ORIGINAL

RECEIVED
MAY 08 2019
SC Court of Appeals

**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 RESPONDENT

---

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SHERRIE BUTTERBAUGH
Assistant Attorney General
S.C. Bar No. 101477
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

ATTORNEYS FOR RESPONDENT

**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 RESPONDENT

---

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SHERRIE BUTTERBAUGH
Assistant Attorney General
S.C. Bar No. 101477
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

ATTORNEYS FOR RESPONDENT

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Constitution**



**Statutes**



**Other Sources**

## APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I.

In violation of state and federal constitutions, did the judge err in denying appellant's request for resentencing 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 err 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 offense?

## RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I.

Did the circuit court err in ruling appellant is not entitled to resentencing where he received a life *with* parole sentence and is continuously eligible for release every two years, and where the court properly found *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), only applies to juvenile homicide offenders previously sentenced to life *without* parole and has not been extended to any other sentence? Further, did the circuit court err where appellant's sentence is the remedy deemed sufficient by the United States Supreme Court to cure an unconstitutional sentence?

II.

Did the circuit court err in refusing to admit evidence regarding the parole board's denial of release to appellant where it was not relevant to the court's determination of whether appellant's sentence was unconstitutional, a limited issue separate and distinct from parole eligibility?

## STATEMENT OF THE CASE

Appellant was sentenced to life with the possibility of parole on September 27, 1993, following a guilty plea to two counts of murder.[1] (R.p.3, line 23-p.4, line 5). Appellant became parole eligible on July 14, 2012, and has had three parole hearings since that time. (R.p.50).

The State alleged appellant, then sixteen-years-old, and a co-defendant killed two victims during an armed robbery on July 9, 1992. (R.p.3, lines 15-22; R.p.41; pp.70-78). At the time appellant pled guilty, defendants sentenced to life for murder were eligible for parole after serving either twenty or thirty years, dependent on the presence of an aggravating circumstance. *See* S.C. Code Ann. § 16-3-20(A) (Supp. 1990) (providing the punishment for a conviction or guilty plea to murder shall be death or life imprisonment, and if sentenced to life, the person shall not be eligible for parole until the service of twenty years, or thirty years if a recommendation of death is not made but a statutory aggravating circumstance is found beyond a reasonable doubt). In appellant's case, appellant became parole eligible after serving twenty years.

On April 1, 2016, appellant submitted a *pro se* motion for re-sentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). (R.pp.37-40). The State filed a response in opposition to the motion on October 11, 2017. (R.pp.41-44). Appellant, through appointed counsel, filed a reply. (R.pp.45-48).

On November 13, 2017, a hearing was held on appellant's motion before the Honorable Deadra L. Jefferson. (R.p.1). Appellant was represented by Cameron Blazer, and the State was represented by Charles M. Condon, Jr. (R.p.1). By order dated December 20, 2017, Judge Jefferson denied appellant's motion for a resentencing hearing, finding *Aiken* did not apply to

[1] Appellant was also sentenced to twenty-five years for armed robbery. (R.p.3, line 23-p.4, line 1).

appellant's case because he was eligible for release. (R.pp.54-55).

Appellant filed a motion to reconsider on January 8, 2018. (R.pp.60-67). By order filed January 24, 2018, Judge Jefferson denied the motion and reaffirmed her previous ruling. (R.p.69).

This appeal follows.

## I.

The circuit court did not err in ruling appellant is not entitled to resentencing as he received a life *with* parole sentence and is continuously eligible for release every two years, and the court properly found *Aiken* only applies to juvenile homicide offenders previously sentenced to life *without* parole and has not been extended to any other sentence. Further, appellant's sentence is the remedy deemed sufficient by the United States Supreme Court to cure an unconstitutional sentence.

Appellant is not entitled to resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), as he received a life *with* parole sentence and is continuously eligible for release every two years. The limited issue before the circuit court was whether appellant's sentence was unconstitutional. The fact appellant was rejected for parole previously does not create a cognizable claim under *Miller v. Alabama*, 567 U.S. 460 (2012), and its progeny. By their plain language *Miller* and *Aiken* apply only to juvenile homicide offenders sentenced to life *without* parole and appellant is not part of that class.

Neither our courts nor the United States Supreme Court have extended the *Miller* rule to apply to any other type of sentence, or so broadly construed the rule to include the argument made by appellant that his sentence for murder amounts to a *de facto* life without parole sentence. Critically, our Supreme Court recently held it was unwilling to extend United States Supreme Court precedent related to juvenile sentencing beyond its "explicit holding" until given the authority to do so. *State v. Slocumb*, Op. No. 27877, at *25-26; *32 (S.C. Sup. Ct. filed Apr. 3, 2019) (Shearouse Adv. Sh. No. 14).

Appellant received the sentence the Supreme Court deemed sufficient to remedy an unconstitutional sentence pursuant to *Miller* and is eligible for release. The criteria used by the South Carolina parole board are similar to those already considered acceptable by the Supreme Court and Fourth Circuit. *See Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016); *Bowling v.*

*Director of Va. Dep't of Corr.*, No. 18-6170, 2019 WL 1449139, at *5 (4th Cir. Apr. 2, 2019). The sentencing scheme in *Miller* was unconstitutional because it denied juveniles convicted of murder all possibility of parole, leaving them no opportunity or incentive for rehabilitation. Life in prison *with* the possibility for parole allows juvenile offenders to prove they have changed while also assessing a punishment the legislature deemed appropriate for murder. Appellant has the opportunity every two years to demonstrate his rehabilitation when he goes before the parole board, in keeping with the "central intuition" of *Miller* that juveniles who commit even violent crimes are capable of change. Accordingly, appellant's sentence of life *with* parole is not cruel and unusual punishment under the Eighth Amendment, and the circuit court did not err in denying appellant's motion for resentencing.

Motion for Resentencing and Responses

On April 1, 2016, appellant moved for resentencing pursuant to *Aiken*, and submitted a *pro se* motion. (R.pp.37-40). Appellant asserted he was immature and vulnerable to negative influences and outside pressures, including family and peers when he committed two murders. (R.p.37). Further, appellant argued he was not properly advised of the direct and collateral consequences of his plea, and age was but a chronological fact considered by the sentencing judge. (R.p.38).

The State filed a response in opposition and argued *Aiken* did not apply to appellant's case because he was eligible for parole. (R.pp.42-44). The State maintained appellant's sentence was categorically different than those in *Miller* and *Aiken* because he was eligible for release. (R.p.42). The State argued the parole board could take into account any factors it deemed important during appellant's parole hearing, such as "youthfulness and immaturity at the time of the crime" and rehabilitation following incarceration. (R.p.43). As such, the concerns in

*Miller* were not present in appellant's case because he had the opportunity to obtain release. (R.p.43). The State noted appellant had been before the parole board three times since becoming eligible for parole in 2012, and was set to return before the board in 2019, at which time he could attempt to demonstrate his rehabilitation, the central tenant of *Miller*. (R.p.44).

Defense counsel filed a memorandum in support of appellant's motion. (R.pp.45-48). Counsel argued the life with parole sentence appellant received was the functional equivalent of a life without parole sentence where appellant has not obtained release, and does not have the opportunity at his parole hearings to present evidence regarding the characteristics of his youth and any mitigating circumstances from his specific case. (R.pp.45-46). Counsel maintained appellant's sentence was a "legal anachronism" and the parole board had few opportunities "to address the unique circumstances of juveniles convicted of murder who are now parole eligible." (R.p.47). Counsel asserted the parole board was not equipped to determine the applicability of the *Miller* factors of appellant's case. (R.p.47). Counsel argued parole eligibility was "merely illusory" and not a meaningful opportunity for release as constitutionally required. (R.pp.47-48). Counsel asserted appellant was similarly situated to the other offenders in *Aiken* and was entitled to resentencing. (R.p.48).

Hearing on *Aiken* Motion

A hearing on appellant's motion was held on November 13, 2017, before Judge Jefferson. (R.p.1). The State first argued appellant was not entitled to resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), because he did not receive a sentence of life without the possibility of parole, but received a sentence of life with the possibility of parole. (R.p.4, lines 18-24). The State maintained the sentencing implications noted in *Aiken* were not at issue in appellant's case because the parole board could consider the factors relevant to

rehabilitation and other concerns when determining appellant's opportunity for release. (R.p.5, lines 14-22). The State argued the United States Supreme Court held a possible remedy for an unconstitutional sentence was the same one appellant received, which was to convert the sentence to life with parole. (R.p.5, line 23-p.6, line 13). The State maintained *Aiken* applied only to a narrow class of juvenile offenders sentenced to life without parole and appellant was not within that class because he was parole eligible. (R.p.4, lines 19-21). The State also noted appellant's lengthy disciplinary history while incarcerated which defense counsel conceded existed. (R.p.22, line 13-p.23, line 13).

Defense counsel argued appellant was entitled to resentencing because: (1) *Aiken* should be expanded to include offenders such as appellant who were serving the functional equivalent of a life without parole sentence; (2) appellant was similarly situated to those offenders in *Aiken* because his parole eligibility was "merely illusory" and he had not been afforded a meaningful opportunity for release where he had been denied parole three times; (3) leaving the matter up to the parole board was insufficient as the parole statute in South Carolina had not changed since *Miller* or *Aiken*; and, (4) a life with parole sentence did not remedy appellant's unconstitutional sentence because the parole board's process of review did not consider the mitigating hallmark features of youth. (R.p.8, line 5-p.13, line 15; p.20, line 14-p.21, line 17).

Defense counsel also sought to introduce evidence of the parole process, but Judge Jefferson found the question before her was "purely a legal issue" and limited what could be presented by the parties. (R.p.7, line 18-p.8, line 16). The judge explained her concern was the applicability of *Miller* and *Aiken* to sentencing and not how the parole board made its decisions, because appellant had administrative remedies he could use to appeal the denial of parole. (R.p.8, line 23-p.11, line 11). Defense counsel agreed appellant could appeal an adverse decision

from the parole board, but asserted the "structure" of the "parole review process" was "at odds with *Miller*" and should be reviewed by the court. (R.p.10, lines 17-19; p.12, line 18-p.13, line 15). When asked by Judge Jefferson, defense counsel acknowledged parole was not guaranteed and *Miller* did not guarantee release, but asserted *Aiken* expanded the rights provided in *Miller* to those "similarly situated," which would include appellant. (R.p.13, line 16-p.14, line 12). The judge found that was "an extrapolation of the language" that was not supported by the holding and found she did not have the authority to examine the parole process and appellant should exercise his due process rights in that system. (R.p.14, line 13-p.17, line 5; p.24, line 14-p.25, line 4). Judge Jefferson stated the resentencing motion before her did not deprive appellant of his right to challenge the denial of parole in the appropriate court, but it was a separate system with a separate appellate process. (R.p.25, line 5-p.27, line 7). The judge concluded by stating it was not whether she thought the argument had merit or not, but that her court was not the proper forum in which to consider it. (R.p.27, lines 8-11).

Judge Jefferson also noted, and counsel acknowledged, appellant had not appealed any of the previous denials of parole when he could raise these issues, others had raised constitutional issues without the aid of counsel and been successful on appeal, and others helped change the system. (R.p.17, line 8-p.18, line 7). The judge stated her focus was the decisions in *Miller* and *Aiken*, and other cases and arguments made by the parties were guidance she would use in making her ruling. (R.p.19, line 7-p.20, line 13). Judge Jefferson allowed defense counsel to submit the policy and procedure manual from South Carolina Department of Probation, Parole, and Pardon Services (DPPPS) as an exhibit while noting she would not consider the requirements of parole because she did not find it was one of the features of youth *Aiken* contemplated. (R.p.31, line 22-p.32, line 19). The judge explained *Aiken* addressed those

offenders who received life without parole sentence because those are the people who did not have the opportunity to demonstrate rehabilitation. (R.p.32, line 20-p.33, line 12).

Order Denying Resentencing Pursuant to *Aiken*

By order dated December 21, 2017, Judge Jefferson denied appellant's motion for a resentencing hearing, finding *Aiken* did not apply to appellant's case because he was eligible for release. (R.pp.54-55). The judge first noted *Miller* forbid sentencing schemes that mandated life without parole for juvenile offenders because they are constitutionally different given their lack of maturity, underdeveloped sense of responsibility, and greater prospects for reform. (R.pp.50-51). Judge Jefferson then explained *Aiken* expanded *Miller* to include those juvenile homicide offenders sentenced under South Carolina's discretionary scheme and applied it retroactively, and required judges in our state to provide juvenile offenders "with individualized sentencing hearings where the mitigating hallmark features of youth are fully explored before [] life without parole is imposed." (R.p.51). Next, the judge discussed remedies for a *Miller* violation which the United States Supreme Court held could include extending parole eligibility to previously ineligible juvenile offenders, and *Aiken*'s holding the appropriate remedy was resentencing hearings where the offender could present evidence specific to their attributes of youth. (R.p.52).

Following a recap of the parties' positions, Judge Jefferson stated she had "fully and carefully considered the documents and exhibits submitted to the Court and the arguments of counsel at the November 13, 2017 hearing." (R.pp.52-54). The judge denied appellant's motion, finding he was not within the class of juvenile offenders entitled to resentencing because he was sentenced to life with parole rather than life without parole, and was not similarly situated to those defendants in *Aiken*. (R.p.54). Judge Jefferson also noted:

> [T]his interpretation of *Aiken* is supported by *Montgomery v.* [*Louisiana*, 136 S.Ct. 718 (2016)], wherein the U.S. Supreme

> Court held that giving *Miller* retroactive effect does not require courts to re-litigate sentences in every case where the defendant received life without parole. A court may instead elect to extend parole eligibility to juvenile offenders rather than resentence them.

(R.p.54 (internal citations omitted). The judge found she did not have the authority to reconsider appellant's sentence because it was categorically different than those at issue in *Miller* and *Aiken* and, because appellant is already parole eligible, "he already enjoys one of the potential remedies afforded juvenile offenders by the U.S. Supreme Court." (R.pp.54-55).

Judge Jefferson found she did not have the authority to examine "the criteria relied upon by the parole board in making its determination of [appellant's] parole eligibility for constitutional muster" to evaluate whether it met with the mandates of *Miller*. (R.pp.55-57). The judge explained:

> [Appellant] contends that the criteria [] fails to consider the factors of youthfulness and immaturity set forth in *Miller*, and that as a result, [appellant] has been denied "meaningful review" of his sentence as afforded to him by *Miller*. This contention is solely based upon the fact that [appellant] has had three (3) parole hearings since first became parole eligible in 2012, and has been denied parole all three (3) times.

(R.p.56). Judge Jefferson found she could not usurp the parole board's decision making because it had the sole authority to determine parole eligibility, appellant had administrative remedies he could use to seek review of the board's adverse decisions, and parole was not a right, but a privilege. (R.pp.56-57). Further, the judge noted the parole board had not permanently denied him release and a denial of parole, itself, did not mean appellant had been denied a meaningful review. (R.p.57). Judge Jefferson found she could not review the board's negative parole determination to resolve whether the criteria promulgated by the legislature and utilized by the parole board complied with *Miller* was unconstitutional because to do so would substitute her own judgment for that of the board. (R.p.57). The judge encouraged appellant to seek other

remedies, such an appeal through the Administrative Law Court where the issue would be more properly raised. (R.pp.57-58). Judge Jefferson denied the motion for resentencing. (R.p.58).

Motion to Reconsider and Subsequent Order

Appellant filed a motion to reconsider. Appellant asserted the judge misapprehended his argument about the parole process. (R.pp.60-61). Appellant argued he did not contend he was being denied a meaningful review solely because he was denied parole three times, but because "the very structure and plan of South Carolina's parole system[] is at odds with the meaningful review contemplated by *Montgomery v. Louisiana*." (R.p.61). Judge Jefferson denied the motion to reconsider by order explaining she ruled "after careful and deliberate consideration" of *Miller* and its progeny, and finding the motion did not change her previous analysis. (R.p.61).

Analysis

*Standard of Review*

In criminal cases, appellate courts review errors of law only. *State v. Gamble*, 405 S.C. 409, 415, 747 S.E.2d 784, 787 (2013) (citing *State v. Jacobs*, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011)). The appellate court is bound by the lower court's factual findings unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). This Court reviews questions of law *de novo*. *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012) (citations omitted).

*Resentencing Only Applies to Life Without Parole Sentences*

The Eighth Amendment prohibits cruel and unusual punishment. U.S. Const. amend. VIII. In *Miller v. Alabama*, 567 U.S. 460 (2012), the United States Supreme Court held mandatory life without parole sentences for juvenile homicide offenders violated the Eighth Amendment's prohibition against such punishment. 567 U.S. at 465, 470. *Miller* did not

categorically bar life sentences for juvenile murderers; rather, the Court held a sentencing court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. The Court held a sentencing authority must consider youth a factor which carries with it immaturity, irresponsibility, and recklessness. *Id.* at 476. Further, the age of the defendant, along with his family background, and emotional development must be considered in assessing his culpability. *Id.*

Our Supreme Court held *Miller* applied retroactively to juveniles in South Carolina previously sentenced to life without parole. *Aiken*, 410 S.C. at 540-41, 765 S.E.2d at 575. Acknowledging *Miller* applied only to mandatory sentencing schemes rather than discretionary schemes such as ours, our Court held juveniles previously sentenced to life without parole sentence were nevertheless entitled to resentencing to allow them "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 Court determined the factors in *Miller* were those which must be considered during resentencing, such as the offender's age and other features of youth, family life, circumstances of the crime, understanding of the legal process, and possibility of rehabilitation. *Id.* at 544-45, 765 S.E.2d at 577-78. Just as the *Miller* court held, our Court explained juveniles could still receive life without parole, but only after "an individualized hearing where the mitigating hallmark features of youth are fully explored." *Id.* at 545, 765 S.E.2d at 578.

Recently our Supreme Court revisited the Eighth Amendment jurisprudence involving juvenile sentencing and held:

> [P]recedent dictates that only the [United States] Supreme Court may extend and enlarge the protections guaranteed by the United States Constitution. Once the Supreme Court has drawn a line in the sand, the authority to redraw that line and broaden federal

constitutional protections is limited to our nation's highest court.

*State v. Slocumb*, Op. No. 27877, at *25-26 (S.C. Sup. Ct. filed Apr. 3, 2019) (Shearouse Adv. Sh. No. 14). While *Slocumb* involved a non-homicide juvenile offender and the question of whether his aggregate 130-year sentence violated the Eighth Amendment, the Court's opinion is instructive for its reluctance to extend Supreme Court precedent beyond their "explicit holding[s]." *Id.* at *32. The Court chose not to extend protections to juveniles serving any sentence other than life without parole, such as a *de facto* life sentence. *Id.* at *40. Following a discussion about general Supreme Court jurisprudence and specific juvenile sentencing cases, the Court explained:

> The *Roper* [*v. Simmons*, 543 U.S. 551 (2005)]-*Graham* [*v. Florida*, 560 U.S. 48 (2010)]-*Miller* trilogy has resulted in much confusion and conflicting opinions in ascertaining the reach of the Eighth Amendment in the sentencing of juveniles. . . . Courts have struggled in good faith in trying to determine the manner in which juveniles may be constitutionally sentenced. We are one of those courts. Rather than predict what the Supreme Court may or may not do, we believe the proper course is to respect the Supreme Court's admonition that lower courts must refrain from extending federal constitutional protections beyond the line drawn by the Supreme Court.

*Id.* at *38-39. While indicating the debate was not over, the Court signaled one solution could be the grant of parole eligibility which was how many state legislatures have responded following the juvenile sentencing cases. *Id.* at *39-40 (discussing juvenile sentencing statutes enacted in states such as Iowa which provide juvenile offenders "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" and detailing the bill introduced in South Carolina which provides, among other things, parole eligibility for juvenile homicide offenders after twenty-five years).

The United States Supreme Court also offered parole eligibility as a solution to states

tasked with re-litigating cases where a juvenile received mandatory life without parole. The Court explained states could remedy a *Miller* violation—i.e. an unconstitutional sentence—by permitting juvenile homicide offenders to be considered for parole, rather than resentencing them. *Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016). The Supreme Court carefully explained its determination did *not* require the states "to relitigate sentences, let alone convictions," despite the fact juvenile offenders sentenced before *Miller* likely would not have received the type of sentencing considerations mandated by that decision. *Id.*; *see also Miller*, 567 U.S. at 483 ("Our decision . . . mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing [life without parole]."). Citing with approval a Wyoming statute which provided for juvenile parole eligibility after twenty-five years, the Court found allowing "those offenders to be considered for parole ensures those 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." *Montgomery*, 136 S.Ct. at 736. The Court continued, "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 the Court held in *Graham*, which was cited and applied in both *Miller* and *Montgomery*, a state must give a juvenile some meaningful opportunity for release based on demonstrated maturity and rehabilitation. *Graham*, 560 U.S. at 75. Critically, the Court placed limits on its holding and explained a state was neither "required to guarantee eventual freedom to a juvenile offender" nor "to release that offender during his natural life." *Id.* Just as *Miller* does not preclude a life without parole sentence for juvenile homicide offenders, the *Graham* Court

instructed, "Those who commit truly horrifying crimes as juveniles may turn out to irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life." *Graham*, 560 U.S. at 75. Accordingly, a grant of parole eligibility—as opposed to an individualized sentencing hearing—was expressly recognized as an appropriate way to remedy an unconstitutional sentence involving a juvenile offender.

*Appellant Not Entitled to Resentencing: He Received Life With Parole Sentence*

The circuit court did not err in its application of *Miller* or *Aiken* as both cases hold the relief granted extends only to juveniles sentenced to life *without* the possibility of parole. *See Miller*, 567 U.S. at 470 (holding mandatory life without parole sentences for juvenile offenders who committed murder violates the Eighth Amendment); *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577 (holding juveniles who received a life without parole sentence were entitled to resentencing to allow them to present evidence specific to their attributes of youth). Appellant received a life *with* parole sentence and the circuit court was correct in finding he was not "within the ambit of juvenile offenders eligible for resentencing under *Miller* and *Aiken*." (R.p.54). By their explicit holdings, both cases apply only to those juveniles sentenced to life without the possibility of parole—a sentence appellant did not receive. Finding appellant is entitled to relief would impermissibly extend the holdings in *Miller* and *Aiken* beyond their plain language and the circuit court properly denied the motion for resentencing. *See, e.g.*, *Slocumb*, Op. No. 27877, at *37 (declining to extend *Graham* beyond its "explicit holding" without further input from the United States Supreme Court).

Importantly, appellant's life sentence for the murder he committed while a juvenile was

not one which denied him all possibility of release, leaving him with no opportunity or incentive for rehabilitation. *Cf. Graham*, 560 U.S. at 79 ("The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit."). Appellant's life sentence includes parole eligibility which is a meaningful way by which he can attempt to obtain release during his lifetime. *See Johnson v. State*, 546 S.W.3d 470, 471 (Ark. 2018) ("Because Johnson's sentence of life imprisonment [for murder] now carries with it the possibility of parole, his contention that his sentence violates the requirements of *Miller* is incorrect."). Appellant has the sentence the Supreme Court found can remedy a *Miller* violation because it gives him the ability to show he is capable of change. *See Montgomery*, 136 S.Ct. at 736 (explaining giving juvenile homicide offenders parole eligibility means inmates who are show an inability to reform will continue to serve life sentences but 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"). Appellant became eligible for parole just twenty years after he began serving his sentence for murder and, since then, he has received and will continue to receive regular opportunities to obtain release. *See* S.C. Code Ann. § 16-3-20(A) (providing the punishment for a conviction or guilty plea to murder shall be death or life imprisonment, and if sentenced to life, the person shall not be eligible for parole until the service of twenty years, or thirty years). Appellant's sentence of life with parole affords him the opportunity for release, and it is not cruel and unusual for constitutional purposes. *See State v. Williams-Bey*, 167 Conn. App. 744, 765 (Conn. App. Ct. 2016) ("We do not believe that the United States Supreme Court would so glibly identify a constitutionally adequate remedy under the eighth amendment [as it did in *Montgomery*]. . . . We

conclude that parole eligibility is an adequate remedy for sentences that violated *Miller* as applied retroactively.") (citation omitted).

The Fourth Circuit recently considered a case in which a juvenile homicide offender appealed after repeated denials of parole. *Bowling v. Director of Va. Dep't of Corr.*, No. 18-6170, 2019 WL 1449139, at *1 (4th Cir. Apr. 2, 2019). Appellant alleged the parole board violated the constitution when it processed his applications because it was not specifically required to consider age-related characteristics unique to juvenile offenders. *Id.* In a published opinion, the court declined "to find that juvenile-specific Eighth Amendment protections extend to juvenile homicide offenders sentenced to life with parole" or "to find that those protections extend beyond sentencing proceedings." *Id.* at *4. Explaining its reasoning, the Fourth Circuit stated:

> Significantly, the Supreme Court has placed no explicit constraints on a sentencing court's ability to sentence a juvenile offender to life with parole. The Court has not yet gone so far as to require that juvenile offenders be released from prison during their lifetime. *See Graham*, 560 U.S. at 75, 130 S.Ct. 2011. ("A State is not required to guarantee eventual freedom to a juvenile offender . . ."). That is to say, the Court "[did] not foreclose" the possibility that "the rare juvenile offender whose crime reflects irreparable corruption" could be sentenced to life without parole. *Miller*, 567 U.S. at 479-80, 132 S.Ct. 2455. Rather, the Supreme Court required that, before sentencing a juvenile to life without parole, sentencing courts "take into account how children are different." *Id.* at 480, 132 S.Ct. 2455.

*Id.* The court found, given the disagreement among circuits about the application of *Miller* and its protections "to sentences that are practically equivalent to life without parole, we are satisfied that those protections have not yet reached a juvenile offender who has and will continue to receive parole considerations." *Id.*

Here, the circuit court also properly rejected appellant's argument advanced during the

hearing that he was serving the equivalent of a life without parole sentence because he had been denied parole since becoming eligible on July 14, 2012. (R.pp.8-13; pp.20-21; R.pp.53-57). Neither our courts nor the United States Supreme Court have extended the *Miller* rule to apply to sentences other than life without parole, such as a *de facto* life sentence. As explained above, the *Slocumb* Court specifically declined to do so, and collected cases from other jurisdictions which had done the same, while also acknowledging a split of authority. *See Slocumb*, Op. No. 27877, at *37-38, *40-49; *see e.g., Bunch v. Smith*, 685 F.3d 546, 552 (6th Cir. 2012) (determining that until the Supreme Court rules term-of-year sentences resulting in the functional equivalent of life without parole offend the Eighth Amendment, such sentences do not violate clearly established federal law); *In re Harrell*, No. 16-1048, 2016 WL 4708184 (6th Cir. Sept. 8, 2016) (denying motion for successive federal habeas corpus petition, because the defendant's 60-150 years of imprisonment for murder when he was seventeen was not the functional equivalent of mandatory life without parole; defendant was eligible for parole at seventy-seven-years old); *State v. Ali*, 895 N.W.2d 237, 242, 244-46 (Minn. 2017) (declining to extend *Miller* to *de facto* life sentences resulting from multiple crimes and/or consecutive sentences), *cert. denied*, 138 S.Ct. 640 (2018); *People v. Aponte*, 981 N.Y.S.2d 902, 905 (N.Y. Sup. Ct. 2013) (determining *Miller* and *Graham* applied only to sentences of life without parole and because the defendant remained technically parole eligible, despite the prospect his sentence may preclude him from release, his sentence was not unconstitutional).

Recognizing appellant did not receive a sentence of life without parole or one that would unconstitutionally deny him a meaningful opportunity to obtain release during his lifetime, the circuit court correctly denied appellant's motion for resentencing. Appellant's parole-eligible life sentence is in no way unconstitutional and this Court should affirm the circuit

court's ruling.

*Proper Authority Determines Eligibility for Release*

The circuit court's ruling also affords appellant the continuous attempt to obtain release by demonstrating to the proper authority rehabilitation, maturity, and growth. *See* S.C. Code Ann. § 24-21-640 ("The board must carefully consider the record of the prisoner before, during, and after imprisonment."); *see also State v. Calhoun*, 222 So. 3d 903, 907 (La. Ct. App. 2017) ("He has a chance at parole, but he will have to earn it. This scheme is reasonable and satisfies *Miller*."). At the same time, the circuit court's order ensures appellant will remain incarcerated for the murder he committed if he fails to sufficiently mature and rehabilitate to such an extent that a grant of parole would be warranted. *Cf. Graham*, 560 U.S. at 75 ("It bears emphasis . . . that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life.").

Every two years, the parole board considers evidence presented by appellant to determine whether he is eligible for release. *See James v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 376 S.C. 392, 396, 656 S.E.2d 399, 401 (Ct. App. 2008) ("[A]n inmate has a liberty interest in gaining access to the parole board, although there is no protected right to parole."). Nothing guarantees anyone the right to parole or release, including appellant. By statute, the parole board may only grant release if the inmate "has shown a disposition to reform," he will probably obey the law and "lead a correct life" in the future, his conduct led to "a lessening of the rigors of his imprisonment," the "interest of society will not be impaired" by the inmate's release, and he has secured suitable employment. S.C. Code Ann. § 24-21-640. Examining its manual, it is clear the board can also examine any other factors it "may consider relevant." *See* DPPPS South

Carolina Board of Paroles and Pardons Policy and Procedure Manual, (June 2017), p.27, https://www.dppps.sc.gov/content/download/120663/2749351/file/Parole+Board+Manual+June+7+2017.pdf (providing other criteria the board can consider including the inmate's criminal history and risk to the community, general attitude, health, adjustment while confined, employment history, and "[a]ny other factors that the Board may consider relevant") (Parole Board Manual).

Critically, these are the exact types of criteria the Fourth Circuit considered in *Bowling* and found provide a meaningful opportunity for release. *Bowling*, 2019 WL 1449139, at *5. While declining to find *Miller* extends juvenile-specific protections beyond a sentencing proceeding, the court also explained it was not persuaded appellant's parole proceedings fell below the standard established in *Graham* and *Miller*. *Id.* at *4-5. The court found the parole board considered whether appellant's release "would be compatible with public safety and the mutual interests of society" and appellant, whether his "character, conduct, vocational training, and other developmental activities during incarceration reflect the probability" he will lead a law-abiding life in the community and "live up to all the conditions of parole," appellant's "personal history," his institutional adjustment, change in attitude, appellant's release plans, his evaluations, "impressions gained . . . by the parole examiner," and any other information provided by appellant. *Id.* at *5. The Fourth Circuit found the factors allowed the parole board "to fully consider the inmate's age at the time of the offense, as well as any evidence submitted to demonstrate his maturation since then, and account for the concern at the heart of *Graham* and *Miller*: 'that children who commit even heinous crimes are capable of change.'" *Id.* (citing *Montgomery*, 136 S.Ct. at 736). The court noted although the bases of the board's denials have been linked to the severity of appellant's crime previously, the record suggests there is a

possibility, in time, his conduct and positive adjustment while in prison, when considered with all other factors, will outweigh the concerns the board has for the offense. *Id.* (internal citation omitted); *see also State v. Scott*, 416 P.3d 1182, 1187 (Wash. 2018) (finding the statutory grant of parole eligibility to Scott remedied any constitutional issues with his "de facto" life sentence for offenses he committed as a juvenile, rejecting the argument the parole process was inadequate due to the fact "it does not provide for consideration of a defendant's diminished capacity due to attributes of youth," and noting the United States Supreme Court in *Montgomery* expressly approved of a Wyoming parole-eligibility statute that also did *not* require consideration of factors related to youth as part of a parole determination).

Every two years when appellant goes before the parole board, he has the opportunity to demonstrate the maturity and rehabilitation necessary to entitle him to release. *See* S.C. Code Ann. § 24-21-640 (providing the board required to consider an inmate's record before, during, and after imprisonment). Appellant has the opportunity to present evidence, including the testimony of favorable witnesses, to demonstrate his "disposition to reform" and that he will obey the law if he is released from prison. *See* Parole Board Manual, p.20 (providing during a parole hearing, the prisoner has the opportunity to present evidence and have up to three witnesses speak on his behalf). One of the criteria considered by the parole board is an inmate's disciplinary record while incarcerated. Appellant's record while incarcerated does not show "a disposition to reform" nor is it evidence he will likely obey the law if he is released from prison. Appellant's inmate detail report maintained by the South Carolina Department of Corrections (SCDC) shows a history of disciplinary actions, including multiple counts of possession or attempt to possess a cell phone, drug use, and violation of institution rules. *See* SCDC Inmate Detail Report, http://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000199433.

Such a disciplinary record is not evidence of rehabilitation or reform in keeping with the "central intuition" of *Miller* that children who commit even violent crimes are capable of change. *See Miller*, 567 U.S. at 480 (finding children's diminished culpability and heightened capacity to change requires sentencing authorities to take into account how children are different prior to "irrevocably sentencing them to a lifetime in prison"); *see also Montgomery*, 136 S.Ct. at 736 (noting evidence of petitioner's "evolution from a troubled, misguided youth to a model member of the prison community" was relevant and the kind of information prisoners use to demonstrate rehabilitation).

The circuit court properly recognized it did not have the authority to evaluate the criteria the parole board uses to determine parole eligibility, or to review the previous decisions in appellant's case denying his release. (R.pp.56-57). The question before the lower court was limited to whether appellant's sentence was unconstitutional because it denied him all opportunity for release. As the circuit court properly found, appellant's sentence was "categorically different" from those at issue in *Miller* and *Aiken* because he is eligible for parole. (R.pp.54-55). Accordingly, appellant's life with parole sentence is constitutional and this Court should affirm the circuit court's ruling.

*Whether Sentence "Mandatory" and Whether It Violates State Constitution Not Preserved*

Two issues appellant raises in his brief before this Court are not preserved for review. First, appellant argues his sentence of life with parole was mandatory because the sentencing judge did not have discretion at the time to sentence him to anything other than life or death. (FBOA, pp.40-42). Second, appellant argues his sentence violates the state constitution which provides greater protections than the federal constitution. (FBOA, pp.43-44). Neither of these issues were raised to or ruled on by the circuit court. *See State v. Rogers*, 361 S.C. 178, 183, 603

S.E.2d 910, 912-913 (Ct. App. 2004) (explaining for an issue to be preserved for appellate review, it must have been: (1) raised to and ruled upon by the trial court; (2) raised by appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity).

The issues raised below were limited to whether appellant, generally, was entitled to resentencing, whether he has a meaningful opportunity for release, whether the parole process is sufficient, and whether appellant's sentence was unconstitutional under the Eighth Amendment of the federal constitution. *See State v. Freiburger*, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) (holding if an issue—including a constitutional one—is not presented to and ruled upon by the circuit court, it cannot be raised for the first time to the appellate court). Because neither of these issues were raised, the circuit court was denied an opportunity to consider, address, or rule upon the arguments. In addition, there is no authority in our state ruling on either of these issues, particularly whether any sentence other than life without parole is unconstitutional as applied to juveniles in certain circumstances. *See Slocumb*, Op. No. 27877, at *32 n.8 (declining to "address the import of state constitutional protections on Slocumb's sentence" because he "did not argue he would be entitled to relief under [the] state constitution's cruel and unusual punishments clause"). As a result, the two arguments are not properly presented for appellate review to this Court.

Therefore, because appellant was sentenced to life with parole, he is continuously eligible for release, his sentence is not cruel and unusual punishment, and the circuit court did not err in denying his motion for resentencing.

## II.

The circuit court did not err in refusing to admit evidence regarding the parole board's denial of release to appellant because it was not relevant to its determination of whether appellant's sentence was unconstitutional, a limited issue separate and distinct from parole eligibility.

The circuit court did not abuse its discretion in refusing to admit evidence considered by the parole board in denying release to appellant. The limited issue before the court was whether appellant's sentence was unconstitutional—a separate and distinct matter from parole eligibility. Because appellant was and is eligible for parole, his life sentence for murder was not unconstitutional and there was no proper basis upon which the circuit court could either disturb his sentence or grant resentencing. There was no need for the circuit court to hear evidence regarding the parole board's decision to deny parole to appellant. Rather, under *Miller*, a sentencing court's obligation to consider youth related mitigating factors is limited to cases in which the court imposes a sentence of life without parole. *Miller* simply does not apply when a juvenile's sentence provides an opportunity for parole.

### Analysis

#### *Standard of Review*

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion "accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (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.* at 429-30, 632 S.E.2d at 848.

#### *Evidence Not Relevant to Issue Before the Court*

When defense counsel sought to introduce evidence of the parole process, the circuit

court properly recognized the limited issue before it was the question of whether appellant's sentence was unconstitutional pursuant to *Miller* and *Aiken*. (R.pp.7-11). Importantly, the court stated appellant, if he believed the parole process was unfair, could exercise his due process rights in that system, which appellant had so far failed to do. (R.pp.14-18; pp.24-27). The court allowed counsel to submit exhibits and expressly stated in the order the court "fully and carefully considered the documents and exhibits submitted to the Court and the arguments of counsel at the November 13, 2017 hearing." (R.pp.31-32; p.54). It cannot be asserted the court did not consider at least part of the evidence appellant sought to introduce. Regardless, the evidence was not necessary to decide the issue before the circuit court.

To the extent appellant is challenging the circuit court's ruling based on claimed deficiencies with the parole process in South Carolina, such an argument fails because parole and sentencing are entirely separate and distinct matters. *See State v. McKay*, 300 S.C. 113, 115, 386 S.E.2d 623, 623 (1989) ("[T]he question of parole eligibility is separate and independent from the court's authority to sentence an offender. The final judgment of the court in a criminal case is the sentence."). In resolving the limited issue before it, the circuit court evaluated whether appellant's life sentence with parole eligibility was unconstitutional in light of the decisions in *Miller* and *Aiken*. Because appellant's sentence was not unconstitutional based on the express holdings of those decisions, the circuit court properly denied the motion for resentencing while also doing nothing to unlawfully interfere with the parole board's sole authority on matters of parole. *See Brown v. State*, 306 S.C. 381, 383, 412 S.E.2d 399, 400-401 (1991) ("[P]arole eligibility is not a matter within the jurisdiction of the trial court, but falls within the province of the Board of Probation, Parole, and Pardon Services."); *cf. State v. Delgado*, 323 Conn. 801, 810-811 (Conn. 2016) (explaining the Eighth Amendment, as interpreted by *Miller*, does not

prohibit a court from imposing a sentence of life imprisonment with the opportunity for parole for a juvenile homicide offender, "nor does it require the court to consider the mitigating factors of youth before imposing such a sentence," rather under *Miller*, a sentencing court's obligation to consider youth related mitigating factors is limited to cases in which the court imposes life without parole, or its equivalent, "*Miller* simply does not apply when a juvenile's sentence provides an opportunity for parole; that is, a sentencing court has no constitutionally founded obligation to consider any specific youth related factors under such circumstances") (citations omitted); *State v. Shaffer*, 77 So. 3d 939, 943 (La. 2011) ("Access to the [Parole] Board's consideration will satisfy the mandates of *Graham*."). It was not relevant to the circuit court's decision what the parole board considered and the court did not abuse its discretion in refusing to admit the evidence.

Moreover, assuming the parole process in South Carolina is somehow flawed or the parole board has improperly evaluated any rehabilitation and growth exhibited by appellant prior to reaching a parole decision in his case, appellant has mechanisms available to him to challenge the parole process and the board's specific decisions. As the circuit court noted, appellant can appeal adverse decisions, something he has thus far failed to do. *See Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000) ("[A]n inmate make seek review of Department's final decision in an administrative matter under the APA."); *see also Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 502, 661 S.E.2d 106, 113 (2008) (affirming an order remanding for an administrative appeal of the methods and procedure employed by the parole board in denying parole where the board "apparently failed to consider the requisite factors and, instead, based its decision on certain fixed factors that are unaffected by any rehabilitation efforts on the part of Cooper").

Therefore, because the evidence regarding the parole board's decision in appellant's case was not necessary to the issue before the circuit court, it did not abuse its discretion in refusing to admit it.

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted the decision of the circuit court denying the request for resentencing should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SHERRIE BUTTERBAUGH
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: _____
SHERRIE BUTTERBAUGH

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

May 8, 2019.

**STATE OF SOUTH CAROLINA**
**In the Court of Appeals**



Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

**THE STATE,**

**Respondent,**

v.

**COREY LAMONT SPARKMAN,**

**Appellant.**

Appellate Case No. 2018-000172

## CERTIFICATE OF COMPLIANCE

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

This 8th day of May, 2019.

SHERRIE BUTTERBAUGH
Assistant Attorney General

ATTORNEY FOR RESPONDENT