STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Allendale County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT LEE MILLER, III,

APPELLANT

APPELLATE CASE NO. 2017-001347

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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II. Did the trial judge violate Appellant's rights pursuant to the Fifth and Fourteenth Amendments to the Constitution by permitting the introduction of statements he gave during custodial interrogation where the totality of the circumstances, including, but not limited to Appellant's age, Appellant's low intellectual functioning, and the promises and threats issued by law enforcement, indicated the statements were not given pursuant to a voluntary, knowing, and intelligent waiver of his rights?

STATEMENT OF THE CASE

The state charged fifteen-year old Appellant with the June 17, 2014, murder of Willie Johnson. R. 2, ll. 4-6; R. 459. Appellant was arrested along with two other juveniles – one was sixteen and one was seventeen. R. 2, ll. 7-10. Due to his age, Appellant was charged as a juvenile offender. R. 2, ll. 4-13. The state sought to transfer jurisdiction to the Court of General Sessions from the Family Court. R. 2, l. 2 – R. 7, l. 6; R. 17, ll. 10-21. On March 24, 2015, the Honorable Gerald C. Smoak, Jr., convened a hearing on the state's motion. R. 1. Isaac McDuffie Stone, III, and Christine Grefe represented the state. R. 1. Kimberly Jordan and Stephanie Smart-Gittings represented Appellant. R. 1. At the conclusion of the hearing, Judge Smoak granted the state's motion to transfer jurisdiction to the Court of General Sessions. R. 22, l. 12 – R. 23, l. 24; R. 459.

Thereafter, on July 23, 2015, the Allendale County grand jury indicted Appellant for murder (2015-GS-03-0050). R. 477-478. The state, represented by Sean Thornton and Ann Fitz, called the case to trial before the Honorable R. Lawton McIntosh and a jury on July 11-14, 2016. R 25-26. Smart-Gittings represented Appellant. R. 26. The jury found Appellant guilty as charged. R. 397, l. 24 – R. 398, l. 4.

On June 5, 2017, the parties re-convened before Judge McIntosh for sentencing. R. 401. Smart-Gittings continued to represent Appellant, and Brian Hollen represented the state. R. 402. At the conclusion of the hearing, which included only argument by the lawyers and a colloquy between the deceased's son and the court, Judge McIntosh sentenced Appellant to fifty-five years imprisonment. R. 442, l. 25 – R. 443, l. 1; R. 479.

ARGUMENT

I. The court erred in sentencing Appellant to fifty-five years imprisonment, a *de facto* life sentence, for an offense committed as a juvenile where the court failed to place the burden of proving Appellant irreparably corrupt beyond a reasonable doubt on the state, and where the court did not find Appellant was irreparably corrupt, which is a finding that is necessary to sentence a juvenile to a *de facto* life sentence pursuant to the Eighth Amendment to the United States Constitution.

Standard of Review

"'In criminal cases, the appellate court sits to review errors of law only.'" State v. Vick, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009)(quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is "'bound by the trial court's factual findings unless they are clearly erroneous.'" Id. (quoting Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829). The reviewing court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." State v. Slocumb, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (Ct. App. 2015). "A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

Relevant facts

Defense counsel argued that for the judge to sentence Appellant to life imprisonment without the possibility of parole or to a *de facto* life sentence, the state must prove beyond a reasonable doubt that Appellant is irreparably correct. R. 403, l. 21 – R. 404, l. 13. Defense counsel explained the law provides a presumption that Appellant is not irreparably corrupt and

the state must overcome that presumption by proving that he is. R. 404, ll. 6-13. If the state could overcome that presumption, then the Court must consider the five factors. R. 404, ll. 6-13; R. 420, ll. 15-21. The judge refused to apply "the irreparably corrupt standard," stating he would consider the factors only. R. 405, l. 1 – R. 406, l. 25. At the conclusion of the hearing, defense counsel objected that the judge failed to make a finding of irreparable corruption, which was necessary prior to imposition of a *de facto* life sentence. R. 443, ll. 10-19.

In arguing for a sentence of LWOP, the state focused on the facts of the crime. R. 408, l. 6 – R. 414, l. 5; R. 417, ll. 20-25; R. 431, l. 13 – R. 432, l. 10. When addressing the Miller[1] factors, the solicitor acknowledged he was not "extremely familiar" with Appellant's background, but he explained that in his opinion "no matter how bad someone's upbringing might be it doesn't mean that they automatically resort to murder. There are people who overcome obstacles everyday despite how they are brought up. So, I don't believe that that is or should be a deciding factor in the length of his sentence." R. 409, l. 23 – R. 410, l. 5.

Defense counsel emphasized Appellant's chronological age at the time of the crime – a mere fifteen-years old. R. 419, ll. 20-22. Appellant was "a true juvenile," one who loved cartoons and carried a security blanket until he was twelve. R. 420, ll. 22-25. Appellant did not understand the consequences of his actions or being incarcerated. R. 421, ll. 14-17. Appellant expressed remorse for what happened. R. 422, ll. 6-7.

Appellant entered the foster care system at the age of four. R. 422, ll. 13-14. His mother physically abused him. R. 422, ll. 14-15; R. 426, ll. 6-7. Appellant lived in "several different foster cares, several different group homes." R. 422, ll. 17-18. Appellant's mother was neglectful – allowing her children to "walk the street all night." R. 423, ll. 21-22. Due to their

[1] Miller v. Alabama, 567 U.S. 460, 471 (2012).

mother's abuse of alcohol and drugs, Appellant and his siblings "raised themselves." R. 423, ll. 22-25. In six years, there were fifteen 911 calls from Appellant's mother's home. R. 5, ll. 21-23. According to the state's evidence, Appellant committed the crime with his older brother, Keshawn Bynum, and Bynum's friend, Gabriel Joyner. R. 427, ll. 12-15. Peer and familial pressures were clearly at play. R. 427, ll. 16-18. Appellant tried to protect his brother by taking the blame. R. 424, ll. 9-16; R. 427, ll. 18-21.

Due to Appellant's low intelligence, he struggled in school, requiring more individualized attention than the school system was equipped to provide. R. 422, l. 19 – R. 423, l. 1. His IQ was 76 and he had undeveloped cognitive and reasoning skills. R. 429, ll. 4-5; R. 429, ll. 11-14. He was fifteen-years old and still only in the eighth grade. R. 434, ll. 16-21. Appellant performed better academically while in DJJ due to the structured system and the opportunity for individualized lessons. R. 423, ll. 1-4. Appellant was diagnosed with ADHD and took medication until his father stopped the medication and counseling. R. 425, ll. 17-19. Appellant was very immature, rushing through activities without thinking. R. 426, ll. 14-17. Prior to the criminal charges, Appellant expressed sadness and stress. R. 426, ll. 18-20.

Appellant wanted to attend college and become a businessman. R. 425, ll. 5-7. Prior to being incarcerated, he raked yards, starting at eleven-years old. R. 425, ll. 8-10.

Appellant had limited experience with the criminal justice system, and he expressed a lack of understanding of his rights during his psychological evaluation. R. 428, ll. 5-10. Appellant "was too immature to appreciate the consequence of even being in law enforcement custody for so long all of those hours by himself late at night" during the interrogation. R. 428, ll. 18-20. In fact, Appellant went to sleep on the floor of the interrogation room after the interrogation. R. 428, ll. 20-23.

Appellant adjusted well to incarceration – he had *no* disciplinary infractions while at the county jail or while in DJJ. R. 429, l. 21 – R. 430, l. 1; R. 430, ll. 11-14; R. 441, l. 2 – R. 442, l. 7. Thus, Appellant demonstrated his ability to be rehabilitated. R. 430, ll. 2-5.

In sentencing Appellant to a *de facto* life sentence of fifty-five years, the judge acknowledged that Appellant had "little if any parental guidance" and that his older brother "seemed to influence his actions." R. 438, ll. 17-20; R. 443, l. 1. The judge agreed that Appellant's home environment and family weighed in favor of him because he did not have "much of an opportunity coming up." R. 439, ll. 14-15. The judge also agreed that Appellant's participation in the crime was the result of familial and peer pressure, explaining Appellant's older brother was his co-defendant and the other co-defendant was an older man as well. R. 440, ll. 7-10.

The judge found the "act itself was impetuous" but determined that Appellant's "fairly extensive record involving violence," including an unconvicted charge, mitigated against Appellant's impetuosity. R. 438, ll. 20-24. It was hard for the judge to fathom that someone "even somebody with a 76 IQ" could not "appreciate the risk of going in and beating an 80 something year old man to the point where his teeth scattered, his dentures were scattered around." R. 438, l. 25 – R. 439, l. 4. In short, the judge had trouble getting over the brutality of the crime. R. 439, ll. 4-9.

The judge disagreed with defense counsel, concluding Appellant had the ability to deal with law enforcement. R. 440, ll. 11-12. The judge found no evidence, other than Appellant's "mere age," to indicate that Appellant was unable to understand and deal with the police. R. 440, ll. 12-18. After considering the arguments presented, Judge McIntosh sentenced Appellant to a *de facto* life sentence of fifty-five years without requiring the state to prove Appellant is

irreparably corrupt beyond a reasonable doubt and without making a finding that Appellant is irreparably corrupt. This violated the Eighth Amendment.

Discussion

"[C]hildren are constitutionally different from adults for purposes of sentencing." Miller v. Alabama, 567 U.S. 460, 471 (2012). Beginning with its decision in Roper v. Simmons, 543 U.S. 551 (2005), the Supreme Court began a steady evolution of juvenile justice jurisprudence. In Roper, the Court held death sentences for juveniles were cruel and unusual punishment. Four years later, the Court held that a LWOP sentence imposed upon a juvenile for a non-homicide offense violated the Eighth Amendment's ban on cruel and unusual punishment. Graham v. Florida, 560 U.S. 48 (2010). When presented with the question of whether mandatory life without parole (LWOP) sentences for juveniles in homicide cases violated the Eighth Amendment, the Supreme Court held they did. Miller, 567 U.S. at 479.

Not long after the Court's opinion in Miller, our Supreme Court reviewed non-mandatory life sentences for juveniles in South Carolina through the lens of Eighth Amendment jurisprudence. In Aiken v. Byars, 410 S.C. 534, 540-541, 765 S.E.2d 572, 575-576 (2014), the South Carolina Supreme Court held that Miller applied retroactively and to juveniles who were sentenced to non-mandatory terms of life without parole. Finding that "Miller does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered," the Court held the sentencing judge must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" and that this requirement "deserves universal application." Id. at 543, 765 S.E.2d at 577. The Court held the class of petitioners in the case "and those similarly situated" were "entitled to resentencing to allow the

inmates to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight." Id. at 544, 765 S.E.2d at 577.

Following Miller, courts have confronted the question of what constitutes a "life without parole sentence," particularly, considering the Court's mandate that juvenile offenders *must* be afforded a *meaningful opportunity* for release unless there has been a finding of irreparable corruption. Additionally, courts have confronted when, if ever, a court may sentence a juvenile offender to LWOP or its functional equivalent. To answer this question, a review of the evolution of the Court's Eighth Amendment jurisprudence as it applies to juveniles is of assistance and of import to Appellant's appeal.

No death penalty for children

In Roper, 543 U.S. at 569-75, 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. 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.

No LWOP for children convicted of non-homicide offenses

Sixteen-year-old Terrance Graham was sentenced to LWOP for violating probation for armed burglary and attempted armed robbery of a barbeque restaurant. Graham, 560 U.S. at 56-57.

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

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

Id. at 68 (internal citations omitted). The Court explained the decision was "necessary to prevent the possibility that life without parole sentences will be imposed on juvenile non-homicide offenders who are not sufficiently culpable to merit that punishment." Id. at 74.

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

No mandatory LWOP sentences for children

In Miller, supra, the United States Supreme Court continued the evolution of Eighth Amendment jurisprudence by holding that mandatory sentences of life without parole for

juvenile homicide offenders also violates the Eighth Amendment's prohibition on cruel and unusual punishment. Miller, 567 U.S. at 465. However, the Court further explained that while the decision did not foreclose imposition of a sentence without the possibility of a parole on a juvenile convicted of a homicide offense, the Court required the sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 479-480.

The Miller Court repeatedly focused on the notion that the character traits of children are "more transitory and less fixed." Id. at 471. Children by definition lack maturity and responsibility; thus, they are more likely to act with "recklessness, impulsivity, and needless risk-taking." Id. at 471-472. The Court explained that due to the innate characteristics of children at large, there is a "great difficulty ... of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id. at 479-480. In fact, the Court stated "incorrigibility is inconsistent with youth." Id. at 472-473. The Court emphasized the potential for reform present in all juveniles. The Court emphasized the mitigating qualities of youth and noted "[i]t is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.'" Id. at 476 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)). The Court's decision created a presumption against LWOP sentences for juveniles. Specifically, the court explained that "death is different" and "children are different too." Id. at 481.

Focusing on the concept of individualized sentencing, the Court recognized "that children are constitutionally different from adults for purposes of sentencing." Id. at 471. Children "have diminished culpability and greater prospects for reform," and therefore, "'they are less deserving of the most severe punishments.'" Id. (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 473. As a result, "[a]n offender's age is relevant to the Eighth Amendment." Graham, 560 U.S. at 76. "[I]mposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." Miller, 567 U.S. at 474.

Mandatory sentencing prevents the sentencer from considering the juvenile offender's "chronological age and its hallmark features, among them, immaturity, impetuosity, and failure to appreciate risks and consequences," the offender's family and home environment, the extent of the offender's conduct in the offense and the way familial and peer pressures may have affected him. Id. at 477. The Court required sentencers "to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 480. Thus, sentencing authorities *must* consider a juvenile offender's age and consideration of such *must* be a mitigating factor.

No non-mandatory LWOP sentences for juveniles & Retroactivity

In Aiken v. Byars, 410 S.C. 534, 540-541, 765 S.E.2d 572, 575-576 (2014), the South Carolina Supreme Court held that Miller applied retroactively and to juveniles who were sentenced to non-mandatory terms of life without parole. According to the Court, Miller "unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole." Id. at 542, 765 S.E.2d at 576. Thus, the Court determined "an individualized sentencing proceeding before imposing a sentence of life without parole on a juvenile offender" was required. Id. Recognizing that Miller "did not expressly extend its ruling to states such as South Carolina whose sentencing scheme permits a life without parole sentence to be imposed on a juvenile offender but does not mandate it," the

South Carolina Supreme Court held it "must give effect to the proportionality rationale integral to Miller's holding – youth has constitutional significance." Id. at 542-543, 765 S.E.2d at 576. Therefore, youth "must be afforded adequate weight in sentencing." Id. at 543, 765 S.E.2d at 576.

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

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

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

Id. at 544, 765 S.E.2d at 577 (internal quotations omitted). While not requiring the sentencing proceedings to "mirror the penalty phase of a capital case," the Court determined "the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance

to juvenile life without parole sentencing hearings," in addition to the Miller factors. Id. at 544-45, 765 S.E.2d at 577.

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

According to the court, "[t]he 'foundation stone' for Miller's analysis" was the "Court's line of precedent holding certain punishments disproportionate when applied to juveniles." Montgomery, 136 S.Ct. at 732. The "starting premise" is the "principle" "that children are constitutionally different from adults for purposes of sentencing" that "result from children's diminished culpability and greater prospects for reform." Id. (internal quotation omitted).

The Court further noted Miller recognized "that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." Montgomery, 136 S.Ct. at 733. However, "in light of children's diminished culpability and heightened capacity for change, Miller made clear that appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Id. at 733-34 (internal quotations omitted). Therefore, Miller "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth." Id. at 734 (internal quotations omitted).

"Because Miller determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status – that is, juvenile offenders whose crimes reflect the transient immaturity of youth." Id. (internal citations and quotations omitted). Miller barred "life without parole" "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." Id. "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." Id. (internal quotations omitted).

Having set the scene established by the decisions of the Supreme Court of the United States and the South Carolina Supreme Court, the answer to the questions initially posed – what constitutes a "life without parole sentence," particularly, in light of the Court's mandate that juvenile offenders *must* be afforded a *meaningful opportunity* for release unless there has been a finding of irreparable corruption – becomes clear. The Eighth Amendment bars not only "literal" LWOP sentences, but it also bars sentences that are the "functional equivalent" of LWOP sentences, unless the sentencer considered the Miller factors. This is particularly so where such a sentence was mandatory. Additionally, in order for a judge to sentence a juvenile offender to LWOP or its functional equivalent, the judge must make a finding of irreparable corruption proven by the state beyond a reasonable doubt.

Lessons learned – the functional equivalent of life sentences

The South Carolina Supreme Court recognized the concept of a sentence that is the "functional equivalent" of a life sentence in State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273

(1948).[2] The Court explained that when a judge exercises his discretion in sentencing a defendant following a jury's recommendation of mercy, the judge must sentence the defendant to a term of years that will not exceed the life expectancy of the defendant unless the record disclosed some reasonable basis for disregarding the jury's verdict. Id. at 356, 46 S.E.2d at 277. The jury's recommendation of mercy was a finding that the defendant should not receive the maximum punishment of life imprisonment; however, the judge's sentence of thirty years' imprisonment was for "all intents and purposes the equivalent of a life sentence." Id. at 357, 46 S.E.2d at 277. Where the record revealed nothing to justify the trial court's disregarding the jury's recommendation, the Supreme Court held the sentence was "manifestly too severe." Id. Thus, our Court has recognized that consideration of a defendant's life expectancy is necessary when fashioning a sentence when the intent of the sentence is to allow the defendant a meaningful opportunity to obtain release.

While the South Carolina Supreme Court has not addressed the issue presented directly, the majority opinion in Aiken made clear that its intent was to give effect to the *spirit* of Miller. See Aiken, 410 S.C. at 541-44, 765 S.E.2d at 576-77. Therefore, 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 anyone "irrevocably sentenced . . . to a lifetime in prison." Id. at 543, 765 S.E.2d at 577. The Aiken Court did not restrict the relief it granted to only those members of the class – homicide offenders sentenced to life imprisonment without the possibility of parole. 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.

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[2] See also United States v. Pileggi, 703 F.3d 675, 678 (4th Cir. 2013) (referencing "a de facto life sentence" of fifty years); United States v. Garcia, 754 F.3d 460, 474 (7th Cir. 2014).

Several states and at least one federal circuit court of appeals examining sentencing schemes involving juveniles have concluded that certain terms-of-years sentences violate the Eighth Amendment's ban on cruel and unusual punishment. Essentially, those courts have found that the term-of-years failed to offer the juvenile offender an opportunity to obtain release before the end of his expected life span. Thus, those sentences were the *functional equivalent* of a sentence of life without the possibility of parole.

California

In People v. Caballero, 282 P.3d 291 (Cal. 2012), the Supreme Court of California held that term-of-years sentences that extend beyond a juvenile's life expectancy and are imposed for non-homicide offenses, violate the Eighth Amendment pursuant to reasoning announced in Graham. The California Supreme Court held "that sentencing a juvenile offender for a non-homicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." Caballero, 282 P.3d at 295. The court further directed that, when sentencing juvenile offenders, California courts must consider the defendant's age and mental development in order to impose an appropriate time when the juvenile will be able to seek parole from the parole board. Id.

Connecticut

In Casiano v. Commissioner, 115 A.3d 1031, 1036-1037 (Conn. 2015), the Supreme Court of Connecticut held that Miller's "reasoning extend[ed] beyond mandatory sentencing schemes." According to the court, "[t]he individualized sentencing requirement in Miller" created "a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances." Id. at 1037 (internal quotations

and citations omitted). Further, the court held "the imposition of a fifty-year sentence without the possibility of parole" was "subject to the sentencing procedures set forth in Miller." Id. at 1044. According to the court, "the Supreme Court's focus in Graham and Miller was not on the label of a 'life sentence' but rather on whether a juvenile would, as a consequence of a lengthy sentence without the possibility of parole, actually be imprisoned for the rest of his life." Id. (internal quotation omitted).

Determining that United States Supreme Court "viewed the concept of 'life' in Miller and Graham" "more broadly than biological survival," the court found the High Court "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 1046. Accordingly, the court held that "[i]n 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. at 1047.

Florida

The Florida Court of Appeals found a juvenile's aggregate sentence of eighty years violated the Eighth Amendment's cruel and unusual punishment clause because it was the functional equivalent of a life sentence without parole. Floyd v. State, 87 So.3d 45 (Fla. Dist. Ct. App. 2012). Floyd was seventeen years old when he stole a car and committed two armed robberies. Floyd was sentenced to consecutive forty-year sentences on the armed robberies. Id. at 45-46. If Floyd served the entirety of his sentence, he would be ninety-seven years old when released. The earliest Floyd could be released was age eighty-five. Id. at 46. According to the court, "[t]his situation does not in any way provide [Floyd] with a meaningful or realistic opportunity to obtain release." Id. By

sentencing Floyd to eighty years, the trial court "impermissibly" decided at the outset that Floyd will never be fit to reenter society. Id. "[C]ommon sense dictates that [Floyd]'s eighty-year sentence, which according to the statistics cited by [Floyd] is longer than his life expectancy, is the functional equivalent of a life without parole sentence and will not provide him with a meaningful or realistic opportunity to obtain release." Id. at 47. See also Atwell v. State, 197 So.3d 1040 (Fla. 2016) (following "the spirit" of the Supreme Court cases to find a parole eligible sentence unconstitutional).

Idaho

The Idaho Supreme Court recently addressed the application of Miller and Montgomery to a discretionary life sentence imposed on a sixteen-year-old. Windom v. State, 398 P.3d 150 (Idaho 2017). Following the brutal killing of his mother, Windom pled guilty to second degree murder and received a determinate life sentence. Id. at 152. Following Miller and Montgomery, Windom filed a petition for state post-conviction relief challenging to his sentence. Id. at 153. The Idaho Supreme Court explained that while it was "possible" that the Supreme Court intended Miller to be applied retroactively only to those juveniles who received mandatory sentences of LWOP, the court noted that such a "reading would be inconsistent with the last paragraph" of the Miller opinion providing that LWOP was an unconstitutional penalty for a class of defendants because of their status. Id. at 156.

Iowa

In State v. Null, 836 N.W.2d 41, 70-74 (Iowa 2013), using its state constitution, the Iowa Supreme Court held that the principles of Miller apply to juveniles sentenced to a lengthy term of years, which included Null's 52.5 year sentence. According to the court, "[e]ven if lesser sentences than life without parole might be less problematic," "the juvenile's potential future

release in his or her late sixties after half a century of incarceration" was not "sufficient to escape the rationales of Graham or Miller." Id. at 71. "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. (internal citation omitted). The court concluded that "Miller's principles are fully applicable to a lengthy term-of-years sentence as was imposed in this case because an offender sentenced to a lengthy term-of-years sentence should not be worse off than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under Miller." Id. at 72. According to the court, a narrow reading of Miller would "avoid the basic thrust of Roper, Graham, and Miller by refusing to recognize the underlying rationale of the Supreme Court is not crime specific." Id. at 72-73.

In a companion case to Null, the Iowa Supreme Court reversed a sentence because the sentencing court failed to consider the rehabilitation potential and lessened culpability of the defendant. State v. Pearson, 836 N.W.2d 88, 97 (Iowa 2013). Seventeen-year-old Pearson was convicted of two robberies and two burglaries. Id. at 89. The judge sentenced her to fifty years in prison with parole eligibility after service of thirty-five years. Id. The sentencing judge "found that while her file reflected a troubled family life, a troubled history, the lack of a support structure, and negative influences, these circumstances did not *justify* her criminal actions." Id. at 93 (emphasis added). Although the judge understood the argument that as a young person, Pearson may not have had the wisdom and ability to understand the consequences of her conduct, but the judge was convinced that such immaturity and lack of brain development did not "diminish" her actions. Id. The judge attributed Pearson's current predicament as the result of a "series of bad choices." Id.

The judge focused on Pearson's prior interactions with the juvenile justice system, including curfew violations and assault charges. Id. In the judge's opinion, the system had provided Pearson with support, education, training, and life skills, but Pearson had failed to "turn her life around." Id. The judge also opined that Pearson's statements and the statements written by others in support of Pearson "wanted to blame her friends, alcohol use, drug use, a bad family relationship, and poor parenting" for Pearson's criminal charges. Id. The judge disagreed with any attempt to shift blame, stating Pearson was responsible for her actions and choices and that she knew what she was doing and understood the impact. Id. However, the judge interpreted Pearson's request for a sentence less than the mandatory minimum as indicating she did not understand the significance of the charges against her. Id.

The sentencing judge was convinced that by providing repeated opportunities to juvenile offenders, the judicial system was sending the "wrong message" to other potential juvenile offenders. Id. at 94. Next, the judge turned to what he considered the "focus" of the sentence – protection of the public, not rehabilitation. Id. The judge concluded the determining factor was not whether Pearson would be able to contribute to society in a meaningful way someday because Pearson had not succeeded with received several rehabilitation attempts in the past. Id.

The Iowa Supreme Court held that "it should be relatively rare or uncommon that a juvenile be sentenced to a lengthy prison term without the possibility of parole for offenses like those involved in [Pearson's] case." Id. at 96. To do otherwise would ignore "the teaching of the Roper-Graham-Miller line of cases that juveniles have less culpability than adults, that the few youth who are irredeemable are difficult to identify, and that juveniles have rehabilitation potential exceeding that of adults." Id. The court held the reasoning of Miller applied equally to Pearson's sentence of thirty-five years without the possibility of parole even though Pearson was

not convicted of a homicide. Id. Thus, the court held the sentence violated the "core teachings of Miller." Id.

The court held the sentencing judge did not consider the principles underlying Miller because the judge failed to consider that a juvenile's culpability is lessened due to juveniles having underdeveloped cognitive abilities when compared to adults. Id. at 97. The sentencing judge treated Pearson's lack of maturity to understand the consequences of her actions as an aggravating factor, not the mitigating factor dictated by the Eighth Amendment. Id. Finally, the sentencing court erred when it failed to consider rehabilitation as a factor in sentencing, focusing on protection of the community as supreme. Id. "In sum, the district court emphasized the nature of the crimes to the exclusion of the mitigating features of youth." Id. See also State v. Ragland, 836 N.W.2d 107, 121-121 (Iowa 2013) (holding a sentence of life with parole eligibility after sixty years violated the Constitution).

New Jersey

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." State v. Zuber, 152 A.3d 197, 211-212 (N.J. 2017) (internal quotation and citation omitted). "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." Id. at 212. The court refused to "elevate form over substance." Id.

The court held the sentences permitting "55 years' imprisonment for Zuber and 68 years and 3 months for Comer" without parole eligibility were "sufficient to trigger the protections of

Miller." Id. at 212-213. "Defendants' potential release after five or six decades of incarceration, when they would be in their seventies and eighties, implicates the principles of Graham and Miller." Id. at 213. The court took the opportunity to ask its legislature "to consider enacting a scheme that provides for later review of juvenile sentences with lengthy periods of parole ineligibility, and to consider whether defendants should be entitled to appointed counsel at that hearing." Id. at 215.

Washington

Though the Washington Supreme Court has not ruled on the issue, the Washington Court of Appeals held that Miller is applicable to *de facto* life sentences in State v. Ronquillo, 361 P.3d 779 (Wash. Ct. App. 2015). Ronquillo was sentenced to an aggregate sentence of fifty-one years for murder and other offenses committed when he was sixteen years old. 361 P.3d at 781-82. Relying significantly on the analysis by the Iowa Supreme Court, the Ronquillo Court held: "Before imposing a term-of-years sentence that is the functional equivalent of a life sentence for crimes committed when the offender was a juvenile, the court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 784. The Court found that Ronquillo's sentence, which contemplates that he will remain in prison until the age of sixty-eight, "is a *de facto* life sentence." Id. As such, Ronquillo was entitled to resentencing. Id. at 789.

Wyoming

In Bear Cloud v. State, 294 P.3d 36 (Wyo. 2013), the Supreme Court of Wyoming held a sentence of "'life according to law'" under the state statutory scheme violated the Eighth Amendment. Bear Cloud was sentenced to "life according to law," and two other statutes prohibited parole for any person serving a life sentence, whether it be a LWOP sentence or one

"according to law." Id. at 44-45. The court concluded that "Wyoming's current sentencing and parole scheme for persons convicted of first-degree murder, which murder occurred before those persons were 18 years of age, violate[d] the Eighth Amendment because it ha[d] the practical effect of mandating life in prison without the possibility of parole." Id. at 45.

On remand, after an individualized sentencing proceeding, Bear Cloud was sentenced to life in prison with the possibility of parole after serving twenty-five years on the murder charge. Bear Cloud v. State, 334 P.3d 132, 136 (Wyo. 2014). This sentence was ordered to run consecutively to a previously imposed sentence of twenty to twenty-five years. Id. Thus, Bear Cloud's earliest possible meaningful opportunity for release was when he was sixty-one years old. Id.

Considering the constitutionality of the parole eligible sentence, the Wyoming Supreme Court 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, as here, the aggregate sentences result in the functional equivalent of life without parole." Id. at 141-42 (internal quotations omitted). The Court explained that "[t]o do otherwise would be to ignore the reality that lengthy aggregate sentences have the effect of mandating that a juvenile die in prison." Id. at 142 (internal quotation omitted). The Court remanded the case for re-sentencing with instructions to "weigh the entire sentencing package" and "consider the practical result of lengthy consecutive sentences." Id. at 143.

The Court warned against "the perils" of allowing the nature of the crime overwhelm consideration of the hallmarks of youth. Id. at 144. Relying upon the Roper Court's rejection of the use of a case-by-case approach to proportionality, the Court agreed there was an

"'unacceptable likelihood'" "that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.'" Id. (quoting Roper, 543 U.S. at 572-573).

United States Court of Appeals for the Third Circuit

The Third Circuit Court of Appeals recently tackled the "novel issue of constitutional law" of "whether the Eighth Amendment prohibits a term-of-years sentence for the duration of a juvenile homicide offender's life expectancy (i.e., 'de facto LWOP') when the defendant's 'crimes reflect transient immaturity [and not] ... irreparable corruption.'" United States v. Grant, 887 F.3d 131, 135 (3rd Cir. 2018)(quoting Montgomery, 136 S.Ct. at 734). Grant was sentenced to sixty-five years following an individualized sentencing proceeding. Id. The judge who imposed the sentence determined Grant had the capacity to reform and that a LWOP sentence was not appropriate. Id.

The Third Circuit held a "term-of-years sentence without parole that meets or exceeds the life expectancy of the juvenile offender who is still capable of reform is inherently disproportionate and therefore violates the Eighth Amendment." Id. at 142. The court was compelled to reach this result for three reasons. First, the court explained that Miller permits "the sentence of LWOP *only* for juvenile homicide offenders 'whose crimes reflect permanent incorrigibility.'" Id. "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." Id. Finally, the Court observed that "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.'" Id.

The Third Circuit explained that it must "[g]ive effect to the Supreme Court's pronouncement that children who are found to have the capacity for change are to be treated differently than those who are not." Id. at 143. Thus, "[a] sentence for a juvenile offender who is not incorrigible but that still results in him spending the rest of his life in prison does not appreciate the categorical differences between children and adults and between children who are incorrigible and those that have 'diminished culpability and greater prospects for reform.'" Id.

The Third Circuit found "no indication that Miller's holdings depended on a sentence formally being designated as LWOP." Id. "Indeed, it would make little sentence if sentencing courts could circumvent Miller and eradicate this constitutionally required distinction simply by imposing extraordinarily high term-of-years sentences." Id. The court concluded by "stat[ing] the obvious: a de facto LWOP sentence cannot possibly provide a meaningful opportunity for release because it relegates the juvenile offender to spending the rest of his or her life behind prison bars and prohibits him or her from reentering society." Id. at 145; see also McKinley v. Butler, 809 F.3d 908, 911 (7th Cir. 2016) (explaining that Miller cannot logically be limited to *de jure* life sentences, as distinct from sentences denominated in numbers of years yet highly likely to result in imprisonment for life"); Budder v. Addison, 851 F.3d 1047, 1056 (10th Cir. 2017) (reasoning a state cannot escape the categorical rule "merely because [it] does not label this punishment as 'life without parole'").

Examining the Supreme Court's opinions, the Third Circuit concluded that a "'meaningful opportunity for release" meant "a non-incorrigible juvenile offender must be afforded an opportunity for release at a point in his or her life that still affords 'fulfillment

outside prison walls,' 'reconciliation with society,' 'hope,' and 'the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.'" Id. at 147. In other words, the Eighth Amendment requires "more than mere physical release at a point just before a juvenile offender's life is expected to end." Id. Recognizing that prisons often deny individuals access to vocational training and rehabilitative services based on length of sentences, the Third Circuit explained the state "must give non-incorrigible juvenile offenders the opportunity to meaningfully reenter society upon their release." Id. at 148. Rejecting the Government's position that "'hope for some years outside prison walls'" was sufficient, the court went on to provide some guidance regarding "a principled legal framework" to carry out the Supreme Court's holdings. Id.

First, the sentencing process "must start with a factual determination of the juvenile offender's life expectancy." Id. at 149. However, due to the inherent problems, some of constitutional magnitude of life expectancy data, the court cautioned against measuring life expectancy of juveniles based solely on actuarial tables. Id. Courts determining life expectancy "should consider any evidence made available by the parties that bear on the offender's mortality, such as medical examinations, medical records, family medical history, and pertinent expert testimony." Id. at 150. Next, the sentencing court must "shape a sentence that properly accounts for a meaningful opportunity for release," specifically considering the factors outlined by the court. Id. On this point, the court recognized that "society accepts the age of retirement as a transitional life stage where an individual permanently leaves the work force after having contributed to society over the course of his or her working life." Id. "It is indisputable that retirement is widely acknowledged as an earned inflection point in one's life, marking the simultaneous end of a career that contributed to society in some capacity and the birth of an

opportunity for the retiree to attend to other endeavors in life." Id. Thus, the court concluded that a juvenile offender "should presumptively be afforded an opportunity for release at some point before the age of retirement." Id.

Appellant's de facto life sentence

South Carolina's actuarial table indicates that the life expectancy for an eighteen-year-old male, like Appellant was on the day of sentencing, is 59.12 years, such that he will live to age 77.12. See S.C. Code Ann. § 19-1-150. The statute's table is based on 2001 data and does not account for race or incarceration. Using this information, albeit of limited utility for the analysis, shows that Appellant's sentence of fifty-five years is a *de facto* life sentence as Appellant would be required to serve almost his entire life expectancy behind bars.[3] The analyses from other states show Appellant's sentence is a *de facto* life sentence as well.

Required finding of irreparable corruption & Burden of proof

The language used by the United States Supreme Court makes clear that a juvenile offender may be sentenced to LWOP or its functional equivalent only upon a finding of irreparable corruption. The language also makes clear that the burden is on the state to prove irreparable corruption beyond a reasonable doubt. State courts interpreting the High Court's decisions have concluded likewise.

The United States Supreme Court's decisions in this arena unambiguously permit a LWOP sentence for a juvenile offender *only* if the juvenile is permanently incorrigible; that the crime was not the result of "unfortunate yet transient immaturity." See Montgomery, 136 S.Ct.

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[3] The February 2015 United States Sentencing Commission report titled "Life Sentences in the Federal System" used a sentence of 470 months (39 years and two months) to identify cases in which a *de facto* life sentence was imposed, which was consistent with the average life expectancy of federal criminal offenders. 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.

at 726, 734; Miller, 567 U.S. at 479; Graham, 560 U.S. at 73. Repeatedly, in barring life without parole for juvenile offenders, the United States Supreme Court emphasized that it is "the rare juvenile offender whose crime represents irreparable corruption," because juveniles are more capable of change than are adults, "their actions are less likely to be evidence of irretrievably depraved character." Graham, 560 U.S. at 68-69; see also Miller, 567 U.S. at 479 (explaining that "given 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 will be uncommon").[4] The Court explained that LWOP may be imposed *only* on "the rare juvenile offender whose crime represents irreparable corruption." Miller, 576 U.S. at 479-80. In Montgomery, 136 S.Ct. at 734, the Court reiterated that Miller "bar[red] life without parole ... for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."

Interpreting the Supreme Court's decisions, the Pennsylvania Supreme Court concluded that "in the absence of the sentencing court reaching a conclusion, supported by competent evidence, that the defendant will forever be incorrigible, without any hope for rehabilitation, a life-without-parole sentence imposed on a juvenile is illegal, as it is beyond the court's power to impose." Commonwealth v. Batts, 163 A.3d 410, 435 (Penn. 2017); see also State v. Sweet, 879 N.W.2d 811, 834 (Iowa 2016) (explaining that the Supreme Court in Roper and its progeny

[4] In Tatum v. Arizona, 137 S.Ct. 11 (2016) (mem.), the United States Supreme Court granted, vacated, and remanded five cases of juvenile homicide offenders sentenced to life without parole. Explaining the Court's decision, Justice Sotomayor stated 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." "[A] sentencer [must] 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." Id. at 13. (Sotomayor, J., concurring) (internal citation omitted).

declared the opportunity for parole can be denied, if at all, only to irretrievably depraved or irreparably corrupt juvenile offenders). "[A] faithful application of the holding in Miller, as clarified in Montgomery, requires the creation of a presumption against sentencing a juvenile offender to life in prison without the possibility of parole." Batts, 163 A.3d at 452. Examining the language used by the Supreme Court in Miller, the Connecticut Supreme Court concluded the "language suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances." State v. Riley, 110 A.3d 1205, 1214 (Conn. 2015).

Examining this very issue, the Pennsylvania Supreme Court reasoned that "a presumption places the burden of proof and the burden of production on the party that seeks to rebut the presumed fact." Batts, 163 A.3d at 453. The Supreme Court of Pennsylvania explained that "any suggestion of placing the burden on the juvenile offender is belied by the central premise of Roper, Graham, Miller, and Montgomery – that as a matter of law, juveniles are categorically less culpable than adults." Batts, 163 A.3d at 452. "Therefore, the presumption against the imposition of [life without parole] is rebuttable by the Commonwealth upon proof that the juvenile is removed from this generally recognized class of potentially rehabilitable offenders." Id. In other words, the state must bear the burden of proof to overcome the presumption that a LWOP sentence or its functional equivalent is unconstitutional when applied to a juvenile offender.

Likewise, the Supreme Court of Missouri held the state has the burden of proof of beyond a reasonable doubt in sentencing juvenile offenders. State v. Hart, 404 S.W.3d 232, 241 (Mo. 2013). The Missouri court explained that "a juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentencer beyond a

reasonable doubt that this sentence is just and appropriate under all the circumstances." Id. The Supreme Court of Wyoming recently held that a sentencing court must begin its analysis with the premise that life without parole, and its functional equivalent, must be "uncommon," and is presumptively wrong for a juvenile. Davis v. State, 415 P.3d 666, 681 (Wyo. 2018). Next, the court concluded "that the State bears the burden of overcoming that presumption at sentencing." Id.

In the instant case, the judge indicated he placed the burden of proof upon Appellant when he tried to compare what he incorrectly believed was the burden of proof in death penalty cases. Without question, the analogy to capital sentencing proceedings is correct and useful for the juvenile offender sentencing proceeding. However, the judge perverted that analogy when he erroneously concluded that the burden of proof in a death penalty case was on the defendant to prove the mitigating factors by a preponderance of the evidence.

The judge posited that the death penalty mitigating factors were relevant for sentencing juvenile offenders. Sent. 34, ll. 10-12. From that, the judge explained his belief that in the death penalty context, the burden of establishing the mitigating factors was on the defendant and that the burden was by a preponderance of the evidence. Sent. 34, ll. 10-14. The judge was simply wrong – "[t]here is no burden of proof on a capital defendant with regard to evidence of mitigating circumstances." State v. Hicks, 330 S.C. 207, 215, 499 S.E.2d 209, 218 (1998). In creating this analogy, which included with it an erroneous legal conclusion regarding the burden of proof, the judge improperly placed the burden of proof on Appellant to prove that he was not irreparably corrupt. The burden belonged on the state to overcome the constitutional presumption that all juveniles, including Appellant, are not irreparably corrupt. Using the

analogy to the death penalty, the state must overcome the presumption and prove a juvenile offender is irreparably corrupt beyond a reasonable doubt. See S.C. Code Ann. § 16-3-20(C).

Judge McIntosh's ruling indicated he fell into the trap the Supreme Court warned against – allowing the brutality of the crime to dominate his sentencing analysis, just as the state asked. In determining the Eighth Amendment prohibits the death penalty for juveniles, the United States Supreme Court noted that while it could not "deny or overlook the brutal crimes too many juvenile offenders have committed," "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." Roper, 543 U.S. at 570-72. Absent proof beyond a reasonable doubt by the state and a finding that exceptional circumstances demonstrated Appellant was irreparably corrupt, sentencing him to the functional equivalent of life without parole was error.

II. The trial judge violated Appellant's rights pursuant to the Fifth and Fourteenth Amendments to the Constitution by permitting the introduction of statements he gave during custodial interrogation where the totality of the circumstances, including, but not limited to Appellant's age, Appellant's low intellectual functioning, and the promises and threats issued by law enforcement, indicated the statements were not given pursuant to a voluntary, knowing, and intelligent waiver of his rights.

Standard of review

"On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990); see also State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998). Put another way, the reviewing court will reverse a trial judge's ruling on the voluntariness of the confession when the ruling is "so erroneous as to constitute an abuse of discretion." State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). "In criminal cases, appellate courts are bound by fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997).

Relevant facts

Marvin J. Williams, the police chief for Fairfax, interrogated Appellant on June 24, 2014. R. 28, ll. 9-20. Williams claimed he advised Appellant of his rights using a form. R. 28, l. 21 – R. 29, l. 14; R. 445. The record was unclear when Appellant arrived at the police station or when the interrogation by Williams began, but the form indicated Appellant *printed* his name on the form at 4:56 p.m. R. 29, l. 24 – R. 30, l. 2; R. 31, l. 25 – R. 32, l. 3; R. 445. Although Williams was aware

of Appellant's tender age of fifteen, Williams made no inquiries regarding Appellant's grade level or intelligence. R. 41, l. 20 – R. 42, l. 3. Tiffany Sabb, the mother of Appellant's friend and with whom Appellant was living at the time, took Appellant to the police station so that he could be questioned. R. 32, ll. 4-5. Sabb's son was at the police station giving a statement *against* Appellant. R. 41, ll. 5-11. Sabb was not in the interrogation room while Williams interrogated Appellant. R. 44, ll. 9-11.

While Williams was conducting his interrogation of fifteen-year old Appellant, Williams claimed Appellant confessed to killing Willie Johnson in Allendale – outside of Williams' jurisdiction. R. 34, ll. 3-14. Appellant's interrogation by Williams was not recorded and it was never reduced to writing – not even in a police report. R. 35, ll. 15-22; R. 36, ll. 4-9; R. 44, ll. 19-24.

Williams then turned the interrogation of Appellant over to SLED agents who were investigating the Johnson murder. R. 36, ll. 1-3. For some reason, SLED was already at the Fairfax Police Department prior to Williams interrogating Appellant. R. 37, l. 20 – R. 38, l. 2.

Richard Johnson was one of the SLED agents at the Fairfax Police Station who took over the interrogation. R. 47, ll. 3-5. He and fellow Agent Natasha Merrell recorded the interrogation using Merrell's phone, which resulted in an incomplete recording due to the phone not recording while Merrell received phone calls. R. 47, ll. 6-8; R. 47, ll. 17-22; R. 58, ll. 4-7; R. 58, l. 22 – R. 59, l. 15; State's Exhibit #34. Johnson and Merrell did not bother advising Appellant of his rights when they initiated their interrogation. R. 48, ll. 6-8; R. 60, ll. 3-5.

Sabb was in the room with Appellant when Johnson and Merrell initially started their interrogation, but she left pursuant to Johnson's insistence. R. 49, ll. 11-18; R. 58, ll. 8-10; R. 64, ll. 17-23; State's Exhibit #34. At least one other officer was present as well. State's Exhibit #34

(Williams). SLED's interrogation lasted about an hour. R. 50, ll. 16-18. Appellant indicated he did not want to talk to Johnson, but indicated he would talk to Merrell. R. 51, ll. 6-13; State's Exhibit #34. Johnson noted that he thought he intimidated Appellant. R. 54, ll. 4-11; State's Exhibit #34. Merrell noted Appellant was more comfortable with her. R. 65, ll. 5-8.

The SLED agents knew fifteen-year old Appellant was only in eighth grade. State's Exhibit #34. They also knew he was in alternative school. State's Exhibit #34. Johnson had Appellant read a certificate of service during the interrogation. State's Exhibit #34. Appellant struggled to read "contributions." State's Exhibit #34. Appellant did not even know his social security number or his street address. State's Exhibit #34. He had candy in his pocket. State's Exhibit #34.

Appellant repeatedly denied any involvement in Johnson's death. R. 65, ll. 9-12; State's Exhibit #34. Merrell told Appellant she was "trying to help [him] out." State's Exhibit #34. Appellant expressed his fear of SLED to Merrell. He explained that he had been told by an adult who knew someone "in the force" that if SLED caught him, he would have a gun pointed on him and he would be taken off. State's Exhibit #34. He was told the night before that if SLED caught him, he would be shot down. State's Exhibit #34.

Upon Merrell's request, Johnson re-entered the interrogation room. R. 51, ll. 20-22; R. 54, ll. 16-24; R. 61, ll. 9-11. Johnson immediately launched into Appellant. R. 51, l. 23 – R. 52, l. 3. Johnson told Appellant he was "full of it" and was going to jail. R. 51, l. 23 – R. 52, l. 3; State's Exhibit #34. Like Merrell, Johnson told Appellant that he wanted to help Appellant. State's Exhibit #34. Johnson assured Appellant everyone involved would get the same amount of time except the person who cooperated and that Appellant was the first one that the police were interrogating. State's Exhibit #34.

Johnson lied, telling Appellant the police had all the evidence they needed, and alluded to the television CSI to explain that evidence. State's Exhibit #34. When Appellant wanted to know how many years he would receive, Johnson told him he would receive "an ass" of time. State's Exhibit #34. When Appellant asked what he could do to get out of the situation, Johnson told him he was not getting out of this, but he could "minimize the kind of time." R. 55, ll. 12-16; R. 62, ll. 13-17; State's Exhibit #34. Johnson promised to tell the prosecutor if Appellant cooperated. R. 62, ll. 8-12; State's Exhibit #34. An exchange on this topic between the solicitor and Merrell was particularly eye-opening:

> Q Other than that, were there any specific promises of leniency? Did you tell him you'd let him go or anything like that?
>
> A No, sir.

R. 62, ll. 18-21.

After these threats, promises of leniency, and intimidation, Appellant began making inculpatory statements. State's Exhibit #34. When Appellant expressed his exasperation with going to jail, he asked Johnson what would change if he talked to police. State's Exhibit #34. Johnson told him the length of time that he was looking at would change. State's Exhibit #34. When Appellant incriminated himself, Johnson repeatedly said, "That's right," indicating confirmation of what Appellant was saying. State's Exhibit #34. Near the conclusion of the interrogation, Johnson said that when he talked to the solicitor, he would explain what Appellant said, that Appellant was "hurt about it," and that the solicitor should do whatever the solicitor could to help him. State's Exhibit #34.

Appellant's lawyer for purposes of the juvenile charges, Kimberly Jordan, testified regarding the pre-adjudicatory waiver evaluation conducted. Jordan explained that when the doctor questioned Appellant about his rights, Appellant did not understand, forcing the doctor to stop and

explain the rights to him. R. 69, l. 14 – R. 70, l. 18. Appellant had no idea how an attorney may have been helpful to him during the questioning. R. 70, ll. 14-15. Even after the doctor's explanation, Jordan questioned whether Appellant really understood. R. 70, ll. 19-23. Only after the doctor "explained it step by step" did Appellant understand. R. 70, l. 25 – R. 71, l. 1.

At the conclusion of the hearing, defense counsel argued to exclude the statement from evidence. R. 75, l. 15 – R. 80, l. 11. Defense counsel argued Appellant was at the tender age of fifteen and was alone in a room with three police officers. R. 75, ll. 21-24. Appellant found Johnson intimidating. R. 76, ll. 3-9. By the end of the interrogation, Appellant, a child, was in tears. R. 76, ll. 10-11. This was unsurprising given the rumors Appellant heard regarding what SLED was going to do to him. R. 77, ll. 7-10. Exhausted at the end of this three hour marathon interrogation and clearly not understanding the full ramifications of his situation, Appellant went to sleep on the interrogation room floor. R. 77, ll. 16-21. Johnson used positive and negative reinforcement to get Appellant to say what he wanted to hear. R. 78, ll. 5-23. Defense counsel also noted the lies Johnson used, particularly about the forensic evidence to coerce a confession from Appellant. R. 79, ll. 10-15.

In ruling on the motion, the judge found that Appellant suffered from a limited educational basis. R. 85, ll. 7-10. He was concerned about Appellant's "maturity level" and "education level," particularly in light of Appellant only being in eighth grade. R. 86, ll. 4-6. He thought Appellant was "pretty street smart," however. R. 85, ll. 10-15; R. 86, ll. 10-11. Appellant's experience with law enforcement was minimal – only one juvenile adjudication. R. 86, ll. 16-25. The judge found Appellant was isolated from his parent, but indicated the presence of Sabb was sufficient. R. 88, ll. 7-14. Next, the judge found "there was no coercive nature of this interview that would lead to suppression." R. 85, l. 23 – R. 86, l. 1. He thought the length of the interrogation "was entirely

reasonable" and that the "place was fine." R. 86, ll. 1-2. Despite contrary evidence in the record, the judge found there were "no police misrepresentations." R. 87, l. 15. Additionally, the judge did not view Johnson's repeated promises to help minimize Appellant's sentence as promises of leniency. R. 87, ll. 15-19. According to the judge, the fact that Appellant was told he was going to jail completely obviated the officer's assurance that Appellant would receive a lesser sentence if he confessed. R. 87, ll. 19-20. In conclusion, the judge permitted the admission of the statement based on the totality of the circumstances. R. 88, ll. 16-20.[5]

Discussion

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 426 (1966). State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007).

It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement. The prosecution must show that the accused understood the rights. Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)). Thus, "[t]he waiver inquiry 'has two distinct dimensions': waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,' and 'made with a full awareness

[5] During the trial, defense counsel renewed her objections. R. 215, l. 11 – R. 216, l. 3; R. 216, l. 24 – R. 217, l. 7; R. 319, ll. 10-14.

of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" Id. at 382-383 (quoting Moran v. Burbine, 475 U.S. 421, 421 (1986)); see also Johnson v. Zerbst, 304 U.S. 458, 464 (1938)("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.").

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted). The test requires consideration of "'totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.'" Dickerson v. United States, 530 U.S. 428, 434 (2000)(citations omitted).

Although youth alone is not a ground for holding a confession inadmissible, the age of the confessor is an extremely important factor for determining whether the waiver of rights was voluntary, knowing, and intelligent. Haley v. Ohio, 332 U.S. 596, 600-601 (1948); Gallegos v. Colorado, 370 U.S. 49, 52 (1962). In fact, confessions by juveniles must endure special scrutiny. Haley, 332 U.S. at 600-601; Fare v. Michael C., 442 U.S. 707, 725 (1979); Thomas v. North Carolina, 447 F.2d 1320, 1322 (4th Cir. 1971); State v. Pittman, 373 S.C. 527, 569, 647 S.E.2d 144, 165-166 (2007). When the police secure an admission from a juvenile without the presence of

counsel, "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair." In re Gault, 387 U.S. 1, 55 (1967).

The factors to consider when examining a statement made to police by a juvenile include the juvenile's age, the length of the detention without counsel, and any failure to send for the juvenile's parents. Gallegos, 370 U.S. at 55; Williams v. Peyton, 404 F.2d 528, 531 (4th Cir. 1968). The United States Supreme Court explained the reason for such special scrutiny:

> [A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

Gallegos, 370 U.S. at 54.

Appellant was a mere fifteen years of age just like the juvenile in Haley. See Haley, 332 U.S. at 599 (describing the juvenile's "tender and difficult age" of fifteen). Other courts have acknowledged the ages of fourteen and fifteen demonstrating difficulty in understanding Miranda rights and the serious implications from the waiver of those rights. See e.g., Hardaway v. Young, 302 F.3d 757, 764 (7th Cir. 2002) (stating that the "difficulty a vulnerable child of 14 would have in making a critical decision about waiving his Miranda rights and voluntarily confessing cannot be understated); In re Jerrell C.J., 699 N.W.2d 110, 116-117 (Wisc. 2005); People v. Travis, 985 N.E.2d 1019, 1032 (Ill. App. Ct. 2013).

Consideration of a person's mental capacity is an important factor in determining whether a statement to police was voluntary. State v. Callahan, 263 S.C. 35, 41, 208 S.E.2d 284, 286 (1974) (citing State v. Cain, 246 S.C. 536, 144 S.E.2d 905 (1965)). In fact, the United States Supreme Court has warned that intellectually disabled defendants face the special risk of wrongful execution

because of the possibility that they will confess to crimes they did not commit. Atkins v. Virginia, 536 U.S. 304, 320 (2002)(citing Everington & Fulero, Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation, 37 Mental Retardation 212, 212-213 (1999)).

> [A] person's capacity to make an informed waiver requires three abilities: an understanding of the words and phrases contained within the warnings, an accurate perception of their intended functions (e.g., that interrogation is adversarial, that an attorney is an advocate, that these rights trump police powers), and a capacity to reason about the likely consequences of the decision to waive or invoke these rights.

Saul M. Kassin, The Psychology of Confessions, 4 Ann. Rev. L. & Soc. Sci. 193, 199 (2008).

Research reveals that individuals with low levels of intelligence, particularly those with intellectual disability, "do not comprehend their rights as fully or know how to apply them as well as older adolescents and adults." Id. "On standardized tests that measure people's comprehension of Miranda rights, comprehension scores correlate significantly with IQ." Id. at 206. Therefore, "most people who are mentally retarded, being limited in their cognitive and linguistic abilities, cannot adequately comprehend their rights or know how to apply them in their own actions." Id. Further, "people who are mentally retarded exhibit a high need for approval, particularly from others in positions of authority, which reveals itself in an acquiescence response bias." Id. "[P]eople who are mentally retarded are limited in their capacity to foresee the consequences of their actions when making legal decisions." Id.

In State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999), this Court held that although Davis suffered from mild mental retardation with an IQ of 66, he had the capacity to make a knowing waiver of his constitutional rights to silence and counsel. Id. at 336, 422 S.E.2d at 140. After Davis's arrest, an officer read the standard Miranda warnings to Davis from a card. Id. The officer

testified he "read slowly, paused after each sentence, looked at Davis, and asked him to verbally indicate whether he understood what had been read to him." Id. Davis responded affirmatively that he understood each of his rights. Id. When asked if he wanted a lawyer present, Davis stated he did not need a lawyer. The officer also "explained" that Davis could end the interrogation at any time. Davis indicated he understood this and agreed to give a taped statement. Due to a problem with the audio equipment, the officer asked Davis for a second statement. Again, the officers explained to Davis his constitutional rights and Davis waived those rights and provided a statement. Id. at 336, 422 S.E.2d at 140.

A forensic psychiatrist testified that he interviewed Davis in detail regarding his understanding each of the rights afforded to him pursuant to Miranda. Id. at 336-337, 422 S.E.2d at 140. The psychiatrist admitted Davis's understanding "would be on a different, less abstract, level from a person of average intelligence, but Davis's comprehension was adequate to enable Davis to knowingly and intelligently waive those rights." On the other hand, Davis presented experts who testified he lacked the mental ability to understand the implications of Miranda. Id. at 337, 422 S.E.2d at 140. The Supreme Court held "there was sufficient evidence on the record, both lay and expert, to support the trial judge's determination that Davis was competent to waive his Miranda rights." Id.

Numerous courts throughout the country have found statements to police inadmissible where the defendants lacked the ability to understand their rights and the implications of waiving such rights due to low intellectual functioning. See e.g., State v. Flower, 539 A.2d 1284 (N.J. Super. L. 1987); State v. Rossiter, 623 N.E.2d 645 (Ohio Ct. App. 1993); People v. Daniels, 908 N.E.2d 1104 (Ill. App. 2009); Albarran v. State, 96 So.3d 131 (Ala. Crim. App. 2011); State v. Blackstock, 19 S.W.3d 200 (Tenn. 2000); United States v. Jennings, 491 F.Supp.2d 1072 (M.D.

Ala. 2007); United States v. Preston, 751 F.3d 1008 (9th Cir. 2014); United States v. Hull, 441 F.2d 308, 309 (7th Cir. 1971).

The trial judge erred in allowing the state to introduce Appellant's statements to law enforcement into evidence. Due to Appellant's age – a mere fifteen – the interrogation he endured and the statement he provided required special scrutiny. Using such scrutiny, suppression was required. Appellant could not even read the word "contributions," indicating his comprehension level was very low. Appellant's intelligence level was very low – his IQ measured only 76, which is within the range of intellectual disability. By the age of fifteen, he was still in eighth grade. Appellant had no parent or lawyer present during the three hour long marathon interrogation, and expressed that he was intimidated by Agent Johnson, who made promises of minimizing his sentence.

CONCLUSION

Regarding Issue I, Appellant respectfully requests this Court vacate his de facto life sentence and remand for re-sentencing. Regarding Issue II, Appellant respectfully requests this Court reverse his conviction and remand for a new trial.

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ATTORNEY FOR APPELLANT

This 25th day of January, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 25, 2019

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