STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRD JUDICIAL CIRCUIT
COUNTY OF WILLIAMSBURG	)	
	)	
State of South Carolina,	)	2009-GS-45-180
	)	
v.	)	**ORDER DENYING STATE'S MOTION TO DISMISS DEFENDANT'S MOTION FOR RESENTENCING**
	)	
Ronald Hakeem Mack,	)	
	)	
Defendant.	)	
	)	

This matter is before the Court upon the State's motion to dismiss the defendant's motion for resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). A hearing on the motion was held on February 17, 2017, in Florence County before the Honorable Michael G. Nettles. The State was represented by Solicitor Ernest A. Finney, III, and the defendant was represented by Appellate Defender Laura R. Baer. The Court had before it the transcript of the plea and sentencing hearing, the written and oral arguments of the parties, and the testimony and exhibits presented at the hearing. The Court held the matter *sub curia* pending the submission of proposed orders by both parties. The Court presents its findings and conclusions below.

I. PROCEDURAL HISTORY

On July 6, 2009, the Williamsburg County Grand Jury indicted Defendant Ronald Mack, along with his three co-defendants, Tawanda Mack Allen, Kelvin Michael Bowen, Jr., and Antonio Lavelle McClary, for murder, first degree burglary, conspiracy, and possession of a weapon during a violent crime.[1] Mack, born August 24, 1991, was 17 years old on the date of the incident, April 5, 2009.

[1] Tawanda Mack Allen is Mack's mother, Kelvin Michael Bowen, Jr. was Mack's mother's boyfriend, and Antonio Lavelle McClary was a friend of Mack.

On August 24, 2010, Mack's nineteenth birthday, he pled guilty before the Honorable Clifton Newman to one count of murder and one count of first-degree burglary. He was sentenced to concurrent terms of fifty and thirty years, respectively. Pursuant to S.C. CODE ANN. § 16-3-20 and § 24-13-100, Mack is not eligible for parole and must serve his fifty-year sentence "day for day." [2]

No direct appeal was filed from Mack's guilty plea and sentence. On August 5, 2011, Mack filed his application for post-conviction relief ("PCR") alleging ineffective assistance of counsel and that his guilty plea was not knowing, intelligent, and voluntary. The State filed its return on May 18, 2012. An evidentiary hearing was held before the Honorable R. Ferrell Cothran, Jr. on May 27, 2014. Mack was represented by Charles T. Brooks, and the state was represented by assistant attorney general Croom Hunter. On July 1, 2014, Judge Cothran filed an Order of Dismissal denying Mack's PCR application. Mack was represented on appeal by Appellate Defender Laura Baer, who filed a petition for writ of certiorari with the South Carolina Supreme Court on his behalf on April 1, 2015. The state filed its return on August 20, 2015. By Order dated March 29, 2016, the Supreme Court denied the petition for writ of certiorari.

Meanwhile, on June 25, 2012, the United States Supreme Court issued its opinion in *Miller v. Alabama*, 132 S.Ct. 2455, 2475 (2012), holding that the imposition of mandatory life without parole ("LWOP") sentences for homicide offenses committed when the defendant was a

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[2] 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.").

juvenile violates the principle of proportionality and the Eighth Amendment's ban on cruel and unusual punishment absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing. Subsequently, in *Aiken v. Byars*, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014), *cert. denied* 135 S.Ct. 2379 (2015), a class of fifteen inmates in the South Carolina Department of Corrections ("SCDC"), who were sentenced to life without parole for various homicide offenses committed as juveniles, filed a petition in our Supreme Court's original jurisdiction seeking resentencing in light of *Miller*. On November 12, 2014, our Supreme Court ruled that *Miller* applied "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." *Aiken v. Byars*, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014), *cert. denied* 135 S.Ct. 2379 (2015) (emphasis added). The Court further ruled that "*any individual affected by our holding* may file a motion for resentencing within one year from the filing of this opinion in the court of general sessions where he or she was originally sentenced." *Id.* (emphasis added).

On April 20, 2015, Mack, through counsel, filed a motion for resentencing in Williamsburg County, arguing that Mack's fifty-year sentence was a de facto life sentence such that he was eligible for resentencing under *Aiken*. The solicitor filed his response on April 28, 2015, and Mack filed a reply on May 15, 2015. On July 23, 2015, our Supreme Court issued an Order lifting the stay of *Aiken* following the United States Supreme Court's denial of the state's petition for writ of certiorari. The Court ordered: "Petitioners *and any other individuals affected by our holding in Aiken* may file a motion for resentencing within one year of the date of this order in the court of general sessions where he or she was originally sentenced." *S.C. Supreme Court Order,*

July 23, 2015 (emphasis added). On March 16, 2016, Chief Justice Costa M. Pleicones issued an administrative order regarding the procedures to be followed statewide in the management and disposition of all motions for resentencing filed pursuant to *Aiken*. The Order instructed the Clerk of Court to forward a copy of the motion for resentencing to South Carolina Court Administration, following which the Chief Justice would assign the matter to a circuit court judge other than the original sentencing judge. *S.C. Supreme Court Admin. Order Mar. 16, 2016.*

On August 11, 2016, Chief Justice Pleicones issued an Order vesting this Court with exclusive jurisdiction over Mack's motion for resentencing. *State v. Ronald Mack, Aiken v. Byars Judicial Appointment Order Aug. 11, 2016.* The solicitor filed an additional opposition to defendant's motion for resentencing on September 22, 2016. A status conference was held in Williamsburg County on September 30, 2016, at which time this Court issued an initial scheduling order, which provided the solicitor two weeks to file a formal motion to dismiss. The solicitor filed his motion to dismiss on October 5, 2016, to which Mack filed his opposition on November 4, 2016. At the time of the hearing on the State's motion on February 17, 2017, Mack was 25 years old. The parties agreed that under his current sentence, Mack will be 67 years old on his scheduled date of release. Hr'g Tr. 9, ll. 1-9; Hr'g Tr. 65, l. 18 – 66, l. 19.

II. SUMMARY OF APPLICABLE LAW

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).

The constitutional requirement for individualized consideration of mitigating and extenuating circumstances at sentencing began with American death penalty jurisprudence. In *Furman v. Georgia*, 408 U.S. 238 (1972), the United States Supreme Court invalidated all then-existing death penalty statutes, finding that they allowed for the arbitrary and capricious imposition of capital punishment. The Supreme Court struck down subsequent attempts by states to cure the defect through mandatory death penalty statutes, holding that "the fundamental respect for humanity underlying the Eighth Amendment, requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *see also Roberts v. Louisiana*, 428 U.S. 325 (1976); *State v. Rumsey*, 267 S.C. 236, 226 S.E.2d 894 (1976). However, the Court upheld Georgia's bifurcated scheme that separated the guilt and penalty phases of a capital trial because the jury's discretion was "controlled by clear and objective standards so as to produce non-discriminatory application." *Gregg v. Georgia*, 428 U.S. 153, 198 (1976). Of particular importance was the jury's consideration of mitigating evidence and extenuating circumstances. *Id.*

In the ensuing years, the Supreme Court imposed several categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty, reflecting its continued concern with proportionate punishment under the Eighth Amendment. In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), a plurality of the Court prohibited the imposition of the death penalty upon a juvenile offender who was under the age of

sixteen at the time of the offense. Later, the Court banned the imposition of the death penalty upon mentally retarded defendants in *Atkins v. Virginia,* 536 U.S. 304 (2002), and upon offenders who commit non-homicide crimes in *Kennedy v. Louisiana,* 554 U.S. 407 (2008).

Roper v. Simmons

The twenty-first century has seen continued development in the area of Eighth Amendment jurisprudence, especially with respect to juvenile offenders. In *Roper v. Simmons,* 543 U.S. 551 (2005), the United States Supreme Court categorically banned the imposition of the death penalty on juvenile offenders, who were under the age of eighteen at the time of the crime. The *Roper* Court explained that "[c]apital punishment must be limited to those offenders who commit "'a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution.'" 543 U.S. at 568 (quoting *Atkins,* 536 U.S. at 319). The *Roper* Court distinguished youthful offenders from those most deserving of execution based on their lack of maturity and underdeveloped sense of responsibility; their greater susceptibility to negative influences and outside pressures; and the transitory nature of their personality traits. *Id.* at 569-70. As such, a juvenile's conduct is not as morally reprehensible as that of an adult. *Id.* at 570.

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

a sentence less severe than death." *Id.* at 573. Thus, the Court held: "When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." *Id.* at 573-74.

Graham v. Florida

Six years later, in *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court categorically banned the imposition of life without parole upon juvenile offenders who commit non-homicide offenses. In addition to finding that a national consensus supported such a ban, the Court discussed whether such a categorical ban was necessary in the Court's "independent judgment." 560 U.S. at 62-68. Similar to its reasoning in *Roper*, the *Graham* Court's conclusion was based upon the limited culpability of juvenile non-homicide offenders, the severity of life without parole sentences, and the lack of any penological theory adequate to justify such a sentence. 560 U.S. at 68-75. "When compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Id.* at 69. Regarding severity, the Court noted that life without parole is the second most severe punishment permitted by law, and, like the death penalty, deprives the offender of his liberty "without giving hope of restoration." *Id.* at 69-70. For a juvenile, the Court found that a sentence of life without parole is "an especially harsh punishment" because "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." *Id.* at 70. While *Graham* does not require a guarantee of release for a youthful offender convicted of a non-homicide crime, such defendants must be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 71.

Miller v. Alabama

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

Thus, the Court held that a sentencer must have the opportunity to consider youth as a mitigating factor just as capital defendants must be afforded the opportunity to present mitigating factors for a sentencer's consideration. *Id.* at 2467. The *Miller* Court wrote further: "[G]iven all we have said in *Roper, Graham,* and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this

harshest possible penalty will be uncommon." *Id.* at 2469. "That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* Thus, the Court ruled: "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.*

Aiken v. Byars

In *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), our Supreme Court considered two questions – first, whether *Miller* applied retroactively, and second, whether *Miller* applied to juveniles who received a non-mandatory sentence of life without parole? 410 S.C. at 536-37, 765 S.E.2d at 573. A plurality of the Court answered both questions affirmatively. *Id.* Regarding retroactivity, the United States Supreme Court's decision in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), held that *Miller* announced a new substantive constitutional rule retroactive on state collateral review, effectively affirming our Supreme Court's retroactivity ruling in *Aiken.*

The *Aiken* Court recognized that in holding that the Eighth Amendment proscribes a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders, the *Miller* Court did not expressly extend its ruling to states such as South Carolina where the imposition of life without parole upon a juvenile offender is permitted but not mandatory. *Id.* at 542, 765 S.E.2d at 576. Rather, because its holding was sufficient to decide the cases before it, the *Miller* Court found it unnecessary to consider the defendants' alternative argument that the Eighth Amendment requires a categorical bar on life without parole for all

juveniles. *Id.* Even so, the *Aiken* Court determined that it "must give effect to the proportionality rationale integral to *Miller*'s holding—*youth has constitutional significance*. As such, it must be afforded adequate weight in sentencing." *Id.* at 542-43, 765 S.E.2d at 576 (emphasis added).

The *Aiken* Court reasoned: "*Miller* is clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution." *Id.* at 543, 765 S.E.2d at 576-77. Thus, it found that *Miller* did more than prohibit statutory schemes resulting in mandatory life sentences for juveniles. *Id.* at 543, 765 S.E.2d at 577. It "establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." *Id.* The Court noted that though some of the fifteen petitioners' sentencing hearings "touch[ed] on the issues of youth, none of them approach[ed] the sort of hearing envisioned by *Miller* where the factors of youth are carefully and thoughtfully considered." *Id.* at 543, 765 S.E.2d at 577.

Regarding the practical application of *Miller*, the *Aiken* Court referenced the mandatory factors articulated in *Miller* for the sentencer's consideration, which include:

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

Id. at 544, 765 S.E.2d at 577 (citing *Miller*, 132 S.Ct. at 2468). Further, while not specifically requiring that the sentencing hearing mirror the penalty phase of a capital case, the *Aiken* Court

noted 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 factors illustrated above." *Id.* at 544-45, 765 S.E.2d at 577.

The Court acknowledged that life without parole sentences are still possible for juveniles in homicide cases. *Id.* 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). Thus, the Court wrote:

> [A]ny juvenile offender who receives a sentence of life without the possibility of parole is entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment. The petitioners *and those similarly situated* are accordingly entitled to resentencing to allow the inmates to present evidence specific to their attributes of youth and allow the judge to consider such evidence in the light of its constitutional weight.

Id. at 544, 765 S.E.2d at 577 (emphasis added). The Court provided that "*any individual affected by our holding* may file a motion for resentencing within one year from the filing of this opinion in the court of general sessions where he or she was originally sentenced." *Id.* at 545, 765 S.E.2d at 578 (emphasis added).

Montgomery v. Louisiana

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

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

III. SUMMARY OF ARGUMENTS AND EVIDENCE

The defense articulated the issues before the Court as follows: (1) whether *Miller* and *Aiken* are applicable to de facto life sentences; (2) whether a fifty-year sentence constitutes a de facto life sentence; and (3) whether Mack's original sentencing hearing was sufficient to comply with *Miller* and *Aiken*. *See* Hr'g Tr. 63, ll. 10-17. Though each party made its respective presentation at the hearing, for ease of reference, the Court will utilize the three-issue structure to discuss the arguments of the parties.

Applicability of *Aiken* to De Facto Life Sentences

In both his written motion and at the hearing, the solicitor argued that Mack is not entitled to relief under *Aiken* because *Aiken* applies only to those defendants sentenced to "life without parole" and not to an offender sentenced to a term of years, even a lengthy one. State's

Mot. to Dismiss (Oct. 5, 2016); Hr'g Tr. 5, l. 24 – 6, l. 11. The solicitor said that the defense was taking language from *Miller* that applied to life without parole sentences and asking this Court to apply it to a case where there was no life sentence. Hr'g Tr. 76, ll. 18-20; Hr'g Tr. 86, ll. 18-22. He submitted that the constitution prohibits the imposition of the death penalty on juvenile offenders, the imposition of life without parole on non-homicide offenders, and mandatory life without parole on a juvenile who commits a homicide without consideration of the mitigating characteristics of youth. However, he averred that Mack does not fall within any of those categories because he was sentenced to fifty years rather than to life. Hr'g Tr. 89, l. 16 – 90, l. 3.

Further, the solicitor noted that de facto life sentences were not mentioned in *Aiken*. Hr'g Tr. 77, ll. 5-9. In his second response to the motion for resentencing, he wrote:

> [T]he Supreme Court did not specify any other sentencing scenarios which would entitle a defendant to a resentencing hearing. Accordingly, even in a situation where a juvenile defendant may very well spend the remainder of his natural life in prison, that defendant is not entitled to a resentencing hearing unless they have been sentenced to a term of life without the possibility of parole.

State's Mot. in Opp. (Sept. 22, 2016). He further argued that the granting of resentencing in this case would open the door to an argument that other term of years sentences are de facto life sentences. Hr'g Tr. 91, l. 20 – 92, l. 3.

The defense argued that the *Aiken* Court intended its ruling to apply to any juvenile whose sentence had the practical effect of being a lifetime in prison without the possibility of parole, *i.e.* de facto life sentences. Hr'g Tr. 66, l. 21 – 71, l. 3; Def.'s Opp. to State's Mot. to Dismiss, pp. 4-17 (Nov. 4, 2016). She pointed to the underlying reasoning of *Roper*, *Graham*, and *Miller*, all of which were based on the neuroscience that children are not fully formed such

that, even those who commit heinous crimes, are less culpable but more capable of change. Counsel further pointed to the *Aiken* Court's finding that *Miller*'s holding went beyond mandatory sentencing schemes to establish "an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." Hr'g Tr. 66, l. 21 – 68, l. 10. She argued that the *Aiken* Court set forth the mechanism to effectuate *Miller* by ordering that any individual affected by its holding could file a petition for resentencing within one year of the opinion. Hr'g Tr. 68, l. 11 – 69, l. 4.

Defense counsel argued that the use of the "similarly situated" and "any individual affected" language was intentional, in light of the litigation around the country surrounding the applicability of *Graham* and *Miller* to de facto life sentences. She suggested that if the Court wanted to limit the relief enunciated in *Aiken* to the narrow class of those serving sentences of "life without parole" that the solicitor suggested, it could have done so. She argued that their use of broader language was intentional, as the Court undoubtedly recognized that there can exist lengthy term of years sentences that leave no meaningful opportunity to obtain release and are just as offensive to the Constitution. Hr'g Tr. 69, l. 5 – 71, l. 3.

Defense counsel admitted that 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. However, she argued that the inclusion of juvenile offenders serving de facto life sentences for homicide in the affected class is implicit in the reasoning explained in *Miller*, *Aiken*, and *Montgomery*. Counsel cited, as persuasive authority, several cases from other jurisdictions that held *Miller* applicable to de facto life sentences whose rationale for finding *Miller* applicable to de facto life without parole sentences mirrored our

Supreme Court's rationale in *Aiken* for finding *Miller* applicable to our State's discretionary sentencing scheme.[3] Counsel said: "[Whether] you call it 50 years or you call it LWOP, you have the same sense of hopelessness for the Defendant who has [to serve] the sentence." Hr'g Tr. 73, ll. 10-12. Thus, defense counsel averred that *Miller* and *Aiken* are applicable to de facto life sentences given that their focus was not on the semantics of "life without parole," but rather

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[3] *State v. Null*, 836 N.W.2d 41, 70-74 (Iowa 2013) (holding that 52.5 year sentence was "such a lengthy sentence imposed on a juvenile is sufficient to trigger *Miller*-type protections" and reasoning that "*Miller's* principles are fully applicable to a lengthy term-of-years sentence as was imposed in this case because an offender sentenced to a lengthy term-of-years sentence should not be worse off than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under *Miller*."); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013) (holding that *Miller* applies to sentences that are the functional equivalent of life without parole, noting that "[o]ftentimes, it is important that the spirit of the law not be lost in the application of the law); *Bear Cloud v. State*, 334 P.3d 132, 135 (Wyo. 2014) ("The United States Supreme Court's Eighth Amendment jurisprudence requires that a process be followed before we make the judgment that juvenile offenders never will be fit to reenter society. That process must be applied to the entire sentencing package, when the sentence is life without parole, or when aggregate sentences result in the functional equivalent of life without parole."); *Casiano v. Commissioner*, 115 A.3d 1031, 1044 (Conn. 2015), *cert. denied*, 136 S.Ct. 1364 (2016) (holding *Miller* was applicable to the imposition of a 50-year sentence without the possibility of parole, ruling 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."); *Atwell v. State*, 197 So.3d 1040 (Fla. 2016) ("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."); *People v. Franklin*, 370 P.3d 1053, 1059 (Cal. 2016), *cert. denied*, 137 S.Ct. 573 (2016) ("[A] juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in *Miller*."); *State v. Ronquillo*, 361 P.3d 779 (Wash. Ct. App. 2015) ("Before imposing a term-of-years sentence that is the functional equivalent of a life sentence for crimes committed when the offender was a juvenile, the court must take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."); *People v. Ellis*, 2015 WL 4760322 *3-6 (Colo. App. Aug. 13, 2015) (holding *Miller* applicable to de facto life sentences but that the constitutionality of Ellis' individual sentence required a factual determination of his parole eligibility and life expectancy).

on whether the sentence forecloses a meaningful opportunity for release. Hr'g Tr. 72, l. 13 – 73, l. 15; Def.'s Opp. to State's Mot. to Defense, pp. 6-17 (Nov. 4, 2016).

Fifty Years as a De Facto Life Sentence

The solicitor emphasized that Mack's plea was entered without negotiations such that Mack knew that he could receive a life sentence.[4] However, he argued that Mack's sentence was not only less than life but less than the maximum sentence he could have received. He said that it "nowhere approached life without parole." Hr'g Tr. 6, ll. 11-19; Hr'g Tr. 76, l. 20 – 77, l. 2; Hr'g Tr. 86, l. 22 – 87, l. 3; Hr'g Tr. 90, l. 7 – 91, l. 13. He noted that Judge Newman could have imposed a higher term of years sentence and/or imposed consecutive sentences, such that Mack had received "a lot of breaks." Hr'g Tr. 8, ll. 7-13. Thus, he contended that Judge Newman gave Mack "the benefit of the doubt" by imposing a fifty-year sentence. Hr'g Tr. 91, ll. 8-13.

The solicitor averred that many judges do not believe in rehabilitation and that a lengthy sentence gives the person an opportunity to come back into society as an older, though not necessarily productive, member of society. Hr'g Tr. 90, l. 7-25. He argued that the fifty-year sentence imposed provides Mack with "the ability to stay out of trouble, serve the sentence and come home." Hr'g Tr. 90, l. 25 – 91, l. 3. "If he doesn't want to do that, then no, he may not get out of prison. That's on him." Hr'g Tr. 91, ll. 3-4. The solicitor admitted that the statistics

[4] The transcript of the guilty plea hearing reflects that assistant solicitor Barr initially indicated that the plea was being entered without recommendation or negotiation from the State. Plea Tr. 3, ll. 15-19. However, during her sentencing presentation, Ms. Barr said: "And so I certainly believe that given what he's done, that a life sentence is appropriate for him." Plea Tr.. 15, ll. 1-2. Her recommendation was echoed by the victim's mother, who said: "I just hope he does the rest of his life in prison." Plea Tr. 13, ll. 18-19. Later the solicitor said that Mack's case "was at least worth [a] conversation about the death penalty" but that the victim's mother was opposed to imposition of the death penalty. Plea Tr. 25, ll. 5-10.

seemed to show that prison lowers life expectancy. However, he argued that if Mack is sixty-seven years old when released, he would still have ten years of life expectancy left. Hr'g Tr. 9, l. 1 – 10, l. 1. He further argued that the SCDC specific life tables, discussed *infra*, did not apply to Mack's case. Hr'g Tr. 76, ll. 12-15; Hr'g Tr. 77, ll. 3-5.

The defense cited both the testimony of Vera Dolan and Judge Newman's comments at sentencing and in support of its argument that a fifty-year sentence is a de facto life sentence. For the purposes of Mack's hearing, Ms. Dolan was qualified as an expert in the areas of life expectancy and epidemiology without objection. Ms. Dolan earned her Bachelors of Arts in Public Health from John's Hopkins University and Masters of Science in Public Health from the University of North Carolina at Chapel Hill. She is also a fellow of the Academy of Life Underwriting. In addition to independent consulting, Ms. Dolan is a senior research scientist with a clinical reference laboratory in Lenexa, Kansas. As part of her work, she regular prepares mortality ratios and corresponding life tables, and she abides by the general accepted methods and practices in her field. Ms. Dolan testified that she has contributed to at least thirty-three peer-reviewed articles in which she prepared mortality ratio analysis from raw population data. Ms. Dolan has previously been qualified as an expert in various state and federal court trials eight times. Her prior qualifications were in the areas of life expectancy, life insurance, and epidemiology. Hr'g Tr. 11, l. 7 – 16, l. 17. Ms. Dolan's curriculum vitae was also admitted into evidence. *See* Defendant's Exhibit 1.

Ms. Dolan's testimony began by explaining the inapplicability of the U.S. general population and S.C. statutory life tables to the inmate population. She defined life expectancy as the statistical calculation of the average length of life expected for an individual based on their

age, sex, race or other risk factors. Hr'g Tr. 16, ll. 20-23. Utilizing the United States National Vital Statistics Bureau's 2011 life tables for all males, non-Hispanic black males, and non-Hispanic white males, Ms. Dolan explained the various components of a life table. *See* Defendant's Exhibits 2 – 4. She explained that a "mortality rate" is a metric of how many people out of a certain population die – the numerator is the number of deaths and the denominator is the population at risk. The mortality rate is utilized to calculate life expectancy, which is the statistically expected average length of life left for an average person at a respective age. Hr'g Tr. 17, l. 6 – 188, l. 23. The average age of death is calculated by simple addition of the age and corresponding life expectancy. For example, an 18-year-old male in the general population of the United States has an average life expectancy of 59.1 years, such that his average age at death is 77.1 years old. Hr'g Tr. 18, l. 24 – 19, l. 13.

Ms. Dolan explained that race, as a demographic factor, has a very powerful effect on life expectancy. The National Vital Statics Bureau produces separate life tables for each race in order to get its analysis closest to what the actual expected average for that individual would be. The average age at death for an 18-year-old black male in the general population decreases to 73 years old. Even so, Ms. Dolan opined that the general population statistics are not a reliable indicator of the life expectancy of the male inmates in SCDC because prison has been well recognized as a very significant risk factor on someone's life expectancy. Hr'g Tr. 19, l. 14 – 20, l. 11.

Turning to the life table codified in S.C. CODE ANN. § 19-1-150, Ms. Dolan opined that such tables should never be used for the general population and would not accurately reflect the life expectancy of inmates in SCDC. She said that the statutory table was derived from the 2001

Commissioners Standard Ordinary Mortality Table ("CSO tables"). *See* Defendant's Exhibits 5 and 6. Ms. Dolan explained that the tables were constructed by the Society of Actuaries in conjunction with the National Association of Insurance Commissioners to provide statutory guidance to state insurance commissioners in determining the statutory reserves necessary to protect insured citizens in their state. Ms. Dolan explained that the CSO tables are built on insured lives, which is different from the general population. "When you become an insured, you are essentially cherry picked, you're selected out of the general population for the purposes of insurance." Thus, they reflect a much healthier segment of the population. Hr'g Tr. 20, l. 16 – 23, l. 21.

Next, Ms. Dolan testified regarding the method that she used to calculate the mortality rates and ratios applicable to male prisoners in SCDC and the corresponding life tables. *See* Defendant's Exhibits 7 – 12. In addition to the general analysis and life tables for all males, Ms. Dolan prepared separate analysis for blacks and non-Hispanic whites. Hr'g Tr. 31, l. 18 – 32, l. 7. Ms. Dolan was provided a file of approximately 68,000 adult male inmate records, spanning from 1996 to 2015, with a follow-up of mortality through 2016, from SCDC. Hr'g Tr. 23, l. 22 – 24, l. 22. She reviewed the data to remove duplicate records where the offender did multiple stints in SCDC, such that only the most recent admission was utilized, and to remove incongruent data where the date of death preceded the date of admission. Hr'g Tr. 24, l. 23 – 25, l. 23.

Ms. Dolan was left with data related to 64,204 current or former male inmates. Hr'g Tr. 25, l. 24 – 26, l. 10; Hr'g Tr. 59, l. 24 – 60, l. 17. The data included all persons who were incarcerated in SCDC during the twenty-year period regardless of their age at entry, length of

incarceration, or whether they were released from prison prior to their death. Ms. Dolan looked at how many people passed through each age and how many of those people died at that age. Hr'g Tr. 27, l. 19 – 28, l. 19. Based on those numbers, Ms. Dolan calculated mortality rates for each age. From there, Ms. Dolan calculated a smoothed mortality rate. Ms. Dolan explained that smoothing is used to find the general trend in data. Even the U.S. life tables and the CSO tables utilize smoothing functions. In this case, Ms. Dolan did not use any predictive formula so as not to inject any bias into the trend. Hr'g Tr. 28, l. 20 – 29, l. 12. Thus, she primarily used a moving average of the rates for three different ages. Where the data was sparser for the older ages, she used a moving average of five rates. Hr'g Tr. 29, l. 13 – 30, l. 3. Like the U.S. life tables, the average age of death is calculated by adding the age to the corresponding life expectancy. Hr'g Tr. 32, ll. 8-20; Hr'g Tr. 33, l. 17 – 37, l. 19.

The life tables reflect that the average life expectancy of an 18-year-old black male who spent time in SCDC is 38.2 years, giving an average age at death of 56 years old. Hr'g. Tr. 37, ll. 8-12. Assuming that Mack is an average inmate, his average life expectancy based on his current age of 25 years old is 32.2 years, giving him an average age at death of 57.2 years. Hr'g Tr. 37, ll. 13-24; Hr'g Tr. 45, l. 12 – 46, l. 2. Ms. Dolan explained that she utilized mortality ratios to create the life tables because she was missing mortality rate information for the very youngest and very oldest inmates. She explained that in order to calculate a reliable mortality rate, there must have been at least five or more deaths at that age. For those ages where such information was not available, Ms. Dolan defaulted to the use of the general population rates, yielding a mortality ratio of 1.0. Hr'g Tr. 31, ll. 7-17. For the rest of the ages, the mortality ratios were calculated by dividing the mortality rate from the SCDC population by the mortality

rate for the general population. Hr'g Tr. 30, ll. 4-7; Hr'g Tr. 30, l. 24 – 31, 1. 6. Thus, while there were reliable mortality rates for all ages, only a portion of the age span (delineated on the SCDC life table exhibits with gray highlighting) had mortality rates adjusted for the risk factors specific to the SCDC population experience.[5]

Ms. Dolan found a general pattern that mortality ratios climbed to a plateau of the highest risk from 30 to 40 years old but began to decline again after 50 years old. This reflects a survival affect as you pass through various ages. Hr'g Tr. 37, l. 25 – 38, l. 6; Hr'g Tr. 41, l. 7 – 42, l. 17. Ms. Dolan noted that her analysis found a lower life expectancy for white men than for black men, which is the opposite of what is seen in the general population. Ms. Dolan could not explain the reason for that difference without conducting a much more in-depth and costly analysis. Hr'g Tr. 38, l. 8 – 39, l. 6.

Regarding comparisons, Ms. Dolan opined that prison takes approximately twenty years off of the average inmates life expectancy, as her analysis is directly comparable to the U.S. general population data. Hr'g Tr. 40, l. 4 – 41, l. 5; Hr'g Tr. 44, ll. 6-11. Ms. Dolan also reviewed literature on life expectancy studies conducted on prisoners in New South Wales, Australia, and in Ontario, Canada. She found the average mortality ratios in those studies comparable to the mortality ratios for black males in the SCDC population. Additionally, Ms. Dolan noted that the Canadian study showed a similar pattern of mortality, with a plateau of high risk from ages 30 to 50, with a decline after 50 years old. Hr'g Tr. 42, l. 18 – 43, l. 19. Ms.

[5] Ms. Dolan testified that obtaining the data for the younger population would not affect her analysis for the older ages for which the mortality rates already reflected the SCDC population experience. Hr'g Tr. 44, l. 13 – 45, l. 11.

Dolan also noted that the Canadian study had data available for their juveniles, for whom mortality was very high. Hr'g Tr. 43, l. 20 – 44, l. 4.

While Ms. Dolan's analysis did not look at cause of death inside and outside of prison, she relayed that the foreign studies revealed that many deaths that occurred after release were the result of mental illness, suicide, and overdose. One study found a high mortality due to suicide and overdose within the first year of release from prison. Hr'g Tr. 54, l. 18 – 56, l. 8; Hr'g Tr. 57, l. 5 – 58, l. 19; Hr'g Tr. 61, ll. 5-12.

On cross-examination, Ms. Dolan explained that her analysis did not look at the length of prison sentence for any of these individuals to examine the specific effect of long-term incarceration on life expectancy. Rather, her focus was on what the life expectancy of a juvenile would be in the SCDC prison system. Hr'g Tr. 46, l. 18 0 49, l. 16; Hr'g Tr. 58, l. 20 – 59, l. 20. Further, Ms. Dolan agreed that she had not conducted any further analysis relative to Mack and did not know if he suffered from diabetes, heart conditions, high blood pressure, or drug use. Hr'g Tr. 49, l. 17 – 50, l. 2. However, she testified on re-direct that any such conditions would tend to decrease life expectancy. Hr'g Tr. 60, ll. 18-23. Regarding the 10.1 year life expectancy for a 66 year old black male in SCDC reflected on the life tables she prepared, Ms. Dolan disagreed with the solicitor's representation that the longer Mack stays in prison, the more likely he is to live a longer life. Rather, she explained that the longer Mack stays alive in prison, the more likely he will continue stay alive. Thus, if he makes it to 66, he would have another 10 years. However, she does not know what experience Mack will have in prison from age 25 to 66. Hr'g Tr. 50, l. 3 – 51, l. 10; Hr'g Tr. 53, l. 20 – 54, l. 15.

Ms. Dolan recommended that the life tables she prepared be updated every five years to account for the improvements in the life expectancy of the U.S. general population, and every ten years to update the prison population data. Hr'g Tr. 50, l. 3 – 51, l. 10; Hr'g Tr. 53, l. 20 – 54, l. 15.

This Court left the record open for defense counsel to provide a copy of the results from an ACLU of Michigan study done on the life expectancy of offenders sentenced to life without parole. Hr'g Tr. 75, l. 22 – 78, l. 22; *see* 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 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." The ACLU 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. They determined that the average age at death for adults incarcerated for natural life sentences in Michigan, was 58.1 years. When adjusted for race, the average age at death for African-American adults, sentenced to natural life, is 56.0 years, and for whites, 60.1 years. 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. 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*. Defense counsel noted that a number of cases from other jurisdictions, which found *Miller* applicable to de facto life sentences, considered determinate sentences of and around fifty years to be de facto life

sentences. Hr'g Tr. 79, l. 1 – 80, l. 20; Def's Memo in Support of Resentencing, pp. 12-14 (Apr. 20, 2015); Def's Opp. to State's Mot. to Dismiss, pp. 6-16 (Nov. 4, 2016).

Defense counsel argued that the general population life tables are not an accurate source of life expectancy data because they do not account for the additional risk factors present in the inmate population. Further, she argued that the South Carolina statutory life tables are wholly inapplicable because they represent only the healthiest members of society who have been approved for life insurance. Hr'g Tr. 71, l. 10 – 72, l. 12; Def's Memo in Support of Resentencing, pp. 14-16 (Apr. 20, 2015); Def.'s Reply, pp. 1-3 (May 15, 2015). Based on the life tables prepared by Ms. Dolan, defense counsel averred that Mack's current life expectancy is 32.2 years, giving an average age of death of 57.2 years old. While she recognized that Ms. Dolan's analysis was broad in an effort to be the most use to greatest number of defendants, defense counsel argued that, if anything, it inflates life expectancy for those serving extended sentences in SCDC. In addition to the increased violence in prison, increased risk factors include the sedentary lifestyle, poor nutrition, and poor access to healthcare. As such, she argued that Mack will almost certainly die in prison if his sentence goes unchanged. Hr'g Tr. 74, l. 12 – 75, l. 21; Hr'g Tr. 82, ll. 20-23; Def's Memo in Support of Resentencing, p. 17 (Apr. 20, 2015).

Additionally, defense counsel argued that Judge Newman's comments at the original sentencing hearing were *prima facie* evidence that he intended the fifty-year sentence to be the functional equivalent of a life sentence without parole. Hr'g Tr. 73, l. 23 – 74, l. 12; Def's Memo in Support of Resentencing, p. 16 (Apr. 20, 2015); Def.'s Reply, pp. 2-3 (May 15, 2015). Specifically, Judge Newman said:

> *It's not about the future years of Mr. Mack.* How about the lack of future years of Mr. Dorsey. He's the victim, the victim, victim's family, the victim's loved ones. Mr. Mack is almost a lost cause at this point based on all of the choices that he made. *He's a lost cause as far as society is concerned. His future is not within society. His future, your future, is out of society. You've given up your freedom. You've given up the right to walk among free people.*

Plea Tr. 31, ll. 6-14 (emphasis added). After asking the Mack why he decided to give up his future and freedom, Judge Newman said:

> *Unfortunately you'll never know any better because you – that's a – just as you snuffed out his life you snuffed out your future just the same.* All of the great things that Mr. Carraway said about you and all he thinks about you, I mean, I'm not questioning at all whether those things are true. *But if you are to take advantage of those things it won't be – it will not be out in a free society where you've given up your freedom and your right to anyone to trust you to walk the streets. And you'll have to do those good deeds behind bars.* That's just a fact of the matter.

Plea Tr. 31, l. 14 – 32, l. 6 (emphasis added).

Sufficiency of Original Sentencing Hearing

The solicitor argued that all relevant information about the defendant, his background, and the crime itself were considered at the original sentencing hearing conducted by Judge Newman in 2010. Hr'g Tr. 6, l. 11 – 8, l. 16; State's Response, pp. 2-4 (Apr. 28, 2015); State's Mot. to Dismiss, p. 2 (Oct. 5, 2016). The solicitor said that Judge Newman did "a good job of considering the five factors which *Aiken v. Byars* says that the judge must consider." Hr'g Tr. 7, ll. 14-18; H'rg Tr. 76, ll. 20-24; H'rg Tr. 86, l. 22 – 87, l. 2; H'rg Tr. 91, ll. 13-19. He noted that *Aiken* does not require a death penalty sentencing hearing. H'rg Tr. 7, ll. 19-21. He argued that at the original sentencing hearing, Judge Newman had a lot of information about Mack and what happened, including Mack's age and lack of criminal record and the nature and circumstances of the crime. Hr'g Tr. 7, l. 21 – 8, l. 23. He argued that the fifty-year sentence imposed was supported by the facts considered. Hr'g Tr. 8, ll. 7-13; Hr'g Tr. 91, ll. 4-19.

The defense argued that the pre-*Miller* sentencing hearing conducted in Mack's case did not comply with the constitutional requirements set forth in *Miller*, *Aiken*, and *Montgomery*. Defense counsel again pointed again to Judge Newman's comments during sentencing, including that "the sentence is not about Mr. Mack." *See* Plea Tr. 30 – 31. Counsel further argued that the *Aiken* majority explicitly rejected the dissent's argument that the original sentencing hearings were sufficient. In conclusion, defense counsel argued that Mack's pre-*Miller* sentencing hearing, which resulted in his de facto life sentence, did not provide the constitutional protections afforded to him by the federal and state constitutions. Hr'g Tr. 80, l. 21 – 82, l. 4; Hr'g Tr. 85, l. 7 – 86, l. 15; Def's Memo in Support of Resentencing, pp. 17-18 (Apr. 20, 2015); Def.'s Reply, pp. 5-7 (May 15, 2015); Def's Opp. to State's Mot. to Dismiss, pp. 17-19 (Nov. 4, 2016).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

***Aiken* is Applicable to De Facto Life Sentences**

This Court finds that *Miller* and *Aiken* are applicable to de facto life sentences. The Eighth Amendment, applicable to the states under the Fourteenth Amendment, prohibits cruel and unusual punishment, guaranteeing individuals the right to be free from excessive sanctions, which "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller v. Alabama*, 132 S.Ct. 2455, 2463 (2012) (internal citations and quotations omitted). The United States Supreme Court held in *Miller* that mandatory life imprisonment without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* Subsequently, in *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), the South Carolina Supreme Court held that the *Miller* decision applies retroactively and that the imposition of life without

parole sentences for juveniles without individualized consideration of youth constituted cruel and unusual punishment.

Similar to *Miller*, the particular class before the *Aiken* Court was limited, being made up of fifteen inmates who were sentenced to life without parole for homicides committed as juveniles. *Id.* at 536-37, 765 S.E.2d at 573. However, the *Aiken* Court did not restrict the relief it granted to only those members of the class. Instead, the Court held that "the principles enunciated in *Miller v. Alabama* 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). The *Aiken* Court provided that "any individual affected by our holding may file a motion for resentencing within one year from the filing of this opinion in the court of general sessions where he or she was originally sentenced." *Id.* (emphasis added). Thus, it is logical to conclude that the *Aiken* Court did not mean to restrict its interpretation of the applicability of *Miller* to only those cases specifically denominated "life without parole," but rather intended to provide relief to anyone "irrevocably sentenced . . . to a lifetime in prison." *Id.* at 543, 765 S.E.2d at 577 (quoting *Miller*, *supra*).

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." The United States Sentencing Commission defines a de facto life sentence 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.

In United States v. Pileggi, 703 F.3d 675, 678 (4th Cir. 2013), 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." While not binding authority, this Court also notes that various courts around the country have likewise found *Graham* and *Miller* applicable to de facto life sentences. *See State v. Null*, 836 N.W.2d 41, 70-74 (Iowa 2013); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *Bear Cloud v. State*, 334 P.3d 132, 135 (Wyo. 2014); *Casiano v. Commissioner*, 115 A.3d 1031, 1044 (Conn. 2015), *cert. denied*, 136 S.Ct. 1364 (2016); *Atwell v. State*, 197 So.3d 1040 (Fla. 2016); *People v. Franklin*, 370 P.3d 1053, 1059 (Cal. 2016), *cert. denied*, 137 S.Ct. 573 (2016); *State v. Ronquillo*, 361 P.3d 779 (Wash. Ct. App. 2015); *People v. Ellis*, 2015 WL 4760322 *3-6 (Colo. App. Aug. 13, 2015).

Thus, this Court finds that the principles of *Miller* and *Aiken* are not limited to just those sentences specifically denominated "life without parole." Rather, as held by our Supreme Court in *Aiken*, *Miller*'s holding that the sentencing court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to *a lifetime in prison*" "deserves universal application." 410 S.C. at 543 (emphasis added). This Court is persuaded that defendants who are similarly situated to the offenders in *Aiken* include those

subject to a term of years sentence that constitutes the functional equivalent of life without parole. This interpretation is not an expansion of *Aiken*, but rather an effectuation of its intent.

Fifty Years is a De Facto Life Sentence

This Court finds that the fifty-year sentence imposed in Mack's case constitutes a de facto life sentence. As noted *supra*, the February 2015 United States Sentencing Commission report titled "Life Sentences in the Federal System" defines a de facto life sentence as an "extremely long specific terms of imprisonment" that is, "for all practical purposes, a life sentence and likely was intended to be such by the judge who imposed it." Saris, et al., *supra*. Though the subjective intent of the original sentencing judge is not dispositive, it is notable that Judge Newman spoke of Mack's life behind bars and that his future was outside of society. Plea Tr. 30 – 32.

Beyond the sentencing judge's comments, this Court recognizes the numerous statistical sources regarding life expectancy. This Court does not find that the statutory tables codified in S.C. CODE ANN. § 19-1-150 applicable to the instant case. The Court notes that the tables were derived from 2001 Commissioners Standard Ordinary Mortality Table, which are out dated and do not account for differences in race. More importantly, because it represents only insured lives, the statutory table is not representative of the general population, much less the inmate population in South Carolina. While a necessary point of comparison, the U.S. life tables also fail to account for the risk factors applicable to inmates in SCDC that lower their life expectancy.

While Ms. Dolan's analysis did not focus solely on the limited class of juvenile offenders sentenced to lengthy term of years sentences, her analysis is nonetheless persuasive that *incarceration drastically reduces life expectancy by approximately twenty years*. Her findings

were consistent with those in the Australian and Canadian studies cited in her testimony. The ACLU of Michigan's more narrow analysis of juvenile offenders sentenced to life in prison, found an average age at death of 50.6 years old. That is almost five years less than the average age at death of 55.3 years old for an average 18-year-old male inmate in SCDC, without regard to race. (*See* Defendant's Exhibit 10). Notably, for purposes of statistical analysis, the U.S. 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. Additionally, defense counsel has cited numerous cases from other jurisdictions that found *Graham* and *Miller* applicable to terms of between fifty and sixty years.[6] *See State v. Null*, 836 N.W.2d 41, 70-74 (Iowa 2013) (finding 52.5 year sentence constituted de facto LWOP); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013) (finding

[6] For example, 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 50-year sentence without the possibility of parole on a juvenile offender. The *Casiano* Court noted that the life tables for the general population 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.* at 1046. The Court cited various studies and court decisions that reflected 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 found that if 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 further 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." *Id.* 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. (emphasis added). Accordingly, the Court held that "the procedures set forth in *Miller* must be followed 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.

life sentence with parole after 60 years constitutes de facto LWOP); *Bear Cloud v. State*, 334 P.3d 132, 135 (Wyo. 2014) (finding life sentence with parole in just over 45 years constituted de facto LWOP); *Casiano v. Commissioner*, 115 A.3d 1031, 1044 (Conn. 2015), *cert. denied*, 136 S.Ct. 1364 (2016) (finding 50 year sentence constituted de facto LWOP); *People v. Franklin*, 370 P.3d 1053, 1059 (Cal. 2016), *cert. denied*, 137 S.Ct. 573 (2016) (finding life with parole after 50 years constituted de facto LWOP); *State v. Ronquillo*, 361 P.3d 779 (Wash. Ct. App. 2015) (finding 51.75 year sentence constituted de facto LWOP).

This myriad of statistical sources support this Court's finding that the practical effect of Mack's fifty-year sentence is that he will remain in prison for the rest of his days, with no meaningful hope of release. While the imposition of such a sentence is not itself unconstitutional, *Miller* and *Aiken* provide that such a sentence cannot be imposed without evaluating the full impact of the defendant's juvenility on the sentence rendered and a finding of irreparable corruption.

Original Sentencing Hearing Was Insufficient

Having found *Miller* and *Aiken* applicable to Mack's fifty-year de facto life sentence, this Court must determine whether Mr. Mack's original sentencing hearing was sufficient to comply with the constitutional requirements of those cases. In finding that it did not, this Court considered both the sentencing transcript and the applicable case law. The *Aiken* Court explained that the underlying sentencing hearings "suffer from a constitutional defect—the failure to examine the youth of the offender through the lens mandated by *Miller*." 410 S.C. at 543, n. 8. Thus, it was not matter of an abuse of discretion by the sentencing judge because the sentencing courts did not have the benefit of *Miller* to shape their inquiries. *Id.* The *Aiken* Court

ruled that on resentencing the judge will have the opportunity to exercise their discretion within the proper framework. *Id.*

While plea counsel Carraway made his best attempt to describe Mack's background and point to the negative influences of the gang and Mack's mother, his truncated presentation fell far below the full exploration of the factors associated with Mack's youth required by *Miller* and *Aiken*. It resembled the ordinary sentencing presentation that one would expect following any adult offender's guilty plea. Moreover, the record does not reflect that any of the mitigating factors pointed to by Carraway were actually considered by the sentencing court. The sentencing judge made no reference to Mack's youth, except to say that the sentence was "not about the future years of Mr. Mack" but rather the lack of future years of Mr. Dorsey (decedent). Thus, there is no evidence that the sentencing judge actually considered the hallmark features of youth, the environment that surrounded the offender, how familial and peer pressures affected his alleged conduct, the incompetencies associated with youth, or the possibility of rehabilitation. *See Aiken*, 410 S.C. at 544, 765 S.E.2d at 577.

Instead, Mack's sentence was based purely on retribution and incapacitation, which the *Miller* court found less applicable to sentences of minors as opposed to adults. 132 S.Ct. at 2464-65. Retribution is less applicable because "the heart of the retribution rationale relates to an offender's blameworthiness." *Id.* at 2465. Children's "transient rashness, proclivity for risk, and inability to assess consequences" lessen their moral culpability and enhance the prospect that as they continue to develop their "deficiencies will be reformed." *Id.* at 2464-65. The *Miller* Court rejected incapacitation as a valid basis for imposing life without parole on juveniles. This is because "[d]eciding that a juvenile offender forever will be a danger to society would require

making a judgment that he is incorrigible – but incorrigibility is inconsistent with youth." *Id.* at 2465 (internal quotations omitted). *Miller* further recognized that due to their diminished culpability and heightened capacity for change, "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 2469.

Moreover, the *Montgomery* Court wrote: "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity" rather than irreparable corruption. 136 S.Ct. at 734. Subsequently, in Justice Sonia Sotomayor's concurring decision in *Tatum v. Arizona*, she explained:

> 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). Thus, both our Supreme Court and the United States Supreme Court have made clear that a pre-*Miller* sentencing hearing will not be saved by a review of its contents, even when it reveals some discussion of the defendant's youth. Accordingly, this Court finds that Mack's original sentencing hearing did not comply with the constitutional requirements of *Miller*, *Aiken*, and their progeny.

V. CONCLUSION

Based on the foregoing, the Court finds and concludes that *Aiken* is applicable to both defendants sentenced to "life without parole" or a term of years that constitutes the functional equivalent of "life without parole;" that Mack's fifty-year sentence constitutes a de facto life sentence such that his motion for resentencing pursuant to *Aiken* is proper; and that Mack's original sentencing hearing did not comply with the constitutional requirements *Miller*, *Aiken*, and their progeny. Therefore, Mack is entitled to a resentencing hearing where this court can fully explore "the mitigating hallmark features of youth" in accordance with Aiken.

IT IS THERFORE ORDERED THAT:

A. The State's Motion to Dismiss the Defendant's Motion for Resentencing is DENIED; and

B. A status conference to determine a scheduling order for the remainder of the case will be held within fifteen (15) days of this Order.

AND IT IS SO ORDERED this 14 day of June, 2016.

Honorable Michael G. Nettles
Specially Assigned by Order of Supreme Court
Twelfth Judicial Circuit

Florence, South Carolina

State of South Carolina
The Circuit Court of the Twelfth Judicial Circuit

Michael G. Nettles
Judge

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June 14, 2017

The Honorable Sharon W. Staggers
Williamsburg County Clerk of Court
125 West Main Street
Kingstree, South Carolina 29556

RE: State v. Ronald Hakeem Mack

Dear Ms. Staggers:

Enclosed please find an Order regarding the above matter that was before Judge Nettles on February 17, 2017 in Florence County. Please file the order and provided clocked copies to Solicitor Ernest A. Finney, III, and Laura R. Baer, Esquire.

Thank you for your assistance and cooperation in this matter.

With kind regards, I am

Sincerely,

Charlene

Charlene Bryant
Secretary to Judge Nettles