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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Carmen T. Mullen, Circuit Court Judge

THE STATE,

Respondent,

v.

ANTHONY M. ENRIQUEZ,

Appellant.

Appellate Case No. 2016-002237

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

Whether the circuit court erred in finding that appellant 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 service of twenty years, where the mandatory nature of appellant'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 sentencing?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

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

STATEMENT OF THE CASE

Appellant, Anthony M. Enriquez, was sentenced to life with the possibility of parole on December 1, 1994, following a guilty plea to murder.[1] (R.p.31, lines 10-14). Appellant became parole eligible on January 23, 2014, and has had two parole hearings since that time. (R.p.80).

The State alleged appellant, then seventeen-years-old, and two co-defendants killed the victim during an armed robbery on January 23, 1994. (R.p.10, line 7-p.12, line 4; p.19, lines 16-21; p.21, lines 16-24; 1994-GS-10-3056, -3057). Appellant was represented by William L. Runyon, Jr., at his guilty plea hearing. (R.p.1). In exchange for appellant's plea, the State agreed not to seek the death penalty, and to allow appellant to plead to murder without an aggravating circumstance so appellant avoided the thirty-year minimum sentence prior to parole eligibility. (R.p.14, line 19-p.15, line 13). At the time appellant pled guilty, defendants sentenced to life for murder were eligible for parole after serving either twenty or thirty years, as ordered by the sentencing judge. *See* S.C. Code Ann. § 16-3-20(A) (Supp. 1990) (providing the punishment for a conviction or guilty plea to murder shall be death or life imprisonment, and if sentenced to life, the person shall not be eligible for parole until the service of twenty years, or thirty years if a recommendation of death is not made but a statutory aggravating circumstance is found beyond a reasonable doubt).

Appellant filed five post-conviction relief (PCR) applications in state court following his guilty plea, as well as a state habeas corpus action and a civil action against plea counsel. (1995-CP-10-04475; 1998-CP-10-00944; 2000-CP-10-01347; 2003-CP-10-03186; 2004-CP-10-04859; 2008-CP-10-03580; 2009-CP-10-05985). The actions alleged various claims, including

[1] Appellant was also sentenced to twenty-five years for armed robbery. (R.p.31, lines 15-19). Appellant pled guilty to the robbery pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). (R.p.7, lines 10-23; p.10, line 7-p.11, line 9).

involuntary guilty plea and multiple allegations of ineffective assistance of counsel. Following the denial of appellant's fifth PCR, our Supreme Court dismissed the appeal and prohibited appellant "from filing any further collateral actions challenging his 1994 conviction in the circuit court (including PCR or habeas corpus) without first obtaining permission to do so from [the] Court." (Order in 2009-CP-10-05985).

On December 18, 2014, appellant submitted a *pro se* motion for re-sentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). (R.pp.33-36). Defense counsel filed a memorandum in support of appellant's motion on March 30, 2016. (R.pp.38-45). The State filed a response, and both parties subsequently filed additional replies. (R.pp.61-67).

On July 20, 2016, a hearing was held on appellant's motion before the Honorable Carmen T. Mullen. (R.p.68). Appellant was represented by Bentley D. Price, and the State was represented by Charles M. Condon, Jr. (R.p.68). By order dated October 13, 2016, Judge Mullen denied appellant's motion for a re-sentencing hearing, finding *Aiken* did not apply to appellant's case. (R.p.81).

This appeal follows.

ARGUMENT

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

Appellant is not entitled to re-sentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), as he received a life *with* parole sentence and is eligible for release every year. The fact appellant has been rejected for parole twice does not create a cognizable claim under *Miller v. Alabama*, 567 U.S. 460 (2012), and its progeny. By their plain language *Miller* and *Aiken* apply only to juvenile homicide offenders sentenced to life *without* parole and appellant is not part of that class.

Neither our courts nor the United States Supreme Court have extended the *Miller* rule to apply to any other type of sentence, such as a *de facto* life sentence. Appellant received the sentence the Supreme Court deemed sufficient to remedy an unconstitutional sentence pursuant to *Miller* and is parole eligible. Appellant's lengthy disciplinary history while incarcerated belies his contention that he is serving the equivalent of a life without parole sentence because he was denied parole twice. A disciplinary history, which is considered by the parole board, is not evidence of rehabilitation in keeping with the "central intuition" of *Miller* that juveniles who commit even violent crimes are capable of change. Accordingly, appellant's sentence of life *with* parole is not cruel and unusual punishment under the Eighth Amendment, and the trial court did not err in denying appellant's motion for re-sentencing.

Guilty Plea Hearing

Appellant pled guilty to murder and armed robbery in Charleston on December 1, 1994,

before the Honorable Casey Manning. (R.p.1; p.7, lines 10-23; p.10, line 7-p.12, line 4). Prior to accepting the plea, Judge Manning allowed appellant additional time to talk to defense counsel to make sure appellant understood the charges against him. (R.p.7, line 24-p.10, line 15).

Judge Manning explained the rights appellant was giving up by pleading guilty, asked appellant repeatedly if he understood what those rights meant, and discussed the potential sentences appellant faced by pleading guilty. (R.p.10, line 16-p.14, line 16). In exchange for appellant's plea, the State agreed not to seek the death penalty, and to allow appellant to plead to murder without an aggravating circumstance so appellant avoided the thirty-year minimum sentence prior to parole eligibility.[2] (R.p.14, line 19-p.15, line 13). Appellant stated repeatedly he understood the negotiations and his parole eligibility. (R.p.15, line 14-p.16, line 1; p.18, lines 11-16). Judge Manning found appellant's plea was voluntarily and knowingly entered. (R.p.18, line 17-p.19, line 4).

The State told the plea judge briefly some of the evidence that would have been presented had the case gone to trial. Deputies found the victim in the driveway of a home in Charleston County early on the morning of January 23, 1994, with a gunshot wound to the chest. (R.p.19, lines 6-15). Several witnesses identified appellant as the shooter, and told deputies his brother and another person were also involved, and described their vehicle. (R.p.19, lines 16-21; p.20, lines 2-13). Derrick Brown (Brown) saw all three of them talking to the victim, saw appellant get a sawed off shotgun from the car, heard a gunshot, and saw the victim fall to the ground.

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[2] As previously noted, at the time appellant pled guilty, defendants sentenced to life for murder were eligible for parole after serving either twenty or thirty years, as ordered by the sentencing judge. *See* S.C. Code Ann. § 16-3-20(A) (Supp. 1990) (providing the punishment for a conviction or guilty plea to murder shall be death or life imprisonment, and if sentenced to life, the person shall not be eligible for parole until the service of twenty years, or thirty years if a recommendation of death is not made but a statutory aggravating circumstance is found beyond a reasonable doubt).

(R.p.21, lines 6-19). Brown told deputies he saw appellant's brother and the third co-defendant going through the victim's pockets. (R.p.21, lines 21-24). Brown left with appellant and heard him ask his co-defendants who loaded the shotgun.[3] (R.p.21, lines 19-20; p.21, line 25-p.22, line 1; p.47).

Witnesses also told deputies appellant and his co-defendants wanted to rob someone that night, knew someone at the house carried a large amount of cash, and had been there earlier with guns, but left when they realized the person they were looking for was not there. (R.p.22, line 10-p.23, line 17). Brown specifically told deputies he and Joyner knew about the robbery plan. (R.p.47).

At trial, the State would have presented witnesses to testify appellant was the shooter, about seeing appellant and his co-defendants at the house previously with guns, and that their motive was robbery. (R.p.24, lines 2-9). The pathologist would have testified about the deadly wound to the victim's chest, and that appellant slammed the shotgun's muzzle into the victim's face prior to shooting him. (R.p.23, line 18-p.24, line 1). Further, if appellant testified, the State could have impeached him on his lengthy criminal history. (R.p.24, lines 14-15).

Defense counsel discussed the circumstances of the crime, and disagreed with some of the facts. (R.p.26, lines 18-24). Counsel described the murder as an "accident waiting to happen" and told the plea judge appellant had expressed remorse since the crime. (R.p.26, line 25-p.27, line 4). Counsel further stated all of the "young people" knew each other and "partied together," and explained the victim had alcohol and marijuana in his system at the time of his death. (R.p.27, lines 5-11).

Appellant's father and mother both spoke at the plea hearing. Appellant's father told the

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[3] Wendy Joyner (Joyner) was in the car and also heard appellant ask who loaded the gun. (R.p.51). Joyner further heard appellant say someone at the house owed him money. (R.p.50).

plea judge he retired from the Navy and worked at a civil service job. (R.p.30, lines 8-9). He explained his son was "training for college preparation" and intended to go to college, when he asked to borrow the car on the night of the incident to go to a party. (R.p.29, lines 16-21). Appellant's father stated it was his belief the shooting was an accident. (R.p.29, line 22-p.30, line 7; p.30, lines 9-10). Appellant's mother explained appellant was the youngest of six children, and stated she understood the pain the victim's mother was experiencing. (R.p.30, lines 14-18).

Appellant expressed remorse for the crime, and said he had no intention of hurting anyone that night. (R.p.30, lines 24-25).

Judge Manning stated it was a difficult situation for both families, but that a life with parole sentence was an "appropriate punishment when a life is taken." (R.p.31, lines 1-6). The judge sentenced appellant to life with the possibility of parole after service of twenty years for murder, and twenty-five years for armed robbery. (R.p.31, lines 10-19). Appellant became parole eligible on January 23, 2014, and has had two parole hearings since that time. (R.p.80).

Motion for Re-Sentencing and Responses

On December 18, 2014, appellant moved for re-sentencing pursuant to *Aiken*, and submitted a *pro se* motion. (R.pp.33-36). In his motion, appellant asserted he was vulnerable to negative influences and outside pressures, including family and peers. (R.p.33). Further, appellant argued he was not properly advised of the direct and collateral consequences of his plea, and age was but a chronological fact considered by the sentencing judge. (R.p.34).

Defense counsel filed a memorandum in support of appellant's motion on March 31, 2016. (R.pp.38-45). Counsel noted the life with parole sentence appellant received as a juvenile was mandatory because it was the only possible sentence appellant could receive under the

statute. (R.pp.38-40). Counsel maintained appellant did not have "the opportunity to present evidence regarding the characteristics of his youth and any mitigating circumstances from his specific case." (R.p.41). Counsel asserted the mandatory sentence prevented Judge Manning from fully exploring appellant's immaturity or recklessness, family environment, despite the fact that his parents spoke at the plea hearing, and possibility of rehabilitation. (R.pp.41-42).

While admitting appellant "struggled with his adjustment to prison," defense counsel maintained appellant had been rehabilitated. (R.p.42). Counsel stated appellant obtained a legal assistant/paralegal certificate, took college courses, participated in various programs for employment readiness, and took part in alcohol and drug abuse programs. (R.p.42). Counsel also discussed the circumstances of the murder, appellant's home life, and appellant's alleged misunderstanding of the charges against him. (R.pp.42-44). Finally, counsel argued appellant's "life expectancy is substantially less than a person in society in light of the stress factors associated with prison life," geriatric release is uncommon in South Carolina, and appellant's sentence is, therefore, the "functional equivalent to life without parole." (R.p.44).

The State responded and argued *Aiken* did not apply because appellant was eligible for parole. (R.pp.61-63). The State maintained the parole board could take into account "youthfulness and immaturity at the time of the crime, rehabilitation, along with other important considerations" during any parole hearing. (R.p.63).

Defense counsel replied, and argued appellant had the right to have a judge consider the mitigating factors of youth prior to imposing a life sentence, regardless of appellant's parole eligibility. (R.p.65). The State subsequently replied and maintained the United States Supreme Court "made clear" in an opinion following *Aiken* that relief applies only to juvenile homicide offenders who receive life without parole sentences. (R.pp.66-67). The State argued the

Supreme Court held a remedy for such an unconstitutional sentence was "to convert the sentence of life without parole to life with eligibility for parole, the same sentence" appellant received. (R.p.67). The State further noted parole was denied for appellant on April 17, 2014, due, in part, to an unfavorable disciplinary record while incarcerated and appellant would be back before the parole board on September 21, 2016, when he could "attempt to demonstrate his rehabilitation." (R.p.67).

Hearing on *Aiken* Motion

A hearing on appellant's motion was held on July 20, 2016, in Charleston before Judge Mullen. (R.p.68). The State first argued appellant was not entitled to re-sentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), because he did not receive a sentence of life *without* the possibility of parole, but received a sentence of life *with* the possibility of parole. (R.p.69, lines 2-16). The State maintained the sentencing implications noted in *Aiken* were not at issue in appellant's case "because the parole board could consider the novelties of youth and the other considerations of youth." (R.p.69, lines 16-19). The State argued the United States Supreme Court held a possible remedy for an unconstitutional sentence was the same one appellant received, which was to convert the sentence to life with parole. (R.p.69, lines 20-25). The State maintained *Aiken* applied only to a narrow class of juvenile offenders and appellant was not within that class because he was parole eligible. (R.p.75, lines 10-22). Appellant already received relief from what *Aiken* contemplated as cruel and unusual punishment for juveniles and *Aiken* did not authorize relief from life with parole sentences because the proper body reconsidered appellant's case every other year. (R.p.75, line 22-p.76, line 4).

Defense counsel argued appellant was entitled to re-sentencing because: (1) a life sentence was the only possibility available at the time appellant was sentenced and the plea judge

did not have the option of setting a term-of-years sentence, and (2) a court should have the chance to consider the mitigating hallmark features of youth prior to sentencing a juvenile to a life sentence. (R.p.70, line 19-p.72, line 11). Counsel also argued a life with parole sentence did not always remedy an unconstitutional sentence, and leaving the matter up to the parole board was not going to "fix this problem." (R.p.73 line 18-p.75, line 1, p.76, lines 10-13). Counsel maintained the board would continue to "not parole" inmates as it had "done in the past" and appellant's sentence was the functional equivalent of life without parole. (R.p.76, lines 5-14).

Judge Mullen noted, "If the basis of being able to have the [re-sentencing] hearing is a constitutional violation, the sentence [appellant] received isn't a violation. It isn't a constitutional violation because he was given a life sentence with parole. And he, in fact, has had at least one opportunity of parole." (R.p.75, lines 2-7). The judge took the matter under advisement. (R.p.76, lines 24-25).

Order Denying Re-Sentencing Pursuant to *Aiken*

By order dated October 13, 2016, Judge Mullen denied appellant's motion for a re-sentencing hearing, finding *Aiken* did not apply to appellant's case. (R.p.81). The judge first noted *Aiken* applied to "juveniles sentenced to life without the possibility of parole" and only those who received such a sentence were entitled to an individualized sentencing hearing. (R.pp.79-80). Judge Mullen then found appellant was sentenced to life with parole, became parole eligible in 2014, and was denied parole in April 2014. (R.p.80). The judge also noted the parole board denied parole because of the nature and seriousness of the offense, the use of a deadly weapon, and appellant's unfavorable institutional record, and appellant was scheduled to go before the parole board again on September 21, 2016. (R.p.80).

Judge Mullen found there was no South Carolina case law addressing whether juvenile

homicide offenders sentenced to life *with* parole were entitled to the same individualized sentencing hearings as those sentenced to life *without* parole. (R.p.81). However, the judge found the United States Supreme Court's ruling in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), instructive. (R.p.81). Judge Mullen quoted the opinion which held allowing juvenile offenders to be considered for parole ensured those "'whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve disproportionate sentence in violation of the Eighth Amendment.'" (R.p.81); *see also Montgomery*, 136 S.Ct. at 736. The judge found *Montgomery* allowed states to remedy unconstitutional life sentences by giving juveniles parole eligibility, so "it logically follows" that a life sentence with the possibility for release, such as the one appellant is serving, "imposed upon a juvenile defendant is not unconstitutional." (R.p.81). Therefore, Judge Mullen found appellant was not within the class of juvenile offenders for whom *Aiken* provides for re-sentencing hearings as *Aiken* did not extend to juveniles who have the opportunity for release. (R.p.81). The judge denied the motion for re-sentencing. (R.p.81).

Subsequent Parole Proceeding

Appellant appeared before the parole board subsequent to Judge Mullen's ruling and the board denied parole on September 22, 2016. *Enriquez v. S.C. Dep't of Prob., Parole & Pardon Servs.*, Order in Lower Court Case No. 2016-ALJ-15-0049-AP. On appeal to the Administrative Law Court, appellant raised the issue of whether the parole board complied with due process when it denied him parole. (R.p.82). Appellant argued "the maturity of a juvenile who has taken steps to rehabilitate himself in prison should be considered" by the parole board. (R.p.85). The court found case law from New York persuasive, but ruled "no existing United States or South Carolina authority requires the South Carolina Parole Board to consider age or immaturity in its

decisions." (R.p.85). Because appellant received a routine denial of parole under current statutory and due process requirements, the court affirmed the parole board's decision. (R.p.85).

Appellant appealed the decision to this Court, which dismissed the appeal for failure to serve and file the initial brief of appellant and designation of matter. *Enriquez v. S.C. Dep't of Prob., Parole & Pardon Servs.*, Order in Appellate Case No. 2017-001133.

<u>Analysis</u>

Standard of Review

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

Re-Sentencing Only Applies to Life <u>Without</u> Parole Sentences

The Eighth Amendment prohibits cruel and unusual punishment. U.S. Const. amend. VIII. In *Miller v. Alabama*, 567 U.S. 460 (2012), the United States Supreme Court held mandatory life without parole sentences for juvenile offenders who committed murder violated the prohibition against such punishment. 567 U.S. at 470. The Court held a sentencing authority must be allowed to consider youth as "more than a chronological fact," but a factor which carries with it immaturity, irresponsibility, and recklessness. *Id.* at 476. Further, the age of the defendant, along with his family background, and mental and emotional development must be considered in assessing his culpability. *Id.* The Court held a juvenile convicted of murder could still be sentenced to life without parole, but only after an individualized hearing in which the

various mitigating factors were considered. *Id.* at 479-80.

Our Supreme Court held *Miller* applied retroactively to juveniles in South Carolina previously sentenced to life without parole. *Aiken*, 410 S.C. at 540-41, 765 S.E.2d at 575. The Court also held the rule extended to juveniles sentenced under our non-mandatory scheme, and those who received a life without parole sentence were entitled to re-sentencing to allow them "to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight." *Id.* at 544, 765 S.E.2d at 577. Further, the Court determined the factors in *Miller* were those which must be considered during the hearings, such as the offender's age, family life, extent of his participation in the murder, and possibility of rehabilitation. *Id.* at 544-45, 765 S.E.2d at 577-78. Just as the *Miller* court held, our Court explained juveniles could still receive life without parole sentences, but only after "an individualized hearing where the mitigating hallmark features of youth are fully explored." *Id.* at 545, 765 S.E.2d at 578.

Two years later, the Supreme Court held its rule in *Miller* was retroactive on state collateral review. *Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016). However, the Court also recognized the potential burden on states tasked with re-litigating cases where a juvenile received mandatory life without parole. The Court explained states could remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than re-sentencing them. *Id.* Citing with approval a Wyoming statute which provided for juvenile parole eligibility after twenty-five years, the Court found allowing "those offenders to be considered for parole ensures those whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Id.* The Court continued:

> Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. 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. The Court noted petitioner's evidence of rehabilitation and reform since incarceration were claims typically considered by parole boards, but which had not been "tested or even addressed by the State" given petitioner's life without parole sentence. *Id.*

Appellant Not Entitled to Re-Sentencing: He Received Life With Parole Sentence

The trial court did not err in its application of *Miller* or *Aiken* as both cases hold the relief granted extends only to juveniles sentenced to life *without* the possibility of parole. *See Miller*, 567 U.S. at 470 (holding mandatory life without parole sentences for juvenile offenders who committed murder violates the Eighth Amendment); *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577 (holding juveniles who received a life without parole sentence were entitled to re-sentencing to allow them to present evidence specific to their attributes of youth). Appellant received a life *with* parole sentence and the trial court was correct in finding he was not within the class of juvenile offenders who the courts were trying to protect from cruel and unusual punishment. *See Miller*, 567 U.S. at 471 (explaining because juveniles have diminished culpability and greater prospects for reform, they are less deserving of the most severe punishments) (citations omitted). Finding appellant is entitled to relief would impermissibly extend the holdings in *Miller* and *Aiken* beyond their plain language and the trial court properly denied the motion for re-sentencing.

Moreover, the Supreme Court specifically held states could remedy a *Miller* violation—i.e. an unconstitutional sentence—by "permitting juvenile homicide offenders to be considered

for parole" rather than re-sentencing them. *Montgomery*, 136 S.Ct. at 736. The Court explained prisoners who showed an inability to reform would continue to serve life sentences, but the "opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." *Id.* Respondent acknowledges, as the Supreme Court held, fundamental differences between juveniles and adults affect the proportionality analysis under the Eighth Amendment. However, neither our courts nor the United States Supreme Court have ever held the *Miller* rule applied to sentences other than life without parole, such as a *de facto* life sentence. The trial court properly rejected appellant's argument advanced during the hearing that he was serving the equivalent of a life without parole sentence because he had previously been denied parole. (*Aiken* Tr., R.p.76; *Aiken* order, R.p.81). Every year the proper authority considers and weighs whether appellant is eligible for release. *See James v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 376 S.C. 392, 396, 656 S.E.2d 399, 401 (Ct. App. 2008) ("[A]n inmate has a liberty interest in gaining access to the parole board, although there is no protected right to parole.").

No Evidence Presented of What Factors Parole Board Considered

Appellant discusses at length the decisions in other jurisdictions which have found the parole process was inadequate to remedy an unconstitutional sentence. (App.Br.pp.28-37). However, those cases can be distinguished from appellant's case as many involve non-homicide offenses, presumptive parole processes, or were filed in the federal system as civil actions pursuant to 42 U.S.C.A. § 1983. The fact remains appellant has the meaningful opportunity for release based on demonstrated maturity and rehabilitation when he goes before the parole board every other year, and has done so twice since he became eligible for parole in January 2014. Appellant already received the sentence the Supreme Court found was an appropriate remedy for

offenders in his position.

In addition, while the Administrative Law Court properly found the parole board is not required by any authority to consider factors relative to appellant's youth, it is not clear from the record before this Court that the board, in fact, did not consider such factors, or what other evidence the board weighed in denying appellant parole. The board is required by law to consider an inmate's record before, during, and after imprisonment. S.C. Code Ann. § 24-21-640. Moreover, the board may only grant parole if the inmate "has shown a disposition to reform," he will probably obey the law and "lead a correct life" in the future, his conduct led to "a lessening of the rigors of his imprisonment," the "interest of society will not be impaired" by the inmate's release, and he has secured suitable employment. *Id.* However, the board can examine during the hearing any other factors it "may consider relevant." *See* DPPPS South Carolina Board of Paroles and Pardons Policy and Procedure Manual, (June 2017), p.27, https://www.dppps.sc.gov/content/download/120663/2749351/file/Parole+Board+Manual+June+7+2017.pdf (providing other criteria the board can consider including the inmate's criminal history and risk to the community, general attitude, health, adjustment while confined, employment history, and "[a]ny other factors that the Board may consider relevant") (Parole Board Manual).

Here, there are no transcripts from the parole board hearings and no indication from appellant what evidence he presented. *See* Parole Board Manual, p.20 (providing during a parole hearing, the prisoner has the opportunity to present evidence and have up to three witnesses speak on his behalf). Appellant maintains he has demonstrated rehabilitation by his receipt of education and work credits. However, appellant's disciplinary record while incarcerated does not show "a disposition to reform" nor is it evidence he will likely obey the law if he is released from

prison. Appellant's inmate detail report maintained by the South Carolina Department of Corrections (SCDC) shows a history of disciplinary actions, including threatening to harm an employee, possession or attempt to possess a cell phone, and drug use. *See* SCDC Inmate Detail Report, http://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000215961.[4] Appellant's disciplinary history was cited by the parole board as one of the reasons for denying parole in 2014. (R.p.80). Such a lengthy disciplinary history is not evidence of rehabilitation or reform in keeping with the "central intuition" of *Miller* that children who commit even violent crimes are capable of change. *See Miller*, 567 U.S. at 480 (finding children's diminished culpability and heightened capacity to change requires sentencing authorities to take into account how children are different prior to "irrevocably sentencing them to a lifetime in prison"); *see also Montgomery*, 136 S.Ct. at 736 (noting evidence of petitioner's "evolution from a troubled, misguided youth to a model member of the prison community" was relevant and the kind of information prisoners use to demonstrate rehabilitation).

Youth and Its Relevant Factors Considered at Plea Hearing

Finally, appellant's youth and its relevant factors were considered by Judge Manning during the plea hearing. Prior to accepting the plea, when it became clear appellant was confused about one of the indictments, the judge allowed appellant additional time to talk to defense counsel. (R.pp.7-10). Judge Manning also made sure appellant, as a seventeen-year-old, understood the rights he was giving up by pleading guilty and asked appellant repeatedly if he

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[4] This Court can take judicial notice of appellant's online inmate detail report. *See* Rule 201(b)(2), SCRE (providing a judicially noticed fact must be one capable of accurate and ready determination by resorting to sources who accuracy cannot reasonably be questioned); *see also Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (finding courts "may properly take judicial notice of matters of public record"); *Tisdale v. S.C. Highway Patrol*, No. 09-cv-1009-HFF-PJG, 2009 WL 1491409, at *1, n. 1 (D.S.C. May 27, 2009), *aff'd*, 347 F. App'x 965 (4th Cir. Aug. 27, 2009) (finding courts may take judicial notice of factual information located in postings on government websites).

understood the proceedings. (R.pp.10-16). Further, when discussing the circumstances of the murder, the State, through witness statements, told the judge appellant was well aware of the robbery plan ahead of time, actively participated in the armed robbery, and was the shooter. (R.pp.19-24; pp.46-48). Defense counsel also discussed the circumstances and expressed disagreement with the State's facts, telling Judge Manning appellant expressed remorse. (R.pp.26-27). In addition, both appellant's mother and father spoke at the hearing, and his father discussed appellant's plans for college. (R.pp.29-30). Finally, the judge acknowledged the seriousness of the sentence, but found a life with parole sentence was an "appropriate punishment when a life is taken." (R.p.31). From the record, it appears Judge Manning considered the factors specifically noted by the *Miller* court as the "hallmark features" of youth. *See Miller*, 567 U.S. at 477 (listing the factors a court must take into account, including the juvenile's immaturity, family life, circumstances of the murder, including the extent of his participation, how peer pressure may have affected him, and his interactions with police and his attorney). Accordingly, it cannot be said no court ever took into account appellant's age and its surrounding circumstances.

Therefore, because appellant was sentenced to life with parole, he is eligible for release every two years, and his sentence does not violate the Eighth Amendment, the trial court did not err in denying appellant's motion for re-sentencing pursuant to *Aiken*.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the trial court's decision denying the motion for re-sentencing should be affirmed.

Respectfully submitted,

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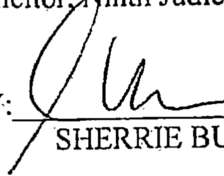
BY: 
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ATTORNEYS FOR RESPONDENT

November 20, 2017.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Carmen T. Mullen, Circuit Court Judge

THE STATE,

Respondent,

v.

ANTHONY M. ENRIQUEZ,

Appellant.

Appellate Case No. 2016-002237

CERTIFICATE OF COMPLIANCE

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

This 20th day of November, 2017.

SHERRIE BUTTERBAUGH
Assistant Attorney General

ATTORNEY FOR RESPONDENT

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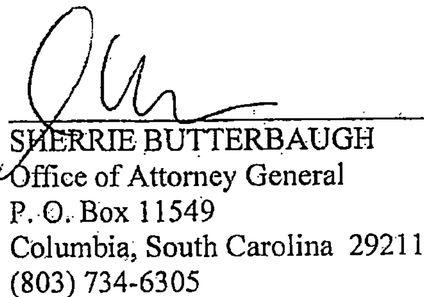
CERTIFICATE OF SERVICE

I, Sherrie Butterbaugh, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Laura Ruth Baer, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. 401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 20th day of November, 2017.



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