STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Chester County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT ISAIAH GRAHAM,

APPELLANT

APPELLATE CASE NO 2016-000425

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the sentencing court's imposition of a de facto life without parole sentence for the murder offense that Appellant committed as a juvenile violates the Eighth Amendment's ban on cruel and unusual punishment as set forth in Miller and its progeny?

STATEMENT OF THE CASE

On October 7, 2014, the Chester County Grand Jury indicted Appellant Robert Isaiah[1] Graham for murder, related to the shooting death of sixteen year old Shyheim K. Isaiah was seventeen years old on the date of the incident. R. 321.

On May 12, 2015, Isaiah appeared before the Honorable Roger M. Young, Sr. and pled guilty, as indicted, to murder. Isaiah was represented by Michael Lifsey, and the state was represented by assistant solicitor Karen Fryar. R. 1. Sentencing was deferred so that the defense could complete its mitigation investigation pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). R. 5, ll. 12-23; R. 13, ll. 9-18.

On February 22, 2016, Isaiah appeared for sentencing before the Honorable Brian M. Gibbons. Isaiah was again represented by Michael Lifsey, and the state was represented by assistant solicitor Karen Fryar, solicitor Randy Newman, and assistant solicitor Julie Hall. R. 16. Following presentations and argument by the solicitor and defense, and allocution by Isaiah, Judge Gibbons imposed a sentence of forty-five years incarceration. R. 213.

This appeal follows.

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[1] Appellant and his father are both named "Robert Graham," such that Appellant goes by the name of "Isaiah Graham" and is referred to as "Isaiah" throughout the proceedings.

ARGUMENT

The sentencing court's imposition of a de facto life without parole sentence for the murder offense that Appellant committed as a juvenile violates the Eighth Amendment's ban on cruel and unusual punishment as set forth in Miller and its progeny.

Introduction

Isaiah's mother and father were both hopeless drug addicts, such that even with free will, Isaiah never had a real chance for success in life. His father was generally absent, and his mother was consumed with her own mental health problems and crack cocaine. They had no idea how to deal with a child who suffered from impulse control and aggression problems. However, that does *not* lead to the conclusion that as Isaiah grows in the strict environment of the Department of Corrections, he is incapable of change and will not be suitable for release when he is much older.

As the Court noted in Miller v. Alabama, 132 S.Ct. 2455, 2464 (2012), children have limited control over their own environment and "lack the ability to extricate themselves from horrific, crime-producing settings." While children have a lack of maturity and an underdeveloped sense of responsibility, which leads to recklessness, impulsivity, and heedless risk-taking, their character is not as well formed as an adult's character. 132 S.Ct. at 2464. Thus, a juvenile's traits are less fixed and their actions are less likely to be evidence of "irretrievable depravity" or "irreparable corruption." Id.; Montgomery v. Louisiana, 136 S.Ct. 718 (2016). This concept – that you can overcome the circumstances of your birth – is grounded in science, social science, and common sense. Miller, 132 S.Ct. at 2464-65; see also R. 236 – 237 (Defense Ex. 2, pp. 22-24).

There were two theories regarding the shooting in this case, both equally tragic. The solicitor submitted that it was gang-motivated and that Isaiah realized later that he shot the

wrong person. R. 37, ll. 4-14. Isaiah maintained that he and the victim were arguing; when Isaiah thought the victim was reaching for a gun, he pulled out his own gun and fired it. R. 210, l. 7 – 211, l. 18; R. 234 – 235 (Defense Ex. 2, p. 20-21). Because Isaiah faced a possible sentence of life without parole following his guilty plea to murder, he was entitled to an individualized sentencing hearing pursuant to Miller and its progeny.

The question for the sentencing court to answer was whether Isaiah was a child whose crime reflected transient immaturity or was one of those rare children whose crimes reflect irreparable corruption for whom a life without parole sentence may be proper. Tatum v. Arizona, 137 S.Ct. 11, 12-13 (Mem.) (2016) (J. Sotomayor, concurring). Instead, Judge Gibbons did exactly what the solicitor asked him to do – he treated Isaiah like an adult and sentenced him to forty-five years, which is the functional equivalent of a lifetime of incarceration.[2] R. 203, l. 18 – 204, l. 13; R. 213, ll. 4-10. Defense counsel argued both initially and in his rebuttal that the life expectancy is decreased for incarcerated individuals such that a term of years sentence "much more than 30 [years]" would be "effectively giving him a life sentence whether you use those words or not." R. 200, l. 13 – 201, l. 9; R. 208, l. 19 – 209, l. 2.

Respectfully, if the judge does not ask the right question – whether the state has proven irreparable corruption beyond a reasonable doubt – he can never get the right answer. Here, Judge Gibbons did not find that Isaiah was irreparably corrupt beyond a reasonable doubt. Thus,

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[2] In South Carolina, a murder sentence is not eligible for parole and must be served "day for day." See S.C. CODE ANN. § 16-3-20 ("No person sentenced to a mandatory minimum term of imprisonment for thirty years to life pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years to life required by this section. "); S.C. CODE ANN. § 24-13-100 ("For purposes of definition under South Carolina law, a 'no parole offense' means a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more.").

he was precluded from imposing a de facto life sentence. R. 213, ll. 4-9; see Montgomery, 136 S.Ct. at 726 ("Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect irreparable corruption.").

Relevant Facts

Format of Sentencing Hearing

At the sentencing hearing, the parties agreed that the solicitor would present her witnesses and evidence first, followed by the defense's presentation. R. 19, ll. 9-17. The solicitor called the following witnesses: Lydia Young, Isaiah's last supervision officer with the Department of Juvenile Justice ("DJJ"); Dr. Lisa Williams, the clinical director and supervising psychologist at DJJ's Upstate Evaluation Center; Dr. Richard Frierson, who conducted Isaiah's competency evaluation prior to the plea hearing; Molly Leake, Isaiah's probation officer with the South Caroline Department of Probation, Parole, and Pardon Services ("SCDPPPS") at the time of the incident; and Wayne Alley, the administrator of Chester County jail. The solicitor also submitted redacted and unredacted copies of Isaiah's interrogation video, various reports and evaluations from throughout Isaiah's upbringing, and the competency evaluation report prepared by Dr. Frierson. R. 30 – 159; R. 254-299. Photographs of the victim were shown to the judge and three family members provided oral victim impact statements. R. 160 – 164.

The defense presented testimony from Dr. Susan Knight, along with her more comprehensive written report. R. 165 – 188; R. 215 (Defense Ex. 2). Letters of support from Isaiah's former mentor and former middle school administrator were submitted, and Isaiah's mother and father both spoke to the court. R. 188 – 192; R. 242-243. Following the presentation of evidence, defense counsel made his argument regarding the Miller factors, followed by the

solicitor's argument, and then the defense's reply. R. 164, l. 23 – 165, l. 10; R. 192, l. 7 – 209, l. 11. Isaiah was then given the opportunity for allocution before the judge pronounced the sentence. R. 210, l. 7 – 213, l. 3.

Isaiah's Gestation and Birth

Isaiah was born three months premature on September 8, 1996, and weighed two pounds and seven ounces. Dr. Knight testified that prematurity can affect cognitive development, including deficits in thinking, reasoning, and planning. R. 171, l. 16 – 172, l. 5. Isaiah's mother frequently used marijuana throughout her pregnancy with him, including in the first trimester, which Dr. Knight said was linked to neuro-developmental problems. Children exposed to cannabis in utero are more hyperactive, depressed, and have lower cognitive functioning. Sent. R. 171, ll. 4-16; R. 172, ll. 13-19. Thus, Dr. Knight opined that even a mentally healthy youth would have a brain that is less mature than an adult, but that these adverse developments in Isaiah predisposed him to experience an increased vulnerability to the "'hallmark features of youth' in his life, particularly in regards to impulse control, executive function, and emotion regulation." R. 170, l. 9 – 171, l. 7; R. 222 – 223 (Defense Ex. 2, pp. 8-9); R. 231 – 233 (Defense Ex. 2, pp. 17-19); R. 239 (Defense Ex. 2, p. 25).

Dr. Knight also noted that newborn screening was positive for congenital hypothyroidism and recommended that rescreening be conducted as soon as possible. Dr. Knight was unable to locate any record of follow-up from that recommendation. She wrote: "Untreated congenital hypothyroidism can result in irreversible neurological impairment, manifesting as intellectual disability." R. 223 (Defense Ex. 2, p. 9); R. 239 (Defense Ex. 2, p. 9 25).

Isaiah's Childhood

Isaiah's parents separated when he was sixteen months old and eventually divorced. R. 223 (Defense Ex. 2, p. 9). His father was absent during Isaiah's upbringing due to alcohol and drug dependency, distance, and philandering. Dr. Knight opined that this lack of a strong paternal influence put Isaiah at a greater risk to adopt negative peer models and for delinquency. R. 234 (Defense Ex. 2, p. 20). Further, there was history of cognitive impairment and substance abuse on both the maternal and paternal sides of Isaiah's family. Isaiah was raised by a single mother, who struggled with her own cocaine addiction and mental illness. Dr. Knight found that the records revealed a family life that was "chronically dysfunctional" and lacked the consistent supportive family environment that Isaiah's special needs required. R. 173, l. 13 – 174, l. 7; R. 233 – 234 (Defense Ex. 2, pp. 19-20); R. 240 (Defense Ex. 2, p. 26).

Isaiah was first evaluated for mental health treatment at the Catawba Community Mental Health Center at less than two years old, due to his mother's reports of his poor sleep, aggression, and destructive behavior. The evaluator noted: "Mother admits at times feels she might hurt [Isaiah] in an effort to control him." R. 223 (Defense Ex. 2, p. 9); R. 233 (Defense Ex. 2, p. 19). At two and a half years old, Isaiah's mother again took him to Catawba. She requested a psychiatric evaluation due to aggression, hyperactivity, and defiance. She admitted using a "switch" for punishment and holding him down to enforce "time out." Dr. Knight agreed with the evaluator's notations that the cannabis use during pregnancy and the early modeling of harsh physical discipline may have contributed to Isaiah's aggressive behavior. Isaiah was put on a Clonidine patch (sometimes used in children to treat hyperactive behavior) for symptom control. R. 224 (Defense Ex. 2, p. 10); R. 234 (Defense Ex. 2, p. 20); R. 239 (Defense Ex. 2, p. 25); R. 292 (State's Ex. 12); R. 59, ll. 14-17; R. 111, ll. 4-6. Dr. Frierson, who conducted the

competency evaluation, said that children are not usually prescribed medication for behavioral problems at such a young age. R. 110, l. 25 – 111, l. 12.

At four years old, Isaiah was prescribed Risperdal (used for psychosis, mood stability, and agitation) and Adderall (stimulant used to improve concentration, distractibility and impulsivity), in addition to the Clonidine. At five years old, while still being treated at Catawba, Isaiah's mother reported that other family members were pressuring her to give Isaiah more whippings. He was continued on medication and diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"), combined type, and Oppositional Defiant Disorder ("ODD"). At age seven, Straterra (used for attention/concentration deficits) was added to Isaiah's prescriptions. The psychiatrist noted, although lowering Risperdal may be possible in the future, I will not consider this until the family system has an extended time of stability." R. 224 (Defense Ex. 2, p. 10).

Isaiah was hospitalized for psychiatric evaluations at ages eight and nine. Notably, though Isaiah had been stable on Risperdal and Straterra, in January 2005, the doctor took Isaiah off of his medications to "reassess symptomatology." Isaiah then became significantly worse, with increased impulsivity and behavior problems. R. 224 (Defense Ex. 2, p. 10). At his referral to Baptist Hospital on June 28, 2005, eight year old Isaiah presented as "thin" with "unkempt grooming," "restless psychomotor activity," "poor attention span," "'initial insomnia and diminished appetite," with "'threats of suicide, very low self-esteem." Though he was set to advance to third grade in the fall, Isaiah's reading and spelling skills were on a first grade level. Though there was a strong indication of "significant attention problem," Isaiah's electroencephalogram ("EEG") was normal and magnetic resonance imaging ("MRI") ruled out "organic disorders." Isaiah was put on yet another mediation, Focalin, which appeared to help

his concentration and thought processes. He was discharged home to his mother on July 6, 2005, with diagnoses of ADHD and ODD. R. 225 (Defense Ex. 2, p. 11); R. 295 (State's Ex. 13).

Later that year, on November 2, 2005, Isaiah was admitted to William S. Hall Psychiatric Institute based on a referral from Catawba. He was discharged to his mother on November 17, 2005, having been switched back to a combination of Risperdal and Straterra. Isaiah's diagnoses were ADHD, ODD, Rule Out Borderline IQ, and Patient Preemie Exposed to Cannabis in Utero. R. 225 (Defense Ex. 2, p. 11); R. 299 (State's Ex. 14).

Dr. Knight noted that the hospitalizations at eight and nine years old coincided with the peak of Isaiah's mother's relapse with crack cocaine use. In addition to drug use, Isaiah's mother struggled with multiple mental disorders that required ongoing treatment. R. 234 (Defense Ex. 2, p. 20). Michael Williams, who served as a mentor to Isaiah beginning when Isaiah was in the third grade, also noted that Isaiah's mother struggled with addiction and put her own well-being above that of Isaiah. Williams recalled Isaiah's positive involvement in little league football, and submitted: "He [Isaiah] was born with three strikes against him but when given exposure to positive activities, consistent attention, and love you could see signs of hope. Unfortunately that love and attention wasn't always available." R. 242 (Defense Ex. 3).

Following psychoeducational testing when Isaiah was in the third grade, he was classified as "emotionally disabled," making him eligible for additional resources like a self-contained classroom. Isaiah continued on psychiatric medications from ages nine to eleven. At age twelve, in the sixth grade, Isaiah was reevaluated by the school district and continued in specialized education classes. The evaluator also recommended mental health counseling with an emphasis on social skills training and coping skills. R. 225 – 226 (Defense Ex. 2, p. 11-12).

Isaiah's Adolescence

Isaiah's first contact with the juvenile justice system was on January 29, 2009, when he was twelve years old and charged with simple assault and battery third degree for an incident at school. He remained on probation until August 24, 2009. R. 42, l. 3 – 46, l. 2. On December 14, 2009, Isaiah was charged with second-degree burglary for stealing bicycles. He pled guilty to trespassing on January 26, 2010 and served two weekends. He was put on indefinite probation and ordered to submit to a community evaluation. R. 46, ll. 3-24; R. 87, l. 4 – 92, l. 4; R. 254 (State's Ex. 9). Though the source of the information is unclear, Isaiah's probation officer was "notified" that he forced his way into a sixteen year old girl's bedroom but no sexual assault was committed and no charges were pressed. R. 62, ll. 14-19; R. 245 (State's Ex. 6, p. 1).

From ages thirteen to sixteen, Isaiah had multiple juvenile charges, including: March 1, 2010, charged with assault and battery for pushing his mother onto a bed near a second story window; August 1, 2010, charged with assault and battery third degree for threatening to kill mother with glass bottle; January 18, 2011, charged with public disorderly conduct for throwing things and antagonizing teacher; March 13, 2011, charged with assault and battery third degree for pulling a knife on mother after she pulled a knife on him; April 11, 2011, detained for contempt; April 25, 2013, charged with probation violation; and June 21, 2013, charged with probation violation. R. 46, l. 25 – 79, l. 22; R. 251 (State's Ex. 8).

Following the March 2010 incident and community evaluation, Isaiah was placed in a therapeutic foster home but was removed due to fighting on April 24, 2010. R. 47, l. 8 – 49, l. 8. On August 8, 2010, he was sent to Camp White Pines, from which he was successfully released to probation on November 14, 2010. R. 50, l. 15 – 52, l. 3. On March 15, 2011, Isaiah was placed in a therapeutic home in Camden. He was removed on April 11, 2011, after threatening

the foster parent with a fire extinguisher. Following a finding of contempt, Isaiah was referred to the Upstate Evaluation Center for a secure evaluation. R. 55, l. 13 – 58, l. 11; R. 93, l. 6 – 99, l. 7; R. 263 (State's Ex. 10). Isaiah was sent back to Camp White Pines on June 16, 2011, where he stayed until September 14, 2011. R. 63, ll. 5-8; R. 64, l. 22 – 65, l. 18. He was then continued on probation and admitted to the Carolina Children's Home in Columbia on October 20, 2011. He attended A.C. Flora High School until his release from the children's home on May 20, 2012. R. 65, l. 23 – 67, l. 6; R. 250 (State's Ex. 7).

On August 29, 2012, Isaiah was enrolled in the South Pointe High School, but he was expelled in November 2012, following several infractions for fighting and sexual misconduct. R. 67, l. 7 – 70, l. 24. On January 29, 2013, Isaiah's probation was transferred from York County to Chester County, where he was under "intensive supervision" of probation officer Lydia Young due to his continued involvement with the department. Isaiah expressed his discontent over the 11:00 p.m. curfew, was not enrolled in school, and admitted smoking cigarettes and marijuana and drinking alcohol. R. 70, l. 25 – 75, l. 15. Young eventually issued a warrant for a probation violation and Isaiah was detained on April 16, 2013. R. 75, l. 16-20. Following a May 1, 2013 hearing, Isaiah was placed with Excalibur Youth Services program in Greenville. He was removed from the Excalibur program on June 21, 2013 for marijuana use and fighting, and placed in a detention facility. R. 75, l. 21 – 78, l. 12. On June 24, 2013, Isaiah was sentenced to ninety days and sent to the Upstate Evaluation Center for an updated psychological evaluation. R. 78, l. 13 – 79, l. 11; R. 99, l. 8 – 88, l. 25; R. 286 (State's Ex. 11). He was placed in Pinelands Group Home on July 26, 2013 and released on September 12, 2013 because he completed his sentence. R. 79, ll. 12-19.

On cross-examination, Lydia Young agreed that the evaluations conducted while Isaiah was under the supervision of DJJ indicated that his behavior is the product of his unstable home life and that Isaiah adjusted well to a structured environment. R. 81, l. 8 – 83, l. 15; R. 214 (Defense Ex. 1). Young also testified, surprisingly, that she was not aware of any involvement of the Department of Social Services with Isaiah. R. 83, ll. 16-17.

In January 2014, Isaiah was placed on five years of probation with SCDPPPS after pleading to the third degree burglary of his father's house. R. 128, ll. 13-25. Isaiah admitted that he had a gun on his probation paperwork and was advised that such was a violation of his probation. R. 129, l. 5 – 115, l. 18. While on probation, Isaiah was arrested for being an minor in possession of alcohol and simple possession of marijuana on April 12, 2014; arrested for possession with intent to distribute a controlled dangerous substance (prescription drugs) on June 24, 2014; and arrested for malicious injury to property related to an incident where he kicked the storm door of his father's house on June 26, 2014. An arrest warrant for various probation violations was issued for Isaiah on June 27, 2014, but he failed to report for additional meetings. R. 132, l. 20 – 141, l. 16. On July 18, 2014, Isaiah was arrested for the instant offense. R. 141, ll. 17-20; R. 251 (State's Ex. 8).

Shooting Incident

On July 16, 2014, Isaiah shot sixteen year old Shyheim K. in the chest. At the guilty plea hearing, the solicitor presented a very brief summary of the facts, stating:

> Your Honor, this incident occurred on July 16th of 2014 about 9:30 at night on Pickney Street here in the City of Chester. Sixteen year old Shyheim K[.] was shot in the chest and died on the scene there. An autopsy was performed and the cause of death was a gunshot wound to the chest and it was ruled a homicide. Mr. Robert Isaiah Graham was developed as a suspect and ultimately confessed to the shooting, and then led the officers to the gun used as the murder weapon.

R. 12, ll. 16-24. At the sentencing hearing, the solicitor said that witnesses would have testified that Isaiah was on the street with two other young men when Isaiah approached Shyheim K., "fussed" with him, and shot him. Shyheim K. was deceased when police arrived at the scene. R. 30, l. 6 – 31, l. 10. She alleged that there was evidence from Isaiah's mother and other witnesses that Isaiah had a gun prior to the incident and had made statements about wanting to kill someone. R. 31, l. 10 – 32, l. 23. The solicitor theorized that Isaiah intended to shoot a rival gang member, who looked similar to the victim, and realized afterward that he shot the wrong person. R. 37, ll. 4-14.

Isaiah waived his Miranda[3] rights and spoke with investigators, one of whom he was familiar with from a prior incident. Isaiah initially denied having any knowledge of or involvement in the shooting. However, he eventually admitted that he shot Shyheim K. and told police where to find the gun. Per his written statement, he indicated that the victim "'pushed me and I pushed him back so he started reachen *[sic]* so I pull out my gun and shoot." R. 234 – 235 (Defense Ex. 2, p. 20-21). At the sentencing hearing, Isaiah said that he knew Shyheim K. and his family, and that he did not plan to kill him. Isaiah recognized that he was the one responsible for Shyheim's death. Isaiah said that he had been "shot at" and "jumped" before and "did not know what [Shyheim K.] was about to do." R. 210, l. 7 – 211, l. 18. Though inartful, Isaiah expressed remorse for taking Shyheim's life and apologized to the family for their loss. Isaiah also expressed regret for the "hurt" caused to his family and young daughter. R. 211, l. 24 – 212, l. 16.

Dr. Knight characterized the shooting incident as "an impulsive over-reaction or a perceived defensive action, described as a 'spur of the moment' reactionary event without

[3] Miranda v. Arizona, 86 S.Ct. 1602 (1966).

consideration to the potential consequences." She wrote that such appeared to be "in line with the 'hallmark features' of youth, including impulsivity, acting and reacting without thinking through consequences, immature decision-making, and recklessness." She further stated that "[t]he characteristics of the homicide are also in line with Mr. Graham's history of mental disorder, including impulsivity and difficulty processing his emotional reactions." R. 174, ll. 8-19; R. 235 (Defense Ex. 2, p. 21).

Regarding the Miranda waiver and statements to police, Dr. Knight noted that the waiver form was read to Isaiah and that he immediately stated "yes" when asked if understood each point. Isaiah told Dr. Knight that he did not know why he waived his rights and spoke without an attorney. She noted that while he was previously arrested, most of those were handled through the family court. During the interrogation itself, Isaiah had difficulty controlling his emotions and eventually provided incriminating statements to police. Dr. Knight observed that "[y]outh, as well as individuals of limited intellectual/cognitive function, are well established as populations vulnerable to poor comprehension and interpretation of *Miranda* rights." R. 174, l. 20 – 175, l. 14; R. 235 (Defense Ex. 2, p. 21). Juvenile offenders are more apt to value the immediate gains of ending the questioning by waiving their rights, because the immaturity of their prefrontal cortex hinders their ability to prioritize long-term negative consequences such as convictions and lengthy sentences. R. 235 – 236 (Defense Ex. 2, pp. 21-22). Additionally, research has found that "the synergistic effects of poor reading comprehension, low intelligence, and comorbid mental disorders are likely to have catastrophic effects on *Miranda* comprehension and subsequent reasoning." Thus, she opined that since all three of those factors were present for Isaiah, "he may have been more susceptible to the 'incompetencies of youth' as discussed by *Miller* and *Aiken*." R. 236 (Defense Ex. 2, p. 22).

Infractions in County Jail

The solicitor presented testimony from Wayne Alley, the administrator of the Chester County jail, regarding numerous disciplinary infractions involving Isaiah while at the local jail. R. 143, l. 11 – 156, l. 19. Alley agreed with defense counsel that jail was just a holding facility with no education or work opportunities for detainees. He also agreed that several of the incidents also involved Quintin McClinton, who was previously identified as an older male and the leader of the Roundtree Circle gang with which Isaiah was involved. R. 157, l. 11 – 158, l. 19; see also R. 142, ll. 7-24. R. 178, l. 15 – 179, l. 19. Dr. Knight noted that youth who lack a supportive family environment are often looking for community, and recruited and influenced by older gang members. R. 180, ll. 5-22.

Mental Health Diagnoses and Possibility of Rehabilitation

Dr. Knight's report included a table that reflects the various diagnoses made throughout Isaiah's life, from his first diagnosis with Disruptive Behavior Disorder, not otherwise specified, at twenty-one months old, through Dr. Frierson's diagnosis of antisocial personality disorder at the 2014 competency evaluation. R. 229 (Defense's Ex. 2, p. 15). Unfortunately, Isaiah, likely not recognizing Dr. Knight's function and the importance of her testimony, declined to meet with her a second time. As such, she was unable to complete the cognitive examination or conduct a full review of psychological symptoms. R. 181, l. 7 – 182, l. 7; R. 230 (Defense Ex. 2, p. 16). Nonetheless, she found the following to be "appropriate" diagnoses: Borderline Intellectual Functioning, ADHD, and Antisocial Personality Disorder ("ASPD"). R. 230 (Defense Ex. 2, p. 16).

In addition to those same diagnoses, Dr. Frierson found that Isaiah suffered from alcohol dependence and cannabis dependence. R. 117, ll. 2-25. He found no signs of major mental

illness or psychosis. R. 118, ll. 1-9. Regarding antisocial personality disorder, Dr. Frierson described it as "a pervasive pattern of behavior that is unlawful, that fails to conform to social norms." R. 118, l. 16 – 119, l. 1. An individual must be at least eighteen years old to be diagnosed with ASPD and there must have been evidence of a conduct disorder with the symptom onset prior to age 15. R. 119, ll. 1-3. Though Dr. Frierson said that that there is no medication to cure ASPD, he admitted on cross-examination that interventions over time can help people better control their anger and aggression. R. 124, l. 3 – 125, l. 2.

While unsure of any particular research, he also noted a common perception among psychiatrists that as persons with ASPD age, they become less violent. R. 125, ll. 3-18; R. 126, ll. 14-25. Additionally, he admitted that ASPD is a common diagnosis among inmates. R. 125, ll. 19-24. However, Dr. Frierson maintained that studies have shown that persons with a combination of ASPD and low intelligence tend to be more violent long term than people who suffer from only one of those. R. 127, ll. 1-11. He also noted that with any mental health disorder, the earlier the onset of the behavior, the worse the prognosis. R. 126, ll. 4-13.

Dr. Knight opined that Isaiah's status as a juvenile alone made him more amenable to treatment that an adult. She noted that while we cannot know who will continue in a criminal career and who will not, the character of a juvenile is not fully formed. Even so, she said that there is "a very robust finding in the social science, that people age out of crime, they age out of violence faster than general crime but they also age out of violence." R. 176, ll. 5-20. Though discussed more fully in her written report, **Dr. Knight testified that criminal activity typically peaks in adolescence, slowly goes down throughout the twenties, and typically flatlines in the fourth decade. The same pattern has been observed in incarcerated persons, seventy-**

five to eighty percent of whom have ASPD. R. 176, l. 20 – 178, 8; R. 182, l. 8 – 184, l. 13; R. 185, ll. 3-17; R. 236 – 238 (Defense Ex. 2, pp. 22-24).

With respect to continuing mental health treatment, Dr. Knight recommended that Isaiah be evaluated by a psychiatrist at SCDC to determine if a mediation may assist him in dealing with his anger. She noted that Isaiah had been medicated from approximately ages two to fifteen and had sometimes noted a positive response in his behavior. R. 179, l. 20 – 180, l. 4. Dr. Knight disagreed with Dr. Frierson's averment that violence would persist longer for persons who suffer from a combination of APSD and lower intelligence; instead opining that, as a general rule, people with antisocial personality disorder have lower intellectual functioning. R. 184, l. 14-23.

Outbursts During Sentencing

More than seven months passed between Isaiah's guilty plea hearing and sentencing. During that time, he regretted entering the plea and grew to distrust his attorney. Dr. Knight observed the distressed relationship between Isaiah and defense counsel during the initial portion of her evaluation on January 5, 2016. She noted that Isaiah seemed to calm once Lifsey left the room. Isaiah's requests to withdraw his plea and to relieve Michael Lifsey were both denied. Isaiah interrupted the sentencing proceedings and had to be removed from the courtroom at one point. R. 19, l. 1 – 29, l. 3; R. 161, ll. 22-23; R. 202, ll. 11-20; R. 230 (Defense Ex. 2, p. 16); R. 236 (Defense Ex. 2, p. 22).

Notably, an article was published in The Herald the day before Isaiah's sentencing, in which the author compared Isaiah's case to that of Clayton Eli Watts, a white seventeen year old who plotted the murder of his grandmother, Jimmie Paul, and was sentenced to thirty years in prison. Dys, Andrew, *Will teen killer in Chester get life in prison?*, THE HERALD, Feb. 21, 2016,

http://www.heraldonline.com/news/local/news-columns-blogs/andrew-dys/article61679997.html. The article suggested that Isaiah may be sentenced more harshly because of his race. Dys, *supra.* Prior to and during his removal from the courtroom, Isaiah yelled: "Yeah, I'm a black man, so what? I'm a black man. I don't even care no more."; "I'm a black man and I don't care, I will stand up for what's right period;" and "It doesn't matter, I'm going to stand up for what's right." R. 24, ll. 17-25. The sentencing judge responded: "I know you're a black man, your color doesn't matter to me. Take him back to lockup." R. 24, ll. 22-23; R. 29, ll. 4-25.

Dr. Knight testified that "showing out on the day of sentencing" was consistent with the nature of Isaiah's mental disorder, as he suffers from poor impulse control. R. 175, l. 15 – 176, l. 4. In his argument, defense counsel emphasized that Isaiah's behavior was reflective of the poor decision making and incompetency that are characteristically associated with youth. He asked the court to view not only the crime, but Isaiah's behavior at sentencing, through that lens and not to punish Isaiah more harshly because of his actions in court. R. 194, l. 4 – 195, l. 3; R. 207, ll. 6-13.

Argument on Miller Factors

Defense Counsel

Defense counsel pointed the sentencing court to Miller v. Alabama, 132 S.Ct. 2455 (2012), Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), and Montgomery v. Louisiana, 136 S.Ct. 718 (2016). He argued that the main thrust of the case law is that "life without parole for a juvenile should be an extremely, extremely rare event." R. 192, l. 17 – 193, l. 6. In light of the hallmark features of youth, "juveniles must be treated differently and they must be viewed differently." R. 193, ll. 6-16. He argued that in order to find that a juvenile is the rare offender against whom a life without parole sentence is justified, the court must find "irretrievable

depravity [such] that rehabilitation is [im]possible" and that the juvenile is "incorrigible." R. 193, ll. 16-24. However, case law recognizes "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, he summarized that the court "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 argued that in determining what would constitute such a "rare circumstance," the court should begin by looking at the facts of the crime. While noting that any murder is tragic, he argued that there was, sadly, nothing particularly unusual or sophisticated about this crime. He submitted: "The crime that we have here is really a shockingly common occurrence in the 25 years I have been practicing law and been a public defender, which is a young man makes a snap decision and what probably 30 or 40 or 50 years ago would have been a fist fight turns into a killing." Sent R. 195, ll. 8-20. Counsel noted that Isaiah pled guilty to murder, acknowledging that there was some malice aforethought. However, there was no "extraordinary wickedness" that would distinguish this murder from any large number of other homicides that have been prosecuted in Chester County. R. 195, l. 21 – 196, l. 2.

Defense counsel then presented a chart to the court outlining other homicides handled by the public defender's office in Chester since 2009. R. 196, ll. 2-17. Counsel noted that it was rare for the solicitor to insist upon a plea to murder as they did in Isaiah's case. R. 196, l. 17 – 197, l. 13. Counsel recognized that thirty-three year old Casey Perkins was sentenced to fifty years for murder, but that was after a trial rather a guilty plea. Further, counsel described Perkins as "the worst case" he had heard of in Chester, noting that Perkins was a registered sex offender,

who raped his neighbor to the point that she died from injuries she suffered in the sexual assault. R. 197, ll. 13-20. The only other defendant who received a sentence of more than thirty years was twenty-seven year old Jeffrey Bradley, who crushed the skull of an eleven-month old child and received thirty-two years in prison for homicide by child abuse. R. 197, l. 20 – 198, l. 5. Forty year old Aris Nichols stabbed his pregnant girlfriend, killed a viable fetus, but plead guilty to death of fetus in utero and he received twenty-five years. R. 198, ll. 6-10.

Noting the danger to the general public from firing shots on street, counsel looked for other crimes of a similar nature. Keith Keener opened fire in a crowded parking lot of a nightclub and was allowed to plead to voluntary manslaughter and received a sentence of twenty-seven years. William Graham was twenty-one years old when he opened fire in the breezeway of the Chester County Hospital while people were brining injured into the hospital. He was allowed to plead to voluntary manslaughter and received a sentence of twenty years. R. 198, l. 11 – 199, l. 4. With respect to age at the time of the offense, the only seventeen year old that counsel could find who was charged with murder was Clayton Watts. He conspired with an eighteen year old and nineteen year old to have his grandparents killed and his grandmother was actually murdered. Counsel argued: "[I]f you're looking for a case that talks about wickedness, that the facts of the case indicate evil, hiring someone to kill your grandmother strikes me as much worse than losing your temper on the roadway." R. 19, R. 31.

Counsel agreed with the judge that Watts and his conspirators all had negotiated pleas to thirty years. However, he argued that there was no reason that this case should not also be a thirty year sentence. R. 199, l. 17 – 200, l. 4. He noted that "consistency in the judicial system is a desired trait" and asked that 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. 9-13.

Next, defense counsel handed the court a list, gleaned from a Freedom of Information Act request served on SCDC, of the age at death for all inmates who died from natural causes from 2009 to 2011. Counsel submitted that the "fate" of inmates in SCDC is worse than the general population, as the chart reflected an average age at natural death for black males of fifty years old and for white males of fifty-three years old. R. 200, l. 13 – 201, l. 4. Counsel explained that life expectancy was important because even if the court agreed that this was not a case for life without parole, "a certain number is effectively giving him a life without parole sentence regardless of what we call it." R. 201, ll. 4-10.

Solicitors

Assistant solicitor Fryar advocated for the imposition of a sentence of life without the possibility of parole, arguing that Isaiah committed "a heinous murder" that "terrifies ... everybody in America who have children walking down the street to the store." R. 201, l. 17 – 202, l. 1. She argued that while some children are still playing with G.I. Joes when they are teenagers, Isaiah "got started at an early age hurting other people." R. 202, ll. 1-23. She argued that Isaiah is not a typical young person and "has no remorse for anything that he's ever done and ... has shown that he will continue on this path for as long as he lives." R. 202, l. 23 – 203, l. 6. The solicitor went so far as to argue that "the State of South Carolina got involved with him at an early age and tried and tried and tried to help him, but either he didn't want to be helped, is what I submit, or he can't be helped and that's unfortunate." R. 203, ll. 6-10. She submitted that Dr. Frierson's testimony established that Isaiah is "just going to be at a risk to be violent for the rest of his life." R. 203, ll. 10-13.

The solicitor averred that Isaiah's case was different than the others cited by defense counsel because of "the number of incidents this young man has been in through his whole life." R. 203, ll. 13-18. Though undisputed that Isaiah was seventeen on the date of the incident, she argued that Isaiah has "gotten to the point where he crossed over the child line into adult line." R. 203, ll. 18-19. She even suggested: "He's been engaging in pseudo adult activities for a very long time, Your Honor, and he should be perceived that way by you, sir." R. 203, ll. 19-22.

Regarding the Miller factors, the solicitor failed to acknowledge any of the related mitigating evidence. Rather, regarding age, she said: "Yeah, you can look at his chronological age, but if you look at his age through the system, he knows the system." R. 203, ll. 22-24. Thus, she argued that Isaiah is "not easily frightened by the police" and "sophisticated in his criminal thinking." R. 203, l. 25 – 204, l. 2. She submitted that Isaiah "should be treated like other adults and he should be feared like other adults." R. 204, ll. 3-13.

Regarding Isaiah's family and home environment, she argued that the state had placed Isaiah in various group homes and programs over the years, where he continued to have problems. Thus, she argued "it's not just his environment." R. 204, l. 13 – 205, l. 1. With respect to his participation, the solicitor argued that crime was "gang motivated" and that Isaiah had talked about wanting to kill someone. She averred that it was up to the judge to decide if walking up to the victim and shooting him in the street was "wicked and evil." R. 205, ll. 1-11. Regarding the fourth factor, the solicitor suggested that Isaiah's prior contacts with the juvenile justice system provide him with "quite the ability to deal with police officers and prosecutors in courts because he has been doing it his whole life." R. 205, ll. 11-15. Finally, regarding rehabilitation, she argued: "[Y]ou have seen what can be done and what we have offered him for

years, in my opinion and the State's opinion there is no hope for rehabilitation." R. 205, ll. 15-21. She asked the court to "protect us by giving him life without parole." R. 205, ll. 21-22.

Solicitor Newman added that there were "literally no similarities between this Paul murder with three defendants and this case that we're before you for today." R. 205, l. 25 – 206, l. 4. In reiterating the state's request for life without parole, he said: "That's an evil young man who deserves life in prison, and if his actions and his record don't shock your conscious, Your Honor, I don't know what will." R. 206, ll. 9-13.

Defense Counsel's Rebuttal

In response to the solicitor's averments that the state had done all that it could for Isaiah, defense counsel said that such efforts primarily took the form of medication. He noted that Isaiah was prescribed his first psychiatric medication when he weighed only thirty-one pounds. With due respect to the juvenile justice system, counsel asked rhetorically what you have to do to get committed to DJJ in York County. He argued that "to characterize the State [a]s doing great things for him is inaccurate." R. 206, l. 15 – 207, l. 6. While counsel agreed that Isaiah had been before many courts, he disagreed that they equated to "experience," noting the difficulties that Isaiah had with his behavior during the proceedings. R. 207, ll. 6-13.

He further noted the inconsistency in the solicitor's position that the shooting was gang related but that Isaiah acted alone. R. 207, ll. 13-19. While counsel acknowledged that Isaiah pulled the trigger, he argued that "to act as if this 17 year old who has suffered mightily from mental problems and medications and a dysfunctional home environment and a lack of a father figure in the home regularly would not be adversely influenced by older gang members" would require that we "shut our eyes to...the reality of...the gang structure." R. 207, ll. 19-25.

Counsel argued that one of the best things for Isaiah would be to get away from Quintin McClinton. R. 208, ll. 1-8.

Counsel reiterated that he was not asking the court to release Isaiah tomorrow. While there is no crystal ball to see who Isaiah will become, counsel argued that the implication of the case law "is that life without parole for a juvenile should be reserved for the worst of the worst." R. 208, ll. 8-17. He argued that concept applies not only to worst of the defendants, but to the worst of the crimes. He offered that Isaiah's crime is a serious crime, but that was why he is facing a minimum sentence of thirty years. R. 208, ll. 17-20. Counsel argued:

> 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.

R. 208, l. 21 – 209, l. 2. In addition to the Miller factors, counsel asked that court not to punish Isaiah for his immaturity in this courtroom "by throwing away the rest of his life." He submitted that if Isaiah "is fortunate enough to live to be 47 years old, he, like all of us who have reached that age, will regret the things we did." R. 209, ll. 2-10.

Imposition of Sentence

The judge's imposition was brief, stating only:

> Based upon the testimony and evidence presented in the court today and after considering all evidence and exhibits offered, specifically considering the applicable *Miller* factors as the Court is required to do under our U.S. Supreme Court, the sentence of the court 45 years. Good luck to you, sir. Credit for time served.

R. 213, ll. 5-10.

Discussion

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

The Eighth Amendment to the United States Constitution, applicable to the states under the Fourteenth Amendment, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend VIII; U.S. Const. amend XIV. The United States Supreme Court has found that because the words of the Eighth Amendment are not precise and their scope is not static, it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). Following a line of other cases that recognized that diminished capacity and culpability can constitutionally preclude severe penalties for certain offenders,[4] the United States Supreme Court held in Miller v. Alabama, 132 S.Ct. 2455 (2012), that the mandatory imposition of a life sentence without parole for youthful offenders was unconstitutional. Though the Miller Court did not go on to consider the alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, it wrote:

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

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[4] Thompson v. Oklahoma, 487 U.S. 815 (1988) (banned death penalty for juvenile offenders who was under the age of sixteen at the time of the offense); Atkins v. Virginia, 536 U.S. 304 (2002) (banned the death penalty for mentally retarded offenders); Kennedy v. Louisiana, 554 U.S. 407 (2008) (banned the death penalty for non-homicide offenders); Roper v. Simmons, 543 U.S. 551 (2005) (banned the death penalty for juvenile offenders who were under the age of eighteen at the time of the offense); Graham v. Florida, 560 U.S. 48 (2010) (banned life without parole for juvenile offenders who commit non-homicide offenses).

132 S.Ct. at 2469 (internal quotations omitted) (emphasis added).

In Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), our Supreme Court held both that Miller was retroactively applicable and that Miller was applicable to juveniles who received a non-mandatory sentence of life without parole. In determining the breadth of Miller, the Aiken majority found that it "unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole" and "required an individualized sentencing proceeding before imposing a sentence of life without parole on a juvenile offender." 410 S.C. at 542, 765 S.E.2d at 576. The majority recognized that the Miller Court "did not expressly extend its ruling to states such as South Carolina whose sentencing scheme *permits* a life without parole sentence to be imposed on a juvenile offender but does not *mandate* it." Id. at 542, 765 S.E.2d at 576. However, the Aiken majority held that there was a proportionality rationale integral to Miller's holding – youth has constitutional significance; as such, it must be afforded adequate weight in sentencing – which must be given effect. Id. at 542-43, 765 S.E.2d at 576. Thus, the Court wrote: "Miller does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." Id. at 543, 765 S.E.2d at 577.

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

> (1) the chronological age of the offender and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence; (2) the family and home environment that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the incompetencies associated with youth—for example, the offender's inability to deal with police officers or prosecutors (including on a plea agreement) or the offender's incapacity to assist his own attorneys; and (5) the possibility of rehabilitation.

Id. at 544, 765 at 577 (internal quotations omitted) (citing Miller, 132 S.Ct. at 2468). While the Court did not require the sentencing proceedings to mirror the penalty phase of a capital case, it found that "the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings," in addition to the Miller factors. Id. at 544-45, 765 at 577. Thus, the Aiken Court provided that the principles enunciated in Miller "apply retroactively to these petitioners, to those similarly situated, *and prospectively to all juvenile offenders who may be subject to a sentence of life imprisonment without the possibility of parole*." Id. at 545, 765 S.E.2d at 578 (emphasis added).

In Montgomery v. Louisiana, 136 S.Ct. 718 (2016), the United States Supreme Court set forth the true breadth of Miller. The Court held that Miller announced a new substantive constitutional rule that was retroactive on state collateral review, effectively affirming our Supreme Court's retroactivity ruling in Aiken. 136 S.Ct. at 732-36. It further noted Miller's recognition "that a sentencer might encounter the **rare juvenile offender** who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." 136 S.Ct. at 733 (emphasis added). 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) (emphasis added). Thus, the Court explained: "Miller . . . did more than

require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth." 136 S.Ct. at 734 (internal quotations omitted).

The Montgomery Court ruled: "Because Miller determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status —that is, juvenile offenders whose crimes reflect the transient immaturity of youth." 136 S.Ct. at 724 (internal citations and quotations omitted). **"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) (emphasis added). The Court concluded that Montgomery and other prisoners like him "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." 136 S.Ct. at 736-37.

B. A forty-five year sentence for murder constitutes a de facto life without parole sentence.

Isaiah is not eligible for parole and must serve his forty-five year sentence "day for day." See S.C. CODE ANN. §§ 16-3-20, § 24-13-100. According to the South Carolina Department of Corrections, **Isaiah's projected release date is July 6, 2059, approximately two months prior to his sixty-third birthday.** This constitutes a de facto life sentence, which is just as offensive to the Constitution's ban on cruel and unusual punishment as a sentence of "life without parole" for an offender whose crime reflects unfortunate yet transient immaturity. While neither the United States Supreme Court nor our Supreme Court has expressly ruled that Miller is applicable to a

term of years sentence that is the functional equivalent of life without parole, their inclusion in the affected class is implicit in the reasoning explained in Miller, Aiken, and Montgomery. The relevant inquiry is whether the sentence provides a realistic and meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. A sentences that fails to provide an opportunity for release at a meaningful point in time in an individual's life violates the Eighth Amendment—regardless of whether the sentence is labeled life without parole, life with parole, or a term of years (with or without parole eligibility).

Here, defense counsel presented the sentencing court with documentation obtained through a Freedom of Information Act regarding inmates in SCDC who died of natural causes from 2009 through 2011. Counsel submitted that the statistics reflect an average age at death of fifty years old for black males and fifty-three years old for white males. He argued that even if the court agreed that a life without parole sentence was not warranted in this case, it must "be mindful that . . . a certain number is effectively giving him a life without parole sentenced regardless of what we call it." R. 200, l. 13 – 201, l. 9. Again, just prior to Isaiah's allocution and the imposition of the sentence, the defense counsel argued that "there's a more than reasonable chance that he [Isaiah] will not live 30 years in the department of corrections but at least there will be some possib[ility] of him surviving." R. 208, ll. 19-24. However, he argued that any sentence of "much more than 30 [years]" would be "effectively giving him a life sentence whether you use those words or not." R. 208, l. 24 – 194, l. 2.

The concept of a de facto life sentence is not novel. In State v. Kimbrough, 212 S.C. 348, 357, 46 S.E.2d 273, 277 (1948), our Supreme Court remanded for resentencing where it found: "From the evidence the jury evidently concluded that appellant should not receive the maximum punishment of life imprisonment, but the [thirty-year] sentence imposed is to all intents and

purposes the equivalent of a life sentence, which is the highest punishment permitted for the most aggravated form of the crime." In United States v. Pileggi, the Fourth Circuit Court of Appeals referenced its prior remand for resentencing of Pileggi where the government recommended and the district court imposed "a *de facto* life sentence" of fifty years contrary to its extradition agreement with Costa Rica that Pileggi "would not receive a penalty of death or one that requires that he spend the rest of his natural life in prison." 703 F.3d 675, 678 (4th Cir. 2013). Even the United States Sentencing Commission recognizes such sentences, defining it as "one where the length of the sentence imposed is so long that the sentence is, for all practical purposes, a life sentence and likely was intended to be such by the judge who imposed it." Patti B. Saris, et al., U.S. Sent. Comm'n, Life Sentences in the federal system (Feb. 2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf. For purposes of statistical analysis, the Sentencing Commission uses a sentence of **470 months (39 years and two months)** to identify cases in which a de facto life sentence was imposed, consistent with the average life expectancy of federal criminal offenders. Saris, *supra*.

Several other state decisions, discussed *infra*, are also instructive, as their rationale for finding Miller applicable to de facto life without parole sentences mirrors our Supreme Court's rationale in Aiken for finding Miller applicable to our State's discretionary sentencing scheme. That is, that Miller was focused on the constitutional significance of youth, which must be afford adequate weight at sentencing. Aiken, 410 S.C. at 543, 765 S.E.2d at 576. Miller established "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. It was on that basis that our Supreme

Court found that Miller "deserves **universal application**." Id. (emphasis added). This universal application includes de facto life without parole sentences.

In State v. Null, 836 N.W.2d 41, 70-74 (Iowa 2013), the Iowa Supreme Court held that the principles of Miller apply to juveniles sentenced to a lengthy term of years, remanding Null's fifty-two and a half year sentence for resentencing. Although the Iowa Supreme Court made clear that its decision was based on its interpretation of the provision against cruel and unusual punishment in the Iowa Constitution, it also expressed that the language of its state constitution closely tracks that of the Eighth Amendment to the federal constitution. Null, 836 N.W.2d at 69, 70 n. 7; see also S.C. Const. art. I, § 15 (prohibiting cruel, corporal, and unusual punishment). The Court found that "[t]he prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society . . . ." Id. The Null Court reasoned: "*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 (emphasis added).

The Iowa Supreme Court reiterated its ruling in State v. Ragland, 836 N.W.2d 107 (Iowa 2013), where the Court found that the governor's commutation providing the possibility of parole after sixty years did not cure the unconstitutionality of Ragland's life without parole sentence. The Ragland Court noted the split in authority regarding whether Graham applies to long sentences that are not "technically" life without parole. Id. at 120-21. The Court ruled:

> [T]he 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. **Oftentimes, it is important that the spirit of the law not be lost in the application of the law. This is one such time.** The spirit of the constitutional mandates of *Miller* and *Graham* instruct that much more is at stake in the sentencing of juveniles than merely making sure that parole is possible. In light of our increased understanding of the decision making of youths, the sentencing process must be tailored to account in a meaningful way for the attributes of juveniles that are distinct from adult conduct. **At the core of all of this also lies the profound sense of what a person loses by beginning to serve a lifetime of incarceration as a youth.**
>
> **In the end, 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. Accordingly, we hold *Miller* applies to sentences that are the functional equivalent of life without parole.**

Id. at 121-22 (internal citations omitted) (emphasis added).[5]

In Bearcloud v. State, 334 P.3d 132, 135 (Wyo. 2014), after two remands for resentencing pursuant to Miller, the appellant's aggregate sentence was structured such that his earliest possible meaningful opportunity for release was "in **just over 45 years**, or when he is 61 [years old]." 334 P.3d at 135-36. 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 reasoned that a lengthy sentence results in the same of denial of hope – rendering good behavior

[5] The Iowa Supreme Court subsequently adopted a categorical rule that juvenile offenders may not be sentenced to life without the possibility of parole under article I, section 17 of the Iowa Constitution. State v. Sweet, 879 N.W.2d 811, 839 (Iowa 2016).

and character improvement immaterial because the juvenile offender "will remain in prison for the rest of his days" – as the mandatory life without parole sentences held unconstitutional in Miller. Id. Consequently, the Court remanded Bear Cloud's case for resentencing, again.

More recently, in Casiano v. Commissioner, 115 A.3d 1031, 1044 (Conn. 2015), the Connecticut Supreme Court held that Miller was applicable to the imposition of a fifty-year sentence without the possibility of parole on a juvenile offender. Like Iowa, the Connecticut Supreme Court acknowledged that some courts have concluded that the requirements of Graham and Miller apply only to "a literal 'life' sentence regardless of whether the sentence exceeds the average life expectancy of a juvenile offender." 115 A.3d at 1044. The Casiano Court was not persuaded by those decisions, finding that **"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. (emphasis added).

The Casiano Court observed that the Center for Disease Control's statistics reflect an average life expectancy of seventy-six years for a male in the United States. 115 A.3d. at 1046. However, the Court noted that such statistics do not account for the reduction in life expectancy due to the impact of spending the vast majority of one's life in prison. Id. The Court cited to various studies and court decisions that reflect **an average life expectancy of 50.6 years for a juvenile sentenced to natural life**, a two-year decline in life expectancy for every year of incarceration, and the overall reduction in life expectancy in prison as compared to the general population. Id. The Court noted that a fifty-year no-parole sentence would result in release between the ages of sixty-six and sixty-eight years old. Id. Assuming the offender lived to be released, "he will have irreparably lost the opportunity to engage meaningfully in many of these

activities and will be left with seriously diminished prospects for his quality of life for the few years he has left." Id.

The Casiano Court found that United States Supreme Court's view of the concept of "life" in Miller and Graham was more broad than "biological survival" and "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." 115 A.3d at 1046. Thus, the Court ruled: "In 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. Accordingly, the Court held that Miller was applicable "when considering whether to sentence a juvenile offender to fifty years imprisonment without parole" and remanded the case for further proceedings consistent with its opinion. Id. at 1048.

In Atwell v. State, 197 So.3d 1040 (Fla. 2016), the Florida Supreme Court found Miller applicable to de facto life sentences, noting that it has "consistently followed the spirit of *Graham* and *Miller* rather than a narrow, literal interpretation." *Id.* at 1046. The Atwell Court wrote: "It is thus evident from our case law that this Court has—and must—look beyond the exact sentence denominated as unconstitutional by the Supreme Court and examine the practical implications of the juvenile's sentence, in the spirit of the Supreme Court's juvenile sentencing jurisprudence." Id. at 1047. Like Florida, the California Supreme Court began by ruling that Graham applied to sentences that are the functional equivalent of a life without parole sentence. People v. Caballero, 282 P.3d 291, 295 (Cal. 2012). Subsequently, in People v. Franklin, 370 P.3d 1053, 1059 (Cal. 2016), *cert. denied*, 137 S.Ct. 573 (2016), the Court extended its ruling and held that Miller also applies "to such functionally equivalent sentences." Ultimately, the

Court did not reach the determination of whether Franklin's original sentence was the functional equivalent of life without parole, instead determining that California legislative reform applicable to Frankin effectively amended his sentence to life with parole after twenty-five years, bringing it out of the gamut of Miller. 370 P.3d at 1060-62, 1067. Notably, the South Carolina General Assembly has yet to pass any attempt at legislative resolution in light of Graham and Miller. See Montgomery v. Louisiana, 136 S.Ct. 718 (2016) ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.").

Recently, in State v. Ramos, 387 P.3d 650, 659 (Wash. 2017), *as amended* (Feb. 22, 2017), *reconsideration denied* (Feb. 23, 2017), the Washington Supreme Court held that Miller's requirement that sentencing courts conduct individualized hearings for convicted juvenile offenders facing a possible life-without-parole sentence, applied equally to literal and de facto life-without-parole sentences. The Ramos Court ruled: "*Miller*'s reasoning clearly shows that it applies to any juvenile homicide offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation." 387 P.3d at 660. The Court noted that "most courts that have considered the issue agree that a lengthy term of years for a juvenile offender will become a de facto life sentence at some point." Id. Thus, it concluded: "Given that the majority of jurisdictions agree on this point and it is consistent with both common sense and Washington case law, we follow suit." Id. at 660-61; see also State v. Ronquillo, 361 P.3d 779 (Wash. Ct. App. 2015) (holding that sentence that contemplated imprisonment until the age of sixty-eight "is a *de facto* life sentence").

The New Jersey Supreme Court also recently found a lengthy term-of-years sentence imposed on a juvenile can be sufficient to trigger the protections of Miller under the Federal and

State Constitutions in State v. Zuber, 152 A.3d 197 (N.J. 2017). See also People v. Ellis, 2015 WL 4760322 *3-6 (Colo. App. Aug. 13, 2015) (remanded case for a determination of parole eligibility and life expectancy, with instructions to resentence in accordance with Miller if there is no meaningful opportunity for release).

Thus, there are a myriad of cases from around the country that recognize the applicability of Miller to de facto life sentences. The court's properly focus upon whether the sentence provides a meaningful opportunity parole. Here, Isaiah's expected age at release would be almost sixty-three years old. As counsel articulated, it is unlikely that Isaiah will live to be fifty years old in SCDC, much less into his sixties. That figure is supported by the U.S. Sentencing Commission statistics, discussed *supra*, and the ACLU of Michigan study, which found an average age at death of 50.6 years for juvenile offenders sentenced to life without parole sentences.[6] ACLU of Michigan, Michigan Life Expectancy Data for Youth Serving Natural Life Sentences 1 (April 2013), http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf. The study cited the increase in youth's vulnerability to sexual and physical assault as factors contributing to their decreased life expectancy. ACLU of Michigan, *supra*. Even if Isaiah could survive to be released, a geriatric release does not provide the meaningful opportunity for a life outside of the prison walls contemplated by the case law. See Graham v. Florida, 130 S.Ct. 2011, 2030; State v. Null, 836

[6] The ACLU found "a strong correlation between the number of years spent in prison and life expectancy resulting in further diminished life expectancy for those serving a natural life sentence." ACLU of Michigan, *supra*. The study looked at the data for all individuals 18 and older sentenced to natural life in Michigan who have died in prison, in excess of 400 individuals. ACLU of Michigan, *supra*. They determined that the average age at death for adults incarcerated for natural life sentences in Michigan, was 56.0 years for African-American males and 60.1 years for whites. ACLU of Michigan, *supra*. Though the sample was not large enough to adjust for race, the average age at death for Michigan youth sentenced to natural life is 50.6 years. ACLU of Michigan, *supra*.

N.W.2d 41, 71 (Iowa 2013); Bear Cloud v. State, 334 P.3d 132, 142 (Wyo.2014); Casiano v. Commissioner, 115 A.3d 1031, 1047 (Conn. 2015).

If this Court were to find that the interpretation of the Eighth Amendment of the federal constitution in Miller and Aiken did not apply to functional equivalent of life without parole sentences, the Appellant asserts that his sentence violates the South Carolina Constitution's prohibition on cruel and unusual punishment. See S.C. CONST. art. I, § 15 ("Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained."); Aiken, 410 S.C. at 545-46, 765 S.E.2d at 578 (Pleicones, J., concurring) (stating that he would reach the same result as the Aiken majority under S.C. CONST. art. I, § 15).

C. The sentencing judge's failure to find that the state proved that Appellant was irreparably corrupt beyond a reasonable doubt precluded imposition of a de facto life without parole sentence.

In the present case, there is no question that the prosecution and defense presented evidence and argument related to the Miller factors. However, in Montgomery v. Louisiana, 136 S.Ct. 718 (2016), the United States Supreme Court made clear what should have been evident already from Miller: it is not enough merely to discretionarily consider a child's chronological youth in selecting a sentence. Instead, the sentencer must actually give mitigating effect to the characteristics and circumstances of youth. 136 S.Ct. at 733-34. The sentencer may impose a life-without-parole sentence only after making a properly informed, forward-looking determination that the particular child "exhibits such irretrievable depravity that rehabilitation is impossible." Montgomery, 136 S. Ct. at 733. Accordingly, sentences for children must provide "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" — except in the rarest of homicide cases where the sentencer determines, after giving mitigating

effect to the characteristics and circumstances of youth, that the child is irreparably corrupt. See Miller, 132 S. Ct. at 2469 (citing Graham v. Florida, 560 U.S. 48, 74 (2010)).

In Montgomery, the state argued that Miller could not have made a constitutional distinction between children whose crimes reflect transient immaturity and those whose crimes reflect irreparable corruption because Miller did not require trial courts to make a finding of fact regarding a child's incorrigibility. 136 S.Ct. at 735. The Montgomery Court explained that "[w]hen a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." Id. Even so, the Court was noted that Miller's failure to impose a formal factfinding requirement "does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." Id.

On May 23, 2016, the United States Supreme Court granted certiorari, vacated judgment, and remanded for resentencing in light of Montgomery in eight cases where juvenile offenders were serving life without parole for homicide offenses, primarily following conversions of their death sentences under Roper. Adams v. Alabama, 136 S. Ct. 1796 (Mem.) (2016); Johnson v. Manis, 136 S.Ct. 2443 (Mem.) (2016); Knotts v. Alabama, 136 S.Ct. 2443 (Mem.) (2016); Bonds v. Alabama 2444 (Mem.) (2016); Flowers v. Alabama 136 S.Ct. 2445 (Mem.) (2016); Slaton v. Alabama, 136 S.Ct. 2445 (Mem.) (2016); Barnes v. Alabama 136 S.Ct. 2446 (Mem.) (2016); Barnes v. Alabama, 136 S.Ct. 2447 (Mem.) (2016). Justice Sonia Sotomayor authored a concurring opinion, which was referenced in the concurring opinions for the other seven cases. Adams, 136 S.Ct. at 1799-1801 (Sotomayor, J., concurring, joined by Ginsburg, J.). Justice

Sotomayor explained that, in light Miller and Montgomery, **the question that the sentencer is required to ask and answer correctly is: "whether petitioners' crimes reflected transient immaturity or irreparable corruption."** Id. at 1799 (internal quotations omitted) (emphasis added). She noted that prior sentencers "did not have the benefit of this Court's repeated exhortation that the gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption: 'The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character'." Id. at 1800 (quoting Roper v. Simmons, 125 S.Ct. 1183, 1186). Further, "when the petitioners were sentenced, their youth was just one consideration among many; **after *Miller*, we know that youth is the dispositive consideration for 'all but the rarest of children.'"** Id. (quoting Montgomery, 136 S.Ct. at 726) (emphasis added).

Justice Sotomayor thus stated that the lower courts must "ask the difficult but essential question whether petitioners are among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" 136 S.Ct. at 1801 (quoting Montgomery, 136 S.Ct. at 734). Similarly, in Tatum v. Arizona, Justice Sotomayor explained in her concurring opinion:

> On the record before us, none of the sentencing judges addressed the question *Miller* and *Montgomery* require a sentencer to ask: **whether the petitioner was among the very "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility** . . . . It is clear after *Montgomery* that the Eighth Amendment requires more than mere consideration of a juvenile offender's age before the imposition of a sentence of life without parole. **It requires that a sentencer decide whether the juvenile offender before it is a child "whose crimes reflect transient immaturity" or is one of "those rare children whose crimes reflect irreparable corruption" for whom a life without parole sentence may be appropriate.** There is thus a very meaningful task for the lower courts to carry out on remand.

137 S.Ct. 11, 12-13 (Mem.) (2016) (J. Sotomayor, concurring) (emphasis added).

Several courts across the country have had the opportunity to determine the process to be followed to reach a properly-informed determination of irreparable corruption. In Veal v. State, 784 S.E.2d 403 (Ga. 2016), the Georgia Supreme Court recognized that Montgomery cast aside any notions about the limited applicability of Miller. The Court quoted Miller's often cited language that "given all we have said in *Roper, Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon.*" 784 S.E.2d at 702 (emphasis in original). The Veal Court wrote:

> **The *Montgomery* majority explains, however, that by *uncommon, Miller* meant *exceptionally rare,* and that determining whether a juvenile falls into that exclusive realm turns not on the sentencing court's consideration of his age and the qualities that accompany youth along with all of the other circumstances of the given case, but rather on a specific determination that he is *irreparably corrupt.*** Thus, *Montgomery* emphasizes that a LWOP sentence is permitted only in "*exceptional* circumstances," for "the *rare* juvenile offender who exhibits such *irretrievable depravity* that rehabilitation is *impossible* "; for those "*rarest* of juvenile offenders ... whose crimes reflect *permanent incorrigibility* "; for "those *rare* children whose crimes reflect *irreparable corruption* "—and not, it is repeated twice, for "the vast majority of juvenile offenders." The Supreme Court has now made it clear that LWOP sentences may be constitutionally imposed only on the worst-of-the-worst juvenile murderers, much like the Supreme Court has long directed that the death penalty may be imposed only on the worst-of-the-worst adult murderers.

Id. at 702-03 (partial emphasis added).

The Court found that trial judge in Veal's case "did not...make any sort of distinct determination on the record that Appellant is irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom an LWOP sentence is proportional under the Eighth Amendment as interpreted in *Miller* as refined by *Montgomery.*" 784 S.E.2d at 703. The Court ruled that whether such a determination could be made was a matter that should addressed in the first instance by the trial court on remand. Id. Accordingly, it

vacated Veal's life without parole sentence for malice murder and remanded the case for resentencing on that count in accordance with its opinion, *Miller,* and *Montgomery.* Id.

Prior to its imposition of a categorical bar on life without parole for juvenile offenders under the Iowa state constitution in State v. Sweet, 879 N.W.2d 811, 839 (Iowa 2016), the Iowa Supreme Court held: "The question the court must answer at the time of sentencing is whether the juvenile is irreparably corrupt, beyond rehabilitation, and thus unfit ever to reenter society, notwithstanding the juvenile's diminished responsibility and greater capacity for reform that ordinarily distinguishes juveniles from adults." State v. Seats, 865 N.W.2d 545, 558 (Iowa 2015). The Seats Court further provided:

> [I]f the sentencing judge believes the information in the record rebuts the presumption to sentence a juvenile to life in prison with the possibility of parole and the case is the rare and uncommon case requiring the judge to sentence the juvenile to life in prison without the possibility of parole, **the judge must make specific findings of fact discussing why the record rebuts the presumption**. In making such findings, the district court must go beyond a mere recitation of the nature of the crime, which the Supreme Court has cautioned cannot overwhelm the analysis in the context of juvenile sentencing.

State v. Seats, 865 N.W.2d 545, 557 (Iowa 2015) (emphasis added).

In People v. Hyatt, 316 Mich. App. 368 (2016), a special conflict panel of the Michigan Court of Appeals was tasked with deciding whether the determination of whether life without parole is warranted should be made by a judge or a jury. In finding that there was no constitutional right to a jury finding, the panel noted its understanding that: "[A] sentence of life without parole is to be reserved for only the rarest of juvenile offenders so as to avoid imposing an unconstitutionally disproportionate life-without-parole sentence on a transiently immature offender." 316 Mich. App. at *1. Consequently, the Court explained:

> This mandate necessarily affects not only the way a trial court is to exercise its discretion when meting out punishment, but also the way an appellate court is to review a life-without-parole sentence for a juvenile offender. In short, **youth matters when it comes to sentencing, and to avoid an unconstitutional sentence, our courts, at sentencing and on appeal, must carefully take this into account when going about the exceedingly difficult task of determining whether a juvenile is irreparably corrupt—meaning incapable of rehabilitation for the remainder of his or her life.**

Id. (emphasis added).

The Hyatt Court ruled that a sentencing judge "must begin its analysis with the understanding that life without parole is, unequivocally, appropriate only in rare cases." 316 Mich. App. at *20. "Sentencing courts are to do more than pay mere lip service to the demands of *Miller.* A sentencing court must operate under the understanding that life without parole is, more often than not, not just inappropriate, but a violation of the juvenile's constitutional rights." Id. The Court noted that "given the unique and transient qualities of youth, even the most thorough, well-intentioned, and earnest sentencing courts encounter a significant risk of reaching the wrong conclusion about a juvenile's character being irreparably corrupt." Id. Thus, it cautioned that "this risk carries with it the grave consequences of violating the Eighth Amendment and of denying an undeserving individual—who it must be remembered is nevertheless deserving of significant punishment because of the conviction—an opportunity to leave the prison he or she entered while still a child." Id.

In Landrum v. State, 192 So. 3d 459, 469 (Fla. 2016), Florida Supreme Court ruled that "*Miller* and *Montgomery*, together with *Roper* and *Graham,* require a sentencer to consider age-related evidence as mitigation, and permit the sentencing of a juvenile offender to life imprisonment only in the most uncommon and rare case where the juvenile offender's crime reflects irreparable corruption." (internal quotations omitted). Finding that such a procedure was not followed for Landrum, her case was remanded for resentencing. Similarly, in Luna v. State, 387

P.3d 956, 963 (Okla. Crim. App. 2016), the Oklahoma Court of Criminal Appeals vacated the appellant's life without parole sentence and remanded for resentencing to determine whether the crime reflected transient immaturity, or an irreparable corruption and permanent incorrigibility warranting the extreme sanction of life imprisonment without parole.[7]

Here, the sentencing judge made no finding that Isaiah was irreparably corrupt and permanently incorrigible, so as to warrant the harshest sentence available for homicide offenses committed by youth of life without parole. It was the solicitor who had the burden of proof beyond a reasonable doubt that such a sentence was proper, despite the constitutional presumption otherwise. This Court should accordingly vacate Isaiah's forty-five year, de facto life without parole sentence and remand for resentencing.

D. To the extent that this Court determines that the sentencing court made a finding of irreparable corruption, such a finding was error in light of the compelling mitigating evidence presented at sentencing.

Assuming *arguendo* that the sentencing judge's imposition of a de facto life sentence constituted an implicit finding of irreparable corruption and permanent incorrigibility, such a finding was an error in this case in light of the compelling mitigation evidence presented through the testimony and exhibits. This is simply not one of the uncommon circumstances where a sentence to a lifetime in prison is proper. All of the Miller factors weigh in favor of a minimum sentence, which would provide the most realistic hope of release.

Isaiah's mother was not equipped to parent any child, much less one with special needs, in light of her own mental health problems and crack cocaine addiction. Notably, at least some

[7] In Oklahoma, there is a statutory right to sentencing by a jury. Luna v. State, 387 P.3d 956, 961 (Okla. Crim. App. 2016). After a guilty verdict, the trial court can only assess and declare punishment in the event that the jury fails to agree on the punishment or assessed a punishment greater than the highest limit declared by law for the offense. Id. at 962.

of his developmental problems and aggression were linked to her use of cannabis while pregnant with him and use of corporal punishment against him at a very early age. R. 239-240 (Defense Ex. 2, pp. 25-26). Perhaps the most illuminating insight into the household is contained in the psychological evaluation conducted when Isaiah was eight years old. He presented as thin, unkempt, and suicidal, with very low self-esteem. Yet, Isaiah was released back to the care of his mother. R. 295 (State's Ex. 13).

The solicitor's argument that Isaiah had "crossed over the child line into adult line," is incompatible with the juvenile life without parole jurisprudence. R. 203, ll. 18-19. Further, her description of this murder as "heinous" must be balanced against the tragic nature of any homicide. In light of their arguments at sentencing, it is difficult to imagine what murder the state would not find "heinous." R. 201, l. 17 – 202, l. 1; R. 206, ll. 9-13. In People v. Hyatt, 316 Mich. App. 368, *21 (2016), the Court noted that "nearly every situation in which a sentencing court is asked to weigh in on the appropriateness of a life-without-parole sentence will involve heinous and oftentimes abhorrent details. After all, the sentence can only be imposed for the worst homicide offenses." However, the Court cautioned that "the fact that a vile offense occurred is not enough, by itself, to warrant imposition of a life-without-parole sentence." 316 Mich. App. at *21. Rather, the Court instructed:

> The [sentencing] court must undertake a searching inquiry into the particular juvenile, as well as the particular offense, and make the admittedly difficult decision of determining whether this is the truly rare juvenile for whom life without parole is constitutionally proportionate as compared to the more common and constitutionally protected juvenile whose conduct was due to transient immaturity for the reasons addressed by our United States Supreme Court. And in making this determination in a way that implements the stern rebuke of *Miller* and *Montgomery,* the sentencing court must operate under the notion that more likely than not, life without parole is not proportionate.

Id.

Though the solicitor averred that Isaiah was not a "typical" youth and even characterized him as "evil," Isaiah's diagnosis of antisocial personality disorder is hardly remarkable in light of statistics showing that seventy-five to eighty percent of inmates have such a diagnosis. Dr. Knight cited research that reflects that the majority of inmates, even with ASPD, will age out of crime in their forties. R. 125, l. 3 – 126, l. 25; R. 176, l. 21 – 178, 8; R. 182, l. 8 – 184, l. 13; R. 185, ll. 3-17; R. 202, l. 1 – 203, l. 6; R. 206, ll. 9-13; R. 236 – 238 (Defense Ex. 2, pp. 22-24). Further, in addition to the general amenability of juveniles to treatment, Isaiah did well in a few of his placements, including White Pines and the Carolina Children's Home. However, once his sentence was complete he was sent back to same dysfunctional household. Not surprisingly, more problems would soon follow. R. 176, ll. 5-20; R. 215 (Defense Ex. 2). While the solicitor referenced much of her personal feelings regarding Isaiah and his potential for change, the reality is that there is a constitutional presumption that Isaiah is capable of change. That presumption was not overcome beyond a reasonable in this case.

In sum, sentencing judges are generally given great deference in sentencing adult offenders and meting out a punishment based on the traditional penological justifications. However, Montgomery held that "*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.'" 136 S.Ct. at 734. A judge's mindset in sentencing a juvenile must be different, as the focus in such proceedings is on whether the child is one whose crime reflected transient immaturity or is one of those rare children whose crimes reflect irreparable corruption for whom a life without parole sentence may be proper. Tatum v. Arizona, 137 S.Ct. 11, 12-13 (Mem.) (2016) (J. Sotomayor, concurring). Here, the sentencing judge sentenced Isaiah to a sentence of forty-five years, which

constitutes a de facto life without parole sentence because it denies him any meaningful opportunity for release. Such a sentence cannot be imposed without a finding of "irreparably corruption" and "permanent incorrigibility," which was not supported by the evidence in this case. Isaiah is accordingly entitled to resentencing and an opportunity to walk out of prison someday as an older, more mature adult.

CONCLUSION

Based on the foregoing, Appellant Robert Isaiah Graham respectfully requests that this Court vacate his forty-five year sentence and remand his case for resentencing.

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This 9th day of November, 2017.

ATTORNEYS FOR APPELLANT

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, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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