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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case Number: 2018-001269

THE STATE.....*Respondent*,

v.

KENNETH LAMONT ROBINSON, JR. .....*Appellant*.

BRIEF OF JUSTICE 360 AS AMICUS CURIAE IN SUPPORT OF THE APPELLANT

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INTRODUCTION

On June 7, 2018, fifteen-year-old Kenneth Robinson was sentenced to spend fifty years in prison because he "was in a car from which a shot was fired[,] killing Kedena Brown."[1] Kenneth was not the person who shot Ms. Brown, and he told the actual killer, Richard Simmons, not to shoot Ms. Brown. Kenneth was charged with murder and transferred to the Court of General Sessions following a waiver hearing on the (false) assumption that he was the shooter. Kenneth maintained from the day of his arrest that Simmons was the person who fired the fatal shots, but Simmons initially insisted that Kenneth was the shooter. The Family Court judge waived Kenneth based on this conflicting information. The truth came to light only when Simmons failed a law enforcement–administered polygraph and finally admitted that he was the shooter. When Simmons' admission was disclosed, Kenneth's attorneys requested that his case be remanded to the Family Court for a new waiver hearing.[2] Judge Harrington, the same judge who imposed Kenneth's fifty-year sentence, refused to do so.[3] Despite his young age and his lesser role in the offense, Kenneth received a significantly longer sentence than either of the two adults in the car—including Simmons, who was sentenced to thirty years.

Data provided by the South Carolina Department of Corrections (SCDC) demonstrate that Black juveniles, like Kenneth, are waived into adult court at a consistently higher rate and receive consistently longer sentences than white juveniles. South Carolina's juvenile waiver process accounts for much of this disparity because it fails to protect the youngest defendants, particularly Black juveniles, and leaves them without procedural safeguards afforded to adults, placing the

[1] Sentencing Tr. 356.
[2] Trial Tr. 160–62.
[3] Trial Tr. 162–63.

youngest of the young at a disadvantage relative to adults. Though the United States and South Carolina Supreme Courts have recognized that juveniles are less blameworthy than adults,[4] South Carolina's sentencing and waiver processes effectively ignore this determination and allow courts to give Black juveniles long sentences that do not reflect their lesser culpability. Kenneth's disproportionately long sentence is representative of sentencing and waiver discrepancies between Black and white juveniles in South Carolina.

ARGUMENT

I. Kenneth's sentence is disproportionate to his offense and reflects systemic racial discrimination in juvenile sentencing in South Carolina.

A. *Kenneth's sentence illustrates discrepancies in sentence length between Black and white juveniles in South Carolina.*

When confronted with the question of whether a sentence violates the Eighth Amendment's proportionality requirement, the South Carolina Supreme Court assesses three factors: (1) the gravity of the offense compared to the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences for the same crime in other jurisdictions ("the results in similar cases"[5]).[6] In other words, the sentence must be proportionate to both the offense and the offender.[7] As set forth fully in the party briefs, Kenneth's sentence is proportionate to neither.

The disparity between Kenneth's sentence and the sentences of juveniles who commit more serious offenses reveal the sentencing discrepancies in South Carolina between Black and white

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[4] *See Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).
[5] *State v. Dickerson*, 395 S.C. 101, 124, 716 S.E.2d 895, 908 (2011).
[6] *State v. Jones*, 344 S.C. 48, 56, 543 S.E.2d 541, 545 (2001).
[7] *Miller*, 567 U.S. at 469; *Aiken*, 410 S.C. at 538–39, 765 S.E.2d at 574–75.

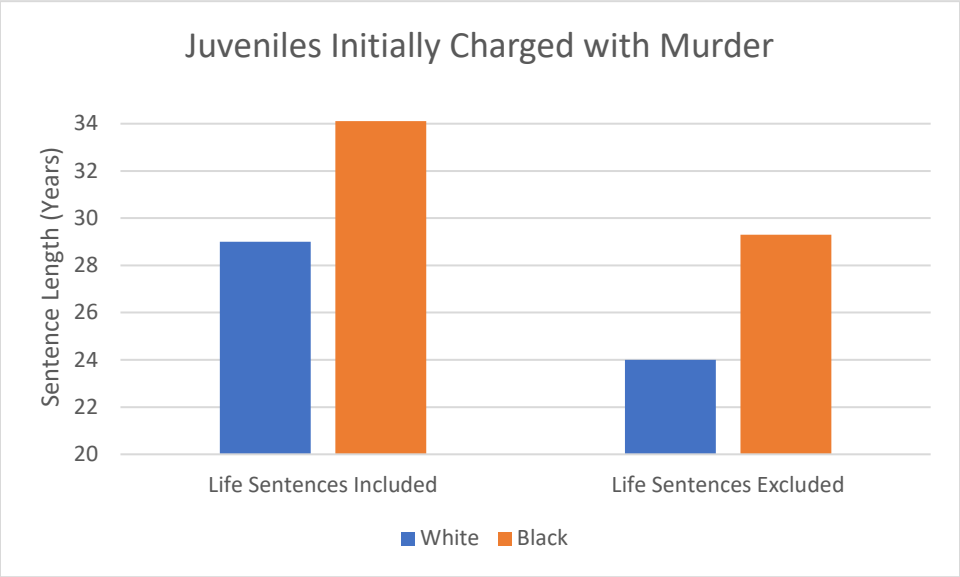
juveniles. South Carolina Department of Corrections (SCDC) data from 2005 to 2020 reveals that Black children charged with murder receive substantially longer sentences than white children charged with murder.[8]

Between 2005 and 2020, 185 juveniles in South Carolina were charged with murder.[9] Of those 185, 87 were ultimately convicted of murder.[10] Thirteen of those 87 received sentences of life without parole.[11]

Of the 185 who were initially charged with murder (including some who were ultimately convicted of lesser sentences), excluding the thirteen juveniles who received life sentences, the white juveniles received an average final sentence of 24 years.[12] Black juveniles charged with murder, however, received an average final sentence of 29.3 years, 5.3 years longer than their white counterparts.[13] If life sentences are included,[14] the racial discrepancy remains—white juveniles charged with murder receive an average sentence of 29 years, while Black juveniles charged with murder receive an average sentence of 34.11 years, a 5.11-year difference. Kenneth's fifty-year sentence far exceeds the average sentences for both white and Black juveniles charged with murder in South Carolina. Kenneth's sentence is 15.89 years longer than the average sentence

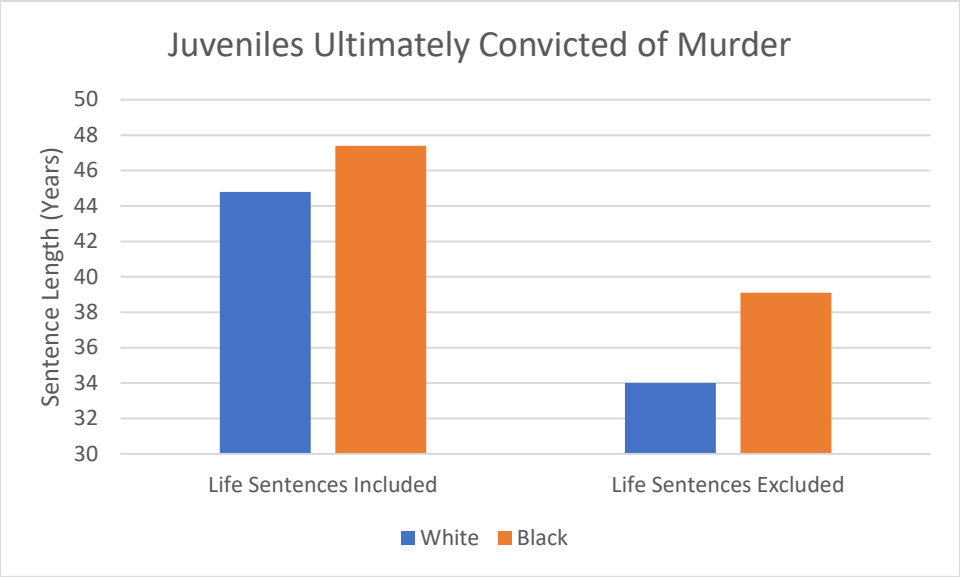
[8] SCDC Database of Juveniles Charged with Murder, 2005–2020 (on file with Justice 360).
[9] Of those 185, 146 (78.9%) were Black, 30 (16.2%) were white, 2 (1.1%) were Asian, and 7 (3.8%) were "other." *Id.*
[10] 72 of those 87 were Black (82.8%), and only 12 were white (13.8%). *Id.*
[11] *Id.* Two of those 13 juveniles were white, and ten (77%) were Black. This data focuses on juveniles who received life sentences for murder between 2005 and 2020, but a broader look at all SCDC inmates sentenced to life as juveniles is also illustrative of racial disparities. In total, there are 136 prisoners currently serving life sentences in SCDC who were sentenced to life as juveniles (109 were convicted of murder). Of the 136, 98 (73.7%) are Black and 35 (26.3%) are white.
[12] *Id.*
[13] *Id.*
[14] For purposes of statistical analysis, a life sentence is estimated to be a 99-year sentence. The database, however, did not include any juveniles with life with parole sentences, only juveniles with life without parole sentences.

of Black juveniles charged with murder in the state, and 21 years longer than of the average sentence of white juveniles charged with murder in the state—*almost twice as long*. This data is reflected in Table 1 below.



In considering only the 87 juveniles (82.8% Black) who were ultimately convicted of murder, including the 13 juveniles who received life sentences, a racial gap still exists. Black juveniles convicted of murder received an average sentence of 47.4 years, while white children received an average sentence of 44.8 years. When juveniles with life sentences are excluded, Black juveniles received an average sentence of 39.1 years, and white juveniles received an average sentence of 34 years, a 5.1-year difference. Even when juveniles with life sentences are included, Kenneth's fifty-year sentence is still longer than the average sentence given to either Black or white juveniles.[15] This data is reflected in Table 2 below.

[15] Similar discrepancies exist between Black and white juveniles' chances of receiving parole. In 2016, 370 juveniles in SCDC (people who were arrested as juveniles) received parole hearings. 280 (75.7%) of the juveniles were Black, 87 (23.5%) were white, and 3 (0.8%) were classified as "Other." 68 of those juveniles were granted parole (18.4%). 49 of the parolees were Black (72.1%)



The harshness of Kenneth's sentence becomes particularly evident when his sentence is compared to those of more culpable white defendants who received substantially shorter sentences. The following cases are particularly illustrative of racial disparities in South Carolina sentencing:

- Matthew Fischer, a sixteen-year-old white male charged with murder in Charleston County, was sentenced to eighteen years for voluntary manslaughter after he stabbed another teenager repeatedly in the gut in a fight over a girl.[16] Kenneth's sentence is almost *three times longer* than Fischer's.[17]

- James Smith, a seventeen-year-old white male sentenced in Union County, was convicted along with a co-defendant of shooting two men to death in their home,

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and 19 of the parolees were white (27.9%). In total, Black juveniles were paroled at a rate of 17.5%, while white juveniles were paroled at a rate of 21.8%. These data indicate that Black juveniles not only are incarcerated at higher rates than white juveniles and receive longer sentences, but they also are less likely to be paroled. In other words, Black juveniles are disadvantaged both coming into and getting out of SCDC. *See* SCDC Database of 2016 Parole Hearings (on file with Justice 360).

[16] Nick Krueger & Karina Bolster, *Mt. Pleasant Teen to Serve 18 Years in Deadly Stabbing Case*, WCSC (Nov. 29, 2017, 9:25 AM), https://www.live5news.com/story/36949016/mt-pleasant-teen-to-serve-18-years-in-deadly-stabbing-case/.

[17] Fischer's eighteen-year sentence was the result of a negotiated plea bargain. In Kenneth's case, the State refused to reduce the charge to voluntary manslaughter, as was done in Fischer's case, unless Kenneth agreed to plead to a negotiated sentence of twenty-three years—still five years longer than Fischer's.

pouring gasoline on their bodies, and burning their house down.[18] Smith ultimately received a sentence of thirty-eight years—twelve years shorter than Kenneth's.

- Jennifer McSharry, a seventeen-year-old white female sentenced in Anderson County, was arrested for an offense in which her role was similar to Kenneth's. McSharry waited outside in the car while one of her co-defendants shot the victim.[19] She was initially sentenced to life without parole, but at her post-*Aiken v. Byars* resentencing hearing, the court recognized that McSharry, like Kenneth, was not the shooter and sentenced her to thirty years.[20]

- Justin Conrad, a seventeen-year-old white male charged with murder in Greenville County, received a sentence of twenty-five years for voluntary manslaughter after shooting a fellow high school student to death in an elementary school playground.[21]

- Thomas Vanhoose Jr., a seventeen-year-old white male sentenced in Florence County, received a thirty-year murder sentence after robbing and shooting a man to death in his home with the victim's six-year-old son in the next room.[22]

- Jordan Principe, a seventeen-year-old white male sentenced in Horry County, was sentenced to twenty-five years—half of Kenneth's sentence—for shooting a college student five times in the head and neck over a disputed drug deal.[23] Principe's adult co-defendant was sentenced to fourteen years, in accordance his role as a non-shooter.[24] Kenneth's sentence is 3.5 times longer.

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[18] Tom Langhorne, *Union Teen-ager Gets Life Sentence*, GoUpstate (Jun. 5, 2001, 12:01 A.M.), https://www.goupstate.com/article/NC/20010605/News/605182256/SJ.

[19] Robert M. Dudek, *A Meaningful Opportunity for Release: Resentencing Hearings for Juvenile Sentenced to Life without Parole following* Aiken v. Byars, 68 S.C. L. Rev. 499, 507–08 (2017).

[20] *See* "The State of South Carolina VS Jennifer McSharry," https://publicindex.sccourts.org/Anderson/PublicIndex/CaseDetails.aspx?County=04&CourtAgency=04001&Casenum=1997GS0401691&CaseType=C&HKey=898269977111382671001027383494811189691156511111173498780121471119767905711448499774688119651035 6.

[21] "Killings," Greenville News, 5B, Saturday (Dec. 27, 2003), www.newspapers.com/image/195639653/.

[22] Traci Bridges, *Triggerman in Scranton Murder Gets 30-Year Sentence*, SCNow (Dec. 13, 2011), https://scnow.com/news/local/triggerman-in-scranton-murder-gets-30-year-sentence/article_172be993-bde8-5d94-9751-60e858dfb1a9.html.

[23] Kathy Ropp, *Principe Gets 25 Years in Death of CCU Student*, Horry News (Oct. 6, 2017), https://www.myhorrynews.com/news/crime/principe-gets-25-years-in-death-of-ccu-student/article_a5641da4-aaaf-11e7-9629-af0b8e41ef28.html.

[24] *Killer, Accomplice Sentenced to Jail for Shooting CCU Student in 2015*, WBTW 13 News (Oct. 6, 2017, 3:49 PM), https://www.wbtw.com/news/killer-accomplice-sentenced-to-jail-for-shooting-ccu-student-in-2015/918285375/.

While Black juveniles collectively receive longer sentences for murder than white juveniles, Kenneth's sentence still exceeds those of Black juveniles convicted of equally serious or more serious crimes. The following are just a few examples of Black juveniles who committed similar crimes but received shorter sentences than Kenneth:

- Terrell Smith, a seventeen-year-old sentenced in Charleston County, was convicted of both murder and attempted murder for breaking into the victim's bedroom and repeatedly stabbing and killing the victim while he was sleeping in his bed.[25] When the victim's father walked in on the assault, Smith attacked the father as well.[26] Smith was sentenced to thirty-five years.

- Brandon Glover, a seventeen-year-old Black male, was sentenced in Orangeburg County for voluntary manslaughter after he admitted to hitting the victim in the head before his cousin shot the victim.[27] Glover received a sentence of twenty-two years, less than half as long as Kenneth's.

- Julian Young, a seventeen-year-old Black male, was sentenced to thirty-five years in Orangeburg County for shooting the victim during a drug deal.[28]

B. *South Carolina juvenile sentencing follows a common pattern in which juveniles who appear more stereotypically Black receive more severe sentences on average than juveniles who appear stereotypically white.*

Extensive empirical research reveals that people with more stereotypically Black physical traits are perceived as more "criminal" and sentenced more harshly than people with more

[25] Dave Munday, *Police: Teen Stabbed Brandon Bennett While He Was Sleeping; Parents Thought They Were Friends*, The Post and Courier (Jul. 2, 2014), https://www.postandcourier.com/archives/police-teen-stabbed-brandon-bennett-while-he-was-sleeping-parents-thought-they-were-friends/article_cb97b46c-a47e-5040-9637-8f13ef70fcc3.html.
[26] *Id.*
[27] Kim Kimzey, *Jury Finds Man Guilty of Voluntary Manslaughter in Waffle House Death*, GoUpstate (Jun. 6, 2013, 6:40 PM), https://www.goupstate.com/article/NC/20130606/News/605136210/SJ.
[28] *Teen Gets 35 Years for Fatal Shooting at SC State*, Live 5 News (Aug. 17, 2012), https://www.live5news.com/story/19304906/teenager-gets-35-years-for-fatal-shooting/.

stereotypically white physical traits.[29] A study of death-sentenced inmates found that among Black defendants convicted of killing white victims, defendants who were perceived as more stereotypically Black were more likely to have received a death sentence than defendants who were perceived as less stereotypically Black.[30] Further, in a study of Florida inmates, "Afrocentric facial features were associated with sentence length, such that offenders who had equivalent criminal histories and came from the same racial group (Black or White) were given longer sentences the more Afrocentric their features."[31] Another study of Mississippi inmates determined that convicted inmates' "prison sentence increases with the darkness of skin hue."[32]

In South Carolina, SCDC assigns a "skin tone" to each inmate, ranging from "black" to "fair." SCDC data reveals that juveniles to whom SCDC assigns a darker "skin tone" receive more severe sentences than juveniles deemed lighter-skinned. Juveniles categorized with the darkest skin tones ("black" and "dark brown") received an average sentence of 30 years, while juveniles with the lightest skin tones ("light" and "fair") received an average sentence of 27.83 and 23.54 years, respectively.[33]

As illustrated by the graph below, juveniles categorized as having the darkest skin tones ("black," "dark," and "dark brown") received an average sentence of 29.69 years. Juveniles with "medium brown," "medium," and "light brown" skin tones received an average sentence of 27.15

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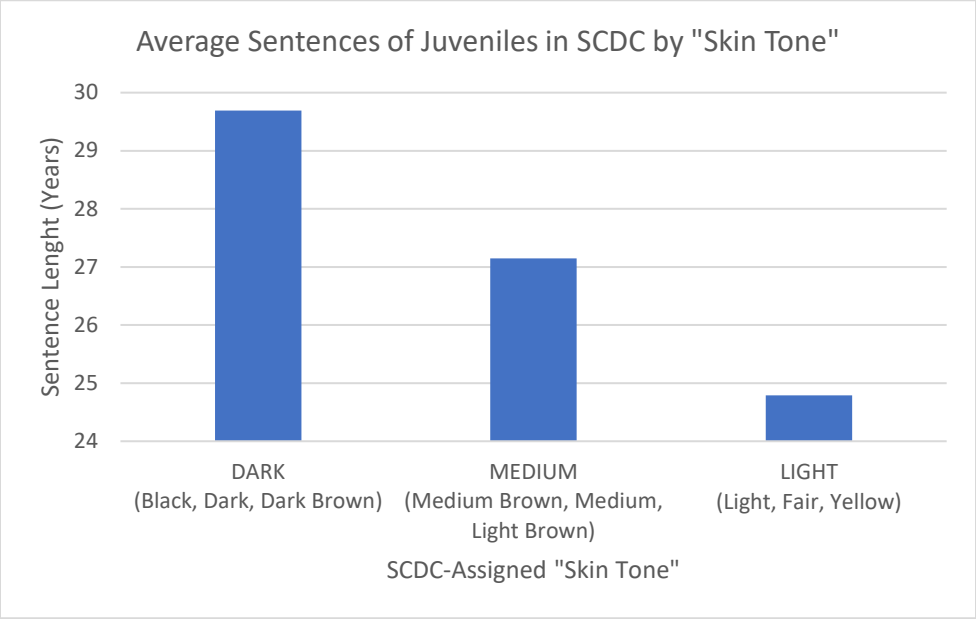
[29] Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 Psychol. Sci. 383, 383 (2006). In determining which defendants were considered more "stereotypically Black," raters were told that they could consider any number of features, including skin tone, hair texture, and facial features.
[30] *Id.* at 384.
[31] Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 Psychol. Sci. 674, 677 (2004).
[32] Kwabena Gyimah-Brempong & Gregory N. Price, *Crime and Punishment: And Skin Hue Too?*, 96 Am. Econ. Rev. 246, 249 (2006).
[33] SCDC Database of Juveniles Charged with Murder, 2005–2020.

years. Finally, juveniles with the lightest skin tones ("light brown," "fair," and "yellow") received an average sentence of 24.79 years. This data is illustrated in Table 3 below.



Ultimately, a variety of factors, including his race, worked against Kenneth to result in a disproportionately long sentence. SCDC assigned Kenneth a "dark brown" skin tone, and his sentence was 21 years longer than the average sentence given to juveniles with "dark brown" skin (29.07 years) and 26 years longer than the average sentence given to juveniles with a "fair" skin tone (23.54 years).[34] In light of the fact that Kenneth was not the shooter and tried to convince Richard Simmons not to kill Kedena Brown and the far more lenient sentences given to both white and Black juveniles who commit similar crimes, Kenneth's fifty-year sentence is grossly disproportionate to his offense.

[34] *Id.*

II. Kenneth's sentence is a product of a waiver process that systemically produces disproportionate sentencing for the youngest of the young.

A. *In light of recent developments in law and science, South Carolina's waiver process is no longer adequate to protect the youngest defendants.*

The waiver process was designed to protect the youngest of the young, but since the process's inception, social science, neuroscience, and a sea change in juvenile sentencing law have rendered South Carolina's system outdated. South Carolina family courts make waiver determinations based on the eight outdated factors that the United States Supreme Court first outlined in *Kent v. United States* and adopted by the South Carolina Supreme Court and South Carolina family courts:[35]

(1) The seriousness of the alleged offense to the community and whether the protection of the community requires waiver;

(2) Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;

(3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted;

(4) The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney);

[35] *See, e.g.*, *State v. Avery*, 333 S.C. 284, 289, 289 n.3, 509 S.E.2d 476, 479, 479 n. 3; *State v. Kelsey*, 331 S.C. 50, 64–65, 65 n.4, 502 S.E.2d 63, 70, 70 n.4 (1998).

(5) The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia;

(6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living;

(7) The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions; and

(8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Kent v. United States, 383 U.S. 541, 566–67 (1966); *State v. Pittman*, 373 S.C. 527, 588, 647 S.E.2d 144, 160 (2007) (adopting the *Kent* factors to determine whether transfer is in the best interest of the child). While the *Kent* factors were originally designed to protect juveniles, the considerations of *Kent* have not withstood the test of time. Social science, neuroscience, and the findings of the U.S. Supreme Court have disproven the relevance of the *Kent* factors.

The sea change in sentencing law that renders the *Kent* factors obsolete began with *Roper v. Simmons*, 543 U.S. 551 (2005), when the U.S. Supreme Court determined that sentencing juveniles to death was cruel and unusual. Protection for juveniles continued to expand with *Graham v. Florida*, 560 U.S. 48 (2010), in which the Court barred life-without-parole sentences for juveniles who commit non-homicide offenses, and *Miller v. Alabama*, 567 U.S. 460 (2012),

which banned mandatory life-without-parole sentences for juveniles convicted of homicide offenses. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (giving *Miller* retroactive application) and *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d5 72 (2014) (applying *Miller* retroactively to all juvenile offenders in South Carolina serving life-without-parole sentences) completed the process of judicially recognizing that youth deserves special sentencing consideration.

Since *Kent*, South Carolina courts have adhered to the *Kent* factors as they were developed, but the legal view of juvenile culpability has changed significantly enough that the factors, by the new legal and scientific standards, no longer do enough to protect children. Importantly, South Carolina courts have interpreted the waiver statute to overemphasize the nature of the offense to the exclusion of all other factors, ignoring both scientific and legal findings that youth must be considered in sentencing.[36] The waiver statute explicitly provides that a child's eligibility for waiver should be determined largely on the basis of the child's alleged crime—making the seriousness of the alleged offense the single most important factor in a transfer decision.[37] By establishing that the nature of the offense is the sole, or at least most significant, consideration in deciding whether a child can be treated as an adult for culpability and sentencing purposes, the transfer process ignores other factors that the South Carolina and United States Supreme Courts have acknowledged make children different from adults, as a matter of constitutional law: their underdeveloped brains, diminished culpability, capacity for reform, vulnerability to environmental and peer pressures, and inability to assist in their own defense and appropriately calculate risks.

[36] *See, e.g.*, *State v. Corey D.*, 339 S.C. 107, 118, 529 S.E.2d 20, 26 (2000); *State v. Avery*, 333 S.C. 294, 292, 509 S.E.2d 476, 481 (1998).
[37] S.C. Code Ann. § 63-19-1210; *see also, e.g.*, *Corey D.*, 339 S.C. at 118, 529 S.E.2d at 26; *Avery*, 333 S.C. at 292, 509 S.E.2d at 481.

In short, the considerations of *Kent* have become too narrow in light of recent social science, neuroscience, and U.S. Supreme Court findings.

In the fifty-plus years that have passed since the *Kent* decision, scientific understanding of both juvenile brain development and the effect of neurobiology on culpability has changed dramatically. In recognition of that change, the Supreme Court has determined that juvenility must be given special sentencing consideration. Consequently, post-*Miller*, several states have jettisoned strict adherence to the *Kent* factors recognizing that juveniles must now be treated with greater solicitude. Since 2011, seven states—Arizona, Indiana, Nevada, Missouri, Ohio, Vermont, and Wisconsin—limited their transfer and waiver criteria to create a broader array of options for juvenile courts to handle youth and leave the adult system for only the most serious offenders.[38] Further, 2014 laws in California, Maryland, and Nebraska also require juvenile court judges to take into account factors such as physical and mental health when considering transfer—two factors not included within *Kent*'s framework.[39]

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[38] Sarah Alice Brown, *Trends in Juvenile Justice State Legislation 2011-2015*, National Conference of State Legislatures 4 (Sept. 2015), https://www.ncsl.org/documents/cj/Juvenile_Justice_Trends.pdf. Several of these states had previously adopted the *Kent* factors and expanded them in recognition that the *Kent* factors exclude key components that are crucial to a determination of the impact of juvenility. For example, Arizona mandates that courts consider, among other factors, a juvenile's mental and emotional condition. Ariz. Rev. Stat. Ann. §8-327 (2019). Idaho requires courts to consider a juvenile's "home, environment, emotional attitude, and pattern of living" in determining the juvenile's maturity. Idaho Code § 20-508(8) (2019). Wisconsin has established that courts must look at "the personality of the juvenile, including whether the juvenile has a mental illness or developmental disability, the juvenile's physical and mental maturity, and the juvenile's pattern of living, prior treatment history, and apparent potential for responding to future treatment," an expansion of *Kent*'s simple requirement that a court consider the juvenile's maturity and prospects for rehabilitation. Wis. Stat. § 938.18(5)(a) (2008).

[39] Brown, *Trends in Juvenile Justice State Legislation* at 5.

The South Carolina waiver process is intended to serve as a procedural backstop to ensure that the Supreme Court's mandates are followed—that is, that children are not treated like adults.[40] In practice, however, it fails that purpose because it continues to base waiver decisions on the *Kent* factors, the basis for which has been eroded by the Supreme Court's decisions in the past thirty years. While courts and legislatures in other states have adopted procedures for children that align with the Eighth Amendment's "children are different" maxim—specifically, procedures to determine which children should be subjected to the most severe punishments—the South Carolina transfer process has not changed since *Kent* was decided in 1966. The transfer process still allows children as young as fourteen to be sent to adult prison solely on the basis of their offense, and there is no minimum age for transferring a child charged with murder.[41]

B. *Due to various failures of the waiver process, juveniles across South Carolina are continually subjected to the most severe sentencing outcomes.*

"[T]here may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[42] Despite *Kent*'s attempt to remedy this problem, the statement remains accurate in South Carolina. The transfer system is failing to correctly identify those who deserve lesser sentences, and the adult court system subsequently fails to distinguish less culpable juveniles from more culpable adults. The reality is that for juveniles charged with murder, the younger the

[40] *See State v. Pittman*, 373 S.C. 527, 558–59, 647 S.E.2d 144, 160 (2007).
[41] S.C. Code Ann. § 63-19-1210; *State v. Corey D.*, 339 S.C. 107, 118, 529 S.E.2d 20, 26 (2000) (holding that a child accused of murder can be transferred regardless of age).
[42] *Kent v. United States*, 383 U.S. 541, 556 (1966). Various constitutional protections that are granted to adults are not available to children at waiver hearings. For example, hearsay is admissible, and the protection against double jeopardy does not apply—the prosecution may try repeatedly to waive children into adult court.

defendant, the harsher the sentence.[43] Of juveniles charged with murder who have been sentenced with at least one adult co-defendant in South Carolina since 2005, 66.3 percent of them received the harshest sentence that was handed down to any codefendant.[44]

The waiver process all but ensures that the youngest codefendants will be exposed to the most severe sentencing outcomes for three reasons. First, hearsay is admissible at the waiver proceedings, which decreases their reliability. Second, the desire to try all co-defendants in one venue means that initial police and prosecutorial investigations are focused on the youngest co-defendant. Finally, juveniles who are improperly transferred have virtually zero avenues of appellate relief.

1. Hearsay is admissible at waiver hearings.

Under-protective procedural rules governing waiver hearings prejudice children in a variety of ways. The rules of evidence do not apply to waiver hearings in family court, which are considered analogous to preliminary hearings in general sessions court.[45] "This informal atmosphere has become a breeding ground for the deprivation of a substantial number of procedural and evidentiary safeguards usually accorded a defendant in a criminal prosecution."[46] As a result, a prosecutor can build a case for waiver based primarily on hearsay—including self-

[43] SCDC Database of Juveniles Charged with Murder, 2005–2020 (with codefendant data added) (on file with Justice 360).
[44] *Id.*
[45] *See United States v. SLW*, 406 F.3d 991, 995 (8th Cir. 2005); Rule 104, SCRE (rules of evidence do not apply to preliminary matters); Rule 1101, SCRE (rules of evidence do not apply to "preliminary hearings in criminal cases"); Monica Franklin Hill, Annotation, *Applicability of Rules of Evidence to Juvenile Transfer, Waiver, or Certification Hearings*, 37 ALR 5th 703 (1996) (collecting cases).
[46] *Juvenile Waiver Hearings and the Hearsay Rule—The Need for Reliable Evidence at the Critical Stage*, 12 Val. U. L. Rev. 397, 397 (1978).

serving statements from older codefendants.[47] Further, admitting hearsay evidence skews the waiver analysis because one of the *Kent* factors is the "prosecutive merit of the complaint," i.e., the strength of the evidence. If the strength of the evidence is to be taken into account in a waiver decision, the only evidence considered should be evidence that could be admitted at trial.

A waiver hearing is far too important to base a case for waiver on evidence otherwise inadmissible in court.[48] The consequences for children who are transferred out of juvenile court are severe: In addition to receiving longer sentences—often longer than adults would receive for the same crime[49]—juveniles lose their chance to take advantage of the rehabilitative programs offered by the Department of Juvenile Justice, and the community subsequently loses "a potentially productive citizen."[50] In short, "[t]he decision to transfer a minor is too important for a judge to rely solely upon hearsay."[51]

The admissibility of hearsay evidence was particularly harmful to Kenneth. The argument for Kenneth's waiver was based largely on Richard Simmons' false statements that Kenneth was the shooter, and that Kenneth had encouraged Simmons to chase the car. Kenneth himself quickly told investigators the truth—that he had been in the car while Simmons shot Ms. Brown. The prosecution, however, chose to believe Simmons over Kenneth, and only believed that Kenneth was telling the truth after Simmons failed a polygraph test and admitted that Kenneth was not the

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[47] *See, e.g.*, *State v. Robinson*, 15-JU-10-511-515, Transcript of Waiver Hearing (July 11–12, 2016).
[48] *See, e.g.*, *Kent*, 383 U.S. at 554 (stressing the "tremendous consequence" of the waiver hearing as a "critically important" step in the process of juvenile adjudication).
[49] Stacey Sabo, Note, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction*, 64 Fordham L. Rev. 2425, 2432 n. 50 (1996).
[50] *Juvenile Waiver Hearings and the Hearsay Rule—The Need for Reliable Evidence at the Critical Stage*, 12 Val. U. L. Rev. 397, 406 (1978).
[51] Thomas F. Geraghty & Will Rhee, *Learning from Tragedy: Representing Children at Discretionary Transfer Hearings*, 33 Wake Forest L. Rev. 595, 637 (1998).

shooter. If Simmons' false hearsay statements had not been admitted, at the very least, they would not have influenced the Family Court judge's decision of whether to transfer Kenneth.

2. Because of the desire to try all co-defendants in one venue, the initial police and prosecutorial investigation are focused on the youngest co-defendant.

The *Kent* factors require consideration of the "desirability of trial and disposition of the entire offense in one court."[52] This factor skews the waiver analysis against the most vulnerable juveniles who are charged along with older co-defendants. "It neglects the circumstances of the homicide offense, including the extent of [the child's] participation in the conduct and the way . . . peer pressures may have affected him," as well as the child's inability "to extricate [himself] from horrific, crime-producing settings."[53] Holding a child accountable in adult court based on allegations that he was drawn into criminal conduct by adult co-defendants is to punish a child for his juvenility, which the Eighth Amendment prohibits.[54]

When the desire to try all co-defendants in one venue is a driving consideration, initial police and prosecutorial investigations become focused on the youngest co-defendant. The prosecutorial goal in taking this factor into account is to find juvenile co-defendants *more* culpable so that they can be waived into adult court. An investigation of a juvenile defendant with the goal of finding reasons to move that juvenile out of family court directly contravenes the Supreme Court's repeated mandates that youth be considered as a factor that diminishes culpability.

Like the hearsay issue, the presumption that all defendants should be tried in the same court harmed Kenneth. At Kenneth's initial waiver hearing in 2016, at which he was transferred to adult court on the presumption that he was the shooter, Judge Cate explicitly determined that "it would

[52] *Pittman*, 373 S.C. at 559, 647 S.E.2d at 160 (citing *Kent*, 383 U.S. at 567).
[53] *Miller*, 567 U.S. at 471, 477.
[54] *See id.* at 478–79.

be desirable for the trial of all of the Defendants to take place in one court" because of Simmons' and Kenneth's differing statements regarding who the shooter was. After Simmons finally admitted that he had been lying and Kenneth was not the shooter, Kenneth's attorneys requested that the case be remanded to family court for another waiver hearing because Kenneth had been waived up on the presumption that he was the shooter. However, the trial judge refused to even consider the extent to which the new evidence of Kenneth's diminished culpability bore on the transfer order.

3. The lack of meaningful appellate and post-conviction remedies means that a child who is improperly transferred has no realistic opportunity to correct an erroneous transfer decision.

The transfer statute gives the state an automatic right to appeal the family court's decision not to waive a child into adult court; that motion is reviewed under the abuse-of-discretion standard described in *State v. Corey D.*[55] A child who is waived may file a motion for remand, but unless the child can identify newly discovered evidence or establish that the family court failed to make findings on the *Kent* factors, the child's motion will be denied.[56] In Kenneth's case, his motion to remand was denied *in spite of* his presentation of compelling newly discovered evidence (Simmons' admission that he had lied and Kenneth was not the shooter). In other words, a child who is improperly transferred has no realistic opportunity to have the transfer determination reviewed on appeal, even though the state has a statutory right to seek appellate review.

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[55] *See* S.C. Code Ann. § 63-19-1210(6); *Corey D.*, 338 S.C. at 118–19, 529 S.E.2d at 26 (finding that the family court abused its discretion when it denied the state's motion to waive a twelve-year-old into general sessions court because "the heinousness of these particular crimes is beyond dispute" and because "there was probable cause to believe [the child] participated actively in all aspects of the crimes").

[56] *See* S.C. Code Ann. § 63-19-1210(3); *Kelsey*, 331 S.C. at 64–66, 502 S.E.2d at 70–71 (affirming the denial of a remand motion because "the family court's hearing was extensive" and the transfer order "was detailed").

Similarly, a child who is improperly transferred as a result of a constitutional defect in his transfer hearing has no access to post-conviction relief. The family court has jurisdiction to remand a child to DJJ's custody for an indeterminate sentence "not extending beyond the twenty-second birthday of the child," and the family court loses jurisdiction to hear cases involving children who are over eighteen years old.[57] A child who is waived into general sessions court is unlikely to have his trial and direct appeal resolved before his twenty-second birthday, meaning that by the time an improperly transferred child receives post-conviction relief, he will have aged out of the juvenile system and the family court will lack jurisdiction to hear his case.[58] There is no post-conviction remedy for a child who receives a constitutionally inadequate waiver hearing. In short, the procedure available to a child at a waiver hearing is insufficient to ensure that the child receives an accurate waiver determination, and as discussed below, these procedural deficiencies are more likely to harm Black juveniles than white juveniles.

C. *The inadequate protections of South Carolina's waiver process are disproportionately likely to harm Black juveniles.*

The risk that a child will be improperly waived to adult court is higher for children of minority racial groups, and South Carolina's current transfer statute provides no safeguards against this racial disparity. Black children in particular are consistently more likely to be transferred than white children.[59] In South Carolina, 896 of 1,139 current SCDC inmates who were sentenced as juveniles are Black.[60] In contrast, just 217 of those children were white—only 19%.[61] Minority youth are more likely to be viewed as "disrespectful troublemakers" or as having a "criminal-like

[57] S.C. Code Ann. § 63-19-1440(A), (B).
[58] *See id.*
[59] SCDC List of Currently Incarcerated Inmates Sentenced as Juveniles (on file with Justice 360).
[60] *Id.*
[61] *Id.*

demeanor," particularly in a criminal context, which may contribute to the higher rate at which minority youth are transferred.[62] Even if judges do not specifically intend to single out minority youth as more deserving of adult treatment, implicit racial bias nonetheless affects judges' transfer decisions.[63] The current transfer process fails to address implicit racial bias, encourage judges to be aware of their own biases and mindful of the racial disproportionalities among transferred children, or establish safeguards against racially biased transfer decisions.

CONCLUSION

Kenneth Robinson's disproportionate sentence is an extreme example of the consistent sentencing discrepancies between the sentences of Black and white juveniles in South Carolina. Black juveniles are more likely to be treated harshly at every stage of the juvenile justice system: They are both more likely to be transferred to adult court and more likely to receive a longer sentence than their white counterparts. Severe sentencing and erroneous waiver decisions are disproportionately likely to harm Black children.

The juvenile waiver process in South Carolina has punished innumerable children with draconian sentences, and repeatedly fails to identify juveniles like Kenneth who do not deserve long sentences. As a result, juveniles frequently receive sentences at least as long as or longer than those of their more culpable adult co-defendants. This process directly contravenes the U.S. and South Carolina Supreme Courts' determinations that juvenility and its lesser culpability mitigate in favor of lesser sentences. A fifty-year prison sentence—twenty years longer than the sentence

[62] Amanda NeMoyer, Kent *Revisited: Aligning Judicial Waiver Criteria with More Than Fifty Years of Social Science Research*, 42 Vt. L. Rev. 441, 467 (2018).
[63] Becky Tatum, *Trying Juveniles as Adults: A Case of Racial and Ethnic Bias?*, in *Racial Issues in Criminal Justice: The Case of African-Americans* 159–75 (2003) (suggesting that a judge's transfer decision may be prejudiced by unconscious biases formed as a result of media, direct contact with a racial or ethnic group, or class differences).

of the actual shooter—for a fifteen-year-old must surely violate the principle that "the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008). We urge this Court to vacate Kenneth's sentence as unconstitutional under the Eighth Amendment.

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