STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Greenville County

R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT BERNARD CAMPBELL,

APPELLANT

APPELLATE CASE NO. 2016-002457

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the judge err by denying Appellant's motion for resentencing on juvenile non-homicide offenses where Appellant received a sentence of life imprisonment with the possibility of parole, which is the functional equivalent of life without the possibility of parole because the sentence does not afford a meaningful opportunity for release where 1) Appellant is mentally ill and unrepresented by counsel at parole hearings, and 2) the parole board is not required to consider the special characteristics of a juvenile offender?

STATEMENT OF THE CASE

Appellant was indicted for armed robbery, attempted armed robbery, housebreaking, criminal sexual conduct 1st degree, and burglary 1st degree, offenses alleged to have occurred from March through May of 1985 when Appellant was seventeen years old. R. 51 – 64. On February 28, 1986, Appellant pleaded guilty. R. 48; R. 51 – 64. He received, respectively, sentences of twenty-five years; ten years; thirty years; and life imprisonment. R. 48 – 50.

On December 7, 2015, Appellant timely filed a motion for resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). R. 37 – 45. Parker Baxley represented Appellant in his request for resentencing. R. 4, ll. 21-23. The Honorable R. Keith Kelly presided over a hearing on the motion September 15, 2016. R. 1, ll. 15-16. Elizabeth Gary appeared on behalf of the state. R. 1, ll. 18-22.

By an order filed December 7, 2016, Judge Kelly ruled that Appellant was not entitled to resentencing. R. 48 – 50.

ARGUMENT

The judge erred by denying Appellant's motion for resentencing on juvenile non-homicide offenses where he received a sentence of life imprisonment with the possibility of parole, which is the functional equivalent of life without the possibility of parole because the sentence does not afford a meaningful opportunity for release where 1) Appellant is mentally ill and unrepresented by counsel at parole hearings, and 2) the parole board is not required to consider the special characteristics of a juvenile offender.

Relevant facts

During the hearing before Judge Kelly, the state argued that Appellant was not entitled to resentencing under *Miller v. Alabama*, 567 U.S. 460 (2012), or *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), as their holdings only applied to a class of offenders made up of juvenile homicide offenders facing life without the possibility of parole. R. 17, ll. 15-21. The state argued that because Appellant was not convicted of homicide, "this is clearly not a *Miller v. Alabama* motion." R. 17, ll. 22-25.

The state agreed that a juvenile non-homicide offender under *Graham v. Florida*, 560 U.S. 48 (2010), is entitled to a specialized sentencing procedure. R. 18, ll. 14-21. Gary admitted that a juvenile offender facing even a *de facto* life sentence is entitled to a specialized sentencing hearing, a "particular sentencing hearing is so important with juvenile offenders, especially those who are facing life without parole or even a *de facto* life sentence..." R. 18, ll. 22-25. However, the state argued that Appellant was not entitled to a particularized sentencing hearing because he was eligible for parole. R. 19, ll. 11-18. Gary said of Appellant: "[h]e's had 18 parole hearings." R. 19, ll. 19-20. The state argued that there was no *Graham* violation as Appellant was parole eligible, a remedy recognized in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). R. 20, l. 24 –

21, l. 5. Gary argued that it was the "opportunity to obtain release after that initial sentencing that remedies our Eighth Amendment violations in these cases." R. 22, ll. 5-8.

Defense counsel posited that Appellant's sentence was within the purview of *Miller*, *Aiken*, and *Graham* although it was a life sentence as opposed to life without parole sentence, because the sentence was a *de facto* life without parole sentence. R. 8, ll. 22-24. Baxley argued that Appellant's sentence was a *de facto* life without parole sentence under the reasoning of, among others, *State v. Ragland*, R. 13, ll. 24-25. In *State v. Ragland*, the Iowa Supreme Court found that the chance of parole eligibility during the offender's lifetime did not remove the case from the purview of *Miller*, as Ragland's sentence was the functional equivalent of life without parole. *State v. Ragland*, 836 N.W.2d 107, 122 (Iowa 2013).

Appellant moved for resentencing alleging that he was not allowed the opportunity to present mitigating evidence of his youth and immaturity at his original sentencing hearing in 1986. R. 37 – 45. Defense counsel argued that a juvenile non-homicide offender may not be sentenced to a *de facto* life without parole sentence without the opportunity to present mitigating evidence of his youth and its attendant characteristics, and that Appellant was entitled to resentencing. R. 8, ll. 8-24. Baxley argued that Appellant's *de facto* life without parole sentence "is a *Miller* violation, is an Eighth Amendment violation, was contemplated by *Graham* and deserves reconsideration and an opportunity to present the five factors prescribed by the *Miller* Court..." R. 17, ll. 3-7. *Miller* requires a sentencing judge to consider a juvenile's: (1) age at the time of the offense and hallmark features of youth including immaturity, impetuosity, and failure to appreciate the risks and consequences; (2) his family and home environment at the time of the offense; (3) the circumstances of the offense, including the extent of his participation and how familial and peer pressures may have affected him; (4) the incompetencies associated with youth

such as his inability to deal with police or prosecutors, or his incapacity to assist his own attorneys; and (5) the possibility of rehabilitation. *Miller*, 567 U.S. at 477.

Defense counsel also argued that Appellant was entitled to resentencing as his special characteristics as a juvenile offender were not taken into account by the parole board; Baxley said of Appellant's parole hearings that "[h]is youth is not taken into account at those hearings." R. 9, ll. 4-5. Baxley stated "[c]ertainly none of them are taking into consideration his age at the time of the offense." R. 9, ll. 14-16. Baxley said the parole board was not considering "[h]is impulsiveness that comes along with being a teenager at the time." R. 9, ll. 18-19. Baxley stated that a "meaningful opportunity for release" "has certainly never been afforded Mr. Campbell, both at his – at the time of the plea and the subsequent 18 times he's been in front of the parole board." R. 10, ll. 11-18. Baxley said that as to the *Miller* factors being considered at Appellant's parole hearings, "I think it's clear from the factors they check off on their sheet that Mr. Campbell is not being given an opportunity to present this information." R. 24, l. 14 – 25; l. 1. Gary did not contest the parole board's lack of consideration of the *Miller* factors.

Defense counsel additionally argued Appellant had not received a meaningful opportunity to obtain release via parole as he had been and continued to be mentally ill and unrepresented by counsel during his parole hearings. R. 25, ll. 1-12. Baxley said that Appellant has been "in and out of the mental health unit during his 30-year stay." R. 6, ll. 23-24. Baxley noted the difficulty of Appellant "who suffers from mental illnesses to argue on his own behalf as to why he should be released" when appearing in front of the parole board. R. 13, ll. 6-8. "He is mentally ill," Baxley stated. R. 13, ll. 15-16. Baxley reported that part of Appellant's difficulty in obtaining a meaningful hearing in front of the parole board is due to the fact that "he's mentally ill." R. 25, l. 5. Baxley also said Appellant "was mentally ill as a 17 year old and

as a child." R. 6 ll. 15-16. Baxley noted that Appellant was transported to his guilty plea from the mental hospital on "Bull Street," although despite her efforts, she was unable to obtain his thirty year old records from the Department of Mental Health. R. 6, ll. 16-22. Appellant confirmed: "I stayed at Bull Street for like five months before I went to court." R. 32, ll. 13-14.

Appellant is without benefit of counsel at his parole hearings; Baxley stated that Appellant "has certainly not had an attorney with him at the parole board." R. 29, ll. 24-25. Baxley noted that Appellant is only "given two or three minutes to stand up in front of the parole board by himself without counsel and explain to them why he needs to be released." R. 25, ll. 9-12. After Appellant addressed the court, Baxley argued that Appellant's difficulty in articulating his position to Judge Kelly was indicative of his inability to communicate relevant information to the parole board. Baxley stated: "I think it's evident from his presentation here this morning" that he is unable "to effectively communicate to the parole board." R. 33, ll. 4-7. Defense counsel argued that Appellant was unable to obtain a meaningful opportunity for release without benefit of legal counsel. Baxley said: "they're asking for someone who's been in prison for 30 years without benefit of education, certainly without benefit of legal education, who suffers from mental illnesses to argue on his own behalf as to why he should be released." R. 13, ll. 4-8.

The state never spoke to Appellant's mental illness or lack of counsel. About Appellant's opportunity to obtain release via parole, Gary stated that "I am not able to tell the Court what he has been able to present at those hearings." R. 19, ll. 20-22. Gary only stated that neither she nor Baxley were "fully aware of what happens at those hearings." R. 19, l. 25 – 20, l. 1. However, the parties were able to discover the reasons for Appellant's denial of parole. Baxley stated that "Ms. Gary was able to, to ascertain exactly what the specific reasons he was denied parole, and those are the nature and seriousness of the crimes that, that were committed,

indications of violence, use of a deadly weapon, prior record indicating lack of compliance with supervision and his internal SCDC record." R. 9, ll. 6-12.

By an order filed November 28, 2016, Judge Kelly denied Appellant's request for resentencing. R. 48 – 50. The judge denied Appellant's motion for resentencing under *Miller* and *Aiken*, finding that Appellant "was not charged with, nor did he plead guilty to, murder. As such, he is not a member of the class of offenders entitled to resentencing under *Miller* or *Aiken*." R. 48 – 50. Judge Kelly denied Appellant's motion for resentencing pursuant to *Graham*, by finding that Appellant's parole eligibility was a satisfactory remedy under *Montgomery v. Louisiana*. R. 48 – 50.

Discussion

Introduction

The principle that because juveniles have lessened culpability they are less deserving of the most severe punishments has directed a series of United States Supreme Court decisions involving the sentencing of juvenile offenders. In *Roper v. Simmons*, 543 U.S. 551, 573 (2005), the Court held that a juvenile may not be sentenced to death, noting the difficulty differentiating "between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." In *Graham v. Florida*, 560 U.S. 48 (2010), the Court held that a juvenile non-homicide offender may not be sentenced to life in prison without the possibility of parole, and must be given a meaningful opportunity to obtain release. In *Miller v. Alabama*, 567 U.S. 460 (2012), the Court held that a juvenile homicide offender may not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing. However, *Miller* emphasizes that the principles of *Roper* and *Graham* are not

"crime-specific." *Id.* at 473. In *Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016), the Court gave *Miller* retroactive effect, and noted that a state "may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."

In *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), the South Carolina Supreme Court addressed the effect of *Miller* on inmates sentenced to life without parole as juveniles. Our Court stated 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.**" *Id.* at 543, 765 S.E.2d at 577 (emphasis added). In discussing the scope of *Miller's* application, the Court stated that "[i]mportant to our determination of the breadth of the *Miller* decision is this statement by the majority: '*Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.'" *Id.* at 542, 765 S.E.2d at 576 (2014). **"[Y]outh has constitutional significance,"** and **"must be afforded adequate weight in sentencing."** *Id.* at 543, 765 S.E.2d at 576 (emphasis added).

When a juvenile offender is facing the possibility of a life without parole sentence, the sentencing authority must consider factors including: "(1) the chronological age of the offender and the hallmark features of youth, including 'immaturity, impetuosity, and failure to appreciate the risks and consequence'; (2) the 'family and home environment' that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the 'incompetencies associated with youth—for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to

assist his own attorneys'; and (5) the 'possibility of rehabilitation.'" *Id.* at 544, 765 S.E.2d at 577 (quoting *Miller*).

Neither the judge at sentencing nor the board at parole hearings considered the factors prescribed in *Aiken*. To determine whether Appellant is entitled to protection under the *Miller*, *Graham*, and *Aiken* line of cases, it is informative to examine whether Appellant has received the functional equivalent of a life without parole sentence and whether he has a meaningful opportunity to obtain release.

Functional equivalent of LWOP or meaningful opportunity to obtain release

A state must give juvenile non-homicide offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. "A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Id.* at 82.

The South Carolina Supreme Court has recognized the concept that a sentence may be the functional equivalent of a life sentence in *State v. Kimbrough*, 212 S.C. 348, 46 S.E.2d 273 (1948). More than fifty years ago, our Court considered whether a sentence "will probably extend beyond the natural life of the average prisoner," in determining the propriety of a sentence. *Id.* at 356, 46 S.E.2d at 277. The Court found that although the sentencing judge has broad discretion, when the jury made a recommendation of mercy, the judge should "impose a sentence for a term less than the ordinary expectancy of life" unless the record disclosed some reason for disregarding the jury's recommendation. *Id.* at 355, 46 S.E.2d at 276.

Several states have examined juvenile sentencing schemes to determine whether they give a juvenile some meaningful opportunity at release. These states have found lengthy term of

years or life sentences to be the functional equivalent of a life without parole sentence in violation of the Eighth Amendment when they failed to offer the juvenile a meaningful opportunity to obtain release before the end of his expected life span.

In *People v. Caballero*, 282 P.3d 291 (Cal. 2012), the Supreme Court of California held that sentencing a juvenile non-homicide offender to one hundred and ten years was inconsistent with *Graham* and an Eighth Amendment violation. Although the Court declined to provide specific timeframes for setting parole hearings in non-homicide cases, "the sentence must not violate the defendant's Eighth Amendment rights and must provide him or her a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' under *Graham*'s mandate." *Id.* at 296.

In *Casiano v. Commissioner*, 115 A.3d 1031, 1044 (Conn. 2015), the Supreme Court of Connecticut held that "the imposition of a fifty-year sentence without the possibility of parole" was subject to the sentencing procedures outlined in *Miller*. In *Bear Cloud v. State*, the Supreme Court of Wyoming found that a juvenile sentence with the earliest possible meaningful opportunity for release occurring in forty-five years to violate the principles of *Miller* and *Graham*. *Bear Cloud v. State*, 334 P.3d 132, 143-44 (Wyo. 2014). The Wyoming Supreme Court reasoned that these protections "must be applied to the entire sentencing package, when the sentence is life without parole, or when aggregate sentences result in the functional equivalent of life without parole." *Id.* at 144.

The Florida Supreme Court addressed a sentence similar to the case at hand in *Atwell v. State*, 197 So.3d 1040 (Fla. 2016). Atwell was convicted at age sixteen of murder and received a sentence of life with the possibility of parole after twenty-five years. Under Florida's statutory scheme, his parole hearing occurred twenty-five years after sentencing, at which time the parole

board set his presumptive parole release date at the year 2130 based on the seriousness of his offense and his prior record. *Id.* at 1041. The Florida Supreme Court reasoned that "throughout this Court's post-*Graham* and *Miller* juvenile sentencing jurisprudence, we have consistently followed the spirit of *Graham* and *Miller* rather than a narrow, literal interpretation." *Id.* The Court determined that parole eligibility did not exempt Atwell from the purview of *Miller* and *Graham*. *Id.* at 1047. The Florida Supreme Court remanded Atwell for resentencing as his sentence was the functional equivalent of life without parole due to Florida's parole guidelines. *Id.* at 1050.

The Iowa Supreme Court found that a fifty-two-and-a-half-year minimum sentence for a juvenile triggered the protections afforded by *Miller*. *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013). "[W]e believe that while a minimum of 52.5 years imprisonment is not technically a life-without-parole sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger *Miller*-type protections." *Id.* In *State v. Ragland*, 836 N.W.2d 107, 122 (Iowa 2013), the Iowa Supreme Court found that the chance of parole eligibility during the offender's lifetime did not remove the case from the purview of *Miller*. Ragland's commuted sentence required that he serve sixty years before being eligible for parole. *Id.* at 119. "The spirit of the constitutional mandates of *Miller* and *Graham* instruct that much more is at stake in the sentencing of juveniles than merely making sure that parole is possible." *Id.* at 121. The Court held that "*Miller* applies to sentences that are the functional equivalent of life without parole." *Id.* at 121-22.

In *State v. Louisell*, 865 N.W.2d 590 (Iowa 2015), the Iowa Supreme Court upheld a sentence life with the possibility of parole after twenty-five years. Louisell asserted her opportunity for parole was illusory, not real, as "only one of Iowa's thirty-eight juvenile offenders originally sentenced to LWOP has been granted parole." *Id.* at 601. Regarding a

meaningful opportunity for release, the Iowa Supreme Court said "[t]o be sure, a meaningful opportunity must be realistic. *Id.* at 602. However, the Court stated that it "must leave 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," noting that the enumerated codified factors considered by the parole board "do not closely track the *Miller* factors pertinent to the parole eligibility of juvenile offenders, nor do they account for the mitigating attributes of youth that are constitutionally required sentencing considerations." *Id.*

The Supreme Court of Massachusetts addressed how the opportunity for release on parole will be protected for juvenile offenders serving life. *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 27 N.E.3d 349 (Mass. 2015). The Massachusetts Supreme Court examined "the meaningful opportunity for release through parole" specific to juveniles serving a life sentence, noting that "the parole process takes on a constitutional dimension that does not exist for other offenders whose sentences include parole eligibility." *Id.* at 357. The Court found that the juveniles were entitled to representation by counsel at their parole hearings in order for their opportunity for release to be meaningful. *Id.* at 361. "[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, we conclude that this opportunity is not likely to be 'meaningful,'" "without access to counsel." *Id.* The Court determined that in these juvenile life cases, in addition to representation by counsel, the offenders were entitled to funding for expert witnesses and judicial review of a parole decision. *Id.* at 363-65.

The New York Supreme Court, Appellate Division, recently held that a juvenile was entitled to a parole hearing where his youth and attendant circumstances would be considered. *Matter of Hawkins v. New York State Dept. of Corr. & Community Supervision*, 140 A.D.3d 34 (N.Y. App. Div. 2016). Hawkins was sentenced to a prison term of twenty-two years to life for an offense committed as a juvenile, and had been denied parole nine times since becoming eligible. *Id.* at 35-36. At the time of his appeal, Hawkins was fifty-four years of age, had served thirty-six years of his sentence, and argued that he had not received a meaningful opportunity for release as neither the sentencing judge nor the parole board considered the significance of his youth and its attendant circumstances at the time of the commission of the crime. *Id.* at 36.

The Court in *Hawkins* determined that as a "person serving a sentence for a crime committed as a juvenile, petitioner has a substantive constitutional right not to be punished with a life sentence if the crime reflects transient immaturity and that petitioner was denied his constitutional right to a meaningful opportunity for release when the Board failed to consider the significance of petitioner's youth and its attendant circumstances at the time of the commission of the crime." *Id.* The Court found that the parole board, "as the entity charged with determining whether petitioner will serve a life sentence, was required to consider the significance of petitioner's youth and its attendant circumstances at the time of the commission of the crime before making a parole determination." *Id.* The Court reasoned that since Hawkins had not received a hearing where youth and its attendant circumstances were considered during sentencing, "an analogous procedural requirement is necessary at the parole release hearing stage." *Id.* at 39.

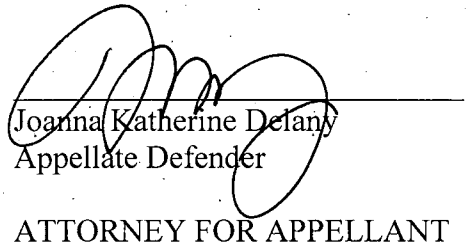
Simply stating that Appellant is parole eligible does not relieve the state of its obligation to afford juvenile offenders the protections conferred in *Miller*, *Graham*, and *Aiken*, when his

parole hearings do not provide a meaningful opportunity to obtain release. South Carolina's parole statute, S.C. Code Ann. § 24-21-640, does not require the parole board to consider the special characteristics of juvenile offenders. Indigent inmates such as Appellant are not provided with the benefit of counsel to assist them at parole hearings. Appellant has spent over thirty years in prison suffering from mental illness, and has received no education past the schooling he obtained prior to his incarceration at age seventeen. Appellant lacks the ability to advocate for himself by presenting evidence of the *Aiken* factors to the parole board, even if the board was required to consider them.

Appellant was entitled to a juvenile resentencing hearing where the judge considered Appellant's: (1) age at the time of the offense and hallmark features of youth including immaturity, impetuosity, and failure to appreciate the risks and consequences; (2) his family and home environment at the time of the offense; (3) the circumstances of the offense, including the extent of his participation and how familial and peer pressures may have affected him; (4) the incompetencies associated with youth such as his inability to deal with police and prosecutors, and his incapacity to assist his own attorneys; and (5) the possibility of rehabilitation.

CONCLUSION

Appellant respectfully requests that this Court reverse the trial court's order denying his motion for resentencing and remand his case for a resentencing hearing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), and *Graham v. Florida*, 560 U.S. 48 (2010).



Joanna Katherine Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of May, 2018.

CERTIFICATE OF COUNSEL

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

May 22, 2018

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