

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

THE STATE,

RESPONDENT,

V.

MARCUS CHANNING JOHNSON,

APPELLANT

APPELLATE CASE NO. 2017-000293

Appeal from Pickens County

Eugene C. Griffith, Circuit Court Judge

Opinion No. 2018-UP-437

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SC Court of Appeals

PETITION FOR REHEARING

On December 5, 2018, this Court affirmed Appellant's sentence in an unpublished opinion. State v. Johnson, 2018-UP-437 (S.C. Ct. App. filed Dec. 5, 2018). Pursuant to Rule 221(a), SCACR, Petitioner respectfully requests this Court rehear the matter based upon significant points overlooked and/or misapprehended by this Court in arriving at its conclusion.

On appeal, Appellant challenged the trial judge sentencing him to life without parole (LWOP) because the sentence was excessive and disproportionate in light of Appellant's intellectual functioning and the statistical data illuminating the life expectancies of incarcerated individuals. In a per curiam opinion, this Court appeared to conclude that incarcerating

Appellant for life without the possibility of parole was not in violation of the federal or state constitutions. Appellant respectfully requests this Court rehear the matter to address the significant points examined in his brief regarding the evolving standards of decency regarding LWOP sentences.

“The Eighth Amendment prohibits punishment considered ‘Cruel and Unusual’ at the time the Bill of Rights was adopted.” State v. Wilson, 306 S.C. 498, 509, 413 S.E.2d 19, 25 (1992) (citing Solem v. Helm, 463 U.S. 277 (1983)). However, “[t]he Eighth Amendment analysis does not stop with the examination of the intent of the framers of the Constitution.” Id. at 509, 413 S.E.2d at 26. “To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to ‘the evolving standards of decency that mark the progress of a maturing society.’” Graham v. Florida, 560 U.S. 48, 58 (2010)(quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)). “Embodied in the Constitution’s ban on cruel and unusual punishment is the ‘precept of justice that punishment for the crime should be graduated and proportioned to [the] offense.’” Id. at 59 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)). When “considering the constitutionality of a punishment in the abstract,” the court is “guided by two principles,” “[f]irst, the historical principle that the cruel and unusual punishment clause is designed to prevent inhuman and barbarous treatment,” and “[s]econd, that the sentence must not be grossly out of proportion with the severity of the crime.” Stockton v. Leeke, 269 S.C. 459, 462, 237 S.E.2d 896, 897 (1977).

Over the years, the cases addressing the proportionality of sentences have developed along two general lines. The first is concerned with the particular circumstances of the case and whether the defendant’s sentence for a term of years is grossly disproportionate given the particular offense. Graham, 560 U.S. at 59; Harmelin v. Michigan, 501 U.S. 957, 1005 (1991). The second

classification of cases is concerned with categorical rules as applied to groups of offenses or groups of offenders. Graham, 560 U.S. at 60-61. In recent years, there has been a convergence of the two.

The common theme throughout the “modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime.” Williams v. People of State of N.Y., 337 U.S. 241, 247 (1949). One area in which this focus is clear is ensuring that a sentence corresponds with an individual’s level of culpability.

In Enmund v. Florida, 458 U.S. 782, 798 (1982), the United States Supreme Court held the Eighth Amendment prohibited treating individuals the same when their culpability was not the same. At most, the state’s case against Enmund supported an inference that Enmund was the person in the car at the side of the road at the time of the killings, waiting to help the robbers escape. Id. at 788. There was no evidence that Enmund took life, attempted to take life, or intended to take life. Id. The Court concluded society had rejected the death penalty for accomplice liability in felony murders based upon (1) state laws prohibiting the practice or permitting minimal participation to be a mitigating circumstance and (2) sentencing decisions by juries repudiating imposition of the death penalty for accomplices. Id. at 789-796. In arriving at its conclusion, the Court explained the question of the disproportionality of the sentence required “[t]he focus” to be on Enmund’s culpability. Id. at 798.

Examining the deterrence goal of sentencing schemes, the Court determined the threat of capital punishment for murder would not deter “one who does not kill and has no intention or purpose that life will be taken.” Id. at 798-799. Regarding the goal of retribution through sentencing, the Court explained “this very much depends on the degree of Enmund’s culpability – what Enmund’s intentions, expectations, and actions were.” Id. at 800. “American criminal law has long considered a defendant’s intention – and therefore his moral guilty – to be critical to ‘the

degree of [his] criminal culpability.” Id. (quoting Mullaney v. Wilbur, 421 U.S. 684, 698 (1975)). An individual’s “punishment must be tailored to his personal responsibility and moral guilt.” Id. at 801.

In Atkins, the Court surveyed the state legislative actions related to executing intellectually disabled individuals. Atkins, 536 U.S. 304, 313 (2002). After reviewing the legislatures that had banned the practice or had contemplated such a ban, the Court concluded that it was “not so much the number of these states that is significant, but the consistency of the direction of change.” Id. at 315. The Court found the “number of states prohibiting the execution of mentally retarded persons” though small was “powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.” Id. at 315-316. Examining the number of individuals with intellectual disability executed in states where the practice was permissible, the Court concluded “the practice” of executing intellectually disabled people had “become truly unusual” and that it was “fair to say that a national consensus ha[d] developed against it.” Id. at 316.

Individuals with intellectual disability “by definition” “have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.” Id. at 318. “Abundant evidence” shows the intellectually disabled “often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.” Id. “Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.” Id.

After identifying retribution and deterrence as the “social purposes served by the death penalty,” the Court examined whether executing intellectually disabled people served those

purposes. Id. at 318-319. Concerning retribution, the Court concluded that “[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the state, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.” Id. at 319.

Turning to deterrence, the Court explained “[e]xempting the mentally retarded from the punishment will not affect the cold calculus that precedes the decision of other potential murderers” because “that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders.” Id. at 319-320 (internal quotation omitted). Thus, a categorical bar on executing the intellectually disabled was appropriate. Id. at 319.

“The reduced capacity of mentally retarded offenders provide[d] a second justification for a categorical rule making such offenders ineligible for the death penalty.” Id. at 320. With the intellectually disabled there was an enhanced risk of false confessions, a lesser ability to a persuasive showing of mitigation, a lesser ability to give meaningful assistance to counsel, a decreased ability to be a good witness, and a risk “their demeanor may create an unwarranted impression of lack of remorse for their crimes.” Id. at 320-321. Ultimately, the Court concluded that executing the intellectually disabled was “excessive” and in violation of the Eighth Amendment. Id. at 321.

In Roper v. Simmons, 543 U.S. 551 (2005), the Court held death sentences for juveniles were cruel and unusual punishment. In Roper, the Supreme Court established a categorical ban on the death penalty for juveniles relying in large part on social science research indicating that youths have a lessened culpability and are less deserving of the most severe punishments. 543 U.S. at 569-75. Juvenile offenders are fundamentally different from adults for purposes of sentencing for three reasons: (1) they are immature and have “an underdeveloped sense of responsibility;” (2) they “are

more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;” and (3) their characters are “not as well formed” as adults. Id. at 569-70 (internal citations omitted). “It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” Id. at 573. Therefore, “juvenile offenders cannot with reliability be classified among the worst offenders.” Id.

A few years after Roper, the Court held that a LWOP sentence imposed upon a juvenile for a non-homicide offense violated the Eighth Amendment’s ban on cruel and unusual punishment. Graham v. Florida, 560 U.S. 48 (2010). The Supreme Court held that “for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole.” Id. at 74. Just as the Court did in Roper, the Graham Court, relied upon developments in social science demonstrating the fundamental differences between juveniles and adults:

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

Id. at 68 (internal citations omitted). Based upon the differences between adults and children, the Court concluded that while “[a] juvenile is not absolved of responsibility for his actions,” his transgressions are “not as morally reprehensible as that of an adult.” Id. at 68 (internal citations omitted).

The Court explained the decision was “necessary to prevent the possibility that life without parole sentences will be imposed on juvenile non-homicide offenders who are not sufficiently culpable to merit that punishment.” Id. at 74. Although “[a] state is not required to guarantee the

eventual freedom to a juvenile offender convicted of a non-homicide crime,” the state must “give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” Id.

Continuing the trend of examining the culpability of the offender, when presented with the question of whether mandatory LWOP sentences for juveniles in homicide cases violated the Eighth Amendment, the Supreme Court held they did. Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 2464 (2012). In Miller, the Court continued the evolution of Eighth Amendment jurisprudence. The Court extended the reasoning of Roper and Graham by holding that mandatory sentences of LWOP for juvenile homicide offenders also violates the Eighth Amendment’s prohibition on cruel and unusual punishment. Miller, 132 S.Ct. at 2460. This was a categorical ban. However, the Court further explained that while the decision did not foreclose imposition of a sentence without the possibility of a parole on a juvenile convicted of a homicide offense, the Court required the sentencer “to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” Id. at 2469. This was the convergence of the two lines of reasoning in Eighth Amendment jurisprudence – the categorical ban and grossly disproportionate sentences.

“The Eighth Amendment’s prohibition of cruel and unusual punishment ‘guarantees individuals the right not to be subjected to excessive sanctions.’” Id. at 2463 (quoting Roper, 543 U.S. at 560). The Miller Court emphasized that “proportionality is central to the Eighth Amendment.” Id. Focusing on the concept of individualized sentencing, the Court recognized “that children are constitutionally different from adults for purposes of sentencing.” Children “have diminished culpability and greater prospects for reform,” and therefore, “they are less deserving of the most severe punishments.” Id. at 2464 (quoting Graham, 560 U.S. at 68). “[T]he distinctive

attributes of youth diminish penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.” Id. at 2465. The Miller Court repeatedly focused on the notion that the character traits of children are “more transitory and less fixed.” Id. at 2464. Children by definition lack maturity and responsibility; thus, they are more likely to act with “recklessness, impulsivity, and needless risk-taking.” Id. The Court eloquently explained that due to the innate characteristics of children at large, there is a “great difficulty ... of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” In fact, the Court stated “incurrigibility is inconsistent with youth.” Id. at 2469. The Court emphasized the potential for reform present in all juveniles. The Court emphasized the mitigating qualities of youth and noted “[i]t is a time of immaturity, irresponsibility, impetuosity[,] and recklessness.” Id. at 2467 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

In Aiken v. Byars, 410 S.C. 534, 540-541, 765 S.E.2d 572, 575-576 (2014), the South Carolina Supreme Court held that Miller “unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole.” Id. at 542, 765 S.E.2d at 576. Thus, the Court determined “an individualized sentencing proceeding before imposing a sentence of life without parole on a juvenile offender” was required. Id. Recognizing that Miller “did not expressly extend its ruling to states such as South Carolina whose sentencing scheme *permits* a life without parole sentence to be imposed on a juvenile offender but does not *mandate* it,” the Court held it “must give effect to the proportionality rationale integral to Miller’s holding – youth has constitutional

significance.” Id. at 542-543, 765 S.E.2d at 576. Therefore, youth “must be afforded adequate weight in sentencing.” Id. at 543, 765 S.E.2d at 576.

Quite simply, the Court concluded, “Miller does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant’s juvenility on the sentence rendered.” Id. at 543, 765 S.E.2d at 577. Accordingly, the Court held the requirement that sentencing judge must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison” “deserves universal application.” Id. (internal quotations omitted). The Court held the class of petitioners in the case “and those similarly situated” were “entitled to resentencing to allow the inmates to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight.” Id. at 544, 765 S.E.2d at 577. See also Montgomery v. Louisiana, 136 S.Ct. 718 (2016).

As demonstrated, when the Supreme Court examined sentences for gross disproportionality, the Court used a three-part test:

First, courts look to the gravity of the offense and the harshness of the penalty. Second, it may be helpful to compare the sentence to sentences imposed on other criminals in the same jurisdiction. ... Third, courts may also compare sentences imposed for the commission of the same crime in other jurisdictions.

State v. Harrison, 402 S.C. 288, 294-295, 741 S.E.2d 727, 730 (2013) (internal citations omitted).

“[I]n analyzing proportionality under the Eighth Amendment outside the capital context, South Carolina courts shall first determine whether a comparison between the sentence and the crime committed gives rise to an inference of gross disproportionality.” Harrison, 402 S.C. at 299-300, 741 S.E.2d at 733. “If no such inference is present, the analysis ends.” Id. at 300, 741 S.E.2d at 733. When the inference is present, “intra-jurisdictional and inter-jurisdictional analysis is appropriate.” Id. Also as demonstrated, when the Supreme Court has created categorical bars to

certain sentences or for certain individuals, the Court first considers “objective indicia of society’s standards, as expressed in legislative enactments and state practice” to determine whether there is a national consensus against the sentencing practice at issue. Graham, 560 U.S. at 61 (quoting Roper, 543 U.S. at 572); see also Wilson, 306 S.C. at 509, 413 S.E.2d at 26. Generally, the Court has relied on social science data and statistics to discern “society’s evolving standards of decency.” Roper, 543 U.S. at 560-77. “[G]uided by ‘the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose,’” the Court, in the exercise of its own independent judgment, then determines whether the punishment in question violates the Eighth Amendment to the Constitution. Graham, 560 U.S. at 61 (quoting Kennedy, 554 U.S. at 421).

With these principles in mind, the Oregon Supreme Court examined whether a mandatory sentence of seventy-five months for multiple sex offenses imposed on a person with intellectual disability violated the Oregon Constitution’s ban on excessive punishments. State v. Ryan, 396 P.3d 867, 875-877 (Ore. 2017). He argued the mandatory sentence was disproportionate as applied to him because it prohibited the court from considering his intellectual disability. Id. After examining the Supreme Court’s Eighth Amendment jurisprudence, the Oregon Supreme Court concluded “[e]vidence of an offender’s intellectual disability” “is relevant to a proportionality determination where sentencing laws require the imposition of a term of imprisonment without consideration of such evidence.” Id. at 877. According to the Court, “where the issue is presented, a sentencing court must consider an offender’s intellectual disability in comparing the gravity of the offense and the severity of a mandatory prison sentence on such an offender in a proportionality analysis.” Id.

Similarly, the Illinois Appellate Court examined whether a discretionary fifty-year sentenced imposed upon an intellectually disabled defendant violated the proportionate penalties clause of the state constitution. People v. Coty, 110 N.E.3d 1105 (Ill. App. Ct. 2018). After recounting recent decisions in Illinois, the court explained its “community’s standards of decency appear to have evolved to prohibit the imposition of de jure and de facto mandatory and discretionary life sentences for juveniles, where procedurally the court fails to consider the attendant characteristics of youth.” Id. at 1120. The court explained that it “must not forget that such jurisprudence [related to juveniles] began with Atkins and the Court’s concern with the intellectually disabled.” Id. In essence, “adults with intellectual disabilities should be treated similarly to minors.” Id. at 1121. “Intellectually disabled individuals, just like juveniles, are less culpable, where the deficiencies associated with intellectual disability ‘diminish their personal culpability.’” Id. (quoting Atkins, 536 U.S. at 318). “[J]ust as the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, the distinctive attributes of the intellectually disabled, who are by their very nature less culpable, diminish the interest in seeing that the offender gets his just deserts.” Id. (internal quotations and citations omitted). Ultimately, the Illinois Appellate Court concluded that its state constitution forbade the imposition of a de facto life sentence without the procedural safeguards of Miller upon the intellectually disabled. Id. at 1122-1124.

The Kansas Legislature prohibits the imposition of a sentence of death, life without the possibility of parole, or a mandatory term of imprisonment if a person convicted of capital murder has intellectual disability. Kan. Stat. Ann. § 21-6622(f); see also State v. Corbin, 386 P.3d 513, 516 (Kan. 2016). Likewise, Indiana forbids the imposition of a life without the possibility of parole sentence for someone convicted of capital murder if the person has an

intellectual disability. Ind. Code § 35-50-2-9(a). Thus, at least two state legislatures have determined that mandatory life imprisonment for intellectually disabled individuals does not comply with the country's evolving standards of decency.

In South Carolina, intellectually disabled “means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.” S.C. Code Ann. § 16-3-20(C)(b)(10); see also S.C. Code Ann. § 44-20-30(12). Imposing LWOP sentences on intellectually disabled individuals, such as Appellant, is cruel, unusual, and excessive under the federal and state constitutions.¹ By the nature of his intellectual disability, Appellant is less culpable than others convicted of the same offense. The justifications for the severe sentence of mandatory LWOP are not satisfied when such a sentence is imposed on the intellectually disabled. People who suffer from intellectual disability, such as Appellant, have cognitive and social functioning deficits, which undermine the retribution and deterrence purposes of the harsh punishment of LWOP.

Consistently, when the United States Supreme Court has confronted a class of criminal defendants who have lower levels of culpability, such as Appellant, the Court has recognized the requirement of individualized sentencing and the bar to mandatory sentencing. The modern body of law developed by the United States Supreme Court and our Court reinforces the notion that pursuant to the Eighth Amendment and the South Carolina Constitution, the sentence must fit the offender. A sentence of life imprisonment without the possibility of parole offends the

¹ At the guilty plea hearing, Appellant presented substantial evidence of his intellectual disability. R. 50-97. Appellant's IQ measured at 75 without any consideration of the Flynn effect or the standard error of measurement. R. 50-97. He repeated the first and second grades, performed poorly during three years of junior high, and finally stopped going to school during the tenth grade when he was failing all grades. R. 50-97. Appellant had difficulty managing money and relied upon the kindness of others to complete his job duties. R. 50-97. The crime for which Appellant pled guilty showed all the hallmarks of an intellectually disabled man manipulated by an intellectual superior. R. 31, l. 19 – R. 32, l. 13; R. 50-97.

evolving standards of decency when imposed on an individual suffering from cognitive deficits, an individual with diminished culpability due to his co-defendant taking advantage of his gullibility, and an individual with a life expectancy inside the department of corrections not expected to exceed much over fifty years of age. The Eighth Amendment requires the sentence imposed be proportional to the crime including consideration of the offender, particularly the offender's culpability. Sentencing Appellant to life imprisonment without the possibility of parole violates our society's notions of decency and proportionality in sentencing. Therefore, his sentence must be vacated.

Respectfully Submitted,



SUSAN B. HACKETT
Appellate Defender

This 14th day of December, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
Eugene C. Griffith, Circuit Court Judge

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Sherrie Butterbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Marcus Channing Johnson, #371396, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 11th day of December, 2018.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 14th day of December 2018.

Scott Levent (L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028