STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenville County
R. Scott Sprouse, Circuit Court Judge

THE STATE,

Respondent,

v.

MICHAEL JAY FINLEY,

Appellant.

Appellate Case No. 2016-002480

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SHERRIE BUTTERBAUGH
Assistant Attorney General
S.C. Bar No. 101477
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

W. WALTER WILKINS, III
Solicitor, Thirteenth Judicial Circuit
305 East North Street, Suite 325
Greenville, South Carolina 29601
(864) 467-8282

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

APPELLANT'S STATEMENT OF ISSUE ON APPEAL 1

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

ARGUMENT

The trial court did not err in ruling appellant is not entitled to resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), as appellant received a life *with* parole sentence and will be eligible for release in 2022, and the court properly found the law only applies to juvenile homicide offenders previously sentenced to life *without* parole and has not been extended to any other sentence 4

Guilty Plea Hearing 5

Motion for Resentencing and State's Response 10

Hearing on *Aiken* Motion 11

Order Denying Resentencing Pursuant to *Aiken* 12

Analysis

Standard of review 13

Resentencing only applies to life without parole sentences 14

Appellant received life with parole sentence 15

No evidence of inadequate parole process 18

Youth and its relevant factors considered at plea hearing 19

CONCLUSION 21

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

Aiken v. Byars,
410 S.C. 534, 765 S.E.2d 572 (2014) ..... passim
Bunch v. Smith,
685 F.3d 546 (6th Cir. 2012) 16
In re Harrell,
6th Cir. No. 16-1048, 2016 WL 4708184 (Sept. 8, 2016) 17
James v. S.C. Dep't of Prob., Parole & Pardon Servs.,
376 S.C. 392, 656 S.E.2d 399 (Ct. App. 2008) 17
Miller v. Alabama,
567 U.S. 460 (2012) ..... passim
Montgomery v. Louisiana,
136 S.Ct. 718 (2016) 15, 16, 19
State v. Gamble,
405 S.C. 409, 747 S.E.2d 784 (2013) 13
State v. Jacobs,
393 S.C. 584, 713 S.E.2d 621 (2011) 14
State v. Kasic,
228 P.3d 410 (Ariz. Ct. App. 2011) 17
State v. Whitner,
399 S.C. 547, 732 S.E.2d 861 (2012) 14
State v. Wilson,
345 S.C. 1, 545 S.E.2d 827 (2001) 14
Vasquez v. Commonwealth,
781 S.E.2d 920 (Va. 2016) 17
Virginia v. LeBlanc,
137 S.Ct. 1726 (2017) 18
Willbanks v. Dep't of Corr.,
522 S.W.3d 238 (Mo. 2017) 17

Constitutional Provisions

U.S. Const. amend. VIII 14

Statutes

S.C. Code Ann. § 16-3-20 (Supp. 1990) 2, 10
S.C. Code Ann. § 24-21-640 18
S.C. Code Ann. § 24-21-715 18

Other Sources

S.C. Board of Paroles and Pardons Policy and Procedure Manual, June 2017 ..... 18, 19

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

Whether the circuit court erred in finding that appellant's parole eligibility after the service of thirty years incarceration rendered him ineligible for resentencing, where the principles of *Graham*, *Miller*, and *Aiken* are more broadly applicable to de facto life without parole sentences that do not provide a *meaningful* opportunity for release?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

The trial court did not err in ruling appellant is not entitled to resentencing as appellant received a life *with* parole sentence and will be eligible for release in 2022, and the court properly found the law only applies to juvenile homicide offenders previously sentenced to life *without* parole and has not been extended to any other sentence. Further, appellant's sentence is the remedy deemed sufficient by the United States Supreme Court to cure an unconstitutional sentence.

STATEMENT OF THE CASE

Appellant, Michael Jay Finley, was sentenced to life with the possibility of parole on April 22, 1993, following a guilty plea to murder. (Sent. Tr.p.15, lines 15-17). The sentencing judge found beyond a reasonable doubt appellant committed the murder during the commission of first-degree burglary, armed robbery, and arson. (Sent. Tr.p.15, lines 12-14). Accordingly, appellant will become eligible for parole on August 11, 2022. *See* S.C. Code Ann. § 16-3-20(A) (Supp. 1990) (providing the punishment for murder is death or life imprisonment, and if sentenced to life, the person is eligible for parole only after the service of twenty years, or thirty years if a recommendation of death is not made but a statutory aggravating circumstance is found beyond a reasonable doubt). The judge further sentenced appellant to a concurrent term of life for burglary, and a consecutive twenty-five years for armed robbery and arson. (Sent. Tr.p.15, lines 17-22).

Appellant admitted he and a co-defendant strangled the eighty-year-old victim during a burglary and armed robbery, and set his house on fire. (Plea Tr.p.16, line 17-p.21, line 7; p.22, line 11-p.26, line 12; R* (Indictments)). Appellant was seventeen-years-old at the time. (Sent. Tr.p.3, lines 8-13). Appellant was represented by John I. Mauldin and Jeffery A. Merriam. (Plea Tr.p.1; Sent. Tr.p.1). In exchange for appellant's plea, the State agreed to withdraw the notice of intent to seek the death penalty with the added negotiation that appellant would not be eligible for parole for thirty years. (Plea Tr.p.11, lines 7-13; R* (Notice)).

On March 17, 2016, appellant submitted a *pro se* motion for resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). (*Aiken* motion). The South Carolina Supreme Court appointed the Honorable Edward W. Miller to hear the case by order dated March 23, 2016. (Judge Miller Order). Judge Miller appointed the Greenville County Public

Defender's Office to represent appellant on May 9, 2016. (Counsel Order). On June 21, 2016, the State filed a reply to the motion for resentencing. (State's Reply). Judge Miller subsequently recused himself and the Supreme Court reassigned the case to the Honorable R. Scott Sprouse. (Judge Sprouse Order). By consent order signed August 10, 2016 and filed August 23, 2016, Judge Sprouse relieved the public defender's office due to a conflict of interest and appointed new counsel to represent appellant. (New Counsel Order).

On October 14, 2016, a hearing was held on appellant's motion before Judge Sprouse. (*Aiken* Tr.p.1). Appellant was represented by Kenneth Gibson, and the State was represented by Elizabeth Gary. (*Aiken* Tr.p.1). At the end of the hearing, the judge took the matter under advisement and gave the parties ten days to supplement the record. (*Aiken* Tr.p.17, lines 19-25). The State filed a memorandum to supplement the record with an attached affidavit in support from Matthew Buchanan with the South Carolina Department of Probation, Parole, and Pardon Services. (State's Memo). By order dated November 21, 2016, Judge Sprouse denied appellant's motion for a resentencing hearing, finding *Aiken* did not apply to appellant's case. (*Aiken* order, p.4).

This appeal follows.

ARGUMENT

The trial court did not err in ruling appellant is not entitled to resentencing as appellant received a life *with* parole sentence and will be eligible for release in 2022, and the court properly found the law only applies to juvenile homicide offenders previously sentenced to life *without* parole and has not been extended to any other sentence. Further, appellant's sentence is the remedy deemed sufficient by the United States Supreme Court to cure an unconstitutional sentence.

Appellant is not entitled to resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), as he received a life *with* parole sentence and will be eligible for release beginning in 2022. Concerns about the future of the parole process do not create a cognizable claim under *Miller v. Alabama*, 567 U.S. 460 (2012), and its progeny. By their plain language *Miller* and *Aiken* apply only to juvenile homicide offenders sentenced to life *without* parole and appellant is not part of that class.

Neither our courts nor the United States Supreme Court have extended the *Miller* rule to apply to any other type of sentence, or so broadly construed the rule to include the argument made by appellant that his aggregate sentence for homicide and non-homicide crimes amounts to a *de facto* life without parole sentence. Appellant received the sentence the Supreme Court deemed sufficient to remedy an unconstitutional sentence pursuant to *Miller* and is eligible for release. The sentencing scheme in *Miller* was unconstitutional because it denied juveniles convicted of murder all possibility of parole, leaving them no opportunity or incentive for rehabilitation. Life in prison *with* the possibility for parole allows juvenile offenders to prove they have changed while also assessing a punishment the legislature deemed appropriate in light of the fact the juvenile killed someone. Appellant has the opportunity in just over four years to demonstrate his rehabilitation when he goes before the parole board, in keeping with the "central intuition" of *Miller* that juveniles who commit even violent crimes are capable of change.

Accordingly, appellant's sentence of life *with* parole is not cruel and unusual punishment under the Eighth Amendment, and the trial court did not err in denying appellant's motion for resentencing.

Guilty Plea Hearing

Appellant pled guilty to murder, first-degree burglary, armed robbery, and arson on February 25, 1993 before the Honorable C. Victor Pyle, Jr. (Plea Tr.p.1; p.7, lines 20-25; p.10, lines 13-16; p.11, lines 1-2; R* (Indictments)). Prior to accepting the plea, Judge Pyle told appellant to stop him any time he did not understand the proceeding or any time he wanted speak to defense counsel. (Plea Tr.p.4, line 23-p.5, line 9).

Judge Pyle explained the rights appellant was giving up by pleading guilty, asked appellant repeatedly if he understood what those rights meant, and discussed the potential sentences appellant faced by pleading guilty. (Plea Tr.p.7, line 14-p.11, line 2). In exchange for appellant's plea, the State agreed to withdraw the notice of intent to seek the death penalty with the added negotiation that appellant would not be eligible for parole for thirty years. (Plea Tr.p.11, lines 7-13; R* (Notice)). Appellant stated repeatedly he understood the negotiations and his parole eligibility. (Plea Tr.p.11, line 14-p.13, line 6).

The State told the plea judge briefly the facts of the case. Appellant admitted to investigators he and a co-defendant killed eighty-year-old James Brockman in his home on May 6, 1990. (Plea Tr.p.16, line 17-p.17, line 1; p.21, line 2-p.22, line 4; R* (Indictments)). Firefighters discovered the victim's body after witnesses called 911 about a house fire. (Plea Tr.p.17, line 18-p.18, line 2). The victim was in a bedroom, lying back on a bed, with his legs and feet dangling over the edge. (Plea Tr.p.18, lines 2-10). His hands were tied behind his back and his feet were bound together. (Plea Tr.p.18, lines 10-12). The victim's head was covered

with a pillowcase, there was a men's tie around his neck, and blood on the pillowcase. (Plea Tr.p.18, lines 12-15). Investigators found pieces of a broken shotgun near the victim's body, and his home had been ransacked, numerous items taken, and his car stolen. (Plea Tr.p.18, lines 15-24). Further, two "pour patterns" of gasoline were found in the home—one leading from the bedroom where the victim was found and another in the living room. (Plea Tr.p.18, line 24-p.19, line 11).

An autopsy revealed James Brockman suffered "extreme" injuries to his head, first and second-degree burns to his legs, and his larynx was broken in two places. (Plea Tr.p.19, lines 12-20). The victim died from strangulation. (Plea Tr.p.19, lines 18-19). However, the autopsy revealed the victim did not die quickly. An elevated carbon level in his blood indicated James Brockman was alive and breathing during part of the fire. (Plea Tr.p.19, lines 20-24).

After the murder, appellant was seen driving the victim's stolen car and tried to sell some of the victim's belongings to his uncle. (Plea Tr.p.19, line 25-p.20, line 9). A friend of appellant's family called investigators and when they arrived to talk to appellant, he said, "I know what you need to talk to me about." (Plea Tr.p.20, lines 9-18). Appellant admitted his involvement in the crime in a written statement to investigators. (Plea Tr.p.21, line 2-p.22, line 4). Appellant said he and his co-defendant needed money, so the co-defendant talked about going to Greenville and "killing an old man." (Plea Tr.p.22, lines 11-21). The two put gas in an extra can, changed clothes, and got items to cover their hands. (Plea Tr.p.22, line 21-p.23, line 1). However, it was too early to go to the victim's house, so appellant and his co-defendant played miniature golf and waited until it was dark before driving over to James Brockman's house. (Tr.p.23, lines 4-8). The accomplices parked the car down the street and walked to the victim's home, knocked, pretended they had car trouble, and asked to use the phone to call for

help. (Plea Tr.p.23, lines 8-14). Appellant and his co-defendant pulled out a gun and robbed the victim, and one of them stayed with the victim in the bedroom, pointing a gun at him, while the other ransacked the house. (Plea Tr.p.23, line 21-p.24, line 7). Appellant and his co-defendant took jewelry, money, and other items. (Plea Tr.p.24, lines 7-12). Then appellant tied the victim up, they stuck a handkerchief in his mouth, put a pillowcase over his head and a tie around his neck, "and with one defendant on one side and one defendant on the other side, they strangled Mr. Brockman." (Plea Tr.p.24, lines 12-24). The co-defendant beat the victim with a shotgun "to make sure he was dead," and appellant poured gas on the floor. (Plea Tr.p.24, line 25-p.25, line 10). Appellant then went outside to the victim's car while his co-defendant set the fire. (Plea Tr.p.25, lines 10-12).

At trial, the State was prepared to present evidence of appellant's written statement. (Plea Tr.p.21, line 2-p.22, line 9). Further, investigators recovered the victim's car, and found some of the victim's jewelry during a search of house where appellant was staying. (Plea Tr.p.20, lines 13-14, p.25, lines 13-18). Appellant also showed investigators the lake where he and his co-defendant threw some of the victim's belongings because they were worried about fingerprints. (Plea Tr.p.25, line 21-p.26, line 1). In addition, the co-defendant gave a written statement, and the gun and gas can were found at his home. (Plea Tr.p.25, lines 18-21).

Following the State's recitation, Judge Pyle asked appellant if that was what happened and appellant replied, "Yes, sir." (Plea Tr.p.26, lines 9-12). The judge reminded appellant about his parole eligibility, and appellant again acknowledged repeatedly he understood he would not be eligible for release for thirty years. (Plea Tr.p.26, line 13-p.27, line 8). Judge Pyle found appellant's plea was voluntarily and knowingly entered, and deferred sentencing. (Plea Tr.p.27, lines 12-21).

Judge Pyle held the sentencing hearing on April 22, 1993. (Sent. Tr.p.1). Prior to sentencing, several people spoke on appellant's behalf, in an effort to give the judge a better idea of appellant's social history and personality. Appellant lived with Terry Dempsey (Dempsey) and her family while out on bond pending trial. (Sent. Tr.p.3, line 16-p.4, line 10). Dempsey explained she met appellant through her daughter's school and the chorus at Dorman High School and she "always admired his talent and stage presence." (Sent. Tr.p.4, lines 16-18). Dempsey explained appellant was "a warm and gentle young man who longs for affection and for respect. He's an individual who has great value which needs to be recognized." (Sent. Tr.p.4, lines 13-16). During her family's time getting to know appellant, Dempsey said she "began to see that he was a very insecure boy whose greatest wish was to be accepted for himself and to be loved unconditionally." (Sent. Tr.p.4, line 19-p.6, line 7). Dempsey explained appellant was helpful around the house, trustworthy, never tried to run away, and helped her during difficult times with good advice "from one who was so young." (Sent. Tr.p.6, line 18-p.7, line 4; p.8, lines 2-8). Further, appellant was "intelligent, creative, and resourceful. His thirst for knowledge was strong. He read as many books as he could get a hold of on any subject that he could." (Sent. Tr.p.7, lines 5-8).

Finally, Dempsey explained some of the changes she noticed in appellant during the fifteen months he lived with her family:

> [Appellant] came to us kind of hyperactive. He left us a much calmer person. He came insecure and I think left more secure with himself and who he is. He was impulsive when he came; now he is more reflective and thinks about what his actions are going to cause.

(Sent. Tr.p.8, lines 9-15). Dempsey stated appellant was ready to "pay his penalty, but his life is still valuable, and I think that some good can result from it." (Sent. Tr.p.8, lines 16-20).

A minister also spoke and told the court appellant had become a valuable part of his congregation, and was missed. (Sent. Tr.p.8, line 24-p.9, line 17). Michael McGee (McGee) stated he saw a person who made a mistake, who never tried to make excuses, but was humble and genuine. (Sent. Tr.p.9, lines 23-25). McGee said he did not understand what happened before he knew appellant because "if you lined up fifty people and told me that one of them had done what he had done, then he would probably be the last one that I would have picked out knowing what I know about him now." (Sent. Tr.p.10, lines 1-10). McGee said his church's prayers are with appellant every day. (Sent. Tr.p.10, lines 8-10).

Defense counsel reminded the court about appellant's cooperation throughout the investigation "in light of the potential alternatives that [the judge] has with regard to sentencing." (Sent. Tr.p.11, lines 4-14). Counsel stated appellant had never tried to "shirk his responsibility," knew he would have to "stand before a court," and was prepared to cooperate in the prosecution of his co-defendant, if that had been necessary. (Sent. Tr.p.11, lines 15-22). Counsel said it was his belief that merited some consideration for appellant during sentencing, as did the fact that he did not violate any condition of his bond. (Sent. Tr.p.11, lines 23-24; p.12, lines 6-18).

Appellant expressed remorse for the crime, apologized to the victim's family, and said he hoped the victim's family could forgive him one day or that he could forgive himself. (Sent. Tr.p.14, line 16-p.15, line 1).

Judge Pyle found beyond a reasonable doubt appellant committed the murder during the commission of first-degree burglary, armed robbery, and arson. (Sent. Tr.p.15, lines 12-14). The judge sentenced appellant to life *with* the possibility of parole for murder, a concurrent term of life for burglary, and a consecutive twenty-five years for armed robbery and arson. (Sent. Tr.p.15, lines 15-22). Accordingly, appellant will become eligible for parole on August 11,

2022. *See* S.C. Code Ann. § 16-3-20(A) (Supp. 1990) (providing the punishment for murder is death or life imprisonment, and if sentenced to life, the person is eligible for parole only after the service of twenty years, or thirty years if a recommendation of death is not made but a statutory aggravating circumstance is found beyond a reasonable doubt).

Motion for Resentencing and State's Response

On March 17, 2016, appellant moved for resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), and submitted a *pro se* motion. (*Aiken* motion). In his motion, appellant asserted he was vulnerable to negative influences and outside pressures, including family and peers, and had an underdeveloped sense of responsibility and lacked the maturity of an adult. (*Aiken* motion, p.4). Further, appellant argued at the time of his crimes, youth was only a chronological fact and a plea for mercy and he was entitled resentencing. (*Aiken* motion, pp.4-5).

The State responded and argued *Aiken* did not apply because appellant was not sentenced to life without the possibility of parole.[1] (State response, pp.3-4). The State maintained appellant was eligible for parole, and had multiple future opportunities to present mitigating evidence in the hopes of obtaining release. (State response, pp.3-5). The State asserted the clear rule from *Miller* and *Aiken* was that sentencing a juvenile to life without the possibility of parole without first holding an individualized hearing at which a judge considered the unique attributes of youth violated the Eighth Amendment, and only those juveniles were entitled to resentencing. (State response, p.3). The State argued to hold *Aiken* applied to *any* type of life sentence impermissibly extended the rule. (State response, p.3). Finally, the State maintained the parole

[1] The State also made an argument regarding the timeliness of appellant's motion. (State's response, p.1). However, there was no subsequent discussion on the assertion at the hearing or in the order denying resentencing.

board was a sentencing authority which could assess appellant's case when he became eligible for release in 2022. (State response, pp.4-5).

Hearing on *Aiken* Motion

A hearing on appellant's motion was held on October 14, 2016, before the Honorable R. Scott Sprouse. (*Aiken* Tr.p.1). Defense counsel argued appellant was entitled to resentencing because: (1) the aggregate term appellant received for homicide and non-homicide crimes created a *de facto* life without parole sentence, and (2) parole eligibility did not create a "meaningful opportunity" for release. (*Aiken* Tr.p.3, line 4-p.5, line 3; p.15, line 22-p.16, line 9). Specifically, counsel asserted appellant "would be placed in a situation where he would be arguing for parole without counsel" and would not have a "meaningful opportunity" to explain to the parole board the "great things" appellant had done while incarcerated, such as attend classes or his lack of a disciplinary record. (*Aiken* Tr.p.5, lines 4-13). Counsel maintained parole eligibility was not enough for a sentence to comply with *Miller* or *Aiken*. (*Aiken* Tr.p.5, lines 14-20).

The State argued appellant was not entitled to resentencing because he did not receive a life *without* the possibility of parole sentence, but received a life *with* the possibility of parole sentence. (*Aiken* Tr.p.7, lines 4-18). The State maintained the sentencing implications noted in *Aiken* were not at issue in appellant's case because he had the opportunity to obtain release. (*Aiken* Tr.p.7, line 19-p.9, line 6). The State asserted the United States Supreme Court noted a remedy for an unconstitutional sentence was the same one appellant received, which was to convert the sentence to life with parole. (*Aiken* Tr.p.9, lines 7-16). The State maintained offenders were never guaranteed release, but appellant had the opportunity at future parole hearings to present to the parole board evidence that he was rehabilitated and had matured which

was the relief contemplated by *Miller* and *Aiken*. (*Aiken* Tr.p.10, line 9-p.11, line 4). The State reiterated its position that appellant was already guaranteed relief from what *Aiken* contemplated as cruel and unusual punishment for juveniles—he had the opportunity for release in 2022. (*Aiken* Tr.p.14, line 2-p.15, line 3).

Finally, an issue raised at the hearing was whether appellant's consecutive sentences would prevent him from obtaining release. (*Aiken* Tr.p.6, lines 9-19; p.11, line 5-p.12, line 8). The State asserted the South Carolina Department of Probation, Parole and Pardon Services (DPPPS) indicated parole eligibility was calculated using the murder sentence, as the lead charge, and the consecutive non-homicide sentences would not impact appellant's eligibility. (*Aiken* Tr.p.8, line 21-p.9, line 16). Judge Sprouse gave the parties ten days to research and supplement the record with any policy or regulation governing consecutive sentences and parole eligibility. (*Aiken* Tr.p.16, line 10-p.17, line 25). On October 25, 2016, the State submitted a memorandum and affidavit in support from Matthew Buchanan, General Counsel at DPPPS. (State's Supp. Memo). The memorandum reiterated the State's position that appellant would be considered for parole when he became eligible in 2022 regardless of his consecutive sentences and, if the board granted him parole, he would be released. (State's Supp. Memo, p.2). The attached affidavit clarified that DPPPS calculated parole eligibility on an inmate's full sentence, and appellant's "lead charge" of murder was that which was used to calculate appellant's parole eligibility date of August 11, 2022. (State's Supp. Memo, p.4).

Order Denying Resentencing Pursuant to *Aiken*

By order dated November 21, 2016, Judge Sprouse denied appellant's motion for a resentencing hearing, finding *Aiken* did not apply to appellant's case. (*Aiken* order, p.4). The judge first noted appellant received a life with parole sentence rather than a life without the

possibility of parole sentence. (*Aiken* order, p.1). Judge Sprouse found unavailing appellant's arguments that *any* life sentence violated the Eighth Amendment and his "consecutive" sentences would preclude his release. (*Aiken* order, pp.1-3). Specifically, the judge found appellant's "life with the possibility of parole after the service of thirty years does not amount to a *de facto* life sentence and is not the type of sentence addressed under *Miller* or *Aiken*." (*Aiken* order, p.2). Judge Sprouse noted both cases were "unequivocal" that the remedy they provide is only available to juvenile homicide offenders sentenced to life without the possibility of parole. (*Aiken* order, pp.2-3).

Judge Sprouse stated:

> [*Miller* and *Aiken*] rest on the principle that life without the possibility of parole is the harshest of all penalties for a juvenile offender. A sentencing court must provide a juvenile who is sentenced to life without the possibility of parole the meaningful opportunity to obtain release through the presentation of specialized, mitigating evidence prior to sentencing because they will not have another opportunity to present such evidence. For those who will become parole eligible, there are multiple opportunities to obtain release—prior to sentencing and every time they appear before the Parole Board.

(*Aiken* order, p.3). The judge found appellant becomes parole eligible in 2022, and his consecutive sentences will not preclude him from appearing before the parole board or bar his possible release. (*Aiken* order, p.3). Therefore, Judge Sprouse found appellant was not within the class of juvenile offenders for whom *Aiken* provides for resentencing hearings as *Aiken* did not extend to juveniles who have the opportunity for release. (*Aiken* order, pp.3-4). The judge denied the motion for resentencing. (*Aiken* order, p.4).

Analysis

Standard of Review

In criminal cases, appellate courts only review errors of law. *State v. Gamble*, 405 S.C.

409, 415, 747 S.E.2d 784, 787 (2013) (citing *State v. Jacobs*, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011)). The appellate court is bound by the lower court's factual findings unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). However, this Court reviews questions of law *de novo*. *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012) (citations omitted).

Resentencing Only Applies to Life Without Parole Sentences

The Eighth Amendment prohibits cruel and unusual punishment. U.S. Const. amend. VIII. In *Miller v. Alabama*, 567 U.S. 460 (2012), the United States Supreme Court held mandatory life without parole sentences for juvenile offenders who committed murder violated the prohibition against such punishment. 567 U.S. at 470. The Court held a sentencing authority must be allowed to consider youth as "more than a chronological fact," but a factor which carries with it immaturity, irresponsibility, and recklessness. *Id.* at 476. Further, the age of the defendant, along with his family background, and mental and emotional development must be considered in assessing his culpability. *Id.* The Court held a juvenile convicted of murder could still be sentenced to life without parole, but only after an individualized hearing in which the various mitigating factors were considered. *Id.* at 479-80.

Our Supreme Court held *Miller* applied retroactively to juveniles in South Carolina previously sentenced to life without parole. *Aiken*, 410 S.C. at 540-41, 765 S.E.2d at 575. The Court also held the rule extended to juveniles sentenced under our non-mandatory scheme, and those who received a life without parole sentence were entitled to resentencing to allow them "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. Further, the Court determined the factors in *Miller* were those which must be considered during the hearings, such

as the offender's age, family life, extent of his participation in the murder, and possibility of rehabilitation. *Id.* at 544-45, 765 S.E.2d at 577-78. Just as the *Miller* court held, our Court explained juveniles could still receive life without parole sentences, but only after "an individualized hearing where the mitigating hallmark features of youth are fully explored." *Id.* at 545, 765 S.E.2d at 578.

Two years later, the Supreme Court held its rule in *Miller* was retroactive on state collateral review. *Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016). However, the Court also recognized the potential burden of re-litigating cases where a juvenile received mandatory life without parole. The Court explained states could remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than resentencing them. *Id.* Citing with approval a Wyoming statute which provided for juvenile parole eligibility after twenty-five years, the Court found allowing "those offenders to be considered for parole ensures those 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 continued, "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.* The Court noted petitioner's evidence of rehabilitation and reform since incarceration were claims typically considered by parole boards, but which had not been "tested or even addressed by the State" given petitioner's life without parole sentence. *Id.*

Appellant Not Entitled to Resentencing: He Received Life <u>With</u> Parole Sentence

The trial court did not err in its application of *Miller* or *Aiken* as both cases hold the relief granted extends only to juveniles sentenced to life *without* the possibility of parole. *See Miller*,

567 U.S. at 470 (holding mandatory life without parole sentences for juvenile offenders who committed murder violates the Eighth Amendment); *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577 (holding juveniles who received a life without parole sentence were entitled to resentencing to allow them to present evidence specific to their attributes of youth). Appellant received a life *with* parole sentence and the trial court was correct in finding he was not within the class of juvenile offenders who the courts were trying to protect from cruel and unusual punishment. *See Miller*, 567 U.S. at 471 (explaining because juveniles have diminished culpability and greater prospects for reform, they are less deserving of the most severe punishments) (citations omitted). *Miller* requires an individualized sentencing hearing only when a juvenile can be sentenced to life without the possibility of parole—a sentence appellant did not receive. Finding appellant is entitled to relief would impermissibly extend the holdings in *Miller* and *Aiken* beyond their plain language and the trial court properly denied the motion for resentencing.

Moreover, the Supreme Court specifically noted states could remedy a *Miller* violation—i.e. an unconstitutional sentence—by "permitting juvenile homicide offenders to be considered for parole" rather than resentencing them. *Montgomery*, 136 S.Ct. at 736. The Court explained inmates who showed an inability to reform would continue to serve life sentences, but 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.* Respondent acknowledges, as the Supreme Court held, fundamental differences between juveniles and adults affect the proportionality analysis under the Eighth Amendment. However, neither our courts nor the United States Supreme Court have ever held the *Miller* rule applied to sentences other than life without parole, such as a *de facto* life sentence. *See e.g.*, *Bunch v. Smith*, 685 F.3d 546, 552 (6th Cir. 2012) (determining that until the Supreme Court rules term-

of-year sentences resulting in the functional equivalent of life without parole offend the Eighth Amendment, such sentences do not violate clearly established federal law); *In re Harrell*, 6th Cir. No. 16-1048, 2016 WL 4708184 (Sept. 8, 2016) (denying motion for successive federal habeas corpus petition, because the defendant's 60-150 years of imprisonment for murder when he was seventeen was not the functional equivalent of mandatory life without parole; defendant was eligible for parole at seventy-seven-years old); *State v. Kasic*, 228 P.3d 410, 414 (Ariz. Ct. App. 2011) (finding a sentence of 139.75 years, exceeding life expectancy, was not constitutionally excessive).

The trial court properly rejected appellant's argument advanced during the hearing that he was serving the equivalent of a life without parole sentence because he *might* be denied parole when he becomes eligible in 2022. (*Aiken* Tr.pp.3-5; pp.15-16; *Aiken* order, pp.1-3). Beginning on August 11, 2022, the proper sentencing authority will consider evidence presented by appellant to determine whether he is eligible for release. *See James v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 376 S.C. 392, 396, 656 S.E.2d 399, 401 (Ct. App. 2008) ("[A]n inmate has a liberty interest in gaining access to the parole board, although there is no protected right to parole."). Further, the United States Supreme Court has specifically denied review of petitions for writ of certiorari in which state appellate courts have found the Eighth Amendment does not prohibit lengthy term-of-years sentences where the juvenile offender has an opportunity for parole in old age. *See e.g.*, *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238, 246-47 (Mo. 2017), *cert. denied*, 2017 WL 4340106 (Oct. 2, 2017); *Vasquez v. Commonwealth*, 781 S.E.2d 920, 928 (Va. 2016), *cert. denied*, 137 S. Ct. 568 (2016). Even more, the Supreme Court recently held in a unanimous *per curiam* opinion that Virginia's determination that its geriatric release program provided a "meaningful opportunity" for release for juvenile offenders was not "'contrary to . . .

clearly established federal law.'" *Virginia v. LeBlanc*, 137 S.Ct. 1726, 1727-29 (2017). South Carolina utilizes a similar program which authorizes parole for inmates who are geriatric, terminally ill, or permanently incapacitated. *See* S.C. Code Ann. § 24-21-715 (providing that someone who is "geriatric" is an inmate who is seventy years of age or older and suffers from a chronic illness or disease related to aging, and further providing guidelines for release).

No Evidence of Inadequate Parole Process in Appellant's Case

There is no evidence in the record before the Court that the process by which parole is granted is inadequate. Nothing guarantees anyone the right to parole. The parole board may only grant release if the inmate "has shown a disposition to reform," he will probably obey the law and "lead a correct life" in the future, his conduct led to "a lessening of the rigors of his imprisonment," the "interest of society will not be impaired" by the inmate's release, and he has secured suitable employment. S.C. Code Ann. § 24-21-640. However, the board can examine during the hearing any other factors it "may consider relevant." *See* DPPPS South Carolina Board of Paroles and Pardons Policy and Procedure Manual, (June 2017), p.27, https://www.dppps.sc.gov/content/download/120663/2749351/file/Parole+Board+Manual+June+7+2017.pdf (providing other criteria the board can consider including the inmate's criminal history and risk to the community, general attitude, health, adjustment while confined, employment history, and "[a]ny other factors that the Board may consider relevant") (Parole Board Manual).

Appellant is not yet parole eligible. When he becomes eligible for release in 2022, he will have the opportunity to demonstrate to the parole board the maturity and rehabilitation necessary to entitle him to relief. *See* S.C. Code Ann. § 24-21-640 (providing the board required to consider an inmate's record before, during, and after imprisonment). Appellant will have the

opportunity to present evidence, including the testimony of favorable witnesses, to demonstrate his "disposition to reform" and that he will obey the law if he is released from prison. *See* Parole Board Manual, p.20 (providing during a parole hearing, the prisoner has the opportunity to present evidence and have up to three witnesses speak on his behalf). Appellant maintains he has taken classes and had few disciplinary actions while incarcerated. Both are factors in keeping with the "central intuition" of *Miller* that children who commit even violent crimes are capable of change. *See Miller*, 567 U.S. at 480 (finding children's diminished culpability and heightened capacity to change requires sentencing authorities to take into account how children are different prior to "irrevocably sentencing them to a lifetime in prison"); *see also Montgomery*, 136 S.Ct. at 736 (noting evidence of petitioner's "evolution from a troubled, misguided youth to a model member of the prison community" was relevant and the kind of information prisoners use to demonstrate rehabilitation).

Youth and Its Relevant Factors Considered at Sentencing Hearing

Finally, appellant's youth and its relevant factors were considered by Judge Pyle during the sentencing hearing. Terry Dempsey (Dempsey) spoke about appellant's personality as a "gentle young man" who "has great value." (Sent. Tr.p.4). During her family's time getting to know appellant, Dempsey said she "began to see that he was a very insecure boy whose greatest wish was to be accepted for himself and to be loved unconditionally." (Sent. Tr.pp.4-6). Dempsey explained appellant was helpful, trustworthy, and gave good advice for someone "so young." (Sent. Tr.pp.6-8). Further, appellant was "intelligent, creative, and resourceful." (Sent. Tr.p.7). Dempsey also explained appellant was already exhibiting signs of maturing. (Sent. Tr.p.8).

A minister also spoke, telling the court appellant was a person who was humble and

genuine and never tried to make excuses for his mistakes. (Sent. Tr.p.9). Finally, defense counsel reminded the court about appellant's cooperation during the investigation which merited some consideration during sentencing, as did the fact appellant never violated any condition of his bond. (Sent. Tr.pp.11-12).

The judge acknowledged the seriousness of the sentence, but found a life with parole sentence was an appropriate punishment given "the horror" appellant and his co-defendant committed on the day of the murder. (Sent. Tr.p.15). From the record, it appears Judge Pyle considered the factors specifically noted by the *Miller* court as the "hallmark features" of youth. *See Miller*, 567 U.S. at 477 (listing the factors a court must take into account, including the juvenile's immaturity, family life, circumstances of the murder, including the extent of his participation, how peer pressure may have affected him, and his interactions with police and his attorney). Accordingly, it cannot be said no court ever took into account appellant's age and its surrounding circumstances.

Therefore, because appellant was sentenced to life with parole, he is eligible for release in 2022, and his sentence does not violate the Eighth Amendment, the trial court did not err in denying appellant's motion for resentencing pursuant to *Aiken*.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the trial court's decision denying the motion for resentencing should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SHERRIE BUTTERBAUGH
Assistant Attorney General

W. WALTER WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY: _____
SHERRIE BUTTERBAUGH

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

November 30, 2017.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenville County
R. Scott Sprouse, Circuit Court Judge

THE STATE,

Respondent,

v.

MICHAEL JAY FINLEY,

Appellant.

Appellate Case No. 2016-002480

CERTIFICATE OF SERVICE

I, Sherrie Butterbaugh, counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two (2) copies of the same in the United States mail, addressed to her attorney of record: Laura Ruth Baer, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 30th day of November, 2017.

SHERRIE BUTTERBAUGH

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

November 30, 2017

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *The State v. Michael Jay Finley*
Appeal from Greenville County
Appellate Case No. 2016-002480

Dear Ms. Kitchings:

Enclosed for filing please find the original Initial Brief of Respondent and Designation of Matter, together with Proof of Service in the above-referenced case. If you should have any questions, please feel free to contact me.

Sincerely,

Sherrie Butterbaugh,
Assistant Attorney General

SB/dmd
Enclosures
cc: Laura Ruth Baer, Esq. (w/two copies of encls.)
The Honorable W. Walter Wilkins, Solicitor 13th Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)