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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARCUS CHANNING JOHNSON,

APPELLANT

APPELLATE CASE NO 2017-000293

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in sentencing Appellant to life imprisonment without the possibility of parole because such a sentence was excessive and disproportionate in violation of the Eighth Amendment to the United States Constitution and Article 1, section 15 of the South Carolina Constitution in light of Appellant's intellectual functioning as revealed through neuropsychological data, his level of culpability, and the statistical data illuminating the life expectancy of individuals in the Department of Corrections?

STATEMENT OF THE CASE

On April 15, 2014, a Pickens County grand jury indicted Appellant for murder, possession of a weapon during the commission of a violent crime (2014-GS-39-0735) and criminal conspiracy (2014-GS-39-736). R. 98-99; R. 102-103. On February 10, 2017, Appellant appeared before the Honorable Eugene Griffith to enter guilty pleas to the charged offenses. R. 1. Walt Wilkins and Betty Strom represented the state. R. 1. Bill McGuire and John DeJong represented Appellant. R. 1. The state requested a sentence of life without the possibility of parole (LWOP). R. 8, l. 25 – R. 9, l. 3; R. 17, ll. 17-19; R. 45, ll. 6-24. Plea counsel requested "the minimum sentence." R. 42, l. 6. Plea counsel objected to any sentence exceeding the statutory minimum based upon Appellant's intellectual disability, level of culpability, neuropsychological data, and the statistics from the Department of Corrections. R. 42, l. 17 – R. 43, l. 2. Plea counsel also set forth his objections in a sentencing memorandum. R. 50-97.

At the conclusion of the hearing, Judge Griffith sentenced Appellant to LWOP for murder, five years' imprisonment for the weapon, and five years' imprisonment for conspiracy. R. 46, l. 25 – R. 47, ll. 5; R. 100-101; R. 104. He ordered all sentences to be served concurrently. R. 47, ll. 6-9; R. 100-101; R. 104. Immediately following the sentence, defense counsel re-iterated his objection to a sentence of LWOP. R. 47, ll. 10-17.

On February 15, 2017, Appellant served his notice of appeal. Pursuant to Rule 203(d)(B)(iv), Appellant explained the basis of his appeal was his objection to a sentence exceeding the mandatory minimum sentence of thirty years based upon the Eighth Amendment to the United States Constitution and Article 1, Section 15 of the South Carolina Constitution. This brief follows.

ARGUMENT

The trial judge erred in sentencing Appellant to life imprisonment without the possibility of parole because such a sentence was excessive and disproportionate in violation of the Eighth Amendment to the United States Constitution and Article 1, section 15 of the South Carolina Constitution in light of Appellant's intellectual functioning as revealed through neuropsychological data, his level of culpability, and the statistical data illuminating the life expectancy of individuals in the Department of Corrections.

Relevant facts

When Appellant was in junior high school, he had already repeated the first and second grades. R. 50-97. His academic performance was poor during his three years in junior high, culminating with him being "placed" into tenth grade at the local high school. R. 50-97. His education ended during the tenth grade with him receiving all failing grades. R. 50-97. Appellant met Crystal Williams in junior high school, and reconnected within two or three years of the death of Williams' husband. R. 10, ll. 14-17; R. 13, ll. 1-5.

Although Appellant maintained employment, he had difficulty managing money. R. 50-97. Appellant struggled to hold on to his wallet and important documents, leading his mother to safeguard his paperwork and providing him with only copies. R. 50-97. Even while working, Appellant relied on the kindness of others to assist him with his job responsibilities. R. 50-97. Appellant's friends described him as vulnerable and willing to do anything to get affection. R. 40, ll. 17-18; R. 42, ll. 1-3; R. 50-97. People often took advantage of Appellant. R. 50-97.

According to the state, Appellant conspired with Williams, his school friend, to kill Williams' husband for insurance proceeds. R. 10, ll. 9-25; R. 13, ll. 10-13. Ultimately, Williams told police that after her husband went to bed, she allowed Appellant into the house. R. 11, ll. 5-

19. Williams then woke her husband and used a ruse to get him to go into the living room. R. 12, ll. 1-3. Williams claimed she heard gunshots, and went into the living room after her husband. R. 12, ll. 4-8. She then called 911 to report her husband had been shot. R. 12, ll. 8-10. Her husband had been "shot at five times," but hit only three times. R. 15, ll. 22-24.

Eventually, Williams confessed to the police and implicated Appellant. R. 12, ll. 11-13. When the police arrested Appellant, he admitted his involvement. R. 12, ll. 22-25. Shortly after their arrest, it was apparent that Williams used Appellant's naïveté to her advantage concerning the death of her husband. R. 31, l. 19 – R. 32, l. 3; R. 50-97. While in jail, she described Appellant as a "stupid nigger," and commented that he was going to jail for something she did. R. 32, ll. 4-13; R. 50-97.

Unsurprisingly, neuropsychological testing revealed Appellant suffered severe cognitive deficits. R. 50-97. His IQ, without any consideration of the Flynn effect or the standard error of measurement, was 75. R. 50-97. Based on the limited testing conducted, he was preliminarily placed in the "Borderline range of intellectual functioning." R. 50-97. He suffered deficits "in the areas of verbal memory, visual memory, speed of mental tracking, motor speed, manual dexterity, trail making and visuospatial functioning." R. 50-97. According to the neuropsychologist who evaluated Appellant, he likely had "brain organicity" and deficits in his ability "to fully process and comprehend more complex materials and issues." R. 50-97.

During the guilty plea hearing, the state repeatedly requested the maximum sentence – life imprisonment without the possibility of parole. R. 8, l. 25; R. 17, ll. 17-19; R. 45, ll. 6-24. Plea counsel requested "the minimum sentence." R. 42, l. 6. Counsel noted that even if Appellant, who was thirty-eight years old at the time of sentencing, were sentenced to fifteen years' imprisonment, which was half of the mandatory minimum, there was "fifty-fifty

proposition that that [would be] a life sentence." R. 42, ll. 9-13. As demonstrated by the life expectancy data provided by the Department of Corrections, the average age of death for an African-American male was 52.4 years old in 2009, 48.56 years old in 2010, and 51.06 years old in 2011. R. 50-97. Appellant could expect to live another ten to fourteen years behind bars. R. 50-97. Further, in objecting to the imposition of a life sentence, plea counsel explained any sentence exceeding the statutory minimum was unconstitutional in light of Appellant's intellectual functioning, level of culpability, and the life expectancy information from the prison. R. 42, l. 17 – R. 43, l. 2; R. 47, ll. 10-20.

Nevertheless, with no explanation, Judge Griffith sentenced Appellant to life imprisonment. R. 47, ll. 1-9; R. 100-101; R. 104.

Discussion

"The Eighth Amendment succinctly prohibits '[e]xcessive' sanctions. It provides: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'" Atkins v. Virginia, 536 U.S. 304, 311 (2002). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." Trop v. Dulles, 356 U.S. 86, 100 (1958). "The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be." Hall v. Florida, 134 S.Ct. 1986, 1992 (2014). South Carolina's Constitution likewise proscribes excessive punishments and cruel or unusual punishments: "Excessive bail shall not be required; nor shall excessive fines be imposed; nor shall cruel, nor corporal, nor unusual punishment be inflicted." S.C. Const. Art. I, § 15. Traditionally, the South Carolina Supreme Court has employed the same analysis for both constitutions. State v. Wilson, 306 S.C. 498, 512, 413 S.E.2d 19, 27 (1992).

Without question, "[t]he Eighth Amendment prohibits punishment considered 'Cruel and Unusual' at the time the Bill of Rights was adopted." Id. at 509, 413 S.E.2d at 25 (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).

"The United States Supreme Court first recognized a constitutional principle of proportionality in Weems v. United States, 217 U.S. 349 (1910)." State v. Harrison, 402 S.C. 288, 293, 741 S.E.2d 727, 729 (2013). A sentence must be "graduated and proportioned to [the] offense." Id. "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." Id. at 294-295, 741 S.E.2d at 730 (internal citations omitted).

Grossly Disproportionate Sentences

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). "[A] sentence, though not cruel and unusual in kind, may be so severe in duration as to be cruel and unusual." Stockton, 269 S.C. at 462, 237 S.E.2d at 897. "[E]ven when a particular sentence is authorized by statute, 'it may run afoul of the Eighth Amendment prohibition against cruel and unusual punishment.'" State v. Brannon, 341 S.C. 271, 278, 533 S.E.2d 345, 348-349 (Ct. App. 2000)(quoting Solem, 463 U.S. at 290). "[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, "intrajurisdictional and interjurisdictional analysis is appropriate." Id.

Categorical Bans

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. 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). For example, the United States Supreme Court categorically ruled the Eighth Amendment prohibits the imposition of the death penalty for non-homicide crimes against individuals, Kennedy v. Louisiana, 554 U.S. 407 (2008), and prohibited the death penalty for defendants who committed their crimes before the age of eighteen, Roper v.

Simmons, 543 U.S. 551 (2005). In Atkins, the Court explained it had held "that death [was] an impermissibly excessive punishment for the rape of an adult woman," "or for a defendant who neither took life, attempted to take life, nor intended to take life." Atkins, 536 U.S. at 312 (internal citations omitted).

When adopting categorical proportionality rules, the Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Graham, 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).

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 Enumnd'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. at 313. 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.

Convergence –

Grossly Disproportionate Sentences & Categorical Bans

Not surprisingly, 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 "incorrigibility 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,

'impetuousness[,] 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).

When examining its own excessive punishment ban embodied in the Oregon Constitution, the Oregon Supreme Court looked to the United States Supreme Court's opinions on intellectual disabilities to determine whether a trial judge was required to consider a defendant's intellectual disability prior to sentencing. State v. Ryan, 396 P.3d 867, 875-877 (Ore. 2017). Ryan received a mandatory minimum prison sentence of seventy-five months for multiple sex offenses. Id. at 868. 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.

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). Thus, at least one state legislature has 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. 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.

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). 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

Several states examining sentencing schemes involving juveniles have concluded that certain terms-of-years sentences violate the Eighth Amendment's ban on cruel and unusual punishment when considering the juveniles' life expectancy. 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. See e.g., People v. Caballero, 282 P.3d 291, 295 (Cal. 2012)(holding a term-of-years sentence that extended beyond the defendant's life expectancy violated the Eighth Amendment); Casiano v. Commissioner, 115 A.3d 1031, 1036-1037 (Conn. 2015)(concluding a fifty-year sentence was the equivalent of life based upon statistical data presented); Floyd v. State, 87 So.3d 45, 46-47 (Fla. Dist. Ct. App. 2012)(holding an eighty year sentence violated the Eighth Amendment because it exceeded the defendant's life expectancy); State v. Null, 836 N.W.2d 41, 70-74 (Iowa 2013)(invalidating a sentence of 52.5 years sentence as not providing a meaningful opportunity for release); State v. Zuber, 152 A.3d 197, 211-213 (N.J. 2017)(finding sentences of fifty-five years and sixty-eight years were the equivalent of life sentences); Bear Cloud v. State, 334 P.3d 132, 136 (Wyo. 2014)(concluding sentencing a defendant such that his earliest possible meaningful opportunity for release would be when he was sixty-one years old was the functional equivalent of a life sentence).

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 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.

CONCLUSION

Appellant respectfully requests this Court vacate his sentence and imposition of the mandatory minimum sentence of thirty years' imprisonment.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of March, 2018.

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."

March 20, 2018

Susan B. Hackett

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MARCUS CHANNING JOHNSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Sherrie Butterbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of March, 2018.

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of March, 2018.

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