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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 5303 (S.C. Ct. App. filed 3/18/2015)

96-GS-40-11974, 11979, 11980, 12010, 12004

THE STATE,

RESPONDENT,

V.

CONRAD LAMONT SLOCUMB,

PETITIONER

APPELLATE CASE NO. 2013-000933

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on April 24, 2015.

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in affirming the trial court's refusal to re-sentence Petitioner on all of his convictions where Petitioner's counsel filed a timely motion for resentencing in light of the Supreme Court's constitutional decision in Graham v. Florida, 130 S. Ct. 2011 (2010) and fully argued that motion to the trial court, the federal court vacated Petitioner's life sentence for burglary and required "re-sentencing consistent with Graham," and where Petitioner's aggregate one hundred and thirty (130) year sentence for nonhomicide offenses committed when he was a juvenile is the functional equivalent of a life sentence without parole because it does not afford him any "meaningful opportunity to obtain release" within his lifetime as required under the United States Supreme Court's decision in Graham?

II. Whether, assuming *arguendo* that Petitioner could only be resentenced on the burglary count, the Court of Appeals erred in failing to find that Petitioner's fifty-year sentence for the burglary conviction alone is the functional equivalent of a life sentence without parole because it does not afford him any "meaningful opportunity to obtain release" within his lifetime as required under the United States Supreme Court's decision in Graham?

STATEMENT OF THE CASE

In November 1996, Slocumb was tried and convicted by a jury for the indicted offenses of (1) first degree burglary; (2) criminal sexual conduct, first degree; (3) kidnapping; (4) escape; and (5) armed robbery. R. 4, ll. 1-4; R. 63 - 71. The Honorable James W. Johnson, Jr. sentenced Slocumb to life without the possibility of parole ("LWOP") for the charges of kidnapping, criminal sexual conduct, first degree, and first degree burglary. Slocumb also received a fifteen (15) year, consecutive sentence for robbery and a five (5) year, consecutive sentence for escape. R. 3, l. 17 – 4, l. 16.

Following two re-sentencing hearings, held on March 16, 2000 and February 18, 2004, Slocumb was sentenced to life imprisonment for burglary; thirty (30) years for kidnapping; thirty (30) years for criminal sexual conduct; fifteen (15) years for robbery; and five (5) years for escape. All sentences were ordered to be served consecutively. R. 72 - 81 [Sentencing sheets]; R. 4, l. 17 – 5, l. 15.

Slocumb was age sixteen (16) years, eight (8) months, and twenty-four (24) days at the time the offense were committed. R. 30 (Motion for Re-sentencing). In light of the United States Supreme Court's decision in Graham v. Florida, 130 S. Ct. 2011 (2010), which prohibits the imposition of LWOP sentences on juvenile offenders who did not commit homicide, Slocumb requested resentencing through the filing of a Motion for Re-sentencing through counsel Tara Shurling on January 26, 2011 and through the filing of a *pro se* Petition for a Writ of Habeas Corpus in the United States District Court for the District of South Carolina. R. 30 (Motion); R. 44 (Magistrate's Report and Recommendation); R. 5, ll. 16-21. On June 2, 2011, the federal court issued an Order vacating the burglary sentence of "life" and requiring that Slocumb be returned to

the state sentencing court for re-sentencing consistent with Graham. R. 48, 44 (Opinion and Order; Report and Recommendation); R. 5, ll. 16-23.

On April 25, 2013, Slocumb appeared before the Honorable DeAndrea G. Benjamin for a re-sentencing hearing. R. 1-28. He was represented by Tara Dawn Shurling, and the State was represented by Assistant Solicitors K. Luck Campbell and Joanna A. McDuffie. R. 1.

At the hearing, Slocumb argued that he should be re-sentenced on all counts because his total term-of-years sentence was the functional equivalent of a life sentence and thus impermissible under the letter and spirit of the Graham decision. R. 33 (Bench Brief in Support of a Reduced Sentence); R. 6, l. 12 – 12, l. 4.

At the conclusion of the hearing, Judge Benjamin re-sentenced Slocumb to fifty (50) years imprisonment on the first degree burglary conviction and left the sentences on the remaining convictions intact, with all sentences to run consecutively. R. 28, ll. 2-10; R. 84 (2013 Sentence Sheet). This resulted in an aggregate term of years sentence of one hundred and thirty (130) years when coupled with the unchanged sentences of thirty (30) years for kidnapping, thirty (30) years for criminal sexual conduct, fifteen (15) years for robbery, and five (5) years for escape.

Slocumb appealed and the South Carolina Court of Appeals heard oral argument on January 6, 2015. On March 18, 2015, the South Carolina Court of Appeals affirmed Slocumb's sentence. State v. Slocumb, 412 S.C. 88, 770 S.E.2d 436 (Ct. App. 2015). App. 1. Slocumb subsequently filed a petition for rehearing on April 2, 2015. App. 6. The State filed its Return on April 13, 2015. App. 19. Rehearing was denied on April 24, 2015. App. 26.

This petition for a writ of certiorari to the Court of Appeals follows.

ARGUMENT

I. The Court of Appeals erred in affirming the trial court's refusal to re-sentence Petitioner on all of his convictions where Petitioner's counsel filed a timely motion for resentencing in light of the Supreme Court's constitutional decision in Graham v. Florida, 130 S. Ct. 2011 (2010) and fully argued that motion to the trial court, the federal court vacated Petitioner's life sentence for burglary and required "re-sentencing consistent with Graham," and where Petitioner's aggregate one hundred and thirty (130) year sentence for nonhomicide offenses committed when he was a juvenile is the functional equivalent of a life sentence without parole because it does not afford him any "meaningful opportunity to obtain release" within his lifetime as required under the United States Supreme Court's decision in Graham.

Prior to the most recent re-sentencing hearing before Judge Benjamin, Slocumb had been sentenced to life for first degree burglary; thirty (30) years for kidnapping; thirty (30) years for criminal sexual conduct; fifteen (15) years for robbery; and five (5) years for escape, all to be served consecutively. R. 5, ll. 10-15. In light of the United States Supreme Court's decision in Graham v. Florida, 130 S.Ct. 2011 (2010), Slocumb's sentence was unconstitutional. Both he and his motion hearing attorney, Tara Shurling, attempted to address this matter, the former by filing a pro se petition for habeas corpus in federal court and the latter by filing a motion for re-sentencing in the trial court on January 28, 2011. The federal court vacated the life sentence for burglary and remanded his case for re-sentencing. R. 44 – 49. At the re-sentencing hearing, Judge Benjamin sentenced Slocumb to fifty years for burglary, to run consecutive to the other sentences, and left the terms of the other sentences unchanged. R. 28, ll. 2-10. Thus, Slocumb's current aggregate sentence for offenses he committed as a juvenile equals one hundred and thirty (130) years. Slocumb must serve 56 years on the non-burglary offenses and 42.5 years on the burglary offense, a total of 98.5 years before he is eligible for parole. Resp't Brief 29 – 30. He will not be eligible for parole until he is 114.5 years old. Therefore, his sentence remains unconstitutional because it is a de facto life sentence for nonhomicide offenses that he committed

as a juvenile and provides him no "meaningful opportunity to obtain release" within his lifetime as required under Graham.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. Graham v. Florida, 130 S. Ct. 2011, 2021 (2010). "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. (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.'" Graham, 130 S. Ct. at 2021 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

Graham is the first Eighth Amendment case in which the Supreme Court considered a categorical challenge to a term of years sentence as opposed to the death penalty. Sixteen-year old Terrance Graham was charged with armed burglary and attempted armed robbery of a restaurant in Florida. He pled guilty to both charges. Pursuant to his 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. 130 S. Ct. at 2018. Less than six months later, when Graham was seventeen years old, he was arrested again after allegedly committing a home invasion and avoiding arrest. Approximately one year later, at his probation violation hearing, Graham maintained that he had no involvement in the home invasion but admitted to violating his probation by fleeing arrest. Id. at 2018-19. The trial court ruled that Graham had violated his probation and had the statutory option of sentencing Graham to between five years to life. The judge sentenced Graham to the maximum sentence of life, stating, "We can't do anything to deter you . . . ." Id. at 2019-20. Florida had abolished its parole system; accordingly, the life sentence gave Graham no possibility of release unless he was granted executive clemency. Id.

Graham challenged his sentence under the Eighth Amendment. The First District Court of Appeals for Florida affirmed Graham's sentence, holding it was not grossly disproportionate to his crimes and that he was incapable of rehabilitation. The Florida Supreme Court denied review, and the United States Supreme Court granted certiorari and reversed. Id. 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 2030. The Court expounded:

> This clear line is 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. Because the age of 18 is the point where society draws the line for many purposes between childhood and adulthood, those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime.
>
> A State is not required to guarantee the eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham *some meaningful opportunity to obtain release* based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide 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. (emphasis added) (internal citations omitted).

In pronouncing this categorical rule, the Court in Graham adopted its analysis in Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005), that juvenile offenders are fundamentally different from adults for sentencing purposes, noting "[n]o recent data provide reason to reconsider the Court's observations in Roper about the nature of juveniles":

> [De]velopments 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 2026-27 (internal citations omitted).

The Graham court underscored the severity of a life without parole sentence for juvenile offenders. An LWOP sentence is the "second most severe penalty permitted by law." Id. at 2027 (internal citations omitted). 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. (quoting Naovarath v. State, 779 P.2d 944 (Nev. 1989)).

The Graham court further observed that a juvenile offender sentenced to LWOP 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." Graham, 130 S. Ct. at 2028.

Finally, the Graham court concluded that its new categorical rule "gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform." Id. at 2032.

> The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives 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. . . . A categorical rule against life without parole for juvenile nonhomicide offenders avoids the perverse consequences in which the lack of maturity that led to an offender's crime is reinforced by the prison term.

Id. at 2032-33.

The issue that arises in this case is whether a lengthy term-of-years sentence for a juvenile that is the functional equivalent of a life without parole sentence is also prohibited under Graham and the Eighth Amendment. A number of cases nationwide have considered this issue of whether the holding in Graham should be extended to prohibit term-of-years sentences that are materially indistinguishable from LWOP.

In several cases, courts have read Graham narrowly and have rejected the argument that Graham applies to lengthy term-of-years sentences that are the functional equivalent of LWOP. See State v. Kasic, 265 P.3d 410, 414 (Ariz. Ct. App. 2011) (concluding Graham only applies to those juvenile offenders sentenced to life without parole for a nonhomicide offense); State v. Williams, 352 Wis.2d 573, 842 N.W.2d 536 (Ct.App.2013) (per curiam); Henry v. State, 82 So.3d 1084 (Fla. Dist. Ct. App. 2012); Adams v. State, 707 S.E.2d 359 (Ga. 2011); Bunch v. Smith, 685 F.3d 546, 551–53 (6th Cir.2012).

However, in a number of other cases, courts have explicitly or implicitly held that the reasoning in Graham should be extended to apply to term-of-years sentences that result in a de facto life without parole sentence. In these well-reasoned cases, courts have relied on Graham to reverse a juvenile offender's term-of-years sentence on the ground that it was the functional equivalent of LWOP, and thus unconstitutional under the Eighth Amendment. In People v. Caballero, 282 P.3d 291 (Cal. 2012),[1] the Supreme Court of California held that term-of-years sentences that extend beyond a juvenile's life expectancy and are imposed for nonhomicide

[1] Following Caballero, the California legislature enacted CAL. PENAL CODE § 3051 (West 2014), titled youth offender parole hearings, effectively abolishing de facto LWOP sentences in that State "by virtue of its provision for mandatory parole eligibility hearings after no more than 25 years in prison." People v. Scott, 185 Cal.Rptr.3d 235 (Cal. Dist. Ct, App. 2015). The South Carolina Code contains no similar provision.

offenses, violate the Eighth Amendment pursuant to Graham. In Caballero, the Supreme Court of California reversed an intermediate court, ruling as follows:

> Consistent with the high court's holding in Graham... we conclude that sentencing a juvenile offender for a nonhomicide 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. Although 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.

282 P.3d at 295. Consistent with Graham, the court further directed that, when sentencing nonhomicide 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.

In its reasoning, Caballero drew on People v. Mendez, 114 Cal.Rptr.3d 870, 886 (Ct. App. 2010), a previous California appellate case in which the court held that a sentence of eighty-four (84) years to life for a nonhomicide child offender constituted cruel and unusual punishment because it was the equivalent of life without parole. The court in Mendez acknowledged that Graham was not expressly controlling because Mendez's sentence was "not technically" a life without parole sentence, but stated, "[w]e are nevertheless guided by the principles set forth in Graham ...." Id. at 883. Noting that the Court in Graham "did not define what constitutes a 'meaningful' opportunity for parole," the Mendez court concluded that "common sense dictates that a juvenile who is sentenced at the age of 18 and who is not eligible for parole until after he is expected to die does not have a meaningful, or as the Court put it, 'realistic,' opportunity of release." Id.

Courts from other jurisdictions have also found that the Graham principles apply to term-of-years sentences for juvenile offenders that are the functional equivalent of an LWOP sentence. See Moore v. Biter, 725 F.3d 1184 (9th Cir. 2013) (finding that Graham itself involved a de facto life without parole sentence because the ineligibility for parole under Graham's life sentences was due to Florida's elimination of its parole system) (further holding that "[t]he California Court of Appeal's failure to apply Graham on the ground that Moore has a term-of-years sentence [of 254 years] for multiple crimes was contrary to Graham because 'there are no constitutionally significant distinguishable facts' between Graham's and Moore's sentences."); People v. Rainer, No. 10CA2414, 2013 WL 1490107 (Colo. Ct. App. May 9, 2013), cert. granted 2014 WL 7330977 (Colo. Dec. 22, 2014) (holding aggregate sentence of 112 years for juvenile offender did not offer defendant an opportunity to obtain release before the end of his expected life span and was therefore constituted functional equivalent of an LWOP sentence, violating the Eight Amendment); United States v. Mathurin, No. 09-21075-CR, 2011 WL 2580775 (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, No. 1 D 11–3225, 2012 WL 3193932 (Fla. Dist. Ct. App. Aug. 8, 2012) (holding that a sentence requiring a nonhomicide 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) (further defining de facto life sentence as "one that exceeds the defendant's life expectancy"); Floyd v. State, 87 So.3d 45 (Fla. Dist. Ct. App. 2012) (holding that child sentenced to combined eighty (80) year sentence for two counts of armed robbery constituted cruel and unusual punishment as the functional equivalent of LWOP); Thomas v. Pennsylvania, No. 10-4537, 2012 WL 6678686 (E.D.

Pa. Dec. 21, 2012) (holding that where juvenile offender was not eligible for parole until the age of eighty-three (83), sentence imposed amounted to cruel and unusual punishment in violation of the Eighth Amendment); cf. State v. Null, 836 N.W.2d 41 (Iowa 2013) (holding that while "52.5 years imprisonment is not technically an LWOP sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger Miller-type protections."); State v. Ragland, 836 N.W.2d 107, 121-22 (Iowa 2013).

This Court should likewise adopt the holdings from courts around the county that Graham prohibits de facto life sentences for juvenile offenders which deprive such offenders of any "meaningful opportunity to obtain release." Like Terrance Graham's life sentence prior to the Graham decision, Slocumb's one hundred and thirty (130) year sentence, of which he will at least have to serve a minimum of ninety-eight and a half (98.5) years and possibly more, guarantees that Slocumb 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 S.Ct. at 2033. "The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit." Id.

The Court of Appeals failed to reach the issue of the unconstitutionality of Sloumb's aggregate sentence, instead determining that the re-sentencing judge had authority only to issue a new sentence on the burglary charge. However, despite the federal court's vacating only his burglary conviction, it remanded the case for "resentencing in compliance with Graham" and Slocumb's motion counsel filed a timely motion for resentencing in light of the Supreme Court's

constitutional decision in Graham and fully argued that motion to the trial court.[2] Though the Court of Appeals found that the resentencing judge made no error "in refusing to entertain Slocumb's request to reconsider sentencing on all of his convictions," Slocumb submits that the resentencing judge did not refuse to entertain the request to resentence Slocumb on all counts but rather denied the request.

Traditionally, the two exceptions providing a trial judge with jurisdiction to consider a criminal matter beyond the term of court in which judgment was entered are timely post-trial motions or a motion for new trial based on after-discovered evidence. State v. Campbell, 376 S.C. 212, 215, 656 S.E.2d 371, 373 (2008). Campbell involved the State's attempt to have the defendant resentenced for non-compliance with his plea agreement, a matter far distinguishable from the subsequent constitutional decision applicable in Slocumb's case, which was the basis for his Motion for Resentencing. Id. Here, a motion regarding the unconstitutionality of Slocumb's sentence in light of Graham could not be filed within ten days of Slocumb's conviction because Graham was not finally decided until July 6, 2010. The constitutional decision in Graham also does not fall squarely within the framework of after discovered evidence because it does not raise any matter

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[2] Contrary to the Court of Appeal's notation in footnote 1 of its opinion that "Slocumb alleges no court has yet ruled on this motion," Slocumb did not contend that no court has ruled on the Motion for Resentencing filed January 26, 2011. See Slocumb, 412 S.C. at 90 n.1, 770 S.E.2d at 438 n.1. The motion was fully argued by motions counsel at the resentencing hearing. Nowhere in the appellant's brief is there any indication that this motion remains outstanding. Further, appellate counsel never conceded that the motion was not ruled upon by the trial court at oral argument. Audio: Oral Argument, Jan. 6, 2015 (6:15-13:28; 31:35-31:57) ("He never had a separate hearing under her [motion counsel's] separate motion for resentencing, so I would argue that that hearing was really on both of those, both the federal court's order and on her motion for resentencing that day."). Rather, appellate counsel argued that the motion was fully heard by the resentencing court and that the statement ". . . that is the only one that I am going to entertain today. All sentences will run consecutive" was a denial of the Motion for Resentencing. See R. 28, ll. 2-9. Slocumb consistently argued that the Motion for Resentencing was denied and did not "allege[] no court has yet ruled on this motion."

material to guilt or innocence. Rather, application of Graham requires Slocumb's resentencing because his current sentence is cruel and unusual punishment. Cf. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973) ("where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice").

This Court's recent decision in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), is instructive. There, this Court determined that the United States Supreme Court holding in Miller v. Alabama, 132 S.Ct. 2455 (2012), that mandatory life sentences for juvenile offenders violate the Eighth Amendment ban against cruel and unusual punishment, applies retroactively. 410 S.C. at 538, 765 S.E.2d at 574. The Court noted the two exceptions to the general rule that a new constitutional rule of criminal procedure does not apply to a case that becomes final before the new rule is announced – (1) the new rule is substantive, or (2) the new rule is a "watershed rule" of criminal procedure. Id. at 539-40, 765 S.E.2d at 575. In concluding that Miller created a new, substantive rule, the Court found that "[t]he rule plainly excludes a certain class of defendants—juveniles—from specific punishment—life without parole absent individualized considerations of youth." Id. at 540-41, 765 S.E.2d at 575-76.

The Aiken majority then further determined that the constitutional principles set forth in Miller v. Alabama, 132 S.Ct. 2455 (2012), are applicable to South Carolina even though Miller itself held only that *mandatory* life sentences for juvenile offenders violate the Eighth Amendment ban against cruel and unusual punishment. Id. at 542-43, 765 S.E.2d at 576-77. Even though South Carolina law permits rather than mandates life without parole for some offenses regardless of age, the Court held that "before a life without parole sentence is imposed upon a juvenile offender, he must receive an individualized hearing where the mitigating hallmark features of youth are fully

explored." Id. at 545, 765 S.E.2d at 578. Having found that Miller applies retroactively, this Court ordered that other similarly situated offenders can file for resentencing consistent with the Aiken opinion within one year of its filing. Id.; see also Dodd v. United States, 545 U.S.353, 125 S.Ct. 2478 (2005) (holding that Title 28 U.S.C.A. § 2255 (f)(3) provides defendants the opportunity to attack their sentence within one year of "the date on which the right asserted was initially recognized by the Supreme Court.").

While the South Carolina appellate courts have not yet had an opportunity to rule on the retroactivity of Graham, this Court's reasoning in Aiken for finding that Miller should apply retroactively certainly points to Graham's retroactivity also. Graham announced a similar constitutional rule, declaring that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. at 82, 130 S.Ct. at 2034. The Court further stated 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. Thus, the rule announced in Graham excludes a certain class of defendants – juvenile offenders who did not commit homicide – from specific punishment – life imprisonment without a meaningful opportunity for parole, such that it created a new, substantive rule that should apply retroactively. See Aiken, 410 S.C. at 540, 765 S.E.2d at 540 ("A rule is substantive if it prohibits the States from criminalizing certain conduct or prohibits 'a certain category of punishment for a class of defendants because of their status or offense.' New substantive rules apply retroactively on collateral review because they 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him.'") (internal citations omitted); see also Danforth v. Minnesota, 552 U.S. 264, 282, 128 S.Ct. 1029, 1042 (2008)

(holding that state courts can give broader effect to a new rule of criminal procedure even if such would be deemed "non-retroactive" under Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989)).[3]

In the present case, while the State suggested that consideration of Slocumb's aggregate sentence is not proper on appeal because the circuit court judge only resentenced Slocumb on his vacated first-degree burglary conviction, a review of the resentencing hearing transcript reveals that the motion for resentencing on ***all offenses*** was fully argued to the sentencing court and denied. The State's Brief ignored Slocumb's motion for resentencing in light of Graham filed on January 28, 2011, approximately six and a half months after the United States Supreme Court's decision. Resp't Brief, 25-27; see R. 30. On April 25, 2013, Slocumb's counsel filed a Bench Brief in Support of a Reduced Sentence in Light of Graham v. Florida and Implications of De Facto Life Sentences, asking the Court to rule upon her January 28, 2011 motion for resentencing along with the resentencing on the first degree burglary conviction that was vacated and remanded by the federal court following Slocumb's *pro se* habeas petition. R. 33. At the resentencing hearing, motion counsel acknowledged that the United States District Court vacated only the first degree burglary sentence of life without parole, but asked the resentencing court to vacate the remaining sentences and to resentence Slocumb on all counts "in keeping with the spirit and intent of Graham v. Florida and Miller v. Alabama." R. 7, ll. 1-9; R. 11, l. 17 – 12, l. 13; R. 24, l. 21 – 25, l. 3. The solicitor's initial recitation of the procedural posture of the case stated that they were there "to resentence this Defendant for the charge of burglary in the first

[3] Because Miller was found to be "clearly retroactive under Teague," this Court noted in Aiken that it has not yet addressed whether it should employ a more expansive analysis for determining retroactivity in light of Danforth. 410 S.C. 534, 539 n. 4, 765 S.E.2d 572, 575 n. 4.

degree" pursuant to Graham v. Florida. R. 5, ll. 16-23. However, the solicitor never presented any argument against the propriety of motions counsel's subsequent argument that in order to comply with Graham, the court must vacate the remaining sentences so that the aggregate sentence does not violate Graham.

Instead, the solicitor contended that Slocumb's projected parole date was 2046 based on his then current sentences.[4] R. 12, l. 23 – 13, l. 5. She then gave the factual basis for all of Slocumb's 1996 convictions, including the first burglary, criminal sexual conduct, kidnapping, escape, and robbery offenses. R. 14, l. 4 – 17, l. 6. In response to the discussion of Graham by motion counsel, the solicitor only emphasized that Graham does not require that a juvenile non-homicide offender be guaranteed release during his life and that some juveniles may be irredeemable. R. 17, l. 7 – 18, l. 17. The solicitor then described Slocumb's many infractions while in the Department of Corrections. R. 19, l. 11 – 20, l. 24.

In response, motion counsel argued that even if her calculations regarding parole eligibility were incorrect due to the different classifications of the offenses, a conservative estimate reveals that Slocumb's sentences on the non-burglary offenses require the service of at least sixty-one years prior to parole eligibility. R. 22, ll. 9-24. Thus, those sentences alone put Slocumb over his life expectancy prior to parole eligibility. R. 22, l. 24 – 23, l. 2. She also acknowledged that Slocumb's misconduct to date is such that he would not likely be granted parole were he eligible that day, but that he may be able to demonstrate the required

[4] The solicitor provided no documentation to support this contention, which seems unlikely since at the time of resentencing Petitioner was sentenced to consecutive terms of life for first degree burglary; thirty (30) years for kidnapping; thirty (30) years for criminal sexual conduct; fifteen (15) years for robbery; and five (5) years for escape. Regardless, if the court accepted this averment, Slocumb would not be eligible for parole until age sixty-six.

rehabilitation within his lifetime. However, she emphasized that under his current sentence, Slocumb will never have that opportunity. R. 23, l. 3 – R. 24, l. 20.

The Court then heard from the victim and the former solicitor who prosecuted the case in 1996. R. 26, l. 1 – 27, l. 23. The State presented no further argument or testimony. R. 27, l. 15 – R. 28, l. 1. The resentencing judge issued her decision, stating:

> All right. On Indictment Number 1996-GS-40-11974, sir, you will be sentenced to the State Department of Corrections for 50 years. The sentence will run consecutive to the other sentences. I am not going to remand as to the burglary, ***and that is the only one that I am going to entertain today. All sentences will run consecutive.*** And of course he will be given credit for the time he has spent in jail. All right, thank you.

R. 28, ll. 2-11 (emphasis added). The court's statement "that is the only one that I am going to entertain today" is not indicative of a failure to rule on Slocumb's motion for resentencing such that it is still available for adjudication today. Rather, it was a denial of Slocumb's motion for resentencing on the offenses other than burglary. Notably, the court then stated "***all*** sentences will run consecutive," indicating her disinclination to change them to run concurrent, which would have brought the aggregate sentence closer to compliance with Graham. Moreover, the court did not mention any inability to consider the motion, and heard argument on the motion repeatedly throughout the resentencing hearing.

Therefore, the trial court did have jurisdiction to resentence Slocumb on all counts based on the filed Motion for Resentencing, and the resentencing judge's ruling was a denial of that Motion such that appellate review of the constitutionality of Slocumb's aggregate sentence is proper. As will be discussed more fully infra, in Part II of this Petition, and is dictated by common sense, Slocumb's life expectancy is far below 114.5 years old. Thus, his de facto life sentence provides him no meaningful opportunity for parole, in contradiction to the reasoning and mandates of

Graham. Accordingly, Slocumb is entitled to a re-sentencing hearing on all offenses in accordance with Graham.

II. Assuming *arguendo* that Petitioner could only be resentenced on the burglary count, the Court of Appeals erred in failing to find that Petitioner's fifty-year sentence for the burglary conviction alone is the functional equivalent of a life sentence without parole because it does not afford him any "meaningful opportunity to obtain release" within his lifetime as required under the United States Supreme Court's decision in Graham.

Slocumb's sentence cannot realistically be considered in a vacuum because the consecutive nature of his sentences prolong his eligibility for parole even further past his life expectancy to the point that there can be no question that Slocumb will die in prison for non-homicidal offenses committed as a juvenile. However, even assuming *arguendo* that Slocumb could only be resentenced on the burglary count, his fifty-year sentence alone is the functional equivalent of life without parole and affords no meaningful opportunity to obtain release.

Slocumb is currently thirty-five years old, having a birthdate of June 11, 1979. Though he has been incarcerated since age thirteen, he committed the instant offenses on March 6, 1996, at age sixteen, during an escape from custody. Even ignoring the other sentences imposed and looking at only at the fifty year sentence for first degree burglary, such a sentence is still a de facto sentence of life without parole, because Slocumb would not be eligible for release until age fifty-eight and a half. However, the other consecutive sentences cannot be legitimately ignored because of their significant impact on Slocumb's parole eligibility. According to the Department of Corrections, Slocumb is not eligible for parole and his projected release date is November 17, 2109, at which point he will be one hundred thirty years old. Statutory calculations indicate that Slocumb will be at least one-hundred ten years old before he is eligible for parole. See Resp't Brief 29 – 30.

This Court recognized in State v. Kimbrough, 212 S.C. 348, 357, 46 S.E.2d 273, 277 (1948), that the trial judge imposed a thirty year sentence that was "to all intents and purposes the

equivalent of a life sentence." Where the record revealed nothing to justify the trial court's disregarding the jury's recommendation of mercy, this Court held that "[n]o one doubts that the able trial judge conscientiously endeavored to fix a sentence which he thought was fair and just, but under all the circumstances we are constrained to hold that the sentence imposed is manifestly too severe." Id. The Court also noted that parole eligibility is "an act of grace and a matter of discretion, and may be refused" such that their decision could not be influenced by statutory allowances for good time credits or parole eligibility. Id. at 358, 46 S.E.2d at 277. As discussed supra in Part I of this Petition, other state courts have explicitly recognized that one or multiple term of years sentences can constitute the functional equivalent of a life sentence, i.e. a de facto life sentence. See People v. Walker, 911 N.E.2d 439, 460 (Ill. App. Ct. 2009) (recognizing that a 60–year sentence imposed on a 20–year–old defendant was a "*de facto* life sentence"); People v. Dupree, 16 N.E.3d 788 (Ill. App. Ct. 2014); State v. Ragland, 836 N.W.2d 107, 121-22 (Iowa 2013); State v. Null, 836 N.W.2d 41 (Iowa 2013) (noting that while the aggregate "52.5 years imprisonment is not technically a life-without-parole sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger Miller-type protections."); Floyd v. State, 87 So.3d 45, 47 (Fla. Dist. Ct. App. 2012) ("common sense dictates that Appellant's eighty-year sentence, which, according to the statistics cited by Appellant, is longer than his life expectancy, is the functional equivalent of a life without parole sentence").

The Fourth Circuit recognized de facto life sentencing in United States v. Pileggi, 703 F.3d 675, 678 (4th Cir. 2013), in which it referenced its prior remand for resentencing of Pileggi where the government recommended and the district court imposed "a de facto life sentence" of fifty years contrary to the extradition agreement with Costa Rica. The Seventh and Ninth Circuits have likewise recognized de facto life sentences. See United States v. Garcia, 754 F.3d 460, 474

(7th Cir. 2014) (stating that the Court is "wary of a de facto life sentence when it was imposed without any explanation despite the district court's rejection of an actual life sentence"); Moore v. Biter, 725 F.3d 1184, 1192 n.3 (9th Cir. 2013).

In February 2014, the United States Sentencing Commission issued a report titled "Life Sentences in the Federal System" in which it compiled statistical data on the imposition of explicit life sentences, de facto life sentences, and sentences for a term beyond the inmate's life expectancy in the federal courts. Patti B. Saris, et al., U.S. Sent. Comm'n, Life Sentences in the federal system (Feb. 2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf. In its discussion of de facto life imprisonment sentences, the Commission described these sentences as being "extremely long specific terms of imprisonment" that is, "for all practical purposes, a life sentence and likely was intended to be such by the judge who imposed it." Saris, supra p. 10. For the purposes of this and any other statistical analysis, the Commission uses a sentence of 470 months (39 years and two months) to identify cases in which a de facto life sentence was imposed, which is consistent with the average life expectancy of federal criminal offenders. Saris, supra p. 10, n. 52 (citing U.S. SENT. COMM'N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-170 (2014)). Clearly Slocumb's 600 month sentence for first degree burglary alone, and even more so his aggregate sentence of 1560 months, would qualify as a de facto life sentence under the United States Sentencing Commission's parameters. Slocumb's parole eligibility at age 58.5 for first degree burglary and at age 110 for his aggregate offenses are also both well beyond the average life expectancy of a federal prisoner.

South Carolina's actuarial table indicates that the life expectancy for a thirty-five year old male is 43.05 years, such that he will live to age 78.05. S.C. Code Ann. § 19-1-150. However, it is

notable that the statute's table is based on 2001 data and does not account for Slocumb's race, incarceration, or age at incarceration. In Bearcloud v. State, 334 P.3d 132, 142 n.7 (Wyo. 2014), the defense presented an ACLU report analyzing life expectancy data obtained regarding youth serving natural life sentences in Michigan's state prisons. The April 2013 report indicates that "life in prison, with its stressors, violence and disease in and of itself significantly shortens one's life expectancy." ACLU of Michigan, Michigan Life Expectancy Data for Youth Serving Natural Life Sentences 1 (April 2013), http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf. The report indicated that the average life expectancy for an unincarcerated African-American male is 71.1 years. ACLU of Michigan, supra 2 n.2. However, life expectancy drops to an average of 64 years for incarcerated persons and to 58.1 years for those incarcerated for their natural life. ACLU of Michigan, supra 1-2. Then adjusting for race, the average life expectancy of an African-American male incarcerated for his natural life is 56 years. ACLU of Michigan, supra 2. Without regard to race, juvenile offenders incarcerated for their natural lives have the lowest life expectancy, 50.6 years. ACLU of Michigan, supra 2. This is approximately eight years earlier than Slocumb's potential release date based on a fifty year sentence alone, and it is approximately sixty years prior to Slocumb's potential release date based on his aggregate sentence.

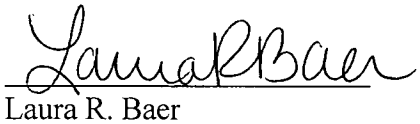
It is undeniable that Slocumb's race, incarceration, and age at sentencing will result in a lower life expectancy than that of an unincarcerated African-American male. He is unlikely to reach the age of fifty, much less fifty-eight, and will certainly die in prison due to his aggregate sentence. Therefore, his sentence of fifty years, and even more so his aggregate sentence of one-hundred thirty years, constitutes a de facto life sentence without parole such that the principles of

Graham are applicable. Accordingly, Slocumb is entitled to a re-sentencing hearing on all offenses in accordance with Graham.

CONCLUSION

For the reasons set forth herein, Petitioner Conrad Lamont Slocumb respectfully requests that this Court grant certiorari to allow full briefing on these issues and ultimately remand Petitioner's case for resentencing in accordance with Graham.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER.

This 1st day of June, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 5303 (S.C. Ct. App. filed 3/18/2015)
96-GS-40-11974, 11979, 11980, 12010, 12004

THE STATE,

RESPONDENT,

V.

CONRAD LAMONT SLOCUMB,

PETITIONER

APPELLATE CASE NO. 2013-000933

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Conrad Lamont Slocumb, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, and the S.C. Court of Appeals this 1st day of June, 2015.

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day
of June, 2015.

Barby Reed (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021