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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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S.C. SUPREME COURT

Appeal from Anderson County
Honorable R. Scott Sprouse, Circuit Court Judge
Appellate Case No. 2017-001733

THE STATE,

Respondent,

vs.

JOHNNY LEE BURTON,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Appellant's appellate challenge to the circuit court judge's ruling denying and dismissing the motion for resentencing was not properly preserved for appellate review because defense counsel did not raise any of the arguments Appellant is currently raising on appeal and, instead, conceded to the circuit court judge Appellant was not entitled to resentencing for the murder he committed at the age of seventeen in light of the fact he received a parole-eligible life sentence. However, notwithstanding any issue preservation concerns, the circuit court judge correctly dismissed and denied Appellant's motion for resentencing because Appellant's parole-eligible life sentence afforded and continues to afford Appellant a meaningful opportunity to obtain release from incarceration through the parole process and, as a result, was and is in no way unconstitutional.

STATEMENT OF THE CASE

In January of 1994, Appellant Johnny Lee Burton was arrested when he was seventeen years old after he shot and killed another person. In April of 1994, the Anderson County Grand Jury indicted Appellant for one count of murder and one count of possession of a firearm during the commission of a violent crime. On April 11, 1994, a jury trial was commenced in the Anderson County Court of General Sessions with the Honorable H. Dean Hall, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, Judge Hall sentenced Appellant to concurrent terms of imprisonment of life for murder and five years for possession of a firearm during the commission of a violent crime.

Subsequently, through a pro se motion filed on October 24, 2016, Appellant sought resentencing pursuant to the decisions in Miller v. Alabama, 567 U.S. 460 (2012), and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). On November 2, 2016, the Honorable Costa M. Pleicones, Chief Justice of the South Carolina Supreme Court, issued an order appointing the Honorable R. Scott Sprouse, circuit court judge, to hear and rule upon Appellant's motion. On July 19, 2017, the State filed a motion to dismiss in response to Appellant's motion. On August 9, 2017, a hearing on the matter was conducted in the Anderson County Court of General Sessions with Judge Sprouse presiding. Thereafter, through an order filed on August 7, 2017, Judge Sprouse found Appellant was not entitled to resentencing and dismissed the matter. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

On the night of January 22, 1994, Appellant, who was seventeen years old at the time, shot his victim, Shedrick Gaines, several times with a handgun in front of multiple witnesses, and Gaines died as a result of the injuries he sustained in the shooting. (R. pp. 20-22; pp. 24-26). Subsequently, Appellant was arrested and indicted for murder and possession of a firearm during the commission of a violent crime, and he proceeded forward to trial. (R. pp. 21-23; pp. 25-27). At the conclusion of trial, the jury convicted Appellant as indicted, and the trial judge sentenced him to life imprisonment *with* the possibility of parole for murder along with a concurrent five-year sentence for the firearm charge. (R. pp. 21-23; pp. 25-27).

Approximately twenty-two years later, Appellant, who had been eligible for parole since 2014 but had not yet been granted it, filed a pro se motion seeking resentencing pursuant to the decisions in Miller v. Alabama, 567 U.S. 460 (2012), and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), due to the fact he was a juvenile at the time he committed the murder for which he received his parole-eligible life sentence. (R. pp. 10-15). Based on the motion, the Chief Justice of the South Carolina Supreme Court issued an order vesting Judge Sprouse with jurisdiction over the matter. (R. pp. 16-17). Subsequently, the solicitor moved for Appellant's motion to be dismissed and denied in light of the fact Appellant was eligible for parole, and Judge Sprouse conducted a hearing on the matter. (R. p. 2; p. 18).

During the hearing, the solicitor acknowledged Appellant had received a life sentence for murder but noted Appellant was both eligible for parole and periodically receiving parole hearings. (R. p. 2; p. 18). Accordingly, in light of Appellant's parole eligibility, the solicitor maintained Appellant was not entitled to resentencing pursuant to the mandates of Aiken. (R. p. 2). In reply, defense counsel readily acknowledged Appellant was, in fact, eligible for parole

despite the fact he received a life sentence for murder. (R. p. 3). However, defense counsel asserted Appellant's "problem" was the question of whether he actually had a meaningful chance of being granted parole. (R. p. 3). Candidly though, defense counsel conceded she thought that particular issue was something "beyond the scope of [the] hearing" and was "not a matter of what's before the court." (R. p. 3).

At that point, Judge Sprouse indicated he believed the language of Aiken was clear and questioned defense counsel as to whether there was any other applicable authority on the matter. (R. pp. 3-4). In response, defense counsel expressed a desire for the law to evolve in a manner that would grant Appellant "some sort of reprieve in the future" but conceded the controlling authority was the Aiken decision. (R. p. 4). Thereafter, Judge Sprouse granted the State's motion to dismiss. (R. p. 4; p. 6; p. 8; p. 19). In dismissing the matter, Judge Sprouse found Appellant was not entitled to resentencing in light of the fact he was eligible for parole while further noting the matter before him was "not a review of what happens at [Appellant's] parole hearing."[1] (R. pp. 3-4; p. 6; p. 8; p. 19). For those reasons, Judge Sprouse declined to vacate Appellant's parole-eligible life sentence and grant resentencing. (R. pp. 3-4; p. 6; p. 8; p. 19).

[1] While Judge Sprouse was explaining the Aiken decision did not give him authority to alter Appellant's sentence in light of the fact Appellant was eligible for parole, defense counsel repeatedly responded: "Yes, sir." (R. p. 4).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The issue of whether a criminal defendant is serving an illegal or unconstitutional sentence constitutes a question of law. Bordeaux v. State, 410 S.C. 495, 499, 765 S.E.2d 143, 145 (2014). Therefore, an appellate court considering the lawfulness of a sentence reviews the matter de novo for errors of law. Id.; see Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("[Appellate courts] are free to decide a question of law with no particular deference to the circuit court.").

ARGUMENT

Appellant's appellate challenge to the circuit court judge's ruling denying and dismissing the motion for resentencing was not properly preserved for appellate review because defense counsel did not raise any of the arguments Appellant is currently raising on appeal and, instead, conceded to the circuit court judge Appellant was not entitled to resentencing for the murder he committed at the age of seventeen in light of the fact he received a parole-eligible life sentence. However, notwithstanding any issue preservation concerns, the circuit court judge correctly dismissed and denied Appellant's motion for resentencing because Appellant's parole-eligible life sentence afforded and continues to afford Appellant a meaningful opportunity to obtain release from incarceration through the parole process and, as a result, was and is in no way unconstitutional.

Appellant contends the circuit court judge committed reversible error by dismissing and denying the motion for resentencing pursuant Miller v. Alabama, 567 U.S. 460 (2012), and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). In support of that contention, Appellant maintains his parole-eligible life sentence is unconstitutional because: (1) his sentence is the functional equivalent of life without parole due to the fact the parole board in South Carolina has allegedly failed to consider the factors identified in Miller when it denied him parole on two prior occasions; (2) he allegedly did not receive consideration of his youth when he was sentenced for murder or when he has been considered for parole; and (3) "the South Carolina Constitution's bar against cruel and unusual punishment prohibits sentencing a juvenile offender to life imprisonment without the possibility of parole after service of twenty years where the parole board fails to consider the 'unique characteristics of youth.' " Notably though, *none* of those arguments was presented to the circuit court judge. Instead, defense counsel *conceded* Appellant was not entitled to resentencing pursuant to the applicable appellate decisions in light of the fact he was eligible for parole while further maintaining any issues related to South Carolina's parole process were not properly before the circuit court judge. Thus, as Appellant's appellate arguments were not presented to or ruled upon by the circuit court judge, those arguments were not properly preserved for appellate review and cannot appropriately be raised

or considered for the first time on appeal. However, regardless of any issue preservation concerns, Appellant's parole-eligible life sentence for a murder he committed at the age of seventeen has afforded him and continues to afford him a meaningful avenue by which he could and still can obtain release from incarceration based on demonstrated maturity, rehabilitation, and growth. In light of that fact, Appellant's sentence of life *with parole* was not and is not unconstitutional. Accordingly, the circuit court judge properly declined to unnecessarily relitigate Appellant's sentence decades after Appellant gunned down his victim, and the circuit court judge's decision to dismiss and deny the motion for resentencing was entirely correct. The circuit court judge's ruling should be affirmed.

A. Appellant's Failure to Preserve the Arguments He is Raising on Appeal

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Significantly, the application of issue preservation requirements ensures the trial court has an opportunity "to rule properly after it considered all relevant facts, law, and *arguments*." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (emphasis added); see generally Unemployment Compensation Comm'n of Alaska v. Aragan, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action.").

For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 185 (3rd ed. 2016) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). If an issue—including a constitutional one—is not presented to and ruled upon by the circuit court judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); see In re Care and Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to and ruled on by the trial court to be preserved for appeal."). Critically, on appeal, an appellant is limited solely to the grounds raised at trial and is precluded from raising a different argument from the one raised to the circuit court judge. State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997); see State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (recognizing a party cannot argue one ground in support of an issue at trial and then argue an alternative ground on appeal); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal.").

In the case sub judice, Appellant contends the circuit court judge erred by denying and dismissing the motion for resentencing. In making such a contention, Appellant, who was seventeen years old at the time of the murder, maintains his parole-eligible life sentence was unconstitutional "on its face and as applied" and is the "functional equivalent" of a life sentence

without the possibility of parole. As support for that particular argument, Appellant maintains the parole process in South Carolina is flawed because the parole board allegedly does not consider an offender's youth at the time of the offense "at all" and because the parole board allegedly did not consider "the hallmarks of youth" when it twice denied him parole. For those reasons, Appellant maintains he is constitutionally entitled to have his sentence vacated and to be resentenced for the murder he committed as a juvenile pursuant to both the United States Constitution and the South Carolina Constitution.

Importantly though, during the circuit court proceedings, defense counsel did not argue to the circuit court judge Appellant's sentence was unconstitutional or the functional equivalent of life without parole. Likewise, defense counsel did not argue Appellant was entitled to resentencing based on issues related to South Carolina's parole process or pursuant to the decisions in Aiken, Miller, or any other relevant appellate case. Instead, defense counsel *conceded* the Aiken decision was not applicable to Appellant's case in light of the fact Appellant received a parole-eligible life sentence as opposed to a sentence of life without the possibility of parole, responded affirmatively when the circuit court judge indicated he did not have the authority to grant resentencing to Appellant in light of his eligibility for parole, and asserted any issues related to the parole process went beyond the scope of the matter before the circuit court judge.[2] See State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (recognizing an issue conceded during trial cannot subsequently be argued on appeal); see also State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) (finding an appellate argument involving a jury

[2] Specifically, defense counsel stated: "His problem, Your Honor, is that what is a meaningful chance of parole? I think that goes beyond the scope of this hearing, and it's not a matter of what's before the court. But that is his frustration, how do I present something to the parole board if not given the opportunity to look at the Miller factors that are enunciated in Aiken v. Byars, but the case does appear to specifically apply to individuals who have received a life without the possibility of parole sentence." (R. p. 3).

instruction to be unpreserved because defense counsel explicitly stated he had no objection to the trial judge's instruction).

Because defense counsel did not raise any of the arguments Appellant is now attempting to raise on appeal, the circuit court judge was wholly denied an opportunity to consider, address, or rule upon those arguments when resolving the matter before him. See Queen's Grant, 368 S.C. at 372-373, 628 S.E.2d at 919 ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." (citations omitted)). Critically, without first giving the circuit court judge an opportunity to address his constitutional claims regarding the propriety of his sentence and the parole process, Appellant is precluded from raising those claims for the first time on appeal in seeking to get the circuit court judge's ruling reversed. See State v. McCray, 222 S.C. 391, 394, 73 S.E.2d 1, 2 (1952) (finding McCray's appellate contention the sentence imposed was "cruel and excessive" was unavailable to him on appeal because that particular contention was not raised to the circuit court judge); see also I'On, 338 S.C. at 422, 526 S.E.2d at 724 ("The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."). As a result, Appellant's appellate challenge to the circuit court judge's ruling is not properly preserved for appellate review and simply cannot appropriately be raised or addressed for the first time on appeal. See State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000) (finding Benton's appellate challenge to the trial judge's refusal to give a requested charge was not preserved for appellate review where Benton "argued one ground in support of a circumstantial evidence charge at trial (State only presented circumstantial evidence of intent) and argues another ground in support of the charge on appeal (palm print is circumstantial evidence)"); In re Walter M., 386 S.C. 387,

392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review."); see also State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court "cannot address unpreserved errors"). The circuit court judge's ruling should be affirmed.

B. Propriety of the Circuit Court Judge's Decision to Dismiss and Deny the Motion for Resentencing

Generally speaking, the issue of an incarcerated inmate's eligibility for parole is an entirely separate and independent issue from the issue of an appropriate and proper sentence for a defendant convicted of a criminal offense. State v. McKay, 300 S.C. 113, 115, 386 S.E.2d 623, 623 (1989). In South Carolina, the responsibility for determining whether an incarcerated inmate meets the requirements for parole is statutorily assigned to the state's parole board, which is required by law to "carefully consider the record of the prisoner before, during, and after imprisonment" in determining whether parole should be granted. S.C. Code Ann. § 24-21-640 (Supp. 2017); see State v. Dingle, 376 S.C. 643, 649, 659 S.E.2d 101, 104 (2008) ("[T]he parole board has the sole authority to determine parole eligibility separate and apart from the court's authority to sentence a defendant."). Meanwhile, trial judges in our state are tasked with imposing a defendant's sentence upon conviction and are vested with broad discretion to carry out that duty. See State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) ("A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed.").

Despite the broad discretion afforded to South Carolina's trial judges, both the Eighth Amendment of the United States Constitution and Article I, Section 15 of the South Carolina Constitution place limits on a trial judge's sentencing discretion by prohibiting the imposition of

cruel and unusual punishment. See U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); S.C. Const. art. I, § 15 ("Excessive bail shall not be required . . . nor shall cruel, nor corporal, nor unusual punishment be inflicted[.]"). Pursuant to the ban on cruel and unusual punishment, a defendant's sentence must not be "barbaric" and must be graduated and proportioned to the offense in order to pass constitutional muster. Solem v. Helm, 463 U.S. 277, 284 (1983); see Atkins v. Virginia, 536 U.S. 304, 311 (2002) (instructing it is a precept of justice the punishment for a crime should be graduated and proportioned to the offense).

Notably, in Graham v. Florida, 560 U.S. 48, 81 (2010), a narrow majority of the United States Supreme Court concluded the imposition of a life sentence *without the possibility of parole* upon a juvenile offender who committed a non-homicide offense was violative of the Eighth Amendment's prohibition against cruel and unusual punishment. In reaching that conclusion, the Supreme Court applied its own "independent judgment" and determined life without parole sentences for juvenile non-homicide offenders were unconstitutional due to the lessened culpability of juveniles, the severity and irrevocable nature of life without parole sentences, and the lack of sufficient penalogical justifications for the sentencing practice in regard to juveniles. Id. at 74. As a result, the Supreme Court held a state must "give [juvenile non-homicide] defendants like Graham some meaningful opportunity for release based on demonstrated maturity and rehabilitation." Id. at 75. Importantly though, the Supreme Court placed careful limits on its holding by explaining a state is neither "required to guarantee eventual freedom to a juvenile offender" nor required "to release that offender during his natural life." Id. To the contrary, the Supreme Court instructed:

> Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the

> duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life.

Id.

Subsequent to that decision, a narrow majority of the United States Supreme Court in Miller v. Alabama, 567 U.S. 460, 489 (2012), applied the reasoning of the Graham decision to mandatory life without parole sentences for juvenile homicide offenders and concluded such sentences constituted cruel and unusual punishment. In reaching that conclusion, the Supreme Court determined a requirement for a mandatory sentence of life without parole sentence would doom a juvenile homicide offender to an *irrevocable* lifetime in jail without consideration being given to important factors related to the offender, including the offender's specific chronological age, the hallmark features of youth, the offender's home environment, the particular circumstances of the offender's crime, the effects peer pressure may have had on the crime, the "incompetencies associated with youth," and the possibility for rehabilitation. Id. at 477-478. Accordingly, in light of the irrevocable nature of a life without parole sentence, the Supreme Court held a sentencer must consider an offender's youth and attendant characteristics before imposing the particular penalty of life *without parole* on a juvenile non-homicide offender. Id. at 483. However, the Supreme Court expressly declined to preclude a sentencer from imposing a life without parole sentence on a juvenile homicide offender so long as it first took "into account how children are different, and how those differences counsel against *irrevocably* sentencing them to a lifetime in prison." Id. at 480 (emphasis added and footnote omitted).

Thereafter, in Aiken v. Byars, 410 S.C. 534, 536-537, 765 S.E.2d 572, 574 (2014), the South Carolina Supreme Court considered whether the Miller decision was applicable to juvenile homicide offenders who had been sentenced to life without parole under South Carolina's non-

mandatory sentencing scheme. In a sharply-divided decision, a two-justice plurality of the Supreme Court concluded "any juvenile offender who receives a sentence of life without the possibility of parole [was] entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment." Id. at 544, 765 S.E.2d at 577 (plurality opinion). Agreeing in principle on different grounds, an additional justice joined with the plurality while concurring solely in the result. Id. at 545-546, 765 S.E.2d at 578 (Pleicones, J., concurring in result). Accordingly, through its decision, the Supreme Court permitted "all juvenile offenders who may be subject to a sentence of life imprisonment *without the possibility of parole*" to seek resentencing "to allow the inmates to present evidence specific to their attributes of youth and allow the judge to consider such evidence in the light of its constitutional weight." Id. at 544-545, 765 S.E.2d at 577-578 (plurality opinion) (emphasis added).

Following those decisions, in Montgomery v. Louisiana, __ U.S. __, 136 S. Ct. 718, 736 (2016), the United States Supreme Court considered whether its decision in Miller was entitled to retroactive effect in the cases of juvenile offenders previously sentenced to life without parole and concluded it was, in fact, retroactively applicable. Critically, upon reaching that conclusion, the Supreme Court carefully explained its determination did *not* require the states "to relitigate sentences, let alone convictions," despite the fact juvenile offenders sentenced before Miller likely would not have received the type of sentencing considerations mandated by that decision. Id.; see Miller, 567 U.S. at 483 ("Our decision . . . mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing [life without parole]."). Instead, the Supreme Court instructed an unconstitutional sentence imposed upon a juvenile offender could be remedied by permitting the offender *to be considered for parole*. Montgomery, 136 S. Ct. at 736. Specifically, the Supreme Court explained:

> Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.
>
> . . .
>
> Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded those who demonstrate the truth of Miller's central intuition—that children who commit even heinous crimes are capable of change.

Id. Thus, a grant of parole eligibility—as opposed to an individualized sentencing hearing—was expressly recognized as an appropriate means to remedy an Eighth Amendment violation involving a juvenile offender's sentence. Id.

In the case at bar, Appellant, a convicted murderer, received a life sentence for unlawfully and maliciously killing his victim less than a year before he reached the age of eighteen. See Miller, 567 U.S. at 476-477 (recognizing there is a difference between the culpability level of a fourteen-year-old offender versus a seventeen-year-old offender); see also People v. Willover, 248 Cal. App. 4th 302, 324, 203 Cal. Rptr. 3d 384, 399 (Cal. Ct. App. 2016) ("While Miller did recognize that juveniles are generally immature, impetuous, and unable to appreciate risks and consequences, here defendant was nearly 18 years old at the time of his offenses, so the trial court could reasonably determine that defendant's age did not weigh strongly in favor of resentencing."). Importantly though, Appellant's life sentence for the murder he committed as a juvenile was *not* perpetually irrevocable from the date it was imposed and did *not* guarantee Appellant would die in prison without ever having any opportunity to obtain release. Cf. Graham, 560 U.S. at 79 ("The State has *denied him any chance to later demonstrate that he is fit to rejoin society* based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not

permit." (emphasis added)). To the contrary, his life sentence specifically afforded him eligibility for parole, which constituted a meaningful mechanism by which Appellant could—and still can—obtain release from incarceration during his lifetime. Cf. Johnson v. State, __ S.W.3d __, 2018 Ark. 168, __ (Ark. 2018) ("Because Johnson's sentence of life imprisonment [for a murder he committed at the age of seventeen] now carries with it the possibility of parole, his contention that his sentence violates the requirements of Miller is incorrect."); State v. Smith, 295 Neb. 957, 979, 892 N.W.2d 52, 66 (Neb. 2017) (concluding Smith's ninety-year-to-life sentence for a kidnapping he committed when he was sixteen years old was *not* unconstitutional because Smith would be eligible for parole at some point during his lifetime). In fact, Appellant was first eligible for parole when he was thirty-seven years old just twenty years after he began serving his sentence for maliciously ending the life of his victim, and, since that point in time, he has received and will continue to receive regular opportunities to obtain release on parole. See S.C. Code Ann. § 16-3-20 (Supp. 1993) ("A person who is convicted of or pleads guilty to murder must be punished by death or by imprisonment for life and *is not eligible for parole until the service of twenty years*[.]" (emphasis added)). Accordingly, because Appellant's parole-eligible life sentence afforded him—and continues to afford him—an opportunity for obtaining release from incarceration during his lifetime, his life sentence *with* the possibility of parole was not and is not cruel, unusual, or grossly disproportionate to the murder Appellant's committed shortly before he reached the age of adulthood for constitutional purposes.[3] See Montgomery, 136 S. Ct. at 736 ("Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be

[3] Notably, pursuant to South Carolina law, a person seventeen years old or older is *not* considered to be a juvenile or child. See S.C. Code Ann. § 63-19-20(1) (Supp. 2017) (" 'Child' or 'juvenile' means a person less than seventeen years of age.").

forced to serve a disproportionate sentence in violation of the Eighth Amendment."); cf. State v. Williams-Bey, 167 Conn. App. 744, 765, 144 A.3d 467, 480 (Conn. App. Ct. 2016) ("We do not believe that the United States Supreme Court would so glibly identify a constitutionally adequate remedy under the eighth amendment. . . . We conclude that parole eligibility is an adequate remedy for sentences that violated Miller as applied retroactively." (citation omitted)).

Recognizing Appellant did *not* receive a sentence of life without parole or a sentence that would otherwise unconstitutionally deny him any meaningful opportunity to obtain release during his lifetime, the circuit court judge correctly dismissed and denied Appellant's motion for resentencing as Appellant's parole-eligible life sentence itself was in no way unconstitutional. See Miller, 567 U.S. at 483 (mandating a sentencing process that must "only" be followed prior to the imposition of an *irrevocable* sentence of life without parole upon a juvenile homicide offender); Graham, 560 U.S. at 75 (holding juvenile non-homicide offenders are only entitled to "some meaningful opportunity for release based on demonstrated maturity and rehabilitation" and may be incarcerated for their entire lives for crimes committed as juveniles if they fail to rehabilitate and, thus, ultimately prove to be irredeemable); Aiken, 410 S.C. at 544-545, 765 S.E.2d at 577-578 (plurality opinion) (permitting "all juvenile offenders who may be subject to a sentence of life imprisonment without the possibility of parole" to seek resentencing). By ruling in that manner, the circuit court judge properly avoided the unnecessary and unwarranted relitigation of Appellant's sentence years after he murdered his victim at a point in time when any witnesses capable of presenting pertinent information about what actually occurred realistically may no longer be available to appear at a resentencing hearing. See Montgomery, 136 S. Ct. at 736 (instructing a state is not required "to relitigate sentences" in order to remedy constitutional violations with juvenile offenders' sentences and, instead, can remedy such

violations by permitting the offenders "to be considered for parole, *rather than by resentencing them*" (emphasis added)); see generally Solem, 463 U.S. at 290, n. 16 ("Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate."). Meanwhile, the circuit court judge did nothing through his ruling to interfere with Appellant's eligibility for parole, and, thus, Appellant will continue to be capable of obtaining release from incarceration based on demonstrated rehabilitation, maturity, and growth assuming he is ever actually able to demonstrate such rehabilitation, maturity, and growth at some point in the future. See S.C. Code Ann. § 24-21-640 (Supp. 2017) ("The board must carefully consider the record of the prisoner before, during, and after imprisonment[.]"); see also State v. Calhoun, 222 So. 3d 903, 907 (La. Ct. App. 2017) ("He has a chance at parole, but he will have to earn it. This scheme is reasonable and satisfies Miller[.]"). At the same time, the circuit court judge ensured through his ruling Appellant will continue to remain incarcerated for the murder he committed in the event he fails to sufficiently mature, rehabilitate, and grow to such an extent that a grant of parole would be warranted. Cf. Graham, 560 U.S. at 75 ("*It bears emphasis* . . . that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life." (emphasis added)).

In arguing the circuit court judge erred by dismissing and denying the motion for resentencing, Appellant readily acknowledges he received a parole-eligible life sentence for murder, which is not a constitutionally-prohibited type of sentence for a juvenile homicide offender. See Montgomery, 136 S. Ct. at 736 (recognizing an otherwise unconstitutional life without parole sentence for a juvenile homicide offender may be rendered constitutional "by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them"). Nevertheless, Appellant maintains his life sentence is the functional equivalent of an unconstitutional sentence of life *without parole* because the parole board is allegedly not required to consider and has not considered the special characteristics of juvenile offenders discussed in the Miller and Aiken decisions during his parole hearings. For those reasons, Appellant contends he should have been granted resentencing by the circuit court judge.

Importantly though, the limited issue before the circuit court judge was the issue of whether Appellant's *sentence* was unconstitutional. See Prince v. Beaufort Mem'l Hosp., 392 S.C. 599, 605, 709 S.E.2d 122, 125 (Ct. App. 2011) ("When we remand a case, the trial court has only the jurisdiction and authority mandated by this court."). Because Appellant was and is eligible for parole, Appellant's life sentence for murder was not unconstitutional, and, thus, there was no proper basis upon which the circuit court judge could either disturb Appellant's sentence or grant resentencing. See Montgomery, 136 S. Ct. at 736 (recognizing parole eligibility can remedy a constitutional violation with a juvenile sentence); see also State v. Connally, 227 S.C. 507, 510, 88 S.E.2d 591, 593 (1955) (instructing a court has no authority to disturb a criminal sentence when it falls within the appropriate statutory limits, is not unconstitutional, and is not the result of partiality, prejudice, oppression, or corrupt motive); cf. State v. Delgado, 323 Conn. 801, 810-811, 151 A.3d 345, 351-352 (Conn. 2016) ("The eighth amendment, as interpreted

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

To the extent Appellant is challenging the propriety of the circuit court judge's ruling based on claimed deficiencies with the parole process in South Carolina, Appellant appears to be confusing the issues of parole and sentencing, which are entirely separate and distinct matters. <u>See</u> <u>McKay</u>, 300 S.C. at 115, 386 S.E.2d at 623 ("[T]he question of parole eligibility is separate and independent from the court's authority to sentence an offender. The final judgment of the court in a criminal case is the sentence."). In resolving the limited issue before him, the circuit court judge properly evaluated whether Appellant's life sentence *with parole eligibility* was unconstitutional in light of the decisions in <u>Miller</u> and <u>Aiken</u>, and, since Appellant's sentence was *not* unconstitutional in any way based on the express holdings of those decisions, the circuit court judge properly dismissed and denied the motion for resentencing while also doing nothing to unlawfully interfere with the parole board's sole authority on matters of parole. <u>See</u> <u>Brown v. State</u>, 306 S.C. 381, 383, 412 S.E.2d 399, 400-401 (1991) ("[P]arole eligibility is not a matter within the jurisdiction of the trial court, but falls within the province of the Board of Probation, Parole, and Pardon Services (the Board).").

However, even if the parole process could somehow properly be analyzed through the case at bar, the parole process available to Appellant has provided and continues to provide him with a constitutionally-sufficient meaningful opportunity for release. That is true because, during each parole hearing, the parole board in South Carolina is statutorily required to give *careful* consideration to Appellant's crimes *and* subsequent behavior, including any rehabilitative efforts he may have engaged in while incarcerated, in determining whether he should be afforded a grant of parole. See S.C. Code Ann. § 24-21-640 (Supp. 2017) ("The board must carefully consider the record of the prisoner *before*, *during*, and after imprisonment[.]" (emphasis added)); see also South Carolina Parole Board Manual, https://www.dppps.sc.gov/Parole-Pardon-Hearings/Parole-Board (outlining the criteria considered by the parole board in determining whether parole should be granted, which include growth-related and rehabilitation-related factors such as the prisoner's progress in programs "designed to encourage the prisoner to improve himself" while incarcerated, the prisoner's current attitude, the prisoner's "understanding of the causes of his past criminal behavior," and the prisoner's "efforts to solve his problems"). Therefore, before a parole decision was or is made in his case, Appellant has received and will receive consideration of whether he has shown rehabilitation and growth, which is *exactly* what a juvenile offender is constitutionally entitled to through the requirement for a meaningful opportunity for release. See Graham, 560 U.S. at 75 (instructing a juvenile non-homicide offender is entitled to a meaningful opportunity for release "based on *demonstrated maturity and rehabilitation*" (emphasis added)); see also State v. Scott, 416 P.3d 1182, 1187 (Wash. 2018) (finding the statutory grant of parole eligibility to Scott remedied any constitutional issues with his "de facto" life sentence for offenses he committed as a juvenile, rejecting the argument the parole process was inadequate due to the fact "it does not

provide for consideration of a defendant's diminished capacity due to attributes of youth," and noting the United States Supreme Court in Montgomery expressly approved of a Wyoming parole-eligibility statute that also did *not* require consideration of factors related to youth as part of a parole determination); cf. Miller, 567 U.S. at 483 (identifying a variety of sentencing factors related to juveniles that must only be considered prior to the imposition of an *irrevocable* sentence of life without parole upon a juvenile offender); Aiken, 410 S.C. at 544-545, 765 S.E.2d at 577-578 (plurality opinion) (permitting resentencing for juvenile offenders who received *irrevocable* life without parole sentences).

Moreover, assuming the parole process in South Carolina is somehow flawed or, more specifically, the parole board has improperly failed—or subsequently fails—to evaluate any hypothetical rehabilitation and growth exhibited by Appellant prior to reaching a parole decision in his case, Appellant has mechanisms available to him to challenge the parole process and the parole board's specific decisions, including the mechanism of an administrative appeal. See Al-Shabazz v. State, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000) ("[A]n inmate make seek review of Department's final decision in an administrative matter under the APA."); see also Cooper v. South Carolina Dep't of Prob., Parole & Pardon Servs., 377 S.C. 489, 502, 661 S.E.2d 106, 113 (2008) (affirming an order remanding for an administrative appeal of the methods and procedure employed by the parole board in denying parole where the board "apparently failed to consider the requisite factors and, instead, based its decision on certain fixed factors that are unaffected by *any rehabilitation efforts* on the part of Cooper" (emphasis added)); see generally S.C. Const. art. V, § 5 ("The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs."). Notably though, defense counsel at no point argued, suggested, or implied

Appellant was improperly being denied parole even though he had sufficiently demonstrated rehabilitation, maturity, or growth subsequent to his imprisonment, which is the *sole* basis upon which Appellant would be entitled to constitutional consideration for release.[4] See Graham, 560 U.S. at 75 (explaining juvenile offenders are entitled to a meaningful opportunity for release "based on demonstrated maturity and rehabilitation"). Therefore, in light of the information currently available, nothing has been presented to establish South Carolina's parole process is denying Appellant a meaningful opportunity for parole despite demonstrated rehabilitation, maturity, and growth or is otherwise unconstitutionally flawed.[5] Cf. Montgomery, 136 S. Ct. at 736 ("These claims have not been tested or even addressed by the State, so the Court does not confirm their accuracy.").

However, as parole and sentencing remain entirely separate matters, the circuit court judge properly focused his consideration on the issue before him, which was the issue of whether Appellant's aggregate parole-eligible life sentence for murder was unconstitutional pursuant to the appellate decisions in Miller and Aiken. See McKay, 300 S.C. at 115, 386 S.E.2d at 623 (recognizing parole and sentencing are entirely separate and distinct matters). Since Appellant's

[4] While defense counsel made no remarks regarding Appellant's rehabilitative efforts subsequent to the murder, Appellant personally asserted he was a "model inmate" and identified a number of things he had accomplished during his years of incarceration. (R. pp. 4-6). Tellingly though, Appellant made no mention of any of the disciplinary infractions he had committed while incarcerated, which—according to records available from the South Carolina Department of Correction—included the commission of an assault and battery of a fellow inmate with the intent to kill or injure him. Inmate Search Detail Report for Johnny Lee Burton, https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000213281.

[5] Critically, during the motion hearing before the circuit court judge, defense counsel presented *nothing* to the circuit court judge in regard to the basis upon which Appellant had been denied parole, and, as a result, neither the circuit court judge nor this Court was or has been presented with any evidence to establish Appellant actually has been denied parole based on any ground that could be considered constitutionally defective. See State v. Williams, 321 S.C. 455, 464, n. 4, 469 S.E.2d 49, 54 (1996) ("The burden is on appellant to provide a sufficient record for review.").

life sentence affords him eligibility for parole and, thus, a meaningful opportunity for release, his sentence was *not*, in fact, unconstitutional. Cf. Montgomery, 136 S. Ct. at 736 ("Giving Miller retroactive effect . . . does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." (citation omitted)). Therefore, the circuit court judge correctly dismissed and denied the motion for resentencing. The circuit court judge's ruling should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the circuit court judge's ruling be affirmed.

Respectfully submitted,

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June 20, 2018

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IN THE COURT OF APPEALS

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Honorable R. Scott Sprouse, Circuit Court Judge
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THE STATE,

Respondent,

vs.

JOHNNY LEE BURTON,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent 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."

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PROOF OF SERVICE

I, Destiny Blue, certify I have served the within Final Brief of Respondent on Appellant by sending two copies of the same to:

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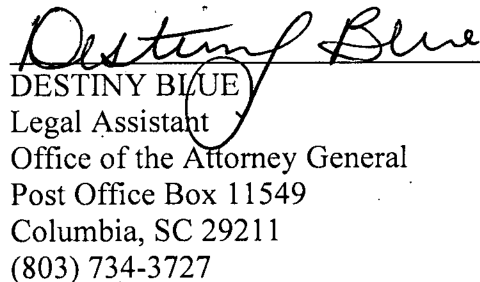
I further certify that all parties required by Rule to be served have been served.
This 20th day of June, 2018.



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