STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Jun 16 2022

S.C. SUPREME COURT

Appeal from Clarendon County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JON PAUL SMART,

APPELLANT

APPELLATE CASE NO. 2021-000987

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the Court of Appeals erred in affirming Petitioner's sentence of life without parole for an offense committed as a juvenile after a resentencing hearing where the trial court placed the burden of proof on Petitioner, since the burden of proof should be on the State to show a life sentence was proper?

STATEMENT

On May 25, 2001, Petitioner pleaded guilty before the Honorable Kenneth Goode to murder, armed robbery, grand larceny of a motor vehicle, criminal conspiracy and escape; offenses which occurred on August 12, 1999. R. 1; R. 401 – 403. On August 9, 2001, the Honorable Thomas W. Cooper, Jr., sentenced Petitioner to imprisonment for life without the possibility of parole for murder. Petitioner received concurrent sentences of ten years for grand larceny, five years for criminal conspiracy, fifteen years for escape, and thirty years for armed robbery. R. 404; R. 25; R. 148, ll. 2-11; R. 167, ll. 3-22.

On May 26, 2016, Petitioner moved for resentencing pursuant to *Miller v. Alabama*,[1] *Roper v. Simmons*,[2] *Graham v. Florida*,[3] and *Aiken v. Byars*.[4] R. 181 – 182. This Court issued an order vesting the Honorable D. Craig Brown with jurisdiction over Petitioner's motion for resentencing. R. 183. On May 24, 2017, a resentencing hearing was held. R. 288, ll. 7-8. R. 184, 1. On August 10, 2017, the court resentenced Petitioner to life in prison without the possibility of parole. R. 388, ll. 17-24; R. 404. The Court of Appeals affirmed in a published opinion, *State v. Jon Smart*, Op. No. 5830 (S.C. Ct. App. Filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 18). Petitioner moved for rehearing and the State made its return. The Court of Appeals denied rehearing. Petitioner sought a writ of certiorari to the Court of Appeals on four issues, and this Court granted certiorari as to the first issue but denied certiorari as to the remaining three issues.

This brief of petitioner follows.

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1 *Miller v. Alabama*, 567 U.S. 460 (2012).

2 *Roper v. Simmons*, 543 U.S. 551 (2005).

3 *Graham v. Florida*, 560 U.S. 48 (2010).

4 *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Vick*, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009) (quoting *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is "bound by the trial court's factual findings unless they are clearly erroneous." *Id.* (quoting *Wilson*, 345 S.C. at 5-6, 545 S.E.2d at 829). "A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

STATEMENT OF FACTS

Petitioner was sixteen years old when he was charged with murder for beating Tracey Pack (Decedent) to death with a pipe. R. 401 – 403. In 2001, to avoid the death penalty, Petitioner pleaded guilty to murder, armed robbery, grand larceny of a motor vehicle, criminal conspiracy, and escape, and he was sentenced to imprisonment for life without the possibility of parole for murder and term-of-years sentences for the other offenses. R. 167, ll. 3-23; R. 354; R. 401 – 404.

Petitioner routinely abused inhalants and other drugs, and he was diagnosed with "polysubstance dependence" by the Department of Juvenile Justice (DJJ) prior to committing these offenses. R. 220, ll. 1-8; R. 211, ll. 8-25. Petitioner was at the Rimini Marine Institute in DJJ's custody for burglary when he committed the murder. R. 151, ll. 3-6; R. 220, ll. 1-8. Petitioner's codefendant, Stephen Hutto, was also at Rimini. R. 112, l. 13. Rimini was attached to a chicken farm owned and operated by the Pack family. R. 31, ll. 10-15.

As part of their DJJ placement, Petitioner and Hutto worked in the Packs' chicken houses, where they were supervised by Decedent. R. 32, l. 4 – 33, l. 4. Petitioner continued to huff (inhale fumes from) gasoline while in DJJ custody. R. 243, ll. 18-23; R. 226, l. 16 – 227, l. 4. A day or two before Decedent was killed, Petitioner and Hutto were huffing gasoline stolen from a generator when Hutto suggested they kill Decedent and take his truck. R. 64, ll. 9-15. There was additional evidence the murder was planned. R. 54, l. 10 – 55, l. 24; R. 62, ll. 7-17.

The day of Decedent's death, Petitioner was again huffing gasoline at the chicken houses. R. 65, l. 25 – 66, l. 1. Hutto gave Petitioner a metal pipe and he urged Petitioner to use it to hit Decedent. R. 65, l. 25 – 66, l. 16. Petitioner hit Decedent in the head and bludgeoned him to death. R. 66, ll. 17-18; R. 33, l. 22 – 34, l. 4. Hutto and Petitioner hid Decedent's body and the

two went on to commit more crimes, including the armed robbery of a dollar store, before they were arrested in Myrtle Beach. R. 66, l. 19 – 70, l. 5; R. 22, ll. 16-19. According to the solicitor, "Hutto was the brains, [Petitioner] was the muscle." R. 108, ll. 16-17.

Petitioner was granted resentencing pursuant to *Miller*, *Roper*, *Graham*, and *Aiken*, *supra*, on the murder. R. 181 – 184. At an evidentiary hearing on May 24, 2017, the Honorable D. Craig Brown received evidence from two defense witnesses (David Price, a forensic psychologist, and Petitioner's sister, Tammy Smart) and three prosecution witnesses (Thomas Burgess, a former police investigator, and Joe and Andy Pack, Decedent's brothers).

According to David Price, an expert in clinical psychology, Petitioner came from a family with a "drug culture," where his parents abused marijuana, cocaine, crack cocaine, and methamphetamine. R. 205, l. 12 – 206, l. 25; R. 322; R. 212, l. 1. Dr. Price explained Petitioner "lived in an impoverished environment in which a lot of the income went to purchase drugs. There were violent family arguments between his parents over when drugs ran out. His responsibility was to go score more drugs." R. 208, ll. 1-6. Petitioner's parents modeled "dishonest and unlawful behavior and [he had] just a lack of basic parental supervision." R. 212, ll. 8-10.

Dr. Price opined Petitioner's substance abuse at the time of the offense was related to his home life. R. 211, ll. 16-25. Dr. Price told the court that although Petitioner was chronologically sixteen years old at the time of the offense, he was cognitively "much younger." R. 207, ll. 11-15. Dr. Price diagnosed Petitioner with "a neuro-cognitive disorder to reflect a frontal lobe dysfunction." R. 209, ll. 17-19. He explained, "when you do a substantial amount of drugs, particularly early, it [a]ffects the functioning of the frontal lobes and it directly affects

impulsivity, aggressiveness, poor judgment, failure to appreciate the consequences of your action." R. 209, ll. 2-7; R. 213, ll. 3-6; R. 215, ll. 5-16.

Dr. Price determined that the attack on Decedent was "influenced by [Petitioner's] instant drug use superimposed on the organic damages secondary to his years of drug usage on a developing brain, and specifically his frontal lobes." R. 348. Dr. Price told the court that Petitioner's huffing and neurocognitive disorder "certainly predispose[d] him to act impulsively without concern for the consequences of his actions." R. 212, ll. 11-19. He further explained that the confluence of these circumstances caused Petitioner to "act without regard for others" and resulted in "primitive" behavior. R. 213, ll. 7-10. Dr. Price explained Petitioner had a reduced capacity to conform his conduct to the law and appreciate the wrongfulness of his actions. R. 223, ll. 11-25.

Dr. Price noted that Petitioner had undergone good "cognitive recovery" since being incarcerated, he had average behavior for an inmate, and he was not psychotic or delusional. R. 214, l. 4; R. 235, ll. 6-19; R. 236, ll. 7-10. Petitioner had been employed while incarcerated. R. 352. Dr. Price did not think Petitioner would be "aggressive" if released from prison. R. 222, ll. 11-23. The solicitor asked Dr. Price: "Do you have an opinion based on a reasonable degree of medical certainty that [Petitioner] could come out of prison early, earlier than the sentence he's got now, and be a model citizen?" R. 223, ll. 1-4. Dr. Price responded: "I think he can—you'd have to define model citizen; but I think he can be a productive member of society, yes." R. 223, ll. 5-7.

Petitioner's sister, Tammy Smart, testified and her testimony tracked with Dr. Price's testimony. Smart was three years younger than Petitioner, and she described an environment of physical neglect in which both parents abused drugs. R. 192, l. 13 – 193, l. 15; R. 201, ll. 8-10.

Smart also recounted physical abuse. R. 193, ll. 20-22. Smart said Petitioner acted as a parent for her: "he would watch me, get me up for school, you know, make sure I matched and, I mean, fix me food and everything." R. 192, ll. 18-24.

The State presented evidence that Petitioner had received disciplinary infractions while at the Department of Corrections which included striking another inmate, possessing a weapon, and possessing marijuana. R. 241, ll. 7-25; R. 257, ll. 7-23. The State also presented testimony on the circumstances surrounding the offense: that the decedent's body was hidden in a tarp and had chicken litter placed in the mouth, and that the defendants shot at police while they were being chased. R. 252, l. 11 – 253, l. 16; R. 254, ll. 1-7. The decedent's brothers testified about the negative effects the decedent's death had on their mother and father, and they testified the decedent was a good person. R. 264, l. 25 - 273, l. 4.

The court placed the burden of proof for resentencing on Petitioner. R. 190, ll. 9-16. Defense counsel argued that the burden of proof was on the State to show a life sentence was proper. R. 396, ll. 14-25. At the conclusion of testimony, defense counsel argued that because the testimony on the *Miller* factors had been favorable, Petitioner's sentence should be reduced. R. 277, l. 25 – 278, l. 21.

The trial court indicated it believed Petitioner was required to present more evidence in order to obtain relief. The court stated that "no MRI was ever performed on this defendant" "to determine the extent of damage of the frontal lobe that could result from such drug usage." R. 374, l. 24 – 20, l. 5. The court said of Dr. Price's testimony: "Impetuosity, he didn't specifically address that." R. 375, ll. 20-21. The court stated Petitioner had not been found incompetent to stand trial, and that Petitioner was "not insane." R. 383, ll. 15-20; R. 386, ll. 2-3. The court

remarked that Dr. Price "brought no documents of any kind" "for the court to look at . . ." R. 393, ll. 4-8.

In issuing its sentence, the trial court acknowledged Dr. Price testified that "he believed to a reasonable degree of medical certainty, that [Petitioner] could be a productive member of society." R. 385, ll. 18-20; R. 223, ll. 1-7. The court did not find this testimony was not credible; instead it found: "The possibility of rehabilitation, there is a possibility. There is always a possibility. But there are impossibilities as well." R. 394, ll. 12-13. The court stated: "I believe it is safe to say that every 16-year-old, and at least that I've been around, is immature." R. 371, ll. 17-19. It found "every 16-year old" has an undeveloped brain. R. 389, ll. 15-24. The court further found Petitioner's drug abuse "doesn't excuse what he did" because "voluntary intoxication is not a defense." R. 385, l. 25 – 386, l. 1; R. 389, l. 16 – 390, l. 4. The court explained it had considered the brutality of the killing "ad nauseum." R. 394, ll. 8-9. "I affirm so to speak, or deny your client's motion and impose a life sentence." R. 395, ll. 15-18. "[T]his court believes that the appropriate conclusion in this matter is that the defendant's motion to set aside his life imprisonment sentence, be denied. Therefore, he is to remain incarcerated for the balance of his natural life." R. 388, ll. 19-24.

The Court of Appeals affirmed in *State v. Jon Smart*, Op. No. 5830 (S.C. Ct. App. Filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 18). The Court of Appeals found the trial court did not err by placing the burden of proof on Petitioner, because, "First, the Supreme Court did not establish a particular burden in *Miller*," and "Second, our supreme court has not addressed whether a particular party bears the burden." The Court of Appeals concluded that "the hearing was consistent with the [*Aiken v.*] *Byars* requirements." *State v. Jon Smart*, Op. No. 5830 (S.C. Ct. App. Filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 28).

ARGUMENT

The Court of Appeals erred in affirming Petitioner's sentence of life without parole for an offense committed as a juvenile after a resentencing hearing where the trial court placed the burden of proof on Petitioner, since the burden of proof should be on the State to show a life sentence was proper.

The Court of Appeals did not determine which party should have had the burden of proof at Petitioner's juvenile life without parole (LWOP) sentencing hearing, but simply affirmed the trial court, which placed the burden on Petitioner. Petitioner presented favorable testimony, including expert testimony, on many *Miller* factors, while the State presented unfavorable testimony on a lesser number of *Miller* factors. The circuit court found Petitioner needed to present more evidence to receive a non-LWOP sentence. Absent guidance from this Court, it was unclear to the circuit court how to fashion a sentence that complied with the Eighth Amendment when it had received evidence from both sides. As will be discussed below, this Court should hold that in order for a court to impose LWOP on a juvenile offender, the burden of proof is on the State to show LWOP is proper.

"[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions." *Roper v. Simmons*, 543 U.S. at 560. "*Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments." *Graham v. Fla*., 560 U.S. at 68. "[T]he Eight Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller v. Alabama*, 567 U.S. at 479. "By making youth (and all that accompanies it) irrelevant to the imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. *Id*. "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*., 567 U.S. at 480.

"*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." *Aiken v. Byars*, 410 S.C. at 543, 765 S.E.2d at 577. "*Miller* requires the sentencing authority 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Id*., 410 S.C. at 544, 765 S.E.2d at 577 (quoting *Miller*, 567 U.S. at 480). *Miller* articulated that,

> the factors a sentencing court consider at a hearing must include: (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."

Aiken, 410 S.C. at 544, 765 S.E.2d at 577 (quoting *Miller*, 567 U.S. at 477-78) (hereinafter the *Miller* factors).

The sentencing judge must "consider such evidence in light of its constitutional weight." *Id*. "[T]he type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings, in addition to the factors illustrated above." *Id*., 410 S.C. at 544-45, 765 S.E.2d at 577. "Without question, the judge may still determine that life without parole is the appropriate sentence in some of these cases in light of other aggravating circumstances." *Id*., 410 S.C. at 545, 765 S.E.2d at 578.

Miller "announced a substantive rule of constitutional law" and was thus effective retroactively under *Teague v. Lane*, 489 U.S. 288 (1989). *Montgomery v. Louisiana*, 577 U.S. 190, 208 (2016). *Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility before imposing a life without parole sentence because principles of federalism weighed against the Court requiring the States follow a highly specific designated procedure. "When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Montgomery*, 577 U.S. at 211. "That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established this punishment is disproportionate under the Eighth Amendment." *Id*. However, in "exceptional circumstances," LWOP may be the proper sentence for some juvenile offenders. *Id*., 577 U.S. at 213.

Nevertheless, a finding of fact regarding a juvenile offender's incorrigibility is not required before imposing a sentence of LWOP. *Jones v. Mississippi*, 141 S.Ct. 1307, 1313 (2021). "[T]he *Miller* Court mandated only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a life-without-parole sentence" *Id*., 141 S.Ct. at 1316 (quoting *Miller*, 567 U.S. at 483) (internal quotations removed). "Because *Montgomery* directs us to avoid intruding more than necessary on the States, and because a discretionary sentencing procedure suffices to ensure individualized consideration of a defendant's youth, we should not now add still more procedural requirements." *Id*., 141 S.Ct. at 1321 (quoting *Montgomery*, 577 U.S. at 211) (internal quotations and alterations removed). But, the Court was careful to clarify that, "Today's decision does not overrule *Miller*

or *Montgomery*." *Id*., 577 U.S. at 1321. Rather, it leaves matters such as determining the standard of proof in discretionary juvenile sentencing to the states. *See Jones*, 141 S.Ct. at 1323.

In this case, the Court of Appeals did not determine which party should have had the burden of proof at Petitioner's juvenile LWOP resentencing hearing; it simply affirmed the circuit court, which placed the burden on Petitioner. The circuit court heard evidence of both mitigating and aggravating circumstances here. However, despite favorable expert testimony on the *Miller* factors, the circuit court found Petitioner needed to present more evidence to receive a non-LWOP sentence. R. 190, ll. 9-16. It listed things such as an MRI, a finding of incompetency or insanity, and printed materials, that it believed Petitioner should have provided the court to justify a lesser sentence. R. 374, l. 24 – 386, l. 3; R. 393, ll. 4-8. However, the court had heard mitigating evidence on nearly all of the *Miller* factors.

In the context of juvenile LWOP sentencing, states are not in agreement on which, if any, party bears a burden of proof and what that burden would be. For example, Pennsylvania holds the government must prove beyond a reasonable doubt that the offender is so irretrievably depraved that rehabilitation is impossible. *Commonwealth v. Clary*, 226 A.3d 571, 577 (Pa. Super. 2020). Mississippi holds the burden rests with the juvenile to convince the sentencer that *Miller* considerations are sufficient to prohibit a sentence of LWOP. *Wharton v. State*, 298 So. 3d 921, 927 (Miss. 2019). Florida does not place the burden on either party, instead requiring a hearing which allows the State and defendant to present relevant evidence. *Phillips v. State*, 286 So.3d 905, 909-11 (Fla. Dist. Ct. App. 2019).

This Court should hold that in order for a court to impose a life without parole sentence on a juvenile defendant, the burden of proof is on the State to show a life sentence is proper. Because the State is the party seeking a life without parole sentence, it is proper to place the

burden of proof on the proponent of the sentence. *See Cooper v. Oklahoma*, 517 U.S. 348, 358 (1996) (quoting *Queen v. Podola*, 43 Crim.App. 220, 235 (1959) (if defense's contention that accused is insane is contested by prosecution, the burden is on the defense to show insanity). It is also proper to place the burden on the State since it is the "rare juvenile offender" for whom LWOP will be fitting. *Montgomery*, 577 U.S. 208 (quoting *Miller*, 567 U.S. at 479-80). "[A]ppropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Aiken v. Byars*, 410 S.C. at 539, 765 S.E.2d at 575 (quoting *Miller*, 567 U.S. at 479).

In *Aiken*, this Court explained, "Without question, the judge may still determine that life without parole is the appropriate sentence in some of these cases in light of other aggravating circumstances." *Id*., 410 S.C. at 545, 765 S.E.2d at 578. "[T]he 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*., 410 S.C. at 544-45, 765 S.E.2d at 577. Petitioner submits a determination that the aggravating circumstances should outweigh mitigating circumstances in order to support a sentence of LWOP for a juvenile would be in keeping with *Aiken*'s discussion of aggravating circumstances and mitigating evidence. Petitioner suggests that burden should be a requirement to prove beyond a reasonable doubt that exceptional circumstances of aggravation outweigh mitigating factors, including the *Miller* factors. *Aiken*, 410 S.C. at 544-45, 765 S.E.2d at 577-78.

Because this is a criminal case, the burden of proof should be beyond a reasonable doubt. The standard of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979). "The function of a standard of proof, as that concept is embodied in the Due Process

Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996) (quoting *Addington*, *supra*) (internal quotations removed). "The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision." *Cooper*, 517 U.S. at 362-63 (quoting *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 283 (1990)) (internal quotations removed).

"The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358, 363 (1970). Stated differently, "[a] heightened standard does not decrease the risk of error, but simply reallocates that risk between the parties." *Cooper*, 517 U.S. at 366. The reasonable doubt standard "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *Winship*, 397 U.S. at 364 (quoting Dorsen & Rezneck, In Re Gault and the Future of Juvenile Law, 1 Family Law Quarterly, No. 4, pp. 1, 26 (1967)). The reasonable doubt standard would reduce the risk of erroneous juvenile LWOP sentences, and it would also denote the importance of the ultimate decision.

Moreover, due process favors a reasonable doubt standard. The four-part test identified by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), considers,

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Eldridge, 424 U.S. at 335. The private interest is a juvenile's fundamental interest in liberty. Because no burden of proof has been identified and allocated, there is a risk that an erroneous decision would result in the juvenile's loss of liberty for the rest of his life. The probable value of a proper standard of proof is therefore high. And, the State, which has no legitimate interest in a constitutionally disproportionate sentence, commonly undertakes the same burden of proof in the guilt phase of these cases.

In keeping with the principles laid out in *Miller* and *Montgomery*—that youth "counsel[s] against" irrevocable lifetime sentences and that LWOP is only permitted for juveniles in exceptional circumstances—the burden of proof should be on the State. *Miller*, 567 U.S. at 480; *Montgomery*, 577 U.S. at 209. In this case, if the burden had been placed on the State to prove that aggravating circumstances outweighed mitigating circumstances, Petitioner would not have been sentenced to LWOP.

As to the *Miller* factors: (1) the chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate the risks and consequence," the court heard expert testimony that Petitioner was sixteen years old chronologically but "much younger" than that cognitively, and that he had a neurocognitive disorder. Petitioner also had a reduced capacity to conform his conduct to the law. R. 207, l. 11 – 209, l. 19; R. 223, ll. 11-25. As to (2) the "family and home environment" that surrounded the offender, the court heard expert and lay testimony that Petitioner's home life was violent and chaotic, with parents who abused hard drugs and made Petitioner "score" drugs for them when they ran out. R. 205, l. 12 – 212, l. 10.

As to (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, the court heard expert testimony that Petitioner's conduct in committing the crime was influenced by his home life, drug abuse, and neurocognitive disorder. Petitioner also committed the crime with a codefendant and struck the fatal blows at the codefendant's urging. R. 211, l. 16 – 213, l. 10; R. 65, l. 25 – 66, l. 16. As to (5) the "possibility of rehabilitation," the court heard expert testimony that Petitioner had undergone good cognitive recovery since being incarcerated and the expert opined Petitioner could be a productive member of society if released from prison. Dr. Price did not believe Petitioner was likely to be aggressive if released. R. 214, l. 4; R. 222, l. 11 – 223, l. 7.

Petitioner respectfully submits that to support a sentence of life without parole for a juvenile, the prosecution should be required to show that aggravating circumstances (including the facts of the case and other relevant facts) outweigh the mitigating factors (including the *Miller* factors and death penalty-type mitigation). *Miller*, 567 U.S. at 480; U.S. Const. am. VIII; *Aiken*, 410 S.C. at 544-45, 765 S.E.2d at 577-78.

CONCLUSION

Based on the foregoing argument, Petitioner requests this Court reverse his sentence and remand for a sentencing hearing where the proper burden is placed on the proper party. In addition, Petitioner respectfully requests this Court appoint a different judge for sentencing.

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This 16th day of June, 2022.