STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH LEE BROWN,

APPELLANT.

APPELLATE CASE NO. 2020-000086

ANDERS BRIEF OF APPELLANT

LARA M. CAUDY
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ATTORNEY FOR 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 was sentenced to life imprisonment with the possibility of parole for nonhomicide offenses committed when he was only seventeen years old in violation of Graham v. Florida, 560 U.S. 48 (2010), Miller v. Alabama, 567 U.S. 460 (2012), and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014)?

STATEMENT OF THE CASE

A Spartanburg County Grand Jury indicted Appellant on January 17, 1983 for five counts of burglary, two counts of armed robbery, assault and battery with intent to kill, attempted armed robbery, first degree criminal sexual conduct, and three counts of grand larceny for conduct which allegedly occurred when Appellant was seventeen years old. R. 108-121. On January 28, 1983, Appellant pled guilty before the Honorable Paul M. Moore. Michael Rudasill represented Appellant. Judge Moore sentenced Appellant to five consecutive terms of life imprisonment, a consecutive twenty years for attempted armed robbery, and a consecutive ten years for assault and battery with intent to kill. R. 108-121.

On June 10, 2015, Appellant filed an application for post-conviction relief seeking a resentencing hearing pursuant to Graham v. Florida, 560 U.S. 48 (2010), Miller v. Alabama, 567 U.S. 460 (2012), and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). R. 1-14. The state filed a return and motion to dismiss on September 22, 2016 arguing Appellant's application should be dismissed as successive and untimely. R. 15-20. As to Appellant's claim that he was entitled to a resentencing hearing, the state argued the claim could not be "properly heard in a PCR action." R. 18. Rather, the state asserted Appellant must file a motion for resentencing in the Court of General Sessions pursuant to our Supreme Court's holding in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). R. 17-18.

By order filed December 30, 2016, the Honorable J. Mark Hayes, II dismissed Appellant's application with prejudice. R. 30-32. Appellant filed a *pro se* notice of appeal with the Spartanburg County Clerk of Court on January 3, 2017. R. 33. The notice of appeal was received by the Supreme Court on May 18, 2017. R. 33. By letter dated June 7, 2017, the Supreme Court requested Appellant file a written explanation pursuant to Rule 243(c), SCACR,

as to why the action was not barred as being successive and untimely as found by the circuit court. R. 34-35. On June 26, 2017, Appellant filed a *pro se* written explanation as requested arguing he was entitled to a resentencing hearing pursuant to Graham v. Florida, 560 U.S. 48 (2010), Miller v. Alabama, 567 U.S. 460 (2012), and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). R. 36-41. By order filed August 18, 2017, the Supreme Court dismissed Appellant's appeal holding Appellant failed to show there was an arguable basis for asserting the determination made by the circuit court was improper. R. 42.

Six days later, by order filed August 24, 2017, the Supreme Court held Appellant's application for post-conviction relief filed June 10, 2015, in which he sought a resentencing hearing pursuant to Aiken v. Byars, should be considered a timely motion for a resentencing hearing. R. 47. The order further vested the Honorable R. Keith Kelly with exclusive jurisdiction over Appellant's motion. R. 47.

On October 3, 2017, the state filed a return to Appellant's motion for resentencing. R. 48-49. By order filed October 11, 2017, Judge Kelly ordered Appellant's motion for resentencing be stayed until his release from federal custody. R. 57-58. According to the order, Appellant's projected release date from federal custody is February 10, 2058. R. 57. Appellant filed a motion to reconsider on October 17, 2017. R. 59-61. The state filed a return to the motion to reconsider on October 25, 2017. R. 62-64. By order dated July 25, 2018, Judge Kelly denied the motion to reconsider. R. 71.

On June 12, 2019, Judge Kelly appointed counsel to represent Appellant. R. 87-88. In the order, the judge stated the Supreme Court had recently lifted the stay previously issued by the judge and asked the judge to appoint an attorney to represent Appellant. R. 87.

On July 22, 2019, the state filed a supplemental motion to dismiss Appellant's motion for resentencing. R. 89-91. A hearing on Appellant's motion was finally held on December 17, 2019 before Judge Kelly. R. 92. Solicitor Barry Barnette represented the state, and Robin File represented Appellant. R. 92. Attorney File waived Appellant's presence at the hearing as Appellant remained in federal custody. R. 96, l. 22 – 97, l. 2.

By order filed January 14, 2020, Judge Kelly denied Appellant's motion for resentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). R. 102-107.

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 was sentenced to life imprisonment with the possibility of parole for nonhomicide offenses committed when he was only seventeen years old in violation of *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).

Relevant Facts

During the hearing, the solicitor argued Appellant was not entitled to resentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014) because he was sentenced to life imprisonment *with* the possibility of parole. R. 94, l. 20 – 95, l. 25. The solicitor emphasized that Appellant was released on parole on May 1, 2002. R. 95, ll. 2-3. Thereafter, Appellant was charged with numerous federal offenses related to several bank robberies in Florida. He was later convicted and sentenced for those offenses. Appellant in currently in federal custody in Florida with a projected release date of February 10, 2058. R. 95, ll. 6-13.

The solicitor distinguished this case from other cases in which a juvenile defendant was sentenced to life imprisonment with the possibility of parole and sought resentencing because Appellant, unlike those other defendants, was previously granted parole and released from incarceration. The solicitor argued, "This Defendant has been given parole. Therefore, he actually had his chance, was out, and obviously threw it away. He went and committed more crimes down in the state of Florida, and is serving his time for that, Your Honor. I believe they've actually filed a parole violation on him that will be taken care of . . . if he ever gets out of the Federal system." R. 96, ll. 1-10.

Based on this Court's opinion in State v. Finley, 427 S.C. 419, 831 S.E.2d 158 (Ct. App. 2019), the solicitor concluded Appellant was not entitled to resentencing pursuant to Aiken v. Byars. R. 96, ll. 11-15.

Counsel for Appellant conceded Appellant was previously granted parole. R. 98, ll. 22-23. However, he argued Appellant was entitled to resentencing because, pursuant to State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948), his sentence is excessive given that he was a juvenile at the time he allegedly committed his crimes and he had no prior record at the time. R. 98, l. 24 – 99, l. 13.

Judge Kelly ruled Appellant was not entitled to a resentencing hearing because the life sentence Appellant received for his burglary convictions is parole eligible. R. 104. The judge noted that under South Carolina law in 1983, one who received a life sentence for burglary was eligible for parole after ten years. R. 104. The judge further emphasized that Appellant was granted parole in 2002. R. 105. Based on the United States Supreme Court's holding in Montgomery v. Louisiana, 136 S.Ct. 718 (2016), this Court's holding in State v. Finley, 427 S.C. 419, 831 S.E.2d 158 (Ct. App. 2019), and our Supreme Court's holding in State v. Slocumb, 426 S.C. 297, 827 S.E.2d 148 (2019), Judge Kelly denied Appellant's motion for resentencing. R. 105-106.

Discussion

The Eighth Amendment to the United States Constitution, applicable to the states under the Fourteenth Amendment, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend VIII; U.S. Const. amend XIV; See also S.C. Const. art. I, § 15. The United States Supreme Court has found that because the words of the Eighth Amendment are not precise and their scope is not static, it "must

draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958).

The constitutional requirement for individualized consideration of mitigating and extenuating circumstances at sentencing began with American death penalty jurisprudence. In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court invalidated all then existing death penalty statutes, finding that they allowed for the arbitrary and capricious imposition of capital punishment. The Supreme Court struck down subsequent attempts by states to cure the defect through mandatory death penalty statutes, holding that "the fundamental respect for humanity underlying the Eighth Amendment, requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976); See also Roberts v. Louisiana, 428 U.S. 325 (1976); State v. Rumsey, 267 S.C. 236, 226 S.E.2d 894 (1976). However, the Court upheld Georgia's bifurcated scheme that separated the guilt and penalty phases of a capital trial because the jury's discretion was "controlled by clear and objective standards so as to produce non-discriminatory application." Gregg v. Georgia, 428 U.S. 153, 197-198 (1976). Of particular importance was the jury's consideration of mitigating evidence and extenuating circumstances. Id. Further, one of ten specific statutory aggravating circumstances had to be proved beyond a reasonable doubt and designated in writing before a death sentence could be imposed. Id. Before the state supreme court could affirm the death sentence, it had to consider whether the death sentence was the result of passion, prejudice, or other arbitrary factors, and conduct a proportionality review to determine whether it is disproportionate to the punishment usually imposed in similar cases. Id. at 204-06.

In the ensuing years, the Supreme Court imposed several categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty, reflecting its continued concern with proportionate punishment under the Eighth Amendment. In Thompson v. Oklahoma, 487 U.S. 815 (1988), a plurality of the Court prohibited the imposition of the death penalty upon a juvenile offender who was under the age of sixteen at the time of the offense. Later, the Court banned the imposition of the death penalty upon intellectually disabled defendants in Atkins v. Virginia, 536 U.S. 304 (2002), and upon offenders who commit nonhomicide crimes in Kennedy v. Louisiana, 554 U.S. 407 (2008).

Roper v. Simmons

The twenty-first century has seen continued development in the area of Eighth Amendment jurisprudence, especially with respect to juvenile offenders. In Roper v. Simmons, 543 U.S. 551 (2005), the United States Supreme Court categorically banned the imposition of the death penalty on juvenile offenders, who were under the age of eighteen at the time of the crime. The Court in Roper explained that "[c]apital punishment must be limited to those offenders who commit "'a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution.'" 543 U.S. at 568 (quoting Atkins, 536 U.S. at 319). The Court distinguished youthful offenders from those most deserving of execution based on their lack of maturity and underdeveloped sense of responsibility, their greater susceptibility to negative influences and outside pressures, and the transitory nature of their personality traits. Id. at 569-570. As such, a juvenile's conduct is not as morally reprehensible as that of an adult. Id. at 570.

Because of their diminished culpability, the Court observed that the penological justifications for the death penalty apply to youthful offenders "with lesser force than to adults."

Id. In rejecting the government's arguments against a categorical ban, the Court explained: "An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." Id. at 573. Thus, the Court held: "When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." Id. at 573-574.

Graham v. Florida

Six years later, in Graham v. Florida, 560 U.S. 48 (2010), the Supreme Court categorically banned the imposition of life without parole upon juvenile offenders who commit nonhomicide offenses. In addition to finding that a national consensus supported such a ban, the Court discussed whether such a categorical ban was necessary in the Court's "independent judgment." 560 U.S. at 62-68. Similar to its reasoning in Roper, the Court's conclusion was based upon the limited culpability of juvenile nonhomicide offenders, the severity of life without parole sentences, and the lack of any penological theory adequate to justify such a sentence. 560 U.S. at 68-75. "When compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." Id. at 69. Regarding severity, the Court noted that life without parole is the second most severe punishment permitted by law, and, like the death penalty, deprives the offender of his liberty "without giving hope of restoration." Id. at 69-70. For a juvenile, the Court found that a sentence of life without parole is "an especially harsh punishment" because "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." Id. at 70. While Graham does not require

a guarantee of release for a youthful offender convicted of a nonhomicide crime, such defendants must be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 71.

Miller v. Alabama

In 2012, the Court decided another seminal case in juvenile justice. In Miller v. Alabama, 567 U.S. 460 (2012), the United States Supreme Court held that the mandatory imposition of a life sentence without parole for youthful offenders was unconstitutional. The Court in Miller wrote, "Roper and Graham establish that children are constitutionally different from adults for purposes of sentencing." 567 U.S. at 471. The Court found that while Graham's flat ban on life without parole was for nonhomicide crimes, nothing that Graham said about children is crime specific. Id. at 473. Thus, the Court recognized that Graham's reasoning implicates any life without parole sentence for a juvenile, even as its categorical bar relates only to nonhomicide offenses. Id. "Most fundamentally, Graham insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." Id. The Court in Miller held that the mandatory penalty schemes at issue prevented the sentencer from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. Id. at 474. Such schemes contravene the foundational principle of Roper and Graham – "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." Id.

Thus, the Court held that a sentencer must have the opportunity to consider youth as a mitigating factor just as capital defendants must be afforded the opportunity to present mitigating factors for a sentencer's consideration. Id. at 476. The Court wrote further, "[G]iven all we have said in Roper, Graham, and this decision about children's diminished culpability and heightened

capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Id. at 479. "That is especially so because of the great difficulty we noted in Roper and Graham of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" Id. Thus, the Court ruled: "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it 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.

Aiken v. Byars

In Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), our Supreme Court held both that Miller was retroactively applicable and that Miller was applicable to juveniles who received a nonmandatory sentence of life without parole. In determining the breadth of Miller, the Aiken majority found that Miller "unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole" and "required an individualized sentencing proceeding before imposing a sentence of life without parole on a juvenile offender." 410 S.C. at 542, 765 S.E.2d at 576. The majority recognized that the Court in 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." Id. at 542, 765 S.E.2d at 576 (emphasis in original). However, the majority in Aiken held that there was a proportionality rationale integral to Miller's holding – youth has constitutional significance; as such, it must be afforded adequate weight in sentencing – which must be given effect. Id. at 542-43, 765 S.E.2d at 576. Thus, the Court wrote, "Miller does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative

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

The Court in Aiken acknowledged that life without parole sentences are still possible for juveniles in homicide cases. 410 S.C. at 543, 765 S.E.2d at 577. However, the Court held that Miller's requirement that the sentencing judge first "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" "deserves universal application." Id. To that end, the sentencing court must consider:

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

Id. at 544, 765 at 577 (internal quotations omitted) (citing Miller, 567 U.S. at 477-478). While the Court did not require the sentencing proceedings to mirror the penalty phase of a capital case, it found that "the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings," in addition to the Miller factors. Id. at 544-45, 765 at 577. The Court provided that "*any individual affected by our holding* may file a motion for resentencing within one year from the filing of this opinion in the court of general sessions where he or she was originally sentenced." Id. at 545, 765 S.E.2d at 578 (emphasis added).

Montgomery v. Louisiana

In Montgomery v. Louisiana, 136 S.Ct. 718 (2016), the United States Supreme Court set forth the true breadth of its decision in Miller. In ruling that Miller created a substantive rule of

constitutional law and applied retroactively, the Court in Montgomery explained that "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." 136 S.Ct. at 734 (internal quotations omitted).

The Court held, "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." 136 S.Ct. at 724 (internal citations and quotation marks omitted). Thus, the Court in Montgomery wrote, "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 quotation marks omitted). The Court concluded that Montgomery and other prisoners 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 736-737.

Notably, the specific issue before the Court in Montgomery was whether its holding in Miller was retroactive to juvenile offenders whose convictions and sentences were final when Miller was decided. 136 S.Ct. at 725. However, the Court went on to write—arguably as dicta—that "[g]iving Miller retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole." Id. at 736. Rather, the Court wrote, "A State *may* remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." Id. (emphasis added). "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. The Court further wrote, "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.

State v. Slocumb

In State v. Slocumb, 426 S.C. 297, 827 S.E.2d 148 (2019), our Supreme Court held Conrad Slocumb's one hundred and thirty year aggregate sentence for nonhomicide crimes committed when he was a juvenile did not violate the Eighth Amendment pursuant to Graham v. Florida, 560 U.S. 48 (2010) or Miller v. Alabama, 567 U.S. 460 (2012). While the majority acknowledged Slocumb's one hundred and thirty year sentence was a *de facto* life sentence, it concluded Graham only prohibited a sentence of *life without parole* for *a* nonhomicide offense. Id. at 309-310, 827 S.E.2d at 154-155. Given the United States Supreme Court's narrow holding in Graham, our Supreme Court refused to extend relief to Slocumb. Id. at 314-315, 827 S.E.2d at 157.

State v. Finley

In State v. Finley, 427 S.C. 419, 420-421, 831 S.E.2d 158, (Ct. App. 2019), Finley argued his mandatory sentence of life imprisonment with the possibility of parole upon the service of thirty years' imprisonment is the functional equivalent to a sentence of life imprisonment without the possibility of parole, which violates the Eighth Amendment's prohibition on cruel and unusual punishments, and therefore, he is entitled to resentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). Finley pled guilty to murder in

1993. Id. at 421, 831 S.E.2d at 159. Given the sentencing scheme in place at the time, the judge had no discretion in what sentence to impose. Id. at 422 n.2, 831 S.E.2d at 159 n.2. This Court held Finley was not entitled to resentencing pursuant to Miller and Byars. Id. at 427, 831 S.E.2d at 162. The Court concluded Finley's life with the possibility of parole sentence "differs significantly from those at issue in Graham, Miller, and Byars in which the juvenile offenders received sentences of life imprisonment *without* the possibility for parole." Id. (emphasis in original). The Court further emphasized that the United States Supreme Court indicated in Graham and Montgomery that a sentencing court may remedy any potential Eighth Amendment violations by permitting a juvenile offender to be considered for parole. Id. at 428, 831 S.E.2d at 162-163.

Appellant's Sentence is Unconstitutional Under the Eighth Amendment

Appellant's sentence of life imprisonment with the possibility of parole for nonhomicide offenses he allegedly committed when he was seventeen years old is unconstitutional under the Eighth Amendment pursuant to Graham v. Florida, 560 U.S. 48 (2010), Miller v. Alabama, 567 U.S. 460 (2012), and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). Miller established "an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." See Aiken, 410 S.C. at 543, 765 S.E.2d at 577. At the time of Appellant's sentencing in 1983, the judge failed to take into account how children are different and how those differences counseled against sentencing Appellant to life imprisonment. Consequently, the trial judge erred by refusing to grant Appellant's motion for resentencing.

Moreover, Appellant's life imprisonment sentence for nonhomicide crimes is excessive pursuant to State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948). As the United States Supreme Court exclaimed in Graham, "When compared to an adult murderer, a juvenile offender

who did not kill or intend to kill has a twice diminished moral culpability." 540 U.S. at 69. Appellant's lack of maturity and underdeveloped sense of responsibility at the age of seventeen and his "twice diminished moral culpability" demonstrate the excessiveness of his life imprisonment sentence for crimes he allegedly committed as a juvenile.

Respectfully, this Court should hold the trial judge erred by refusing to grant Appellant's motion for resentencing and remand for a resentencing hearing.

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 Graham v. Florida, 560 U.S. 48 (2010), 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 21st day of September, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH LEE BROWN,

APPELLANT.

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kenneth Lee Brown 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 December 17, 2019 before the Honorable R. Keith Kelly, and, in her opinion, the appeal is without legal merit sufficient to warrant a new hearing.

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

WHEREFORE, she asks the Court to relieve her as counsel for Kenneth Lee Brown.

Respectfully Submitted,

s/Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of September, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH LEE BROWN,

APPELLANT.

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) PCR Application filed June 10, 2015;
(2) Return and Motion to Dismiss filed September 22, 2016;
(3) *Pro Se* Motion to Grant Resentencing filed October 4, 2016;
(4) *Pro Se* Motion Requesting Order Granting Resentencing filed November 9, 2016;
(5) Final Order of Dismissal filed December 30, 2016;
(6) Pro Se Notice of Appeal filed January 3, 2017;
(7) Letter from Supreme Court dated June 6, 2017;
(8) *Pro Se* Rule 243(c), SCACR, Written Explanation filed June 26, 2017;
(9) Supreme Court Order Dismissing Appeal dated August 18, 2017;
(10) Remittitur dated September 6, 2017;
(11) *Pro Se* Petition for Rehearing filed September 22, 2017;
(12) Letter from the Supreme Court dated September 25, 2017;
(13) Supreme Court order dated August 24, 2017;
(14) Return to Defendant's Motion for Resentencing Dated October 3, 2017;
(15) Order Staying Motion for Resentencing filed October 11, 2017;
(16) Motion to Reconsider filed October 17, 2017;
(17) Return to Defendant's Motion for Reconsideration filed October 25, 2017;

(18) *Pro Se* Motion to Lift the Stay dated October 31, 2017;
(19) *Pro Se* Petition for a Speedy Trial filed December 11, 2017;
(20) Order Denying Motion to Reconsider dated July 25, 2018;
(21) *Pro Se* Motion to Dismiss Charges filed January 24, 2019;
(22) *Pro Se* Motion for a New Trial filed January 24, 2019;
(23) *Pro Se* Filing dated January 31, 2019;
(24) Order Appointing Counsel filed June 12, 2019;
(25) State's Supplemental Motion to Dismiss Petitioner's Motion for Resentencing filed July 22, 2019;
(26) Transcript of Hearing held December 17, 2019;
(27) Order Granting Respondent's Motion to Dismiss and Denying Petitioner's Motion for Resentencing filed January 16, 2020;
(28) True-Billed Indictments;
(29) Sentence Sheets.

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

September 21, 2020

s/ Lara M. Caudy
Appellate Defender

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ATTORNEY FOR APPELLANT

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."

September 21, 2020.

s/ Lara M. Caudy
Appellate Defender

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