STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County
Honorable William H. Seals, Circuit Court Judge

Opinion No. 2023-UP-262

THE STATE,

RESPONDENT,

V.

TERRIEL LESHAWN MACK,

PETITIONER

APPELLATE CASE NO. 2019-000521

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, counsel for Petitioner, Terriel Leshawn Mack, respectfully requests that this Court grant rehearing. On July 12, 2023, this Court affirmed the imposition of a sentence of life without parole [LWOP] following a juvenile resentencing hearing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). State v. Mack, 2023-UP-262 (S.C. Ct. App. filed July 12, 2023). Counsel respectfully submits that this Court overlooked the fact that the resentencing judge's statements about Petitioner's age demonstrate that he failed to consider the chronological age of the Petitioner and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence.

Instead of viewing the Petitioner's age as a mitigating factor, the sentencing judge viewed Petitioner's age as an aggravating factor to justify a sentence of life without parole.

Additionally, counsel respectfully submits that this Court overlooked the fact that the resentencing judge's statements about the difficult family lives of well-known successful individuals demonstrate that he failed to properly consider the family and home environment that surrounded this particular individual juvenile, Terriel Mack. Counsel respectfully seeks rehearing on these two issues and a finding that the resentencing hearing failed to meet the requirements of the Eighth Amendment pursuant to Miller v. Alabama, 567 U.S. 460 (2012) and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572, (2014),.

Introduction

"[C]hildren are constitutionally different from adults for purposes of sentencing." Miller v. Alabama, 567 U.S. 460, 471 (2012). In Aiken v. Byars, 410 S.C. 534, 540-541, 765 S.E.2d 572, 575-576 (2014), the South Carolina Supreme Court held that "Miller does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." The Court held the sentencing judge must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" and that this requirement "deserves universal application." Aiken, 410 S.C. at 543, 765 S.E.2d at 577.

The Miller Court repeatedly focused on the notion that the character traits of children are "more transitory and less fixed." Miller, 567 U.S. at 471. Children by definition lack maturity and responsibility; thus, they are more likely to act with "recklessness, impulsivity, and needless risk-taking." Id. (internal quotation omitted). Due to the innate characteristics of children at

large, there is a "great difficulty ... of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id. at 479 (internal quotation omitted). In fact, the Court stated, "incorrigibility is inconsistent with youth." Id. at 473. Emphasizing the potential for reform present in all juveniles, the Court discussed the mitigating qualities of youth and noted "[i]t is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.'" Id. at 476 (quoting Johnson v. Texas, 509 U.S. 350, 368 (1982)).

Children "have diminished culpability and greater prospects for reform," and therefore, "'they are less deserving of the most severe punishments.'" Id. at 471 (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)). "[T]he distinctive attributes of youth diminish penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Id. at 472. As a result, "[a]n offender's age is relevant to the Eighth Amendment." Id. at 473 (citing Graham, 560 U.S. at 76). In light of the relevance to the ban on cruel and unusual punishment, "imposition of a state's most severe penalties on juvenile offenders cannot proceed as though they were not children." Id. at 474.

The Court required sentencers "to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 480. Thus, it is clear that sentencing authorities *must* consider a juvenile offender's age and consideration of such *must* be a mitigating factor.

Recognizing that Miller "did not expressly extend its ruling to states such as South Carolina whose sentencing scheme *permits* a life without parole sentence to be imposed on a juvenile offender but does not *mandate* it," the South Carolina Supreme Court held it "must give effect to the proportionality rationale integral to Miller's holding – youth has constitutional

significance." Aiken, 410 S.C. at 542-543, 765 S.E.2d at 576. Therefore, youth "must be afforded adequate weight in sentencing." Id. at 543, 765 S.E.2d at 576. The Court found the Miller decision "clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution." Id. at 543, 765 S.E.2d at 576-577. The sentencing court must consider the following factors in crafting a sentence proportional to the offense and the juvenile offender:

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

Id. at 544, 765 S.E.2d at 577 (internal quotations omitted).

Petitioner was a juvenile at the time of the offense and was re-sentenced to LWOP following Aiken, supra. On appeal, Petitioner challenges the imposition of the sentence as a violation of the Eighth Amendment's prohibition on cruel and unusual punishment. These principals, established by the United States Supreme Court and the South Carolina Supreme Court, govern review of his claims.

1. **The court erred as a matter of law by sentencing Petitioner to life without parole for an offense committed as a juvenile where the court failed to give Petitioner's age and the hallmark features of youth, including immaturity, impetuosity, and the failure to appreciate the risks and consequences, the constitutional significance required pursuant to Eighth Amendment jurisprudence.**

In his sentencing order, Judge Seals considered Petitioner's age as an aggravating circumstance, instead of a mitigating circumstance as required by the Eighth Amendment. Specifically, Judge Seals found as follows:

> In regard to the age of the offender, Defendant was 17 years old at the time of the murder, and was 18 years old when he was convicted. The court considered that at the time of the murder, the Defendant was within one year of being able to serve in the military to possibly fight and die for this country and had a driver's license. The Defendant was within one year of an age whereby he would have immense responsibilities and considered an adult by law.

(R. p. 677). Judge Seals considered Petitioner's age of seventeen years at the time of the offense to have no constitutional significance. Rather, Judge Seals determined that due to Petitioner's age, he was an adult for purposes of sentencing – contrary to the Eighth Amendment. Further, expert testimony showed Petitioner "was emotionally, perceptually, and cognitively (decision-making, problem-solving) a much younger person" than his seventeen years when the shooting occurred. (R. p. 513).

The constitutional impact of youth is not new. In Johnson v. Texas, 509 U.S. 350, 367 (1993), the United States Supreme Court recognized that a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Oklahoma Court of Criminal Appeals refused to consider Eddings' personality disorder and family history as mitigating because, in its view Eddings "knew the difference between right and wrong," and the

evidence did not "excuse" the behavior. Eddings, 455 U.S. at 113. The United States Supreme Court admonished the state appellate court from "consider[ing] only that evidence to be mitigating which would tend to support a legal excuse from criminal liability." Id. Emphasizing that "the chronological age of minor is a relevant mitigating factor of great weight," the Court held the background and mental and emotional development of a youthful defendant" must be "duly considered in sentencing." Id. at 116.[1]

"The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." Roper v. Simmons, 543 U.S. 551, 574 (2005).[2] The Court recognized that "[d]rawing the line at 18 years of age" was subject to objection. Id. Nevertheless, the Court determined that "a line must be drawn." Id. The Court settled on eighteen because at the time "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood." Id.

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[1] Concluding the Eighth Amendment prohibited the execution of a person who was under sixteen years of age at the time of his or her offense, the Court found "broad agreement on the proposition that adolescents as a class are less mature and responsible than adults." Thompson v. Oklahoma, 487 U.S. 815, 834 (1988). The Court "endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." Id. at 835. "Given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children," retribution as a goal for imposition of the death penalty "is simply inapplicable to the execution of a 15-year-old offender." Id. at 836. Likewise, the Court found "the deterrence rationale is equally unacceptable" "[f]or such a young offender." Id. at 836-837.

[2] "[I]f the neurological research and social science on which Miller was based conclude that cognitive abilities are not fully developed until around age twenty-five, it may be arbitrary and inconsistent to choose age eighteen as the age after which a defendant may be subject to mandatory life without parole." Kevin J. Holt, The Inbetweeners: Standardizing Juvenileness and Recognizing Emerging Adulthood for Sentencing Purposes After *Miller*, 92 Wash. U. L. Rev. 1393, 1396 (2015). "The distinction of adulthood beginning at age eighteen is arguably based on no more than traditional and outdated norms." Id. "The Court's Eighth Amendment jurisprudence and cognitive science articulated in Miller and its forebears may necessitate legal recognition of a stage of life between adolescence and adulthood often called 'emerging adulthood,' during which defendants should be entitled to further special consideration under the Eighth Amendment." Id. See also Alexandra O. Cohen, et al., When Does a Juvenile Become an Adult? Implications for Law and Policy, 88 Temp. L. Rev. 769 (2016).

The Graham Court, relied upon developments in social science demonstrating the fundamental differences between juveniles and adults:

> [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults. It remains true that from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Graham, 560 U.S. at 68 (internal citations omitted).

The impetus for Miller, Graham, and Roper was not chronological age; rather, it was the characteristics of individuals associated with that age. "The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." Graham, 560 U.S. at 570. The Supreme Court's trilogy of cases, Roper, Graham, and Miller, emphasized their reliance on the growing body of scientific evidence establishing significant differences between adult and juvenile brains, which the Court deemed to be of constitutional import. Despite the Court's categorization of juveniles relative to chronological age, the focus of the decisions was the psychological and behavioral aspects inherent to the age group in general. See State v. O'Dell, 358 P.3d 359, 366 (Wash. 2015) (holding "a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender" because "advances in scientific literature," show that "age may well mitigate a defendant's culpability, even if that defendant is over the age of 18"); Cruz v. United States, No. 11-CV-787 (JCH), 2018 WL 1541898 (D. Conn. Mar. 29, 2018) (cataloguing state and federal statutes detailing sentencing schemes for juveniles and youthful offenders and examining (1) the 2017 report from the United States Sentencing Commission regarding youthful offenders, (2) an ABA Resolution

urging the prohibition of capital punishment on individuals twenty-one years old or younger at the time of the offense, and (3) compelling scientific evidence regarding the brains of 18-year-olds).

This "factor draws upon the features expected to be exhibited by youthful offenders that support mitigation and allows for the introduction of evidence at the sentencing hearing to show the offender had more or less maturity, deliberation of thought, and appreciation of risk-taking than normally exhibited by juveniles." State v. Roby, 897 N.W.2d 127, 145 (Iowa 2017). "This factor is most meaningfully applied when based on qualified professional assessments of the offender's decisional capacity." Id.

Just as the judge in the present case relied heavily on Petitioner's age of seventeen, in State v. Seats, 865 N.W.2d 545, 556 (2015), the Iowa Supreme Court confronted a case in which the trial court "emphasized that Seats was a seventeen-year-old at the time the crime was committed." The court explained that "current science demonstrates that the human brain continues to develop into the early twenties." Seats, 865 N.W.2d at 557. The court held that "[i]n light of the science, the fact that a defendant is nearing the age of eighteen does not undermine the teachings of Miller." Id.

Similarly, the sentencing judge in Davis, supra, failed to give youth its constitutional significance. Davis, 415 P.3d at 688-689. The sentencing judge noted that Davis "was literally days away from his eighteenth (18^{th}) birthday at the time of the crimes." Id. at 688. The Supreme Court of Wyoming held the sentencing judge "discounted the importance" of the Miller factor requiring consideration of a juvenile's chronological age and its hallmark features, including immaturity, impetuosity, and failure to appreciate the risks and consequences. Id. at 688-689. Based on the language used by the sentencing court, the Wyoming Supreme Court

warned that the court may have even ignored Davis' youth or even weighed his age against him. Id. at 689.

"[T]he Miller Court established that violation of the Eighth Amendment occurs when offenders 'under the age of 18 at the time of their crimes' are sentenced to mandatory life without parole." Id. "[A]ge is not a sliding scale that necessarily weighs against mitigation the closer the offender is to turning eighteen years old at the time of the crime." Id. (internal quotation omitted). "Miller contains no suggestion that a seventeen-year-old is more deserving of adult punishment than a sixteen-year-old." Id. Accordingly, the court held the sentencing court abused its discretion when it refused to take Davis' youth into account as a mitigating factor because there was no evidence to conclude Davis possessed features of maturity beyond his years. Id.

The sentencing judge devoted a single paragraph of his brief order to his consideration of Petitioner's age and the hallmark features of youth. The language used in this short paragraph shows how the judge actually used Petitioner's age as an aggravating factor, and not the mitigating one required by the Eighth Amendment. Instead of considering the hallmark features of youth, the judge used Petitioner's age of seventeen years to support his decision to treat Petitioner as an adult. Not only was Petitioner's age in and of itself a factor necessarily militating in favor of a sentence less than life, but the expert testimony, which was not contradicted, showed that at the time of the shooting, Petitioner was functioning at a maturity level even below his seventeen years of life. The sentencing judge erred as a matter of law when he treated Petitioner's age as an aggravating factor and failed to give youth the constitutional significance required by the Constitution.

Instead of considering the hallmark features of youth the resentencing judge noted that Petitioner was 17 years old at the time of the murder, and was 18 years old when he was convicted. The judge considered that at the time of the murder, Petitioner was within one year of being able to serve in the military to possibly fight and die for this country and had a driver's license. The judge considered that Petitioner was within one year of an age whereby he would have immense responsibilities and considered an adult by law. The judge failed to consider Petitioner's youth, in violation of the requirement of Aiken.

In affirming the resentencing judge's decision to impose a life sentence this Court noted that, "two portions of the court's order give us pause." This Court then wrote:

> The first is the resentencing court's statement that Mack was "within one year of" adulthood when his crime was committed. We do not wish to leave anyone with the impression that seventeen-year-olds are not covered by Aiken; they clearly are. See Aiken, 410 S.C. at 537 n.1, 765 S.E.2d at 573 n.1 ("However, Miller extends to defendants under eighteen years of age and therefore for the purposes of this opinion[,] we consider juveniles to be individuals under eighteen.").
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> Under Aiken, Miller, and the entire line of authority about juvenile sentencing, the courts have made clear that seventeen-year-olds are not kind-of juveniles, or sort of juveniles. They are juveniles. In the words of *Miller* and *Montgomery v. Louisiana*, they are children. See, *e.g.*, Montgomery, 577 U.S. 190, 212 (2016) ("The opportunity for release will be afforded to those who demonstrate the truth of Miller's central intuition—that children who commit even heinous crimes are capable of change."); Miller, 567 U.S. at 474 ("[I]mposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."). The fact that an offender is seventeen is relevant. See Miller, 567 U.S. at 477 (criticizing mandatory LWOP because "every juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one"); see also Malvo v. State, 281 A.3d 758, 816 (Md. 2022) (Hotten, J., dissenting) ("In determining whether Petitioner's crimes were

> representative of 'transient immaturity,' it is relevant that Petitioner was nearly an adult."). But it does not remove a juvenile from the protection of Miller and Aiken.

State v. Mack, No. 2019-000521, 2023 WL 4489442, at *4 (S.C. Ct. App. July 12, 2023).

This Court correctly had concerns about the resentencing judge's statements in the order about Petitioner's age. Counsel respectfully notes that the sentencing order states more than Petitioner was "within one year" of adulthood. The judge wrote in the sentencing order that:

> In regard to the age of the offender, Defendant was 17 years old at the time of the murder, and was 18 years old when he was convicted. The court considered that at the time of the murder, the Defendant was within one year of being able to serve in the military to possibly fight and die for this country and had a driver's license. The Defendant was within one year of an age whereby he would have immense responsibilities and considered an adult by law.

(R. p. 677). Despite this Court's valid concern, this Court found that:

> Here, despite our misgivings about some of the resentencing court's comments, we find that the court followed the appropriate process under Aiken. The resentencing hearing transcript and documentary evidence run for hundreds of pages. The court did not issue its ruling until a month after the hearing. Like the court in Smart, the resentencing court here made statements that could at times be read to suggest it was not taking the appropriate factors into account. But it also noted that Mack "presented some mitigating evidence including his immaturity at the time of the murder, some mental health diagnoses, and [his] growing up in a difficult environment[.]"

State v. Mack, No. 2019-000521, 2023 WL 4489442, at *6 (S.C. Ct. App. July 12, 2023).

Counsel respectfully submits that this Court overlooked the fact that the statements in the sentencing order that the resentencing judge considered the fact that Petitioner was within one year of being able to serve in the military to possibly fight and die for this country and had a driver's license and was within one year of an age whereby he would have immense responsibilities and considered an adult by law demonstrates that the judge failed to properly

consider the chronological age of the Petitioner and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence. The judge viewed Petitioner's age of seventeen as an aggravating factor. Respectfully, the sentencing judge did not follow the appropriate process under Aiken when he failed to consider age.

Counsel respectfully submits that this Court's reliance on State v. Smart, No. 2021-000987, 2023 WL 4096212 (S.C. June 21, 2023), is misplaced. First, Petitioner is not asking this Court to review the substance of the resentencing court's decision to impose a life sentence. As the Court in Smart noted, "While we do not review the substance of the resentencing court's decision to impose a life sentence, to explain our ruling the court followed the proper procedure under Aiken, we summarize the thought process the court went through in making its decision." State v. Smart, No. 2021-000987, 2023 WL 4096212, at *3 (S.C. June 21, 2023). Instead, Petitioner asks this Court to review the procedure and process undertaken by the resentencing judge and find that the process did not comply with Miller and Aiken because the judge failed to properly consider Petitioner's youth. Second, the issue in Smart involved burden of proof. The Court in Smart wrote:

> We acknowledge there is language in the resentencing court's oral ruling that could be understood to support Smart's claim the court placed an improper burden on him. After a careful review of the entire record, however, we are convinced the resentencing court thoroughly considered Smart's background and history in light of the Aiken factors. As Aiken requires, "the mitigating hallmark features of youth [were] fully explored," 410 S.C. at 545, 765 S.E.2d at 578, and the resentencing court imposed its life sentence de novo without any burden of proof or persuasion on Smart or any deference to the sentence previously imposed.

State v. Smart, No. 2021-000987, 2023 WL 4096212, at *2 (S.C. June 21, 2023) (n. #3 omitted).

In contrast, in the present case, the language in the order can only be understood to show that the resentencing judge failed to fully explore the mitigating hallmark features of youth. In

discussing the Aiken hearing in Smart, this Court, citing the concurrence in Jones v. State, No. 2020-000188, 2023 WL 4098065, at *8 (S.C. June 21, 2023), wrote, "The concurrence contrasted that [guilty plea colloquy in Jones] with the 'textbook example of what a proper Aiken hearing affords' presented by the Smart case. Id. (Howard Adv. Sh. No. 24 at 52)." State v. Mack, No. 2019-000521, 2023 WL 4489442, at *5 (S.C. Ct. App. July 12, 2023). In a proper Aiken hearing youth must be afforded adequate weight in sentencing. In Jones the majority found the judge properly considered the mitigating factors of youth during the guilty plea colloquy. The judge in the present case, however, failed to properly consider Petitioner's youth and instead used his age as an aggravating factor. Respectfully, the language of the order in the present case is a textbook example of what is prohibited by Aiken and Miller, the failure to consider youth in sentencing.

2. Misinterpreting the *Miller* factor requiring consideration of the family and home environment that surrounded Petitioner, the court erred in sentencing Petitioner to life without parole for an offense committed as a juvenile where the court faulted Petitioner for not overcoming his circumstances to become a good, law-abiding citizen, like Elie Wiesel, Oprah Winfrey, and Tyler Perry, instead of considering his circumstances as militating in favor of a sentence less than life.

The United States Supreme Court mandated consideration of a juvenile defendant's family and home environment. Miller v. Alabama, 567 U.S. 460, 478-479 (2012). Specific to the case before it, the Court declared that "if ever a pathological background might have contributed to a 14-year-old's commission of a crime, it is here. Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him . . . ." Id. Subsequently, the South Carolina Supreme Court held a sentencing court must consider "the family and home environment that surrounded the offender." Aiken v. Byars, 410 S.C. at 544, 765 S.E.2d at 577.

Petitioner's difficult family and home life is discussed in the briefs before this Court and Petitioner incorporates by reference those facts in this petition. In the sentencing order, the judge "acknowledge[d] that [Petitioner] grew up in a bad home environment, whereby he witnessed several traumatic events in his childhood, and was affected by these events as well as many other things in his life." (R. p. 677). The judge, however, "recognize[d] that many successful people grew up in chaotic and violent environments, and were able to adhere to the law and become productive members of society." (R. p. 677). The judge specifically noted in the order that, "[T]he State highlighted the childhoods of Elie Wiesel, Oprah Winfrey, and Tyler Perry and how they all were able to overcome traumatic experiences in their childhoods and home life and become good, law-abiding citizens in the community." (R. p. 677).

Consideration of the family and home environment is most familiar to those considering cases involving capital punishment. See Wiggins v. Smith, 539 U.S. 510, 533 (2003) ((citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C)(1989), which discussed the need to collect information related to a defendant's "family and social history"). In Eddings v. Oklahoma, 455 U.S. 104 (1982), the United States Supreme Court vacated the death sentence of a sixteen-year-old who killed a police officer where evidence showed Eddings experienced a neglectful and sometimes violent upbringing, had a personality disorder, and that his mental and emotional age was younger than his chronological age. Eddings, 455 U.S. at 115-16. The Court held evidence presented was mitigating and must be considered by the sentencer, explaining "[e]ven the normal 16-year-old customarily lacks the maturity of an adult. In this case, Eddings was not a normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve." Id. at 116.

The Iowa Supreme Court explained "[t]his factor seeks to identify any familial dependency and negative influences of family circumstances that can be ingrained on children. State v. Roby, 897 N.W.2d 127, 146 (Iowa 2017). Additionally, the court observed that "expert testimony will best assess how the family and home environment may have affected the functioning of the juvenile offender." Id. "This factor does not rely on general perceptions, but specific measures of functioning," and "it is not limited to extremely brutal or dysfunctional home environments, but considers the impact of all circumstances and all income and social backgrounds." Id.

In another case, the Iowa Supreme Court reviewed an order imposing a life without parole sentencing on a juvenile in a case much like the present case in State v. Seats, 865 N.W.2d 545 (Iowa 2015). After the hearing, the sentencing judge noted that he had "considered the defendant's unfortunate background and the difficulties he faced in his youth." Seats, 865 N.W.2d at 552. While the court was "not unsympathetic to the bleakness and desperation of that life," the judge "failed to find here the 'attendant characteristics' of youth that might outweigh the seriousness of the crime or otherwise require a less sentence than one that would be imposed on an adult." Id. Reviewing the lower court's findings, the Iowa Supreme Court concluded that "[f]actually, the district court appeared to use Seat's family and home environment vulnerabilities together with his lack of maturity, underdeveloped sense of responsibility, and vulnerability to peer pressure as aggravating, not mitigating, factors." Id. at 557.

The High Court has repeatedly warned "that the gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption: 'The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.'" Adams v. Alabama,

136 S. Ct. 1796, 1800 (2016) (Sotomayor, J. concurring) (quoting Roper, 543 U.S. at 570). "The nature of the crime alone will generally be insufficient to support a conclusion that a juvenile is irreparably depraved." Davis v. State, 415 P.3d 666, 689 (Wyo. 2018). In fact, "the circumstances of the crime may not necessarily weigh against mitigation" because "the aggravating circumstances of a crime that suggest an adult offender is depraved may only reveal a juvenile offender to be wildly immature and impetuous." Id. at 690.

The resentencing judge in the present case failed to use Petitioner's "bad home environment" as mitigating evidence. Instead, the judge showed that he did not consider "a bad home environment" and witnessing "several traumatic events [during one's] childhood," as matters that would weigh in favor of a sentence less than LWOP. According to the judge, individuals such as "Elie Wiesel, Oprah Winfrey, and Tyler Perry," had difficult childhoods, which they were able to overcome in order to become "good law-abiding citizens in the community." R. 677. Thus, in the judge's view, a difficult childhood was simply something to overcome. The judge transformed Petitioner's mitigating evidence into aggravating evidence because Petitioner was unable to pull himself up by his bootstraps in order to rise above his circumstances. In doing so, the judge erred in sentencing Petitioner to life because he refused to consider Petitioner's unrefuted mitigating evidence and give it the constitutional significance demanded by the Eighth Amendment.

In addition to this Court's concerns about statements made by the resentencing judge in the sentencing order about Petitioner's age and discussed above in issue one, this Court also wrote:

> Second, we are concerned by the resentencing court's statement that "many successful people grew up in chaotic and violent environments[ ] and were able to adhere to the law and become productive members of society." The paths of other people's lives are not what our supreme court was asking sentencing and

> resentencing courts to consider in Aiken. The framework for considering a juvenile's upbringing is certainly not whether that upbringing was comparable to the hardships faced by individuals referenced by the resentencing court, including Elie Wiesel, Oprah Winfrey, or Tyler Perry. Using as a yardstick for this factor the childhood of Elie Wiesel, a Holocaust survivor, would reduce one of the Aiken factors required by our supreme court to nothingness. The question under Aiken is not how the upbringing of *those individuals* influenced *them*, but how *Mack's* childhood affected *him.*

State v. Mack, No. 2019-000521, 2023 WL 4489442, at *5 (S.C. Ct. App. July 12, 2023).

Despite this Court's valid concern with the resentencing judge's comments about how other people were able to overcome hardships in childhood, this Court found that:

> Here, despite our misgivings about some of the resentencing court's comments, we find that the court followed the appropriate process under Aiken. The resentencing hearing transcript and documentary evidence run for hundreds of pages. The court did not issue its ruling until a month after the hearing. Like the court in Smart, the resentencing court here made statements that could at times be read to suggest it was not taking the appropriate factors into account. But it also noted that Mack "presented some mitigating evidence including his immaturity at the time of the murder, some mental health diagnoses, and [his] growing up in a difficult environment[.]"

State v. Mack, No. 2019-000521, 2023 WL 4489442, at *6 (S.C. Ct. App. July 12, 2023).

Counsel respectfully submits that this Court overlooked the fact that the sentencing judge's statements about the ability of others to overcome growing up in difficult family and home environments demonstrate that he failed to properly consider the family and home environment that surrounded this individual juvenile. Respectfully, the resentencing judge did not follow the process required by Aiken. As discussed above with regard to the first issue, Petitioner is not asking this Court to review the substance of the resentencing court's decision to impose a life sentence. Instead, Petitioner asks this Court to review the procedure and process undertaken by the resentencing judge and find that the process did not comply with Miller and

Aiken because the judge failed to properly consider this individual juvenile's family and home life. In the same way the resentencing judge improperly used Petitioner's age as an aggravating rather than mitigating factor, the resentencing judge improperly used Petitioner's inability to overcome a difficult home environment as an aggravating rather than mitigating factor.

Again, respectfully, this Court's reliance on the Smart case is misplaced. In Smart the Court addressed burden of proof for an Aiken resentencing hearing and wrote:

> This Court's decision in Aiken requires juveniles "receive an individualized hearing where the mitigating hallmark features of youth are fully explored" before being sentenced to life without parole. 410 S.C. at 545, 765 S.E.2d at 578. The resentencing court in this case gave Smart just such an individualized hearing and soundly exercised its sentencing discretion without placing any burden of proof or persuasion on Smart nor giving any deference to the previously imposed sentence.

State v. Smart, No. 2021-000987, 2023 WL 4096212, at *3 (S.C. June 21, 2023). In contrast, the resentencing judge in the present case failed to explore the mitigating hallmark features of youth when he considered Petitioner's family and home environment as an aggravating rather than mitigating factor.

Based on the above two arguments, counsel respectfully seeks rehearing and a finding that that the resentencing hearing failed to meet the requirements of the Eighth Amendment pursuant to Miller v. Alabama, 567 U.S. 460 (2012) and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572, (2014).

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ATTORNEY FOR PETITIONER

This 27th day of July, 2023.

RECEIVED
Jul 27 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Honorable William H. Seals, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRIEL LESHAWN MACK,

PETITIONER

APPELLATE CASE NO. 2019-000521

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Terriel Leshawn Mack, #312070, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 27th day of July, 2023.

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

From:	Warren, Kaylynn
To:	SC - BROWN MELODY
Cc:	Hudgins, Kathrine; Angela Brown; Stock, Chris
Subject:	2019-000521 The State v. Terriel Leshawn Mack
Date:	Thursday, July 27, 2023 2:32:00 PM
Attachments:	2019-000521 The State v. Terriel Leshawn Mack Petition for Rehearing and COS.pdf

Good Afternoon,

Attached for service in the above-referenced case is the Petition for Rehearing which will be filed today, July 27, 2023, with the Court of Appeals via email filing.

Respectfully,
Kaylynn

Kaylynn Warren
Administrative Assistant
South Carolina Commssion on Indigent Defense
Division of Appellate Defense
(803) 734-1330