ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Carmen T. Mullen, Circuit Court Judge

RECEIVED

JUN 07 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ANTHONY M. ENRIQUEZ,

APPELLANT

APPELLATE CASE NO 2016-002237

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the circuit court erred in finding that Appellant did not qualify for resentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), because he was eligible for parole after service of twenty years, where the mandatory nature of Appellant's life with parole sentence treated all adults and juveniles the same, and where the parole process in South Carolina does not provide a meaningful opportunity for release such that it is not an adequate substitute for individualized resentencing?

STATEMENT OF THE CASE

During the June 1994 term, the Charleston County Grand Jury indicted Appellant Anthony Enriquez (hereinafter "Anthony") for one count of murder and one count of armed robbery, related to an incident that occurred on January 21, 1994, when Anthony was seventeen years old.

On December 1, 1994, Anthony appeared before the Honorable Casey Manning to enter pleas to both indicted offenses. Anthony was represented by William L. Runyon, Jr., and the state was represented by R. Spencer Roddey. Plea Tr. 1. Anthony pled guilty to the murder offense, and pled guilty pursuant to Alford[1] to the armed robbery offense. Plea Tr. 7, l. 3 – 19, l. 4. He was sentenced to the mandatory term of life imprisonment for murder and to a concurrent term of twenty-five years for armed robbery. Plea Tr. 31, ll. 10-23. Pursuant to the statutory scheme in place at the time of the offense, Anthony would become eligible for parole after service of twenty years of his sentence.[2] Hr'g Tr. 3, ll. 1-16; S.C. Code Ann. § 16-3-20 (1992).

According to the Charleston County Public Index, Anthony filed numerous post-conviction relief and other collateral actions related to his conviction in state court. See Case No. 1995-CP-10-04475 (first PCR action); Case No. 1998-CP-10-00944 (civil action against Runyon); Case No. 2000-CP-10-01347 (second PCR action); Case No. 2003-CP-10-03186 (state

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[1] North Carolina v. Alford, 400 U.S. 25 (1970).

[2] S.C. Code Ann. § 16-3-20(A) (1992) provided, in pertinent part: A person who is convicted of or pleads guilty to murder must be punished by death or by imprisonment for life and is not eligible for parole until the service of twenty years, provided, however, that when the State seeks the death penalty and an aggravating circumstance is specifically found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the court must impose a sentence of life imprisonment without eligibility for parole until the service of thirty years. . . . No person sentenced under the provisions of this subsection may receive any work-release credits, good-time credits, or any other credit that would reduce the mandatory imprisonment required by this subsection.

habeas corpus); Case No. 2004-CP-10-04859 (third PCR action); Case No. 2008-CP-10-03580 (fourth PCR action); and Case No. 2009-CP-10-05985 (fifth PCR action). Anthony also filed for federal habeas relief, but was not granted relief through any of his collateral action. Case No. 3:98-cv-01840-MBS (filed June 23, 1998).

Following our Supreme Court's decision in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), Anthony filed a *pro se* motion for resentencing on December 23, 2014. R.* (Defense Motion for Resentencing). On March 30, 2016, Anthony filed a Memorandum in Support of his Motion for Resentencing through counsel, Bentley Price. R.* (Defense Memo). By Order filed April 6, 2016, the Supreme Court vested the Honorable Carmen T. Mullen with exclusive jurisdiction over Anthony's Motion for Resentencing. R. * (Order Assigning Judge).

On April 21, 2016, the State, represented by assistant solicitor Charles M. Condon, Jr., filed its response to the motion for resentencing, arguing that Anthony was not eligible for resentencing because he was eligible for parole. R.* (State's Response). The defense filed a reply to the state's response on June 30, 2016. R.* (Defense Reply). On July 19, 2016, the State filed a supplemental response. R.* (State's Supp. Response).

On July 20, 2016, the parties appeared for a hearing before Judge Mullen, at which she considered whether Anthony was entitled to a resentencing hearing pursuant to Aiken. Judge Mullen heard argument from counsel and took the matter under advisement. Hr'g Tr. 1 – 10. On October 20, 2016, Judge Mullen filed an Order denying Anthony's motion for resentencing. R.* (Order Denying Resentencing).

STATEMENT OF FACTS

Guilty Plea

At the outset of the guilty plea hearing, Judge Manning asked Anthony whether he had any concerns about whether Runyon's representation of both Anthony and his brother/co-defendant, Jessie Enriquez, presented a conflict. Anthony responded "no, sir." Plea Tr. 3, l. 5 – 6, l. 23. See Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007) ("An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's."). Notable, in the defense memorandum in support of resentencing, Anthony averred that it was his brother, Jessie, who loaded the gun on the night of the incident, unbeknownst to Anthony. R.* (Defense Memo, p. 6). There was strong evidence that Anthony did not know that the gun was loaded. Witnesses Derrick Brown and Wendy Joyner both provided written statements that after the shooting, Anthony asked "who loaded the gun?" R. * (Derrick Brown's written statement, p. 2); see also R. * (Wendy Joyner's written statement, p. 3).

Despite this, Runyon said that Anthony would be pleading guilty to the murder offense and pleading guilty pursuant to Alford to the armed robbery offense. Plea Tr. 7, ll. 3-23. When Judge Manning inquired as to whether that was Anthony's understanding, Anthony responded that he did not know about the second indictment for armed robbery. Plea Tr. 7, l. 24 – 8, l. 8. A recess was taken, after which Anthony tendered the guilty and Alford pleas. The prosecutor and Runyon agreed that the terms of the plea agreement were that Anthony would plead guilty to murder without an aggravating circumstance, and avoid the thirty-year minimum prior to parole eligibility, in exchange for the state's agreement not to seek the death penalty. Plea Tr. 8, l. 9 – 19, l. 4.

The prosecutor recited the state's version of the facts, which plea counsel said the defense disagreed with in many respects.[3] Plea Tr. 19, l. 6 – 24, l. 9; Plea Tr. 26, l. 11 – 29, l. 7. According to the prosecutor, Anthony was quickly identified as a suspect in the shooting death of Jeffrey Sewell. The incident occurred outside of a known "party house" among teens and young adults. The prosecutor averred that when Sewell and his friend, Derrick Brown, got to the house, "the Enriquez brothers came up to [Brown] and they asked him if Sewell had any papers on him." Brown said that he did not know and said "go ask him yourself." Plea Tr. 19, l. 6 – 21, l. 5. The prosecutor said that Anthony, along with his brother Jessie Enriquez and another boy, Dan Murphy, surrounded Sewell and asked him if he had any "papers."[4] Anthony walked back to the car, retrieved a sawed-off shotgun with a pistol grip, and walked back up to Sewell.[5] Brown saw Jessie and Murphy going through Sewell's pockets and then heard a muffled gun shot and saw Sewell fall. The boys ran back to their car, told Brown to get in, and they all drove off. Plea Tr. 21, ll. 6-24. The prosecutor admitted that when Anthony got in the car, he asked "who loaded the shotgun?" Plea Tr. 21, l. 25 – 22, l. 1. Jessie allegedly said that he "got his [Sewell's] cigarettes." Plea Tr. 22, ll. 1-9. The autopsy showed markings consistent with Sewell

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[3] The solicitor's recitation of the "facts," primarily based on testimony the State expected to elicit from Derrick Brown, was not entirely consistent with the written statement Brown provided to police on January 23, 1994. R. * (Derrick Brown's written statement); <u>see also</u> R. * (Wendy Joyner's written statement).

[4] "Papers" can apparently refer to either money or, as in this case, "rolling paper" for marijuana. R.* (Derrick Brown's written statement).

[5] In the defense memorandum, Anthony explained that Jessie alone approached Sewell. It was only when Anthony saw that the two were in a heated argument that he retrieved the gun and went up to them, intending only to scare Sewell. He said that the gun accidentally discharged when he struck Sewell with it to keep him at bay. R.* (Defense Memo, p. 6).

being hit in the face with the shogun prior to the fatal shot to the chest. Plea Tr. 23, l. 18 – 24, l. 1.

The prosecutor noted: "[T]here's only one sentence in this case . . . the sentence is life imprisonment." Plea Tr. 19, ll. 10-12. After hearing briefly from both of Anthony's parents, Judge Manning asked Anthony if he wanted to tell the Court anything. Anthony responded: "That I'm sorry, and I had no intentions of hurting anybody this night." Plea Tr. 29, l. 16 – 30, l. 25. Judge Manning acknowledged that two lives were lost – that of the victim and the defendant – and said "I probably won't be around when he gets out of jail, I don't know, it will be a long time, but it's an appropriate punishment when a life is taken." Plea Tr. 31, ll. 1-6. He sentenced Anthony to concurrent terms of life imprisonment for murder and twenty-five years for armed robbery. Plea Tr. 31, ll. 10-23.

Request to Withdraw Plea

On December 5, 1994, *four days after the plea hearing*, Anthony wrote to plea counsel Runyon asking for help because the classification office told him that he would not be eligible for parole until after he served twenty years, rather than the ten years that was discussed with Runyon. R.* (Letter to Runyon Dec. 5, 1994). Runyon wrote back to Anthony on December 7, 1994, explaining that while parole eligibility would not be for twenty years, Anthony would be eligible for early release in ten years "with the computation of good time plus other time incentive programs." R.* (Letter from Runyon Dec. 7, 1994). On the contrary, S.C. Code Ann. § 16-3-20(A) (1992), provided in pertinent part: "No person sentenced under the provisions of this subsection may receive any work-release credits, good-time credits, or any other credit that would reduce the mandatory imprisonment required by this subsection."

Runyon further wrote: "Now to your request. I am not going to expose you to the possibility of the electric chair. Hire someone else to do that or go get an appointed lawyer. I realize you are 'scared' of prison, but at least you are alive." R.* (Letter from Runyon Dec. 7, 1994). After discussing the risks of trial, he wrote: "I therefore advise against and respectfully decline to risk your life. This is not a Burger King system – you cannot have it your way when someone is dead." R.* (Letter from Runyon Dec. 7, 1994). On December 13, 1994, Enriquez wrote to the Charleston County Clerk of Court, requesting information on how to withdraw a plea. R.* (Letter to Clerk Dec. 13, 1994).

Motion for Resentencing

In his motion for resentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), Anthony argued that at the time of the crime he was only seventeen years old, had an underdeveloped sense of responsibility, and was vulnerable to negative influences and outside pressures from family and peers. Anthony's age was only a chronological factor at his plea hearing and not considered for its constitutional significance, as explained in Aiken and Miller v. Alabama, 132 S.Ct. 2455 (2012). R.* (Defense Motion for Resentencing). The subsequent memorandum in support of his motion elaborated on both the law and facts relevant to the instant case. R.* (Defense Memo). Counsel noted that while Enriquez's sentence provided for parole eligibility after service of twenty years of his sentence, its imposition was mandatory under the law in place at the time. R.* (Defense Memo, pp. 1-2). Thus, Enriquez never had the opportunity "to present evidence specific to the attributes of his youth" to the sentencing judge and the judge was prevented from considering such evidence in determining a proper and proportionate sentence. R.* (Defense Memo, p. 2, p. 4).

Counsel reviewed Anthony's many achievements while incarcerated, which include completion of the Bondage to Freedom seminar, earning a certificate of achievement for Work Keys – Silver, earning a legal assistant/paralegal certificate, and earning an associate's degree in paralegal studies. R.* (Defense Memo, p. 5). He also discussed the circumstances of the offense, Anthony's home life and peer pressures, and Anthony's difficulty in assisting in his own defense. R.* (Defense Memo, pp. 5-6). Counsel further noted that "[t]he life expectancy for an incarcerated youth who serves decades in prison is substantially less than a person in society in light of the stress factors associated with prison life." R.* (Defense Memo, p. 7). He argued that even geriatric release is uncommon for "lifers" in South Carolina, but that such release would not provide Anthony with the opportunity for any meaningful life outside of prison. Thus, he argued that Anthony's sentence "is the 'functional equivalent' to life without parole," such that he is entitled to a resentencing hearing. R.* (Defense Memo, p. 7).

In the state's response, the prosecutor argued that Miller and Aiken were not applicable to Anthony because he is eligible for parole, noting an initial parole eligibility date of January 23, 2014. R.* (State's Response, p. 2). The prosecutor cited to the South Carolina Department of Probation, Parole and Pardon Services' Policies and Procedures Handbook in support of his assertion that "the parole board can take into considerations of youthfulness and immaturity at the time of the crime, rehabilitation, along with other important considerations." R.* (State's Response, p. 3). Thus, the prosecutor suggested that Anthony's motion be summarily denied. R.* (State's Response, p. 3).

In the defense's reply, counsel asserted that Anthony had a right to have a judge consider the mitigating factors prior to imposing a life sentence, regardless of his parole eligibility. R.* (Defense Reply). In the state's supplemental response, the prosecutor argued that the United

States Supreme Court's decision in Montgomery v. Louisiana, 136 S.Ct. 718 (2016), "made clear that Miller, and consequently Aiken v. Byars, does not apply to juveniles who receive life with eligibility for parole sentences." R.* (State's Supp. Response, pp. 1-2). Rather, he asserted that a remedy for a Miller violation is to convert the life without parole sentence to one of life with eligibility for parole. He further wrote: "The Defendant's parole was denied in April 2014 due to (1) nature and seriousness of offense, (2) use of a deadly weapon to commit the offense, and (3) unfavorable institutional record at SCDC. The Defendant will be back before the parole board on September 21, 2016, and can attempt to demonstrate his rehabilitation." R.* (State's Supp. Response, p. 2).

Hearing on Eligibility for *Aiken* Resentencing

At the July 20, 2016 hearing before Judge Mullen, the prosecutor argued that the resentencing provided for in Aiken was applicable only to juveniles sentenced to literal "life without parole" and not to anyone sentenced to life with parole. Hr'g Tr. 2, ll. 11-15. He averred that because Anthony was parole eligible, "the parole board could consider the novelties of youth and the other considerations of youth." Hr'g Tr. 2, ll. 16-19. The prosecutor further cited to Montgomery as having held that "a possible remedy for a Miller violation is the same sentence that the defendant received in this case, which is converting a life without parole sentence to a life with parole." Hr'g Tr. 2, ll. 20-25. Regarding the sentencing scheme in place at the time of Anthony's original plea and sentencing, the prosecutor said:

> My understanding, Your Honor, is it could have been a capital case, which, obviously, would have been death penalty. If they choose not to select capital punishment, it would have been life. And I believe it would have been parole after 30 years, if he had gotten that. In this case, it was pled down without aggravating circumstance, so it is the 20 years . . . parole eligible.

Hr'g Tr. 3, ll. 1-16. He argued that Aiken's language indicated applicability to a narrow class, such that there was no authority to grant a resentencing hearing in Anthony's case. Hr'g Tr. 8, l. 10 – 9, l. 4.

Defense counsel responded that the fact that the mandatory sentencing scheme allowed for parole eligibility did not preclude resentencing. He discussed the Miller factors and how they would have counseled against a life sentence in Anthony's case, had the sentencing judge been allowed to consider them. Hr'g Tr. 3, l. 19 – 6, l. 7. Counsel averred that there were other similarly situated inmates serving life with parole sentences, though it was difficult to identify the specific number because they are "dying off" in prison. He noted that life expectancy is reduced in prison. Hr'g Tr. 6, ll. 8-17. Regarding the scope of Montgomery, counsel noted that the language used in the opinion is that "[a] State ***may*** remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." 136 S.Ct. at 736 (emphasis added). Thus, he argued that parole eligibility does ***not always*** provide an adequate remedy. Hr'g Tr. 6, ll. 18-24. Counsel averred that parole is much easier to attain in other states than in South Carolina. He argued that, in our State, it is the judiciary that needs to weigh the Miller factors and determine the proper sentence. Hr'g Tr. 6, l. 25 – 7, l. 25. Leaving the matter to the parole board was not adequate because no one serving a similar sentence for a similar offense had been granted parole, and that the parole board was going to continue to "not parole," just as they have done in the past. Thus, defense counsel argued that Anthony's sentence is the functional equivalent of life without parole, imposed in violation of the Constitution. Hr'g Tr. 9, ll. 5-18. Notably, the prosecutor did not dispute defense counsel's assertion regarding the unlikelihood of parole for Anthony. Hr'g Tr. 9, ll. 19-23.

Order Denying Resentencing

Judge Mullen took the matter under advisement. Hr'g Tr. 9, ll. 24-25. On October 20, 2016, she filed an Order dismissing Anthony's motion for resentencing. She found that Anthony was sentenced to life imprisonment with the possibility of parole after service of twenty years in accordance with the 1990 version of the South Carolina murder statute, such that he became parole eligible on January 23, 2014. Judge Mullen noted that Anthony's parole was denied, but that he would be eligible again on September 21, 2016. R.* (Order Denying Resentencing, p. 2). She found that there was "currently no South Carolina case law addressing whether a juvenile defendant sentenced to life imprisonment with the possibility of parole is entitled to the same individualized sentencing hearing as those juvenile defendants sentenced to life without the possibility of parole." R.* (Order Denying Resentencing, p. 3). However, she found Montgomery's holding – that states may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole – "instructive." R.* (Order Denying Resentencing, p. 3). She quoted Montgomery: "Allowing those offenders to he considered for parole ensures that juveniles whose crimes reflected only transient immaturity – and who have since matured – will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." R.* (Order Denying Resentencing, p. 3) (quoting Montgomery, 136 S.Ct. at 736).

Thus, Judge Mullen reasoned that "[b]ecause Montgomery allows States to remedy unconstitutional life sentences imposed on juveniles by giving such offenders parole eligibility, it logically follows that a life sentence with the possibility for parole – such as the one Enriquez is serving – imposed upon a juvenile defendant is not unconstitutional." R.* (Order Denying Resentencing, p. 3). She accordingly ruled: "Enriquez is not entitled to a resentencing hearing

under Aiken v. Byars as Aiken v. Byars does not extend to juveniles serving life sentences who are eligible for parole. R.* (Order Denying Resentencing, p. 3).

Subsequent Parole Proceedings

Following Judge Mullen's decision in this case, Anthony did appear for an additional parole hearing and was again denied on September 22, 2016. On appeal to the administrative law court, Anthony raised the following issue: "Whether the Department complied with procedural due process requirements when denying the Appellant parole?" The court addressed Anthony's constitutional argument that "the maturity of a juvenile who has taken steps to rehabilitate himself in prison should be considered by the Board." The court found the case law cited by Anthony "persuasive" but ultimately ruled:

> **Currently, the Board does not consider these factors.** However, no existing United States or South Carolina authority requires the South Carolina Parole Board to consider age or immaturity in its decisions. Because, the Appellant received a routine denial of parole consistent with the current statutory and procedural due process requirements under South Carolina law, the court must affirm the Department's decision.

Enriquez v. SCDPPPS, Appellate Case No. 2017-001133 (Order Challenged on Appeal) (emphasis added).

ARGUMENT

The circuit court erred in finding that Appellant did not qualify for resentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), because he was eligible for parole after service of twenty years, where the mandatory nature of Appellant's life with parole sentence treated all adults and juveniles the same, and where the parole process in South Carolina does not provide a meaningful opportunity for release such that it is not an adequate substitute for individualized resentencing.

Introduction

Anthony was born on April 14, 1976, and seventeen years old at the time of the instant offense. When he pled guilty in 1994, the only possible sentences for murder were death, life with parole eligibility after thirty years (if the death penalty was sought and an aggravating circumstance was found beyond a reasonable doubt, but a recommendation of death was not made), or life with parole eligibility after twenty years.[6] S.C. Code Ann. § 16-3-20 (1992). It is evident from the plea transcript that Anthony entered his pleas to avoid the death penalty, which was not banned as a punishment for juvenile offenders for another decade after his plea hearing. Plea Tr. 14, l. 17 – 15, l. 13; Roper v. Simmons, 543 U.S. 551 (2005). In light of his plea, Anthony's life sentence with parole eligibility after twenty years for murder was mandatory, such that the sentencing judge had no discretion and was required to impose the same sentence on Anthony as he would for even the most heinous adult offender who pled guilty to murder. S.C. CODE ANN. § 16-3-20 (1992).

As will be discussed more fully *infra*, the failure to differentiate between juvenile and adult offenders at the original sentencing hearing renders the mandatorily imposed sentence upon

[6] S.C. Code Ann. § 16-3-20 was amended, effective January 1, 1996, to remove parole eligibility and provide for three sentencing alternatives: death, life without parole, or thirty years without parole. S.C. Code Ann. § 16-3-20 (1996). Subsequent amendments have maintained parole ineligibility following a murder conviction, though the possible sentences are now death or a mandatory minimum term of imprisonment for thirty years to life. S.C. Code Ann. § 16-3-20 (2002); S.C. Code Ann. § 16-3-20 (2010). The statute has never provided for any differentiation in sentencing between adult and juvenile offenders.

Anthony unconstitutional. Miller v. Alabama, 132 S.Ct. 2455 (2012) (holding that the mandatory imposition of a life sentence without parole for youthful offenders was unconstitutional); Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014) (holding that Miller was retroactively applicable to South Carolina's discretionary sentencing scheme); Montgomery v. Louisiana, 136 S.Ct. 718 (2016) (holding that Miller applied retroactively and required that juvenile offenders be "given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored."). Anthony's parole eligibility after service of twenty years does not cure the unconstitutionality of his sentence because it does not provide him with a meaningful opportunity for release since the factors considered by the South Carolina Board of Paroles and Pardons do not include the mitigating hallmark features of youth. Further, while parole may be more than a mere hope for offenders who committed less serious offenses, defense counsel argued that parole eligibility is a virtual nullity for an offender like Anthony, who committed murder as a juvenile. The solicitor offered no contrary evidence to establish that a grant of parole was a realistic possibility for Anthony. Hr'g Tr. 6, l. 8 – 7, l. 9; Hr'g Tr. 9, ll. 5-23.

In denying Anthony's motion for resentencing, Judge Mullen let stand the unconstitutional, mandatory life with parole sentence imposed upon him in 1994 – an anathema to Miller, which requires that juveniles receive individualized sentencing with consideration of the hallmark features of youth. The only way to provide Anthony with a constitutional sentence is to allow him resentencing where the court can fully explore the factors required under Miller and Aiken and where a different sentence is possible. See Hayden v. Keller, 134 F.Supp.3d 1000 (E.D.N.C. 2015) (holding that the North Carolina parole process, which treats every adult and juvenile offender the same, violated the Eighth Amendment); Atwell v. State, 197 So.3d 1040

(Fla. 2016) (remanding for resentencing after holding that a life with parole sentence imposed on juvenile violated the Eighth Amendment because the Florida parole process "fails to take into account the offender's juvenile status at the time of the offense, and effectively forces juvenile offenders to serve disproportionate sentences of the kind forbidden by Miller"); Maryland Restorative Justice Initiative v. Hogan, 2017 WL 467731 (D. Md. Feb. 3, 2017) (rejecting argument that Graham, Miller, and Montgomery were not applicable because plaintiffs did not receive sentences of life without parole).

Discussion

A. The Eighth Amendment's ban against cruel and unusual punishment provides additional protections for juvenile offenders.

Following our Supreme Court's decision in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), Anthony filed a motion for resentencing. He argued that his sentence violates the constitutional prohibitions against cruel and unusual punishment due to both the mandatory nature of his sentence and the failure of the parole process to provide an adequate substitute for judicial consideration of the "hallmark features of youth." Hr'g Tr. 3, l. 19 – 8, l. 1; Hr'g Tr. 9, ll. 5-18; R.* (Defense Motion for Resentencing); R.* (Defense Memo); R.* (Defense Reply); see U.S. Const. amend. VIII; S.C. Const. art. I, § 15. In order to fully appreciate the issue raised in this appeal, a brief understanding of the development of Eighth Amendment jurisprudence is necessary.

The Eighth Amendment to the United States Constitution, applicable to the states under the Fourteenth Amendment, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend VIII; U.S. Const. amend XIV; see also S.C. Const. art. I, § 15. The United States Supreme Court has found that because the words of the Eighth Amendment are not precise and their scope is not static, it "must

draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958).

Because the scheme under which Anthony was sentenced was mandatory in nature, the original sentencing judge gave no consideration to any mitigating evidence. Rather, Anthony was sentenced just as any other juvenile or adult offender, with no individualization. Plea Tr. 24, ll. 8-17; Plea Tr. 26, l. 11 – 31, l. 19. The constitutional requirement for individualized consideration of mitigating and extenuating circumstances at sentencing began with American death penalty jurisprudence. In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court invalidated all then-existing death penalty statutes, finding that they allowed for the arbitrary and capricious imposition of capital punishment. The Supreme Court struck down subsequent attempts by states to cure the defect through mandatory death penalty statutes, holding that "the fundamental respect for humanity underlying the Eighth Amendment, requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976); see also Roberts v. Louisiana, 428 U.S. 325 (1976); State v. Rumsey, 267 S.C. 236, 226 S.E.2d 894 (1976). However, the Court upheld Georgia's bifurcated scheme that separated the guilt and penalty phases of a capital trial because the jury's discretion was "controlled by clear and objective standards so as to produce non-discriminatory application." Gregg v. Georgia, 428 U.S. 153, 197-98 (1976). Of particular importance was the jury's consideration of mitigating evidence and extenuating circumstances. Id. Further, one of ten specific statutory aggravating circumstances had to be proved beyond a reasonable doubt and designated in writing before a death sentence could be imposed. Id. Before the state supreme court could affirm the death sentence, it had to consider

whether the death sentence was the result of passion, prejudice, or other arbitrary factors, and conduct a proportionality review to determine whether it is disproportionate to the punishment usually imposed in similar cases. Id. at 204-06.

In the ensuing years, the Supreme Court imposed several categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty, reflecting its continued concern with proportionate punishment under the Eighth Amendment. In Thompson v. Oklahoma, 487 U.S. 815 (1988), a plurality of the Court prohibited the imposition of the death penalty upon a juvenile offender who was under the age of sixteen at the time of the offense. Later, the Court banned the imposition of the death penalty upon mentally retarded defendants in Atkins v. Virginia, 536 U.S. 304 (2002), and upon offenders who commit non-homicide crimes in Kennedy v. Louisiana, 554 U.S. 407 (2008).

Roper v. Simmons

The twenty-first century has seen continued development in the area of Eighth Amendment jurisprudence, especially with respect to juvenile offenders. In Roper v. Simmons, 543 U.S. 551 (2005), the United States Supreme Court categorically banned the imposition of the death penalty on juvenile offenders, who were under the age of eighteen at the time of the crime. The Roper Court explained that "[c]apital punishment must be limited to those offenders who commit "'a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution."' 543 U.S. at 568 (quoting Atkins, 536 U.S. at 319). The Roper Court distinguished youthful offenders from those most deserving of execution based on their lack of maturity and underdeveloped sense of responsibility; their greater susceptibility to negative influences and outside pressures; and the transitory nature of their personality traits.

Id. at 569-70. As such, a juvenile's conduct is not as morally reprehensible as that of an adult. Id. at 570.

Because of their diminished culpability, the Court observed that the penological justifications for the death penalty apply to youthful offenders "with lesser force than to adults." Id. In rejecting the government's arguments against a categorical ban, the Court explained: "An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." Id. at 573. Thus, the Court held: "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." Id. at 573-74.

Graham v. Florida

Six years later, in Graham v. Florida, 560 U.S. 48 (2010), the Supreme Court categorically banned the imposition of life without parole upon juvenile offenders who commit non-homicide offenses. In addition to finding that a national consensus supported such a ban, the Court discussed whether such a categorical ban was necessary in the Court's "independent judgment." 560 U.S. at 62-68. Similar to its reasoning in Roper, the Graham Court's conclusion was based upon the limited culpability of juvenile non-homicide offenders, the severity of life without parole sentences, and the lack of any penological theory adequate to justify such a sentence. 560 U.S. at 68-75. "When compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." Id. at 69. Regarding severity, the Court noted that life without parole is the second most severe punishment permitted by law,

and, like the death penalty, deprives the offender of his liberty "without giving hope of restoration." Id. at 69-70. For a juvenile, the Court found that a sentence of life without parole is "an especially harsh punishment" because "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." Id. at 70. While Graham does not require a guarantee of release for a youthful offender convicted of a non-homicide crime, such defendants must be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 71.

Miller v. Alabama

In 2012, the Court decided another seminal case in juvenile justice. In Miller v. Alabama, 132 S.Ct. 2455 (2012), the United States Supreme Court held that the mandatory imposition of a life sentence without parole for youthful offenders was unconstitutional. The Miller Court wrote: "Roper and Graham establish that children are constitutionally different from adults for purposes of sentencing." 132 S. Ct. at 2464. The Court found that while Graham's flat ban on life without parole was for non-homicide crimes, nothing that Graham said about children is crime-specific. Id. at 2465. Thus, the Miller Court recognized that Graham's reasoning implicates any life without parole sentence for a juvenile, even as its categorical bar relates only to non-homicide offenses. Id. "Most fundamentally, Graham insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." Id. The Miller Court found that the mandatory penalty schemes at issue prevented the sentencer from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. Id. at 2466. Such schemes contravene the foundational principle of Roper and Graham – "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." Id.

Thus, the Court held that a sentencer must have the opportunity to consider youth as a mitigating factor just as capital defendants must be afforded the opportunity to present mitigating factors for a sentencer's consideration. 132 S. Ct. at 2467. The Miller Court wrote further: "[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." Id. at 2469. "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. Thus, the Court ruled: "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id.

Aiken v. Byars

In Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), our Supreme Court held both that Miller was retroactively applicable and that Miller was applicable to juveniles who received a non-mandatory sentence of life without parole. In determining the breadth of Miller, the Aiken majority found that Miller "unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole" and "required an individualized sentencing proceeding before imposing a sentence of life without parole on a juvenile offender." 410 S.C. at 542, 765 S.E.2d at 576. The majority recognized that the Miller Court "did not expressly extend its ruling to states such as South Carolina whose sentencing scheme *permits* a life without parole sentence to be imposed on a juvenile offender but does not *mandate* it." Id. at 542, 765 S.E.2d at 576 (emphasis in original). However, the

Aiken majority held that there was a proportionality rationale integral to Miller's holding – youth has constitutional significance; as such, it must be afforded adequate weight in sentencing – which must be given effect. Id. at 542-43, 765 S.E.2d at 576. Thus, the Court wrote: "Miller does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." Id. at 543, 765 S.E.2d at 577.

The Aiken Court acknowledged that life without parole sentences are still possible for juveniles in homicide cases. 410 S.C. at 543, 765 S.E.2d at 577. However, the Court found that Miller's requirement that the sentencing judge first "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" "deserves universal application." Id. To that end, the sentencing court must consider:

> (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. at 544, 765 at 577 (internal quotations omitted) (citing Miller, 132 S.Ct. at 2468). While the Court did not require the sentencing proceedings to mirror the penalty phase of a capital case, it found 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 Miller factors. Id. at 544-45, 765 at 577. The Court provided that "*any individual affected by our holding* may file a motion for resentencing within one year from the filing of this opinion in

the court of general sessions where he or she was originally sentenced." Id. at 545, 765 S.E.2d at 578 (emphasis added).

Montgomery v. Louisiana

In Montgomery v. Louisiana, 136 S.Ct. 718 (2016), the United States Supreme Court set forth the true breadth of its decision in Miller. In ruling that Miller created a substantive rule of constitutional law and applied retroactively, the Montgomery Court explained that "Miller . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth." 136 S.Ct. at 734 (internal quotations omitted).

The Court ruled: "Because Miller determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption it rendered life without parole an unconstitutional penalty for a class of defendants because of their status —that is, juvenile offenders whose crimes reflect the transient immaturity of youth." 136 S.Ct. at 724 (internal citations and quotations omitted). Thus, the Montgomery Court wrote: "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity." Id. (internal quotations omitted). The Court concluded that Montgomery and other prisoners like him "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." Id. at 736-37.

Notably, the specific issue before the Court in Montgomery was whether its holding in Miller was retroactive to juvenile offenders whose convictions and sentences were final when Miller was decided. 136 S.Ct. at 725. However, the Court went on to write – arguably as

dicta – that "[g]iving Miller retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole." Id. at 736. Rather, the Court wrote, "[a] State *may* remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." Id. (emphasis added). "Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." Id. The Court further wrote: "Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of Miller's central intuition—that children who commit even heinous crimes are capable of change." Id.

B. The mandatory life sentence imposed upon Anthony is disproportionate because it treats juveniles like adults and all juveniles the same.

As the United States Supreme Court has made clear over the past decade: juveniles are not the same as adults, and that difference makes them "less deserving of the most severe punishments." Miller, 132 S.Ct. at 2464 (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)). The Aiken Court recognized this, writing: "[T]he Court in Miller noted that Roper and Graham established that children were constitutionally different from adults for sentencing purposes, a conclusion that was based on common sense as well as science and social science." 410 S.C. at 541-42, 765 S.E.2d at 576. "[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Id. at 542, 765 S.E.2d at 576. Juveniles have a general lack of maturity and underdeveloped sense of responsibility, are more vulnerable to negative influences and outside

pressures, including family and peers, and their character and personality traits are still evolving. Id.

The Aiken Court found the following statement from Miller particularly important: "Graham's reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." Id. (quoting Miller, 132 S.Ct. at 2465). The Miller Court recognized that Graham precluded a life without parole sentence for non-homicide offenses based upon a defendant's juvenile status, even though an adult could receive it for a similar crime. 132 S.C. at 2465-66. However, the Court found that "**in other contexts as well**, the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate." Id. (emphasis added). It was upon this basis that "the Miller Court unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole, and that the mandatory penalty schemes at issue prevented the sentencing authority from considering the differences between adult and juvenile offenders before imposing a sentence of life without parole." Aiken, 410 S.C. at 542, 765 S.E.2d at 576. Specifically, the Miller Court wrote:

> By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes Graham's (and also Roper's) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.

132 S. Ct. at 2466.

The premise of both Miller and Aiken – that children are not the same as adults and therefore should not be treated the same – applies with equal force to juveniles sentenced to life imprisonment even with the possibility of parole after twenty years. At the time of Anthony's sentencing, S.C. Code Ann. § 16-3-20 (1992) provided for three possible sentences for murder:

the death penalty, life with parole eligibility after thirty years (if the death penalty was sought and an aggravating circumstance was found beyond a reasonable doubt, but a recommendation of death was not made), or life with parole eligibility after twenty years. Thus, where the death penalty was not sought, juvenile and adult offenders alike were sentenced to life with the possibility of parole after twenty years. As discussed *supra*, there are many distinctions between children and adults. Treating them the same violates a "basic precept of justice" that sentencing be "graduated and proportioned to both the offender and offense." Miller, 132 S.Ct. at 2458. As the Miller Court observed: "[N]one of what [Graham] said about children about their distinctive (and transitory) mental traits and environmental vulnerabilities was crime-specific." Miller, 132 S.Ct. at 2465. Further, nothing that it said about children is *sentence*-specific either. "A sentencer misses too much if he treats every child as an adult." Miller, 132 S.Ct. at 2468.

Thus, Anthony's mandatory sentence of life with parole is no less disproportionate, vis-a-vis the more culpable adult offenders who received the same sentence, than a discretionary sentence of life without parole imposed without the requisite individualization. See Atwell v. State, 197 So. 3d 1040, 1042 (Fla. 2016) ("Although the pre–1994 first-degree murder statute under which Atwell was sentenced provided for parole eligibility, it remained a mandatory sentence that treated juveniles exactly like adults and precluded any individualized sentencing consideration."). This violates the "concept of proportionality [that] is central to the Eighth Amendment." Graham, 560 U.S. at 59. Both sentences – mandatory life with parole and mandatory life without parole – violate the prohibition against cruel or unusual punishment of the Eighth Amendment to the United States Constitution and article I, section 15 of the South Carolina Constitution.

Further, the mandatory-penalty scheme applied to Anthony required the trial court to treat all children the same. This runs afoul of Miller's individualized-sentencing requirement. As the Miller Court said, such mandatory sentencing schemes "by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." 132 S.Ct. at 2467. "[E]very juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one." Id. at 2467-68. "And still worse, each juvenile (including these two 14–year–olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as Graham noted, a *greater* sentence than those adults will serve." Id. at 2468 (emphasis in original). Thus, just as a "sentencer misses too much if he treats every child as an adult," id., a sentencer misses too much if he or she treats every child the same.

Notably, here, both Anthony's adult co-defendant, Jessie Enriquez, and juvenile co-defendant, Daniel Murphy, pled guilty to lesser offenses and were sentenced to concurrent terms under the Youth Offender Act, not to exceed six years. Charleston County Public Index, Case Nos. E053428, -29, -30, 31. While Anthony was undisputedly the one who held the gun, there was evidence that Anthony did not know that the gun was loaded and did not intentionally shoot Sewell. Rather, Anthony believed that the unloaded gun would only scare Sewell. Plea Tr. 21, l. 25 – 22, l. 1; R.* (Defense Memo, p. 6); R.* (Derrick Brown's written statement, p. 2); see also R. * (Wendy Joyner's written statement, p. 3). Here, as in all mandatory life sentences, with or without parole, the sentencing court was precluded from considering how Anthony was different from adults and how he was different from other children. Unless a court can consider these matters, the sentence will not be proportioned to the offender and offense.

C. **The South Carolina parole process does not provide a meaningful opportunity for release and is not an adequate substitute for individualized resentencing.**

The failure of the sentencing judge to have any discretion over Anthony's sentence is not cured by the fact that he received a parole eligible sentence of life. The South Carolina Board of Paroles and Pardons' ("the Parole Board") considerations do not come close to encompassing the Miller requirements. As such, our current parole system does not provide Anthony with a meaningful opportunity for release, making his sentence the functional equivalent of life without parole. Other jurisdictions have recognized the applicability of Miller to de facto life sentences, which may arise in at least two circumstances. The first is where a term of years or aggregate term of years sentence is imposed such that the sentence is tantamount to a life without parole sentence. See State v. Null, 836 N.W.2d 41, 70-74 (Iowa 2013) (holding that the principles of Miller applied to Null's fifty-two and a half year sentence and that "[t]he prospect of geriatric release, if one is to be afforded the opportunity for release at all" does not provide a meaningful opportunity for release); State v. Ragland, 836 N.W.2d 107 (Iowa 2013) (holding that gubernatorial commutation that provided possibility of parole after service of sixty years did not cure the unconstitutionality of life without parole sentence); Bear Cloud v. State, 334 P.3d 132, 135 (Wyo. 2014) ("[T]he teachings of the Roper/Graham/Miller trilogy require sentencing courts to provide an individualized sentencing hearing to weigh the factors for determining a juvenile's diminished culpability and greater prospects for reform when, as here, the aggregate sentences result in the functional equivalent of life without parole."); Casiano v. Commissioner, 115 A.3d 1031, 1044 (Conn. 2015) ("[T]he Supreme Court's focus in Graham and Miller was not on the label of a 'life sentence' but rather on whether a juvenile would, as a consequence of a lengthy sentence without the possibility of parole, actually be imprisoned for the rest of his life."); State

v. Ramos, 387 P.3d 650, 659 (Wash. 2017), *as amended* (Feb. 22, 2017), *cert. pending* May 23, 2017 ("Miller's reasoning clearly shows that it applies to any juvenile homicide offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation."); State v. Zuber, 152 A.3d 197 (N.J. 2017) ("Miller's command that a sentencing judge 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison,' applies with equal strength to a sentence that is the practical equivalent of life without parole." (internal citation omitted)); see also State v. Kimbrough, 212 S.C. 348, 357, 46 S.E.2d 273, 277 (1948) (holding that thirty year sentence for adult offender was "to all intents and purposes the equivalent of a life sentence"); United States v. Pileggi, 703 F.3d 675, 678 (4th Cir. 2013) (holding that the imposition of a fifty years sentence violated the government's extradition agreement that defendant would not be sentenced to death or life imprisonment). The second, as will be discussed more fully *infra*, is where the offender is eligible for parole but the parole process does not provide for individualized consideration of the defendant's juvenile status at the time of the offense and its attendant circumstances. Here, Anthony is serving the functional equivalent of a life without parole sentence due to the failure of our State's parole process to require such considerations in determining whether to parole a juvenile offender.

i. Other Jurisdictions Find Parole Inadequate to Remedy Unconstitutional Sentence

In Greiman v. Hodges, 79 F.Supp.3d 933 (S.D. Iowa 2015), the United States District Court for the Southern District of Iowa denied the government's motion to dismiss a federal section 1983 action where the petitioner alleged that the parole board summarily denied him parole based solely on the seriousness of his offense and failed to take into account his youth and demonstrated maturity and rehabilitation. Following Graham, Greiman's life without parole

sentence was revised by the Iowa court to one of life with parole, making him immediately parole eligible. 79 F.Supp.3d at 935-36. Greiman was twice denied parole, with the following explanation: "In view of the seriousness of the crime for which you were convicted, the Board believes that a parole at this time would not be in the best interest of society." Id. at 936. The Greiman Court did not reach the merits of whether the Iowa parole process is compliant with the constitutional mandate of Graham when applied to juveniles, as the issue before it was only whether there existed a cognizable claim for relief. Id. at 943-44. Even so, the Court made several important findings.

First, the Greiman Court recognized that the judge who revised Grieman's sentence had no discretion, such that "the ultimate length of Plaintiff's prison sentence will be determined by the [Iowa Board of Parole], because it alone has the authority to grant Plaintiff release." 79 F.Supp.3d at 943. As such, the Court found that the Board had "the responsibility for ensuring that Plaintiff receives his constitutionally mandated 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" Id. Secondly, the Court recognized the due process claim integral to Grieman's allegations. Grieman was not claiming that the Board applied fair and appropriate parole policies to him and reached the wrong conclusion on whether to grant parole. Id. at 945. Rather, he was asserting that the Board's existing procedures and policies deprive him of the "meaningful opportunity" to which he is entitled under Graham. Id. The Court agreed that while Graham stops short of guaranteeing parole, "it does provide the juvenile offender with substantially more than a *possibility* of parole or a mere hope of parole; it creates a categorical entitlement to demonstrate maturity and reform, to show that he is fit to rejoin society, and to have a meaningful opportunity for release." Id. (internal quotations omitted) (emphasis in original).

In Hayden v. Keller, 134 F.Supp.3d 1000 (E.D.N.C. 2015), the United States District Court for the Eastern District of North Carolina held that the North Carolina parole process did not provide meaningful opportunity for release where there was no distinction between juvenile and adult offenders, there was no notice and opportunity for the offender to be heard regarding maturity and rehabilitation, and data reflected unusually low parole rates for juvenile offenders. The Court summarized Hayden's argument:

> Hayden contends that, as a juvenile offender sentenced to a life sentence with parole, he is owed something that adult offenders are not: a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' Hayden further contends that the North Carolina Post–Release Supervision and Parole Commission ("Parole Commission" or "Commission") and their procedures do not afford him that opportunity.

134 F.Supp.3d at 1001. Though Hayden's convictions were for non-homicide offenses such that Graham was applicable, like Anthony, he was serving a sentence of life with the possibility of parole after twenty years. Id. The Court explained the North Carolina parole procedures and noted that "[t]hroughout this process, every felony offender—adult or juvenile—is reviewed in the same way." Id. at 1002-04, 1006. The offender is "an entirely passive participant" in the parole review process. Id. at 1011. Further, "[t]he Parole Commission gives no consideration to an offender's age at the time of the offense." Id. at 1004. The Court also benefited from statistical data reflecting a low or non-existent parole rate for juvenile offenders from 2010 to 2015. Id. at 1005.

The Hayden court analogized the reasoning of many courts that have held that Miller and Graham apply to lengthy term-of-years sentences or aggregate sentences, finding that "[t]he same principles apply here." 134 F.Supp.3d at 1007-09. "If a juvenile offender's life sentence, while ostensibly labeled as one 'with parole,' is the functional equivalent of a life sentence without parole, then the State has denied that offender the 'meaningful opportunity to

obtain release based on demonstrated maturity and rehabilitation' that the Eighth Amendment demands." Id. at 1009. Finding that the North Carolina parole review process for juvenile offenders serving a life sentence violated the Eighth Amendment, the court provided the parties with sixty days to "present a plan for the means and mechanism for compliance with the mandates of Graham . . . ." 134 F.Supp.3d at 1011.

Similarly, in Atwell v. State, 197 So.3d 1040 (Fla. 2016), the Florida Supreme Court held that the defendant's sentence of life with the possibility of parole violated the Eighth Amendment, as it effectively resembled a mandatorily imposed life without parole sentence under Florida's statutory parole process, which gave no consideration to the diminished culpability of juvenile offenders.[7] Practically speaking, an offender convicted of first-degree murder may have a presumptive parole release date from hundreds of months to nearly ten thousand months. 197 So.3d at 1048. This range of months, which encompasses hundreds of

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[7] The Florida parole process was summarized by the Atwell Court:

> An inmate who is eligible for parole has an initial interview with a hearing examiner. That examiner uses a salient factor score—a numerical score based on the offender's present and prior criminal behavior and related factors found to be predictive in regard to parole outcome—as well as the statutory severity of the inmate's offense to determine a corresponding range of months on a matrix that automatically indicates a range of presumptive parole release dates. The presumptive parole release dates are the earliest dates an offender may be released from prison as determined by objective parole guidelines . . . . The hearing examiner then makes a written recommendation to the Commission of a presumptive parole release date, which is reviewed by a panel of no fewer than two commissioners appointed by the chair.
>
> Subsequent parole interviews are conducted to determine whether information has been gathered that could affect the presumptive parole release date. When the inmate's presumptive parole release date nears and if the inmate's institutional conduct and parole release plan are satisfactory, the presumptive parole release date becomes the effective parole release date. The Commission then engages in a final review process to determine if release is still appropriate and will authorize or modify the effective parole release date accordingly.

Atwell v. State, 197 So.3d 1040, 1047-48 (Fla. 2016) (emphasis in original).

years, could be lawfully imposed without the Commission on Offender Review even considering mitigating circumstances. Id. The Commission is only required to consider mitigating and aggravating circumstances if it wishes to impose a presumptive parole release date that falls outside the given range of months. Id. Further, the enumerated mitigating and aggravating circumstances in the Florida Administrative Code, even if utilized, do not have specific factors tailored to juveniles. Id. "In other words, they completely fail to account for Miller." Id.

The Atwell Court articulated the question before it as whether "for those parole-eligible inmates who were juveniles at the time of the crime, . . . the principles articulated in Graham and Miller have any application?" 197 So.3d at 1046. Answering in the affirmative, the Court found that "this Court has—and must—look beyond the exact sentence denominated as unconstitutional by the Supreme Court and examine the practical implications of the juvenile's sentence, in the spirit of the Supreme Court's juvenile sentencing jurisprudence." Id. at 1047; see Aiken, 410 S.C. at 542-43, 765 S.E.2d at 576 ("[W]e must give effect to the proportionality rationale integral to Miller's holding—youth has constitutional significance. As such, it must be afforded adequate weight in sentencing."). Much like the prosecutor in the present case, the Atwell Court characterized the state's position as follows:

> The State argues that Atwell's sentence is not unconstitutional because Miller unambiguously applies only to mandatorily imposed life without parole sentences. Because Atwell's sentence is not "without parole," the State asserts, it is not unconstitutional under Miller. To the State, it is quite literally as simple as that.

Id. at 1046.

Recognizing that Atwell's life with parole sentence was mandatory in nature when imposed, the Court looked at whether the parole process provided an adequate means of complying with Miller. 197 So. 3d at 1042, 1047-50. The Court noted the language from Montgomery regarding parole as a possible remedy, which was the basis for the circuit court's

order in the present case, but noted that "the requirements of the parole process vary significantly from state to state." Id. at 1049. For example, legislation passed in California and West Virginia requires that specific consideration be given to the diminished culpability of juveniles in the parole process. Id. (citing Cal. Penal Code § 4801(c) (2013) and W.Va. Code § 62–12–13b(b) (2015)). In Florida, however, "there are no special protections expressly afforded to juvenile offenders and no consideration of the diminished culpability of the youth at the time of the offense. The Miller factors are simply not part of the equation." Id. Ultimately, the Atwell Court found that "[t]he current parole process . . . fails to take into account the offender's juvenile status at the time of the offense, and effectively forces juvenile offenders to serve disproportionate sentences of the kind forbidden by Miller." Id. at 1042. Atwell's case was accordingly remanded for resentencing. 197 So.3d at 1050.

In Diatchenko & Roberio v. Dist. Attorney for Suffolk Dist., 27 N.E.3d 349, 360-64 (Mass. 2015), the Massachusetts Supreme Court held that in order to ensure that the opportunity for release through parole is meaningful, in connection with a petition for release before the parole board, indigent inmates must have access to counsel and access to funds for expert witnesses. They must also be given an opportunity for judicial review of the decision on their parole applications. 27 N.E.3d at 364-66. In determining that these protections were necessary, the Court found that "the parole hearing acquires a constitutional dimension for a juvenile homicide offender because the availability of a meaningful opportunity for release on parole is what makes the juvenile's mandatory life sentence constitutionally proportionate." Id. at 365.

In Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision, 140 A.D.3d 34 (N.Y. App. Div. 2016), the Court held that the parole board had a constitutional obligation to consider youth and its attendant characteristics, in relationship to the crime, when making parole release

decisions for juveniles sentenced to life in order for the opportunity for release to be "meaningful." The Hawkins Court explained that although the Court had not specifically reviewed a case regarding a parole determination for a juvenile homicide offender, "it is axiomatic that such an offender still has a substantive constitutional right not to be punished with life imprisonment for a crime 'reflect[ing] transient immaturity.'" 140 A.D.3d at 38. "Further, the Court has made abundantly clear that the 'foundational principle' of the Eighth Amendment jurisprudence regarding punishment for juveniles is 'that [the] imposition of a [s]tate's most severe penalties on juvenile offenders cannot proceed as though they were not children.'" Id. The Hawkins Court found: **"A parole board is no more entitled to subject an offender to the penalty of life in prison in contravention of this rule than is a legislature or a sentencing court."** Id. (emphasis added).

Looking to the United States Supreme Court for guidance "as to the promise that a parole determination represents," the Hawkins Court found that "the relevant distinction between a constitutional and unconstitutional life sentence for a juvenile homicide offender—for all but the rare case of an irreparably corrupt juvenile—is that a constitutional sentence guarantees, at some point, a "meaningful opportunity to obtain release." 140 A.D.3d at 37-38. The Court held: "For those persons convicted of crimes committed as juveniles who, but for a favorable parole determination will be punished by life in prison, the Board ***must*** consider youth and its attendant characteristics in relationship to the commission of the crime at issue." Id. at 39 (emphasis added). Thus, the Court found that Hawkins was entitled to a de novo parole release hearing. Id.

In LeBlanc v. Mathena, 841 F.3d 256 (4th Cir. 2016), *as amended* (Nov. 10, 2016), *petition for cert. filed*, 841 F.3d 256 (U.S. Mar. 30, 2017) (No. 16-1177), the Fourth Circuit

Court of Appeals held that Virginia's geriatric release statute was not sufficient to comply with constitutional protections because it allows denial without consideration of a juvenile offender's maturity and rehabilitation.[8] The Court found that Graham established three minimum requirements for parole programs for juvenile non-homicide offenders sentenced to life:

> First, Graham held that such offenders must have the opportunity to obtain release based on demonstrated maturity and rehabilitation. Put differently, the juvenile offender must have a chance to later demonstrate that he is fit to rejoin society and that the bad acts he committed as a teenager are not representative of his true character. To that end, a parole or early release system does not comply with Graham if the system allows for the lifetime incarceration of a juvenile nonhomicide offender based solely on the heinousness or depravity of the offender's crime.
>
> Second, Graham held that the opportunity to obtain release must be meaningful, which means that the opportunity must be realistic and more than a remote possibility. Graham's meaningfulness requirement reflects the Supreme Court's long-standing characterization of parole as a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. Because parole is the normal expectation, it should be possible to predict, at least to some extent, when parole might be granted. To that end, Graham held that the availability of executive clemency did not satisfy the meaningful opportunity to obtain release requirement.
>
> Third, Graham held that a state parole or early release program must account for the lesser culpability of juvenile offenders: An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed. Accordingly, a state parole or early release system that subjects juvenile offenders to more severe punishments than their adult counterparts necessarily violates Graham.

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[8] Under Virginia's geriatric release program, an inmate who has reached age sixty must petition the Virginia Parole Board for geriatric release and provide "compelling reasons" for release. LeBlanc v. Mathena, 841 F.3d 256, 260 (4th Cir. 2016). During the "Initial Review" stage, the Virginia Parole Board has "unconstrained discretion" to "deny the petition ... based on a majority vote." Id. at 261-62. Virginia law does not specify what constitutes "compelling reasons," nor does it "require the Parole Board to consider any particular factors in conducting the Initial Review" or "set forth any criteria" for review of a prisoner's petition, which may be rejected "for any reason." Id. at 260-62. "If the Parole Board does not deny a petition at the Initial Review stage, the petition moves forward to the 'Assessment Review' stage." Id. at 262. At this stage, the Parole Board must consider certain "decision factors," which are enumerated in the Parole Board Policy Manual. Id.

841 F.3d at 266-67 (internal quotations and citations omitted).

Though the Fourth Circuit found that the North Carolina Supreme Court aptly recognized the aforementioned principles, it determined that the state court's adjudication constituted an "unreasonable application" of Graham. 841 F.3d at 268. The Court found: "It was objectively unreasonable to conclude that Geriatric Release satisfied Graham's requirement that juvenile offenders be able to obtain release 'based on maturity and rehabilitation,' when, under the plain and unambiguous language of the governing procedures, the Parole Board can deny every juvenile offender Geriatric Release for any reason whatsoever." Id. at 269 (emphasis in original). The Court also observed: "For purposes of Graham, the key issue is not whether the Parole Board is 'able' to consider a juvenile offender's rehabilitation and maturity—it is whether the Parole Board **must** consider rehabilitation and maturation." Id. at 271 n. 10 (emphasis added).

Most recently, the United States District Court for the District of Maryland denied the motion to dismiss in a federal section 1983 action attacking the constitutionality of the Maryland parole system as applied to juveniles serving life sentences. Maryland Restorative Justice Initiative v. Hogan, 2017 WL 467731 (D. Md. Feb. 3, 2017). The named plaintiffs were all serving life with parole, becoming eligible after either service of fifteen years of twenty-five years, for homicide offenses committed as juveniles. Id. at *5. The plaintiffs asserted that "although Maryland ostensibly provides parole eligibility for Juvenile Offenders serving life sentences, in practice under the Maryland parole system such sentences are converted into unconstitutional 'de facto' sentences of life without parole." Id. at *1. Notably, no juvenile lifer had been paroled in Maryland in the preceding twenty years. Id. The Court determined that the plaintiffs had sufficiently alleged that Maryland's parole system operates as a system of

executive clemency, in which opportunities for release are "remote," rather than a true parole scheme in which opportunities for release are "meaningful" and "realistic" as required by Graham.[9]

In reaching this decision, the District Court rejected defendants' argument that Graham, Miller, and Montgomery were not applicable because plaintiffs did not receive sentences of life without parole. 2017 WL 467731 at *19-24. The Court wrote: "The logic of LeBlanc indicates that, in the absence of 'permanent incorrigibility,' the rationale of Graham, Miller, and Montgomery applies to a Juvenile Offender sentenced to life with parole for a homicide offense." Id. at *24. Citing Greiman, the court explained that the responsibility for ensuring that plaintiffs received their constitutionally mandated "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" lies squarely with the state's parole process. Id. at *20. It reasoned that, in light of the promise in Graham and Montgomery that a meaningful opportunity for release extends to all juvenile offenders except for those whose crimes reflect permanent incorrigibility, "it is difficult to reconcile the Supreme Court's insistence that juvenile offenders with life sentences must be afforded a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation if the precept does not apply to the parole proceedings that govern the opportunity for release." Id. at *22.

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[9] In Maryland, parole is a discretionary system of conditional release administered by the Maryland Parole Commission (the "MPC"). Maryland Restorative Justice Initiative v. Hogan, 2017 WL 467731 *5 (D. Md. Feb. 3, 2017). The MPC considers special factors for juvenile offenders, including age, maturity, peer pressure, background, subsequent character development, and other factors or circumstances unique to juvenile offenders. Id. However, the Governor must approve a decision of the MPC to grant parole to an inmate who has served fewer than twenty-five years of a life sentence. Id. at *6. The governor may also "disapprove" release for an inmate who has served twenty-five years or more. Id. There are no statutory or regulatory provisions governing the Governor's exercise of discretion. Id. at *6, *26. According to the plaintiffs' allegations, although Maryland's governors have in the last two decades received recommendations for parole of twenty-four individuals serving life sentences, they have rejected every recommendation without explanation. Id. at *4.

ii. Inadequacies of South Carolina's Current Parole Process Prevent It From Substituting For Judicial Resentencing

In South Carolina, parole is a privilege, not a right. State v. Dingle, 376 S.C. 643, 649, 659 S.E.2d 101, 104 (2008). In Cooper v. SCDPPPS, 377 S.C. 489, 500, 661 S.E.2d 106, 112 (2008), our Supreme Court recognized that the Parole Board is the sole authority with respect to decisions regarding the grant or denial of parole. However, the Court found that "the Legislature created this Board to operate within certain parameters" and did not intended for it to "render decisions without any means of accountability." 377 S.C. at 500, 661 S.E.2d at 112. The Board is required to consider the factors outlined in S.C. Code Ann. § 24-21-640 and the factors listed in the Department's parole manual. Id. Additionally, the Board must also utilize an actuarial risk and needs assessment tool as prescribed in S.C. Code Ann. § 24-21-10(F).[10]

It is undisputed that Anthony became eligible for parole on January 23, 2014, after serving twenty years in prison. Regarding the purpose of parole, the SCDPPPS Board of Paroles and Pardons Policies and Procedures Manual ("SCBPP Manual") states:

> The purpose of parole is universally recognized to be reformatory or rehabilitative. Parole is intended as a means of rehabilitating then restoring the offender to society as a law-abiding and productive member. Under the structured supervision that parole sets up, the parolee has the opportunity to participate in a wide array of health and human services programs designed to help him/her. As an early-release mechanism, parole also serves to alleviate the high costs to the

[10] The SCDPPPS utilizes Correctional Offender Management Profiling for Alternative Sanctions, known as COMPAS. "Although COMPAS is used in a number of jurisdictions and purports to be 'statistically validated,' researchers from the University of California at Davis have called into question its reliability as a predictor of recidivism. Laura Cohen, Freedom's Road: Youth, Parole, and the Promise of Miller v. Alabama and Graham v. Florida, 35 Cardozo L. Rev. 1031, 1071 (2014). "In a 2007 study, they found that the instrument overemphasizes 'risk status,' or the static factors, like offense of conviction, that are immutable and measure comparative risk among a cohort of inmates." Id. "The study found little evidence, on the other hand, that COMPAS measured a prospective parolee's 'risk state,' or current propensity for recidivism." Id. at 1071-72. "In order to accurately predict re-offending, an evaluation tool must capture dynamic information about criminogenic needs and changes in 'risk state' over time." Id. at 1072. "COMPAS failed on both counts." Id.

state, and ultimately to the taxpayer, of keeping offenders in prison, not to mention the costs of building and operating new prisons. Further, parolees are required to pay supervision fees to help defray the cost of administering the parole system.

SCDPPPS, S.C. BOARD OF PAROLES AND PARDONS POLICY AND PROCEDURE MANUAL ("SCBPP Manual"), pp. 4-5 (Mar. 2, 2016), https://www.dppps.sc.gov/content/download/108825/2484762/file/PAROLE%2BMANUAL%2BMarch%2B2016%2BFINAL%2BVERSION.pdf.

The Parole Board is composed of seven members, each of whom is appointed by the Governor, with the advice and consent of the senate, to a six-year term. S.C. CODE ANN. § 24-21-10(B). A parole "panel" consists of three members of the Board. S.C. CODE ANN. § 24-21-30(A). Offenders convicted of a violent crime are scheduled for parole hearings before the full Board only. Offenders convicted of a non-violent crime may be scheduled for parole hearings before either the full Board or a three-member panel. S.C. CODE ANN. § 24-21-30(B).

The SCBPP Manual provides: "Because there is no federal constitutional right to parole, and because South Carolina's parole laws leave the decision to grant or deny parole entirely in the discretion of the Board, **very little is required in the way of procedural due process at parole hearings**." SCBPP Manual, p. 21 (emphasis added). Nonetheless, the Board acknowledges that it is required to provide parole eligible inmates: (a) the right to be heard for parole if eligible and the right to waive such hearing; (b) fair written notice of the specific parole criteria; (c) fair written notice of the date, time, and place of the parole hearing; (d) the opportunity to be heard by a fair and impartial Board or panel; (e) the opportunity to present evidence and to have up to three witnesses to speak on their behalf, and to have the Board or panel carefully consider the complete record before, during, and after imprisonment; (f) at the offender's own expense, to have an attorney present at the hearing; and (g) when parole is

denied, written notice of the Board's reasons for denying parole. SCBPP Manual, p. 21; see S.C. CODE ANN. § 24-21-640.

Regarding notice, an offender and other interested parties are provided at least thirty days notice of a parole hearing date. An offender is also provided written notice of their rejection for parole, which states the reasons for the decision and the date of the next parole hearing. SCBPP Manual, p. 21. Cases are prepared for review by the Department's Division of Field Operations and Office of Board Support Services. Before a hearing, the board or panel members receive a list of the offenders who will be appearing for a parole hearing, together with the respective parole file on each prisoner, no less than two weeks before the actual date of the hearing. SCBPP Manual, p. 22. According to the Manual, the information in the parole file includes, but it is not limited to:

> The criminal offense and a description of it; the sentencing date, the "max-out" date, the parole eligibility date, the date of any previous parole hearings, the names of any co-defendants; the offender's criminal record; the offender's prison and disciplinary records; risk classification reports; a medical history and psychological reports, if any; a history of the offender's supervision on probation or parole, if any; a proposed place of residence and employment; the parole examiner's recommendation(s); any statements from law enforcement; any statement from the prosecuting witness or the prosecuting witness's next of kin, if the witness is deceased; any statement from the solicitor or his successor; any statement from the sentencing judge; the offender's social history; the offender's employment experience.

SCBPP Manual, p. 22.

"Parole hearings are informal proceedings." SCBPP Manual, p. 22. The SCBPP Manual provides that hearings ***may*** be conducted in the following manner:

> The Department, through its Office of Board Support Services, schedules hearings. The names and case numbers of offenders who have been scheduled for a parole hearing are then published at the respective prisons where they are confined, so that they can begin preparing themselves for their hearing. The Department, through its parole examiners, then interviews these offenders, investigates their cases, and submits a recommendation for or against parole.

> At the hearing, the offender or offender's counsel, if any, appears first and presents to the Board or panel. The Department of Corrections sets the limit for family members or other supporters appearing on behalf of the offender, however, the Board may limit the number of speakers. Members of the Board or the panel may ask questions of the offender and his witnesses. The Chair or the member presiding over the panel leads the questioning. Once the case has been presented, the offender is excused from the hearing room, and those appearing in opposition to parole are given their opportunity to be heard. After the witnesses in opposition are heard, they are excused from the hearing room, and the Board or the panel then deliberates.
>
> After deliberations, a voice and/or electronic vote is cast and documented. The offender and the other interested parties are informed of the decision by Department staff. If the offender is rejected for parole, the Department gives a written notice of the reasons for rejection.

SCBPP Manual, pp. 22-23. Parole eligible offenders make their presentations to the Board from prisons throughout the state via video conferencing. If represented by counsel, the offender's attorney must also be allowed to be present at the hearing. SCBPP Manual, pp. 18, 23. There is no right to counsel or right to confrontation at a South Carolina parole hearing. SC Code Ann. § 24-21-50.

While the Board has sole and exclusive power to grant parole, by statute, "the board must carefully consider the record of the prisoner before, during, and after imprisonment." S.C. CODE ANN. § 24-21-640; SCBPP Manual, pp. 26-27. No prisoner may be paroled "until it appears to the satisfaction of the board: that the prisoner has shown a disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interest of society will not be impaired thereby; and that suitable employment has been secured for him." S.C. CODE ANN. § 24-21-640. The statute further requires the Board to "establish written, specific criteria for the granting of parole and provisional parole." Id. The criteria "must reflect all of the aspects of this section and

include a review of a prisoner's disciplinary and other records." Id. The criteria is also required to be made available to all prisoners at the time of their incarceration and the general public. Id.

The "specific parole criteria" are enumerated in the Parole Manual as follows:

(1) The risk that the offender poses to the community;
(2) The nature and seriousness of the offender's offense, the circumstances surrounding that offense, and the prisoner's attitude toward it;
(3) The offender's prior criminal record and adjustment under any previous programs of supervision;
(4) The offender's attitude toward family members, the victim, and authority in general;
(5) The offender's adjustment while in confinement, including his progress in counseling, therapy, and other similar programs designed to encourage the prisoner to improve himself;
(6) The offender's employment history, including his job training and skills and his stability in the workplace;
(7) The offender's physical, mental, and emotional health;
(8) The offender's understanding of the causes of his past criminal conduct;
(9) The offender's efforts to solve his problems;
(10) The adequacy of the offender's overall parole plan, including his proposed residence and employment;
(11) The willingness of the community into which the offender will be paroled to receive that offender;
(12) The willingness of the offender's family to allow the offender, if he is paroled, to return to the family circle;
(13) The opinion of the sentencing judge, the solicitor, and local law enforcement on the offender's parole;
(14) The feelings of the victim or the victim's family, about the offender's release;
(15) Any other factors that the Board may consider relevant, including the recommendation of the parole examiner.

SCBPP Manual, p. 28. Compare these broad factors that a judge is to consider at the post-Miller sentence-review hearing, pursuant to Aiken:

> (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."

Aiken, 410 S.C. at 544, 765 S.E.2d at 577. None of the factors considered by the Parole Board address the juvenile-specific factors listed above. Further, to the extent that some of the Miller factors could possibly fall under one of the broader enumerated categories, such as "the circumstances surrounding that offense," the consideration of the juvenile-specific factors is not required by the SCBPP Manual.

"In the case of violent offenders whose offenses occurred after January 1, 1986, the vote to grant parole must be by at least two-thirds of the members of the Board members present; however, only a quorum must be present to conduct business." SCBPP Manual, p. 29. The SCBPP Manual provides that "[a] denial of parole continues the status quo: the offender remains in prison until his next parole hearing or until he maxes out of his sentence." SCBPP Manual, p. 32. For violent offenders, their next parole hearing will be scheduled for two years after the date of the last hearing in which parole was denied, unless the law provides for annual review. SCBPP Manual, p. 33.

The SCBPP Manual recognizes that when the Board or a panel decides to deny parole, due process of law requires it to express its reasons for rejection in writing. SCBPP Manual, p. 32; Cooper v. SCDPPPS, 377 S.C. 489, 661 S.E.2d 106 (2008). In Cooper, our Supreme Court found that the Board's order was defective where it "neither offered an explanation nor indicated that it had considered the statutory criteria of section 24–21–640 and the fifteen criteria listed on the parole form." 377 S.C. at 500, 661 S.E.2d at 112. However, the Court suggested that in future parole hearings, "the Parole Board may avoid the result in the instant case if it clearly states in its order denying parole that it considered the factors outlined in section 24–21–640 and the fifteen factors published in its parole form." Id. The Court explained that "[i]f the Board

complies with this procedure, the decision will constitute a routine denial of parole and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure." Id.

To that end, the SCBPP Manual provides:

> [T]he Board or panel should begin by making some such general introductory statement as the following: "The Board (or the panel) is reasonably satisfied that (Offender's Name) does not at this time deserve a lessening of the rigors of imprisonment and that the interests of society will not be best served by granting parole now." After this general statement, the Board or the panel should then enumerate its reasons for denying parole. Due process requires that these reasons be sufficient to explain to the offender why he was denied parole. Further, due process also requires that the reasons for denying parole be rationally related to the written standards and criteria of parole which the Board has adopted and published.

SCBPP Manual, p. 32. The following reasons for denying parole are recognized by the Board as being "rationally related to the Board's published parole criteria":

> Nature and seriousness of the current offense; indication of violence in this or a previous offense; use of a deadly weapon in this or a previous offense; prior criminal record indicates poor community adjustment; failure to successfully complete a community supervision program; institutional record is unfavorable.

SCBPP Manual, p. 32. Thus, it appears that a juvenile offender can be denied parole based solely upon the seriousness of the offense.

In sum, contrary to the prosecutor's assertions otherwise, the SCBPP Manual does not provide for consideration of Enriquez's youth at the time of the offense. In fact, the administrative opinion in Enriquez's subsequent parole hearing makes clear that the Board does not consider the Miller factors in its decision making, finding that such consideration is not required by federal or state law. Enriquez v. SCDPPPS, Appellate Case No. 2017-001133 (Order Challenged on Appeal). On the contrary, the reasoning of Graham, Miller, Aiken, and Montgomery mandate consideration of an offender's juvenile status at the time of the offense

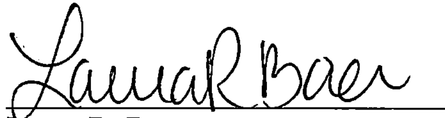
and his demonstrated maturity and rehabilitation in the parole process in order for it afford a meaningful opportunity for release. As it stands, our State's parole process does not fulfill the promises under Montgomery that parole consideration "ensures that juveniles who crimes reflected only transient immaturity – and who have since matured – will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment" and that "[t]he opportunity for release will be afforded to those who demonstrate the truth of Miller's central intuition—that children who commit even heinous crimes are capable of change." 136 S.Ct. at 736.

Of course, the Board can change its parole guidelines to incorporate the holding of Miller and account for the disadvantages of inmates who committed their crimes as children. Until it does so, however, Anthony's sentence of life without the possibility of parole for twenty years will violate the Cruel and Unusual Punishment Clause of the Eighth Amendment and the Cruel or Unusual Punishment Clause of article I, section 15 of the South Carolina Constitution. The circuit court erred in concluding that Anthony's sentence is not unconstitutional because he is parole eligible. Anthony is entitled to resentencing pursuant to Aiken where a judge can weigh the Miller factors and determine if Anthony is the kind of rare juvenile offender for whom life imprisonment is a proper punishment based on a finding of irreparable corruption, or if some lesser punishment is required under the facts and circumstances of this case.

CONCLUSION

Based on the foregoing, Appellant Anthony Enriquez respectfully requests that this Court reverse the circuit court's order denying his motion for resentencing and remand his case for resentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014).

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of June, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

JUN 07 2017

SC Court of Appeals

Appeal from Charleston County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

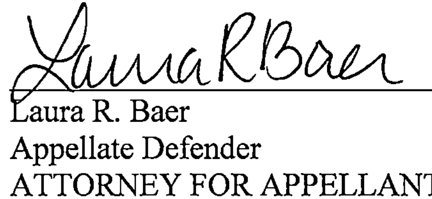
V.

ANTHONY M. ENRIQUEZ,

APPELLANT

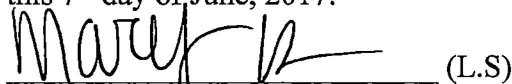
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Anthony M. Enriquez, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 7th day of June, 2017.



Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of June, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2017 .