STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRELL ARTIETH SMITH,

APPELLANT

APPELLATE CASE NO. 2017-001178

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the thirty year mandatory minimum sentence for murder set forth in S.C. Code Ann. § 16-3-20(A) violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution as applied to juvenile offenders because it does not treat juveniles as constitutionally different for sentencing purposes as required by Miller v. Alabama, 567 U.S. 460 (2012) and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014)?

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant on October 6, 2014 for murder, attempted murder, first degree burglary, and possession of a weapon during the commission of a violent crime. R. *. His case was called to trial on September 19, 2016 before the Honorable Kristi Lea Harrington, and a jury. Tr. 1. Assistant Solicitors Charles Patrick and Chad Simpson represented the state, and Benjamin Lewis and Megan Ehrlich represented Appellant. Tr. 1.

Judge Harrington ultimately directed a verdict for first degree burglary. Tr. 402, ll. 6-9. On September 22, 2016, the jury found Appellant guilty. Tr. 532, ll. 12-21.

Sentencing was deferred until May 9, 2017. Tr. 1 (May 9, 2017). After an individualized sentencing hearing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), Judge Harrington sentenced Appellant to thirty five years for murder, thirty years for attempted murder, and five years for the weapons offense. All sentences were ordered to be served concurrently. Tr. 91, ll. 1-14 (May 9, 2017).

This appeal follows.

STATEMENT OF THE FACTS

On May 3, 2017, Appellant filed a motion requesting the trial judge declare the mandatory minimum sentence for murder set forth in S.C. Code Ann. § 16-3-20(A) unconstitutional as applied to juvenile offenders because it does not treat juveniles as constitutionally different for sentencing purposes as required by Miller v. Alabama, 567 U.S. 460 (2012). R. * (Motion). Appellant asserted the thirty year mandatory minimum sentence violates the Eighth Amendment to the United States Constitution and Article 1, § 15 of the South Carolina Constitution. R. * (Motion).

At the beginning of Appellant's individualized sentencing hearing, counsel for Appellant again argued that the mandatory minimum thirty year sentence for murder set forth in S.C. Code Ann. § 16-3-20(A) is unconstitutional as applied to Appellant, who was a juvenile at the time of the alleged offense. Tr. 8, ll. 12-22. Counsel asserted that recent precedent from the United States Supreme Court and the Supreme Court of South Carolina establish that "juveniles are constitutionally different from adults for sentencing purposes and that any punishment in cases involving juvenile offenders must take those differences into account if it is to be proportional to both the offender as well as the offense." Tr. 9, ll. 5-12.

Counsel continued:

> [T]he penological justifications that . . . support lengthy incarceration and lengthy mandatory minimum sentences for adults do not apply equally to juveniles; and, therefore, our position would be that the court [should] not commit Terrell [Appellant], who was a juvenile at the time of the offense that he's being sentenced for, to the same mandatory minimum sentence as an adult offender.

Tr. 9, ll. 14-21.

Counsel then urged the trial judge to declare the thirty year mandatory minimum sentence for murder unconstitutional as applied to juveniles and consider sentencing Appellant pursuant to

the scheme set forth for the offense of voluntary manslaughter, which provides a much wider sentencing range and would allow the court to consider the characteristics of youth. Tr. 9, l. 22 – 10, l. 7.

The trial judge denied the motion and declined to declare the mandatory minimum unconstitutional. Tr. 10, ll. 8-9.

ARGUMENT

The thirty year mandatory minimum sentence for murder set forth in S.C. Code Ann. § 16-3-20(A) violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution as applied to juvenile offenders because it does not treat juveniles as constitutionally different for sentencing purposes as required by *Miller v. Alabama*, 567 U.S. 460 (2012) and *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).

I. Introduction

"[C]hildren are constitutionally different from adults for purposes of sentencing." Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 2464 (2012). On June 25, 2012, the United States Supreme Court held mandatory sentences of life without parole (LWOP) imposed upon juveniles violated the Eighth Amendment to the United States Constitution. Id. Beginning in 2005, with its decision in Roper v. Simmons, 543 U.S. 551 (2005), the Supreme Court began a steady evolution of juvenile justice jurisprudence applicable to the states and federal government. In Roper, the Court held death sentences for juveniles were cruel and unusual punishment. Four years later, the Court held that a LWOP sentence imposed upon a juvenile for a non-homicide offense violated the Eighth Amendment's ban on cruel and unusual punishment. Graham v. Florida, 560 U.S. 48 (2010). Not surprisingly, when presented with the question of whether mandatory LWOP sentences for juveniles in homicide cases violated the Eighth Amendment, the Supreme Court held they did. Miller, 567 U.S. at ___, 132 S.Ct. at 2464.

"To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" Graham, 560 U.S. at 58 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)). "Embodied in the Constitution's ban on cruel and unusual punishment is the 'precept of justice that

punishment for the crime should be graduated and proportioned to [the] offense.'" Id. at 59 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)). Over the years, the cases addressing the proportionality of sentences have developed along two general lines. The first is concerned with the particular circumstances of the case and whether the defendant's sentence for a term of years is grossly disproportionate given the particular offense. Graham, 560 U.S. at 59; Harmelin v. Michigan, 501 U.S. 957, 1005 (1991). The second classification of cases is concerned with categorical rules as applied to groups of offenses or groups of offenders. Graham, 560 U.S. at 60-61. For example, Supreme Court categorical rulings related to categories of offenses prohibit the imposition of the death penalty for non-homicide crimes against individuals. Kennedy v. Louisiana, 554 U.S. 407 (2008). Categorical rulings prior to Graham prohibited the death penalty for defendants who committed their crimes before the age of eighteen, Roper v. Simmons, 543 U.S. 551 (2005), or who suffered from intellectual disability, Atkins v. Virginia, 536 U.S. 304 (2002).

When adopting categorical proportionality rules, the Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Id. at 61 (quoting Roper, 543 U.S. at 572). Generally, the Court has relied on social science data and statistics to discern "society's evolving standards of decency." Roper, 543 U.S. at 560-577. "[G]uided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,'" the Court, in the exercise of its own independent judgment, then determines whether the punishment in question violates the Eighth Amendment. Graham, 560 U.S. at 61 (quoting Kennedy, 554 U.S. at 421).

It was upon this backdrop that the United States Supreme Court decided Roper, Graham, and Miller. Not long after the Court's opinion in Miller, our Supreme Court reviewed non-

mandatory life sentences for juveniles in South Carolina through the lens of Eighth Amendment jurisprudence. In Aiken v. Byars, 410 S.C. 534, 540-541, 765 S.E.2d 572, 575-576 (2014), the South Carolina Supreme Court held that Miller applied retroactively and to juveniles who were sentenced to non-mandatory terms of life without parole. Finding that "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," the Court held the sentencing judge must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" and that this requirement "deserves universal application." Id. at 543, 765 S.E.2d at 577 (internal quotations omitted). The Court held the class of petitioners in the case "and those similarly situated" were "entitled to resentencing to allow the inmates to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight." Id. at 544, 765 S.E.2d at 577.

Following Miller, courts have confronted the question of what constitutes a "life without parole sentence," particularly, in light of the Court's mandate that juvenile offenders *must* be afforded a *meaningful opportunity* for release unless there has been a finding of irreparable corruption.

No Death Penalty for Children

In Roper, the Supreme Court established a categorical ban on the death penalty for juveniles relying in large part on social science research indicating that youths have a lessened culpability and are less deserving of the most severe punishments. Roper, 543 U.S. at 569-575. Juvenile offenders are fundamentally different from adults for purposes of sentencing for three reasons: (1) they are immature and have "an underdeveloped sense of responsibility;" (2) they "are more vulnerable or

susceptible to negative influences and outside pressures, including peer pressure;" and (3) their characters are "not as well formed" as adults. Id. at 569-570 (internal citations omitted). "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." Id. at 573. Therefore, "juvenile offenders cannot with reliability be classified among the worst offenders." Id. While "[a] juvenile is not absolved of responsibility for his actions," his transgressions are "not as morally reprehensible as that of an adult." Graham, 560 U.S. at 68 (internal citations omitted).

No LWOP for Children Convicted of Non-Homicide Offenses

Sixteen-year old Terrance Graham was charged with armed burglary and attempted armed robbery of a barbeque restaurant. Graham, 560 U.S. at 53. Graham entered guilty pleas to both charges pursuant to a plea agreement. The trial court withheld adjudication of guilt as to both charges and sentenced Graham to concurrent three-year terms of probation with jail time. Id. at 54. Shortly thereafter, when Graham was seventeen years old, he was arrested again and charged with home invasion robbery. Graham's probation officer charged Graham with violating the terms of his probation by "possessing a firearm, committing crimes, and associating with persons engaging in criminal activity." When Graham appeared before the trial court where he maintained he had no involvement in the home invasion robbery, he admitted to violating his probation by fleeing arrest, even though the trial court emphasized that the admission could expose him to a life sentence based on his previous charges. Id. at 55.

After finding Graham had violated his probation, the trial judge, in his discretion, sentenced Graham to the maximum sentence of life. During the sentencing proceeding, the judge provided his reasoning for the sentence: "We can't do anything to deter you. This is the way you are going to

lead your life.... [T]hat is where we are today is I don't see where I can do anything to help you any further." Id. at 56-57. Florida had abolished its parole system; accordingly, the life sentence gave Graham no possibility of release unless he was granted executive clemency. Id. at 57.

The Supreme Court held that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." Id. at 74. Just as the Court did in Roper, the Court in Graham relied upon developments in social science demonstrating the fundamental differences between juveniles and adults:

> [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults. It remains true that from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Id. at 68 (internal citations omitted).

The Court explained the decision was "necessary to prevent the possibility that life without parole sentences will be imposed on juvenile non-homicide offenders who are not sufficiently culpable to merit that punishment." Id. at 74. Although "[a] state is not required to guarantee the eventual freedom to a juvenile offender convicted of a non-homicide crime," the state must "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. "[W]hile the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile non-homicide offender, it does not require the state to release that offender during his natural life." Id. at 75. "The Eighth Amendment does not foreclose the possibility that persons convicted of non-homicide crimes committed before adulthood will remain behind bars for life. It does forbid states from making the judgment at the outset that those offenders never will be fit to reenter society." Id.

While explaining its rationale, the Court in Graham noted that a life without parole sentence is the "second most severe penalty permitted by law." Id. at 69 (internal citations omitted). Additionally, "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." Such a sentence "alters the offender's life by a forfeiture that is irrevocable." Id. For a juvenile offender, a life without parole sentence "'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 70 (quoting Naovarath v. State, 779 P.2d 944 (Nev. 1989)). Additionally, the Court in Graham observed that a juvenile offender sentenced to life without parole will on average serve more years and a greater percentage of his life in prison than an adult offender. "A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." Id.

Finally, the Court in Graham concluded that its new categorical rule "gives all juvenile non-homicide offenders a chance to demonstrate maturity and reform." Id. at 79. "Life in prison without the possibility of parole gives no chance for reconciliation with society, no hope." Id. However, "[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual." Id. By imposing a "categorical rule against life without parole for juvenile non-homicide offenders," the Court avoided "the perverse consequences in which the lack of maturity that led to an offender's crime is reinforced by the prison term." Id.

No Mandatory LWOP Sentences for Children

In Miller, supra, the United States Supreme Court continued the evolution of Eighth Amendment jurisprudence. The Court extended the reasoning of Roper and Graham by holding that mandatory sentences of life without parole for juvenile homicide offenders also violates the Eighth Amendment's prohibition on cruel and unusual punishment. Miller, 567 U.S. at ___, 132 S.Ct. at 2460. This was a categorical ban. However, the Court further explained that while the decision did not foreclose imposition of a sentence without the possibility of a parole on a juvenile convicted of a homicide offense, the Court required the sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at ___, 132 S.Ct. at 2469.

The Court in Miller reserved ruling on whether juveniles could ever be sentenced to LWOP. Id. at ___, 132 S.Ct. at 2469. The Court in Miller repeatedly focused on the notion that the character traits of children are "more transitory and less fixed." Id. at ___, 132 S.Ct. at 2464. Children by definition lack maturity and responsibility; thus, they are more likely to act with "recklessness, impulsivity, and needless risk-taking." Id. The Court eloquently explained that due to the innate characteristics of children at large, there is a "great difficulty ... 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." In fact, the Court stated "incorrigibility is inconsistent with youth." Id. at ___, 132 S.Ct. at 2469. The Court emphasized the potential for reform present in all juveniles. The Court emphasized the mitigating qualities of youth and noted "[i]t is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.'" Id. at ___, 132 S.Ct. at 2467 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

Although the Court in Miller did not hold LWOP to be an unconstitutional sentence in non-mandatory sentencing schemes, the Court held Eighth Amendment jurisprudence governing imposition of death sentences applied equally to cases involving juveniles facing the possibility of LWOP. Id. at ___, 132 S.Ct. at 2470. The Court's decision created a presumption against LWOP sentences for juveniles, and most importantly, the Court imported the principles of capital sentencing into cases where juveniles face the possibility of LWOP. Specifically, the court explained that "death is different" and "children are different too." Id. at ___, 132 S.Ct. at 2470.

"The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" Id. at ___, 132 S.Ct. at 2463 (quoting Roper, 543 U.S. at 560). The Court in Miller emphasized that "proportionality is central to the Eighth Amendment." Id. (quoting Graham, 130 S.Ct. at 2021). Focusing on the concept of individualized sentencing, the Court recognized "that children are constitutionally different from adults for purposes of sentencing." Children "have diminished culpability and greater prospects for reform," and therefore, "'they are less deserving of the most severe punishments.'" Id. at ___, 132 S.Ct. at 2464 (quoting Graham, 560 U.S. at 68). "[T]he distinctive attributes of youth diminish penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Id. at ___, 132 S.Ct. at 2465. As a result, "[a]n offender's age is relevant to the Eighth Amendment." Graham, 560 U.S. at 76. In light of the relevance to the ban on cruel and unusual punishment, "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." Miller, 567 U.S. at ___, 132 S.Ct. at 2466.

Mandatory sentencing prevents the sentencer from considering the juvenile offender's "chronological age and its hallmark features, among them, immaturity, impetuosity, and failure to appreciate risks and consequences," the offender's family and home environment, the extent of the

offender's conduct in the offense and the way familial and peer pressures may have affected him. Id. at ___, 132 S.Ct. at 2468. The Court required sentencers "to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at ___, 132 S.Ct. at 2469. Thus, it is clear that sentencing authorities *must* consider a juvenile offender's age and consideration of such *must* be a mitigating factor.

No Non-Mandatory LWOP Sentences for Juveniles and Retroactivity

In Aiken v. Byars, 410 S.C. 534, 540-541, 765 S.E.2d 572, 575-576 (2014), the South Carolina Supreme Court held that Miller applied retroactively and to juveniles who were sentenced to non-mandatory terms of life without parole. According to the Court, Miller "unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole." Id. at 542, 765 S.E.2d at 576. Thus, the Court determined "an individualized sentencing proceeding before imposing a sentence of life without parole on a juvenile offender" was required. Id. Recognizing that Miller "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," the South Carolina Supreme Court held it "must give effect to the proportionality rationale integral to Miller's holding – youth has constitutional significance." Id. at 542-543, 765 S.E.2d at 576. Therefore, youth "must be afforded adequate weight in sentencing." Id. at 543, 765 S.E.2d at 576.

The Court found the Miller decision "clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution." Id. at 543, 765 S.E.2d at 576-577. Quite simply, the Court concluded "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. Accordingly, the Court held the requirement that the sentencing judge must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" "deserves universal application." Id. (internal quotations omitted). The Court held the class of petitioners in the case "and those similarly situated" were "entitled to resentencing to allow the inmates to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight." Id. at 544, 765 S.E.2d at 577.

The sentencing court must consider the following factors in crafting a sentence proportional to the offense and the juvenile offender:

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

Id. at 544, 765 S.E.2d at 577 (internal quotations omitted). While not requiring the sentencing proceedings to "mirror the penalty phase of a capital case," the Court determined "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 544-545, 765 S.E.2d at 577.

Two years after the South Carolina Supreme Court's decision in Aiken, the United States Supreme Court addressed the retroactivity question of Miller. Montgomery v. Louisiana, 136 S.Ct. 718 (2016). In line with our Court's opinion in Aiken, the Supreme Court held that Miller

announced a new substantive constitutional rule that was retroactive on state collateral review. Montgomery, 136 S.Ct. at 732-736. However, the Court's opinion answered more than the retroactivity question.

In 1963, Henry Montgomery was seventeen years old. Id. at 725. He shot and killed a deputy sheriff. Id. He was sentenced to death for the crime, but his conviction was reversed by the state supreme court. Id. Upon retrial, the jury returned a verdict of guilty without capital punishment. Id. According to state law, the judge was required to impose LWOP. Id. at 726. "The sentence was automatic upon the jury's verdict, so Montgomery had no opportunity to present mitigation evidence to justify a less severe sentence." Id. At the time of his appeal to the United States Supreme Court, Montgomery was sixty-nine years old, having "spent almost his entire life in prison." Id.

When Montgomery challenged his sentence based upon the Miller decision, the state court held he was not entitled to relief because Miller was not retroactive on collateral review. Montgomery, 136 S.Ct. at 727. In deciding that Miller's prohibition on mandatory life without parole for juvenile offenders announced a new substantive rule that must be retroactive, the Court revealed much about its prior opinion in Miller. Montgomery, 136 S.Ct. at 732. "The 'foundation stone' for Miller's analysis" was the "Court's line of precedent holding certain punishments disproportionate when applied to juveniles." Montgomery, 136 S.Ct. at 732. The "starting premise" is the "principle" "that children are constitutionally different from adults for purposes of sentencing" that "result from children's diminished culpability and greater prospects for reform." Id. (internal quotation omitted).

The Court further noted Miller recognized "that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and

life without parole is justified." Montgomery, 136 S.Ct. at 733. However, "in light of children's diminished culpability and heightened capacity for change, Miller made clear that appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Id. at 733-34 (internal quotations omitted). Therefore, 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." Id. at 734 (internal quotations omitted).

"Because Miller determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status – that is, juvenile offenders whose crimes reflect the transient immaturity of youth." Id. (internal citations and quotations omitted). Miller barred "life without parole" "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." Id. "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).

"A hearing where youth and its attendant characteristics are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." Id. at 735. It is the hearing that "gives effect to Miller's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." Id. The Court concluded that Montgomery and others 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 736-737.

II. The Thirty Year Mandatory Minimum Sentence Set Forth in S.C. Code Ann. § 16-3-20(A) is Unconstitutional as Applied to Juveniles Because it Does not Treat Juveniles as Constitutionally Different for Sentencing Purposes.

S.C. Code Ann. § 16-3-20(A) states that a "person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life." Because it was enacted long before Miller and Aiken, the statute does not differentiate between juveniles and adults, and requires the same mandatory minimum sentence for both classes of offenders. Under the statute, a juvenile may never, regardless of the circumstances, receive a sentence less than thirty years. The statute has not been updated to conform to current Eighth Amendment jurisprudence and now runs contrary to the established constitutional maxim that juveniles are different than adults for sentencing purposes. See Miller, 567 U.S. at ___, 132 S.Ct. at 2464.

The United States Supreme Court in Miller explained that its recent decisions concerning juveniles—Roper v. Simmons, 543 U.S. 551 (2005) and Graham v. Florida, 560 U.S. 48 (2009)—hinged on the now established constitutional maxim that juveniles have both "diminished culpability and greater prospects for reform" and are thus "less deserving of the most severe punishments." Miller, 567 U.S. at ___, 132 S.Ct. at 2464 (quoting Graham, 560 U.S. at 68). The Court's observations with regard to lessened culpability and greater prospects for rehabilitation are grounded in three constitutionally significant differences between juveniles and adults:

1. Children are less mature and developed than adults, leading to "recklessness, impulsivity, and needless risk-taking." Id.

2. Children are more "vulnerable . . . to negative influences and outside pressures," and have "limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." Id. (internal quotation marks omitted).

3. Children's actions are "less likely to be evidence of irretrievable depravity" because "a child's character is not well formed as an adults" and "his traits are less fixed." Id. (internal quotation marks omitted).

These differences, the Court in Miller noted, result in part from a consistently growing body of social science and neuroscience research conclusively establishing that (1) only a small percentage of adolescents who commit crimes, even serious crimes, "develop entrenched patterns of problem behavior," Miller, 567 U.S. at ___, 132 S.Ct. at 2464 (quoting Roper, 543 U.S. at 570); and (2) there are fundamental differences between the brains of juveniles and adults in areas "involved in behavior control." Id., at ___, 132 S.Ct. at 2464-2465 (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. Miller, 567 U.S. at ___, 132 S.Ct. at 2464 n.5 (quoting Brief of the American Psychological Association et al.).

In Miller, the Court reaffirmed what it had previously established in Graham and Roper: "Children are constitutionally different from adults for the purposes of sentencing." 567 U.S. at ___, 132 S.Ct. at 2464. The Court in Miller emphasized that juveniles "cannot be viewed simply as miniature adults" and, as a result, their punishments should also be different because of their diminished culpability and greater prospects for reform." Id. at ___, 132 S.Ct. at 2470. Our Supreme Court embraced this reasoning in Aiken where the Court recognized that "youth has constitutional significance" and "must be afforded adequate weight in sentencing." Aiken, 410 S.C. at 543, 765 S.E.2d at 576. Applying these principles, the Court went on to hold that all South Carolina juveniles currently serving LWOP were entitled to resentencing beycase the

proceedings which led to those sentences failed to "fully explore the impact of the defendant's juvenility on the sentence rendered." Id. at 543, 765 S.E.2d at 577; See Id. (declaring exploration "of the defendant's juvenility" an "affirmative requirement" for an Eighth Amendment complainant sentencing scheme.)

The mandatory minimum sentence for murder is inconsistent with Miller and Aiken because it erroneously places juveniles and adults on equal footing for sentencing purposes. Both juvenile and adult offenders are subject to the same thirty year mandatory minimum sentence. Consequently, the sentencing scheme ignores the now firmly established scientific and constitutional differences between juveniles and adults. Due to their diminished culpability arising from the hallmark features of youth, juvenile offenders must be treated differently, including when it comes to mandatory minimum sentences. See Miller, 567 U.S. at ___, 132 S.Ct. at 2468 (by "imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult").

Moreover, the mandatory minimum sentence of § 16-3-20(A) also violates the Eighth Amendment's requirement of individualized sentencing for juveniles established in Miller. Two strands of Eighth Amendment precedent are relevant here. The first applies the Court's concerns for proportionate punishment for juveniles. Applying the Eighth Amendment's proportionality principle, the Court instituted a "categorical ban on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." Miller, 567 U.S. at ___, 132 S.Ct. at 2463-2464. The second has addressed mandatory sentences for adult offenders on various occasions. See e.g., Hamelin v. Michigan, 501 U.S. 957 (1991) (upholding a mandatory sentence of life without parole for possessing a large quantity of cocaine); Ewing v. California, 538 U.S. 11 (2003) (upholding a mandatory sentence of twenty five years to life for

theft under California's three strikes recidivism statute). Taken together, these two lines of cases establish the proposition that mandatory sentencing schemes permitted for adults are not permissible for juveniles.

Additionally, Miller established that the protections of individualized sentencing jurisprudence apply to juveniles in non-capital cases. Miller, 567 U.S. at ___, 132 S.Ct. at 2470. The Court also made clear that individualized sentencing for juveniles in adult court should "follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." Id. at ___, 132 S.Ct. at 2471. Consistent with this mandate, a sentencer may not impose LWOP on a juvenile offender without first accounting for how children are different as a class, the particular circumstances of the child and the child's offense, and how those differences counsel against irrevocably sentencing a juvenile to a lifetime of prison." See Id. at ___, 132 S.Ct. at 2467-2468. Consequently, Miller requires juveniles convicted of murder receive an individualized sentencing hearing designed to take into consideration the factors attendant to youth and the circumstances of the offense before fashioning an adequate sentence. See Id. at ___, 132 S.Ct. at 2460 (suggesting that mandatory schemes for juveniles that eliminate the sentencer's discretion to impose a lesser and more appropriate punishment "run[] afoul of our cases' requirement of individualized sentencing.")

Mandatory minimum sentences, by their very nature, do not permit the implementation of individualized sentencing contemplated by Miller and Aiken. Specifically in this case, the arbitrary thirty year mandatory minimum tied the trial judge's hands and eliminated the exercise of discretion to determine the proper sentence. Under the sentencing scheme in § 16-3-20(A), juveniles receive the same sentence of thirty years to life as adults, regardless of mitigating evidence and the applicability of the sentencing factors outlined by the Courts in Miller and

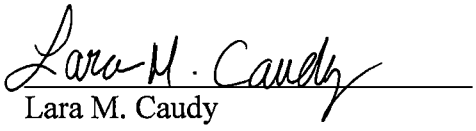
Aiken. The mandatory minimum sentencing provision destroys a sentencer's ability to craft a lesser sentence if it deems such a sentence proper after its consideration of those factors. While that regime may have been permissible in the pre-Miller era, it cannot be squared with the Eighth Amendment rules that now govern juvenile sentencing.

For these reasons, the mandatory minimum sentence for murder set forth in S.C. Code Ann. § 16-3-20(A) violates the Eighth Amendment and Article I, § 15 of the South Carolina Constitution as applied to juvenile offenders, such as Appellant, because it removes the sentencer's discretion to determine the proper sentence by confining his or her choices to the same sentencing range prescribed for adult offenders. Consequently, Appellant respectfully requests this Court hold the thirty year mandatory minimum sentence set forth in § 16-3-20(A) is unconstitutional as applied to juvenile defenders, reverse Appellant's sentence for murder, and remand for resentencing.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court hold the thirty year mandatory minimum sentence set forth in S.C. Code Ann. § 16-3-20(A) violates the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution as applied to juvenile defenders, reverse Appellant's sentence for murder, and remand for resentencing.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of February, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRELL ARTIETH SMITH,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Terrell Artieth Smith, #372430, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 1st day of February, 2018.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of February, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.