ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Williamsburg County

R. Ferrell Cothran, Jr., Circuit Court Judge

RONALD H. MACK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001518

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Whether Petitioner's case should be remanded for resentencing based on the intervening cases of Miller v. Alabama, 132 S.Ct. 2455 (2012), and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), where Petitioner was a juvenile at the time of the offense and his sentence of fifty years is the functional equivalent of life without parole?

II. Whether the PCR Court erred in finding Petitioner's plea counsel provided effective assistance counsel where plea counsel failed to advise Petitioner regarding the strength of the State's case, effectively advised Petitioner that he would not receive a fair trial in South Carolina, and failed to correct the Solicitor's misstatement that she could have pursued the death penalty in Petitioner's case?

III. Whether the PCR Court erred in finding Petitioner's guilty plea was knowing, intelligent, and voluntary where Petitioner was not advised that he was constitutionally ineligible for the death penalty after the Solicitor stated at the plea hearing that she considered pursuing the death penalty in Petitioner's case?

STATEMENT OF THE CASE

Procedural History

On July 6, 2009, Petitioner Ronald H. Mack, along with his three co-defendants, Tawanda Mack Allen, Kelvin Michael Bowen, Jr., and Antonio Lavelle McClary, was indicted by the Williamsburg County Grand Jury for murder, first degree burglary, conspiracy, and possession of a weapon during a violent crime.[1] App. 72 – 74. Mack, born August 24, 1991, was seventeen years old on the date of the alleged crime, April 5, 2009.

On August 24, 2010, Mack appeared before the Honorable Clifton Newman and pled guilty to the offenses of murder and first degree burglary. App. 1 – 3. The remaining charges were *nolle prossed.* App. 3. Mack was represented by Legrand Carraway, and the State was represented by Assistant Solicitor Kimberly V. Barr. App. 1. Judge Newman accepted Mack's guilty plea. App. 13. He then sentenced Mack to concurrent sentences of fifty years for murder and thirty years for first degree burglary. App. 32, ll. 7-12.

No direct appeal was filed.

Application for Post-Conviction Relief and Evidentiary Hearing

On August 5, 2011, Mack filed his application for post-conviction relief ("PCR") alleging ineffective assistance of counsel and that his guilty was not knowing, intelligent, and voluntary. App. 34 – 40. The State filed its Return on May 18, 2012. App. 41 – 45. An evidentiary hearing was held before the Honorable R. Ferrell Cothran, Jr. on May 27, 2014. Mack was represented by Charles T. Brooks and the State was represented by Assistant Attorney General Croom Hunter. App. 46. Mack and plea counsel Carraway testified at the hearing. App. 46 – 60.

[1] Tawanda Mack Allen is Mack's mother, Kelvin Michael Bowen, Jr. is Mack's mother's boyfriend, and Antonio Lavelle McClary is a friend of Mack.

At the PCR hearing, Mack testified that Carraway told him that he would never win a trial for murder in South Carolina. App. 50, ll. 19-23. Mack further stated that Carraway met with him only twice, did not review discovery with him, and did not discuss any possible defenses or witnesses. App. 52, ll. 4-15. Mack admitted that the trial transcript reflected his affirmative answers to the plea judge's questions regarding if he understood everything and his satisfaction with Carraway's services, and whether he was in fact guilty of the crimes. App. 52, l. 16 – 54, l. 21.

Carraway testified that he met with Mack between three and five times prior to the plea. App. 55, ll. 14-17; App. 55, l. 25 – 56, l. 2. He admitted that he did not discuss any defenses with Mack, purportedly because Mack never denied his presence. App. 5 – 12. He also admitted that he never questioned Mack's competency despite his being a minor. App. 56, ll. 13-18. Carraway testified that he obtained discovery but did not file any Rule 5 or Brady[2] motions and could not recall if he went over discovery with Mack or if they "just talked about what had happened." App. 57, ll. 11-18. Carraway acknowledged that Mack made a confession, but did not testify as to whether there was any basis to suppress the confession. App. 58, ll. 18-20.

Order of Dismissal

Judge Cothran's Order of Dismissal denying Mack's PCR application was filed July 1, 2014. App. 61 – 67. Judge Cothran ruled that Mack failed to demonstrate any deficiencies in plea counsel Carraway's representation and that Mack's guilty plea was knowingly and voluntarily entered. App. 64 – 66.

This petition for writ of certiorari follows.

[2] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963).

ARGUMENT

I. Petitioner's case should be remanded for resentencing based on the intervening cases of Miller v. Alabama, 132 S.Ct. 2455 (2012), and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), where Petitioner was a juvenile at the time of the offense and his sentence of fifty years is the functional equivalent of life without parole.[3]

Relevant Facts

During the sentencing phase of the August 24, 2010 hearing, the victim's mother, Annette Bradshaw, asked the court to sentence Mack to life in prison. App. 13, ll. 15-19. The solicitor admitted that Mack was seventeen years old at the time of the offense and did not have any prior arrests or convictions. App. 14, ll. 3-5. However, she mentioned references that Mack made in his statement to police about his gang involvement and prior violent conduct. App. 14, ll. 5-17. She described the killing of Kenyon Dorsey as cold-blooded and callous. App. 14, ll. 17-18. She then requested imposition of a life sentence, stating "I certainly believe that given what he's done, that a life sentence is appropriate for him." App. 15, ll. 1-2. She also said that "this case was at least worth conversation about a death penalty case" but did not pursue it due to the victim's mother's opposition to the death penalty. App. 25, ll. 5-11.

Plea counsel, Legrand Carraway, noted that Mack was seventeen at the time of the crime, nineteen at the time of sentencing, and observed him to be a "nice, soft spoken, and intelligent boy." App. 15, ll. 9-17; App. 19, ll. 2-5. He also provided the court with some background on Mack's upbringing, being raised in Kingstree by his mother and step-father, James Allen, until the family

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[3] The sentencing issue was not raised in the PCR application or at the evidentiary hearing on May 27, 2014, because Byars was not filed until November 12, 2014. This case presents a most unusual circumstance in that it involves a term of years sentence that is the functional equivalent of a sentence of life without parole rather than an explicit life without parole sentence. Rather than leaving the trial court to determine if Byars applies to Mack's case upon the filing of a Motion for Resentencing, it is in the interest of judicial economy for this Court to grant certiorari and remand this case for re-sentencing consistent with Byars. However, out of an abundance of caution, appellate counsel has advised Mack to file a Motion for Resentencing in Clarendon County.

moved to Maryland when Mack was in seventh grade. App. 15, l. 23 – 16, l. 8. When Mack was in the ninth grade, his mother and Mr. Allen separated and were eventually divorced. App. 16, ll. 8-14. During or after his tenth grade year, Mack moved back to South Carolina living with either his grandmother or step-father while his mother remained in Maryland. App. 20, ll. 12-16.

Regarding the incident itself, Carraway advised that Mack was involved with the Bloods gang in Maryland and that the victim was involved with the same gang in Williamsburg County, South Carolina. App. 16, l. 15 – 17, l. 6; App. 20, ll. 16-19. The victim owed Mack a "tremendous amount of money" related to drug transactions and was relaying negative information about Mack to gang members in Maryland. App. 17, l. 6 – 18, l. 6. The victim and other individuals then shot at Mack when he was playing basketball in a park. App. 18, ll. 6-18. The gang members in Maryland told Mack that he "needed to take of this problem here." App. 18, ll. 18-19. Carraway also noted the attraction of what seems to be a "glamorous" life to any seventeen year old. App. 20, ll. 5-12. In addition to the "brain washing" of the gang that he saw as family, Carraway noted the involvement of Mack's mother and her boyfriend in the crime. App. 21, l. 1 – 22, l. 24. Mack's mother drove him and the other co-defendants to the victim's home to carry out the crime. App. 23, ll. 14-18.

Carraway argued that the involvement of Mack's mother and her adult boyfriend made this case unusual. App. 25, l. 18 – 26, l. 11. He advised the Court that since being away from these outside influences Mack is out of his previous mindset. App. 20, ll. 20-24; App. 22, ll. 16-19. In asking for the mandatory minimum sentence of thirty years, Carraway averred that Mack would not have taken the same actions were it not for the influence of the gang and his mother. App. 21 – 24. He asked the court to give Mack another chance and imagine how much he has changed and will continue to change away from his mother and the gang. App. 26, ll. 11-18. Carraway concluded

his argument by asking "who among us has been cursed enough to have a mother to take us to a murder site?" App. 26, ll. 19-21.

Mack also made a statement during sentencing, in which he asked for mercy. He acknowledged that what he did was wrong and that he was acting out of fear and under the influence of the gang in which he was involved. App. 24, l. 1-7. Mack confirmed that his mother drove him down from Maryland to commit the crime, provided the weapons, waited outside, and never tried to dissuade Mack. App. 27, l. 1 – 28, l. 5. He stated that Bowen, his mother's boyfriend, was also an influence and accompanied him "to make sure things go smooth." App. 28, ll. 9-17. The solicitor confirmed that Bowen had gang ties also and a criminal history including pending charges in Florence County for the shooting of Mack's step-father on January 25, 2009. App. 28, l. 18 – 30, l. 10. However, the solicitor indicated that she did not believe Bowen had a "dog in the fight" with respect to the killing of victim Dorsey, but was rather "just happy to provide gun fire and happy to go and help kill him." App. 30, ll. 11-15.

Judge Newman began the explanation of his sentence with the following:

> Well, the purpose of a sentence is to represent what society determines to be justice for a crime and to – not to send a message to the community, but to do what most law abiding citizens would expect the Court to do. And then in weighing all of this, the fact of the matter is, that ***the sentence is not about Mr. Mack, not about him and the possibility that he might turn his life around at some point in time between age 19 and age 80, if he lives that long***... But it's – ***the sentence is not about Mr. Mack***. I mean, it's – how old is Mr. Dorsey?

App. 30, l. 21 – 31, l. 4. The solicitor responded that the victim, Kenyon Dorsey, was seventeen. App. 31, l. 5. The judge went on to say:

> ***It's not about the future years of Mr. Mack.*** How about the lack of future years of Mr. Dorsey. He's the victim, the victim, victim's family, the victim's loved ones. Mr. Mack is almost a lost cause at this point based on all of the choices that he made. ***He's a lost cause***

> ***as far as society is concerned. His future is not within society. His future, your future, is out of society. You've given up your freedom. You've given up the right to walk among free people.***

App. 31, ll. 6-14. After asking the defendant why he decided to give up his future and freedom, the judge stated:

> Unfortunately you'll never know any better because you – that's a – just as you snuffed out his life ***you snuffed out your future just the same***. All of the great things that Mr. Carraway said about you and all he thinks about you, I mean, I'm not questioning at all whether those things are true. But if you are to take advantage of those things it won't be – ***it will not be out in a free society where you've given up your freedom and your right to anyone to trust you to walk the streets. And you'll have to do those good deeds behind bars.*** That's just a fact of the matter.

App. 31, l. 14 – 32, l. 6. Judge Newman then sentenced Mack to concurrent sentences of fifty years for murder and thirty years for first degree burglary and admonished Mack "that's more than you can count" and "that's the bed you made." App. 32, ll. 7-12.

Discussion

A. Pursuant to *Byars*, which applied the principles enunciated in *Miller*, the Eighth Amendment requires individualized consideration of youth prior to the imposition of a life sentence without parole upon a juvenile offender.

The Eighth Amendment, applicable to the states under the Fourteenth Amendment, prohibits cruel and unusual punishment, guaranteeing individuals the right to be free from excessive sanctions, which "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." Miller v. Alabama, 132 S.Ct. 2455, 2463 (2012) (internal citations and quotations omitted). The United States Supreme Court held in Miller that mandatory life imprisonment without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment's prohibition against cruel and unusual punishment. Id. Subsequently, in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), this Court

held that the Miller decision applies retroactively and that life without parole sentence for juveniles without individualized consideration of youth constitute cruel and unusual punishment.

In Miller, the defendants were both convicted of murder at age fourteen and mandatorily sentenced to life without the possibility of the parole. 132 S.Ct. at 2460. The Court evaluated two sets of precedent, the first adopting categorical bans on sentencing practices due to the difference in the culpability of the class of offenders and the severity of the penalty, and the second requiring sentencing authorities to "consider the characteristics of a defendant and the details of his offense before sentencing him to death." Id. at 2463-64. The Court determined that the principles established in those two lines of cases support its conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment. Id. at 2464.

The Court noted that its prior decisions in Roper [4] and Graham[5] established "that children are constitutionally different than adults for purposes of sentencing." Id. The difference between children and adults is based on children's lack of maturity and responsibility, increased vulnerability to negative influences and outside pressure, and ability to develop their character and reform. Id. at 2464-65. While the Court noted that Graham distinguished the moral culpability and consequential harm between homicide and non-homicidal offenses, the distinctive characteristics of children remain regardless of the crime committed. Thus, the Court found that "Graham's reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." Id. They also noted that because juveniles cannot be sentenced to death, the most severe penalty available for juvenile offenders is life without parole and its imposition "cannot proceed as though they were not children." Id. at 2466. Moreover, a life

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[4] Roper v. Simmons, 543 U.S. 551 (2005).

[5] Graham v. Florida, 560 U.S. 48 (2010).

sentence for a juvenile shares characteristics with the imposition of the death penalty in that "[i]mprisoning an offender until he dies alters the remainder of his life "by forfeiture that is irrevocable" and is especially harsh for a juvenile who will almost inevitably spend more years and a greater percentage of his life incarcerated than an adult offender. Id.

Due to the similarity of life sentences for juveniles and capital punishment, the Court found the second line of cases requiring individualized sentencing before imposing the death penalty relevant to its analysis. Id. at 2467. While juveniles deserve punishment for their crimes, the sentencer must examine all of the circumstances before concluding that life without the parole is the proper penalty. Id. at 2469. While Miller did not proscribe a categorical bar on life without parole sentences for juveniles, it advised:

> [G]iven all we have said in Roper, Graham, and this decision about children's diminished culpability and heightened capacity for change, we think ***appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon***. That is especially so because of the great difficulty we noted in Roper and Graham of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.

Id. (internal citations and quotations omitted). The Miller opinion "require[s] [a sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" before imposing a penalty of life without parole. Id.

In Aiken v. Byars, this Court determined Miller's retroactivity and its applicability in South Carolina, which does not have the mandatory sentencing scheme prohibited in Miller. 410 S.C. 534, 765 S.E.2d 572. This Court first determined that Miller "creates a new, substantive rule and should therefore apply retroactively." Id. at 540, 765 S.E.2d at 575. The new rule is substantive because it prohibits "a certain class of defendants – juveniles – from specific punishment – life

without parole absent individualized consideration of youth." Id. at 541, 765 S.E.2d at 575. Retroactive applicability is proper because a failure to do so "risks subjecting defendants to a legally invalid punishment." Id. at 541, 765 S.E.2d at 576.

Turning then to Miller's application in South Carolina, where the statutes do not mandate life sentences for juveniles, this Court noted Miller's reasoning, outlined supra, and Miller's statement that "'Graham's reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.'" Id. at 542, 765 S.E.2d at 576 (quoting Miller, 132 S.Ct. at 2465). The Aiken majority determined that even though South Carolina's statutes permit rather than require life sentences for juvenile offenders, the "proportionality rationale integral to Miller's holding" must be given effect such that youth "must be afford adequate weight in sentencing." Id. at 542-43, 765 S.E.2d at 576. The majority reasoned that "Miller is clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution." Id. at 543, 765 S.E.2d at 576-77. Thus, it found that Miller did more than prohibit statutory schemes resulting in mandatory life sentences for juveniles. Id. at 543, 765 S.E.2d at 577. It "establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." Id.

Regarding the practical application of this requirement, this Court referenced the framework outlined in Miller, which articulated the factors that a sentencing court ***must*** consider. Id. at 544, 765 S.E.2d at 577. The requisite factors include:

> (1) the chronological age of the offender and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence; (2) the family and home environment that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the incompetencies associated with youth—for example, the offender's inability to deal with police

> officers or prosecutors (including on a plea agreement) or the offender's incapacity to assist his own attorneys; and (5) the possibility of rehabilitation.

Id. (citing Miller, 132 S.Ct. at 2468). Further, while not specifically requiring that the sentencing hearing mirror the penalty phase of a capital case, this Court noted that "the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings, in addition to the factors illustrated above." Id. at 544-45, 765 S.E.2d at 577. Thus, while a juvenile may still be sentenced to life without parole in light of other aggravating circumstances, before that sentence may be imposed upon a juvenile, "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.

B. The sentencing judge's imposition of a fifty year sentence is a de facto life without parole sentence, and the judge's comments during sentencing indicate his intention that the sentence be the equivalent of life without parole.

Mack is currently twenty-three years old, having a birthdate of August 24, 1991. According to the Department of Probation and Parole, Mack is not eligible for parole and his expected date of release is August 11, 2060. His release date is two weeks prior to his sixty-ninth birthday. The fifty year sentence imposed upon Mack is a de facto sentence of the life without parole.

While there is little South Carolina case law regarding de facto life sentences, 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. This 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.

In State v. Null, 836 N.W.2d 41 (Iowa 2013), the Iowa Supreme Court held that the principles of Miller apply to juveniles sentenced to a lengthy term of years.[6] The Court first set forth a lengthy analysis of the application of the Eighth Amendment to juveniles, determining that "Roper, Graham, and Miller directly settled a number of controversies." Id. at 66. The Court said:

> After these cases, it is clear that the Eighth Amendment prohibits the imposition of the death penalty for crimes committed by juvenile defendants, that life in prison without parole cannot be imposed on a juvenile nonhomicide offender, and that mandatory life without parole cannot be imposed on a juvenile who commits homicide without consideration of the mitigating characteristics of youth. All of these results rested on the notion that juveniles are constitutionally different from adults for purposes of the imposition of harsh punishments.

Id. The Court then considered whether the principles of Miller applied to Null, who was sentenced to a total of 52.5 years based on aggregation of his mandatory minimum sentences for second-degree murder and first-degree robbery. Id. at 71.

In finding Miller applicable and remanding Null's case for resentencing, the Court first noted that Miller emphasized that the differences in children are not "crime specific." Id. It also noted that while "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." Id.

[6] Though the Iowa Supreme Court made clear that its decision was based on its interpretation of the provision against cruel and unusual punishment in the Iowa Constitution, it also expressed that the language of the state constitution closely tracks that of the Eighth Amendment to the federal constitution. Null, 836 N.W.2d at 69, 70 n. 7.

This finding was made despite the Court's recognition that the evidence "does not clearly establish that Null's prison term is beyond his life expectancy," though it noted that incarceration may affect the applicability of generalized mortality tables. Id. Regardless, the Court determined that the application of Miller should not "turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates," ***otherwise an offender sentenced to a lengthy term-of-years would be "worse off than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under Miller.***" Id. at 72 (emphasis added).

Though recognizing that other courts have applied Miller more narrowly, the Iowa Court found that those cases avoid the "basic thrust" of the Supreme Court precedent that the principles announced regarding how children are different is not crime specific. Id. at 72-73. Not only is the sentence in Null strikingly similar to that in present case, but the majority's reasoning in Aiken echoes the principles and reasoning emphasized by the Iowa Supreme Court in Null. See also State v. Ragland, 836 N.W.2d 107, 121-22 (Iowa 2013) (holding "Miller applies to sentences that are the functional equivalent of life without parole" because "[f]or all practical purposes, the same motivation behind the mandates of Miller applies to . . . any sentence that is the practical equivalent to life without parole"); People v. Caballero, 282 P.3d 291, 295 (Cal. 2012) (holding "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"); People v. Mendez, 114 Cal.Rptr.3d 870 (Ct. App. 2010) (applying the principles of Graham and traditional proportionality review in finding sentence of 84 years "is the equivalent of LWOP" and that is cruel and unusual punishment); Floyd v. State, 87 So.3d 45 (Fla. Dist. Ct. App. 2012) ("In this

case, 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 also 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 Circuit has 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").

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 Mack's sentence of 600 months would qualify as a de facto life sentence under the United States Sentencing Commission's parameters.

South Carolina's actuarial table indicates that the life expectancy for a twenty-three year old male is 54.40 years, such that he will live to age 77.4. 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 Mack'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, the 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. Though the sample is too small to determine an average based on race, juvenile offenders incarcerated for their natural lives have the lowest life expectancy, 50.6 years. ACLU of Michigan, supra 2. This is eighteen and a half years earlier than Mack's release date.

In the event there was any uncertainty as to whether the sentencing judge intended to impose a de facto life sentence, his comments make clear that he understood that Mack would spend the rest of his life incarcerated. Judge Newman said that Mack is "a lost cause as far as

society is concerned," his "future is out of society," he has "given up [his] freedom" and "the right to walk among free people," and he had "snuffed out [his] future." App. 30, l. 21 –App. 31, l. 14. He further told Mack that any improvements he made would not be in society but instead "behind bars" because he has given up his freedom and "right to anyone to trust [him] to walk the streets." App. 31, l. 14 – 32, l. 6. When Judge Newman finally imposed concurrent sentences of fifty years for murder and thirty years for first degree burglary, he told Mack that it was "more than [he] can count" and "the bed [he] made." App. 32, ll. 7-12. Thus, there is no doubt that the sentencing judge intended for Mack to spend the rest of his life incarcerated despite the fact that he did not explicitly write "life imprisonment without parole" on the sentencing sheet.

It is undeniable that Mack'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 sixty-nine, and will almost certainly die in prison, as the sentencing judge intended. Therefore, his sentence of fifty years constitutes a de facto life sentence without parole such that the principles of Miller and Aiken are applicable.

C. The sentencing judge did not engage in an individualized consideration of youth before sentencing Petitioner to the functional equivalent of life without parole.

Aiken v. Byars involved the appeal of fifteen defendants who were sentenced to life without parole as juveniles. 410 S.C. 534, 536, 765 S.E.2d 572, 573. This Court noted that "although some of the hearings touch on the issues of youth, none of them approach the sort of hearing envisioned by Miller where the factors of youth are carefully and thoughtfully considered." Id. at 543, 765 S.E.2d at 577. While Carraway made his best attempt to describe Mack's background and point to the negative influences of the gang and Mack's mother, this too was a far cry from the full exploration of the factors associated with Mack's youth required by Miller and Aiken. Moreover, the record does not reflect that any of the mitigating factors pointed to by Carraway

were actually considered by the sentencing court. The sentencing judge made no reference to Mack's youth, except to say that the sentence was "not about the future years of Mr. Mack" but rather the lack of future years of Mr. Dorsey (decedent). Thus, there is no evidence that the sentencing judge actually considered the hallmark features of youth, the environment that surrounded the offender, how familial and peer pressures affected his alleged conduct, the incompetencies associated with youth, or the possibility of rehabilitation. See Aiken, 410 S.C. at 544, 765 S.E.2d at 577.

Instead, Mack's sentence was based purely on retribution and incapacitation, which the Miller court found less applicable to sentences of minors as opposed to adults. 132 S.Ct. at 2464-65. Retribution is less applicable because "the heart of the retribution rationale relates to an offender's blameworthiness." Id. at 2465. Children's "transient rashness, proclivity for risk, and inability to assess consequences" lessen their moral culpability and enhance the prospect that as they continue to develop their "deficiencies will be reformed." Id. at 2464-65. The Court rejected incapacitation as a valid basis for imposing life without parole on juveniles. This is because "[d]eciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible – but incorrigibility is inconsistent with youth." Id. at 2465 (internal quotations omitted). Miller further recognized that due to their diminished culpability and heightened capacity for change, "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Id. at 2469.

Because the sentencing court failed to fully explore "the mitigating hallmark features of youth" before imposing a de facto life sentence of fifty years, Mack's case should be remanded for resentencing in accordance with this Court's decision in Aiken. Id. at 545, 765 S.E.2d at 578.

II. The PCR Court erred in finding Petitioner's plea counsel provided effective assistance counsel where plea counsel effectively advised Petitioner that he would not receive a fair trial in South Carolina, failed to advise Petitioner regarding the strength of the State's case, and failed to correct the Solicitor's misstatement that she could have pursued the death penalty in Petitioner's case.

In this case, plea counsel Carraway's representation fell far below the standard of reasonableness required in a criminal case where he effectively advised Mack that he would not receive a fair trial in South Carolina , failed to advise Mack regarding the infirmities in the State's case against him, and failed to correct the Solicitor's misstatement that she could have pursued the death penalty. App. 50, ll. 19-24. Due to Carraway's deficient performance, Mack could not make an informed decision regarding whether to plead guilty. Had Mack thought he would receive a fair trial, been aware of the potential trial strategy, and known that he was not eligible for the death penalty, he likely would have chosen to proceed to trial rather than plead guilty to murder and first degree burglary with no agreement as to sentencing.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under

prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694.

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238 (1969). Therefore, in the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000). "The second, or 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. 52 at 59. In other words,

> A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.

Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also Hill v. Lockhart, 474 U.S. 52, 59 (1985) (footnote omitted).

Mack testified at the PCR hearing that he entered the guilty plea because Carraway told him at the plea hearing, "[y]ou know, Mr. Mack, you'll never win a case as far as in South Carolina for murder being that you're from out of town and everything." App. 50, ll. 19-24. Carraway's flip assertion to Mack that he would not be successful at trial based on a factor

irrelevant to a determination of guilt, i.e. his being from Maryland, was the equivalent of telling Mack that he would not receive a fair trial in South Carolina. Given that this was said to Mack at the plea hearing, this was undoubtedly lingering in Mack's mind as the plea judge asked him if he understood his right to a jury trial. This important constitutional right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, § 14, of the South Carolina Constitution, is the right to a fair trial by an impartial jury. State v. Stewart, 278 S.C. 296, 303, 295 S.E.2d 627, 631 (1982). Where the defendant was under the belief, due to Carraway's advice, that he would not receive a fair trial, his acknowledgement of his jury trial right was rendered meaningless.

Carraway testified that he was appointed to represent Mack and met with him between three and five times prior to the plea. App. 55, ll. 14-17; App. 55, l. 25 – 56, l. 2. He admitted that he did not discuss any defenses with Mack because Mack never denied his involvement. App. 5 – 12. Carraway also admitted that he never questioned Mack's competency despite his being a minor. App. 56, ll. 13-18. He did not file any Rule 5 or Brady motions, and though he obtained discovery he was not sure whether he went over that with Mack or if they just talked about what happened. App. 57, ll. 11-18. Carraway admitted that Mack had made a confession, but did not testify as to whether there was any basis to suppress the confession. App. 58, ll. 18-20.

While Carraway noted Mack's youth to the Court in sentencing, he apparently failed to appreciate that youth and inexperience with the criminal justice system during his own representation of Mack. Carraway conducted no investigation of the case and engaged in no discussion with Mack regarding the merits of the State's case against him. He seemed to stretch the duty to consult with Mack about "important decisions, including questions of overarching defense strategy," to mean that it was incumbent upon Mack to develop a defense strategy. See Moore v.

State, 399 S.C. 641, 732 S.E.2d 871 (2012); Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014) ("At a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.") (citing Ard v. Catoe, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007)). While Mack's confession, the inculpatory statements of co-defendants, and the discovery of one of the murder weapons in the residence where Mack was staying appear damning at first glance, had this case gone to trial it would have been the State's burden to prove Mack guilty beyond a reasonable doubt. App. 10, l. 3 – 12, l. 20. Even the limited record in this case reveals many opportunities to attack the strength of the State's case at trial and a reasonable alternative theory to present. Recognition of the infirmities in the State's case and third party defense were not matters within Mack's knowledge and should have been obvious to an attorney of Carrway's lengthy experience.

While Mack confessed, his confession was that of a juvenile, who had no prior record and was obviously concerned with protecting his mother and her boyfriend. Additionally, co-defendant McClary's statements implicating Mack were self-serving and resulted in McClary receiving a sentence of only twelve years for the offense of second degree burglary. McClary's statement indicated that Bowen used a shotgun and that Mack used a 9-millimeter handgun. App. 11, ll. 9-14. The shotgun used in the crimes was recovered under the mattress of co-defendants Allen and Bowen. App. 12, ll. 12-16. While 9-millimeter ammunition was found in the bedroom also, the handgun allegedly used by Mack was never recovered. App. 12, ll. 17-20. Due to Bowen's involvement with drugs and gangs and history of violence, it is plausible that he committed the alleged crimes of his own accord and without the support or cooperation of Mack. See App. 28, l. 18 – 30, l. 15. All of these issues should have been discussed with Mack so that he could fully appreciate what potential defense strategy existed were he to proceed to trial, but none of them

were. Thus, while Mack may have understood the general principle that he had the right to confront his accusers, his attorney had given him no reason to believe that there was any basis to do so.

Additionally, as discussed more fully below in part III, Carraway failed to correct the solicitor's misstatement that she could have sought the death penalty in Mack's case. App. 25, ll. 5-11. Due to his age at the time of the offense, Mack was constitutionally ineligible to receive the death penalty. Sentencing considerations are paramount in the decision to enter a guilty plea, and the misinformation regarding death penalty eligibility may explain how Mack could have thought that there was some benefit to his pleading without any sentencing cap.

Carraway's representation of Mack was deficient because he advised Mack that he would "never win" a case in South Carolina, showed no diligence in discussing or advising Mack regarding the merits of his case, and failed to correct the solicitor's misstatement that the State could have sought the death penalty. His deficiencies are even less reasonable in light of Mack's young age and lack of inexperience. Had Mack been properly advised by Carraway, there is a reasonable probability that he would have chosen to proceed to trial rather than plead guilty, especially where there was no negotiation as to Mack's sentence.

III. The PCR Court erred in finding Petitioner's guilty plea was knowing, intelligent, and voluntary where Petitioner was not advised that he was constitutionally ineligible for the death penalty after the Solicitor stated at the plea hearing that she considered pursuing the death penalty in Petitioner's case.

Contrary to the PCR Court's ruling, Mack was not "fully apprised of the rights he was forfeiting." App. 66. At the plea hearing the solicitor stated on the record that she considered pursuing the death penalty in Mack's case and would have done so but for protest from the victim's mother. App. 25, ll. 5-11. Neither the plea court nor Carraway corrected that gross misstatement and informed Mack that he was not eligible for the death penalty.

"A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." Kercheval v. United States, 274 U.S. 220, 224, 47 S.Ct. 582, 583 (1927). Therefore, the requirement that the state place on the guilty plea record the prerequisites of a valid waiver of constitutional rights is no less important than ensuring that a confession, an admission of various acts, is reliable before it is admitted into evidence. See Carnley v. Cochran, 369 U.S. 506, 516 82 S.Ct. 884, 890 (1962); Jackson v. Denno, 378 U.S. 368, 387, 84 S.Ct. 1774, 1786 (1964).

Consequently, due process of law requires that before a guilty plea can be voluntarily and intelligently entered, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront his accusers. A valid waiver of those rights cannot be presumed from a silent record. Boykin, 395 U.S. at 243, 89 S.Ct. at 1712. In State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982), the Court emphasized that the record must ***clearly establish*** a waiver of the three constitutional rights listed in Boykin. In addition to these requirements, a criminal defendant entering a guilty plea must also be aware of the nature and crucial elements of the offense, the maximum and mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999).

The solicitor's statement that she considered pursuing the death penalty in Mack's case presented an inaccurate picture of the maximum penalty Mack could have faced. App. 25, ll. 5-11. Long before the alleged offenses, the United States Supreme Court held in Roper v. Simmons, 543 U.S. 551 (2005), that the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty upon offenders who were under the age of eighteen when their crimes were committed. Thus, Mack would have been constitutionally ineligible for the death penalty.

Undoubtedly, a fear that the State could pursue the death penalty is a paramount concern in deciding whether to plead guilty. See U.S. v. Nelson, 732 F.3d 504, 517 (5th Cir. 2013) (recognizing that the threat of the death penalty can induce a defendant's incriminating statement). There was no correction at the plea hearing of the solicitor's misstatement of the potential penalty Mack could face were he to proceed to trial, thus he believed the State could pursue a punishment which the United States' Supreme Court has held to be cruel and unusual if imposed upon a juvenile offender. See Roper, 543 U.S. at 568-75 ("When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.").

Therefore, Mack did not knowingly, intelligently, and voluntarily waive his constitutional rights where Mack was not aware of the maximum penalty he was facing because the solicitor erroneously indicated at the plea hearing that the State could have pursued the death penalty.

CONCLUSION

For the foregoing reasons, Petitioner Ronald H. Mack respectfully requests this Court vacate his guilty plea and remand the case for a new trial, or alternatively, remand his case for re-sentencing consistent with this Court's decision in Aiken v. Byars.

Respectfully submitted,

Laura R. Baer

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

This 1st day of April, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

APR 1 2015

S.C. Supreme Court

Certiorari to Williamsburg County

R. Ferrell Cothran, Jr., Circuit Court Judge

RONALD H. MACK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001518

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 have been served on J. Croom Hunter, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Ronald Mack # 342556, at Lee Correctional Institution, this 1st day of April, 2015.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

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

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