STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable R. Keith Kelly, Circuit Court Judge
Appellate Case No. 2016-002457

THE STATE,

Respondent,

vs.

ROBERT BERNARD CAMPBELL,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court judge correctly denied Appellant's motion for resentencing because Appellant's aggregate parole-eligible life sentence for heinous crimes he committed shortly before he reached the age of eighteen afforded and continues to afford Appellant a meaningful opportunity to obtain release from incarceration through the parole process and, as a result, was and is in no way unconstitutional.

STATEMENT OF THE CASE

In the spring of 1985, Appellant Robert Bernard Campbell was arrested for a series of crimes he committed shortly before he reached the age of eighteen. In January of 1986, the Greenville County Grand Jury indicted Appellant for two counts of burglary, one count of first-degree criminal sexual conduct, two counts of armed robbery, one count of attempted armed robbery, and one count of housebreaking. On February 28, 1986, Appellant appeared in the Greenville County Court of General Sessions and entered a guilty plea to all the indicted offenses before the Honorable Jonathan Z. McKown, circuit court judge. At the conclusion of the plea hearing, Judge McKown accepted Appellant's guilty plea and sentenced him to concurrent terms of imprisonment of life for each count of burglary, thirty years for first-degree criminal sexual conduct, twenty-five years for each count of armed robbery, ten years for attempted armed robbery, and ten years for housebreaking.

Subsequently, through a pro se motion filed on December 7, 2015, Appellant sought resentencing pursuant to the decisions in Miller v. Alabama, 567 U.S. 460 (2012), and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). On May 20, 2016, the Honorable Costa M. Pleicones, Chief Justice of the South Carolina Supreme Court, issued an order appointing the Honorable R. Keith Kelly, circuit court judge, to hear and rule upon Appellant's motion. On September 15, 2016, a hearing on Appellant's motion was conducted in the Spartanburg County Court of General Sessions with Judge Kelly presiding. Thereafter, through an order filed on November 28, 2016, Judge Kelly denied Appellant's motion for resentencing. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

One night in March of 1985, Appellant, who was seventeen years old at the time, broke into the Greenville, South Carolina, home of ninety-three-year-old Eva Arledge and robbed her of three dollars while threatening her with a pair of scissors.[1] (Indictments (86-GS-23-125 & 86-GS-23-128); Arrest Warrant (B-350004)). A few weeks later, Appellant forced his way into the home of his next victim, Alice McIntyre, as she tried to close her door and unsuccessfully attempted to steal her billfold at knifepoint before fleeing from the scene. (Indictments (86-GS-23-127 & 86-GS-23-134); Arrest Warrants (B-287940 & B-287941)). Thereafter, just one day before his eighteenth birthday in May of 1985, Appellant broke into the home of Olis Merritt, raped her, and robbed her of thirty-two dollars at knifepoint.[2] (Indictments (86-GS-23-126, 86-GS-23-129, & 86-GS-23-132); Arrest Warrants (B-287896, B-287897, & B-352028)).

Subsequently, Appellant was apprehended, and, in February of 1986, he pled guilty to numerous charges stemming from his crime spree, including multiple counts of burglary, multiple counts of armed robbery, and one count of first-degree criminal sexual conduct. (Indictments (86-GS-23-125, 86-GS-23-126, 86-GS-23-127, 86-GS-23-128, 86-GS-23-129, 86-GS-23-132, & 86-GS-23-134). As a result of his guilty pleas, Appellant was sentenced to life imprisonment *with* the possibility of parole for each burglary conviction along with concurrent sentences for his remaining convictions, including thirty years for first-degree criminal sexual conduct and twenty-five years for each armed robbery. (Tr. p. 5; Indictments (86-GS-23-125, 86-GS-23-126, 86-GS-23-127, 86-GS-23-128, 86-GS-23-129, 86-GS-23-132, & 86-GS-23-134).

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[1] Following the burglary, physical evidence was recovered from Arledge's home linking Appellant to the crime. (Arrest Warrant (B-350004)).

[2] Subsequent to the incident, Merritt identified Appellant as her assailant from a six-person photographic lineup. (Arrest Warrant (B-352028)).

Approximately twenty-nine years later, Appellant, who had been eligible for parole since 1995 but had not yet been granted it, filed a pro se motion seeking resentencing pursuant to the decisions in Miller v. Alabama, 567 U.S. 460 (2012), and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), due to the fact he was a juvenile at the time he committed the crimes for which he received his parole-eligible life sentences. (Tr. pp. 4-5; Pro Se Motion for Resentencing). Thereafter, the Chief Justice of the South Carolina Supreme Court issued an order directing Judge Kelly to decide the merits of Appellant's motion. (Tr. p. 4; Order Remanding for Hearing on Motion for Resentencing).

During the ensuing hearing, defense counsel acknowledged Appellant had been eligible for parole for over two decades and noted Appellant had been considered for parole on eighteen prior occasions. (Tr. p. 5). However, in light of the fact Appellant had not yet been granted parole, defense counsel maintained Appellant had received a "de facto" life sentence, had "never been given a meaningful opportunity for release," and had "no meaningful hope of release." (Tr. pp. 5-6; p. 8; p. 10; p. 15). Additionally, defense counsel contended the parole process was problematic because Appellant had self-reported mental illness, Appellant had not had the benefit of education prior to or during his incarceration, Appellant allegedly had only two or three minutes to argue for his release before the parole board, parole hearings were allegedly "very secretive in nature," attorneys were allegedly not permitted to be present during parole hearings, and the parole board allegedly appeared to be solely considering a "rote list" of factors without taken anything else into consideration in denying parole.[3] [4] (Tr. p. 13; pp. 24-25). As a

[3] Contrary to defense counsel's contentions during the hearing, attorneys in South Carolina are statutorily permitted to appear on behalf of and argue for inmates during parole hearings, a "complete record" of all parole hearings is required by law to be maintained, and the parole board is statutorily required to "carefully consider the record of the prisoner before, during, and after imprisonment." See S.C. Code Ann. § 24-21-40 ("The Board shall keep a complete record

result, defense counsel asserted Appellant's aggregate life sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment while noting life without parole sentences for juvenile non-homicide offenders had been declared unconstitutional in Graham v. Florida, 560 U.S. 48 (2010). (Tr. pp. 9-10). Importantly though, defense counsel conceded juvenile non-homicide offenders did not actually have to be guaranteed release on parole, candidly acknowledged the decision in Montgomery v. Alabama, __ U.S. __, 136 S. Ct. 718 (2016), may undermine her position, and admitted the relevant appellate precedent "on [its] face" would not entitle Appellant to relief since he was not sentenced to life without parole. (Tr. p. 10; p. 14; p. 16). Nonetheless, because Appellant had been repeatedly denied parole, defense counsel argued Appellant should be afforded an individualized resentencing hearing and an opportunity to receive a "lesser" sentence.[5] (Tr. pp. 16-17; p. 26).

In rebuttal, the solicitor asserted the appellate decisions in Miller and Aiken were simply not applicable to Appellant's case as he was neither convicted of homicide nor sentenced to life

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of all its proceedings and hold it subject to the order of the Governor or the General Assembly."); S.C. Code Ann. § 24-21-50 ("The board shall grant hearings and permit arguments and appearances by counsel or any individual before it at any such hearing while considering a case for parole[.]"); S.C. Code Ann. § 24-21-640 ("The board must carefully consider the record of the prisoner before, during, and after imprisonment[.]").

[4] Regarding the specific reasons why Appellant had been denied parole, defense counsel indicated the parole board identified the following factors in support of its decision: (1) the nature and seriousness of Appellant's crimes; (2) Appellant's use of violence; (3) Appellant's use of a deadly weapon; (4) Appellant's lack of compliance with supervision while incarcerated; and (5) Appellant's prison disciplinary record. (Tr. p. 9).

[5] In seeking a grant of resentencing, defense counsel further alleged Appellant's sentences for his other crimes were consecutive based on her discussions with personnel from the South Carolina Department of Corrections, which she maintained could result in Appellant being required to serve an additional fifty-five years after the completion of his life sentence. (Tr. pp. 11-12). Notably though, records available from the South Carolina Department of Corrections confirm Appellant has fully served all of his sentences other than his two life sentences for burglary. Inmate Search Detail Report for Robert Bernard Campbell, https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000131941.

without parole. (Tr. pp. 17-18). Additionally, the solicitor asserted Appellant had been given numerous opportunities to present mitigating evidence and obtain release since 1995, and she further noted the United States Supreme Court had recognized juvenile non-homicide offenders could be incarcerated for life while also recognizing eligibility for parole could remedy a constitutional issue with a juvenile offender's life sentence. (Tr. pp. 19-21). Furthermore, the solicitor argued the relevant consideration in Appellant's case was whether Appellant had a meaningful opportunity for release, which she contended he did through his eligibility for parole. (Tr. pp. 26-28). For those reasons, the solicitor asserted Judge Kelly should deny the motion. (Tr. pp. 17-18; pp. 23-24).

At the conclusion of the hearing, Judge Kelly took the matter under advisement, and he ultimately denied Appellant's motion for resentencing.[6] (Tr. p. 34; Order Denying Motion for Resentencing). In denying the motion, Judge Kelly initially found Appellant was not entitled to resentencing pursuant to either Miller or Aiken because he was not convicted of murder and did not receive a sentence of life without the possibility of parole. (Order Denying Motion for Resentencing). Furthermore, Judge Kelly concluded Appellant was not entitled to resentencing pursuant to Graham because he had been repeatedly afforded an opportunity for release since June of 1995 through his parole eligibility. (Order Denying Motion for Resentencing).

[6] Prior to the conclusion of the hearing, Judge Kelly permitted Appellant to speak on his own behalf, and Appellant claimed he could not have committed "some" of the offenses to which he pled guilty as he was allegedly incarcerated from March 23, 1985, to May 21, 1985. (Tr. p. 31). Notably, Appellant's two burglary convictions and resulting life sentences stemmed from crimes committed prior to and after that claimed time period of incarceration. (Indictments (86-GS-23-125 & 86-GS-23-126)).

ARGUMENT

The circuit court judge correctly denied Appellant's motion for resentencing because Appellant's aggregate parole-eligible life sentence for heinous crimes he committed shortly before he reached the age of eighteen afforded and continues to afford Appellant a meaningful opportunity to obtain release from incarceration through the parole process and, as a result, was and is in no way unconstitutional.

Appellant contends the circuit court judge committed reversible error by denying the motion for resentencing. In support of that contention, Appellant maintains the motion should have been granted because his aggregate parole-eligible life sentence for non-homicide crimes he committed as a juvenile is allegedly the functional equivalent of a life *without parole* sentence in light of the facts he claims to be mentally ill, he is unrepresented by counsel during parole hearings, and the parole board is not required to consider the special characteristics of a juvenile offender during the parole hearings. Significantly though, Appellant's aggregate parole-eligible sentence for heinous crimes he committed just before he reached the age of eighteen has afforded him and continues to afford him a meaningful avenue by which he could and still can obtain release from incarceration based on demonstrated maturity, rehabilitation, and growth. In light of that fact, Appellant's aggregate sentence of life *with parole* was not and is not unconstitutional. Accordingly, the circuit court judge properly declined to unnecessarily relitigate Appellant's sentence decades after his crimes were committed and correctly denied the motion for resentencing. The circuit court judge's ruling should be affirmed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The issue of whether a criminal defendant is serving an illegal or unconstitutional sentence constitutes a question of law. Bordeaux v. State, 410 S.C. 495, 499, 765 S.E.2d 143, 145 (2014). Therefore, an appellate court considering the lawfulness

of a sentence reviews the matter de novo for errors of law. Id.; see Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("[Appellate courts] are free to decide a question of law with no particular deference to the circuit court.").

ANALYSIS

Generally speaking, the issue of an incarcerated inmate's eligibility for parole is an entirely separate and independent issue from the issue of an appropriate and proper sentence for a defendant convicted of a criminal offense. State v. McKay, 300 S.C. 113, 115, 386 S.E.2d 623, 623 (1989). In South Carolina, the responsibility for determining whether an incarcerated inmate meets the requirements for parole is statutorily assigned to the state's parole board, which is required by law to "carefully consider the record of the prisoner before, during, and after imprisonment" in determining whether parole should be granted. S.C. Code Ann. § 24-21-640; see State v. Dingle, 376 S.C. 643, 649, 659 S.E.2d 101, 104 (2008) ("[T]he parole board has the sole authority to determine parole eligibility separate and apart from the court's authority to sentence a defendant."). Meanwhile, trial judges in our state are tasked with imposing a criminal defendant's sentence upon conviction and are vested with broad discretion to carry out that duty. See State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) ("A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed.").

Despite the broad discretion afforded to South Carolina's trial judges, the Eighth Amendment of the United States Constitution places limits on a trial judge's sentencing discretion by prohibiting the imposition of cruel and unusual punishment. See U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and

unusual punishments inflicted."). Pursuant to the ban on cruel and unusual punishment, a defendant's sentence must not be "barbaric" and must be graduated and proportioned to the offense in order to pass constitutional muster. Solem v. Helm, 463 U.S. 277, 284 (1983); see Atkins v. Virginia, 536 U.S. 304, 311 (2002) (instructing it is a precept of justice the punishment for a crime should be graduated and proportioned to the offense).

Notably, in Graham v. Florida, 560 U.S. 48, 81 (2010), a narrow majority of the United States Supreme Court concluded the imposition of a life sentence *without the possibility of parole* upon a juvenile offender who committed a non-homicide offense was violative of the Eighth Amendment's prohibition against cruel and unusual punishment. In reaching that conclusion, the Supreme Court applied its own "independent judgment" and determined life without parole sentences for juvenile non-homicide offenders were unconstitutional due to the lessened culpability of juveniles, the severity and irrevocable nature of life without parole sentences, and the lack of sufficient penalogical justifications for the sentencing practice in regard to juveniles. Id. at 74. As a result, the Supreme Court held a state must "give [juvenile non-homicide] defendants like Graham some meaningful opportunity for release based on demonstrated maturity and rehabilitation." Id. at 75. Importantly though, the Supreme Court placed careful limits on its holding by explaining a state is neither "required to guarantee eventual freedom to a juvenile offender" nor required "to release that offender during his natural life." Id. To the contrary, the Supreme Court instructed:

> Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life.

Id.

Subsequent to that decision, a narrow majority of the United States Supreme Court in Miller v. Alabama, 567 U.S. 460, 489 (2012), applied the reasoning of the Graham decision to mandatory life without parole sentences for juvenile homicide offenders and concluded such sentences constituted cruel and unusual punishment. In reaching that conclusion, the Supreme Court determined a requirement for a mandatory sentence of life without parole sentence would doom a juvenile homicide offender to an *irrevocable* lifetime in jail without consideration being given to important factors related to the offender, including the offender's specific chronological age, the hallmark features of youth, the offender's home environment, the particular circumstances of the offender's crime, the effects peer pressure may have had on the crime, the "incompetencies associated with youth," and the possibility for rehabilitation. Id. at 477-478. Accordingly, in light of the irrevocable nature of a life without parole sentence, the Supreme Court held a sentencer must consider an offender's youth and attendant characteristics before imposing the particular penalty of life *without parole* on a juvenile non-homicide offender. Id. at 483. However, the Supreme Court expressly declined to preclude a sentencer from imposing a life without parole sentence on a juvenile homicide offender so long as it first took "into account how children are different, and how those differences counsel against *irrevocably* sentencing them to a lifetime in prison." Id. at 480 (emphasis added and footnote omitted).

Thereafter, in Aiken v. Byars, 410 S.C. 534, 536-537, 765 S.E.2d 572, 574 (2014), the South Carolina Supreme Court considered whether the Miller decision was applicable to juvenile homicide offenders who had been sentenced to life without parole under South Carolina's non-mandatory sentencing scheme. In a sharply-divided decision, a two-justice plurality of the Supreme Court concluded "any juvenile offender who receives a sentence of life without the possibility of parole [was] entitled to the same constitutional protections afforded by the Eighth

Amendment's guarantee against cruel and unusual punishment." Id. at 544, 765 S.E.2d at 577 (plurality opinion). Agreeing in principle on different grounds, an additional justice joined with the plurality while concurring solely in the result. Id. at 545-546, 765 S.E.2d at 578 (Pleicones, J., concurring in result). Accordingly, through its decision, the Supreme Court permitted "all juvenile offenders who may be subject to a sentence of life imprisonment *without the possibility of parole*" to seek resentencing "to allow the inmates to present evidence specific to their attributes of youth and allow the judge to consider such evidence in the light of its constitutional weight." Id. at 544-545, 765 S.E.2d at 577-578 (plurality opinion) (emphasis added).

Following those decisions, in Montgomery v. Louisiana, __ U.S. __, 136 S. Ct. 718, 736 (2016), the United States Supreme Court considered whether its decision in Miller was entitled to retroactive effect in the cases of juvenile offenders previously sentenced to life without parole and concluded it was, in fact, retroactively applicable. Critically, upon reaching that conclusion, the Supreme Court carefully explained its determination did *not* require the states "to relitigate sentences, let alone convictions," despite the fact juvenile offenders sentenced before Miller likely would not have received the type of sentencing considerations mandated by that decision. Id.; see Miller, 567 U.S. at 483 ("Our decision . . . mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing [life without parole]."). Instead, the Supreme Court instructed an unconstitutional sentence imposed upon a juvenile offender could be remedied by permitting the offender *to be considered for parole*. Montgomery, 136 S. Ct. at 736. Specifically, the Supreme Court explained:

> Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.
>
> . . .

> Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded those who demonstrate the truth of Miller's central intuition—that children who commit even heinous crimes are capable of change.

Id. Thus, a grant of parole eligibility—as opposed to an individualized sentencing hearing—was expressly recognized as an appropriate means to remedy an Eighth Amendment violation involving a juvenile offender's sentence. Id.

In the case sub judice, Appellant, an admitted serial burglar, serial armed robber, and rapist, received life sentences for two different, unrelated burglaries he committed shortly before he reached the age of eighteen. See Miller, 567 U.S. at 476-477 (recognizing there is a difference between the culpability level of a fourteen-year-old offender versus a seventeen-year-old offender). Importantly though, Appellant's life sentences for non-homicide crimes were *not* perpetually irrevocable from the date they were imposed and did *not* guarantee Appellant would die in prison without ever having any opportunity to obtain release. Cf. Graham, 560 U.S. at 79 ("The State has *denied him any chance to later demonstrate that he is fit to rejoin society* based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit." (emphasis added)). To the contrary, those life sentences specifically afforded him eligibility for parole, which constituted a meaningful mechanism by which Appellant could—and still can—obtain release from incarceration during his lifetime. Cf. State v. Smith, 295 Neb. 957, 979, 892 N.W.2d 52, 66 (Neb. 2017) (concluding Smith's ninety-year-to-life sentence for a kidnapping he committed when he was sixteen years old was *not* unconstitutional because Smith would be eligible for parole at some point during his lifetime). In fact, Appellant was first eligible for parole when he was only twenty-eight years old just *ten years* after he began serving his aggregate sentence, and, since that point in time, he has

continuously and regularly received opportunities to obtain release on parole. See S.C. Code Ann. § 24-21-610 (recognizing the parole board may grant parole to a prisoner who has received a parole-eligible life sentence after that prisoner has served at least ten years). Accordingly, because Appellant's aggregate parole-eligible life sentence afforded him—and continues to afford him—an opportunity for obtaining release from incarceration during his lifetime, his aggregate life sentence *with* the possibility of parole was not and is not cruel, unusual, or grossly disproportionate to the heinous crimes Appellant's committed just before he reached the age of adulthood for constitutional purposes.[7] See Montgomery, 136 S. Ct. at 736 ("Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment."); see also Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion) ("[Rape] is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the 'ultimate violation of self.' " (footnote omitted)); State v. Johnson, 350 S.C. 543, 547, 567 S.E.2d 486, 488 (Ct. App. 2002) ("[F]ew would argue that *first-degree burglary*, *armed robbery*, and kidnapping are anything other than grave offenses of the 'most serious' nature." (emphasis added)).

Recognizing Appellant was *not* convicted of a homicide crime, did *not* receive a sentence of life without parole, and did *not* receive a sentence that would unconstitutionally deny him any meaningful opportunity to obtain release during his lifetime, the circuit court judge correctly

[7] Notably, pursuant to South Carolina law, a person seventeen years old or older is *not* considered to be a juvenile or child. See S.C. Code Ann. § 63-19-20(1) (" 'Child' or 'juvenile' means a person less than seventeen years of age.").

denied Appellant's motion for resentencing as Appellant's sentence itself was in no way unconstitutional. See Miller, 567 U.S. at 483 (mandating a sentencing process that must "only" be followed prior to the imposition of an *irrevocable* sentence of life without parole upon a juvenile homicide offender); Graham, 560 U.S. at 75 (holding juvenile non-homicide offenders are only entitled to "some meaningful opportunity for release based on demonstrated maturity and rehabilitation" and may be incarcerated for their entire lives for crimes committed as juveniles if they fail to rehabilitate and, thus, ultimately prove to be irredeemable); Aiken, 410 S.C. at 544-545, 765 S.E.2d at 577-578 (plurality opinion) (permitting "all juvenile offenders who may be subject to a sentence of life imprisonment without the possibility of parole" to seek resentencing). By ruling in that manner, the circuit court judge properly avoided the unnecessary and unwarranted relitigation of Appellant's sentence years after his crimes were committed at a point in time when his victims along with any other witnesses capable of presenting pertinent information about his offenses realistically may no longer be available to appear at a resentencing hearing. See Montgomery, 136 S. Ct. at 736 (instructing a state is not required "to relitigate sentences" in order to remedy constitutional violations with juvenile offenders' sentences and, instead, can remedy such violations by permitting the offenders "to be considered for parole, *rather than by resentencing them*" (emphasis added)); see generally Solem, 463 U.S. at 290, n. 16 ("Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.").

Meanwhile, the circuit court judge did nothing through his ruling to interfere with Appellant's eligibility for parole, and, thus, Appellant will continue to be capable of obtaining release from incarceration based on demonstrated rehabilitation, maturity, and growth assuming he is ever actually able to demonstrate such rehabilitation, maturity, and growth at some point in the future. See S.C. Code Ann. § 24-21-640 ("The board must carefully consider the record of the prisoner before, during, and after imprisonment[.]"). At the same time, the circuit court judge ensured through his ruling Appellant will continue to remain incarcerated for the heinous crimes he committed just before reaching the age of eighteen in the event he fails to sufficiently mature, rehabilitate, and grow to such an extent that a grant of parole would be warranted. See Graham, 560 U.S. at 75 ("*It bears emphasis* . . . that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life." (emphasis added)).

In arguing the circuit court judge erred by denying the motion for resentencing, Appellant readily acknowledges he received an aggregate parole-eligible life sentence, which is not a constitutionally-prohibited type of sentence for a juvenile offender. See id. ("A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."). Nevertheless, Appellant maintains his life sentence is the functional equivalent of an unconstitutional sentence of life *without parole* because he is allegedly mentally ill, he is allegedly unrepresented by counsel at parole hearings, and the parole board is allegedly not required to consider the "special characteristics of a juvenile offender" discussed in the Miller and Aiken decisions. For those reasons, Appellant contends he should have been granted resentencing by the circuit court judge.

Importantly though, the limited issue before the circuit court judge was the issue of whether Appellant's *sentence* was unconstitutional. See Prince v. Beaufort Mem'l Hosp., 392 S.C. 599, 605, 709 S.E.2d 122, 125 (Ct. App. 2011) ("When we remand a case, the trial court has only the jurisdiction and authority mandated by this court."). Because Appellant was and is eligible for parole, Appellant's aggregate life sentence for the heinous crimes he committed just before he reached the age of eighteen was not unconstitutional, and, thus, there was no proper basis upon which the circuit court judge could either disturb Appellant's sentence or grant resentencing. See Graham, 560 U.S. at 75 (recognizing a life sentence for a juvenile non-homicide offender is not unconstitutional so long as the offender has some meaningful opportunity for release available to him during his lifetime); see also State v. Connally, 227 S.C. 507, 510, 88 S.E.2d 591, 593 (1955) (instructing a court has no authority to disturb a criminal sentence when it falls within the appropriate statutory limits, is not unconstitutional, and is not the result of partiality, prejudice, oppression, or corrupt motive); cf. State v. Shaffer, 77 So. 3d 939, 943 (La. 2011) ("Access to the [Parole] Board's consideration will satisfy the mandates of Graham.").

To the extent Appellant is challenging the propriety of the circuit court judge's ruling based on claimed deficiencies with the parole process in South Carolina, Appellant appears to be confusing the issues of parole and sentencing, which are entirely separate and distinct matters. See McKay, 300 S.C. at 115, 386 S.E.2d at 623 ("[T]he question of parole eligibility is separate and independent from the court's authority to sentence an offender. The final judgment of the court in a criminal case is the sentence."). In resolving the limited issue before him, the circuit court judge properly evaluated whether Appellant's aggregate life sentence *with parole* was unconstitutional in light of the decisions in Graham, Miller, and Aiken, and, since Appellant's

sentence was *not* unconstitutional in any way based on the express holdings of those decisions, the circuit court judge properly denied the motion for resentencing while also doing nothing to unlawfully interfere with the parole board's sole authority on matters of parole. See Brown v. State, 306 S.C. 381, 383, 412 S.E.2d 399, 400-401 (1991) ("[P]arole eligibility is not a matter within the jurisdiction of the trial court, but falls within the province of the Board of Probation, Parole, and Pardon Services (the Board).").

However, even if the parole process could somehow properly be analyzed through the case at bar, the parole process available to Appellant has provided and continues to provide him with a constitutionally-sufficient meaningful opportunity for release. That is true because, during each parole hearing, the parole board in South Carolina is statutorily required to give *careful* consideration to Appellant's crimes *and* subsequent behavior, including any rehabilitative efforts he may have engaged in while incarcerated, in determining whether he should be afforded a grant of parole. See S.C. Code Ann. § 24-21-640 ("The board must carefully consider the record of the prisoner *before*, *during*, and after imprisonment[.]" (emphasis added)); see also South Carolina Parole Board Manual, https://www.dppps.sc.gov/Parole-Pardon-Hearings/Parole-Board (outlining the criteria considered by the parole board in determining whether parole should be granted, which include growth-related and rehabilitation-related factors such as the prisoner's progress in programs "designed to encourage the prisoner to improve himself" while incarcerated, the prisoner's current attitude, the prisoner's "understanding of the causes of his past criminal behavior," and the prisoner's "efforts to solve his problems"). Therefore, before a parole decision was or is made in his case, Appellant has received and will receive consideration of whether he has shown rehabilitation and growth, which is *exactly* what a juvenile offender is constitutionally entitled to

through the requirement for a meaningful opportunity for release. Compare Graham, 560 U.S. at 75 (instructing a juvenile non-homicide offender is entitled to a meaningful opportunity for release "based on *demonstrated maturity and rehabilitation*" (emphasis added)); with Miller, 567 U.S. at 483 (identifying a variety of sentencing factors related to juveniles that must only be considered prior to the imposition of an *irrevocable* sentence of life without parole upon a juvenile offender); and Aiken, 410 S.C. at 544-545, 765 S.E.2d at 577-578 (plurality opinion) (permitting resentencing for juvenile offenders who received *irrevocable* life without parole sentences).

Moreover, assuming the parole process in South Carolina is somehow flawed or, more specifically, the parole board has improperly failed—or subsequently fails—to evaluate any hypothetical rehabilitation and growth exhibited by Appellant prior to reaching a parole decision in his case, Appellant has mechanisms available to him to challenge the parole process and the parole board's specific decisions, including the mechanism of an administrative appeal. See Al-Shabazz v. State, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000) ("[A]n inmate make seek review of Department's final decision in an administrative matter under the APA."); see also Cooper v. South Carolina Dep't of Prob., Parole & Pardon Servs., 377 S.C. 489, 502, 661 S.E.2d 106, 113 (2008) (affirming an order remanding for an administrative appeal of the methods and procedure employed by the parole board in denying parole where the board "apparently failed to consider the requisite factors and, instead, based its decision on certain fixed factors that are unaffected by *any rehabilitation efforts* on the part of Cooper" (emphasis added)); see generally S.C. Const. art. V, § 5 ("The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs."). Notably though, defense counsel at no point argued, suggested, or implied

Appellant was being denied parole even though he had demonstrated rehabilitation, maturity, or growth subsequent to his imprisonment, which is the *sole* basis upon which Appellant would be entitled to constitutional consideration for release.[8] See Graham, 560 U.S. at 75 (explaining juvenile offenders are entitled to a meaningful opportunity for release "based on demonstrated maturity and rehabilitation"). Therefore, in light of the information currently available, nothing has been presented to establish South Carolina's parole process is denying Appellant a meaningful opportunity for parole despite demonstrated rehabilitation, maturity, and growth or is otherwise unconstitutionally flawed.[9] Cf. Montgomery, 136 S. Ct. at 736 ("These claims have not been tested or even addressed by the State, so the Court does not confirm their accuracy.").

However, as parole and sentencing remain entirely separate matters, the circuit court judge properly focused his consideration on the issue before him, which was the issue of whether Appellant's aggregate parole-eligible life sentence was unconstitutional pursuant to the appellate decisions in Graham, Miller, and Aiken. See McKay, 300 S.C. at 115, 386 S.E.2d at 623

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[8] Although no evidence of any rehabilitation or growth on Appellant's part was presented to the circuit court judge, records available from the South Carolina Department of Correction suggest Appellant has committed disciplinary infractions, engaged in a riot, escaped, and obtained almost no educational credits since he was first incarcerated. Inmate Search Detail Report for Robert Bernard Campbell, https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000131941. Moreover, as defense counsel noted during the hearing, the parole board identified Appellant's prison disciplinary record and lack of compliance as grounds warranting the denial of parole in his case. (Tr. p. 9).

[9] Notably, during the motion hearing before the circuit court judge, defense counsel presented *nothing* to the circuit court judge apart from her own representations that either were largely inaccurate or were based solely on Appellant's unsupported claims to her. See McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This Court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."); Beaufort Realty Co., Inc. v. Beaufort County, 346 S.C. 298, 302, 551 S.E.2d 588, 590 (Ct. App. 2001) ("[A]rguments of counsel are not evidence."). Thus, the circuit court judge was *not* presented with any evidence to establish Appellant actually was mentally ill or was being denied parole based on some impermissible ground, and there is nothing appearing in the appellate record to support such claims on appeal. See State v. Williams, 321 S.C. 455, 464, n. 4, 469 S.E.2d 49, 54 (1996) ("The burden is on appellant to provide a sufficient record for review.").

(recognizing parole and sentencing are entirely separate and distinct matters). Since Appellant's aggregate life sentence affords him eligibility for parole and, thus, a meaningful opportunity for release, his sentence was *not*, in fact, unconstitutional. Cf. Montgomery, 136 S. Ct. at 736 ("Giving Miller retroactive effect . . . does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." (citation omitted)). Therefore, the circuit court judge correctly denied the motion for resentencing. The circuit court judge's ruling should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the circuit court judge's ruling be affirmed.

Respectfully submitted,

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April 9, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable R. Keith Kelly, Circuit Court Judge
Appellate Case No. 2016-002457

THE STATE,

Respondent,

vs.

ROBERT BERNARD CAMPBELL,

Appellant.

PROOF OF SERVICE

I, Destiny Blue, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

Joanna Katherine Delany, Esq.
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 9th day of April, 2018.

Destiny Blue

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April 9, 2018

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RE: State v. Robert Bernard Campbell – Appellate Case No. 2016-002457

Dear Ms. Delany:

I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Honorable Jenny A. Kitchings (original enclosed)
Victim Services