STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL JAY FINLEY,

APPELLANT

APPELLATE CASE NO 2016-002480

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

On May 9, 1990, Appellant Michael Finley was arrested in connection with the May 6, 1990 death of James Brockman. R. 51. On January 22, 1991, the solicitor filed a notice of intent to seek the death penalty. R. 65. On February 25, 1992, the Greenville County Grand Jury returned indictments against Michael for murder, first degree burglary, armed robbery, and first degree arson. R. 57.

On February 25, 1993, Michael appeared before the Honorable C. Victor Pyle, Jr. and entered guilty pleas to the indicted offenses. Michael was represented by Jeffrey Merriam of Carter, Smith, Merriam, Tapp, Rogers & Traxler and by John Mauldin, and the State was represented by former Solicitor Joseph Watson. R. 68. At a deferred sentencing hearing held on April 22, 1993, Judge Pyle sentenced Michael to life for murder, life for burglary, twenty-five years for robbery, and twenty-five years for arson. The sentences for armed robbery and arson were run consecutive to the life term for murder. The sentence of life for burglary ran concurrent to the murder sentence. R. 111; R. 114 – 117.

Michael's co-defendant, Hao Qing Zhan, was similarly charged and was sentenced following entry of a guilty plea. R. 99, ll. 5-6. According to the solicitor's recitation of the facts at Michael's plea hearing, Michael worked as a cashier in the Chinese food restaurant owned by Zhan's parents. Though Michael admitted his participation in the crimes, the evidence indicated that it was Zhan who instigated the criminal conduct. R. 72, ll. 18-23; R. 89, l. 16 – 92, l. 8. Both boys provided written confessions. R. 89, ll. 11-14; R. 92, ll. 21-22.

Michael's subsequent post-conviction relief action was unsuccessful. Michael Finley v. State, 1995-CP-23-03705. Following our Supreme Court's decision in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), Michael filed a *pro se* motion for resentencing on March 17, 2016.

R. 1. By Order filed March 23, 2016, the Supreme Court vested the Honorable Edward W. Miller with exclusive jurisdiction over Michael's Motion for Resentencing. R. 9. The Greenville County Public Defender's Office was appointed to represent Michael. R. 11. On June 21, 2016, the State filed a Reply to the Motion for Resentencing. R. 12. Following Judge Miller's recusal from the case, the Court reassigned the case to the Hon. R. Scott Sprouse by Order filed June 30, 2016. R. 17.

On October 14, 2016, a hearing was held before Judge Sprouse to determine whether Michael was entitled to a resentencing hearing. Michael was represented by Kenneth Gibson, and the State was represented by assistant solicitor Elizabeth Gary. R. 20. The matter was taken under advisement and the parties were given ten days to supplement the record. R. 36. On October 25, 2016, the State filed a memorandum to supplement to the record with an accompanying affidavit from Matthew Buchanan, General Counsel to the South Carolina Department of Probation, Parole and Pardon Services. R. 39. On November 28, 2016, Judge Sprouse issued a written order denying the motion for resentencing. R. 47.

This appeal follows.

ARGUMENT

I.

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

Introduction

Michael Finley was born on March 11, 1973, and seventeen years old at the time of the instant offenses. When he pled guilty in 1993, the only possible sentences for murder were death, life with parole eligibility after thirty years (if the death penalty was sought and an aggravating circumstance was found beyond a reasonable doubt, but a recommendation of death was not made), or life with parole eligibility after twenty years.[1] S.C. CODE ANN. § 16-3-20 (1992). The statute for first degree burglary also called for a mandatory life sentence absent a jury recommendation for mercy. Simmons v. State, 331 S.C. 333, 336 n. 1, 503 S.E.2d 164, 165 n. 1 (1998). Despite his lack of any criminal record, Michael's life sentences were mandatory, such that the sentencing judge had no discretion and was required to impose the same sentence on Michael as he would for even the most heinous adult offender who pled guilty to murder and burglary after being served a death notice. S.C. CODE ANN. § 16-3-20 (1992).

As will be discussed more fully *infra*, the failure to differentiate between juvenile and adult offenders at the original sentencing hearing renders the mandatorily imposed sentence upon

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[1] S.C. CODE ANN. § 16-3-20 was amended, effective January 1, 1996, to remove parole eligibility and provide for three sentencing alternatives: death, life without parole, or thirty years without parole. S.C. CODE ANN. § 16-3-20 (1996). Subsequent amendments have maintained parole ineligibility following a murder conviction, though the possible sentences are now death or a mandatory minimum term of imprisonment for thirty years to life. S.C. CODE ANN. § 16-3-20 (2002); S.C. CODE ANN. § 16-3-20 (2010). The statute has never provided for any differentiation in sentencing between adult and juvenile offenders.

Michael unconstitutional. Michael's parole eligibility after service of thirty years does not cure the unconstitutionality of his sentence because it does not provide him with a meaningful opportunity for release since Michael is not provided appointed counsel to assist him at the hearing and the factors considered by the South Carolina Board of Paroles and Pardons do not include the mitigating hallmark features of youth. See Diatchenko & Roberio v. Dist. Attorney for Suffolk Dist., 27 N.E.3d 349, 360-64 (Mass. 2015) (holding that in order to be a meaningful opportunity for release, juvenile offenders must be afforded counsel at their initial parole hearing); Hayden v. Keller, 134 F.Supp.3d 1000 (E.D.N.C. 2015) (holding that the North Carolina parole process, which treats every adult and juvenile offender the same, violated the Eighth Amendment); Atwell v. State, 197 So.3d 1040 (Fla. 2016) (remanding for resentencing after holding that a life with parole sentence imposed on juvenile violated the Eighth Amendment because the Florida parole process "fails to take into account the offender's juvenile status at the time of the offense, and effectively forces juvenile offenders to serve disproportionate sentences of the kind forbidden by Miller"); Maryland Restorative Justice Initiative v. Hogan, 2017 WL 467731 (D. Md. Feb. 3, 2017) (rejecting argument that Graham, Miller, and Montgomery[2] were not applicable because plaintiffs did not receive sentences of life without parole).

In denying Michael's motion for resentencing, Judge Sprouse let stand the unconstitutional, mandatory life with parole sentence imposed upon Michael in 1993 – an anathema to Graham[3] and Miller[4], which require that juveniles receive individualized sentencing with consideration of the hallmark features of youth. The only way to provide Michael with a

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[2] Montgomery v. Louisiana, 136 S.Ct. 718, 736 (2016).

[3] Graham v. Florida, 560 U.S. 48 (2010).

[4] Miller v. Alabama, 132 S.Ct. 2455 (2012).

constitutional sentence is to allow him resentencing where the court can fully explore the factors annunciated in Miller and Aiken[5] and where a different sentence is possible.

Relevant Facts

In his *pro se* motion for resentencing, Michael argued that at the time of the crimes, he was a juvenile who lacked the maturity of an adult, had an underdeveloped sense of responsibility, and was vulnerable to negative influences and outside pressures. He averred that he still had an evolving character and personality traits. Michael further argued that as a juvenile, he was unable to effectively deal or assist in dealing with the prosecution or negotiating a plea agreement. R. 1. Though Miller and Aiken subsequently held that youth "has a constitutional dimension when determining the appropriateness of a lifetime of incarceration," at the time of Michael's sentence, youth was merely "a chronological fact." Aiken v. Byars, 410 S.C. 534, 542, 765 S.E.2d 572, 576; R. 1. Thus, Michael averred that the imposition of the functional equivalent of a life without parole sentences upon him constituted cruel and unusual punishment in violation of the Eighth Amendment such that he was entitled to resentencing. R. 1.

The State filed a reply, initially arguing that Michael's motion was untimely. R. 12. There was no discussion of the timeliness of Michael's motion for resentencing at the eventual hearing or in the order denying resentencing. Though our Supreme Court's decision in Aiken was filed on November 12, 2014, the Court granted the State's motion to stay relief pending resolution of its petition for writ of certiorari in the United States Supreme Court. The Order denying certiorari was filed on June 1, 2015. Byars v. Aiken, 135 S.Ct. 2379 (2015). On July 23, 2015, our Supreme Court issued an Order lifting the stay and providing that "the Petitioners

[5] Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014).

and any other individuals affected by the 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." Aiken v. Byars, S.C. Sup. Ct. Order dated July 23, 2015 (emphasis in original). Thus, Michael's motion for resentencing was timely filed on March 17, 2016. R. 1.

The State's reply further argued that Michael was not eligible for resentencing because Miller and Aiken apply only to offenders serving a "life without parole" sentence and not to an offender like Michael who is eligible for parole after service of thirty years incarceration. The State further pointed to the Supreme Court's statement in Montgomery v. Louisiana, 136 S.Ct. 718, 736 (2016), that "[a] State may remedy a Miller violation by permitting juvenile homicide offerender to be considered for parole, rather than by resentencing" in support of its contention that parole eligibility removed Michael from the ambit of offenders eligible for resentencing. R. 13 – 16.

At the October 14, 2016 hearing before Judge Couch, defense counsel for Michael argued that Michael's consecutive sentences for life and twenty-five years constitute a de facto life sentence such that he was eligible for resentencing. Counsel argued that the Montgomery Court's statement regarding the potential to remedy a Miller violation with parole eligibility was *dicta* and not fully litigated or controlling. Despite Michael's future parole eligibility in 2022, counsel noted that he would be without an attorney to represent him and unable to present the mitigating evidence necessary to constitute a meaningful opportunity for parole on his own. R. 22, l. 4 – 24, l. 20. Consequently, he argued that the mere eligibility for parole is not enough to comply with Miller, but rather that there must be a meaningful opportunity for release through the parole process. R. 34, l. 8 – 35, l. 9. Counsel noted that Michael had participated in virtually

every class available to him and had not incurred a single a disciplinary infraction in twenty-four years. R. 24, ll. 10-13.

The solicitor reiterated the State's position that Michael is not among the class of offenders to whom Aiken afforded resentencing because he did not receive a "life without parole" sentence. She argued that offenders sentenced to life without parole were entitled to present the mitigating evidence to the sentencing judge because their sentences precluded any future opportunity to present such evidence. However, in Michael's case, she averred that his parole eligibility would give him a "second meaningful opportunity [for release] other than the first chance that he had at his sentencing hearing." R. 29, ll. 10-15. Further, even if Michael did not have that opportunity at the outset during his original sentencing hearing, she maintained that he would have a meaningful opportunity for release before the parole board. R. 25, l. 24 – 28, l. 6; R. 29, ll. 9-15. The solicitor again pointed to Montgomery, arguing that "parole eligibility . . . remedies these Miller violations because that provides this meaningful opportunity to obtain release that they're so concerned with." R. 28, ll. 12-16; R. 29, l. 16 – 30, l. 4. She argued that cases finding that a lengthy term of years sentences constituted a de facto life sentence requiring resentencing were distinguishable because there was a lack of parole eligibility. She suggested that Miller requires only a meaningful opportunity for release, regardless of what the outcome of that opportunity may be. R. 31, l. 12 – 34, l. 3.

Regarding the right to counsel at a parole hearing, the solicitor audaciously claimed that she had been informed in response to an inquiry following another case "that all they [potential parolees] have to do is request counsel at that hearing and counsel will be provided for them." R. 28, ll. 17-24. She acknowledged that the assistance of "a trained, licensed attorney who can

help present this mitigating evidence to th[e] parole board" makes the opportunity to obtain release "more meaningful." R. 29, ll. 3-8.

Another matter raised at the hearing was whether, even if technically eligible for parole, the Board would be unable to grant Michael parole due to his consecutive sentencing. R. 25, ll. 9-19; R. 30, l. 13 – 31, l. 8. The solicitor averred, based upon her discussions with the South Carolina Department of Probation, Parole and Pardon Services, that the consecutive nature of Michael's sentence would not affect his parole eligibility or prevent the grant of parole. R. 28, ll. 7-16; R. 30, ll. 5-12. Judge Sprouse gave both parties ten days to research and supplement the record regarding whether there was any statute or policy related to consecutive sentencing that would prevent parole. R. 35, l. 10 – 36, l. 25. On October 25, 2016, the State filed a memorandum to supplement to the record with an accompanying affidavit from Matthew Buchanan, General Counsel to the South Carolina Department of Probation, Parole and Pardon Services. The affidavit specified that Michael's consecutive sentencing would neither render him ineligible for parole nor operate to bar release in the event that the Board granted him parole. R. 39. The affidavit did not specify what consideration the consecutive nature of Michael's sentences may be given by the Board in reaching its decision on whether to grant parole.

In the order denying resentencing, Judge Sprouse ruled:

> Finley's life sentence with the possibility of parole after the service of 30 years does not amount to a de facto life sentence and is not the type of sentence addressed under Miller or Aiken. Both cases are unequivocal in that the remedy they provide is only available to juveniles sentenced to life **without the possibility of parole** for homicide. Miller, 132 S.Ct.at 2460, 183 L.Ed.2d at 414; Aiken, 410 S.C. at 536, 765 S.E.2d at 573 (emphasis added). These cases rest on the principle that life without the possibility of parole is the harshest of all penalties for a juvenile offender. A sentencing court must provide a juvenile who is sentenced to life without the possibility of parole the meaningful opportunity to obtain release through the presentation of specialized, mitigating evidence prior

> to sentencing because they will not have another opportunity to present such evidence. For those who will become parole eligible, there are multiple opportunities to obtain release- prior to sentencing and every time they appear before the Parole Board.

R. 48 – 49. Judge Sprouse found that "South Carolina Code subsection §16-3-20 (Supp. 1990), the statute under which Michael was sentenced, provided parole eligibility after the service of 30 years in prison" such that Michael will be parole eligible on August 11, 2022. R. 49. "At that time, he will be given the opportunity to appear before the Parole Board, which will determine whether he remains incarcerated or is released on parole." R. 49 Thus, he reasoned that Michael would "be able to apprise himself of the opportunity to obtain release beginning in 2022" and noted that "[s]hould his request for parole be denied, Finley will have additional opportunities to present his case to the Board in the future." R. 49.

Discussion

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

Following our Supreme Court's decision in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), Michael filed a motion for resentencing. He argued that his life with parole sentences were the functional equivalent of a life without parole sentence such that they could not be lawfully imposed without consideration of the "hallmark features of youth." R. 1. In order to fully appreciate the issue raised in this appeal, a brief understanding of the development of Eighth Amendment jurisprudence is necessary.

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; see also S.C. Const. art. I, § 15. 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).

Because the scheme under which Michael was sentenced was mandatory in nature, the original sentencing judge gave no consideration to any mitigating evidence. Rather, Michael was sentenced just as any other juvenile or adult offender, with no individualization. R. 74, l. 20 – 8, l. 20; R. 78, ll. 3-19; R. 93, l. 4 – 94, l. 8; R. 111, ll. 2-22. 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, 197-98 (1976). Of particular importance was the jury's consideration of mitigating evidence and extenuating circumstances. Id. Further, one of ten specific statutory aggravating circumstances had to be proved beyond a reasonable doubt and designated in writing before a

death sentence could be imposed. Id. Before the state supreme court could affirm the death sentence, it had to consider whether the death sentence was the result of passion, prejudice, or other arbitrary factors, and conduct a proportionality review to determine whether it is disproportionate to the punishment usually imposed in similar cases. Id. at 204-06.

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. Consequently, under Roper, Michael would not have been eligible for the death penalty.

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. Interestingly, our Supreme Court held that a defendant whose death sentence had to be vacated under Roper, was entitled to present evidence on remand for re-sentencing that he should receive a sentence less than life imprisonment. State v. Morgan, 367 S.C. 615, 618–19, 626 S.E.2d 888, 889 (2006).

Graham v. Florida

Six years later, in Graham v. Florida, 560 U.S. 48 (2010), the United States 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. 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. 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. 132 S. Ct. 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 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 Miller "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 (emphasis in original). 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. To that end, 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. 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." 136 S.Ct. at 724 (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 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." Id. at 736-37.

Notably, the specific issue before the Court in Montgomery was whether its holding in Miller was retroactive to juvenile offenders whose convictions and sentences were final when Miller was decided. 136 S.Ct. at 725. However, the Court went on to write – arguably as dicta – that "[g]iving Miller retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole." Id. at 736. Rather, the Court wrote, "[a] State *may* remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." Id. (emphasis added). "Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." Id. The Court further wrote: "Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of Miller's central intuition—that children who commit even heinous crimes are capable of change." Id.

B. The mandatory life sentence imposed upon Appellant is disproportionate because it treats juveniles like adults and all juveniles the same.

As the United States Supreme Court has made clear over the past decade: juveniles are not the same as adults, and that difference makes them "less deserving of the most severe punishments." Miller, 132 S.Ct. at 2464 (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)). The Aiken Court recognized this, writing: "[T]he Court in Miller noted that Roper and Graham established that children were constitutionally different from adults for sentencing purposes, a conclusion that was based on common sense as well as science and social science." 410 S.C. at

541-42, 765 S.E.2d at 576. "[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Id. at 542, 765 S.E.2d at 576. Juveniles have a general lack of maturity and underdeveloped sense of responsibility, are more vulnerable to negative influences and outside pressures, including family and peers, and their character and personality traits are still evolving. Id.

The Aiken Court found the following statement from Miller particularly important: "Graham's reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." 410 S.C. at 542, 765 S.E.2d at 576 (quoting Miller, 132 S.Ct. at 2465). The Miller Court recognized that Graham precluded a life without parole sentence for non-homicide offenses based upon a defendant's juvenile status, even though an adult could receive it for a similar crime. Miller, 132 S.Ct. at 2465-66. However, the Court found that "**in other contexts as well**, the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate." Id. (emphasis added). It was upon this basis that "the Miller Court unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole, and that the mandatory penalty schemes at issue prevented the sentencing authority from considering the differences between adult and juvenile offenders before imposing a sentence of life without parole." Aiken, 410 S.C. at 542, 765 S.E.2d at 576. Specifically, the Miller Court wrote:

> By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes Graham's (and also Roper's) foundational principle: that imposition of a State's most severe

> penalties on juvenile offenders cannot proceed as though they were not children.

132 S. Ct. at 2466. The premise of both Miller and Aiken – that children are not the same as adults and therefore should not be treated the same – applies with equal force to juveniles sentenced to life imprisonment even with the possibility of parole after thirty years.

Judge Sprouse found that Michael's sentence was somehow distinguishable from life without parole, which is currently the "harshest of all penalties for a juvenile offender." R. 49. Judge Sprouse further ruled that "for those who will become parole eligible, there are multiple opportunities to obtain release- prior to sentencing and every time they appear before the Parole Board." R. 49. At the time of Michael's sentencing, life with the possibility of parole after thirty years was the harshest penalty available, with the exception of the death penalty, which was not held unconstitutional for juveniles under the age of eighteen until the Roper decision in 2005. The murder statute applicable to Michael provided for three possible sentences for murder: the death penalty, life with parole eligibility after thirty years (if the death penalty was sought and an aggravating circumstance was found beyond a reasonable doubt, but a recommendation of death was not made), or life with parole eligibility after twenty years. S.C. CODE ANN. § 16-3-20 (1992). Thus, where the death penalty was not sought, juvenile and adult offenders alike were sentenced to life with the possibility of parole after twenty years. There was similarly no distinction for the age of the offender in the first degree burglary statute, which provided for a mandatory life sentence absent a jury recommendation for mercy. Simmons v. State, 331 S.C. 333, 336 n. 1, 503 S.E.2d 164, 165 n. 1 (1998). Thus, contrary to Judge Sprouse's findings, Michael did not have an opportunity to obtain release "prior to sentencing" before receiving the mandatory imposition of the harshest penalty available. R. 49.

As discussed *supra*, there are many distinctions between children and adults. Treating them the same violates a "basic precept of justice" that sentencing be "graduated and proportioned to both the offender and offense." Miller, 132 S.Ct. at 2458. As the Miller Court observed: "[N]one of what [Graham] said about children about their distinctive (and transitory) mental traits and environmental vulnerabilities was crime-specific." Miller, 132 S.Ct. at 2465. Further, nothing that it said about children is *sentence*-specific either. "A sentencer misses too much if he treats every child as an adult." Miller, 132 S.Ct. at 2468.

Thus, Michael's mandatory sentences of life with parole are no less disproportionate, vis-a-vis the more culpable adult offenders who received the same sentence, than a discretionary sentence of life without parole imposed without the requisite individualization. See Atwell v. State, 197 So. 3d 1040, 1042 (Fla. 2016) ("Although the pre–1994 first-degree murder statute under which Atwell was sentenced provided for parole eligibility, it remained a mandatory sentence that treated juveniles exactly like adults and precluded any individualized sentencing consideration."). This violates the "concept of proportionality [that] is central to the Eighth Amendment." Graham, 560 U.S. at 59. Both sentences – mandatory life with parole and mandatory life without parole – violate the prohibition against cruel or unusual punishment of the Eighth Amendment to the United States Constitution.

Further, the mandatory-penalty schemes applied to Michael required the trial court to treat all children the same. This runs afoul of Miller's individualized-sentencing requirement. As the Miller Court said, such mandatory sentencing schemes "by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." 132 S.Ct. at 2467. "[E]very juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a

stable household and the child from a chaotic and abusive one." Id. at 2467-68. "And still worse, each juvenile (including these two 14–year–olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as Graham noted, a *greater* sentence than those adults will serve." Id. at 2468 (emphasis in original). Thus, just as a "sentencer misses too much if he treats every child as an adult," id., a sentencer misses too much if he or she treats every child the same.

Notably, here, both Michael and his co-defendant received the same sentence. Though the solicitor averred that the boys were equally culpable, it was Zhan who initiated the conduct and brought the supplies to carry it through. Here, as in all mandatory life sentences, with or without parole, the sentencing court was precluded from considering how Michael was different from adults and how he was different from other children. Unless a court can consider these matters, the sentence will not be proportioned to the offender and offense.

C. Appellant does not have a meaningful opportunity for release because the South Carolina parole system does not provide appointed counsel, does not mandate consideration of the *Miller* factors, and permits denial based solely upon the severity of the offense.

The failure of the sentencing judge to have any discretion over Michael's sentence is not cured by the fact that he received parole eligible life sentences. Michael will become eligible for parole on August 11, 2022, after serving thirty years in prison. Despite the denomination of Michael's sentences as being "with parole," under our State's current parole system his opportunity for release is neither realistic nor meaningful. The South Carolina Board of Paroles and Pardons' ("the Parole Board") does not provide counsel to indigent offenders who are serving sentences for crimes committed as juveniles. Rather, they, like adult offenders, are only provided counsel if they can afford a privately retained attorney. Additionally, the Parole Board's considerations do not come close to encompassing the Miller requirements. As such,

Michael does not have "a meaningful opportunity for release," making his sentence the functional equivalent of life without parole.

Other jurisdictions have recognized the applicability of Graham and Miller to de facto life sentences, which may arise in at least two circumstances. The first is where a term of years or aggregate term of years sentence is imposed such that the sentence is tantamount to a life without parole sentence. See State v. Null, 836 N.W.2d 41, 70-74 (Iowa 2013) (holding that the principles of Miller applied to Null's fifty-two and a half year sentence and because the prospect of geriatric release does not provide a meaningful opportunity for release); State v. Ragland, 836 N.W.2d 107 (Iowa 2013) (holding commutation that provided possibility of parole after service of sixty years did not cure the unconstitutionality of life without parole sentence); Bear Cloud v. State, 334 P.3d 132, 135 (Wyo. 2014) (holding that "the teachings of the Roper/Graham/Miller trilogy" require individualized sentencing where aggregate sentences result in the functional equivalent of life without parole); Casiano v. Commissioner, 115 A.3d 1031, 1044 (Conn. 2015) ("[T]he 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."); State v. Ramos, 387 P.3d 650, 659 (Wash. 2017), *as amended* (Feb. 22, 2017), *cert. pending* May 23, 2017 ("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."); State v. Zuber, 152 A.3d 197 (N.J. 2017) ("Miller's command that a sentencing judge 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison,' applies with equal strength to a sentence that is the practical equivalent of life without parole." (internal citation omitted)); see also State v.

Kimbrough, 212 S.C. 348, 357, 46 S.E.2d 273, 277 (1948) (holding that thirty year sentence for adult offender was "to all intents and purposes the equivalent of a life sentence"); United States v. Pileggi, 703 F.3d 675, 678 (4th Cir. 2013) (holding that the imposition of a fifty years sentence violated the government's extradition agreement that defendant would not be sentenced to death or life imprisonment).

The second, as will be discussed more fully *infra*, is where the offender is eligible for parole but the parole process does not provide a meaningful opportunity for release. Here, Michael's sentence does not provide a meaningful opportunity for release because of the lack of appointed counsel to assist him in the parole process and because our State's parole process does not require individualized consideration of the defendant's juvenile status at the time of the offense and its attendant circumstances in determining whether to parole a juvenile offender. As a result, Michael is serving the functional equivalent of a life without parole sentence.

i. Other Jurisdictions Find Parole Inadequate to Remedy Unconstitutional Sentence

In Greiman v. Hodges, 79 F.Supp.3d 933 (S.D. Iowa 2015), the federal District Court denied the government's motion to dismiss a federal section 1983 action where the petitioner alleged that the parole board summarily denied him parole based solely on the seriousness of his offense and failed to take into account his youth and demonstrated maturity and rehabilitation. Following Graham, the Iowa courts revised Greiman's life without parole sentence to one of life with parole, making him immediately parole eligible. 79 F.Supp.3d at 935-36. Greiman was twice denied parole, with the following explanation: "In view of the seriousness of the crime for which you were convicted, the Board believes that a parole at this time would not be in the best interest of society." Id. at 936.

The Greiman Court did not reach the merits of whether the Iowa parole process is compliant with the constitutional mandate of Graham when applied to juveniles, as the issue before it was only whether there existed a cognizable claim for relief. Id. at 943-44. Even so, the Court made several important findings. First, the Greiman Court recognized that the judge who revised Greiman's sentence had no discretion, such that "the ultimate length of Plaintiff's prison sentence will be determined by the [Iowa Board of Parole], because it alone has the authority to grant Plaintiff release." 79 F.Supp.3d at 943. As such, the Court found that the Board had "the responsibility for ensuring that Plaintiff receives his constitutionally mandated 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" Id. Secondly, the Court recognized the due process claim integral to Greiman's allegations. Greiman was not claiming that the Board applied fair and appropriate parole policies to him and reached the wrong conclusion on whether to grant parole. Id. at 945. Rather, he was asserting that the Board's existing procedures and policies deprive him of the "meaningful opportunity" to which he is entitled under Graham. Id. The Court agreed that while Graham stops short of guaranteeing parole, "it does provide the juvenile offender with substantially more than a *possibility* of parole or a mere hope of parole; it creates a categorical entitlement to demonstrate maturity and reform, to show that he is fit to rejoin society, and to have a meaningful opportunity for release." Id. (internal quotations omitted) (emphasis in original).

In Hayden v. Keller, 134 F.Supp.3d 1000 (E.D.N.C. 2015), *appeal dismissed by* 667 Fed.Appx. 416 (Mem.) (4th Cir. 2016), the federal District Court held that the North Carolina parole process did not provide meaningful opportunity for release where there was no distinction between juvenile and adult offenders, there was no notice and opportunity for the offender to be

heard regarding maturity and rehabilitation, and data reflected unusually low parole rates for juvenile offenders. The Court summarized Hayden's argument:

> Hayden contends that, as a juvenile offender sentenced to a life sentence with parole, he is owed something that adult offenders are not: a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' Hayden further contends that the North Carolina Post–Release Supervision and Parole Commission ("Parole Commission" or "Commission") and their procedures do not afford him that opportunity.

134 F.Supp.3d at 1001. Similar to Michael's life with parole eligibility after thirty years, Hayden was serving a sentence of life with the possibility of parole after twenty years. Id. The Court explained the North Carolina parole procedures and noted that "[t]hroughout this process, every felony offender—adult or juvenile—is reviewed in the same way." Id. at 1002-04, 1006. The offender is "an entirely passive participant" in the parole review process. Id. at 1011. Further, "[t]he Parole Commission gives no consideration to an offender's age at the time of the offense." Id. at 1004. The Court also benefited from statistical data reflecting a low or non-existent parole rate for juvenile offenders from 2010 to 2015. Id. at 1005.

The Hayden court analogized the reasoning of many courts that have held that Miller and Graham apply to lengthy term-of-years sentences or aggregate sentences, finding that "[t]he same principles apply here." 134 F.Supp.3d at 1007-09. "If a juvenile offender's life sentence, while ostensibly labeled as one 'with parole,' is the functional equivalent of a life sentence without parole, then the State has denied that offender the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' that the Eighth Amendment demands." Id. at 1009. Finding that the North Carolina parole review process for juvenile offenders serving a life sentence violated the Eighth Amendment, the court provided the parties

with sixty days to "present a plan for the means and mechanism for compliance with the mandates of Graham . . . ." 134 F.Supp.3d at 1011.

Similarly, in Atwell v. State, 197 So.3d 1040 (Fla. 2016), the Florida Supreme Court held that the defendant's sentence of life with the possibility of parole violated the Eighth Amendment, as it effectively resembled a mandatorily imposed life without parole sentence under Florida's statutory parole process, which gave no consideration to the diminished culpability of juvenile offenders.[6] Practically speaking, an offender convicted of first-degree murder may have a presumptive parole release date from hundreds of months to nearly ten thousand months. 197 So.3d at 1048. This range of months, which encompasses hundreds of years, could be lawfully imposed without the Commission on Offender Review even considering mitigating circumstances. Id. The Commission is only required to consider mitigating and aggravating circumstances if it wishes to impose a presumptive parole release date that falls

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[6] The Florida parole process was summarized by the Atwell Court:

> An inmate who is eligible for parole has an initial interview with a hearing examiner. That examiner uses a salient factor score—a numerical score based on the offender's present and prior criminal behavior and related factors found to be predictive in regard to parole outcome—as well as the statutory severity of the inmate's offense to determine a corresponding range of months on a matrix that automatically indicates a range of presumptive parole release dates. The presumptive parole release dates are the earliest dates an offender may be released from prison as determined by objective parole guidelines . . . . The hearing examiner then makes a written recommendation to the Commission of a presumptive parole release date, which is reviewed by a panel of no fewer than two commissioners appointed by the chair.
>
> Subsequent parole interviews are conducted to determine whether information has been gathered that could affect the presumptive parole release date. When the inmate's presumptive parole release date nears and if the inmate's institutional conduct and parole release plan are satisfactory, the presumptive parole release date becomes the effective parole release date. The Commission then engages in a final review process to determine if release is still appropriate and will authorize or modify the effective parole release date accordingly.

Atwell v. State, 197 So.3d 1040, 1047-48 (Fla. 2016) (emphasis in original).

outside the given range of months. Id. Further, the enumerated mitigating and aggravating circumstances in the Florida Administrative Code, even if utilized, do not have specific factors tailored to juveniles. Id. "In other words, they completely fail to account for Miller." Id.

The Atwell Court articulated the question before it as whether "for those parole-eligible inmates who were juveniles at the time of the crime,... the principles articulated in Graham and Miller have any application?" 197 So.3d at 1046. Answering in the affirmative, the Court found 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; see Aiken, 410 S.C. at 542-43, 765 S.E.2d at 576 ("[W]e 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."). Much like the prosecutor in the present case, the Atwell Court characterized the state's position as follows:

> The State argues that Atwell's sentence is not unconstitutional because Miller unambiguously applies only to mandatorily imposed life without parole sentences. Because Atwell's sentence is not "without parole," the State asserts, it is not unconstitutional under Miller. To the State, it is quite literally as simple as that.

Id. at 1046.

Recognizing that Atwell's life with parole sentence was mandatory in nature when imposed, the Court looked at whether the parole process provided an adequate means of complying with Miller. 197 So. 3d at 1042, 1047-50. The Court noted the language from Montgomery regarding parole as a possible remedy, which was the basis for the circuit court's order in the present case, but noted that "the requirements of the parole process vary significantly from state to state." Id. at 1049. For example, legislation passed in California and West Virginia requires that specific consideration be given to the diminished culpability of juveniles in

the parole process. Id. (citing CAL. PEN. CODE § 4801(c) (2013) and W.VA. CODE § 62–12–13b(b) (2015)). In Florida, however, "there are no special protections expressly afforded to juvenile offenders and no consideration of the diminished culpability of the youth at the time of the offense. The Miller factors are simply not part of the equation." Id. Ultimately, the Atwell Court found that "[t]he current parole process . . . fails to take into account the offender's juvenile status at the time of the offense, and effectively forces juvenile offenders to serve disproportionate sentences of the kind forbidden by Miller." Id. at 1042. Atwell's case was accordingly remanded for resentencing. 197 So.3d at 1050.

In Diatchenko & Roberio v. Dist. Attorney for Suffolk Dist., 27 N.E.3d 349, 360-64 (Mass. 2015), the Massachusetts Supreme Court held that in order to ensure that the opportunity for release through parole is meaningful, in connection with an initial petition for release before the parole board, indigent inmates must have access to counsel and access to funds for expert witnesses. They must also be given an opportunity for judicial review of the decision on their parole applications. 27 N.E.3d at 364-66. In determining that these protections were necessary, the Court found that "the parole hearing acquires a constitutional dimension for a juvenile homicide offender because the availability of a meaningful opportunity for release on parole is what makes the juvenile's mandatory life sentence constitutionally proportionate." Id. at 365.

In Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision, 140 A.D.3d 34 (N.Y. App. Div. 2016), the Court held that the parole board had a constitutional obligation to consider youth and its attendant characteristics, in relationship to the crime, when making parole release decisions for juveniles sentenced to life in order for the opportunity for release to be "meaningful." The Hawkins Court explained that although the Court had not specifically reviewed a case regarding a parole determination for a juvenile homicide offender, "it is

axiomatic that such an offender still has a substantive constitutional right not to be punished with life imprisonment for a crime 'reflect[ing] transient immaturity.'" 140 A.D.3d at 38. "Further, the Court has made abundantly clear that the 'foundational principle' of the Eighth Amendment jurisprudence regarding punishment for juveniles is 'that [the] imposition of a [s]tate's most severe penalties on juvenile offenders cannot proceed as though they were not children.'" Id. The Hawkins Court found: "**A parole board is no more entitled to subject an offender to the penalty of life in prison in contravention of this rule than is a legislature or a sentencing court.**" Id. (emphasis added).

Looking to the United States Supreme Court for guidance "as to the promise that a parole determination represents," the Hawkins Court found that "the relevant distinction between a constitutional and unconstitutional life sentence for a juvenile homicide offender—for all but the rare case of an irreparably corrupt juvenile—is that a constitutional sentence guarantees, at some point, a 'meaningful opportunity to obtain release.'" 140 A.D.3d at 37-38. The Court held: "For those persons convicted of crimes committed as juveniles who, but for a favorable parole determination will be punished by life in prison, the Board ***must*** consider youth and its attendant characteristics in relationship to the commission of the crime at issue." Id. at 39 (emphasis added). Thus, the Court found that Hawkins was entitled to a de novo parole release hearing. Id.

Most recently, the United States District Court for the District of Maryland denied the motion to dismiss in a federal section 1983 action attacking the constitutionality of the Maryland parole system as applied to juveniles serving life sentences. Maryland Restorative Justice Initiative v. Hogan, 2017 WL 467731 (D. Md. Feb. 3, 2017). The named plaintiffs were all serving life with parole, becoming eligible after either service of fifteen years of twenty-five

years, for homicide offenses committed as juveniles. Id. at *5. The plaintiffs asserted that "although Maryland ostensibly provides parole eligibility for Juvenile Offenders serving life sentences, in practice under the Maryland parole system such sentences are converted into unconstitutional 'de facto' sentences of life without parole." Id. at *1. Notably, no juvenile lifer had been paroled in Maryland in the preceding twenty years. Id.

In Maryland, parole is a discretionary system of conditional release administered by the Maryland Parole Commission (the "MPC"). Maryland Restorative Justice Initiative v. Hogan, 2017 WL 467731 *5 (D. Md. Feb. 3, 2017). The MPC considers special factors for juvenile offenders, including age, maturity, peer pressure, background, subsequent character development, and other factors or circumstances unique to juvenile offenders. Id. However, the Governor must approve a decision of the MPC to grant parole to an inmate who has served fewer than twenty-five years of a life sentence. Id. at *6. The governor may also "disapprove" release for an inmate who has served twenty-five years or more. Id. There are no statutory or regulatory provisions governing the Governor's exercise of discretion. Id. at *6, *26. According to the plaintiffs' allegations, although Maryland's governors have in the last two decades received recommendations for parole of twenty-four individuals serving life sentences, they have rejected every recommendation without explanation. Id. at *4.

The District Court rejected defendants' argument that Graham, Miller, and Montgomery were not applicable because the plaintiffs did not receive sentences of life without parole. 2017 WL 467731 at *19-24. The Court wrote: "[I]n the absence of 'permanent incorrigibility,' the rationale of Graham, Miller, and Montgomery applies to a Juvenile Offender sentenced to life with parole for a homicide offense." Id. at *24. Citing Greiman, the court explained that the responsibility for ensuring that plaintiffs received their constitutionally mandated "meaningful

opportunity to obtain release based on demonstrated maturity and rehabilitation" lies squarely with the state's parole process. Id. at *20. It reasoned that, in light of the promise in Graham and Montgomery that a meaningful opportunity for release extends to all juvenile offenders except for those whose crimes reflect permanent incorrigibility, "it is difficult to reconcile the Supreme Court's insistence that juvenile offenders with life sentences must be afforded a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation if the precept does not apply to the parole proceedings that govern the opportunity for release." Id. at *22. Thus, the Court found that the plaintiffs had "sufficiently alleged that Maryland's parole system operates as a system of executive clemency, in which opportunities for release are 'remote,' rather than a true parole scheme in which opportunities for release are 'meaningful' and 'realistic,' as required by Graham." Id. at *27.

ii. The South Carolina Parole Process

In South Carolina, parole is a privilege, not a right. State v. Dingle, 376 S.C. 643, 649, 659 S.E.2d 101, 104 (2008). In Cooper v. SCDPPPS, 377 S.C. 489, 500, 661 S.E.2d 106, 112 (2008), our Supreme Court recognized that the Parole Board is the sole authority with respect to decisions regarding the grant or denial of parole. However, the Court found that "the Legislature created this Board to operate within certain parameters" and did not intended for it to "render decisions without any means of accountability." 377 S.C. at 500, 661 S.E.2d at 112. The Board is required to consider the factors outlined in S.C. CODE ANN. § 24-21-640 and the factors listed in the Department's parole manual. Id. Additionally, the Board must also utilize an actuarial risk and needs assessment tool as prescribed in S.C. CODE ANN. § 24-21-10(F). In South

Carolina, the actuarial tool used is the Correctional Offender Management Profiling for Alternative Sanctions, known as COMPAS.[7]

Regarding the purpose of parole, the SCDPPPS Board of Paroles and Pardons Policies and Procedures Manual ("SCBPP Manual") states:

> The purpose of parole is universally recognized to be reformatory or rehabilitative. Parole is intended as a means of rehabilitating then restoring the offender to society as a law-abiding and productive member. Under the structured supervision that parole sets up, the parolee has the opportunity to participate in a wide array of health and human services programs designed to help him/her. As an early-release mechanism, parole also serves to alleviate the high costs to the state, and ultimately to the taxpayer, of keeping offenders in prison, not to mention the costs of building and operating new prisons. Further, parolees are required to pay supervision fees to help defray the cost of administering the parole system.

SCDPPPS, S.C. BOARD OF PAROLES AND PARDONS POLICY AND PROCEDURE MANUAL ("SCBPP Manual"), pp. 5-6 (June 7, 2017), https://www.dppps.sc.gov/content/download/120663/2749351/file/Parole+Board+Manual+June+7+2017.pdf.

The Parole Board is composed of seven members, each of whom is appointed by the Governor, with the advice and consent of the senate, to a six-year term. S.C. CODE ANN. § 24-21-10(B). A parole "panel" consists of three members of the Board. S.C. CODE ANN. § 24-21-30(A). Offenders convicted of a violent crime are scheduled for parole hearings before the full

[7] "Although COMPAS is used in a number of jurisdictions and purports to be 'statistically validated,' researchers from the University of California at Davis have called into question its reliability as a predictor of recidivism. Laura Cohen, Freedom's Road: Youth, Parole, and the Promise of Miller v. Alabama and Graham v. Florida, 35 Cardozo L. Rev. 1031, 1071 (2014). "In a 2007 study, they found that the instrument overemphasizes 'risk status,' or the static factors, like offense of conviction, that are immutable and measure comparative risk among a cohort of inmates." Id. "The study found little evidence, on the other hand, that COMPAS measured a prospective parolee's 'risk state,' or current propensity for recidivism." Id. at 1071-72. "In order to accurately predict re-offending, an evaluation tool must capture dynamic information about criminogenic needs and changes in 'risk state' over time." Id. at 1072. "COMPAS failed on both counts." Id.

Board only. Offenders convicted of a non-violent crime may be scheduled for parole hearings before either the full Board or a three-member panel. S.C. CODE ANN. § 24-21-30(B).

The SCBPP Manual provides: "Because there is no federal constitutional right to parole, and because South Carolina's parole laws leave the decision to grant or deny parole entirely in the discretion of the Board, **very little is required in the way of procedural due process at parole hearings**." SCBPP Manual, p. 20 (emphasis added). Nonetheless, the Board acknowledges that it is required to provide parole eligible inmates: (a) the right to be heard for parole if eligible and the right to waive such hearing; (b) fair written notice of the specific parole criteria; (c) fair written notice of the date, time, and place of the parole hearing; (d) the opportunity to be heard by a fair and impartial Board or panel; (e) the opportunity to present evidence and to have up to three witnesses to speak on their behalf, and to have the Board or panel carefully consider the complete record before, during, and after imprisonment; (f) at the offender's own expense, to have an attorney present at the hearing; and (g) when parole is denied, written notice of the Board's reasons for denying parole. SCBPP Manual, p. 20; see S.C. CODE ANN. § 24-21-640.

Regarding notice, an offender and other interested parties are provided at least thirty days notice of a parole hearing date. An offender is also provided written notice of their rejection for parole, which states the reasons for the decision and the date of the next parole hearing. SCBPP Manual, p. 20. Cases are prepared for review by the Department's Division of Field Operations and Office of Board Support Services. Before a hearing, the board or panel members receive a list of the offenders who will be appearing for a parole hearing, together with the respective parole file on each prisoner, no less than two weeks before the actual date of the hearing. SCBPP

Manual, p. 21. According to the Manual, the information in the parole file includes, but it is not limited to:

> The criminal offense and a description of it; the sentencing date, the "max-out" date, the parole eligibility date, the date of any previous parole hearings, the names of any co-defendants; the offender's criminal record; the offender's prison and disciplinary records; risk classification reports; a medical history and psychological reports, if any; a history of the offender's supervision on probation or parole, if any; a proposed place of residence and employment; the parole examiner's recommendation(s); any statements from law enforcement; any statement from the prosecuting witness or the prosecuting witness's next of kin, if the witness is deceased; any statement from the solicitor or his successor; any statement from the sentencing judge; the offender's social history; the offender's employment experience.

SCBPP Manual, p. 21.

Parole hearings are informal proceedings." SCBPP Manual, p. 21. The SCBPP Manual provides that hearings ***may*** be conducted in the following manner:

> The Department, through its Office of Board Support Services, schedules hearings. The names and case numbers of offenders who have been scheduled for a parole hearing are then published at the respective prisons where they are confined, so that they can begin preparing themselves for their hearing. The Department, through its parole examiners, then interviews these offenders, investigates their cases, and submits a recommendation for or against parole.
>
> At the hearing, the offender or offender's counsel, if any, appears first and presents to the Board or panel. The Department of Corrections sets the limit for family members or other supporters appearing on behalf of the offender, however, the Board may limit the number of speakers. Members of the Board or the panel may ask questions of the offender and his witnesses. The Chair or the member presiding over the panel leads the questioning. Once the case has been presented, the offender is excused from the hearing room, and those appearing in opposition to parole are given their opportunity to be heard. After the witnesses in opposition are heard, they are excused from the hearing room, and the Board or the panel then deliberates.

> After deliberations, a voice and/or electronic vote is cast and documented. The offender and the other interested parties are informed of the decision by Department staff. If the offender is rejected for parole, the Department gives a written notice of the reasons for rejection.

SCBPP Manual, pp. 21-22. Parole eligible offenders make their presentations to the Board from prisons throughout the state via video conferencing. If represented by counsel, the offender's attorney must also be allowed to be present at the hearing. SCBPP Manual, pp. 17, 22. There is no right to counsel or right to confrontation at a South Carolina parole hearing. S.C. CODE ANN. § 24-21-50.

While the Board has sole and exclusive power to grant parole, by statute, "the board must carefully consider the record of the prisoner before, during, and after imprisonment." S.C. CODE ANN. § 24-21-640; SCBPP Manual, pp. 25-26. No prisoner may be paroled "until it appears to the satisfaction of the board: that the prisoner has shown a disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interest of society will not be impaired thereby; and that suitable employment has been secured for him." S.C. CODE ANN. § 24-21-640. The statute further requires the Board to "establish written, specific criteria for the granting of parole and provisional parole." Id. The criteria "must reflect all of the aspects of this section and include a review of a prisoner's disciplinary and other records." Id. The criteria is also required to be made available to all prisoners at the time of their incarceration and the general public. Id.

The "specific parole criteria" are enumerated in the Parole Manual as follows:

> (1) The risk that the offender poses to the community;
> (2) The nature and seriousness of the offender's offense, the circumstances surrounding that offense, and the prisoner's attitude toward it;
> (3) The offender's prior criminal record and adjustment under any previous programs of supervision;

(4) The offender's attitude toward family members, the victim, and authority in general;
(5) The offender's adjustment while in confinement, including his progress in counseling, therapy, and other similar programs designed to encourage the prisoner to improve himself;
(6) The offender's employment history, including his job training and skills and his stability in the workplace;
(7) The offender's physical, mental, and emotional health;
(8) The offender's understanding of the causes of his past criminal conduct;
(9) The offender's efforts to solve his problems;
(10) The adequacy of the offender's overall parole plan, including his proposed residence and employment;
(11) The willingness of the community into which the offender will be paroled to receive that offender;
(12) The willingness of the offender's family to allow the offender, if he is paroled, to return to the family circle;
(13) The opinion of the sentencing judge, the solicitor, and local law enforcement on the offender's parole;
(14) The feelings of the victim or the victim's family, about the offender's release;
(15) Any other factors that the Board may consider relevant, including the recommendation of the parole examiner.

SCBPP Manual, p. 26-27.

"In the case of violent offenders whose offenses occurred after January 1, 1986, the vote to grant parole must be by at least two-thirds of the members of the Board members present; however, only a quorum must be present to conduct business." SCBPP Manual, p. 28. The SCBPP Manual provides that "[a] denial of parole continues the status quo: the offender remains in prison until his next parole hearing or until he maxes out of his sentence." SCBPP Manual, p. 31. For violent offenders, their next parole hearing will be scheduled for two years after the date of the last hearing in which parole was denied, unless the law provides for annual review. SCBPP Manual, p. 32.

The SCBPP Manual recognizes that when the Board or a panel decides to deny parole, due process of law requires it to express its reasons for rejection in writing. SCBPP Manual, p.

31; Cooper v. SCDPPPS, 377 S.C. 489, 661 S.E.2d 106 (2008). In Cooper, our Supreme Court found that the Board's order was defective where it "neither offered an explanation nor indicated that it had considered the statutory criteria of section 24–21–640 and the fifteen criteria listed on the parole form." 377 S.C. at 500, 661 S.E.2d at 112. However, the Court suggested that in future parole hearings, "the Parole Board may avoid the result in the instant case if it clearly states in its order denying parole that it considered the factors outlined in section 24–21–640 and the fifteen factors published in its parole form." Id. The Court explained that "[i]f the Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure." Id.

To that end, the SCBPP Manual provides:

> [T]he Board or panel should begin by making some such general introductory statement as the following: "The Board (or the panel) is reasonably satisfied that (Offender's Name) does not at this time deserve a lessening of the rigors of imprisonment and that the interests of society will not be best served by granting parole now." After this general statement, the Board or the panel should then enumerate its reasons for denying parole. Due process requires that these reasons be sufficient to explain to the offender why he was denied parole. Further, due process also requires that the reasons for denying parole be rationally related to the written standards and criteria of parole which the Board has adopted and published.

SCBPP Manual, p. 31. The following reasons for denying parole are recognized by the Board as being "rationally related to the Board's published parole criteria":

> Nature and seriousness of the current offense; Indication of violence in this or a previous offense; Use of a deadly weapon in this or a previous offense; Prior criminal record indicates poor community adjustment; Failure to successfully complete a community supervision program; Institutional record is unfavorable.

SCBPP Manual, p. 31. Thus, it appears that in South Carolina a juvenile offender can be denied parole based solely upon the seriousness of the offense.

iii. South Carolina's Current Parole Process is Inadequate to Substitute For Judicial Resentencing Because There is No Right to Appointed Counsel

Counsel for Michael argued that one of the many infirmities in the South Carolina parole system, rendering it an inadequate substitute for judicial resentencing, is that the prospective parolee is not provided an attorney to assist him in the presentation of his case before the Parole Board. R. 22, l. 4 – 24, l. 20. The solicitor responded, without any evidence, that she had "been informed" and "learned that all they have to do is request counsel at that hearing and counsel will be provided for them." R. 28, ll. 17-24.

Notably, however, the SCBPP Manual provides that the law only requires that a potential parolee have an attorney present at the hearing "at their own expense." SCBPP Manual, p. 20. While S.C. CODE ANN. § 24-21-50 provides that "[t]he board shall grant hearings and permit arguments and appearances by counsel or any individual before it at any such hearing while considering a case for parole, pardon, or any other form of clemency provided for under law," it does not provide for the appointment of counsel for indigent offenders like Michael. In Duckson v. State, 355 S.C. 596, 598, 586 S.E.2d 576, 578 (2003), our Supreme Court held that the Sixth Amendment right to counsel does not exist in the context of a parole revocation hearing which is an administrative rather than a criminal proceeding. Rather, as held in In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001), the Sixth Amendment right to the effective assistance of counsel is limited to criminal actions. "A parolee's statutory right to have counsel present is not comparable to a probationer's absolute right under state law to appointed counsel." Turner v. State, 384 S.C. 451, 455, 682 S.E.2d 792, 794 (2009). It is this lack of a right to counsel to assist

a juvenile offender that is one of the glaring problems with looking to parole eligibility to substitute for resentencing.

Prior to the Massachusetts Supreme Court's decision in Diatchenko v. Dist. Attorney for Suffolk Dist., 27 N.E.3d 349, 360 (2015), the Massachusetts parole board permitted attorneys to represent inmates serving life sentences at their parole hearings, but there was no provision for providing counsel to those who are indigent. In determining whether a juvenile homicide offender must be afforded the assistance of counsel in connection with his or her initial parole hearing, the Court noted that "the extent of procedural due process which must be afforded in any situation varies with the nature of the private and governmental interests at stake, but basic to due process is the right to be heard at a meaningful time and in a meaningful manner." Id. at 358 (internal quotations omitted).

The Massachusetts Court had previously recognized that an indigent parent facing the possible loss of a child cannot be said to have a meaningful right to be heard in a contested proceeding without the assistance of counsel." Diatchenko, 27 N.E.3d at 360 (citing Dep't of Pub. Welfare v. J.K.B., 393 N.E.2d 406 (Mass. 1979)); see also S.C. CODE ANN. § 63-7-2560(A) (providing that any indigent parent subject to a termination of parental rights proceeding must be provided counsel); S.C. Dep't of Social Servs. v. Vanderhorst, 287 S.C. 554, 340 S.E.2d 149 (1986) (holding, prior to revision of S.C. CODE ANN. § 63–7–2560(A), that statute required the Family Court to make a case by case analysis related to the appointment of counsel based upon Lassiter, but cautioning that cases in which appointment of counsel is not required should be the exception); Lassiter v. Dep't of Social Servs. of Durham County, N.C., 101 S.Ct. 2153, 2161 (1981) ("Expert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute, is sometimes presented. The parents are likely to be people

with little education, who have had uncommon difficulty in dealing with life, and are, at the hearing, thrust into a distressing and disorienting situation. That these factors may overwhelm an uncounseled parent is evident from the findings some courts have made." (citations omitted)).

Much like the reasons articulated in Lassiter, the Diatchenko Court found that "[t]he question the [parole] board must answer for each inmate seeking parole, namely, whether he or she is likely to reoffend, requires the board to weigh multiple factors and consider a wide variety of evidence." 27 N.E.3d at 360. "In the case of a juvenile homicide offender—at least at the initial parole hearing—the task is probably far more complex than in the case of an adult offender because of 'the unique characteristics' of juvenile offenders." Id. The Court further wrote:

> A potentially massive amount of information bears on these issues, including legal, medical, disciplinary, educational, and work-related evidence. In addition, although a parole hearing is unlike a traditional trial in that it does not involve direct and cross-examination of witnesses by attorneys, because the inmate's parole application may well be opposed by both the victim's family and public officials, it would be difficult to characterize this as an uncontested proceeding.
>
> Thus, like a proceeding to terminate parental rights, **a parole hearing for a juvenile homicide offender serving a mandatory life sentence involves complex and multifaceted issues that require the potential marshalling, presentation, and rebuttal of information derived from many sources. An unrepresented, indigent juvenile homicide offender will likely lack the skills and resources to gather, analyze, and present this evidence adequately. Furthermore, although parole hearings are not contested in the strictest sense, the juvenile homicide offender seeking parole is likely to be required to overcome arguments by both victims' family members and government officials opposed to the offender's release; the former of these parties may present as particularly sympathetic, while the latter will likely have greater advocacy skills than the offender seeking parole.**

Id. at 360-61 (emphasis added). The Court concluded that "given the challenges involved for a juvenile homicide offender serving a mandatory life sentence to advocate effectively for parole release on his or her own, and in light of the fact that the offender's opportunity for release is critical to the constitutionality of the sentence," it was "not likely" that such an opportunity would be "meaningful" without access to counsel. Id. at 361. Accordingly, the Court ruled that indigent juveniles serving a mandatory life sentence for homicide offenses must have access to counsel in connection with an initial application for parole. Id.

Some state legislatures have likewise recognized the need for appointed counsel at parole hearings for juvenile lifers. In Connecticut, the enactment of a 2015 statute retroactively eliminated life without parole sentences for juveniles by providing graduated parole eligibility depending upon the length of the juvenile's judicially imposed sentence. CONN. GEN. STAT. § 54-125a(f)(1)(B). A year before the parole hearing, counsel is appointed by the office of the Chief Public Defender for indigent individuals to help them prepare for the hearing. CONN. GEN. STAT. § 54-125a(f)(3). In California, a 2013 bill was passed to retroactively provide new parole eligibility rules for youthful offenders and require the parole board to use special criteria and procedures in these cases. S.B. 260 (Cal. 2013) (amending CAL. PEN. CODE §§ 3041, 3046, 4801 and enacting CAL. PEN. CODE § 3051). Indigent inmates are provided with attorney representation at State expense. CAL. CODE REGS. tit. 15, § 2256.

One of the most critical requirements to ensure meaningful parole hearings is for counsel to be appointed for juvenile offenders to help them to prepare for the hearings. Juvenile offenders face special challenges in preparing for parole hearings. They have often entered prison with little education, and may have been denied access to educational programs during their incarceration. They may have few remaining ties to the community after spending decades

behind bars and will need assistance in developing a release plan. An extensive investigation of the client's childhood and experiences while in prison is necessary to develop mitigating information and to present a persuasive case for release. An individual who has essentially "grown up" in prison will almost certainly not have the capacity or resources to undertake this kind of comprehensive effort.

Michael's parole eligibility under a state parole system that does not afford him the right to counsel is not sufficient to comply with Eighth Amendment's requirements. Without counsel to assist him at the parole hearing, his parole eligibility does not provide him with the "meaningful opportunity to obtain release" discussed in Graham and Montgomery. Until this Court or our legislature requires that indigent juveniles serving life sentences be represented by counsel, the only viable option to bring Michael's sentence into compliance with the Constitution is resentencing.

iv. South Carolina's Current Parole Process is Inadequate to Substitute For Judicial Resentencing Because It Does Not Mandate Consideration of the Miller Factors and Permits Denial Based Solely Upon the Severity of the Offense

The solicitor argued that Michael would be able to present evidence related to the mitigating hallmark features of youth to the Parole Board. R. 26, l. 19 – 30, l. 4. Judge Sprouse ruled that parole eligible offenders have "multiple opportunities to obtain release" "every time they appear before the Parole Board." R. 49. Both the solicitor and Judge Sprouse relied upon a single sentence contained in Montgomery, which defense counsel properly argued was non-controlling dicta: "A State may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." Montgomery v. Louisiana, 136 S.Ct. 718, 736 (2016); see R. 23, l. 4 – 24, l. 20; R. 25, l. 24 – 26, l. 3; R. 28, ll. 12-16; R. 29, ll. 16-25; R. 49.

The Montgomery Court went on to write: "Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." 136 S.Ct. at 736. The Court further wrote: "Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of Miller's central intuition—that children who commit even heinous crimes are capable of change." Id. The current framework of our parole system does not provide a meaningful opportunity for release because it does not mandate consideration of the Miller factors and permits denial based solely upon the seriousness of the underlying crime.

Our State's Parole Board has no specialized procedures related to juvenile offenders such that the only factors required to be considered are the fifteen enumerated in the Parole Manual, listed *supra* om page 37. See also SCBPP Manual, p. 26-27. When contrasted with the Miller factors, it is apparent that none of the factors considered by the Parole Board address the distinctive attributes of youth that counsel against imposing a lifetime of incarceration. Aiken v. Byars, 410 S.C. 534, 544, 765 S.E.2d 572, 577 (2014) ("Miller establishes a specific framework, articulating that the factors a sentencing court consider at a hearing must 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.').

To the extent that some of the Miller factors could possibly fall under one of the broader enumerated categories, such as "the circumstances surrounding that offense," the consideration of the juvenile-specific factors is not mandated by the SCBPP Manual. Additionally, the fifteenth factor – "[a]ny other factors that the Board may consider relevant, including the recommendation of the parole examiner" – could include consideration of Michael's consecutive sentences, which were imposed without consideration of the constitutional significance of his youth. Such is not refuted by the affidavit from Matthew Buchanan that the solicitor submitted in this case. R. 39. Without mandated consideration of specific criteria related to the juvenile status of the offender at the time that their crime, our parole system fails to provide a meaningful opportunity for release for Michael and others like him. See Greiman v. Hodges, 79 F.Supp.3d 933, 945 (S.D. Iowa 2015) (finding that Graham provides a juvenile offender "with substantially more than a *possibility* of parole or a mere hope of parole; it creates a categorical entitlement to demonstrate maturity and reform, to show that he is fit to rejoin society, and to have a meaningful opportunity for release"); Atwell v. State, 197 So.3d 1040, 1042 (Fla. 2016) (finding the Florida parole system an inadequate remedy for Miller violations because it fails to take into account the offender's juvenile status at the time of the offense); Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision, 140 A.D.3d 34, 39 (N.Y. App. Div. 2016) (holding "[f]or those persons convicted of crimes committed as juveniles who, but for a favorable parole determination will be punished by life in prison, the Board ***must*** consider youth and its attendant characteristics in relationship to the commission of the crime at issue." (emphasis added)).

Another significant problem with our current parole system is that it allows denial solely based upon the severity of the offense. SCBPP Manual, p. 31. Under the Supreme Court's decisions, the proper question for the parole board is whether the juvenile offender has demonstrated maturity and rehabilitation. If the prisoner can show that their crime "did not reflect irreparable corruption," then "their hope for some years of life outside prison walls must be restored." Montgomery v. Louisiana, 136 S. Ct. 718, 736–37 (2016). While the severity of the offense may be sufficient to deny an adult offender parole, for a juvenile offender the considerations and reasoning of the Parole Board must look beyond the circumstances of the crime to assess whether the offender has matured and rehabilitated since the time of the crime. See Hayden v. Keller, 134 F.Supp.3d 1000 (E.D.N.C. 2015), *appeal dismissed by* 667 Fed.Appx. 416 (Mem.) (4th Cir. 2016) (finding North Carolina parole process inadequate because it treats juvenile and adult offenders the same); Maryland Restorative Justice Initiative v. Hogan, 2017 WL 467731, *22 (D. Md. Feb. 3, 2017) (finding that "it is difficult to reconcile the Supreme Court's insistence that juvenile offenders with life sentences must be afforded a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation if the precept does not apply to the parole proceedings that govern the opportunity for release.").

In sum, the SCBPP Manual does not provide for consideration of Michael's youth at the time of the offense and allows for denial of parole based solely upon the severity of the offense. The reasoning of Graham, Miller, Aiken, and Montgomery mandate consideration of an offender's juvenile status at the time of the offense and his demonstrated maturity and rehabilitation in the parole process in order for it afford a meaningful opportunity for release. As it stands, our State's parole process does not fulfill the promises under Montgomery that parole consideration "ensures that juveniles who crimes reflected only transient immaturity – and who

have since matured – will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment" and that "[t]he opportunity for release will be afforded to those who demonstrate the truth of Miller's central intuition—that children who commit even heinous crimes are capable of change." 136 S.Ct. at 736.

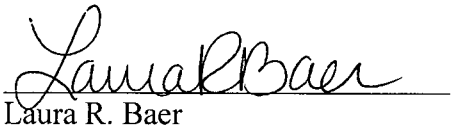
Of course, the parole guidelines could be revised to incorporate the holding of Miller and account for the disadvantages of inmates who committed their crimes as children. See, e.g., CAL. PEN. CODE §§ 4801(c) ("When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, prior to attaining 23 years of age, the board, in reviewing a prisoner s suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law"), CAL. PEN. CODE 3051(f)(1) ("In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual."); CONN. GEN. STATE § 54-125a(f) (providing special criteria in juvenile offender parole cases); LA. REV. STAT. ANN. 15:574.4 (requiring committee on parole to be provided with and consider "a written evaluation of the offender by a person who has expertise in adolescent brain development and behavior and any other relevant evidence pertaining to the offender."); W.VA. CODE § 62-12-13b (providing special parole considerations for persons convicted as juveniles); NEB. REV. STAT. § 83-1,110.04 (same). However, until such revisions takes place to provide specialized parole considerations for juvenile offenders serving life sentences, Michael's life sentences without the possibility of

parole for thirty years constitutes a de facto life without parole sentence imposed in violation of prohibition against cruel and unusual punishment in the Eighth Amendment.

The circuit court erred in concluding that Michael's sentence is not unconstitutional because he is parole eligible. Michael is entitled to resentencing pursuant to Aiken, at which time a judge can weigh the Miller factors and determine if Michael is the kind of rare juvenile offender for whom life imprisonment is a proper punishment based on a finding of irreparable corruption, or if some lesser punishment is required under the facts and circumstances of this case.

CONCLUSION

Based on the foregoing, Appellant Michael Jay Finley respectfully requests that this Court reverse the circuit court's order denying his motion for resentencing and remand his case for resentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014).



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ATTORNEY FOR APPELLANT

This 17th day of January, 2018.

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."

January 17, 2018

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