ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Brian M. Gibbons, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

RONALD YATES HYATT,

APPELLANT

APPELLATE CASE NO 2016-001872

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in denying Appellant's request for re-sentencing where he received a *mandatory* sentence of life imprisonment *with* the possibility of parole, which is the functional equivalent of life imprisonment *without* the possibility of parole, because (1) the sentence does not afford a meaningful opportunity for release as evidenced by his repeated denials of parole for sixteen consecutive years and (2) the statutory scheme does not provide for consideration of the characteristics attendant to youth?

STATEMENT OF THE CASE

The state alleged that on August 17, 1981, sixteen-year old Appellant shot Buddy Plyler, who died as a result of the shooting. R. 5, ll. 1-3; R. 44-45. Appellant was charged with armed robbery as well. R. 32-36. Appellant was not alone during the armed robbery and murder. R. 32-36; R. 38-40. An adult, William Robert Horton, was with him.[1] R. 32-36; R. 38-40.

On August 24, 1981, the solicitor "moved for the case to be transferred from juvenile court to general sessions court." R. 5, ll. 4-6; R. 37. The following day, the Honorable Roddey L. Bell, granted the state's request. R. 5, ll. 6-8. According to the order, a hearing on the state's motion was held on August 25, 1981. R. 38-40. During the proceedings, Appellant was represented by Berry Mobley, and Frank Manning represented the state. R. 38-40.

The judge found a previous investigation and report completed "during his commitment to Reception and Evaluation" to be "a sufficient examination of the parentage and surroundings of the juvenile, his age, habits, and history" and "a sufficient inquiry into the home conditions, habits, and character of his parents or guardian." R. 38-40. Thus, despite the prior examination occurring almost a year before the transfer of jurisdiction hearing, the judge did not order "a mental and psychological examination of" Appellant. R. 38-40. Additionally, the judge did not require "a school report," or "a physical examination," finding those would not benefit him in making his decision. R. 38-40. Based upon the prior report, the judge determined Appellant was "sophisticated and mature in regards to the severity of the offense." R. 38-40.

Ultimately, the judge transferred jurisdiction, finding the seriousness of the alleged offenses "require[d] waiver." R. 38-40. In light of Appellant's prior offenses in 1980, which

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[1] According to the South Carolina Department of Corrections' website, William Robert Horton was found guilty of or entered guilty pleas to murder and armed robbery on December 16, 1981. Horton received identical sentences to Appellant. Although Horton was eligible for parole starting in March 1998, he has not been paroled.

included truancy, breaking and entering into a motor vehicle, petty larceny, forgery, and housebreaking, for which he received a probationary sentence, the judge determined Appellant's prospects for rehabilitation were "unlikely" in the juvenile justice system. R. 38-40. On August 26, 1981, Appellant was admitted to the state hospital for a determination of his capacity to stand trial. R. 41. According to the "Report of Finding of Mental Capacity," the Superintendent of the South Carolina State Hospital found Appellant was not mentally ill and was capable of assisting in his own defense on September 4, 1981. R. 41.

On December 7, 1981, a Lancaster County grand jury indicted Appellant for murder (1981-GS-29-829). R. 44-45. On December 16, 1981, sixteen-year old Appellant entered guilty pleas before the Honorable Richard E. Fields to murder and armed robbery. R. 5, ll. 8-10; R. 18; R. 32-36; R. 46. He was represented by Tyre Lee of the Public Defender's Office. R. 44-45. Judge Fields sentenced Appellant to imprisonment for "his lifetime," the only sentence permitted under the statute. R. 5, ll. 13-14; R. 46. The judge "recommended that he begin serving his sentence under the jurisdiction of the Dept. of Youth Services." R. 46.

In November of 2015, Appellant filed a motion for re-sentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). R. 2, ll. 1-5; R. 5, ll. 16-18; R. 18-31. According to Appellant, the sentencing judge "refused to entertain matter relating to school record, juvenile records, and other essential types of mitigating evidence." R. 18-31.[2] Certainly, those matters would have not mattered to the plea judge as the only sentence permissible under the statute was life. Appellant explained his desire for re-sentencing was to "have those matters relevant to his sentence" reviewed by a sentencing authority. R. 18-31. Appellant argued that section 16-3-

[2] Appellant explained that he had "a very low education and scholastic scoring level" demonstrating his low intellectual functioning and that he was "the product of a violent home," which included physical abuse. R. 18-31.

20(A) of the South Carolina Code, as it existed at the time of his offense, was unconstitutionally applied to him, and that his sentence of life with the possibility of parole violated the state and federal constitution's prohibitions on cruel and unusual punishments. R. 18-31. Appellant emphasized that the only sentencing options available at the time of his offense were death and life imprisonment with the possibility of parole. R. 18-31.

Michael H. Lifsey was appointed to represent Appellant in his request for re-sentencing. R. 2, ll. 5-25; R. 32-36. The Honorable Brian M. Gibbons presided over a hearing concerning the motion on June 16, 2016. R. 1. Lifsey appeared on behalf of Appellant, and Lisa Collins appeared on behalf of the state. R. 1. During the hearing, the state moved "for a summary dismissal" of Appellant's motion for re-sentencing. R. 3, ll. 7-10.[3] By an order filed August 16, 2016, Judge Gibbons held Appellant was not entitled to re-sentencing. R. 32-36.

According to the amended proof of service filed by appointed counsel, Appellant served his notice of appeal on September 8, 2016. This brief follows.

[3] According to the Clerk of Court records, the state did not file a formal written motion for dismissal.

ARGUMENT

The trial judge erred in denying Appellant's request for re-sentencing where he received a *mandatory* sentence of life imprisonment *with* the possibility of parole, which is the functional equivalent of life imprisonment *without* the possibility of parole, because (1) the sentence does not afford a meaningful opportunity for release as evidenced by his repeated denials of parole for sixteen consecutive years and (2) the statutory scheme does not provide for consideration of the characteristics attendant to youth.

Relevant facts

Hearing

During the hearing before Judge Gibbons, the state argued Appellant was "not within the class of people who [were] entitled to a reconsideration of sentencing and a hearing under Aiken v. Byars" because Appellant "was not actually sentenced to life without parole, he was sentenced to a lifetime in prison." R. 5, ll. 18-23. According to the state, "[a]t that time before 1996 a murder conviction was eligible for consideration for a parole after 20 years in the department of corrections if it was a non-death penalty case." R. 5, l. 23 – R. 6, l. 1. Further, the state informed the judge that "the probation and parole department" "confirmed" that Appellant "in fact, received 16 parole hearings since his parole eligibility." R. 6, ll. 4-7. Appellant "began attending parole hearings approximately 17 years into his life sentence." R. 6, ll. 7-8.

The state posited that the "essential goal" of Aiken "was to protect juvenile offenders from cruel and unusual punishment through a sentence with life without the possibility of parole." R. 6, ll. 8-12. The state argued "[t]he fact that the defendant has not been granted by the board - - parole by the parole board is not the issue here." R. 7, ll. 3-5. The issue, as the state saw it, was "to whom does the relief set forth in Aiken v. Byars apply." R. 7, ll. 5-6. The state

argued Appellant "quite simply [was] not within that class." R. 7, ll. 6-7; see also, R. 17, ll. 1-4. The state conceded that Appellant "was under the age of 18 at the time of his plea to murder at the time of his sentence," but maintained that because he was "parole eligible," he was not one of the "class" protected by Aiken. R. 7, ll. 7-10. Thus, the state asked the trial court to "summarily dismiss" Appellant's motion for re-sentencing "and rule" that Appellant was "not entitled to a full hearing" under Aiken. R. 7, ll. 13-16.

Appellant argued that the "whole focus" of Aiken was that "children are different." R. 7, ll. 18-21. Appellant fell into the class of offenders protected by Aiken because he was sixteen-years old at the time of the offense. R. 7, ll. 21-23. Prior to court's sentencing on juvenile offenders, the court must consider

> the hallmark features of youth, which include maturity, being impetuous and not considering the risk and consequences, the family and home environment of the offender, the circumstances of the homicide offense including the extent of [the] offender's participation in the conduct, and how other co-defendants might have exerted peer pressure on him, the incompetencies of youth, which include both his dealings with police officers and prosecutors, but also his ability to assist his counsel.

R. 8, ll. 4-14. Defense counsel argued that consideration of these factors "certainly were not recognized in 1981" when Appellant was sentenced. R. 8, ll. 14-18.

Defense counsel "concede[d]" that Appellant did not "fall within the plain language" of Aiken, but argued Appellant was entitled to a new sentencing hearing for consideration of the factors. R. 8, ll. 18-23; R. 9, ll. 9-11. According to defense counsel, and the state, under the statute for murder in existence at the time of Appellant's sentencing, "the only possibility was a life sentence." R. 8, l. 23 – R. 9, l. 1; R. 11, ll. 20-24 (explaining the only sentences for murder were life and death). Therefore, the sentencing judge "did not have the option of setting a specific term of years for his release" even if the judge thought a term of years was the proper

sentence. R. 9, ll. 3-6. Additionally, defense counsel argued Appellant was "serving a de facto life sentence" because he had served thirty-five years in prison and had been denied parole "16 times." R. 9, ll. 6-9. The "reasoning" of the South Carolina Supreme Court and the United States Supreme Court "extend[ed] to someone who [was] serving a sentence which ha[d] the practical [e]ffect of a life sentence." R. 9, ll. 11-16.

Appellant echoed defense counsel's sentiments regarding the de facto life sentence, explaining that the continuous denial of parole amounted to "life without parole." R. 10, ll. 5-10. He explained that he was spending the rest of his life in prison, which constituted cruel and unusual punishment. R. 10, ll. 10-14.

The state countered, arguing that the point of the prior decisions was that

> if it's a life sentence without the possibility of parole, that there is no sentencing authority, there is no body to hear - - or a body of people to hear and consider and weigh, has there been reform? Has there been remorse? Has there been - - what factors played in? Whether that has been not only the behavior while he's been in the department of corrections but what factors played into it.

R. 12, ll. 7-17. According to the state, "the bottom line" was that "an authority" "each year revisits this case and makes the decision whether or not the defendant should be granted parole." R. 12, l. 22 – R. 13, l. 1. In the state's estimation, Appellant was "getting the relief" from what Aiken "looks at as being cruel and unusual" because he had parole hearings. R. 13, ll. 1-5. "The proper body to consider the position and the sentence of the defendant is doing so every year, every year as to whether or not he should be released." R. 13, ll. 17-19.

The judge inquired about the "parole rate" for those with "older life sentence[s]." R. 10, ll. 15-17. According to the judge, the parole rate, specifically for the life sentences with parole eligibility, was "an important factor" for consideration, especially, in light of the argument that Appellant's sentence "technically may not be life without parole." R. 10, l. 24 – R. 11, l. 6.

Defense counsel was unaware of the rate, but explained that "as of about 10 years ago ... the overall denial of parole rate was about 91 percent." R. 10, ll. 18-21. When defense counsel asked for the record to be left open so that he could submit evidence regarding the parole rate, the judge reversed course, stating "whether or not parole is granted is really not the issue." R. 14, ll. 2-19.[4] According to Judge Gibbons, "the process" was "the issue." R. 14, l. 19.

On this point, the judge elaborated, finding "[t]he process of somebody being allowed an opportunity to be heard concerning being able to get out of jail, that is what is protected by the [C]onstitution." R. 14, ll. 20-23. According to the judge not providing someone with "that process," was "cruel and unusual because of the hallmarks of the youth, et cetera, et cetera." R. 14, l. 23 – R. 15, l. 1. While defense counsel agreed with the judge "generally," counsel noted that if the possibility of parole was actually an "impossibility or an almost impossibility," then the sentence would not satisfy the Eighth Amendment without consideration of the factors. R. 15, ll. 2-7. Counsel argued that Appellant's sentence provided for "parole eligibility in name only." R. 15, ll. 7-11. Ultimately, the judge decided he did not "need to see a chart or data or statistics" to resolve the issue. R. 17, ll. 7-9.

Order denying re-sentencing

By an order filed August 16, 2016, Judge Gibbons denied Appellant's request for re-sentencing. R. 32-36. Judge Gibbons found that Appellant was sixteen-years old at the time of the offense, and his co-defendant was nineteen-years old at the time. R. 32-36. The judge further found that at the time of Appellant's "charge and plea hearing, South Carolina law allowed a life sentence for murder to be eligible for parole." R. 32-36. Appellant "was eligible for parole after serving approximately seventeen (17) years of his sentence." R. 32-36. Citing

[4] The state objected to the parties submitting data and requested "to have a representative from" "the probation and parole department in Columbia" testify. R. 16, ll. 2-16.

the records of SCDC, the court noted Appellant's "eligibility for parole began in April of 1998." R. 32-36. Finally, the judge found Appellant "is considered for parole every year" and had "in fact had sixteen (16) parole hearings and ha[d] been rejected for parole at all of them." R. 32-36.

Considering Miller v. Alabama, 132 S.Ct. 2455 (2012) and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), Judge Gibbons concluded that the "essential goal" of the cases "was to protect juvenile offenders from unconstitutional cruel and unusual punishment through a sentence of life in prison without parole – the key element being life in prison without parole." R. 32-36 (emphasis in original). He determined that "[t]he holding in Aiken v. Byars does not apply" to Appellant because "he did not receive a sentence of life imprisonment without the possibility of parole." R. 32-36. The judge emphasized that Appellant "is afforded the opportunity to have his case reviewed every year by the Parole Board, and is given the possibility of parole every year." R. 32-36. Based upon this fact, the judge concluded Appellant was "not within the class of offenders for whom Aiken v. Byars provides for resentencing hearings." R. 32-36.

Judge Gibbons "specifically" rejected Appellant's argument that he was "in effect serving a sentence of life without parole as the Parole Board has rejected" his application for parole each year for the past sixteen years. R. 32-36. The basis for rejecting the argument was that Aiken and Miller apply only to "juvenile offenders who are serving 'life in prison without possibility of parole.'" R. 32-36 (emphasis in original). Judge Gibbons found Appellant "clearly has the possibility of parole, and that possibility comes to fruition each year when the Parole Board reviews" his "case and considers him for parole." R. 32-36. Based upon this rationale, the judge granted the state's motion to summarily dismiss the motion for re-sentencing. R. 32-36.

Discussion

Introduction

"[C]hildren are constitutionally different from adults for purposes of sentencing." Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 2464 (2012). On June 25, 2012, the United States Supreme Court held mandatory sentences of life without parole (LWOP) imposed upon juveniles violated the Eighth Amendment to the United States Constitution. Id. Beginning in 2005 with its decision in Roper v. Simmons, 543 U.S. 551 (2005), the Supreme Court began a steady evolution of juvenile justice jurisprudence applicable to the states and federal government. In Roper, the Court held death sentences for juveniles were cruel and unusual punishment. Four years later, the Court held that a LWOP sentence imposed upon a juvenile for a non-homicide offense violated the Eighth Amendment's ban on cruel and unusual punishment. Graham v. Florida, 560 U.S. 48 (2010). Not surprisingly, when presented with the question of whether mandatory LWOP sentences for juveniles in homicide cases violated the Eighth Amendment, the Supreme Court held they did. Miller, 132 S.Ct. at 2464.

"To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" Graham, 560 U.S. at 58 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)). "Embodied in the Constitution's ban on cruel and unusual punishment is the 'precept of justice that punishment for the crime should be graduated and proportioned to [the] offense.'" Id. at 59 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)). Over the years, the cases addressing the proportionality of sentences have developed along two general lines. The first is concerned with the particular circumstances of the case and whether the defendant's sentence for a term of years is grossly disproportionate given the particular offense. Graham, 560 U.S. at 59; Harmelin v.

Michigan, 501 U.S. 957, 1005 (1991). The second classification of cases is concerned with categorical rules as applied to groups of offenses or groups of offenders. Graham, 560 U.S. at 60-61. For example, Supreme Court categorical rulings related to categories of offenses prohibit the imposition of the death penalty for non-homicide crimes against individuals. Kennedy v. Louisiana, 554 U.S. 407 (2008). Categorical rulings prior to Graham prohibited the death penalty for defendants who committed their crimes before the age of eighteen, Roper v. Simmons, 543 U.S. 551 (2005), or whose suffered from intellectual disability, Atkins v. Virginia, 536 U.S. 304 (2002).

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

It was upon this backdrop that the United States Supreme Court decided Roper, Graham, and Miller. Not long after the Court's opinion in Miller, our Supreme Court reviewed non-mandatory life sentences for juveniles in South Carolina through the lens of Eighth Amendment jurisprudence. In Aiken v. Byars, 410 S.C. 534, 540-541, 765 S.E.2d 572, 575-576 (2014), the South Carolina Supreme Court held that Miller applied retroactively and to juveniles who were sentenced to non-mandatory terms of life without parole. Finding that "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," the Court held the sentencing judge must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" and that this requirement "deserves universal application." Id. at 543, 765 S.E.2d at 577. Id. (internal quotations omitted). The Court held the class of petitioners in the case "and those similarly situated" were "entitled to resentencing to allow the inmates to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight." Id. at 544, 765 S.E.2d at 577.

Following Miller, courts have confronted the question of what constitutes a "life without parole sentence," particularly, in light of the Court's mandate that juvenile offenders *must* be afforded a *meaningful opportunity* for release unless there has been a finding of irreparable corruption. In order to answer this question, a review the evolution of the Court's Eighth Amendment jurisprudence as it applies to juveniles is of assistance and of particular import to Appellant's appeal.

No death penalty for children

In Roper, the Supreme Court established a categorical ban on the death penalty for juveniles relying in large part on social science research indicating that youths have a lessened culpability and are less deserving of the most severe punishments. 543 U.S. at 569-75. Juvenile offenders are fundamentally different from adults for purposes of sentencing for three reasons: (1) they are immature and have "an underdeveloped sense of responsibility;" (2) they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;" and (3) their characters are "not as well formed" as adults. Id. at 569-70 (internal citations omitted). "It is

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

No LWOP for children convicted of non-homicide offenses

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

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

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

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

> [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults. It remains true that from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Id. at 68 (internal citations omitted).

The Court explained the decision was "necessary to prevent the possibility that life without parole sentences will be imposed on juvenile non-homicide offenders who are not sufficiently culpable to merit that punishment." Id. at 74. Although "[a] state is not required to guarantee the eventual freedom to a juvenile offender convicted of a non-homicide crime," the state must "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. "[W]hile the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile non-homicide offender, it does not require the state to release that offender during his natural life." Id. at 75. "The Eighth Amendment does not foreclose the possibility that persons convicted of non-homicide crimes committed before adulthood will remain behind bars for life. It does forbid states from making the judgment at the outset that those offenders never will be fit to reenter society." Id.

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

Finally, the Graham Court concluded that its new categorical rule "gives all juvenile non-homicide offenders a chance to demonstrate maturity and reform." Id. at 79. "Life in prison without the possibility of parole gives no chance for reconciliation with society, no hope." Id. However, "[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual." Id. By imposing a "categorical rule against life without parole for juvenile non-homicide offenders," the Court avoided "the perverse consequences in which the lack of maturity that led to an offender's crime is reinforced by the prison term." Id.

No mandatory LWOP sentences for children

In Miller, supra, the United States Supreme Court continued the evolution of Eighth Amendment jurisprudence. The Court extended the reasoning of Roper and Graham by holding that mandatory sentences of life without parole for juvenile homicide offenders also violates the Eighth Amendment's prohibition on cruel and unusual punishment. Miller, 132 S.Ct. at 2460. This was a categorical ban. However, the Court further explained that while the decision did not foreclose imposition of a sentence without the possibility of a parole on a juvenile convicted of a homicide offense, the Court required the sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 2469.

The Miller Court reserved ruling on whether juveniles could ever be sentenced to LWOP. Id. at 2469. The Miller Court repeatedly focused on the notion that the character traits of children are "more transitory and less fixed." Id. at 2464. Children by definition lack maturity and responsibility; thus, they are more likely to act with "recklessness, impulsivity, and needless risk-taking." Id. The Court eloquently explained that due to the innate characteristics of children at large, there is a "great difficulty ... 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." In fact, the Court stated "incorrigibility is inconsistent with youth." Id. at 2469. The Court emphasized the potential for reform present in all juveniles. The Court emphasized the mitigating qualities of youth and noted "[i]t is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.'" Id. at 2467(quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

Although the Miller Court did not hold LWOP to be an unconstitutional sentence in non-mandatory sentencing schemes, the Court held Eighth Amendment jurisprudence governing imposition of death sentences applied equally to cases involving juveniles facing the possibility of LWOP. Id. at 2470. The Court's decision created a presumption against LWOP sentences for juveniles, and most importantly, the Court imported the principles of capital sentencing into cases where juveniles face the possibility of LWOP. Specifically, the court explained that "death is different" and "children are different too." Id. at 2470.

"The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" Id. at 2463 (quoting Roper, 543 U.S. at 560). The Miller Court emphasized that "proportionality is central to the Eighth Amendment." Id. (quoting Graham, 130 S.Ct. at 2021). Focusing on the concept of individualized sentencing, the Court recognized "that children are constitutionally different from adults for purposes of sentencing." Children "have diminished culpability and greater prospects for reform," and therefore, "'they are less deserving of the most severe punishments.'" Id. at 2464 (quoting Graham, 560 U.S. at 68). "[T]he distinctive attributes of youth diminish penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Id. at 2465. As a result, "[a]n offender's age is relevant to the Eighth Amendment." Graham, 560 U.S. at 76. In light of the relevance to the ban on cruel and unusual punishment, "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." Miller, 132 S.Ct. at 2466.

Mandatory sentencing prevents the sentencer from considering the juvenile offender's "chronological age and its hallmark features, among them, immaturity, impetuosity, and failure to appreciate risks and consequences," the offender's family and home environment, the extent of the

offender's conduct in the offense and the way familial and peer pressures may have affected him. Id. at 2468. The Court required sentencers "to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 2469. Thus, it is clear that sentencing authorities *must* consider a juvenile offender's age and consideration of such *must* be a mitigating factor.

No non-mandatory LWOP sentences for juveniles & Retroactivity

In Aiken v. Byars, 410 S.C. 534, 540-541, 765 S.E.2d 572, 575-576 (2014), the South Carolina Supreme Court held that Miller applied retroactively and to juveniles who were sentenced to non-mandatory terms of life without parole. According to the Court, Miller "unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole." Id. at 542, 765 S.E.2d at 576. Thus, the Court determined "an individualized sentencing proceeding before imposing a sentence of life without parole on a juvenile offender" was required. Id. Recognizing that Miller "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," the South Carolina Supreme Court held it "must give effect to the proportionality rationale integral to Miller's holding – youth has constitutional significance." Id. at 542-543, 765 S.E.2d at 576. Therefore, youth "must be afforded adequate weight in sentencing." Id. at 543, 765 S.E.2d at 576.

The Court found the Miller decision "clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution." Id. at 543, 765 S.E.2d at 576-577. Quite simply, the Court concluded "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. Accordingly, the Court held the requirement that sentencing judge must "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. (internal quotations omitted). The Court held the class of petitioners in the case "and those similarly situated" were "entitled to resentencing to allow the inmates to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight." Id. at 544, 765 S.E.2d at 577.

The sentencing court must consider the following factors in crafting a sentence proportional to the offense and the juvenile offender:

> (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 S.E.2d at 577 (internal quotations omitted). While not requiring the sentencing proceedings to "mirror the penalty phase of a capital case," the Court determined "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 S.E.2d at 577.

Two years after the South Carolina Supreme Court's decision in Aiken, the Supreme Court of the United States addressed the retroactivity question of Miller. Montgomery v. Louisiana, 136 S.Ct. 718 (2016). In line with our Court's Aiken opinion, the High Court held that

Miller announced a new substantive constitutional rule that was retroactive on state collateral review. Montgomery, 136 S.Ct. at 732-36. However, the Court's opinion answered more than the retroactivity question.

In 1963, Henry Montgomery was seventeen-years old. Id. at 725. He shot and killed a deputy sheriff. Id. He was sentenced to death for the crime, but his conviction was reversed by the state supreme court. Id. Upon re-trial, the jury returned a verdict of guilty without capital punishment. Id. According to state law, the judge was required to impose LWOP. Id. at 726. "The sentence was automatic upon the jury's verdict, so Montgomery had no opportunity to present mitigation evidence to justify a less severe sentence." Id. At the time of his appeal to the United States Supreme Court, Montgomery was sixty-nine years old, having "spent almost his entire life in prison." Id.

When Montgomery challenged his sentence based upon the Miller decision, the state court held he was not entitled to relief because Miller was not retroactive on collateral review. Montgomery, 136 S.Ct. at 727. In deciding that Miller's prohibition on mandatory life without parole for juvenile offenders announced a new substantive rule that must be retroactive, the Court revealed much about its prior opinion in Miller. Montgomery, 136 S.Ct. at 732. "The 'foundation stone' for Miller's analysis" was the "Court's line of precedent holding certain punishments disproportionate when applied to juveniles." Montgomery, 136 S.Ct. at 732. The "starting premise" is the "principle" "that children are constitutionally different from adults for purposes of sentencing" that "result from children's diminished culpability and greater prospects for reform." Id. (internal quotation omitted).

The Court further noted Miller recognized "that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and

life without parole is justified." Montgomery, 136 S.Ct. at 733. However, "in light of children's diminished culpability and heightened capacity for change, Miller made clear that appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Id. at 733-34 (internal quotations omitted). Therefore, 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." Id. at 734 (internal quotations omitted).

"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." Id. (internal citations and quotations omitted). Miller barred "life without parole" "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." Id. "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).

"A hearing where youth and its attendant characteristics are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." Id. at 735. It is the hearing that "gives effect to Miller's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." Id. The Court concluded that Montgomery and others 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.

Important for Appellant's case, the Montgomery Court explained that "[g]iving Miller retroactive effect" "does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole." Montgomery, 136 S.Ct. at 736. For example, a State "may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." Id. "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.

> Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. 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. As evidenced by the decision, extending parole eligibility to juvenile offenders convicted of homicide offenses must *not* be viewed as a panacea. In order for parole eligibility to remove a life sentence from the scope of Miller, parole considerations must include the Miller factors, specifically, accepting that "children who commit even heinous crimes are capable of change." In other words, the nature of the crime *alone* must not prevent release in order for the parole scheme to comply with Miller and the Eighth Amendment's prohibition on cruel and unusual punishments.

Having set the scene established by the decisions of the Supreme Court of the United States and the South Carolina Supreme Court, the answer to the question initially posed – what constitutes a "life without parole sentence," particularly, in light of the Court's mandate that juvenile offenders *must* be afforded a *meaningful opportunity* for release unless there has been a finding of irreparable corruption – becomes clear. The Eighth Amendment bars not only

"literal" LWOP sentences, but it also bars sentences that are the "functional equivalent" of LWOP sentences, unless the sentencer considered the Miller factors. This is particularly so where such a sentence was mandatory. Finally, a parole system that does not consider the Miller factors cannot save a sentence that is the functional equivalent of a life sentence from the Eighth Amendment's prohibition on cruel and unusual punishment.

Lessons learned – the functional equivalent of life sentences

The South Carolina Supreme Court recognized the concept of a sentence that is the "functional equivalent" of a life sentence in State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948). The Court explained that when a judge exercises his discretion in sentencing a defendant following a jury's recommendation of mercy, the judge must sentence the defendant to a term of years that will not exceed the life expectancy of the defendant unless the record disclosed some reasonable basis for disregarding the jury's verdict. Id. at 356, 46 S.E.2d at 277. The jury's recommendation of mercy was a finding that the defendant should not receive the maximum punishment of life imprisonment; however, the judge's sentence of thirty years' imprisonment was for "all intents and purposes the equivalent of a life sentence." Id. at 357, 46 S.E.2d at 277. Where the record revealed nothing to justify the trial court's disregarding the jury's recommendation, the Supreme Court held the sentence was "manifestly too severe." Id. Thus, our Court has recognized that consideration of a defendant's life expectancy is necessary when fashioning a sentence when the intent of the sentence is to allow the defendant a meaningful opportunity to obtain release

Several states examining sentencing schemes involving juveniles have concluded that certain terms-of-years sentences violate the Eighth Amendment's ban on cruel and unusual punishment. Essentially, those courts have found that the term-of-years failed to offer the juvenile

offender an opportunity to obtain release before the end of his expected life span. Thus, those sentences were the *functional equivalent* of a sentence of life without the possibility of parole.

Some states have examined the parole schemes available as well to determine whether parole eligibility "saved" a lengthy term-of-years sentence or a life sentence. Those courts have found that parole systems must consider the Miller factors in order to survive Eighth Amendment challenges and that lengthy term-of-years sentences that require substantial periods of incarceration prior to parole eligibility violate the Constitution as those sentences are the functional equivalent of life imprisonment without the possibility of parole.

California

In People v. Caballero, 282 P.3d 291 (Cal. 2012), the Supreme Court of California held that term-of-years sentences that extend beyond a juvenile's life expectancy and are imposed for non-homicide offenses, violate the Eighth Amendment pursuant to reasoning announced in Graham. The California Supreme Court held "that sentencing a juvenile offender for a non-homicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." Caballero, 282 P.3d at 295. The court recognized that "the proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future." Id. The court further directed that, when sentencing juvenile offenders, California courts must consider the defendant's age and mental development in order to impose an appropriate time when the juvenile will be able to seek parole from the parole board. Id.

Subsequently and significantly, in People v. Franklin, 370 P.3d 1053, 1060 (Cal. 2016), the California Supreme Court held a "juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in Miller." Additionally, the court determined that a legislative "fix" to that state's Miller problem, which amended Franklin's sentence to life with parole eligibility during the twenty-fifth year of his sentence, rendered the appeal moot. Id. at 277. "Crucially," the legislative enactment required "the [Parole] Board not just to consider but to give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." Id. (internal quotation omitted). The court remanded for the trial court to determine if Franklin had "sufficient opportunity" to make a record of information relevant to his eventual youth offender parole hearing. Id. at 284. Additionally, the court determined "it would be premature" "to opine on whether" the parole hearing procedures or practices conformed to the dictates of statutory and constitutional law where the Board had yet to revise existing regulations to conform with the newly enacted statute for youth offender parole. Id. at 286.

Connecticut

In Casiano v. Commissioner, 115 A.3d 1031, 1036-1037 (Conn. 2015), the Supreme Court of Connecticut held that Miller's "reasoning extend[ed] beyond mandatory sentencing schemes." According to the court, "[t]he individualized sentencing requirement in Miller" created "a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances." Id. at 1037 (internal quotations and citations omitted). Further, the court held "the imposition of a fifty-year sentence without the possibility of parole" was "subject to the sentencing procedures set forth in Miller." Id. at

1044. According to the court, "the 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." Id. (internal quotation omitted).

Determining that United States Supreme Court's "viewed the concept of 'life' in Miller and Graham was more broadly than biological survival," the court found the High Court "implicitly endorsed the notion that an individual is effectively incarcerated for 'life' if he will have no opportunity to truly reenter society or have any meaningful life outside of prison." Id. at 1046. Accordingly, the court held that "[i]n light of the foregoing statistics and their practical effect, a fifty year term and its grim prospects for any future outside of prison effectively provide a juvenile offender with no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." Id. at 1047. The Court was "persuaded that the procedures set forth in Miller must be followed when considering whether to sentence a juvenile offender to fifty years imprisonment without parole." Id. at 1048.

Florida

The Florida Court of Appeals found a juvenile's aggregate sentence of eighty years violated the Eighth Amendment's cruel and unusual punishment clause because it was the functional equivalent of a life sentence without parole. Floyd v. State, 87 So.3d 45 (Fla. Dist. Ct. App. 2012). Floyd was seventeen years old when he stole a car and committed two armed robberies. Initially, Floyd was sentenced to life imprisonment on the armed robbery charges. Id. at 45. After Graham, Floyd was re-sentenced to consecutive forty-year sentences on the armed robberies. Id. at 45-46. If Floyd served the entirety of his sentence, he would be ninety-seven years old when released. The earliest Floyd could be released was age eighty-five. Id. at 46. According to the court, "[t]his

situation does not in any way provide [Floyd] with a meaningful or realistic opportunity to obtain release." Id. By sentencing Floyd to eighty years, the trial court "impermissibly" decided at the outset that Floyd will never be fit to reenter society. Id. "[C]ommon sense dictates that [Floyd]'s eighty-year sentence, which according to the statistics cited by [Floyd] is longer than his life expectancy, is the functional equivalent of a life without parole sentence and will not provide him with a meaningful or realistic opportunity to obtain release." Id. at 47.

In Atwell v. State, 197 So.3d 1040 (Fla. 2016), the Florida Supreme Court confronted a sentence very much like the one in the instant matter. In 1992, Atwell was convicted of first-degree murder when he was sixteen years old. Id. at 1043. The only sentencing options were death or life in prison with the possibility of parole after twenty-five years. Id. The Commission on Offender Review conducted a parole hearing on June 10, 2015, which was twenty-five years after Atwell was sentenced. Id. at 1044. The Commission set a "presumptive parole release date of December 27, 2130, with another interview in February 2022." Id. The "presumptive parole release date" may be changed only for reasons of institutional conduct or acquisition of new information. Id. "Clearly," the release date in 2130 "far exceed[ed] Atwell's life expectancy." Id.

In determining whether Graham and Miller had any application to those individuals sentenced to life *with* the possibility of parole, the Florida Court explained it had "consistently followed the spirit of" the cases "rather than a narrow, literal interpretation." Id. at 1046. The court held it "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.

Next, the court examined the Florida parole system to "determine whether the eligibility for

parole removes a sentence from the purview of Graham and Miller." Id. Under the system, "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" was used to determine "a range of presumptive parole release dates." Id. The numerical score gave "primary weight" to the seriousness of the inmate's present criminal offense and past criminal record. Id. at 1048. Although the statutes permitted consideration of the aggravating and mitigating circumstances to permit a decision outside a given range, the court explained "none" provided "for the level of consideration of diminished culpability of youth at the time of the offense as sentencing judges now consider post-Miller." Id. The court explained consideration of mitigating and aggravating circumstances was "only required" when the Commission "wishe[d]" to impose a presumptive parole release date outside the given range. Id. Additionally, the "enumerated mitigating and aggravating circumstances," "even if utilized, [did] not have specific factors tailored to juveniles. In other words, they completely fail to account for Miller." Id.

According to the court, "[a] presumptive parole release date set decades beyond a natural lifespan is at odds with the Supreme Court's recent pronouncement in Montgomery." Id. Recognizing that a state may remedy a Miller violation by providing for parole for juvenile offenders, the court held the parole system must account for the Miller factors. Id. Florida's parole system permitted a juvenile who committed an offense to be subject to one of the harshest penalties without consideration of the mitigating circumstances. Id. at 1049. In Florida, parole was an "act of grace," not a right. Id. The statutory scheme provided for "no special protections expressly afforded to juvenile offenders and no consideration of the diminished capacity of the youth at the time of the offense." Id. "The Miller factors are simply not part of the equation." Id. The court concluded that Atwell's "sentence effectively resemble[d] a mandatorily imposed life without

parole sentence, and he did not receive the type of individualized sentencing consideration Miller requires." Id. "The only way to correct Atwell's sentence" was "to resentence Atwell in conformance" with newly enacted Florida statutory law created to comply with Miller and Graham by providing for judicial sentence review hearings at which the court is required to consider the Miller factors. Id.

Iowa

In State v. Null, 836 N.W.2d 41, 70-74 (Iowa 2013), using its state constitution, the Iowa Supreme Court held that the principles of Miller apply to juveniles sentenced to a lengthy term of years, which included Null's 52.5 year sentence. According to the court, "[e]ven if lesser sentences than life without parole might be less problematic," "the juvenile's potential future release in his or her late sixties after half a century of incarceration" was not "sufficient to escape the rationales of Graham or Miller." Id. at 71. "The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by Graham." Id. (internal citation omitted). The court concluded that "Miller's principles are fully applicable to a lengthy term-of-years sentence as was imposed in this case because an offender sentenced to a lengthy term-of-years sentence should not be worse off than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under Miller." Id. at 72. According to the court, a narrow reading of Miller would "avoid the basic thrust of Roper, Graham, and Miller by refusing to recognize the underlying rationale of the Supreme Court is not crime specific." Id. at 72-73.

In State v. Ragland, 836 N.W.2d 107 (Iowa 2013), the Iowa Supreme Court addressed whether a sentence providing for the possibility of parole after sixty years in prison warranted re-

sentencing. When Ragland was convicted of murder as a seventeen-year old, he was sentenced to a mandatory term of LWOP. Id. at 110. After the Miller decision, the governor commuted Ragland's sentence to life with no possibility for parole for sixty years. Id. at 110-111. Ragland argued his sentence, even though less than life without parole, still violated the Constitution. Id. at 113. The Iowa Supreme Court agreed, finding "the rationale of Miller, as well as Graham, reveals that the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole." Id. at 121. As explained by the court, "it is important that the spirit of the law not be lost in the application of the law," and in this case, the court determined the spirit of Miller and Graham required that "in the sentencing of juveniles than merely making sure that parole is possible." Id. Based upon an "increased understanding of the decision making of youths," the court held the sentencing process must be tailored to account in a meaningful way for the attributes of juveniles that are distinct from adult conduct." Id. The court explained that "a government system that resolves disputes could hardly call itself a system of justice with a rule that demands individualized sentencing considerations common to all youths apply only to those youths facing a sentence of life without parole and not to those youths facing a sentence of life with no parole until age seventy-eight." Thus, the court held Miller applied to sentences that are the "functional equivalent of life without parole." Id. at 121-22.

Following the Ragland decision, the Iowa Supreme Court approved a sentence of life with the opportunity for parole after twenty-five years. State v. Louisell, 865 N.W.2d 590, 600-601 (Wyo. 2015). Louisell asserted "her eligibility for parole [was] illusory, not real." Id. at 601. According to Louisell, only one of Iowa's thirty-eight juvenile offenders originally

sentenced to LWOP had been granted parole. Id. This was a conditional release to hospice care for cancer treatment, and "the parole board reserved the right to revisit its decision if her health improved." Id. Louisell argued that if juveniles were "repeatedly denied parole based on offense severity, there is no realistic opportunity for her to receive parole, no matter how extensively she has been rehabilitated." Id. at 602. However, the question of whether Louisell had been denied parole in violation of the law was not before the Court. Id. Nevertheless, the Court took the opportunity to reaffirm that juveniles "must be afforded a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. (internal quotation omitted). Without fully exploring the meaning of the phrase "meaningful opportunity," the Court explained it "must be *realistic*." Id. (emphasis in original). The Court left "for another day the question whether repeated cursory denials of parole deprive juvenile offenders who have shown demonstrable rehabilitation and maturity of a meaningful or realistic opportunity for release." Id.

Massachusetts

After remarking that in order for juvenile homicide offenders to be sentenced to life imprisonment, the offenders must be eligible for parole, the Massachusetts Court turned to the question of what was procedurally required in order to protect juvenile homicide offender's meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Diatchenko v. Dist. Attorney for Suffolk Dist., 27 N.E.3d 349, 357-358 (Mass. 2015). The court explained that the parole board must consider the "unique characteristics" of juvenile offenders. Id. at 360. "[G]iven the challenges involved for a juvenile homicide offender serving a mandatory life sentence to advocate effectively for parole release on his or her own, and in light of the fact that the offender's opportunity for release is critical to the constitutionality of the

sentence," the court concluded "that this opportunity is not likely to be 'meaningful'" without access to counsel. Id. at 361.

Additionally, the court held "a parole-eligible, indigent juvenile homicide offender," may receive funding for expert witnesses to assist in connection with the initial parole proceeding." Id. at 363. The court noted an expert may be particularly helpful in explaining the "effects of the individual's neurobiological immaturity and other personal circumstances at the time of the crime, and how this information relates to the individual's present capacity and future risk of reoffending." Id.

Finally, the court held that judicial review of a parole decision was available. Id. at 365. Explaining that because "the parole hearing acquires a constitutional dimension for a juvenile homicide offender" as it is "what makes the juvenile's mandatory life sentence constitutionally proportionate," the court determined judicial review was necessary to ensure the board exercised "its discretionary authority in a constitutional manner, meaning that the right of the offender to a constitutionally proportionate sentence was not violated." Id. "[J]udicial review is limited to the question whether the board has carried out its responsibility to take into account the attributes or factors" outlined in Miller "in making its decision." Id.

New Jersey

The New Jersey Supreme Court held "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." State v. Zuber, 152 A.3d 197, 211-212 (N.J. 2017)(internal quotation and citation omitted). "Defendants who serve lengthy term-of-years sentences that amount to life without parole should be no worse off than defendants whose

sentences carry that formal designation. The label alone cannot control." Id. at 212. The court refused to "elevate form over substance." Id.

The court held the sentences permitting "55 years' imprisonment for Zuber and 68 years and 3 months for Comer" without parole eligibility were "sufficient to trigger the protections of Miller." Id. at 212-213. "Defendants' potential release after five or six decades of incarceration, when they would be in their seventies and eighties, implicates the principles of Graham and Miller." Id. at 213. The court took the opportunity to ask its legislature "to consider enacting a scheme that provides for later review of juvenile sentences with lengthy periods of parole ineligibility, and to consider whether defendants should be entitled to appointed counsel at that hearing." Id. at 215.

New York

The New York Supreme Court recently concluded that a juvenile was entitled to a parole release hearing at which his youth would be considered. Hawkins v. New York State Dep't. of Corr. and Cmty. Supervision, 140 A.D.3d 34 (N.Y. App. Div. 2016). In 1979, Hawkins was sentenced "to a prison term of 22 years to life." Id. at 35. He was first eligible for parole in 2000. Id. He was denied parole release nine times. Id. at 36. At his most recent parole hearing, he was "54 years old and had served 36 years of his sentence." Id. The appellate court held "a person serving a sentence for a crime committed as a juvenile ... has a substantive constitutional right not to be punished with a life sentence if the crime reflects transient immaturity." Id. Hawkins' "constitutional right to a meaningful opportunity for release" was denied when the board "failed to consider the significance of [his] youth and its attendant circumstances at the time of the commission of the crime." Id. "The Board, as the entity charged with determining whether [Hawkins] will serve a life sentence, was required to consider the significance of

[Hawkins'] youth and its attendant circumstances at the time of the commission of the crime before making a parole determination." Id. According to the court, this "consideration [was] the *minimal* procedural requirement necessary to ensure the substantive Eighth Amendment protections." Id. (emphasis added).

The court held it was "axiomatic" that a juvenile homicide offender "still has a substantive constitutional right not to be punished with life imprisonment for a crime reflect[ing] transient immaturity." Id. at 38 (alterations in original)(internal quotation omitted). Finding the 'foundational principle' of the Eighth Amendment jurisprudence regarding punishment for juveniles is that the imposition of a state's most severe penalties on juvenile offenders cannot proceed as though they were not children, the court held "[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. The court held that the parole release hearing stage must include a procedures analogous to those at the sentencing stage where a juvenile is entitled to a hearing at which his youth and its attendant characteristics are considered. Id. at 38-39. "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. The court held Hawkins was entitled to a de novo parole release hearing. Id. at 40.

Wyoming

In Bear Cloud v. State, 294 P.3d 36 (Wyo. 2013), the Supreme Court of Wyoming held a sentence of "'life according to law'" under the state statutory scheme violated the Eighth Amendment. Bear Cloud received a sentence of "life according to law" for murder. Id. at 39. The state murder statute provided for punishment by death, LWOP, or "life imprisonment

according to law." Id. at 44. However, two other statutes prohibited parole for any person serving a life sentence, whether it be a LWOP sentence or one "according to law." Id. at 44-45. The court concluded that "Wyoming's current sentencing and parole scheme for persons convicted of first-degree murder, which murder occurred before those persons were 18 years of age, violate[d] the Eighth Amendment because it ha[d] the practical effect of mandating life in prison without the possibility of parole." Id. at 45.

On remand, after an individualized sentencing proceeding, Bear Cloud was sentenced to life in prison with the possibility of parole after serving twenty-five years on the murder charge. Bear Cloud v. State, 334 P.3d 132, 136 (Wyo. 2014). This sentence was ordered to run consecutively to a previously imposed sentence of twenty to twenty-five years. Id. Thus, Bear Cloud's earliest possible meaningful opportunity for release was when he was sixty-one years old. Id. Considering the constitutionality of the parole eligible sentence, the Wyoming Supreme Court held "that the 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." Id. at 141-42 (internal quotations omitted). The Court explained that "[t]o do otherwise would be to ignore the reality that lengthy aggregate sentences have the effect of mandating that a juvenile die in prison." Id. at 142 (internal quotation omitted). The Court remanded the case for re-sentencing with instructions to "weigh the entire sentencing package" and "consider the practical result of lengthy consecutive sentences." Id. at 143. The Court warned against "the perils" of allowing the nature of the crime overwhelm consideration of the hallmarks of youth. Id. at 144. Relying upon the Roper Court's rejection of the use of a case-by-case approach to proportionality, the Court agreed there was an

"'unacceptable likelihood" "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. (quoting Roper, 543 U.S. at 572-573).

South Carolina's Parole System

According to South Carolina statutory law, the Parole Board "must carefully consider the record of the prisoner before, during, and after imprisonment." S.C. Code Ann. § 24-21-640. An inmate may *not* be paroled until it appears to the satisfaction of the board: (1) "that the prisoner has shown a disposition to reform;" (2) "that in the future he will probably obey the law and lead a correct life;" (3) "that by his conduct he has merited a lessening of the rigors of his imprisonment;" (4) "that the interest of society will not be impaired thereby;" *and* (5) "that suitable employment has been secured for him." Id. The five-part statutory test for obtaining parole fails to take into the hallmarks of youth and the greater capacity for the youthful offender to change. Although the provisions include consideration of reform, the statute does not involve the rigorous examination of the Miller factors required by the Constitution in sentencing a juvenile.

In addition to the statutory provision, the Parole Board, exercising its regulatory authority, provides additional criteria considered by the Board when determining whether to grant or deny parole. These criteria may be found in the Parole Board Manual. The Parole Board's objectives and mission are important for understanding its decision-making process. According to the Parole Board Manual, the "Board's primary objective is the long-term protection of society." Policy and Procedure, South Carolina Department of Probation, Parole and Pardon Services, Division of Paroles and Pardons, 9 (April 2015), at

https://www.dppps.sc.gov/content/download/68278/1576111/file/Parole+Board+Manual-+April+2015.pdf. Also, the first objective of the Board is to ensure its every decision "is based on the risk presented by the offender and is consistent with the goal of protection of the public." Id. In addressing the constitutionally-required procedural requirements, the Board functions under the notion that "very little is required in the way of procedural due process at parole hearings." Id. at 21. Prisoners have the right to be heard, "[f]air written notice of the specific parole criteria," notice of the date, time and place of the hearing, right to be heard by a fair panel, 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," to have an attorney present at the prisoner's expense, and to written notice of the Board's reasons for denying parole. Id.

The Manual also sets forth the contents of the parole case summary report. Id. at 22. While the report includes the prisoner's criminal history, disciplinary record, and *even* statements from law enforcement, the prosecutor, and the sentencing judge, the report makes no mention of any of the Miller factors or the diminished culpability of youth. Finally, the Board established "specific parole criteria." Id. at 27-28. The Board "will not parole a prisoner unless it determines, based on the ... criteria, as well as any other factors the Board may consider relevant, that the conduct of the offender merits a lessening of the rigors of imprisonment; that the interests of society will not be impaired by granting parole; and that the offender has secured, or will be able to secure, suitable employment and residence." Id. at 27. The specific criteria set out by the Board include:

> The risk that the offender poses to the community;
>
> The nature and seriousness of the offender's offense, the circumstances surrounding that offense, and the prisoner's attitude toward it;

> The offender's prior criminal record and adjustment under any previous programs of supervision;
>
> The offender's attitude toward family members, the victim, and authority in general;
>
> 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;
>
> The offender's employment history, including his job training and skills and his stability in the workplace;
>
> The offender's physical, mental, and emotional health;
>
> The offender's understanding of the causes of his past criminal conduct;
>
> The offender's efforts to solve his problems;
>
> The adequacy of the offender's overall parole plan, including his proposed residence and employment;
>
> The willingness of the community into which the offender will be paroled to receive that offender;
>
> The willingness of the offender's family to allow the offender, if he is paroled, to return to the family circle;
>
> The opinion of the sentencing judge, the solicitor, and local law enforcement on the offender's parole;
>
> The feelings of the victim or the victim's family, about the offender's release;
>
> Any other factors that the Board may consider relevant, including the recommendation of the parole examiner.

Id. at 28. Quite clearly, the Parole Board's considerations do not extend to any matters relative to the youth of the offender at the time of the commission of the offense. Eligibility for parole in South Carolina simply cannot "save" a life sentence from Eight Amendment scrutiny. The judge erred in holding otherwise.

Appellant's sentence violates the Eighth Amendment

Appellant's sentence of life with parole eligibility after twenty years violates the Eighth Amendment's prohibition on cruel and unusual punishment on its face and as applied. The sentencing judge had no discretion in what sentence to impose upon Appellant. The statute required that he sentence Appellant to life imprisonment with the possibility of parole. The mandatory nature of the sentence makes it immediately suspect under Eighth Amendment jurisprudence as it demonstrates the lack of individualization required by the Constitution. The mandatory nature of the sentence also demonstrates that the sentencer never considered the Miller factors deemed necessary prior to sentencing a juvenile offender. Despite Appellant receiving a mandatory life sentence, one that is the functional equivalent to LWOP, no sentencer ever determined he was irreparably corrupt as required by the Constitution.

Appellant's sentence is the *functional equivalent* of life imprisonment without the possibility of parole on its face in light of the parole system's failure to consider the Miller factors in rendering its decisions. In fact, the Parole Board does not consider an offender's youth at the time of the offense at all. The statutory scheme providing for the circumstances warranting parole and the Parole Board Manual completely fail to account for Miller. In the wake of Miller, Aiken, and Montgomery, a person serving a sentence for a juvenile offense has a substantive constitutional right not to be sentence to life imprisonment. The presumption is against life imprisonment and can only be overcome by a showing and finding of irreparable corruption. Appellant's constitutional right to a meaningful opportunity for release was violated by the Parole Board's failure to consider the significance of his youth at the time of the commission of the offense. See Greiman v. Hodges, 79 F.Supp.3d 933, 943 (S.D. Iowa 2015)(refusing to accept at the summary judgment stage that the Parole Board's consideration of

the "totality of the circumstances" necessarily considered the prisoner's age at the time of the offense, maturation, and rehabilitation). In light of the mandatory nature of Appellant's life with parole sentence, it is the Parole Board that will determine the ultimate length of his sentence. See id. Thus, the requirements of Miller must be fulfilled by the Parole Board. Id.

Appellant's sentence is the functional equivalent of life imprisonment without the possibility of parole as applied to Appellant because he has been denied parole for sixteen consecutive years without any consideration of the hallmarks of youth. Due to the Board's cursory, repeated denials of release and the statutory and regulatory procedures not incorporating the Miller factors or anything remotely close, there is an unacceptable likelihood that the nature of the crime alone, a fact that will never change, works to deny Appellant a meaningful opportunity for release from incarceration. Appellant is entitled to a meaningful opportunity to obtain release, which is something to which adult offenders are not entitled. Thus, the Parole Board's treatment of Appellant in the same manner as adult offenders violates the Constitution. See Hayden v. Keller, 134 F.Supp.3d 1000, 1009 (E.D.N.C. 2015)(holding North Carolina's parole system, which "wholly" failed to provide a juvenile offender any meaningful opportunity for release in light of the system's lack of distinction between parole reviews for juvenile offenders from adult offenders, showing no consideration for children's diminished culpability and heightened capacity for change in the parole determination).

Appellant's mandatory sentence of life imprisonment with the possibility of parole violates the Eighth Amendment. The sentence is the functional equivalent of life imprisonment without the possibility of parole. Appellant has been incarcerated since 1981, serving almost two decades in prison before becoming eligible for parole. Thereafter, he has been denied parole sixteen times. At no time – not during the sentencing proceeding and not during the parole

process – has Appellant's youth been considered as required by the Constitution. The Supreme Court has provided a juvenile offender "with substantially more than a possibility of parole or a 'mere hope' of parole." Greiman, 79 F.Supp.3d at 945. The Constitution "creates a categorical entitle to demonstrate maturity and reform, to show that he is fit to rejoin society, and to have a meaningful opportunity for release." Id. (internal citation and quotations omitted). Appellant must be re-sentenced in accordance with the Eighth Amendment and federal and state jurisprudence governing prohibitions on cruel and unusual punishments.

CONCLUSION

Appellant respectfully requests that this Court reverse the trial 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).

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ATTORNEY FOR APPELLANT

This 8th day of November, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 8, 2017

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