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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CLARENDON COUNTY
The Honorable D. Craig Brown, Circuit Court Judge

THE STATE,.....RESPONDENT,

v.

JON PAUL SMART,.....PETITIONER.

BRIEF OF RESPONDENT
Appellate Case No. 2021-000987

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APPELLANT'S STATEMENT ON APPEAL

Whether the Court of Appeals erred in affirming Appellant'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 Appellant, since the burden of proof should be on the State to show a life sentence was proper?

RESPONDENT'S COUNTER ARGUMENT ON APPEAL

Did the Court of Appeals err in affirming the decision of the trial court sentencing the Appellant to a term of incarceration for the remainder of his natural life when the trial court distinctly followed all of the qualifications listed in *Aiken v. Byars*, and the issue was not even preserved by the Appellant?

STATEMENT OF THE CASE

The Pack family who own a farm in Clarendon County, partnered with the State of South Carolina to place a juvenile detention facility on the premises, this facility was called Rimini Marine Institute. Its main focus was for juveniles to work and become rehabilitated. (R. p. 20 line 25 – p. 21 line 9). Mr. Stacy Pack (victim) part of the Pack family formed a bond with the Appellant and his co-defendant Stephen Hutto, both sixteen years old. The victim would bring them to different areas to work, and on the chicken farm for hands on work with the chickens. (R. p. 21 lines 20-25; p. 32 lines 19-22). The victim even offered to take the defendants to church if they choose to do so. (R. p. 362 lines 5-6).

On the day in question the victim picked up both defendants and took them to the chicken farm. After they arrived the defendants purposely broke the foggers in order for the victim to climb on a ladder to fix them. (R. p. 32 lines 5-9). Once on the ladder the Appellant hit the victim with a foot long metal pipe weighing fifteen to sixteen pounds. (R. p. 33 lines 17-21; R. p. 362 line 21). The Appellant beat the victim so badly that the left side of his skull was completely crushed, (R. p. 370 lines 1-2), exposing his brains through a crack in his skull. (R. p. 369 lines 7-11).

After they murdered the victim the defendants took the victim's beeper, cigarettes and lighter. They decided to smoke a cigarettes while figuring out what to do next. (R. p. 34 lines 5-8). Defendants decided to wrap the victim's body and the murder weapon in a tarp and place it in the woods. Then they decided to steal the victim's truck, and drive to Bamberg where Hutto once lived. (R. p. 36, lines 3-4). After arriving in Bamberg they gained entrance into the Hutto home, they changed clothes, and drank liquor. As they were leaving they decided to take a shotgun and some shells. (R. p. 36 lines 13-16). Defendants went to purchase marijuana, however, they did not have any money. So they then decided to rob a Family Dollar in order to obtain money to purchase

marijuana. (R. p. 36 lines 17-21). Hutto waited in the truck while the Appellant went inside the store armed with the shotgun. (R. p. 36 line 22 – p. 37 line 5). Once inside Appellant pointed the shotgun at the chest of one store clerk and in the face of the other clerk demanding money. Appellant left the store with two hundred (\$200.00) dollars cash. (R. p. 37 lines 7-10). Outside a passerby recognized Hutto in the truck, and realized he should not be in town so he wrote down the license plate number. (R. p. 37 lines 15-19).

Later that morning around 2:00am officer Patricia Hemray of the Myrtle Beach Police Department noticed a pickup with no taillights. (R. p. 38 lines 2-8). She called in the license plate number and was informed that the truck was reported stolen. (R. p. 38 lines 10-11). As officer Hemray was in the process of initiating a traffic stop she was joined by officer Troy Spivey also of the Myrtle Beach Police Department. As they got near the truck, the defendants decided to take off at a high rate of speed. (R. p. 38 line 18 – p. 39 line 1). During the chase the Appellant took several shots at officer Spivey. (R. p. 39 lines 10-12). They were later joined by Sergeant Stan Strickland of the Horry County Sheriff's Department. Appellant also fired shots at Sergeant Strickland during this chase. (R. p. 40 lines 6-11).

The high speed chase continued all the way through Conway with speeds reaching one hundred (100) miles per hour. (R. p. 40 line 25 – p. 41 line 1). Conway police officers joined the chase placing stop sticks in the street to flatten the tires of the truck. The tires were flattened, however, the defendants kept driving. (R. p. 41 lines 2-5). The chase went on for a total of twenty to thirty miles until the defendant's vehicle finally ran off the road. The Appellant got out of the truck and ran, he was arrested the next day. (R. p. 41 lines 19-24). Hutto was apprehended at the scene sitting behind the steering wheel. (R. p. 51 lines 4-6).

After his arrest the Appellant spoke to law enforcement. He told them that the victim and Hutto got into a scuffle and he hit the victim protecting Hutto. (R. p. 51 lines 15-24). The Appellant spoke to law enforcement again with the solicitor present, he gave another story that more closely matched the evidence found. (R. p. 382 lines 21-25). During their investigation law enforcement came across two fellow inmates at Rimini Marine. One of the inmates informed law enforcement that the Appellant and Hutto were planning this attack. He heard Appellant telling Hutto, "I don't believe you got to guts to do it." (R. p. 61 lines 7-10). The other inmate told law enforcement that while working with the defendants and the victim he overheard the Appellant ask the victim, "what if we knocked you out and took your truck?" The victim responded, "I'll just call the police." Where the Appellant stated, "what if we killed you and took your truck." (R. p. 62 lines 11-14). While searching their belongings at Rimini law enforcement also discovered a map with Bamberg and Myrtle Beach circled. (R. p. 376 line 25 – p. 377 line 4).

A Clarendon County Grand Jury later indicted the Appellant for the offenses of murder, armed robbery, escape, grand larceny of a motor vehicle (GLMV) and criminal conspiracy. (Indictment No. 2000-GS-14-356). (R. p. 401-403). On May 25, 2001, Appellant appeared before the Honorable Kenneth Good to enter a plea of guilty. Present representing the Appellant was his counsel Kenneth Good, representing the State of South Carolina was Third Circuit Solicitor C. Kelly Jackson. As part of plea negotiations the State agreed to allow the Appellant to plead to a period of incarceration for the remainder of his natural life without the possibility of parole. In return the State would not seek the death penalty.¹ As part of these plea negotiations the Appellant

¹ This plea occurred prior to the United States Supreme Court decision of *Roper v. Simmons*, 543 U.S. 551 (2005) where the Supreme Court decided to bar capital punishment for juvenile offenders.

agreed to give truthful testimony against his co-defendant. (R. p. 353-355). Due to these negotiations Judge Goode decided not to sentence the Appellant and retain jurisdiction.

Judge Goode later relinquished jurisdiction, and on August 9, 2001, both co-defendants appeared before the Honorable Thomas W. Cooper, Jr. for sentencing. Appearing before the court representing defendant Hutto was his attorneys Jack Early, Daniel W. Luginbill, and Harry Devoe. Again appearing for the Appellant was his attorney Frederick Hofer. Due to these crimes occurring in three separate counties, appearing for the State of South Carolina were solicitors from each of those counties, Third Circuit Solicitor, C. Kelly Jackson; Second Circuit Solicitor Barbara Morgan; and Thirteenth Circuit Solicitor, Greg Hembree. Each solicitor gave a recitation to the Court regarding the crimes occurring in their respective county. Present were also numerous members of law enforcement from each county, Ms. Rhonda Rainey, victim advocate for the Clarendon County Sheriff's Department, and numerous members of the victim's family and friends. Appearing on behalf of the Appellant was his father Richard Smart and his aunt Laurie Woods.

At the conclusion of the presentation of facts by the State, victim impact statements, and mitigation raised by the defense, the resentencing judge sentenced the Appellant to a term of incarceration for the remainder of his natural life for the offense of murder; thirty years for armed robbery; fifteen years for escape; ten years for GLMV; and five years for criminal conspiracy. The sentencing court ordered that each of these offenses were to be served concurrently. The sentencing court also ordered that the Appellant must undergo substance abuse treatment. (R. p. 167 lines 3-22).

While serving his sentence, the United State Supreme Court decided the case of *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455 (2012). In *Miller*, the United States Supreme Court decided that mandatory life imprisonment without parole for those under 18 at the time of their crimes

violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* Due to the *Miller* decision, this court decided to grant certiorari in the case of *Aiken v. Byars*. At its conclusion this Court decided to apply the *Miller* standards to South Carolina juveniles who were sentenced to life without parole. *Aiken v. Byars*, 401 S.C. 534, 765 S.E.2d 572 (2014).

Due to the *Aiken v. Byars* decision Appellant decided to file a motion for resentencing on May 26, 2016. (R. pp. 181-182). On June 7, 2016, this Court issued an order for a resentencing hearing pursuant to *Aiken*. This order also appointed the Honorable D. Craig Brown to preside over the resentencing hearing, and order that within sixty (60) days a scheduling order must be made. (R. p. 183).

On May 24, 2017, a resentencing hearing was held before the Honorable D. Craig Brown. Representing the Appellant was attorney Jack Howle Jr., and representing the State of South Carolina was Third Circuit Solicitor Ernest A. Finney, III. Testifying on behalf of the Appellant was his sister Tammy Smart and licensed clinical psychologist Dr. David Price. Testifying for the State was Investigator Thomas Burgess and the victim's two siblings Andy and Joe Pack. Without objection, the resentencing judge entered the transcript of the prior guilty plea and sentencing hearings into the record. (R. p. 189 line 7 – p. 190 line 7). At the conclusion of this hearing the resentencing court took all of the evidence under advisement and decided that final sentencing would take place on August 11, 2017. (R. p. 88 lines 7-13). The sentencing actually took place on August 10, 2017. During this hearing the resentencing court went over all of the *Miller* factors and how they pertained to the present case. At the conclusion the resentencing judge stated:

“Having addressed, believing this court has fully addressed each of the factors as set forth in *Aiken v. Byars*, this 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. p. 388 lines 17-24).

After sentencing the Appellant filed a timely notice of appeal before the South Carolina Court of Appeals. Within this appeal the Appellant alleged that prior to sentencing the resentencing court, (1) did not sufficiently consider the Appellant's family and home environment; (2) only considered the Appellant's chronological and not cognitive age; (3) did not make a specific finding that the Appellant was irreparably corrupt; and (4) did not properly consider the Appellant's possibility of rehabilitation.

On July 7, 2021 the Court of Appeals issued a unanimous decision affirming the decision of the trial court. *State v. Smart*, 433 S.C. 651, 861 S.E.2d 383 (2021). Appellant filed a motion for rehearing, and the State responded. The motion for rehearing was denied on August 10, 2021.

On September 9, 2021, Appellant filed a petition for writ of certiorari before this Court. Within this petition the Appellant argued that they deserved certiorari due to, 1) The Court of Appeals erred in affirming the life without parole sentence when the trial court placed the burden of proof on Appellant when it should be on the state to show a life sentence was proper; 2) Court of Appeals erred in affirming Appellant's sentence where the trial court misapprehended and misapplied the requirement to consider the family and home environment that surrounded the Appellant; 3) Court of Appeals erred in affirming Appellant's sentence where the court misapprehended and misapplied the requirement to consider Appellant's possibility of rehabilitation; and, 4) Court of Appeals erred in affirming Appellant's sentence where the trial court misapprehended and misapplied the requirement to consider the chronological age of the Appellant.

On May 17, 2022, this Court granted certiorari only on the Appellant's first issue. This Court denied certiorari on the remaining three issues. The Respondent now issues

their initial brief in response to Appellant initial brief. The Respondent argues that the sentencing court issuing this life sentence and the Court of Appeals affirming this sentence was not done in error and these decisions should be upheld by this Honorable Court. The arguments supporting that position follows.

STANDARD OF REVIEW

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal, the trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law. *State v. Smicklevich*, 268 S.C. 411, 234 S.E.2d 230 (1977). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). When considering whether a sentence violates the Eighth Amendment's prohibition on cruel and unusual punishment, 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). Credibility findings are treated as factual findings and therefore, the appellate inquiry is limited to reviewing whether the trial court's factual findings are supported by any evidence in the record. *State v. Banda*, 371 S.C. 245, 639 S.E.2d 36, 39 (2006). The appellate court does not re-evaluate the facts based on its own view of the evidence but simply determines whether the trial court's ruling is supported by the evidence. *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). In order for an issue to be preserved for appellate review it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. *State v. Dunbar*, 356 S.C. 138, 142,

587 S.E.2d 691, 694 (2003). A party may not argue one ground at trial and an alternate ground on appeal. *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001).

ARGUMENT

The Court of Appeals did not err in affirming the decision of the trial court because the trial court did not place the burden on the Appellant during his resentencing hearing. No burden of proof exists regarding a resentencing pursuant to *Aiken v. Byars*. The Appellant also failed to preserve this issue for appeal due to it not being raised before the trial court so it should not be considered by this Court.

Relevant Factors

In *Miller*, the United States Supreme Court held that a mandatory life sentence without the possibility of parole for a juvenile offender violated the Eighth Amendment prohibition against cruel and unusual punishment.² *Miller*, 567 U.S. at 465, 470. In *Miller* the United States Supreme Court stated:

Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. *Id.*, 567 U.S. at 477-478.

Miller did not categorically bar life sentences for juvenile murderers; rather, the Court held that a sentencing court is required 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 476. The United States Court held a sentencing authority must consider youth as “more than a

² Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const. Amend. VIII.

chronological fact,” but also a factor which carries with it immaturity, irresponsibility, and recklessness. *Id.* 567 U.S. at 476. The United States Supreme Court held a juvenile convicted of murder could still be sentenced to life without parole, but only after an individualized hearing in which the various mitigating factors were considered. *Id.* 567 U.S. at 479-480. *Miller* mandated that a sentencing court follow a process before imposing a particular penalty. *Id.* 567 U.S. at 483.

After *Miller*, this Court decided the case of *Aiken v. Byars* which applied the *Miller* factors to South Carolina juveniles sentenced to life without parole. This Court also ordered that *Miller* be applied retroactively. *Aiken*, 410 S.C. at 540-541. This Court acknowledged that *Miller* applied only to mandatory sentencing schemes rather than discretionary schemes such as in South Carolina. In *Aiken*, this Court stated, “whether their sentence in mandatory or permissible, any juvenile offender who receives a sentence of life without the possibility of parole is entitled to the same constitutional protections afforded by the Eighth Amendment’s guarantee against cruel and unusual punishment.” *Id.* 410 S.C. at 544, 765 S.E.2d at 577. This Court held that juveniles previously sentenced under our discretionary scheme who receive a life without parole sentence were nevertheless entitled to resentencing to allow them “to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight.” *Id.*, 410 S.C. at 544, 765 S.E.2d at 57.

In *Aiken* this Court determined that the *Miller* factors must be considered during these separate hearings. In *Aiken* this Court specifically stated,

Consequently *Miller* establishes a specific framework, articulating 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 surround 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, 534 S.E.2d at 577, quoting, *Miller*, 132 S.Ct. at 2468.

Just as the *Miller* court, this Court explained juveniles could still receive a sentence of life without parole, but only after "an individualized hearing where the hallmark features of youth are fully explored." *Id.*, 410 S.C. at 545, 765 S.E.2d at 578.

The Court of Appeals decided to affirm the decision of the trial court due to the fact the Appellant received a hearing where the court considered all of the factors that were listed in the *Miller* and *Aiken* opinions. Even after the consideration of all of the *Miller* factors this was the appropriate sentence and the decision of the Court of Appeals does not suggest any reversal by this court is necessary.

During his hearing Appellant's counsel presented testimony from a clinical psychologist Dr. David Price and his sister Tammy Smart. Dr. Price testified that he reviewed numerous documents, the plea transcript, and met with the Appellant seven times performing psychological testing. (R. p. 203; p. 206 lines 1-17). Appellant's sister testified as to her and the Appellant's home life. They lived with their parents both of whom were doing and selling drugs out of their home. (R. p. 193 lines 3-10; R., p. 195 lines 10-15). The kids were not going to school and this life led to not only the Appellant becoming addicted to drugs but her also. Also testifying was investigator Thomas Burgess who was employed with the South Carolina Department of Corrections and was working with the Clarendon County Sheriff's Department at the time of this offense. Investigator Burgess testified to the planning done by the Appellant and his co-defendant prior to this offense, revealing premeditation, and the extent of the crime scene which demonstrated the amount of violence that occurred during victim's murder. (R. p. 248 lines 4-17). Investigator Burgess also testified about the Appellant's prison disciplinary record which included some forty-

four (44) disciplinary actions including ones for striking an inmate, possession of a weapon, striking an employee with or without a weapon, striking an inmate with or without a weapon, numerous drug offenses, and an attempted escape. (R. p. 257 lines 7-23; R. pp. 349-351).

The resentencing judge then summoned all interested parties before him to announce his sentence. The resentencing judge gave a detailed reading of his consideration of all the *Miller* factors. After that, the resentencing court then announce that he decided the Appellant should, “remain incarcerated for the balance of his natural life.” (R. p. 388) The record clearly reveals that the trial court acted within its discretion to make the appropriate sentence given the information presented, including the prior plea and sentencing hearing transcript which were allowed into evidence without objection. (R. p. 189 line 7 – p. 190 line 7)

The Appellant argues that the resentencing court shifted the burden of proof toward him. That did not occur, the resentencing court weighed all of the factors presented by both sides equally. In considering all of the *Miller* factors individually, this is what the resentencing court found:

1. Hallmark features of youth – The resentencing judge explained he considered Dr. Price’s testimony when examining appellant’s youth, including his immaturity and impetuosity at the age of sixteen. (R. pp. 371-372). The court also detailed Dr. Price’s testimony about Appellant’s drug use, prior evaluations, and other history. (R. pp. 373-374). The trial court noted that Dr. Price’s opinion on the Appellant’s ability to make decisions was influenced by huffing gas, family life, a diagnosis of attention deficit disorder, and frontal lobe damage due to drug use. (R. p. 371-374). Although the trial court questioned Dr. Price on the use of an MRI and whether it would have been beneficial, the trial court never doubted any frontal lobe damage existed. The court only questioned Dr. Price on the use of an MRI to determine the extent of this damage or if there was any atrophy. (R. p. 374 line 24 – p. 375 line 13) Dr. Price opined, Appellant could appreciate the wrongfulness of his actions which were evidenced “by the way he hid the body,” and his efforts were a continuation of his drug use and a series of impulsive decisions. (R. pp. 238-239). The trial court stated that Dr. Price never specifically addressed impetuosity. (R. p. 375 lines 20-21). The trial court found that the Appellant was immature, but stated, “all of the information pertaining to this case reveals it was not a sudden or rash action,” given the evidence which revealed Appellant and his co-defendant planned the crime. (R. p. 375 line 21 - p. 377 line 25)

2. Home and family environment – The trial court recounted the testimony of the Appellant’s sister Tammy Smart. Her testimony revealed their parent’s drug use, their absence, and generally bad home environment. (R. pp. 378 line 14 – p. 379 line 23). The trial court found the sister’s testimony was inconsistent with her father’s statements from the first sentencing hearing. The trial court raised the fact the Appellant’s father stated in the first sentencing hearing that they essentially asked the neighbors whose home the Appellant broke into to press charges in order for the Appellant to get some drug treatment. His father testified that since they could not afford treatment that he hoped that would be addressed through the courts. The trial court also addressed the fact the Appellant’s aunt spoke at this sentencing hearing and asked the court, “Will he get help now? Finally will he get help?” (R. pp. 379 line 24 – p. 382 line 5). The trial court found it confusing to coincide the fact Appellant’s parents would be at this sentencing hearing and attempting to get him some help if in fact all of what his sister was testifying to was occurring inside the home at that time. The trial court specifically stated, “It just doesn’t add up.” (R. p. 382 line 13). It can be inferred this was a credibility finding as it relates to the Appellant’s sister,³ but there is no corresponding finding as it relates to the father because he did not testify before the resentencing court.
3. Circumstances of the crime – The resentencing court gave detailed facts from the record about the murder, armed robbery, high speed car chase where the Appellant fired shots at law enforcement officers and described the participation of the Appellant and his co-defendant. (R. pp. 360 line 14 – p. 371 line 5). The resentencing court noted that it reviewed the first sentencing transcript “in its entirety,” so he could take it into account, as well as testimony from the resentencing hearing. (R. p. 361 line 3-4). The resentencing court noted it was the Appellant who struck and killed the victim and he worked with his co-defendant to hide his body. (R. pp. 363 line 1- line 20).
4. Incompetency of youth – The resentencing judge found there was little concern regarding this factor because Appellant gave statements to law enforcement, there was a plea agreement that plea counsel signed, (R. p. 355), and there was no indication from counsel he was not able to assist or understand the proceeding. (R. pp. 382 line 15 – p. 384 line 1). Dr. Price also agreed that the Appellant was competent at the time of his guilty plea, and explained he understood the plea proceeding and could assist his attorney. (R. pp. 233 line 16 – p. 234 line 14; pp. 347-348).
5. Possibility of rehabilitation – The resentencing judge did not discount or misapprehend Dr. Price’s testimony regarding the possibility of Appellant’s rehabilitation. The trial court did take the opportunity to note the inconsistencies in Dr. Price’s statements. The trial court explained that Dr. Price testified Appellant had made cognitive improvements since incarceration because he had stopped using drugs and opined about Appellant could be a productive member of society, yet on cross-examination Dr. Price admitted Appellant was still using drugs while incarcerated, including inhalants. (R. p. 388 lines 11-14). The court noted the Appellant’s lengthy disciplinary history while incarcerated. This record included

³ The determination of credibility must be left to the trial judge who saw and heard the witnesses and is therefore in a better position to evaluate their veracity. *State v. Johnson*, 413 S.C. 458, 776 S.E.2d 367, 372 (2015).

an escape attempt, assaults, use of contraband, and other charges. Dr. Price failed to acknowledge the Appellant's actions while incarcerated until asked by the trial court. (R. p. 386 line 4 - p. 388 line 17). The trial court found Appellant "had taken no efforts while incarcerated for rehabilitation" given his disciplinary record. (R. p. 388 line 3-7).

Issue was not preserved

The Appellant argues that the resentencing court erred in shifting the burden of proof to the defense, and that the burden of proving that the Appellant deserves a life without parole sentence should be left up to the State. The Respondent argues that this issue was never preserved before the trial court, so it should not be considered by this court.

At the conclusion of the resentencing court's announcement of the final sentence, Appellant's counsel objected to the sentence. There was no objection as to a failure of the State to prove Appellant should be sentenced to life without parole. The objection was due to the State not proving that the Appellant is "incorrigible or non-redemption." (R. p. 396 lines 17-18). It is the opinion of the Respondent that this is not the same as not proving Appellant deserves a life sentence without parole. The reasoning is because pursuant to *Miller* and *Aiken* there are five factors the court must consider prior to sentencing a juvenile to life without parole. His lack of rehabilitation is only one. There was never any mentioning that the State failed to prove the other factors. The argument being raised within this appeal was never raised before the resentencing court.

Within the *Smart* opinion the Court of Appeals stated, "Initially, whether there is a presumption against LWOP sentences is not preserved for our review because Smart failed to raise this argument to the trial court." *Smart*, 433 S.C. at 665, 861 S.E.2d at 391. The Respondent agrees. The argument raised within this appeal was not raised before the resentencing judge so it was not preserved for appeal, so it should not be considered by this court.

Burden of Proof

The Appellant argues that the State should be obligated to have the burden of proving that he should be sentenced to life without parole. The Appellant makes this argument although this burden was not stated in the *Miller* nor *Aiken* decisions. The Respondent will argue that if the Court wished either side to be responsible for satisfying a burden of proof it would have been stated in either or both opinions.

Within their brief the Appellant argues that the resentencing court found that the Petitioner needed to present more evidence to receive a non-LWOP sentence. The resentencing court never stated that more evidence was needed to be presented to sway his decision. The court specifically stated that they fully addressed each of the factors set forth in *Aiken v. Byars* and decided not to set aside the sentence of life imprisonment. (R. p. 388 lines 17-24). According to this Court that is all that is needed to justify a life without parole sentence given to a juvenile. Without question the judge may still determine that life without parole is the appropriate sentence in some of these cases in light of the aggravating circumstances.... However, *Miller* requires that before a life without parole sentence is imposed upon a juvenile offender, he must receive an individualized hearing where the mitigating hallmark features of youth are fully explored. *Aiken*, 410 S.C. at 545, 765 S.E.2d at 578.

The resentencing court never stated that the mitigating evidence presented was insufficient. The Appellant would like this Court to believe that the resentencing judge wished Dr. Price would have provided an MRI or more printed materials. The resentencing judge questioned Dr. Price as to the MRI because he thought it would have revealed the level of damage or atrophy done to the frontal lobe of the Appellant due to his drug abuse. Dr. Price stated himself an MRI would have been beneficial. (R. p. 374 line 25 – p. 375 line 2; p. 375 line 45; p. 375 lines 10-13). It is the

responsibility of the circuit court to inquire about all of the evidence presented or that could have been presented in order to make a fair and just decision. The statement about an MRI was just a curiosity made by the court into if one was done. If one was done the resentencing judge would have ordered those results be provided in order for him to see the extent of the damage done to the Appellant's frontal lobe due to his drug abuse which Dr. Price stated was the cause of his lack of impulse control.

The Appellant is of the belief that the burden of proving that the Appellant should receive a life without parole sentence should be left up to the State. The *Miller* factors were considered and the resentencing judge clearly explained prior to his decision that the factors were considered and what led him to make his sentence. At that time the resentencing judge clearly revealed in detail his considerations of the *Miller* and *Aiken* criteria. An explanation that was not even required to give. In *Jones v. Mississippi* the United States Supreme Court noticed that through its opinion in *Miller*, they did not even hint at requiring an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility. *Jones v. Mississippi*, 141 S.Ct. 1307, 1320 (2021). In *Jones*, the United States Supreme Court found:

Because the Constitution does not require an on-the-record explanation of mitigating circumstances by the sentencer in *death penalty* cases, it would be incongruous to require an on-the-record explanation of the mitigating circumstance of youth by the sentencer in *life-without-parole cases*.

Jones, 141 S.Ct. at 1320-1321. (emphasis in original)

The United States Supreme Court is of the opinion that an on-the-record finding of permanent incorrigibility is not necessary to ensure that the sentencer considered a defendant's youth; is not required or is consistent with *Miller*; is not required or was consistent with the Court's analogous death penalty precedents, nor dictated by any consistent historical or contemporary sentencing practice in the States. *Id.*, 141 S.Ct. at 1319.

The State would argue that the reasoning given by the resentencing judge in the present case went beyond what is required pursuant to *Jones*. The State further argues that if an on the record finding of permanent incorrigibility, or any of the other factors is not mandatory then no burden of proof exists. As any other sentencing except the death penalty there exists no burden to prove aggravation or mitigation. And with the death penalty the burden falls on the State because it is statutory.⁴ In *Aiken*, this Court did state that the type of mitigating evidence permitted in death penalty sentencing hearings has relevance to juvenile life without parole hearings. *Aiken*, 410 S.C. at 544-545, 765 S.E.2d at 578. However, also in *Aiken* this Court stated, “while we do not go so far as some commentators who suggest that the sentencing of a juvenile offender subject to a life without parole sentence should mirror the penalty phase of a capital case.” *Id.* This logic is due to the sentencing of a person to death is much more serious. To sentence a person to death is the ultimate punishment an individual could receive. There has to be greater safeguards when there is consideration of keeping an individual alive or sentencing him to death.

The Appellant also argues that the State should be required to show that aggravating circumstances outweigh mitigating circumstances. That is a burden not even placed on the State when it is seeking the death penalty. A jury should not be instructed to “weigh” the aggravating circumstances against the mitigating circumstances. *State v. Bellamy*, 293 S.C. 103, 107, 359 S.E.2d 63, 65 (1987). The jury should be instructed to consider any mitigating circumstances authorized by law as well as aggravating circumstances. S.C. Code Ann. §16-3-20(C)(1976). To request a burden be placed on the State greater than that of a death penalty case is egregious.

⁴ The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. S.C. Code Ann. §16-3-20(C)(2010).

There was never any mention of a burden of proof within neither the *Miller* nor *Aiken* decisions. No burden must be satisfied when determining the proper sentence for a juvenile defendant in this circumstance. In *Montgomery v. Louisiana*, 577 U.S. 190, 136 S.Ct. 718 (2016) the United States Supreme Court decided that they were going to leave it up to the States as to how they were going to apply the *Miller* standards for juvenile life without parole sentences. In *Montgomery* the Court stated, “We leave to the state[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences. *Montgomery*, 577 U.S. at 211, 136 S.Ct. at 735, quoting, *Ford v. Wainwright*, 477 U.S. 399, 416-417, 106 S.Ct. 2595 (1986). In *Aiken*, this Court established a procedure that would guarantee that the five *Miller* factors would be considered prior to resentencing any juvenile to life without parole. In *Aiken*, this Court also allowed for retroactive application of this sentencing procedure. The one thing *Aiken* did not address was burden of proof. In *Aiken*, the dissent stated, “Further and more egregiously, the majority fails to give adequate instructions to the resentencing courts regarding how to conduct the resentencing hearings. *Aiken*, 410 S.C. at 554, 765 S.E.2d at 582(Toal, C.J. dissenting). The majority explained,

We decline the dissent’s invitation to set out a specific process for trial court judges to follow when considering whether to sentence a juvenile to life without parole. The United States Supreme Court did not establish a definite resentencing procedure and we likewise see no reason to do so. We have the utmost confidence in our trial judges to weigh the factors discussed herein and to sentence juveniles in the light of this new constitutional jurisprudence.

Id., 410 S.C. at 545, 765 S.E.2d at 578 n.10.

A judge or sentencing authority is to be afforded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed. *Wasman v. United States*, 468 U.S. 563 (1984). The instruction on this type of hearing was raised

by this Court, and the majority decided to leave it in the discretion of the lower courts. If this Court wished there to be a burden of proof it would have been addressed. But this Court declined to do so. All that must be shown to the sentencing court is evidence of mitigation or aggravation, each must be considered equally. The resentencing judge clearly reviewed all of the evidence presented by the Appellant and the State, then the court made a very thoughtful yet agonizing decision. (R. p. 395 line 5 – p. 396 line 13)

In *Aiken*, a burden of proof was never addressed so it is the position of the State that it was never considered. The Court has established burdens of proof in previous decisions like in self-defense, *see, State v. Bixby*, 388 S.C. 528, 698 S.E.2d 572 (2010)(once raised by the Defendant, the State must disprove self-defense beyond a reasonable doubt), or insanity, *see, State v. Milian-Hernandez*, 287 S.C. 183, 379 S.E.2d 287 (1989)(A criminal defendant is presumed to be sane, the State does not have to prove sanity.) A burden of proof was never addressed so it does not apply.

As the record demonstrated the resentencing court did not abuse discretion in ordering the Appellant to remain incarcerated for the remainder of his natural life without the possibility of parole. The resentencing court carefully considered all of the *Miller* factors as is constitutionally required. The resentencing court evaluated, based on the testimony presented and the previous record, the Appellant's youth and immaturity, family circumstances, and the facts of the crime. The resentencing court also took into consideration the particularized evidence about the Appellant to determine if he was capable of demonstrating maturity and rehabilitation.

The *Miller* factors were created in order to provide the court with a guideline to determine if a juvenile defendant convicted of murder is criminally responsible despite his juvenile status. And if he is responsible does this crime raise to the level that he should be imprisoned for the

remainder of his natural life. After reviewing all of the evidence provided and considering the *Miller* factors, the court decided that a life sentence is proportionate for this particular defendant.

In *Aiken*, this Court required that an individualized sentencing hearing be conducted where the hallmark features of youth are explored before a life sentence is imposed on a juvenile defendant. This Court set forth the necessary procedures to ensure juveniles are afforded protection under the Eighth Amendment. The Appellant received such a hearing. The record demonstrates the trial court did not misapprehend, ignore, or disregard any testimony or evidence in the record that was brought before him. The resentencing court followed the proper procedures in determining the Appellant's sentence, so the lower court did not err in sentencing the Appellant to life.

The Court of Appeals was correct in acknowledging that there exists no error in law that occurred during this hearing and sentencing, thereby affirming the sentence given by the resentencing judge. The Court of Appeals was also correct in determining that this issue was not preserved for appeal so it should not be considered or that a burden of proof does not exist for either party during these resentencing hearings. Due to the proper rulings given by the resentencing judge which was correctly upheld by the Court of Appeals, this Court should affirm and uphold the decision given by the Court of Appeals.

CONCLUSION

The Court of Appeals made no error in affirming the decision of the resentencing court.
The State respectfully request this Honorable Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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July 18, 2022

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