

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Appeal from Charleston County

Honorable Carmen T. Mullen, Circuit Court Judge

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Opinion No. 2019-UP-295 (S.C. Ct. App. Filed August 21, 2019)

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1994-GS-10-3056, 1994-GS-10-3057

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

ANTHONY M. ENRIQUEZ,

PETITIONER

APPELLATE CASE NO. 2019-001895

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 15, 2019.

QUESTION PRESENTED

Did the Court of Appeals err by holding the circuit court properly found Petitioner did not qualify for resentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), because he was eligible for parole after the service of twenty years, where the mandatory nature of Petitioner's life with parole sentence treated all adults and juveniles the same, and where the parole process in South Carolina does not provide a meaningful opportunity for release such that it is not an adequate substitute for individualized resentencing?

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Petitioner in June 1994 for murder and armed robbery, related to an incident that occurred on January 21, 1994 when Petitioner was seventeen years old. On December 1, 1994, Petitioner pled guilty as indicted before the Honorable L. Casey Manning.¹ R. 1. Assistant Solicitor R. Spencer Roddey represented the state, and William L. Runyon, Jr. represented Petitioner. R. 1. Petitioner was sentenced to the mandatory term of life imprisonment for murder and to a concurrent term of twenty-five years for armed robbery. R. 31, ll. 10-23. Pursuant to the statutory scheme in place at the time of the offense, Petitioner would become eligible for parole after the service of twenty years of his sentence. R. 70, ll. 1-16; S.C. Code Ann. § 16-3-20 (1992).

¹ Petitioner pled guilty to armed robbery pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). R. 7, l. 3 – 19, l. 4.

Following this Court's decision in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), Petitioner filed a *pro se* motion for resentencing on December 23, 2014. R. 33. In this motion, Petitioner argued that at the time of the crime he was only seventeen years old, had an underdeveloped sense of responsibility, and was vulnerable to negative influences and outside pressures from family and peers. Petitioner's age was only a chronological factor at his plea hearing and not considered for its constitutional significance, as explained in Aiken and Miller v. Alabama, 567 U.S. 460 (2012). R. 33.

On March 30, 2016, Petitioner filed a Memorandum in Support of his Motion for Resentencing through counsel, Bentley Price. R. 38. The memorandum elaborated on both the law and facts relevant to the instant case. R. 38. Counsel noted that while Petitioner's sentence provided for parole eligibility after service of twenty years of his sentence, its imposition was mandatory under the law in place at the time. R. 38-39. Thus, Petitioner never had the opportunity "to present evidence specific to the attributes of his youth" to the sentencing judge and the judge was prevented from considering such evidence in determining a proper and proportionate sentence. R. 39-41.

Counsel reviewed Petitioner's many achievements while incarcerated and discussed the circumstances of the offense, Petitioner's home life and peer pressures, and Petitioner's difficulty in assisting in his own defense. R. 42-43. Counsel further noted that "[t]he life expectancy for an incarcerated youth who serves decades in prison is substantially less than a person in society in light of the stress factors associated with prison life." R. 44. He argued that even geriatric release is uncommon for "lifers" in South Carolina, but that such release would not provide Petitioner with the opportunity for any meaningful life outside of prison. Thus, he argued that Petitioner's sentence "is the 'functional equivalent' to life without parole," such that he is entitled to a resentencing hearing. R. 44.

On April 21, 2016, the state, represented by Assistant Solicitor Charles M. Condon, Jr., filed its response to the motion for resentencing, arguing Petitioner was not eligible for resentencing because he was eligible for parole. R. 61. The state asserted that Miller and Aiken were not applicable to Petitioner because Petitioner is eligible for parole, noting an initial parole eligibility date of January 23, 2014. R. 62. The state cited to the South Carolina Department of Probation, Parole and Pardon Services' Policies and Procedures Handbook in support of its assertion that "the parole board can take into considerations of youthfulness and immaturity at the time of the crime, rehabilitation, along with other important considerations." R. 63. Thus, the prosecutor suggested that Petitioner's motion be summarily denied. R. 63.

The defense filed a reply to the state's response on June 30, 2016, asserting that Petitioner had a right to have a judge consider the mitigating factors prior to imposing a life sentence, regardless of his parole eligibility. R. 64. In the state's supplemental response filed on July 19, 2016, the solicitor argued the United States Supreme Court's decision in Montgomery v. Louisiana, 136 S.Ct. 718 (2016), "made clear that Miller, and consequently Aiken v. Byars, does not apply to juveniles who receive life with eligibility for parole sentences." R. 66-67. Rather, he asserted that a remedy for a Miller violation is to convert the life without parole sentence to one of life with eligibility for parole.

On July 20, 2016, a hearing was held before the Honorable Carmen T. Mullen.² At the hearing, the solicitor argued that the resentencing provided for in Aiken was applicable only to juveniles sentenced to literal "life without parole" and not to anyone sentenced to life with parole. R. 69, ll. 11-15. He averred that because Petitioner was parole eligible, "the parole board could consider the novelties of youth and the other considerations of youth." R. 69, ll. 16-19. The

² By order filed April 6, 2016, this Court vested Judge Mullen with exclusive jurisdiction over Petitioner's Motion for Resentencing. R. 37.

solicitor further cited to Montgomery as having held that “a possible remedy for a Miller violation is the same sentence that the defendant received in this case, which is converting a life without parole sentence to a life with parole.” R. 69, ll. 20-25. He argued that Aiken’s language indicated applicability to a narrow class, such that there was no authority to grant a resentencing hearing in Petitioner’s case. R. 75, l. 10 – 76, l. 4.

Defense counsel responded that the fact that the mandatory sentencing scheme allowed for parole eligibility did not preclude resentencing. He discussed the Miller factors and how they would have counseled against a life sentence in Petitioner’s case had the sentencing judge been allowed to consider them. R. 70, l. 19 – 73, l. 7. Counsel averred that there were other similarly situated inmates serving life with parole sentences, though it was difficult to identify the specific number because they are “dying off” in prison. He noted that life expectancy is reduced in prison. R. 73, ll. 8-17. Regarding the scope of Montgomery, counsel noted that the language used in the opinion is that “[a] State *may* remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.” 136 S.Ct. at 736 (emphasis added). Thus, he argued that parole eligibility does *not always* provide an adequate remedy. R. 73, ll. 18-24. Counsel asserted that parole is much easier to attain in other states than in South Carolina. He argued that, in our state, it is the judiciary that needs to weigh the Miller factors and determine the proper sentence. R. 73, l. 25 – 74, l. 25. Leaving the matter to the parole board was not adequate because no one serving a similar sentence for a similar offense had been granted parole, and that the parole board was going to continue to “not parole,” just as they have done in the past. Thus, defense counsel argued that Petitioner’s sentence is the functional equivalent of life without parole, imposed in violation of the Constitution. R. 76, ll. 5-18. Notably, the solicitor did not dispute defense counsel’s assertion regarding the unlikelihood of parole for Petitioner. R. 76, ll. 19-23.

On October 20, 2016, Judge Mullen filed an Order denying Petitioner’s motion for resentencing. R. 79. She emphasized that there was “currently no South Carolina case law addressing whether a juvenile defendant sentenced to life imprisonment with the possibility of parole is entitled to the same individualized sentencing hearing as those juvenile defendants sentenced to life without the possibility of parole.” R. 81. However, she found Montgomery’s holding – that states may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole – “instructive.” R. 81. She quoted Montgomery, “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.” R. 81 (quoting Montgomery, 136 S.Ct. at 736).

Thus, Judge Mullen reasoned that “[b]ecause Montgomery allows States to remedy unconstitutional life sentences imposed on juveniles by giving such offenders parole eligibility, it logically follows that a life sentence with the possibility for parole—such as the one Enriquez [Petitioner] is serving—imposed upon a juvenile defendant is not unconstitutional.” R. 81. She accordingly ruled: “Enriquez is not entitled to a resentencing hearing under Aiken v. Byars as Aiken v. Byars does not extend to juveniles serving life sentences who are eligible for parole.” R. 81.

By opinion filed August 21, 2019, the Court of Appeals affirmed the circuit court’s decision denying Petitioner’s motion for resentencing. State v. Enriquez, 2019-UP-295 (S.C. Ct. App. filed August 21, 2019); App. 1-4. On August 26, 2019, Petitioner filed a petition for rehearing with the Court of Appeals. App. 5-10. The state filed a return to this petition on September 13, 2019. App. 10-18. By order filed October 15, 2019, the Court of Appeals denied the petition for rehearing. App. 19. This petition for writ of certiorari to the Court of Appeals follows.

ARGUMENT

The Court of Appeals erred by holding the circuit court properly found Petitioner did not qualify for resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), because he was eligible for parole after the service of twenty years, where the mandatory nature of Petitioner's life with parole sentence treated all adults and juveniles the same, and where the parole process in South Carolina does not provide a meaningful opportunity for release such that it is not an adequate substitute for individualized resentencing.

Petitioner was born on April 14, 1976, and seventeen years old at the time of the instant offense. When he pled guilty in 1994, the only possible sentences for murder were death, life with parole eligibility after thirty years (if the death penalty was sought and an aggravating circumstance was found beyond a reasonable doubt, but a recommendation of death was not made), or life with parole eligibility after twenty years. S.C. Code Ann. § 16-3-20 (1992). It is evident from the plea transcript that Petitioner entered his pleas to avoid the death penalty, which was not banned as a punishment for juvenile offenders for another decade. R. 14, l. 17 – 15, l. 13; *Roper v. Simmons*, 543 U.S. 551 (2005). In light of his plea, Petitioner's life sentence with parole eligibility after twenty years for murder was mandatory, such that the sentencing judge had no discretion and was required to impose the same sentence on Petitioner as he would for even the most heinous adult offender who pled guilty to murder.

As will be discussed more fully *infra*, the failure to differentiate between juvenile and adult offenders at the original sentencing hearing renders the mandatorily imposed sentence upon Petitioner unconstitutional. Petitioner's parole eligibility after service of twenty years does not cure the unconstitutionality of his sentence because it does not provide him with a meaningful opportunity for release since the factors considered by the South Carolina Board of Pardons and Pardons do not include the mitigating hallmark features of youth. Further, while parole may be

more than a mere hope for offenders who committed less serious offenses, defense counsel argued that parole eligibility is a virtual nullity for an offender like Petitioner, who committed murder as a juvenile. The solicitor offered no contrary evidence to establish that a grant of parole was a realistic possibility for Petitioner. R. 73, l. 8 – 74, l. 9; R. 76, ll. 5-23.

The only way to provide Petitioner with a constitutional sentence is to allow him resentencing where the court can fully explore the factors required under Miller and Aiken and where a different sentence is possible.

A. The Eighth Amendment's ban against cruel and unusual punishment provides additional protections for juvenile offenders.

The Eighth Amendment to the United States Constitution, applicable to the states under the Fourteenth Amendment, provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend VIII; U.S. Const. amend XIV; see also S.C. Const. art. I, § 15. The United States Supreme Court has found that because the words of the Eighth Amendment are not precise and their scope is not static, it “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Trop v. Dulles, 356 U.S. 86, 101 (1958).

Because the scheme under which Petitioner was sentenced was mandatory in nature, the original sentencing judge gave no consideration to any mitigating evidence. Rather, Petitioner was sentenced just as any other juvenile or adult offender, with no individualization. R. 24, ll. 8-17; R. 26, l. 11 – 31, l. 19. The constitutional requirement for individualized consideration of mitigating and extenuating circumstances at sentencing began with American death penalty jurisprudence. In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court invalidated all then-existing death penalty statutes, finding that they allowed for the arbitrary and capricious imposition of capital punishment. The Supreme Court struck down subsequent attempts by states to cure the defect through mandatory death penalty statutes, holding that “the fundamental respect for humanity

underlying the Eighth Amendment, requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” Woodson v. North Carolina, 428 U.S. 280, 304 (1976); see also Roberts v. Louisiana, 428 U.S. 325 (1976); State v. Rumsey, 267 S.C. 236, 226 S.E.2d 894 (1976). However, the Court upheld Georgia’s bifurcated scheme that separated the guilt and penalty phases of a capital trial because the jury’s discretion was “controlled by clear and objective standards so as to produce non-discriminatory application.” Gregg v. Georgia, 428 U.S. 153, 197-98 (1976). Of particular importance was the jury’s consideration of mitigating evidence and extenuating circumstances. Id. Further, one of ten specific statutory aggravating circumstances had to be proved beyond a reasonable doubt and designated in writing before a death sentence could be imposed. Id. Before the state supreme court could affirm the death sentence, it had to consider whether the death sentence was the result of passion, prejudice, or other arbitrary factors, and conduct a proportionality review to determine whether it is disproportionate to the punishment usually imposed in similar cases. Id. at 204-206.

In the ensuing years, the Supreme Court imposed several categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty, reflecting its continued concern with proportionate punishment under the Eighth Amendment. In Thompson v. Oklahoma, 487 U.S. 815 (1988), a plurality of the Court prohibited the imposition of the death penalty upon a juvenile offender who was under the age of sixteen at the time of the offense. Later, the Court banned the imposition of the death penalty upon mentally retarded defendants in Atkins v. Virginia, 536 U.S. 304 (2002), and upon offenders who commit non-homicide crimes in Kennedy v. Louisiana, 554 U.S. 407 (2008).

In Roper v. Simmons, 543 U.S. 551 (2005), the United States Supreme Court categorically banned the imposition of the death penalty on juvenile offenders, who were under the age of

eighteen at the time of the crime. The Court explained that “[c]apital punishment must be limited to those offenders who commit “a narrow category of the most serious crimes” and whose extreme culpability makes them “the most deserving of execution.” 543 U.S. at 568 (quoting Atkins, 536 U.S. at 319). The Court distinguished youthful offenders from those most deserving of execution based on their lack of maturity and underdeveloped sense of responsibility, their greater susceptibility to negative influences and outside pressures, and the transitory nature of their personality traits. Id. at 569-570. As such, a juvenile’s conduct is not as morally reprehensible as that of an adult. Id. at 570. Because of their diminished culpability, the Court observed that the penological justifications for the death penalty apply to youthful offenders “with lesser force than to adults.” Id.

Six years later, in Graham v. Florida, 560 U.S. 48 (2010), the Supreme Court categorically banned the imposition of life without parole upon juvenile offenders who commit non-homicide offenses. In addition to finding that a national consensus supported such a ban, the Court discussed whether such a categorical ban was necessary in the Court’s “independent judgment.” 560 U.S. at 62-68. Similar to its reasoning in Roper, the Court’s conclusion was based upon the limited culpability of juvenile non-homicide offenders, the severity of life without parole sentences, and the lack of any penological theory adequate to justify such a sentence. Id. at 68-75. Regarding severity, the Court noted that life without parole is the second most severe punishment permitted by law, and, like the death penalty, deprives the offender of his liberty “without giving hope of restoration.” Id. at 69-70. For a juvenile, the Court found that a sentence of life without parole is “an especially harsh punishment” because “a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.” Id. at 70. While Graham does not require a guarantee of release for a youthful offender convicted of a non-homicide crime, such

defendants must be given “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” Id. at 71.

In 2012, the Court decided another seminal case in juvenile justice. In Miller v. Alabama, 567 U.S. 460 (2012), the Supreme Court held that the mandatory imposition of a life sentence without parole for youthful offenders was unconstitutional. The Court wrote: “Roper and Graham establish that children are constitutionally different from adults for purposes of sentencing.” Id. at 471. The Court found that while Graham’s flat ban on life without parole was for non-homicide crimes, nothing that Graham said about children is crime-specific. Id. at 473. Thus, the Miller Court recognized that Graham’s reasoning implicates any life without parole sentence for a juvenile, even as its categorical bar relates only to non-homicide offenses. Id. The Court held that the mandatory penalty schemes at issue prevented the sentencer from considering youth and from assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender. Id. at 474. Such schemes contravene the foundational principle of Roper and Graham—“that imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.” Id.

Thus, the Court held that a sentencer must have the opportunity to consider youth as a mitigating factor just as capital defendants must be afforded the opportunity to present mitigating factors for a sentencer’s consideration. Id. at 479. The Court wrote further: “[G]iven all we have said in Roper, Graham, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” Id. “That is especially so because of the great difficulty we noted in Roper and Graham 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. Thus, the Court ruled: “Although we do not foreclose a

sentencer's ability to make that judgment in homicide cases, we require it 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.

In Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), this Court held that Miller applied retroactively and was applicable to juveniles who received a non-mandatory sentence of life without parole. In determining the breadth of Miller, this Court stated Miller "unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole" and "required an individualized sentencing proceeding before imposing a sentence of life without parole on a juvenile offender." 410 S.C. at 542, 765 S.E.2d at 576. The majority recognized that the Court in 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." Id. at 542, 765 S.E.2d at 576 (emphasis in original). However, the Court held there was a proportionality rationale integral to Miller's holding—youth has constitutional significance; as such, it must be afforded adequate weight in sentencing—which must be given effect. Id. at 542-543, 765 S.E.2d at 576. Thus, the Court wrote: "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.

To that end, the sentencing court must consider:

(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 at 577 (internal quotations omitted) (citing Miller, 132 S.Ct. at 2468). While the 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. Id. at 544-545, 765 at 577. The Court provided that “any individual affected by our holding may file a motion for resentencing within one year from the filing of this opinion in the court of general sessions where he or she was originally sentenced.” Id. at 545, 765 S.E.2d at 578.

In Montgomery v. Louisiana, 136 S.Ct. 718 (2016), the United States Supreme Court set forth the true breadth of its decision in Miller. In ruling that Miller created a substantive rule of constitutional law and applied retroactively, the Court explained that “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.” 136 S.Ct. at 734 (internal quotations omitted).

The Court ruled: “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.” 136 S.Ct. at 724 (internal citations and quotations omitted). Thus, the 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.’” Id. (internal quotations omitted). The Court concluded that Montgomery and other prisoners 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.

Arguably as dicta, the Court wrote, “Giving Miller retroactive effect, moreover, 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.” Id. at 736 (emphasis added). The Court further wrote: “Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of Miller’s central intuition—that children who commit even heinous crimes are capable of change.” Id.

B. The mandatory life sentence imposed upon Petitioner is disproportionate because it treats juveniles like adults and all juveniles the same.

The premise of both Miller and Aiken—that children are not the same as adults and therefore should not be treated the same—applies with equal force to juveniles sentenced to life imprisonment even with the possibility of parole after twenty years. At the time of Petitioner’s sentencing, § 16-3-20 provided for three possible sentences for murder: the death penalty, life with parole eligibility after thirty years (if the death penalty was sought and an aggravating circumstance was found beyond a reasonable doubt, but a recommendation of death was not made), or life with parole eligibility after twenty years. Thus, where the death penalty was not sought, juvenile and adult offenders alike were sentenced to life with the possibility of parole after twenty years. As discussed *supra*, there are many distinctions between children and adults. Treating them the same violates a “basic precept of justice” that sentencing be “graduated and proportioned to both the offender and offense.” Miller, 132 S.Ct. at 2458. As the Court in Miller observed: “[N]one of what [Graham] said about children about their distinctive (and transitory) mental traits and

environmental vulnerabilities was crime-specific.” Miller, 132 S.Ct. at 2465. Further, nothing that it said about children is *sentence*-specific either. “A sentencer misses too much if he treats every child as an adult.” Miller, 132 S.Ct. at 2468.

Thus, Petitioner’s mandatory sentence of life with parole is no less disproportionate, vis-a-vis the more culpable adult offenders who received the same sentence, than a discretionary sentence of life without parole imposed without the requisite individualization. This violates the “concept of proportionality [that] is central to the Eighth Amendment.” Graham, 560 U.S. at 59. Both sentences—mandatory life with parole and mandatory life without parole—violate the prohibition against cruel or unusual punishment of the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution.

Further, the mandatory penalty scheme applied to Petitioner required the trial court to treat all children the same. This runs afoul of Miller’s individualized sentencing requirement. As the Court in Miller said, such mandatory sentencing schemes “by their nature, preclude a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it.” 567 U.S. at 476. “[E]very juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one.” Id. at 477. “And still worse, each juvenile (including these two 14-year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as Graham noted, a *greater* sentence than those adults will serve.” Id. at 477. Thus, just as a “sentencer misses too much if he treats every child as an adult,” a sentencer misses too much if he or she treats every child the same. Id.

Notably, here, both Petitioner’s adult co-defendant, Jessie Enriquez, and juvenile co-defendant, Daniel Murphy, pled guilty to lesser offenses and were sentenced to concurrent terms under the Youth Offender Act, not to exceed six years. Charleston County Public Index, Case Nos.

E053428, -29, -30, 31. While Petitioner was undisputedly the one who held the gun, there was evidence that Petitioner did not know the gun was loaded and did not intentionally shoot the decedent. Rather, Petitioner believed the unloaded gun would only scare the decedent. R. 21, l. 25 – 22, l. 1; R. 43; R. 47; R. 51. Here, as in all mandatory life sentences, with or without parole, the sentencing court was precluded from considering how Petitioner was different from adults and how he was different from other children. Unless a court can consider these matters, the sentence will not be proportioned to the offender and offense.

C. The South Carolina parole process does not provide a meaningful opportunity for release and is not an adequate substitute for individualized resentencing.

The failure of the sentencing judge to have any discretion over Petitioner's sentence is not cured by the fact that he received a parole eligible sentence of life. The South Carolina Board of Pardons and Paroles' ("the Parole Board") considerations do not come close to encompassing the Miller requirements. As such, our current parole system does not provide Petitioner with a meaningful opportunity for release, making his sentence the functional equivalent of life without parole. Other jurisdictions have recognized the applicability of Miller to de facto life sentences, which may arise in at least two circumstances. The first is where a term of years or aggregate term of years sentence is imposed such that the sentence is tantamount to a life without parole sentence. See State v. Null, 836 N.W.2d 41, 70-74 (Iowa 2013) (holding that the principles of Miller applied to Null's fifty-two and a half year sentence and that "[t]he prospect of geriatric release, if one is to be afforded the opportunity for release at all" does not provide a meaningful opportunity for release); State v. Ragland, 836 N.W.2d 107 (Iowa 2013) (holding that gubernatorial commutation that provided possibility of parole after service of sixty years did not cure the unconstitutionality of life without parole sentence); Bear Cloud v. State, 334 P.3d 132, 135 (Wyo. 2014) ("[T]he 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.”); State v. Ramos, 387 P.3d 650, 659 (Wash. 2017) (“Miller’s reasoning clearly shows that it applies to any juvenile homicide offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation.”); State v. Zuber, 152 A.3d 197 (N.J. 2017) (“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.” (internal citation omitted)); see also State v. Kimbrough, 212 S.C. 348, 357, 46 S.E.2d 273, 277 (1948) (holding that thirty year sentence for adult offender was “to all intents and purposes the equivalent of a life sentence”); United States v. Pileggi, 703 F.3d 675, 678 (4th Cir. 2013) (holding that the imposition of a fifty years sentence violated the government’s extradition agreement that defendant would not be sentenced to death or life imprisonment). The second, as will be discussed more fully *infra*, is where the offender is eligible for parole but the parole process does not provide for individualized consideration of the defendant’s juvenile status at the time of the offense and its attendant circumstances. Here, Petitioner is serving the functional equivalent of a life without parole due to the failure of our state’s parole process to require such considerations in determining whether to parole a juvenile offender.

i. Other Jurisdictions Find Parole Inadequate to Remedy Unconstitutional Sentence

In Greiman v. Hodges, 79 F.Supp.3d 933 (S.D. Iowa 2015), the United States District Court for the Southern District of Iowa denied the government’s motion to dismiss a federal section 1983 action where the petitioner alleged that the parole board summarily denied him parole based solely on the seriousness of his offense and failed to take into account his youth and demonstrated maturity and rehabilitation. Following Graham, Greiman’s life without parole sentence was revised by the Iowa court to one of life with parole, making him immediately parole eligible. 79 F.Supp.3d

at 935-36. Greiman was twice denied parole, with the following explanation: “In view of the seriousness of the crime for which you were convicted, the Board believes that a parole at this time would not be in the best interest of society.” *Id.* at 936. The court in Greiman did not reach the merits of whether the Iowa parole process is compliant with the constitutional mandate of Graham when applied to juveniles, as the issue before it was only whether there existed a cognizable claim for relief. *Id.* at 943-44. Even so, the court made several important findings.

First, the court recognized that the judge who revised Grieman’s sentence had no discretion, such that “the ultimate length of Plaintiff’s prison sentence will be determined by the [Iowa Board of Parole], because it alone has the authority to grant Plaintiff release.” 79 F.Supp.3d at 943. As such, the court found that the Board had “the responsibility for ensuring that Plaintiff receives his constitutionally mandated ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.’” *Id.* Secondly, the court recognized the due process claim integral to Grieman’s allegations. Grieman was not claiming that the Board applied fair and appropriate parole policies to him and reached the wrong conclusion on whether to grant parole. *Id.* at 945. Rather, he was asserting that the Board’s existing procedures and policies deprive him of the “meaningful opportunity” to which he is entitled under Graham. *Id.* The court agreed that while Graham stops short of guaranteeing parole, “it does provide the juvenile offender with substantially more than a *possibility* of parole or a mere hope of parole; it creates a categorical entitlement to demonstrate maturity and reform, to show that he is fit to rejoin society, and to have a meaningful opportunity for release.” *Id.* (internal quotations omitted) (emphasis in original).

In Hayden v. Keller, 134 F.Supp.3d 1000 (E.D.N.C. 2015), the United States District Court for the Eastern District of North Carolina held that the North Carolina parole process did not provide meaningful opportunity for release where there was no distinction between juvenile and

adult offenders, there was no notice and opportunity for the offender to be heard regarding maturity and rehabilitation, and data reflected unusually low parole rates for juvenile offenders.

Though Hayden's convictions were for non-homicide offenses such that Graham was applicable, like Petitioner, he was serving a sentence of life with the possibility of parole after twenty years. Id. The court explained the North Carolina parole procedures and noted that "[t]hroughout this process, every felony offender—adult or juvenile—is reviewed in the same way." Id. at 1002-1004, 1006. The offender is "an entirely passive participant" in the parole review process. Id. at 1011. Further, "[t]he Parole Commission gives no consideration to an offender's age at the time of the offense." Id. at 1004.

The court in Hayden analogized the reasoning of many courts that have held that Miller and Graham apply to lengthy term-of-years sentences or aggregate sentences, finding that "[t]he same principles apply here." 134 F.Supp.3d at 1007-1009. "If a juvenile offender's life sentence, while ostensibly labeled as one 'with parole,' is the functional equivalent of a life sentence without parole, then the State has denied that offender the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' that the Eighth Amendment demands." Id. at 1009. Finding that the North Carolina parole review process for juvenile offenders serving a life sentence violated the Eighth Amendment, the court provided the parties with sixty days to "present a plan for the means and mechanism for compliance with the mandates of Graham" 134 F.Supp.3d at 1011.

In Diatchenko & Roberio v. Dist. Attorney for Suffolk Dist., 27 N.E.3d 349, 360-64 (Mass. 2015), the Massachusetts Supreme Court held that in order to ensure that the opportunity for release through parole is meaningful, in connection with a petition for release before the parole board, indigent inmates must have access to counsel and access to funds for expert witnesses. They must also be given an opportunity for judicial review of the decision on their parole applications. 27

N.E.3d at 364-66. In determining that these protections were necessary, the court found that “the parole hearing acquires a constitutional dimension for a juvenile homicide offender because the availability of a meaningful opportunity for release on parole is what makes the juvenile’s mandatory life sentence constitutionally proportionate.” Id. at 365.

In Hawkins v. N.Y. State Dep’t of Corr. & Cmty. Supervision, 140 A.D.3d 34 (N.Y. App. Div. 2016), the court held that the parole board had a constitutional obligation to consider youth and its attendant characteristics, in relationship to the crime, when making parole release decisions for juveniles sentenced to life in order for the opportunity for release to be “meaningful.” 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.

Looking to the United States Supreme Court for guidance “as to the promise that a parole determination represents,” the court in Hawkins found that “the relevant distinction between a constitutional and unconstitutional life sentence for a juvenile homicide offender—for all but the rare case of an irreparably corrupt juvenile—is that a constitutional sentence guarantees, at some point, a “meaningful opportunity to obtain release.” 140 A.D.3d at 37-38. The court held: “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 (emphasis added). Thus, the court found that Hawkins was entitled to a de novo parole release hearing. Id.

Most recently, the United States District Court for the District of Maryland denied the motion to dismiss in a federal section 1983 action attacking the constitutionality of the Maryland parole system as applied to juveniles serving life sentences. Maryland Restorative Justice Initiative v. Hogan, 2017 WL 467731 (D. Md. Feb. 3, 2017). The named plaintiffs were all serving life with parole, becoming eligible after either service of fifteen years or twenty-five years, for homicide

offenses committed as juveniles. Id. at *5. The plaintiffs asserted that “although Maryland ostensibly provides parole eligibility for Juvenile Offenders serving life sentences, in practice under the Maryland parole system such sentences are converted into unconstitutional ‘de facto’ sentences of life without parole.” Id. at *1. Notably, no juvenile lifer had been paroled in Maryland in the preceding twenty years. Id. The court determined that the plaintiffs had sufficiently alleged that Maryland’s parole system operates as a system of executive clemency, in which opportunities for release are “remote,” rather than a true parole scheme in which opportunities for release are “meaningful” and “realistic” as required by Graham.

In reaching this decision, the District Court rejected defendants’ argument that Graham, Miller, and Montgomery were not applicable because plaintiffs did not receive sentences of life without parole. 2017 WL 467731 at *19-24. Citing Greiman, the court explained that the responsibility for ensuring that plaintiffs received their constitutionally mandated “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” lies squarely with the state’s parole process. Id. at *20. It reasoned that, in light of the promise in Graham and Montgomery that a meaningful opportunity for release extends to all juvenile offenders except for those whose crimes reflect permanent incorrigibility, “it is difficult to reconcile the Supreme Court’s insistence that juvenile offenders with life sentences must be afforded a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation if the precept does not apply to the parole proceedings that govern the opportunity for release.” Id. at *22.

ii. Inadequacies of South Carolina’s Current Parole Process Prevent It From Substituting For Judicial Resentencing

In South Carolina, parole is a privilege, not a right. State v. Dingle, 376 S.C. 643, 649, 659 S.E.2d 101, 104 (2008). In Cooper v. SCDPPPS, 377 S.C. 489, 500, 661 S.E.2d 106, 112 (2008), this Court recognized that the Parole Board is the sole authority with respect to decisions regarding the grant or denial of parole. However, the Court found that “the Legislature created this Board to

operate within certain parameters” and did not intended for it to “render decisions without any means of accountability.” 377 S.C. at 500, 661 S.E.2d at 112. The Board is required to consider the factors outlined in S.C. Code Ann. § 24-21-640 and the factors listed in the Department’s parole manual. Id. Additionally, the Board must also utilize an actuarial risk and needs assessment tool as prescribed in S.C. Code Ann. § 24-21-10(F).

The SCDPPPS Board of Paroles and Pardons Policies and Procedures Manual (“SCBPP Manual”) provides: “Because there is no federal constitutional right to parole, and because South Carolina’s parole laws leave the decision to grant or deny parole entirely in the discretion of the Board, **very little is required in the way of procedural due process at parole hearings.**” SCDPPPS, S.C. Board of Paroles and Pardons Policy and Procedure Manual, p. 21 (emphasis added). Nonetheless, the Board acknowledges that it is required to provide parole eligible inmates: (a) the right to be heard for parole if eligible and the right to waive such hearing; (b) fair written notice of the specific parole criteria; (c) fair written notice of the date, time, and place of the parole hearing; (d) the opportunity to be heard by a fair and impartial Board or panel; (e) the opportunity to present evidence and to have up to three witnesses to speak on their behalf, and to have the Board or panel carefully consider the complete record before, during, and after imprisonment; (f) at the offender’s own expense, to have an attorney present at the hearing; and (g) when parole is denied, written notice of the Board’s reasons for denying parole. SCBPP Manual, p. 21.

Regarding notice, an offender and other interested parties are provided at least thirty days’ notice of a parole hearing date. An offender is also provided written notice of their rejection for parole, which states the reasons for the decision and the date of the next parole hearing. SCBPP Manual, p. 21. Before a hearing, the board or panel members receive a parole file on each prisoner. SCBPP Manual, p. 22. According to the Manual, the information in the parole file includes, but it is not limited to:

The criminal offense and a description of it; the sentencing date, the “max-out” date, the parole eligibility date, the date of any previous parole hearings, the names of any co-defendants; the offender’s criminal record; the offender’s prison and disciplinary records; risk classification reports; a medical history and psychological reports, if any; a history of the offender’s supervision on probation or parole, if any; a proposed place of residence and employment; the parole examiner’s recommendation(s); any statements from law enforcement; any statement from the prosecuting witness or the prosecuting witness’s next of kin, if the witness is deceased; any statement from the solicitor or his successor; any statement from the sentencing judge; the offender’s social history; the offender’s employment experience.

SCBPP Manual, p. 22.

“Parole hearings are informal proceedings.” SCBPP Manual, p. 22. Parole eligible offenders make their presentations to the Board from prisons throughout the state via video conferencing. If represented by counsel, the offender’s attorney must also be allowed to be present at the hearing. SCBPP Manual, pp. 18, 23. There is no right to counsel or right to confrontation at a South Carolina parole hearing. S.C. Code Ann. § 24-21-50.

While the Board has sole and exclusive power to grant parole, by statute, “the board must carefully consider the record of the prisoner before, during, and after imprisonment.” S.C. Code Ann. § 24-21-640; SCBPP Manual, pp. 26-27. No prisoner may be paroled “until it appears to the satisfaction of the board: that the prisoner has shown a disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interest of society will not be impaired thereby; and that suitable employment has been secured for him.” S.C. Code Ann. § 24-21-640. The statute further requires the Board to “establish written, specific criteria for the granting of parole and provisional parole.” Id. The “specific parole criteria” are enumerated in the Parole Manual as follows:

(1) The risk that the offender poses to the community; (2) The nature and seriousness of the offender’s offense, the circumstances surrounding that offense, and the prisoner’s attitude toward it; (3) The offender’s prior criminal record and adjustment under any previous programs of supervision; (4) The offender’s attitude toward family members, the victim, and authority in general; (5) The offender’s adjustment while in confinement, including his progress in counseling, therapy, and other similar programs designed to encourage the prisoner to improve himself; (6) The

offender's employment history, including his job training and skills and his stability in the workplace; (7) The offender's physical, mental, and emotional health; (8) The offender's understanding of the causes of his past criminal conduct; (9) The offender's efforts to solve his problems; (10) The adequacy of the offender's overall parole plan, including his proposed residence and employment; (11) The willingness of the community into which the offender will be paroled to receive that offender; (12) The willingness of the offender's family to allow the offender, if he is paroled, to return to the family circle; (13) The opinion of the sentencing judge, the solicitor, and local law enforcement on the offender's parole; (14) The feelings of the victim or the victim's family, about the offender's release; (15) Any other factors that the Board may consider relevant, including the recommendation of the parole examiner.

SCBPP Manual, p. 28. Compare these broad factors that a judge is to consider at the post-Miller sentence review hearing, pursuant to Aiken:

(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."

Aiken, 410 S.C. at 544, 765 S.E.2d at 577. None of the factors considered by the Parole Board address the juvenile specific factors listed above. Further, to the extent that some of the Miller factors could possibly fall under one of the broader enumerated categories, such as "the circumstances surrounding that offense," the consideration of the juvenile-specific factors is not required by the SCBPP Manual.

The manual recognizes that when the Board or a panel decides to deny parole, due process of law requires it to express its reasons for rejection in writing. SCBPP Manual, p. 32; Cooper v. SCDPPPS, 377 S.C. 489, 661 S.E.2d 106 (2008). In Cooper, our Supreme Court found that the Board's order was defective where it "neither offered an explanation nor indicated that it had considered the statutory criteria of section 24-21-640 and the fifteen criteria listed on the parole form." 377 S.C. at 500, 661 S.E.2d at 112. However, the Court suggested that in future parole

hearings, “the Parole Board may avoid the result in the instant case if it clearly states in its order denying parole that it considered the factors outlined in section 24–21–640 and the fifteen factors published in its parole form.” Id. The Court explained that “[i]f the Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure.” Id.

To that end, the SCBPP Manual provides:

[T]he Board or panel should begin by making some such general introductory statement as the following: “The Board (or the panel) is reasonably satisfied that (Offender’s Name) does not at this time deserve a lessening of the rigors of imprisonment and that the interests of society will not be best served by granting parole now.” After this general statement, the Board or the panel should then enumerate its reasons for denying parole. Due process requires that these reasons be sufficient to explain to the offender why he was denied parole. Further, due process also requires that the reasons for denying parole be rationally related to the written standards and criteria of parole which the Board has adopted and published.

SCBPP Manual, p. 32. The following reasons for denying parole are recognized by the Board as being “rationally related to the Board’s published parole criteria”:

Nature and seriousness of the current offense; indication of violence in this or a previous offense; use of a deadly weapon in this or a previous offense; prior criminal record indicates poor community adjustment; failure to successfully complete a community supervision program; institutional record is unfavorable.

SCBPP Manual, p. 32. Thus, it appears that a juvenile offender can be denied parole based solely upon the seriousness of the offense.

In sum, contrary to the state’s assertions otherwise, the SCBPP Manual does not provide for consideration of Petitioner’s youth at the time of the offense. However, the reasoning of Graham, Miller, Aiken, and Montgomery mandate consideration of an offender’s juvenile status at the time of the offense and his demonstrated maturity and rehabilitation in the parole process in order for it to afford a meaningful opportunity for release. As it stands, our state’s parole process does not fulfill the promises under Montgomery that parole consideration “ensures that juveniles who crimes reflected only transient immaturity – and who have since matured – will not be forced to serve a

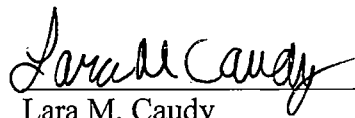
disproportionate sentence in violation of the Eighth Amendment” and that “[t]he opportunity for release will be afforded to those who demonstrate the truth of Miller’s central intuition—that children who commit even heinous crimes are capable of change.” 136 S.Ct. at 736.

Of course, the Board can change its parole guidelines to incorporate the holding of Miller and account for the disadvantages of inmates who committed their crimes as children. Until it does so, however, Petitioner’s sentence of life without the possibility of parole for twenty years will violate the Cruel and Unusual Punishment Clause of the Eighth Amendment and the Cruel or Unusual Punishment Clause of Article I, Section 15 of the South Carolina Constitution. The circuit court erred in concluding that Petitioner’s sentence is not unconstitutional because he is parole eligible. Petitioner is entitled to resentencing pursuant to Aiken where a judge can weigh the Miller factors and determine if Petitioner is the kind of rare juvenile offender for whom life imprisonment is a proper punishment based on a finding of irreparable corruption, or if some lesser punishment is required under the facts and circumstances of this case.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the question presented.

Respectfully Submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of November, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

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S.C. SUPREME COURT

Certiorari to Charleston County
Honorable Carmen T. Mullen, Circuit Court Judge

Opinion No. 2019-UP-295 (S.C. Ct. App. Filed August 21, 2019)
1994-GS-10-3056, 1994-GS-10-3057

THE STATE,

RESPONDENT,

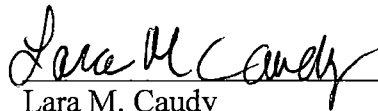
V.

ANTHONY M. ENRIQUEZ,

PETITIONER

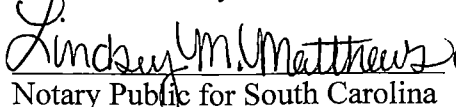
CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Sherrie Butterbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Anthony M. Enriquez, #215961, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 25th day of November, 2019.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 25th day of November, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: October 22, 2024.