

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2017-000758

JOHN B. BONNER, #338030 *Respondent,*

v.

STATE OF SOUTH CAROLINA *Petitioner*

**RESPONSE IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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RESTATEMENT OF QUESTIONS PRESENTED

- I. Whether the record contains probative evidence to support the PCR court's finding that resentencing counsel was ineffective for failing to object to, or request reconsiderations of, Bonner's sixty-year individual sentence or seventy-year aggregate sentence where both sentences constitute *de facto* life without parole sentences imposed on Bonner who was a juvenile at the time of the offense, in violation of *Graham v. Florida*, 560 U.S. 48 (2010).
- II. Whether the PCR court erred as a matter of law in finding that a sixty-year individual sentence and a seventy-year aggregate sentence amount to a *de facto* life sentence in violation of *Graham v. Florida*, 560 U.S. 48 (2010).

STATEMENT OF THE CASE

In 2009, John Bonner was sentenced to die in prison for crimes committed at the age of seventeen.¹ After a Cherokee County jury found Bonner guilty of the crimes with which he was charged, Judge J. Derham Cole sentenced Bonner to the life without parole (“LWOP”) for burglary – 1st degree, a consecutive sentence of ten years for assault and battery of a high and aggravated nature (“ABHAN”), and concurrent sentences of fifteen years for burglary – 2nd degree, thirty years for kidnapping, thirty years for armed robbery, and five years for grand larceny. On direct appeal, the Court of Appeals found Bonner’s LWOP sentence violated the Eighth Amendment prohibition on cruel and unusual punishment under *Graham v. Florida*, 560 U.S. 48 (2010) (holding “[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide”). *State v. Bonner*, 400 S.C. 561, 735 S.E.2d 525 (Ct. App. 2012). The court remanded for Bonner to be resentenced in accordance with *Graham*.

On January 22, 2013, Judge Cole held a resentencing hearing at which Bonner was represented by his original trial counsel Joshua Schultz. Schultz argued at the resentencing that Bonner was not eligible for life without parole and must be given a meaningful opportunity for release under *Graham*. App. 394, 396. Judge Cole sentenced Bonner to a term of sixty-years on the burglary – 1st degree charge. All other sentences remained in place, including the ten-year sentence for the ABHAN charge which was to run consecutively. Schultz did not object to the imposition of a sixty-year sentence, resulting in an aggregate seventy-year sentence, and did not file a motion for the judge to reconsider the sentence. Based on the sentence imposed at resentencing, Bonner is not eligible for release until 2064, when he would be over seventy-three years old. App. 605.

¹ Bonner was charged, along with seven other individuals, with a home-invasion robbery in April of 2008. *State v. Bonner*, 400 S.C. 561, 735 S.E.2d 525 (2012).

On January 29, 2013, Schultz timely filed a notice of appeal. App. 433. Office of Appellate Defense Attorney Susan B. Hackett represented Bonner on appeal after his resentencing and filed an *Anders*² Brief, asserting the judge erred in sentencing Bonner to sixty years' imprisonment, resulting in a seventy-year aggregate sentence, because the sentence would not afford Bonner a meaningful opportunity for release in violation of the Eighth Amendment. App. 437-48. Hackett also moved to be relieved as counsel because she believed the appeal was without legal merit because counsel failed to object to the sentence imposed upon resentencing. *See* App. 449, 574. The Court of Appeals denied Hackett's request to be relieved as counsel and ordered her to file a merits brief, App. 453, but ultimately found the issue was not preserved for appeal. App. 508-09.

Bonner timely filed a *pro se* application for post-conviction relief. App. 511-16. Steven D. Epps was appointed to represent Bonner and filed a Supplemental Petition for Post-Conviction Relief, asserting that Bonner's sixty-year sentence for burglary and seventy-year aggregate sentence violated the Supreme Court's decision in *Graham* and that resentencing counsel was ineffective in failing to object to the imposition of the sentence. App. 528-33. Judge Frank R. Addy held a hearing on the PCR application on November 9, 2016. At the hearing, Schultz testified a seventy-year sentence does not provide a meaningful opportunity for release as required under *Graham*, App. 563, and that he thought he preserved the record on the *Graham* issue. App. 566. Hackett also testified, stating there were no preserved issues from the resentencing. App. 574, 579. She also testified that the National Center of Health Statistics reports the life expectancy of an African American male born in 1991, like Bonner, is 64.6 years and a sixty or seventy-year sentence would exceed Bonner's life expectancy. App. 580. Ruling from the bench and in a written order, Judge Addy found resentencing counsel was ineffective in failing to object to the sentence imposed in resentencing because the sentence

² *Anders v. California*, 386 U.S. 738 (1967).

constitutes a *de facto* LWOP sentence in violation of *Graham*. App. 598-99, 603-05. The State filed a Motion to Reconsider, App. 607-11, which was denied on February 17, 2017. App. 615. The State petitioned this Court for a writ of certiorari to review the PCR court's ruling. For the reasons that follow, the PCR court's decision is supported by probative evidence and was not an error of law and this Court should deny certiorari.³

STANDARD OF REVIEW

On a petition for writ of certiorari in a PCR action, this Court “applies the ‘any evidence’ standard of review.” *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2012) (quoting *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). Accordingly, the Court will affirm the PCR court's findings “when there is any evidence of probative value to support them” and will only reverse when the PCR judge's decision “is controlled by an error of law.” *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007). The Court gives “great deference to the [PCR] court's findings of fact and conclusions of law.” *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005).

ARGUMENT

I. Recent Evolution of Juvenile Sentencing.

Over the last dozen years, the Supreme Court of the United States has dramatically altered the legal framework governing the sentencing of juvenile offenders. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court held the Eighth Amendment's prohibition against cruel and unusual punishment prevents states from sentencing juveniles to death. In reaching this conclusion, the Court relied on its prior decisions recognizing the unique characteristics of juveniles and scientific

³ This Court previously granted certiorari in a similar case, which also raises the issue of a *de facto* life sentence imposed on a juvenile charged with a non-homicide offense. *State v. Slocumb*, No. 2015-002031.

evidence regarding differences between adult and juvenile psychological development. *Id.* at 569–71. Viewed together, the Court concluded that a juvenile's less developed character, maturity and impulse control, which significantly affect decision making and risk appreciation, so diminished their culpability that the death penalty was a disproportionate punishment. In doing so, the Court recognized that a juvenile offender's criminal act does not permanently define that individual's character or prospects for rehabilitation. *Id.*

In *Graham v. Florida*, 560 U.S. 48 (2009), the Court went further, holding that sentencing juvenile offenders to life imprisonment without the possibility of parole for non-homicide offenses is also disproportionate and barred by the Cruel and Unusual Punishment Clause. The Court analogized life without the possibility of parole for juveniles to the death penalty, recognizing that like the death penalty, life without parole “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.” *Id.* at 69–70 (citations omitted).

Life sentences without the possibility of parole for non-homicide offenders were particularly disproportionate because “defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishments than are murderers.” *Id.* at 69. As a result, a juvenile non-homicide offender has a twice diminished moral culpability and is, thus, undeserving of the ultimate penalty applicable to juvenile offenders. *Id.* Juveniles' twice diminished moral culpability also rendered the penological justifications for any criminal punishment (retribution and deterrence) inconsistent with life without parole sentences for juvenile non-homicide offenders. *Id.* at 71–74. Fundamental to the Court's holding was the sentencer's inability to predict whether, in light of juveniles' greater capacity for change,

a juvenile would be a risk to society for the rest of his life and that life without parole sentences improperly deny juvenile offenders a chance to demonstrate growth and maturity.⁴ *Id.* at 73. Therefore, juveniles, and especially non-homicide offenders, constitute a category of offenders that are not as capable of engaging in conduct that is as morally reprehensible as adults, and thus cannot be classified among the worst of the worst offenders. *Id.* at 68. States are consequently required to provide juvenile non-homicide offenders a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Id.* at 75.

The Court then determined in *Miller v. Alabama*, 567 U.S. 460 (2012), that, even in homicide cases, states are precluded from imposing mandatory life without parole sentences on juvenile offenders. *Miller*, like *Roper* and *Graham*, embraced neuroscientific research delimiting adolescent brain development.⁵ It also continued, and expanded, *Graham*’s analogy of life without

⁴ The Court observed that it “is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 572).

⁵ *Miller* found that a consistently growing body of social science and neuroscience research conclusively established that: (a) only a small percentage of adolescents who commit crimes, even serious crimes, “develop entrenched patterns of problem behavior,” *id.* at 471 (quoting *Roper*, 543 U.S. at 570), and, (b) there are fundamental differences between the brains of juveniles and adults in areas “involved in behavior control.” *Id.* at 471-72 (quoting *Graham*, 560 U.S. at 68). Because the brains of juveniles are not “fully mature in regions and systems related to higher executive functions such as impulse control, planning and risk avoidance,” juveniles have a constitutionally different level of moral blameworthiness and, for that reason, the penological justifications—deterrence and retribution—for any criminal punishment are inconsistent with the most severe sentences. See *id.* at 472 n.5 (quoting Brief of the American Psychological Association et al.); see also Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 *BRAIN AND COGNITION* 160, 162 (2010) (“From this perspective, middle adolescence (roughly 14–17) should be a period of especially heightened vulnerability to risky behavior, because sensation-seeking is high and self-regulation is still immature. And, in fact, many risky behaviors follow this pattern, including unprotected sex, criminal behavior, attempted suicide, and reckless driving.”); Sarah-Jayne Blakemore, *Imaging Brain Development: The Adolescent Brain*, 61 *NEUROIMAGE* 397 (“The plentiful data that

parole sentences for juvenile offenders to the death penalty for adult offenders. *See Miller*, 567 U.S. at 474-75 (affirming the Court’s analogy of life without parole sentences for juveniles with the death penalty and concluding that life without parole sentences for juveniles necessarily invokes death penalty jurisprudence). Most recently, in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 732 (2016), the Court held that *Miller* was “a new substantive rule that, under the Constitution, must be retroactive” and effectively ordered new sentencing proceedings for hundreds of individuals who had been sentenced to mandatory life without parole as juveniles. All four of these cases were grounded in the core Eighth Amendment principle that “children are constitutionally different from adults for purposes of sentencing,” *Miller*, 567 U.S. at 471, and thus, courts must lend credence to their capacity to demonstrate maturity and rehabilitation. The Court also made clear that any sentence depriving a juvenile offender of a meaningful opportunity for release could only be imposed in the rarest of cases and only after a clear demonstration of utter incorrigibility. *Montgomery*, 136 S. Ct. at 734.

In *Aiken v. Byars*, 410 S.C. 534, 542–43, 765 S.E.2d 572, 576 (2014), this Court embraced the reasoning of the United States Supreme Court that “youth has constitutional significance” and “must be afforded adequate weight in sentencing.” After examining the records of sentencing hearings in homicide cases where juveniles were sentenced to life without parole in this State, the Court concluded that the Eighth Amendment required that all such defendants be resentenced. *Id.* at 544, 765 S.E.2d at 577. The key defect in South Carolina’s sentencing practices noted in *Aiken* was the failure to “fully explore the impact of the defendant’s juvenility on the sentence rendered.” *Id.* at 543, 765 S.E.2d at 577. In ordering new sentencing proceedings due to the lack of

consistently paint a picture of the adolescent brain as relatively immature might speak against the relatively young age of criminal responsibility and harsh sentences for adolescents.”).

individualized sentencing hearings, this Court echoed the Supreme Court’s observation in *Miller* that life without parole for juveniles is equivalent to the death penalty, and that death penalty jurisprudence applies to juvenile life without parole cases. *See Miller*, 567 U.S. at 474-75; *Aiken*, 410 S.C. at 544–45, 765 S.E.2d at 577.

Contrary to these principals, the Judge Cole sentenced Bonner to die in prison for a non-homicide offenses committed as a juvenile. Bonner’s sixty-year individual sentence and seventy-year aggregate sentence ensure that has no “meaningful opportunity to obtain release,” in violation of *Graham* and the principals of *Miller*, *Montgomery*, and *Aiken*.

II. Probative Evidence Supports the PCR Court’s Finding that Resentencing Counsel was Ineffective.

Probative evidence supports the PCR judge’s finding that resentencing counsel was ineffective in failing to object to the imposition of a “60-year sentence on a Burglary 1st degree charge coupled with a 10-year consecutive sentence to ABHAN,” which “will result in a *de facto* life sentence depriving [Bonner] of a realistic opportunity to obtain release before the end of his prison term in violation of *Graham*.” App. 605. The right to effective assistance of counsel is violated when (1) counsel’s performance was deficient, and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). This Court measures counsel’s performance by “an objective standard of reasonableness.” *Weik v. State*, 409 S.C. 214, 233, 761 S.E.2d 757, 767 (2014) (quoting *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)). The prejudice prong is satisfied by a showing that “but for counsel’s error, there is a reasonable probability that the outcome of the proceeding would have been different.” *Williams v. State*, 363 S.C. 341, 344, 611 S.E.2d 232, 233 (2005).

Evidence in the record supports the PCR court’s finding of deficient performance. Resentencing counsel did not object to the imposition of the sentence at the resentencing hearing

and, thus, the issue was not preserved for appellate review. The Court of Appeals found this explicitly in denying Bonner's direct appeal from his resentencing. App. 508-09 (affirming pursuant *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to be ruled upon by the trial [court].")).

Evidence also supports a finding that resentencing counsel should have objected to the sentence imposed as a *de facto* LWOP sentence in violation of *Graham* and failure to do so was deficient performance. At the PCR hearing, Bonner presented evidence from the South Carolina Department of Corrections stating that, based on the sentence imposed at resentencing, he would not be eligible for release until 2064,⁶ when he is 73 years and 13 days old. App. 543, 549. Bonner's resentencing counsel testified he believed the sentence constituted a life sentence and would not provide Bonner with a "meaningful opportunity" of release because Bonner is unlikely to live long enough in the Department of Corrections to reach his release date. App. 563. Life expectancy tables from the National Center of Health Statistics confirmed that Bonner's sentence constitutes a *de facto* life sentence. The life expectancy tables, based on data maintained by the United States Department of Health and Human Services, show an African American male born in the United States in 1991, like Bonner, has a life expectancy of 64.6 years.⁷ App. 474, 580-81. Based on this

⁶ Bonner is classified as ineligible for parole by SCDC because his "maxout" date comes before his parole eligibility date. App. 530.

⁷ Data collected in South Carolina reveals Bonner's life expectancy is even shorter as a person who has been incarcerated in the South Carolina Department of Corrections. Life expectancy tables prepared by actuary Vera Dolan in connection with another juvenile sentencing case reveal the life expectancy of an African American male entering SCDC at seventeen years old is only 56.1 years, meaning Bonner is likely to die nearly twenty years prior to his release date. Transcript of Record at 21-23, *State v. Mack*, No. 2009-GS-45-00180 (Feb. 17, 2017); *see also* Defendant's Exhibit 12, *id.* (materials related to the February 2017 hearing are on file with the Williamsburg County Clerk of Court).

data, Bonner's will almost certainly die approximately a decade before he is eligible for release, making the sentence indistinguishable from an LWOP sentence imposed on a juvenile.

It was unreasonable for resentencing counsel to not object to the imposition of the sixty-year sentence resulting in a seventy-year aggregate sentence. The resentencing transcript demonstrates counsel was aware there was a line at which a term-of-years sentence becomes the equivalent of an LWOP sentence in violation of *Graham*. Prior to the imposition of the sentence, counsel asserted that the sentence imposed must be less than the juvenile non-homicide offender's life expectancy in order to provide a meaningful opportunity for release in compliance with *Graham*. App. 395-96. Counsel testified he believed the sentence ultimately imposed was longer than Bonner's life expectancy, App. 563, yet he did not object after imposition of the sentence. Counsel stated he believed he preserved the record regarding this issue by arguing it prior to imposition of the sentence, App. 566, but South Carolina law requires defense counsel to object to a sentence contemporaneously with the imposition of the sentence in order for the issue to be preserved for appeal. *State v. Shumate*, 276 S.C. 46, 47, 275 S.E.2d 288, 288 (1981) ("A defendant's failure to timely object to or seek modification of his sentence in the trial court precludes him from presenting his objection for the first time on appeal."). Counsel's failure to object after the imposition of the sentence, thus, "was not based on 'strategy,' but counsel's mistaken" understanding of the law and constituted deficient performance.⁸ See *Kimmelman v.*

⁸ The State argues that counsel could not have been deficient because no South Carolina appellate courts have ruled on the issue of *de facto* life sentences. Petition for Writ of Certiorari at 16. This argument is belied by the fact that the very issue was discussed at the resentencing hearing and counsel believed the sentence violated *Graham* by failing to provide a meaningful opportunity for Bonner to obtain release. Additionally, other courts began addressing this issue as early as 2012. *People v. Caballero*, 282 P.3d 291, 293 (Cal. 2012). Counsel was clearly aware of the issue and simply failed to appropriately preserve the issue with a contemporaneous objection. *Cf. Smith v. State*, 386 S.C. 562, 568-69, 689 S.E.2d 629, 633 (2010) (finding counsel ineffective for failing to object to improper hearsay and bolstering testimony); *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d

Morrison, 477 U.S. 365, 385 (1986); *see also Smith v. State*, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010) (finding the presumption that counsel provided effective representation based on a valid trial strategy disappears when counsel acknowledges there was no trial strategy in mind).

The PCR court’s finding that counsel’s deficient performance prejudiced Bonner is also supported by probative evidence and other court decisions finding *Graham* prohibits *de facto* LWOP sentences.⁹ The State argues Bonner was not prejudiced because *Graham* applies only to sentences imposed with the explicit term “life without parole.” This argument leads to the absurd consequence that a judge could effectively impose an LWOP sentence simply by sentencing a juvenile non-homicide offender to a lengthy term of years he has no chance of surviving while not explicitly using the words “life without parole.” The State’s argument elevates form over substance and ignores *Graham*’s mandate that a juvenile non-homicide offender must be given “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Graham*, 560 U.S. at 75.

Many courts around the country have rejected the State’s argument, finding term-of-years sentences that exceed a juvenile’s life expectancy are *de facto* LWOP sentences for the purposes of *Graham* and *Miller*.¹⁰ The Seventh, Ninth, and Tenth Circuits have recognized that *de facto* life

335, 341 (2004) (finding counsel ineffective for failing to object to an impermissible prosecutorial argument).

⁹ Bonner’s appellate counsel testified she believed the South Carolina appellate courts would have ruled favorably in Bonner’s case if the issue had been properly preserved for appeal. Based on her knowledge of this Court’s jurisprudence, especially in *Aiken v. Byars*, Hackett testified “there’s no reason to expect that our South Carolina Supreme Court wouldn’t also consider these *de facto* life sentences, which I think they are likely to do.” App. 585.

¹⁰ Other states have legislatively abolished *de facto* life sentences for juvenile homicide offenders. Ark. Code Ann. § 16-93-621 (juvenile offenders parole eligible after at most 30 years); An Act to Amend Sections 3051 and 4801 of the Penal Code, Relating to Parole, 2017–2018 Reg. Sess., Cal. Sen. Bill 394 (Oct. 11, 2017) (to be codified at Cal. Penal Code §§ 3051, 4801) (juvenile offenders

sentences violate *Graham*. *Budder v. Addison*, 851 F.3d 1047, 1059-60 (10th Cir. 2017), *McKinley v. Butler*, 809 F.3d 908, 909, 914 (7th Cir. 2016), and *Moore v. Biter*, 725 F.3d 1184, 1186, 1194 (9th Cir. 2013). And at a minimum, eleven state supreme courts to consider the constitutionality of *de facto* life sentences for juvenile non-homicide offenders have concluded they violate the Eighth Amendment.¹¹ Given that *Graham* explicitly requires juveniles convicted of a non-homicide offense be given a “meaningful opportunity to obtain release” and other courts have recognized lengthy term-of-years sentences violate that requirement, it is likely an objection by resentencing counsel would have changed the outcome of Bonner’s sentencing or appeal.¹² Thus, probative evidence supports the PCR court’s finding that resentencing counsel was deficient in

parole eligible after at most 25 years); Conn. Gen. Stat. § 54-125a (juvenile offenders parole eligible after at most 30 years); Mass. Gen. Laws 279, § 24, *Diatchenko v. District Attorney for Suffolk Dist.*, 27 N.E.3d 349, 354 (Mass. 2015) (juvenile offenders parole eligible after 15 years); W. Va. Code §§ 61-11-23, 62-12-13b (juvenile offenders parole eligible after 15 years); Wyo. Stat. Ann. § 6-10-301 (juvenile offenders parole eligible after 25 years).

¹¹ State supreme court cases that have held that a term-of-years sentence longer than a juvenile’s life expectancy is the equivalent of a sentence to LWOP for the purposes of *Graham* and *Miller* include: *State v. Ramos*, 387 P.3d 650, 660–61 (Wash. 2017), *cert. denied* 138 S. Ct. 467 (2017); *State v. Zuber*, 152 A.3d 197, 212-13 (N.J. 2017), *cert. denied* 138 S. Ct. 152 (2017); *State v. Moore*, 76 N.E.3d 1127, 1137-38 (Ohio 2016), *cert. denied* 138 S. Ct. 62 (2017); *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016); *State v. Riley*, 110 A.3d 1205, 1207 (Conn. 2015), *cert. denied*, 136 S.Ct. 1361 (2016); *Gridine v. State*, 175 So.3d 672, 574-75 (Fla. 2015), *cert. denied*, 136 S. Ct. 1387; *State v. Boston*, 363 P.3d 453, 454 (Nev. 2015) (juvenile non-homicide offenders convicted of multiple offenses with aggregate terms are entitled to the earliest possible parole eligibility of 15 years); *Brown v. State*, 10 N.E.3d 1, 8 (Ind. 2014); *State v. Ragland*, 836 N.W.2d 107, 110 (Iowa 2013); *Commonwealth v. Brown*, 1 N.E.3d 259, 270 n.11 (Mass. 2013); and *Bear Cloud v. State*, 334 P.3d 132, 141-42 (Wyo. 2014); *People v. Caballero*, 282 P.3d 291, 293 (Cal. 2012).

¹² The State correctly noted some courts have found *Graham* did not clearly establish that a term-of-years sentence falls under *Graham*. See, e.g., *Bunch v. Smith*, 685 F.3d 546, 550 (6th Cir. 2012); *Adams v. State*, 707 S.E.2d 359, 365 (Ga. 2011). However, a majority of courts to address the issue have found *Graham* prohibits *de facto* LWOP sentences, like Bonner’s, supporting the PCR court’s finding that counsel was ineffective.

failing to object to Bonner's sentence once it was imposed and that Bonner was prejudiced because the sentence is a *de facto* LWOP sentence that violates *Graham*.

III. The PCR Court did not Err as a Matter of Law in Finding Bonner's Sentence is a *De Facto* Life Sentence in Violation of *Graham*.

The PCR court did not make an error of law or extend *Graham* in finding Bonner's sentence violates the Eighth Amendment because the sentence imposed at Bonner's resentencing virtually guarantees Bonner will die in prison. As discussed above, *Graham* cannot be interpreted so narrowly as to only bar sentences that use the words "life without parole" but to allow lengthy term-of-year sentences that operate to achieve the same objective. Such a narrow construction of *Graham* is contrary to the Court's mandate that states must afford a juvenile non-homicide offender, like Bonner, a "meaningful opportunity to obtain release." *Graham*, 560 U.S. at 75.

Contrary to the State's arguments, *Graham* applies regardless of whether a juvenile LWOP sentence resulted from the commission of one or multiple non-homicide offenses.¹³ The *Graham* Court found a "juvenile offender who did not kill or intend to kill has twice diminished moral culpability" as compared to the adult murderer. *Id.* at 50. This diminished culpability means a punishment of life without parole (the second most severe penalty permitted by law) is not justified for juvenile non-homicide offenders. *Id.* The Court's categorical ruling in *Graham* thus

¹³ The State asserts the issue of Bonner's aggregate sentence, which includes the sixty-year sentence for burglary first degree and a consecutive ten-year sentence for ABHAN, was objected to by resentencing counsel and it was actually appellate counsel who failed to raise the issue. Petition for Writ of Certiorari at 19. On the contrary, evidence in the record demonstrates that resentencing counsel failed to preserve this issue. Hackett argued in her merits brief that Bonner would not survive to be released after serving a seventy-year sentence, App. 474, and the Court of Appeals' found the issues raised on appeal were not preserved its consideration. App. 508.

encompasses all juveniles who did not commit a murder, including aggregate sentences for multiple crimes.¹⁴

Further, nothing in *Graham* limits its holding to offenders who were convicted for a single non-homicide offense. *See State v. Boston*, 363 P.3d 453, 457 (Nev. 2015) (“Nowhere in the *Graham* decision does the Supreme Court specifically limit its holding to offenders who were convicted for a single nonhomicide offense, and the State does not cite to any language in the case to support its claim that the *Graham* decision does”). Instead, the opinion created a broad categorical rule that included all juvenile non-homicide offenders who faced a lifetime behind bars, stating “[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State . . . must provide him or her with some realistic opportunity to obtain release before the end of that term.” *Graham*, 560 U.S. at 82; *see also Aiken*, 410 S.C. at 542 (noting that “*Graham*’s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses”) (quoting *Miller*, 132 S. Ct. at 2465). Categorical rules are, by their nature, expansive and include individuals who do not share the exact facts as the defendant in the case.¹⁵ *See e.g. Roper*, 543

¹⁴ It is noteworthy that *Graham* did not receive the specific sentence of life without parole. He received the sentence of life in a jurisdiction that later abolished its parole system. *Graham*’s ultimate sentence stemmed from several underlying offenses and a probation violation that triggered a new sentencing hearing. *See Graham*, 560 U.S. at 53–56. Therefore, *Graham*, like *Bonner*, received the functional equivalent of life without parole after committing various offenses. *State v. Boston*, 363 P.3d 453, 457 (Nev. 2015).

¹⁵ Concurring in *Graham*, Chief Justice Roberts recognized the majority’s rule applied broadly and expressed his disapproval when he asserted the majority used *Graham* as a “vehicle for unsettling our established jurisprudence and fashioning a categorical rule *applicable to far different cases*,” acknowledging the majority opinion reached beyond the facts of *Graham*’s individual circumstances *Graham*, 560 U.S. at 96 (Roberts, C.J., concurring) (emphasis added).

U.S. 551 (creating a categorical rule barring any juvenile homicide offender, regardless of the underlying facts, from receiving the death penalty).

The Court further confirmed the broad and categorical application of *Graham* in *Miller* and *Montgomery*. *Miller* recognized *Graham* belonged to a set of cases that “adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty” and established a “flat ban” for nonhomicide offenses.¹⁶ *Miller*, 567 U.S. at 470, 474 n.6. In *Montgomery*, the Court treated *Graham* equally as broad, stating *Graham* fell within the line of Supreme Court “precedent holding certain punishments disproportionate when applied to juveniles” and that *Graham* “held that the Eighth Amendment bars life without parole for juvenile nonhomicide offenders.” *Montgomery*, 136 S. Ct. at 732. *Graham* and its progeny demonstrate that the Court intended its categorical ban of LWOP sentences to apply to *all* non-homicide offenders, regardless of whether the offender committed one or multiple non-homicide offenses.¹⁷ *See Budder*, 851 F.3d at 1054–55 (describing *Graham*’s language and the Court’s subsequent treatment of *Graham* as inclusive of all juvenile non-homicide offenders).

Given *Graham*’s clear intention to create a categorical ban of all LWOP sentences imposed on juvenile non-homicide offenders, the PCR court did not err in finding Bonner’s sentence

¹⁶ Justice Breyer stated in his concurring opinion, “*Graham* dictates a clear rule: The only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses.” *Id.* at 2476 (Breyer, J., concurring); *see also id.* at 2483 (Thomas, J., dissenting) (recognizing *Graham* “conclude[d] that the Constitution prohibits a life-without-parole sentence for a nonhomicide offender who was under the age of 18 at the time of his offense.”).

¹⁷ As the State recognized, many other courts have found *Graham*’s categorical ban extends to aggregate sentences, such as Bonner’s. *See, e.g., Budder*, 851 F.3d at 1054–55 (Tenth Circuit); *Reyes*, 63 N.E.3d at 888 (Illinois); *Brown*, 10 N.E.3d at 8 (Indiana); *State v. Null*, 836 N.W2d 41, 71 (Iowa 2013); *Boston*, 363 P.3d at 457 (Nevada); *Zuber*, 152 A.3d 197 (New Jersey); *Moore*, 76 N.E.3d at 1137-38 (Ohio); *Bear Cloud*, 334 P.3d at 141-42 (Wyoming); *Caballero*, 282 P.3d at 295 (California).

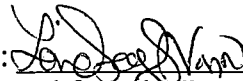
violated the Eighth Amendment by denying him “some meaningful opportunity to obtain release,” *Graham*, 560 U.S. at 75, and that his resentencing counsel was ineffective in failing to object to the imposition of the sentence. *See Strickland*, 466 U.S. at 687-88.

CONCLUSION

For the reasons stated above, the PCR Court’s findings are supported by probative evidence and properly the court applied *Graham* in finding Bonner’s counsel was ineffective in failing to object when Bonner was sentenced to die in prison in violation of the Eighth Amendment. This Court should, therefore, deny certiorari and allow Bonner to be resentenced to a term that provides him with the constitutionally mandated “meaningful opportunity to obtain release.” *Graham*, 560 U.S. at 75.

Respectfully Submitted,

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BY: 
Counsel for John Bonner

January 22, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Cherokee County
Court of Common Pleas

Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2017-000758

JOHN B. BONNER, #338030,

RESPONDENT,

V.

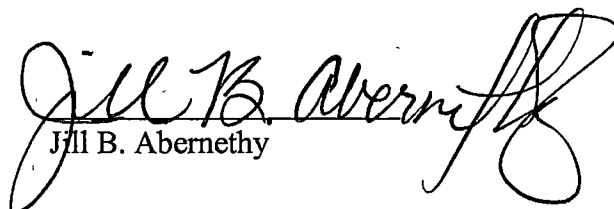
STATE OF SOUTH CAROLINA,

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Respondent's Response in Opposition to Petition for Writ of Certiorari was served by first class United States mail, postage prepaid, this 22nd day of January, 2018, upon the following:

Valerie Giovanoli, Esq.
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549


Jill B. Abernethy

January 22, 2018

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The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

S.C. SUPREME COURT

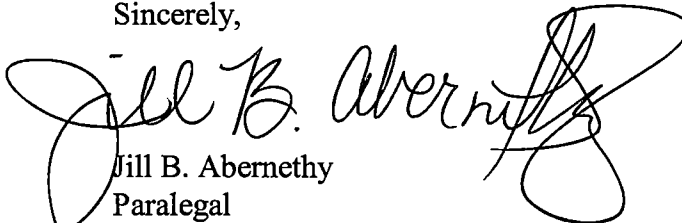
RE: *John B. Bonner, SCDC#338030 v. State of South Carolina*
2017-000758

Dear Mr. Shearouse:

Please find enclosed for filing, with certificate of service, the original and seven copy of the Respondent's Response in Opposition to Petition for Writ of Certiorari in regards to the above captioned case. Please clock-in the extra copy and return it to me in the enclosed self-addressed stamped envelope.

If you should have any questions, please feel free to contact this office.

Sincerely,


Jill B. Abernethy
Paralegal

cc: Valerie Giovanoli, Esq.
John Bonner

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