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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

The Honorable Letitia Verdin, Circuit Court Judge

Appellate Case No. 2022-000311
2005-GS-42-000888

THE STATE, ...RESPONDENT

v.

JOSHUA JETER,..APPELLANT.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF APPELLANT'S ISSUES ON APPEAL

I. Whether the Court Undertook an Adequate *Aiken v Byers* Inquiry.

II. Whether the Court Assumed Facts with no Evidentiary Basis.

RESPONDENT'S COUNTER-STATEMENT OF THE ISSUES

I. Where the Appellant was sentenced to a 50 year sentence and vacated a life without parole sentence for murder in an *Aiken v Byars* proceeding and no specific objection is made to the sentence at the in person sentencing proceeding after the written order was entered which is within the statutory mandates for murder, the matters raised herein are not preserved for appellate review.

II. Where the Appellant was sentenced to a fifty year sentence for murder after an *Aiken v. Byars* hearing rather than a life without parole sentence for a crime he committed when he was 16 years old, the trial judge did not abuse her discretion in sentencing the Appellant to a fifty year sentence after a full presentation in aggravation and mitigation of sentence.

III. Since the Appellant did not receive a life without parole sentence, Appellant does not fall within a class of offenders to which *Miller v. Alabama* and *Aiken v. Byars* now applies.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); *see also State v. Finley*, 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019) ("When considering whether a sentence violates the Eighth Amendment's prohibition on cruel and unusual punishments, the appellate court's standard of review extends only to the correction of errors of law."). Thus, the trial court's factual findings are binding on the appellate court unless clearly erroneous or controlled by an error of law. *See State v. Winkler*, 388 S.C. 574, 582–83, 698 S.E.2d 596, 601 (2010). On appeal, "the reviewing court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial [court's] ruling is supported by any evidence." *State v. Parker*, 391 S.C. 606, 611–12, 707 S.E.2d 799, 801 (2011) (quoting *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001)).

STATEMENT OF THE PROCEEDINGS

This matter arises from an appeal by Joshua Jeter from the August 18, 2022 resentencing and December 30, 2021 order of the Honorable Leticia Verdin, presiding judge, ordering the resentencing of Jeter to a sentence of fifty (50) years on Indictment 2005-GS-42-0888 for murder, concurrent to his other sentences involving the December 8, 2004 shooting death of Tavaris Howze. August 18, 2022 Sentencing Tr. p. 1-4., Sentencing Sheet, August 18, 2022. On August 24, 2022, counsel Michael Morin served the notice of appeal.

On July 27, 2015, Jeter filed a motion for resentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014) of his 2006 sentence of life imprisonment without possibility of parole for murder while under the age of eighteen. On August 2, 2016, Judge Verdin was assigned by the Supreme Court to appoint counsel and handle the matter. Judge Verdin initially assigned

Public Defender Clay Allen to handle the matter. Upon Mr. Allen's retirement, the matter was re-assigned to Seventh Circuit Public Defender Michael Morin.

On December 8, 2021, a hearing was held in the matter before Judge Verdin. The Appellant was present and represented by Mr. Morin. The State was represented by Solicitor Barry Barnette of the Seventh Judicial Circuit. During the hearing, evidence was presented by William Farr, Barbra Howze, Latanya Walker for the State. The defense presented prior counsel Patricia Anderson , Rick Vieth, social worker Jan Vogelsang, Sherry Johnson (the Appellant's mother), Linda Askari (the Appellant's aunt), Bishop Cathaye Jones, Rashad Moore (the Appellant's cousin), and the Appellant. Judge Verdin took the matter under advisement after the hearing.

On January 14, 2022, a written order dated December 30, 2021 was filed in which Judge Verdin ordered Jeter to be resentenced to 50 years. The order was not received by counsel until March 9, 2022. On March 10, 2022, a written Notice of Appeal was served upon Solicitor Barnette.

On August 18, 2022, Judge Verdin in open court with counsel and virtual court presence of the Appellant resentenced the Appellant to 50 years consistent with the earlier written order. August 18, 2022 Tr. p. 3-4. During the proceeding, counsel Morin did not make any motions or objections to Judge Verdin's December 30, 2022 order. August 18, 2022 Tr.p. 3-4. A second notice of appeal was served on August 24, 2022 after the in person resentencing. This appeal follows.

Prior Relevant Proceedings.

Jeter is presently confined at the Broad River Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Jeter was indicted at the February 24, 2005 term of the Court of General Sessions for Spartanburg County for murder (05-GS-42-0888) involving the December 8, 2004 murder of

Tavaris Howze. He was subsequently indicted on June 23, 2005 for burglary in the first degree [05-GS-42-2628], on August 25, 2005 for armed robbery [05-GS-42-3711], and on February 23, 2006 for possession of a pistol by a person under the age of twenty-one [06-GS-42-0880]. His co-defendant, Lance Lyles was similarly indicted.

On March 13, 2006, the matter was convened for a jury trial before the Honorable J. Derham Cole, Presiding Judge. Jeter was represented by J. Patricia Anderson. His co-defendant, Lance Lyles, was present and represented by Richard W. Vieth of the Spartanburg County Bar. The prosecution was represented by Assistant Solicitors Derrick Bulsa and Michael Smith of the Solicitor's Office of the Seventh Judicial Circuit. The Appellant was convicted on March 17, 2006 of murder, unlawful possession of a pistol by a person under the age of 21, attempted burglary in the first degree, and attempted armed robbery. App. p. 725.1 He was sentenced to life for murder, ten (10) years for attempted burglary in the first degree, twenty (20) years for attempted armed robbery, and five (5) years for unlawful possession of a pistol by a person under the age of twenty-one (21). A motion for reconsideration of sentence was filed March 24, 2006. See State v. Jeter, Motion to Reconsider Sentence, dated March 24, 2006. It was denied April 11, 2006. State v. Jeter, Order Denying Motion to Reconsider Sentence, filed April 11, 2006. [2]

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1 For purposes of the initial brief of Respondent, references to App. are to the prior Appendix to the petition for writ of certiorari before this court which are consistent with the March 2006 trial transcript. References to "Tr." are to the December 8, 2021 Aiken v. Byars hearing before Judge Verdin.

2 The record of the original sentencing proceeding reveals a comment by counsel Anderson to the sentencing court that "I think you will remember my client did want to plead to manslaughter at the time and has always been forthcoming with the fact that he was there, the fact that he had the gun." App.p. 728, l. 20-23. She also stated that " I would hope you would consider the fact that he did talk to the police and was willing to plead. Unfortunately, Mr Bulsa would not let him plead without Mr. Lyles pleading at the same time. But he did offer to plead to manslaughter several times." App.p. 729, l. 10-20.

The Initial Direct Appeal of the conviction

A timely Notice of Appeal was filed on Appellant's behalf and an appeal was perfected. In the appeal, the Appellant was represented by Robert M. Dudek of the South Carolina Division of Appellate Defense. A motion for reconsideration of the sentence was filed on March 24, 2006. It was denied on April 11, 2006.

On January 18, 2008, counsel filed a Final Brief of Appellant raising the following issues presented:

I. Whether the lower court erred by refusing to allow cross-examination, and other corroborating evidence, that the victims were engaged in drug dealing and drug use, since appellant's right to corroborate his own testimony that he simply went with co-defendant Lyles to purchase marijuana from the apartment was critical to his credibility, and it was part of his right to present a complete defense?

II. Whether the court erred by refusing to direct a verdict on the murder charge since there was not any evidence , direct or substantial circumstantial evidence, that appellant had criminal intent to fire a shot and kill anyone with malice aforethought on the night of the incident?

Final Brief of Appellant, p. 3. App.p. 737-753. The Respondent, through below-signed counsel made a Final Brief of Respondent on January 22, 2008. App.p. 754-796. The South Carolina Court of Appeals affirmed Appellant's conviction and sentence. State v. Jeter, Op. No. 2008-UP-587 (S.C. Ct. App. filed October 15, 2008). App.p. 797-799. The Remittitur was issued on November 26, 2008.

The Prior State PCR Proceedings

The Appellant made an application for post-conviction relief on March 4, 2009. Jeter v. State, 2009-CP-42-01221. App.p. 800-808. In his Application, the Appellant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel; and

2. "Rule 403 S.C.R.E."

App.p. 802-803. The Respondent made its Return and Motion to Dismiss on or about July 9, 2009. App.p. 809-813.

An evidentiary hearing into the matter was convened on May 26, 2010, at the Spartanburg County Courthouse before the Honorable J. Mark Hayes, Presiding Judge. App.p. 814-862. Vanessa Cason, Esquire, represented the Appellant. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Appellant, as well as Pastor Cathaye Jones, testified on Appellant's behalf. J. Patricia Anderson, Esquire, also testified. On July 28, 2010, Judge Hayes entered his written order of dismissal. App.p. 863-871.

The PCR Appeal

The Appellant made an appeal from the denial to the South Carolina Supreme Court. On appeal, the Appellant was represented by Robert M. Pachak of the South Carolina Division of Appellate Defense. On January 4, 2011, counsel Pachak made a "Johnson Petition for Writ of Certiorari" and petition to be relieved as counsel pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). In the Johnson petition, Pachak raised as the sole arguable ground "whether defense counsel was ineffective in failing to request a severance?" The Respondents waived a response to the petition on January 6, 2011. On February 16, 2011, the Appellant made a "Pro Se Petition for Writ of Certiorari" raising as issues presented:

1. Whether defense counsel was ineffective in failing to request a severance?
2. Was defense counsel ineffective assistance for failing to advise of improbability of acquittal and desirability of accepting offered plea bargain?

Pro Se Petition for Writ of Certiorari, p. 2. On August 10, 2011, the Court allowed the pro se petition to be supplemented to allege a due process violation based upon a March 5, 1999 order of

the Chief Justice that all criminal cases shall be disposed of in 180 days. On October 27, 2011, the Appellant made an additional pro se filing alleging "insufficient evidence to support conviction of attempted armed robbery and attempted burglary" and Miranda rights violated statement obtained in violation of fifth amendment rights." [These document were included within the attachment styled Pro Se Petition for Writ of Certiorari]. On December 13, 2012, the South Carolina Court of Appeal entered its written order denying the petition and granting counsel's request to withdraw after review pursuant to Johnson v. State, supra. Joshua Jeter, Petitioner, v. State of South Carolina, Respondent, Appellate Case No. 2010-170031 , Order (S.C. Ct App. December 13, 2012) (order denying certiorari and granting request to withdraw). The remittitur was issued on January 2, 2013.

The State's Theory of the Trial Evidence in 2006

As revealed in the opening statement, the prosecution's theory of the case was not complex. On December 8, 2004, 21 year old Traveris Howze was visiting a neighbor, Clarence Spicer in Spicer's apartment with Brian Durbin. Durbin leaves the apartment to get some food. Around 9 p.m., a knock on the door occurs and Spicer goes to the door thinking Durbin has returned with the food. Opening the door, Spicer sees a man with a hood over his head and the man says "what's up." The man then gets a foot in the door and Spicer sees a second man behind him wearing a mask with a gun in his hand. At that point, Spicer attempts to close the door. While trying to force the door closed, an arm comes through the door and a shot is fired. The victim, Tavaris Howze, still seated on a couch, is struck in the head and falls dead on the floor. App.p. 91.

The State's theory was that Lance Lyles and Jeter were acting in concert attempting to burglarize and rob Spicer while brandishing weapons. App.p. 91, l. 19-23. However, when Spicer fought back, it did not go as planned and Howze died as a result.

The 2006 Trial Evidence

In his opening statement counsel Rick Vieth for co-defendant Lyles noted that there would be a series of evidence that he would not attempt to contradict. He said: 1) that someone has died; 2) that Lance Lyles knocked on the door; 3) that Lance was totally exposed and did not try to hide his face and 4) that someone obviously got shot.

> When Mr. Spicer correctly sees someone with a gun and a mask behind Mr. Lyles, goes to shut the door that closes in this angle. Now when the door is closed in this angle it hit a gun, and that gun is discharged. And Mr. Howze was sitting on the sofa minding his own business and died as a result of a gunshot wound to the left side of his head.

App.p. 98, l. 16-22.

Counsel Pat Anderson for Jeter opened with the fact that Jeter and Lyles went over to Mr. Spicer's apartment and what happened was a terrible accident. App.p. 102, ll. 13-20. "I agree an arm came in the door. And when Mr. Spicer hit it, because you'll see you couldn't, these two boys could not have known that Mr. Howze was in that apartment from that door." She stated that when the arm went in with the gun and Mr. Spicer shut the door, it was reflex, the gun was fired, and the bullet hit Mr. Howze in the head. App.p. 104.

The State's first witness was Clarence Spicer. He stated that his roommate at the Rose Hill Apartment was Kerry Huff. Tavaris Howze was a neighbor and friend who had an apartment below his. App.p. 108-109. Spicer testified that after work on December 8, he went to Howze's apartment where Tavaris and Brian were playing a game. After they finished, the three of them went upstairs to Spicer's apartment. They talked and put in a movie. App.p. 114. Brian then left to get something to eat. App.p. 114.

> While he was gone two guys came up to my door, one of them with a mask and a gun and the other with a hood covering his face. I opened the door and saw that. One of the guys tried to step in. I

> stopped him on his way in. The other guy came from the side with a gun and mask on, and I started trying to close the door. And while I was closing the door one of them shot inside of my house, and that's when Tee was shot.

App.p. 114, l. 16-24.

Spicer said he recognized the first person with the hood on, although he did not recall him immediately at the incident. App.p. 115, l. 10-14. He said the person had gold teeth and said "what's up" and "something else" when he attempted to enter the apartment. Spicer said he did not know why the person was there and then the other man came around from the right side with a ski mask and a gun. App.p. 116-117. Spicer described both parties pushing on the door. App.p. 117-118. Spicer stated that he thought they were trying to rob him because they came to his house with a gun and mask. App.p. 118, l. 13-17.

Spicer called 911 then and Brian returned before the police arrived. App.p. 121-122.

Spicer testified that he later recalled one day in November a friend came over to play on the Playstation and that Leonard and Lance Lyles came over to his apartment to meet the other person. He said when he recalled this at the police department, he called his friend to ask who they were and he gave Spicer their names. App.p. 125-27. He subsequently identified Lance Lyles as the person at the door in a photographic line-up. App.p. 128.[3] After cross-examination, the state further disclosed Spicer's impression that the men appeared to be acting together and that he was not inviting them into his house. App.p. 154.

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3 Prior to cross-examination of Spicer, counsel Vieth stated, upon the Court's inquiry, that he was not going to elicit any testimony on whether it was a drug transaction on cross-examination. App.p. 129-130.
Counsel Anderson inquired at that time whether she could inquire about the marijuana cigarette found in the apartment. App.p. 131, l. 2-3. When the court asked about its relevance, counsel responded "it goes to why the boys were there. App.p. 131, l. 5-6.

The Court said that if it was something the witness agrees to you can ask it, but if he denies it, it is not relevant. App.p. 131, l. 10-16.

Scott Hill, a student at Dorman High School, described walking on a path that evening near the Rose Hill Apartments. App.p. 163. He said he heard two (2) gunshots around 9 p.m. and two people ran fast by him.. App.p. 163, l. 22-p. 166. Hill stated that the two men each had guns and masks. App.p. 164-165, 167-168. He described that they were wearing dark clothing and one gun was silver and the other was black. App.p. 169.

Brian Durbin testified he was a first year student at Spartanburg Methodist studying to be a minister. App.p. 179. He corroborated the events of the evening until he left to get food. App.p. 179-187.

Officer William Swanlund described being flagged down by a "very upset and hysterical" Clarence Spicer who stated his friend had been shot. App.p. 195. He said Spicer told him that he had heard a knock on the door, opened it, and two were outside his door, one of them said "what's up" and then one pulled a silver handgun and then Spicer tried to shut the door on one of the suspect's arms. App.p. 196. Officer Swanlund described going into the apartment and seeing the black male lying face down in the living room. App.p. 197.

The pathologist, Dr. David Wren, described Howze's gunshot wound in the left temporal region of his head. App.p. 205. He said various positions the victim could have been in, including a seated position with his head turned away from the assailant. App.p. 207. He opined the victim could have survived only 5 to 10 minutes after the shot. App.p. 208.

Crime Scene Investigator David Hogsed, formerly of the Spartanburg Public Safety Division testified that he documented and collected evidence from the crime scene. He opined that the victim had been seated on the love seat and it appeared he may have tried to stand up and fell after being shot. App.p. 213-214.

On cross-examination from counsel Anderson, Officer Hogsed confirmed that he had

photographed and put in his report that "the ashtray contained cigarette filters and partially smoked, hand rolled cigarette containing green plant material." App.p. 220, l. 15-18. He stated he did not personally request for the hand-rolled cigarette to be tested and did not know if it was tested. App.p. 221, l. 21-23. After the conclusion of Jeter's cross-examination, counsel Vieth had no questions of Officer Hogsed. App.p. 226, l. 15.

After an *in camera* hearing, statements from Jeter were determined to be freely and voluntarily entered. App.p. 269-270. [App.p. 234-268].

Officer Edgar Guthro of Spartanburg Public Safety testified that on December 10, 2004, he was involved with proceeding on an arrest warrant for Lyles. App.p. 272-273. He described Lyles running to avoid arrest after he left the house. App.p. 274, 277. Officer Steve Lamb described being involved in the chase of Lyles on December 10. App.p. 285-286. Officer Lamb described the chase beginning around 7:45 p.m. and ending around 8:45 when he was apprehended at Baskin-Robbins business. App.p. 286-289, 294-295.

Officer Russell Porter described executing a search warrant of Lyles' residence on December 10. App.p. 300-301. He testified they recovered 75-80 .22 long rifle rounds, a mini-magazine from the bed side stand, two fire rimmed shell casings from the bedroom drawer, a denim jacket with a red ski mask in the left pocket, 41 .380 caliber rounds, 41, .40 caliber Winchester rounds and 13 .40 Smith and Wesson rounds. App.p. 302-303.

On cross-examination, he stated no guns were recovered, although there were weapons in the parent's room, but they were not .22 caliber. App.p. 309.

S.L.E.D. Forensic Firearm Expert Dan DeFreese testified that the bullet recovered from the victim was a .22 caliber and could have been either a short or a long rifle bullet and could have fired by any weapon, handgun, or rifle, chambered for .22 long. App.p. 312. State Exhibit 19.

He determined the bullet fragments were consistent in their construction with the unfired cartridges in State Exhibit 31 (seized from Lyles' home). App.p. 313. However, he could not state they were from the same source. *Id.*

Sgt. Chris Taylor of the Spartanburg Public Safety Department described speaking with Mr. Spicer the following day after the incident to see if he recalled any further information. Officer Taylor corroborated Spicer's recollection about seeing one of the guy's previously at the apartment. App.p. 323. Spicer made a telephone call to someone and got the person's brothers' name. He then described the investigative path to Lyles. He spoke with Lyles about his whereabouts on December 8 and he described catching a ride home with Josh Jeter around 8 p.m. App.p. 329. He initially denied going by Rose Hill Apartments. App.p. 329, l. 8-9. Lyles told him that he did not wear gold fronts on his teeth and Taylor learned he had been told by a school official that he could not wear them at school. App.p. 329. Taylor stated that in interviews, both Jeter an Lyles denied being at Rose Hill that date. App.p. 331, l. 21-23.

Officer Taylor described the photo identification of Lyles by Spicer. App.p. 334. He further described his involvement in the.chase leading to the arrest of Lyles. App.p. 334-335.

On cross-examination, he confirmed that Lyles mother was present during his interview after the arrest at City Hall and she told her son, in many different ways, to keep his mouth shut and snatched his gold teeth. App.p. 339-40.

Stacey Watson, and intervention counselor, testified that Lyles and Jeter were friends who spent most of their time together at school. App.p. 344. She recalled the interviews of the students at school and each was nervous, but appeared to give voluntary statements. App.p. 348.

Investigator David Hearst described the brief statement he took from Lyles. App.p. 358-360. In the statement, he stated he went to his house after 8 p.m. App.p. 360. Similarly, during

the interview with Jeter, he also declared he went to his house. App.p. 361-362.

Officer Paula Brewster described processing the crime scene. App.p. 367-369. She described her investigation seeking information concerning videos, suspects, line-ups, etc. App.p. 373-375.

Officer Brewster described Jeter's statement of December 11, 2004. App.p. 375-379. She stated that during the interview Jeter denied going to Rose Hill Apartments. App.p. 377-379. However, on December 14, 1004, Jeter gave another statement. As redacted, it stated:

> ... I went to Rose Hill. So I walked over there, and I was other there, and I was over by the balcony thing. And dude came to the door. So I walked by the door and I had a mask on all the way ... And the dude saw me. The dude tried to close the door. I had run back to Charleston Place and I had got in the car. This was between 8:30 and 9:00 o'clock. I did have on a mask all the way. I don't think nothing should happen to me. But if you do the crime, you do the time.

App.p. 383, l. 3-10. Thus, on December 14, he admitted being there with a mask on, but denied having a gun. App.p. 383, l. 11-18.

Officer Brewster stated nine (9) months later, she took another statement from Jeter. App.p. 385-387. In that (redacted) statement, Jeter said:

> ...When I got to Rose Hill, I walked up and the guy then like wus up, and I said wus up. When I pulled my gun out the guy tried to close the door. ***I didn't see anyone else in the house***. So after that I ran back to Charleston Place. On the way it was a guy walking on the pathway that saw me running. The gun I had I bought it at the park from a guy named Kevin, Calvin...

App.p. 386, ll. 5-14. In the statement on September 14, 2004, Jeter admitted being masked and having a gun which he pulled out. App.p. 387. However, he did not admit it being fired. Id.[4]

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[4] At the conclusion of the state's case, counsel for Lyles initially made a motion for a directed verdict of acquittal. App.p. 416-418. He asserted that he did not believe that there was evidence of malice in the case. He argued as to attempted armed robbery that the evidence was sufficient that someone was coming in and that Spicer saw that someone had a gun and a mask

D. The 2006 Trial Testimony of Joshua Jeter.

Jeter testified in his own defense. He initially described getting a .25 caliber weapon with three bullets in it around August from a person named Calvin. App.p. 426-27.[5] He said he had shot the bullets in it. Jeter declared he had this gun with him on December 8, 2004 on the side of his hip. App.p. 427-28. After he described earlier events on December 8, Joshua described Lance's brother being taken by the police and advising Lyle's father about it. Later, Jeter said after they

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and assumes that someone is trying to rob them , but asserted that this was just an assumption. App.p. 417. He stated that since there was only one pistol alluded to that the state failed to prove possession since there were two people. Id. Although, counsel Vieth admitted that there were witnesses who saw two people running in the woods with pistols.

Judge Cole concluded that there was some direct evidence and in addition substantial circumstantial evidence and denied each motion. App.p. 418.

Counsel Anderson for Jeter next made similar motions and joined in counsel Vieth's motion for murder, contending that there was no evidence of malice. App.p. 418, ll. 7-10. As to burglary, she asserted that even if you accept what Spicer stated, he did not state that Jeter was ever in the home so it lacked evidence. He admitted that there was evidence from Spicer's testimony that Jeter had a gun. Judge Cole denied the motions. Finding some direct evidence and substantial circumstantial evidence. App.p. 418-419.

After the defenses had rested, a summary renewal of directed verdict motions were made. App.p. 611, l. 16-21. Judge Cole denied them.

5 The issue on whether the .25 caliber was the actual weapon Jeter had in his possession permeated the trial as noted in the PCR proceeding. PCR Hearing Tr. p. 30-31,37-42, 99-100, Lyles Trial Exhibit #1, App. 472-477, 480-491. A Phoenix .25 caliber weapon was turned into law enforcement through Jeter's mother prior to the trial. At trial, Jeter described purchasing a Phoenix .25 caliber handgun for $30.00 around August 2004 from "Calvin" after playing basketball at a park near the fairgrounds. App. 424-427, 443. It was introduced at trial as Jeter Exhibit 3 with a stipulation by the State and Lyles that they do not agree that it was the weapon Jeter had in his possession that night. App.p. 444. . In his direct examination, he claimed this was the gun he carried with him the night of the incident. App.p. 427. He was confronted by the State on cross-examination about the whether the gun he put in evidence was the gun he had that night because of the conflicting taped conversation from the jail when he was asking his mother and brother about having to get a gun to turn in. App.p. 453-454, 455. He was confronted by Lyles counsel Vieth about the acquiring of the weapon and the jail call after Jeter knew the murder weapon was a .22 caliber weapon and revised the statements he had given police. App.p. 460-461. (Counsel Vieth summarizes the calls as suggesting "we need to get a gun, get any gun, doesn't matter if it's a .25" which gets more prevalent in the calls closer to the trial before a gun is delivered. Importantly, Jeter conceded that he recalled those conversations with his family. App.p.462, l. 4-10. See also App.p. 475. However, he attempted to back off the concessions later in his testimony claiming "I was just agreeing with him." App.p. 471-472. .

talked to a guy named Vern for a while, " 'Lance asked me "let's go get some weed.' " App.p. 430, l. 23-25. Jeter said he was not driving his mother's car to get weed (marijuana) and Lance then told him "his homeboy sells weed in Rose Hill." App.p. 431, l. 3-=8. Jeter said they were about to walk over there and the he needed Lance's stocking cap because he only had on a long sleeve shirt, while Lyles had a coat and it was cold outside. App.p. 531, ll. 10-18. Jeter pulled the cap over his face. He said Lyles had a hood and had his gold teeth in. App.p. 432-33. They walked over to the house, he said Lance asked him if he was going to put in on the weed and he gave Lance $10. Lance told him that he was going to get a big sack for Jeter's birthday that was coming up in two days. App.p. 432, l. 10-23. **Jeter stated he did not know where they were going and did not know the guy.** App.p. 433, l. 1-11.

Jeter described walking over and that Lance knocked on the door. The guy answered and they talked for about 30 seconds to a minute. Jeter said he turned around because we usually go somewhere to buy weed and go in the house, so I walked over to see what was going on because Lance had not gone into the house. App.p. 433. He could not make out what they were discussing and "when I came to the door the guy says what's up and I say what's up." App.p. 434, ll. 1-2. Jeter described looking around and sees Lyles making a weird face and saw his right hand reach into his right back pocket and put his hand on a .22 black gun. App.p. 434, l. 2-11. He pulled it out slowly while the guy at the door was looking at Jeter. When he saw Lance's gun, Jeter said he reached and his first reaction was to pull his gun out. App.p. 434. He stated he pointed it at the guy's foot and then asked Lance what was going on and then the guy tried to shut the door. App.p. 434. Lance then tried to push against the door with his shoulder and Jeter claimed to be walking toward the stairs. Then he said he heard two shots fired and started running down the stairs and Lyles came after him. He stated he recalled seeing the guy on the path. App.p. 435. Jeter denied

firing any weapon and claimed he had no bullets in the gun. App.p. 435-36. He did not know if anyone had been shot and asserted that he did not see anyone else in the apartment. App.p. 436, l. 5-14.

After describing the statements given to the police, Jeter claimed he did not see the situation that went on between Lyles and the person and did not know if it was an accident. However, he denied going over there to rob, steal, or kill anyone. App.p. 441, l. 24- p. 442, l. 4. He stated that he went over there to buy marijuana. App.p. 442, l. 6. See also, App.p. 446-447. He said that he had turned the gun in because his mother told him to do so. App.p. 442-443. The .25 caliber weapon was introduced without any concession that it was the weapon he had that night and the unredacted statements were entered. App.p. 444.

He was subjected to cross-examination by the State and counsel for Lyles. App.p. 447-465. Importantly, Jeter admitted that he was aware that the person that there were going to see for the marijuana owed Lance some marijuana because the person had shorted him before. App.p. 466-67. He admitted that Lance was mad about. App.p. 466,l. 21-23. Jeter testified that Lance told him on December 10 (after the shooting) that the guy did not give Lyles all the marijuana that he owed him. App.p. 457. Jeter admitted that he had previously stated that when the person saw him walk behind Lance that he tried to shut the door that Lance tried to push the door back "and then Lance shot off into the apartment." App.p. 470. At the time of that statement, Jeter admitted he did not say anything about going over there for marijuana. App.p. 470, l. 17-24. He admitted that he did not even know Mr. Spicer. App.p. 470.

Jeter's mother, Sherry Hardy testified that on she had moved on December 8, 2004 and took all of the defendant's property with her. She stated that Jeter told her to look in a shoe box, but he did not tell her what to look for. App.p. 481. She started she looked in the shoebox and

found a gun. She state she called Jeter's brother and told him what she found in the shoebox and that they had to turn the gun in. App.p. 482. They then turned the gun into one of the Solicitor's investigators. App.p. 482-83. She claimed she did not know her son had the gun up to then and claimed it belonged to Grandma Lillie, who had passed away. App.p. 485. However, she was confronted with a jail call about making up a story about Grandma Lillie. App.p. 485-488. She admitted that in none of the jail calls did Jeter ever tell her mother to go and look in the shoebox for a gun. App.p. 488-489.

E. Testimony from Lyles Defense.

Lyles first called his mother, Melissa Lyles. App.p. 494-543. She attempted to explain the reason why the ammunition was present in the house and the location of various items that the police had seized. App.p. 504- 507., 515-516, 527, 539-540.

Lance Lyles testified in his own defense. App.p. 543. Similarly, he described the events leading up to asking Jeter to "come with him to buy some weed to smoke." App.p. 548-549. Lyles stated that Spicer was known to him as "See." App.p. 549. At that time he said he had braids. Id. He said Jeter agreed, but said they had to walk there. When they got there Lyles said he told Jeter to wait by the balcony while he buys the weed because Spicer knows him because he had purchased marijuana from him several times before the incident happened. App.p. 550, l. 20-25. He though he had been there three or four times. App.p. 551. He said he had smoked marijuana in the apartment with his brother (Leonard) who he said knew Spicer. Id.

Lyles stated that he knocked on the door and Spicer came and opened the door. He claimed he said what's up and Spicer said what's up. He said he then asked Spicer for "some weed" and whether he had any weed. He recalled that Spicer said:

> "I ain't got any right now, I just ran up, so I'm going to have to re-up. And I asked him how long it was going to take, and he said about 30 minutes until he go re-up

and get some more. And then that's when the commotion and everything just rushed in."

App.p. 552, l. 1-8. He denied ever receiving any money from Jeter. He stated that Jeter just overpowered him. App.p. 552.

Lyles stated that he did not see any mask that night. He said that he recalled hearing a firearm discharge and then he fled the scene with Jeter. App.p. 553.

Lyles denied trying to force his way into the apartment and was only talking with Spicer when all the rambling and commotion happened. App.p. 554, l. 9-11. He denied seeing anyone sitting on the couch. App.p. 554, ll. 14-15. Lyles further denied having any weapon that night or particularly a .22 at anytime. App.p. 555. He said when they got to the car at Charleston Place, he asked Jeter to take him home and there was a lot of conflict about what happened.. App.p. 555, l.16-23. He denied that anyone went into the house or attempted to rob Mr. Spicer. Lyles stated that when he learned the Spicer did not have any marijuana, that he intended to leave and then come back.

Q. So you knew there wasn't any marijuana there.

A. Right.

App.p. 556, l. 25-p. 557, l. 1. Lyles denied that he had ever been shortchanged by Spicer or had a grudge against him. App.p. 557, l. 1 - 13.

Lyles described that the reason he fled from arrest because he did not know the person who told him to come here was a police officer and that he was scared because he did not know who they were. He thought he would be safe in the Baskin Robbins. App.p. 560, l. 2-8.

On cross-examination, Lyles stated that he did not go there to rob Spicer, denied he put his foot in the door, and claimed he did not attempt to break into the house. App.p. 573, l. 6-23. He also denied seeing any gun or mask on Jeter. App.p. 573, l. 20-12. He admitted that Jeter was a

good friend, but denied that there were acting together. App.p. 573, l. 17-23. He denied that he saw Jeter fire a shot, but heard the gun discharge. App.p. 575, l. 21-25. App.p. 576-577.

Lyles denied that from the view he had that he could see the person sitting on the couch when viewing the picture from the doorway. App.p. 578-579. He claimed that he was only making eye contact with Spicer about buying weed. App.p. 23-24. Lyles further denied recollection about the conversation in the car other than that he was scared. He also claimed that he had never seen the seized coat and ski mask and denied knowing that bullets were in the room. App.p. 582-583.

Aiken v. Byars Hearing Testimony

At the onset of the hearing before Judge Verdin, Solicitor Barnette introduced a number of exhibits, including the March 13-17, 2006 trial transcript, the 2003 PCR Order of Judge Hayes, the 2013 Final Order of Dismissal of another PCR by Judge Couch, Spartanburg docket entries, and the obituary of Tavaris Howze, (State Exhibits 1-9) and trial exhibits including the jail call tapes introduced as Lyles Exhibit 1 consisting of Tape 60. (State Exhibit 10). Tr. p.5-9. Judge Verdin also allowed the SCDC disciplinary matters to be introduced at the hearing although she advised it would be addressed in the Order. Tr. p.10-11. State Exhibit 8. There was a discussion where Solicitor Barnette urged that rehabilitation was a factor and the records revealed what Jeter was like in prison for the past 17 years. Tr. p.10-11.

The State's first witness was William Thomas Farr, Assistant Chief of Investigations who introduced Jeter's disciplinary record since March 2006. Tr. p.12-13. State Exhibit 8. This disciplinary record included the following:

- Possession or attempt to possess cell phone- 4 instances
- Inciting or creating a disturbance – 1 instance
- Striking an employee with/without a weapon – 1 instance

- Exhibitionism and public masturbation – 10 instances
- Possession of contraband – 4 instances
- Threatening to inflict harm on employee – 2 instances
- Disorderly conduct – 1 instance
- Use of obscene, vulgar, profane language, gestures - 1 instance
- Possession of a weapon – 2 instances
- Use possession, narcotic, marijuana, unauthorized drug or inhalant – 1 instance
- Refusing or failing to obey – 2 instance
- Disrespect – 1 instance.

In addition, the report included a sanction December 9, 2010 for assault and battery of an employee, etc. with intent to kill/injure. For that incident, Jeter was reported to have disciplinary detention for 360 days. State's Exhibit 8. ROA p._____. On cross-examination, counsel referenced the fact that Jeter's record also revealed he earned work credits and education credits. State's Exhibit 8, p.5-6. Tr. p.14-15. However, Investigator Farr pointed out all inmates have to work or go to school. Tr. p.15.

Barbara Howze, the victim's mother, testified that Tavaris was murdered on December 8, 2004. Tr. p.18. She described the manner she was notified about the shooting and death at 4 a.m. Tr. p.18-119. She described Tavaris as a student of Spartanburg Methodist College (SMC) with hopes of being a history teacher after his mentor, Coach McMurray of Leesville High. Tr. p.19. She stated she and her late husband got a car for him and an apartment near campus where he was eventually killed. Tr. p.19. She said he was doing well in school and they spoke daily. She recalled he did not answer the phone the day of his death. Tr. p.19-20. They learned from a friend around

11:30 that he was "shot in the head." She said her husband just stopped living after his son's death. Tr. p.21.

LaTanya Walker, cousin of the victim, is a correctional counselor at SCDC and he was raised as her little brother after her mother passed away. She described Tavaris as a "gentle giant" who would do anything for anybody. Tr. p.22-23. She described Tavaris' obituary revealing that football was a major part of his life, always looking up to Coach McMurray. Tr. p.23-24, State's Exhibit 9. ROA______. Ms. Walker then spoke about accountability and the need to follow standards and God. She urged that there is no way a 16 or 17 year old should have been out of the house that night. Tr. p.14-25.

The initial witness for Jeter at the hearing was Jeter's defense counsel, Julia Patricia "Pat" Anderson. Tr. p.26-27. The State objected to keep out issues related to plea negotiations. Tr. p. 26-28. Judge Verdin allowed admission for purpose of the hearing. Tr. p. 26-27.[6] Anderson stated she represented Jeter and that there was no offer made by the State to plead guilty prior to the trial. Tr.p. 28.[7] She claimed Jeter wanted to plead guilty during the trial after an offer was made, but claimed it had to be jointly done with Lyles, but his co-defendant refused. Tr. p.28-29. She claimed she heard through Vieth that it was contingent on both accepting and Lyles had refused. Tr. p.28-29. [This was later disputed by counsel Vieth at the hearing].

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6 Respondent notes that issues related to the nature and existence of disputed plea offers was also set forth in 2010 PCR hearing in Jeter v. State, 2009-CP-42-1221. The S. C. Court of Appeals denied certiorari in that action in Jeter v. State, Appellate Case No. 2010-170031, Order, S.C. Ct App. Dec. 13, 2012. This Court can take judicial notice of its records. In the appendix in that proceeding includes the PCR testimony of Jeter and Patricia Anderson related to possible offers. App.p. 825-826, 836-838 (Jeter's version), p. 855-856,857-860.

7 This is inconsistent with her PCR testimony when she said she did not recall if a plea offer was made, although she felt the State had an air-tight case against the defendants. App. 855.

On cross-examination, the State challenged the assertion of a plea offer and pointed out there was no record of any plea offer in the trial transcript. Counsel Anderson claimed co-defendant's counsel Vieth had some information about it. She noted that during the trial after the jury was picked, her client produced a .25 caliber weapon which he claimed was the weapon he took to crime. Tr. p.30-31. It was brought by Jeter's mother to the Solicitor's office and caused a delay in the start of the trial. Tr. p.31. It was also developed that Jeter gave various versions of the incident: 1.) denied being at Rose Hill Apartments; 2.) there but no involvement; 3.) there with gun and mask on. Tr. p.31-32.

Anderson noted that there was a difference in the defense versions at trial between Jeter and Lyles as to who was responsible for the shooting. However, it was noted that Spicer only saw one gun with the person with the mask, and it was not Lyles who Spicer later identified as the person with the hoodie and gold grill (teeth). App.p. 115. Tr. p.33. Contrary to the record, App. p.141, Anderson maintained it was established that Lyles had the gun that was shut in the door. Tr. p.34-35. See App. p.116-117, 141.[8] She claimed the .25 was the gun that Jeter had with him that night which was not the murder weapon. Solicitor Barnette noted evidence was presented at trial which suggested the presentation of the gun by Jeter's other was the product of a conspiracy with Jeter. Tr. p.37-42. Barnette claimed the evidence of the phone call plan was produced at trial by Jeter's co-defendant's counsel, Rick Vieth, as Lyles Exhibit #1 at the 2006 trial. See App. 472-477. Also, App. p.481-491.

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8 Both defendants claimed the other defendant had the weapon that was fired and resulted in the death as set forth earlier in the brief. What was established was that Spicer only saw the Appellant who wore the mask with the only gun he saw. Additionally, it was established that after shots were fired, two men wearing masks with guns were seen running near the area. App. 163-166, 173. (Testimony of Scott Hill).

It was developed that contested evidence about the plea offer alleged by Anderson was previously presented at the trial and earlier PCR proceedings. Tr. p.40-42. App. 728-729.

Over objection by the State, Lyles trial counsel Vieth testified that the State advised him that they would consider alternatives to murder if Lyle cooperated and testified, but his client chose to plead not guilty and go to trial. Tr.p. 45-46. He said his client did not have the mask on. He noted that Jeter and Lyles were pointing to each other at trial as the shooter. Tr. p. 45.

On cross-examination, Vieth clarified that his client's position was that Lyles only knocked on the door to get marijuana and had no mask or gun, consistent with Lyles' fourth statement. Tr. p. 46. He claimed their position was he was not aware that Jeter was going to pull the mask and the gun. Tr. p. 47. He confirmed that Spicer knew his client. Lyles had claimed he did not know the attempted robbery would happen. Tr. p. 48.

Vieth stated that his client's pre-trial offer was only if his client cooperated and was the one to cut a deal and that it was not contingent on Jeter's alleged offer. Tr. p. 47. However, at the proceeding he did not recall the trial discussion or matters related to the acquiring of the gun by Jeter's mother. TR. p. 48-49.

Janet Vogelsang, a forensic social work expert, testified she performed a bio-social assessment. Tr. p. 50. Vogelsang interviewed Jeter and a number of his family members and friends. Tr. p. 52-23. She also reviewed school records, D.J.J. and S.C.D.C, D.S.S. records, his parent's divorce records, and his mother's medical records. Tr. p. 53-54.

Vogelsang reported that Jeter's mother's side was a large, loving, extended family in a community with emphasis on education. Originally from Bronx, N.Y., they settled in Spartanburg. Tr. p. 54. Jeter has a brother who is three years older. She found when just prior to when Jeter was

born, it had been a happy marriage with hopes and dreams, but declined after she became pregnant with Jeter. Jeter's father had begun using crack cocaine which led to a violent relationship and dissolution of the marriage. Tr. p. 56-57. Jeter initially developed pneumonia leading to a collapsed lung at 3 ½ months of age. Tr. p. 57. At 5 months old, he was taken to the hospital after he had allegedly fallen from the car and hit his head on the pavement, resulting in a skull fracture. At that visit, he had pneumonia again. Tr. p. 58. Another incident resulted in a referral to D.S.S. when the parents were fighting and his mother picked up an iron meaning to hit his father but hit Jeter in the forehead. Tr. p. 58. This referral also resulted in the agency learning his father was addicted to drugs and had been in a psychiatric hospital. Tr. p. 58.

After the family broke apart, his mother had to provide for her two boys because the father was not good about paying child support. Although they allegedly still loved each other, attempts at reconciliation did not work. Tr. p. 59.

According to Vogelsang, this early conflict in life impacted upon Jeter's child development. Tr. p. 59. She found his school records showed his conduct deteriorated in the fourth grade, het he still maintained good grades after the divorce. Tr. p. 61. After his mother was arrested for assault and jailed, he still received A's and B's, but poor inconsistent conduct continued and he quit football. Tr. p. 61.

As he reached middle school through the 8th grade, he received low conduct ratings, but no testing. Jeter began spending more time with his father in a rougher and violent section of the community. He was moved to an alternative school in 7th grade. Tr. p. 63.

Jeter was arrested for assaulting a coach and he was sent to D.J.J. as a result. Tr. p. 64. Vogelsang noted that predictors of juvenile incarceration are neglect and family violence. Tr. p. 65.

She referred to Jeter's situation as "benign neglect." His mother was not getting child support and doing the best she could, according to Vogelsang. Tr. p. 65. However, she found there was no structure in the home. Tr. p. 65.

Jeter's I.Q. was found to be in the low average range, which she thought was inconsistent with his higher grades. He was opined to have "oppositional defiant disorder" with no structure in the home, his daily use of marijuana, and his selling marijuana and crack as factors. Tr. p. 66. D.J.J. records showed he was able to perform in a structured environment where he did work and respected authority and others rights. Tr. p. 67. D.J.J. recommended family counseling, anger management, and decision-making counseling. However, there are no records supporting that this was done. Tr. p. 67-68.

Prior to the incident, his mother had moved to a nicer area and working in responsible jobs, yet Jeter was left in an unstructured environment where he could do as he wanted. Tr. p. 68. She found that at age 16, two days short of 17, Jeter was prone to engage in riskier behavior. With his freedom to go as he pleased with adverse influences, he lacked a mature sense of responsibility. Tr. p. 70.

On cross-examination, Vogelsang admitted she did not inquire with Jeter about the circumstances of the crime. Tr. p. 73. On re-direct, Vogelsang noted that emotional intelligence did not have anything to do with academic intelligence. Tr. p. 74. Vogelsang confirmed most people do not commit murder. Tr. p. 75.

Jeter's mother, Sherry Johnson, testified that she had raised her sons on her own. Tr. p. 77. She stated sometimes she had to work late or second shift. Tr. p. 77-78. She claimed Jeter did take a few anger management classes that she attended. Tr. p. 78. Prior to alternative school, she claimed

she was not contacted about Jeter's behavior problems. Tr. p.79. She stated she wanted to do the best she could for him. She learned when he lived with her husband Tommy, that he had several interactions with the police. Tr. p. 81.

She said when he was taken by the police to be interviewed, she was not in the room. Tr. p.81-82. His mother made a statement in mitigation that she grieves for the victims and grieves for her son who has a life sentence and thinks about the victims family all the time. Tr. p. 83.

Jeter's aunt, Linda Askari, testified Jeter spent many nights at her home. Tr. p. 84-85. She stated Jeter told her that he needed a place to sleep and that no one was at his home. Tr. p. 84. He would arrive around 10p.m. Tr. p. 85. This happened when he was too young to be out, particularly in a bad, unsafe neighborhood. Tr. p. 86.

Bishop Cathaye Jones testified that Jeter participated in his after-school program and little league football for a couple of years from 9 through 12 years old. Tr. p. 87. However, he noted that Jeter struggled and fell off from regular contact with him and his programs and he had to search for him which was a task. He found that Jeter was "adrift". Tr. p. 89.

Cousin Rashad Moore is about the same age as Jeter. He stated he grew up in the dame neighborhood with Jeter and attended elementary school with him. Tr. p. 90-91. Moore graduated from Boiling Springs High School and went to college. He presently works for D.S.S. He recalled when he was 16, this incident occurred and noted within two weeks he had lost three cousins. Tr. p.91. He described up to then he thought they were young and nothing was going to happen to them. It opened up his eyes to the effect it had on family and other families. Up to then, he was going to do whatever he wanted to do regardless of the fact. Tr. p. 92. He stated the 2008 event was one of his own motivations in life and led to his being active in the community. He said he did

this "so that no other family has to experience it". Tr. p. 93, l. 7-8. He said he tells kids about his incident and that they received life sentences and was life changing. Tr. p. 93, l .9-14.

On cross-examination, Moore acknowledged that he grew up in the same environment as Jeter and followed a different path. Tr. p. 94. Moore stated he was fortunate to where he did not end up in the situation, although he conceded he had encounters with law enforcement. Tr. p. 94.

Joshua Jeter was the final witness at the Aiken v. Byars hearing. He stated that when he was growing up after age 13, no one was really in charge of him because his mother was always working. Tr. p.95. He recalled spending time with his father when he was alone and on the street and that he felt lost. [although the forensic social worker noted that Jeter had been punched in the face while in school, he had no vivid memory of the incident. Tr. p. 96].

Jeer acknowledged that he had been incarcerated at various institutions, including Lee Correctional Institution, McCormick Correctional Institution, Perry Correctional Institution, as well as Broad River Correctional Institution where he was presently. Tr. p. 91-92. He claimed to have been stabbed multiple times, including July 2016. He admitted that around a month and a half later, they found a weapon in his cell. He asserted he had the weapon because being incarcerated "around all those dopes, I had to have something to protect myself cause I've been stabbed I seen a king of people get stabbed". Tr. p. 97. He claimed to have thought about what happened in 2008 everyday for 17 years. Concerning what he thought about it was for the situation never to have occurred. He claimed he cannot pray enough or ask God for forgiveness enough for it. "Like I say, my family, the victim's family, Howze's family, I know everybody hurting". Tr. p. 97-98. He claimed to not understand why the situation happened or why he had to be a part of it. He claimed to be striving better.

As far as what he wanted to do if he got out, he claimed he wanted to help people prevent gun violence like what happened to me. Tr. p. 98, l. 13-14 (emphasis added). He also wanted to raise his son, have more children and be a success story. [At the time of hearing, Jeter was 33 and his son was 16. Tr. p. 98].

On cross-examination, Jeter denied that the .25 weapon was not the gun he had at the incident. Tr. p.99. He claimed it was the weapon. Tr. 99-100. Jeter denied stating in March 2006 that it was not the gun. Tr. p. 100. Jeter claimed to take responsibility for everything he did, including that he was there and brought a gun. Tr. p. 100. He denied that there was intent to rob or burglarize Mr. Spicer's home. However, he admitted having a mask on and bringing a gun. Tr. p. 100-101. He then claimed he was "merely present." Tr. p. 101. He denied that the gun he claimed to have gotten on the basketball court was actually Aunt Lilly's gun. Tr. p. 101. See App. p. 485 (mother Sherry Hardy testifying that she spoke with her son stating the gun was Grandma Lilly's gun). Jeter stated that he was there and a reckless situation occurred with no plan, but "just a reckless disregard for life or whatever happened." Tr. p. 102, l.6-13. He stated that he and Lyles were friends and he went with him that night and the Lyles knew Spicer and had his face exposed. Jeter claimed, contrary to the trial record, that he was standing in another area possibly 30 feet away. Tr. p. 103. [At trial, Jeter testified he was 5 to 7 feet from the door. App. P. 467, l.23-25]. However, when confronted that there was not enough room for that, Jeter pivoted and stated he was standing by the balcony's door around 24 feet. Tr. p. 103.

Jeter claimed that he was merely present and told his mother that Lyles shot the victim and that his mother turned him in. Tr. p. 104. However, the solicitor pointed out that this was in the third statement. But, Jeter had claimed at trial that the third statement was a half-truth. Tr. p. 104.

See App. p. 263, l. 8-12 ("half of it"). Jeter concluded his hearing testimony concerning whether he was taking responsibility for what he did as follow:

> If you're asking me did I murder someone, no I did not
> Murder no one. So I can't take responsibility for nothing
> I didn't do.

Tr. p. 105, l. 25 – 106, l. 2.

ARGUMENT

I. Where the Appellant was sentenced to a 50 year sentence and vacated a life without parole sentence for murder in an *Aiken v Byars* proceeding and no specific objection is made to the sentence at the in person sentencing proceeding after the written order was entered which is within the statutory mandates for murder, the matters raised herein are not preserved for appellate review where no exceptional circumstances exist and there is no concession by the State that this is an illegal sentence.

The arguments raised in Brief of Appellant are not preserved for the appeal. The Appellant for the first time on appeal challenges the fifty year sentence he received for the crime of murder he committed when he was sixteen years old. Although he made no request for reconsideration or objection at the time he received either the December 30, 2021 order or during the August 18, 2022 sentencing proceeding before Judge Verdin, he now initially complains that the order was incomplete in its *Aiken v. Byars* and *Miller v. Alabama* analysis. "A challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." *State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999).

Order of December 30, 2021

On December 30, 2021, Judge Verdin signed her order with the intent to resentence Jeter to a 50 year sentence rather than the life sentence without parole previously given in 2006. In the pertinent part of the order, it stated:

> In 2014, the South Carolina Supreme Court issued an opinion in *Aiken v. Byars* which changed the guidelines under which a minor could be sentenced to life without parole. 410 S.C. 534, 765 S.E.2d 572(2014). In *Miller v. Alabama*, the United States Supreme Court had previously decided that imposing a sentence of life without parole on juveniles violated the Eighth Amendment to the U.S. Constitution if the sentencing authority failed to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 567 U.S. 460, 480. In *Aiken*, our Supreme Court held that *Miller* applied retroactively, thus allowing juvenile defendants sentenced to life without parole to petition the Court to be resentenced under *Aiken* guidelines. 410 S.C. 534 at 541, S.E.2d at 576. The factors that this Court must consider when resentencing Petitioner are as follows:

> (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*, at 544, 765 S.E.2d at577 (2014), citing *Miller*, at 477.

> This Court held a hearing on December 8, 2021, during which it heard testimony relating to these factors. The Court has carefully considered this testimony in coming to its decision. The family and home environment of the Petitioner was not structured, as his father was not present in the home and his mother was often at work leaving Petitioner mostly unsupervised. The Court heard testimony that, in structured environments, Petitioner has, for the most part, done well. The Court also considered arguments from the State that Petitioner has continually failed to take responsibility for the shooting death which occurred in 2004. Petitioner testified at the hearing that he never intended to rob the victim, that he hadn't brought the gun, and that he was "merely present" at the crime scene. This testimony is not consistent with the evidence presented at Petitioner's original trial. Therefore, it appears to the Court that Petitioner has not fully taken responsibility for his role in the murder.

> After careful consideration of the testimony presented at the hearing, the Petitioner's age at the time of the offense, and the *Aiken* factors, the Court resentences Petitioner to 50 years on Indictment 2005-GS-42-0888 for murder, to run concurrent to his other sentences. Petitioner will receive credit for any time he has already served.

ROA _. No objection or request was made by defense in any manner at the August 18, 2022 sentencing concerning the order nor was any motion for reconsideration made. August 18, 2022 Tr. p. 3-4.

A. The Failure to Object to the Sentence and Raise the Specific Concerns to Judge Verdin Defeats the Court's Authority to Consider the Assertions of Error raised for the First Time in the Appeal.

Jeter suggests that the December 2021 written order was insufficient because it did not specifically address all the hallmarks of youth set out in *Aiken v. Byars* . Initial Brief of Appellant,

p. 11-12. Absent any request below when given the opportunity to do so by Judge Verdin at the August 18, 2022 proceeding or before, Appellant for the first time in the appeal suggests a remand to Judge Verdin is necessary for such consideration - a correction or clarification he failed to ask for when he received the written order or at the time of the actual sentencing on August 18, 2022 or before. (August 18, 2022 Hearing Transcript, p. 2-3, l.1).

He also contends for the first time that the Order was too vague and incomplete to allow appellate consideration. He assumes *arguendo* that such specific written findings are required when a term of years sentence for murder is given within the statutory mandates rather than a sentence of life without parole under *Aiken* and *Miller*, even though he never suggested this was a defect in the sentence or order to Judge Verdin.

He further contends for the first time that Judge Verdin's portion of the order addressing the evidence and her consideration of the evidence in authorizing sentence less than life without parole of fifty years were either inadequate to address the penological factors of youth at the time of the crime and notes that three of the *Aiken* factors were not emphasized in her order for 50 year sentence.[9] Initial Brief of Appellant, p. 12. Despite Judge Verdin's affirmative statement in her order statement to the contrary about her consideration ;

> . . .This Court held a hearing on December 8, 2021, during which it heard testimony relating to these factors. The Court has carefully considered this testimony in coming to its decision. . . .
>
> . . . After careful consideration of the testimony presented at the hearing, the Petitioner's age at the time of the offense, and the *Aiken* factors, the Court resentences Petitioner to 50 years. . . Order of December 30, 2021, p. 2

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9 It cannot go without notice that Jeter was 16 at the time of the crime and with a 50 year sentence, he faced release at age 65. He was 33 years old at the time of the proceeding. No evidence or argument was presented to the trial court that a 50 year sentence was equivalent to a life without parole sentence, which was expressly limited in *Aiken v Byars* to life sentences.

the Appellant contends that nothing other than limited parcels of the evidence was considered and none of the *Aiken* factors were considered other than matters related to two of the factors – home life (#2) and possibly rehabilitation (#5) were addressed in the order. He contends this leaves (#1) age (#1), (#3)circumstances of the crime[10], and (#4) the incompetencies associated with youth were hardly addressed, except though the preliminary statement that she was expressly required to consider these matters in her order, p. 1-2. Again, this concerns on the alleged deficiencies in the written order should have been presented directly to Judge Verdin at that time. The appropriateness of the need for that timely request is reflected in the Appellant's request before this Court to remand to the Court to make further findings. Initial Brief of Appellant, p. 12-13.

"A challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." *State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999). *But cf. State v. Johnston*, 333 S.C. 459, 463-64, 510 S.E.2d 423, 425 (1999) (holding that when the State has conceded that the trial court committed error by imposing an excessive sentence, an exceptional circumstance exists that allows the appellate court to remand for resentencing even though the issue was not properly preserved. See *disapproved of by State v. Vick*, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009). In *Johnston*, our supreme court vacated an illegal sentence

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10 This is not a correct assertion by Appellant. There can be no rational argument that she did not consider the testimony of Jan Vogelsang who touched upon all the factors. Although Appellant may disagree with the findings, the Court's order did address the circumstances of the crime consideration ,. In particular, Judge Verdin found: "The family and home environment of the Petitioner was not structured, as his father was not present in the home and his mother was often at work **leaving Petitioner mostly unsupervised**. The Court heard testimony that, in structured environments, Petitioner has, for the most part, done well. **The Court also considered arguments from the State that Petitioner has continually failed to take responsibility for the shooting death which occurred in 2004. Petitioner testified at the hearing that he never intended to rob the victim, that he hadn't brought the gun, and that he was "merely present" at the crime scene. This testimony is not consistent with the evidence presented at Petitioner's original trial. Therefore, it appears to the Court that Petitioner has not fully taken responsibility for his role in the murder." Emphasis added. Order, p. 2.**

notwithstanding preservation rules. *See id.* at 463-64, 510 S.E.2d at 425. There, the court found there were exceptional circumstances in that the State conceded "the trial court committed error by imposing an excessive sentence," and there was a "real threat" that the defendant would "remain incarcerated beyond the legal sentence due to the additional time it w[ould] take to pursue [post-conviction relief]." *Id.* In *Vick*, this court acknowledged the holding in *Johnston*, but addressed the sentencing issue even though there was no "threat" that the appellant would "remain incarcerated beyond the legal sentence." *Vick*, 384 S.C. at 202-03, 682 S.E.2d at 281-82. The court reasoned, "[O]ur courts have, in the past, 'summarily vacated' sentences for kidnapping whe[n] such sentences were precluded by [statute] because the defendant received a concurrent sentence under the murder statute." *Id.* at 202, 682 S.E.2d at 282. The court also noted that "our courts have at times considered an issue in the interest of judicial economy." *Id.* In *Bonner*, the Court vacated a defendant's sentence notwithstanding preservation rules when both parties fully briefed the issue, and we stated, "[T]his case presents an exceptional circumstance because the State concedes in its brief that the trial court committed error by imposing an improper sentence." *See State v. Bonner*, 400 S.C. 561, 567, 735 S.E.2d 525, 528 (Ct. App. 2012).

Here, extraordinary circumstances do not exist. The Appellant was subject to a sentence of 30 years to life without parole for murder. He was 16 at the time of the crime and 33 years old at the time of the *Aiken v. Byars* proceeding. Unlike *Johnston*, his sentence would not be completed before completion of appropriate collateral remedies. Unlike *Vick*, there is no concession by the State that the statutory law of the State or *Aiken v. Byars* or *Miller v. Alabama* forbid either a life without parole sentence or a fifty year sentence of a juvenile. To the contrary, it is expressly allowed unlike the settings in *Johnston*, *Vick* and *Bonner*. Similarly, there is no present requirement that a General Sessions sentencing court of a juvenile set forth in written detail factors

it considered in giving a sentence of less than a life without parole sentence. What is required is for the sentencing court to fully consider the *Aiken* and *Miller* factors in sentencing and subject them to individualized sentencing. As recognized throughout the Appellant's brief and our summary of the evidence presented to Judge Verdin, evidence was presented to her which touched upon all five factors in *Aiken.* Her acknowledgement that she considered all the factors and the failure of Appellant (or the State) to suggest otherwise when a sentence other than a life without parole sentence when given the opportunity suggests they recognized the sentence did not abuse her discretion. *Compare*, *State v. Morgan*, 433 S.C. 435, 858 S.E.2d 647 (Ct.App 2021) (although sentencing judge considered age in pre-Miler sentencing, remand was proper when subsequent factors of Aiken were not available or required for consideration in an LWOP sentence situation). The Appellant will be free to attack those decisions in subsequent collateral proceedings.

Since no objections to the sentence of fifty (50) years was made to Judge Verdin, Respondent submits all his grounds for relief from the sentence must be rejected.

II. Since the Appellant did not receive a life without parole sentence, Appellant does not fall within a class of offenders to which *Miller v. Alabama* and *Aiken v. Byars* now applies. His underlying argument must be rejected.

Assuming arguendo this underlying assertion can be addressed absent an objection, Respondent respectfully submits that since Appellant received a sentence of fifty years rather than an available life without parole sentence, his concerns and challenges about whether *Aiken v. Byars* and *Miller v. Alabama* were sufficiently complied with are without merit. But see *State v Miller*, 433 S.C. 613, 861 S.E.2d 373 (Ct. App. 2021) (court applies *Byars* consideration in 55 year sentence finding no error in manner court considered case).

Over the last twenty years, the United States Supreme Court has held that the Eighth Amendment prohibits certain punishments and requires special procedural protections in the context of juvenile sentencing. *See Roper*, 543 U.S. at 568, 125 S.Ct. 1183; *Graham v. Florida*, 560 U.S. 48, 74–75, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Miller*, 567 U.S. at 465, 132 S.Ct. 2455; *Montgomery v. Louisiana*, 577 U.S. 190, 212, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016).

The *Miller* Court explained that there may be the type of rare incorrigible youth who commits homicide and deserves a sentence of life without parole. Id. at 479–80, 132 S.Ct. 2455. However, given all that *Roper* and *Graham* said about youth, the "appropriate occasions for sentencing juveniles [to life without parole] will be uncommon" and require a sentencing scheme that allows for the sentencer to consider the offender's "youth and attendant characteristics." Id. at 479, 483, 132 S.Ct. 2455. If the sentencing scheme is mandatory and "mak[es] youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence," the Supreme Court explained, the "scheme poses too great a risk of a disproportionate punishment" and runs afoul of the Eighth Amendment. Id. at 479, 132 S.Ct. 2455. *Miller* relied on the same characteristics of youth announced in *Roper* and reiterated in *Graham*, that a juvenile's "transient rashness, proclivity

for risk, and inability to assess consequences" leads to diminished criminal culpability and an increased ability to reform and be rehabilitated, and determined that "none of what [its precedents] said about children ... is crime-specific." Id. at 471–73, 132 S.Ct. 2455.

Building on *Graham*'s conclusion that life without parole "alters the offender's life by a forfeiture that is irrevocable," the *Miller* Court reasoned that individualized sentencing and consideration of "the 'mitigating qualities of youth' " are particularly relevant when considering the constitutionality of a life-without-parole sentence imposed on a juvenile. Id. at 475–76, 132 S.Ct. 2455 (first quoting Graham, 560 U.S. at 69, 130 S.Ct. 2011; then quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993)). Both *Roper* and *Graham*, the Supreme Court acknowledged, "teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." Id. at 477, 132 S.Ct. 2455. Therefore, mandatory imposition of life without parole, which ignores the very attributes that make children constitutionally different from adults and disregards the offender's potential for rehabilitation, violates the Eighth Amendment. Id. at 479, 132 S.Ct. 2455. The Supreme Court clarified that its holding, unlike *Graham*, did not categorically bar life-without-parole sentences for juvenile homicide offenders. Id. at 479–80, 132 S.Ct. 2455. However, after *Miller*, the Eighth Amendment requires that a sentencer "take into account how children are different, and how those differences counsel against irrevocably sentencing [a juvenile] to a lifetime in prison." Id. at 480, 132 S.Ct. 2455. These cases and their collective underpinning are compelling. However, in answering the federal constitutional question before the Court today, "our duty to follow binding precedent is fixed upon case-specific holdings rather than general expressions in an opinion that exceed the scope of any particular holding." *State v. Slocumb*, 426 S.C. 297, 827 S.E.2d 148, 153 (2019)

First, appellant did not receive a life sentence. He received a valid term-of-years sentence

within the statutory range of murder. Appellant received a fifty year sentence and will be released at the end of that term when he is 66 years old. Appellant has the possibility of release when his sentence ends, assuming no further criminal conduct and sentences. He was already afforded the relief *Miller* contemplates. Neither our courts nor the United States Supreme Court have held the *Miller* rule applied to sentences other than life without parole, such as a *de facto* life sentence or, for that matter, defined or determined what constitutes a *de facto* life sentence. While there are cases which found a term-of-years or aggregate sentence were the functional equivalent of life, there are many other courts which have found otherwise and rejected application of *Miller v. Alabama's requirements*. *See Lucero v. People,* 394 P.3d 1128, 1132 (Colo. 2017) ("*Graham* and *Miller* apply only where a juvenile is sentenced to the specific sentence of life without the possibility of parole for one offense."); *Wilson v. State*, 157 N.E.3d 1163, 1176 (Ind. 2020) ("*Miller, Graham, and Montgomery* expressly indicate their holdings apply only to life-without-parole sentences."); *Hobbs v. Turner*, 431 S.W.3d 283, 289 (Ark. 2014) (with an aggregate term of 55 years, "[The defendant] was not subjected as a juvenile homicide offender to a mandatory life-without-parole sentence; therefore, *Miller*, is inapplicable."); *Lewis v. State*, 428 S.W.3d 860, 863–64 (Tex. Crim. App. 2014) (holding that *Miller* did not apply to single sentence of life imprisonment with the possibility of parole after forty years imposed mandatorily on a juvenile homicide offender). *See e.g., Bunch v. Smith*, 685 F.3d 546, 552 (6th Cir. 2012) (determining until the Supreme Court rules term-of-year sentences resulting in the functional equivalent of life without parole offend the Eighth Amendment, such sentences do not violate clearly established federal law); *Contreras v. Davis*, 716 F. App'x 160, 163 (4th Cir. 2017) (declining to determine whether a 77-year sentence was a *de facto* life sentence that violated *Miller* and *Graham*); *In re Harrell*, 6th Cir. No. 16-1048, 2016 WL 4708184 (Sept. 8, 2016) (denying

motion for successive federal habeas corpus petition, because defendant's 60-150 year sentence for murder when he was seventeen was not the functional equivalent of mandatory life without parole; defendant was eligible for parole at seventy-seven-years old); *State v. Nathan*, 522 S.W.3d 881, 893 (Mo. 2017) (en banc) (holding sentencing a juvenile to consecutive, lengthy sentences for multiple non-homicide offenses along with homicide was not the functional equivalent of life without parole); *State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017) (holding *Miller* did not apply to consecutive life sentences with possibility of release on multiple counts of murder, even if such sentence, in aggregate, was functional equivalent of life without possibility of parole); *State v. Kasic*, 228 P.3d 410, 414 (Ariz. Ct. App. 2011) (finding a sentence of 139.75 years, exceeding life expectancy, was not constitutionally excessive).

A defendant's average life expectancy is not a "guaranteed date of death" and might change depending on his individual health, available healthcare, and other factors such as drug use. It is difficult to draw a line to conclude at what point a juvenile received a *de facto* life sentence so his term-of-years sentence violates the constitution, particularly in this case where no evidence of appellant's individual characteristics was presented at his sentencing hearing.[11]

Respondent does not believe it is wise or appropriate to extend *Miller*, or other existing Eighth Amendment precedent, by predicting whether the United States Supreme Court would extend its jurisprudence and hold unconstitutional a lengthy term-of-years sentence in this context. See, e.g., *Wilson*, 157 N.E.3d at 1175 ("[D]etermining the reach of the [Eighth Amendment's cruel

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11 Moreover, as set forth in Issue I, it is questionable whether the argument regarding a functional equivalent of a life sentence is preserved for this Court's review. Appellant presented no evidence or argument at his sentencing hearing to support the contention he makes on appeal. *see also State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) ("[A] challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review."). However, given the timely, albeit, short objection following the general statement, respondent addresses the argument out of an abundance of caution.

and unusual punishment] clause is inherently a line drawing exercise best left to the U.S. Supreme Court."). This Court must apply the holdings of the United States Supreme Court as they are written, not what we wish were true about the holding or how far we would like for the holding to extend.14 See, e.g., *Jones*, 141 S. Ct. at 1321–22 ("The dissent draws inferences about what, in the dissent's view, *Miller* and *Montgomery* 'must have done' in order for the decisions to 'make any sense.' We instead rely on what *Miller* and *Montgomery* said ...." (citation omitted)).

At this time, given no controlling authority to the contrary, Respondent submits that State should remain consistent with the limitations and *Aiken v. Byars* and *Miller v. Alabama* and join the other state courts that have adopted a narrower interpretation of Miller's holding and United States Supreme Court Eighth Amendment precedent. See Slocumb, 827 S.E.2d at 156 ("Rather than predict what the Supreme Court may or may not do, we believe the proper course is to respect the Supreme Court's admonition that lower courts must refrain from extending federal constitutional protections beyond the line drawn by the Supreme Court."); Turner, 431 S.W.3d at 289 ("Miller prohibits a sentencing scheme that *mandates* life in prison without the possibility of parole for juveniles homicide offenders. [The defendant] was not subjected ... to a mandatory life-without-parole sentence; therefore, Miller is inapplicable." (citation omitted)); Wilson, 157 N.E.3d at 1175 ("And determining what sentence constitutes a 'de facto life sentence' would be a task completely unmoored from the language of Miller.").

The United States Supreme Court certainly could choose to extend its aforementioned Eighth Amendment jurisprudence to a lengthy term-of-years sentence. However, unlike the Appellant, Respondent does not find it appropriate to extend its precedent further than its own language.

III. Where the Appellant was sentenced to a fifty year sentence for murder after an *Aiken v. Byars* hearing rather than a life without parole sentence for a crime he committed when he was 16 years old, the trial judge did not abuse her discretion in sentencing the Appellant to a fifty year sentence after a full presentation in aggravation and mitigation of sentence.

The Supreme Court has clarified that "*Miller* did not impose a formal factfinding requirement" on the sentencer. *Montgomery*, 577 U.S. at 211, 136 S.Ct. 718. Rather, it is up to States to determine the mechanisms to comply with *Miller*'s mandate. Id. This means that not only is the sentencer relieved of making a specific finding of incorrigibility, but also he or she is relieved of making any specific factual findings on the record. *Jones*, 141 S. Ct. at 1316, 1320 (stating "*Miller* did not require the sentencer to make a separate finding of permanent incorrigibility before imposing [life without parole]" and "*Miller* did not say a word about requiring some kind of particular sentencing explanation with an implicit finding of permanent incorrigibility, as *Montgomery* later confirmed"). The discretionary scheme itself is sufficient, the Supreme Court explained, because it "allows the sentencer to consider the [offender's] youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the [offender's] age." Id. at 1318.

Assuming *arguendo* this issue is preserved for consideration by a complete lack of objection or motion for reconsideration (Issue I) or that *Byars – Miller* is inapplicable to a term of years sentence (Issue II), it is without merit. The focus of Appellant's challenge is that in her two page order, Judge Verdin did not expressly go though each of the five hallmarks of *Aiken v. Byars* and address the evidence that was presented in the proceeding or trial on each presentation by the defense or prosecution. Although the order was short, this Court has not set of an order for sentencing requiring a judicial sentence to summarize the evidence and the impact of the evidence. What *Byars* and *Miller* require are consideration of the hallmarks of youth factors. Although not

required to make written findings Judge Verdin unequivocally declared within the order that she was directed by *Aiken v. Byars* to consider those five factors and consider the evidence presented to her in the hearing which she declared she did. As set out in argument one:

> . . .This Court held a hearing on December 8, 2021, during which it heard testimony relating to these factors. The Court has carefully considered this testimony in coming to its decision. . . .
>
> . . . After careful consideration of the testimony presented at the hearing, the Petitioner's age at the time of the offense, and the *Aiken* factors, the Court resentences Petitioner to 50 years. . . Order of December 30, 2021, p. 2

Respondent submits the mandates of *Miller* were satisfied according to *Montgomery* and *Jones*..

The Appellant further complains that the Order misapprended the evidence presented in the hearing because he believes it was weighted toward the prosecution suggestions. Since the State's quest for a life without parole sentence which it did not get, it is difficult to accept the Appellant's suggestion of judicial bias. Appellant contends that Judge Verdin downplayed the circumstances of Jeter's childhood by not specifically expressing it in her order, but rather summarizing it as "lacking structure" rather than paraphrasing all of the testimony of Jan Vogelsang which caused to reject the life without parole request by the State. Initial Brief of Appellant, p. 13. The summary of Vogelsang's testimony set forth above is incorporated by reference concerning the circumstances of his upbringing which influenced his criminal conduct of being a drug user and seller, as well as being engaged in violent conduct that resulted in his detention and evaluation at the Department of Juvenile Justice for assaulting a coach. Tr.p. 65. While Vogelsang's emphasis on neglect and family violence as being a factor in leading to DJJ detention, was not set forth in the Order, Vogelsang noted that when he was left in an unstructured environment, he was prone to riskier behavior, which led to the freedom to go as he pleased with adverse influences. Tr.p. 70 Though not fully set out in the Order by Judge Verdin, it certainly

suggest that Judge Verdin considered the testimony, albeit not describing that he was not a latchkey child whose father had become separated and divorced from the family due to his violent nature and crack cocaine addiction. The mere fact that Judge Verdin noted 'his father was not present in the home" itself spoke volumes about his standing. It was obvious by the nature of the crime and the family trauma and theft of Christmas presents that Jeter lived in a rough area based upon Vogelsang, his mother and Jeter's testimony.

The Appellant challenges the fact that Jeter did not take responsibility for his actions. He ignores that at the hearing it became at one point that he was merely present. Tr.p. 101. He denied that he was there to rob Mr. Spicer, even though he was wearing a mask at the time and brought a gun, although what gun was disputed. Tr.p. 100-103. Judge Verdin's conclusion that he had "not fully taken responsibility for his role in the murder" is supported by the evidence at the sentencing hearing as well as at the trial where the jury also rejected his assertion of merely present.

Judge Verdin did not merely accept that the State had urged that he had not fully taken responsibility for the shooting death as well. The Appellant asserts before this Court there is not a factual basis to support this suggestion. But the Appellant sees only his side which the judge and jury had rejected by rejecting his "mere presence" argument. He now asserts he never denied having a gun. Contrary to the claims at the hearing and before the jury, he had claimed leading up to the trial that he did not have a gun. Closer to the trial evidence in September 2005 was presented concerning an apparent conspiracy by his family members to locate a gun- any gun – and present it to the State. See State Hearing Exhibit 10, Lyle Trial Exhibit 1 (Tape 60). App. 486 (tape played to the jury). Tr.p. 9. On cross-examination, Jeter tried to claim that the .Phoenix .25 caliber gun that the family had brought to the Solicitor's office was the gun he claimed to have acquired prior to the shooting. However, he denied that the gun provided to the Solicitor was Grandma Lilly's

gun, but her mother was told to say something different. Tr.p. 101. See App.p. 487, l. 13. Yet at trial, his mother declared at one point it was Grandma Lilly's gun she found, not a gun that Jeter had allegedly bought at the basketball court. App. 485, l. 20-21. However, her testimony, like Jeter's in light of the telephone calls is suspect. As noted earlier, in Jeter's December 14, 2004 statement to police, he only admitted having a mask on and denied having a gun. App.,p. 382-383. However, in the September 14, 2005 *Bruton* redacted statement, after a gun was provided to the State (after a series of calls between Jeter and his facility from jail to get a gun see Initial Brief of Respondent, p. 17, ft. 5 infra), Jeter described acquiring the gun that was provide and shooting the three bullets in it. App.p.385-387. In that statement, he denied shooting the victim at Spicer's home, but admitted being there with a mask. App. 387.

Appellant contends that the State mislead Judge Verdin because the trial transcript does not support what the State urged. The Appellant is ignoring State Exhibit 10 (Lyles trial exhibit 1) as well as the testimony from his mother and the testimony following it being played. App.p.486-487. See also App.p. 471-477.

The Appellant takes issue with the Solicitor suggesting that this was Jeter's opportunity to come clean. Initial Brief of Appellant, p. 16. Tr.p. 106. The Appellant complains that they never concluded that Jeter was the actual trigger person, suggesting this inquiry was unfair. What Appellant fails to recognize is that the Appellant's calls to the family revealed in the jail calls, the assertions made to the mother concerning her testimony made it suspicious whether the gun presented around September 2005 was the weapon Jeter had on him that night. Nevertheless, Jeter did not state that there was an intent to rob Spicer that night. Instead, although stating he took full responsibility for what he did, what he actually claims it that he was merely present with possession

an illegal weapon with intent to purchase drugs. There is a sound factual basis for Judge Verdin's rejection of that assertion in assessing his role in the crime.

Jeter makes assertions in his brief, p. 16-18, that the State, at trial, never concluded or argued that Jeter was the triggerman, and implies it was improper in this setting under Byars to suggest that he may have been the triggerman. In the sentencing setting, after a conviction based upon "hand of one hand of all" concepts, it is not inquire for a sentence to make such an inquiry prior to sentencing. *Byars* also suggests the inquiry is appropriate in placing as a point of consideration "(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." Both the State was correct to inquire and the Court to consider.

His claims must be dismissed. The fifty year sentence should be upheld.

CONCLUSION

For all the foregoing reasons, the appeal should be dismissed and sentence affirmed.

Respectfully Submitted,

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April 3, 2023.