STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Laurens County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ARTHUR JASON BOWERS,

APPELLANT

APPELLATE CASE NO. 2018-000868

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Violating the Eighth Amendment's prohibition on cruel and unusual punishment and the South Carolina Constitution's ban on cruel or unusual punishment, did the trial judge err by sentencing Appellant to fifty years in prison – the functional equivalent of life without the possibility of parole – for murder where Appellant was a mere seventeen years old at the time of the offense and thirty-two years old at the time of his trial and the judge failed to conduct an individualized sentencing proceeding?

STATEMENT OF THE CASE

In 2003, the police charged Appellant with crimes related to the death of James Bolt. R. 170, l. 17 – R. 171, l. 3. In 2006, Solicitor Jerry Peace determined there was insufficient evidence to prosecute Appellant; therefore, the charges were dismissed. R. 232, ll. 4-20.[1] On March 24, 2017, the new solicitor, David Stumbo presented the case to a Laurens County grand jury. R. 233, ll. 15-20. On that date, the grand jury indicted Appellant for conspiracy (2017-GS-30-520). R. 398. Later, on September 15, 2017, the grand jury indicted Appellant for armed robbery (2017-GS-30-1570). R. 401. Finally, on April 20, 2018, the grand jury indicted Appellant for murder (2018-GS-30-612). R. 404. The state, represented by O. Warren Mowry, Jr., called the case for trial before the Honorable Donald Hocker and a jury on April 23-26, 2018. R. 1. Jay Anderson represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 386, l. 17 – R. 387, l. 10. Judge Hocker sentenced Appellant to fifty years imprisonment for murder, thirty years imprisonment for armed robbery, and five years imprisonment for conspiracy. R. 397, ll. 4-7; R. 400; R. 403; R. 406. He ordered all sentences to be served concurrently. R. 397, ll. 1-3; R. 400; R. 403; R. 406.

On May 4, 2018, Appellant served his notice of appeal. This brief follows.

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[1] Walter Bentley was an investigator with law enforcement at the time of Appellant's arrest. Bentley told the jurors that he "absolutely [did] not" agree with Solicitor Peace's decision to dismiss the charges. R. 232, ll. 21-22. In fact, he "questioned that decision greatly." R. 232, ll. 23-24. It was Bentley's "opinion" that Peace was "unaware of some of the main evidence." R. 232, ll. 24-25. When Bentley voiced these concerns, Bentley claimed that Peace told him that if he wanted to prosecute the case that he needed to go to law school and earn a law degree. R. 233, ll. 1-3. There was no objection to this testimony by defense counsel.

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).

ARGUMENT

Violating the Eighth Amendment's prohibition on cruel and unusual punishment and the South Carolina Constitution's ban on cruel or unusual punishment, the trial judge erred by sentencing Appellant to fifty years in prison – the functional equivalent of life without the possibility of parole – for murder where Appellant was a mere seventeen years old at the time of the offense and thirty-two years old at the time of his trial and the judge failed to conduct an individualized sentencing proceeding.

Relevant facts

After the jury returned its guilty verdict, the state requested the judge impose a sentence that was a term of years equivalent to a life sentence. The prosecutor referred to a discussion among the parties in chambers concerning sentencing:

> And, Your Honor, as we discussed in chambers, I understand based on the U.S. Supreme Court case given [Appellant's] age at the time of this event, he is not eligible for life without parole; however, we would request that Your Honor sentence him to a substantial number of years that would achieve the same effect.

R. 395, ll. 1-7. Thereafter, the judge gave the state exactly what it asked for by sentencing Appellant to fifty years imprisonment for murder. R. 397, ll. 6-7; R. 406. In fact, the judge made his intent to sentence Appellant to a term of years equivalent to Appellant's life when he informed Appellant that "now [his] life has been taken away" as well. R. 396, ll. 2-8.

Discussion

Error preservation

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)(citing Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997)). "Moreover, an objection must be

sufficiently specific to inform the trial court of the point being urged by the objector." Id. "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000)(quoting I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." Id. The rationale of issue preservation is to prevent "a party from keeping an ace card up his sleeve – intentionally or by chance – in hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." I'On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724. Further, an appellant may waive his right to appeal a decision by the trial judge through acquiescence. State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000); Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 481, 629 S.E.2d 653, 673 (2006).

The United States Supreme Court held life sentences for homicide crimes committed while the defendant was under the age of eighteen violated the Eighth Amendment to the United States Constitution unless the state could prove the defendant was irreparably corrupt during an individualized sentencing proceeding. Miller v. Alabama, 567 U.S. 460, 471 (2012). Although no objection was made at the time of sentencing, all parties were aware of the Supreme Court's opinion as evidenced by the prosecutor's comments and reference to a conference in the judge's chambers. Therefore, this issue was raised to and ruled upon by the trial judge ensuring that it was preserved for appellate review.

Generally, the rules of issue preservation are strictly enforced. However, the appellate courts have carved out certain limited exceptions. First, the "lack of subject matter jurisdiction may be raised at anytime, including for the first time on appeal." State v. Passmore, 363 S.C. 568, 584,

611 S.E.2d 273, 282 (Ct. App. 2005). Another exception is the "doctrine of futility." Id. Our courts have recognized "that in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused." Id. A third "exception exists where the interests of minors or incompetents are involved." Id. at 585, 611 S.E.2d at 282. The final exception is where exceptional circumstances require excusal of error preservation. Id. For example, the Supreme Court found exceptional circumstances existed where failure to review the merits of a sentencing error would result in the defendant remaining incarcerated beyond the legal sentence. State v. Johnston, 333 S.C. 459, 463-464, 510 S.E.2d 423, 425 (1999); see also State v. Vick, 384 S.C. 189, 203, 682 S.E.2d 275, 281-282 (Ct. App. 2009)(excusing error preservation where the sentencing for kidnapping was in violation of the statute).

If this Court determines the issue is not preserved under the traditional error preservation analysis, this Court should find an exceptional circumstance exists and address the issue in the interest of judicial economy. See State v. Bonner, 400 S.C. 561, 567, 735 S.E.2d 525, 528 (Ct. App. 2012) (excusing the lack of preservation to address the merits of the claim, found Bonner's sentence violated the United States Constitution, vacated the sentence, and remanded the case for re-sentencing). The judge sentenced Appellant to a sentence of fifty years when Appellant was thirty-two-years old for a crime he allegedly committed when he was seventeen-years old, rendering the fifty-year sentence the functional equivalent of a life without parole sentence. Therefore, the sentence violates the Eighth Amendment and the South Carolina Constitution and should be reviewed during the direct appeal process instead of forcing Appellant to wait to raise the issue in post-conviction relief proceedings. See Jeter v. South Carolina Dept. of Transp., 369 S.C. 433, 441 n.6, 633 S.E.2d 143, 147 n.6 (2006); Southern Bell Tel. and Tel. Co. v. Hamm, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991).

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.[2] 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.

[2] 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.

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 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:

> 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.

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.

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. See also United States v. Pileggi, 703 F.3d 675, 678 (4th Cir. 2013)(referring to its prior remand for resentencing where the district court imposed "a *de facto* life sentence" of fifty years contrary to

its extradition agreement with Costa Rica that Pileggi "would not receive a penalty of death or one that requires that he spend the rest of his natural life in prison").

Various courts around the country have recognized de facto life sentences specifically in the context of finding them unconstitutional if imposed without compliance with the requirements of Graham and Miller. The Third, Seventh, Ninth, and Tenth Circuits have held that the Eighth Amendment prohibits de facto LWOP sentences for juvenile offenders who are not incorrigible. See United States v. Grant, 887 F.3d 131 (3rd Cir. 2018) (on appeal from resentencing, holding that a term-of-years sentence that meets or exceeds the life-expectancy of a non-incorrigible juvenile offender violates the Eighth Amendment); Budder v. Addison, 851 F.3d 1047 (10th Cir. 2017) (on AEDPA review, concluding that aggregate sentence resulting in parole eligibility at age 131 was barred by Graham, stating: "we cannot read the Court's categorical rule as excluding juvenile offenders who will be imprisoned for life with no hope of release for nonhomicide crimes merely because the state does not label this punishment as 'life without parole'" and observing that "[l]imiting the Court's holding by this linguistic distinction would allow states to subvert the requirements of the Constitution by merely sentencing their offenders to terms of 100 years instead of 'life'" and "[t]he Constitution's protections are not so malleable"); McKinley v. Butler, 809 F.3d 908 (7th Cir. 2016) (on appeal from denial of federal habeas relief, finding that Miller's "children are different" language "cannot logically be limited to de jure life sentences, as distinct from sentences denominated in number of years yet highly likely to result in imprisonment for life"); Moore v. Biter, 725 F.3d 1184 (9th Cir. 2013) (on AEDPA review, finding that aggregate sentence resulting in parole eligibility at age 127 was "irreconcilable with Graham's mandate that a juvenile nonhomicide offender must be provided 'some meaningful opportunity' to reenter society and thus unconstitutional under Graham."

Additionally, several states have concluded that certain terms-of-years sentences violate the Eighth Amendment's ban on cruel and unusual punishment. Essentially, those courts have found that the term-of-years failed to offer the juvenile offender an opportunity to obtain release before the end of his expected life span. Thus, those sentences were the *functional equivalent* of a sentence of life without the possibility of parole.

California

In People v. 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 (emphasis added). 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.

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.

Illinois

The Illinois Supreme Court tackled the concept of functional equivalent life sentences in People v. Reyes, 63 N.E.3d 884 (Ill. 2016). Reyes was sentenced to forty-five years imprisonment for murder, twenty-six years imprisonment for two attempted murder convictions. Id. at 886. The sentences were to be served consecutively, resulting in a ninety-seven year sentence. Id. According to state law, Reyes would have to serve a minimum of eighty-nine years before he would be eligible for release. Id. Addressing whether Miller applied to terms-of-years sentences, the court explained "[a] mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect on a juvenile defendant's life as would an actual mandatory sentence of life without parole – in either situation, the juvenile will die in prison." Id. at 888. The court held Reyes' sentence was unconstitutional pursuant to Miller. 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.

Louisiana

The Supreme Court of Louisiana held a defendant's 99-year sentence was an effective life sentence and therefore, illegal under Graham. State ex rel. Morgan v. State, 217 So. 3d 266, 272 (La. 2016). Rejecting the state's argument that Graham applied only to literal life sentences, the court explained the central premise of Graham was that "because a juvenile nonhomicide offender has diminished culpability, a sentence which, based upon a judgment at the time of sentencing, bars him from ever re-entering society, is grossly disproportionate. Id. The court

also pointed out that the Supreme Court characterized the sentence in Graham as a "term-of-years sentence" to distinguish it from a death sentence. Id. at 274. "Arguably, the Supreme Court's use of the 'term-of-years' label for Graham's life sentence indicates any term-of-years sentence may implicate the rule, so long as its practical effect is to deny a meaningful opportunity for release." Id. The Louisiana court noted that Morgan would not become parole eligible until he reached the age of 101. Id. "Thus, he ha[d] received the functional equivalent of life without parole." Id.

Maryland

The Maryland Court of Appeals held a defendant's sentence of 100 years with parole eligibility after the service of fifty years was the functional equivalent of life without parole. Carter v. State, 192 A.3d 695, 734-735 (Md. 2018). The court reasoned "[t]he parole eligibility date far exceeds the parole eligibility date for a defendant sentenced to life in prison under Maryland law (15 years); it exceeds the threshold duration recognized by most court in decisions and legislatures in reform legislation (significantly less than 50 years); and the eligibility date will be later than a typical retirement date for some of [the defendant]'s age." Id. at 734. When answering whether a sentence stated as a term of years could ever be regarded as a life sentence without parole, the court concluded it was "a matter of common sense that the answer must be 'yes.'" Id. at 725. "Otherwise, the Eighth Amendment proscription against cruel and unusual punishment in the context of a juvenile offender could be circumvented simply by stating the sentence in numerical terms that exceed any reasonable life expectancy rather than labeling it a 'life' sentence." 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).

Missouri

The Supreme Court of Missouri held three concurrent sentences of life without the possibility of parole for fifty years violated the Eighth Amendment. State ex rel. Carr v. Wallace, 527 S.W.3d 55, 67 (Mo. 2017). "Carr was sentenced to the harshest penalty other than death available under [the state's] mandatory sentencing scheme without the jury having any opportunity to consider the m mitigating and attendant circumstances of his youth." Id. at 60.

Montana

The Montana Supreme Court held that "[l]ogically, the requirement to consider how 'children are different' cannot be limited to de jure life sentences when a lengthy sentence denominated in a number of years will effectively result in the juvenile offender's imprisonment for life." Steilman v. Michael, 407 P.3d 313, 319 (Mont. 2017). The court rejected the state's argument "that because Montana law provides a distinction between sentences of life imprisonment, term-of-years, and death, a term-of-years sentence cannot become a de facto life sentence and equate to a de jure life imprisonment under Montana law." Id. The court recognized "[a] strict application of the state's argument would mean that a sentence that

inarguably would not allow for the offender to ever be released could not be considered a life sentence so long as the sentence is expressed in years." Id.

Nevada

The Nevada Supreme Court recognized that "courts have inconsistently decided whether the Graham holding prohibits sentences that, when aggregated, constitute the functional equivalent of life without the possibility of parole." State v. Boston, 363 P.3d 453, 456 (Nev. 2015). However, the Nevada court found "[n]owhere" in the Graham decision was there a limitation on the holding to offenders who were convicted of a single offense. Id. at 457. Additionally, the court was persuaded by the decisions of other states that allowing the functional equivalent of life without the possibility of parole for juvenile nonhomicide offenders would frustrate the Supreme Court's reasoning regarding a juvenile's opportunity to demonstrate growth and maturity. Id. at 456. "The juvenile would not have a realistic opportunity for release from prison because the opportunity to receive parole would not arise during the juvenile's natural life expectancy." Id. at 456-457. The court refused to define an exact number of years that would qualify as the functional equivalent of a life sentence. Id. at 458. The court reasoned that Boston's aggregate sentences that required him "to serve approximately 100 years before being eligible for parole were without a doubt the functional equivalent of a sentence of life without the possibility of parole." Id.

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 concluded 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.

Ohio

The Ohio Supreme Court held "that pursuant to Graham, a term-of-years prison sentence that exceeds a defendant's life expectancy violates the Eighth Amendment to the United States Constitution when it is imposed on a juvenile nonhomicide offender." State v. Moore, 76 N.E.3d 1127, 1128-1129 (Ohio 2016). Moore was sentenced to 112 years imprisonment for crimes he committed when he was fifteen-years old. Id. at 1133. Under the state statute, he would become eligible to file a motion for judicial release after serving seventy-seven years of his sentence. Id.

Moore would be ninety-two years old before he would have his first chance to move a court for release. Id. There was no dispute that his life expectancy fell well short of 92 years. Id.

The court rejected the state's argument that Graham applied only to sentences of life without parole. Id. at 1137-1138. The court concluded "that the principles behind Graham apply equally to a juvenile nonhomicide offender sentenced to prison for a term of years that extends beyond the offender's life expectancy." Id. The court saw "no significant difference between a sentence of life imprisonment without parole and a term-of-years prison sentence that would extend beyond the defendant's expected lifespan before the possibility of parole." Id. at 1139. "The court in Graham was not barring a terminology – 'life without parole' – but rather a punishment that removes a juvenile from society without a meaningful chance to demonstrate rehabilitation and obtain release." Id. at 1139-1140. According to the court, it made "little sense that a juvenile offender sentenced to prison for life without parole would get a chance, pursuant to Graham, to prove his or her rehabilitation and be released but a juvenile offender sentenced to a functional life term would not." Id. at 1140.

Washington

In State v. Ronquillo, 361 P.3d 779 (Wash. Ct. App. 2015), the Washington Court of Appeals held Miller applied to an aggregate 51.3-year sentence. The court accepted that "[a] sentence of 51.3 years is not necessarily a life sentence for a 16-year-old," but stated that "it is a very severe sentence. State v. Ronquillo, 361 P.3d 779, 784 (Wash. Ct. App. 2015). Noting that "Ronquillo's sentence contemplates that he will remain in prison until the age of 68," the court held it was "a de facto life sentence." Id. The sentence assessed Ronquillo as "virtually irredeemable." Id. The court held "[b]efore imposing a term-of-years sentence that is the functional equivalent of a life sentence for crimes committed when the offender was a juvenile,

the court must take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. (internal citation omitted). See also State v. Keodara, 364 P.3d 777 (Wash. Ct. App. 2015) (Miller applicable to aggregate 69.25-year sentence); State v. Ramos, 387 P.3d 650 (Wash. 2017) (Miller applicable to "any juvenile offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation," whether a sentence for a single crime or an aggregated sentence for multiple crimes).

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).

Appellant's sentence violates the Eighth Amendment

Appellant's sentence of fifty years imprisonment violates the Eighth Amendment's prohibition on cruel and unusual punishment. Appellant's sentence is the *functional equivalent* of life imprisonment without the possibility of parole in light of the significant term of years imposed by the judge – fifty years – particularly due to Appellant's age at the time of sentencing. 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 judge's imposition of a de facto life sentence. Prior to imposing the sentence, the judge failed to afford Appellant an individualized sentencing proceeding during which he could present evidence related to the Miller factors. Additionally, prior to the imposition of the sentence, the judge failed to hold the state to its burden of proving Appellant was irreparably corrupt.

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 prohibit imposition of de facto life sentences on juveniles and would require individualized sentencing proceedings.

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 a de facto life imprisonment, particularly where the trial judge failed to conduct an individualized sentencing proceeding. Petitioner's sentence must be vacated, and re-sentencing conducted.

There is no practical distinction between a sentence of "life without parole" and a term of years sentence that will similarly result in a defendant's death in prison, with no meaningful opportunity for release. Consequently, the imposition of such sentences against juvenile defendants are equally offensive to our federal and state constitutions, absent an individualized sentencing hearing and reasoned finding that the defendant is "the rare juvenile offender whose crime reflects irreparable corruption." Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016). Other state and federal courts have adopted this reasoning, and such is a fair and reasonable interpretation of our Supreme Court's intention in Aiken.

No individualized sentencing hearing

The presentation in this case did not come close to the individualized sentencing hearing required by Miller and Aiken, both of which were decided prior to Appellant's trial and sentencing. Though the Aiken Court did not require the sentencing proceedings to mirror the penalty phase of a capital case, it found that "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. Aiken, 410 S.C. 534, 544-545, 765 S.E.2d

572, 577. Here, trial counsel presented no evidence and no argument. See R. 394, ll. 9-13; R. 395, ll. 9-15. As mentioned previously, the solicitor requested the judge sentence Appellant "to a substantial number of years that would achieve the same effect" as a life without parole sentence. R. 395, ll. 1-7. When sentencing Appellant, the judge made only a passing remark about Appellant's age: "But it's a tragedy for [Appellant] and his family. You're a young - - reasonably young fellow no. Very young at the time of the commission of the crime. And now your life has been taken away because of your actions." R. 396, ll. 2-8. Thus, it was clear the judge did not consider Appellant's age as a constitutionally significant fact and the judge intended to sentence Appellant to a term of years that would be the functional equivalent of life without parole. The judge also stated that he was sentencing Appellant "to a significant period of time" because the crime "was a pretty gruesome and heinous crime" "and there must be punishment for it." R. 396, ll. 13-18. Appellant's sentence was based purely on retribution and incapacitation, which the Miller court found less applicable to sentences of minors as opposed to adults.

This Court need not analyze how the various statements and arguments made at the sentencing hearing could have related to the hallmark features of youth, the family and home environment that surrounded the offender, the circumstances of the homicide offense, the incompetencies associated with youth, and the possibility of rehabilitation. See Aiken, 410 S.C. at 544, 765 S.E.2d at 577. The Aiken majority specifically rejected the dissent's suggestion that the Court evaluate each petitioner's case to determine the adequacy of the original sentencing hearing. Aiken, 410 S.C. at 543 n.8, 765 S.E.2d at 577 n.8. Rather, the Aiken majority found that "although some of the hearings touch on the issues of youth, none of them approach the sort of hearing envisioned by Miller where the factors of youth are carefully and thoughtfully

considered." 410 S.C. at 543, 765 S.E.2d at 577. The Court explained that the underlying sentencing hearings "suffer from a constitutional defect—the failure to examine the youth of the offender through the lens mandated by Miller." 410 S.C. at 543 n.8, 765 S.E.2d at 577 n.8.

The Montgomery Court wrote: "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." 136 S.Ct. at 734 (internal quotations omitted). The Court concluded that "prisoners like Montgomery 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.

Subsequently, in Justice Sonia Sotomayor's concurring decision in Tatum, she explained:

> On the record before us, none of the sentencing judges addressed the question Miller and Montgomery require a sentencer to ask: whether the petitioner was among the very "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.... It is clear after Montgomery that the Eighth Amendment requires more than mere consideration of a juvenile offender's age before the imposition of a sentence of life without parole. It requires that a sentencer decide whether the juvenile offender before it is a child "whose crimes reflect transient immaturity" or is one of "those rare children whose crimes reflect irreparable corruption" for whom a life without parole sentence may be appropriate. There is thus a very meaningful task for the lower courts to carry out on remand.

Tatum v. Arizona,137 S.Ct. 11, 12-13 (Mem.) (2016) (J. Sotomayor, concurring). Thus, both our Supreme Court and the United States Supreme Court have made clear that a perfunctory sentencing hearing will not be saved by a review of its contents, even when it reveals some discussion of the defendant's youth.

CONCLUSION

Appellant respectfully requests this Court vacate his fifty-year sentence for murder and remand his case to the trial court for an individualized sentencing proceeding in accordance with controlling state and federal law.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of June, 2019.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,

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This 12th day of June, 2019.