STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals
Appeal from Lancaster County
Brian M. Gibbons, Circuit Court Judge



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Opinion No. 2019-UP-318 (S.C. Ct. App. filed Sept. 25, 2019)

1981-GS-29-829

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THE STATE,

RESPONDENT,

V.

RONALD YATES HYATT,

PETITIONER

APPELLATE CASE NO. 2016-001872

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# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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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 November 1, 2019. App. 24-25.

## QUESTION PRESENTED

Did the Court of Appeals err in holding Petitioner was not entitled to re-sentencing where he received a *mandatory* sentence of life imprisonment *with* the possibility of parole, which is the functional equivalent of life imprisonment *without* the possibility of parole, in light of Petitioner's repeated denials of parole for sixteen consecutive years and the parole statutes not providing for consideration of the hallmark characteristics of youth?

## STATEMENT OF THE CASE

The state alleged that on August 17, 1981, sixteen-year old Petitioner shot Buddy Plyler, who died as a result of the shooting. R. 5, ll. 1-3; R. 44-45. Petitioner was charged with armed robbery as well. R. 32-36. Petitioner was not alone during the armed robbery and murder. R. 32-36; R. 38-40. An adult, William Robert Horton, was with him.[1] R. 32-36; R. 38-40.

On August 24, 1981, the solicitor "moved for the case to be transferred from juvenile court to general sessions court." R. 5, ll. 4-6; R. 37. The following day, the Honorable Roddey L. Bell, granted the state's request. R. 5, ll. 6-8. According to the order, a hearing on the state's motion was held on August 25, 1981. R. 38-40. During the proceedings, Petitioner was represented by Berry Mobley, and Frank Manning represented the state. R. 38-40.

The judge found a previous investigation and report completed "during his commitment to Reception and Evaluation" to be "a sufficient examination of the parentage and surroundings of the juvenile, his age, habits, and history" and "a sufficient inquiry into the home conditions, habits, and character of his parents or guardian." R. 38-40. Thus, despite the prior examination occurring almost a year before the transfer of jurisdiction hearing, the judge did not order "a mental and psychological examination of" Petitioner. R. 38-40. Additionally, the judge did not require "a school report," or "a physical examination," finding those would not benefit him in making his decision. R. 38-40. Based upon the prior report, the judge determined Petitioner was "sophisticated and mature in regards to the severity of the offense." R. 38-40.

Ultimately, the judge transferred jurisdiction, finding the seriousness of the alleged offenses "require[d] waiver." R. 38-40. In light of Petitioner's prior offenses in 1980, which

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[1] According to the South Carolina Department of Corrections' website, William Robert Horton was found guilty of or entered guilty pleas to murder and armed robbery on December 16, 1981. Horton received identical sentences to Petitioner. Although Horton was eligible for parole starting in March 1998, he has not been paroled.

included truancy, breaking and entering into a motor vehicle, petty larceny, forgery, and housebreaking, for which he received a probationary sentence, the judge determined Petitioner's prospects for rehabilitation were "unlikely" in the juvenile justice system. R. 38-40. Thereafter, on August 26, 1981, Petitioner was admitted to the state hospital for a determination of his capacity to stand trial. R. 41. According to the "Report of Finding of Mental Capacity," the Superintendent of the South Carolina State Hospital found Petitioner was not mentally ill and was capable of assisting in his own defense on September 4, 1981. R. 41.

On December 7, 1981, a Lancaster County grand jury indicted Petitioner for murder (1981-GS-29-829). R. 44-45. On December 16, 1981, sixteen-year old Petitioner entered guilty pleas before the Honorable Richard E. Fields to murder and armed robbery. R. 5, ll. 8-10; R. 18; R. 32-36; R. 46. He was represented by Tyre Lee of the Public Defender's Office. R. 44-45. Judge Fields sentenced Petitioner to imprisonment for "his lifetime," the only sentence permitted under the statute. R. 5, ll. 13-14; R. 46.

In November of 2015, Petitioner filed a motion for re-sentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). R. 2, ll. 1-5; R. 5, ll. 16-18; R. 18-31. Petitioner explained his sentencing judge "refused to entertain matter relating to school record, juvenile records, and other essential types of mitigating evidence." R. 18-31.[2] Certainly, those matters would have not mattered to the plea judge as the only sentence permissible under the statute was life. Petitioner further explained his desire for re-sentencing was to "have those matters relevant to his sentence" reviewed by a sentencing authority. R. 18-31. Petitioner argued that section 16-3-20(A) of the South Carolina Code, as it existed at the time of his offense, was

[2] Petitioner explained that he had "a very low education and scholastic scoring level" demonstrating his low intellectual functioning and that he was "the product of a violent home," which included physical abuse. R. 18-31.

unconstitutionally applied to him, and that his sentence of life with the possibility of parole violated the state and federal constitution's prohibitions on cruel and unusual punishments. R. 18-31. Petitioner emphasized that the only sentencing options available at the time of his offense were death and life imprisonment with the possibility of parole. R. 18-31.

The Honorable Brian M. Gibbons presided over a hearing concerning the motion on June 16, 2016. R. 1. Michael H. Lifsey appeared on behalf of Petitioner, and Lisa Collins appeared on behalf of the state. R. 1.

During the hearing, the state moved "for a summary dismissal" of Petitioner's motion for re-sentencing. R. 3, ll. 7-10.[3] The state argued Petitioner was "not within the class of people who [were] entitled to a reconsideration of sentencing and a hearing under Aiken v. Byars" because Petitioner "was not actually sentenced to life without parole, he was sentenced to a lifetime in prison." R. 5, ll. 18-23. According to the state, "[a]t that time before 1996 a murder conviction was eligible for consideration for a parole after 20 years in the department of corrections if it was a non-death penalty case." R. 5, l. 23 – R. 6, l. 1. Further, the state informed the judge that "the probation and parole department" "confirmed" that Petitioner "in fact, received 16 parole hearings since his parole eligibility." R. 6, ll. 4-7. Petitioner "began attending parole hearings approximately 17 years into his life sentence." R. 6, ll. 7-8.

The state posited that the "essential goal" of Aiken "was to protect juvenile offenders from cruel and unusual punishment through a sentence with life without the possibility of parole." R. 6, ll. 8-12. The state argued "[t]he fact that the defendant has not been granted by the board - - parole by the parole board is not the issue here." R. 7, ll. 3-5. The issue, as the state saw it, was "to whom does the relief set forth in Aiken v. Byars apply." R. 7, ll. 5-6. The state

[3] According to the Clerk of Court records, the state did not file a formal written motion for dismissal.

argued Petitioner "quite simply [was] not within that class." R. 7, ll. 6-7; see also, R. 17, ll. 1-4. The state conceded that Petitioner "was under the age of 18 at the time of his plea to murder at the time of his sentence," but maintained that because he was "parole eligible," he was not one of the "class" protected by Aiken. R. 7, ll. 7-10. Thus, the state asked the trial court to "summarily dismiss" Petitioner's motion for re-sentencing "and rule" that Petitioner was "not entitled to a full hearing" under Aiken. R. 7, ll. 13-16.

Petitioner argued that the "whole focus" of Aiken was that "children are different." R. 7, ll. 18-21. Petitioner fell into the class of offenders protected by Aiken because he was sixteen-years old at the time of the offense. R. 7, ll. 21-23. Prior to a court sentencing a juvenile offender, the court must consider

> the hallmark features of youth, which include maturity, being impetuous and not considering the risk and consequences, the family and home environment of the offender, the circumstances of the homicide offense including the extent of [the] offender's participation in the conduct, and how other co-defendants might have exerted peer pressure on him, the incompetencies of youth, which include both his dealings with police officers and prosecutors, but also his ability to assist his counsel.

R. 8, ll. 4-14. Defense counsel argued that consideration of these factors "certainly were not recognized in 1981" when Petitioner was sentenced. R. 8, ll. 14-18.

Defense counsel "concede[d]" that Petitioner did not "fall within the plain language" of Aiken, but argued Petitioner was entitled to a new sentencing hearing for consideration of the factors. R. 8, ll. 18-23; R. 9, ll. 9-11. According to defense counsel, and the state, under the statute for murder in existence at the time of Petitioner's sentencing, "the only possibility was a life sentence." R. 8, l. 23 – R. 9, l. 1; R. 11, ll. 20-24 (explaining the only sentences for murder were life and death). Therefore, the sentencing judge "did not have the option of setting a specific term of years for his release" even if the judge thought a term of years was the proper

sentence. R. 9, ll. 3-6. Additionally, defense counsel argued Petitioner was "serving a de facto life sentence" because he had served thirty-five years in prison and had been denied parole "16 times." R. 9, ll. 6-9. The "reasoning" of the South Carolina Supreme Court and the United States Supreme Court "extend[ed] to someone who [was] serving a sentence which ha[d] the practical [e]ffect of a life sentence." R. 9, ll. 11-16.

Petitioner echoed defense counsel's sentiments regarding the de facto life sentence, explaining that the continuous denial of parole amounted to "life without parole." R. 10, ll. 5-10. He explained that he was spending the rest of his life in prison, which constituted cruel and unusual punishment. R. 10, ll. 10-14.

The state countered, arguing that the point of the prior decisions was that

> if it's a life sentence without the possibility of parole, that there is no sentencing authority, there is no body to hear - - or a body of people to hear and consider and weigh, has there been reform? Has there been remorse? Has there been - - what factors played in? Whether that has been not only the behavior while he's been in the department of corrections but what factors played into it.

R. 12, ll. 7-17. According to the state, "the bottom line" was that "an authority" "each year revisits this case and makes the decision whether or not the defendant should be granted parole." R. 12, l. 22 – R. 13, l. 1. In the state's estimation, Petitioner was "getting the relief" from what Aiken "looks at as being cruel and unusual" because he had parole hearings. R. 13, ll. 1-5. "The proper body to consider the position and the sentence of the defendant is doing so every year, every year as to whether or not he should be released." R. 13, ll. 17-19.

The judge inquired about the "parole rate" for those with "older life sentence[s]." R. 10, ll. 15-17. According to the judge, the parole rate, specifically for the life sentences with parole eligibility, was "an important factor" for consideration, especially, in light of the argument that Petitioner's sentence "technically may not be life without parole." R. 10, l. 24 – R. 11, l. 6.

Defense counsel was unaware of the rate, but explained that "as of about 10 years ago ... the overall denial of parole rate was about 91 percent." R. 10, ll. 18-21. When defense counsel asked for the record to be left open so that he could submit evidence regarding the parole rate, the judge reversed course, stating "whether or not parole is granted is really not the issue." R. 14, ll. 2-19.[4] According to Judge Gibbons, "the process" was "the issue." R. 14, l. 19.

On this point, the judge elaborated, finding "[t]he process of somebody being allowed an opportunity to be heard concerning being able to get out of jail, that is what is protected by the [C]onstitution." R. 14, ll. 20-23. According to the judge not providing someone with "that process," was "cruel and unusual because of the hallmarks of the youth, et cetera, et cetera." R. 14, l. 23 – R. 15, l. 1. While defense counsel agreed with the judge "generally," counsel noted that if the possibility of parole was actually an "impossibility or an almost impossibility," then the sentence would not satisfy the Eighth Amendment without consideration of the factors. R. 15, ll. 2-7. Counsel argued that Petitioner's sentence provided for "parole eligibility in name only." R. 15, ll. 7-11. Ultimately, the judge decided he did not "need to see a chart or data or statistics" to resolve the issue. R. 17, ll. 7-9.

By an order filed August 16, 2016, Judge Gibbons denied Petitioner's request for re-sentencing. R. 32-36. Judge Gibbons found that Petitioner was sixteen-years old at the time of the offense, and his co-defendant was nineteen-years old at the time. R. 32-36. The judge further found that at the time of Petitioner's "charge and plea hearing, South Carolina law allowed a life sentence for murder to be eligible for parole." R. 32-36. Petitioner "was eligible for parole after serving approximately seventeen (17) years of his sentence." R. 32-36. Citing the records of SCDC, the court noted Petitioner's "eligibility for parole began in April of 1998."

[4] The state objected to the parties submitting data and requested "to have a representative from" "the probation and parole department in Columbia" testify. R. 16, ll. 2-16.

R. 32-36. Finally, the judge found Petitioner "is considered for parole every year" and had "in fact had sixteen (16) parole hearings and ha[d] been rejected for parole at all of them." R. 32-36.

Considering Miller v. Alabama, 567 U.S. 460 (2012) and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), Judge Gibbons concluded that the "essential goal" of the cases "was to protect juvenile offenders from unconstitutional cruel and unusual punishment through a sentence of life in prison without parole – the key element being life in prison without parole." R. 32-36 (emphasis in original). He determined that "[t]he holding in Aiken v. Byars does not apply" to Petitioner because "he did not receive a sentence of life imprisonment without the possibility of parole." R. 32-36. The judge emphasized that Petitioner "is afforded the opportunity to have his case reviewed every year by the Parole Board, and is given the possibility of parole every year." R. 32-36. Based upon this fact, the judge concluded Petitioner was "not within the class of offenders for whom Aiken v. Byars provides for resentencing hearings." R. 32-36.

Judge Gibbons "specifically" rejected Petitioner's argument that he was "in effect serving a sentence of life without parole as the Parole Board has rejected" his application for parole each year for the past sixteen years. R. 32-36. The basis for rejecting the argument was that Aiken and Miller apply only to "juvenile offenders who are serving 'life in prison without possibility of parole.'" R. 32-36 (emphasis in original). Judge Gibbons found Petitioner "clearly has the possibility of parole, and that possibility comes to fruition each year when the Parole Board reviews" his "case and considers him for parole." R. 32-36. Based upon this rationale, the judge granted the state's motion to summarily dismiss the motion for re-sentencing. R. 32-36.

According to the amended proof of service filed by appointed counsel, Petitioner served his notice of appeal on September 8, 2016. Undersigned counsel perfected Petitioner's appeal.

On September 25, 2019, the Court of Appeals affirmed the lower court's finding that Petitioner, who was sentenced to life with the possibility of parole for murder in 1981, was not entitled to a resentencing hearing. App. 1-4; State v. Hyatt, 2019-UP-318 (S.C. Ct. App. filed Sept. 25, 2019). Petitioner then filed a petition for rehearing, which was denied. App. 5-25.

According to the Court of Appeals, Petitioner was "not a member of the class of offenders contemplated by our precedent" who are entitled to resentencing "as he did not receive an LWOP sentence." App. 1-4; State v. Hyatt, 2019-UP-318 (S.C. Ct. App. filed Sept. 25, 2019). The Court acknowledged that the United State Supreme Court held (1) the Eighth Amendment prohibited imposition of an LWOP sentence on a juvenile offender for a nonhomicide crime, Graham v. Florida, 560 U.S. 48 74 (2010). App. 1-4; State v. Hyatt, 2019-UP-318 (S.C. Ct. App. filed Sept. 25, 2019). Further, the Court admitted the United States Supreme Court concluded mandatory LWOP sentences for juvenile offenders who violate the Eighth Amendment, Miller v. Alabama, 567 U.S. 460, 479-280 (2012). App. 1-4; State v. Hyatt, 2019-UP-318 (S.C. Ct. App. filed Sept. 25, 2019). Finally, the Court acknowledged the South Carolina Supreme Court held that all juvenile offenders serving a discretionary LWOP sentence were entitled to new sentencing hearings for consideration of the mitigating factors of youth, Aiken v. Byars, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014). App. 1-4; State v. Hyatt, 2019-UP-318 (S.C. Ct. App. filed Sept. 25, 2019). Nevertheless, according to this Court, Petitioner's sentence "differ[ed] significantly from those at issue in Graham, Miller, and Byars in which the juvenile offenders received sentences of life imprisonment *without* the possibility of parole." App. 1-4; State v. Hyatt, 2019-UP-318 (S.C. Ct. App. filed Sept. 25, 2019) (emphasis in original). In other words, this Court held that only individuals sentenced to *literal* LWOP sentences were entitled to resentencing. In arriving at this conclusion, the Court of Appeals

relied upon its own precedent, State v. Finley, 427 S.C. 419, 831 S.E.2d 158 (Ct. App. 2019). App. 1-4; State v. Hyatt, 2019-UP-318 (S.C. Ct. App. filed Sept. 25, 2019).

On October 10, 2019, undersigned counsel filed a petition for rehearing. App. 5-23. The Court of Appeals denied the petition on November 1, 2019. App. 24-25. This petition for writ of certiorari follows.

## ARGUMENT

The Court of Appeals erred in holding Petitioner was not entitled to re-sentencing where he received a *mandatory* sentence of life imprisonment *with* the possibility of parole, which is the functional equivalent of life imprisonment *without* the possibility of parole, in light of Petitioner's repeated denials of parole for sixteen consecutive years and the parole statutes not providing for consideration of the hallmark characteristics of youth.

Petitioner respectfully requests this Court grant certiorari to review the novel question of law presented. See Rule 242 (b)(1), SCACR. This Court has not addressed whether a mandatory sentence of life with the possibility of parole violates the Eighth Amendment. However, the Court of Appeals has addressed this question, and in a published opinion. State v. Finley, 427 S.C. 419, 831 S.E.2d 158 (Ct. App. 2019). The Court of Appeals determined Finley was not entitled to a new sentencing hearing where the hallmarks of youth could be considered by the judge because "any potential Eighth Amendment violation was cured" by the fact that Finley was parole eligible. Id. at 428, 831 S.E.2d at 163. This Court – the highest court in South Carolina – should grant certiorari to review this novel question of law.

The United States Supreme Court made clear that "children are constitutionally different from adults for purposes of sentencing." Miller v. Alabama, 567 U.S. 460, 471 (2012). In Miller, the Court continued the evolution of Eighth Amendment jurisprudence by extending the reasoning of Roper and Graham to hold that mandatory sentences of life without parole for juvenile homicide offenders also violates the Eighth Amendment's prohibition on cruel and unusual punishment. Miller, 567 U.S. at 465. However, the Court further explained that while the decision did not foreclose imposition of a sentence without the possibility of a parole on a juvenile convicted of a homicide offense, the Court required the sentencer "to take into account

how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 479.

Children by definition lack maturity and responsibility; thus, they are more likely to act with "recklessness, impulsivity, and needless risk-taking." Id. at 471. The Court eloquently explained that due to the innate characteristics of children at large, there is a "great difficulty ... of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." In fact, the Court stated, "incorrigibility is inconsistent with youth." Id. at 479. The Court emphasized the potential for reform present in all juveniles. The Court emphasized the mitigating qualities of youth and noted "[i]t is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.'" Id. at 475-476 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

Mandatory sentencing prevents the sentencer from considering the juvenile offender's "chronological age and its hallmark features, among them, immaturity, impetuosity, and failure to appreciate risks and consequences," the offender's family and home environment, the extent of the offender's conduct in the offense and the way familial and peer pressures may have affected him. Id. at 477. The Court required sentencers "to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 480. Thus, it is clear that sentencing authorities *must* consider a juvenile offender's age and consideration of such *must* be a mitigating factor.

Not long after the Court's opinion in Miller, this Court reviewed non-mandatory life sentences for juveniles in South Carolina through the lens of Eighth Amendment jurisprudence. In Aiken v. Byars, 410 S.C. 534, 540-541, 765 S.E.2d 572, 575-576 (2014), this Court held that Miller

applied retroactively and to juveniles who were sentenced to non-mandatory terms of life without parole. Finding that "Miller does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered," this Court held the sentencing judge must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" and that this requirement "deserves universal application." Id. at 543, 765 S.E.2d at 577 (internal quotations omitted). This Court held the class of petitioners in the case "and those similarly situated" were "entitled to resentencing to allow the inmates to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight." Id. at 544, 765 S.E.2d at 577.

The sentencing court must consider the following factors in crafting a sentence proportional to the offense and the juvenile offender:

> (1) the chronological age of the offender and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence; (2) the family and home environment that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the incompetencies associated with youth—for example, the offender's inability to deal with police officers or prosecutors (including on a plea agreement) or the offender's incapacity to assist his own attorneys; and (5) the possibility of rehabilitation.

Id. at 544, 765 S.E.2d at 577 (internal quotations omitted). While not requiring the sentencing proceedings to "mirror the penalty phase of a capital case," this Court determined "the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings," in addition to the Miller factors. Id. at 544-45, 765 S.E.2d at 577.

Important for Petitioner's case, in Montgomery v. Louisiana, 136 S.Ct. 718 (2016), the Supreme Court explained that a state "may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." Montgomery v. Louisiana, 136 S.Ct. 718, 736 (2016). "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.

> 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. As evidenced by the decision, extending parole eligibility to juvenile offenders convicted of homicide offenses must *not* be viewed as a panacea. In order for parole eligibility to remove a life sentence from the scope of Miller, parole considerations must include the Miller factors, specifically, accepting that "children who commit even heinous crimes are capable of change." In other words, the nature of the crime *alone* must not prevent release in order for the parole scheme to comply with Miller and the Eighth Amendment's prohibition on cruel and unusual punishments.

When citing to State v. Slocumb, 426 S.C. 297, 306, 314-315, 827 S.E.2d 148, 153, 157 (2019), the Court of Appeals claimed this Court declined "to extend the holdings of Graham and Miller to include *de facto* LWOP sentences imposed upon juvenile offenders." State v. Hyatt, 2019-UP-318 (S.C. Ct. App. filed Sept. 25, 2019). The Court misapprehended this Court's ruling in Slocumb.

This Court held that Graham's explicit holding applied to *de jure* life sentences alone, and that its rationale may implicate *de facto* life sentences. Slocumb, 426 S.C. at 306, 827 S.E.2d at 152. In declining to extend the rationale to Slocumb, this Court emphasized that "Slocumb committed multiple crimes at two different points in time – the second set after he had escaped from custody and, in the short time he was free, committed another strikingly similar set of crimes to the first one three years earlier." Id. at 310, 827 S.E.2d at 155. Thereafter, this Court reasoned that "Slocumb received an average per-crime sentence of twenty-six years' imprisonment." Id. Thus, "[t]he only reason his aggregate sentence exceed[ed] his life expectancy [was] because he committed so many crimes, not because a single sentence [was] disproportionately lengthy." Id.

Contrary to the court's conclusion that Slocumb stands for the proposition that the Eighth Amendment bars only literal LWOP sentences, this Court made clear that the only reason Slocumb's *de facto* life sentence passed constitutional muster was because it was an aggregate sentence for multiple crimes on multiple dates.

This Court recognized the concept of a sentence that is the "functional equivalent" of a life sentence in State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948). This Court explained that when a judge exercises his discretion in sentencing a defendant following a jury's recommendation of mercy, the judge must sentence the defendant to a term of years that will not exceed the life expectancy of the defendant unless the record disclosed some reasonable basis for disregarding the jury's verdict. Id. at 356, 46 S.E.2d at 277. The jury's recommendation of mercy was a finding that the defendant should not receive the maximum punishment of life imprisonment; however, the judge's sentence of thirty years' imprisonment was for "all intents and purposes the equivalent of a life sentence." Id. at 357, 46 S.E.2d at 277. Where the record revealed nothing to justify the trial

court's disregarding the jury's recommendation, this Court held the sentence was "manifestly too severe." Id. Thus, this Court has recognized that consideration of a defendant's life expectancy is necessary when fashioning a sentence when the intent of the sentence is to allow the defendant a meaningful opportunity to obtain release

Several states examining sentencing schemes involving juveniles have concluded that certain life with parole sentences violate the Eighth Amendment's ban on cruel and unusual punishment. See e.g., State v. Ragland, 836 N.W.2d 107, 121 (Iowa 2013) (holding "the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole" and explaining the sentencing process must be tailored to account in a meaningful way for the attributes of juveniles that are distinct from adult conduct").

After remarking that in order for juvenile homicide offenders to be sentenced to life imprisonment, the offenders must be eligible for parole, the Massachusetts Court turned to the question of what was procedurally required in order to protect juvenile homicide offender's meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Diatchenko v. Dist. Attorney for Suffolk Dist., 27 N.E.3d 349, 357-358 (Mass. 2015). The court explained that the parole board must consider the "unique characteristics" of juvenile offenders. Id. at 360. "[G]iven the challenges involved for a juvenile homicide offender serving a mandatory life sentence to advocate effectively for parole release on his or her own, and in light of the fact that the offender's opportunity for release is critical to the constitutionality of the sentence," the court concluded "that this opportunity is not likely to be 'meaningful'" without access to counsel. Id. at 361.

Additionally, the court held "a parole-eligible, indigent juvenile homicide offender," may receive funding for expert witnesses to assist in connection with the initial parole proceeding." Id. at 363. The court noted an expert may be particularly helpful in explaining the "effects of the individual's neurobiological immaturity and other personal circumstances at the time of the crime, and how this information relates to the individual's present capacity and future risk of reoffending." Id.

Finally, the court held that judicial review of a parole decision was available. Id. at 365. Explaining that because "the parole hearing acquires a constitutional dimension for a juvenile homicide offender" as it is "what makes the juvenile's mandatory life sentence constitutionally proportionate," the court determined judicial review was necessary to ensure the board exercised "its discretionary authority in a constitutional manner, meaning that the right of the offender to a constitutionally proportionate sentence was not violated." Id. "[J]udicial review is limited to the question whether the board has carried out its responsibility to take into account the attributes or factors" outlined in Miller "in making its decision." Id.

The New York Supreme Court concluded that a juvenile was entitled to a parole release hearing at which his youth would be considered. Hawkins v. New York State Dep't. of Corr. and Cmty. Supervision, 140 A.D.3d 34 (N.Y. App. Div. 2016). In 1979, Hawkins was sentenced "to a prison term of 22 years to life." Id. at 35. He was first eligible for parole in 2000. Id. He was denied parole release nine times. Id. at 36. At his most recent parole hearing, he was "54 years old and had served 36 years of his sentence." Id. The appellate court held "a person serving a sentence for a crime committed as a juvenile ... has a substantive constitutional right not to be punished with a life sentence if the crime reflects transient immaturity." Id. Hawkins' "constitutional right to a meaningful opportunity for release" was denied when the board "failed

to consider the significance of [his] youth and its attendant circumstances at the time of the commission of the crime." Id. "The Board, as the entity charged with determining whether [Hawkins] will serve a life sentence, was required to consider the significance of [Hawkins'] youth and its attendant circumstances at the time of the commission of the crime before making a parole determination." Id. According to the court, this "consideration [was] the *minimal* procedural requirement necessary to ensure the substantive Eighth Amendment protections." Id. (emphasis added).

The court held it was "axiomatic" that a juvenile homicide offender "still has a substantive constitutional right not to be punished with life imprisonment for a crime reflect[ing] transient immaturity." Id. at 38 (alterations in original) (internal quotation omitted). Finding the 'foundational principle' of the Eighth Amendment jurisprudence regarding punishment for juveniles is that the imposition of a state's most severe penalties on juvenile offenders cannot proceed as though they were not children, the court held "[a] parole board is no more entitled to subject an offender to the penalty of life in prison in contravention of this rule than is a legislature or a sentencing court." Id. The court held that the parole release hearing stage must include procedures analogous to those at the sentencing stage where a juvenile is entitled to a hearing at which his youth and its attendant characteristics are considered. Id. at 38-39. "For those persons convicted of crimes committed as juveniles who, but for a favorable parole determination will be punished by life in prison, the Board must consider youth and its attendant characteristics in relationship to the commission of the crime at issue." Id. at 39. The court held Hawkins was entitled to a de novo parole release hearing. Id. at 40.

According to South Carolina statutory law, the Parole Board "must carefully consider the record of the prisoner before, during, and after imprisonment." S.C. Code Ann. § 24-21-640.

An inmate may *not* be paroled until it appears to the satisfaction of the board: (1) "that the prisoner has shown a disposition to reform;" (2) "that in the future he will probably obey the law and lead a correct life;" (3) "that by his conduct he has merited a lessening of the rigors of his imprisonment;" (4) "that the interest of society will not be impaired thereby;" *and* (5) "that suitable employment has been secured for him." Id. The five-part statutory test for obtaining parole fails to take into the hallmarks of youth and the greater capacity for the youthful offender to change. Although the provisions include consideration of reform, the statute does not involve the rigorous examination of the Miller factors required by the Constitution in sentencing a juvenile.

In addition to the statutory provision, the Parole Board, exercising its regulatory authority, provides additional criteria considered by the Board when determining whether to grant or deny parole. These criteria may be found in the Parole Board Manual. The Parole Board's objectives and mission are important for understanding its decision-making process. According to the Parole Board Manual, the "Board's primary objective is the long-term protection of society." Policy and Procedure, South Carolina Department of Probation, Parole and Pardon Services, Division of Paroles and Pardons, 9 (April 2015), at https://www.dppps.sc.gov/content/download/68278/1576111/file/Parole+Board+Manual-+April+2015.pdf. Also, the first objective of the Board is to ensure its every decision "is based on the risk presented by the offender and is consistent with the goal of protection of the public." Id. In addressing the constitutionally-required procedural requirements, the Board functions under the notion that "very little is required in the way of procedural due process at parole hearings." Id. at 21. Prisoners have the right to be heard, "[f]air written notice of the specific parole criteria," notice of the date, time and place of the hearing, right to be heard by a fair panel,

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," to have an attorney present at the prisoner's expense, and to written notice of the Board's reasons for denying parole. Id.

The Manual also sets forth the contents of the parole case summary report. Id. at 22. While the report includes the prisoner's criminal history, disciplinary record, and *even* statements from law enforcement, the prosecutor, and the sentencing judge, the report makes no mention of any of the Miller factors or the diminished culpability of youth. Finally, the Board established "specific parole criteria." Id. at 27-28. The Board "will not parole a prisoner unless it determines, based on the ... criteria, as well as any other factors the Board may consider relevant, that the conduct of the offender merits a lessening of the rigors of imprisonment; that the interests of society will not be impaired by granting parole; and that the offender has secured, or will be able to secure, suitable employment and residence." Id. at 27. The specific criteria set out by the Board include:

> The risk that the offender poses to the community;
>
> The nature and seriousness of the offender's offense, the circumstances surrounding that offense, and the prisoner's attitude toward it;
>
> The offender's prior criminal record and adjustment under any previous programs of supervision;
>
> The offender's attitude toward family members, the victim, and authority in general;
>
> 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;
>
> The offender's employment history, including his job training and skills and his stability in the workplace;

> The offender's physical, mental, and emotional health;
>
> The offender's understanding of the causes of his past criminal conduct;
>
> The offender's efforts to solve his problems;
>
> The adequacy of the offender's overall parole plan, including his proposed residence and employment;
>
> The willingness of the community into which the offender will be paroled to receive that offender;
>
> The willingness of the offender's family to allow the offender, if he is paroled, to return to the family circle;
>
> The opinion of the sentencing judge, the solicitor, and local law enforcement on the offender's parole;
>
> The feelings of the victim or the victim's family, about the offender's release;
>
> Any other factors that the Board may consider relevant, including the recommendation of the parole examiner.

Id. at 28. Quite clearly, the Parole Board's considerations do not extend to any matters relative to the youth of the offender at the time of the commission of the offense. Eligibility for parole in South Carolina simply cannot "save" a life sentence from Eight Amendment scrutiny. The judge erred in holding otherwise.

Petitioner's sentence of life with parole eligibility after twenty years violates the Eighth Amendment's prohibition on cruel and unusual punishment on its face and as applied. The sentencing judge had no discretion in what sentence to impose upon Petitioner. The statute required that he sentence Petitioner to life imprisonment with the possibility of parole. The mandatory nature of the sentence makes it immediately suspect under Eighth Amendment jurisprudence as it demonstrates the lack of individualization required by the Constitution. The mandatory nature of the sentence also demonstrates that the sentencer never considered the Miller factors deemed necessary prior to sentencing a juvenile offender. Despite Petitioner

receiving a mandatory life sentence, one that is the functional equivalent to LWOP, no sentencer ever determined he was irreparably corrupt as required by the Constitution.

Petitioner's sentence is the *functional equivalent* of life imprisonment without the possibility of parole on its face in light of the parole system's failure to consider the Miller factors in rendering its decisions. In fact, the Parole Board does not consider an offender's youth at the time of the offense *at all*. The statutory scheme providing for the circumstances warranting parole and the Parole Board Manual completely fail to account for Miller. In the wake of Miller, Aiken, and Montgomery, a person serving a sentence for a juvenile offense has a substantive constitutional right not to be sentence to life imprisonment. The presumption is against life imprisonment and can only be overcome by a showing and finding of irreparable corruption. Petitioner's constitutional right to a meaningful opportunity for release was violated by the Parole Board's failure to consider the significance of his youth at the time of the commission of the offense. See Greiman v. Hodges, 79 F.Supp.3d 933, 943 (S.D. Iowa 2015) (refusing to accept at the summary judgment stage that the Parole Board's consideration of the "totality of the circumstances" necessarily considered the prisoner's age at the time of the offense, maturation, and rehabilitation). In light of the mandatory nature of Petitioner's life with parole sentence, it is the Parole Board that will determine the ultimate length of his sentence. See id. Thus, the requirements of Miller must be fulfilled by the Parole Board. Id.

Petitioner's sentence is the functional equivalent of life imprisonment without the possibility of parole as applied to Petitioner because he has been denied parole for at least sixteen consecutive years without any consideration of the hallmarks of youth. Due to the Board's cursory, repeated denials of release and the statutory and regulatory procedures not incorporating the Miller factors or anything remotely close, there is an unacceptable likelihood that the nature

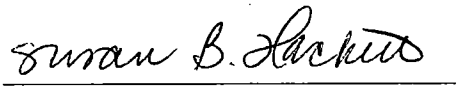
of the crime alone, a fact that will never change, works to deny Petitioner a meaningful opportunity for release from incarceration. Petitioner is entitled to a meaningful opportunity to obtain release, which is something to which adult offenders are not entitled. Thus, the Parole Board's treatment of Petitioner in the same manner as adult offenders violates the Constitution. See Hayden v. Keller, 134 F.Supp.3d 1000, 1009 (E.D.N.C. 2015) (holding North Carolina's parole system, which "wholly" failed to provide a juvenile offender any meaningful opportunity for release in light of the system's lack of distinction between parole reviews for juvenile offenders from adult offenders, showing no consideration for children's diminished culpability and heightened capacity for change in the parole determination).

Petitioner has been incarcerated since 1981, serving almost two decades in prison before becoming eligible for parole. Thereafter, he has been denied parole sixteen times. At no time – not during the sentencing proceeding and not during the parole process – has Petitioner's youth been considered as required by the Constitution. The Supreme Court has provided a juvenile offender "with substantially more than a possibility of parole or a 'mere hope' of parole." Greiman, 79 F.Supp.3d at 945. The Constitution "creates a categorical entitle to demonstrate maturity and reform, to show that he is fit to rejoin society, and to have a meaningful opportunity for release." Id. (internal citation and quotations omitted). Petitioner must be re-sentenced in accordance with the Eighth Amendment and federal and state jurisprudence governing prohibitions on cruel and unusual punishments.

## CONCLUSION

Petitioner respectfully requests this Court grant his petition for writ of certiorari and order full briefing on the issue presented.

Respectfully Submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of December, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to the Court of Appeals
Appeal from Lancaster County
Brian M. Gibbons, Circuit Court Judge



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Opinion No. 2019-UP-318 (S.C. Ct. App. Filed Sept. 25, 2019)
1981-GS-29-829

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THE STATE,

RESPONDENT,

V.

RONALD YATES HYATT,

PETITIONER

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CERTIFICATE OF SERVICE

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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 Ronald Yates Hyatt, #109143, 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 23rd day of December, 2019.

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 23rd day of December, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029