STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CORY LAMONT SPARKMAN,

APPELLANT

APPELLATE CASE NO. 2018-000172

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. In violation of the state and federal constitutions, did the judge err in denying Appellant's request for re-sentencing where he received a *mandatory* sentence of life imprisonment *with* the possibility of parole, which is the functional equivalent of life imprisonment *without* the possibility of parole, because the statutory and regulatory scheme governing parole does not provide for consideration of the characteristics attendant to youth?

II. Did the trial judge erred by denying Appellant an opportunity to present evidence, or even proffer evidence to be considered on appeal, regarding the parole board's decision-making process to demonstrate that parole is illusory for Appellant in light of the parole board's policies and procedures, which permit denial of parole on the basis of the seriousness of the offense, and the parole board's failure to consider the impact of juvenility on Appellant and his offenses?

STATEMENT OF THE CASE

On July 9, 1992, sixteen-year-old Appellant and Jackie Robinson killed Ronald Ravenel and Michael Gadsden. R. 37-40; R. 41-44; R. 45-48; R. 49-59; R. 70-78. On January 4, 1993, a Charleston County grand jury indicted Appellant for two counts of murder (1993-GS-10-90; -92) and one count of armed robbery (1993-GS-10-91). R. 70-78. On September 27, 1993, Appellant entered guilty pleas to the charged offenses. R. 37-40; R. 41-44; R. 45-48; R. 49-59. The Honorable Gerald C. Smoak sentenced Appellant to mandatory life sentences for each of the murders and to twenty-five years for the armed robbery. R. 37-40; R. 41-44; R. 49-59; R. 70-78. He ordered the sentences to be served consecutively. R. 37-40; R. 49-59; R. 70-78.

On April 1, 2016, Appellant, who has spent more than half of his life in prison, filed a *pro se* motion for re-sentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). R. 37-40; R. 45-48. On October 11, 2017, the state, represented by Charles M. Condon, Jr., filed its response. R.41-44. Through counsel, Cameron Blazer, Appellant filed a reply. R. 45-48. After a brief hearing on November 13, 2017, the Honorable Deadra L. Jefferson denied Appellant's motion for re-sentencing by an order filed December 21, 2017. R. 49-59.

Subsequently, on January 8, 2018, Appellant filed a motion to reconsider. R. 60-67. By an order filed on January 24, 2018, Judge Jefferson denied the motion. R. 68-69. After receiving the order on January 25, 2018, Appellant served his notice of Appeal on February 1, 2018. This brief follows.

STATEMENT OF FACTS

It was undisputed that Appellant was sixteen-years old at the time of his crimes. R. 3, l. 18; R. 37-40; R. 41-44; R. 45-48; R. 49-59. It was also undisputed that Appellant, without negotiation or recommendation, pled guilty and had been sentenced to two consecutive life sentences with the possibility of parole after service of twenty years. R. 3, l. 23 – R. 4, l. 5; R. 4, ll. 21-24; R. 7, ll. 16-18; R. 37-40; R. 41-44; R. 45-48; R. 49-59. Finally, it was undisputed that Appellant had been denied parole three times. R. 5, ll. 1-11; R. 8, ll. 17-22; R. 41-44; R. 45-48; R. 49-59; R. 60-67. Each time, Appellant was "cursorily denied parole on the basis of the seriousness of his offense." R. 45-48.

At the hearing on the motion for re-sentencing, Appellant argued his sentence, while parole eligible, was the functional equivalent of a life without parole sentence because the parole system failed to afford a meaningful opportunity for release. R. 45-48. Specifically, Appellant explained the parole board did not consider the factors mandated by the United States Supreme Court and the South Carolina Supreme Court to ensure sentences for juvenile offenders align with the Eighth Amendment to the United States Constitution and the South Carolina Constitution. R. 45-48. Appellant's sentence allowing for parole eligibility was "a technical distinction without a material difference" from life without parole sentences. R. 45-48. "[W]ithout a system in place to ensure a constitutionally compliant review of the Miller[1] factors and their effect on his case, there appears to be no meaningful opportunity for him to secure the rights guaranteed to him by the Eighth Amendment as outlined in Miller." R. 45-48.

Appellant's counsel noted that the judge had restricted her ability to present evidence at the hearing, and the judge affirmed that she limited the hearing to legal argument, but would

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

permit supplementing the record if the judge "felt it was necessary." R. 7, ll. 19-24; see also R. 45-48 (requesting an opportunity to present evidence as to the effect of parole eligibility in his case). When counsel proposed, at a minimum, presenting testimony from Appellant "[t]o establish the contours of the parole system," the judge refused, stating the parole system was not "dispositive" to the legal issue presented. R. 8, ll. 1-16. Counsel argued the parole system's operations were relevant because it was the parole system itself that rendered Appellant "similarly situated" to those individuals serving life without parole. R. 9, ll. 10-17. Counsel explained:

> [T]he parole statute in South Carolina has not changed one whit since Miller or since Aiken vs. Byars, and the government is resting on the fact that he has parole eligibility as making it similar to the Wyoming situation, which [in] Montgomery v. Louisiana,[2] the Supreme Court said, parole is fine. If you get parole and you follow what Wyoming does, then yes, it's going to work. The problem is that South Carolina's parole system bears no resemblance whatsoever to the parole system in Wyoming that Montgomery vs. Louisiana approved of.

R. 9, l. 23 – R. 10, l. 7. Thus, counsel argued, it was "important to establish for the record" exactly what the parole board considered and, more importantly, what the parole board failed to consider. R. 10, ll. 8-14. As counsel explained, "if parole eligibility is merely illusory, it's no parole eligibility at all." R. 10, l. 22 – R. 11, l. 2. Counsel argued "the parole board hearing itself is constitutionally deficient" and the circuit court had authority to "hear evidence to establish that and that the state ha[d] provided no evidence to refute it." R. 11, ll. 20-23.

Appellant requested the Court consider the structure of the parole review process was "at odds with Miller" because the Constitution requires consideration "of the issues related to juvenility," which the parole board refused to consider. R. 12, l. 21 – R. 13, l. 6. Counsel explained there was no evidence in the record and could be no evidence to indicate any

[2] Montgomery v. Louisiana, 136 S.Ct. 718 (2016).

consideration by the parole board of the Miller factors. R. 13, ll. 7-11.[3] According to counsel, "[t]he constitutional rights protected by Miller and reviewed in Montgomery are not being honored by the [parole] process" in South Carolina. R. 13, ll. 13-15. Essentially, Appellant had been "sitting in [prison] for 25 years with no consideration of the juvenility - - the impact of juvenility on his crimes, on his capacity for rehabilitation, on his capacity to live independently of the confines of the prison system" and he would never receive such consideration based upon the strictures of the parole board's review. R. 18, l. 8 – R. 19, l. 6.

Persuasively, counsel pointed out that the Supreme Court never indicated its decision in Miller was limited. R. 20, ll. 14-18. Rather, the Court decided the case before it, which concerned two juveniles sentenced to mandatory sentences of life without the possibility of parole. R. 20, ll. 18-21. Thereafter, the South Carolina Supreme Court concluded Miller and the Eighth Amendment required re-sentencing for individuals with sentences of *discretionary* life without parole and those similarly situated; thus, the Court acknowledged Miller was not limited to its facts. R. 20, l. 22 – R. 21, l. 5.

The state's central argument was that Appellant was not eligible for re-sentencing because he was serving a sentence of life imprisonment with the possibility of parole after twenty years. R. 4, ll. 18-24; R. 41-44. According to the state, Aiken applied *only* to sentences of life without the possibility of parole. R. 5, ll. 14-18.

Additionally, the state relied upon Montgomery to argue that a parole eligible sentence was a way to cure unconstitutional life without parole sentences, and therefore, Appellant's

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[3] When the state pointed to Appellant's institutional record, which Appellant was unable to rebut based upon the judge's limitation on the presentation of evidence, the judge explained that the parole board could deny parole based solely upon his disciplinary record in prison. R. 23, ll. 14-17. Counsel argued the judge's observation "underscored" her argument because the parole board could deny parole for an unfavorable institutional record without consideration of the juvenility factors – or any other factor. R. 24, ll. 1-10.

parole eligible life sentence was constitutional. R. 5, l. 23 – R. 6, l. 13; R. 22, ll. 8-13. On this point, the state claimed "the parole board can take into considerations of youthfulness and immaturity at the time of the crime, rehabilitation, along with other important considerations." R. 5, ll. 19-22; R. 41-44.

Judge Jefferson explained her understanding of Aiken was that "a juvenile should just not get a life sentence because they killed somebody because they are very young, they lack discretion, and, as a matter of procedure, [a judge] should consider all of that." R. 14, ll. 14-23. The "only difference" between a death penalty case and a juvenile sentencing proceeding, in the judge's estimation, was that a judge would not consider aggravating circumstances." R. 14, ll. 21-25. Rather, the circuit court would "only consider the mitigating circumstances" in juvenile sentencing proceedings. R. 14, l. 25 – R. 15, l. 1.

In her order, Judge Jefferson construed Appellant's request for re-sentencing to be a request for "an Aiken hearing for the specific purpose of granting him parole thereby usurping the role of the parole board and their decision-making authority which is delegated to them by statute." R. 49-59. Judge Jefferson then concluded "this request exceed[ed] [the court's] authority as well as the purpose and goal of the Aiken decision." R. 49-59. The judge continued, finding no support in Aiken for "a guarantee of the grant of parole versus parole eligibility." R. 49-59.

Additionally, Judge Jefferson concluded that "only those defendants sentenced to life without parole as juveniles are eligible for re-sentencing under Miller and Aiken." R. 49-59. According to Judge Jefferson, because Appellant is parole-eligible, he "is not 'similarly situated' to those in Miller and Aiken" and not "a proper candidate for re-sentencing in accordance with the guidelines set for by these cases." R. 49-59. In support of her finding, Judge Jefferson noted

her "interpretation of Aiken [was] supported by Montgomery v. Alabama where in the U.S. Supreme Court held that giving Miller retroactive effect [did] not require courts to re-litigate sentences in every case where the defendant received life without parole," and provided that "[a] court may instead elect to extend parole eligibility to juvenile offenders rather than re-sentence them." R. 49-59.[4]

Judge Jefferson acknowledged that Appellant asked her to consider the criteria relied upon by the parole board in making its decision to deny parole to Appellant; however, she did not acknowledge her refusal to permit Appellant to present evidence on this point. R. 49-59.[5] Citing to the parole board manual and a statute, Judge Jefferson claimed the board must "carefully consider whether the prison has shown a disposition to reform, whether the prisoner is likely to obey the law and lead a correct life in the future, whether the prisoner's conduct has merited a lessening of the rigors of imprisonment, whether society's interest will be impaired by parole, and whether suitable employment has been secured for the inmate." R. 49-59. Finally, the judge noted the "parole board must also consider the record of the prisoner before, during, and after imprisonment." R. 49-59.

Regarding Appellant's claim that the parole criteria "fail[ed] to consider the factors of youthfulness and immaturity" as required by the federal and state constitutions, Judge Jefferson concluded that Appellant was "in effect, asking [the] court to review the decisions made by the

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[4] During the hearing, Judge Jefferson intimated that she was not going to consider Montgomery v. Louisiana, 136 S.Ct. 718 (2016). R. 19, ll. 7-9; r. 19, ll. 13-19. Nevertheless, she relied heavily upon the case in her order. R. 49-59.

[5] Judge Jefferson's order did not acknowledge that at the hearing, she indicated to counsel that she would not consider the policies and procedures in place for the parole board or that she refused to permit counsel to present evidence related to the parole board's considerations. R. 31, l. 22 – R. 32, l. 19. Nevertheless, her order referenced the criteria and the manual used by the parole board. R. 49-59.

board as well as the decision-making process itself." R. 49-59. According to the judge, Appellant was "in effect asking [the] court to usurp the board's statutory decision-making authority and substitute it with its own." R. 49-59. She determined "[s]uch a request [was] improper." R. 49-59. Nevertheless, Judge Jefferson claimed that "a denial of parole, in and of itself, [did] not mean that [Appellant] ha[d] been denied a meaningful review." R. 49-59. Although the judge recognized that Appellant was asking the circuit court to determine whether his sentence, which included his release from imprisonment being determined by certain criteria, complied with federal and state constitutions, the judge determined Appellant was "effectively asking the court to usurp the authority of the parole board to make parole determinations, and instead substitute its own judgment as to whether [Appellant] should have been granted parole." R. 49-59. The judge refused to "render an opinion as to the appropriateness of the parole board's decision" and found that "[s]uch a determination [was] not dispositive as to the applicability of Aiken to [Appellant]'s sentence." R. 49-59.

In his motion to reconsider, Appellant argued against the circuit court's construction of his request. R. 60-67. Appellant explained he did not ask the circuit court to "substitute its judgment for that of the parole board" or ask the circuit court to "sit in judgment of that body's particularized execution of its statutory and regulatory functions." R. 60-67. Instead, Appellant "sought to elicit testimony to demonstrate the degree to which the statutory and regulatory framework directing the parole board's activities comports with the constitutional protections demanded by Miller and its progeny." R. 60-67. Additionally, Appellant clarified that he sought re-sentencing because "the process, the very structure and plan of South Carolina's parole system, is directly at odds with the meaningful review contemplated by Montgomery v. Alabama." R. 60-67. Appellant admitted that his parole denials did not prove the structural

deficiencies, but he argued the state "did not and [could not] demonstrate that the parole process – as it relates to *any* defendant – involves any meaningful consideration of the Miller factors," rendering his sentence the functional equivalent of a life without parole sentence. R. 60-67.

Thereafter, Judge Jefferson denied Appellant's motion for reconsideration. R. 68-69. Judge Jefferson indicated she rendered her decision "after careful and deliberate consideration of Aiken v. Byars and its predecessors, Miller v. Alabama and Montgomery v. [Louisiana]." R. 68-69. Additionally, the judge determined Appellant's motion to reconsider failed to raise any issues or proffer any argument not considered by the court in its prior ruling. R. 68-69. According to the judge, the motion "simply restate[d] previous arguments made by [Appellant] and considered by the court." R. 68-69.

ARGUMENT

I. In violation of the state and federal constitutions, the judge erred in denying Appellant's request for re-sentencing where he received a *mandatory* sentence of life imprisonment *with* the possibility of parole, which is the functional equivalent of life imprisonment *without* the possibility of parole, because the statutory and regulatory scheme governing parole does not provide for consideration of the characteristics attendant to youth.

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).

Introduction

"[C]hildren are constitutionally different from adults for purposes of sentencing." Miller v. Alabama, 567 U.S. 460, 471 (2012). Using this basic premise, on June 25, 2012, the United States Supreme Court held mandatory sentences of life without parole (LWOP) imposed upon juveniles violated the Eighth Amendment to the United States Constitution. Id. at 479.

"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)). Over the years, the cases addressing the proportionality of sentences have developed along two general lines. One of those lines imposes categorial rules and generally considers those rules as applied to groups of offenses or offenders. For example, Supreme Court prohibited the death penalty for defendants who committed their crimes before the age of eighteen, Roper v. Simmons, 543 U.S. 551 (2005).

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. Id. at 61 (quoting Roper, 543 U.S. at 572). 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 of the Constitution. Graham, 560 U.S. at 61 (quoting Kennedy v. Louisiana, 554 U.S. 407, 421 (2008)).

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, 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. In order 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 particular import to Appellant's appeal.

No death penalty for children

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. While "[a] juvenile is not absolved of responsibility for his actions," his transgressions are "not as morally reprehensible as that of an adult." Graham, 560 U.S. at 68 (internal citations omitted).

No LWOP for children convicted of non-homicide offenses

Sixteen-year old Terrance Graham entered guilty pleas to armed burglary and attempted armed robbery pursuant to a plea agreement. Graham, 560 U.S. at 53. Graham. The trial court sentenced Graham to concurrent three-year terms of probation. Id. at 54. Shortly thereafter, when Graham was seventeen-years old, he was arrested again and charged with home invasion robbery. Graham's probation officer charged Graham with violating the terms of his probation. When Graham appeared before the trial court, he admitted to violating his probation by fleeing arrest. Id. at 55. After finding Graham had violated his probation, the trial judge, in his discretion, sentenced Graham to the maximum sentence of life.[6] During the sentencing proceeding, the judge provided his reasoning for the sentence: "We can't do anything to deter you. This is the way you are going to lead your life.... I don't see where I can do anything to help you any further." Id. 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. 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

[6] Florida had abolished its parole system; accordingly, the life sentence gave Graham no possibility of release unless he was granted executive clemency. Graham, 560 U.S. at 57.

> 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. 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. "[W]hile the Eighth Amendment forbids a state from imposing a life without parole sentence on a juvenile non-homicide offender, it does not require the state to release that offender during his natural life." Id. at 75. "The Eighth Amendment does not foreclose the possibility that persons convicted of non-homicide crimes committed before adulthood will remain behind bars for life. It does forbid states from making the judgment at the outset that those offenders never will be fit to reenter society." Id.

While explaining its rationale, the Graham Court noted that a life without parole sentence is the "second most severe penalty permitted by law." Id. at 69 (internal citations omitted). Additionally, "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." Such a sentence "alters the offender's life by a forfeiture that is irrevocable." Id. For a juvenile offender, a life without parole sentence "'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit [of the convict], he will remain in prison for the rest of his days.'" Id. at 70 (quoting Naovarath v. State, 779 P.2d 944 (Nev. 1989)).

Finally, 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, the Court extended the reasoning of Roper and Graham by holding that mandatory sentences of life without parole for juvenile homicide offenders also violate the Eighth Amendment's prohibition on cruel and unusual punishment. Miller, 567 U.S. at 465. 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 479-480.

The Miller Court reserved ruling on whether juveniles could ever be sentenced to LWOP. Id. at 479. 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 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." 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)).

Although the Miller Court did not hold LWOP to be an unconstitutional sentence in non-mandatory sentencing schemes, the Court held Eighth Amendment jurisprudence governing imposition of death sentences applied equally to cases involving juveniles facing the possibility of LWOP. Id. at 481-482. The Court's decision created a presumption against LWOP sentences for juveniles, and most importantly, the Court imported the principles of capital sentencing into cases where juveniles face the possibility of LWOP. Specifically, the court explained that "death is different" and "children are different too." Id. at 481.

"The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" Id. at 469 (quoting Roper, 543 U.S. at 560). The Miller Court emphasized that "proportionality is central to the Eighth Amendment." Id. (quoting Graham, 560 U.S. at 59). 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. In light of the relevance to the ban on cruel and unusual punishment, "imposition 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, it is clear that 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 found the Miller decision "clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution." Id. at 543, 765 S.E.2d at 576-577. 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.

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

> (II)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.

"The '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).

"A hearing where youth and its attendant characteristics are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." Id. at 735. It is the hearing that "gives effect to Miller's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." Id. The Court concluded that Montgomery and others like him "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." Id. at 736-37.

Important for Appellant's case, the Montgomery Court explained that "[g]iving Miller retroactive effect" "does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole." Montgomery, 136 S.Ct. at 736. For example, a State "may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." Id. "Allowing those

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

> Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of Miller's central intuition – that children who commit even heinous crimes are capable of change.

Id. As evidenced by the decision, extending parole eligibility to juvenile offenders convicted of homicide offenses must *not* be viewed as a panacea. In order for parole eligibility to remove a life sentence from the scope of Miller, parole considerations must include the Miller factors, specifically, accepting that "children who commit even heinous crimes are capable of change." In other words, the nature of the crime *alone* must not prevent release in order for the parole scheme to comply with Miller and the Eighth Amendment's prohibition on cruel and unusual punishments.

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 question 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. Finally, a parole system that does not consider the Miller factors cannot save a sentence that is the functional equivalent of a life sentence from the Eighth Amendment's prohibition on cruel and unusual punishment.

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). 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 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.

Some states have examined the parole schemes available as well to determine whether parole eligibility "saved" a lengthy term-of-years sentence or a life sentence. Those courts have found that parole systems must consider the Miller factors in order to survive Eighth Amendment

challenges and that lengthy term-of-years sentences that require substantial periods of incarceration prior to parole eligibility violate the Constitution as those sentences are the functional equivalent of life imprisonment without the possibility of parole.

California

In People v. Franklin, 370 P.3d 1053, 1060 (Cal. 2016), the California Supreme Court held a "juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in Miller." Additionally, the court determined that a legislative "fix" to that state's Miller problem, which amended Franklin's sentence to life with parole eligibility during the twenty-fifth year of his sentence, rendered the appeal moot. Id. at 277. "Crucially," the legislative enactment required "the [Parole] Board not just to consider but to give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." Id. (internal quotation omitted). The court remanded for the trial court to determine if Franklin had "sufficient opportunity" to make a record of information relevant to his eventual youth offender parole hearing. Id. at 284. Additionally, the court determined "it would be premature" "to opine on whether" the parole hearing procedures or practices conformed to the dictates of statutory and constitutional law where the Board had yet to revise existing regulations to conform with the newly enacted statute for youth offender parole. Id. at 286.

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's "viewed the concept of 'life' in Miller and Graham was 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. The Court was "persuaded that the procedures set forth in Miller must be followed when considering whether to sentence a juvenile offender to fifty years imprisonment without parole." Id. at 1048.

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 sentenced to two consecutive forty-year sentences. Id. at 45-46. If Floyd served the

entirety of his sentence, he would be ninety-seven years old when released, and 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.

In Atwell v. State, 197 So.3d 1040 (Fla. 2016), the Florida Supreme Court confronted a sentence very much like the one in the instant matter. In 1992, Atwell was convicted of first-degree murder when he was sixteen years old. Id. at 1043. The only sentencing options were death or life in prison with the possibility of parole after twenty-five years. Id. The Commission on Offender Review conducted a parole hearing on June 10, 2015, which was twenty-five years after Atwell was sentenced. Id. at 1044. The Commission set a "presumptive parole release date of December 27, 2130, with another interview in February 2022." Id. The "presumptive parole release date" may be changed only for reasons of institutional conduct or acquisition of new information. Id. "Clearly," the release date in 2130 "far exceed[ed] Atwell's life expectancy." Id.

In determining whether Graham and Miller had any application to those individuals sentenced to life *with* the possibility of parole, the Florida Court explained it had "consistently followed the spirit of" the cases "rather than a narrow, literal interpretation." Id. at 1046. The court held it "must" "look beyond the exact sentence denominated as unconstitutional by the

Supreme Court and examine the practical implications of the juvenile's sentence, in the spirit of the Supreme Court's juvenile sentencing jurisprudence." Id. at 1047.

Next, the court examined the Florida parole system to "determine whether the eligibility for parole removes a sentence from the purview of Graham and Miller." Id. Under the system, "a numerical score based on the offender's present and prior criminal behavior and related factors found to be predictive in regard to parole outcome" was used to determine "a range of presumptive parole release dates." Id. The numerical score gave "primary weight" to the seriousness of the inmate's present criminal offense and past criminal record. Id. at 1048. Although the statutes permitted consideration of the aggravating and mitigating circumstances to permit a decision outside a given range, "none" provided "for the level of consideration of diminished culpability of youth at the time of the offense as sentencing judges now consider post-Miller." Id. Consideration of mitigating and aggravating circumstances was "only required" when the Commission "wishe[d]" to impose a presumptive parole release date outside the given range. Id. Additionally, the "enumerated mitigating and aggravating circumstances," "even if utilized, [did] not have specific factors tailored to juveniles. In other words, they completely fail to account for Miller." Id.

"A presumptive parole release date set decades beyond a natural lifespan is at odds with the Supreme Court's recent pronouncement in Montgomery." Id. Recognizing that a state may remedy a Miller violation by providing for parole for juvenile offenders, the court held the parole system *must* account for the Miller factors. Id. Florida's parole system permitted a juvenile who committed an offense to be subject to one of the harshest penalties without consideration of the mitigating circumstances. Id. at 1049. In Florida, parole was an "act of grace," not a right. Id. The statutory scheme provided for "no special protections expressly afforded to juvenile offenders and no consideration of the diminished capacity of the youth at the time of the

offense." Id. "The Miller factors are simply not part of the equation." Id. The court concluded that Atwell's "sentence effectively resemble[d] a mandatorily imposed life without parole sentence, and he did not receive the type of individualized sentencing consideration Miller requires." Id. "The only way to correct Atwell's sentence" was "to resentence Atwell in conformance" with newly enacted Florida statutory law created to comply with Miller and Graham by providing for judicial sentence review hearings at which the court is required to consider the Miller factors. Id.

Idaho

The Idaho Supreme Court recently addressed the application of Miller and Montgomery to a discretionary life sentence imposed on a sixteen-year-old in 2007. 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. 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.

Further, the Idaho Supreme Court was unimpressed with the state's argument that the sentencing judge complied with the requirements of Miller and Montgomery where the judge stated he "considered the nature of the offense," "the mental health issues," "mitigating and aggravating facts," and in mitigation, "the relative youth" of Windom, and the fact that Windom did "not have a long criminal record." Id. at 157. Emphasizing Montgomery's mandate that Miller did more than require a sentencing judge to consider a juvenile offender's youth before

imposing LWOP, the Idaho Supreme Court noted there was no evidence presented regarding the factors required by Miller, which must be individualized for the youth being sentenced. Id.

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. 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. See also State v. Pearson, 836 N.W.2d 88, 96 (Iowa 2013) (holding "it should be relatively rare or uncommon that a juvenile be sentenced to a lengthy prison term without the possibility of parole").

In State v. Ragland, 836 N.W.2d 107 (Iowa 2013), the Iowa Supreme Court addressed whether a sentence providing for the possibility of parole after sixty years in prison warranted re-sentencing. The Iowa Supreme Court held "the rationale of Miller, as well as Graham, reveals that the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole." Id. at 121. As explained by the court, "it is important that the spirit of the law not be lost in the application of the law," and in this case, the court determined the spirit of Miller and Graham required that "in the sentencing of juveniles than merely making sure that parole is possible." Id. Based upon an "increased understanding of the decision making of youths," the court held the sentencing process must be tailored to account in a meaningful way

for the attributes of juveniles that are distinct from adult conduct." Id. The court explained that "a government system that resolves disputes could hardly call itself a system of justice with a rule that demands individualized sentencing considerations common to all youths apply only to those youths facing a sentence of life without parole and not to those youths facing a sentence of life with no parole until age seventy-eight." Thus, the court held Miller applied to sentences that are the "functional equivalent of life without parole." Id. at 121-22.

Following the Ragland decision, the Iowa Supreme Court approved a sentence of life with the opportunity for parole after twenty-five years. State v. Louisell, 865 N.W.2d 590, 600-601 (Iowa 2015). Louisell asserted "her eligibility for parole [was] illusory, not real." Id. at 601. According to Louisell, only one of Iowa's thirty-eight juvenile offenders originally sentenced to LWOP had been granted parole. Id. This was a conditional release to hospice care for cancer treatment, and "the parole board reserved the right to revisit its decision if her health improved." Id. Louisell argued that if juveniles were "repeatedly denied parole based on offense severity, there is no realistic opportunity for her to receive parole, no matter how extensively she has been rehabilitated." Id. at 602. However, the question of whether Louisell had been denied parole in violation of the law was not before the Court. Id. Nevertheless, the Court took the opportunity to reaffirm that juveniles "must be afforded a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. (internal quotation omitted). Without fully exploring the meaning of the phrase "meaningful opportunity," the Court explained it "must be *realistic*." Id. (emphasis in original). The Court left "for another day the question whether repeated cursory denials of parole deprive juvenile offenders who have shown demonstrable rehabilitation and maturity of a meaningful or realistic opportunity for release." Id.

Massachusetts

After remarking that in order for juvenile homicide offenders to be sentenced to life imprisonment, the offenders must be eligible for parole, the Massachusetts Court turned to the question of what was procedurally required in order to protect juvenile homicide offender's meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Diatchenko v. Dist. Attorney for Suffolk Dist., 27 N.E.3d 349, 357-358 (Mass. 2015). The court explained that the parole board must consider the "unique characteristics" of juvenile offenders. Id. at 360. "[G]iven the challenges involved for a juvenile homicide offender serving a mandatory life sentence to advocate effectively for parole release on his or her own, and in light of the fact that the offender's opportunity for release is critical to the constitutionality of the sentence," the court concluded "that this opportunity is not likely to be 'meaningful'" without access to counsel. Id. at 361.

Additionally, the court held "a parole-eligible, indigent juvenile homicide offender," may receive funding for expert witnesses to assist in connection with the initial parole proceeding." Id. at 363. The court noted an expert may be particularly helpful in explaining the "effects of the individual's neurobiological immaturity and other personal circumstances at the time of the crime, and how this information relates to the individual's present capacity and future risk of reoffending." Id.

Finally, the court held that judicial review of a parole decision was available. Id. at 365. Explaining that because "the parole hearing acquires a constitutional dimension for a juvenile homicide offender" as it is "what makes the juvenile's mandatory life sentence constitutionally proportionate," the court determined judicial review was necessary to ensure the board exercised "its discretionary authority in a constitutional manner, meaning that the right of the offender to a

constitutionally proportionate sentence was not violated." Id. "[J]udicial review is limited to the question whether the board has carried out its responsibility to take into account the attributes or factors" outlined in Miller "in making its decision." Id.; see also Com. v. Okoro, 26 N.E.3d 1092, 57-58 (Mass. 2015)(allowing juveniles convicted of murder in the second degree to be sentenced to life with the possibility of parole after service of fifteen years as long as the parole board considers "'the unique characteristics'" of juvenile offenders to ensure they are afforded a meaningful opportunity to obtain release).

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. Additionally, 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.

New York

The New York Supreme Court mconcluded that a juvenile was entitled to a parole release hearing at which his youth would be considered. Hawkins v. New York State Dep't. of Corr. And Cmty. Supervision, 140 A.D.3d 34 (N.Y. App. Div. 2016). In 1979, Hawkins was

sentenced "to a prison term of 22 years to life." Id. at 35. He was first eligible for parole in 2000. Id. He was denied parole release nine times. Id. at 36. At his most recent parole hearing, he was "54 years old and had served 36 years of his sentence." Id. The appellate court held "a person serving a sentence for a crime committed as a juvenile ... has a substantive constitutional right not to be punished with a life sentence if the crime reflects transient immaturity." Id. Hawkins' "constitutional right to a meaningful opportunity for release" was denied when the board "failed to consider the significance of [his] youth and its attendant circumstances at the time of the commission of the crime." Id. "The Board, as the entity charged with determining whether [Hawkins] will serve a life sentence, was required to consider the significance of [Hawkins'] youth and its attendant circumstances at the time of the commission of the crime before making a parole determination." Id. According to the court, this "consideration [was] the *minimal* procedural requirement necessary to ensure the substantive Eighth Amendment protections." Id. (emphasis added).

The court held it was "axiomatic" that a juvenile homicide offender "still has a substantive constitutional right not to be punished with life imprisonment for a crime reflect[ing] transient immaturity." Id. at 38 (alterations in original) (internal quotation omitted). Finding the 'foundational principle' of the Eighth Amendment jurisprudence regarding punishment for juveniles is that the imposition of a state's most severe penalties on juvenile offenders cannot proceed as though they were not children, the court held "[a] parole board is no more entitled to subject an offender to the penalty of life in prison in contravention of this rule than is a legislature or a sentencing court." Id. The court held that the parole release hearing stage must include procedures analogous to those at the sentencing stage where a juvenile is entitled to a hearing at which his youth and its attendant characteristics are considered. Id. at 38-39. "For

those persons convicted of crimes committed as juveniles who, but for a favorable parole determination will be punished by life in prison, the Board must consider youth and its attendant characteristics in relationship to the commission of the crime at issue." Id. at 39. The court held Hawkins was entitled to a de novo parole release hearing. Id. at 40.

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,'" which was the equivalent of LWOP, under the state statutory scheme violated the Eighth Amendment. 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).

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 "give 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.

South Carolina's Parole System

According to South Carolina statutory law, the Parole Board "must carefully consider the record of the prisoner before, during, and after imprisonment." S.C. Code Ann. § 24-21-640. An inmate may *not* be paroled until it appears to the satisfaction of the board: (1) "that the prisoner has shown a disposition to reform;" (2) "that in the future he will probably obey the law and lead a correct life;" (3) "that by his conduct he has merited a lessening of the rigors of his imprisonment;" (4) "that the interest of society will not be impaired thereby;" *and* (5) "that suitable employment has been secured for him." Id. The five-part statutory test for obtaining parole fails to take into the hallmarks of youth and the greater capacity for the youthful offender to change. Although the provisions include consideration of reform, the statute does not involve the rigorous examination of the Miller factors required by the Constitution in sentencing a juvenile.

In addition to the statutory provision, the Parole Board, exercising its regulatory authority, provides additional criteria considered by the Board when determining whether to grant or deny parole. These criteria may be found in the Parole Board Manual. The Parole Board's objectives and mission are important for understanding its decision-making process. According to the Parole Board Manual, the "Board's primary objective is the long-term protection of society." Policy and Procedure, South Carolina Department of Probation, Parole and Pardon Services, Division of Paroles and Pardons, 9 (April 2015).[7] Also, the first objective of the Board is to ensure its every decision "is based on the risk presented by the offender and is consistent with the goal of protection of the public." Id. In addressing the constitutionally-

[7] As noted at the proceedings below, the Parole Board's manual is available online at: https://www.dppps.sc.gov/content/download/68278/1576111/file/Parole+Board+Manual-+April+2015.pdf.

required procedural requirements, the Board functions under the notion that "very little is required in the way of procedural due process at parole hearings." Id. at 21. Prisoners have the right to be heard, "[f]air written notice of the specific parole criteria," notice of the date, time and place of the hearing, right to be heard by a fair panel, the "opportunity to present evidence and to have up to three witnesses to speak on their behalf, and to have the Board or panel carefully consider the complete record before, during, and after imprisonment," to have an attorney present at the prisoner's expense, and to written notice of the Board's reasons for denying parole. Id.

The Manual also sets forth the contents of the parole case summary report. Id. at 22. While the report includes the prisoner's criminal history, disciplinary record, and *even* statements from law enforcement, the prosecutor, and the sentencing judge, the report makes no mention of any of the Miller factors or the diminished culpability of youth. Finally, the Board established "specific parole criteria." Id. at 27-28. The Board "will not parole a prisoner unless it determines, based on the ... criteria, as well as any other factors the Board may consider relevant, that the conduct of the offender merits a lessening of the rigors of imprisonment; that the interests of society will not be impaired by granting parole; and that the offender has secured, or will be able to secure, suitable employment and residence." Id. at 27. The specific criteria set out by the Board include:

> The risk that the offender poses to the community;
>
> The nature and seriousness of the offender's offense, the circumstances surrounding that offense, and the prisoner's attitude toward it;
>
> The offender's prior criminal record and adjustment under any previous programs of supervision;
>
> The offender's attitude toward family members, the victim, and authority in general;

> The offender's adjustment while in confinement, including his progress in counseling, therapy, and other similar programs designed to encourage the prisoner to improve himself;
>
> The offender's employment history, including his job training and skills and his stability in the workplace;
>
> The offender's physical, mental, and emotional health;
>
> The offender's understanding of the causes of his past criminal conduct;
>
> The offender's efforts to solve his problems;
>
> The adequacy of the offender's overall parole plan, including his proposed residence and employment;
>
> The willingness of the community into which the offender will be paroled to receive that offender;
>
> The willingness of the offender's family to allow the offender, if he is paroled, to return to the family circle;
>
> The opinion of the sentencing judge, the solicitor, and local law enforcement on the offender's parole;
>
> The feelings of the victim or the victim's family, about the offender's release;
>
> Any other factors that the Board may consider relevant, including the recommendation of the parole examiner.

Id. at 28. Quite clearly, the Parole Board's considerations do not extend to any matters relative to the youth of the offender at the time of the commission of the offense. Eligibility for parole in South Carolina simply cannot "save" a life sentence from Eight Amendment scrutiny. The judge erred in holding otherwise.

Examining North Carolina's parole system as applied to a juvenile offender, the District Court for the Eastern District of North Carolina concluded the parole system "wholly" failed to provide the offender with any meaningful opportunity for release. Hayden v. Keller, 134 F.Supp.3d 1000, 1009 (E.D.N.C. 2015). The court explained the system did not distinguish

parole reviews for juvenile offenders from adult offenders. Id. The system failed to consider children's diminished culpability and heightened capacity for charge. Id. Under the system, the parole board afforded no consideration to juvenile status. Id. In conclusion, the court held "North Carolina's parole process fails to meet th[e] constitutional mandate" that juvenile offenders receive a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 1011.

Appellant's sentence violates the Eighth Amendment

As an initial matter, the judge erred in her construction of Appellant's motion. The judge opined that Appellant's motion for re-sentencing requested that she grant him parole. As Appellant made clear in his motion to reconsider, he was requesting a determination that his sentence of life with parole was the equivalent of a life without parole sentence, and as such, he was entitled to re-sentencing. In addition to the judge's erroneous construction of the motion, the judge also concluded Appellant was not entitled to re-sentencing because the Eighth Amendment barred only life without parole sentences for juveniles unless a judge considered the impact of the juvenile's age. This too was error.

Appellant's sentence of life with parole eligibility after twenty years violates the Eighth Amendment's prohibition on cruel and unusual punishment on its face and as applied. The sentencing judge had no discretion in what sentence to impose upon Appellant. The statute required that he sentence Appellant to life imprisonment with the possibility of parole. The mandatory nature of the sentence makes it immediately suspect under Eighth Amendment jurisprudence as it demonstrates the lack of individualization required by the Constitution. The mandatory nature of the sentence also demonstrates that the sentencer never considered the Miller factors deemed necessary prior to sentencing a juvenile offender. Despite Appellant

receiving a mandatory life sentence, one that is the functional equivalent to LWOP, no sentencer ever determined he was irreparably corrupt as required by the Constitution.

Appellant's sentence is the *functional equivalent* of life imprisonment without the possibility of parole in light of the parole system's failure to consider the Miller factors in rendering its decisions. In fact, the Parole Board does not consider an offender's youth at the time of the offense at all. The statutory scheme providing for the circumstances warranting parole and the Parole Board Manual completely fail to account for Miller. In the wake of Miller, Aiken, and Montgomery, a person serving a sentence for a juvenile offense has a substantive constitutional right not to be sentenced to life imprisonment. The presumption is against life imprisonment and can only be overcome by a showing and finding of irreparable corruption. Appellant's constitutional right to a meaningful opportunity for release was violated by the Parole Board's failure to consider the significance of his youth at the time of the commission of the offense. See Greiman v. Hodges, 79 F.Supp.3d 933, 943 (S.D. Iowa 2015) (refusing to accept at the summary judgment stage that the Parole Board's consideration of the "totality of the circumstances" necessarily considered the prisoner's age at the time of the offense, maturation, and rehabilitation). In light of the mandatory nature of Appellant's life with parole sentence, it is the Parole Board that will determine the ultimate length of his sentence. See id. Thus, the requirements of Miller must be fulfilled by the Parole Board. Id.

Appellant's sentence is the functional equivalent of life imprisonment without the possibility of parole as applied to Appellant because he has been denied parole at least three without any consideration of the hallmarks of youth. Due to the Board's cursory, repeated denials of release and the statutory and regulatory procedures not incorporating the Miller factors or anything remotely close, there is an unacceptable likelihood that the nature of the crime alone,

a fact that will never change, works to deny Appellant a meaningful opportunity for release from incarceration. Appellant is entitled to a meaningful opportunity to obtain release, which is something to which adult offenders are not entitled. Thus, the Parole Board's treatment of Appellant in the same manner as adult offenders violates the Constitution. See Hayden, 134 F.Supp.3d at 1009 (holding North Carolina's parole system, which "wholly" failed to provide a juvenile offender any meaningful opportunity for release in light of the system's lack of distinction between parole reviews for juvenile offenders from adult offenders, showing no consideration for children's diminished culpability and heightened capacity for change in the parole determination).

Appellant's mandatory sentence of life imprisonment with the possibility of parole violates the Eighth Amendment. The sentence is the functional equivalent of life imprisonment without the possibility of parole. Appellant has been incarcerated since 1993, serving two decades in prison before becoming eligible for parole. Thereafter, he has been denied parole at least three times. At no time – not during the sentencing proceeding and not during the parole process – has Appellant's youth been considered as required by the Constitution. The Supreme Court, as explained by the District Court for the Southern District of Iowa explained, has provided a juvenile offender "with substantially more than a possibility of parole or a 'mere hope' of parole." Greiman, 79 F.Supp.3d at 945. The Constitution "creates a categorical entitlement to demonstrate maturity and reform, to show that he is fit to rejoin society, and to have a meaningful opportunity for release." Id. (internal citation and quotations omitted). Appellant must be re-sentenced in accordance with the Eighth Amendment and federal and state jurisprudence governing prohibitions on cruel and unusual punishments.

Appellant's sentence violates the South Carolina Constitution

In a concurring opinion in Aiken, then-Justice Pleicones explained that in his view the "current Eighth Amendment jurisprudence" did not prohibit sentencing juveniles to life imprisonment without the possibility of parole where such a sentence was discretionary for the sentencer. Aiken, 410 S.C. at 545-546, 765 S.E.2d at 578 (Pleicones, J., concurring). However, Justice Pleicones went on to hold that the South Carolina Constitution forbade sentencing juveniles to life imprisonment without the possibility of parole under South Carolina's statutory scheme permitting such a sentence in the judge's discretion. Id. at 546, 765 S.E.2d at 578. The South Carolina Constitution provides that "cruel," "corporal," and "unusual punishment" shall not be inflicted. S.C. Const. art. I, § 15. Thus, it is clear that South Carolina's Constitution affords greater protections than the Eighth Amendment to the United States Constitution. If this Court were to determine that the Eighth Amendment did not prohibit Appellant's sentence because he has been sentenced to life with the possibility of parole, this Court must consider whether the South Carolina Constitution and its greater protections forbid such a sentence.

"South Carolina, as *parens patriae*, protects and safeguards the welfare of its children." Harris v. Harris, 307 S.C. 351, 353, 415 S.E.2d 391, 393 (1992). The juvenile justice system in this state is designed "to exempt an infant from the stigma of a criminal conviction and its attendant detrimental consequences." In re Skinner, 272 S.C. 135, 137, 249 S.E.2d 746, 746 (1978). In keeping with South Carolina's judicial system as *parens patriae* and working to protect children, it necessarily follows that the South Carolina Constitution would require that children be treated differently than adults for purposes of sentencing. Further, it necessarily follows that the greater protections afforded by the South Carolina Constitution would require that juveniles sentenced to life with the possibility of parole are entitled to re-sentencing because

the sentence was mandatory and does not allow for consideration of the characteristics attendant to youth.

Using its state constitution, the Iowa Supreme Court concluded that "youth has constitutional significance." Null, 836 N.W.2d at 70-74. Relying upon the principles announced in Miller, the court held a juvenile's sentence of 52.5 years violated the Iowa Constitution barring cruel and unusual punishments. Id.; see also Pearson, 836 N.W.2d at 96 (finding the state constitution required an individualized sentencing hearing where a juvenile was sentenced to fifty years with parole eligibility after service of thirty-five years).

In light of South Carolina's Constitution affording greater rights than the Eighth Amendment to the United States Constitution and South Carolina's continued role as *parens patriae*, this Court must determine that the South Carolina Constitution's bar against cruel and unusual punishment prohibits sentencing a juvenile offender to life imprisonment with the possibility of parole after service of twenty years where the parole board fails to consider the "unique characteristics of youth." Petitioner's sentence must be vacated and re-sentencing conducted.

II. The trial judge erred by denying Appellant an opportunity to present evidence, or even proffer evidence to be considered on appeal, regarding the parole board's decision-making process to demonstrate that parole is illusory for Appellant in light of the parole board's policies and procedures, which permit denial of parole on the basis of the seriousness of the offense, and the parole board's failure to consider the impact of juvenility on Appellant and his offenses.

Standard of review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Discussion

Criminal defendants are entitled to meaningful appellate review. See State v. Ladson, 373 S.C. 320, 323-324, 644 S.E.2d 271, 272-273 (Ct. App. 2007). The appellate courts will not review an alleged error of the exclusion of testimony unless a proffer of testimony is properly made on the record. State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979); see also Ellis v. Oliver, 323 S.C. 121, 132, 473 S.E.2d 793, 799 (1996); Greenville Memorial Auditorium v. Martin, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990). The judge erred in refusing to permit Appellant to proffer the proposed evidence, and in doing so, the judge denied meaningful appellate review to Appellant. See State v. Blackwell, 420 S.C. 127, 155-156, 801 S.E.2d 713, 728 (2017).

Pursuant to the South Carolina Rules of Evidence, all relevant evidence is generally admissible. Rule 402, SCRE. "Evidence which is not relevant is not admissible." Id. Even

relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. A determination on the admissibility of relevant evidence requires consideration of the evidence's probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Preslar, 364 S.C. 466, 476, 613 S.E.2d 381, 386 (Ct. App. 2005). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-127, 606 S.E.2d 508, 513 (Ct. App. 2004).

Evidence regarding the parole board's decision to deny parole to Appellant was relevant as it formed the basis for Appellant's argument that his sentence was the functional equivalent to a life without parole sentence. See State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) (holding the defendant's proposed evidence of a vendetta to establish motive, bias, and prejudice on the part of the alleged victim and her family "was clearly relevant and should have been admitted").

Despite the judge's insistence at the hearing that the procedures employed by the parole board were irrelevant to her decision, the judge cited to a statute regarding the parole board's considerations and to the parole board's manual. The judge refused to permit Appellant to present evidence at the hearing regarding the parole board's policies and procedures despite Appellant's request to do so. Additionally, the judge refused to permit Appellant to present evidence of why the parole board denied his three prior requests for parole. The judge's denial

of Appellant's request to present relevant evidence was error and requires a remand to allow the presentation of evidence concerning the parole board's considerations and decisions in Appellant's cases and when other juvenile offenders seek parole.

CONCLUSION

Regarding Issue I, Appellant respectfully requests this Court reverse the lower court and remand for resentencing in accordance with the Eighth Amendment to the United States Constitution and the South Carolina Constitution. Regarding Issue II, Appellant respectfully requests this Court reverse the lower court and remand for a hearing where Appellant is allowed to present evidence concerning the parole board's decision making process.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of April, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CORY LAMONT SPARKMAN,

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 26th day of April, 2019.

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of April, 2019.

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