 'unusual.' "); Commonwealth v. Concepcion, 487 Mass. 77, 86, 164 N.E.3d 842, *cert. denied sub nom.* Concepcion v. Massachusetts, —— U.S. ——, 142 S. Ct. 408, 211 L.Ed.2d 219 (2021) (stating that a Massachusetts constitutional provision proscribing cruel or unusual punishment "affords defendants greater protections than the Eighth Amendment does").

Id. at 579-580, 873 S.E.2d at 382. Recognizing that the interpretation of the Constitution "always begins with the text" the NC Supreme Court concluded that "there is reason to confer interpretive significance on this textual distinction." Id. at 580, 873 S.E.2d at 383. The NC Court continued its discussion by recognizing that "even where provision of the North Carolina Constitution precisely mirrors a provision of the United States Constitution, we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel provision." Id.

The NC Court finished its initial analysis by noting that "the nature of the inquiry the United States Supreme Court has adopted in resolving cruel and unusual punishment claims itself suggests that state courts should not reflexively defer to Supreme Court precedent in assessing similar claims arising under distinct state constitutional provisions" but that a state court should exercise its own independent judgment to determine whether the punishment in question is violative of the state constitution. Id. at 581, 873 S.E.2d at 383. The NC Court concluded, "[t]he constitutional text, our precedents illustrating this Court's role in interpreting the North Carolina Constitution, and the nature of the inquiry used to determine whether a punishment violates the federal constitution all militate against interpreting article I, section 27 in lockstep with the Eighth Amendment." Id.

While the NC Court concluded that its state constitutional provision did not need to be interpreted in lockstep with the Eighth Amendment, the Court did acknowledge the two provisions shared an important similarity: neither precisely defined the terms "cruel" or "unusual." However, the plain meaning of the terms made it clear that "determining whether a punishment is "cruel" or "unusual" requires a contextual inquiry, the results of which may

change over time as society evolves." Thus, the NC Court found it proper to apply the analytical framework announced by the United States Supreme Court in Graham and others to determine whether punishment in questioned violated the North Carolina Constitution. Id. at 584, 873 S.E.2d 385. After applying that analytical framework, the NC Court concluded "that sentencing a juvenile who can be rehabilitated to life without parole is cruel within the meaning of article I, section 27 of the North Carolina Constitution." Id. at 586, 873 S.E.2d 387.

The NC Court then analyzed whether Kelliher's sentence, which was not an actual LWOP sentence but a *de facto* LWOP sentence, was constitutionally barred under the North Carolina Constitution. To begin, the NC Court recognized that the article 1, section 27 prohibition against "the imposition of a sentence of life without parole for almost all juvenile offenders is rooted in the insight that juvenile offenders are different from adult criminal defendants in ways that are significant with respect to extreme sentences." The NC Court continued

> **What makes the juvenile offender different is the fact that he or she is a child, not the nature or number of the crimes he or she has committed.** Indeed, the fact that the juvenile committed multiple crimes (as opposed to a single offense) itself likely reflects distinctive features of youth. A child who commits multiple criminal offenses is no less a child than a child who commits a single criminal offense or a child who commits none. Cf. State v. Moore, 149 Ohio St.3d 557, 76 N.E.3d 1127, 1142 (2016) ("Whether the sentence is the product of a discrete offense or multiple offenses, the fact remains that it was a *juvenile* who committed the one offense or several offenses and who has diminished moral culpability."). The protections afforded by article I, section 27 that are applicable to Kelliher **emanate from his status as within a category of offenders understood to have diminished moral culpability. The fact that he committed multiple offenses does not change the fact that he was, at the time he committed those offenses, a child understood to be less morally culpable for his actions than an adult. These distinctive features of youth compel us to recognize that a sentence which deprives a juvenile of any genuine opportunity to earn his or her release by demonstrating that he or she has been rehabilitated is, in effect if not in name, a sentence of life without parole within the meaning of article I, section 27.**

Id. at 587–88, 873 S.E.2d at 387–88 (emphasis added).

Discussion

Article 1, section 15 of the South Carolina Constitution provides in part that "[e]xcessive bail shall not be required, nor shall excessive fines be imposed, **nor** shall cruel **nor** corporal **nor** unusual punishment be inflicted..." S.C. Const. Art I, § 15 (emphasis added). This language is distinct from the language of the Eighth Amendment to the United States Constitution which prohibits "cruel **and** unusual punishment." The use of the disjunctive term "nor" indicates that the South Carolina Constitution contains broader protections for its citizens that those afforded by the Eighth Amendment to the United States Constitution. Considering the plain meaning of the term "nor" it follows that our Constitution prohibits punishments that are *either* cruel **or** unusual, and certainly prohibits punishments that are *both* cruel and unusual. See Hodges v. Rainey, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) (where the text language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning).

Notably, our Supreme Court has found that our State Constitution affords broader protections under other provisions. Most recently in Planned Parenthood S. Atl. v. State, 882 S.E.2d 770 (S.C. 2023), reh'g denied (Feb. 8, 2023), our Supreme Court recognized that article I, section 10 of our State Constitution granted a broader right to privacy than the federal Constitution based on the plain language of the text. As Chief Justice Beatty wrote in his separate opinion in Planned Parenthood S., "[w]e interpret our constitution to ensure South Carolinians retain the rights it guarantees." Id.

"It is well settled that the interpretation of the state's constitution is a matter for the courts." Baddourah v. McMaster, 433 S.C. 89, 103, 856 S.E.2d 561, 568 (2021). "State courts

may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." State v. Easler, 327 S.C. 121, 131 n.13, 489 S.E.2d 617, 622 n.13 (1997), overruled on other grounds by State v. Greene, 423 S.C. 263, 814 S.E.2d 496 (2018). "This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." Forrester, 343 S.C. at 643, 541 S.E.2d at 840.

In Roper, Graham, and Miller, *supra*, the United States Supreme Court set the floor for federal constitutional protections for juvenile offenders. The Supreme Court repeatedly recognized that children are constitutionally different from adults for the purposes of sentencing, have diminished culpability and greater prospects for reform, and are therefore less deserving of the harshest punishments. Our Supreme Court in Aiken, *supra*, adopted that reasoning and recognized the unconstitutionality of non-mandatory LWOP sentences for juvenile offenders. Under that reasoning, any sentence which denies a juvenile a meaningful opportunity for release violates the broader prohibition against cruel or unusual punishment found in article I, section 15 of the South Carolina Constitution.

As the North Carolina Supreme Court recognized Kelliher, *supra*, it is not the number of or nature of crimes that distinguishes a juvenile offender but the fact that, in the eyes of the law they are a child when they commit their offense. Because of their juvenility, they are inherently less culpable and should not be subjected to life sentences, be they *de facto* or *de jure*, that preclude them from having a meaningful opportunity to earn release based on their maturity and rehabilitation.

Appellant is currently serving a *de facto* life without parole sentence for offenses he committed at sixteen. Despite any productive changes he makes to himself while incarnated, he

will never have a meaningful opportunity to establish a life outside of prison. There is a distinct possibility he will not live to see his release date in 2070, and if he does, he will have little chance at successfully integrating into society after a lifetime of incarceration. Additionally, because of his age, he will spend on average more years of his life incarcerated than an adult offender given the same sentence. It cannot be reasonably concluded that our State Constitution allows such disproportion punishment.

Finally, Appellant's sentence is not justified by any traditional penological goals. In fact, such a severe sentence can only logically be concerned with retribution and incapacitation. While both goals are legitimate reason to punish an offender, they must be balanced against the scientifically shown diminished culpability of the juvenile offender and consider a child's ability to be rehabilitated.

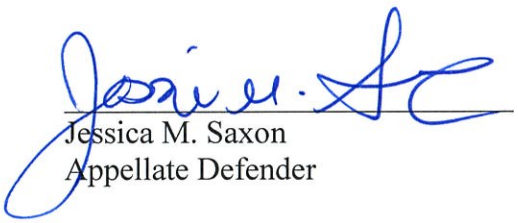
In announcing categorical bans on the death penalty, LWOP for non-homicide offenses and mandatory LWOP sentencing scheme for juvenile offenders, the Supreme Court concluded that an "unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe..." Graham at 78 (cleaned up). This likelihood was realized in Appellant's case.

The circuit court wholly disregarded Appellant's juvenility and diminished culpability in sentencing him to a *de facto* LWOP sentence. Despite objective evidence of his underdeveloped brain, transient immaturity, impulsivity, and potential for rehabilitation, the court made the judgment that he will forever be a danger to society. Instead, the circuit court allowed the horrendous nature of the crimes to dominate its sentencing analysis, just as the State requested.

The result is that Appellant has been subjected to a sentence that is both cruel and unusual. It subjects him to a lifetime of incarceration, with no meaningful opportunity for release, based on offenses he committed as a child. Based on the reasoning espoused in Roper, Graham, and Miller, this Court should find that any sentence which subjects a child to a lifetime of imprisonment without providing for a meaningful and realistic opportunity for release violates the broader prohibition against cruel **or** unusual punishment in article I, section 15 of our State Constitution whether the sentence is a *de jure* or *de facto* life sentence.

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests that this Court hold his aggregate term of sixty-years' imprisonment, a *de facto* life sentence, for non-homicide offenses he committed as a juvenile during a single incident is violative of both the Eighth Amendment to the United States Constitution and of Article I, Section 15 of the South Carolina Constitution.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of February, 2023.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

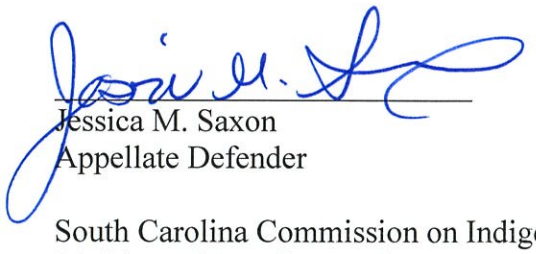
TERRY SHAIMEK TYLER,

APPELLANT.

APPELLATE CASE NO. 2021-001316

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 27th day of February, 2023.



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