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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

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Appeal from Chester County

Honorable Brian M. Gibbons, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

ROBERT ISAIAH GRAHAM,

APPELLANT

APPELLATE CASE NO 2016-000425

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# FINAL REPLY BRIEF OF APPELLANT

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## ARGUMENT IN REPLY

### *Introduction*

The issue on appeal is whether the sentencing court's imposition of a de facto life without parole sentence for the homicide offense that Appellant Isaiah Graham committed as a juvenile violated the Eighth Amendment's ban on cruel and unusual punishment as set forth in Miller and its progeny. Brief of Appellant, p. 1. Respondent contends that this issue is not preserved for appellate review, arguing that Isaiah's counsel did not make the substantive arguments raised on appeal to the sentencing court and that counsel did not object to the forty-five year sentence when imposed. Brief of Respondent, pp. 19-25. As will be discussed more fully *infra*, the issue and arguments raised on appeal were sufficiently raised and ruled upon by the sentencing court. To the extent that there is any validity to Respondent's preservation argument, this Court should rule upon the issue raised because further objection would have been futile, the duty to protect the rights of minors has precedence over procedural rules, and in the interest of judicial economy. See State v. Passmore, 363 S.C. 568, 583-86, 611 S.E.2d 273, 281-83 (Ct. App. 2005) (discussing exceptions to traditional issue preservation rules). Further, when placed in the proper context, plea counsel did not make any statement that constituted a concession or waiver of the issue on appeal.

### *The Issue Raised on Appeal is Preserved*

The basis for Isaiah's argument at trial and on appeal that his forty-five year sentence for a homicide offense committed as a juvenile violates the ban against cruel and unusual punishment, is that the sentence constitutes a de facto life without parole sentence imposed without a finding of irreparable corruption and without evidence to support such a finding. Brief of Appellant, pp. 25-46. The sole purpose of the deferred sentencing hearing was to determine whether Isaiah

was one of the rare offenders who should be sentenced to life without parole because he was permanently incorrigible or whether he should have some meaningful hope for release because his crime was the result of transient immaturity. See Montgomery v. Louisiana, 136 S. Ct. 718, 733-34 (2016) (internal citations omitted). Plea counsel's arguments at the sentencing hearing were far more than what was necessary to preserve the issue and arguments raised on appeal and did not require an additional objection following the imposition of the forty-five year sentence.

Counsel extensively outlined the applicable law and proper considerations for a juvenile homicide offender's sentencing hearing. R. 192, l. 17 – 195, l. 8. He also presented the written forensic psychological evaluation and live testimony from Dr. Susan Knight, both of which provided a detailed analysis of the juvenile sentencing factors set forth in Miller v. Alabama, 132 S.Ct. 2455, 2468 (2012), and their applicability in Isaiah's case. R. 167, l. 14 – 181, l. 2; R. 231-238 (Defendant's Ex. 2, pp. 17-24). In Aiken v. Byars, 410 S.C. 534, 545 n. 10, 765 S.E.2d 572, 578 n. 10 (2014), our Supreme Court "decline[d] the dissent's invitation to set out a specific process for trial court judges to follow when considering whether to sentence a juvenile to life without parole." The Court noted that "[t]he United States Supreme Court did not establish a definite resentencing procedure and we likewise see no reason to do so." 410 S.C. at 545 n. 10, 765 S.E.2d at 578 n. 10. Rather, the Court had "the utmost confidence in our trial judges to weigh the factors discussed herein and to sentence juveniles in light of this new constitutional jurisprudence." Id.

Following Aiken, the United States Supreme Court decided Montgomery v. Louisiana, which provided:

> *Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." The Court 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. But 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."
>
> *Miller*, then, 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." 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." Because *Miller* determined that sentencing a child to life without parole is excessive for all but "the rare juvenile offender whose crime reflects irreparable corruption," it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status" — that is, juvenile offenders whose crimes reflect the transient immaturity of youth.

136 S. Ct. 718, 733-34 (2016) (internal citations omitted). It was in light of this that counsel argued to Judge Gibbons that Montgomery provides that life without parole is justified only for "the rare juvenile offender who exhibits such **irretrievable depravity** that rehabilitation is [im]possible." R. 193, ll. 16-19. He explained that to "to justify life without parole on the assumption that the juvenile offender forever will be a danger to society[,] **requires the sentencer to make a judgment that the juvenile is incorrigible**" but "the characteristics of juveniles make that questionable." R. 193, ll. 19-24. He further noted the Court's discussion of the "great difficulty of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient maturity, and the rare juvenile offender whose crime reflects **irreparable corruption**." R. 193, l. 24 – 194, l. 4. Thus, counsel argued that "we must begin with the intellectual position that the presumptions are against the life without parole sentences, and that life without parole sentences for juveniles are inappropriate in all but the rarest of circumstances." R. 195, ll. 3-8.

Counsel further discussed the myriad of reasons that Isaiah's case did not constitute one of those rare circumstances where life without parole was a proper sentence, including the ordinary and unsophisticated circumstances of the crime and proportionality to other sentences in Chester County homicide cases. R. 195, l. 8 – 200, l. 13. Counsel then cited to data obtained from the South Carolina Department of Corrections, which reflected an average age at natural death for black male inmates of fifty years old and for white male inmates of fifty-three years old. R. 200, l. 13 – 201, l. 4. Counsel explained: "I want you to know that even if you agree with me, Your Honor, that this is not a case that cries out for a sentence of life without parole, that the Court be mindful that **Your Honor at a certain number is effectively giving him a life without parole sentence regardless of what we call it**." R. 201, ll. 4-9 (emphasis added).

Following the solicitor's argument, counsel addressed Judge Gibbons again. In addition to responding to some of the outlandish contentions[1] made by the solicitor, R. 206, l. 15 – 208, l. 8, counsel made the following argument just before Isaiah addressed the court and the sentence was imposed:

> Your Honor, I'm not asking you to turn him lose tomorrow. What we're asking you -- and I will admit that both the Solicitor and I have no crystal balls, we can't look in it, we're trying to project out to what this 17 year old will be like when he is 47 or 57 or 67 or ever if he were to live that far. It's my contention, Judge, that the clear reading and implication of *Miller*, of the Louisiana case, *Montgomery*, and of *Aiken versus Byars* is that **life without parole for a juvenile should be reserved for the worst of the worst, and I believe that's not only the worst of the defendants, but the worst of the crimes.**

[1] For example, the solicitor argued that the State of South Carolina had been involved with Isaiah since an early age and repeatedly tried to "help" him and that his repeated contacts with the juvenile system provided him with "quite the ability to deal with police officers and prosecutors in courts." R. 203, ll. 6-10; R. 203, l. 22 – 204, l. 2; R. 204, l. 13 – R. 205, l. 21. She further argued that despite the fact that Isaiah was undisputedly seventeen at the time of the incident, he should be viewed as an adult by the sentencing judge. R. 203, ll. 18-22; R. 204, ll. 3-13.

> This is a serious crime, but Judge, **if you were to give him a 30 year sentence – first of all, I think based on statistics there's a more than reasonable chance that he will not live 30 years in the department of corrections but at least there will be some possib[ility] of him surviving. I think with all due respect to the Court if you give him much more than 30 you are effectively giving him a life sentence whether you use those words or not.** I would ask the Court to take into account all of the factors, you know, the factors described by the *Miller* case and *Aiken versus Byars*, do not punish my client for his immaturity in this courtroom as much as it deserves to be punished, do not punish him by throwing away the rest of his life. Because I can guarantee you, if he's fortunate enough to live to be 47 years old I'm sure he, like all of us who have reached that age, with regret the things we did. I would ask you to take all of that into consideration, Your Honor, in this matter.

R. 208, l. 8 – 209, l. 11 (emphasis added).

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). "[T]his is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants, but rather is an adherence to settled principles that serve an important function." Id. at 329–30, 730 S.E.2d at 285. Though our appellate courts should follow longstanding precedent and resolve an issue on preservation grounds when it "clearly is unpreserved," it is "good practice for [the appellate courts] to reach the merits of an issue when error preservation is doubtful." Id. at 330, 730 S.E.2d at 285. Here, counsel was not required to object following the imposition of the forty-five year sentence, as he had just argued to Judge Gibbons that a sentence "much more than 30 [years]" would be "effectively giving him a life sentence whether you use those words or not." R. 208, l. 19 – 209, l. 2. He had also argued that a life sentence could not be imposed absent a finding of irreparable corruption. Sent R. 193, l. 19 – 194, l. 4.

Respondent contends that no matter what arguments were advanced during the sentencing hearing, an objection must be made when the sentence is imposed in order to preserve any issue for appeal. Respondent's Brief, pp. 21-25. Many of the decisions cited and quoted in Respondent's brief can be traced back to State v. Walker, 252 S.C. 325, 166 S.E.2d 209 (1969). In Walker, the appellant was indicted under two indictments, each of which charged separate counts of resisting an officer or resisting arrest, assault and battery with intent to kill, and carrying a concealed weapon. 252 S.C. at 327, 166 S.E.2d at 210. Walker pled guilty with respect to both indictments, to the charges of resisting an officer, or resisting arrest, and assault and battery of a high and aggravated nature. The judge sentenced him to concurrent terms of three years in prison, suspended upon the service of twelve months, followed by three years probation. Id. Though not mentioned *at all* during the plea and sentencing hearings, Walker contended on appeal that his acts of resisting on officer and assault and battery of a high and aggravated nature were inseparable from each other and constituted identical acts, such that it was error to sentence him to a single general sentence on the separate counts in the indictments, charging separate offenses. Id. Thus, the Court ruled: "We dispose of the principal contention of the defendant on the elementary ground that the question was not raised below, and since it does not go to the jurisdiction of the subject matter of the offenses charged and plead guilty to, defendant is not entitled to raise and have the issue considered on appeal." Id. at 328, 166 S.E.2d at 210.

In State v. Winestock, 271 S.C. 473, 474-75, 248 S.E.2d 307, 307-08 (1978), the appellant alleged that, following the jury verdict, the trial court had bound itself at an off-the-record colloquy to sentence him as if he had been convicted of violating only S.C. Code Ann. § 16-21-60(2), which provided a maximum sentence of one year and five hundred dollars. Instead,

Winestock was sentenced to eighteen months imprisonment. Id. Because there was no record of the colloquy, the parties submitted affidavits from trial counsel and the trial judge. Counsel's affidavit contained an assertion that the trial judge said he would be bound as previously stated, but the trial judge's counter-affidavit did not confirm the assertion. Id. The Court found that in that context, even if trial counsel's affidavit were accepted as accurate, "appellant's failure to timely object to or seek modification of his sentence in the lower court precludes him from presenting the question to this Court for the first time on appeal." Id. at 475, 248 S.E.2d at 308 (citing State v. Walker, 252 S.C. 325, 166 S.E.2d 209 (1969)). The ruling in Winestock makes sense, as the sentence would have been legal and proper but for the trial court's purported agreement otherwise.

Subsequently in State v. Shumante, 276 S.C. 46, 46–47, 275 S.E.2d 288 (1981), the appellant attempted to challenge the trial court's authority to revoke his probationary sentence. There was no such argument presented to the probationary court by virtue of any objection or motion for modification such that the issue was not properly raised for the first time on appeal. Id. at 47, 275 S.E.2d at 288 (citing State v. Winestock, 271 S.C. 473, 248 S.E.2d 307 (1978)). In State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991), following his conviction for trafficking cocaine, the appellant argued that he should have been sentenced for only conspiracy. The Garner Court ruled that "no objection to sentencing was raised at trial and this issue is not properly before the court." 304 S.C. at 222, 403 S.E.2d at 632 (citing State v. Shumate, 276 S.C. 46, 275 S.E.2d 288 (1981)).

Walker and the cases that followed after it stood for the principle that the appellant is required to present the argument to the sentencing court and cannot present their argument for the first time on appeal. See also State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425

(1999) ("[A] challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review."). The cases do not provide that an argument actually made to the sentencing court can only be preserved for review if an additional objection is made after the imposition of the sentence. Somehow, in State v. Salisbury, 330 S.C. 250, 276–77, 498 S.E.2d 655, 668–69 (Ct. App. 1998), Gardner got contorted into a rule that the "failure to object to [a] sentence at time of its imposition constitutes a waiver of the issue on appeal." Such a contemporaneous objection requirement makes sense in the context of *in limine* rulings that may change based upon the evidence presented during the course of the trial. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("In most cases, making a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced."). However, even the general rule requiring a contemporaneous objection has an exception when the judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question. Forrester, 343 S.C. at 642, 541 S.E.2d at 840. In such circumstances, the aggrieved party does not need to renew the objection for the issue to be preserved. Id. Similarly here, defense counsel's arguments were presented to the trial judge just prior to the imposition of the sentence. It was not necessary for counsel to reassert his arguments in the form of objections again after the judge pronounced the forty-five year sentence. The trial judge considered the arguments, rejected them, and this Court can properly review whether that decision was made in error.

***Applicable Exceptions to Issue Preservation Requirements***

*Futility*

Assuming *arguendo* that this Court finds that a contemporaneous objection must have been made when the sentence was imposed in order to preserve the issue for appeal, this Court should nevertheless consider the merits of Isaiah's appeal. "[T]he rule that an unpreserved issue will not be considered on appeal does have its exceptions." State v. Passmore, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005). Our courts recognize the doctrine of futility, whereby in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused. Id.; Staubes v. City of Folly Beach, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000) ("This Court does not require parties to engage in futile actions in order to preserve issues for appellate review."); State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994) (excusing the failure to make a contemporaneous objection where the judge's comments are such that any objection would be futile); State v. Higgenbottom, 344 S.C. 11, 542 S.E.2d 718 (2001) (employing futility doctrine)).

In the present case, counsel spent a significant amount of time arguing to the sentencing judge that a life without parole sentence could not be imposed absent a finding that Isaiah was the rare offender whose crime reflected irreparable corruption, why such a finding was not proper in Isaiah's case, and that any sentence much over thirty years would constitute a de facto life without parole sentence. R. 192, l. 17 – 201, l. 15; R. 206, l. 15 – 209, l. 11. When Judge Gibbons imposed a forty-five year sentence, it would have been futile for counsel to object and reiterate the same arguments that he had just made to the court. It is unrealistic to think that the judge would have decreased his sentence based upon a contemporaneous objection. Had such an objection been made, perhaps Judge Gibbons would have articulated that he had rejected

counsel's decreased life expectancy argument and intended his forty-five year sentence to provide a meaningful opportunity for release. This would not change Isaiah's assertion that the sentence constitutes a de facto life without parole sentence, impermissible absent a finding of irreparable corruption. Alternatively, Judge Gibbons may have made explicit a finding that Isaiah was irreparably corrupt. This would not change Isaiah's contention on appeal that the evidence did not support such a finding beyond a reasonable doubt. More likely, any such objection would have garnered a response of "noted" or "denied." Because a contemporaneous objection would have been futile, appellate review is proper in this case.

*Protection of the Rights of Minors*

Another exception to traditional issue preservation requirements is in cases where the interests of minors or incompetents are involved. Passmore, 363 S.C. at 585, 611 S.E.2d at 282. In Caughman v. Caughman, 247 S.C. 104, 109, 146 S.E.2d 93, 95 (1965), our Supreme Court held that in both the trial and appellate courts "the duty to protect the rights of incompetents has precedence over procedural rules otherwise limiting the scope of review." In Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000), our Supreme Court approved this Court's conclusion that procedural rules are subservient to the court's duty to zealously guard the rights of minors. See also S.C. Dep't of Soc. Servs. v. Roe, 371 S.C. 450, 463, 639 S.E.2d 165, 172 (Ct. App. 2006). The principle that the Court has a duty to protect the rights of minors is no less applicable to a defendant in a criminal case who is being subjecting to the severe penalties of the adult system despite the commission of his offense as a minor child. Accordingly, this Court can overlook the alleged preservation problems in this case to ensure that the constitutionally required considerations set forth by both the United States Supreme Court and our Supreme Court as to juvenile offenders were properly employed in Isaiah's case.

*Judicial Economy*

This Court has the authority to consider the merits of the issue raised in the interest of judicial economy. See State v. Vick, 384 S.C. 189, 202-03, 682 S.E.2d 275, 282 (Ct. App. 2009); Jeter v. S.C. Dep't of Transp., 369 S.C. 433, 441 n. 6, 633 S.E.2d 143, 147 n. 6 (2006) (holding, regardless of any preservation problems, the appellate court would address an issue in the interest of judicial economy); State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) (ruling on merits after finding that unyielding enforcement of PCR as the only avenue of relief presented a real threat that appellant would remain incarcerated beyond the legal sentence due to the additional time it would take to pursue such a remedy). In Southern Bell Tel. & Tel. Co. v. Hamm, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991), our Supreme Court found: "[S]ince this issue would be raised to the Court at some future time and since both parties have fully briefed the issue, we find that it is in the interest of judicial economy to decide the matter now."

In the present case, Appellant fully briefed the issue of whether the imposition of a de facto life without parole sentence violated the Eighth Amendment's ban on cruel and unusual punishment. Appellant's Brief, pp. 25-45. Respondent chose to focus the majority of its brief on issue preservation, but responded to the merits of the allegation in a lengthy footnote. Respondent's Brief, pp. 25-26 n. 19. If this Court does not rule upon the merits, this case will inevitably continue to post-conviction relief, at which point the same arguments raised here will be raised to the PCR court. Rather than delay resolution for several more years and require the additional expenditure of resources in the court of common pleas, this Court should consider the merits of this case now.

***Plea Counsel Did Not Concede the Appellate Issue***

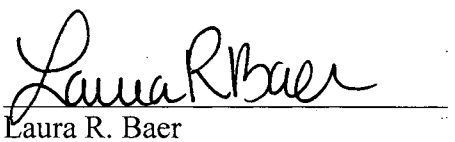
Respondent took a statement made by plea counsel out of context to suggest that he waived any challenge to Isaiah's subsequently imposed sentence. Respondent's Brief, pp. 16 and 22. Counsel made a robust proportionality argument, outlining the facts of a variety of homicide cases in Chester County, all of which resulted in sentences of between twenty and thirty-two years, with the exception of Casey Perkins, an adult offender who received a fifty year sentence for the rape and murder his neighbor, who died as a result of injuries from the sexual assault. R. 196, l. 2 – 200, l. 4. Following that portion of his argument, counsel said:

> I say all of this not to argue that you can't decide whatever you want to decide in this case, and the solicitor can take whatever possession they're entitled to take because that is their constitutional right under our system, but I do think consistency in the judicial system is a desired trait, and I would ask the Court to consider how the similarly situated homicides have been handled, and the way homicides in general have been handled in Chester County.

R. 200, ll. 5-13. Thus, counsel was not arguing that the trial judge could impose a life without parole sentence, de facto or otherwise, without making a finding of irreparable corruption, as required by Montgomery. Rather, he was acknowledging that proportionality was one amongst many considerations. In other words, he was not suggesting that the sentences in other cases discussed prohibited Judge Gibbons from imposing a sentence over thirty-two years. That is a far cry from Respondent's suggestion that counsel meant that Isaiah could be sentenced to a term of years that constituted a de facto life without parole sentence or to life without parole and that such a sentence would be beyond challenge or review.

## CONCLUSION

For the reasons set forth herein and in the Brief of Appellant, Appellant Robert Isaiah Graham respectfully requests this Court vacate his forty-five year sentence and remand his case for resentencing.



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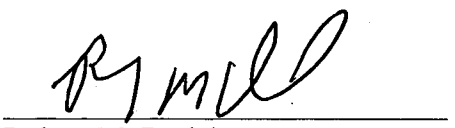

Robert M. Dudek
Chief Appellate Defender

This 9th day of November, 2017.

ATTORNEYS FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

November 9, 2017

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