STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Michael G. Nettles, Circuit Court Judge

THE STATE,

APPELLANT,

V.

RONALD HAKEEM MACK,

RESPONDENT

APPELLATE CASE NO. 2017-002441

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE PRESENTED

Did the circuit court err in finding respondent's term-of-years sentence for murder was the functional equivalent of a life sentence which entitled him to resentencing pursuant to *Aiken v. Byars,* where our Supreme Court and the United States Supreme Court limited their holdings to juveniles actually sentenced to life without parole and where the evidence the court relied on to support its ruling was irrelevant?

RESPONDENT'S COUNTER-STATEMENT OF ISSUES PRESENTED

I.

Whether this appeal should be dismissed where the court's ruling denying the State's motion to dismiss Respondent's motion for Aiken resentencing is not immediately appealable under S.C. Code Ann. § 14-3-330?

II.

Whether the circuit court properly denied the State's motion to dismiss Respondent's motion for Aiken resentencing, where Respondent's fifty-year sentence for a murder committed as a juvenile constitutes a de facto life sentence such that he is entitled to an individualized resentencing hearing?

STATEMENT OF THE CASE

Indictment and Guilty Plea

On July 6, 2009, the Williamsburg County Grand Jury returned a multi-count indictment for murder, first degree burglary, conspiracy, and possession of a weapon during a violent crime against Respondent Ronald Mack and his three co-defendants, Tawanda Mack Allen, Kelvin Michael Bowen, Jr., and Antonio Lavelle McClary.[1] R. 34-36. Mack, born August 24, 1991, was 17 years old on the date of the incident, April 5, 2009.

On August 24, 2010, Mack's nineteenth birthday, he pled guilty to murder and first-degree burglary before the Honorable Clifton Newman. Mack was represented by LeGrand Carraway, and the State was represented by assistant solicitor Kimberly Barr. R. 1. Mack was sentenced to concurrent terms of 50 years and 30 years, respectively. R. 30 – 32; R. 37-38. Pursuant to S.C. Code Ann. sections 16-3-20 and 24-13-100, Mack is not eligible for parole and must serve his 50-year sentence "day for day."

Post-Conviction Relief

On August 5, 2011, Mack filed his application for post-conviction relief ("PCR"). An evidentiary hearing was held before the Honorable R. Ferrell Cothran, Jr. on May 27, 2014. On July 1, 2014, Judge Cothran filed an Order of Dismissal denying Mack's PCR application. Mack's appeal from the order of dismissal was perfected by the filing of a petition for writ of certiorari by appellate defender Laura Baer. One of the issues raised in the petition was: "Whether Petitioner's case should be remanded for resentencing based on the intervening cases of Miller v. Alabama, 567 U.S. 460 (2012), and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), *cert. denied* 135 S. Ct. 2379 (2015), where Petitioner was a juvenile at the time of the offense and his sentence of fifty

[1] Tawanda Mack Allen is Mack's mother, Kelvin Michael Bowen, Jr. was Mack's mother's boyfriend, and Antonio Lavelle McClary was a friend of Mack.

years is the functional equivalent of life without parole." Pet. for Cert., p. 2, Mack v. State, Appellate Case No. 2014-001518. By Order dated March 29, 2016, the Supreme Court denied the petition for writ of certiorari.[2]

Motion for Resentencing

On April 20, 2015, Respondent filed a motion for resentencing and supporting memorandum in Williamsburg County, arguing that Mack's 50-year sentence was a de facto life without parole ("LWOP") sentence such that he was eligible for resentencing under Aiken.[3] R. 40-42; R. 43-61. The solicitor filed his response on April 28, 2015, to which Respondent filed a reply. R.62-65; R. 66-72. On July 23, 2015, our Supreme Court issued an Order lifting the stay of Aiken following the United States Supreme Court's denial of the state's petition for writ of certiorari. The

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[2] It was never contended that the Miller/Aiken issue was raised and ruled upon by the PCR court. Rather, recognizing the weaknesses in the other issues presented at the PCR hearing and the strength of the resentencing issue, counsel asked the Court to exercise its discretion and remand for resentencing in the interest of judicial economy. See Mack v. State, Appellate Case No. 2014-001518, Pet. for Cert., p. 5. The denial of certiorari is not ruling on the merits of the case. See Boumediene v. Bush, 550 U.S. 1301 (2007) (an order denying certiorari "is plainly not a 'judgment or decision ... on the merits.'"). The Court does not disclose it's reasoning for the denial of certiorari; thus, there is nothing to be gleaned from the denial. However, it seems intuitive that the factors weighing into the decision were likely that the issue was admittedly not preserved below and was being pursued through a motion for resentencing.

[3] In Miller v. Alabama, 567 U.S. 460 (2012), the United States Supreme Court held that the imposition of a mandatory life without parole sentence for homicide offenses committed when the defendant was a juvenile violates the principle of proportionality and the Eighth Amendment's ban on cruel and unusual punishment absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing.

Subsequently, in Aiken v. Byars, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014), a class of inmates in the South Carolina Department of Corrections ("SCDC"), who were sentenced to LWOP for various homicide offenses committed as juveniles, filed a petition in our Supreme Court's original jurisdiction seeking resentencing in light of Miller. On November 12, 2014, our Supreme Court ruled that Miller applied "retroactively to these petitioners, ***to those similarly situated***, and prospectively to all juvenile offenders who may be subject to a sentence of life imprisonment without the possibility of parole." Aiken, 410 S.C. at 545, 765 S.E.2d at 578 (emphasis added). The Court further ruled: "***[A]ny individual affected by our holding*** may file a motion for resentencing within one year from the filing of this opinion in the court of general sessions where he or she was originally sentenced." Id. (emphasis added).

Court ordered: "Petitioners ***and any other individuals affected*** by our holding in Aiken may file a motion for resentencing within one year of the date of this order in the court of general sessions where he or she was originally sentenced." R. 73-74 (emphasis added). On March 16, 2016, former Chief Justice Costa M. Pleicones issued an administrative order regarding the procedures to be followed statewide in the management and disposition of all motions for resentencing filed pursuant to Aiken. R. 75.

On August 11, 2016, Justice Pleicones issued an order vesting the Honorable Michael G. Nettles with exclusive jurisdiction over Mack's motion for resentencing. R. 82. Undersigned counsel filed a formal motion for appointment of counsel, which Judge Nettles granted. R. 76-80; R. 81. On September 22, 2016, the solicitor filed a supplemental opposition to defendant's motion for resentencing. R. 83-84. A status conference was held in Williamsburg County on September 30, 2016. The circuit court provided the solicitor two weeks to file a formal motion to dismiss. See R. 90. The solicitor filed his motion to dismiss on October 5, 2016, to which Mack filed an opposition. R. 85; R. 88.

A hearing on the State's motion to dismiss was held before Judge Nettles on February 17, 2017. The State was represented by Solicitor Ernest A. Finney, III, and Respondent was represented by appellate defender Laura Baer. R. 117. Prior to the hearing, Respondent filed a notice of expert witness. R. 115. At the conclusion of the hearing, Judge Nettles provided the parties thirty days to submit written proposed orders. R. 209, ll. 9-12; R. 282-284; R. 285-305. On May 16, 2017, Respondent filed a supplemental affidavit from Vera Dolan, who testified as an expert in life expectancy and epidemiology at the hearing. R. 306-367.

On June 16, 2017, Judge Nettles filed an order denying the State's motion to dismiss. R. 368-401. Judge Nettles found that Aiken was applicable both to defendants sentenced to

LWOP and sentenced to a term of years that constitutes the functional equivalent of LWOP; that Mack's 50-year sentence constituted a de facto life sentence such that his motion for resentencing pursuant to Aiken was proper; and that Mack's original sentencing hearing did not comply with the constitutional requirements of Miller, Aiken, and their progeny. Accordingly, he ruled that Mack was entitled to an Aiken resentencing hearing.

The State filed a motion to reconsider on June 23, 2017, to which Respondent filed a response. R. 402; R. 403-405. On November 14, 2017, the State filed a memorandum in support of reconsideration and hearing waiver. R. 406-434. On November 15, 2017, Judge Nettles signed an order denying the State's motion to reconsider. An identical order denying the motion for reconsideration was also signed by Judge Nettles on November 22, 2017. R. 435.

The State filed a notice of appeal, which Respondent moved to dismiss as an improper interlocutory appeal on December 19, 2017. Appellant opposed the motion by return filed January 2, 2018. The motion to dismiss the appeal was denied by order filed February 1, 2018.

The State filed its brief of appellant. This brief of respondent follows.

STANDARD OF REVIEW

"In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." State v. Laney, 367 S.C. 639, 643, 627 S.E.2d 726, 729 (2006). The appellate courts of South Carolina "review questions of law de novo, with no deference to trial courts." Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018), *reh'g denied* (Mar. 29, 2018). An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012).

ARGUMENT

I. This appeal should be dismissed where the court's ruling denying the State's motion to dismiss Respondent's motion for Aiken resentencing is not immediately appealable under S.C. Code Ann. § 14-3-330.

Introduction

Seventeen-year-old Ronald Mack, assisted by his mother, her adult boyfriend, and another juvenile, shot and killed his former friend. In 2010, Mack pled guilty to murder and burglary. He is currently serving a 50-year sentence for murder, which is the functional equivalent of life without parole, *i.e.* a de facto life sentence.

In Miller, the United States Supreme Court wrote: "[G]iven all we have said in Roper, Graham, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty [life without parole] will be uncommon."[4] Miller v. Alabama, 567 U.S. 460, 479 (2012). Though the Miller Court did not foreclose that possibility in homicide cases, the Court requires

[4] Roper v. Simmons, 543 U.S. 551 (2005) (banning the death penalty for juvenile offenders who were under the age of eighteen at the time of the crime); Graham v. Florida, 560 U.S. 48 (2010) (banning LWOP for juvenile offenders who commit non-homicide offenses).

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 480.

In Aiken our Supreme Court ruled: "[W]e must give effect to the proportionality rationale integral to Miller's holding—youth has constitutional significance. As such, it must be afforded adequate weight in sentencing." Aiken v. Byars, 410 S.C. 534, 542-43, 765 S.E.2d 572, 576 (2014). The United States Supreme Court's opinion in Montgomery, reinforced this understanding of the significance of Miller, writing: "Miller, then, 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." Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

The remedy provided in Aiken was resentencing for the named petitioners and for "those similarly situated." Aiken, 410 S.C. at 545, 765 S.E.2d at 578 (2014). Mack, through counsel, filed a motion for Aiken resentencing. R. 40-61. The State moved to dismiss. R. 85-87; R. 88-114. After a hearing, Judge Nettles denied the State's motion. R. 368-401.

As will be discussed more fully *infra*, the State's appeal should be dismissed as an improper interlocutory appeal. The denial of the motion to dismiss is not a final judgment because the resentencing hearing has not occurred. Allowing Appellant to go forward with this appeal is exactly the piece-meal review that our strict appealability rules are meant to prevent. To the extent this Court does review the merits of this appeal, the circuit court properly found that Miller and Aiken do not rest upon the semantics of the sentence; thus, their reasoning requires resentencing for juvenile offenders sentenced to a term of years that is the functional equivalent of LWOP. The trial judge's expressed intent, life expectancy data, and the decisions of other courts all support the court's further ruling that Mack's 50-year sentence is a de facto

life sentence such that he is entitled to an individualized sentencing hearing pursuant to Aiken. The court properly rejected the State's claim that the original sentencing judge sufficiently considered Mack's youth and its attendant circumstances before imposing the 50-year sentence, instead finding that the hearing suffered from the same constitutional defect identified in Aiken. Accordingly, if this appeal is not dismissed, the circuit court should be affirmed.

Discussion

The denial of the prosecution's motion to dismiss and subsequent motion to reconsider does not constitute a final order. Rather, the effect of Judge Nettle's ruling is to provide Respondent Mack with a new sentencing hearing in which the resentencing court will fully explore "the mitigating hallmark features of youth" in accordance with Aiken and impose a new sentence. See Aiken, 410 S.C. at 545, 765 S.E.2d at 578 ("Miller requires that before a life without parole sentence is imposed upon a juvenile offender, he must receive an individualized hearing where the mitigating hallmark features of youth are fully explored.").

"An appeal ordinarily may be pursued only after a party has obtained a final judgment." State v. Wilson, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010). "An interlocutory order not governed by a specialized appealability statute is not immediately appealable unless it fits into one of the categories listed in section 14-3-330 of the South Carolina Code (1976 & Supp.2009)." Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 300, 705 S.E.2d 475, 477 (Ct. App. 2011) (citing Ex Parte Capital U–Drive–It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006)). The strict interpretation of the appealability rules is aimed at avoiding piecemeal appeals. Wilson, 387 S.C. at 601, 693 S.E.2d at 925; Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) ("The provisions of section 14-3-330 "have been narrowly construed and

immediate appeal of various orders issued before or during trial generally has not been allowed.").

Under section 14-3-330, the following types of judgments, decrees, and orders are directly appealable:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions ....;
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial[,] or (c) strikes out an answer or any part thereof or any pleading in any action;
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330.

Here, the order denying Appellant's motion to dismiss the motion for resentencing was not entered in a special proceeding (subsection 3), does not involve an injunction or a receiver in the court of common pleas (subsection 4), and does not grant or refuse a new trial or strike a pleading (subsections 2(b) and 2(c)). Thus, the question is whether the order either involves the merits (subsection 1) or affects a substantial right and effectively determines the action and prevents a judgment from which an appeal might be taken (subsection (2)(a)).

An interlocutory order is immediately appealable under subsection (1) if it "involves the merits." "An order 'involves the merits,' ... and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense." Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006). "The phrase 'involving the merits' is narrowly construed in modern precedent." Id. "An order usually

will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights." Id. at 7, 630 S.E.2d at 467-68.

Though more broadly applicable than Aiken's provision for resentencing, the Maryland Rules allow for the filing of a motion to correct illegal sentence in any case. See Md. Rule 4-345(a) ("The court may correct an illegal sentence at any time."). This provision has served as the mechanism by which Maryland inmates raise claims that their sentences violate the Eighth Amendment under Graham and Miller. Recently, in State v. Clements, 2018 WL 4140659 (Md. Aug. 29, 2018), the Court of Appeals of Maryland dismissed the State's appeal from the circuit court's order granting Clement's motion to correct illegal sentence and scheduling a resentencing hearing pursuant to Miller. Clements, 2018 WL 4140659 at *2.

The Clements Court noted that "while a motion under Rule 4-345 may be made at any time, it is part of the same criminal proceeding and not a wholly independent action." 2018 WL 4140659 at *3. The Court found that the State's appeal was not authorized, reasoning:

> [T]he circuit court's order was not a "final judgment" that "imposed or modified a sentence" as required for the State to appeal under that subsection. The circuit court merely granted Clements's motion, vacated the original sentence, and scheduled a new sentencing hearing, which since has been deferred pending appeal. The trial court's order therefore was interlocutory: it was a step toward the imposition of a new sentence—it was not, however, either a final judgment that "imposed" a sentence or a final judgment that "modified" a sentence.

Id. at *6 (internal citations omitted). Accordingly, the Court held that the circuit court's grant of Clements' motion to correct an illegal sentence and vacation of the sentence imposed in 1989 was an interlocutory order that will not become a final judgment triggering the State's right to appeal until such time as the circuit court imposes a new sentence. Id. at * 7.

Similarly, here, while Mack was previously sentenced, Judge Nettles' order found that the original sentence did not comply with the constitutional requirements articulated in Miller and Aiken such that resentencing is required. In its return to Respondent's previous motion to dismiss the appeal, Appellant conceded that the practical effect of Judge Nettle's order was to vacate Mack's 50-year sentence. State's Return to Motion, Jan. 2, 2018, p. 5 (on file with this Court). In State v. Byars, 79 S.C. 174, 60 S.E. 448 (1908), the State appealed the trial court's grant of a new trial to the defendant. Our Supreme Court stated the following:

> [W]e feel ourselves unable at this time to entertain a consideration of the questions now presented. This court is confined to a consideration of questions presented after a final judgment has been rendered. This is no new question to this court, for we have held that a final judgment is essential in the hearing of an appeal. The prisoner has never been sentenced. The sentence is a final judgment.

Id. Mack's resentencing hearing has not yet been held and no new sentence has been imposed such that his case has not been determined with finality. Thus, until resentencing occurs, there has not been a final judgment and is not appealable under subsection (1) of S.C. Code Ann. § 14-3-330.

An interlocutory order is immediately appealable under subsection (2)(a) if it affects a substantial right and the appellant cannot seek review of the current order in an appeal from the final judgment. Peterkin v. Brigman, 319 S.C. 367, 368, 461 S.E.2d 809, 810 (1995). Here, the State is not precluded from raising the issue on appeal after final sentencing. Thus, the order is not appealable under subsection (2)(a) of S.C. Code Ann. § 14-3-330.

With no statutory provision authorizing this appeal, our strict appealability laws necessitate dismissal of the State's improper interlocutory appeal.

II. The circuit court properly denied the State's motion to dismiss Respondent's motion for Aiken resentencing, where Respondent's fifty-year sentence for a murder committed as a juvenile constitutes a de facto life sentence such that he is entitled to an individualized resentencing hearing.

Relevant Facts

Guilty Plea and Original Sentencing

Mack's plea and sentencing hearing proceeded in the same course as any adult offender, with no special consideration of Mack's status as a juvenile. Following the State's recitation of facts, the victim's mother and the solicitor both requested a life sentence despite Mack's age and lack of criminal history.[5] R. 8, l. 18 – 12, l. 20; R. 13, ll. 15-19; R. 14, l. 1 – 15, l. 2. Mack and the victim, Kenyon Dorsey, were both teenagers who belonged to the Bloods gang. A disagreement over money resulted in shots being fired at Mack during a basketball game. Mack believed that Dorsey was responsible. On the night of the incident, Mack's mother, Tawanda Allen, and her boyfriend, Kelvin Bowen, picked up Mack and his friend, Antonio McClary. The foursome traveled to Dorsey's home, where Allen acted as the getaway driver. Mack, Bowen, and McClary found Dorsey asleep in a chair in the living area. Dorsey died from gunshot wounds inflicted by shots fired from Mack's 9-mm handgun and Bowen's shotgun. R. 8, l. 18 – 12, l. 20; R. 16, l. 15 – 23, l. 18; R. 27, l. 1 – 30, l. 15.

In mitigation, plea counsel noted Mack's age and observed him to be a "nice, soft spoken, and intelligent boy." R. 15, ll. 9-17; R. 19, ll. 2-5. He told the court that Mack was raised in Kingstree by his mother and step-father, James Allen, until the family moved to Maryland when

[5] The solicitor also suggested that Mack's case "was at least worth conversation about [the] death penalty" but did not pursue it due to the victim's mother's opposition to the death penalty. R. 25, ll. 5-11. The United States Supreme Court held in Roper v. Simmons, 543 U.S. 551 (2005), that the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty upon offenders who were under the age of eighteen when their crimes were committed. Thus, Mack was constitutionally ineligible for the death penalty under precedent established years prior to his crime and sentencing.

Mack was in seventh grade. R. 15, l. 23 – 16, l. 8. When Mack was in the ninth grade, his mother and Mr. Allen separated and eventually divorced. R. 16, ll. 8-14. During or after his tenth-grade year, Mack moved back to South Carolina, living with either his grandmother or step-father while his mother remained in Maryland. R. 20, ll. 12-16.

Carraway noted the attraction of gang life, which seemed "glamorous" to a seventeen-year-old. R. 20, ll. 5-12. In addition to the "brain washing" of the gang that Mack saw as family, Carraway noted that Mack's mother and her adult boyfriend assisted in the crime. R. 20, l. 24 – 23, l. 18; R. 25, l. 18 – 26, l. 11. In asking for the minimum sentence he said: "[W]ho among us has been cursed enough to have a mother to take us to a murder site." R. 26, ll. 18-21. Carraway advised the plea court that since being away from these outside influences, Mack was out of his previous mindset. R. 20, ll. 20-24; R. 22, ll. 16-19. He asked the court to give Mack another chance and imagine how much he has changed and will continue to change away from his mother and the gang. R. 26, ll. 11-18. Mack asked for mercy, acknowledging that his conduct was wrong, and said that he acted out of fear and under the influence of the gang. R. 24, l. 1-7.

Judge Newman began the explanation of his sentence with the following:

> Well, the purpose of a sentence is to represent what society determines to be justice for a crime and to – not to send a message to the community, but to do what most law abiding citizens would expect the Court to do. And then in weighing all of this, the fact of the matter is, that ***the sentence is not about Mr. Mack, not about him and the possibility that he might turn his life around at some point in time between age 19 and age 80, if he lives that long***... But it's – ***the sentence is not about Mr. Mack***. I mean, it's – how old is Mr. Dorsey?

R. 30, l. 21 – 31, l. 4. The solicitor responded that Dorsey was seventeen. R. 31, l. 5. The judge went on to say:

> ***It's not about the future years of Mr. Mack.*** How about the lack of future years of Mr. Dorsey. He's the victim, the victim, victim's family, the victim's loved ones.

> Mr. Mack is almost a lost cause at this point based on all of the choices that he made. ***He's a lost cause as far as society is concerned. His future is not within society. His future, your future, is out of society. You've given up your freedom. You've given up the right to walk among free people.***

R. 31, ll. 6-14. After asking the defendant why he decided to give up his future and freedom, the judge stated:

> Unfortunately you'll never know any better because you – that's a – just as you snuffed out his life ***you snuffed out your future just the same***. All of the great things that Mr. Carraway said about you and all he thinks about you, I mean, I'm not questioning at all whether those things are true. But if you are to take advantage of those things it won't be – ***it will not be out in a free society where you've given up your freedom and your right to anyone to trust you to walk the streets. And you'll have to do those good deeds behind bars.*** That's just a fact of the matter.

R. 31, l. 14 – 32, l. 6. Judge Newman then sentenced Mack to concurrent terms of 50 years for murder and 30 years for first degree burglary. He admonished Mack: "that's more than you can count" and "that's the bed you made." R. 32, ll. 7-12.

Hearing on State's Motion to Dismiss

The issues before the circuit court at the February 2017 hearing on dismissal of the motion for Aiken resentencing were: (1) whether Miller and Aiken are applicable to de facto life sentences; (2) whether a 50-year sentence constitutes a de facto life sentence; and (3) whether Mack's original sentencing hearing was sufficient to comply with Miller and Aiken.[6] *See* R. 179, ll. 10-17. The parties agreed that under his current 50-year sentence, Mack is scheduled to be released when he is 67 years old. R. 125, ll. 1-9; R. 181, l. 18 – 182, l. 19.

The solicitor's presentation consisted of only argument and the admission of the guilty plea transcript. The solicitor averred that Mack's case "fell outside" of Aiken because he was not sentenced "to life without parole," but rather "a determinant sentence of 50 years." R. 121,

[6] Judge Nettle's Order denying the State's motion to dismiss contains a detailed summary of the arguments and evidence presented at the February 2017 hearing. R. 379-393.

l. 8 – 122, l. 11. He argued that the original sentencing hearing was sufficient, stating: "Judge Newman did do a good job of considering the five factors which Aiken v. Byars says that the judge must consider." R. 122, l. 12 – 124, l. 7. He contended that Mack's sentences were "not only less than life but a lot less than some, some other sentence that he could've given" and that Mack's thirty-year burglary sentence was not run consecutive. R. 124, ll. 7-12. Thus, he opined that "Mr. Mack has got a lot of breaks" and asked the petition for resentencing to be dismissed. R. 124, ll. 12-16.

In response to the court's question about the prosecution's position on functional equivalence, Solicitor Finney said: "I think that at age 67, when he is released from prison, he'll still have 10 years life expectancy under the statistical information that's out there." R. 125, ll. 1-22. When asked whether prison lowers life expectancy, Finney said: "The statistics seem to show that, Your Honor." R. 125, l. 23 – 126, l. 1.

Respondent began its' presentation with testimony from Vera Dolan, who was qualified as an expert in epidemiology and life expectancy. R. 126, l. 5 – 132, l. 17; R. 223-238. An affidavit from Dolan was also submitted after the hearing for the court's consideration. R. 306-367. Ms. Dolan utilized the 2011 U.S. general population life tables, published by the National Vital Statistics Bureau in September 2015, to explain the components of a life table. A life table ultimately reflects life expectancy, which is the statistically expected average length of life left for a person in the relevant population at a particular age. R. 133, l. 6 – 135, l. 22; R. 239-247. The U.S. general population life tables reflect a life expectancy of 55 years for an average 18-year old black male, resulting in an average age of death of 73 years old. R. 135, l. 23 – 136, l. 4; R. 242-244.

Ms. Dolan opined that the general population tables are not a reliable indicator of the life expectancy of the male inmates in the South Carolina Department of Corrections ("SCDC") "[b]ecause prison has been well recognized as a very significant risk factor on someone's life expectancy." R. 136, ll. 5-11. The statutory life tables, codified in S.C. Code Ann. § 19-1-150, are not an accurate reflection of the life expectancy of the general population, much less the SCDC inmate population. They were constructed by the Society of Actuaries in conjunction with the National Association of Insurance Commissioners utilizing only the "cherry picked" healthiest segment of the population. Their purpose is provide statutory guidance to state insurance commissioners in determining the statutory reserves necessary to protect insured citizens in their state. R.136, l. 16 - 139, l. 21; R. 248-253.

In light of the inapplicability of the U.S. tables and state statutory tables, Ms. Dolan was retained in another case to determine the life expectancy of prisoners in SCDC. SCDC provided her with a file of approximately 68,000 adult male inmate records, spanning from 1996 to 2015, with a follow-up of mortality through 2016. R. 139, l. 22 – 140, l. 22. She reviewed the data to remove duplicate records where the offender did multiple stints in SCDC, such that only the most recent admission was utilized, and to remove incongruent data where the date of death preceded the date of admission. Ms. Dolan was left with data related to 64,204 current or former male inmates. The data included all persons who were incarcerated in SCDC during the twenty-year period regardless of their age at entry, length of incarceration, or whether they were released from prison prior to their death. R. 141, l. 23 - 142, l. 10; R. 143, l. 22 - 144, l. 19; R. 170, l. 18 - 172, l. 8; R. 173, ll. 13 -18; R. 175, l. 24 - 176, l. 17.

Ms. Dolan calculated mortality rates for each age, which she utilized to produce life tables for the general male SCDC population, as well as race specific tables for whites and

blacks.[7] R. 142, l. 15 – 152, l. 25; R. 254 - 281. The life table for black males reveals that the average life expectancy of an 18-year-old black male who spent time in SCDC is 38.2 years, giving an average age at death of **56 years old.** R. 153, ll. 1-12; R. 272 - 276. At the time of the hearing before Judge Nettles, Mack was 25 years old, with a life expectancy of 32.2 years and an average age at death of **57.2 years old**. R. 153, ll. 13-24; R. 161, l. 12 – 162, l. 2; R. 272 - 276. On cross-examination, Ms. Dolan agreed that she had not conducted any further analysis relative to Mack and did not know if he suffered from diabetes, heart conditions, high blood pressure, or drug use. R. 165, l. 17 – 166, l. 2. However, she testified on re-direct that such conditions would tend to further decrease life expectancy. R. 176, ll. 18-23.

Ms. Dolan disagreed with the solicitor's representation that the longer Mack stays in prison, the more likely he is to live a longer life. Rather, she explained that the longer Mack stays alive in prison, the more likely he will continue to stay alive. Ms. Dolan found a general pattern that mortality ratios climbed to a plateau of the highest risk from 30 to 40 years old but began to decline again after 50 years old. This reflects a survival affect as you pass through various ages. R. 153, l. 25 – 154, l. 6; R. 157, l. 7 – 158, l. 17. Thus, if Mack survives to 66 years old, he would have another 10 years to live. However, she did not know what experience Mack will have in prison from age 25 to 66. R. 166, l. 3 – 167, l. 10; R. 169, l. 20 – 170, l. 15.

Regarding comparisons, Ms. Dolan opined that **prison decreases an average inmate's life expectancy by approximately twenty years**, as her analysis is directly comparable to the U.S. general population data. R. 156, l. 4 – 157, l. 5; R. 160, ll. 6-11. Ms. Dolan also reviewed literature on life expectancy studies conducted on prisoners in New South Wales, Australia, and

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[7] Ms. Dolan recommended that the life tables she prepared be updated every five years to account for the improvements in the life expectancy of the U.S. general population, and every ten years to update the prison population data. R. 166, l. 3 – 167, l. 10; R. 169, l. 20 – 170, l. 15.

in Ontario, Canada. She found the average mortality ratios and pattern of mortality in those studies to be comparable to the mortality ratios for black males in the SCDC population. R. 158, l. 18 – 160, l. 4. While Ms. Dolan's analysis did not look at cause of death inside and outside of prison, she relayed that the foreign studies revealed that many deaths that occurred after release were the result of mental illness, suicide, and overdose. One study found a high mortality due to suicide and overdose within the first year of release from prison. R. 170, l. 18 – 172, l. 8; R. 173, l. 5 – 174, l. 19; R. 177, ll. 5-12.

Ms. Dolan explained that her analysis did not look at the length of prison sentence for any of these individuals to examine the specific effect of long-term incarceration on life expectancy. R. 162, l. 18 - 165, l. 16; R. 174, l. 20 – 175, l. 20. However, Ms. Dolan later reviewed information specific to inmates serving a life sentence who died in SCDC between January 2011 and June 2016, as explained in her supplemental affidavit. R. 315. Ms. Dolan determined that number of deaths during the period "was not sufficient to create a credible life table for inmates serving life sentences who died while incarcerated." R. 315. However, the data was "sufficient to show the mortality risk trend of people serving life imprisonment in SCDC as compared to the general US Population." R. 315. Ms. Dolan concluded that "**individuals sentenced to life who entered SCDC between the ages of 16 and 19 died while incarcerated an average of *31.8 years earlier* than predicted by the US Population life expectancies**." R. 315 (emphasis added).

In addition to Ms. Dolan's testimony and accompanying exhibits, Respondent presented argument, incorporating the detailed written filings made prior to the hearing. R. 63, l. 2 – 86, l. 16; see R. 43; R. 66; R. 88. As mentioned supra, Respondent's argument was divided into three parts, arguing (1) that Miller and Aiken are applicable to de facto life sentences; (2) that a 50-

year sentence constitutes a de facto life sentence; and (3) that Mack's original sentencing hearing was not sufficient to comply with Miller and Aiken.

Respondent argued that the reasoning and language of Aiken reflect the Court's intention that its ruling apply to any juvenile whose sentence has the practical effect of being a lifetime in prison without the possibility of parole, *i.e.* de facto life sentences. R. 182, l. 21 – 187, l. 3; R. 91-104. The Aiken Court determined that the reasoning of Miller went beyond mandatory sentencing schemes to establish "an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." R. 182, l. 21 – 187, l. 3. Thus, the Aiken Court held that the principles enunciated in Miller apply "retroactively to these petitioners, ***to those similarly situated***, and prospectively to all juvenile offenders who may be subject to a sentence of life imprisonment without the possibility of parole." 410 S.C. at 545 (emphasis added). The Court provided that "***any individual affected***" by its holding could file a petition for resentencing within one year of the Aiken opinion. Id. Thus, Respondent argued that Miller and Aiken are applicable to de facto life sentences given that their focus was not on the semantics of "life without parole," but rather on whether the sentence forecloses a meaningful opportunity for release. R. 188, l. 13 – 189, l. 15; R. 93 - 104.

Regarding the qualification of 50 years as a de facto life sentence, Respondent argued that Judge Newman's comments when he imposed the original sentence were prima facie evidence that he intended Mack's 50-year sentence to be the equivalent of LWOP. R. 189, l. 23 – 190, l. 12; R. 57; R. 66 - 67; see R. 30, l. 16 – 32, l. 14. Further, based on the life tables prepared by Ms. Dolan, discussed *supra*, Respondent averred that Mack's current life expectancy is 32.2 years, giving an average age of death of 57.2 years old. R. 153, ll. 13-19; R. 190, ll. 12-17. Additionally, counsel cited a life expectancy report form the ACLU of Michigan and a report

from the Federal Sentencing Commission, both of which evidenced a reduced life expectancy for inmates. R. 184, l. 25 – 185, l. 4; R. 193, l. 20 – 194, l. 22; R. 55-57; R. 65-67; R. 283-284; Patti B. Saris, et al., U.S. Sent. Comm'n, Life Sentences in the federal system, p. 10 (Feb. 2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_ Sentences.pdf (classifying sentences of 470 months or more as de facto life sentences). Respondent also cited a number of cases from other jurisdictions, which found Miller applicable to de facto life sentences and considered determinate sentences of and around 50 years to be de facto life sentences. R. 195, l. 1 – 196, l. 20; R. 53-55; R. 93-103. Thus, counsel argued that Mack will almost certainly die in prison if his sentence remains unchanged. R. 190, l. 12 – 191, l. 21; R. 198, ll. 20-23; R. 58.

With respect to the sufficiency of the original sentencing hearing, Respondent argued that the pre-Miller sentencing hearing did not comply with the constitutional requirements set forth in Miller, Aiken, and Montgomery. Respondent pointed again to Judge Newman's comments during sentencing, including that "the sentence is not about Mr. Mack." See R. 30-31. Respondent further argued that the Aiken majority explicitly rejected the dissent's argument that the original sentencing hearings were sufficient. In conclusion, counsel argued that Mack's pre-Miller sentencing hearing, which resulted in his de facto life sentence, did not provide the constitutional protections afforded to him by the federal and state constitutions. R. 196, l. 21 – 198, l. 4; R. 201, l. 7 – 202, l. 15; R. 58-59; R. 69-71; R. 104-106.

Order Denying Motion to Dismiss

In the lengthy order denying the State's motion to dismiss, Judge Nettles discussed the procedural history of the case, the applicable law, the evidence and arguments presented by the parties, and his findings of fact and conclusions of law. R. 368-401. The court found that Miller

and Aiken are applicable to de facto life sentences, which are not a novel concept under the law. R. 393-395. The court ruled: "This Court is persuaded that defendants who are similarly situated to the offenders in Aiken include those subject to a term of years sentence that constitutes the functional equivalent of life without parole. This interpretation is not an expansion of Aiken, but rather an effectuation of its intent." R. 395-396.

The court further found that the 50-year sentence imposed in Mack's case constitutes a de facto life sentence in light of both Judge Newman's comments at sentencing and the various sources reflecting a reduced life expectancy for prison inmates. R. 396-398. Thus, the court concluded:

> This myriad of statistical sources support this Court's finding that the practical effect of Mack's fifty-year sentence is that he will remain in prison for the rest of his days, with no meaningful hope of release. While the imposition of such a sentence is not itself unconstitutional, Miller and Aiken provide that such a sentence cannot be imposed without evaluating the full impact of the defendant's juvenility on the sentence rendered and a finding of irreparable corruption.

R. 398.

Lastly, the court ruled that Mack's original sentencing hearing was not sufficient because it suffered from a constitution defect – the failure to examine the youth of the offender through the lens mandated by Miller. R. 398-400. Thus, the court found that "Mack is entitled to a resentencing hearing where this court can fully explore 'the mitigating hallmark features of youth' in accordance with Aiken." R. 401. The State's motion to dismiss was accordingly denied.

Discussion

A. A defendant serving a de facto life sentence for a homicide offense committed as a juvenile is "similarly situated" to those serving a *de jure* life without parole sentence for purposes of *Aiken* and entitled to resentencing.

There is no practical distinction between a sentence of "life without parole" and a term of years sentence that will similarly result in a defendant's death in prison, with no meaningful opportunity for release. Consequently, the imposition of such sentences against juvenile defendants are equally offensive to our federal and state constitutions, absent an individualized sentencing hearing and reasoned finding that the defendant is "the rare juvenile offender whose crime reflects irreparable corruption." Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016). Other state and federal courts have adopted this reasoning, and such is a fair and reasonable interpretation of our Supreme Court's intention in Aiken.

Development of Eighth Amendment Jurisprudence

As the United States Supreme Court has made clear over the past decade: juveniles are not the same as adults, and that difference makes them constitutionally "less deserving of the most severe punishments." Miller, 567 U.S. at 471 (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)). The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." Id. at 469 (quoting Roper v. Simmons, 543 U.S. 551, 560); U.S. Const. amend VIII; U.S. Const. amend XIV; see also S.C. Const. art. I, § 15. That right "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." Miller, 567 U.S. at 469. When considering whether a sentence is proportional, the scope of the Eighth Amendment is not static, but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Id. (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

Of equal importance, sentencing must also be individualized to account for the defendant's mitigating circumstances to ensure that the most serious punishments are "reserved only for the most culpable defendants committing the most serious offenses." Miller, 567 U.S. at 476. Thus, the United States Supreme Court has categorically prohibited the imposition of the most severe punishments on classes of defendants that have diminished culpability due to immutable characteristics and where state practice and legislative enactments demonstrate a national consensus against imposing those punishments on members of that class. See, e.g., Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that Eighth Amendment proscribes death penalty for intellectually disabled offenders); Thompson v. Oklahoma, 487 U.S. 815 (1988) (holding that Eighth Amendment proscribes death penalty for juvenile offender who was under the age of sixteen at the time of the offense); Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding that Eighth Amendment proscribes death penalty for offenders who commit non-homicide crimes).

The twenty-first century has seen continued development in the area of Eighth Amendment jurisprudence, especially with respect to juvenile offenders. In Roper v. Simmons, 543 U.S. 551 (2005), the United States Supreme Court categorically banned the imposition of the death penalty against juvenile offenders who were under the age of eighteen at the time of the crime. Six years later, in Graham v. Florida, 560 U.S. 48 (2010), the United States Supreme Court categorically banned the imposition of LWOP upon juvenile offenders who commit non-homicide offenses. Subsequently, in Miller v. Alabama, 567 U.S. 460 (2012), the United States Supreme Court held that the mandatory imposition of a life sentence without parole for youthful offenders, even those who commit homicide, was unconstitutional.

In Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), our Supreme Court held both that Miller was retroactively applicable and that Miller was applicable to juveniles who received a non-mandatory sentence of LWOP. This retroactivity holding was essentially affirmed by the United States Supreme Court's opinion in Montgomery v. Louisiana, 136 S. Ct. 718 (2016). In ruling that Miller created a substantive rule of constitutional law and applied retroactively, the Montgomery Court explained that "Miller . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth." 136 S. Ct. at 734 (internal quotations omitted).

Similarly, the Aiken majority found that Miller "unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole" and "required an individualized sentencing proceeding before imposing a sentence of life without parole on a juvenile offender." 410 S.C. at 542, 765 S.E.2d at 576. The majority recognized that the Miller Court "did not expressly extend its ruling to states such as South Carolina whose sentencing scheme *permits* a life without parole sentence to be imposed on a juvenile offender but does not *mandate* it." Id. at 542, 765 S.E.2d at 576 (emphasis in original). However, the Aiken majority held that there was a proportionality rationale integral to Miller's holding – youth has constitutional significance; as such, it must be afforded adequate weight in sentencing – which must be given effect. Id. at 542-43, 765 S.E.2d at 576. Thus, the Court wrote: "Miller does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." Id. at 543, 765 S.E.2d at 577.

The Aiken Court acknowledged that LWOP sentences are still possible for juveniles in homicide cases. 410 S.C. at 543, 765 S.E.2d at 577. However, the Court found that Miller's requirement that the sentencing judge first "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" "deserves universal application." Id. To that end, the sentencing court must consider:

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

Id. at 544, 765 at 577 (internal quotations omitted) (citing Miller, 567 U.S. at 477-78). While the Court did not require the sentencing proceedings to mirror the penalty phase of a capital case, it found that "the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings," in addition to the Miller factors. Id. at 544-45, 765 at 577.

Like Miller, the particular class before the Aiken Court was limited, being made up of fifteen inmates sentenced to LWOP for homicides committed as juveniles. 410 S.C. at 536-37, 765 S.E.2d at 573. However, the Aiken Court did not restrict the relief it granted to only the petitioners. Instead, the Court held that "the principles enunciated in Miller v. Alabama apply retroactively to these petitioners, ***to those similarly situated***, and prospectively to all juvenile offenders who may be subject to a sentence of life imprisonment without the possibility of parole." Id. at 545, 765 S.E.2d at 578 (emphasis added). The Court further provided that "***any individual affected by our holding*** may file a motion for resentencing within one year from the

filing of this opinion in the court of general sessions where he or she was originally sentenced." Id. at 545, 765 S.E.2d at 578 (emphasis added). Thus, it is logical to conclude that the Aiken Court did not mean to restrict its interpretation of the applicability of Miller to only those cases specifically denominated "life without parole," but rather intended to provide relief to anyone "irrevocably sentenced . . . to a lifetime in prison." Id. at 543, 765 S.E.2d at 577.

Application of Miller to De Facto Life Sentences

The concept of a de facto life sentence is not novel. Though a different context, in State v. Kimbrough, 212 S.C. 348, 357, 46 S.E.2d 273, 277 (1948), our Supreme Court remanded for resentencing where it found: "From the evidence the jury evidently concluded that appellant should not receive the maximum punishment of life imprisonment, but the [thirty-year] sentence imposed is to all intents and purposes the equivalent of a life sentence, which is the highest punishment permitted for the most aggravated form of the crime." In United States v. Pileggi, 703 F.3d 675, 678 (4th Cir. 2013), the Fourth Circuit Court of Appeals referenced its prior remand for resentencing where the district court imposed "a *de facto* life sentence" of 50 years contrary to its extradition agreement with Costa Rica that Pileggi "would not receive a penalty of death or one that requires that he spend the rest of his natural life in prison.").

The strongest support for the circuit court's determination that Miller and Aiken apply to a de facto LWOP sentence is common sense. The Maryland Court of Appeals found that "common sense" dictates that a sentence stated as a term of years for a juvenile offender can constitute a de facto life sentence for purposes of the Eighth Amendment. Carter v. State, 2018 WL 4140672 at *23 (Md. Aug. 29, 2018). "Otherwise, the Eighth Amendment proscription against cruel and unusual punishment in the context of a juvenile offender could be circumvented

simply by stating the sentence in numerical terms that exceed any reasonable life expectancy rather than labeling it a 'life' sentence." Id.

Various courts around the country have recognized de facto life sentences specifically in the context of finding them unconstitutional if imposed without compliance with the requirements of Graham and Miller. The Third, Seventh, Ninth, and Tenth Circuits have held that the Eighth Amendment prohibits de facto LWOP sentences for juvenile offenders who are not incorrigible. See United States v. Grant, 887 F.3d 131 (3rd Cir. 2018) (on appeal from resentencing, holding that a term-of-years sentence that meets or exceeds the life-expectancy of a non-incorrigible juvenile offender violates the Eighth Amendment); Budder v. Addison, 851 F.3d 1047 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 475 (2017) (on AEDPA review, concluding that aggregate sentence resulting in parole eligibility at age 131 was barred by Graham, stating: "we cannot read the Court's categorical rule as excluding juvenile offenders who will be imprisoned for life with no hope of release for nonhomicide crimes merely because the state does not label this punishment as 'life without parole'" and observing that "[l]imiting the Court's holding by this linguistic distinction would allow states to subvert the requirements of the Constitution by merely sentencing their offenders to terms of 100 years instead of 'life'" and "[t]he Constitution's protections are not so malleable"); McKinley v. Butler, 809 F.3d 908 (7th Cir. 2016) (on appeal from denial of federal habeas relief, finding that Miller's "children are different" language "cannot logically be limited to de jure life sentences, as distinct from sentences denominated in number of years yet highly likely to result in imprisonment for life"); Moore v. Biter, 725 F.3d 1184 (9th Cir. 2013) (on AEDPA review, finding that aggregate sentence resulting in parole eligibility at age 127 was "irreconcilable with Graham's mandate

that a juvenile nonhomicide offender must be provided 'some meaningful opportunity' to reenter society and thus unconstitutional under Graham."

Many states also recognize that applicability of the principles of Graham and Miller to de facto life sentences. See **California:** People v. Caballero, 282 P.3d 291 (Cal. 2012) (sentence of 110-years-to-life unconstitutional under Graham); People v. Franklin, 370 P.3d 1053, 1059 (Cal. 2016), *cert. denied* 137 S. Ct. 573 (2016) (holding "a juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in Miller," though Franklin's claim was mooted by the passage of a statute providing parole eligibility after 25 years for certain juvenile offenders); People v. Contreras, 411 P.3d 445 (Cal. 2018) (co-defendants' sentences of 50-years-to-life and 58-years-to-life were unconstitutional under Graham, clarifying that sentences need not exceed life expectancy to deprive juvenile of meaningful opportunity for release); **Connecticut:** State v. Riley, 110 A.3d 1205 (Conn. 2015) (Miller applicable to 100-year sentence); Casiano v. Commissioner, 115 A.3d 1031 (Conn. 2015) (Miller applicable to 50-year sentence); **Florida:** Henry v. State, 175 So. 3d 675 (Fla. 2015) (Graham applicable to aggregate 90-year sentence); Atwell v. State, 197 So. 3d 1040 (Fla. 2016) (Miller applicable to life with parole sentence); Tarrand v. State, 199 So.3d 507 (Fla. Dist. Ct. App. 2016) (Miller applicable to 51-year sentence); **Illinois:** People v. Reyes, 63 N.E.3d 884 (Ill. 2016) (Miller applicable to aggregate 97-year sentence); **Indiana:** Brown v. State, 10 N.E.3d 1 (Ind. 2014) (aggregate sentence of 150 years "forswears altogether the rehabilitative ideal" and exercising state constitutional authority to impose a lesser sentence); **Iowa:** State v. Null, 836 N.W.2d 41, 71 (Iowa 2013) (52.5 year minimum sentence cruel and unusual in violation of Iowa Constitution); State v. Pearson, 836 N.W.2d 88 (Iowa 2013) (sentence of 55-years with parole eligibility after service of 35 years implicated Miller and Null); State v. Ragland, 836 N.W.2d

107 (Iowa 2013) (Miller applicable to commuted sentence of life with possibility of parole after 60 years); State v. Sweet, 879 N.W. 2d 811, 839 (Iowa 2016) (adopting a categorical rule that juvenile offenders may not be sentenced to life without the possibility of parole under the Iowa Constitution); **Louisiana:** State ex rel. Morgan v. State, 217 So. 3d 266 (La. 2016) (Graham applicable to 99-year sentence and requiring parole eligibility in accordance with subsequently enacted juvenile parole eligibility statute); **Maryland**: Carter v. State, 2018 WL 4140672 (Md. Aug. 29, 2018) (Graham applicable to aggregate sentence with parole eligibility after 50 years); **Missouri:** State ex rel. Carr v. Wallace, 527 S.W.3d 55 (Mo. 2017) (Miller applicable to sentence of life with parole eligibility after 50 years); **Montana:** Steilman v. Michael, 407 P.3d 313, 319-20 (Mont. 2017) (Miller applicable to de facto life sentences, but sentence with possible release after 31.33 years not prohibited); **Nevada:** State v. Boston, 363 P.3d 453 (Nev. 2015) (Graham applicable to aggregate sentences of life with parole eligibility after 100 years); **New Jersey:** State v. Zuber, 152 A.3d 197 (N.J. 2017), *cert. denied*, 138 S. Ct. 152 (2017) (Miller applicable to minimum sentences of 55 years and 68.25 years); **New York:** Hawkins v. N.Y. DOC, 30 N.Y.S. 3d 397 (N.Y. App. Div. 2016) (sentence of 22-years-to-life requires Miller considerations at parole hearing); **Ohio:** State v. Moore, 76 N.E.3d 1127 (Ohio 2016), *cert. denied* 138 S. Ct. 62 (2017) (Graham applicable to aggregate sentence of 112 years with parole eligibility after 77 years); **Oregon:** Kinkel v. Persson, 363 Or. 1 (2018), *cert. pending* (upholding 111-year aggregate sentence, finding record from six-day sentencing hearing established that defendant was within the class of rare juveniles who, as Miller recognized, may be sentenced to life without possibility of parole for a homicide); **Washington:** State v. Ronquillo, 361 P.3d 779 (Wash. Ct. App. 2015) (Miller applicable to aggregate 51.3-year sentence); State v. Keodara, 364 P.3d 777 (Wash. Ct. App. 2015) (Miller applicable to aggregate 69.25-year sentence); State v.

Ramos, 387 P.3d 650 (Wash. 2017), *cert. denied*, 138 S. Ct. 467 (2017) (Miller applicable to "any juvenile offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation," whether a sentence for a single crime or an aggregated sentence for multiple crimes); **Wyoming:** Bear Cloud v. State, 334 P.3d 132, 142 (Wyo. 2014) (Miller applicable to aggregate sentence with parole eligibility after 45 years); Sam v. State, 401 P.3d 834 (Wyo. 2017), *cert. denied* 138 S. Ct. 1988 (2018) (Miller applicable to aggregate sentence with earliest parole eligibility after serving 52 years).

While no two opinions are identical, much like our Court did in Aiken, these courts have begun their analysis with a review of the reasoning and principles espoused in Graham and Miller. See Aiken, 410 S.C. at 542-43, 765 S.E.2d at 576-77 ("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."). In 2013, the Iowa Supreme Court found that Miller's "reasoning" and "core teachings" were applicable to de facto life sentences. Pearson, 836 N.W.2d at 95-96. The Wyoming Supreme Court similarly held that "the teachings of the Roper/Graham/Miller trilogy require sentencing courts to provide an individualized sentencing hearing to weigh the factors for determining a juvenile's 'diminished culpability and greater prospects for reform' when . . . the aggregate sentences result in the functional equivalent of life without parole." Bear Cloud v. State, 334 P.3d at 141-42. The Court explained:

> To do otherwise would be to **ignore the reality that lengthy aggregate sentences have the effect of mandating that a juvenile die in prison** even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate. **Such a lengthy 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 juvenile convict], he will remain in**

> **prison for the rest of his days. That is exactly the result that Miller held was unconstitutional.**

Id. at 142 (emphasis added) (internal quotations and citations omitted).

In 2015, the Connecticut Supreme Court wrote: "The United States Supreme Court viewed the concept of 'life' in Miller and Graham more broadly than biological survival; it **implicitly endorsed** the notion that an individual is effectively incarcerated for 'life' if he will have no opportunity to truly reenter society or have any meaningful life outside of prison." Casiano, 115 A.3d at 1036 (emphasis added). Two years later, the New Jersey Supreme Court held:

> Miller's command that a sentencing judge take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison, **applies with equal strength to a sentence that is the practical equivalent of life without parole.** Defendants who serve lengthy term-of-years sentences that amount to life without parole should be no worse off than defendants whose sentences carry that formal designation. **The label alone cannot control; we decline to elevate form over substance.**

Zuber, 152 A.3d at 211-12 (emphasis added) (internal quotations and citations omitted). Finally, the Washington Supreme Court recognized:

> **Regardless of labeling**, it is undisputed that Ramos was in fact sentenced to die in prison for homicide offenses he committed as a juvenile. Miller **plainly provides** that a juvenile homicide offender cannot be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation unless the offender first receives a constitutionally adequate Miller hearing.

Ramos, 387 P.3d at 661 (emphasis added).

The Third Circuit provided the following summary of its reasoning for holding that "[a] term-of-years sentence without parole that meets or exceeds the life expectancy of a juvenile offender who is still capable of reform is inherently disproportionate and therefore violates the Eighth Amendment under both Miller and Graham":

> We reach this conclusion for three reasons. First, Miller reserves the sentence of LWOP *only* for juvenile homicide offenders "whose crimes reflect permanent incorrigibility." Second, the Supreme Court's concerns about the diminished penological justification for LWOP sentences for juvenile offenders apply with equal strength to de facto LWOP sentences. Third, de facto LWOP is irreconcilable with Graham and Miller's mandate that sentencing judges must provide non-incorrigible juvenile offenders with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

Grant, 887 F.3d at 142. The Seventh Circuit similarly reasoned that Miller's "children are different" language "cannot logically be limited to de jure life sentences, as distinct from sentences denominated in number of years yet highly likely to result in imprisonment for life." McKinley, 809 F.3d at 911.

While not binding authority upon the circuit court or this Court, the reasoning of these cases is significant and persuasive. It is notable that several of the jurisdictions cited *supra* properly found, like Aiken, that Miller applied retroactively even prior to the United States Supreme Court's ruling in Montgomery. Aiken, 410 S.C. at 540, 765 S.E.2d at 575 (holding Miller applies retroactively); Ragland, 836 N.W.2d at 114-17 (Iowa 2013) (same); People v. Davis, 6 N.E.3d 709 (Ill. 2014) (same); State v. Mares, 335 P.3d 487, 504-08 (Wyo. 2014) (same); Falcon v. State, 162 So. 3d 954, 960-62 (Fla. 2015) (same); Casiano, 115 A.3d at 1035, 1037-43 (Conn. 2015) (same); see Montgomery, 136 S. Ct. at 736 (holding that Miller announced a new substantive constitutional rule that was retroactive on state collateral review). The similarity in their reasoning on that point strengthens their persuasiveness on the matter of Miller's applicability to de facto life sentences.

Distinguishing Cases Cited by Appellant

"Appellant acknowledges, as the Supreme Court held, fundamental differences between juveniles and adults affect the proportionality analysis under the Eighth Amendment." Brief of Appellant, p. 18. However, Appellant provides no explanation for how common sense can permit

such a narrow reading of Miller and Aiken so as to uphold the imposition of de facto life sentences without the constitutional protections that would otherwise be afforded if the sentence were called "LWOP." The cases cited by Appellant lend little support, as they either involved challenges to aggregate sentences or were decided by jurisdictions that, unlike Aiken, found Miller's reasoning limited to mandatory sentencing schemes.

The Fourth Circuit's unpublished opinion in Contreras v. Davis, 716 F. App'x 160, 163 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 2012 (2018), found Miller inapplicable because the imposition of his sentence was discretionarily imposed and he received the individualized sentencing hearing that Miller required. With Aiken's finding that Miller was applicable to our State's discretionary sentencing scheme and that pre-Miller hearings could not be saved by a review of their content, the reasoning of Contreras is of little force. The Contreras Court further noted that Contreras would be eligible for release under Virginia's geriatric release program, which they were "compelled to accept" as satisfying the Eighth Amendment.[8] 716 F. App'x at 163-64.

The four states cases provided from Arkansas, Missouri, Minnesota, and Arizona are also distinguishable from our Court's reasoning in Aiken and the facts of the present case.[9] In Hobbs v. Turner, 431 S.W.3d 283, 284-85 (Ark. 2014), the defendant was resentenced following Graham to an aggregate term of 55 years for multiple non-homicide offenses. Turner never argued that his sentence was an improper de facto life sentence. 431 S.W.3d at 286. Rather, he

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[8] As discussed *infra*, the State did not argue below that South Carolina's provisions for the release of terminally ill, geriatric, or permanently incapacitated inmates provides a meaningful opportunity for release. Thus, such an argument is unpreserved in this case. Moreover, our statute is also significantly distinguishable from the Virginia statute.

[9] Notably, legislation passed in Missouri, Arkansas, and Arizona that established parole eligibility for juvenile offenders. Mo. Ann. Stat. §§ 558.047, 565.033 (West); Ark. Code §§ 5-4-104, 5-10-101(c), 5-10-102(c), 16-93-621; Ariz. Rev. Stat. Ann. § 13-716.

argued that he was entitled to an individualized resentencing hearing, like that described in Miller. Id. The Court rejected that argument on the basis that Miller's individualized sentencing requirement was "inapplicable" to a nonhomicide offender. Id. at 289.

The remaining cases all involved challenges to aggregate sentences, which are distinguishable from the present case, where Mack was sentenced to 50 years for a single homicide offense. In State v. Kasic, 265 P.3d 410, 415 (Ariz. Ct. App. 2011), the Court upheld the defendant's aggregate sentence of 139.75 years, noting that the highest term for any single count was 15.75 years and concluding that "different considerations apply to consecutive term-of-years sentences based on multiple counts and multiple victims."[10] Id. at 416. In State v. Nathan, 522 S.W.3d 881, 885-88 (Mo. 2017), the Court determined that the Eighth Amendment is not violated when a juvenile offender is sentenced to consecutive, lengthy sentences for committing multiple nonhomicide offenses along with a homicide offense because Graham was "limited to juvenile offenders sentenced to life without parole **solely for a nonhomicide offense**." (emphasis in original) (citing Bunch v. Smith, 685 F.3d 546, 547-51 (6th Cir. 2012) (on AEDPA review, finding 89-year sentence did not violate clearly established federal law under Graham). The Nathan Court found no violation of Miller because Nathan was given an individualized sentencing hearing, his sentence was discretionarily imposed, and Miller did not address the validity of consecutive sentences. 522 S.W.3d at 888-90.

In State v. Ali, 895 N.W.2d 237, 241 (Minn. 2017), *cert. denied* 138 S. Ct. 640 (2018), the Court upheld the defendant's 90-year aggregate sentence for three homicides he committed

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[10] Between August 2007 and August 2008, Kasic committed a series of arsons on the east side of Tucson. State v. Kasic, 265 P.3d 410, 411 (Ariz. Ct. App. 2011). Most of the fires involved occupied residences were the victims slept inside, but two involved palm trees. Id. at 411-12. Kasic was a juvenile when he committed four of the arsons. Id. at 413. He was ultimately convicted of thirty-two felonies. Id. at 415.

as part of the same incident. The Court ruled that absent further guidance from the Court, it would not apply the Miller/Montgomery rule to Ali and others similarly situated. 895 N.W.2d at 246. The dissenter in Ali, however, wrote: "[B]ecause the force and logic behind the principle that children are 'constitutionally different from adults in their level of culpability' undoubtedly encompass cases in which a juvenile defendant commits multiple offenses during a single criminal episode, as happened here, I respectfully dissent." Id. at 248 (Chutich, J., dissenting). Thus, it is the logic of the dissent in Ali that most mirrors the reasoning in Aiken. Aiken, 410 S.C. at 542–43, 765 S.E.2d at 576 ("However, we must give effect to the proportionality rationale integral to Miller's holding—youth has constitutional significance. As such, it must be afforded adequate weight in sentencing.").

In summary, the circuit court in Mack's case was tasked with interpreting our Supreme Court's decision in Aiken, which intentionally utilized open-ended language like "similarly situated" and "any individual affected." Aiken, 410 S.C. at 544-45, 765 S.E.2d at 577-78. The Aiken Court admittedly went beyond the explicit holding of Miller to give effect to the underlying rationale that implicitly required application of its principles to discretionary sentencing schemes. Id. at 542-43, 765 S.E.2d at 576; Montgomery, 136 S. Ct. at 734 ("Miller, then, 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.'"). With that in mind, the circuit court properly found that the cases from other jurisdictions applying Miller to de facto LWOP sentences were persuasive. The aspect of an LWOP sentence imposed upon a juvenile offender whose crime reflects "unfortunate yet transient immaturity" is not the denomination of the sentence as "life without parole." Rather, the Miller Court referenced how the differences in

children's culpability and capability to change "counsel against irrevocably sentencing them to a lifetime in prison" and removing all hope. 567 U.S. at 480. The Aiken Court similarly found that "the Miller Court unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole...." Aiken, 410 S.C. at 542, 765 S.E.2d at 576. Thus, the circuit court's interpretation of Aiken was not an expansion, but rather an effectuation of our Supreme Court's intent.

B. Respondent's fifty-year sentence constitutes a de facto life sentence such that he is entitled to resentencing.

The circuit court's determination that Mack's 50-year sentences constitutes a de facto LWOP did not rest on any one thing. Rather, the circuit court properly cited the remarks at sentencing that reflected Judge Newman's intention that Mack be imprisoned for life, Dolan's SCDC specific life expectancy study, other life expectancy sources, and cases from other jurisdictions holding similar term of years constituted de facto LWOP. To the extent Appellant argues that our state's geriatric release provision negates Mack's claim, such an argument is unpreserved and unpersuasive.

Judge Newman's Intention

The United States Sentencing Commission recognizes and defines a de facto life sentence as "one where the length of the sentence imposed is so long that the sentence is, for all practical purposes, a life sentence and likely was intended to be such by the judge who imposed it." Patti B. Saris, et al., U.S. Sent. Comm'n, Life Sentences in the federal system (Feb. 2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf; see also State v. Moore, 76 N.E.3d 1127,

1138, 1151 (Ohio 2016) (finding that the trial court "undoubtedly" aimed to sentence Moore to life in prison, as reflected in judge's comments: "I want to make sure you never get out of the penitentiary, and I'm going to make sure that you never get out of the penitentiary" and "[I]t is the intention of this court that you should never be released from the penitentiary.").

Here, when imposing Mack's 50-year sentence, Judge Newman said: "He's a lost cause as far as society is concerned. His future is not within society. His future, your future, is out of society. You've given up your freedom. You've given up the right to walk among free people." R. 31, ll. 11-14. He further told Mack: "[J]ust as you snuffed out his life you snuffed out your future just the same." R. 31, ll. 21-23. The Judge said that Mack would not be "out in a free society," had "given up [his] freedom" and right to "walk the streets." R. 32, ll. 1-4. Thus, any good deeds would have to be done "behind bars." R. 32, ll. 4-6. In admonishing Mack that his 50-year sentence was "more than you can count," it is apparent that Judge Newman utilized the lengthy term of years sentence for shock value and not because of any reasoned determination that Mack was not the rare offender for whom an LWOP sentence was proper. R. 32, ll. 7-12. Judge Newman's comments are prima facie evidence that Mack's 50-year sentence is a de facto LWOP sentence.

Life Expectancy Data

The life expectancy data presented here was not intended to predict Mack's specific date of death, but rather to educate the court on the reduced life expectancy associated with incarceration.[11] Further, Respondent needed to rebut the State's allegation that Mack would have ten years left to live beyond his age of release. See R. 125, ll. 1-22.

[11] Appellant asks this court to take judicial notice of Mack's inmate detail report and infer Mack's drug use from its contents. Brief of Appellant, p. 20. Rule 201(b)(2), SCRE, provides that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally

Ms. Dolan's study of SCDC male inmates revealed that they died an average of 20 years earlier than predicted by the U.S. population life tables. R. 156, l. 4 – 157, l. 5; R. 160, ll. 6-11. The use of inmates who died both during and following release was necessary to produce an accurate life table and to account for what years of life can be expected after any eventual release. Ms. Dolan's supplemental affidavit further revealed that inmates serving life sentences who entered SCDC between the ages of 16 and 19 died while incarcerated an average of **31.8 years earlier** than predicted by the U.S. population life tables. R. 315. The ACLU of Michigan study similarly revealed "a strong correlation between the number of years spent in prison and life expectancy resulting in further diminished life expectancy for those serving a natural life sentence." R. 283-284. The observed average age at death for Michigan youth sentenced to natural life was 50.6 years. R. 283-284.

Courts applying Graham and Miller to de facto life sentences have given varying levels of attention to life expectancy data. The Third Circuit requires that sentencing courts make a factual determination as to the offender's individual life expectancy, but also requires the courts

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known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." SCDC's own website contains the following disclaimer related to the "inmate search" feature:

> SCDC offers the Internet "inmate search" feature and the toll free inmate information line 1-866-SCSAVIN (1-866-727-2846) as a public service to interested citizens. While SCDC strives to ensure accuracy of this information, it makes no guarantees as to the reliability of the data. Under no circumstances will SCDC be liable for any damages, direct or indirect, with regard to any and all information obtained through the use of this service. Please report data errors or discrepancies via E-mail to corrections.info@doc.state.sc.us.

SCDC – Inmate Search, http://www.doc.sc.gov/InmateSearchDisclaimer.html. If SCDC itself cannot guarantee the reliability of the information on its site, this can hardly be the type of source "whose accuracy cannot reasonably be questioned" in order to support the taking of judicial notice. To the extent that this Court does consider Mack's disciplinary history, it must be cognizant that "[t]he purpose of a prison disciplinary proceeding is to maintain institutional order rather than to prosecute criminal conduct." State v. Blick, 325 S.C. 636, 642, 481 S.E.2d 452, 455 (Ct.App. 1997). Because prison disciplinary proceedings are not part of a criminal prosecution, "the full panoply of rights due a defendant in such proceedings does not apply." Wolff v. McDonnell, 418 U.S.539, 556 (1974).

to consider the age of retirement as a sentencing factor. United States v. Grant, 887 F.3d 131, 149-53 (3rd Cir. 2018). The Wyoming Supreme Court declined to make any projections as to the appellant's individual life expectancy but noted the United States Sentencing Commission's recognition of 470 months (39.17 years) as equal to a life sentence. Bear Cloud v. State, 334 P.3d 132 (Wyo. 2014); see R. 56.

On the other hand, the Iowa Supreme Court is often quoted for writing: "[W]hile some courts have concluded that whether potential release might occur within a defendant's life expectancy is a key factual issue, we do not believe the determination of whether the principles of Miller or Graham apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates." State v. Null, 836 N.W.2d 41, 71–72 (Iowa 2013) (internal citations omitted). Notably, the Iowa Court nonetheless remanded for resentencing where Null's aggregate sentences totaled 52.5 years, finding:

> [W]e believe that while a minimum of 52.5 years imprisonment is not technically a life-without-parole sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger Miller-type protections. Even if lesser sentences than life without parole might be less problematic, we do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of Graham or Miller. The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a "meaningful opportunity" to demonstrate the "maturity and rehabilitation" required to obtain release and reenter society as required by Graham.

Id. at 71. Other courts have noted equal protection concerns because life expectancy varies based on immutable characteristics like gender and race. See, e.g., People v. Contreras, 411 P.3d 446, 449-51 (Cal. 2018) (writing that "[a]lthough persons of different races and genders are not similarly situated in terms of life expectancy, it seems doubtful that considering such differences in juvenile sentencing would pass constitutional muster" and finding that the proper starting

point in considering the application to de facto life sentences "is not a life expectancy table but the reasoning of the high court in Graham").

The Connecticut Supreme Court rejected "the notion that, in order for a sentence to be deemed 'life imprisonment,' it must continue until the literal end of one's life." Casiano v. Comm'r, 115 A.3d 1031, 1045 (Conn. 2015). The court observed that general life expectancy statistics do "not account for any reduction in life expectancy due to the impact of spending the vast majority of one's life in prison" and cited several sources acknowledging the correlation between incarceration and reduced life expectancy. Id. at 1046. In the event a juvenile offender lives to be released, the Court noted his diminished prospects and increased risk for age-related diseases and disorders. Id. The Court wrote: "The United States Supreme Court viewed the concept of 'life' in Miller and Graham more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for 'life' if he will have no opportunity to truly reenter society or have any meaningful life outside of prison." Id. at 1047. Thus, the Court found: "In light of the foregoing statistics and their practical effect, a fifty year term and its grim prospects for any future outside of prison effectively provide a juvenile offender with "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." Id.

Regardless of the weight given to life expectancy data, many other jurisdictions have found Graham and Miller applicable to term of years sentences between fifty and sixty years. See Casiano v. Commissioner, 115 A.3d 1031 (Conn. 2015) (finding 50-year sentence constituted de facto LWOP); Tarrand v. State, 199 So.3d 507 (Fla. Dist. Ct. App. 2016) (same for 51-year sentence); State v. Null, 836 N.W.2d 41, 71 (Iowa 2013) (same for 52.5 year sentence); State v. Pearson, 836 N.W.2d 88 (Iowa 2013) (same for 55-year sentence with parole

eligibility after service of 35 years); State v. Ragland, 836 N.W.2d 107 (Iowa 2013) (same for sentence of life sentence with parole eligibilty after 60 years); Carter v. State, 2018 WL 4140672 (Md. Aug. 29, 2018) (same for sentence with parole eligibility after 50 years); State ex rel. Carr v. Wallace, 527 S.W.3d 55 (Mo. 2017) (same for sentence of life with parole eligibility after 50 years); State v. Zuber, 152 A.3d 197 (N.J. 2017), *cert. denied*, 138 S. Ct. 152 (2017) (same for sentence of 55 years); State v. Ronquillo, 361 P.3d 779 (Wash. Ct. App. 2015) (same for sentence of 51.75 years); Bear Cloud v. State, 334 P.3d 132, 142 (Wyo. 2014) (same for sentence with parole eligibility after 45 years); Sam v. State, 401 P.3d 834 (Wyo. 2017), *cert. denied* 138 S. Ct. 1988 (2018) (same for sentence with parole eligibility after 52 years). Thus, Judge Nettles' finding that Mack's 50-year sentence constitutes a de facto life sentence was not an abuse of discretion.

Geriatric Release Argument Unpreserved and Unpersuasive

In a footnote, Appellant discusses the United States Supreme Court's decision in Virginia v. LeBlanc, 137 S. Ct. 1726 (2017). See Brief of Appellant, p. 21 n.10. The LeBlanc Court reversed the Fourth Circuit Court of Appeals, finding that the Virginia Supreme Court did not unreasonably apply the Graham rule in holding that Virginia's geriatric release program satisfied Graham's requirement of parole for juvenile offenders. 137 S. Ct. at 1727-28. The LeBlanc Court recognized that reversal was required under the narrow standard required for relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Id. at 1729. The Court specifically wrote that its ruling "expresses no view on the merits of the underlying Eighth Amendment claim" and did not "suggest or imply that the underlying issue, if presented on direct review, would be insubstantial." Id.

Appellant suggested that "South Carolina utilizes a similar program" to Virginia and argued that "[a]t the very least, the presence of these programs tends to undercut the lesser estimate of life expectancy put forth below." Brief of Appellant, p. 21 n.10. This argument is not preserved, as it was not raised below. See State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an argument advanced on appeal but not raised and ruled on below is not preserved); State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) (issue not preserved for appeal where one ground is raised below and another ground is raised on appeal). Moreover, our state statute is not "similar" to that of Virginia. The Virginia statute provides:

> Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release. The Parole Board shall promulgate regulations to implement the provisions of this section.

Va. Code Ann. § 53.1-40.01 (West). The South Carolina statute provides for release to parole only by "the full parole board, upon a petition filed by the Director of the Department of Corrections" after issuing an order with "findings of fact that substantiate a legal and medical conclusion that the inmate is terminally ill, geriatric, permanently incapacitated, or a combination of these conditions, and does not pose a threat to society or himself." S.C. Code Ann. § 24-21-715 (B) and (C).

"Geriatric" is defined by the statute as "an inmate who is seventy years of age or older and suffers from chronic infirmity, illness, or disease related to aging, which has progressed so the inmate is incapacitated as determined by a licensed physician to the extent that the inmate does not pose a public safety risk." S.C. Code Ann. § 24-21-715(A)(2). "Terminally ill" requires an incurable condition "that will likely produce death within two years, and that is so debilitating that the inmate does not pose a public safety risk." S.C. Code Ann. § 24-21-

715(A)(1). "'Permanently incapacitated' means an inmate who no longer poses a public safety risk because of a medical condition that is not terminal but that renders him permanently and irreversibly incapacitated as determined by a licensed physician and which requires immediate and long term residential care." S.C. Code Ann. § 24-21-715(A)(3).

Thus, the South Carolina statute does not permit the inmate himself to apply for release and imposes the additional requirement that the inmate be in poor health. Essentially, our statute operates to release SCDC from the responsibility and financial burden of caring for inmates who have so disintegrated in prison that they can no longer pose a danger to the public or their death is imminent. See S.C. Code Ann. § 24-21-715(A)(1)–(3). Notably, because Ms. Dolan's data reflected deaths of inmates that occurred both within SCDC and following release, any inmates released pursuant to S.C. Code Ann. § 24-21-715 would have been included in her analysis. See R. 143, l. 22 – 144, l. 25; R. 170, l. 18 – 172, l. 8; R. 254-256. The existence of a so-called "compassionate release" program does nothing to negate Ms. Dolan's life expectancy findings or undermine the determination that Mack's 50-year sentence is a de facto LWOP sentence.

C. Respondent's original sentencing hearing was not sufficient to obviate the need for resentencing.

The presentation in this case did not come close to the individualized sentencing hearing required by Miller and Aiken, both of which were decided years after Mack's original sentencing. Though the Aiken Court did not require the sentencing proceedings to mirror the penalty phase of a capital case, it found that "the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings," in addition to the Miller factors. Id. at 544-45, 765 at 577. Here, plea counsel Carraway mentioned Mack's age, a few things about his background, and the role that

both gang involvement and familial influence played in the crime. See R. 15, l. 9 – 23, l. 23; R. 25, l. 18 – 26, l. 21. The solicitor argued: "[T]he fact that he was as young as he was to me, that just makes it more disturbing that he was capable of doing what he did." R. 25, ll. 11-13. The sentencing judge made no reference to Mack's youth, except to say that the sentence was "not about the future years of Mr. Mack" but rather the lack of future years of Mr. Dorsey (decedent). R. 30, l. 20 – 31, l. 14. Mack's sentence was based purely on retribution and incapacitation, which the Miller court found less applicable to sentences of minors as opposed to adults. 132 S. Ct. at 2464-65.

Even so, this Court need not analyze how the various statements and arguments made at Mack's sentencing hearing could have related to the hallmark features of youth, the family and home environment that surrounded the offender, the circumstances of the homicide offense, the incompetencies associated with youth, and the possibility of rehabilitation. See Aiken, 410 S.C. at 544, 765 S.E.2d at 577. The Aiken majority specifically rejected the dissent's suggestion that the Court evaluate each petitioner's case to determine the adequacy of the original sentencing hearing. Aiken, 410 S.C. at 543 n.8, 765 S.E.2d at 577 n.8. Rather, the Aiken majority found that "although some of the hearings touch on the issues of youth, none of them approach the sort of hearing envisioned by Miller where the factors of youth are carefully and thoughtfully considered." 410 S.C. at 543, 765 S.E.2d at 577. The Court explained that the underlying sentencing hearings "suffer from a constitutional defect—the failure to examine the youth of the offender through the lens mandated by Miller." 410 S.C. at 543 n.8, 765 S.E.2d at 577 n.8. Thus, it was not matter of an abuse of discretion by the sentencing judge because the sentencing courts did not have the benefit of Miller to shape their inquiries. Id. However, the resentencing judge will have the opportunity to exercise their discretion within the proper framework. Id.

Here, too, the constitutional deficiency in Mack's hearing was not the fault of plea counsel, the solicitor, or the plea court. Nonetheless, the constitutional deficiency exists.

The Montgomery Court wrote: "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." 136 S. Ct. at 734 (internal quotations omitted). The Court concluded that "prisoners like Montgomery 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.

Subsequently, in Justice Sonia Sotomayor's concurring decision in Tatum, she explained:

> On the record before us, none of the sentencing judges addressed the question Miller and Montgomery require a sentencer to ask: whether the petitioner was among the very "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.... It is clear after Montgomery that the Eighth Amendment requires more than mere consideration of a juvenile offender's age before the imposition of a sentence of life without parole. It requires that a sentencer decide whether the juvenile offender before it is a child "whose crimes reflect transient immaturity" or is one of "those rare children whose crimes reflect irreparable corruption" for whom a life without parole sentence may be appropriate. There is thus a very meaningful task for the lower courts to carry out on remand.

Tatum v. Arizona,137 S. Ct. 11, 12-13 (Mem.) (2016) (J. Sotomayor, concurring). Thus, both our Supreme Court and the United States Supreme Court have made clear that a pre-Miller sentencing hearing will not be saved by a review of its contents, even when it reveals some discussion of the defendant's youth.

Therefore, the circuit court properly determined that Mack never received the individualized sentencing hearing required under Miller and Aiken.

CONCLUSION

Based on the foregoing, Respondent Ronald Mack respectfully requests that this Court dismiss the State's improper interlocutory appeal (Issue I), or alternatively, affirm the order denying the State's motion to dismiss and granting Respondent an individualized resentencing hearing (Issue II).

Susan B. Hackett
Appellate Defender
ATTORNEY FOR RESPONDENT

This 29th day of October, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Michael G. Nettles, Circuit Court Judge

THE STATE,

APPELLANT,

V.

RONALD HAKEEM MACK,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Respondent in the above referenced case has been served upon Sherrie Butterbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of October, 2018.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 29th day of October, 2018.

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