RECEIVED
Jun 04 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

APPELLANT,

V.

RONALD HAKEEM MACK,

RESPONDENT

APPELLATE CASE NO. 2017-002441

Appeal from Williamsburg County

Michael G. Nettles, Circuit Court Judge

Opinion No. 2020-UP-148

PETITION FOR REHEARING

On May 20, 2020, this Court entertained the state's interlocutory appeal in this matter and reversed the circuit court's grant of a new sentencing hearing. State v. Mack, 2020-UP-148 (S.C. Ct. App. filed May 20, 2020). Pursuant to Rule 221(a), SCACR, Respondent respectfully requests this Court rehear the matter because this Court overlooked and/or misapplied (1) controlling statutory and case law requiring dismissal of the state's interlocutory appeal and (2) controlling federal and state constitutional law requiring affirmance of the circuit court's grant of a new sentencing proceeding for Mack, a juvenile offender who was sentenced to the functional equivalent of a life sentence.

Brief procedural history

Seventeen-year old Ronald Mack, along with his mother, her boyfriend, and a juvenile, shot and killed Mack's former friend. R. 34-36. In 2010, Mack entered a guilty plea to murder and burglary. The Honorable Clifton Newman sentenced Mack to fifty years in prison for murder. R. 30-32; R. 37-38. Under South Carolina law, Mack must serve every day of his fifty-year sentence and may not be released on parole. See S.C. Code Ann. § 16-3-20; S.C. Code Ann. § 24-13-100.

On April 20, 2015, Mack filed a motion for resentencing, arguing his fifty-year sentence was the functional equivalent of a life without parole ("LWOP") sentence such that he was eligible for resentencing under Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). R. 40-42; R. 43-61. The solicitor filed a motion to dismiss on October 5, 2016. R. 85; R. 88. On February 17, 2017, the Honorable Michael G. Nettles convened a hearing on the state's motion. R. 117. Thereafter, on June 16, 2017, Judge Nettles filed an order denying the state's motion to dismiss. R. 368-401. Judge Nettles found that Aiken was applicable to defendants sentenced to a term of years that constitutes the functional equivalent of LWOP; that Mack's 50-year sentence constituted a de facto life sentence such that his motion for resentencing pursuant to Aiken was proper; and that Mack's original sentencing hearing did not comply with the constitutional requirements of the Eighth Amendment as interpreted by the United States Supreme Court and the South Carolina Supreme Court. Accordingly, he ruled that Mack was entitled to a resentencing hearing.

Not immediately appealable

The state filed a notice of appeal, challenging Judge Nettles' decision to grant Mack a new sentencing hearing. Contrary to this Court's holding, the order was not immediately appealable. See State v. Mack, 2020-UP-148 (S.C. Ct. App. filed May 20, 2020). According to this Court, Mack's argument that the order was not immediately appealable was "without merit"

because in considering the merits of the state's appeal, this Court determined the circuit court committed an error of law, which entitled the state to immediately appeal the order. See State v. Mack, 2020-UP-148 (S.C. Ct. App. filed May 20, 2020). To support this contention, this Court cited State v. Johnson, 376 S.C. 8, 654 S.E.2d 835 (2007). This Court's reliance on Johnson was misplaced.

Johnson was convicted of murder based largely on the testimony of his four co-defendants. State v. Johnson, 376 S.C. 8, 10, 654 S.E.2d 835, 836 (2007). One co-defendant mentioned a polygraph test. Id. Johnson moved for a mistrial, which was denied. Id. After the jury found him guilty, he moved for a new trial based upon the reference to a polygraph test. Id. The trial judge granted Johnson a new trial. Id. Thereafter, the state appealed the grant of a new trial. Id. The Supreme Court explained, "[t]he state may only appeal a new *trial* order if, in granting it, the trial judge committed an error of law." Id. (emphasis added). Thereafter, the Court stated, "When determining whether an error of law exists, and therefore whether the state has a right to an appeal, it is necessary to consider the merits of the case." Id. Ultimately, the Court held the state had no right to appeal because there was no error of law as the trial judge did not abuse his discretion in granting the new trial based upon the evidence presented. Id.

By using the holding in Johnson to permit the state to appeal Judge Nettles' order granting Mack a new *sentencing* proceeding, this Court misapplied the legal rule pronounced in Johnson. When the Supreme Court concluded it must review the merits of a case in order to determine whether the state's right to appeal was invoked properly, the Court specifically limited the state's right to appeal and the review of the merits to grants of new *trials*. Such a limitation makes sense in light of the qualitative differences between the grant of a new trial and the grant of a new sentencing proceeding. When a judge grants a defendant a new trial, the judge

overturns a jury's verdict, which may involve an invasion on the province of powers restricted to the jury. See State v. Dasher, 278 S.C. 395, 399-400, 297 S.E.2d 414, 416 (1982) (explaining that trial judges may not "invade the area where the jury system has deemed most effective – that is, in assessing the truthfulness of fellow human beings testifying under oath"). Constrastly, when a judge grants a new sentencing proceeding, the judge alters a matter that was always only within the judge's discretion. No appellate court has permitted the state to appeal the grant of a new sentencing hearing.

In the instant case, the denial of the prosecution's motion to dismiss and subsequent motion to reconsider does not constitute a final order. "An appeal ordinarily may be pursued only after a party has obtained a final judgment." State v. Wilson, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010). "An interlocutory order not governed by a specialized appealability statute is not immediately appealable unless it fits into one of the categories listed in section 14-3-330 of the South Carolina Code (1976 & Supp. 2009)." Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 300, 705 S.E.2d 475, 477 (Ct. App. 2011) (citing Ex Parte Capital U–Drive–It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006)). The strict interpretation of the appealability rules is aimed at avoiding piecemeal appeals. Wilson, 387 S.C. at 601, 693 S.E.2d at 925; Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) ("The provisions of section 14-3-330 "have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed.").

Under section 14-3-330, the following types of judgments, decrees, and orders are directly appealable:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions ....;

> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial[,] or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330.

Here, the order denying Appellant's motion to dismiss the motion for resentencing was not entered in a special proceeding (subsection 3), does not involve an injunction or a receiver in the court of common pleas (subsection 4), and does not grant or refuse a new trial or strike a pleading (subsections 2(b) and 2(c)). Thus, the question is whether the order either involves the merits (subsection 1) or affects a substantial right and effectively determines the action and prevents a judgment from which an appeal might be taken (subsection (2)(a)).

An interlocutory order is immediately appealable under subsection (1) if it "involves the merits." "An order 'involves the merits,' ... and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense." Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006). "The phrase 'involving the merits' is narrowly construed in modern precedent." Id. "An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights." Id. at 7, 630 S.E.2d at 467-68.

Here, the effect of Judge Nettle's ruling is to provide Mack with a new sentencing hearing. Appellant previously conceded that the practical effect of Judge Nettles' order was to

vacate Mack's 50-year sentence. State's Return to Motion, Jan. 2, 2018, p. 5 (on file with this Court). In State v. Byars, 79 S.C. 174, 60 S.E. 448 (1908), the state appealed the trial court's grant of a new trial to the defendant. Our Supreme Court stated the following:

> [W]e feel ourselves unable at this time to entertain a consideration of the questions now presented. This court is confined to a consideration of questions presented after a final judgment has been rendered. This is no new question to this court, for we have held that a final judgment is essential in the hearing of an appeal. The prisoner has never been sentenced. The sentence is a final judgment.

Id. Mack's resentencing hearing has not yet been held and no new sentence has been imposed such that his case has not been determined with finality. Thus, until resentencing occurs, there has not been a final judgment and is not appealable under subsection (1) of S.C. Code Ann. § 14-3-330. See State v. Rearick, 417 S.C. 391, 400, 790 S.E.2d 192, 197 (2016) (refusing to permit a defendant to appeal a denial of a motion to dismiss based on double jeopardy grounds and re-affirming a prior holding that a defendant must be sentenced in order for an appeal to proceed).

An interlocutory order is immediately appealable under subsection (2)(a) if it affects a substantial right and the appellant cannot seek review of the current order in an appeal from the final judgment. Peterkin v. Brigman, 319 S.C. 367, 368, 461 S.E.2d 809, 810 (1995). Here, no substantial right of the state is affected and the state is not precluded from raising the issue on appeal after final sentencing. In fact, not only could the state appeal the order granting resentencing after the resentencing actually occurs, the state may decide not to appeal after a sentencing proceeding. Thus, the order is not immediately appealable under subsection (2)(a) of S.C. Code Ann. § 14-3-330.

With no statutory provision authorizing this appeal, our strict appealability laws necessitate dismissal of the State's improper interlocutory appeal. Mack respectfully request this

Court rehear this matter in light of the controlling statutory and case law requiring dismissal of the state's appeal as interlocutory.

Entitled to re-sentencing

Mack's plea and sentencing hearing proceeded in the same course as any adult offender, with no special consideration of Mack's status as a juvenile. The state presented its view of the facts, the judge engaged in the required colloquy regarding waiver of constitutional rights, and defense counsel presented a brief argument for mitigation. Thereafter, the plea judge imposed his sentence. Judge Newman began the explanation of his sentence with the following:

> Well, the purpose of a sentence is to represent what society determines to be justice for a crime and to – not to send a message to the community, but to do what most law abiding citizens would expect the Court to do. And then in weighing all of this, the fact of the matter is, that ***the sentence is not about Mr. Mack, not about him and the possibility that he might turn his life around at some point in time between age 19 and age 80, if he lives that long***… But it's – ***the sentence is not about Mr. Mack***. I mean, it's – how old is Mr. Dorsey?

R. 30, l. 21 – 31, l. 4. The solicitor responded that Dorsey was seventeen. R. 31, l. 5. The judge went on to say:

> ***It's not about the future years of Mr. Mack.*** How about the lack of future years of Mr. Dorsey. He's the victim, the victim, victim's family, the victim's loved ones. Mr. Mack is almost a lost cause at this point based on all of the choices that he made. ***He's a lost cause as far as society is concerned. His future is not within society. His future, your future, is out of society. You've given up your freedom. You've given up the right to walk among free people.***

R. 31, ll. 6-14. After asking the defendant why he decided to give up his future and freedom, the judge stated:

> Unfortunately you'll never know any better because you – that's a – just as you snuffed out his life ***you snuffed out your future just the same***. All of the great things that Mr. Carraway said about you and all he thinks about you, I mean, I'm not questioning at all whether those things are true. But if you are to take advantage of those things it won't be – ***it will not be out in a free society where you've given up your freedom and your right to anyone to trust you to walk the streets. And you'll have to do those good deeds behind bars.*** That's just a fact of the matter.

R. 31, l. 14 – 32, l. 6. Judge Newman then sentenced Mack to concurrent terms of 50 years for murder and 30 years for first degree burglary. He admonished Mack: "that's more than you can count" and "that's the bed you made." R. 32, ll. 7-12.

In reversing the circuit court's grant of a new sentencing proceeding, this Court held "[b]ecause Mack received a term-of-years sentence rather than an LWOP sentence, he was not a member of the class of offenders contemplated by our precedent." State v. Mack, 2020-UP-148 (S.C. Ct. App. filed May 20, 2020). In arriving at this conclusion, this Court overlooked and misapprehended controlling state and federal law concerning cruel and/or unusual punishments.

As the United States Supreme Court has made clear over the past decade: juveniles are not the same as adults, and that difference makes them constitutionally "less deserving of the most severe punishments." Miller v. Alabama, 567 U.S. 460. 471 (2012) (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)). The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." Id. at 469 (quoting Roper v. Simmons, 543 U.S. 551, 560); U.S. Const. amend VIII; U.S. Const. amend XIV; see also S.C. Const. art. I, § 15. That right "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." Miller, 567 U.S. at 469. When considering whether a sentence is proportional, the scope of the Eighth Amendment is not static, but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Id. (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

Of equal importance, sentencing must also be individualized to account for the defendant's mitigating circumstances to ensure that the most serious punishments are "reserved only for the most culpable defendants committing the most serious offenses." Miller, 567 U.S. at

476. Thus, the United States Supreme Court has categorically prohibited the imposition of the most severe punishments on classes of defendants that have diminished culpability due to immutable characteristics and where state practice and legislative enactments demonstrate a national consensus against imposing those punishments on members of that class. See, e.g., Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that Eighth Amendment proscribes death penalty for intellectually disabled offenders); Thompson v. Oklahoma, 487 U.S. 815 (1988) (holding that Eighth Amendment proscribes death penalty for juvenile offender who was under the age of sixteen at the time of the offense); Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding that Eighth Amendment proscribes death penalty for offenders who commit non-homicide crimes).

In Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), our Supreme Court found that Miller "unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole" and "required an individualized sentencing proceeding before imposing a sentence of life without parole on a juvenile offender." 410 S.C. at 542, 765 S.E.2d at 576. The majority recognized that the Miller Court "did not expressly extend its ruling to states such as South Carolina whose sentencing scheme *permits* a life without parole sentence to be imposed on a juvenile offender but does not *mandate* it." Id. at 542, 765 S.E.2d at 576 (emphasis in original). However, the Aiken majority held that there was a proportionality rationale integral to Miller's holding – youth has constitutional significance; as such, it must be afforded adequate weight in sentencing – which must be given effect. Id. at 542-43, 765 S.E.2d at 576. Thus, the Court wrote: "Miller does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative

requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." Id. at 543, 765 S.E.2d at 577.

The Aiken Court acknowledged that LWOP sentences are still possible for juveniles in homicide cases. 410 S.C. at 543, 765 S.E.2d at 577. However, the Court found that Miller's requirement that the sentencing judge first "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" "deserves universal application." Id. To that end, the sentencing court must consider:

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

Id. at 544, 765 at 577 (internal quotations omitted) (citing Miller, 567 U.S. at 477-78). While the Court did not require the sentencing proceedings to mirror the penalty phase of a capital case, it found that "the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings," in addition to the Miller factors. Id. at 544-45, 765 at 577.

Like Miller, the particular class before the Aiken Court was limited, being made up of fifteen inmates sentenced to LWOP for homicides committed as juveniles. 410 S.C. at 536-37, 765 S.E.2d at 573. However, the Aiken Court did not restrict the relief it granted to only the petitioners. Instead, the Court held that "the principles enunciated in Miller v. Alabama apply retroactively to these petitioners, ***to those similarly situated***, and prospectively to all juvenile offenders who may be subject to a sentence of life imprisonment without the possibility of

parole." Id. at 545, 765 S.E.2d at 578 (emphasis added). The Court further provided that "***any individual affected by our holding*** may file a motion for resentencing within one year from the filing of this opinion in the court of general sessions where he or she was originally sentenced." Id. at 545, 765 S.E.2d at 578 (emphasis added). Thus, it is logical to conclude that the Aiken Court did not mean to restrict its interpretation of the applicability of Miller to only those cases specifically denominated "life without parole," but rather intended to provide relief to anyone "irrevocably sentenced . . . to a lifetime in prison." Id. at 543, 765 S.E.2d at 577.

The concept of a de facto life sentence is not novel. Though a different context, in State v. Kimbrough, 212 S.C. 348, 357, 46 S.E.2d 273, 277 (1948), our Supreme Court remanded for resentencing where it found: "From the evidence the jury evidently concluded that appellant should not receive the maximum punishment of life imprisonment, but the [thirty-year] sentence imposed is to all intents and purposes the equivalent of a life sentence, which is the highest punishment permitted for the most aggravated form of the crime." Further, the South Carolina Supreme Court recognized the concept of de facto life sentences in the context of juvenile sentencing proceedings. The Court held that Graham's explicit holding applied to de jure life sentences alone, and that its rationale may implicate de facto life sentences. State v. Slocumb, 426 S.C. 297, 306, 827 S.E.2d 148, 152 (2019). In declining to extend the rationale to Slocumb, the 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, the 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.

Despite the Court's clear explanation for its holding, this Court cited Slocumb in its opinion reversing the circuit court's grant of a new sentencing proceeding to Mack. See State v. Mack, 2020-UP-148 (S.C. Ct. App. filed May 20, 2020). Contrary to the circuit court's implication that Slocumb stands for the proposition that the Eighth Amendment bars only literal LWOP sentences, the Supreme 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. Further, as will become important infra, the Court specifically did not address any argument that Slocumb's sentence violated the state constitution. Id. at 307 n.8, 827 S.E.2d at 153 n.8.

The strongest support for the circuit court's determination that Miller and Aiken apply to a de facto LWOP sentence is common sense. The Maryland Court of Appeals found that "common sense" dictates that a sentence stated as a term of years for a juvenile offender can constitute a de facto life sentence for purposes of the Eighth Amendment. Carter v. State, 192 A.3d 695 (Md. 2018). "Otherwise, the Eighth Amendment proscription against cruel and unusual punishment in the context of a juvenile offender could be circumvented simply by stating the sentence in numerical terms that exceed any reasonable life expectancy rather than labeling it a 'life' sentence." Id.

Various courts around the country have recognized de facto life sentences specifically in the context of finding them unconstitutional if imposed without compliance with the requirements of Graham and Miller. The Seventh, Ninth, and Tenth Circuits have held that the Eighth Amendment prohibits de facto LWOP sentences for juvenile offenders who are not

incorrigible. See Budder v. Addison, 851 F.3d 1047 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 475 (2017) (on AEDPA review, concluding that aggregate sentence resulting in parole eligibility at age 131 was barred by Graham, stating: "we cannot read the Court's categorical rule as excluding juvenile offenders who will be imprisoned for life with no hope of release for nonhomicide crimes merely because the state does not label this punishment as 'life without parole'" and observing that "[l]imiting the Court's holding by this linguistic distinction would allow states to subvert the requirements of the Constitution by merely sentencing their offenders to terms of 100 years instead of 'life'" and "[t]he Constitution's protections are not so malleable"); McKinley v. Butler, 809 F.3d 908 (7th Cir. 2016) (on appeal from denial of federal habeas relief, finding that Miller's "children are different" language "cannot logically be limited to de jure life sentences, as distinct from sentences denominated in number of years yet highly likely to result in imprisonment for life"); Moore v. Biter, 725 F.3d 1184 (9th Cir. 2013) (on AEDPA review, finding that aggregate sentence resulting in parole eligibility at age 127 was "irreconcilable with Graham's mandate that a juvenile nonhomicide offender must be provided 'some meaningful opportunity' to reenter society and thus unconstitutional under Graham.").

Many states also recognize that applicability of the principles of Graham and Miller to de facto life sentences. See **California:** People v. Caballero, 282 P.3d 291 (Cal. 2012) (sentence of 110-years-to-life unconstitutional under Graham); People v. Franklin, 370 P.3d 1053, 1059 (Cal. 2016), *cert. denied* 137 S. Ct. 573 (2016) (holding "a juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in Miller," though Franklin's claim was mooted by the passage of a statute providing parole eligibility after 25 years for certain juvenile offenders); People v. Contreras, 411 P.3d 445 (Cal. 2018) (co-defendants' sentences of 50-years-to-life and 58-years-to-life were unconstitutional

under Graham, clarifying that sentences need not exceed life expectancy to deprive juvenile of meaningful opportunity for release); **Connecticut:** State v. Riley, 110 A.3d 1205 (Conn. 2015) (Miller applicable to 100-year sentence); Casiano v. Commissioner, 115 A.3d 1031 (Conn. 2015) (Miller applicable to 50-year sentence); **Florida:** Henry v. State, 175 So.3d 675 (Fla. 2015) (Graham applicable to aggregate 90-year sentence); **Illinois:** People v. Reyes, 63 N.E.3d 884 (Ill. 2016) (Miller applicable to aggregate 97-year sentence); **Indiana:** Brown v. State, 10 N.E.3d 1 (Ind. 2014) (aggregate sentence of 150 years "forswears altogether the rehabilitative ideal" and exercising state constitutional authority to impose a lesser sentence); **Iowa:** State v. Null, 836 N.W.2d 41, 71 (Iowa 2013) (52.5 year minimum sentence cruel and unusual in violation of Iowa Constitution); State v. Pearson, 836 N.W.2d 88 (Iowa 2013) (sentence of 55-years with parole eligibility after service of 35 years implicated Miller and Null); State v. Ragland, 836 N.W.2d 107 (Iowa 2013) (Miller applicable to commuted sentence of life with possibility of parole after 60 years); State v. Sweet, 879 N.W.2d 811, 839 (Iowa 2016) (adopting a categorical rule that juvenile offenders may not be sentenced to life without the possibility of parole under the Iowa Constitution); **Louisiana:** State ex rel. Morgan v. State, 217 So.3d 266 (La. 2016) (Graham applicable to 99-year sentence and requiring parole eligibility in accordance with subsequently enacted juvenile parole eligibility statute); **Maryland**: Carter v. State, 2018 WL 4140672 (Md. Aug. 29, 2018) (Graham applicable to aggregate sentence with parole eligibility after 50 years); **Missouri:** State ex rel. Carr v. Wallace, 527 S.W.3d 55 (Mo. 2017) (Miller applicable to sentence of life with parole eligibility after 50 years); **Montana:** Steilman v. Michael, 407 P.3d 313, 319-20 (Mont. 2017) (Miller applicable to de facto life sentences, but sentence with possible release after 31.33 years not prohibited); **Nevada:** State v. Boston, 363 P.3d 453 (Nev. 2015) (Graham applicable to aggregate sentences of life with parole eligibility after 100 years);

New Jersey: State v. Zuber, 152 A.3d 197 (N.J. 2017), *cert. denied*, 138 S. Ct. 152 (2017) (Miller applicable to minimum sentences of 55 years and 68.25 years); **New York:** Hawkins v. N.Y. DOC, 30 N.Y.S.3d 397 (N.Y. App. Div. 2016) (sentence of 22-years-to-life requires Miller considerations at parole hearing); **Ohio:** State v. Moore, 76 N.E.3d 1127 (Ohio 2016), *cert. denied* 138 S. Ct. 62 (2017) (Graham applicable to aggregate sentence of 112 years with parole eligibility after 77 years); **Oregon:** Kinkel v. Persson, 363 Or. 1 (2018) (upholding 111-year aggregate sentence, finding record from six-day sentencing hearing established that defendant was within the class of rare juveniles who, as Miller recognized, may be sentenced to life without possibility of parole for a homicide); **Washington:** State v. Ronquillo, 361 P.3d 779 (Wash. Ct. App. 2015) (Miller applicable to aggregate 51.3-year sentence); State v. Keodara, 364 P.3d 777 (Wash. Ct. App. 2015) (Miller applicable to aggregate 69.25-year sentence); State v. Ramos, 387 P.3d 650 (Wash. 2017), *cert. denied*, 138 S. Ct. 467 (2017) (Miller applicable to "any juvenile offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation," whether a sentence for a single crime or an aggregated sentence for multiple crimes); **Wyoming:** Bear Cloud v. State, 334 P.3d 132, 142 (Wyo. 2014) (Miller applicable to aggregate sentence with parole eligibility after 45 years); Sam v. State, 401 P.3d 834 (Wyo. 2017), *cert. denied* 138 S. Ct. 1988 (2018) (Miller applicable to aggregate sentence with earliest parole eligibility after serving 52 years).

The United States Sentencing Commission recognizes and defines a de facto life sentence as "one where the length of the sentence imposed is so long that the sentence is, for all practical purposes, a life sentence and likely was intended to be such by the judge who imposed it." Patti B. Saris, et al., U.S. Sent. Comm'n, Life Sentences in the federal system (Feb. 2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-

surveys/miscellaneous/20150226_Life_Sentences.pdf; see also State v. Moore, 76 N.E.3d 1127, 1138, 1151 (Ohio 2016) (finding that the trial court "undoubtedly" aimed to sentence Moore to life in prison, as reflected in judge's comments: "I want to make sure you never get out of the penitentiary, and I'm going to make sure that you never get out of the penitentiary" and "[I]t is the intention of this court that you should never be released from the penitentiary.").

Here, when imposing Mack's 50-year sentence, Judge Newman said: "He's a lost cause as far as society is concerned. His future is not within society. His future, your future, is out of society. You've given up your freedom. You've given up the right to walk among free people." R. 31, ll. 11-14. He further told Mack: "[J]ust as you snuffed out his life you snuffed out your future just the same." R. 31, ll. 21-23. The Judge said that Mack would not be "out in a free society," had "given up [his] freedom" and right to "walk the streets." R. 32, ll. 1-4. Thus, any good deeds would have to be done "behind bars." R. 32, ll. 4-6. In admonishing Mack that his 50-year sentence was "more than you can count," it is apparent that Judge Newman utilized the lengthy term of years sentence for shock value and not because of any reasoned determination that Mack was not the rare offender for whom an LWOP sentence was proper. It is also clear that Judge Newman intended to sentence Mack to a term of years that would deny Mack any meaningful opportunity for release. Judge Newman's comments are prima facie evidence that Mack's 50-year sentence is a de facto LWOP sentence.

In light of the life expectancy data presented to Judge Nettles, Judge Newman's expectation that Mack would die in prison was prescient. Vera Dolan's study of SCDC male inmates revealed that they died an average of 20 years earlier than predicted by the U.S. population life tables. R. 156, l. 4 – 157, l. 5; R. 160, ll. 6-11. Ms. Dolan's study further revealed that inmates serving life sentences who entered SCDC between the ages of 16 and 19 died while incarcerated an average

of **31.8 years earlier** than predicted by the U.S. population life tables. R. 315. The ACLU of Michigan study similarly revealed "a strong correlation between the number of years spent in prison and life expectancy resulting in further diminished life expectancy for those serving a natural life sentence." R. 283-284. The observed average age at death for Michigan youth sentenced to natural life was 50.6 years. R. 283-284. Thus, Judge Nettles' finding that Mack's 50-year sentence constitutes a de facto life sentence in violation of the Eighth Amendment was not an abuse of discretion.

In addition to the Eighth Amendment's ban on cruel and unusual punishment, the South Carolina Constitution prohibits cruel *or* unusual punishment. See S.C. Const. art. I, § 15. Precisely, the Constitution states: "Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained." S.C. Const. art. I, § 15. In State v. Wilson, the Supreme Court analyzed this provision. 306 S.C. 498, 512, 413 S.E.2d 19, 27 (1992). The Court was examining whether Wilson's death sentence violated the federal and state constitutions. Id. In conducting this examination, the Court explained the state constitution "clearly ban[ned] cruel *or* unusual punishments; unlike the textual ban in the United Stated States Constitution, which literally reads that "cruel *and* unusual" punishments are forbidden." Id. (emphasis in original). However, the Court noted, that "[d]espite this difference in verbiage," "the United States Supreme Court effectively treats the 'and,' as an 'or' in their Eighth Amendment analysis." Id. According to the South Carolina Supreme Court, the United States Supreme Court "still considers it their constitutional obligation to judge whether the 'nexus between the punishment imposed and the defendant's blameworthiness is proportional.'" Id. The Court described this "formulation of a test of whether the punishment is cruel," and that requiring this analysis in all

death penalty cases was to read "and" as "or." Id. Thus, the Court concluded that South Carolina's "use of the disjunctive 'or' rather than 'and'" was "of no importance" in Wilson's case because the analysis was the same under both constitutions. Id.

While the two constitutions may employ the same analysis in the context of the death penalty, the two constitutions do not employ the same analysis outside the context of the death penalty. Justice Pleicones explained that while he would not have reached the same conclusion as the majority in pursuant to the Eighth Amendment, he would reach the same result under the South Carolina Constitution. Aiken v. Byars, 410 S.C. 534, 545-546, 765 S.E.2d 572, 578 (2014) (Pleicones, J., concurring). Furthermore, the South Carolina Supreme Court has interpreted the state constitution more expansively than the federal constitution. See e.g., State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015); State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007); State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001).

The Iowa Supreme Court determined that "the enterprise of identifying which juvenile offenders are irretrievable at the time of trial is simply too speculative and likely impossible given what we now know about the timeline of brain development and related prospects for self-regulation and rehabilitation." State v. Sweet, 879 N.W.2d 811, 836-837 (Iowa 2016). Thus, the court concluded "that sentencing courts should not be required to make speculative up-front decisions on juvenile offenders' prospects for rehabilitation because they lack adequate predictive information supporting such a decision." Id. at 839. The court adopted "a categorical rule that juvenile offenders may not be sentenced to life without the possibility of parole" under the Iowa Constitution, and thus, afforded greater protections under the state constitution than the

federal constitution. Id. at 839.[1] See also State v. Null, 836 N.W.2d 41 (Iowa 2013) (holding the Iowa Constitution requires an individualized sentencing hearing for lengthy aggregate term-of-years sentences); State v. Lyle, 854 N.W.2d 378 (Iowa 2014) (holding all mandatory minimum sentences of imprisonment for youthful offenders violate the Iowa Constitution).

Similarly, the Supreme Court of Washington held its state constitution's ban on cruel punishment afforded greater protection than the Eighth Amendment. State v. Bassett, 428 P.3d 343, 348-349 (Wash. 2018). The court noted "the direction of change in this country is unmistakably and steadily moving toward abandoning the practice of putting child offenders in prison for their entire lives." Id. at 352. Ultimately, the court held that sentencing juvenile offenders to life without parole or early release is cruel punishment in violation of its constitution. Id. at 354.[2]

This Court neglected to consider the South Carolina Constitution as an alternate sustaining ground. Upon rehearing, if this Court were to conclude that the Eighth Amendment affords Mack no relief, Respondent respectfully requests this Court hold that the South Carolina Constitution affords him greater protection than the Eighth Amendment. As discussed, supra, Justice Pleicones concluded that the South Carolina Constitution provided more expansive protections for children than the federal constitution. Aiken v. Byars, 410 S.C. 534, 545-546, 765 S.E.2d 572, 578 (2014) (Pleicones, J., concurring). The social mores of South Carolina regarding the special protections afforded children as realized through its various statutes and common law demonstrate that the South Carolina Constitution's prohibition on cruel or unusual

[1] The Iowa Constitution provides "Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted." Iowa Const. art. I, § 17.

[2] The Washington Constitution provides "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." Wash. Const. art. I, § 14.

punishment must require re-sentencing of children who were sentenced to life imprisonment with the possibility of parole, particularly where the parole system fails to account for the hallmarks of youth.

"[T]he General Assembly has created a system for juveniles that is distinctly different from adult offenders based on the premise that 'South Carolina, as parens patriae, protects and safeguards the welfare of its children.'" In re Kevin R., 409 S.C. 297, 304, 762 S.E.2d at 390-391 (2014). "The very nature of the juvenile system makes clear the family court juvenile adjudication is an inherently different process than a typical criminal prosecution." In re Stephen W., 409 S.C. 73, 78, 761 S.E.2d 231, 233 (2014). In addition to the Juvenile Justice Code, South Carolina affords special protections for youthful offenders. See S.C. Code Ann. § 24-19-10 to -160 (The Youthful Offender Act). "The purpose of the Youthful Offenders Act is to provide treatment and supervision designed to correct the antisocial tendencies of youthful offenders so as to protect the public." Craft v. State, 281 S.C. 205, 207, 314 S.E.2d 330, 331 (1984). Perhaps, the Children's Code most exemplifies the special role of children in South Carolina society. See S.C. Code Ann. § 63-1-10 to § 63-13-1240. Even in the area of tort law, South Carolina requires its citizens to take greater precautions with children or suffer the consequences. See Kirven v. Askins, 253 S.C. 110, 169 S.E.2d 139 (1969) (describing the attractive nuisance doctrine). Based upon South Carolina's determination that children, due solely to their youth, should receive superior protections than adults in various circumstances, this Court should interpret the South Carolina Constitution's ban on cruel or unusual punishment as prohibiting de facto life sentences.

In conclusion, Mack respectfully requests rehearing in this matter. The state's appeal should be dismissed as an improper interlocutory appeal. The denial of the motion to dismiss is

not a final judgment because the resentencing hearing has not occurred. Allowing Appellant to go forward with this appeal is exactly the piece-meal review that our strict appealability rules are meant to prevent.

To the extent this Court does review the merits of this appeal, the circuit court properly found that Miller and Aiken do not rest upon the semantics of the sentence; thus, their reasoning requires resentencing for juvenile offenders sentenced to a term of years that is the functional equivalent of LWOP. The trial judge's expressed intent, life expectancy data, and the decisions of other courts all support the court's further ruling that Mack's 50-year sentence is a de facto life sentence such that he is entitled to an individualized sentencing hearing pursuant to Aiken. In the alternative, the South Carolina Constitution prohibits de facto life sentences for juveniles unless the court considers the hallmarks of youth. There is no practical distinction between a sentence of "life without parole" and a term of years sentence that will similarly result in a defendant's death in prison, with no meaningful opportunity for release. Consequently, the imposition of such sentences against juvenile defendants are equally offensive to our federal and state constitutions, absent an individualized sentencing hearing and reasoned finding that the defendant is "the rare juvenile offender whose crime reflects irreparable corruption." Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016). Accordingly, if this appeal is not dismissed, the circuit court should be affirmed.

Respectfully Submitted,

s/*Susan B. Hackett*
SUSAN B. HACKETT
Appellate Defender

This 4th day of June, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Michael G. Nettles, Circuit Court Judge

THE STATE,

APPELLANT,

V.

RONALD HAKEEM MACK,

RESPONDENT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Sherrie Butterbaugh, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is sbutterbaugh@scag.gov, this 4th day of June, 2020.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT