STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHARLES M. MITCHELL,

APPELLANT

APPELLATE CASE NO. 2019-000942

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court err in denying Appellant a resentencing hearing where Appellant, who was seventeen-years old at the time, was sentenced to a mandatory sentence of life with the possibility of parole in 1992 because his sentence violates the ban on cruel and unusual punishments in the Eighth Amendment to the United States Constitution and the ban on cruel or unusual punishments in the South Carolina Constitution?

STATEMENT OF THE CASE

When Appellant was seventeen-years old, he was charged with murder. R. 28, ll. 3-14; R. 158. On August 4, 1992, the Honorable R. Henry McKellar sentenced him to life imprisonment with the possibility of parole, which was the only sentence permissible under the law at the time. R. 28, ll. 3-4; R. 28, ll. 22-25; R. 31, l. 24 – R. 32, l. 2; R. 158.

On December 8, 2014, Appellant filed a motion for resentencing. R. 148. On December 5, 2016, the state filed a motion to dismiss. R. 29, ll. 15-24; R. 151. Thereafter, on June 21, 2018, the Honorable R. Knox McMahon dismissed the motion for resentencing, but failed to provide notice of the order to any of the parties involved. R. 30, ll. 1-8; R. 151. When the parties learned of the order of dismissal, the parties agreed to vacate the McMahon order of dismissal. R. 30, ll. 4-8; R. 155. On August 22, 2018, the Honorable L. Casey Manning vacated the McMahon order of dismissal and allowed the case to be reopened. R. 155.

The parties appeared before the Honorable Clifton Newman on February 21, 2019, for a status conference. R. 27. Vance Eaton represented the state. R. 27. J. Rhodes Bailey and Laura Young represented Appellant. R. 27. Thereafter, on April 29, 2019, Judge Newman heard argument on the state's motion to dismiss. R. 42. Eaton represented the state, while Bailey and Young represented Appellant. R. 27. By an order filed May 29, 2019, Judge Newman dismissed Appellant's motion for resentencing. R. 158.

On June 3, 2019, Appellant served his notice of appeal. This brief follows.

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). State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "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).

ARGUMENT

The circuit court erred in denying Appellant a resentencing hearing where Appellant, who was seventeen-years old at the time, was sentenced to a mandatory sentence of life with the possibility of parole in 1992 because his sentence violates the ban on cruel and unusual punishments in the Eighth Amendment to the United States Constitution and the ban on cruel or unusual punishments in the South Carolina Constitution.

Relevant facts

During the hearing on the motion to dismiss, the state argued that Appellant was not entitled to resentencing because he was sentenced to life *with* the possibility of parole. R. 45, ll. 6-16.

Appellant argued he was entitled to resentencing pursuant to the federal and state constitutions. R. 49, ll. 22-25; R. 67, l. 11 – R. 68, l. 24; R. 77, l. 19 – R. 78, l. 20. Regarding his eligibility for parole, Appellant explained that he was still denied a meaningful opportunity for release because the Parole Board failed to consider the Miller factors, was permitted to deny (and had) parole based upon immutable facts of the offense in violation of giving youth constitutional significance, and statistically, the Parole Board denied parole at an astonishingly high rate. R. 50, l. 7 – R. 59, l. 1. In fact, the Parole Board has denied parole to Appellant three times. R. 57, ll. 6-12; R. 80. On March 15, 2012, April 17, 2014, and June 23, 2016, the Parole Board denied parole to Appellant because of the "Nature And Seriousness Of Current Offense," "Indication of Violence in This Or Previous Offense," "Use Of Deadly Weapon In This Or Previous Offense." R. 57, ll. 15-23; R. 88. Appellant argued those three factors were "insurmountable" because no amount of rehabilitation would change those factors. R. 57, l. 25 – R. 58, l. 5. The data supported Appellant's conclusion. Pursuant to a study conducted by Dr.

Amelia Hritz, parole eligible juvenile inmates in South Carolina received parole at a rate of 8%. R. 52, ll. 17-23; R. 80.

Furthermore, Appellant provided Judge Newman with an actuarial study regarding the life expectancy of incarcerated individuals. R. 91. According to the data, Appellant's life expectancy was fifty-seven years old. R. 60, ll. 13-19. At the time of the hearing, Appellant was forty-six years old. R. 60, ll. 19-20. Therefore, he could expect to live only eleven more years. R. 60, ll. 20-21.

In his order, Judge Newman acknowledged that Appellant requested resentencing pursuant to the South Carolina Constitution. R. 158. Regarding this claim for relief, Judge Newman found "[t]he issue of cruel and unusual punishment under the South Carolina Constitution, however, was not addressed in Aiken v. Byars." R. 158. According to Judge Newman, "[t]he Court in Aiken applied federal constitutional protections against cruel and unusual punishment only with regard to LWOP sentences." R. 158. Thus, he concluded his "authority" to "entertain this matter [was] governed solely by Aiken v. Byars, and, as such, [he was] restricted to granting resentencing hearings only to juveniles who received sentences of life without the possibility of parole." R. 158. As a result, Judge Newman refused to consider Appellant's claim for relief based upon the state constitution. R. 158.

Turning to Appellant's claim for relief pursuant to the Eighth Amendment to the United States Constitution, Judge Newman remarked that Appellant "did not receive a sentence of life without parole." R. 158. Based upon Appellant's parole eligibility, Judge Newman determined he had "no authority to grant a resentencing hearing." R. 158. Judge Newman explained that "Aiken v. Byars does not contemplate resentencing for individuals who are eligible, but have been denied, parole." R. 158.

Discussion

Introduction

"[C]hildren are constitutionally different from adults for purposes of sentencing." Miller v. Alabama, 567 U.S. 460, 471 (2012). On June 25, 2012, the United States Supreme Court held mandatory sentences of life without parole (LWOP) imposed upon juveniles violated the Eighth Amendment to the United States Constitution. Id. Beginning in 2005 with its decision in Roper v. Simmons, 543 U.S. 551 (2005), the Supreme Court began a steady evolution of juvenile justice jurisprudence applicable to the states and federal government. In Roper, the Court held death sentences for juveniles were cruel and unusual punishment. Four years later, the Court held that a LWOP sentence imposed upon a juvenile for a non-homicide offense violated the Eighth Amendment's ban on cruel and unusual punishment. Graham v. Florida, 560 U.S. 48 (2010). Not surprisingly, when presented with the question of whether mandatory LWOP sentences for juveniles in homicide cases violated the Eighth Amendment, the Supreme Court held they did. Miller, 567 U.S. at 489.

"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, 560 U.S. at 58 (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)). 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 groups of offenses or groups 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. 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 suffered from intellectual disability, Atkins v. Virginia, 536 U.S. 304 (2002).

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. Graham, 560 U.S. 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, 554 U.S. at 421).

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.

Following Miller, courts have confronted the question of what constitutes a "life without parole sentence," particularly, in light of the Court's mandate that juvenile offenders *must* be afforded a *meaningful opportunity* for release unless there has been a finding of irreparable corruption. In order to answer this question, a review the evolution of the Court's Eighth Amendment jurisprudence as it applies to juveniles is of assistance and of particular import to Appellant's appeal.

No death penalty for children

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).

No LWOP for children convicted of non-homicide offenses

Sixteen-year old Terrance Graham was charged with armed burglary and attempted armed robbery of a barbeque restaurant. Graham, 560 U.S. 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. "[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. at 75. "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. 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.

No mandatory LWOP sentences for children

In Miller, supra, the United States Supreme Court continued the evolution of Eighth Amendment jurisprudence. The Court extended the reasoning of Roper and Graham by holding that mandatory sentences of life without parole for juvenile homicide offenders also violate the Eighth Amendment's prohibition on cruel and unusual punishment. Miller, 567 U.S. at 489. 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 480.

The Miller Court reserved ruling on whether juveniles could ever be sentenced to LWOP. Id. at 479. The Miller Court repeatedly focused on the notion that the character traits of children are "more transitory and less fixed." 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." 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 also emphasized the mitigating qualities of youth and noted "[i]t is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.'" Id. at 476 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

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. 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.

"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, 543 U.S. at 560). The Miller Court emphasized that "proportionality is central to the Eighth Amendment." Id. (quoting Graham, 560 U.S. at 59). Focusing on the concept of individualized sentencing, the Court recognized "that children are constitutionally different from adults for purposes of sentencing." Children "have diminished culpability and greater prospects for reform," and therefore, "'they are less deserving of the most severe punishments.'" Id. at 471 (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 479. Thus, it is clear that sentencing authorities *must* consider a juvenile offender's age and consideration of such *must* be a mitigating factor.

No non-mandatory LWOP sentences for juveniles & Retroactivity

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. 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 Court found the Miller decision "clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution." Id. at 543, 765 S.E.2d at 576-577. Quite simply, the Court concluded "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. Accordingly, the Court held the requirement that sentencing judge must "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. (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.

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.

Important for Appellant's case, the Montgomery Court explained that "[g]iving Miller retroactive effect" "does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole." Montgomery, 136 S.Ct. at 736. For example, a State "may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." Id. "Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity – and who have since matured – will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." Id.

> Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of Miller's central intuition – that children who commit even heinous crimes are capable of change.

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

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 "life without parole sentence," particularly, in light of the Court's mandate that juvenile offenders *must* be afforded a *meaningful opportunity* for release unless there has been a finding of irreparable corruption – becomes clear. The Eighth Amendment and the South

Carolina Constitution bar not only "literal" LWOP sentences, but it also bars sentences that are the "functional equivalent" of LWOP sentences, unless the sentencer considered the Miller factors. This is particularly so where such a sentence was mandatory. Finally, a parole system that does not consider the Miller factors cannot save a sentence that is the functional equivalent of a life sentence from the Eighth Amendment's prohibition on cruel and unusual punishment or the South Carolina Constitution's ban on cruel or unusual punishments.

The functional equivalent of life sentences

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

The South Carolina Supreme 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.

Contrary to the circuit court's conclusion 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.

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) (J. Pleicones, 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]

Turning to the matter at hand, several states have addressed whether a sentence of life with parole passes constitutional muster. Iowa held "the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole" and explained the sentencing process must be tailored to account in a meaningful way for the attributes of juveniles that are distinct from adult conduct" State v. Ragland, 836 N.W.2d 107, 121 (Iowa 2013).

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[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.

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

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

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

question whether the board has carried out its responsibility to take into account the attributes or factors" outlined in Miller "in making its decision." Id.

The New York Supreme Court concluded that a juvenile was entitled to a parole release hearing at which his youth would be considered. Hawkins v. New York State Dep't. of Corr. and Cmty. Supervision, 140 A.D.3d 34 (N.Y. App. Div. 2016). In 1979, Hawkins was sentenced "to a prison term of 22 years to life." Id. at 35. He was first eligible for parole in 2000. Id. He was denied parole release nine times. Id. at 36. At his most recent parole hearing, he was "54 years old and had served 36 years of his sentence." Id. The appellate court held "a person serving a sentence for a crime committed as a juvenile … has a substantive constitutional right not to be punished with a life sentence if the crime reflects transient immaturity." Id. Hawkins' "constitutional right to a meaningful opportunity for release" was denied when the board "failed to consider the significance of [his] youth and its attendant circumstances at the time of the commission of the crime." Id. "The Board, as the entity charged with determining whether [Hawkins] will serve a life sentence, was required to consider the significance of [Hawkins'] youth and its attendant circumstances at the time of the commission of the crime before making a parole determination." Id. According to the court, this "consideration [was] the *minimal* procedural requirement necessary to ensure the substantive Eighth Amendment protections." Id. (emphasis added).

The court held it was "axiomatic" that a juvenile homicide offender "still has a substantive constitutional right not to be punished with life imprisonment for a crime reflect[ing] transient immaturity." Id. at 38 (alterations in original) (internal quotation omitted). Finding the 'foundational principle' of the Eighth Amendment jurisprudence regarding punishment for juveniles is that the imposition of a state's most severe penalties on juvenile offenders cannot

proceed as though they were not children, the court held "[a] parole board is no more entitled to subject an offender to the penalty of life in prison in contravention of this rule than is a legislature or a sentencing court." Id. The court held that the parole release hearing stage must include procedures analogous to those at the sentencing stage where a juvenile is entitled to a hearing at which his youth and its attendant characteristics are considered. Id. at 38-39. "For those persons convicted of crimes committed as juveniles who, but for a favorable parole determination will be punished by life in prison, the Board must consider youth and its attendant characteristics in relationship to the commission of the crime at issue." Id. at 39. The court held Hawkins was entitled to a de novo parole release hearing. Id. at 40.

Appellant's life with parole sentence violates the federal and state constitutions

According to South Carolina statutory law, the Parole Board "must carefully consider the record of the prisoner before, during, and after imprisonment." S.C. Code Ann. § 24-21-640. An inmate may *not* be paroled until it appears to the satisfaction of the board: (1) "that the prisoner has shown a disposition to reform;" (2) "that in the future he will probably obey the law and lead a correct life;" (3) "that by his conduct he has merited a lessening of the rigors of his imprisonment;" (4) "that the interest of society will not be impaired thereby;" *and* (5) "that suitable employment has been secured for him." Id. The five-part statutory test for obtaining parole *fails* to take into the hallmarks of youth and the greater capacity for the youthful offender to change. Although the provisions include consideration of reform, the statute does not involve the rigorous examination of the Miller factors required by the federal and state constitutions in sentencing a juvenile.

In addition to the statutory provision, the Parole Board, exercising its regulatory authority, provides additional criteria considered by the Board when determining whether to

grant or deny parole. These criteria may be found in the Parole Board Manual. The Parole Board's objectives and mission are important for understanding its decision-making process. According to the Parole Board Manual, the "Board's primary objective is the long-term protection of society." Policy and Procedure, South Carolina Department of Probation, Parole and Pardon Services, Division of Paroles and Pardons, 9 (April 2015), at https://www.dppps.sc.gov/content/download/68278/1576111/file/Parole+Board+Manual-+April+2015.pdf. Also, the first objective of the Board is to ensure its every decision "is based on the risk presented by the offender and is consistent with the goal of protection of the public." Id. In addressing the constitutionally-required procedural requirements, the Board functions under the notion that "very little is required in the way of procedural due process at parole hearings." Id. at 21. Prisoners have the right to be heard, "[f]air written notice of the specific parole criteria," notice of the date, time and place of the hearing, right to be heard by a fair panel, the "opportunity to present evidence and to have up to three witnesses to speak on their behalf, and to have the Board or panel carefully consider the complete record before, during, and after imprisonment," to have an attorney present at the prisoner's expense, and to written notice of the Board's reasons for denying parole. Id.

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

the interests of society will not be impaired by granting parole; and that the offender has secured, or will be able to secure, suitable employment and residence." Id. at 27. The specific criteria set out by the Board include:

> The risk that the offender poses to the community;
>
> The nature and seriousness of the offender's offense, the circumstances surrounding that offense, and the prisoner's attitude toward it;
>
> The offender's prior criminal record and adjustment under any previous programs of supervision;
>
> The offender's attitude toward family members, the victim, and authority in general;
>
> The offender's adjustment while in confinement, including his progress in counseling, therapy, and other similar programs designed to encourage the prisoner to improve himself;
>
> The offender's employment history, including his job training and skills and his stability in the workplace;
>
> The offender's physical, mental, and emotional health;
>
> The offender's understanding of the causes of his past criminal conduct;
>
> The offender's efforts to solve his problems;
>
> The adequacy of the offender's overall parole plan, including his proposed residence and employment;
>
> The willingness of the community into which the offender will be paroled to receive that offender;
>
> The willingness of the offender's family to allow the offender, if he is paroled, to return to the family circle;
>
> The opinion of the sentencing judge, the solicitor, and local law enforcement on the offender's parole;
>
> The feelings of the victim or the victim's family, about the offender's release;
>
> Any other factors that the Board may consider relevant, including the recommendation of the parole examiner.

Id. at 28. Quite clearly, the Parole Board's considerations do not extend to any matters relative to the youth of the offender at the time of the commission of the offense. Eligibility for parole in South Carolina simply cannot "save" a life sentence from scrutiny under the Eighth Amendment or the South Carolina Constitution's ban on cruel or unusual punishment. The circuit court erred in holding otherwise.

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

Appellant's sentence is the *functional equivalent* of life imprisonment without the possibility of parole on its face in light of the parole system's failure to consider the Miller factors in rendering its decisions. In fact, the Parole Board does not consider an offender's youth at the time of the offense *at all*. The statutory scheme providing for the circumstances warranting parole and the Parole Board Manual completely fail to account for Miller. In the wake of Miller, Aiken, and Montgomery, a person serving a sentence for a juvenile offense has a substantive constitutional right not to be sentence to life imprisonment. The presumption is against life imprisonment and can only be overcome by a showing and finding of irreparable

corruption. Appellant's constitutional right to a meaningful opportunity for release was violated by the Parole Board's failure to consider the significance of his youth at the time of the commission of the offense. See Greiman v. Hodges, 79 F.Supp.3d 933, 943 (S.D. Iowa 2015) (refusing to accept at the summary judgment stage that the Parole Board's consideration of the "totality of the circumstances" necessarily considered the prisoner's age at the time of the offense, maturation, and rehabilitation). In light of the mandatory nature of Appellant's life with parole sentence, it is the Parole Board that will determine the ultimate length of his sentence. See id. Thus, the requirements of Miller must be fulfilled by the Parole Board. Id.

Appellant's sentence is the functional equivalent of life imprisonment without the possibility of parole as applied to Appellant because he has been denied parole at least three times without any consideration of the hallmarks of youth. The Board's explanations of its denials included only aspects of Appellant's conviction – nature and seriousness of his current offense, an indication of violence in his offense, and his use of a deadly weapon during the offense. Thus, the nature of the crime alone, a fact that will never change, works to deny Appellant a meaningful opportunity for release from incarceration.

Appellant is entitled to a meaningful opportunity to obtain release, which is something to which adult offenders are not entitled. Thus, the Parole Board's treatment of Appellant in the same manner as adult offenders violates the Eighth Amendment to the U.S. Constitution. See Hayden v. Keller, 134 F.Supp.3d 1000, 1009 (E.D.N.C. 2015) (holding North Carolina's parole system, which "wholly" failed to provide a juvenile offender any meaningful opportunity for release in light of the system's lack of distinction between parole reviews for juvenile offenders from adult offenders, showing no consideration for children's diminished culpability and heightened capacity for change in the parole determination).

Appellant has been incarcerated since 1992, serving two decades in prison before becoming eligible for parole. Thereafter, he has been denied at least three times. At no time – not during the sentencing proceeding and not during the parole process – has Appellant's youth been considered as required by the Constitution. The Supreme Court has provided a juvenile offender "with substantially more than a possibility of parole or a 'mere hope' of parole." Greiman, 79 F.Supp.3d at 945. The Constitution "creates a categorical entitle to demonstrate maturity and reform, to show that he is fit to rejoin society, and to have a meaningful opportunity for release." Id. (internal citation and quotations omitted). As such, Appellant's sentence violates the Eighth Amendment to the Constitution because it denies him a meaningful opportunity for release.

If this Court were to conclude that the Eighth Amendment affords Appellant no relief, Appellant 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) (J. Pleicones, 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 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 life with parole sentences for juveniles where the sentencer and parole system fail to consider the hallmarks of youth.

Appellant must be re-sentenced in accordance with the Eighth Amendment and federal and state jurisprudence governing prohibitions on cruel and unusual punishments.

CONCLUSION

Appellant respectfully requests this Court reverse the lower court and remand the matter for a new sentencing proceeding.

s/*Susan B. Hackett*
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ATTORNEY FOR APPELLANT

This 15th day of July, 2020.

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."

July 15, 2020

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