RECEIVED
Apr 02 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Alex Kinlaw, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEREEN DONYELL LEE,

APPELLANT

APPELLATE CASE NO. 2024-000745

INITIAL BRIEF OF APPELLANT

JORDAN WAYBURN
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases

Federal Cases

Other Jurisdiction Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. Does Section 17-23-175 of the South Carolina Code require the child be visible in the "audio and visual recording" of her out-of-court-statement?

2. Did the trial court err by admitting appellant's statements made during a police interrogation that he is a "sex addict" and reasoning appellant's statements during the interrogation "put his character in issue" under Rule 404, SCRE?

3. Was the trial court's instruction sufficient to cure the inadmissible testimony revealing appellant had been in prison and that Minor's mother feared his presence around her children?

4. Does the Eighth Amendment or the South Carolina Constitution require an individualized hearing before imposing a life without parole sentence on someone who is intellectually disabled?

STATEMENT OF THE CASE

Kereen Lee was indicted on October 6, 2020, for first degree attempted criminal sexual conduct with a minor. R. *. The Department of Disabilities and Special Needs found him competent to stand trial following an evaluation on July 19, 2023. Court's Ex. 1. On April 22–24, 2024, he went to trial before Judge Alex Kinlaw, Jr. and a jury. Tr. dated 4/22–24/2024 at 1. He was represented by Michael Gambrell, and the state was represented by Seth Johnson and Anthony McCollum. Tr. 1. The jury found Lee guilty, and the court imposed a mandatory life sentence. Tr. 362:24-363:4, 371:13-20.

This appeal follows.

STATEMENT OF FACTS

On March 31, 2020, the Fountain Inn Police Department responded to alleged criminal sexual conduct with a minor.[1] Tr. 221:1-6. Officer Jake Chupp arrived at the minor's house and immediately detained appellant Kereen Lee in his patrol car. Tr. 221:14-22. He then spoke with Minor and her mother Monique Bryant.[2] Tr. 222:16-23. Minor and Bryant briefly told Chupp their version of events, and then Chupp interviewed appellant in the back of his car. Court's Ex. 2, "Chupp BWC Full" at 2:00 to 9:40. Appellant is the brother of Bryant's long-term boyfriend. Tr. 179:4-6, 197:12-13. Appellant is intellectually disabled and his "functioning is in the extremely low range." Tr. 284:20-285:7; Court's Ex. 1.

Investigator James Paris then arrived on scene and interviewed Minor. Tr. 239:16-240:21. The interview was recorded on his bodycam. Court's Ex. 2; State's Ex. 2. Minor told Paris she was asleep when she "felt something hit [her] mouth" and that she saw "him standing above me trying to stick his stuff in my mouth with his hands behind his head." State's Ex. 2. at 0:45 to 1:40. She clarified "his stuff" referred to appellant's "privates." State's Ex. 2. at 1:45 to 2:15. She stated appellant ran away when he saw her wake up. State's Ex. 2 at 1:30 to 1:45. At no point during the statement is Minor visible; there is only an off-screen voice. State's Ex. 2. Prior to trial the state made a motion under South Carolina Code section 17-23-175 to use that recording at trial, and the trial court granted the motion. Mot. for Admission, dated April 22, 2024, p. 2; Tr. 87:10-13. At trial Minor testified to a similar version of events as she originally told Paris. Tr. 198:2-199:24.

---

[1] This is an overview of the facts presented. Other facts are presented below as relevant to each issue.

[2] The transcript incorrectly records her name as "Monquies."

Paris conducted two interviews of appellant back at the police station after he was arrested. Tr. 245:2-8. Those interviews were recorded and made part of Court's Exhibit 2, which is on file with this Court. Tr. 80:11-82:12. Redacted versions of the interviews were played for the jury in six parts as State's Exhibit 3, which are also on file with this Court. Tr. 244:17-245:21. In the interviews appellant consistently denied attempting to touch his penis to Minor's mouth, and he offered several different possibilities to explain Minor's accusation. Court's Exhibit 2.

The jury ultimately found appellant guilty. Tr. 362:24-363:4. Appellant then made a motion to quash the state's notice of its intention to seek a sentence of life without parole and "ask[ed] for an individualized sentencing hearing." Tr. 365:16-19. He argued sentencing him to life without parole would violate his "right not to be cruelly punished." Tr. 365:16-24. The trial court denied his motion and refused to allow a hearing on the issue because section 17-25-45 of the South Carolina Code, the two/three strikes law, required it to impose a life without parole sentence. Tr. 366:13-15.

This appeal follows.

STANDARD OF REVIEW

It is a question of law whether Section 17-23-175(A) required Minor to be visible on screen. It is also a question of law whether an individualized sentencing hearing is required before appellant can be sentenced to life without the possibility of parole. These questions are reviewed de novo on appeal. *S.C. Dep't of Soc. Servs. v. Boulware*, 422 S.C. 1, 6, 809 S.E.2d 223, 226 (2018) ("Questions of statutory interpretation are 'questions of law, which are subject to *de novo* review . . . .'" (quoting *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012))); *see City of Rock Hill v. Harris*, 391 S.C. 149, 153, 705 S.E.2d 53, 55 (2011) (concerning constitutional interpretation).

Whether the trial court erred in the admission of evidence or the denial of a motion for a mistrial is reviewed to determine if the trial court acted within its discretion. *State v. Swafford*, 375 S.C. 637, 640, 654 S.E.2d 297, 299 (Ct. App. 2007) ("The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." (quoting *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001))); *State v. Bantan*, 387 S.C. 412, 417, 692 S.E.2d 201, 203 (Ct. App. 2010) ("The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law." (quoting *State v. Cooper*, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999))).

ARGUMENT

I. Minor's Recorded Interview was not Admissible under Section 17-23-175

a. Subsection (A) Requires the Child be Visible in the Recording

Section 17-23-175(A) provides that in a criminal case, "an out-of-court statement of a child" is admissible if it satisfies four elements including that "an audio and visual recording of the statement is preserved . . . except as provided in subsection (F)." S.C. Code Ann. § 17-23-175(A)(2). At trial the state introduced State's Exhibit 2, a recording from Investigator Paris's bodycam where he interviewed Minor on the morning of appellant's arrest.[3] State's Ex. 2; Tr. 241:3-11. Minor is never seen in that recording. Appellant objected to the recording because he could not "observe the child in the video [and] the statute says it's got to be audio and video." Tr. 76:22-77:4. The trial court overruled the objection. Tr. 87:10-13.

The trial court erred in admitting the video because it does not comply with the terms of the statute. "The purposes of subsection 17–23–175(A)(2) include giving the jurors direct access—audio and visual—to the victim's statements to enable the jurors to more accurately evaluate the victim's credibility." *State v. White*, 416 S.C. 135, 137, 784 S.E.2d 695, 696 (Ct. App. 2016); *see State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622-23 (2011) ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000))). A video recording that does not visually depict the child does not serve this purpose because the jury is not able to effectively evaluate the child's demeanor or, in this case, her demonstrations. This dark and

[3] The full interview was included in Court's Exhibit 2 as "Interview of Victim by Paris" and is half an hour long. State's Exhibit 2 a five-and-a-half-minute excerpt. Both exhibits are on file with this Court.

grainy recording of a kitchen table and wall does not allow the jury to adequately evaluate her credibility. Just as a recording without any video would not satisfy the requirements, it should be equally clear a video recording without view of the child providing the statement is insufficient. *Cf. State v. Taylor*, 436 S.C. 28, 35, 870 S.E.2d 168, 172 (2022) ("We hold that in order for a DUI recording to 'show' a defendant being advised of his *Miranda* rights [under S.C. Code Ann. § 56-5-2953], the defendant and arresting officer must be visually seen and audibly heard.").

In addition to the plain language and purpose of the statute, its legislative history also supports the strict requirement of the recording. Section 17-23-175 was adopted as part of the Sex Offender Accountability and Protection of Minors Act of 2006. 2006 S.C. Acts 2737, 2747. The first version of the statute as proposed in the Senate did not include the audio and visual requirement now in subsection (A)(2). S.J. 1515 (Mar. 28, 2006), S. 1138, 2006 Gen. Assemb., 116th Sess. (S.C.). It required only what is effectively now subsection (A)(4): that the trial court find "the time, content, and circumstances of the statement provide sufficient guarantees of trustworthiness." *Id.*; *see* § 17-23-175(A)(4) (providing the statement is admissible only if, in addition to other requirements, "the court finds . . . the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness"). Then the House of Representatives amended the bill and included the additional requirements now in subsection (A). H.R. J. 4113 (May 31, 2006), S. 1138.

By amending the bill and requiring an audio-visual recording of the statement, the General Assembly expressed its intention that more was required. By specifying a recording is necessary the General Assembly ensured the jury itself would be able to directly view, hear, and evaluate the child's prior statement. *See White*, 416 S.C. at 137, 784 S.E.2d at 696. That increased reliability of the statement and its utility to the jury is the only justification for

admitting what would otherwise be hearsay. *State v. Russell*, 383 S.C. 447, 450-51, 679 S.E.2d 542, 543-44 (Ct. App. 2009) (explaining admission of a recording of a child's prior statement "would likely be error in absence of the statute" but that "the legislature has made a specific allowance for these out-of-court statements by child victims provided certain elements are met"); *see State v. Barrett*, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989) (describing the "limited" hearsay exception to corroborate the "time and place" of a sexual assault and stating such evidence "may not include particulars or details"). Because there is no video of Minor the requirement in subsection (A)(2) was not met, and the trial court erred by admitting the video. *See State v. Foster*, 354 S.C. 614, 621, 582 S.E.2d 426, 430 (2003) ("[E]vidence of a prior consistent statement is **only** permitted when the elements of Rule 801(d)(1)(B) are met." (citing *State v. Saltz*, 346 S.C. 114, 124, 551 S.E.2d 240, 245 (2001))).

b. Subsection (F) does not Apply Because this is not an "Unrecorded Statement" and that subsection does not allow for the introduction of recordings

The General Assembly intended for subsection (A) to impose strict requirements for admission. Recognizing a recording would not always be available, however, in subsection (F) it allowed for a limited exception to the recording requirement. It provides:

> Out-of-court statements made by a child in response to questioning during an investigative interview that is visually and auditorily recorded will always be given preference. If, however, an electronically unrecorded statement is made to a professional in his professional capacity by a child victim or witness regarding an act of sexual assault or physical abuse, the court may consider the statement in a hearing outside the presence of the jury to determine:
>
> > (1) the necessary visual and audio recording equipment was unavailable;
> >
> > (2) the circumstances surrounding the making of the statement;

> (3) the relationship of the professional and the child; and
>
> (4) if the statement possesses particularized guarantees of trustworthiness.
>
> After considering these factors and additional factors the court deems important, the court will make a determination as to whether the statement is admissible pursuant to the provisions of this section.

§ 17-23-175(F).

There are two reasons subsection (F) is inapplicable to the facts of this case. First, by the express language of the statute, the exception applies only to an "electronically unrecorded statement." The exception was intended to apply to statements made during an interview where there was no recording and no opportunity to record. Because interview was obviously recorded, the subsection does not and cannot apply.

Second, if Minor's statements during her interview could come in, the proper way to do that is through testimony rather than the statutorily inadequate recording. Subsection (F) cannot allow for the admission of a recording—that was plainly not the intention of the General Assembly. Therefore, as the statute clearly contemplates, the statement would need to be in the form of testimony from Investigator Paris or Minor. For these reasons subsection (F) cannot save the erroneous admission of this recording.

c. Admission was not Harmless

This error severely prejudiced appellant because repeating Minor's story and improperly corroborating her testimony with her prior consistent statement has a "devasting impact" in a case where credibility is everything. *Thompson v. State*, 423 S.C. 235, 249, 814 S.E.2d 487, 494 (2018) (quoting *Barrett*, 299 S.C. at 487, 386 S.E.2d at 243). There was no physical evidence. There was no other eyewitness except Minor. As in *Barrett*, "the State relied solely upon

Victim's testimony to establish the details of the crime and the identity of the perpetrator." 299 S.C. at 487, 386 S.E.2d at 243. Her credibility was therefore critical to the state's case, and the erroneous admission of her prior consistent statement was not harmless beyond a reasonable doubt. *See Foster*, 354 S.C. at 624, 582 S.E.2d at 431 (erroneously admitted prior consistent statement not harmless where witness's testimony was "the crux" of the state's case).

II. Referring to Appellant as a "Sex Addict" Clearly Violates Rule 404, SCRE

During appellant's second interrogation by Investigator Paris, he asked appellant: "You a sex addict? You like having sex a lot?" State's Ex. 3, "Kereen Lee 3" at 9:00 to 9:10. Appellant responded, "I'm a scorpio," and he then explained "we more sex addicted than any other horoscope." State's Ex. 3, "Kereen Lee 3" at 9:10 to 9:40. Appellant objected to this portion of the interview because "that would go into prior behavior" and is impermissible Rule 404, SCRE propensity evidence. Tr. 150:4-10. Referring to *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998), the trial court accepted the general rule that "the State cannot attack the character of the defendant unless the defendant first places his character in issue." Tr. 151:13-152:6; *Nelson*, 331 S.C. at 6, 501 S.E.2d at 718 (citing *Mitchell v. State*, 298 S.C. 186, 188, 379 S.E.2d 123, 125 (1989)). However, the trial court reasoned appellant put his character in issue because "he put sex on the table when he answered the question," and thus the court overruled appellant's objection. Tr. 154:19-155:13.

The trial court erred because a defendant does not "put his character in issue" except by introducing evidence at trial. "Plainly, before the State may rebut evidence of a character trait of the accused, the accused must first offer evidence of that character trait into the trial." *State v. Williams*, 430 S.C. 136, 148, 844 S.E.2d 57, 64 (2020); *see also State v. Gibert*, 196 S.C. 306, 13 S.E.2d 451, 453 (1941) (citations omitted) ("[T]he prosecution cannot attack the character and

reputation of the accused . . . unless he first puts his character in issue *by introducing evidence to sustain the same.*" (emphasis added)). This general rule is longstanding: "[T]he state is not entitled to introduce evidence of the bad character or reputation of the accused unless he has clearly and expressly put his character in issue *by introducing evidence* of good character." 16 Corpus Juris, *Criminal Law* § 1122, at 580-81 (1918) (emphasis added) (footnotes omitted). The prohibition is now codified as Rule 404(a)(1), SCRE, which provides such evidence is admissible when "offered by an accused" and only then "by the prosecution *to rebut* the same." Rule 404(a)(1), SCRE (emphasis added). Where the defendant does not first introduce evidence of his good character, the state cannot introduce character evidence.

Appellant's pre-trial conduct during police interrogation does not mean he put his character in issue at trial. The state introduced the video before appellant introduced any evidence at all. Because appellant did not first put his character in issue at trial, the trial court erred by admitting this blatant propensity evidence. Further, not only did the state put his character in issue at trial, but during the interrogation Investigator Paris created the issue by asking the sex addict question. In absolutely no way did appellant introduce the topic or descriptor. It was therefore error to admit the evidence over appellant's objection.

That error was not harmless beyond a reasonable doubt. The only relevance of the statement is for the state to suggest he is more likely to have committed this sex crime because he is a sex addict. That is precisely the type of evidence and argument Rule 404, SCRE is intended to prohibit. *State v. Perry*, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020) ("Rule 404(b) prevents the State from introducing evidence of a defendant's other crimes for the purpose of proving his propensity to commit the crime for which he is currently on trial."). As explained above, there was no physical evidence of this crime nor any corroborating eyewitness. The

entire case depended on the jury's evaluation of Minor and appellant. Accusing appellant of being a sex addict, and his tacit admission of that fact, cannot be harmless in a sexual misconduct case.

III. The Curative Instruction was not Sufficient when the Jury Learned Appellant has a Criminal History because the Testimony was Directly Connected to Minor

Monique Bryant, Minor's mother, testified at trial. Tr. 174:10-15. In her direct- and cross-examinations, Bryant was asked about Minor and how often Minor stayed in the home in which appellant lived. Tr. 175:25-176:13, 180:9-24. She testified Minor and her other children lived with her mother (their grandmother) but sometimes they stayed with her. Tr. 175:25-176:7, 180:9-14. The following exchange occurred during cross-examination:

> Q: Okay. And were your children with your mom for that four or five years [when you lived with appellant's brother]?
>
> A: No.
>
> Q: How long had they been with your mom?
>
> A: They went with my mom when Kereen Lee got out of prison.

Tr. 180:19-24. Appellant immediately moved for a mistrial on the basis of this impermissible testimony because it violates Rule 404, SCRE, and the jury was removed from the courtroom. Tr. 180-25:181-12, 185:9-12. The state agreed it was improper Rule 404(b) evidence. Tr. 181:16-23. The trial court denied the motion and provided a curative instruction over appellant's objection. Tr. 185:19-25, 187:16-22. The trial court instructed the jury:

> Ladies and gentlemen of the jury, I instruct you that the last answer that was given by this witness was incorrect and should be stricken not only from your mind, but I'm instructing Madam Court Reporter to strike it from the record.

Tr. 187:16-20.

"The decision to grant or deny a motion for mistrial is within the sound discretion of the trial court." *State v. Frazier*, 394 S.C. 213, 223, 715 S.E.2d 650, 655 (Ct. App. 2011) (citing *State v. Wasson,* 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989). "[I]n order to receive a mistrial the defendant must show error and resulting prejudice." *State v. Frazier*, 394 S.C. 213, 223, 715 S.E.2d 650, 655 (Ct. App. 2011) (citing *State v. Council*, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999)). "To prove prejudice, the complaining party must show there is a reasonable probability that the jury's verdict was influenced by the challenged evidence or lack thereof." *State v. Jenkins*, 408 S.C. 560, 575, 759 S.E.2d 759, 767 (Ct. App. 2014) (quoting *State v. Tennant*, 383 S.C. 245, 254, 678 S.E.2d 812, 817 (Ct. App. 2009), *aff'd as modified,* 394 S.C. 5, 714 S.E.2d 297 (2011)). Stated differently, a mistrial must be granted when a curative instruction is not likely to cure the prejudice beyond a reasonable doubt. *See State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011) (citation omitted) (mistrial should be granted when "the prejudicial effect can be removed in no other way").

Critically here, the question is primarily about the effectiveness of the curative instruction. While the law presumes curative instructions are effective, that presumption is rebuttable. *See State v. Young*, 420 S.C. 608, 623-24, 803 S.E.2d 888, 896-97 (Ct. App. 2017); *see also* 16 Corpus Juris, *supra*, § 2205, at 880 ("Errors arising from the admission of incompetent evidence over objection are cured by the court striking it out and directing the jury to totally disregard it, *unless the evidence is of a material character* . . . ."). "An instruction to disregard objectionable evidence usually is deemed to have cured the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instruction the accused was prejudiced." *State v. Crim*, 327 S.C. 254, 257, 489 S.E.2d 478, 480 (1997) (citations omitted).

There are two interconnected factors that render Bryant's testimony irreparably prejudicial. First is the inherent prejudice in revealing appellant's prior criminal history and the likelihood that the jury would use that testimony as propensity evidence. A jury is not permitted to learn about a criminal defendant's prior crimes except for very specific purposes, and that is for good reason: "the inherent tendency of evidence of other crimes to show propensity." *Perry*, 430 S.C. at 40, 842 S.E.2d at 662. When the jury learned appellant was recently released from prison, it learned he had previously committed other crimes. The "inherent tendency" of such evidence is to lead the jury toward the inference that because appellant was convicted of crimes before, he is more likely to have committed this crime. *Id.*; *see State v. Fletcher*, 379 S.C. 17, 26, 664 S.E.2d 480, 484 (2008) (explaining "prior bad act testimony is inadmissible" precisely because "it is used by the jury to infer that the defendant did in fact commit the crime for which he is on trial").

The second factor is what makes that inherent prejudice incurable: the testimony was directly related to Minor. In context, Bryant's testimony informed the jury not just of appellant's criminal history but it also connected that history to her belief appellant should be kept away from Minor. That was the real effect of the testimony—Bryant believed appellant was the type of character she did not want her children around. That is improper Rule 404 evidence, and the severe prejudice is apparent. Further, when the objection was made, appellant immediately requested to approach the bench and then the jury was removed from the courtroom. While that is the appropriate procedure for addressing such an incident, it inherently drew the jury's attention to Bryant's testimony. The jury was then left for an extended period of time to consider her testimony and hypothesize about its meaning. Some jurors likely even inferred appellant was

released from prison for previous sex crimes and that is why Bryant did not want Minor around him. That is precisely the prejudice Rule 404 is intended to guard against.

Taken together, this evidence is of such a nature that the trial court's instruction cannot be relied upon to cure the unfair prejudice. The jury heard this mother was already scared of having Minor near the defendant after he was released from prison when he is on trial for allegedly violating Minor. The testimony and inferences therefrom are so clear, substantial, and likely to invite the impermissible propensity inference and an emotional response that instructing the jury to disregard the comment was not and cannot be sufficient. It is unlike that in *State v. Wiley*, 387 S.C. 490, 692 S.E.2d 560 (Ct. App. 2010), where in opening arguments the solicitor referred to an outstanding "unrelated warrant." 387 S.C. at 496, 692 S.E.2d at 563. This was evidence not of a warrant but a prior conviction *and* it is not obviously unrelated. Rather, there is a reasonable inference that directly connects appellant to crimes of a similar nature and the testimony to Minor. Simply put, as appellant argued, "you can't unring that bell." Tr. 182:24-25.

IV. Mandatory LWOP is Unconstitutional for Intellectually Disabled People

Irrevocably and automatically sentencing an intellectually disabled nonhomicide offender to permanent confinement does not sufficiently serve the legal, moral, or penological purposes of criminal sentences. Because his mandatory sentence did not consider the constitutional significance of appellant's intellectual disability, the sentence is unconstitutional.

After the verdict appellant challenged the state's notice of its intention to seek a sentence of life without parole and "ask[ed] for an individualized sentencing hearing." Tr. 365:16-19. He argued sentencing him to life without parole would violate his "right not to be cruelly punished." Tr. 365:16-24. The trial court denied his motion and refused to allow a hearing on the issue because under section 17-25-45 of the South Carolina Code, the two/three strikes law, the trial

court was required to sentence appellant to life without parole.[4] Tr. 366:13-15. As such, appellant was not given the opportunity to develop a factual record concerning his particular circumstances or for the court to consider those circumstances. This was error.

Appellant's argument starts from a simple premise: it is a cruel punishment to treat the intellectually disabled in exactly the same way as the typical offender. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding the Eighth Amendment prohibits the execution of intellectually disabled defendants); *cf. Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 2458 (2012) ("[I]mposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."). He is entitled to an individualized sentencing hearing because his disability makes a sentence to life imprisonment without parole too likely to be a disproportionate sentence for his crime. *Cf. Aiken v. Byars*, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014) (holding defendants who received a life sentence without parole or crimes committed while juveniles are entitled to "an individualized hearing where the mitigating hallmark features of youth are fully explored").

Appellant asserts a specific claim: that he is entitled to a hearing to determine whether he is one of those nonhomicide offenders who should be confined for the remainder of his life without the possibility of parole. *Cf. Aiken*, 410 S.C. at 545, 765 S.E.2d at 578; *Graham v. Florida*, 560 U.S. 48, 79 (2010) (holding sentences to life without parole are unconstitutional for juvenile nonhomicide offenders); *Miller*, 567 U.S. at 489 (2012) (holding mandatory life without parole sentences are unconstitutional for juvenile homicide offenders). His argument is derived from two principles. First, because of their reduced personal culpability, permanent

[4] Appellant's prior offenses were all second-degree burglary charges. Tr. 369:23-370:4; Notice of Intention to Seek Sentence of Imprisonment for Life Without the Possibility of Parole, dated May 15, 2023.

imprisonment is more likely to be a disproportionate sentence for the intellectually disabled defendant. *See Atkins*, 536 U.S. at 320 (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)); *cf. Solem v. Helm*, 463 U.S. 277, 290 (1983) ("In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted."). Second, nonhomicide offenses are of a different category and less deserving of the second most severe punishment in the law. *See Coker v. Georgia*, 433 U.S. 584, 598 (1977); *Kennedy v. Louisiana*, 554 U.S. 407, 420-21 (2008). Appellant is entitled to an individualized hearing because these two constitutionally significant factors were disregarded out of hand. *Cf. Aiken*, 410 S.C. at 545, 765 S.E.2d at 578; *Miller*, 567 U.S. at 471 (first citing *Lockett*, 438 U.S. at 605; then citing *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality opinion)).

a. The Eighth Amendment, South Carolina Constitution, and Intellectually Disabled

"Although the earliest Eighth Amendment cases focused on the barbarous nature of a punishment, the jurisprudence evolved to encompass challenges to the proportionality of the sentence to the offense." *Aiken v. Byars*, 410 S.C. 534, 538, 765 S.E.2d 572, 574 (2014) (plurality opinion) (citing *Gregg v. Georgia*, 428 U.S. 153, 170-72 (1976)); *see generally Solem*, 463 U.S. at 290-92 (outlining the proportionality analysis in noncapital cases). In *Aiken* the Court considered whether the individualized hearings for juvenile homicide offenders required by *Miller v. Alabama*, 567 U.S. 460 (2012), applied to South Carolina's discretionary sentencing procedure. 410 S.C. at 542, 765 S.E.2d at 576. The plurality in *Aiken* concluded it did, "[W]e must give effect to the proportionality rationale integral to *Miller*'s holding—youth has constitutional significance." 410 S.C. at 542-43, 765 S.E.2d at 576. Justice Pleicones disagreed *Miller* extended to South Carolina's procedure but he concurred in result because he "would

reach the same result under S.C. Const. art. I, § 15."[5] *Aiken v. Byars*, 410 S.C. 534, 546, 765 S.E.2d 572, 578 (2014) (Pleicones, J., concurring).

Aiken should be extended to the intellectually disabled nonhomicide offender. As outlined above, there are two combined reasons that mandatory LWOP is inappropriate for cases like this. First is one of the major rationales of the Supreme Court in deciding *Atkins*: "today our society views mentally retarded offenders as categorically less culpable than the average criminal."[6] 536 U.S. at 316. The Court was clear about how intellectually disabled people are different:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins, 536 U.S. at 318 (footnotes omitted). "The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment." *Hall v. Florida*, 572 U.S. 701, 709 (2014). That diminished capacity is the same rationale that led to *Miller* and *Aiken*. *See Miller*, 567 U.S. at 471 (explaining "juveniles have diminished

---

[5] In relevant part, that section provides: "Excessive 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.

[6] The Court in *Atkins* used the term "mentally retarded," and the same is now described as "intellectually disabled." *Hall v. Florida*, 572 U.S. 701, 704 (2014).

culpability" in part because of their "recklessness, impulsivity, and heedless risk-taking" and because they are "more vulnerable . . . to negative influences and outside pressures" (citations omitted) (alteration original)); *Aiken*, 410 S.C. at 542, 765 S.E.2d at 576 (citing those differences identified in *Miller* and stating "the *Miller* Court unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole").[7]

This diminished culpability in both juveniles and the intellectually disabled implicates a long line of cases emphasizing the "proportionality concept" central to the Eighth Amendment because of the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Graham*, 560 U.S. at 59 (alteration original) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). The intellectually disabled are not hardened criminals intent on evil—they have impairments and limitations, like children, that sometimes lead them to do wrong. The Eighth Amendment recognizes that difference matters. *Atkins*, 536 U.S. at 318; *see Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) (citation omitted) ("It is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant.'").

The second reason is that nonhomicide offenses as a category are less egregious and worthy of retribution. The Supreme Court has repeatedly "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." *Graham*, 560 U.S. at 69 (citing *Kennedy v. Louisiana*, 554 U.S. 407, 437-38 (2008); *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *Tison*

---

[7] *See also Graham*, 560 U.S. at 78 (noting juveniles have "[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness"); *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (outlining "[t]hree general differences between juveniles under 18 and adults").

v. Arizona, 481 U.S. 137, 156-58 (1987); *Coker v. Georgia*, 433 U.S. 584, 597-98 (1977)). This is because "[t]here is a line 'between homicide and other serious violent offenses against the individual.'" *Id.* (quoting *Kennedy*, 554 U.S. at 438). There is no doubt that many nonhomicide offenses are "deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life." *Coker*, 433 U.S. at 598. Again, the Eighth Amendment recognizes this difference matters.

Thus, when considered together, the intellectually disabled nonhomicide offender "has a twice diminished moral culpability." *Graham*, 560 U.S. at 69. That diminished culpability means "retribution does not justify imposing the second most severe penalty" on someone who is not like the typical adult. *Graham*, 560 U.S. at 72.

b. Severity of the Sentence

The severity of a life without parole sentence must be recognized as part of the constitutional analysis.[8] *Solem*, 463 U.S. at 291 ("Of course, a court must consider the severity of the penalty in deciding whether it is disproportionate."). The U.S. Supreme Court has previously established that the Eighth Amendment can recognize a punishment is impermissible precisely because the "without parole" condition of the sentence is so severe. *Solem*, 463 U.S. at 297; *Graham*, 560 U.S. at 75. This is because the Eighth Amendment is suspicious of permanent sentences. *See Gregg*, 428 U.S. at 187 ("[D]eath as a punishment is unique in its severity and irrevocability."); *Weems v. United States*, 217 U.S. 349, 366 (1910) (holding twelve-year prison term unconstitutional when combined with a "a perpetual limitation of his liberty" after release

[8] Appellant's life sentence is based on the recidivist statute, but the Court "must focus on the principal felony—the felony that triggers the life sentence—since [appellant] already has paid the penalty for each of his prior offenses." *Solem*, 463 U.S. at 296 n.21. Of course, however, his "prior convictions are relevant to the sentencing decision." *Id.*

where defendant "is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicil without giving notice to the 'authority immediately in charge of his surveillance,' and without permission in writing"). The Supreme Court has justified its scrutiny of death penalty procedures in part because of its permanence:

> "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."

Rummel v. Estelle, 445 U.S. 263, 272 (1980) (quoting *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)). Because of its irrevocability, a life without parole sentence "share[s] some characteristics with death sentences that are shared by no other sentences." *Miller*, 567 U.S. at 474 (2012) (quoting *Graham*, 560 U.S. at 69). Thus, a court can still "draw a 'bright line'" between a life sentence without the possibility of parole and every other sentence. *Rummel*, 445 U.S. at 275.

The Supreme Court has expressly recognized the importance of the possibility of parole in moderating what might otherwise be an unconstitutional sentence. *Compare Rummel*, 445 U.S. at 280-81 (upholding life sentence for recidivist in part because of the possibility of parole so "a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life"), *with Solem*, 463 U.S. at 297 (holding recidivist life without parole sentence was unconstitutional as applied because the lack of parole made it "far more severe than the life sentence we considered in *Rummel*"). Short of the death penalty, a sentence of life without parole is the most severe punishment available to the state, and that is an important part of the constitutional analysis which weighs in favor of deliberate and

thoughtful application. *See Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (holding the Eighth Amendment requires a "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death").

c. Penological Justifications and the Intellectually Disabled

The next part of the analysis considers the penological justifications for the sentence. The United States Supreme Court has recognized four legitimate goals of criminal sanctions: retribution, deterrence, incapacitation, and rehabilitation. *Graham*, 560 U.S. at 71 (citing *Ewing v. California*, 538 U.S. 11, 25 (2003)); *accord Owens v. Stirling*, 443 S.C. 246, 267, 904 S.E.2d 580, 591 (2024) (recognizing the purposes of punishment as "(1) reform or rehabilitation, (2) general deterrence, and (3) specific deterrence"). None of the four purposes identified in *Ewing* support mandatory life imprisonment for nonhomicide intellectually disabled offenders. For the reasons explained above, the intellectually disabled nonhomicide offender is substantially less culpable and retribution less warranted.[9] Further, this category of offender is less deterred by potential sentences and the sentence disregards the possibility of rehabilitation. Finally, the mandatory procedure paints with too broad a brush because an individualized sentencing scheme

---

[9] For one more example, the Court in *Atkins* recognized—correctly—that the "demeanor [of an intellectually disabled defendant] may create an unwarranted impression of lack of remorse for their crimes." 536 U.S. at 321. But the fact that the intellectually disabled are sometimes unable to conform their behavior to the expectations of other should not be held against them. Here, the trial court—for no reason whatsoever, given the mandatory sentence—told defendant after the verdict:

> Do you know what I haven't heard from you, Mr. Lee, since you've been standing here? I haven't heard a single word of apologizing to this victim for what occurred. You're sitting there begging for something for yourself, but you haven't said a single word about that you're sorry, apologizing to this victim for what occurred. That never came out of your mouth. It was all about you, what you want.

Tr. 368:21-369:3.

would still allow those that need to be incapacitated to be permanently confined while providing those that do not the potential for release.[10]

i. Deterrence

As the Supreme Court explained in *Atkins*, the deterrence rationale does not easily apply to the intellectually disabled:

> [I]t is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

Atkins, 536 U.S. at 320. These defendants are not those "where the possible penalty . . . may well enter into the cold calculus that precedes the decision to act." *Gregg*, 428 U.S. at 186. "Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders." *Atkins*, 536 U.S. at 319-20.

The deterrent effect of this punishment is even further reduced because under the sentencing scheme at issue here—the two/three strikes law—the potential sentence depends on factors that may have occurred decades before. For many people, and especially the intellectually disabled, such collateral and temporally distant consequences are simply never going to be considered, and so the punishment cannot be seriously supported as having some general deterrent effect. Due to their disability, the intellectually disabled are not likely to consider the possibility of an LWOP sentence, especially one under this statute. *Atkins*, 536 U.S.

---

[10] Extending *Atkins* and *Aiken* in this way obviously might result in shorter sentences for some defendants, "but if one believes what the Court wrote in *Atkins* about mentally disabled defendants being less culpable than others, such a result should be applauded, not avoided." *State v. Ryan*, 396 P.3d 867, 877 (Or. 2017) (quoting Paul Marcus, *Does* Atkins *Make a Difference in Non-Capital Cases? Should It?*, 23 Wm. & Mary Bill Rts. J. 431, 465 (2014)).

at 319-20. General deterrence also does not support the punishment because those who are not so disabled will not qualify for the potential exception and will know that. *Atkins*, 536 U.S. at 320 ("Such individuals are unprotected by the exemption and will continue to face the threat of execution."). Therefore, the deterrent effect of mandatory LWOP is not an adequate justification for such a severe punishment because there is virtually no deterrent effect for this class of defendants.

ii. Rehabilitation

Next, as with the death penalty, a life sentence without the possibility of parole cannot seriously be supported on the notion that it is for the rehabilitation of the offender; "The penalty forswears altogether the rehabilitative ideal." *Graham*, 560 U.S. at 74. By deciding these offenders must be permanently removed from our common society, the law makes an irrevocable condemnation not supported by their culpability and which eliminates all hope for a future outside prison walls and almost any incentive for growth-and reform. *Id.* That is something it should not and cannot do.

iii. Incapacitation

The final penological justification is that of incapacitation—the removal of a citizen from his society for fear of future malfeasance. Incapacitation alone cannot justify the punishment. *Graham*, 560 U.S. at 73 ("Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity."). The key here, however, goes further. The question is not simply whether appellant's sentence can be justified on the basis of his incapacitation but rather whether he should have the opportunity to present evidence in mitigation and the trial court should have discretion in deciding his sentence. A trial court considering a sentence in this class of cases would certainly be allowed to evaluate the social benefit of incapacitating the defendant in relation to other relevant factors. Some defendants

would be worthy of permanent incapacitation, and some—based on their individual circumstances and crimes—would not. There is no benefit in preemptively deciding all defendants of this class must be sentenced to life without parole because either (1) they would appropriately receive that sentence anyway after discretionary consideration or (2) should not receive that sentence because they do not need to be permanently and irrevocably incapacitated. Because this individual determination is what appellant seeks and the constitution requires, incapacitation offers virtually no support for the mandatory sentence.

d. "Capacity for Change" is not a Sufficient Reason to Deny Discretion in Sentencing Nonhomicide Offenders

The Supreme Court based its decisions about juvenile sentencing on facts and factors that in large part apply just the same to the intellectually disabled. However, there is one way in which appellant recognizes the intellectually disabled differ from juveniles to an extent.[11] Juveniles as a class have a "greater 'capacity for change'" than the typical adult offender, and that capacity is constitutionally relevant. *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (quoting *Graham*, 560 U.S. at 74). In *Graham* the Court considered the characteristics of youth—many similar to those with intellectual disabilities, as explained—and held the Eighth Amendment forbids a state from sentencing the juvenile nonhomicide offender to life without parole in all cases. *Graham*, 560 U.S. at 75 ("The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars

[11] However, and very importantly, intellectually disabled people *are* quite capable of change and growth. *See* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 43-44 (5th ed., text revision) ("The disorder is generally lifelong, although severity levels may change over time. . . . For older children and adults, the extent of the support provided may allow for full participation in all activities of daily living and improved adaptive function."); Am. Ass'n on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* 1 (12th ed. 2021) ("With appropriate personalized supports over a sustained period, the life functioning of the person with ID generally will improve.").

for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society."). In *Miller* the Court extended that rationale to homicide offenses but relaxed the restriction, finding the states can impose such a punishment but only after an individual review to determine if the defendant is "the rare juvenile offender whose crime reflects irreparable corruption." 567 U.S. at 479 (quoting *Roper*, 543 U.S. at 573). This constitutionally significant difference is why appellant seeks only the middle ground: individualized sentencing for intellectually disabled *nonhomicide* offenders.[12] The reduced culpability of nonhomicide offenses is sufficient to outweigh the difference between juveniles and the intellectually disabled because that is the most fundamental point of punishment: to do justice according to the culpability of the offense and offender. *Pennsylvania ex rel. Sullivan v.*

---

[12] This difference also distinguishes this case from those in other jurisdictions that have considered extending *Atkins*. In almost all of those cases, other courts have considered homicide defendants, and so the twice diminished culpability of the class of defendants at issue here did not apply. *See, e.g.*, *State v. Little*, 200 So. 3d 400 (La. App. 2 Cir. 2016) (second degree murder); *Avalos v. State*, 635 S.W.3d 660 (Tex. Crim. App. 2021) (capital murder); *State v. Moen*, 422 P.3d 930, 933 (Wash. App. 2d. 2018) (first degree murder); *Baxter v. State*, 177 So. 3d 423, 447 (Miss. Ct. App. 2014), *aff'd*, 177 So. 3d 394 (Miss. 2015) (capital murder); *People v. Brown*, 967 N.E.2d 1004, 1008 (Ill. App. Ct. 2012) (first degree murder); *Commonwealth v. Yasipour*, 957 A.2d 734, 743-44 (Penn. 2008) (third degree murder); *Harris v. McAdory*, 334 F.3d 665, 667, 668 n.1 (7th Cir. 2003) (murder) (dictum). That distinction is critical: there is a constitutional difference between those that intentionally kill and everyone else. *Coker*, 433 U.S. at 598; *see Brown*, 967 N.E.2d at 1021 (citation omitted) (refusing to extend *Atkins* because "the murder of another human is 'the highest crime known to the law'").

Courts are split where the question has arisen in the nonhomicide context. In *State v. Ryan*, 396 P.3d 867 (2017), the Supreme Court of Oregon extended *Atkins* significantly, apparently on state law grounds "similar" to the Eighth Amendment. 396 P.3d at 868, 875. *Ryan* held a mandatory minimum sentence of 75 *months* could be unconstitutional as applied to the intellectually disabled, so evidence of such a disability must be considered by the sentencing court. 396 P.3d at 877. On the other hand, in *People v. Coty*, 178 N.E.3d 1071 (Ill. 2020), the Supreme Court of Illinois declined to find that state's mandatory life sentencing scheme unconstitutional on either state or federal grounds. 178 N.E.3d 1071, 1085-86. One jurisdiction has expressly avoided answering the question. *See Commonwealth v. Huang*, 180 N.E.3d 968, 988 (Mass. 2022) (citing *Commonwealth v. Jones*, 90 N.E.3d 1238, 1252 (Mass. 2018) ("We therefore decline to consider whether the imposition of a life sentence on a person with an intellectual disability constitutes cruel and unusual punishment.").

Ashe, 302 U.S. 51, 55 (1937) ("[J]ustice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.").

CONCLUSION

For the reasons stated above, appellant's conviction should be reversed. Absent that, his sentence should be vacated and his case remanded for an individualized sentencing hearing.

Jordan Wayburn
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of April, 2025.