STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from York County

Grace Gilchrist Knie, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSHUA KERR CRAMER

APPELLANT

APPELLATE CASE NO. 2017-002471

FINAL BRIEF OF APPELLANT

RECEIVED
FEB 26 2019
SC Court of Appeals

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 APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional provisions

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in dismissing Appellant's motion for re-sentencing where a life sentence imposed upon an eighteen-year old sharing the same developmental qualities and characteristics as offenders under age eighteen violates the federal and state constitutional requirements of an individualized, proportionate sentence?

II. Did the trial judge err in dismissing Appellant's motion for re-sentencing where a life sentence imposed upon an eighteen-year old sharing the same developmental qualities and characteristics as offenders under age eighteen violates the federal and state constitutional requirements of equal protection under the law?

STATEMENT OF THE CASE

On July 28, 1998, Appellant entered guilty pleas to two counts of murder pursuant to a plea agreement to avoid the death penalty. R. 3, ll. 13-20; R. 37-269. The murders occurred during a "drug deal gone bad." R. 37-269. Appellant gave a statement to the police regarding the circumstances of the crimes and testified against a co-defendant. R. 3, ll. 22-23; R. 37-269. Pursuant to the plea agreement, the parties agreed to life sentences, but left it in the judge's discretion regarding whether the sentences would be served concurrently or consecutively. R. 4, ll. 12-18; R. 37-269. The Honorable John C. Hayes, III, accepted Appellant's guilty pleas and sentenced him to two consecutive life sentences without the possibility of parole. R. 4, ll. 12-18; R. 37-269; R. 287-296.

On September 23, 2015, Appellant filed a motion for re-sentencing. R. 4, ll. 19-20; R. 270. Simultaneously, Appellant requested the appointment of counsel. R. 4, ll. 21-22; R. 271-272. On September 19, 2016, Appellant wrote to the Clerk of Court inquiring about the status of his motions. R. 273. The Clerk of Court responded on October 3, 2016, advising Appellant that he was eighteen years of age at the time of his arrest, which may affect whether he qualified for juvenile resentencing. R. 274. The Clerk forwarded Appellant's letter and the Clerk's letter to the Deputy Solicitor. R. 274. The Deputy Solicitor wrote to Appellant, informing him that his case would not be reconsidered due to his age. R. 4, l. 23 – R. 5, l. 1; R. 37-269. Appellant filed a notice of appeal. R. 5, l. 1; R. 37-269; R. 275-276. On June 7, 2017, Chief Justice Beatty issued an order explaining that because the letter from the Deputy Solicitor was not a decision, Appellant could not appeal. R. 5, ll. 2-7; R. 275-276. Nevertheless, Chief Justice Beatty provided his order to the Chief Administrative Judge for the Sixteenth Judicial Circuit to ensure

Appellant's motion was processed in the manner specified by the Supreme Court's Administrative Order regarding re-sentencing motions. R. 5, ll. 2-7; R. 275-276.

Pursuant to a "Memo to File" filed on June 28, 2017, the Honorable John C. Hayes, III, appointed Harry Dest to represent Appellant. R. 277. On September 6, 2017, Chief Justice Beatty assigned the Honorable Grace Gilchrist Knie to preside over all matters related to Appellant's motion for re-sentencing. R. 278-279. Judge Knie appointed the Public Defender's office to represent Appellant and established a scheduling order in the case. R. 5, ll. 8-9; R.280-281. On November 6, 2017, the state filed a return to Appellant's motion for re-sentencing. R. 282-283. In the return, the state argued that Appellant was "not eligible for any re-sentencing" because "he was not a minor at the time of the offense." R. 282-283. According to the state, the court was "without legal authority to conduct a re-sentencing hearing." R. 282-283.

On November 6, 2017, Judge Knie convened a hearing on the matter. R. 1. Deputy Solicitor Willy Thompson represented the state. R. 1. Harry Dest and Melissa Inzerillo represented Appellant. R. 1. At the conclusion of the hearing, Judge Knie took the matter under advisement. R. 31, ll. 10-19. By an order filed November 27, 2017, Judge Knie granted the state's motion to dismiss Appellant's request for resentencing. R. 284-286.

On November 28, 2017, Appellant served his notice of appeal. This brief follows.

ARGUMENT

I. The trial judge erred in dismissing Appellant's motion for re-sentencing where a life sentence imposed upon an eighteen-year old sharing the same developmental qualities and characteristics as offenders under age eighteen violates the federal and state constitutional requirements of an individualized, proportionate sentence.

Standard of review

"'In criminal cases, the appellate court sits to review errors of law only.'" State v. Vick, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009)(quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is "'bound by the trial court's factual findings unless they are clearly erroneous.'" Id. (quoting Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829). The reviewing court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." State v. Slocumb, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (Ct. App. 2015). "A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

Relevant facts

It was undisputed that at the time of the murders, Appellant was eighteen years of age. R. 3, ll. 20-21; R. 17, ll. 4-7; R. 37-269. Appellant argued he was entitled to re-sentencing because the "psychological, neurobiological studies" underlining the cases mandating re-sentencing for juveniles sentenced to life without parole applied equally to Appellant despite the fact that he was eighteen years old at the time of the offense. R. 6, ll. 18-25; R. 37-269.

Appellant explained that as an eighteen-year old, he exhibited the same characteristics of youth as those under the age of eighteen and, as a result, he was similarly situated to those entitled to resentencing under controlling state and federal law. R. 7, ll. 7-10; R. 37-269. Further, Appellant explained that the opinions from the South Carolina Supreme Court and the United States Supreme Court relied heavily upon the study of brain development not only in finding the constitutional violation, but also in creating the factors that courts must consider when sentencing juveniles. R. 28, ll. 11-19; R. 37-269. On this point, Appellant described how the scientific community agreed that "brain development does not fully complete until the mid-20s," and that the brain develops from the back to the front, meaning the "prefrontal cortex" is the "last part of the brain that is developed." R. 8, l. 22 – R. 9, l. 3. This last part is the "portion of the brain deal[ing] with the person's ability to assess risk, think ahead, and regulate emotions. This part of the brain, according to neuroscience, defines a person's personality." R. 9, ll. 3-6; see also R. 37-269. Studies indicated "the emotional reaction between people of the age of 16 and 19-years old are basically the same." R. 9, ll. 7-10; see also R. 37-269.

Next, Appellant noted that the South Carolina statutory scheme acknowledged that "children are different" and that those differences continue past the age of 18. R. 9, ll. 14-22. Specifically, Appellant pointed to the Youthful Offender Act which provides different treatment for individuals between the ages of seventeen and twenty-six. R. 9, ll. 14-23; see also R. 28, l. 20 - R. 29, l. 8; R. 37-269. The Act recognizes the capacity of rehabilitation among youthful offenders, including those beyond the age of eighteen, by requiring that certain educational and housing opportunities be afforded to them. R. 9, ll. 14-23; see also R. 37-269. There is even a special parole system for individuals between ages seventeen and twenty-six. R. 37-269.

Remarking upon the Supreme Court's acknowledgement that the age of eighteen was

arbitrary and that "the qualities that distinguish juveniles do not disappear when the individual turns 18," Appellant noted that if he were under eighteen, he would be entitled to resentencing, according to the states' argument, but not entitled to resentencing as an eighteen-year-old despite the fact that "the neuroscience, the brain development, and the psychological factors are the same for both a 17-year old as one that's either 18 or 19." R. 10, ll. 1-11. Relying upon these similarities, at least two other jurisdictions held that youth must be considered when sentencing those over the age of eighteen. R. 10, ll. 12-15; R. 37-269.

Under the state's argument, Appellant, "despite being similarly situated," would not be able to show how youth impacted his crimes and how he has been rehabilitated while incarcerated. R. 11, ll. 5-9. Over the course of almost twenty years of incarceration, Appellant made significant progress toward rehabilitation. R. 11, ll. 10-11; R. 37-269. He was in a "character behavioral unit," "a special unit inside the Department of Corrections for those who have demonstrated that they can comply with the rules of the Department of Corrections and are on good behavior." R. 11, ll. 13-18; R. 37-269. Appellant had a positive work history within the prison and participated in a program to deter young people from a life of crime. R. 11, ll. 18-23; R. 37-269.

The state argued that Appellant was not entitled to an individualized sentencing proceeding during which the constitutional impact of his youth would be considered because he was eighteen years of age at the time of the offense. R. 15, ll. 4-10. According to the state, eighteen was "the age of majority" in South Carolina, entitling a person to vote, go to war, buy firearms, enter into contracts, and marry. R. 15, ll. 8-16. Although it cannot be disputed that the United States Supreme Court and the South Carolina Supreme Court never considered whether the brain science required consideration of the constitutional significance of youth for individuals

aged eighteen, the state claimed both courts had "already considered that." R. 16, ll. 17-23. Thus, in the state's mind, Appellant was asking to "re-litigate what the case law has already determined and settled." R. 16, ll. 23-25; R. 18, ll. 8-11.

In addition to the state's argument that the law was "settled," the state argued that a requirement that judges consider the constitutional significance of youth during sentencing would open "a Pandora's Box." R. 23, ll. 11-14.

> When do we then limit that?
>
> Well, then every person who's under 20?
>
> Will it be under 21?
>
> Will it be 25 as the defense suggested when they said that, that the mind and the brain of a young person changes all the way and develops all the way up to 25-years of age or would we say that certain people can be in their 30s and 40s and have it apply, and then we have to consider those - - may make certain considerations for them because they weren't as well educated or they were slower mentally or they had other mental health issues that prohibited them from understanding everything and they acted like children even though they were adults.
>
> This Pandora's Box can not be opened because it would be impossible for the court to go back and do all those things. It would be unjust for the court to go back and do all those things.

R. 23, l. 15 – R. 24, l. 6. In other words, the state argued Appellant's position should not be adopted, despite any constitutional significance, because compliance would be hard and time-consuming.

Ultimately, Judge Knie denied Appellant's motion for resentencing. R. 284-286. Judge Knie concluded that the right to a resentencing proceeding due to the failure of courts to consider the constitutional impact of youth was limited to defendants under eighteen years of age at the time of the offense. R.284-286. Thus, Judge Knie found Appellant was eighteen years old at the time of the offense, and therefore, not entitled to resentencing. R.284-286.

Discussion

The Eighth Amendment to the United States Constitution bars "cruel and unusual punishments." U.S. Const. amend VIII. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. ... The Amendment 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, 100-101 (1958). "To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" Graham v. Florida, 560 U.S. 48, 58 (2010) (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)). "Embodied in the Constitution's ban on cruel and unusual punishment is the 'precept of justice that punishment for the crime should be graduated and proportioned to [the] offense.'" Id. at 59 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)). Similarly, the South Carolina Constitution prohibits "cruel," "corporal," and "unusual punishments." S.C. Const. art. I, § 15.

Recently, in Miller v. Alabama, 567 U.S. 460 (2012), the United States Supreme Court held that a mandatory sentence of life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on cruel and unusual punishment. The Court determined that the Eighth Amendment 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.

Following Miller, one of the questions confronting courts has been what constitutes a "juvenile." In order to answer this question, a review the evolution of the Court's Eighth Amendment jurisprudence is of assistance and of particular import to Appellant's appeal.

Over the years, the cases addressing the proportionality of sentences have developed along two general lines. The first is concerned with the particular circumstances of the case and whether the defendant's sentence for a term of years is grossly disproportionate given the particular offense. Graham, 560 U.S. at 59; Harmelin v. Michigan, 501 U.S. 957, 1005 (1991). The second classification of cases is concerned with categorical rules as applied to classes of offenses or classes of offenders. Graham, 560 U.S. at 60-61. For example, Supreme Court categorical rulings related to categories of offenses prohibit the imposition of the death penalty for non-homicide crimes against individuals. Id. (citing Kennedy v. Louisiana, 554 U.S. 407 (2008)). Categorical rulings prior to Graham prohibited the death penalty for defendants who committed their crimes before the age of eighteen, Roper v. Simmons, 543 U.S. 551 (2005), or whose intellectual functioning is in a low range, Atkins v. Virginia, 536 U.S. 304 (2002). Graham, 560 U.S. at 61.

When adopting categorical proportionality rules, the Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Id. at 61 (quoting Roper, 543 U.S. at 572). Generally, the Court has relied on social science data and statistics to discern "society's evolving standards of decency." Roper, 543 U.S. at 560-77. "[G]uided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,'" the Court, in the exercise of its own independent judgment, then determines whether the punishment in question violates the Eighth Amendment of the Constitution. Graham, 560 U.S. at 61 (quoting Kennedy v. Louisiana, 554 U.S. 407, 421 (2008)).

In Roper, the Supreme Court established a categorical ban on the death penalty for juveniles relying in large part on social science research indicating that youths have a lessened culpability and

are less deserving of the most severe punishments. 543 U.S. at 569-75. Juvenile offenders are fundamentally different from adults for purposes of sentencing for three reasons: (1) they are immature and have "an underdeveloped sense of responsibility;" (2) they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;" and (3) their characters are "not as well formed" as adults. Id. at 569-70 (internal citations omitted). "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id. at 573. Therefore, "juvenile offenders cannot with reliability be classified among the worst offenders." Id. While "[a] juvenile is not absolved of responsibility for his actions," his transgressions are "not as morally reprehensible as that of an adult." Graham, 560 U.S. at 68 (internal citations omitted).

Sixteen-year old Terrance Graham was charged with armed burglary and attempted armed robbery of a barbeque restaurant. Id. at 53. Graham entered guilty pleas to both charges pursuant to a plea agreement. The trial court withheld adjudication of guilt as to both charges and sentenced Graham to concurrent three-year terms of probation with jail time. Id. at 54. Shortly thereafter, when Graham was seventeen-years old he was arrested again and charged with home invasion robbery. Graham's probation officer charged Graham with violating the terms of his probation by "possessing a firearm, committing crimes, and associating with persons engaging in criminal activity." When Graham appeared before the trial court where he maintained he had no involvement in the home invasion robbery, he admitted to violating his probation by fleeing arrest, even though the trial court emphasized that the admission could expose him to a life sentence based on his previous charges. Id. at 55.

After finding Graham had violated his probation, the trial judge, in his discretion, sentenced Graham to the maximum sentence of life. During the sentencing proceeding, the judge provided his reasoning for the sentence: "We can't do anything to deter you. This is the way you are going to lead your life.... [T]hat is where we are today is I don't see where I can do anything to help you any further." Id. at 56-57. Florida had abolished its parole system; accordingly, the life sentence gave Graham no possibility of release unless he was granted executive clemency. Id. at 57.

The Supreme Court held that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." Id. at 74. Just as the Court did in Roper, the Graham Court, relied upon developments in social science demonstrating the fundamental differences between juveniles and adults:

> [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults. It remains true that from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Id. at 68 (internal citations omitted).

The Court explained the decision was "necessary to prevent the possibility that life without parole sentences will be imposed on juvenile non-homicide offenders who are not sufficiently culpable to merit that punishment." Id. at 74. Although "[a] state is not required to guarantee the eventual freedom to a juvenile offender convicted of a non-homicide crime," the state must "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 75. "[W]hile the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile non-homicide offender, it does not require the state to release that offender during his natural life." Id. "The Eighth Amendment does not

foreclose the possibility that persons convicted of non-homicide crimes committed before adulthood will remain behind bars for life. It does forbid states from making the judgment at the outset that those offenders never will be fit to reenter society." Id.

While explaining its rationale, the Graham Court noted that a life without parole sentence is the "second most severe penalty permitted by law." Id. at 69 (internal citations omitted). Additionally, "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." Such a sentence "alters the offender's life by a forfeiture that is irrevocable." Id. For a juvenile offender, a life without parole sentence "'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit [of the convict], he will remain in prison for the rest of his days.'" Id. at 70 (quoting Naovarath v. State, 779 P.2d 944 (Nev. 1989)). Additionally, the Graham Court observed that a juvenile offender sentenced to life without parole will on average serve more years and a greater percentage of his life in prison than an adult offender. "A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." Id.

Finally, the Graham Court concluded that its new categorical rule "gives all juvenile non-homicide offenders a chance to demonstrate maturity and reform." Id. at 79. "Life in prison without the possibility of parole gives no chance for reconciliation with society, no hope." Id. However, "[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. Id. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual." Id. By imposing a "categorical rule against life without parole for juvenile non-homicide offenders," the

Court avoided "the perverse consequences in which the lack of maturity that led to an offender's crime is reinforced by the prison term." Id.

In Miller v. Alabama, 567 U.S. 460 (2012), the United States Supreme Court continued the evolution of Eighth Amendment jurisprudence. The Court extended the reasoning of Roper and Graham by holding that a mandatory sentence of life without parole for juvenile homicide offenders also violates the Eighth Amendment's prohibition on cruel and unusual punishment. This was a categorical ban. 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.

The Miller Court explained "children are constitutionally different from adults for purposes of sentencing." Id. at 471. The Miller Court reserved ruling on whether juveniles could ever be sentenced to LWOP. Id. at 480. The Miller Court repeatedly focused on the notion that the character traits of children are "more transitory and less fixed" to explain its holding and reasoning. Id. at 471. Children by definition lack maturity and responsibility; thus, they are more likely to act with "recklessness, impulsivity, and needless risk-taking." Id. 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." Id. at 479 (internal quotation omitted). In fact, the Court stated "incorrigibility is inconsistent with youth." Id. at 473 (internal quotation omitted). The Court emphasized the potential for reform present in all juveniles. The Court emphasized that "'youth is

more than a chronological fact'" the mitigating qualities of youth and noted "[i]t is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.'" Id. at 476 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

Although the Miller Court did not hold LWOP to be an unconstitutional sentence in non-mandatory sentencing schemes, the Court held Eighth Amendment jurisprudence governing imposition of death sentences applied equally to cases involving juveniles facing the possibility of LWOP. Id. at 481-482. The Court's decision created a presumption against LWOP sentences for juveniles, and most importantly, the Court imported the principles of capital sentencing into cases where juveniles face the possibility of LWOP. Specifically, the court explained that "death is different" and "children are different too." Id. at 481.

"The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" Id. at 471 (quoting Roper, 543 U.S. at 560). The Miller Court emphasized that "proportionality is central to the Eighth Amendment." Id. (quoting Graham, 130 S.Ct. at 2021). Focusing on the concept of individualized sentencing, the Court recognized "that children are constitutionally different from adults for purposes of sentencing." Id. Children "have diminished culpability and greater prospects for reform," and therefore, "'they are less deserving of the most severe punishments.'" Id. at 469 (quoting Graham, 560 U.S. at 68). "[T]he distinctive attributes of youth diminish penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Id. at 472. As a result, "[a]n offender's age is relevant to the Eighth Amendment." Graham, 560 U.S. at 76. In light of the relevance to the ban on cruel and unusual punishment, "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." Miller, 567 U.S. at 474.

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, our Supreme 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), the South Carolina Supreme 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," the 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. Id. (internal quotations omitted). The 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.

According to the Court, Miller "unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole." Id. at 542, 765 S.E.2d at 576. Thus, the Court determined "an individualized sentencing proceeding before imposing a sentence of life without parole on a juvenile offender" was required. Id. Recognizing that 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," the South Carolina Supreme Court held it "must give effect to the proportionality rationale integral to Miller's holding – youth has constitutional significance." Id. at 542-543, 765 S.E.2d at 576. Therefore, youth "must be afforded adequate weight in sentencing." Id. at 543, 765 S.E.2d at 576.

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," the 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.

Two years after the South Carolina Supreme Court's decision in Aiken, the Supreme Court of the United States addressed the retroactivity question of Miller. Montgomery v. Louisiana, 136 S.Ct. 718 (2016). In line with our Court's Aiken opinion, the High Court held that Miller announced a new substantive constitutional rule that was retroactive on state collateral review. Montgomery, 136 S.Ct. at 732-36. However, the Court's opinion answered more than the retroactivity question.

In 1963, Henry Montgomery was seventeen-years old. Id. at 725. He shot and killed a deputy sheriff. Id. He was sentenced to death for the crime, but his conviction was reversed by the state supreme court. Id. Upon re-trial, the jury returned a verdict of guilty without capital punishment. Id. According to state law, the judge was required to impose LWOP. Id. at 726. "The sentence was automatic upon the jury's verdict, so Montgomery had no opportunity to present mitigation evidence to justify a less severe sentence." Id. At the time of his appeal to the United States Supreme Court, Montgomery was sixty-nine years old, having "spent almost his entire life in prison." Id.

When Montgomery challenged his sentence based upon the Miller decision, the state court held he was not entitled to relief because Miller was not retroactive on collateral review. Montgomery, 136 S.Ct. at 727. In deciding that Miller's prohibition on mandatory life without parole for juvenile offenders announced a new substantive rule that must be retroactive, the Court revealed much about its prior opinion in Miller. Montgomery, 136 S.Ct. at 732. "The 'foundation stone' for Miller's analysis" was the "Court's line of precedent holding certain punishments disproportionate when applied to juveniles." Montgomery, 136 S.Ct. at 732. The "starting premise" is the "principle" "that children are constitutionally different from adults for

purposes of sentencing" that "result from children's diminished culpability and greater prospects for reform." Id. (internal quotation omitted).

The Court further noted Miller recognized "that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." Montgomery, 136 S.Ct. at 733. However, "in light of children's diminished culpability and heightened capacity for change, Miller made clear that appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Id. at 733-34 (internal quotations omitted). Therefore, 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." Id. at 734 (internal quotations omitted).

"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." Id. (internal citations and quotations omitted). Miller barred "life without parole" "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." Id. "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).

"A hearing where youth and its attendant characteristics are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." Id. at 735. It is the hearing that "gives effect to Miller's substantive

holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." Id. The Court concluded that Montgomery and others 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.

Having set the scene established by the decisions of the Supreme Court of the United States and the South Carolina Supreme Court, the answer to the question initially posed – what constitutes a juvenile – becomes clear. The Eighth Amendment bars not only life sentences for individuals under age eighteen, but it also bars life sentences for individuals aged eighteen and who share the same developmental qualities and characteristics as individuals under age eighteen.

Appellant readily admits the Supreme Court expressly limited its holding to "those under the age of 18 at the time of their crimes." Miller, 567 U.S. at 465. However, this limitation cannot and must not end the inquiry.

When interpreting Miller, the South Carolina Supreme Court, in Aiken, explained that although the relevant state statute defined "a juvenile" "as a person less than seventeen years of age," the Court considered "juveniles to be individuals under eighteen" in line with the United States Supreme Court's opinion. Aiken, 410 S.C. at 537 n.1, 765 S.E.2d at 573 n.1. Thus, Appellant must admit the state supreme court's opinion limited its scope to those under age eighteen. Importantly, the South Carolina Legislature amended its statute in 2016 to define a child or juvenile as a person less than eighteen years of age, recognizing that the chronological age at which society recognizes a juvenile evolves with the behavioral and social science available. See S.C. Code Ann. § 63-19-20(1) (effective July 1, 2019).

Examining the reasoning in Miller and Graham coupled with the Court's jurisprudence concerning age in the death penalty context supports Appellant's argument for extending the ban on life sentences to those eighteen years of age when the individuals share the same characteristics as those under age eighteen. As explained, the impetus for Miller and Graham was not chronological age, but was the characteristics of individuals associated with that age. "The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." Graham, 560 U.S. at 570.

In Stanford v. Kentucky, 492 U.S. 361, 369 (1989), the Supreme Court rejected the notion that the Eighth Amendment prohibited imposition of the death penalty on those between fifteen and eighteen years of age at the time of the offense. Just the year before, the Court concluded the Eighth Amendment prohibited the execution of a person who was under sixteen years of age at the time of his or her offense. Thompson v. Oklahoma, 487 U.S. 815, 836 (1988). The Court found "broad agreement on the proposition that adolescents as a class are less mature and responsible than adults." Id. at 834. The Court "endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." Id. at 835. "Given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children," retribution as a goal for imposition of the death penalty "is simply inapplicable to the execution of a 15-year-old offender." Id. at 836. Likewise, the Court found "the deterrence rationale is equally unacceptable" "[f]or such a young offender." Id. After noting the few number of arrests for willful homicide by persons under age sixteen and the consequent improbability that excluding younger persons from the class eligible for the death penalty would diminish the deterrent effect

of capital punishment on the majority of offenders, the Court explained the "potential deterrent value of the death sentence" for those under sixteen was insignificant because (1) "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility is so remote as to be virtually nonexistent," and (2) even if a young person engages in such a calculation, "it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century." Id. at 837-838.

Sixteen years later, when the Court confronted the issue of the constitutionality of the death penalty for those under eighteen again, the Court overruled Stanford, finding the Eighth Amendment categorically barred imposition of a death sentence on someone under age eighteen. Roper, 543 U.S. at 575. The Court recognized that "[d]rawing the line at [eighteen] years of age [was] subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns [eighteen]. By the same token, some under [eighteen] have already attained a level of maturity some adults will never reach.... The age of [eighteen] is the point where society draws the line for many purposes between childhood and adulthood." Roper, 543 U.S. at 574. Thus, the Court concluded it was "the age at which the line for death eligibility ought to rest." Id. In other words, the Court drew the line at eighteen years of age because that was the question presented in the case and that was where the then-current prevailing societal norms drew the line for adulthood.

The Supreme Court's trilogy of cases, Roper, Graham, and Miller, emphasized their reliance on the growing body of scientific evidence establishing significant differences between adult and juvenile brains, which the Court deemed to be of constitutional import. Despite the Court's categorization of juveniles relative to chronological age, the focus of the decisions was

the psychological and behavioral aspects inherent to the age group. Therefore, the decisions must be applied to individuals, regardless of chronological age, who share the psychological and behavioral characteristics that compelled the categorical bar of the death penalty and life sentences on individuals under age eighteen.

The Supreme Court of Washington held "a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender." State v. O'Dell, 358 P.3d 359, 366 (Wash. 2015). The court explained that based on "advances in scientific literature," it is known that "age may well mitigate a defendant's culpability, even if that defendant is over the age of 18." Id. The court acknowledged that "age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence." Id. Nevertheless, the court was compelled to "conclude that youth may, in fact, relate to [a defendant's] crime" based upon "what we know today about adolescents' cognitive and emotional development." Id. (internal citation omitted, alteration in original). The court explained "youth can" "amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range." Id.

The Washington Court recognized that "[u]ntil full neurological maturity, young people in general have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will when they enter their late twenties and beyond." Id. at 364-365. The court accepted the scientific literature revealing the "fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure." Id. at 364. See also Matter of Light-Roth, 401 P.3d 459, 465-467 (Wash. Ct. App. 2017) (finding that O'Dell announced a significant change in the law that was material to Light-Roth's sentence because he

was only nineteen years old when he committed his crime warranting an opportunity to seek an exceptional sentence based on his youth).

In People v. House, 72 N.E.3d 357, 384 (Ill. App. Ct. 2015), the Illinois Court of Appeals held House's young age of nineteen at the time of the commission of the offense was relevant in consideration under the circumstances of the case. House was convicted of murder under an accomplice liability theory, which subjected him to a mandatory natural life sentence. Id. The court bluntly "question[ed] the propriety of mandatory natural life for a 19 year old defendant convicted under a theory of accountability." Id. at 385. House acted as a lookout for the crime, but he was not involved in the planning. Id. at 384. The court noted that House received "the same sentence applicable to the person who pulled the trigger." Id. at 385. The court recognized that the Supreme Court "delineated a division between juvenile and adult at 18," the court disabused the notion that the demarcation "created a bright line rule." Id. at 386.

Relying upon the language of the Supreme Court, the Illinois Court of Appeals concluded "the designation that after age 18 an individual is a mature adult appears to be somewhat arbitrary." Id. at 387. The court pointed to "[r]ecent research and articles" discussing "the differences between young adults" "and a fully mature adult." Id. That research indicated the brain does not finish developing until the mid-20s. Id. Thus, young adults are more similar to adolescents than to fully mature adults. Id. The court characterized House as "barely a legal adult and still a teenager" when the crime occurred. Id. at 388. His youthfulness was relevant to sentencing. Id. The Court held that "[g]iven [House]'s age, his family background, his actions as a lookout as opposed to being the actual shooting, and lack of any prior violent convictions," his "mandatory sentence of natural life shocks the moral sense of the community." Id. at 389. Therefore, the court held, House's life sentence violated the proportionate penalties clause of the

state constitution. Id. See also People v. Harris, 70 N.E.3d 718, 730 (Ill. App. Ct. 2016) (holding that a seventy-six-year sentence for a violated the state constitution using the analysis in Miller for an eighteen-year old defendant).[1]

In addition to the Washington Supreme Court's interpretation of the constitutional significance of youth, the United States District Court for the District of Connecticut recently addressed whether a defendant was entitled to a new sentencing hearing where he received a mandatory life sentence when he was 18 years and 20 weeks old. Cruz v. United States, No. 11-CV-787 (JCH), 2018 WL 1541898 (D. Conn. Mar. 29, 2018). The court refused to "infer by negative implication that the Miller Court also held that mandatory life without parole is necessarily constitutional as long as it is applied to those over the age of 18." Id. at *14. "Nothing in Miller ... then states or even suggests that courts are prevented from finding that the Eighth Amendment prohibits mandatory life without parole for those over the age of 18." Id. Just as the state has done in this case, the government argued, in Cruz, that "Miller drew a bright line at 18 years old," preventing courts from applying the rule in Miller to an 18-year-old. Id. at *15. The court rejected this argument. The court explained, "there are different kinds of lines." Id. According to the court, the Supreme Court's line drawing in Miller protected offenders falling under the line while remaining silent as to offenders that fall above the line. Id.

[1] The District Court for the Eastern District of Wisconsin relied upon the Miller factors when sentencing a nineteen-year old charged with theft of mail and assaulting/impeding a postal employee. United States v. Walters, 253 F.Supp.3d 1033, 1036 (E.D. Wisc. 2017). The judge "took into account that defendant was a teen at the time he committed" the offenses and that research indicated "teens are prone to doing foolish and impetuous things, like stealing parcels to get marijuana and struggling with postal carriers" "given their immaturity and undeveloped sense of responsibility." Id. The judge noted that it appeared defendant "was brought into this by the co-actor," which was "not unusual with young offenders, who are more susceptible to peer pressure." Id.

The court recognized that several courts declined to apply Miller to defendants over the age of 18 when asked to do so. Id. at *16. However, the court explained the other courts did not have or did not consider the scientific evidence of adolescent brain development. Id.

Next, the court turned to the evolving standards of decency to analyze Cruz's claim under the Eighth Amendment's ban on cruel and unusual punishments. Id. at *17. According to the data, "24 states and the federal government [had] statutes" prohibiting mandatory life imprisonment without the possibility of parole for offenders who commit murder at the age of 18 or older. Id. at *19. Additionally, Congress "enacted 41 statutes with a sentence of mandatory life without parole for premeditated murder." Id. The court rejected the governments' argument that in light of this data there was no national consensus that a mandatory LWOP sentence is unconstitutional as applied to persons aged 18 and older. Id. The court explained "that merely counting the number of states that permitted the punishment was not dispositive." Id.

The court also noted that some states recognized "an intermediate classification of 'youthful offenders' applicable to certain crimes." Id. At least sixteen states "provide protections, such as expedited expungement, Youth Offender Programs, separate facilities, or extended juvenile jurisdiction, for offenders who are 18 years old up to some age in the early 20s, depending on the state." Id. According to the court, these statutes "indicate a recognition of the difference between 18-year-olds and offenders in the mid-twenties for purposes of criminal culpability." Id.

Additionally, the court examined a 2017 report from the United States Sentencing Commission that indicated that between 2010 and 2015, 86,309 youthful offenders were sentenced in the federal system. Id. at *20. Of those, 96 received life sentences. Id. "Of those 96, 85 were 21 years or older at the time of sentencing, 6 were 20 years old, 4 were 19 years old,

and only one was 18 years old." Id. The court explained these findings "indicate[d] the rarity with which life sentences are imposed on 18-year-olds like Cruz, at least in the federal system." Id. While the court did not consider the report dispositive of a national consensus, the court concluded the report "clearly indicate[d] the extreme infrequency of the imposition of life sentences on 18-year-olds in the federal system." Id. at *21.

Next, the court examined the directional trend for how states treat individuals over the age of eighteen. The court found no state legislation prohibiting mandatory LWOP for eighteen-year-olds, but looked at where society draws the age line for important purposes. Id. The court cited a decision from Kentucky declaring the death penalty unconstitutional as applied to those under the age of twenty-one "based on a finding of a consistent direction of change that the national consensus is growing more and more opposed to the death penalty, as applied to defendants eighteen (18) to twenty-one (21)." Id. (internal quotations omitted).

The court also considered a Resolution from the American Bar Association (ABA) issued in February 2018 urging the prohibition of capital punishment on individuals twenty-one years old or younger at the time of the offense. Id. In arriving at this resolution, the "ABA considered both increases in scientific understanding of adolescent brain development and legislative developments in the legal treatment of individuals in late adolescence." Id. "For example, it recognized a consistent trend toward extending the services of traditional child-serving agencies, including the child welfare, education, and juvenile justice systems, to individuals over the age of 18." Id. (internal quotation omitted).

Continuing the examine the "trend," the court noted that "between 2016 and 2018, 5 states and 285 localities raised the age to buy cigarettes from 18 to 21" and that "as of 2016, all

fifty states and the District of Columbia recognized extended age jurisdiction for juvenile courts beyond the age of 18, in comparison to only 35 states in 2003." Id. at *21-22.

Finally, the court looked at the compelling scientific evidence. Based upon unconverted scientific testimony, the court concluded that the scientific evidence "reveal[ed] that 18-year-olds display similar characteristics of immaturity and impulsivity as juveniles under the age of 18." Id. at *23. Additionally, the expert who testified on Cruz's behalf explained that the ability to resist peer pressure is still developing during late adolescence – between ages 18 and 21. Id. at *24. "[S]usceptibility to peer pressure is higher in late adolescence than in adulthood, but slightly lower than in middle adolescence," which is between the ages of 14 and 17. Id. "[U]p until the age of 24, people exhibit greater risk-taking and reward-sensitive behavior when in the presence of their peers," but adults over age 24 do not. Id. "[L]ike juveniles under the age of 18, 18-year-olds also experience similar susceptibility to negative outside influences." Id. Finally, the expert testified "that people in late adolescence are, like 17-year-olds, more capable of change than are adults." Id. In short, "development is still ongoing in late adolescence." Id.

"[R]elying on both the scientific evidence and the societal evidence of national consensus," the District Court for the District of Connecticut held "that the hallmark characteristics of juveniles that make them less culpable also apply to 18-year-olds." Id. at *25. "As such, the penological rationales for imposing mandatory life imprisonment without the possibility of parole cannot be used as justification when applied to an 18-year-old." Id. Thus, the court held, "Miller applies to 18-year-olds" and the Eighth Amendment forbids a sentencing scheme that mandates life imprisonment for offenders who were 18 years old at the time of their crimes. Id. The court held, a sentencers must "take into account how adolescents, including late

adolescents are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. (internal quotation omitted).[2]

In addition to the case law supporting Appellant's argument for applying the reasoning and rationale of Miller and Aiken to individuals aged eighteen at the time of their offenses, at least two state legislatures have enacted statutes taking into account who individuals aged eighteen are much the same as those under the age of eighteen. California amended its statute governing youth offender parole hearings to extend such hearings to "any prisoner who was 25 years of age or younger" at the time of his or her offense. Cal. Penal Code § 3051(a)(1)(2018); see also Cal. Penal Code § 3046(c)(2018); Cal. Penal Code § 4801(c)(2018). The statute requires the parole hearing to "provide for a meaningful opportunity to obtain release." Cal. Penal Code § 3051(e)(2018). The parole board is required to consider "the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." Cal. Penal Code § 4801(c)(2018). Any psychological evaluations and risk assessment instruments used by the parole board must "take into consideration the diminished culpability of youth as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual." Cal. Penal Code § 3051(f)(1)(2018).

"[I]f the neurological research and social science on which Miller was based conclude that cognitive abilities are not fully developed until around age twenty-five, it may be arbitrary and inconsistent to choose age eighteen as the age after which a defendant may be subject to mandatory life without parole." Kevin J. Holt, The Inbetweeners: Standardizing Juvenileness

---

[2] The Superior Court of New Jersey ordered re-sentencing for a twenty-one year old defendant for the offenses of murder and attempted murder, citing Miller v. Alabama, 567 U.S. 460 (2012) as persuasive authority for the decision to remand. State v. Norris, 2017 WL 2062145 at *5 (N.J. Super. Ct. App. Div. 2017).

and Recognizing Emerging Adulthood for Sentencing Purposes After *Miller*, 92 Wash. U. L. Rev. 1393, 1396 (2015). "The distinction of adulthood beginning at age eighteen is arguably based on no more than traditional and outdated norms." Id. "The Court's Eighth Amendment jurisprudence and cognitive science articulated in Miller and its forebears may necessitate legal recognition of a stage of life between adolescence and adulthood often called 'emerging adulthood,' during which defendants should be entitled to further special consideration under the Eighth Amendment." Id.

"Eighteen may be considered too soon for full adulthood." Id. at 1410. "[C]onsideration of the mitigating characteristics of youth should not stop at such an arbitrary time as an individual's eighteenth birthday." Id. "Those circumstances that warrant leniency, and did warrant leniency in Eighth Amendment analyses, do not magically disappear on the individual's eighteenth birthday." Id. at 1411. "[T]he research reveals that the brain develops well into a person's twenties." Id. "Thus, the analysis for children - - that they are 'different' from adults, unable to fully form the same level of culpability, and prone to bouts of poor decision making - - should apply to those under twenty-five, as well." Id.

"If 'children are different' because the human brain does not fully develop until around age twenty-three to twenty-five, then basing the cutoff for the purpose of the Eighth Amendment at eighteen makes little sense." Id. at 1411-1412. "[T]he social and cognitive science findings show that the human brain is not developed until the mid-twenties; thus, the cutoff is not eighteen." Id. at 1412.

"[T]he 'age of majority' was lowered from twenty-one to eighteen in all but two states in the early 1970s when the voting age was lowered." Alexandra O. Cohen, et al., When Does a Juvenile Become an Adult? Implications for Law and Policy, 88 Temp. L. Rev. 769, 770-771

(2016). This "change of policy was not accompanied in any state by a comprehensive inquiry about the welfare consequences of lowering the age or the developmental literature that might bear on it." Id. at 771.

"For nearly a century, the view that young offenders were distinct from adults and therefore deserving of differential and rehabilitative treatment for children held fast." Id. at 772. However, in the 1980s and 1990s, an increase in juvenile crime sparked academics to warn of "a new breed of young offenders – 'superpredators.'" Id. at 772-773. "Capitalizing on mounting public fear, politicians adeptly collapsed the distinctions between young offenders and adult offenders." Id. at 773. States toughened its laws for young offenders and expanded transfer laws to allow the prosecution of juveniles in adult criminal courts. Id. at 773. When the "dire predictions in the 1990s ... never materialized" some "policymakers [began] to revise their conceptions of adolescent offenders and to reconsider their reliance on punitive approaches." Id. This revision has coincided with "recent neuroscience research and findings" suggesting "a neural basis for recognized developmental characteristics of adolescence." Id. Scientific studies of adolescent brain structure and functioning and social science research of adolescent behavior "confirm that teenagers are driven by circumstances and impulses, are vulnerable to the influences of their peers, are less capable of considering alternative courses of action and avoiding unduly risky behavior, and lack the self-control that almost all of them will gain later in life." Id. at 774. The recent trend "has been to take a more protective stance toward older adolescents and young adults, with particular concern for impulsive action, risk-taking, and vulnerability to psychopathy." Id. at 776. "[T]his protective trend is most clearly evident in legislation setting the minimum age for purchasing alcohol, marijuana, and tobacco." Id. at 777.

While "performance of simple cognitive tasks reaches adultlike performance in speed and accuracy by the teen years," "capacities related to self-control and judgment in emotionally and socially charged situations may not mature until much later." Id. at 779-780. Research shows that "[o]ne of the most influential contexts for adolescents is the social environment." Id. at 781. "[T]eens are more oriented toward and influenced by peers than are either children or adults." Id. Neuroscientific "studies provide evidence of regional changes in brain structure, function, and neurochemicals during adolescence that are distinct from childhood and adulthood, and have been proposed to result in imbalances with brain circuitry." Id. at 783. These studies show "continued regional development of the prefrontal cortex, implicated in judgment and self-control beyond the teen years and into the twenties." Id.

"The protracted development of prefrontal circuitry beyond the teen years raises questions with respect to the approximate age at which an adolescent may be considered sufficiently mature to be regarded as an adult." Id. at 784. In at least one study, researchers have found that "relative to adults over twenty-one, young adults show diminished cognitive capacity, similar to that of adolescents, under brief and prolonged negative emotional arousal." Id. at 786. The study showed "less adultlike recruitment of prefrontal circuitry in teens and young adults, consistent with relatively protected development of the prefrontal cortex into the early twenties." Id. Armed with this research, policy makers "are making the case for a rehabilitative, developmentally informed approach to young adult offenders eighteen to twenty-one, recognizing that there is no developmentally informed magical line of demarcation at eighteen." Id. at 787. The "new findings provide empirical support for extending the juvenile court's dispositional age to twenty-one or older and for reconsideration of sentencing statutes for young adult offenders." Id. at 788.

The judge erred in concluding Appellant was not entitled to re-sentencing based upon his age alone. The Supreme Court's Eighth Amendment jurisprudence relied upon the scientific evidence of differences between adult and juvenile brains, not chronological age. Particularly, the Court focused on the psychological and behavioral studies regarding juveniles unequivocally demonstrating that the human brain continues to develop through age twenty-five. As the Court recognized, "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns [eighteen]." Roper, 543 U.S. at 574. The Court, admittedly, drew the line at age eighteen arbitrarily. The Court recognized the line would move as greater knowledge about the development of adolescent brains was learned. The Court's decisions must be applied to individuals, regardless of chronological age, who share the psychological and behavioral characteristics that compelled the categorical bar of the death penalty and life sentences on individuals under age eighteen. Appellant is entitled to re-sentencing under the Eighth Amendment to the United States Constitution and the state constitution's bar against cruel and unusual punishments.

II. The trial judge erred in dismissing Appellant's motion for re-sentencing where a life sentence imposed upon an eighteen-year old sharing the same developmental qualities and characteristics as offenders under age eighteen violates the federal and state constitutional requirements of equal protection under the law.

Standard of review

Generally, in criminal cases, the appellate courts review errors of law only and are bound by the trial court's factual findings unless those findings are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). The appellate courts address questions of law with no particular deference to the lower court. State ex rel. Condon v. City of Columbia, 339 S.C. 8, 13, 528 S.E.2d 408, 410 (2000). In Denene, Inc. v. City of Charleston, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004), the South Carolina Supreme Court indicated that the "proper standard of review" for equal protection challenges was "one of three standards: (1) rational basis; (2) intermediate scrutiny; or, (3) strict scrutiny." See also State v. Thompson, 349 S.C. 346, 353, 563 S.E.2d 325, 328-329 (2002).

Relevant facts

Appellant incorporates the relevant facts portion of Issue I, supra. During the hearing on the state's motion to dismiss and in his written materials, Appellant argued that he was entitled to re-sentencing under the due process and equal protection clauses of the state and federal constitutions. R. 7, ll. 1-6; R. 37-269. Appellant explained that he was similarly situated to individuals under the age of eighteen for whom life without parole sentences without individualized sentencing proceedings were prohibited, and as a result, denying Appellant an

individualized sentencing proceeding would violate Appellant's right to equal protection of the law. R. 37-269.

After explaining how the science indicates that Appellant is similarly situated to those under the age of eighteen, Appellant argued he was entitled to be treated the same as those individuals. R. 37-269. Specifically, Appellant argued that even if the court accepted a strict "age cut off," then Appellant was entitled to resentencing "because he is similarly situated to the juveniles who would be afforded these protections." R. 37-269. Appellant pointed to the language in Aiken that the decision applied to the class petitioners and to those "similarly situated." R. 37-269. The scientific studies made clear "that brain development resulting in higher risk taking and diminished capacity to consider consequences continues past the age of 18," which formed the basis for the reasoning for differential treatment; therefore, Appellant "would be similarly situated to the subclass of juveniles adopted by the Miller and Aiken courts." R. 37-269.

Appellant argued that "[b]y separating [him] from those scientifically similarly situated, the courts have prevented him from full consideration of relevant factors through a thorough individualized sentencing hearing." R. 37-269. "As a result, despite not being considered an adult biologically and psychologically, he is being treated as one in a courtroom." R. 37-269. Appellant argued there was "no rational basis for distinguishing [him], who was 18 at the time of the crime, from those under 18 at the time." R. 37-269. "[R]ecent studies" showing "that an 18 year old is just as capable of rehabilitation as a 17 year old" requires equal treatment of the two classes of individual. R. 37-269. "Creating a distinction between the two violates the Equal Protection clause in that he is similarly situated to other youths in biological age but is not afforded the same constitutional protections." R. 37-269.

Discussion

Appellant incorporates the relevant legal discussion of Issue I, supra. Both the federal and state constitutions mandate that all citizens receive equal protection under the law. U.S. Const. amend. XIV; S.C. Const. art. I, § 3. Neither the federal nor the state governments may deny a person life, liberty, or property without due process of law. Id. "Equal protection requires that all persons be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed." Doe v. State, 421 S.C. 490, 504, 808 S.E.2d 807, 814 (2017) (internal quotation omitted). "The *sine qua non* of an equal protection claim is a showing that a similarly situated persons received disparate treatment." Id. (internal quotation omitted). As previously stated, courts employ three standards when analyzing a matter under the equal protection clause: (1) rational basis; (2) intermediate scrutiny; or (3) strict scrutiny. Id. at 504-505, 808 S.E.2d 814.

The applicable standard for the present case is rational basis. "Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis." Id. at 505, 808 S.E.2d at 814.

There can be little doubt that Appellant, at age eighteen, is similarly situated to individuals under the age of eighteen. In the field of neurological research, it is universally accepted that the brain of an eighteen-year-old is substantially the same as that of a seventeen-year-old. See United States v. Nash, 1 F.Supp.3d 1240, 1246 (N.D. Ala. 2014) (recognizing that "[s]tudies show that until age 25, the part of the brain that governs judgment, decision-making and impulse control is still in the developmental process," that "[m]ale brains specifically

develop even more slowly than female brains," and that what society thinks "of as the costs of adolescence ... are actually more issues with young adults, people in the 18 to 25 range, largely because they have more opportunities to get into these kinds of trouble"); House, 72 N.E.3d 357 at 387 (recognizing "[r]ecent research and articles" discussing "the differences between young adults" "and a fully mature adult" and indicating the brain does not finish developing until the mid-20s); State v. Bruegger, 773 N.W.2d 862, 879 n.5 (Iowa 2009) (recognizing the importance in the area of criminal law that brain development may not be complete until age twenty-five); Jay D. Aronson, Brain Imaging, Culpability and the Juvenile Death Penalty, 13 Psychol. Pub. Pol'y & L. 115, 121 (2007) (explaining that "all available evidence seems to suggest that many important regions of the brain continue to develop through adolescence and into adulthood"); Elizabeth S. Scott, et al., Young Adulthood as Transitional Legal Category: Science, Social Change, and Justice Policy, 85 Fordham L. Rev. 641, 642 (2016) (noting that "developmental psychologists and neuroscientists have found that biological and psychological development continues into the early twenties, well beyond the age of majority" and that "eighteen- to twenty-one-year-old adults are more like younger adolescents than older adults in their impulsivity under conditions of emotional arousal"); Holt, supra, at 1411 (stating "the research reveals that the brain develops well into a person's twenties").

Further, "the scientific research is reinforced by demographic data indicating that the social transition to independent adulthood extends well beyond the age of majority." Scott, supra, at 643. "In contemporary society, age eighteen no longer marks the assumption of mature adult roles." Id. "Instead, this period has become a critical developmental stage of extended dependency and investment in acquiring skills necessary to accomplish the transition to mature adulthood." Id.

The classification of juveniles as individuals under the age of eighteen bears no relation to the purpose sought to be affected. Although the South Carolina Supreme Court has found other classifications based on age to be related to the purpose sought to be affected, those classifications based on age were not due to the brain development of the individuals in the classes. See State v. Johnson, 276 S.C. 444, 447, 279 S.E.2d 606, 607 (1981) (holding there was not a fundamental right to treatment as a youthful offender under the statute and that there was a relation between the legislature's legitimate state goals and the differential treatment of individuals between ages eighteen and twenty-one convicted of armed robbery because the offenders afforded preferential treatment were "most likely to profit from the act's rehabilitative purpose"). The classification of juveniles as those under age eighteen, to the exclusion of those aged eighteen, fails to serve the purposes of deterring crime, ensuring the punishment fits the offense and offender, and aiding rehabilitation.

As the brain science reveals, individuals under the age of eighteen and those aged eighteen are members of the same class. However, the current sentencing paradigm treats the individuals differently despite similar circumstances and conditions.

The classification does not rest upon a reasonable basis. The United States Supreme Court admitted the drawing of the line for the categorical rule at the age of eighteen was "arbitrary." As such, it is the very opposite of "reasonable" because it is admittedly arbitrary. "The distinction of adulthood beginning at age eighteen is arguably based on no more than traditional and outdated norms." Holt, supra, at 1396. There is no data for treating individuals under age eighteen and those aged eighteen differently. In fact, as explained supra, the data supports treating the two groups the same.

Failing to afford Appellant an individualized sentencing proceed offends the Equal Protection Clause. The cognitive science articulated by the United States Supreme Court and the South Carolina Supreme Court requires the same treatment for individuals aged eighteen as those under age eighteen. The circumstances and characteristics of youth that require individualized sentencing proceedings for those under eighteen persist beyond that age, and as a result, Equal Protection demands the same consideration for those eighteen years of age.

CONCLUSION

Appellant respectfully requests this Court remand the case for re-sentencing.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of February, 2019.

CERTIFICATE OF COUNSEL

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

February 26, 2019

Susan B. Hackett

Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

RECEIVED
FEB 26 2019
SC Court of Appeals