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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable Grace Gilchrist Knie, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARNELL DAVIS,

APPELLANT.

APPELLATE CASE NO. 2019-001976

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in holding Appellant was not entitled to resentencing where he received a *mandatory* sentence of life imprisonment *with* the possibility of parole, which is the functional equivalent of life imprisonment *without* the possibility of parole, in light of Appellant's repeated denials of parole and the parole statutes not providing for consideration of the hallmark characteristics of youth?

STATEMENT OF THE CASE

A Spartanburg County grand jury indicted Appellant on April 29, 1991 for murder. R. 154-155. On July 9, 1991, Appellant pled guilty as indicted before the Honorable E.C. Burnett, III. R. 156. He was sentenced to life imprisonment. R. 156.

On November 29, 2015, Appellant filed a *pro se* petition for resentencing pursuant to Miller v. Alabama, 567 U.S. 460 (2012) and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). R. 1-10. The state filed a Return to Defendant's Motion for Resentencing on February 28, 2018 and a Motion to Dismiss Petitioner's Motion for Resentencing on April 13, 2018. R. 12-16. On August 2, 2018, the state filed a Supplemental Motion to Dismiss Petitioner's Motion for Resentencing. R. 17-20. On August 27, 2018, Appellant filed a Memorandum of Defendant. R. 21-29.

On August 27, 2018, a hearing was held on Appellant's petition for resentencing before the Honorable Grace Gilchrist Knie. R. 30. Solicitor Barry Barnette represented the state, and Clay Allen represented Appellant. R. 30. Octavia Wright appeared on behalf of the Department of Probation, Parole, and Pardon Services (the Department). R. 30.

The Department filed a Reply to Defendant's Memorandum on September 19, 2018. R. 101-104. By order filed October 10, 2018, the court denied Appellant's petition for resentencing. R. 105-106.

The state filed a Second Supplemental Motion to Dismiss Petitioner's Motion for Resentencing on July 19, 2019. R. 107-108. Appellant filed a Post-Trial Motion to Reconsider Pursuant to Rule 29(a), SCRCrimP, on July 24, 2019. R. 109-114. The state filed a Return in Opposition to Petitioner's Post-Trial Motion to Reconsider on November 5, 2019. R. 116-124.

A hearing was convened on Appellant's motion to reconsider on November 7, 2019 before Judge Knie. R. 125. Solicitor Barry Barnette represented the state, and Clay Allen represented Appellant. R. 125. Matthew Buchanan appeared on behalf of the Department. R. 125. By order filed November 25, 2019, the court denied Appellant's motion for reconsider. R. 151-153.

This appeal follows.

STANDARD OF REVIEW

"When considering whether a sentence violates the Eighth Amendment's prohibition on cruel and unusual punishments, the appellate court's standard of review extends only to the correction of errors of law." State v. Finley, 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019) (citing State v. Perez, 423 S.C. 491, 496, 816 S.E.2d 550, 553 (2018)). "Therefore, this court will not disturb the circuit court's findings absent a manifest abuse of discretion." Id. (citing Perez, 423 S.C. at 496, 816 S.E.2d at 553). "An abuse of discretion occurs when the circuit court's finding is based on an error of law or grounded in factual conclusions without evidentiary support." Id. (citing Perez, 423 S.C. 496-497, 816 S.E.2d at 553 and State v. Johnson, 413 S.C. 458, 466, 776 S.E.2d 367, 371 (2015)).

ARGUMENT

The trial court erred in holding Appellant was not entitled to resentencing where he received a *mandatory* sentence of life imprisonment *with* the possibility of parole, which is the functional equivalent of life imprisonment *without* the possibility of parole, in light of Appellant's repeated denials of parole and the parole statutes not providing for consideration of the hallmark characteristics of youth.

Relevant Facts

Appellant was charged with murder for conduct which allegedly occurred on February 8, 1991 when he was seventeen years old. The state claimed Appellant shot and killed Thomas Dexter Feaster. On July 9, 1991, Appellant pled guilty as indicted. He was sentenced to life imprisonment. At the time of Appellant's offense, the only possible sentences for murder were death or life imprisonment with the possibility of parole after twenty years. R. 35, l. 17 – 36, l. 8. Appellant became eligible for parole in 2011. R. 36, ll. 9-10. He was denied parole on May 4, 2011, June 19, 2013, August 12, 2015, and October 24, 2017. R. 36, ll. 9-12; R. 78. He became eligible for parole consideration again on October 24, 2019. R. 106.

On November 29, 2015, Appellant filed a *pro se* motion for resentencing pursuant to Miller v. Alabama, 567 U.S. 460 (2012) and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). R. 1-10. Appellant argued in his subsequent memorandum that he is entitled to resentencing because his sentence is the equivalent of life without parole as evidenced by the nature of his previous parole hearings and the prior decisions of the parole board denying him parole. R. 21. He emphasized that neither the original sentencing judge nor the parole board considered the hallmark features of youth or other sentencing factors as required by Miller and Aiken. R. 21-22. Appellant explained that he was denied parole after his first and second parole

hearings based on the "nature and seriousness of the current offense; indication of violence in this or previous offense; and use of deadly weapon during this or previous offense." R. 23. After his third and fourth parole hearings, he was denied parole based on the above findings as well as an additional finding of fact—"institutional record is unfavorable." R. 23. Appellant argued that, because the parole board failed to consider or give any weight to his youth and its attendant characteristics, his sentence violates the Eighth and Fourteenth Amendments of the United States Constitution as he has no realistic opportunity for release. R. 23. Therefore, his sentence is the functional equivalent of life without parole. R. 23.

Appellant expanded upon this argument during the hearing before Judge Knie. Counsel emphasized that when Appellant was sentenced in 1991, the judge had no discretion. The only sentence which could be imposed was life imprisonment with parole. R. 60, ll. 18-21. He argued Appellant has never had "a forum or a hearing" that considered the hallmark features of youth and the "six factors" specified in Aiken v. Byars. R. 60, ll. 9-17.

Appellant also presented recordings of his previous parole hearings, which were marked and admitted as Petitioner's Exhibit No. 2 and are on file with this Court. R. 45, l. 11 – 46, l. 10. Counsel asserted that the reasons given for the denial of parole "deal with matters that, quite frankly, cannot be changed," including the nature and seriousness of the offense, the indication of violence in this or previous offense, and the use of a deadly weapon in this or previous offense. R. 61, ll. 4-12. He explained that "at no time during these hearings" was Appellant "given a realistic opportunity to talk about the characteristics of his youthfulness, and how his youthfulness played into [him] . . . being convicted of these crimes." R. 62, ll. 13-18. Moreover, counsel argued Appellant's sentence is the functional equivalent of life without parole since Appellant has no realistic opportunity of being released. R. 63, l. 7 – 64, l. 5.

The Solicitor argued Appellant was not entitled to resentencing because he is eligible for parole. He cited to <u>Montgomery v. Louisiana</u>, 136 S.Ct. 718 (2016), where the United States Supreme Court held a "state may remedy a <u>Miller</u> violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." R. 37, l. 15 – 38, l. 4.

By order filed October 10, 2018, Judge Knie denied Appellant's petition for resentencing. Citing to <u>Montgomery v. Louisiana</u>, 136 S.Ct. 718 (2016), the judge found that since Appellant's original life sentence makes him eligible for parole, he is not entitled to resentencing pursuant to <u>Miller v. Alabama</u>, 567 U.S. 460, 471 (2012), and <u>Aiken v. Byars</u>, 410 S.C. 534, 765 S.E.2d 572 (2014). R. 105-106.

After this Court published its opinion in <u>State v. Finley</u>, 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019), holding Finley, who was sentenced to life imprisonment with the possibility of parole after thirty years for a murder committed when he was seventeen years old, was not entitled to resentencing pursuant to <u>Miller</u> and <u>Aiken</u>, the state filed a second supplemental motion to dismiss Appellant's petition for resentencing. R. 107-108.

Appellant, only then becoming aware of the trial court's previous order denying his petition for resentencing, filed a post-trial motion to reconsider pursuant to Rule 29(a), SCRCrimP, on July 24, 2019. R. 109-115. Appellant argued his sentence was unconstitutional because it violates the requirements of <u>Miller v. Alabama</u> in that the parole board does not consider Appellant's youth and its attendant characteristics. R. 109. He further argued his sentence was the equivalent to life without parole and therefore violates the Eighth Amendment and Article I, Section 15 of the South Carolina Constitution. R. 110.

After a hearing, Judge Knie, by order filed November 25, 2019, denied Appellant's motion for reconsideration finding no basis upon which to modify her prior order. R. 151-153.

Discussion

The United States Supreme Court made clear that "children are constitutionally different from adults for purposes of sentencing." Miller v. Alabama, 567 U.S. 460, 471 (2012). In Miller, the Court continued the evolution of Eighth Amendment jurisprudence by extending the reasoning of Roper and Graham to hold that mandatory sentences of life without parole for juvenile homicide offenders also violates the Eighth Amendment's prohibition on cruel and unusual punishment. Miller, 567 U.S. at 465. However, the Court further explained that while the decision did not foreclose imposition of a sentence without the possibility of a parole on a juvenile convicted of a homicide offense, the Court required the sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 479.

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

Mandatory sentencing prevents the sentencer from considering the juvenile offender's "chronological age and its hallmark features, among them, immaturity, impetuosity, and failure to

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

Not long after the Court's opinion in Miller, our Supreme Court reviewed nonmandatory 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 Court held that Miller applied retroactively and to juveniles who were sentenced to nonmandatory 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 (internal quotations omitted). Our Supreme 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.

Important for Appellant's case, in Montgomery v. Louisiana, 136 S.Ct. 718 (2016), the United States Supreme Court explained that a state "may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." Montgomery v. Louisiana, 136 S.Ct. 718, 736 (2016). "Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." Id.

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

Id. As evidenced by the decision, extending parole eligibility to juvenile offenders convicted of homicide offenses must *not* be viewed as a panacea. In order for parole eligibility to remove a life sentence from the scope of Miller, parole considerations must include the Miller factors, specifically, accepting that "children who commit even heinous crimes are capable of change."

In other words, the nature of the crime *alone* must not prevent release in order for the parole scheme to comply with Miller and the Eighth Amendment's prohibition on cruel and unusual punishments.

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

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

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

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

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

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

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

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

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

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

In addition to the statutory provision, the Parole Board, exercising its regulatory authority, provides additional criteria considered by the Board when determining whether to grant or deny parole. These criteria may be found in the Parole Board Manual. The Parole

Board's objectives and mission are important for understanding its decision making process. According to the Parole Board Manual, the "Board's primary objective is the long-term protection of society." Policy and Procedure, South Carolina Department of Probation, Parole and Pardon Services, Division of Paroles and Pardons, 9 (April 2015), at https://www.dppps.sc.gov/content/download/68278/1576111/file/Parole+Board+Manual-+April+2015.pdf. 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." R. 84. Prisoners have the right to be heard, "fair written notice of the specific parole criteria," notice of the date, time and place of the hearing, right to be heard by a fair and impartial 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 offender's expense, and to written notice of the Board's reasons for denying parole. R. 84.

The Manual also sets forth the contents of the parole case summary report. R. 85. 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. R. 85. Finally, the Board established "specific parole criteria." R. 90-91. 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." R. 90. 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.

R. 91. Quite clearly, the Parole Board's considerations do not extend to any matters relative to the youth of the offender at the time of the commission of the offense. Eligibility for parole in South Carolina simply cannot "save" a life sentence from Eight Amendment scrutiny.

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 Constitution.

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 sentenced 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 five times without any consideration of the hallmarks of youth. Due to the Board's cursory, repeated denials of release and the statutory and regulatory procedures not incorporating the Miller factors or anything remotely close, there is an unacceptable likelihood that the nature of the crime alone, a fact that will never change, works to deny 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 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 1991, serving two decades in prison before becoming eligible for parole. Thereafter, he has been denied parole five times. At no time—not during the sentencing proceeding or 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 entitlement 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 quotation marks omitted). Appellant must be resentenced 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 trial court's order denying his motion for resentencing and remand his case for resentencing pursuant to Miller v. Alabama, 567 U.S. 460, 471 (2012) and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014).

Respectfully submitted,

s/ Lara M. Caudy____________
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of July, 2020.

RECEIVED
Jul 31 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable Grace Gilchrist Knie, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARNELL DAVIS,

APPELLANT.

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Carnell Davis states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's hearing, which was held on August 27, 2018 before the Honorable Grace Gilchrist Knie, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Carnell Davis.

This 31st day of July, 2020.

Respectfully Submitted,

s/ Lara M. Caudy____________
Appellate Defender

ATTORNEY FOR APPELLANT

RECEIVED
Jul 31 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable Grace Gilchrist Knie, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARNELL DAVIS,

APPELLANT.

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) *Pro Se* Affidavit of Facts Giving Judicial Notice filed November 19, 2015;
(2) Return to Defendant's Motion for Resentencing Filed February 28, 2018;
(3) State's Motion to Dismiss Petitioner's Motion for Resentencing Filed April 13, 2018;
(4) State's Supplemental Motion to Dismiss Petitioner's Motion for Resentencing Filed August 2, 2018;
(5) Memorandum of Defendant Filed August 27, 2018;
(6) Complete Hearing Transcript Dated August 27, 2018;
(7) Petitioner's Exhibit No. 1 (Letters);
(8) Petitioner's Exhibit No. 2 (4 CDs – Recordings of Parole Hearings);
(9) Petitioner's Exhibit No. 3 (Letter);
(10) Petitioner's Exhibit No. 4 (Parole Board Manual);
(11) Reply to Defendant's Memorandum Dated August 21, 2018;
(12) Order Denying Petitioner for Resentencing Filed October 10, 2018;
(13) State's Second Supplemental Motion to Dismiss Petitioner's Motion for Resentencing Filed July 19, 2019;
(14) Defendant's Post-Trial Motion to Reconsider Pursuant to Rule 29(a), SCRCrimP Filed July 24, 2019;
(15) State's Return in Opposition to Defendant's Post-Trial Motion to Reconsider Filed November 4, 2019;
(16) Complete Hearing Transcript Dated November 7, 2019;

(17) Order Denying Petitioner's Motion for Reconsideration Filed November 25, 2019;
(18) True-Billed Indictment;
(19) Sentence Sheet.

I certify that this designation contains no matter which is irrelevant to this appeal.

July 31, 2020

s/ Lara M. Caudy_________________
Appellate Defender

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ATTORNEY FOR APPELLANT

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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 31, 2020.

s/ Lara M. Caudy______________
Appellate Defender

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