STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS ROBERT SHEWTZUK,

APPELLANT

APPELLATE CASE NO 2016-001957

INITIAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory Provisions

Constitutional Provisions

Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err when she denied Appellant's request for a continuance and/or bifurcation of the sentencing proceeding and sentenced Appellant to life imprisonment without the possibility of parole without the benefit of an individualized sentencing hearing?

II. Did the judge err by admitting DNA evidence where the state failed to prove the chain of custody as far as practicable by failing to present evidence of how the DNA evidence was transported from the local sheriff's office to the SLED laboratory?

STATEMENT OF THE CASE

On July 9, 2015 a Dorchester County grand jury indicted Appellant for murder, possession of a weapon during the commission of a violent crime, and two counts of kidnapping. R.* (indictments). On June 2, 2016, the grand jury indicted him for a third count of kidnapping. R. * (indictment). The state, represented by Glenn Justis and Kyle Ward, called the case to trial before the Honorable Maite Murphy and a jury on September 6-8, 2016. Tr. 1. Leslie Sarji represented Appellant. Tr. 1. The jury found Appellant guilty as charged. Tr. 345, l. 19 – Tr. 346, l. 6. Judge Murphy sentenced Appellant to life imprisonment without the possibility of parole for murder, to thirty years imprisonment for two counts of kidnapping, and to five years imprisonment for the weapon. Tr. 375, l. 21 – Tr. 376, l. 9; R. * (sentence sheets). She imposed no sentence for the third count of kidnapping in light of the life sentence for murder. Tr. 376, ll. 6-9.

On September 16, 2016, Appellant served a notice of appeal. When the trial transcript was received, appellate counsel discovered the bench conferences were not recorded or transcribed. The transcript contained numerous instances of assurances that the bench conferences were being recorded. See e.g., Tr. 190, l. 19 – Tr. 191, l. 6; Tr. 247, l. 22 – Tr. 248, l. 2. Therefore, appellate counsel moved to reconstruct the record of the bench conferences on April 6, 2017. The state consented to the motion. On May 11, 2017, this Court granted the motion. On July 17, 2017, Judge Murphy convened a hearing to reconstruct the record. Rec. 1. Undersigned counsel represented Appellant, and Glenn Justis represented the state. Rec. 1. On August 31, 2017, Judge Murphy issued an order regarding her findings concerning reconstruction. R. * (order).

Appellant now files this brief.

ARGUMENT

I. The trial judge erred when she denied Appellant's request for a continuance and/or bifurcation of the sentencing proceeding and sentenced Appellant to life imprisonment without the possibility of parole without the benefit of an individualized sentencing hearing.

Relevant facts

Prior to trial, defense counsel moved to continue the trial or to bifurcate the trial and sentencing proceeding. Tr. 6, ll. 1-13; R. * (motion). At the time of the shooting, Appellant was eighteen years and six months old. Tr. 6, ll. 17-18. Citing Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), defense counsel argued Appellant was similarly situated to those under eighteen years of age and entitled to the same privileges and protections. Tr. 6, l. 18 – Tr. 7, l. 8. Defense counsel explained:

> [T]he science behind the decision in Miller versus Alabama and Roper versus Simmons and Graham versus Florida, which is all aligned -- United States Supreme Court cases that led to the decision in Miller versus Alabama. All of them recognize that the reason that we are treating 17-year-olds as juveniles and treating them differently for purposes of crimes which carry life without parole sentences is that children, juveniles, have less of an ability to appreciate the consequences of their actions. They act more impulsively and that sort of thing. And, Judge the science behind these rationales is equally applicable to Mr. Shewtzuk.

Tr. 7, ll. 8-20.

According to defense counsel, studies comparing individuals aged 13 to 25 showed those "aged 18 to 21 behave more like individuals ages 13 to 17, i.e., juveniles, than they do like individuals aged 22 to 25." Tr. 8, ll. 7-16. Additionally, those ages 18 to 21 also displayed "immature engagement of prefrontal regions in the brain, which is our part of the brain that once it is fully developed is important for overriding predominately emotional reactions." Tr. 8, ll.

16-23. Thus, defense counsel argued Appellant was "entitled to have a full Aiken versus Byars hearing." Tr. 8, l. 24 – Tr. 9, l. 4.

Counsel requested a continuance or bifurcation to permit her to investigate the facts relevant to the Miller factors. Such an investigation was particularly required in this case based upon defense counsel's preliminary investigation revealing Appellant was sexually abused, had a father who was imprisoned for a homicide when Appellant was only four years old, and had a mother who engaged in prostitution and had introduced Appellant to methamphetamine. Tr. 9, l. 18 – Tr. 10, l. 1. Additionally, Appellant "spent time in both Connie Maxwell and John de la Howe." Tr. 10, ll. 2-3.

The state argued the motion was premature. Tr. 11, ll. 17-18. Additionally, the state argued Appellant was not entitled to an individualized sentencing hearing because of his age. Tr. 11, l. 23 – Tr. 12, l. 13. Finally, the solicitor argued the state would be prejudiced by a delay because the outcome of a co-defendant's case was dependent upon the outcome of Appellant's case, and that the deceased's family would be prejudiced by not getting closure. Tr. 12, l. 15 – Tr. 13, l. 8.

The judge denied defense counsel's motion for a continuance, holding Appellant was not entitled to an individualized sentencing proceeding under "the black letter law." Tr. 13, ll. 9-20. Regarding the request for bifurcation, Judge Murphy concluded the request was premature. Tr. 13, ll. 21-23. After noting every sentencing proceeding allowed for presentation of mitigating and aggravating evidence, Judge Murphy determined the bifurcation motion was not ripe unless Appellant were convicted. Tr. 14, ll. 1-4.

When the jury returned with guilty verdicts, defense counsel renewed her request to bifurcate the sentencing hearing to permit her an opportunity to investigate, marshal, and present

the powerful mitigation evidence her limited investigation revealed existed during an individualized sentencing hearing pursuant to Aiken. Tr. 349, ll. 6-25. Defense counsel had requested and paid for records pertaining to Appellant's commitment to William S. Hall for 90 days, but she had not received those records at the time of the trial. Tr. 350, ll. 5-15. However, defense counsel had records from Connie Maxwell, a children's home, where Appellant lived when he was younger. Tr. 350, ll. 15-18.

Defense counsel noted that a sentence of forty or fifty years amounted to a life sentence because "statistically he dies in prison." Tr. 350, ll. 22-24.

Judge Murphy refused to bifurcate the proceedings to allow an investigation for presentation of evidence at an individualized sentencing proceeding in accordance with Aiken. Tr. 353, ll. 1-9. According to the judge, Aiken, did not apply to Appellant because he was eighteen years old at the time of the crime. Tr. 353, ll. 4-8.

When defense counsel presented her mitigation case, she reminded the judge of his father's incarceration and his mother's prostitution. Tr. 364, ll. 21-22; Tr. 365, ll. 4-5. His aunt told defense counsel that Appellant, as a child, would go days without eating. Tr. 365, ll. 6-12. Appellant suffered sexual abuse at the hands of one of his mother's many boyfriends. Tr. 365, ll. 16-18. When he was twelve, his mother dropped him off at Connie Maxwell for the weekend, but never returned. Tr. 366, 11. 1-4.

According to defense counsel, Appellant's aunt was unable to attend the court proceedings, but she had valuable information concerning Appellant's upbringing. Tr. 366, l. 22 – Tr. 367, l. 1. Had the judge granted the continuance or bifurcation to permit an Aiken sentencing proceeding, Appellant's aunt could have testified. Tr. 366, l. 22 – Tr. 367, l. 1. For a period of time, Appellant lived with his grandfather, but his grandfather sent him back to Connie

Maxwell when he learned he would not receive an increase in his social security benefits. Tr. 367, ll. 10-13.

In 2011, Appellant left Connie Maxwell and went to John de la Howe. Tr. 367, l. 23 – Tr. 368, l. 2. Defense counsel had no records from John le la Howe. Tr. 368, ll. 2-3. Overcome with emotion, defense counsel pleaded for justice tempered by mercy. Tr. 368, ll. 6-20. She requested the minimum sentence of thirty years, explaining that he would likely die in prison even serving a thirty-year sentence based on the statistics. Tr. 369, ll. 7-10.

When imposing the life without parole sentence, Judge Murphy claimed she understood Appellant "had and dealt with a difficult hand in life." Tr. 374, ll. 22-24. She acknowledged that Appellant's "parents completely failed [him]." Tr. 374, l. 24. However, it was her contention that the absolute neglect and abuse Appellant suffered did not give him "a free license to kill people." Tr. 374, l. 25 – Tr. 375, l. 1. Despite being "empathetic" to Appellant's past, Judge Murphy claimed Appellant had "free will and choices to make" and one of those choices was "terrible." Tr. 375, ll. 17-19. She implored that Appellant must "pay the consequences" for that terrible choice he made at only eighteen years of age. Tr. 375, ll. 19-20. According to Judge Murphy, Appellant would have to pay with his life – she sentenced him to life without parole for murder. Tr. 376, ll. 4-6; R. *(sentence sheet).

Discussion

Defense counsel requested a continuance in order to prepare for an individualized sentencing proceeding in order to investigate, marshal, and present evidence of the hallmark characteristics of youth, which the judge would need to consider in order to fashion a constitutional sentence. In the alternative, defense counsel requested bifurcation of the trial from the sentencing hearing, with the sentencing hearing occurring several months after the trial, to

permit the necessary investigation and presentation of evidence relevant to sentencing an individualized sentencing proceeding. The judge denied the requests, finding Appellant was not entitled to an individualized sentencing proceeding where the evidence of the hallmark characteristics of youth and the potential for rehabilitation could be presented and considered by the judge because Appellant was chronologically eighteen years of age at the time of the shooting. Thus, in order to analyze this issue, it is first necessary to establish that Appellant was entitled to such a hearing, followed by a discussion of the judge's failure to grant the continuance request and/or bifurcation request.

Individualized sentencing proceeding

The Eighth Amendment to the United States Constitution bars "cruel and unusual punishments." U.S. Const. amend VIII. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. ... The Amendment 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, 100-101 (1958). "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 v. Florida, 560 U.S. 48, 58 (2010)(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)). Similarly, the South Carolina Constitution prohibits "cruel," "corporal," and "unusual punishments." S.C. Const. art. I, § 15.

Recently, the United States Supreme Court held life sentences for non-homicide crimes committed while the defendant was under the age of eighteen violated the Eighth Amendment to the

United States Constitution. Graham, 560 U.S. at 74-76. The Graham Court found that the cruel and unusual punishment clause of the Eighth Amendment forbids the states from determining at sentencing that a juvenile non-homicide offender will never be fit to reenter society. Id. at 74-75. Instead, juvenile non-homicide offenders must be given a meaningful opportunity to obtain release. Id. at 82.

A sentence of life imprisonment without parole "forswears altogether the rehabilitative ideal." Such a sentence "is not appropriate in light of a juvenile non-homicide offender's capacity for change and limited moral culpability." Id. at 74. The United States Constitution forbids judges from making subjective determinations at sentencing that a juvenile non-homicide offender has demonstrated an "irretrievably depraved character." Id. at 76. The Court was clear that a state "need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." Id. at 82.

Following Graham, one of the questions confronting courts has been what constitutes a "juvenile." In order to answer this question, a review the evolution of the Court's Eighth Amendment jurisprudence is of assistance and of particular import to Appellant's appeal.

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. Id. (citing 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 whose intellectual functioning is in a low range, Atkins v. Virginia, 536 U.S. 304 (2002). Graham, 560 U.S. at 61.

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 560-77. "[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 of the Constitution. Graham, 560 U.S. at 61 (quoting Kennedy v. Louisiana, 554 U.S. 407, 421 (2008)).

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. 543 U.S. at 569-75. 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 569-70 (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).

Sixteen-year old Terrance Graham was charged with armed burglary and attempted armed robbery of a barbeque restaurant. Id. 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 Graham Court, 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. at 75. "[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. "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 Graham Court 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 Graham Court 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 Graham Court 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. Id. 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.

In Miller v. Alabama, 567 U.S. 460 (2012), the United States Supreme Court continued the evolution of Eighth Amendment jurisprudence. The Court extended the reasoning of Roper and Graham by holding that a mandatory sentence of life without parole for juvenile homicide offenders also violates the Eighth Amendment's prohibition on cruel and unusual punishment. 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 479.

The Miller Court explained "children are constitutionally different from adults for purposes of sentencing." Id. at 471. The Miller Court reserved ruling on whether juveniles could ever be sentenced to LWOP. Id. at 480. The Miller Court repeatedly focused on the notion that the character traits of children are "more transitory and less fixed" to explain its holding and reasoning. Id. at 471. 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." Id. at 479 (internal quotation omitted). In fact, the Court stated "incorrigibility is inconsistent with youth." Id. at 473 (internal quotation omitted). The Court emphasized the potential for reform present in all juveniles. The Court emphasized that "'youth is more than a chronological fact'" the mitigating qualities of youth and noted "[i]t is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.'" Id. at 476 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

Although the Miller Court 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 481-482. 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 481.

"The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" Id. at 471 (quoting Roper, 543 U.S. at 560). The Miller Court 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." Id. Children "have diminished culpability and greater prospects for reform," and therefore, "'they are less deserving of the most severe punishments.'" Id. at 469 (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 472. 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 474.

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 477. 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 480. Thus, it is clear that sentencing authorities *must* consider a juvenile offender's age and consideration of such *must* be a mitigating factor.

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. 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.

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 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 544-45, 765 S.E.2d at 577.

Two years after the South Carolina Supreme Court's decision in Aiken, the Supreme Court of the United States addressed the retroactivity question of Miller. Montgomery v. Louisiana, 136 S.Ct. 718 (2016). In line with our Court's Aiken opinion, the High Court held that Miller announced a new substantive constitutional rule that was retroactive on state collateral review. Montgomery, 136 S.Ct. at 732-36. 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 re-trial, 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 736-37.

Having set the scene established by the decisions of the Supreme Court of the United States and the South Carolina Supreme Court, the answer to the question initially posed – what constitutes a juvenile – becomes clear. The Eighth Amendment bars not only life sentences for individuals under age eighteen, but it also bars life sentences for individuals over the age of

eighteen who share the same developmental qualities and characteristics as individuals under age eighteen.

Appellant readily admits the Supreme Court expressly limited its holding to "those under the age of 18 at the time of their crimes." Miller, 567 U.S. at 465. When interpreting Miller, the South Carolina Supreme Court, in Aiken, explained that although the relevant state statute defined "a juvenile" "as a person less than seventeen years of age," the Court considered "juveniles to be individuals under eighteen" in line with the United States Supreme Court's opinion. Aiken, 410 S.C. at 537 n.1, 765 S.E.2d at 573 n.1. Thus, Appellant must admit the state supreme court's opinion limited its scope to those under age eighteen. Importantly, the South Carolina Legislature amended its statute in 2016 to define a child or juvenile as a person less than eighteen years of age, recognizing that the chronological age at which society recognizes a juvenile evolves with the behavioral and social science available. See S.C. Code Ann. § 63-19-20(1)(effective July 1, 2019).

Examining the reasoning in Miller and Graham coupled with the Court's jurisprudence concerning age in the death penalty context supports Appellant's argument for extending the ban on life sentences to those older than eighteen when the individuals share the same characteristics as those under age eighteen. As explained, the impetus for Miller and Graham was not chronological age, but was the characteristics of individuals associated with that age. "The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." Graham, 560 U.S. at 570.

In Stanford v. Kentucky, 492 U.S. 361, 369 (1989), the Supreme Court rejected the notion that the Eighth Amendment prohibited imposition of the death penalty on those between

fifteen and eighteen years of age at the time of the offense. Just the year before, the Court concluded the Eighth Amendment prohibited the execution of a person who was under sixteen years of age at the time of his or her offense. Thompson v. Oklahoma, 487 U.S. 815, 836 (1988). The Court found "broad agreement on the proposition that adolescents as a class are less mature and responsible than adults." Id. at 834. The Court "endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." Id. at 835. "Given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children," retribution as a goal for imposition of the death penalty "is simply inapplicable to the execution of a 15-year-old offender." Id. at 836. Likewise, the Court found "the deterrence rationale is equally unacceptable" "[f]or such a young offender." Id. After noting the few number of arrests for willful homicide by persons under age sixteen and the consequent improbability that excluding younger persons from the class eligible for the death penalty would diminish the deterrent effect of capital punishment on the majority of offenders, the Court explained the "potential deterrent value of the death sentence" for those under sixteen was insignificant because (1) "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility is so remote as to be virtually nonexistent," and (2) even if a young person engages in such a calculation, "it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century." Id. at 837-838.

Sixteen years later, when the Court confronted the issue of the constitutionality of the death penalty for those under eighteen again, the Court overruled Stanford, finding the Eighth Amendment categorically barred imposition of a death sentence on someone under age eighteen.

Roper, 543 U.S. at 575. The Court recognized that "[d]rawing the line at [eighteen] years of age [was] subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns [eighteen]. By the same token, some under [eighteen] have already attained a level of maturity some adults will never reach.... The age of [eighteen] is the point where society draws the line for many purposes between childhood and adulthood." Roper, 543 U.S. at 574. Thus, the Court concluded it was "the age at which the line for death eligibility ought to rest." Id. In other words, the Court drew the line at eighteen years of age because that was the question presented in the case and that was where the then-current prevailing societal norms drew the line for adulthood.

The Supreme Court's trilogy of cases, Roper, Graham, and Miller, emphasized their reliance on the growing body of scientific evidence establishing significant differences between adult and juvenile brains, which the Court deemed to be of constitutional import. Despite the Court's categorization of juveniles relative to chronological age, the focus of the decisions was the psychological and behavioral aspects inherent to the age group. Therefore, the decisions must be applied to individuals, regardless of chronological age, who share the psychological and behavioral characteristics that compelled the categorical bar of the death penalty and life sentences on individuals under age eighteen.

The Supreme Court of Washington held "a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender." State v. O'Dell, 358 P.3d 359, 366 (Wash. 2015). The court explained that based on "advances in scientific literature," it is known that "age may well mitigate a defendant's culpability, even if that defendant is over the age of 18." Id. The court acknowledged that "age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence." Id. Nevertheless, the court was

compelled to "conclude that youth may, in fact, relate to [a defendant's] crime" based upon "what we know today about adolescents' cognitive and emotional development." Id. (internal citation omitted, alteration in original). The court explained "youth can" "amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range." Id.

The Washington Court recognized that "[u]ntil full neurological maturity, young people in general have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will when they enter their late twenties and beyond." Id. at 364-365. The court accepted the scientific literature revealing the "fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure." Id. at 364.

"[I]f the neurological research and social science on which Miller was based conclude that cognitive abilities are not fully developed until around age twenty-five, it may be arbitrary and inconsistent to choose age eighteen as the age after which a defendant may be subject to mandatory life without parole." Kevin J. Holt, The Inbetweeners: Standardizing Juvenileness and Recognizing Emerging Adulthood for Sentencing Purposes After *Miller*, 92 Wash. U. L. Rev. 1393, 1396 (2015). "The distinction of adulthood beginning at age eighteen is arguably based on no more than traditional and outdated norms." Id. "The Courts Eighth Amendment jurisprudence and cognitive science articulated in Miller and its forebears may necessitate legal recognition of a stage of life between adolescence and adulthood often called 'emerging adulthood,' during which defendants should be entitled to further special consideration under the Eighth Amendment." Id.

"Eighteen may be considered too soon for full adulthood." Id. at 1410. "[C]onsideration of the mitigating characteristics of youth should not stop at such an arbitrary time as an individual's eighteenth birthday." Id. "Those circumstances that warrant leniency, and did warrant leniency in Eighth Amendment analyses, do not magically disappear on the individual's eighteenth birthday." Id. at 1411. "[T]he research reveals that the brain develops well into a person's twenties." Id. "Thus, the analysis for children - - that they are 'different' from adults, unable to fully form the same level of culpability, and prone to bouts of poor decision making - - should apply to those under twenty-five, as well." Id.

"If 'children are different' because the human brain does not fully develop until around age twenty-three to twenty-five, then basing the cutoff for the purpose of the Eighth Amendment at eighteen makes little sense." Id. at 1411-1412. "[T]he social and cognitive science findings show that the human brain is not developed until the mid-twenties; thus, the cutoff is not eighteen." Id. at 1412.

"[T]he 'age of majority' was lowered from twenty-one to eighteen in all but two states in the early 1970s when the voting age was lowered." Alexandra O. Cohen, et al., When Does a Juvenile Become an Adult? Implications for Law and Policy, 88 Temp. L. Rev. 769, 770-771 (2016). This "change of policy was not accompanied in any state by a comprehensive inquiry about the welfare consequences of lowering the age or the developmental literature that might bear on it." Id. at 771.

"For nearly a century, the view that young offenders were distinct from adults and therefore deserving of differential and rehabilitative treatment for children held fast." Id. at 772. However, in the 1980s and 1990s, an increase in juvenile crime sparked academics to warn of "a new breed of young offenders – 'superpredators.'" Id. at 772-773. "Capitalizing on mounting

public fear, politicians adeptly collapsed the distinctions between young offenders and adult offenders." Id. at 773. States toughened its laws for young offenders and expanded transfer laws to allow the prosecution of juveniles in adult criminal courts. Id. at 773. When the "dire predictions in the 1990s ... never materialized" some "policymakers [began] to revise their conceptions of adolescent offenders and to reconsider their reliance on punitive approaches." Id. This revision has coincided with "recent neuroscience research and findings" suggesting "a neural basis for recognized developmental characteristics of adolescence." Id. Scientific studies of adolescent brain structure and functioning and social science research of adolescent behavior "confirm that teenagers are driven by circumstances and impulses, are vulnerable to the influences of their peers, are less capable of considering alternative courses of action and avoiding unduly risky behavior, and lack the self-control that almost all of them will gain later in life." Id. at 774. The recent trend "has been to take a more protective stance toward older adolescents and young adults, with particular concern for impulsive action, risk-taking, and vulnerability to psychopathy." Id. at 776. "[T]his protective trend is most clearly evident in legislation setting the minimum age for purchasing alcohol, marijuana, and tobacco." Id. at 777.

While "performance of simple cognitive tasks reaches adultlike performance in speed and accuracy by the teen years," "capacities related to self-control and judgment in emotionally and socially charged situations may not mature until much later." Id. at 779-780. Research shows that "[o]ne of the most influential contexts for adolescents is the social environment." Id. at 781. "[T]eens are more oriented toward and influenced by peers than are either children or adults." Id. Neuroscientific "studies provide evidence of regional changes in brain structure, function, and neurochemicals during adolescence that are distinct from childhood and adulthood, and have been proposed to result in imbalances with brain circuitry." Id. at 783. These studies show

"continued regional development of the prefrontal cortex, implicated in judgment and self-control beyond the teen years and into the twenties." Id.

"The protracted development of prefrontal circuitry beyond the teen years raises questions with respect to the approximate age at which an adolescent may be considered sufficiently mature to be regarded as an adult." Id. at 784. In at least one study, researchers have found that "relative to adults over twenty-one, young adults show diminished cognitive capacity, similar to that of adolescents, under brief and prolonged negative emotional arousal." Id. at 786. The study showed "less adultlike recruitment of prefrontal circuitry in teens and young adults, consistent with relatively protected development of the prefrontal cortex into the early twenties." Id. Armed with this research, policy makers "are making the case for a rehabilitative, developmentally informed approach to young adult offenders eighteen to twenty-one, recognizing that there is no developmentally informed magical line of demarcation at eighteen." Id. at 787. The "new findings provide empirical support for extending the juvenile court's dispositional age to twenty-one or older and for reconsideration of sentencing statutes for young adult offenders." Id. at 788.

The judge erred in concluding Appellant was not entitled to re-sentencing based upon his age alone. The Supreme Court's Eighth Amendment jurisprudence relied upon the scientific evidence of differences between adult and juvenile brains, not chronological age. Particularly, the Court focused on the psychological and behavioral studies regarding juveniles unequivocally demonstrating that the human brain continues to develop through age twenty-five. As the Court recognized, "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns [eighteen]." Roper, 543 U.S. at 574. The Court, admittedly, drew the line at age eighteen somewhat arbitrarily. The Court recognized the line would move as greater knowledge

about the development of adolescent brains was learned. The Court's decisions must be applied to individuals, regardless of chronological age, who share the psychological and behavioral characteristics that compelled the categorical bar of the death penalty and life sentences on individuals under age eighteen.

Continuance/Bifurcation

Having determined Appellant was entitled to an individualized sentencing proceeding for the presentation and consideration of evidence demonstrating the hallmark characteristics of youth, it necessary to examine the law in relation to requests for continuances and bifurcation.

The Fourteenth Amendment to the United States Constitution guarantees criminal defendants the right to due process of law. U.S. Const. amend. XIV. "The authority of the court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases. This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants." Williams v. Bordon's, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). The South Carolina Rules of Criminal Procedure provide that the presiding judge may grant a continuance based upon "a showing of good and sufficient legal cause." Rule 7(c), SCRCrimP. As such, "[t]he granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion." State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); see also State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249–50 (Ct. App. 2006)("An abuse of discretion occurs when the trial court's ruling is based on an error of law").

"It is axiomatic that determination of [a motion for continuance] must depend upon the particular facts and circumstances of each case." State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012)(quoting State v. Babb, 299 S.C. 451, 454-455, 385 S.E.2d 827, 829 (1989)). While "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process," the decision must rest upon "the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." Ungar v. Sarafitr, 376 U.S. 575, 589 (1964).

The South Carolina Supreme Court recently decided a case concerning the granting of a continuance. In Winkler v. State, Op. No. 27685 (S.C. Sup. Ct. filed Nov. 23, 2016)(Shearouse Adv. Sh. No. 45 at 13), the Court held the trial judge erred in failing to grant Winkler an extension of time in order to investigate evidence of brain damage. After Winkler was convicted, he filed an application for post-conviction relief and was appointed counsel. Id. Approximately two months into the representation, counsel suspected Winkler may suffer from brain damage. Id. Counsel requested funding to investigate, which was approved, and engaged a neuropsychologist. Id. The neuropsychologist recommended neuroimaging and consulting a neurologist or neuropsychiatrist. Id. Counsel, thereafter, requested funding for neuroimaging. Id. The judge approved the request. Id. Subsequently, counsel moved to extend the deadlines in the scheduling order by ninety days, explaining the testing and analysis would require approximately ten weeks. Id. The judge extended the deadline for filing an amended application, but refused to extend the PCR trial date. Id.

Although Winkler obtained the recommended MRI scan, he was unable to obtain the recommended PET scan because of elevated blood glucose levels. Id. Thereafter, counsel began working to treat Winkler's previously undiagnosed and untreated diabetes. Id. Despite Winkler

receiving diabetes treatment, weeks later, a physician explained his blood sugar was still too high to perform an accurate study of his brain, and that an additional six to eight weeks of treatment would be required, followed by an additional six to eight weeks for analysis. Id. Counsel filed a second motion to extend the deadlines, requested a continuance of six months to file his final amended PCR application and adjustments of other dates, including the trial date. This request was denied. Id.

The Supreme Court explained that the PCR statute, much like the Rules of Criminal Procedure, provided that additional time should be granted "if 'good cause is shown to justify a continuance.'" Id. (quoting S.C. Code Ann. § 17-27-160(c)). The Court found the PCR court abused its discretion in denying Winkler's second motion for additional time because Winkler presented "good cause" for the continuance. Id. The Court emphasized the diligence with which counsel acted at each stage. Id. The Court found no evidence to support the PCR judge's finding that PCR counsel had "'ample opportunity'" to investigate and develop the evidence related to potential brain damage. Id. In fact, the Court found "it would have been impossible for PCR counsel to obtain PET scans in time to have an expert review them and be prepared to testify at the PCR trial." Id. Thus, Winkler provided "good cause" to justify a continuance. Id. According to the Court, the PCR court's denial of the continuance request "left PCR counsel in a position from which they could not present evidence to support the claim that trial counsel was ineffective for failing to investigate Winkler's brain damage." Id.

In State v. McMillian, 349 S.C. 17, 24, 561 S.E.2d 602, 605 (2002), the South Carolina Supreme Court held the trial court abused its discretion in denying McMillian's motion for continuance in order to obtain the transcript of his first trial, which ended in a hung jury, in order to prepare for his second trial. McMillian requested the transcript timely, but the second trial

started prior to his receipt of the transcript. Id. at 19, 561 S.E.2d at 603. He moved for a continuance to obtain the transcript in order to impeach the witness against him, but this request was denied. Id. The Court explained that "[t]he only 'neutral' witness for the state during McMillian's second trial was Dorothy Williams Rumph." Id. at 21, 561 S.E.2d at 604. As such, the Court found "her credibility was essential to McMillian's defense." Id. This fact was reinforced by the fact that the first jury deadlocked, 8-4, after re-hearing her testimony. Id. According to the Court, "[t]he crucial nature of Rumph's testimony cannot be overstated." Id. In fact, the Court concluded "the verdict hinged upon her credibility, and that McMillian was hindered in his ability to impeach her" without the transcript from the first trial. Id. at 23, 561 S.E.2d at 605.

In civil cases, the judge may order bifurcation "in furtherance of convenience or to avoid prejudice." Rule 42(b), SCRCP. This Court held that "[a] trial should be bifurcated only if the issues are so distinct that trial of each alone would not result in injustice." Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 196, 108, 512 S.E.2d 510 (Ct. App. 1998). In all criminal cases, except where the death penalty is sought, the jury trial portion only concerns issues of guilt. The sentencing is within the exclusive province of the trial judge. Thus, a trial judge may delay the sentencing hearing to permit the parties to gather additional information relevant only to sentencing or to allow the judge to order an investigation to assist the judge in determining the appropriate sentence. See State v. Gulledge, 326 S.C. 220, 220, 487 S.E.2d 590, 591 (1997).

Appellant was entitled to a continuance of the entire trial or bifurcation of the trial and sentencing proceeding with an intervening time period sufficient to permit investigating and marshalling of evidence for consideration at the individualized sentencing proceeding. As explained, Appellant was entitled to an individualized sentencing proceeding for presentation

and consideration of evidence of the hallmark considerations of youth because his age, eighteen years and six months, made him similarly situated to those under the age of eighteen. The judge's sentencing of Appellant to life imprisonment without the possibility of parole based upon only a cursory investigation and presentation of mitigation evidence. As detailed by trial counsel, significant evidence existed, but counsel was ill-equipped to investigate, marshal, and present that evidence. Counsel submitted affidavits from a mitigation investigator and a clinical psychologist detailing the investigation necessary to present the evidence to which Appellant was entitled to have the judge consider prior to imposition of a sentence. The trial judge erred by denying the motion for continuance and/or bifurcation to allow for the presentation of critical evidence necessary for sentencing of Appellant, who was eighteen at the time of the offense and entitled to an individualized sentencing proceeding as those to which he was similarly situated were entitled.

II. The judge erred by admitting DNA evidence where the state failed to prove the chain of custody as far as practicable by failing to present evidence of how the DNA evidence was transported from the local sheriff's office to the SLED laboratory.

Relevant facts

Jeff Scott with the Dorchester County Sherriff's Office responded to the scene of the shooting. Tr. 155, ll. 16-18. In front of the store's door, he found three partially smoked cigarette butts. Tr. 157, ll. 17-21. Scott collected all of the cigarette butts. Tr. 168, ll. 8-12. One of the butts was marked as State's Exhibit #18 to be introduced at Appellant's trial. Tr. 168, ll. 13-16. Scott explained how he collected and stored the cigarette butt:

> Once the swab is collected, it's placed into a dry chamber and it's allowed to dry. And then it's placed into an envelope and it'[s] sealed, initialed and dated. And once it gets placed into the paper envelope, again placed into a plastic bag which is then heat-sealed, and my initials and the date that I can see were placed on that bag. And then it is sent to SLED for further processing.

Tr. 168, ll. 19-25.

After Scott collected the cigarette butt, it was stored in the evidence locker. Tr. 169, ll. 11-12. "Only crime scene personnel" had access to the evidence locker." Tr. 169, ll. 13-14. Scott explained the cigarette butt was sent to SLED for further processing. Tr. 169, ll. 6-10. To Scott's knowledge, the cigarette butt was not tampered with in any way prior to being sent to SLED. Tr. 169, ll. 18-21. Also, Scott obtained a buccal swab from Appellant pursuant to a search warrant. Tr. 175, l. 13 – Tr. 176, l. 14. Despite his earlier testimony regarding evidence being maintained in evidence lockers, Scott claim the buccal swabs were in his "exclusive possession until they went to the state lab for further processing." Tr. 176, ll. 15-17. Nevertheless, Scott never explained how or by whom the buccal swab made its way to SLED.

Lillian Gallman, a DNA analyst at SLED, explained how evidence is processed at SLED:

> Whenever evidence is brought to SLED, it doesn't come in a heat sealed pouch like this. What we receive is what you see as this envelope that's on the inside, would come to SLED. The envelope is then placed inside this heat sealed pouch. And it is sealed and then initialed by the submitting agent at the time. So this particular item came to SLED and it was sealed on June 23, 2015. It's also given a SLED case number. In this particular case, it's L157902. And it's also given a SLED item number. And also, as you can see here, we have what agency that it came from. So it was sealed here. And then once it comes to me, I break the seal. Not break the seal; I open the package because you do not break that particular seal. And then I remove the evidence and then I do my work on it.

Tr. 187, l. 21 – Tr. 188, l. 9.

Gallman received Appellant's buccal swab on July 1, 2016 from a SLED login person. Tr. 188, ll. 21-24. She developed a DNA profile from the swab. Tr. 189, ll. 24-25. Gallman received the cigarette butt as well. Tr. 191, ll. 17-21. Gallman developed a DNA profile from the cigarette butt. Tr. 192, ll. 9-10. After comparing the profiles, Gallman opined the profiles matched. Tr. 193, ll. 2-11.

Defense counsel repeatedly objected to the introduction of the DNA evidence due to the state's failure to produce evidence of the chain of custody as far as practicable. Tr. 186, l. 24 – Tr. 187, l. 1; Tr. 190, ll. 16-23; Tr. 196, ll. 18-19. Specifically, counsel explained the state had not established "who took it from Dorchester County to SLED." Tr. 187, ll. 5-6. The solicitor responded that he did not "have to provide a full, every person that's handled this evidence as long as we can show, you know, the majority of the chain and they can identify it and say it was secured." Tr. 187, ll. 7-10. There was a bench conference regarding this objection as well. Tr. 191, ll. 7-9; Rec. 16, l. 18 – Rec. 17, l. 22; Rec. 40, l. 19 – Rec. 43, l. 10. Judge Murphy overruled the objection, finding the chain established. Tr. 187, l. 11; Tr. 191, ll. 11-13; R. * (order).

The solicitor relied heavily upon the DNA evidence in his closing argument to the jury. According the solicitor, "The DNA comes back one in 960 quadrillion. That's 9-6-0 and then 15

more zeros. Alright. That's that odds of selecting another unrelated individual to match that DNA. All right. So that's him. All right." Tr. 325, ll. 11-15.

Discussion

It is axiomatic that a criminal defendant has the right to confront his accusers. U.S. Const. Amend. VI; S.C. Const. Art. I, § 14; Bullcoming v. New Mexico, 564 U.S. 647 (2011); Melendiaz v. Massachusetts, 557 U.S. 305, 313-314 (2009). The South Carolina Supreme Court "has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007); see also State v. Governor, 362 S.C. 609, 612, 608 S.E.2d 474, 475 (Ct. App. 2005).

Although the evidence must be clear as to who handled the evidence and what was done with it between the taking and the analysis, testimony from each custodian is not a prerequisite to establishing a chain of custody sufficient for admissibility. Benton v. Pellum, 232 S.C. 26, 33-34, 100 S.E.2d 534, 537 (1957); Sweet, 374 S.C. at 7, 647 S.E.2d at 206. If other evidence establishes the identity of those who handled the evidence and "reasonably demonstrates the manner of handling of the evidence," courts are willing to fill gaps in the chain of custody due to an absent witness. Sweet, 374 S.C. at 7, 647 S.E.2d at 206. "'Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis.'" Raino v. Goodyear Tire and Rubber Co., 309 S.C. 255, 422 S.E.2d 98 (1992)(quoting Benton, 232 S.C. at 26, 100 S.E.2d at 537); see also State v. Joseph, 328 S.C. 352, 364, 491 S.E.2d 275, 281 (Ct. App. 1997). "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001).

The South Carolina Supreme Court has found evidence inadmissible "only where there is a missing link in the chain of possession because the identity of those who handled the [substance] was not established at least as far as practicable." Id. "On the other hand, where the identity of the persons handling the specimen is established," the Court has "found evidence regarding its care goes only to the weight of the specimen as credible evidence." Id. Police need not account for every transfer of the fungible evidence, but must demonstrate a reasonable assurance the condition of the item remained the same from the time it was obtained until its introduction at trial. State v. Hatcher, 392 S.C. 86, 94, 708 S.E.2d 750, 754 (2011)(quoting State v. Price, 731 S.W.2d 287, 290 (Mo. Ct. App. 1987).

In State v. Cribb, 310 S.C. 518, 522, 426 S.E.2d 306, 309 (1992), the defendant appealed his conviction for three counts of felony DUI raising, among other issues, the trial court's admission of his blood alcohol test results based upon the state's failure to establish the chain of custody. Two nurses treated Cribb when he arrived at the hospital. Id. One nurse administered an intravenous solution ("IV"). Id. It was the hospital's practice to have the nurse administering the IV conduct the blood draw. Id. However, the nurse who administered the IV did not recall drawing Cribb's blood, but assumed that she had in light of her standard procedure. Id. The lab technician did not know who drew the blood or who transferred the blood to the lab. Id. The medical records did not show who drew the blood or transported it to the lab. Further, the label on the blood sample did not reveal who drew it and transported it to the lab. Id.

The Supreme Court reversed Cribb's conviction, holding that the State failed to establish the chain of custody as far as practicable for the blood sample. Id. "The evidence in the record of this case does not identify those persons who handled the blood from the time it was drawn until the

time it was tested." Id. Therefore, admitting the results of the blood alcohol test constituted an abuse of discretion. Id.

This Court found a chain of custody insufficient in State v. Joseph, 328 S.C. 352, 364, 491 S.E.2d 275, 281 (Ct. App. 1997). The state presented the following evidence to support introduction of the drug evidence:

> Officers Ruger and Hardy took Joseph [an inmate at a correctional institution] to the "shakedown room" so that the search could be done in the presence of their supervisor, Sergeant McKinzie. Ruger and Hardy began searching Joseph's hair, and Ruger removed two cellophane packages, one containing separate packets of a green leafy substance, and the other containing separate packets of a beige rock-like substance. Ruger filled out a chain of custody form and turned the packages over to Investigator Davis, Kirkland's contraband officer. Davis immediately field tested the substances in the packages, which tested positive for crack cocaine and marijuana. He found weights of 0.07 grams of crack cocaine and 0.54 grams of marijuana. Davis sealed the evidence in a plastic bag and personally delivered the bag to SLED on August 27, 1993, placing the evidence in the drug box. On April 18, 1994, Davis received the evidence back from SLED. He stored the evidence in a locked file cabinet in his contraband office from that time until January 5, 1995, at which point he delivered the evidence back to SLED for retesting.
>
> On September 1, 1993, Susan Kilmer, a SLED chemist, retrieved the evidence from the drop box. Between September 25 and October 4, 1993, she analyzed the evidence, finding 0.43 grams of marijuana and 0.07 grams of crack cocaine. She then secured the evidence in her locker at SLED until March 24, 1994, when she turned it over to Susan Wilson, an evidence control employee at SLED.
>
> On April 18, 1994, Connie McKay, another SLED employee, retrieved the evidence from the evidence vault and returned it to Officer Davis. On January 5, 1995, Davis resubmitted the evidence to SLED, placing it in a secured drug box. Chemist Kimberly Thigpen reanalyzed the evidence, finding 0.41 grams of marijuana and 0.07 grams of crack cocaine.

Id. at 356, 491 S.E.2d at 277. Prior to trial, the state revealed that Kilmer would not testify because she had moved to Michigan and was beyond the state's subpoena power. Id. This Court held the state failed to establish an adequate chain of custody because "Kilmer was the critical link in the state's chain of custody – it was Kilmer who retrieved the evidence from the drop box and first analyzed the evidence, and it was Kilmer who retained possession of evidence for six

months." Id. at 364-365, 491 S.E.2d at 281. Accordingly, this Court concluded the state's evidence of the chain of custody was "fatally deficient" and the trial judge erred by admitting the drug evidence. Id. at 365, 291 S.E.2d at 281-282.

This Court held the state properly established the chain of custody for drugs found in a police car. State v. Pope, 410 S.C. 214, 228-229, 763 S.E.2d 814, 822 (Ct. App. 2014). Noting that drugs were fungible evidence and that a more strict chain of custody was required, this Court held the chain of custody established where:

> Lieutenant Sherfield testified he took the crack cocaine Corporal Vinson found in the back seat of the patrol car back to his office; secured it in an evidence bag to be sent to SLED for analysis; marked the bag with his name and the date; and secured the evidence in a vault in his office. Lieutenant Sherfield transported the evidence to SLED, along with several other evidence bags, on September 21, 2010. Willie Smith, a senior criminalist-chemist in the drug analysis department of SLED, testified he received the evidence on September 22, 2010. He determined the substance was eleven and a half grams of crack cocaine. He testified to the chain of custody of the drugs; that the evidence bag was still sealed when he received it; he resealed it after he tested it; and it was still in the same condition it was when he resealed it.

Id. This evidence is a far cry from the evidence produced by the state concerning the cigarette and buccal swab used at Appellant's trial, and relied heavily upon by the state in making its case to the jury.

By failing to identify the individual who transported the cigarette and Appellant's buccal swab from the sheriff's office to SLED, the state failed to establish the chain of custody of those items as far as practicable. The state failed to prove that the cigarette tested by SLED was the cigarette found outside the convenience store. Additionally, the state failed to prove the swab from which the analyst derived DNA was a swab from Appellant's mouth. In short, the state could not show that the evidence tested was the evidence collected. The state failed the basic requirement of establishing a chain of custody – providing proof that the evidence analyzed was the evidence

connected to the crime. The state's failure to prove if, who, when, and how evidence was transported from the local sheriff's office to SLED was not a "minor discrepancy" such that this Court could excuse the deficiency. Cf. State v. Geer, 391 S.C. 179, 199-200, 705 S.E.2d 441, 452 (Ct. App. 2010)(explaining testimony that an officer retrieved an item from the evidence locker contradicted the affidavit that the transfer was in person was a minor discrepancy not amounting to reversible error).

CONCLUSION

As to Issue I, Appellant respectfully requests this Court vacate his sentence and remand for an individualized sentencing proceeding consistent with the Eighth Amendment. As to Issue II, Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS ROBERT SHEWTZUK,

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 Thomas Robert Shewtzuk, #369687, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 10th day of April, 2018.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of April, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.