ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Cherokee County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN BONNER,

APPELLANT

APPELLATE CASE NO. 2013-000281

BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in sentencing Bonner to sixty years' imprisonment for a non-homicide offense when he was seventeen-years old and his sentence is cruel and unusual under the Eighth Amendment?

STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg County Grand jury for the offenses of burglary in the first degree (2009-GS-11-824), kidnapping (2009-GS-11-827), armed robbery (2009-GS-11-828), assault and battery of a high and aggravated nature (ABHAN)(2009-GS-11-829), burglary in the second degree (2009-GS-11-0826), and grand larceny greater than $5,000 (2009-GS-11-0825). R. 361. On November 17 2009, Appellant's case was called to trial before the Honorable J. Derham Cole. The State was represented by Barry Barnette and Prina Tailor. Appellant was represented by Joshua Shultz. R. 1.

On November 18, 2009, the jury returned a verdict of guilty on all charges. R. 330, line 24 – R. 331, line 22. Regarding sentencing, Appellant's trial counsel asked the court to take into consideration his age. R. 335, lines 1-4. Appellant was sentenced to life imprisonment for burglary in the first degree. R. 336, lines 7-12. Additionally, Judge Cole sentenced Appellant to thirty years' imprisonment for kidnapping, thirty years' imprisonment for armed robbery, fifteen years' imprisonment for burglary in the second degree, ten years' imprisonment for ABHAN, and five years' imprisonment for grand larceny. Judge Cole ordered all sentences to run concurrently, except he ordered the sentence for ABHAN to run consecutively to the others. R. 336, line 7 – R. 337, line 12; R.363.

Appellant filed a timely notice of appeal. On November 12, 2010, Appellant filed his brief claiming his sentence for life imprisonment without the possibility of parole for a non-homicide offense violated his constitutional rights. This Court agreed, vacated his

sentence of life imprisonment, and remanded the matter for new sentencing. State v. Bonner, 400 S.C. 561, 735 S.E.2d 525 (Ct. App. 2012).

On January 22, 2013, Appellant appeared before Judge Cole for re-sentencing. Barry Barnette appeared on behalf of the state, and Joshua Schultz represented Appellant. R. 339. Judge Cole sentenced Appellant to sixty years' imprisonment. R. 359, lines 14-17; R. 364. Appellant filed a timely notice of appeal. Undersigned counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967) raising the following issue: The judge erred in sentencing Appellant to sixty years' imprisonment for burglary in the first degree, a non-homicide offense, because Appellant was seventeen-years old at the time of the offense; thus, his sentence is cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution as it does not afford him a meaningful opportunity of release. By an order filed on February 25, 2014, the Honorable Aphrodite K. Konduros, on behalf of this Court, denied counsel's motion to be relieved and ordered counsel to file a brief addressing the issue presented herein.

ARGUMENT

The trial court erred in sentencing Bonner to sixty years' imprisonment for a non-homicide offense when he was seventeen-years old and his sentence is cruel and unusual under the Eighth Amendment.

Relevant facts

At the time of the offenses for which Appellant was charged and ultimately convicted, Appellant was seventeen-years old. Bonner, 400 S.C. at 563 n. 1, 735 S.E.2d at 526 n.1. During the re-sentencing proceeding, the state argued that Appellant's age should be used as an aggravating factor to increase his penalty. Specifically, the state acknowledged the ruling of the United States Supreme Court and this Court, but argued against clear precedent. Rather than arguing Appellant deserved a particular penalty unique to the circumstances of the crime and unique to the characteristics of Appellant, the state argued Appellant deserved a severe penalty because other defendants who were seventeen-years old at the time of their alleged crimes with whom the prosecutor was acquainted in some way were "dangerous."

> One thing, talking about juveniles, I know the court, our U.S. Supreme Court, as well as the Court of Appeals has ruled. But, however, some of the most dangerous individuals I have seen in court ha[ve] been seventeen-years old. I have dealt with Jonathan Vick; Calen Radwill, which is in Lexington County.
>
> We also had Eric Morgan in front of Your Honor I believe on a death penalty case. In this situation - - of course, his sentence was commuted to life.

R. 346, lines 11-19. Although he recognized that all of the individuals he mentioned were defendants in murder cases, the solicitor argued, without any evidence to support his

argument, that the victim of the alleged burglary would have been killed had the alarm not sounded. R. 346, line 20 – R. 347, line 8.

Appellant pleaded that he deserved "a second chance at life and a meaningful chance at rehabilitation." R. 348, lines 4-6. Appellant lacked positive role models in his life – particularly male role models. Appellant's father was in and out of jail for most of his life. R. 348, lines 7-15. Appellant's father's involvement in Appellant's life ended when he was only twelve years old. R. 348, lines 24-25. Appellant had young children at the time of re-sentencing and sought "a meaningful chance at rehabilitation [so] he [could] develop some kind of relationship with these children." R. 349, lines 3-10.

Appellant observed that juveniles, like him, have less culpability based upon a lack of maturity and an underdeveloped sense of responsibility. R. 349, lines 15-19. Appellant fit the description of a juvenile who was vulnerable and susceptible to negative influences and outside pressures. R. 349, line 24 – R. 350, line 2. Appellant sought the opportunity to reform and detailed his efforts to reform, including obtaining his GED and certifications in carpentry and electrician training while in prison for just over a year. R. 350, lines 11-22. Appellant expressed his desire to obtain a business degree and open a small business. He also explained his desire to marry and "lead a normal life." R. 351, lines 12-18.

Nevertheless, Judge Cole sentenced Appellant to sixty years' imprisonment on the burglary count, and ordered the term of years to be served concurrently with the other sentences previously imposed. R. 359, lines 14-17; R. 364. Appellant's sixty-year sentence for burglary in the first degree must be considered with the sentenced imposed by Judge Cole on the other charges. Specifically, Judge Cole sentenced Appellant to thirty years' imprisonment for kidnapping, thirty years' imprisonment for armed robbery, fifteen years'

imprisonment for burglary in the second degree, ten years' imprisonment for ABHAN, and five years' imprisonment for grand larceny. Judge Cole ordered all sentences to run concurrently, except he ordered the sentence for ABHAN to run consecutively to the others. R. 336, line 7 – R. 337, line 12; R. 363. Thus, effectively, Judge Cole sentenced Appellant to **seventy** years' imprisonment for non-homicide offenses.

Discussion

The United States Supreme Court held life sentences for non-homicide crimes committed while the defendant was under the age of eighteen violated the Eighth Amendment to the United States Constitution. Graham v. Florida, 560 U.S. 48 (2010). The Graham Court found that the cruel and unusual punishment clause of the Eighth Amendment forbids the states from determining at sentencing that a juvenile non-homicide offender will never be fit to reenter society. Id. at 74-75. Instead, juvenile non-homicide offenders must be given a meaningful opportunity to obtain release. Id. at 82. Although no objection was made at the time of re-sentencing, this Court should address the issue in the interest of judicial economy just as it addressed the issue previously. See State v. Bonner, 400 S.C. 561, 567, 735 S.E.2d 525, 528 (Ct. App. 2012)(relying upon State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009), this Court excused the lack of preservation to address the merits of the claim, found Appellant's sentence violated the United States Constitution, vacated the sentence, and remanded the case for re-sentencing).

Turning to the merits of Appellant's issue on appeal, the Graham Court found that the cruel and unusual punishment clause of the Eighth Amendment forbids the states from determining at sentencing that a juvenile non-homicide offender will never be fit to reenter society. A sentence of life imprisonment without parole "forswears altogether the

rehabilitative ideal." Such a sentence "is not appropriate in light of a juvenile non-homicide offender's capacity for change and limited moral culpability." Id. at 74. The United States Constitution forbids judges from making subjective determinations at sentencing that a juvenile non-homicide offender has demonstrated an "irretrievably depraved character." Id. at 76. The Court was clear that a state "need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." Id. at 82.

The Graham decision explored the Court's jurisprudence of the Eighth Amendment's ban on cruel and unusual punishment. "To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" Id. at 58 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)). "Embodied in the Constitution's ban on cruel and unusual punishment is the 'precept of justice that punishment for the crime should be graduated and proportioned to [the] offense.'" Id. at 59 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

Over the years, the cases addressing the proportionality of sentences have developed along two general lines. The first is concerned with the particular circumstances of the case and whether the defendant's sentence for a term of years is grossly disproportionate given the particular offense. Id. at 59; Harmelin v. Michigan, 501 U.S. 957, 1005 (1991). The second classification of cases is concerned with categorical rules as applied to groups of offenses or groups of offenders. Graham, 560 U.S. at 60-61. For example, Supreme Court categorical rulings related to categories of offenses prohibit the imposition of the death penalty for non-homicide crimes against individuals. Id. (citing Kennedy v. Louisiana, 554

U.S. 407 (2008)). Categorical rulings prior to Graham prohibited the death penalty for defendants who committed their crimes before the age of eighteen, Roper v. Simmons, 543 U.S. 551 (2005), or whose intellectual functioning is in a low range, Atkins v. Virginia, 536 U.S. 304 (2002). Graham, 560 U.S. at 61.

When adopting categorical proportionality rules, the Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Id. at 61 (quoting Roper, 543 U.S. at 572). Generally, the Court has relied on social science data and statistics to discern "society's evolving standards of decency." Roper, 543 U.S. at 560-77. "[G]uided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,'" the Court, in the exercise of its own independent judgment, then determines whether the punishment in question violates the Eighth Amendment of the Constitution. Graham, 560 U.S. at 61 (quoting Kennedy v. Louisiana, 554 U.S. 407, 421 (2008)).

The evolution of the Court's Eighth Amendment jurisprudence as it applies to juveniles is of particular import to Appellant's appeal. In Roper, the Supreme Court established a categorical ban on the death penalty for juveniles relying in large part on social science research indicating that youths have a lessened culpability and are less deserving of the most severe punishments. 543 U.S. at 569-75. Juvenile offenders are fundamentally different from adults for purposes of sentencing for three reasons: (1) they are immature and have "an underdeveloped sense of responsibility;" (2) they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;" and (3)

their characters are "not as well formed" as adults. Id. at 569-70 (internal citations omitted). "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id. at 573. Therefore, "juvenile offenders cannot with reliability be classified among the worst offenders." Id. While "[a] juvenile is not absolved of responsibility for his actions," his transgressions are "not as morally reprehensible as that of an adult." Graham, 560 U.S. at 68 (internal citations omitted).

Sixteen-year old Terrance Graham was charged with armed burglary and attempted armed robbery of a barbeque restaurant. 560 U.S. at 53. Graham entered guilty pleas to both charges pursuant to a plea agreement. The trial court withheld adjudication of guilt as to both charges and sentenced Graham to concurrent three-year terms of probation with jail time. Id. at 54. Shortly thereafter, when Graham was seventeen-years old he was arrested again and charged with home invasion robbery. Graham's probation officer charged Graham with violating the terms of his probation by "possessing a firearm, committing crimes, and associating with persons engaging in criminal activity." When Graham appeared before the trial court where he maintained he had no involvement in the home invasion robbery, he admitted to violating his probation by fleeing arrest, even though the trial court emphasized that the admission could expose him to a life sentence based on his previous charges. Id. at 55.

After finding Graham had violated his probation, the trial judge, in his discretion, sentenced Graham to the maximum sentence of life. During the sentencing proceeding, the judge provided his reasoning for the sentence: "We can't do anything to deter you. This is the way you are going to lead your life.... [T]hat is where we are today is I don't see where

I can do anything to help you any further." Id. at 56-57. Florida had abolished its parole system; accordingly, the life sentence gave Graham no possibility of release unless he was granted executive clemency. Id. at 57.

The Supreme Court held that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." Id. at 74. Just as the Court did in Roper, the Graham Court, relied upon developments in social science demonstrating the fundamental differences between juveniles and adults:

> [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles 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. It remains true that 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.

Id. at 68 (internal citations omitted).

The Court explained the decision was "necessary to prevent the possibility that life without parole sentences will be imposed on juvenile non-homicide offenders who are not sufficiently culpable to merit that punishment." Id. at 74. Although "[a] state is not required to guarantee the eventual freedom to a juvenile offender convicted of a non-homicide crime," the state must "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." "[W]hile the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile non-homicide offender, it does not require the state to release that offender during his natural life." Id. at 75. "The Eighth Amendment does not foreclose the possibility that persons convicted of non-homicide crimes committed before adulthood will remain behind bars for

life. It does forbid states from making the judgment at the outset that those offenders never will be fit to reenter society." Id.

While explaining its rationale, the Graham Court noted that a life without parole sentence is the "second most severe penalty permitted by law." Id. at 69 (internal citations omitted). Additionally, "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." Such a sentence "alters the offender's life by a forfeiture that is irrevocable." Id. For a juvenile offender, a life without parole sentence "'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit [of the convict], he will remain in prison for the rest of his days.'" Id. at 70 (quoting Naovarath v. State, 779 P.2d 944 (Nev. 1989)). Additionally, the Graham Court observed that a juvenile offender sentenced to life without parole will on average serve more years and a greater percentage of his life in prison than an adult offender. "A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." Id.

Finally, the Graham Court concluded that its new categorical rule "gives all juvenile non-homicide offenders a chance to demonstrate maturity and reform." "Life in prison without the possibility of parole gives no chance for reconciliation with society, no hope." However, "[m]aturity 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." By imposing a "categorical rule against life without parole for juvenile non-homicide offenders," the Court avoided "the perverse consequences in

which the lack of maturity that led to an offender's crime is reinforced by the prison term." Id. at 79.

In Miller v. Alabama, 132 S. Ct. 2455 (2012), the United States Supreme Court continued the evolution of Eighth Amendment jurisprudence. The Court extended the reasoning of Roper and Graham by holding that a mandatory sentence of life without parole for juvenile homicide offenders also violates the Eighth Amendment's prohibition on cruel and unusual punishment. This was a categorical ban. However, the Court further explained that while the decision did not foreclose imposition of a sentence without the possibility of a parole 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 2469.

The issue presently before this Court is whether Appellant's sixty-year sentence for a non-homicide offense, which is effectively a seventy-year sentence when combined with the consecutive nature of the sentence imposed for a companion offense, is the functional equivalent of a life without parole sentence and prohibited under Graham and the Eighth Amendment. Other states examining sentencing schemes involving juveniles convicted of non-homicide offenses have concluded that certain terms-of-years sentences violate the Eighth Amendment's ban on cruel and unusual punishment. Essentially, those Courts have found that the term-of-years failed to offer the juvenile offender an opportunity to obtain release before the end of his expected life span. Thus, those sentences were the functional equivalent of a sentence of life without the possibility of parole. In People v. Caballero, 282 P.3d 291 (Cal. 2012), the Supreme Court of California held that term-of-

years sentences that extend beyond a juvenile's life expectancy and are imposed for non-homicide offenses, violate the Eighth Amendment pursuant to reasoning announced in Graham. The California Supreme Court held "that sentencing a juvenile offender for a non-homicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." The Court recognized that "the proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future." Caballero, 282 P.3d at 295. The court further directed that, when sentencing non-homicide juvenile offenders, California courts must consider the defendant's age and mental development in order to impose an appropriate time when the juvenile will be able to seek parole from the parole board. Id.

Likewise the Colorado Court of Appeals held a juvenile's sentence was unconstitutional where the juvenile would not have been eligible for parole until he reached the age of seventy-five and his life expectancy was only between sixty-four and seventy-two years of age. People v. Rainer, ___ P.3d ___, 2013 WL 1490107 (Colo. App. April 11, 2013). Rainer was convicted of two counts of attempted first degree murder, two counts of first degree assault, first degree burglary, and aggravated robbery, and was subject to a sentence enhancement due to crimes of violence. Id. Rainer was subject to a mandatory sentencing range of seventy-two to 224 years. Id. The judge sentenced Rainer to the maximum by ordering all of the maximum sentences to be served consecutively for a total prison term of 224 years. Id. After an appeal, the sentence was reduced to 112 years

when the trial judge was ordered to run two sentences concurrently. Id. Rainer would be eligible for parole in 2057 after serving one-half of his 112-year sentence. In 2057, Rainer would be seventy-five years old. Using statistics from the Center of Disease Control, the Court noted that Rainer had a life expectancy of only between 63.8 years and 72 years. Thus, Rainer would likely die while incarcerated. Id. The court held Rainer's aggregate sentence failed to offer him a meaningful opportunity to obtain release before the end of his expected life expectancy; therefore, the sentence was the functional equivalent of a life sentence without parole and was unconstitutional under the Eighth Amendment. Id. The court concluded "Rainer's sentence qualifies as an unconstitutional de facto sentence to life without parole." Id.

The Florida Court of Appeals found a juvenile's aggregate sentence of eighty years violated the Eighth Amendment's cruel and unusual punishment clause because it was the functional equivalent of a life sentence without parole. Floyd v. State, 87 So.3d 45 (Fla. Dist. Ct. App. 2012). Floyd was seventeen years old when he stole a car and committed two armed robberies. Initially, Floyd was sentenced to life imprisonment on the armed robbery charges. Id. at 45. After Graham, Floyd was re-sentenced to consecutive forty-year sentences on the armed robberies. Id. at 45-46. If Floyd served the entirety of his sentence, he would be ninety-seven years old when released. The earliest Floyd could be released was age eighty-five. Id. at 46. According to the court, "[t]his situation does not in any way provide [Floyd] with a meaningful or realistic opportunity to obtain release." Id. By sentencing Floyd to eighty years, the trial court "impermissibly" decided at the outset that Floyd will never be fit to reenter society. Id. "[C]ommon sense dictates that [Floyd]'s eighty-year sentence, which according to the statistics cited by [Floyd] is longer than his life

expectancy, is the functional equivalent of a life without parole sentence and will not provide him with a meaningful or realistic opportunity to obtain release." Id. at 47.

Other courts around the country that have examined this issue have found a term of years sentence that results in a de facto life sentence violates the Eighth Amendment's ban on cruel and unusual punishment when imposed upon a juvenile. See United States v. Mathurin, 2011 WL 2580775, No. 09-21075-CR (S.D. Fla. June 29, 2011) (holding a combined sentence of 307 years for a child offender convicted of armed robbery and carjacking constitutionally offensive under Graham); Adams v. State, 2012 WL 3193932, No. 1 D 11–3225 (Fla. Dist. Ct. App. Aug. 8, 2012) (holding that a sentence requiring a non-homicide juvenile offender to serve at least 58.5 years in prison was a de facto sentence to life because the defendant would not be eligible for release until he was nearly seventy-six years old, which exceeded his life expectancy according to data from the Centers for Disease Control and defining de facto life sentence as "one that exceeds the defendant's life expectancy"); Thomas v. Pennsylvania, 2012 WL 6678686, No. 10-4537 (E.D. Pa. Dec. 21, 2012) (holding that where juvenile offender was not eligible for parole until the age of eighty-three, the sentence imposed amounted to cruel and unusual punishment in violation of the Eighth Amendment.

Our Supreme 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. State v. Kimbrough, 212 S.C. 348, 356, 46 S.E.2d 273, 277 (1948). 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.

This Court should likewise adopt the holdings from courts around the country that Graham prohibits de facto life sentences for juvenile offenders which deprive such offenders of any "meaningful opportunity to obtain release." Appellant's seventy-year sentence guarantees that Appellant will die in prison without any meaningful opportunity to obtain release, "no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes." See Graham, 560 U.S. at 79.

Currently, Appellant is twenty-three years old.[1] South Carolina's life expectancy tables provide that a male aged twenty-three years old has a life expectancy of 54.40 years. S.C. Code Ann. § 19-1-150. According to the National Vital Statistics Reports, a black male aged twenty-three years old has a life expectancy between 49.9 and 50.8 years. Elizabeth Arias, "United States Life Tables, 2009," National Vital Statistics Reports, Vol. 62, No. 7, January 6, 2014, Centers for Disease Control and Prevention, http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_07.pdf. Using this data, Appellant is

[1] Appellant was born on January 24, 1991.

expected to live to the age of 77.4 or between ages 72.9 and 73.8. Other data from the National Center for Health Statistics reveals the life expectancy for black males born in 1991, as Appellant was, is only 64.6 years. See National Center for Health Statistics, "Vital Statistics of the United States, 1992,", Vol. II, sec. 6, life tables, Washington: Public Health Service, 1996 (http://www.cdc.gov/nchs/data/lifetables/life92_2.pdf). According to the South Carolina Department of Corrections' website, Appellant is not eligible for parole. However, he is eligible for release on January 1, 2064.[2] On that date, Appellant will be seventy-two years old (he will turn seventy-three on January 24, 2064). Based upon the life expectancy data, Appellant is expected to live to the age of 64.6 (using the life expectancy of a black male born in 1991), to the age of 77.4 (using South Carolina's statutory actuarial table), or between ages 72.9 and 73.8 (using the CDC's life expectancy table from 2009). Therefore, Appellant will likely not live long enough to become eligible for parole. Even using the most liberal data available, South Carolina's actuarial table, Appellant would live to see his seventy-second birthday and be eligible for parole, but he would likely live only five years thereafter. Such could not be considered a meaningful opportunity to obtain release.

Appellant's sentences for burglary in the first degree and assault and battery of a high and aggravated nature should be vacated. Pursuant to Appellant's current sentences and his life expectancy, he would be imprisoned until his death without a meaningful opportunity for release. Appellant was only seventeen when he allegedly committed the

[2] Judge Cole sentenced Appellant to sixty years' imprisonment for the offense of burglary, and ordered the sentence of ten years in prison for ABHAN to be served consecutive to the sixty-year sentence. Thus, Judge Cole sentenced Appellant to seventy years' imprisonment for non-homicide offenses.

burglary. Appellant's "sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character." See Graham, 560 U.S. at 79. By enforcing Appellant's current sentence, the state "has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a non-homicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit." Id. Therefore, Appellant requests that this Court vacate his sixty-year sentence and ten-year consecutive sentence as unconstitutional under the Eighth Amendment and remand for re-sentencing.

CONCLUSION

Appellant respectfully requests this Court vacate his sentence for burglary and assault and battery of a high and aggravated nature and remand the matter for re-sentencing.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of March, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Cherokee County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN BONNER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. John Bonner, #338030, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 7th day of March, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of March, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022 .