

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Dec 20 2023

S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Florence County
Hon. William H. Seals, Circuit Court Judge
Appellate Case No. 2019-000521

THE STATE,

Petitioner,

v.

TERRIEL LESHAWN MACK,

Respondent.

Opinion No. 6031 (S.C. Ct. App. filed July 12, 2023)
(Withdrawn, Substituted and Refiled November 1, 2023)

THE STATE, ... PETITIONER

v.

TERRIEL LESHAWN MACK,.....RESPONDENT.

APPENDIX

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INDEX

RECORD ON APPEAL	1
FINAL BRIEF OF RESPONDENT	694
FINAL BRIEF OF APPELLANT.....	743
UNPUBLISHED OPINION 262 OF THE SC COURT OF APPEALS.....	225
PETITIONER’S PETITION FOR REHEARING	798
ORDER DENYING PETITION FOR REHEARING & SUBSTITUTING OPINION.....	818
OPINION NO. 6031 OF THE SC COURT OF APPEALS.....	819
RESPONDENT’S PETITION FOR REHEARING	836
ORDER DENYING PETITION FOR REHEARING.....	842

While examining the Defendant's family and home environment, the Court acknowledges that the Defendant 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. However, the court recognizes 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. Additionally, the 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.

While the Defendant presented some mitigating evidence including his immaturity at the time of the murder, some mental health diagnoses, and growing up in a difficult environment, this Court believes these limited mitigating factors are substantially outweighed by the areas mentioned above pursuant to *Aiken v. Byars*. This Court is extremely concerned by the cold-blooded nature of the killing, and the fact that the Defendant has shown little to no signs of rehabilitation. Furthermore, the Defendant and has shown no remorse for his crime until this hearing, whereby he potentially has something to gain. The Court carefully and deliberately considered all the factors as outlined in *Aiken v. Byars*, and after doing so, based on the above and the entire record of the sentencing hearing, this Court sentences the Defendant to life in the custody of the Department of Corrections.

Signature Page to Follow

IT IS SO ORDERED.



The Honorable William H. Seals, Jr.
Circuit Court Judge
Twelfth Judicial Circuit

Florence, SC

March 20, 2019

WITNESSES

LT. RON SWAGGARD

FPD

Godwin

PROS:

JWL

12-17-2003

ARREST WARRANT NO.

I301320 (1), I301321 (1), I301322 (1);

I301320 (2), I301321 (2), I301322 (2);

I301350 (3); I301322 (3), I301349 (4).

ACTION OF GRAND JURY

TRUE BILL

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

DOCKET NO. 2004 - GS - 21 - 01084

The State of South Carolina,

County of FLORENCE

JWL

COURT OF GENERAL SESSIONS

SEPTEMBER

TERM

2004

THE STATE

vs.

ISLAM HORN

GREGORY JOHNSON

TERRIEL LESHAWN MACK

RASHAWN WOODBERRY

*Vol Pros
on Plea to other charges 10/19/04
Johnston J.*

Indictment for

MURDER,

CONSPIRACY,

ACCESSORY AFTER THE FACT

AND

MISPRISION OF FELONY

INDICTMENT FOR

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

MURDER, CONSPIRACY, ACCESSORY AFTER THE
FACT AND MISPRISION OF FELONY

At a Court of General Sessions, convened on SEPTEMBER 9, 2004, the Grand Jurors of FLORENCE
County present upon their oath:

COUNT ONE - MURDER

That ISLAM HORN, GREGORY JOHNSON AND TERRIEL LESHAWN MACK did in FLORENCE
County on or about December 17, 2003, violate Sections 16-03-0010, 0020 of the Code of Laws of South
Carolina (1976), as amended, in that they did feloniously, wilfully and with malice aforethought kill one
Joseph Todd Wilson by means of shooting him with a pistol, and that the said Joseph Todd Wilson did die
as a proximate result thereof.

COUNT TWO - CONSPIRACY

That ISLAM HORN, GREGORY JOHNSON AND TERRIEL LESHAWN MACK did in FLORENCE
County on or about December 17, 2003, violate Section 16-17-0410 of the Code of Laws of South
Carolina (1976), as amended, in that they did unlawfully, wilfully, knowingly, wickedly and feloniously
unite, combine, conspire, confederate, agree between and among themselves and have tacit understanding
with each other and with divers other persons whose names are unknown to the Grand Jurors for the
purpose of committing the crime of Murder.

COUNT THREE - ACCESSORY AFTER THE FACT

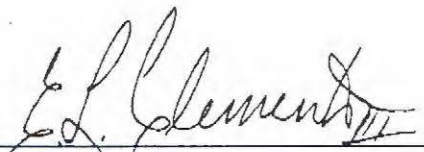
That ISLAM HORN and RASHAWN WOODBERRY did in FLORENCE County on or about
December 17, 2003, violate Section 16-01-0055 of the Code of Laws of South Carolina (1976), as
amended, in that they did render assistance after the fact to felons, namely Gregory Johnson and Terriel
Lashawn Mack, who, on or about December 17, 2003 committed the felony of Murder, in that the said
ISLAM HORN and RASHAWN WOODBERRY hid evidence they knew was associated with the crime
and they assisted the principal felons in avoiding apprehension and by obstructing the police investigation.

ATTACHED TO AND BECOMING A PART OF THE ORIGINAL INDICTMENT FOR MURDER, CONSPIRACY, ACCESSORY AFTER THE FACT AND MISPRISION OF FELONY WITH THE AFORESAID NAME(S) OF ISLAM HORN, GREGORY JOHNSON, TERRIEL LESHAWN MACK AND RASHAWN WOODBERRY SHOWN THEREON:

COUNT FOUR - MISPRISION OF FELONY

That RASHAWN WOODBERRY did in FLORENCE County between December 17, 2003 to January 6, 2004, violate Common Law and Section 17-25-0030 of the Code of Laws of South Carolina (1976), as amended, in that he did withhold information and/or evidence from the Florence Police Department, a law enforcement agency of this State, by hiding evidence and withholding information about a firearm which was used in the Murder of Joseph Todd Wilson on December 17, 2003, thus engaging in criminal neglect.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF

FLORENCE

STATE

VS.

Terrell L. Maults

AKA:

Race:

Sex:

Age:

DOB:

SS#:

Address:

City, State, Zip

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

04

INDICTMENT/CASE#:

-GS-

21

1084

A/W#:

1-301320

Date of Offense:

12/17/03

S.C. Code §:

16-3-10, 20

CDR Code #:

0 1 1 1 1 1 6

☐ CASE RESTORED

SENTENCE

☐ PLEA☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: MURDERin violation of § 16-3-10, 20 of the S.C. Code of Laws, bearing CDR Code # 0, 1, 1, 1, 6☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of Life days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____, plus costs and assessments as applicable*, the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Pardon and Parole Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient: _____

*Fine:

§14-1-206 (Assessments 107.5%)

§14-1-211(A)(1) (Conv. Surcharge)

§14-1-211(A)(2) (DUI Surcharge)

§56-5-2995 (DUI Assessment)

§ 35.13 (Public Def/Prob)

§73.3, 1B TP (Law Enforce. Funding)

§33.7, 1B TP (Drug Court Surcharge)

§50-21-114(BUI Breath Test Fee)

§56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

TOTAL

	\$	
	\$	
\$100	\$	100.00
\$100	\$	
\$12	\$	
\$500	\$	
\$25	\$	25.00
\$100	\$	
\$50	\$	
\$40/ea	\$	
\$	\$	3.75
\$128.75		

Clerk of Court/ Deputy Clerk

Court Reporter:

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ 100 beginning 30 DAR

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

10/26/05

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Florence
STATE VS.
Terriel Leshawn Mack

AKA:

Race: Black Sex: M Age: 32

DOB: [REDACTED] SS#: [REDACTED]

Address: [REDACTED] TUTSON ALLEY

City, State, Zip: FLORENCE, SC 29505

DL#: [REDACTED] SID#: [REDACTED]

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Murder / Murder (30- Life)

INDICTMENT/CASE#: 04-GS-21-1084

A/W#: I301320

Date of Offense: 12/31/2003

S.C. Code §: 16-03-0010; 16-03-0020

CDR Code #: 0116

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0010; 16-03-0020 of the S.C. Code of Laws, bearing CDR Code # 0116

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45
(CSC w/minor 1st or CSC w/minor 3rd)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

John C. Depina 9826
Solicitor SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of Life days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the SCDOC.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic
Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:	\$	
§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso (Public Def/Probation)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 95.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	\$	\$ 37.50

TOTAL

\$ 128.75

Clerk of Court/ Deputy Clerk

Court Reporter: F.B. Ray

SCCA/217 (04/2018)

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,§Proviso requires \$500 be paid to Clerk
during probation and shall be collected before
any other fees.

Presiding Judge

Judge Code: 2157

Sentence Date: March 20, 2019

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

Respectfully Submitted,

s/Susan B. Hackett

Susan B. Hackett
Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

This 27th day of July, 2020.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

V.

TERRIEL LESHAWN MACK,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Record on Appeal in the above-referenced case has been served upon William E. Salter, III, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is esalter@scag.gov, this 27th day of July, 2020.

s/Susan B. Hackett
Susan B. Hackett
Appellate Defender

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Aug 11 2020

SC Court of Appeals

Appeal from Florence County
The Honorable William H. Seals, Circuit Court Judge
Appellate Case No. 2019-000521

THE STATE,

Respondent,

vs.

TERRIEL LESHAWN MACK,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS PRESENTED AT 2005 TRIAL.....	1
STANDARD OF REVIEW	11
ARGUMENT	
I. The sentencing judge complied with the Eighth Amendment in sentencing Mack to life without parole for a murder committed when he was seventeen years old, where the record unequivocally reflects that the sentencing judge considered the mitigating factors of youth required by <i>Miller</i> and <i>Aiken</i> in imposing the sentence and where his factual findings are supported by the record.	12
A. Evidence presented at the resentencing hearing	12
1. The State’s evidence	12
2. Mack’s evidence	16
B. The parties’ arguments for sentencing.....	24
C. The Sentencing Order	28
D. Discussion	29
1. The failure to find that Mack is “irreparably corrupt.”	32
2. Alleged failure to properly consider Mack’s “age and the hallmark features of youth	34
3. Alleged failure to consider expert evidence that Mack could be Rehabilitated	36
4. Allegedly faulting Mack for “not overcoming his circumstances to become a good, law-abiding citizen...instead of considering his circumstances as militating in favor of a sentence less than life.”	38
5. Failure to consider the “incompetencies associated with [Mack’s] youth.”	39
CONCLUSION.....	43

TABLE OF AUTHORITIES

Cases

<i>Aiken v. Byars</i> , 410 S.C. 534, 765 S.E.2d 572 (2014)	passim
<i>Bear Cloud v. State</i> , 294 P.3d 36 (Wyo. 2013)	31
<i>Bordeaux v. State</i> , 410 S.C. 495, 765 S.E.2d 143 (2014)	12
<i>Brown v. State</i> , No. W2015-00887-CCA-R3-PC, 2016 WL 1562981 (Tenn. Crim. App. Apr. 15, 2016)	33
<i>Catawba Indian Tribe of South Carolina v. State</i> , 372 S.C. 519, 642 S.E.2d 751 (2007)	12
<i>Chandler v. State</i> , 242 So.3d 65 (Miss. 2018)	36
<i>Conley v. State</i> , 972 N.E.2d 864 (Ind. 2012)	31
<i>Davie v. State</i> , 381 S.C. 601, 675 S.E.2d 416 (2009)	40
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	33
<i>Edwards v. Arizona</i> , 451 U.S. 477 (1981)	42
<i>Ex parte Littlefield</i> , 343 S.C. 212, 540 S.E.2d 81 (2000)	40
<i>Fare v. Michael C.</i> , 442 U.S. 707 (1979)	41, 42
<i>Ford v. Wainwright</i> , 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)	34
<i>Garcia v. State</i> , 903 N.W.2d 503 (¶ 26) (N.D. 2017)	33
<i>J.D.B. v. North Carolina</i> , 564 U.S. 261 (2011)	41
<i>Jones v. Commonwealth</i> , 293 Va. 29, 795 S.E.2d 705 (Va. 2017)	33
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012)	passim
<i>Missouri v. Frye</i> , 566 U.S. 134 (2012)	40
<i>Montgomery v. Louisiana</i> , 136 S.Ct. 718 (2016)	31, 32, 33, 38
<i>People v. Blackwell</i> , 3 Cal. App. 5th 166, 207 Cal.Rptr.3d 444 (2016)	32
<i>People v. Gutierrez</i> , 324 P.3d 245 (Cal. 2014)	31

<i>People v. Holman</i> , 58 N.E.3d 632 (Ill. App. Mar. 3, 2016)	31
<i>Pittman v. State</i> , 337 S.C. 597, 524 S.E.2d 623 (1999)	40
<i>Roper v. Simmons</i> ., 543 U.S. 551 (2005).....	34
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218 (1973).....	42
<i>Smith v. United States</i> , 348 F.3d 545 (6th Cir. 2003)	41
<i>State v. Ali</i> , 855 N.W.2d 235 (Minn. 2014).....	31
<i>State v. Brown</i> , 401 S.C. 82, 736 S.E.2d 263 (2012)	11, 32
<i>State v. Dawson</i> , 402 S.C. 160, 740 S.E.2d 501 (2013)	11
<i>State v. Fletcher</i> , 149 So.3d 934 (La App. 2014).....	33
<i>State v. Henderson</i> , 286 S.C. 465, 334 S.E.2d 519 (Ct. App. 1985).....	42
<i>State v. Kornahrens</i> , 290 S.C. 281, 350 S.E.2d 180 (1986)	41
<i>State v. Long</i> , 8 N.E.3d 890 (Oh. 2014).....	31
<i>State v. Lovette</i> , 233 N.C.App. 706, 758 S.E.2d 399 (N.C. Ct.App. 2014).....	33
<i>State v. Parker</i> , 381 S.C. 68, 671 S.E.2d 619 (Ct. App. 2008).....	41
<i>State v. Riley</i> , 110 A.3d 1205 (Conn. 2015)	31
<i>State v. Smith</i> , 298 S.C. 205, 379 S.E.2d 287 (1989)	36
<i>State v. Thrift</i> , 312 S.C. 282, 540 S.E.2d 341 (1994)	40
<i>State v. Watts</i> , 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996).....	34
<i>State v. Williams</i> , 386 S.C. 503, 690 S.E.2d 62 (2010)	36
<i>State v. Wilson</i> , 345 S.C. 1, 545 S.E.2d 827 (2001)	11
<i>Thompson v. Oklahoma</i> , 487 U.S. 815 (1988).....	33
<i>Turner v. Calderon</i> , 281 F.3d 851 (9th Cir. 2002)	41
<i>Wasman v. United States</i> , 468 U.S. 559 (1984).....	30

<i>White v. State</i> , 837 S.E.2d 838 (Ga. 2020).....	32
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976).....	34
Statutes	
S.C. Code. Ann. § 16-3-20(A)	29

STATEMENT OF THE CASE

Respondent accepts Appellant Terriel Lashawn Mack (Mack)'s Statement of the Case for purposes of this appeal.

STATEMENT OF FACTS PRESENTED AT 2005 TRIAL

Viewed in the light most favorable to the State, the evidence presented at trial showed that Mack murdered Joseph Todd Wilson (the victim) on December 17, 2003, as a favor to his friend, Marcus Martin (a/k/a White Boy or WB), and in order to gain rank in his gang. The victim's offense that necessitated his murder? He survived the murder of another man and an attempt on his own life the previous day, and he could identify Martin as the assailant in that shooting.

Patrolman Legrand Gowdy, of the City of Florence Police Department, testified that after his shift ended on December 17, 2003, he headed back to headquarters between 6:00 and 6:30 pm. His route took him down Oakland Ave., in the City of Florence. As he passed Oakland Plantation Apartments, he saw three men standing in the parking lot, facing each other and wearing dark clothes.¹ Seconds later, he heard three "loud bangs," which sounded like "either gunshots or fireworks." So, he turned his car around and went to the parking lot to investigate. **R. 2-5.**

By the time Patrolman Gowdy reached the parking lot, two of the three men that he had seen were no longer present.² However, the victim was lying on the pavement with a gunshot wound to the head, there was a pool of blood around his head, and he did not have a pulse. Another man was present and Patrolman Gowdy detained the man for his protection.³ Patrolman Gowdy

¹ Although it was dark, there was adequate lighting in the area for him to see the men, but he could not to identify them. **R. 9-11.**

² He testified that there was a path in the area that leads to another street.

³ This man was a Mr. Reed. Patrolman Gowdy knew that Reed was not one of the people he had seen seconds earlier because Reed was wearing a white t-shirt, but he handcuffed Reed and put

immediately got on his radio and alerted other patrol officers in the area as to what he had discovered. Officer Bruce Moore arrived shortly and Patrolman Gowdy radioed for investigators to come. He then remained on the scene, protecting it and putting up crime scene tape, until they arrived. He turned over the scene to them at that point. **R. 5-8.**

Ms. Virginia Robinson testified that her home is only “about half a block” from the crime scene. Gregory Johnson is her stepson and she has known him since he was twelve. Between 6:30 and 7:00 pm. on December 17, 2003, Johnson came to her house with a man who said his name was “Black.” She identified this man in court as Mack. Both men were wearing dark clothing with long sleeves. Because it was unusual for Johnson to come to her home, Ms. Robinson asked why he was there. He claimed that he was on his way home from a girl’s house. **R. 12-15; 17-18.**

When she opened the door again, she heard “a lot of hollering and stuff out there.” She asked what had happened and made the comment that “somebody must be got hurt in the projects[,] must be got cut up or kill[,] or something.” (Sic). Johnson and Mack just looked at each other and did not respond to her question. Unaware of what had occurred, Ms. Robinson went into her den. Her granddaughter, Michelle Lane, came to the house several minutes later and spoke to Johnson. Johnson thereafter came to the den and asked if he could use her phone to call a cab. She gave him permission to do so, and he and Mack left when the cab got there. **R. 14-18.**

Michelle Lane testified that she is Johnson’s stepsister and that Ms. Robinson is her grandmother. When Michelle arrived at Ms. Robinson’s house shortly before 7:00 pm. on December 17, 2003, her grandmother, her mother, her stepfather, Johnson, and another male were there. She was shocked to see Johnson because it was unusual for him to come by, whereas she

Reed in his patrol car to be safe. **R. 5-6.** Mr. Reed later told Sgt. Melvin Godwin that he saw the shooting but did not know who had done it. **R. 180-81.**

was often there. She asked Johnson why he was there and Johnson claimed that he was “just chilling.” She then went into her grandmother’s den and saw that her mother was crying. Michelle asked her mother why. That is when she learned that the victim had been killed. **R. 19-22; 28.**

After briefly stepping outside to investigate, Michelle came back inside and spoke to Johnson and the other man. She asked this man what his name was and he said, “Black.” Michelle tried to speak with Black but he was not very talkative. She also testified that Black was wearing a black hoodie while Johnson was wearing a dark blue hoodie. The men stayed for roughly an hour before leaving in a cab. Before they left, Johnson asked for something to eat because his stomach was bothering him. **R. 21-22; 28-30.**

After they left, Michelle went and talked to her grandmother. She learned that the suspects in the victim’s murder were wearing “all dark clothing.” She thought it was suspicious that Johnson and Black “pop[ped] up” wearing dark clothes. So, she called a friend, who had the police contact her. When Sgt. Melvin Godwin showed her two photographic lineups on December 28, 2003, she immediately selected Mack’s photo from State’s Ex. 1 and Johnson’s photograph from State’s Ex. 2. She testified that she did not have any doubt that they were the men that she had seen on December 17th. **R. 23-27; 185-88.**

Co-defendant Gregory “Gangsta Fred” Johnson testified that he was charged with murder and conspiracy in connection with this case. Although his attorney had spoken to the State, he had not been given a deal in exchange for his testimony. **R. 110-11; 128-29.** On the afternoon of December 17, 2003, he was “walking the hood” until he met up with Horn and Mack in East Florence shortly after 5:30 pm. Horn was driving his Buick and Mack was in the front passenger seat. They agreed to give Johnson a ride and he got into the back seat. **R. 112-13.**

Horn wanted to go see a girl who lived in North Florence but did not know where she lived. So, Johnson agreed to direct him there. After briefly stopping at the home of Johnson's mother, the men headed to North Florence. While they were travelling on Oakland Ave., Mack saw the victim and asked Johnson if that was "Todd who snitched on ... White Boy." Johnson looked but could not see him. Mack and Horn then had a conversation that Johnson could not hear over the loud music in the car. **R. 114-15.** Following this conversation, Horn made a series of right hand turns so that they returned to the victim's location on Oakland Ave. **R. 115-17.**

Asked what happened next, Johnson testified that:

[Mack] just get out the car [and] he said, I'll talk to him. And I want to see who he was talking about, so I got out of the car. And when I got to the corner, I seen a person with a chain on. So I ain't know what was gone happen the remark about the chain made me think about it, I thought he was gone take his chain. And so I seen the police coming down the street and cars behind him and I told him don't even worry. Don't need to do that. So I tried to talk him out of it, but he kept going. And so I cross the street trying to talk him out of it, but he call the victim back. When the victim turn around, they was coming to each other talking and I stopped. And I seen when they met each other, I seen him shoot the victim in the head.

R. 117.⁴

Mack and the victim were only about an "[a]rm's length" away from each other and had only spoken for "a couple of seconds" when this shot was fired. Also, Johnson had seen a police car before Mack fired the shot and warned Mack. Mack's reply was, "F that." Johnson immediately ran past Mack and the victim after the first shot, but he saw Mack shoot the victim "three more times in the back" as he fled the scene. Johnson did not stop running until he was close to Mrs. Robinson's house. **R. 119-21.**

⁴ Johnson explained that Mack had gotten the victim's attention by calling out for "Tellie," which was the victim's nickname. **R. 118.**

Mack caught up with him at this point and they went to Mrs. Robinson's house, where they remained for roughly ninety minutes. Johnson spoke with Michelle while they were there, even though she mostly stayed in the back of the residence. He and Mack eventually left in a cab that Mack had called and they went to the residence of Marcus May. Johnson went home roughly thirty minutes later and did not see Mack again between the 17th and his own arrest on January 29, 2004. **R. 121-26.**

Johnson corroborated that Mack wore a black hoodie, and that he wore a blue jeans and a black shirt on the 17th. He also admitted that State's Ex. 33, which police seized when they arrested him, was his .38 caliber revolver. **R. 117-18; 123-24. See also R. 188-89.** Finally, he gave police a statement on January 29, 2004, and the key details that he provided, such as Mack being the shooter, were consistent with his trial testimony. **See R. 134-41.**

Co-defendant Islam Horn testified that on December 17, 2003, he met up with Mack, a/k/a "Black," and "Gangsta" Fred Johnson at the home of Maurice Bostic in East Florence. They remained at Bostic's home most of the day before deciding to go to North Florence, so that Horn could see a girl. Both Johnson and Mack rode with him in his blue Buick. By then, it was after 6:00 pm. Horn asked Johnson to go because Johnson knew where the girl lived and Horn did not. Horn drove, Mack sat in the front passenger seat, and Johnson sat in the back seat. **R. 48-52.**

As Horn was driving down Oakland Ave., Mack saw the victim between Oakland Plantation Apartments and a nearby park. Mack told Horn that "he wanted to holler at [the victim] [because he [knew] Todd [sold] drow," which is a type of marijuana. In order to go back to the victim's location, Horn made the series of right hand turns described by Johnson and parked in the Oakland Plantation parking lot. "Gangsta Fred and Black got out of the car" and Horn heard a gunshot "30 or 40 seconds later." **R. 51-54.**

Horn could not see the shot from where he had parked. However, he cranked up his car and pulled out of the parking lot immediately after the first shot. When he reached a stop sign, he looked over and saw the victim lying “face down on the ground. I didn’t see Gangsta Fred, but I seen Black stand over [the victim] and shoot him three more times in the back.” Horn recognized Mack, whom he had known for four years, by the clothes Mack was wearing and he could clearly see because Mack was “right under a street light. **R. 54-56.**

Following the shooting, Horn pulled out onto Oakland Ave. and headed back to his sister’s residence in East Florence. Before he left, he saw Patrolman Gowdy’s car pull into Oakland Plantation Apartments. **R. 54-55.** Horn was arrested on the night of the murder at the residence of Keith Johnson. According to Horn, Mack always carried a .38 after his release from jail in November 2003. Both Johnson and Horn also carried .38s on December 17, 2003. **R. 56-57; 95-96.**

The police recovered Horn’s .38 caliber pistol from the wheel of a car when he was arrested that night. Police recovered a flattened projectile from the concrete underneath the victim’s body. State’s Ex. 36. **R. 80-82; 146-47; 151; 158-59; 161; 165; 181-85.** Johnson left Florence shortly after the murder and stayed in Coward, South Carolina for a period of time. As a result, he was not arrested until January 29, 2004. At that time, police recovered his .38 caliber revolver, State’s Ex. 33. **R. 130-31; 140; 147.**

Following Mack’s arrest, police searched his residence pursuant to a search warrant. They recovered a baggie of marijuana and two weapons: a 9 mm. semi-automatic and a .32 caliber revolver from the crawl space underneath the residence. **R. 174-76.**

At the time of the victim’s murder, Florence police were actively working on another homicide that had occurred on the night of December 16th. **R. 182.** Inv. Smith testified that after

working the crime where the shooting had occurred on the 16th, he went to the hospital to check on the shooting victims who had been taken there. By the time he arrived, Antonio McCall had died. The other shooting victim was Joseph Todd Wilson, the victim in this case, and he identified the person who shot him as White Boy. Inv. Smith later learned that “White Boy” was Marcus Martin. **R. 104-05; 107-08.**

The State also introduced a statement written by Mack to Horn (State’s Ex. 30). This letter contained a detailed account of the murder by Mack and provided evidence of motive and malice, both of which support a sentence of life imprisonment.⁵ The letter is written in a cryptic language of gang jargon, which was obviously designed to confound an unintended recipient. Once translated by one familiar with this jargon, the letter reveals a persuasive writing by a motivated author. It was designed to gain the assistance and advice of its intended audience, Horn, who was something of a mentor for Mack. The letter also reveals that Mack is apparently enamored with an evil, corrupt, and - in his mind - glamorous lifestyle, and that he is someone who gladly killed simply for the thrill of killing and to raise his standing among fellow gang members. The note, as published to the jury, reads as follows:

Yo, son, on some real shit, thank you, for showing me the ropes to some shit bitch nig's don't know - don't have no clue about.⁶ Now a nig will never go broke. This shit went down like this. I got out the car me and Gangsta⁷ and I call that nig like, Yo, that my nig Tellie.⁸ Then he started walking back towards me. Gangsta was

⁵ Horn initially told Mack to remain silent but ultimately sent a note asking Mack to tell him what had happened because Mack had talked to police. **R. 79-80; 95.**

⁶ Horn testified that this is Mack thanking Horn, for teaching Mack the “dope game[,] selling weed” **R. 65-66.** So, the letter starts with an appeal to Horn's sense of camaraderie.

⁷ This begins Mack's account to Horn of the events surrounding Victim's murder. See **R. 65.**

⁸ Horn testified that Mack is informing him of how Mack got Tellie’s, or the victim’s attention. **R. 65-66.**

like, Yo, the jakes⁹ is over there. I was like fuck that nig. I ain't got no time to waste. Plus, I don't give a fuck about jakes anyway. Son, I had hollows in the chamber¹⁰ and I blew the bitch nig brains out. You know how I get down holiday style.¹¹ That nig shit splattered everywhere and he drop like a rag doll, like he had spaghetti legs or some shit, put three in his back.¹² Redrum had me drink as a bitch.¹³ Gangsta didn't even get the drink none because soon as I let off he ran.¹⁴ So that's my shit feel me. In my mind I was thinking Gangsta was scared. And all these nig's talking about I'm jake¹⁵ when I'm the one drop that nig by myself. When war gets deep, beef is everlasting.¹⁶ Did that shit for WB and my nig BG¹⁷ rest in peace, birthday present. Rank wasn't the only thing gained.¹⁸ Respect got earned and loyalty got

⁹ “Jakes” means police. **R. 66.**

¹⁰ “Hollows in the chamber” means that he had hollow-point bullets in his weapon. **R. 66.** The bullet fragments recovered were consistent with semi-jacketed hollow point ammunition. **R. 211.**

¹¹ “Holiday style” is a term used by a rap group, but Horn did not know the term’s meaning. **R. 66.**

¹² Lieutenant Ira Parnell, an expert in firearms testified that the hollow-point projectile is “design[ed] to expend its energy within the first target that it encounters to cause more shock, knock down and not to over penetrate in most cases.” **R. 212.** This explains Mack's observations that his victim dropped “like a rag-doll” and like he had “spaghetti legs.”

¹³ “Redrum” is an anadrome for murder, and it means murder according to Horn. **R. 66.** Respondent notes that “redrum” has been used in this manner at least since the 1977 Stephen King novel, “The Shining,” which Stanley Kubrick made into a 1980 classic horror film. The solicitor made a reasonable inference from the term “had me drink as a bitch” in his closing argument, arguing that Mack was describing getting a rush from having committed the killing. **R. 237.**

¹⁴ “[L]et off” means shoot. **R. 67.** This portion of the letter corroborates Johnson’s testimony. **R. 119-20.**

¹⁵ Based on Horn's testimony, “talking about I'm jake” apparently means that Mack is upset that his friends were accusing him of being a snitch, even though he actually killed Todd Wilson on his own, because Johnson was scared. *See* **R. 67.**

¹⁶ This sentence suggests a gang war or other conflict over some long, deep-seated, grudge. Horn explained it was another phrase by a rap group. **R. 67.**

¹⁷ The victim named WB as one of the shooters when interviewed by Officer Ron Smith. **R. 104-05.** This suggests that Mack killed Todd to protect Martin from prosecution. The killing also serves, in Mack's mind, as a tribute to BG, who is apparently deceased.

¹⁸ Horn testified that this is a reference to being promoted in the Hoover Deuce Crips gang for killing Todd. **R. 68.**

portrayed. Nig's ain't real, son, that's word. Stouk, KB, Poncho, them nigs don't get down how me and you get down, son. You my brother, nig. And I meant that shit when I said it to the heart. Nigs got to die holiday style word up. My lil nigs on the redrum charge too, they gone beat that shit I know. I wouldn't be surprised as Poncho, jake on my lil nig.¹⁹ Word, son, that nig need to get handled.²⁰ Stu jake on you and Gangsta - Stouk jake on you and Gangsta son. KB I find out he straight bitch. Don't even associate with them nigs no more.²¹ Nigs is jakes AKA backstabbers. Man, they didn't have no evidence, but I promise mom. Dukes, I would tell the truth if they ask me anything. I gave them two stories. The first one I said the same shit, but I said you dropped us off at Gangsta's peep's house and you was on yo way to Big Al' s crib. Then I said what you said. Then I told them Beans had the same [thing].²² The reason why I told them that is so it could look like I was lying when Beans didn't give them the thing, feel me. I gave it to him because he needed protection. Plus, he swore on his life he would never let nobody get it, feel me.²³ So I'm thinking that mean the jakes too. Then my parole office[r] came to ask me do you have - do you know anything about a snubnose .38, a .32, a nine, and a long nose .38.²⁴ I was like what the fuck, that shit got me heated, son. I told him, hell no. So that shit got me thinking Beans gave to jakes that shit or either Gangsta or whoever know I had that shit told them about it, feel me. If they got it, I'm fucked, but fuck that shit.²⁵ Yo, son, always looked up to you and you know that because I always know that you were keep it real with a nig who keep it real with you. I wasn't who you want wit it. You wit who I want wit it. Any nig can get it, that's word. I told myself the only thing I was coming back to jail for was either bricks or bodies and I stuck to my word.²⁶ Anyway, who is 203204207208 must be

¹⁹ Horn testified that Mack is accusing KB and Poncho of being snitches. Horn also testified that he and Mack were indeed as close as Mack asserts. **R. 70-71.**

²⁰ Horn testified this means Poncho (Marcus May) needs to die. **R. 71.**

²¹ Horn explains that means do not talk to these people, because they will snitch. **R. 71-72.**

²² It seems the term is actually "thing-thing" which means gun. **R. 73.**

²³ "Beans" swore he would never give up the gun Mack gave him. Horn testified that "feel me" means "believe me." **R. 73.**

²⁴ Horn testified that the snub-nose was his gun and the long-nose was Johnson's gun, but Horn did not know about the .32 or the 9 mm. **R. 74.**

²⁵ In the preceding four sentences. Mack is writing that he is mad, and that if Beans gives the police the gun. Mack would be convicted since the police will have a valuable piece of evidence. **R. 74.**

²⁶ "Bricks" means drugs, and "bodies" means murder victims. **R. 75-76.**

in this fuck them. Them nigs in here must be folks or something. Nigs got to tell you who they be.²⁷ You know what's real, son, holler back. Grave yard to the grave yard on.

R. 62-64 (footnotes added).

Dr. Janice Ross, the forensic pathologist who performed the autopsy on the victim, testified that the victim had four gunshot wounds and that three would have been fatal. The first wound was into his left forehead and was fatal. It then traveled “backwards and across through the brain.” Dr. Ross opined that this was “an intermediate range shot” and that “tattooing” was present. Although not a contact wound, it was fired from between “three or four inches to 18 inches.” The wound “would cause immediate unconsciousness” and the victim would have immediately collapsed. **R. 193-97.**

The second wound was in the victim’s back “just to the left of the middle.” The bullet went underneath the victim’s skin and it was found under the skin in the back of his neck. Because the bullet did not hit any vital organs or arteries, Dr. Ross opined that it would not have been fatal. The third gunshot wound entered the victim’s left back and was also fatal. It travelled “from back to front and a little bit and upward. It “went through the heart and caused a lot of bleeding in the chest cavity.” **R. 197. See also R. 194-195; 199-200.**

The fourth gunshot wound was likewise fatal. This bullet entered the victim’s back, “went through all the lobes of the right lung” before it exited his body. In doing so, it “caused a lot of bleeding internally ... [and] would have been fatal also by itself.” **R. 197.** Dr. Ross explained that the third and fourth wounds caused the victim to bleed over a third of the blood in his body into his chest cavity. **R. 200.**

²⁷ This was a reference to inmates that Horn was trying to identify and Mack was apparently unable to help him. **R. 76.** Also, the note was adorned with gang symbols representing the Hoover Deuce Crips. **R. 77.**

Dr. Ross recovered the bullets that caused the first three wounds (State's Ex. 35) and she provided them to the police. **R. 147-48; 194-95.** She opined that the cause of death was exsanguination caused by gunshot wounds to the chest and "contusion of the brain due to laceration of the brain," caused by a gunshot wound to the head. She opined that the manner of death was homicide. **R. 202-03.**

SLED Agent Ira Parnell testified that he was the supervisor of SLED's firearm and tool mark identification laboratory. Initially, he was asked to determine the caliber of the bullets and to compare the .38 caliber bullets and fragments in State's Exs. 35 and 36 with Horn's .38 (State's Ex. 32). Johnson's .38 (State's Ex. 33) was submitted at a later date. Agent Ira Parnell explained that the bullets were "all consistent with [semi-jacketed] hollow point ammunition, ... which is design[ed] to expend its energy within the first target that it encounters to cause more shock, knock down and not to over penetrate in most cases." Following his testing, he opined that all of the bullets in State's Exs. 35 and 36 were fired by the same weapon and that neither State's Ex. 32 nor State's Ex. 33 fired the bullets. **R. 204-13.**

STANDARD OF REVIEW

An appellate court will not overturn a sentence unless the sentencing court abused its discretion in issuing a ruling; that is, the sentencing judge's ruling must amount to an error of law. *State v. Dawson*, 402 S.C. 160, 163, 740 S.E.2d 501, 502 (2013). Also, "[i]n criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous." *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012); *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The issue of whether a criminal defendant is serving an illegal or unconstitutional sentence constitutes a question of law, *Bordeaux v. State*, 410 S.C. 495, 499, 765 S.E.2d 143, 145 (2014), and errors of law are reviewed *de novo*

by an appellate court. *Id.* See also *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

ARGUMENT

I. The sentencing judge complied with the Eighth Amendment in sentencing Mack to life without parole for a murder committed when he was seventeen years old, where the record unequivocally reflects that the sentencing judge considered the mitigating factors of youth required by *Miller* and *Aiken* in imposing the sentence and where his factual findings are supported by the record.

On appeal, Mack claims that the sentencing judge's Order sentencing him to life without parole (LWOP) violated the Eighth Amendment in five different respects. Notwithstanding his complaints, Respondent submits that the sentencing judge properly complied with the Eighth Amendment in imposing an LWOP sentence for a murder committed when he was seventeen years old because the record reflects that the sentencing judge fully considered the mitigating factors of youth required by *Miller v. Alabama*, 567 U.S. 460 (2012), and *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), *cert. denied*, 135 S.Ct. 2379 (2015), in imposing sentence, and because his factual findings are supported by the record.

A. Evidence presented at the resentencing hearing.

1. The State's evidence.

The State provided a copy of Mack's trial transcript to the sentencing judge and he read it before the February 19-20, 2019 resentencing hearing. **R. 376, ll. 22-24.** At the resentencing hearing, the State presented Inv. Melvin Godwin who testified about the facts leading up to Mack's prosecution for murdering Todd Wilson. Although most of this evidence was heard by the jury, Inv. Godwin also testified to a statement that Mack had given to police and indicated that Mack had admitted to killing the victim in this statement. **R. 289-98.**

Inv. Godwin testified that Mack never asked for his mother when he gave the statement, that he was alert, that he appeared to understand the questions being asked of him, and that he was forthcoming. Further, Inv. Godwin had spoken to trial counsel, Mr. Floyd, prior to trial and Mr. Floyd never indicated that Mack did not understand what was “going on,” that Mack was unintelligent or that he thought that Mack might have a mental problem. **R. 297-98.** Finally, Inv. Godwin “[s]adly” agreed that in his twenty-nine years of being a detective, it was “not uncommon to have someone that had a [shoddy] home life growing up ... wind[ing] up in the criminal justice system[.]” **R. 308-09.**

The State presented the sentencing judge with a computer “printout from the department of juvenile justice that shows [Mack’s] prior engagement with the juvenile justice system [with] convictions of vehicle damage and tampering. And then a violation of his probation.” **R. 310.** The State likewise introduced a November 11, 1986 psychological exam performed by a contract psychologist, Dr. Deanna Lanier, while Mack was in DJJ’s Midlands Evaluation Center as State’s Ex. 1, **R. 417-25.** See also **R. 310-11.**

Under “**Behavioral Observations,**” Dr. Lanier found that Mack “presented as an emotionally isolated individual, who was angry with a ‘chip’ on his shoulder, as evidenced by his tone of voice, perfunctory responses to questioning and body language.” State’s Ex. 1, **R. 421.**

Under “**Behavioral/Emotional/Personality Measures,**” she stated that:

The MACI²⁸ profile was valid and indicated that Terriel is cool and indifferent to the feelings and welfare of others. He may tend to take advantage of others to obtain personal advantage or to achieve personal goals. He does not appear interested in developing close relationships with others, and ties to others are generally based on sharing similar antisocial or unempathetic attitudes. Relationships that are formed tend to be shallow and lacking in loyalties.

²⁸ MACI is an acronym for Millon Adolescent Clinical Inventory.

State's Ex. 1, **R. 421** (footnote added). *See also R. 310-11.*²⁹

The State noted that another evaluation from earlier in the year of the murder (2003) indicated that Mack was “enmeshed in street justice and views it as his responsibility to take the law into his own hands, which we think is consistent with the note[] that he wrote in jail with regard to the motive for killing the victim.” **R. 311.**

Michael Stobbe testified that he is the branch chief of records management and release for the South Carolina Department of Corrections and that he is the Department's records custodian. The State introduced Mack's disciplinary history while incarcerated in SCDC as State's Ex. 2, **R. 437-512.** This Exhibit reflects that Mack had committed at least twenty-seven disciplinary infractions while incarcerated, many of which are for violent acts:

- striking an employee (4 convictions);
- possession of a weapon (2 convictions);
- throwing chemicals on a correctional officer (1 conviction);
- threatening to inflict bodily harm (3 convictions);
- evading a security device (1 conviction);
- refusing to comply with an order (2 convictions);
- disorderly conduct (1 conviction)
- destroying property (1 conviction);

²⁹ Dr. Lanier's fourth recommendation was that:

Terriel needs to be referred for general counseling to uncover and deal with his anger, to fully accept *responsibility for his behaviors, to learn socially acceptable coping skills*, and to resolve conflicts related to his father's absence in his life. This may be incorporated into his drug and alcohol counseling.

State's Ex. 1, **R. 425** (emphasis added).

- use of marijuana or narcotics (2 convictions);
- flooding his cell (1 conviction);
- public masturbation (7 convictions); and
- being out of place (2 convictions).

See **R. 318; 324-25; 327-28**; State's Ex. 2, **R. 437-512**.

Mack had attended school and worked while incarcerated. However, seven jobs ended with him being placed in lockup pending a disciplinary hearing. Further, State's Ex. 2 reflects that he was then under investigation for homicides that occurred at Lee Correctional Institution (LCI). **R. 318-19**; State's Ex. 2, **R. 511-12**.

Joe Todd Wilson's father, Perry Mungo, offered victim impact testimony. Mr. Mungo testified that the victim was eighteen year old and had a fourteen month old child when murdered. Also, the murder turned family members' lives "around." Both the victim's mother and his brother saw him dead at the scene. **R. 330-32**.

The victim's mother was "the first family member at the scene" and she saw him lying on the concrete "in a pool of blood dead." His murder "just destroyed her life." She had spoken to him shortly before the murder and he had planned to come to the house to get a car. Minutes later she heard the gunshots,³⁰ went outside to investigate, and heard that someone had been shot on Oakland Ave. She tried calling the victim and went to the scene when he did not answer. She died in 2012. **R. 331-32**.

Mr. Mungo testified that the murder

took away my life because I ... in his memory ... always remember his birthday coming. We always celebrate his birthday, [and] Christmas. And then I turn around I had to be the father [to his daughter] and, you know, like most of us when we want to be the grandparent – [a] grandparent is different from the parent itself. ...

³⁰ They lived three blocks from the murder scene. **R. 331**.

[T]he parent disciplines the child. The grandparent [is] [supposed] to keep them happy and enjoy them, that's our time in our life when we got older we can enjoy being with the kids our own kids are grown, [it] just took all that away from me.

R. 333.

Also, Mr. Mungo places a cross at the crime scene several times a year, as do some of the victim's friends. The murder has also been hard on the victim's daughter. **R. 333-35.**

2. Mack's evidence.

Mack presented Dr. Geoffrey McKee, a forensic psychologist, who testified that he performed a "forensic psychological evaluation on Mack pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012), and he prepared a report with his findings, which Mack introduced as Def.'s Ex. 1. *See R. 513-22.* Because Dr. McKee had to address the *Miller* factors years after the trial, he conducted a "retrospective evaluation," in which he tried to "psychometrically reconstruct and give his best estimate as to Mack's psychological, emotional, behavioral, and cognitive functioning at the time of sentencing. **R. 338-40; 364-65; Def.'s Ex. 1. R. 513-22.** In order to make this assessment, Dr. McKee reviewed Mack's birth certificate; the trial transcript; medical, school, and hospital records for Mack; SCDC inmate and medical records; Florence County Sheriff's Office incident reports; "DJJ Institutional Records, including 6/27/02 Psychosocial Evaluation;" the DJJ Discharge Summary; and February 5, 2019 affidavits from Terry McLaughlin, Shante McLaughlin, and Nourise McLaughlin. Def.'s Exs. 13-15, **R. 542-44.**

Dr. McKee concluded that by the time Mack was thirteen, he had Post-Traumatic Stress Disorder (PTSD) caused by witnessing physical violence by his stepfather towards his mother. He also had major depressive episodes resulting from the death of his grandmother, and his mother's subsequent boyfriend throwing away all reminders of his stepfather. He likewise experienced traumatic episodes that resulted from having sex at a very young age and because his biological

father denied paternity even after paternity was conclusively established by DNA. Mack began using alcohol and marijuana by the age of thirteen because of these problems. Further, he ran away from home, at least twice, only to be returned. **R. 349-51; Def.'s Exs. 1, 5, & 6, R. 513; 526; 527.**

Mack “started to get into trouble at school” between the ages of thirteen and seventeen. Although he had been a good student through the sixth grade, he was suspended and engaged in “incidents that ended up with him coming to the attention of [DJJ].” Dr. McKee testified that the best data that he had for this period of time was the DJJ report introduced as State’s Ex. 1. This report summarized incidents where Mack ran away from home and matters that led him to be placed in DJJ. Additionally, Mack introduced three incident reports involving domestic violence against his mother for events occurring on December 7, 1999, January 22, 2000, August 16, 2002, and September 4, 2002, as Def.’s Exs. 7-10, respectively. Mack attempted to defend his mother in the September 4th incident. **R. 351-54.** Also, a report from McLeod Regional Medical Center (Def.’s Ex. 11) reflected that, following the September 4th incident, Mack was treated for bites to his head and neck and other minor injuries. **R. 533.**

Dr. McKee opined that the domestic violence in the household

would actually have more impact on his PTSD in that each of those episodes is an reenactment of [re-experiencing] the trauma that led to the symptoms of PTSD, which also include[s] anxiety and depression. So here he is with now a new stepfather, that stepfather physically abusive to his mother to the point where he finally steps between them in an attempt to stop the abuse on his mother. So it would be very deleterious to his emotional health and to his feelings of stability and nurturance and also those things that constitute a loving and caring family.

R. 354.

Dr. McKee explained Mack’s then-current mental status as follows

... [W]hen I saw him, he was alert. He was oriented. He was cooperative. He was responsive to questions. He gave forth good effort on all psychological testing that

I did with him on two of the three sessions that I saw him spanning [overall] some six hours of direct contact with him. His answers often exceeded the scope of the question that I 'would ask. He had good eye contact. He was not especially restless or hyperactive suggestive of attention deficit hyperactivity disorder. ... [H]is expressive vocabulary which means his ability to convey his feelings and his thoughts to others was in the average range. His receptive vocabulary which means his ability to understand and comprehend questions or statements to him was within the normal limits. And there were no overt signs of a psychotic symptom which is to say evidence of delusions which are fixed-false beliefs that persist even despite contradictory, realistic information or hallucinations, auditory and visual experiences of seeing things that aren't really there or hearing things that aren't really there. At the time I was seeing Mr. Mack he was prescribed and had been prescribed for some by this time seven years, ... And he ... also had been taking various antipsychotic medications that would manage and control those kinds of symptoms. And he was also had been taking ... a series of different antidepressants that have been prescribed over the years. So some of the lack of psychotic symptoms or depressive symptoms were probably mediated to some extent by those medications, but all in all he was responsive and cooperative. And I felt he gave good effort throughout the entire assessment procedurally.

R. 356-57

Dr. McKee opined that Mack had not been malingering his symptoms and that he could be rehabilitated. Further, Mack introduced four affidavits that Dr. McKee had reviewed in arriving at his conclusions. **R. 357-58.** Dawn Renee Simmons' affidavit (Def.'s Ex. 12) states she was the author of "Letters To Our Sons, A Collection of Letters By Prisoners & Ex-prisoners To Stop Mass Incarceration of Our Youth," which was published in October, 2018. She avers that Mack submitted a December 31, 2013 letter to her that was used in her book. **R. 359; 541.**

Nourise McLaughlin's affidavit (Def.'s Ex. 13) states that she is Mack's paternal aunt and that she has known Mack his entire life. Mrs. McLaughlin further states that Mack's mother "worked multiple jobs at times." His mother was also inconsistent in her parenting. Consequently, she was not "present" in the lives of Mack and his brother, and "[t]he boys ran free in the neighborhood and did not have much guidance growing up." Likewise, she "had many different relationships with men, which appeared to be more important to her than her sons. "Many of these

men have been arrested and did not treat Dawn or her kids the way they deserved to be treated. Dawn would stand up for the men and tell her children to toughen up now or you will get your [behind] beat later.” **R. 360.**

Mrs. McLaughlin further avers that Mack and his brothers are “intelligent young men but everything positive they learned was in school and everything else was learned in the streets.” Without anyone teaching them “the importance of an education,” ... they did not succeed in school as they got older.” Mrs. McLaughlin states that she lives in Florence County and that that she and her family would “do everything we can to help [Mack] be successful in our community if he was released. **R. 360-61.**

Shante McLaughlin’s affidavit (Def.’s Ex. 14) states that she is Mack’s cousin and that she has known him his entire life. She avers that he was a good student, helped other family members with schoolwork, was in the chess club and enjoyed playing sports, before he went to DJJ. He spent a lot of time with her and family before going to DJJ, but “he stopped hanging out with us” after his release from DJJ. Instead, he “only spent time with the three or four guys in our neighborhood that were in DJJ with him.” **R. 360-61.**

These other associates, “seemed to change his way of thinking and how he spent his time. He did not seem to focus on school at all and was mostly just spending time the neighborhood with them. Finally, Shante avers that if Mack was released, she would “help him and support him with anything he needs including making sure he has somewhere to live and somewhere to work,” and that her entire family would help him successfully transition back into the community. **R. 543.**

Terry McLaughlin, Mack’s biological father, avers in Def.’s Ex. 15 that Mack would have a job working for his uncle and Mr. McLaughlin, if released. Mr. McLaughlin states that Mack is “very bright” and “would easily pick up on the work we do.” Although Mr. McLaughlin refused

to acknowledge paternity in Mack's past, his affidavit claims that he would be "available to my son for anything [Mack] needs, from a place to stay to a warm meal." **R. 361**. Additionally, Mack offered affidavits from Rodriguez Doe (Def.'s Ex. 16) and Vera Dolan (Def.'s Ex. 19). Mr. Doe avers that Mack "was a tutor in the education department" at Lieber Correctional Institution when Doe was incarcerated there in 2009. He describes Mack as "very intelligent and just a good dude," and avers that Mack assisted him and other inmates get their GEDs. **R.361-62**. Ms. Dolan is an epidemiologist and consultant from Las Vegas, Nevada, who had previously investigated and developed "a life table" with the estimated life expectancy for a male entering SCDC as a juvenile. See Def's Ex. 19, **R. 561-68**.

Further, Mack introduced the report of Dr. Matthew E. Gaskins, a forensic psychiatrist who evaluated Mack on February 15, 2019. See Def.'s Ex. 18, **R.547-60**. During the evaluation, Mack said that he "believe[d] that he has PTSD based on several traumatic events which occurred throughout his life. **R. 552**."³¹ After Dr. Gaskins' evaluation of Mack, he opined that "Mr. Mack meets the diagnostic impression for Posttraumatic Stress Disorder" based on Mack allegedly

having clinically significant symptoms that result from his exposure to multiple traumas (e.g. witnessing and experiencing abuse as a child; witnessing and participating in violent acts while incarcerated; witnessing intensely violent acts during the riot of April 2018). Based on the totality of information Mr. Mack's has experienced symptoms of PTSD including intrusive memories, nightmares, increased psychological stress when exposed to reminders of the violence, attempts to avoid reminders of trauma, avoidance of discussing trauma (e.g. minimally communicative with providers), persistent negative emotional state (i.e. descriptions of appearing depressed), feeling estranged from others (i.e. feeling alone), irritability/anger outbursts with little to no provocation, hypervigilance, and sleep disturbance.

R. 556.

³¹ The traumatic experiences are those to which Dr. McKee had testified. See **R. 341-50**.

Dr. Gaskins noted that SCDC medical records “have also offered the diagnosis of malingering,” which is “the intentional feigning or exaggeration of symptoms in order to obtain secondary gain (e.g. medication, preferential placement, money, removal of restrictions).” However, Dr. Gaskins discounted this diagnosis because psychological testing for that diagnosis was not administered at SCDC and because the SCDC records do not list Mack’s motives for malingering, “other than in reference to the suicidal ideation following the riot Lee Correctional Institution.” **R. 556-57.**

Likewise, Dr. Gaskins noted that the SCDC records also listed a diagnosis of Antisocial Personality Disorder (ASPD)³² and acknowledged that Mack showed “clinically significant signs/symptoms of this diagnosis,” which included “aggressiveness, lack of remorse, and

³² The Diagnostic and Statistical Manual of Mental Disorders (DSM-V), p. 659 (5th ed. 2013) lists the following diagnostic criteria for ASPD:

A. A pervasive pattern of disregard for and violation of the rights of others, occurring since age 15 years, as indicated by three (or more) of the following:

1. Failure to conform to social norms with respect to lawful behaviors, as indicated by repeatedly performing acts that are grounds for arrest.
2. Deceitfulness, as indicated by repeatedly lying, use of aliases, or conning others for personal profit or pleasure.
3. Impulsivity or failure to plan ahead.
4. Irritability and aggressiveness, as indicated by repeated physical fights or assaults.
5. Reckless disregard for safety to self or others.
6. Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.
7. Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another

B. The individual is at least age 18 years.

C. There is evidence of conduct disorder with onset before age 15 years.

D. The occurrence of antisocial behavior is not exclusively during the course of schizophrenia or bipolar disorder.

impulsivity while in corrections.” When those traits were combined with the earlier diagnosis of a “conduct disorder and other violations of the rights of others as an adolescen[t],” Dr. Gaskins conceded that Mack “meets the diagnostic criteria for Antisocial Personality Disorder.” However, he disagreed with the diagnosis because Mack “has not been able demonstrate his adult behavior/personality outside of correctional settings” and because “these traits seem to have been adaptively beneficial for Mr. Mack to survive ‘street life’ and while in prison. It is not clear that he would continue this pattern of behavior as an adult in a non-correctional setting.” **R. 557.** Dr. Gaskins’ analysis of the *Aiken* factors essentially echoed Dr. McKee’s. See **R. 557-60.**

Although Mack did not testify, he addressed the sentencing judge. After thanking the sentencing judge for the opportunity to speak, he apologized for his “involvement in the death of Mr. Wilson.” **R. 378-379.** He also asked the victim’s “love[d] ones” and the judge to find it “in their heart[s] to forgive me for the *mistakes I made as a child.*” He added, that at the time of his arrest, he was “was a 17-year-old child that was the under false impression that I was a grown man because at least since the age of 13 I have been running around town with people I thought were my friends doing what we thought grownups did alcohol, doing drugs and living every day like life was a game people ... press restart press a restart button on.” **R. 379** (emphasis added).

He admittedly had not thought about the consequences of his actions. His mother raised him. He loved her, even though she was hard on the children and especially him because he was the oldest. His mother’s “extreme physical abuse” and that of her various male partners led him to often running away from home to escape it. Those men fighting his mother led to his involvement in the fights, in an effort to protect his mother. He said, “I’m not trying to shift the blame on anyone, but that’s what led me to run the streets and become friends with people who never had my best interest at heart.” **R. 379-80.**

He admitted that he and his friends did not have their fathers in their lives and that they “chose the wrong role model.” He was arrested for murder just thirty-two days after his seventeenth birthday and before he “knew anything about living life in general.” **R. 380.** He complained about the representation he had received at trial and said that after his conviction, he found himself “on the prison yard just days after I turn[ed] 19, still yet a child mentality only now in a closed environment of adults, that is not structured to breed faith in anything positive.” **R. 380-81.**

There were ... very few limited opportunities provided by administration to do anything constructive. I wound up growing up in the penitentiary and learning the hard way. I received disciplinary infractions as a result of many things, some entirely my fault, but others range from being unable to communicate with staff, misunderstandings. And on numerous occasions being falsely accused and unable to prove my innocence of the infraction due the fact that the staffs’ word [was] always taken as more credible than mine. After a while, I began to learn how prison operates and my disciplinary infractions became lesser and lesser to the point where I was able to refrain to remain disciplinary free for years at times. And I also [have been] ten years drug free.

R. 381.

In addition to trying to stay out of trouble, he took it upon himself “to learn more and do positive things” in prison. For instance, he obtained his GED at age twenty-two. After that, he and several inmates in his dorm began a tutoring program to help other inmates likewise get their GEDs. “The more I learn, the more I strive to help others learn.” He also joined a “culture awareness committee which organize[s] educational programs to spread a positive message and promote change in spite of prison conditions.” **R. 382.**

Further, he “contributed in a collective effort to reach out to the youth and stop violence and mass incarceration of the youth in the book Letters To Our Sons,” and he has become a Christian and joined the prison ministry program.” While incarcerated, he has been assaulted by staff, seen others die because of neglect by staff, and he has witnessed gang murders and rapes.

He said that prison was not a place in which he wanted to spend any more time. It had changed him “entirely from my core and expose[d] me expose me to an institution of lifestyle I never thought imaginable especially here in America.” **R. 382.**

Finally, he told the sentencing judge that his “overall message was that “when you know better you can do better. He knows “a lot more now” than he did at seventeen and he has grown, matured and developed “into a rational, compassionate adult. He concluded by saying, “I believe I will make this Court proud ... if a fair sentence was pass down to me, so that I may spend a portion of my life with my family to work hard in our community and be an upstanding citizen in today's society. Thank you.” **R. 382-83.**

B. The parties’ arguments for sentencing.

The State argued that “the crime in total” was a relevant consideration in sentencing. While Mack was asking for a “second chance to be a productive citizen,” the victim was dead and Mack could not bring him back. The State also argued the negative impact of the murder on the victim’s daughter and his parents, and it observed that the murder was “horrific,” “malignant[,] and planned.” Mack did not commit the murder because of either familial or peer pressure. Rather, he murdered the victim “to make rank” and to help White Boy by getting rid of the victim, who was a witness to a murder White Boy committed. **R. 383-84.**

The victim never fired a shot, but Mack fired four shots: one to the victim’s head and three to his back. Three of those shots would have been fatal. The State also argued that his trial counsel performed well.³³ **R. 384-85.** Further, the State noted that Mack wrote a letter in 2013. **R. 383.** Yet,

³³ Additionally, Mack had rejected a plea bargain to voluntary manslaughter with a twenty year sentence even though he knew that he killed the victim. **R. 385-86.**

Nowhere in that letter did he express any remorse, ask for any forgiveness for his involvement and his not involvement, his planned act, his planned murder, how he characterized the crime at that time and it was all **self-focused**. What he said was the next thought that comes after that is I'm only 27. I spent the last ten years of my life incarcerated for mistakes I made as a child. It's not a mistake he made as a child. It is a murder that he committed without remorse until *Aiken vs. Byars*³⁴ comes up. That shows his character and he wrote that letter back in 2013 when he was 27 years of age after he been incarcerated for at least ten years from 2003 until the present.

R. 384 (emphasis in original) footnote added).

Although the State did not contest the circumstances of Mack's upbringing, it noted that the "vast majority" of criminal defendants had shoddy home lives; that it was not uncommon to have an abusive parent, an absent father, to be raised in poverty, or to witness violence; and it contended that many famous people had overcome similar circumstances. The State noted that it is a "terrible situation" when people make "wrong choices;" that Mack made "wrong choices;" that DJJ could not rehabilitate him even though that is the agency's purpose and even though he was neither intellectually disabled nor psychotic; and that the DJJ evaluation found that "he was interested in street justice." The State noted that Dr. McKee's opinions were based on Dr. McKee's efforts to reconstruct what Mack was like at age seventeen. Also, everything Mack did and everything Dr. McKee looked at came down to choices that Mack made. **R. 386-87.**

The State pointed out that Mack had committed numerous infractions while incarcerated in SCDC, that many of these were for violent offenses, and that some involved having a weapon. The State then argued that he made choices that show he cannot conform his conduct to "the norms of a prison situation," and that there was no guarantee he could conform his conduct "to the norms of society where there is no control" of his conduct. The State noted that *Aiken* required the judge to consider the immaturity and impetuosity and failure to appreciate the risk consequences."

³⁴ See *Aiken v Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).

However, the State suggested that the letter he wrote to Islam Horn demonstrated that he clearly understood the consequences of his actions because he knew that if police found the murder weapon “his goose was cooked.” The State concluded by describing the murder as “a hit, ... an assassination.” **R. 387-89.**

Mack’s counsel argued that the United States Supreme Court in *Miller* held that a mandatory sentence of life without parole sentences on juveniles violates the Eighth Amendment and that each juvenile was entitled to individualized consideration of his sentence. South Carolina accepted *Miller* and applied it retroactively in *Aiken*. Counsel stated that the judge was required to consider five factors to determine whether a sentence of less than LWOP was proper: “immaturity, impetuosity and failure to appreciate the risks, the circumstances of the homicide itself and the participation offender's participation and how the conduct and familial peer pressures may have affected him, the family and home environment of the defendant, the incompetency ... [associated] with youth ... and ... the possibility of rehabilitation.” With respect to the immaturity, impetuosity and Mack’s failure to appreciate the risk and consequences of his actions, counsel noted that DJJ records observed that although he was sixteen “on March 26, 2003, he was still acting childishly in class and was written up for not obeying instruction because he was involved in horse play.” This was only nine months before the murder. **R. 390-92.**

Counsel suggested that Horn’s testimony showed the circumstances of the murder were that: (1) Mack met up with Horn and Johnson, (2) they stopped so Mack could talk to the victim about buying marijuana, (3) Johnson and Mack exited the vehicle, and (4) Horn thereafter saw Mack shoot victim. Peer pressure was involved, as reflected by the co-defendant’s involvement, as well as Mack thanking Horn for “showing him the ropes”, or “guns” and other things, and Mack’s statement that he felt that he earned respect from the killing. **R. 392-94.** Counsel went

through the psychological impact of Mack's violent familial history on him, to which Dr. McKee had testified. Counsel argued that witnessing his mother being beaten by the only father figure in his life at age eight made him "more susceptible to ... peer pressure from the other individuals." Moreover, Dr. McKee testified that Mack had a diagnosis of PTSD and had experienced major depressive episodes by the age of thirteen. Counsel also pointed out that the State had not presented an expert to refute Dr. McKee's testimony. **R. 394-99; 411-12.**

In an effort to show Mack's immaturity and his failure to appreciate the risks and consequences of his actions, counsel pointed to Mack's statement to law enforcement, which he gave to three officers after invoking his right to counsel. **R. 400-03.**³⁵ Counsel argued that Mack had been unable to properly assist his attorney at trial because his trial attorney was only appointed eighty-one days before the trial and suggested that Mack might have been better able to assist trial counsel if there had been more time, such as providing more information in mitigation of punishment. Counsel likewise noted that DMH did not evaluate his competency to stand trial as an adult and contended that, if he had been evaluated, "it would [have been] much more difficult to assume that he was able to communicate." **R. 403-05.**

Counsel then pointed out that Dr. McKee's expert opinion was that Mack could be rehabilitated and that Dr. Gaskins had explained that many of Mack's disciplinary problems while in SCDC were either necessary to defend himself or to survive prison life because he could not show weakness. Also, Mack had not been convicted of fighting while incarcerated. Additionally, he had not committed a homicide or rape, and there was no evidence of his gang involvement while in prison. However, he had improved himself while incarcerated, by obtaining his GED and helping others get their GEDs. **R. 406-08.**

³⁵ The State did not introduce the statement at trial.

Next, counsel noted that Petitioner had written a letter for Ms. Simmons' book, "Letters To Our Sons, A Collection of Letters By Prisoners & Ex-prisoners To Stop Mass Incarceration of Our Youth," and counsel read the letter into the record. Further, counsel noted that the life expectancy evidence for inmates incarcerated in SCDC as juveniles was 38.2 years and that a thirty-eight year sentence equated to a life sentence. **R. 409-10**. Finally, counsel argued that the original sentencing had no bearing on the appropriate sentence under *Aiken* and his Memorandum had facts of other cases and the sentences imposed in those cases. **R. 410-11**.

The sentencing judge took the matter under advisement. **R. 412-13**. When proceedings resumed on March 20, 2019, the sentencing judge announced that he had signed an order and was sentencing Mack to life imprisonment. **Sent. 3**. Counsel "object[ed] to the sentencing as it being cruel and unusual and in violation of the Eighth Amendment of the United States Constitution." See **R. 415-16**.

C. The Sentencing Order.

The sentencing judge's March 20, 2019 Sentencing Order expressly states that he considered the factors set forth in *Miller* and *Aiken* and explains in detail his reasons for imposing a life sentence following his considering those factors. **R. 677-81**. The sentencing judge's conclusion was that:

While the Defendant presented some mitigating evidence including his immaturity at the time of the murder, some mental health diagnoses, and growing up in a difficult environment, this Court believes these limited mitigating factors are substantially outweighed by the areas mentioned above pursuant to *Aiken v. Byars*. This Court is extremely concerned by the cold-blooded nature of the killing, and the fact that the Defendant has shown little to no signs of rehabilitation. Furthermore, the Defendant ... has shown no remorse for his crime until this hearing, whereby he potentially has something to gain. The Court carefully and deliberately considered all the factors as outlined in *Aiken v. Byars*, and after doing so, based on the above and the entire record of the sentencing hearing, this Court sentences the Defendant to life in the custody of the Department of Corrections.

R. 680.

D. Discussion.

South Carolina employs a constitutionally permissible sentencing scheme in which juvenile homicide offenders are subject to a discretionary sentence ranging from a minimum of thirty years imprisonment to a maximum of life without the possibility of parole. S.C. Code. Ann. § 16-3-20(A); *Aiken*, 410 S.C. at 545, 765 S.E.2d at 578. In *Miller*, the United States Supreme Court held that mandatory life without parole sentences for juvenile homicide offenders violated the Eighth Amendment. 567 U.S. at 465, 470. *Miller* did not categorically bar life sentences for juvenile murderers. Instead, the Court held a sentencing court must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* at 480. The Court noted the difficulty of distinguishing “the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Id.* at 479-80. Yet, the Court did not articulate or require any specific factual findings.

In stating the factors that must be examined before sentencing a juvenile to life, *Miller* explained that a sentencing authority must consider youth a “more than a chronological fact,” but also as a circumstance which carries with it immaturity, irresponsibility, and recklessness. *Id.* at 476. Further, the defendant’s family background, mental and emotional development, and the possibility of rehabilitation must be considered in assessing his culpability. *Id.* The Court held that a juvenile convicted of murder could still be sentenced to life without parole, but only after an individualized hearing in which the various mitigating factors were considered. *Id.* at 479-80. In other words, *Miller* mandated only that a sentencing court follow a certain process before imposing a particular penalty and did not require specific words be used. *Id.* at 483.

Likewise, our Supreme Court explicitly declined any “invitation to set out a specific process for trial court judges to follow when considering whether to sentence a juvenile to life without parole.” *Aiken*, 410 S.C. at 545 n.10, 765 S.E.2d at 578 n.10. The Court held that *Miller* applied to a discretionary sentencing scheme such as ours, and that juveniles previously sentenced to life without parole, such as Mack, were entitled to resentencing to allow them “to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight.” *Id.* at 544, 765 S.E.2d at 577. The Court determined that the factors in *Miller* were those which must be considered during resentencing, such as the offender’s age and other features of youth, family life, circumstances of the crime, understanding of the legal process, and the possibility of rehabilitation. *Id.* at 544-45, 765 S.E.2d at 577-78.

Critically, the *Aiken* majority noted that “[t]he United States Supreme Court did not establish a definite resentencing procedure and we likewise see no reason to do so,” and explained that it trusted trial courts to exercise their discretion wisely to sentence juveniles. *Id.* at 545 n.10, 765 S.E.2d at 578 n.10; *see also Wasman v. United States*, 468 U.S. 559, 563 (1984) (holding a sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed). The Court also explained it was not going “so far” as to hold a juvenile’s individualized sentencing hearing “should mirror the penalty phase of a capital case,” but “the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings.”³⁶ *Aiken*, 410 S.C. at 544-45, 765 S.E.2d at 577.

³⁶ “[S]tate courts that have addressed the question of how to apply *Miller* in the context of discretionary natural-life sentences have reached differing conclusions.” *People v. Holman*, 58 N.E.3d 632, 641 (Ill. App. Mar. 3, 2016); *see State v. Riley*, 110 A.3d 1205, 1214 n.5 (Conn. 2015)

In 2016, the United States Supreme Court held its rule in *Miller* was retroactive on state collateral review. See *Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016). It is notable that the Court, when revisiting its holding in *Miller*, did not constitutionally require judges to make *any specific or formal factual findings* when imposing sentences in juvenile homicide cases. *Id.* at 735 (explaining a sentencing court is not constitutionally required to make any specific findings of fact on the record when sentencing a juvenile offender pursuant to the guidelines of *Miller*). The Court explained that the decision not to require specific findings spoke “to the degree of procedure *Miller* mandated in order to implement its substantive guarantee.” *Id.*

Nothing in *Miller* suggests that a judge use any particular verbiage or recite any phrase prior to imposing a sentence. Therefore, a closing reading of *Miller* requires an examination of certain factors prior to sentencing a juvenile to life without parole. However, neither the United States Supreme Court nor our Supreme Court requires formal fact findings or a specific procedure. Respondent again submits that the sentencing judge properly complied with the Eighth Amendment in sentencing Mack because the record reflects that the sentencing judge fully

(noting “there is no clear consensus”). Some courts, like our own, have found *Miller* requires consideration of factors associated with youth. See e.g., *Riley*, 110 A.3d at 1216; *People v. Gutierrez*, 324 P.3d 245, 268-69 (Cal. 2014) (describing five factors courts must consider before sentencing juvenile defendants to life in prison without parole); *Bear Cloud v. State*, 294 P.3d 36, 47 (Wyo. 2013) (setting forth seven factors courts must consider in sentencing juveniles to life in prison without parole (quoting *Miller*, 567 U.S. at 476-77)). Yet other courts have found, while *Miller* requires the sentencing authority to consider mitigating circumstances related to youth, *Miller* does not bind the court to consider a predetermined list of particular factors. *Holman*, 58 N.E.3d at 642, *State v. Ali*, 855 N.W.2d 235, 256-57 (Minn. 2014) (explaining sentencing courts must consider “any mitigating circumstances,” including those discussed by the *Miller* Court); *State v. Long*, 8 N.E.3d 890, 895 (Oh. 2014) (finding the factors adopted by the Wyoming Supreme Court in *Bear Cloud*, *supra*, “may prove helpful” to courts sentencing juvenile defendants, but refusing to require sentencing courts to make explicit findings with respect to any enumerated factors); *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012) (holding the sentencing court complied with the requirements of *Miller* by taking into account how juveniles are different from adults “and how those differences counsel against irrevocably sentencing them to a lifetime in prison”).

considered the mitigating factors of youth that the Eighth Amendment requires and that his factual findings are not clearly erroneous. *See Brown*, 401 S.C. at 87, 736 S.E.2d at 265.

1. The failure to find that Mack is “irreparably corrupt.”

Mack first attacks the sentencing court’s failure to find that Mack is “irreparably corrupt.” As noted, however, neither the United States Supreme Court nor the Supreme Court of South Carolina require any specific factual findings. Rather than emphasizing some hypothetical fact-finding for the jury or trial judge, *Miller*’s holding was limited: “*Miller* requires a sentencer to consider a juvenile offender’s youth and attendant characteristics before determining that [LWOP] is a proportionate sentence.” *Montgomery*, 136 S.Ct. at 735 (citing *Miller*, 567 U.S. at 483).

Indeed, although the Court in *Montgomery* stated that “*Miller* did bar life without parole for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility,” *Montgomery*, 136 S.Ct. at 734, it also acknowledged that *the sentencer is not required to find the juvenile defendant is “irreparably corrupt.”* *Id.* at 735 (emphasis added). A number of courts from other jurisdictions have likewise held that the sentencer is not required to make such a finding.³⁷ Further, it is clear that the sentencing judge implicitly found that Mack is

³⁷ *See, e.g., People v. Blackwell*, 3 Cal. App. 5th 166, 194, 207 Cal.Rptr.3d 444 (2016) (“*Miller* does not require irreparable corruption be proved to a jury beyond a reasonable doubt in order to ‘aggravate’ or ‘enhance’ the sentence for [a] juvenile offender convicted of homicide”). *see also Id.* at 192 (“‘[I]rreparable corruption’ is not a factual finding, but merely ‘encapsulates the [absence] of youth-based mitigation’”) (alteration in original); *White v. State*, 837 S.E.2d 838, 844 (Ga. 2020) (“*White* also argues that *Veal* requires that the trial court find beyond a reasonable doubt that he is irreparably corrupt before sentencing him to life without parole. But nothing in *Veal* says that, and nothing in *Miller* or *Montgomery* says that, either. Moreover, language in *Miller* and *Montgomery* is contrary to *White*’s argument that those cases demand that the State prove permanent incorrigibility beyond a reasonable doubt”); *State v. Fletcher*, 149 So.3d 934, 943 (La App. 2014) (“*Miller* does not require proof of an additional element of ‘irretrievable depravity’ or ‘irrevocable corruption’”); *State v. Lovette*, 233 N.C.App. 706, 719, 758 S.E.2d 399, 408 (N.C. Ct.App. 2014) (“The findings of fact must support the trial court’s conclusion that defendant should be sentenced to life imprisonment without parole, and a finding of ‘irreparable corruption’ is not required.”); *Garcia v. State*, 903 N.W.2d 503, 512 (¶ 26) (N.D. 2017) (“*Miller* did not impose a

irreparably corrupt even though there was no express finding that Mack to this effect because he found that in light of the many “violent and serious” offenses that Mack had committed in SCDC, “[Mack’s] ability to be rehabilitated is unlikely. In fact, this Court is concerned for the safety of the public should [Mack] ever be released from the Department of at any age.” See **R. 678-79**. This finding, which is supported by the record, is consistent with the admonition in *Montgomery* that “[t]hose prisoners who have shown an inability to reform will continue to serve life sentences. 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.” *Montgomery*, 136 S.Ct. at 736. Accordingly, the failure to make an express finding of irreparable corruption did not amount to an error of law. Also, the sentencing judge’s factual findings are supported by the record,³⁸

formal factfinding requirement *Miller* ‘mandates only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty’”); *Brown v. State*, No. W2015-00887-CCA-R3-PC, 2016 WL 1562981, at *7 (Tenn. Crim. App. Apr. 15, 2016) (unpublished op.) (“[*Montgomery*] reiterated that ‘*Miller* did not require trial courts to make a finding of fact regarding a child’s incorrigibility’”), *appeal denied* (Tenn. Aug. 19, 2016), *cert. denied*, 137 S.Ct. 1331 (2017); *Jones v. Commonwealth*, 293 Va. 29, 795 S.E.2d 705, 709 n.3 (Va. 2017) (“*Montgomery* acknowledged that ‘*Miller* did not require trial courts to make a finding of fact regarding a child’s incorrigibility’ and ‘did not impose a formal factfinding requirement’ on this mitigation issue”). Mack’s reliance upon contrary authority is misplaced, since much of it predates the Court’s decision in *Montgomery* and because neither the United States Supreme Court nor the Supreme Court of South Carolina require such an express factual finding.

³⁸ In his brief, Mack relies upon capital case, such as *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). However, any argument based upon these cases is not properly before this Court on appeal because they were not presented to the sentencing judge, either in Mack’s Sentencing Memorandum (Def.’s Ex. 20) or in argument at the hearing. See **R. 390-412**. See also *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) (“To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal”). Moreover, these capital case are irrelevant both because “death is different, *see, e.g., Woodson v. North Carolina*, 428 U.S. 280, 303–04 (1976); *Ford v. Wainwright*, 477 U.S. 399, 411, 106 S.Ct. 2595, 2602, 91 L.Ed.2d 335 (1986) (Marshall, J., plurality opinion) (“In capital proceedings generally, this Court

2. Alleged failure to properly consider Mack’s “age and the hallmark features of youth.”

There is likewise no merit to Mack’s claim that the sentencing judge failed to properly consider his “age and the hallmark features of youth, including immaturity, impetuosity, and the failure to appreciate the risks and consequences.” *See Miller*, 567 U.S. at 477 (“Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences”). To the contrary, the sentencing judge’s order states that he “considered” each of the factors set forth in *Aiken*. **R. 677**. Also, the order expressly states that he “examined the Defendant’s alleged mental deficiencies and the incompetencies associated with youth.” **R. 678**.

However, the sentencing judge found that “these limited mitigating factors are substantially outweighed by” evidence that (1) he was “within one year of being able to serve in the military” and “within one year of an age whereby he would have immense responsibilities and be considered an adult by law;” (2) the facts of the murder showed Mack was “the shooter” and intentionally shot the victim in the head at ““point blank range;” (3) he shot the victim “three more times in the back while the victim was on the ground;” (4) he wrote the letter to Horn, in which he bragged about the murder and failed to show remorse; (5) the motive for the murder was to kill “a witness to another crime so as to benefit an associate;” (6) the murder was a “premeditated ... cold-blooded assassination,” for which Mack not only did not show remorse but was “actually proud of the killing,” *see Miller*, 567 U.S. at 477;³⁹ (7) the investigating officer testified that he did not display

has demanded that factfinding procedures aspire to a heightened standard of reliability.... This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different”), and because he was never subject to a possible sentence of death in light of *Roper v. Simmons*. 543 U.S. 551 (2005).

³⁹ *Miller* observed that mandatory LWOP sentence for murder “neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and

any problems “communicating with law enforcement,” he “clearly understood all questions, easily communicated with law enforcement, and was alert; (8) he was competently represented at trial and his trial counsel “never once suggested that ...[Mack] had any mental deficiencies or any incompetencies;” (9) his statements during the sentencing hearing “reflect that he is very intelligent, communicates well, and shows no signs of any mental deficiencies;” and (10) his conduct while incarcerated reflect his ability to be rehabilitated is unlikely.” **R. 677-80.**

As the State noted at the sentencing hearing, Mack’s contention that he did not fully appreciate the consequences of murdering the victim is completely refuted by his letter to co-defendant Horn (State’s Ex. 30), in which he expresses his concern that law enforcement had found the murder weapon because he would be convicted if they had. In the letter, he also limits his trust in others to Horn, accuses “KB” and “Poncho” of being snitches, states that Poncho needed to die, and he warns Horn that others may snitch on Horn. *See R. 62-64; 70-71.* Thus, his handwritten letter clearly reflects that Mack fully appreciated the consequences of his actions.

Nor did the sentencing judge consider Mack’s age “as an aggravating circumstance, instead of a mitigating circumstance.” Rather, he simply recognized that Mack was less than a year away from being eighteen. As a result, he is unlike many other juveniles convicted of murder who have committed their offense at a more tender age. Moreover, the sentencing judge specifically stated why he found that Mack’s age did not sufficiently mitigate the other factors found by the judge so as to warrant less than a life sentence and the record supports his findings.

peer pressures may have affected him.” *Id.* Here, Mack was the shooter and neither “familial [nor] peer pressures” impacted his decision. Rather, he carried out a gang-related and gang-motivated hit, to eliminate a witness to another murder committed the previous day. Further, his letter to Horn reflects that their third co-defendant, Johnson, fled when the shooting started. *See State’s Ex. 30.*

Likewise, the sentencing judge was not bound to accept the expert testimony presented by Mack, even though the State did not present any expert testimony. First, the State did introduce the November 11, 1986 psychological exam performed by a contract psychologist, Dr. Deanna Lanier, while Mack was in DJJ's Midlands Evaluation Center as State's Ex. 1, **R. 417-36**. This evaluation rebuts the expert testimony Mack presented as does evidence that he has received a diagnosis of ASPD while incarcerated at SCDC. Secondly, the State could rely upon the evidence of Mack's actions at the time of and subsequent to the murder to meet its burden. *Cf. State v. Williams*, 386 S.C. 503, 516, 690 S.E.2d 62, 69 (2010) ("We have long held that a lay witness may testify as to a defendant's mental state"); *State v. Smith*, 298 S.C. 205, 379 S.E.2d 287 (1989) (holding that where defendant presents expert testimony regarding his insanity, the State may introduce lay testimony in rebuttal).

Further, this is only one of the factors a sentencer is required to consider under *Miller* and *Aiken*. Underlying Mack's present argument and his other claims of error is his apparent belief that the sentencing judge was obligated to accept the evidence as credible and warranting a life sentence, while disregarding contrary evidence presented by the State. Neither *Miller* nor *Aiken* place such unreasonable restrictions on a judge as the fact-finder and *Miller* does not impose a "rebuttable presumption ... in favor of parole eligibility for juvenile offenders." *Chandler v. State*, 242 So.3d 65, 69 (Miss. 2018).

3. Alleged failure to consider expert evidence that Mack could be rehabilitated.

Notwithstanding Mack's contrary argument, the sentencing judge did not fail to consider evidence from expert witnesses that he could be rehabilitated. Rather, he considered Mack's evidence but found that the State's contrary evidence of Mack's numerous disciplinary infractions

to be more persuasive on the possibility of Mack's rehabilitation. Again, his findings in this regard are supported by the record.

Of the multitude of disciplinary offenses that Mack has committed while incarcerated in SCDC, many of them were for violent or disruptive offenses that threatened the safety of correctional officers, other inmates, and anyone else in the prison. The evidence of his prison misconduct refutes the conclusions of his experts that he can be rehabilitated because it shows that, in fact, he has not been rehabilitated. Also, his SCDC disciplinary offenses refuted evidence from Mack and several defense mitigation witnesses.

For instance, Mack testified that he obtained his GED at age twenty-two, and that he and several other inmates began a tutoring program to help other inmates likewise get their GEDs after he obtained his own. He also allegedly joined a "culture awareness committee which organize[s] educational programs to spread a positive message and promote change in spite of prison conditions." **R. 382**. Yet, Mack turned twenty-two in late 2008. See Defense Ex. 20, Appellant's Sentencing Memorandum, **R. 620** (setting forth Mack's - now redacted - birthdate).

SCDC records reflect that he committed two disciplinary infractions within months before turning twenty-two (**R. 316**) and he that he thereafter committed at least *fifteen* disciplinary offenses, many of which were violent or otherwise very serious. His infractions continued until March 8, 2018. **R. 316-18**.⁴⁰ Accordingly, the record supports the sentencing judge's conclusion

⁴⁰ Among other offenses, he was found guilty of possession of contraband, refusing to comply with instructions, three counts of striking an employee, throwing chemicals on a correctional officer, threatening to inflict harm, possession of a weapon, and evading a security device. He was also terminated from seven jobs in SCDC because of disciplinary infractions. See **R. 316-19**. Dr. McKee's opinion that Mack's offenses were decreasing (**R. 372**) ignores that the serious offenses continued until less than a year before the resentencing hearing, despite the fact Mack was a named party in *Aiken* and was presumably aware, following the denial of certiorari in 2015, that a resentencing hearing would be held.

that Mack “has shown little to no signs of rehabilitation.” **R. 680.** Moreover, the sentencing judge’s reliance on Mack’s inability or unwillingness to be rehabilitated as a reason for imposing an LWOP sentence is consistent with the Supreme Court’s admonition that “[t]hose prisoners who have shown an inability to reform will continue to serve life sentences. 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.” *Montgomery*, 136 S.Ct. at 736.

4. Allegedly faulting Mack for “not overcoming his circumstances to become a good, law-abiding citizen... instead of considering his circumstances as militating in favor of a sentence less than life.”

There is also no merit to Mack’s claim that the sentencing judge “faulted” him for “not overcoming his circumstances to become a good, law-abiding citizen... instead of considering his circumstances as militating in favor of a sentence less than life.” Specifically, Mack complains of the following findings:

While examining the Defendant’s family and home environment, the Court acknowledges that the Defendant 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. However, the court recognizes 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. Additionally, the 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. 680.

Respondent submits that it is clear the sentencing judge did not ignore the circumstances of Mack’s youth and home environment, or how those circumstances may have negatively impacted Mack’s life. Rather, as stated in the Order, he was merely recognizing that people are sometimes able to overcome such traumatic circumstances and be productive citizens. Further, *Miller* and *Aiken* make clear that a juvenile offender’s family life is but one of the factors to be

considered in determining whether LWOP or a lesser sentence is appropriate. *See Miller*, 567 U.S. at 479-80; *Aiken*, 410 S.C. at 544-45, 765 S.E.2d at 577-78. Here, the sentencing judge considered the circumstances of Mack’s upbringing and family life; he simply found that the circumstances of the murder, Mack’s lack of true remorse, and Mack’s unwillingness or inability to be rehabilitated – factors clearly supported by the record – justified an LWOP sentence, in spite of Mack’s traumatic youth.⁴¹ There was no error.

5. Failure to consider the “incompetencies associated with [Mack’s] youth.”

Mack’s remaining claim is that the sentencing judge failed to consider “incompetencies associated with [Mack’s] youth,” such as his inability to deal with police officers or prosecutors. Once again, Respondent submits that there was no error.

In support of this claim, Mack points to his refusal to accept what, in hindsight, was a favorable plea bargain to the offense of voluntary manslaughter with a twenty year sentence. *See R. 385*. He suggests that this demonstrated his lack of understanding of the legal process. *See Aiken*, 465 S.C. at 544-45, 765 S.E.2d at 577-78. Mack testified that he did not understand the concept of a “plea offer” or the “pros and cons” of receiving a jury trial as opposed to pleading guilty. *R. 380-81*. Yet, he was represented by counsel whom the sentencing judge found was competent (*R. 678*) when he rejected the plea bargain and his failure to accept the plea bargain does not show any failure to “appreciate the risks and consequences that is peculiar to youth.” *See Miller*, 567 U.S. at 477.

⁴¹ Although not referenced in the Sentencing Order, Respondent notes that Mack’s circumstances are not too different from those faced by former President William Jefferson Clinton, who had to repeatedly intervene when his alcoholic stepfather physically abused his mother. *See, e.g.*, https://en.wikipedia.org/wiki/Roger_Clinton_Sr. (“Though Bill loved his stepfather, Roger's alcoholism and subsequent abuse of his mother and half-brother would lead to Bill's intervening on numerous occasions with physical force, each time resulting in his stepfather's arrest”).

Many adult defendants refuse plea bargains because they wish to take their chances with a twelve person jury or they do not wish to admit guilt to any offense, and they are later convicted of the indicted offense(s) after a jury trial. Other defendants are not even offered an opportunity to plea bargain. See *Ex parte Littlefield*, 343 S.C. 212, 218-19, 540 S.E.2d 81, 84 (2000) (“Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense or they may simply decide not to prosecute the offense in its entirety”) (quoting *State v. Thrift*, 312 S.C. 282, 291-92, 540 S.E.2d 341, 346 (1994)). See also *Missouri v. Frye*, 566 U.S. 134, 148 (2012) (“[A] defendant has no right to be offered a plea ... nor a federal right that the judge accept it”). At most, these defendant’s – whether juvenile or adult - may have made a decision that they later regret.

Also, Mack does not claim on appeal that his decision to exercise his right to a jury trial – a right expressly granted by the Sixth Amendment, and one which was made after receiving the advice of counsel - was not a knowing and intelligent decision. See *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (“[A] defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived”). Additionally, in his original PCR proceedings, he did not allege an ineffective assistance of counsel with respect to advice on whether or not to plead guilty to manslaughter. *Davie v. State*, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009) (“[C]ounsel is required to fully communicate with the client so that the client can make an informed decision regarding any proposals by the State”).⁴² All he has shown is that he made a decision

⁴² If he believed that he had received ineffective assistance of counsel in regard to his decision, the time for asserting such a claim was in his original PCR action, 2009-CP-21-609. See *State v. Kornahrens*, 290 S.C. 281, 287, 350 S.E.2d 180, 184 (1986) (ineffectiveness of counsel is an issue that can only be asserted in proceedings under the Post-Conviction Relief Act).

that, in retrospect, was not a good one. *Cf. Turner v. Calderon*, 281 F.3d 851, 879-81 (9th Cir. 2002) (defendant claimed counsel was ineffective for not pushing him harder to accept a plea when he later received the death penalty); *Smith v. United States*, 348 F.3d 545, 552 (6th Cir. 2003) (failure to “insist” on guilty plea is not a basis for an ineffective assistance of counsel claim).

Mack also points to his interview with law enforcement following his arrest even after he had invoked his right to counsel. *See R. 302-04*. However, Respondent submits that he still has not shown actions reflecting “incompetencies associated with youth.” To the contrary, the testimony from Sgt. Godwin was that Mack appeared to understand his rights when read to him and that never asked for his mother to be present during questioning. *See Fare v. Michael C.*, 442 U.S. 707, 725-26 (1979) (“Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination. At the same time, that approach refrains from imposing rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior record who knowingly and intelligently waives his Fifth Amendment rights and voluntarily consents to interrogation”); *State v. Parker*, 381 S.C. 68, 92, 671 S.E.2d 619, 631 (Ct. App. 2008) (“A juvenile’s request for a parent may be considered when determining the voluntariness of his confession”). *Cf. J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (holding, in a case involving thirteen year old defendant, that a child’s age properly informs the *Miranda* custody analysis, so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer). Also, he was “alert” and “forthcoming.” *R. 297-98*.

Rather than evidence of “incompetencies associated with youth,” by answering questions from officers after he had invoked his right to counsel Mack has merely shown that he lacked an attorney’s understanding of Fifth Amendment jurisprudence. Neither *Miller*, *Montgomery*, nor *Aiken* require an accused to have such a sophisticated understanding of Constitutional law.

Respondent submits that a more reasonable interpretation of *Miller*’s discussion of juveniles not being able to deal with police is the Court was referring to the it’s recognition in *Michael C.* that a younger, unsophisticated juvenile’s “request for his probation officer or his parents” may be an invocation of his right to remain silent, since they also recognize that experienced older juveniles with a prior record, such as Mack, are able to make a knowing and intelligent waiver of his rights. See *Michael C.*, 442 U.S. at 725-26. See also *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (the totality of the circumstances includes “the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep”). Once again, his conduct was no different from many adult defendants. See, e.g., *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (holding that once accused requests counsel, law enforcement may not reinitiate questioning “until counsel has been made available” to him); *State v. Henderson*, 286 S.C. 465, 470, 334 S.E.2d 519, 522 (Ct. App. 1985) (“The statement given by the defendant during the second interrogation ... was obtained in violation of the constitutional principles enunciated in *Edwards* and was not admissible”). Therefore, there was no error.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and sentence of the circuit court should be affirmed.

Respectfully Submitted,

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August 11, 2020.

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Aug 11 2020

SC Court of Appeals

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Florence County
The Honorable William H. Seals, Circuit Court Judge
Appellate Case No. 2019-00521**

THE STATE,

Respondent,

v.

TERRIEL LESHAWN MACK,

Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

This 11th day of August, 2020.

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Appeal from Florence County

William H. Seals, Circuit Court Judge

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Aug 17 2020

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TERRIEL LESHAWN MACK,

APPELLANT

APPELLATE CASE NO. 2019-000521

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
STANDARD OF REVIEW	3
STATEMENT OF THE FACTS	6
ARGUMENT	
INTRODUCTION	9
ARGUMENT I	
The court erred as a matter of law by sentencing Appellant to life without parole for an offense committed as a juvenile where the court failed to find Appellant was irreparably corrupt, which is a necessary conclusion in order to sentence a juvenile to life without parole.....	11
Relevant Facts	11
Discussion	12
ARGUMENT II	
The court erred as a matter of law by sentencing Appellant to life without parole for an offense committed as a juvenile where the court failed to give Appellant’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.....	16
Relevant Facts	16
Discussion	16

ARGUMENT III

Misinterpreting the <i>Miller</i> factor requiring consideration of Appellant’s possibility of rehabilitation, the court erred in sentencing Appellant to life without parole for an offense committed as a juvenile where the court ignored the evidence – testimony and reports from expert witnesses – that Appellant could be rehabilitated.....	21
Relevant Facts	21
Discussion	23

ARGUMENT IV

Misinterpreting the <i>Miller</i> factor requiring consideration of the family and home environment that surrounded Appellant, the court erred in sentencing Appellant to life without parole for an offense committed as a juvenile where the court faulted Appellant 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.	26
Relevant Facts	27
Discussion	31

ARGUMENT V

Misinterpreting the <i>Miller</i> factor requiring the sentencing court to consider an individual’s incompetencies associated with youth, such as the individual’s inability to deal with police officers or prosecutors, the court erred in sentencing Appellant to life without parole where the uncontradicted evidence showed (1) Appellant gave an incriminating statement to law enforcement after his request for counsel was ignored by his interrogators and (2) Appellant declined a favorable plea bargain due to his lack of understanding of the evidence against him.....	33
Relevant Facts	33
Discussion	34

CONCLUSION.....	38
-----------------	----

TABLE OF AUTHORITIES

Cases

<u>Adams v. Alabama</u> , 136 S. Ct. 1796 (2016)	32
<u>Aiken v. Byars</u> , 410 S.C. 534, 765 S.E.2d 572 (2014)	passim
<u>Anders v. California</u> , 386 U.S. 738 (1967)	2
<u>Commonwealth v. Batts</u> , 163 A.3d 410 (Pa. 2017)	14, 15, 25
<u>Cruz v. United States</u> , No. 11-CV-787 (JCH), 2018 WL 1541898 (D. Conn. Mar. 29, 2018) ...	18, 19
<u>Davis v. State</u> , 415 P.3d 666 (Wyo. 2018).....	passim
<u>Davis v. United States</u> , 512 U.S. 452 (1994)	35
<u>Eddings v. Oklahoma</u> , 455 U.S. 104 (1982)	17, 30, 31
<u>Edwards v. Arizona</u> , 451 U.S. 477 (1981).....	35
<u>Fare v. Michael C.</u> , 442 U.S. 707(1979).....	36
<u>Graham v. Florida</u> , 560 U.S. 48 (2010)	passim
<u>J.D.B. v. North Carolina</u> , 564 U.S. 261 (2011).....	34, 35
<u>Johnson v. Texas</u> , 509 U.S. 350 (1982)	9, 16
<u>Landrum v. State</u> , 192 So.3d 459 (Fla. 2016).....	15
<u>Miller v. Alabama</u> , 567 U.S. 460 (2012)	passim
<u>Miranda v. Arizona</u> , 384 U.S. 426 (1966)	35
<u>Montgomery v. Louisiana</u> , 136 S. Ct. 718 (2016)	3, 12, 13
<u>Oregon v. Bradshaw</u> , 462 U.S. 1039 (1983).....	36
<u>People v. Holman</u> , 91 N.E.3d 849 (Ill. 2017)	14
<u>Roper v. Simmons</u> , 543 U.S. 551 (2005).....	13, 17, 18, 33
<u>Smalls v. State</u> , 810 S.E.2d 836 (2018)	3
<u>Smith v. Illinois</u> , 469 U.S. 91 (1984).....	35
<u>Solem v. Stumes</u> , 465 U.S. 638 (1984).....	36, 37

<u>State v. Black</u> , 400 S.C. 10, 732 S.E.2d 880 (2012)	3
<u>State v. Laney</u> , 367 S.C. 639, 627 S.E.2d 726 (2006)	3
<u>State v. Mack</u> , Op. No. 2008-UP-486 (S.C. Ct. App. filed Aug. 15, 2008)	2
<u>State v. O’Dell</u> , 358 P.3d 359 (Wash. 2015)	18
<u>State v. Roby</u> , 897 N.W.2d 127 (Iowa 2017).....	passim
<u>State v. Seats</u> , 865 N.W.2d 545 (2015).....	19, 31
<u>State v. Sweet</u> , 879 N.W.2d 811 (Iowa 2016)	14
<u>Tatum v. Arizona</u> , 137 S. Ct. 11 (2016).....	13
<u>Thompson v. Oklahoma</u> , 487 U.S. 815 (1988)	17
<u>United States v. Haack</u> , 403 F.3d 997 (8th Cir. 2005).....	5
<u>Veal v. State</u> , 784 S.E.2d 403 (Ga. 2016)	15
<u>Wiggins v. Smith</u> , 539 U.S. 510 (2003).....	30

Statutes

U.S. Const. Amend. V.....	36
U.S. Const. Amend VIII	passim

Other Authorities

Robert M. Dudek, <u>A Meaningful Opportunity for Release: Resentencing Hearings for Juvenile Offenders Sentenced to Life Without Parole Following <i>Aiken</i></u> v. Byars, 68 S.C. L. Rev. 499 (2017).....	13, 14
Alexandra O. Cohen, et al., <u>When Does a Juvenile Become an Adult? Implications for Law and Policy</u> , 88 Temp. L. Rev. 769 (2016)	17
Elizabeth Scott et. al., <u>Juvenile Sentencing Reform in A Constitutional Framework</u> , 88 Temp. L. Rev. 675 (2016)	24
Kevin J. Holt, <u>The Inbetweeners: Standardizing Juvenileness and Recognizing Emerging Adulthood for Sentencing Purposes After <i>Miller</i></u> , 92 Wash. U. L. Rev. 1393 (2015).....	17

STATEMENT OF ISSUES ON APPEAL

- I. Did the court err as a matter of law by sentencing Appellant to life without parole for an offense committed as a juvenile where the court failed to find Appellant was irreparably corrupt, which is a necessary conclusion in order to sentence a juvenile to life without parole?
- II. Did the court err as a matter of law by sentencing Appellant to life without parole for an offense committed as a juvenile where the court failed to give Appellant'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?
- III. Misinterpreting the Miller factor requiring consideration of Appellant's possibility of rehabilitation, did the court err in sentencing Appellant to life without parole for an offense committed as a juvenile where the court ignored the evidence – testimony and reports from expert witnesses – that Appellant could be rehabilitated?
- IV. Misinterpreting the Miller factor requiring consideration of the family and home environment that surrounded Appellant, did the court err in sentencing Appellant to life without parole for an offense committed as a juvenile where the court faulted Appellant 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?
- V. Misinterpreting the Miller factor requiring the sentencing court to consider an individual's incompetencies associated with youth, such as the individual's inability to deal with police officers or prosecutors, did the court err in sentencing Appellant to life without parole where the uncontradicted evidence showed (1) Appellant gave an incriminating statement to law enforcement after his request for counsel was ignored by his interrogators and (2) Appellant declined a favorable plea bargain due to his lack of understanding of the evidence against him?

STATEMENT OF THE CASE

On September 9, 2004, a Florence County grand jury indicted Appellant for murder (2004-GS-21-1084). R. 287 ll. 8-9; R. 685. Islam Horn and Gregory Johnson were indicted for murder as well. R. 683. On October 25-26, 2005, the state, represented by Jack Lawson and John Jepertinger, called the case to trial before the Honorable Edward R. Cottingham and a jury. R. 1; R. 287, ll. 5-7. Ultimately, Appellant was found guilty of murder and sentenced to life imprisonment without the possibility of parole (LWOP) for murder. R. 250, ll. 14-20; R. 252, ll. 2-4; R. 685.

On appeal, Appellant was represented by Joseph L. Savitz, III. State v. Mack, Op. No. 2008-UP-486 (S.C. Ct. App. filed Aug. 15, 2008). Savitz filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). Id. On August 15, 2008, this Court dismissed Appellant's appeal and granted Savitz's motion to be relieved. Id.

On April 28, 2016, Appellant filed a motion for re-sentencing. R. 675. The Honorable William H. Seals, Jr., presided over the re-sentencing hearing on February 19-20, 2019. R. 286. John Jepertinger and Dudley Saleeby represented the state. R. 286. Marshall Weaver and Brie R. Russell represented Appellant. R. 286. At the conclusion of the hearing, Judge Seals took the matter under advisement. R. 412, ll. 24-25. The parties reconvened on March 20, 2019. R. 414. At that time, Judge Seals announced that he was sentencing Appellant to LWOP yet again. R. 415, ll. 19-21. Appellant objected to the sentence as "cruel and unusual" "in violation of the Eight Amendment [to] the United States Constitution." R. 416, ll. 1-4.

On March 20, 2019, Judge Seals signed a sentencing order in which he sentenced Appellant to LWOP yet again. R. 677 R. 686. On March 27, 2019, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

The standard of review for determining whether a sentencing court complied with Miller v. Alabama, 567 U.S. 460 (2012) and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), has not been articulated by the appellate courts of South Carolina. Appellant respectfully requests this Court establish a standard of review for these matters. Further, Appellant humbly suggests this court review the sentencing court's legal conclusions de novo and review the sentencing court's factual findings pursuant to a heightened abuse of discretion.

“In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown.” State v. Laney, 367 S.C. 639, 643, 627 S.E.2d 726, 729 (2006). The appellate courts of South Carolina “review questions of law de novo, with no deference to trial courts.” Smalls v. State, 810 S.E.2d 836, 839 (2018). An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012).

The South Carolina Supreme Court observed: “Miller is clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution.” Aiken v. Byars, 410 S.C. at 543, 765 S.E.2d at 576-77. In Montgomery v. Louisiana, 136 S. Ct. 718, 729-30 (2016), the United States Supreme Court said that “when a state enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful.”

In the wake of Miller and Montgomery, the appellate courts of several states have addressed the standard of review applicable to an appellate review of a Miller determination. These courts have noted Miller's instruction that occasions for imposing a life without parole sentence on a juvenile homicide offender should be “uncommon.” Miller, 576 U.S. at 479.

Like South Carolina, when a legal conclusion presents a mixed question of fact and law, Pennsylvania’s appellate courts “defer to the findings of fact made by the sentencing court as long as they are supported by competent evidence, but give no deference to that court’s legal conclusions.” Commonwealth v. Batts, 163 A.3d 410, 435-36 (Pa. 2017). In Batts, the Supreme Court of Pennsylvania reasoned that “in the absence of the sentencing court reaching a conclusion, supported by competent evidence, that the defendant will be forever incorrigible, without any hope for rehabilitation, a life-without-parole sentence imposed on a juvenile is illegal, as it is beyond the court’s power to impose.” Id. at 435. Thus, the Pennsylvania Supreme Court reasoned, an appellate court “must review the sentencing court’s legal conclusion that [a juvenile] is eligible to receive a sentence of life without parole pursuant to a de novo standard and plenary scope of review.” Id.

The Iowa Supreme Court “elaborate[d] on the use of the abuse-of-discretion standard in the juvenile sentencing context,” concluding that it would apply a heightened abuse of discretion standard of review to a juvenile’s sentence after a resentencing hearing. State v. Roby, 897 N.W.2d 127, 137-38 (Iowa 2017). “[W]hile the review is for abuse of discretion, it is not forgiving of a deficiency in the constitutional right to a reasoned sentencing decision based on a proper hearing.” Id. at 138.

In Davis v. State, 415 P.3d 666, 688 (Wyo. 2018), the Supreme Court of Wyoming determined that its review would be “an abuse of discretion, but [it would] not be lenient.” The Court explained it would “view the sentence as inherently suspect and demand rigor from the sentencing court in its factual findings, its application of the Miller factors, and the ensuing sentence.” Id. All legal conclusions would be reviewed de novo. Id.

The Eighth Circuit Court of Appeals discussed situations that constitute an abuse of discretion in United States v. Haack, 403 F.3d 997 (8th Cir. 2005). The Eighth Circuit instructed that a discretionary sentencing ruling may be an abuse of discretion “if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only the appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.” Haack, 403 F.3d at 1004.

Appellant respectfully requests this Court establish the standard of review for appeals involving juvenile life without parole sentences. Further, Appellant suggests the following standard of review for juvenile life without parole sentences, which are inherently suspect: de novo review of legal conclusions and heightened abuse of discretion review to factual findings.

STATEMENT OF THE FACTS

On December 17, 2003, Legrand Gowdy, a traffic officer with the Florence Police Department heard three gunshots between 6:00 and 6:30 p.m. R. 3, ll. 1-17; R. 4, ll. 14-25. When he investigated the source of the gunshots, he found the deceased, Joseph Todd Wilson, lying on the ground. R. 5, ll. 1-4. Gowdy saw what appeared to be a bag of crack cocaine near the deceased. R. 10, ll. 21-25; see also R. 151, ll. 21-23. At the crime scene, the police found no evidence to “indicate a suspect.” R. 167, ll. 1-3. Ultimately, the state’s evidence would boil down to the words of two individuals who were also charged with murder and testified against Appellant in hopes of advantageous plea agreements. R. 84, l. 4 – R. 85, l. 10; R. 110, l. 14 – R. 111, l. 9; R. 128, l. 16 – R. 130, l. 1.

Eventually, the police arrested Appellant, Islam Horn, and Gregory Johnson for offenses related to Wilson’s death. Horn and Johnson testified against Appellant. Horn claimed that he was with Johnson and Appellant on December 17, 2003. R. 49, ll. 17-19. Horn alleged that while they were riding down the road, Appellant saw the deceased walking down the street and asked to stop so that he could buy some drugs from him. R. 52, ll. 2-10. Appellant and Johnson got out of the car and approached the deceased. R. 53, ll. 20-25. Less than a minute later, Horn heard a gunshot. R. 54, ll. 1-3. Unable to see anything from his vantage point, Horn drove his car to a spot with a better view. R. 54, ll. 4-11. Once there, Horn claimed he saw the deceased on the ground with Appellant standing over him. R. 54, ll. 12-16. Horn claimed Johnson was no longer there, but that Appellant shot the deceased three times in the back. R. 54, ll. 12-16. Horn immediately left the area. R. 55, ll. 20-23.

Further, Horn claimed that while he was in the detention center with Appellant, he received an unsigned, undated letter from Appellant confessing to shooting the deceased. R. 5, ll. 23; R.

271, ll. 20-25.¹ Horn gave the letter to his lawyer, who provided it to the prosecution. R. 60, ll. 2-11. In the letter, the writer claimed responsibility for the shooting. R. 62, l. 10 – R. 64, l. 18. Horn was forced to admit on cross-examination that he also sent letters to Appellant, and these letters threatened to kill Appellant if Appellant did not accept responsibility for the killing. R. 87, l. 7 – R. 90, l. 15.

Johnson claimed that when Horn stopped the car, he and Appellant got out. R. 117, ll. 4-7. Johnson alleged Appellant called out to the deceased who turned around and approached Appellant. R. 118, ll. 14-17. According to Johnson, Appellant then shot the deceased in the head. R. 118, ll. 17-19. Johnson ran away, but claimed that he saw Appellant stand over the deceased and shoot him three more times. R. 119, l. 23 – R. 120, l. 5.

During the deliberations, the jury revealed they were “divided.” R. 243, ll. 15-16. Additionally, the jurors wanted to know if they were to consider the conspiracy charge against Appellant, which had been discussed with the jury, but was not called by the state to trial. R. 243, ll. 3-12. Finally, the jury expressed a desire for transcripts of the testimony from Horn and Johnson. R. 243, ll. 12-13. In response to the jury’s question about conspiracy, the judge *sua sponte* proposed instructing the jury on the hand of one is the hand of all. R. 243, ll. 3-12. Defense counsel objected to the proposal, but the judge overruled the objection and instructed the jury regarding accomplice liability. R. 244, ll. 2-10; R. 246, l. 21 – R. 248, l. 13. Shortly after receiving

¹ At his PCR hearing, Appellant denied writing the letter. R. 258, ll. 23-25. Although Appellant told trial counsel that he did not write the letter, trial counsel failed to retain a handwriting expert to review the letter and compare it to Appellant’s handwriting. R. 259, ll. 1-13. At trial, it was only Horn’s self-serving testimony that served to authenticate the letter. R. 38, ll. 23-24; R. 58, l. 25 – R. 59, l. 1. During the PCR hearing, trial counsel characterized the letter as “the most damning” evidence against Appellant. R. 272, ll. 10-11. However, trial counsel indicated that he would not normally get a handwriting expert in this circumstance. R. 276, ll. 1-6; R. 281, ll. 7-9. In fact, trial counsel indicated that in his twenty years of practice, he had never hired a handwriting expert. R. 269, ll. 17-19; R. 281, ll. 10-11.

this additional instruction, the jury returned its verdict finding Appellant guilty of murder. R. 250, ll. 14-20. Judge Cottingham sentenced Appellant, who was seventeen years old at the time of the offense, to life imprisonment without the possibility of parole. R. 252, ll. 2-4; R. 685.

ARGUMENT

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, ‘impetuosity[,] 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).

Discussing these factors, the Iowa Supreme Court explained they would “best serve their purpose if sentencing courts remain committed to several key observations.” State v. Roby, 897 N.W.2d 127, 147 (Iowa).

First, the five factors identify the primary reasons most juvenile offenders should not be sentenced without parole eligibility. A sentence of incarceration without parole eligibility will be an uncommon result. Second, the factors must not normally be used to impose a minimum sentence of incarceration without parole unless expert evidence supports the use of the factors to reach such a result. Third, the factors cannot be applied detached from the evidence from which they were created and must not be applied solely through the lens of the background or culture of the judge charged with the responsibility to apply them. Perceptions applicable to adult behavior cannot normally be used to draw conclusions from juvenile behavior.

Id.

Appellant was a juvenile at the time of the offense and was re-sentenced to LWOP following Aiken, *supra*. On appeal, Appellant 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.

I. The court erred as a matter of law by sentencing Appellant to life without parole for an offense committed as a juvenile where the court failed to find Appellant was irreparably corrupt, which is a necessary conclusion in order to sentence a juvenile to life without parole.

Relevant facts

In deciding Appellant was deserving of the harshest sentence possible, the sentencing judge failed to find Appellant was irreparably corrupt. R. 677. Instead, his order noted his concern with

the “cold-blooded nature of the killing,” “the fact that [Appellant] ha[d] shown little to no signs of rehabilitation,” and that Appellant did not show remorse for the crime until the hearing, which the judge determined was a time when he had something to gain. R. 677. Nowhere in his order did the judge determine Appellant was permanently incorrigible arising from irreparable corruption; thus, the judge could not sentence Appellant to LWOP.

Discussion

In Montgomery v. Louisiana, 136 S. Ct. 718 (2016), the United States Supreme Court noted Miller recognized “that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified.” Montgomery, 136 S. Ct. at 733. However, “in light of children’s diminished culpability and heightened capacity for change, Miller made clear that appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” Id. at 733-34 (internal quotations omitted). “Because Miller determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status – that is, juvenile offenders whose crimes reflect the transient immaturity of youth.” Id. at 734 (internal citations and quotations omitted). Miller barred “life without parole” “for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” Id. “Even if a court considers a child’s age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity.” Id. (internal quotations omitted).

This conclusion was not surprising in light of the Court’s prior jurisprudence in this area. In its landmark decision holding the Eighth Amendment prohibits the death penalty for juveniles,

the United States Supreme Court explained that while it could not “deny or overlook the brutal crimes too many juvenile offenders have committed,” “it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.” Roper v. Simmons, 543 U.S. 551, 570-72 (2005). Later, when it determined LWOP sentences for a juvenile non-homicide offender were unconstitutional, the United States Supreme Court emphasized its conclusion in Roper that it is “the rare juvenile offender whose crime represents irreparable corruption,” and noted that because juveniles are more capable of change than adults, “their actions are less likely to be evidence of irretrievably depraved character.” Graham, 560 U.S. at 68-69.

In Tatum v. Arizona, 137 S. Ct. 11 (2016) (mem.), the United States Supreme Court decided to grant, vacate, and remand five cases of juvenile homicide offenders sentenced to life without parole.

It is clear after Montgomery that the Eighth Amendment requires more than mere consideration of a juvenile offender’s age before the imposition of a sentence of life without parole. It requires that a sentencer decide whether the juvenile offender before it is a child “whose crimes reflect transient immaturity” or is one of “those rare children whose crimes reflect irreparable corruption” for whom a life without parole sentence may be appropriate. 577 U.S., at —, 136 S.Ct., at 734. There is thus a very meaningful task for the lower courts to carry out on remand.

Id. at 13. (Sotomayor, J., concurring).

A review of the United States Supreme Court decisions makes clear that a juvenile may be sentenced to LWOP only if the crime committed is indicative of permanent incorrigibility; that the crime was not the result of “unfortunate yet transient immaturity.” “Youth has constitutional significance, and unless a juvenile offender suffers from ‘irreparable corruption,’ a sentence of life without the possibility of parole is improper.” Robert M. Dudek, A Meaningful Opportunity for Release: Resentencing Hearings for Juvenile Offenders Sentenced to Life Without Parole

Following Aiken v. Byars, 68 S.C. L. Rev. 499, 499 (2017). In fact, “a sentence of life without the possibility of parole for a juvenile offender is presumptively wrong.” Id.

State courts considering this question have come to the same conclusion – the Eighth Amendment requires a finding that the juvenile is irreparably corrupt in order for a life sentence to be imposed. The Iowa Supreme Court interpreted the decisions of the United States Supreme Court and concluded “[i]f life without the possibility of parole may be imposed at all under federal law, ... it may be imposed only in cases where irretrievable corruption has been demonstrated by the rarest of juvenile offenders.” State v. Sweet, 879 N.W.2d 811, 832 (Iowa 2016). The Iowa Court concluded “the United States Supreme Court, under the Federal Constitution, has preserved life without the possibility of parole for juveniles, even those who commit heinous crimes, only for a very small category of cases.” Id. at 834.

In Illinois, “a juvenile defendant may be sentenced to life imprisonment without parole, but only if the trial court determines that the defendant’s conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation.” People v. Holman, 91 N.E.3d 849, 903 (Ill. 2017). “The court may make that decision only after considering the defendant’s youth and its attendant characteristics.” Id. Likewise, the Pennsylvania Supreme Court held

[F]or a sentence of life without parole to be proportional as applied to a juvenile murderer, the sentencing court must first find, based on competent evidence, that the offender is entirely unable to change. It must find that there is no possibility that the offender could be rehabilitated at any point later in his life, no matter how much time he spends in prison and regardless of the amount of therapeutic interventions he receives, and that the crime committed reflects the juvenile’s true and unchangeable personality and character.

Commonwealth v. Batts, 163 A.3d 410, 443 (Pa. 2017). Put simply, “in the absence of the sentencing court reaching a conclusion, supported by competent evidence, that the defendant will

forever be incorrigible, without any hope for rehabilitation, a life-without-parole sentence imposed on a juvenile is illegal, as it is beyond the court’s power to impose.” *Id.* at 444.

When confronted with this question, the Georgia Supreme Court concluded that the United States Supreme Court’s case law required “a specific determination that [the defendant] is *irreparably corrupt*” in order to sentence a juvenile to LWOP. *Veal v. State*, 784 S.E.2d 403, 411 (Ga. 2016) (emphasis in original). The court vacated Veal’s LWOP sentence and remanded for resentencing because the trial judge failed to “make any sort of distinct determination on the record that [Veal was] irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom an LWOP sentence is proportional under the Eighth Amendment.” *Id.* at 412. *See also Davis v. State*, 415 P.3d 666, 695 (Wyo. 2018) (holding a lower court abused its discretion when it sentenced Davis to LWOP without making a finding that he was permanently incorrigible); *Landrum v. State*, 192 So.3d 459, 469 (Fla. 2016) (holding a sentence of LWOP for a juvenile is permissible “only in the most ‘uncommon’ and ‘rare’ case where the juvenile offender’s crime reflects ‘irreparable corruption’”).

The sentencing judge failed to conclude that Appellant was within the narrow class of juvenile offenders who is irreparably corrupt and beyond redemption. This failure is not surprising in light of the evidence presented. Each of the factors weighed heavily in Appellant’s favor as demonstrated by the evidence presented, including testimony from one expert, specifically addressing Appellant’s potential for rehabilitation, two expert reports, details of Appellant’s difficult family and home environment, and his immaturity during youth. Instead, the judge’s brief order gave lip service to the *Miller* factors, relied exclusively on the state’s evidence, and ignored Appellant’s evidence. By failing to make the necessary finding that Appellant was irreparably corrupt, the sentencing judge erred as a matter of law by sentencing Appellant to LWOP.

II. The court erred as a matter of law by sentencing Appellant to life without parole for an offense committed as a juvenile where the court failed to give Appellant’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.

Relevant facts

In his sentencing order, Judge Seals considered Appellant’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, [Appellant] 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, [Appellant] 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. [Appellant] was within one year of an age whereby he would have immense responsibilities and considered an adult by law.

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

Discussion

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 116.²

“The qualities that distinguish juveniles from adults do not disappear when an individual turns 18.” Roper v. Simmons, 543 U.S. 551, 574 (2005).³ Thus, the Court recognized that

² 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.

³ “[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).

“[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. 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).

As explained, 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 impetuosity 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 instant matter relied heavily on Appellant’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 (18th) 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 Appellant's age and the hallmark features of youth. This solitary paragraph evinced how the judge actually used Appellant'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 Appellant's age of seventeen years to support his decision to treat Appellant as an adult. Not only was Appellant'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, Appellant 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 Appellant's age as an aggravating factor and failed to give youth the constitutional significance required by the Constitution.

III. Misinterpreting the *Miller* factor requiring consideration of Appellant’s possibility of rehabilitation, the court erred in sentencing Appellant to life without parole for an offense committed as a juvenile where the court ignored the evidence – testimony and reports from expert witnesses – that Appellant could be rehabilitated.

Relevant facts

Dr. Geoffrey McKee, a forensic psychologist, assessed Appellant prior to his re-sentencing hearing. R. 340, ll. 5-21; R. 513. In his opinion, Appellant could be rehabilitated. R. 357, ll. 9-11; R. 513. The testing showed Appellant was “amenable for treatment.” R. 357, ll. 11-13; 513. In fact, the testing showed Appellant displayed “positive amenability for treatment.” R. 358, ll. 2-3; R. 513. In Dr. McKee’s opinion, Appellant “remains amenable for treatment and his likelihood of rehabilitation is not dissipated.” R. 358, ll. 3-5; R. 513. Dr. McKee noted that the number of Appellant’s disciplinary infractions within the Department of Corrections was decreasing, which indicated he was increasing in maturity. R. 372 ll. 1-5; R. 513.

Appellant’s educational history showed an individual capable of rehabilitation as well. Appellant scored perfect on his kindergarten reading test and made all A’s in third grade. R. 619. His grades were exemplary until sixth grade. R. 619. Appellant’s decrease in scholastic achievement coincided with his great grandmother’s death. R. 619.

Additionally, Appellant presented a psychiatric evaluation conducted by Dr. Matthew E. Gaskins. R. 547. Dr. Gaskins explained that Appellant had “shown the ability to improve himself and others during his current incarceration.” R. 547. Not only did Appellant obtain his GED while he was incarcerated, but he helped others do so as well. R. 547; R. 545. (explaining that Appellant was a tutor in the education department in Lieber in 2009); R. 546. (documentation of Appellant’s

receipt of a GED in 2008). Appellant tutored and mentored other inmates, as well as engaging in a cultural awareness program. R. 547.

Regarding Appellant's disciplinary infractions while in prison, Dr. Gaskins noted that Appellant "had extended periods of time without behavioral infractions." R. 547. Further, Appellant explained that many of his behavioral problems were the result of self-defense or actions taken in order to survive. R. 547. For example, when Appellant was found to have a sharpened stick, he had recently undergone surgery on his shoulder, which left him vulnerable to attack from other inmates. R. 547. Also, Appellant's frustrations with the corrections system were evident – and rightly so – during his evaluation by Dr. Gaskins, who observed a roach crawl out of Appellant's food as it was delivered by the corrections staff. R. 547. Appellant told Dr. Gaskins that what he observed – the roach in Appellant's food – was a normal occurrence. R. 547.

Testing showed that when Appellant was seventeen-years old, his score on the dangerousness domain of the Risk-Sophistication Treatment Inventory would likely have fallen in the low risk category. R. 513. Likewise, his score on the sophistication-maturity domain would have fallen in the low range because the large majority of individuals his age would display greater maturity than he did at seventeen. R. 513. Based upon records available in 2003 and 2004, Dr. McKee placed Appellant in the "good" parole prognosis category. R. 513. This meant Appellant was in the second highest category to not reoffend. R. 513. Appellant's parole risk assessment score showed a high probability that he would be able to successfully complete community supervision. R. 513.

After his incarceration, Appellant wrote a letter to Dawn Renee Simmons, an author, in December 2013, discussing the incarceration of youth. R. 541. Simmons published the letter in her book, Letters to Our Sons, A Collection of Letters by Prisoners & Ex-prisoners to Stop Mass

Incarceration of Our Youth. R. 514. Further, multiple members of Appellant’s family indicated support for his release and pledged to assist him in returning to society in a productive and contributing way. R. 542. (affidavit of aunt promising to support Appellant upon release); R. 543. (affidavit of cousin offering assistance to Appellant upon release); R. 544. (affidavit of father offering employment and housing upon Appellant’s release).

In his order, Judge Seals discussed Appellant’s possibility of rehabilitation. R. 677. However, he only considered Appellant’s infractions at the Department of Corrections. R. 677. After listing Appellant’s infractions, the judge noted that many were “serious and violent in nature.” R. 677. Based solely on the “multitude of infractions,” the judge determined Appellant’s “ability to be rehabilitated [was] unlikely.” R. 677. His order completely ignored Appellant’s expert witnesses and additional evidence that he was capable of rehabilitation. R. 677.

Discussion

Prior to sentencing a juvenile for a homicide offense, a sentencer must consider the juvenile’s possibility of rehabilitation. Miller, 567 U.S. at 478; Aiken, 410 S.C. at 544, 765 S.E.2d at 577. The sentencing judge must take into consideration that “[j]uveniles are more capable of change than are adults” and that as a result, “their actions are less likely to be evidence of ‘irretrievably depraved character.’” Graham, 560 U.S. at 68. Most juveniles who engage in criminal activity are not fated to become criminals for life. Id. The potential for rehabilitation “supports mitigation for most juvenile offenders because the ‘signature qualities of ‘immaturity and irresponsibility, impetuosity, and recklessness’ are all ‘transient.’” Davis v. State, 415 P.3d 666, 693 (Wyo. 2018). “Most juveniles will outgrow the signature qualities of youth by the time their brain development is complete.” Id. “Juveniles are more likely to change with available treatment.” Id. “And, the seriousness of their crime does not alter these propositions.” Id.

When examining an individual's prison record, it is important to consider that the person is serving a life without parole sentence, meaning the person has no hope of release. Davis, 415 P.3d at 693. "A life-without-parole sentence 'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.'" Id. In Davis, the sentencing court's order stated the following regarding rehabilitation:

The Court must also consider the potential for rehabilitation – in this case, it appears that even though the Defendant has been presented with, and completed, a vast range of programs aimed at assisting incarcerated persons personal growth, Defendant still seems to maintain a violent and aggressive attitude based on statements he has made, and incidents he has been involved in This also seems consistent with the reports from Defendant's youth as described in the PSI, wherefore the Court finds that rehabilitation is unlikely at this stage in Defendant's life.

Id. at 675-676. Ultimately, the Wyoming Supreme Court held the sentencing court abused its discretion by "concluding that he was not capable of rehabilitation without the benefit of expert testimony concerning Mr. Davis's potential for rehabilitation, and for considering Mr. Davis's disciplinary record in prison without taking into account the fact that for the majority of his incarceration he had no hope of release, and without weighing his accomplishments and personal growth while in the penitentiary." Id. at 695-696.

It is important to recognize that "the seriousness of the offense (even homicide) is not a reliable predictor of future offending or rehabilitation failure." Elizabeth Scott et. al., Juvenile Sentencing Reform in A Constitutional Framework, 88 Temp. L. Rev. 675, 700 (2016). As explained by the Supreme Court of Iowa, in light of the fact that delinquency is normally transient and that juveniles are more malleable to change and reform in response to available treatment, "[t]he seriousness of the crime does not alter these proportions," and "judges cannot necessarily use the seriousness of a criminal act, such as murder, to conclude the juvenile falls within the

minority of juveniles who will be future offenders or are not amenable to reform.” State v. Roby, 897 N.W.2d 127, 147 (Iowa 2017). Further, according to the Iowa Court, “any such conclusion would normally need to be supported by expert testimony.” Id.

The Pennsylvania Supreme Court reversed a resentencing court’s imposition of life without parole for a juvenile homicide offender where the sentencing court repeatedly made conflicting findings regarding the defendant’s possibility of rehabilitation. Commonwealth v. Batts, 163 A.3d 410, 445 (Pa. 2017). The sentencing court concluded Batts’ actions were not the result of transient immaturity because the murder was deliberate and premeditated. Id. at 446. “[I]t was the sentencing court’s view that because Batts was not ‘caught up in the heat of a stressful confrontation,’ without ‘time to plan and deliberate’ or an ‘appreciation for what might happen next,’ there could be no finding that the murder was the result of youthful impulsiveness or poor judgment.” Id. at 446-447. “Given this perspective, the conviction of any juvenile of first-degree murder would require the imposition of a sentence of life without parole” in light of Pennsylvania’s definition of first-degree murder. Id. at 447.

The court noted that “although there [was] no question that the sentencing court thoroughly and completely reviewed the record and thoughtfully considered the testimony presented at the resentencing hearing, it overlooked the main premise of the United States Supreme Court’s jurisprudence regarding juvenile sentencing issued over the last twelve years.” Id. at 447. “The High Court has held, as a matter of law, that children are constitutionally different from adults for purposes of sentencing, in that they have diminished culpability and greater prospects for reform, making them less deserving of the most severe punishments.” Id. (internal quotations omitted).

Appellant presented evidence from two experts who opined that rehabilitation was possible for Appellant. The state failed to present any expert testimony on this factor. Instead, the state

relied solely on the records of Appellant's disciplinary infractions while in the department of corrections, which were admitted through a records custodian who was unable to elaborate upon the information contained in the records. Many of Appellant's infractions showed his lack of maturity, such as being out of place on numerous occasions, failing to obey orders, and masturbation. Even the infractions that were considered more serious, such as possession of a weapon, were understandable given the dangerous environs of prison. Further, those infractions must be viewed through the reality of Appellant's sentence – he had no hope of release, and therefore, no reward for good behavior.

Appellant's expert evidence regarding his capacity for rehabilitation was un rebutted. In fact, Appellant's disciplinary infractions were explained by his experts as showing that when he was first incarcerated as a teenager, he engaged in the rebellious and non-conforming conduct that is typical of teenagers, but as he aged, his infractions decreased, showing signs of maturity. The sentencing judge misinterpreted the Miller factor requiring consideration of Appellant's possibility of rehabilitation where he simply ignored the evidence in the record that Appellant could be rehabilitated.

IV. Misinterpreting the *Miller* factor requiring consideration of the family and home environment that surrounded Appellant, the court erred in sentencing Appellant to life without parole for an offense committed as a juvenile where the court faulted Appellant 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.

Relevant facts

Appellant was born in 1986 to his sixteen-year old mother. R. 341, ll. 5-7; R. 513; 547. His biological father rejected him. R. 341, ll. 7-10; R. 513. Appellant's mother became involved with a man named Nathaniel, whom Appellant greatly admired and respected. R. 341, ll. 13-18; R. 513. However, Nathaniel had a dark side. When Appellant was eight-years old, Nathaniel severely beat Appellant's mother and destroyed their home. R. 342, ll. 5-8; R. 513; R. 523. The incident report revealed this was not the first time that Nathaniel beat Appellant's mother. R. 523. Then, when Appellant was ten-years old, Appellant contacted authorities because his mother hit him and his siblings, leaving a lump on Appellant's head. R. 342, ll. 8-12; R. 513; R. 525. According to the incident report, Appellant's mother beat her children "a lot." R. 525. Shortly thereafter, Nathaniel beat Appellant's mother again, including breaking one of her front teeth, which finally ended their relationship. R. 342, ll. 13-15; R. 513; R. 524. Due to these traumatic events, Appellant may have developed post-traumatic stress disorder. R. 343, ll. 1-20; R. 513.

As a single mother, Appellant's mother worked multiple jobs to make ends meet. R. 542. Unfortunately, her work schedule prevented her from being present in Appellant's life. R. 542. As a result, Appellant and his siblings "ran free in the neighborhood and did not have much guidance." R. 542. Appellant's mother "did not provide a lot of support or leadership" and she was "very inconsistent with parenting them." R. 542. "[T]he boys just seemed to make their own choices of where to be and when." R. 542. Often, there was no food in Appellant's refrigerator. R. 547. Thus, Appellant and his siblings stole food to eat. R. 547. Additionally, Appellant began living the "street life" to make money to buy food for his siblings. R. 547.

When Appellant was fourteen years old, his maternal great grandmother died. R. 346, ll. 9-15; R. 417; R. 513. She was the "rock of the family," and her death resulted in the family falling apart. R. 346, ll. 15-19; R. 513. Due to their close relationship, Appellant was very saddened by

her loss. R. 346, l. 20; R. 417 R. 513. Thereafter, Appellant's mother was in a series of relationships. R. 346, l. 25 – R. 347, l. 1; R. 513 R. 542. One of these men tried to remove any memory of Nathaniel from their lives – harkening to Appellant's biological father's rejection of him, and resulting in a series of undiagnosed and untreated major depressive episodes. R. 347, ll. 2-19; R. 513. These men continued to inflict abuse upon Appellant's mother. R. 528.

Appellant lost his virginity at age twelve to his seventeen-year old babysitter. R. 347, l. 19 – R. 348, l. 1; R. 513. It was at this age that Appellant began to use alcohol and marijuana as a form of self-medication. R. 349, ll. 1-3; R. 417; R. 513. During this time, Appellant began to run away from home. R. 350, ll. 2-23; R. 513. R. 526; R. 527. (Appellant's mother did not report the twelve-year-old missing until three days after he ran away). Appellant also began to have trouble at school. R. 352, ll. 2-5.

Throughout the 2000s, Appellant witnessed his mother as the repeated victim of domestic violence. R. 352, l. 1 – 353, l. 25; R. 529. (describing violence in a relationship, including punches to her face); R. 530; R. 531. On September 4, 2002, Appellant, who was only fifteen years old, defended his mother against the man who was beating her. R. 353, ll. 22-25; R. 351 (describing how one of the children was cut by a knife by the man). Instead of disengaging, the man beat Appellant causing injuries serious enough to require medical attention. R. 355, ll. 10-16; 533.

In 2002, fifteen-year old Appellant was evaluated at the Department of Juvenile Justice after he was adjudicated delinquent for breaking into cars and stealing cell phones while he was with other individuals. R. 417; R. 513. During this time, Appellant displayed “good manners,” “got along with staff, obeyed the rules and had a good attitude toward supervision.” R. 417. “He volunteered for several work details and demonstrated that he was responsible. He stayed out of trouble and made a good adjustment while at DJJ.” R. 417. The DJJ teachers praised Appellant

for following directions, respecting authority, respecting the rights of others, adapting to class structure, demonstrating self-control, demonstrating responsibility, and demonstrating age-appropriate social skills. R. 417. The DJJ evaluator noted that Appellant employed the defense mechanism of denial, including the denial of the effect of his father's rejection on him and of his need for emotional closeness and support. R.417. Appellant readily rejected others in order to avoid being rejected first. R. 417. He engaged in substance abuse to "numb uncomfortable feelings." R. 417.

Although Appellant was placed on probation, as recommended by DJJ, he violated probation, resulting in a commitment to DJJ. R. 513. While at DJJ, Appellant participated in treatment groups, including anger management. R. 513. Although Appellant had some behavior problems, he made progress with anger management. R. 513. He was paroled from DJJ on November 14, 2003. R. 513. A short time later, Appellant was arrested for the shooting death of Wilson. Psychological testing conducted in 2019 revealed that while Appellant "may have been chronologically 17 years old at the time of his arrest and subsequent confinement in jail awaiting trial, he was emotionally, perceptually, and cognitively (decision-making, problem-solving) a much younger person." R. 513.

While Appellant was incarcerated in the South Carolina Department of Corrections, he was prescribed various anti-psychotic medications and anti-depressants. R. 513. While in the Department of Corrections, he was diagnosed with Psychosis NOS and Post-traumatic Stress Disorder (PTSD). R. 513; R. 547. On June 15, 2018, he attempted suicide. R. 547 (describing a progress note in which Appellant reported he was found hanging in the shower and that he had reported suicidal ideation on multiple occasions). Subsequent evaluations concurred in the diagnosis of PTSD. R. 513; R. 547.

In his order, the judge “acknowledge[d] that [Appellant] 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. 677. Nevertheless, the court “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. 677. The court was persuaded by the state “highlight[ing] 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. 677.

Discussion

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.

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 one at bar 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 sentencing judge failed to use Appellant’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 Appellant’s mitigating evidence into aggravating evidence because Appellant was unable to pull himself up by his bootstraps in order to rise above his circumstances. In doing so, the judge erred in sentencing Appellant to life because he refused to consider Appellant’s unrefuted mitigating evidence and give it the constitutional significance demanded by the Eighth Amendment.

V. Misinterpreting the *Miller* factor requiring the sentencing court to consider an individual's incompetencies associated with youth, such as the individual's inability to deal with police officers or prosecutors, the court erred in sentencing Appellant to life without parole where the uncontradicted evidence showed (1) Appellant gave an incriminating statement to law enforcement after his request for counsel was ignored by his interrogators and (2) Appellant declined a favorable plea bargain due to his lack of understanding of the evidence against him.

Relevant facts

During the re-sentencing hearing, the chief investigating officer, Melvin Godwin, testified on behalf of the state. According to Godwin, he interrogated Appellant following his arrest. At the time of the interrogation of Appellant, Godwin had been in law enforcement for approximately fourteen years. R. 301, ll. 4-10. In addition to Godwin, at least two other officers interrogated Appellant simultaneously. R. 302, ll. 7-9. Godwin advised Appellant of his rights, including his right to counsel. R. 303, ll. 15-24. However, when Godwin asked if Appellant understood, Appellant indicated that he wanted a lawyer. R. 303, l. 24 – R. 304, l. 3. Despite the law requiring Godwin to stop his interrogation and honor Appellant's invocation, Godwin continued. R. 304, ll. 4-20.

Additionally, during the re-sentencing hearing, the solicitor revealed that Appellant was offered a plea bargain whereby he would enter a guilty plea to voluntary manslaughter in exchange for a sentence of twenty years. R. 386, ll. 23-24. However, Appellant rejected the plea offer. R. 386, l. 24.

In his order, the sentencing court claimed he examined Appellant's "alleged mental deficiencies and the incompetencies associated with youth." R. 677. The judge noted the investigating officer testified Appellant "displayed no problems communicating with law

enforcement” and that he “clearly understood all questions, easily communicated with law enforcement, and was alert.” R. 677. Further, the order stated that Appellant’s trial counsel “never once suggested [Appellant] had any mental deficiencies or any incompetencies.” R. 677.

Discussion

According to the United States Supreme Court, one of the reasons that mandatory life without parole for juveniles was unconstitutional was because it “ignore[d] that [the juvenile] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.” Miller v. Alabama, 567 U.S. 460, 477-478 (2012). See also Aiken v. Byars, 410 S.C. 534, 544, 765 S.E.2d 572, 577 (2014). “[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings.” Graham v. Florida, 560 U.S. 48, 78 (2010). “Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it.” Id. As a result, “[t]hey are less likely than adults to work effectively with their lawyers to aid their defense.” Id. Children have “[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel, seen as part of the adult world a rebellious youth rejects,” which leads to “poor decisions by one charged with a juvenile offense.” Id.

Addressing interrogations specifically, the High Court held that a child’s age is a necessary consideration for the in-custody question. J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011). “[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.” Id. After recognizing that a child’s age was far more than a chronological fact, the Supreme Court explained that children are less responsible than

adults, lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them, and more vulnerable to outside pressures than adults. Id. Quite simply, “children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.” Id. at 273.

“[T]he right to have counsel present at [an] interrogation is indispensable to the protection of the Fifth Amendment privilege.” Miranda v. Arizona, 384 U.S. 426, 469 (1966). This right to counsel includes “not merely a right to consult with counsel prior to questioning, but to have counsel present during any questioning.” Id. at 470. According to the Supreme Court, a defendant may waive his rights. Id. at 444.

If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

Id. at 444-445. The Fifth Amendment guarantees the right to speak with counsel upon request in a custodial setting. U.S. Const. Amend. V; Edwards v. Arizona, 451 U.S. 477 (1981). If a suspect invokes his right to counsel, police interrogation **must** cease unless the suspect himself initiates further communication with police. Id.; see also Davis v. United States, 512 U.S. 452, 458 (1994).

The Supreme Court “set forth a ‘bright-line rule’ that *all* questioning must cease after an accused requests counsel.” Smith v. Illinois, 469 U.S. 91, 98 (1984) (citing Solem v. Stumes, 465 U.S. 638, 646 (1984)) (emphasis in original). This purpose of the prohibition is to eliminate “explicit or subtle, deliberate or unintentional” conduct by police that “might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel’s assistance.”

Id. (citing Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983); Fare v. Michael C. 442 U.S. 707, 719(1979)).

It simply cannot be denied in this case that Appellant invoked his right to counsel and the police failed to cease all interrogation by continuing to interrogate Appellant. Appellant was entitled to consult with counsel at any time during the interrogation. There was no suggestion, or even argument, that Appellant's request for counsel was anything but clear and unambiguous. The police knew Appellant sought legal advice, but instead of honoring that request, as the officers knew they were required to do pursuant to the United States Constitution, the officers continued the interrogation. Seventeen-year-old Appellant was unable to stand up to the three experienced interrogators. As an incompetent youth, he surrendered to their inquisition and provided an incriminating statement. The sentencing court failed to consider – or even acknowledge – the testimony in the record that Godwin and the other interrogators violated Appellant's Fifth Amendment right to counsel by continuing to question him after he unambiguously invoked his right to counsel. Had Appellant possessed the intestinal fortitude of an adult, he would not have succumbed to the inquisition and would have stood his ground in his demand for counsel.

Further, the judge ignored evidence in the record that Appellant's incompetencies associated with youth resulted in his rejection of a plea offer for twenty years imprisonment for a conviction of voluntary manslaughter. At the conclusion of the trial, Judge Cottingham characterized the evidence against Appellant – which consisted of the self-serving testimony of his two co-defendants – as “absolutely simply overwhelming.” R. 252, ll. 12-13. Due to his youth, Appellant was ill-equipped to consider the plea offer. He went to trial facing a maximum sentence of life imprisonment without the possibility of parole and could only hope for a minimum thirty-year sentence of which he would be required to serve every day. He rejected a plea offer of twenty years, of which he would not be

required to serve every single day as he would be able to serve a percentage of the sentence prior to being released. Had Appellant possessed the wisdom of an adult, he would have been able to evaluate the plea offer more carefully and determined its value to him.

The sentencing judge erred when he misinterpreted the factor requiring him to consider Appellant's incompetencies associated with youth by only considering the testimony from law enforcement that Appellant was able to converse with them. The judge's failure to consider Appellant's invocation of his right to counsel, which was ignored, and Appellant's rejection of a favorable plea offer was an abuse of discretion.

CONCLUSION

Appellant respectfully requests this Court vacate his LWOP sentence and remand for re-sentencing.

s/Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of August, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

August 17, 2020

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Aug 17 2020
SC Court of Appeals

s/Susan B. Hackett

Susan B. Hackett

Appellate Defender

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The South Carolina Court of Appeals

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July 12, 2023

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1330 Lady St., Ste.401
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Re: The State v. Terriel L. Mack
Appellate Case No. 2019-000521

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

A handwritten signature in blue ink that reads "Catherine Harrison, deputy". The signature is fluid and cursive.

CLERK

cc: Alan McCrory Wilson, Esquire
Donald J. Zelenka, Esquire
Melody Jane Brown, Esquire
Edgar Lewis Clements, III, Esquire
The Honorable William H. Seals, Jr.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Terriel Leshawn Mack, Appellant.

Appellate Case No. 2019-000521

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

Unpublished Opinion No. 2023-UP-262
Heard March 16, 2022 – Filed July 12, 2023

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior
Assistant Deputy Attorney General Melody Jane Brown,
Deputy Attorney General Donald J. Zelenka, Senior
Assistant Attorney General W. Edgar Salter, III, all of
Columbia, and Solicitor Edgar Lewis Clements, III, of
Florence, all for Respondent.

PER CURIAM: Terriel Leshawn Mack appeals the result of a resentencing hearing under *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). Mack argues that the circuit court erred by sentencing Mack to life without parole without making a specific finding that he was irreparably corrupt and by failing to properly consider the factors in juvenile sentencing laid out by our supreme court. We affirm.

In the evening hours of December 17, 2003, Patrolman Otis Gowdy was driving near the Oakland Plantation in Florence when he "heard three loud bangs." Patrolman Gowdy drove to a location where he recently had seen three men standing. Two of the men had now disappeared. Patrolman Gowdy found the body of the third man, Joseph Todd Wilson. Islam Horn, Gregory Johnson and Mack were indicted for murder and conspiracy.¹ Mack was seventeen when the incident occurred.

According to Horn's testimony at Mack's murder trial, Horn and Mack had decided on the day of Wilson's death to drive to North Florence to see a female. Eventually, Mack saw the victim and "wanted to holler at" him. Mack got out of the car, as did Johnson, who by this point had joined Horn and Mack in the vehicle. Not long after, Horn "heard the first gunshot." Moving his car slightly, he saw Mack "stand over [the victim] and shoot him three more times in the back."

At the trial, Horn also read and helped decode an incriminating letter he said Mack wrote to him while the two of them were in jail following the crime. The contents included:

I got out the car me and [Johnson] and I call [the victim] like, Yo, that my n** Tellie. Then he started walking back towards me. [Johnson] was like, Yo, the jakes is over there.[²] I was like f*** that n**. I ain't got no time to waste. Plus, I don't give a f*** about no jakes anyway. Son, I had hollows in the chamber and I blew that b**** n** brains out. . . . That n** s*** splattered everywhere and he drop like a rag doll, like he had spaghetti legs or some s***, put three in his back.

The letter also suggested that Mack killed the victim "for WB and my n** BG rest in peace" Mack also allegedly wrote: "I told myself the only thing I was coming

¹ Horn and another individual were indicted for accessory after the fact.

² According to Horn, "jakes" is a term for law enforcement.

back to jail for was either bricks or bodies and I stuck to my word."³ During his PCR hearing, Mack denied being the author of the note.

Johnson testified similarly to Horn at Mack's trial. He said Horn and Mack picked him up on the evening of the crime. According to Johnson, when Mack saw the victim, "he ask[ed] me was that Todd who snitched on somebody else[,] a guy by the name of White Boy[.]" Johnson testified that he and Mack exited the car, and a few moments later, Mack shot the victim in the head. Johnson said he was running away by the time Mack fired the last three bullets.

Investigator Ron Smith testified about a previous violent crime in Florence.⁴ According to Smith, two men were shot: Antonio McCall, who died, and Joseph Todd Wilson—the victim in this case. Shortly after the incident, Wilson blamed the shooting on "White Boy."

The jury found Mack guilty of murder. The court sentenced Mack to life in prison without parole (LWOP). This court affirmed in an *Anders* appeal.⁵

In 2014, Mack and 14 other individuals challenged the legality of their LWOP sentences in *Aiken*, 410 S.C. at 536–37, 765 S.E.2d at 573. A divided South Carolina Supreme Court found that they were entitled to new sentencing hearings either under the U.S. Supreme Court's recent interpretations of the Eighth Amendment to the U.S. Constitution or under a similar provision of the South Carolina Constitution.⁶ *Id.* at 545–46, 765 S.E.2d at 578.

³ We are unable to locate an actual copy of the letter in the record. What is reproduced is based on testimony at Mack's trial.

⁴ At the time of the trial, Smith was an investigator for the public defender's office, but had previously been a police officer in Florence.

⁵ See *Anders v. California*, 386 U.S. 738, 744 (1967) (finding an attorney's request to withdraw from representing a defendant because of concerns about the merit of an appeal must also file a brief laying out potential issues).

⁶ "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII; see also S.C. CONST. art. I, § 15 ("Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained.").

At Mack's resentencing hearing, the State attempted to portray Mack as a remorseless killer. Mack presented an array of evidence about aspects of his first trial, the offense, and his life both before and after the murder.

Testifying for the State, Detective Melvin Godwin said Mack had confessed to the murder in a statement to police and that Mack said he did so to prevent the victim from testifying against "White Boy," whose real name was Marcus Martin.⁷ However, under cross-examination, Godwin was forced to concede that Mack had asked for a lawyer, but law enforcement had continued questioning him anyway.

The State introduced Mack's disciplinary record in prison, which included charges and allegations of weapons and drug possession, fights with guards, threats to guards, property damage, being part of a "security threat group," and eight instances of public masturbation. He once allegedly attempted to bribe a prison guard to bring money into the prison for him. In all, Mack had 27 reports over more than 12 years. Mack was also investigated for homicide, though that appears to have been a wide-ranging investigation related to a riot at Lee Correctional Institute. At his resentencing hearing, Mack said that "some [of the incidents were] entirely my fault"; additional incidents were caused by "misunderstandings"; and other disciplinary actions included times he was "falsely accused and unable to prove my innocence."

Mack presented the testimony of Dr. Geoffrey McKee, a forensic psychologist. Dr. McKee testified that Mack's mother was abused by a man named Nathaniel, who acted as a "father figure" to Mack. Mack was also allegedly abused by his mother on at least one occasion. Another stepfather attempted "to get rid of any reference" to Nathaniel. At the age of twelve, Mack had a sexual encounter with a seventeen-year-old female.⁸ Around the same time, Mack began using alcohol and marijuana. Mack once defended his mother from an abuser.

In a statement to the court after the end of testimony and evidence, Mack apologized for "my involvement in the death of" the victim and discussed his views at the time of the murder.

At the time of my arrest, I was a 17-year-old child that was under the false impression that I was a grown man because at least since the age of 13[,] I have been running around

⁷ Mack's statement does not appear to have been admitted into evidence at Mack's murder trial.

⁸ The seventeen-year-old was a "former babysitter" of Mack's.

town with people I thought were my friends doing what we thought grownups did[:] alcohol, doing drugs and living every day like life was a game people press restart -- press a restart button on.

Mack also discussed his involvement in the prison ministry, and his efforts to tutor fellow inmates.

Both sides introduced dozens of pages of documentary evidence. A DJJ report prepared when Mack was fifteen and had been charged with petit larceny stated that he was "cool and indifferent to the feelings and welfare of others" and "does not appear interested in developing close relationships with others, and ties to others are generally based on sharing similar antisocial or unempathetic attitudes." The report indicated that Mack had been charged with multiple counts of damaging or tampering with a vehicle and larceny in a December 2001 incident. There were also assorted assault charges listed.⁹

The defense introduced a psychiatric evaluation by Dr. Matthew Gaskins noting an incident in which Mack told a nurse practitioner that "'he was found hanging in the shower' and had to be cut down." Dr. Gaskins also noted that Mack's records included an array of psychiatric diagnoses—including posttraumatic stress disorder, psychosis, antisocial personality disorder, and malingering—and prescriptions. Dr. Gaskins wrote: "His experiences have led him to knowingly push boundaries and break rules in order to 'survive' while incarcerated (i.e. have a potential weapon when limited physically, fight an officer/inmate who disrespects him publicly)."

The resentencing court sentenced Mack to LWOP. The court said it was "extremely concerned by the cold-blooded nature of the killing, and the fact that [Mack] has shown little to no signs of rehabilitation." The court also said that it had "carefully and deliberately considered all the factors as outlined in *Aiken v. Byars*" before reaching its decision. This appeal followed.

"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. Therefore, this court will not

⁹ At Mack's murder trial, counsel for the State and the court referred to three counts of assault and battery with intent to kill that were "pending." It is not clear what became of those charges.

disturb the circuit court's findings absent a manifest abuse of discretion." *State v. Finley*, 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019) (citation omitted).

In 2012, the United States Supreme Court issued a landmark decision in *Miller v. Alabama*, 567 U.S. 460 (2012). There, the Court held "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Id.* at 465. In 2014, the South Carolina Supreme Court considered the impact of *Miller* on South Carolina law in *Aiken v. Byars*. There, a plurality of the court found that even South Carolina's discretionary sentencing regime was affected, because "*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." 410 S.C. at 543, 765 S.E.2d at 577. The plurality then laid out what are now called the *Aiken* factors to guide courts in carrying out their duties under the Eighth Amendment. *Id.* at 544, 765 S.E.2d at 577. Despite finding that "*Miller* does not require that we grant relief to juveniles who received discretionary life without the possibility of parole (LWOP) sentences," Justice Pleicones concurred, saying he "would reach the same result under S.C. Const. art. I, § 15." *Id.* at 545–46, 765 S.E.2d at 578.

Our task has been complicated because of the continuing evolution in this area of law. There have been at least three rulings by higher courts since Mack's resentencing in 2019.

First, the U.S. Supreme Court found in *Jones v. Mississippi* "that a separate factual finding of permanent incorrigibility is not required. . . . In a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." 141 S. Ct. 1307, 1313 (2021). Unsurprisingly, South Carolina courts have followed suit. *See, e.g., State v. Miller*, 433 S.C. 613, 627, 861 S.E.2d 373, 380 (Ct. App. 2021) ("As to [the appellant's] argument that a trial court must specifically find a juvenile is 'irreparably corrupt' before sentencing him or her to a life sentence, pursuant to *Jones v. Mississippi*, such a finding is not required under the Eighth Amendment."), *cert. granted* (Oct. 7, 2022); *see also State v. Slocumb*, 426 S.C. 297, 299, 827 S.E.2d 148, 149 (2019) ("Once the Supreme Court has drawn a line in the sand, the authority to redraw that line and broaden federal constitutional protections is limited to our nation's highest court."). As a result, we believe that Mack's contention that the resentencing court was required to find him "irreparably corrupt" is without merit.

Even so, we find that Mack's issues related to the resentencing court's consideration of the *Aiken* factors must still be resolved. First, the plain language of *Jones* provides that the decision is not intended to remove state-level safeguards for juvenile sentencing. See *Jones*, 141 S. Ct. at 1323 ("[O]ur holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder."). Second, courts in South Carolina have continued using post-*Miller* approaches to consider juveniles' LWOP sentences even after the *Jones* decision. In fact, while our deliberations on this case were underway, our supreme court issued two opinions invoking *Aiken v. Byars*. See *State v. Smart*, Op. No. 28161 (S.C. Sup. Ct. filed June 21, 2023) (Howard Adv. Sh. No. 24 at 17); *Jones v. State*, Op. No. 28164 (S.C. Sup. Ct. filed June 21, 2023) (Howard Adv. Sh. No. 24 at 38).

These opinions guide our decision in this case, as they must. As a result, we affirm the resentencing court's order. However, because *Aiken* continues to govern whether juveniles in South Carolina are sentenced to LWOP in future cases, we note two portions of the court's order that give us pause.

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.").

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*.

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*.

In any event, our supreme court's two recent decisions have made it clear that our review in this area is narrow and highly deferential. For example, in *Smart*, our supreme court found that neither the State nor the defendant bore the burden in a resentencing hearing pursuant to *Aiken*. See *Smart* (Howard Adv. Sh. No. 24 at 18). In affirming the resentencing court in that case, our court held:

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.

Id. (Howard Adv. Sh. No. 24 at 21) (emphasis added). In undertaking a review of the process that the resentencing court in *Smart* used to come to its decision, our supreme court also carefully noted that it was not "review[ing] the substance of the resentencing court's decision to impose a life sentence." *Id.*

Also telling is the court's decision in *Jones v. State*. In that case, our supreme court held that juvenile offenders can constitutionally be subjected to mandatory minimum sentencing, but circuit courts must nonetheless "consider the mitigating factors of youth in sentencing juveniles" who are subject to the circuit court's jurisdiction because of the charges against them. See *Jones v. State* (Howard Adv. Sh. No. 24 at 49). The majority in *Jones v. State* found that questions at a plea colloquy satisfied the requirements of *Aiken* in that context. *Id.* (Howard Adv. Sh. No. 24 at 50); see also *id.* (Howard Adv. Sh. No. 24 at 40) ("Consideration of these

factors can be done at sentencing; therefore, a separate *Aiken* hearing is not required.").

We find the dividing line between the majority and a concurring opinion authored by Acting Justice Hearn and joined by Justice Few particularly significant. The concurring opinion agreed with the majority because the sentence for the juvenile in that case would have been the same regardless of the circuit court's considerations. However, the concurrence parted company with the majority on the sufficiency of the circuit court's consideration of *Aiken*.

For example, the court asked about the defendant's age, his criminal record, his employment history, any drugs or medication he may have been on, his satisfaction with his lawyer, and whether he understood the consequences of pleading guilty. I believe *Aiken* requires more because these general questions simply do not equate to the more in-depth and detailed questions that should be asked and answered in order to analyze the "hallmark features of youth" that *Aiken* mandates. In my view, it would be nearly impossible for any hearing where the judge does all the questioning to comply with *Aiken*.

Id. (Howard Adv. Sh. No. 24 at 52–53). The concurrence contrasted that with the "textbook example of what a proper *Aiken* hearing affords" presented by the *Smart* case. *Id.* (Howard Adv. Sh. No. 24 at 52).

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[.]"

We also find under our limited appellate review that the resentencing court did not abuse its discretion either in its findings considering whether the "incompetencies associated with youth" hindered Mack's defense or its findings that Mack was not a likely candidate for rehabilitation.

The resentencing court indicated some consideration of the *Aiken* factors. Our task here is not to determine whether we agree with the decision of the resentencing court or whether its considerations are a template for *Aiken* hearings. The sentence is appropriate if the court's order indicates that it considered the *Aiken* factors. Because the court cleared that bar, we affirm.

AFFIRMED.

GEATHERS J., HILL, A.J., and LOCKEMY, A.J., concur.

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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

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, ‘impetuosity[,] 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.

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 impetuosity 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 (18th) 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.").

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).

Respectfully submitted,



Kathrine M. Hudgins

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South Carolina Commission on Indigent Defense

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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
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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 Commission on Indigent Defense
Division of Appellate Defense
(803) 734-1330

The South Carolina Court of Appeals

The State, Respondent,

v.

Terriel Leshawn Mack, Appellant.

Appellate Case No. 2019-000521

ORDER

After careful consideration of the petition for rehearing, the Court withdraws Opinion Number 2023-UP-262, filed July 12, 2023, and substitutes the attached opinion. Accordingly, the petition for rehearing is denied.

 J.

 A.J.

 A.J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire

Donald J. Zelenka, Esquire

Melody Jane Brown, Esquire

Edgar Lewis Clements, III, Esquire

Kathrine Haggard Hudgins, Esquire

FILED
Nov 01 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Terriel Leshawn Mack, Appellant.

Appellate Case No. 2019-000521

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

Opinion No. 6031
Heard March 16, 2022 – Filed July 12, 2023
Withdrawn, Substituted and Refiled November 1, 2023

REVERSED AND REMANDED

Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy
Attorney General Donald J. Zelenka, Senior Assistant
Deputy Attorney General Melody Jane Brown, Senior
Assistant Attorney General W. Edgar Salter, III, all of
Columbia, and Solicitor Edgar Lewis Clements, III, of
Florence, for Respondent.

GEATHERS, J.: Terriel Leshawn Mack appeals the result of a resentencing hearing required by our supreme court's decision in *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). Mack argues that the circuit court (1) erred by sentencing Mack to life without parole without finding that he was irreparably corrupt; (2) did not properly consider the "hallmark features of youth" in its decision; (3) improperly

rejected Mack's argument that he could be rehabilitated because of his relative youth at the time of the crime; (4) faulted Mack for not overcoming the circumstances of his upbringing; and (5) erred in finding that Mack's youth did not hinder his ability to present a defense in his original trial. We reverse and remand for reconsideration under the standards laid out by our supreme court.

FACTS/PROCEDURAL HISTORY

In 2003, Terriel Lashawn Mack and two co-defendants, Islam Horn and Gregory Johnson, were indicted for the murder of Joseph Todd Wilson (the victim) and for conspiracy. Mack was seventeen years old at the time of the victim's death.

At trial, Horn and Johnson testified that on the day of the victim's death, they drove to North Florence with Mack. At some point, Mack saw the victim and "wanted to holler at" him. Mack and Johnson got out of the car. Not long after, Horn "heard the first gunshot." Moving his car slightly, Horn saw Mack "stand over [the victim] and shoot him three more times in the back."

According to Johnson, when Mack first saw the victim, "he ask[ed] me was that [the victim] who snitched on somebody else[,] a guy by the name of White Boy[.]"¹ Johnson testified that he and Mack exited the car, and, a few moments later, Mack shot the victim in the head. Johnson said he was running away by the time Mack fired the last three bullets.

At trial, Horn also read and helped decode an incriminating letter he said Mack wrote to Horn while the two of them were in jail following the crime. The contents included:

I got out the car me and [Johnson] and I call [the victim] like, Yo, that my n** Tellie. Then he started walking back towards me. [Johnson] was like, Yo, the jakes is over there.[²] I was like f*** that n**. I ain't got no time to waste. Plus, I don't give a f*** about no jakes anyway. Son, I had hollows in the chamber and I blew that b**** n** brains out That n** s*** splattered everywhere

¹ Investigator Ron Smith testified about a previous violent crime in Florence. According to Investigator Smith, two men were shot: Antonio McCall, who died, and the victim. Shortly after the incident, the victim blamed the shooting on "White Boy."

² According to Horn, "jakes" is a term for law enforcement.

and he drop like a rag doll, like he had spaghetti legs or some s***, put three in his back.

The letter also suggested that Mack killed the victim "for WB and my n** BG rest in peace" Mack also allegedly wrote: "I told myself the only thing I was coming back to jail for was either bricks or bodies and I stuck to my word."³ During a hearing on his post-conviction relief application, Mack denied being the author of the letter.

The jury found Mack guilty of murder. The court sentenced Mack to life in prison without parole (LWOP). This court affirmed in an *Anders* appeal.

In 2014, Mack and fourteen other individuals challenged the legality of their LWOP sentences in *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). A divided South Carolina Supreme Court found that they were entitled to new sentencing hearings under either the U.S. Supreme Court's recent interpretations of the Eighth Amendment to the U.S. Constitution or under a similar provision of the South Carolina Constitution.⁴ *Id.* at 545–46, 765 S.E.2d at 578. The plurality held that circuit courts must consider the following factors (*Aiken* factors) when sentencing a juvenile to LWOP:

(1) the chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate [] risks and consequence[s]"; (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."

³ We are unable to locate an actual copy of the note in the record. What is reproduced is based on testimony at Mack's trial.

⁴ "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII; *see also* S.C. Const. art. I, § 15 ("Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained.").

Id. at 544, 765 S.E.2d at 577 (first and second alterations added) (quoting *Miller v. Alabama*, 567 U.S. 460, 477–78 (2012)).⁵ Following our supreme court's decision, Mack filed a motion for resentencing that was granted.

At Mack's resentencing hearing, the State attempted to portray Mack as a remorseless killer. Mack presented an array of evidence about aspects of his first trial, the offense, and his life both before and after the murder.

Testifying for the State, Detective Melvin Godwin said Mack had confessed to the murder in a statement to police and that Mack said he murdered the victim to prevent him from testifying against "White Boy," whose real name was Marcus Martin.⁶ However, under cross-examination, Godwin was forced to concede that Mack had asked for a lawyer, but law enforcement had continued questioning him anyway.

The State also introduced Mack's disciplinary record in prison, which included charges and allegations of weapons and drug possession, fights with guards, threats to guards, property damage, being part of a "security threat group," and eight instances of public masturbation. He once allegedly attempted to bribe a prison guard to bring money into the prison for him. In all, Mack had twenty-seven reports over more than twelve years. Mack was also investigated for homicide in an investigation related to a riot at Lee Correctional Institute. At his resentencing hearing, Mack said that "some [of the incidents were] entirely my fault"; additional incidents were caused by "misunderstandings"; and other disciplinary actions included times he was "falsely accused and unable to prove my innocence."

Mack presented the testimony of Dr. Geoffrey McKee, a forensic psychologist. Dr. McKee testified about Mack's complicated relationship with the father figures in his life. Mack's biological father denied paternity even after testing confirmed he was Mack's father. A romantic partner of his mother, a man named Nathaniel, acted as a "father figure" to Mack and was abusive to his mother. A subsequent romantic partner of his mother insisted on removing any trace of

⁵ Justice Pleicones concurred in the result that the petitioners were entitled to "seek resentencing in a proceeding that complies with the standards announced" in *Miller* but noted the result was under the South Carolina Constitution, not the U.S. Constitution. *Id.* at 545–46, 765 S.E.2d at 578.

⁶ Mack's statement does not appear to have been admitted into evidence at Mack's murder trial.

Nathaniel, forcing Mack to deny the existence of the man he viewed as a "father figure" and "role model."

Dr. McKee also testified about the abuse Mack experienced and witnessed. Mack once defended his mother from an abuser. Mack was also abused by his mother on at least one occasion. At the age of twelve, Mack was sexually assaulted by a seventeen-year-old female.⁷ Around the same time, Mack began using alcohol and marijuana. Dr. McKee testified that he believed Mack could be rehabilitated.

After the end of testimony and evidence, Mack addressed the court.

I would like to sincerely apologize for my involvement in the death of Mr. Wilson At the time of my arrest, I was a 17-year-old child that was under the false impression that I was a grown man because at least since the age of 13[,] I have been running around town with people I thought were my friends doing what we thought grownups did[:] alcohol, doing drugs[,] and living every day like life was a game people press restart—press a restart button on.

Mack also discussed his involvement in the prison ministry and his efforts to tutor fellow inmates.

Both sides also introduced dozens of pages of documentary evidence. A Department of Juvenile Justice report prepared when Mack was fifteen and had been charged with petit larceny stated that he was "cool and indifferent to the feelings and welfare of others." The report also said Mack "does not appear interested in developing close relationships with others, and [his] ties to others are generally based on sharing similar antisocial or unempathetic attitudes." The report indicated that Mack had been charged with multiple counts of damaging or tampering with a vehicle and larceny in a December 2001 incident. There were also assorted assault charges listed.⁸

The defense introduced a psychiatric evaluation by Dr. Matthew Gaskins noting an incident in which Mack told a nurse practitioner that "he was found

⁷ The seventeen-year-old was a "former babysitter" of Mack's.

⁸ At Mack's murder trial, counsel for the State and the court referred to three counts of assault and battery with intent to kill that were "pending." It is not clear what became of those charges.

hanging in the shower' and had to be cut down." Dr. Gaskins also noted Mack had an array of diagnoses—including posttraumatic stress disorder, psychosis, antisocial personality disorder, and malingering—and prescriptions for Mack. Gaskins's report also noted Mack said he once kept a sharpened stick at prison because "he had shoulder surgery and 'was a one-armed man' making him feel 'like a sitting duck.'" Gaskins added: "His experiences have led him to knowingly push boundaries and break rules in order to 'survive' while incarcerated (i.e.,] have a potential weapon when limited physically, fight an officer/inmate who disrespects him publicly)." Gaskins also wrote: "the most common form of malingering is exaggeration and should not be dismissed." As to the personality disorder diagnosis, Gaskins emphasized Mack's incarceration and prior experience. "[T]hese traits seem to have been adaptively beneficial for Mr. Mack to survive 'street life' and while in prison. It is not clear that he would continue this pattern of behavior as an adult in a non-correctional setting."

The resentencing court sentenced Mack to LWOP again. The court stated that it was "extremely concerned by the cold-blooded nature of the killing[] and the fact that [Mack] has shown little to no signs of rehabilitation." The court also said that it had "carefully and deliberately considered all the factors as outlined in *Aiken v. Byars*" before reaching its decision.

This appeal followed. This court issued an unpublished opinion affirming Mack's sentence on February 23, 2023. Mack subsequently filed a petition for rehearing. Following a review of the petition and the issues raised, we reverse and remand.

ISSUES ON APPEAL

- I. Did the circuit court err by sentencing Mack to LWOP without a specific finding that he was irreparably corrupt?
- II. Did the circuit court inadequately consider the "hallmark features of youth" in its decision to sentence Mack to LWOP?
- III. Did the circuit court err in failing to adequately consider the impact of Mack's upbringing?
- IV. Did the circuit court err in rejecting Mack's argument that he could be rehabilitated because of his relative youth at the time of the crime?

- V. Did the circuit court err in finding that Mack's youth did not hinder his ability to present a defense in his original trial?

STANDARD OF REVIEW

Mack argues that the standard of review in this case is a novel issue in our state because it concerns juvenile LWOP sentencing. This framing distorts the issue; South Carolina courts have frequently dealt with sentencing decisions in the context of the Eighth Amendment, which is the proper background for reviewing Mack's claim.

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*. Therefore, this court will not disturb the circuit court's findings absent a manifest abuse of discretion. An abuse of discretion occurs when the circuit court's finding is based on an error of law or grounded in factual conclusions without evidentiary support.

State v. Finley, 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019) (emphasis added) (citations omitted).

LAW/ANALYSIS

We will begin our discussion of Mack's case by addressing the state of the law, then turn to which of Mack's issues on appeal survive the most recent U.S. Supreme Court decision, and then analyze the issues that remain.⁹

I. STATUS OF LAW ON JUVENILES AND LWOP

In 2012, the United States Supreme Court issued a landmark decision in *Miller v. Alabama*, 567 U.S. 460 (2012). There, the Court held "that mandatory life without

⁹ The State argues that Mack failed to preserve some arguments based on particular cases because he did not cite those cases to the resentencing court. Suffice it to say that we believe it would come as a shock to our state's appellate bar if we were to find that each and every example of case law—or even a line of cases—used to support an argument on appeal and clearly relevant to the issues argued before the resentencing court must be recited at that level if a party wished to rely on those cases on appeal.

parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Id.* at 465 (quoting U.S. Const. amend. VIII). The Court explained this conclusion rested on the nature of human development and the recognition in constitutional law that "children are different." *Id.* at 479–81.

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

Id. at 477–78.

The South Carolina Supreme Court considered the impact of *Miller* on South Carolina law in *Aiken v. Byars*. There, a plurality of the court found *Miller* affected South Carolina's discretionary sentencing regime because "*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." 410 S.C. 534, 543, 765 S.E.2d 572, 576–77 (2014). The plurality laid out the *Aiken* factors to guide courts in carrying out their duties under the Eighth Amendment.¹⁰ *Id.* at 544, 765 S.E.2d at 577.

After *Aiken*, the U.S. Supreme Court elaborated further on the dimensions of *Miller* in *Montgomery v. Louisiana*:

¹⁰ Despite holding "*Miller* does not require that we grant relief to juveniles who received discretionary life without the possibility of parole (LWOP) sentences," Justice Pleicones concurred, saying he "would reach the same result under S.C. Const. art. I, § 15." *Id.* at 545–46, 765 S.E.2d at 578.

Miller, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "unfortunate yet transient immaturity."

577 U.S. 190, 208 (2016) (citation omitted) (quoting *Miller*, 567 U.S. at 472, 479). The Court added: "A hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." *Id.* at 210 (quoting *Miller*, 567 U.S. at 465).

In 2021, the U.S. Supreme Court again addressed the issue in an effort to clarify the meaning of *Miller* and *Montgomery*. In *Jones v. Mississippi*, the Court held: "*Miller* did not require the sentencer to make a separate finding of permanent incorrigibility before imposing such a sentence." 141 S.Ct. 1307, 1316 (2021). Instead, the majority found that "[t]he Court's precedents require a discretionary sentencing procedure in a case of this kind." *Id.* at 1322.

The *Jones* opinion was issued well after Mack and the State submitted their briefs in this case, but it affects our considerations here. The first question we confront is whether Mack's issues survive.

II. SURVIVAL OF MACK'S ISSUES

As an initial matter, Mack's first issue on appeal—whether the circuit court should have made a finding that Mack was irreparably corrupt—is without merit in light of recent U.S. Supreme Court and South Carolina decisions, most significantly the *Jones* opinion. "[T]he Court has already ruled that a separate factual finding of permanent incorrigibility is not required In a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." *Jones*, 141 S.Ct. at 1313 (footnote omitted).

South Carolina courts have followed suit in finding that there is no need for a circuit court to rule that a juvenile is "permanently incorrigible" before sentencing that juvenile to LWOP. *See State v. Miller*, 433 S.C. 613, 627, 861 S.E.2d 373, 380

(Ct. App. 2021) ("As to [the appellant's] argument that a trial court must specifically find a juvenile is 'irreparably corrupt' before sentencing him or her to a life sentence, pursuant to *Jones v. Mississippi*, such a finding is not required under the Eighth Amendment."), *cert. granted* (Oct. 7, 2022); *see also State v. Slocumb*, 426 S.C. 297, 299, 827 S.E.2d 148, 149 (2019) ("Once the Supreme Court has drawn a line in the sand, the authority to redraw that line and broaden federal constitutional protections is limited to our nation's highest court."); *State v. Finley*, 427 S.C. 419, 427, 831 S.E.2d 158, 162 (Ct. App. 2019) (noting that the *Slocumb* court "declined to extend the holdings of *Graham* and *Miller*, stating 'a long line of Supreme Court precedent prohibits us from extending federal constitutional protections beyond the boundaries the Supreme Court itself has set'" (quoting *Slocumb*, 426 S.C. at 306, 827 S.E.2d at 153)).

Even so, we find that Mack's issues related to the *Aiken* factors must still be resolved. The U.S. Supreme Court's precedents through *Montgomery* require that a court "have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller*, 567 U.S. at 489; *see also Montgomery*, 577 U.S. at 208 ("*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" (quoting *Miller*, 567 U.S. at 480)). The plain language of *Jones* provides that the decision is not intended to remove state-level safeguards for juvenile sentencing. *See Jones*, 141 S.Ct. at 1323 ("[O]ur holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder."). The court noted that *Miller* and *Montgomery* declined to mandate how the states complied with their Eighth Amendment obligations in juvenile sentencing—as long as they did so. *See Jones*, 141 S.Ct. at 1314 ("*Miller* mandated 'only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence." (quoting *Miller*, 567 U.S. at 483)); *see also Malvo v. State*, 281 A.3d 758, 765 (Md. 2022) (holding that "the Court's opinion in *Jones* focused almost exclusively on *Miller*'s procedural component," but that "*Miller*'s substantive holding, as articulated in *Montgomery*, remains good law").

Our supreme court has decided that, in South Carolina, compliance should take the shape of a review of the *Aiken* factors. The holdings in our supreme court's most recent cases have reaffirmed that decision. *See State v. Smart*, 439 S.C. 641, 889 S.E.2d 573 (2023); *Jones v. State*, 440 S.C. 14, 889 S.E.2d 590 (2023).

In sum, we may not consider Mack's contention that his resentencing court was required to find him "irreparably corrupt." However, we will review the

resentencing court's process in considering the *Aiken* factors. As we explain, this is where the resentencing court missed the mark.

III. *AIKEN* FACTORS

There are, essentially, four ways in which Mack argues that the resentencing court misinterpreted *Miller* and *Aiken*. We will address two that we find particularly troubling and will not address the other two because they are not essential to our holding. Our conclusion, though, is that we agree with Mack.

First, Mack argues that the resentencing court did not adequately consider whether his crimes were affected by "the chronological age of the offender and the hallmark features of youth, including 'immaturity, impetuosity, and failure to appreciate [] risks and consequence[s.]'" *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577 (quoting *Miller*, 567 U.S. at 477). We agree.

The resentencing court's order addresses Mack's age only as a chronological fact and does not seem to consider the "hallmark features of youth" at all. It found that:

In regards to the age of the offender, [Mack] 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, [Mack] 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. [Mack] was within one year of an age whereby he would have immense responsibilities and be considered an adult by law.

While all of this is true, it could also be said about any seventeen-year-old facing a potential LWOP sentence. *Miller* requires more; it requires "factors of youth [be] carefully and thoughtfully considered" in the individualized sentencing proceeding. *Aiken*, 410 S.C. at 543, 765 S.E.2d at 577 (noting that in some of the sentencing hearings at issue, "[m]any of the attorneys mention[ed] age as nothing more than a chronological fact in a vague plea for mercy. *Miller* holds the Constitution requires more.").

We acknowledge that the fact that an offender is seventeen rather than a younger age is relevant to the inquiry. See *Miller*, 567 U.S. at 476–77 (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*, 281 A.3d at 816 (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*. 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. *Montgomery*, 577 U.S. at 212 ("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."); see also *Roper v. Simmons*, 543 U.S. 551, 574 (2005) ("The qualities that distinguish juveniles from adults *do not disappear when an individual turns 18*. By the same token, some under 18 have already attained a level of maturity some adults will never reach The age of 18 is the point where society draws the line for many purposes between *childhood* and adulthood." (emphases added)); *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."). As the Iowa Supreme Court held:

[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. When the *Miller* Court referred to "chronological age" in identifying the need to distinguish the criminal sentencing of children from adults, it did not suggest that a seventeen-year-old child is more deserving of adult punishment than a sixteen-year-old child, or a fifteen-year-old child more deserving than a fourteen-year-old child. It referred to "chronological age" as a unit of age that distinguishes children from adults. The Court recognized that children within this unit have "signature qualities" of "immaturity, irresponsibility, 'impetuousness[,] and recklessness.'" . . . This is not to say judges cannot and should not be alert to circumstances that might suggest the age of a particular offender might not support mitigation. Yet, categorical age groups do not exist for children to justify using age alone as a factor against granting eligibility for parole.

State v. Roby, 897 N.W.2d 127, 145–46 (Iowa 2017) (citations omitted) (first alteration added) (quoting *Miller*, 567 U.S. at 476).¹¹

To be sure, our courts need not write peer-reviewed papers about human development to follow *Aiken*. See *J.D.B. v. North Carolina*, 564 U.S. 261, 279–80 (2011) ("In short, officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult."). Our courts do, though, need to appreciate that "[a] child's age is far 'more than a chronological fact.'" *Id.* at 272 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)); see also *id.* ("It is a fact that 'generates commonsense conclusions about behavior and perception.'" (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting))).

Simply finding that Mack was almost eighteen—as emphasized by the resentencing court—does not account for the careful and thoughtful consideration the U.S. Supreme Court considers vital. Nor does it change the fact that Mack was not yet eighteen when the crime occurred. The resentencing court's order only considered Mack's age a chronological fact; *Miller* requires more. See *Aiken*, 410 S.C. at 543, 765 S.E.2d at 577 (noting that in some of the sentencing hearings at issue, "[m]any of the attorneys mention[ed] age as nothing more than a chronological fact in a vague plea for mercy. *Miller* holds the Constitution requires more."). Further, other than stating it had considered all the *Aiken* factors, the resentencing court order makes no reference to "the hallmark features of youth, including 'immaturity, impetuosity, and failure to appreciate [] risks and consequence[s].'" *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577 (quoting *Miller*, 567 U.S. at 477). As a result, the court erred by failing to adequately consider whether Mack's crimes were affected by his chronological age and the hallmark features of youth.

Second, Mack argues that the resentencing court erred in its interpretation of the *Aiken* factor concerning a defendant's home life. Again, we agree.

The second *Aiken* factor requires "the 'family and home environment' that surrounded the offender" be accounted for in a court's decision on whether to sentence a juvenile to LWOP. *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577.

¹¹ *Roby* dealt with a non-homicide crime. 897 N.W.2d at 132. However, it references *Miller* and similar precedent and draws on Iowa's version of the *Aiken* factors.

We are unable to locate any South Carolina authority elaborating on what aspects of a juvenile's upbringing should carry weight in considering whether to impose a sentence of LWOP. However, we find the approach of the *Roby* court persuasive:

This factor seeks to identify any familial dependency and negative influences of family circumstances that can be ingrained on children [E]xpert testimony will best assess how the family and home environment may have affected the functioning of the juvenile offender. This factor does not rely on general perceptions, but specific measures of the degree of functioning. Furthermore, it is not limited to extremely brutal or dysfunctional home environments, but considers the impact of all circumstances and all income and social backgrounds.

897 N.W.2d at 146 (citations omitted).

Here, we need not decide whether Mack's home life could arguably qualify as evidence of an "extremely brutal or dysfunctional home environment[]." We are concerned only with whether the resentencing court's order shows a meaningful consideration of the evidence about Mack's home life. We find that it does not. The resentencing court found:

[Mack] 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. However, the court recognizes 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. Additionally, the 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.

The court misapprehended the nature of the question this *Aiken* factor seeks to answer. The inquiry does not ask the court to use the success of others in overcoming their circumstances as the yardstick when considering the defendant's circumstances. Certainly, there are untold numbers of individuals—both public and

private—who have been successful in overcoming abject poverty and a myriad of hardships and traumatic childhoods. And, others have failed. Nonetheless, this is not the appropriate rubric to be applied under the *Aiken* factors. The inquiry requires the court to consider the impact of *the defendant's* family and home environment *on his crimes*. It is a specific and individualized inquiry.

Even if we were to interpret the resentencing court's use of the examples of celebrities with harsh childhoods as rhetorical flourish, the resentencing court did not make findings as to how Mack's childhood affected *him*. The order did provide, "[Mack] grew up in a bad home environment"; however, this finding does not reflect the consideration required by *Aiken*. See *Aiken*, 410 S.C. at 545, 765 S.E.2d at 578 (holding a juvenile defendant facing a LWOP sentence must receive "an *individualized* hearing where the mitigating hallmark features of youth are fully explored" (emphasis added)). Applying the *Aiken* factors involves more than repeating the words; it requires applying the substantive content of those factors.

Finally, we note our supreme court issued two holdings in *Smart* and *Jones* during the time this case was in the appeals process. Our conclusion does not ignore or conflict with those holdings.

In *Smart*, our supreme court found that neither the State nor the defendant bore the burden in a resentencing hearing pursuant to *Aiken*. *Smart v. State*, 439 S.C. 641, 645, 889 S.E.2d 573, 575 (2023). While affirming the resentencing court in that case, our supreme court noted that "there is language in the resentencing court's oral ruling that could be understood to support [the defendant]'s claim that the court placed an improper burden on him." *Id.* at 646, 889 S.E.2d at 576. "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." *Id.*

In *Jones*, the majority held juvenile offenders can constitutionally be subjected to mandatory minimum sentencing, but circuit courts must nonetheless consider the "mitigating factors of youth in sentencing juveniles" who are subject to the circuit court's jurisdiction because of the charges against them. 440 S.C. 14, 29, 889 S.E.2d 590, 598 (2023). The defendant in *Jones* was asked about (1) his age, (2) his criminal record, (3) his employment history, (4) medication he was on, and (5) his understanding of the consequences of pleading guilty. *Id.* at 30, 889 S.E.2d at 599. The majority found the plea colloquy satisfied the requirements of *Aiken* in that context. *Id.*

Unlike *Smart* and *Jones*, the resentencing court's order does not reflect a careful and thorough consideration of the *Aiken* factors. To be sure, the resentencing court stated that although Mack "presented some mitigating evidence including his immaturity at the time of the murder, some mental health diagnoses, and growing up in a difficult environment, this [c]ourt believes these limited mitigating factors are substantially outweighed by the areas mentioned above pursuant to *Aiken v. Byars*." However, as discussed above, the resentencing court's order does not adequately consider the *Aiken* factors and "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Montgomery*, 577 U.S. at 208 (quoting *Miller*, 567 U.S. at 480). Rather, Mack's age being near the age of majority was used against him without affording him full consideration of juvenility; and, he was faulted for not overcoming his circumstances. *See Aiken*, 410 S.C. at 545, 765 S.E.2d at 578 ("*Miller* requires that before a life without parole sentence is imposed upon a juvenile offender, he must receive an individualized hearing where the *mitigating* hallmark features of youth are fully explored." (emphasis added)).

Because we reverse based on the inadequate consideration of the hallmark features of youth and Mack's upbringing, we do not need to address Mack's remaining challenges to the resentencing court's order. We remand for the resentencing court to consider all of the *Aiken* factors. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that the "appellate court need not address remaining issues when disposition of prior issue is dispositive" (citing *Whiteside v. Cherokee Cnty. Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993))).

CONCLUSION

We believe this is a rare instance in which issuing a new opinion on rehearing is appropriate. An individual's rights under the Eighth Amendment of the U.S. Constitution and the similar safeguard under the South Carolina Constitution are implicated. As Mack highlights in his petition for rehearing, we expressed concerns about the resentencing court's order in our initial opinion. It is imperative for us to thoughtfully reconsider the issues rather than mechanically insist we were correct on a close question. We hold that Mack is entitled to have the determination of his sentence made after a faithful application of the *Aiken* factors.

Based on the foregoing, the resentencing court's order is reversed, and the case is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

HILL, A.J., AND LOCKEMY, A.J., concur.

RECEIVED

Nov 14 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
The Honorable William H. Seals, Circuit Court Judge
Appellate Case No. 2019-000521

THE STATE,.....RESPONDENT

v.

TERRIEL LESHAWN MACK,.....APPELLANT

RESPONDENT’S PETITION FOR REHEARING

On November 1, 2023, this Court issued a published opinion reversing the decision of the trial court in the Appellant’s conviction for the offense of murder. *State v. Mack*, Op. no. 6031 (S.C. Ct. App. Filed November 1, 2023). In reversing the Appellant’s conviction, this Court found that the trial court erred based on the inadequate consideration of the “hallmark features of youth” and Appellant’s upbringing. Both are listed factors that must be considered in order to sentence a juvenile to life without the possibility of parole pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).

Pursuant to Rule 221(a) SCACR, Respondent, respectfully petitions this Court for rehearing because this Court has seemingly overlooked or misapprehended this decision on two critical points.¹ This Court’s opinion intended to highlight factors mentioned in the trial court’s

¹A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court. Rule 221(a) SCACR.

order; however, fails to include important factors that were considered and mentioned within the final sentencing order.

This Court decided that the trial court erred by using the Appellant's age as a chronological fact and did not seem to consider the "hallmark features of youth" at all. *Mack*, Op. No. 6031 p. 6 (2023). Within the opinion this Court referenced the following from the sentencing order:

In regards to the age of the offender, [Mack] 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 [Mack] 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. [Mack] was within one year of an age whereby he would have immense responsibilities and be considered an adult by law.

Id.

In *Aiken*, the South Carolina Supreme Court determined that the factors in *Miller*² were those which must be considered during resentencing, such as the offender's age and other features of youth, family life, circumstances of the crime, understanding of the legal process, and the possibility of rehabilitation. *Aiken*, 410 S.C. at 544-545, 765 S.E.2d at 577-578. Respondent argues that these criteria were considered and each consideration could be found in the trial court's sentencing order. In *Aiken*, the South Carolina Supreme Court established that "[t]he United States Supreme Court did not establish a definite resentencing procedure and we likewise see no reason to do so. We have the utmost confidence in our trial judges to weigh the factors discussed herein and to sentence juveniles in light of this new constitutional jurisprudence." *Id.*, at 545 n. 10.

Within his order the trial judge did state that the Appellant was almost at an age where he would be allowed to enter the military and have additional responsibilities as prescribed by law.

² *Miller v. Alabama*, 567 U.S. 460 (2012).

The trial court also found that, “limited mitigating factors are substantially outweighed by areas mentioned above pursuant to *Aiken v. Byars*. ” (R. p. 680).

According to *Aiken*, the United States Supreme Court in *Miller v. Alabama* established a specific framework and certain factors must be considered by the trial court prior to sentencing. One of which is, *the chronological age of the offender and the hallmark features of youth, including “immaturity, impetuosity, and failure to appreciate the risks and consequence.”* *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577, *quoting, Miller*, 132 S.Ct. at 2468 (emphasis added). In examining the “hallmark features of youth,” the trial court considered the following: the facts of the murder revealed that Appellant was “the shooter” and intentionally shot the victim in the head at “point blank range;” Appellant shot the victim “three more times in the back while the victim was on the ground;” he wrote a letter to his co-defendant in which he bragged about the murder and failed to show remorse; the motive for the murder was to kill “a witness to another crime so as to benefit an associate;” murder was a “premeditated...cold-blooded assassination,” for which Appellant did not show remorse but was, “actually proud of the killing.” All of these aspects were reflected in the trial court’s order related to the hallmark features of youth. This reveals that the trial court did not only equate the youth of the Appellant to him soon being able to enter the military or an eligibility to vote; but these relate to the hateful nature of his crime, and his callousness toward the murder during its aftermath.

This Court also reversed due to the fact the trial court failed to go into detail about the Appellant’s upbringing and home environment. The trial court within his order mentioned other individuals that went through traumatic upbrings and have become outstanding citizens. However, the trial court within its order also mentioned that the trial court “acknowledges that the Defendant 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 life.” (R. p. 680). The trial court decided that these events did not override the circumstances of the murder, the lack of remorse of the Appellant, and that the Appellant unwillingness or inability to be rehabilitated. Criteria must be considered pursuant to *Aiken*.

This Court’s opinion only mentioned one reason why the trial court believed the Appellant’s youth should not deny him a life without parole sentence. There was more to the reasoning of the trial court other than a comparison to Elie Wiesel, Oprah Winfrey, and Tyler Perry; or that the Appellant was almost at the age where he can legally defend this country and vote. The trial court mentioned in their order the violent and heinous nature of this killing, and Appellant’s reason for committing this murder. The fact that all of the evidence revealed that the Appellant was the individual that committed this murder, and the total lack of remorse even years after the crime was committed as evidenced by the letter he wrote to his co-defendant. The trial court believed Appellant only revealed any remorse during the *Aiken v. Byars* hearing for his own benefit. (R. p. 680). These are very valid reasons that followed the *Aiken* and *Miller* decisions in order to sentence a juvenile to a life without parole sentence.

The above-mentioned reasons reveal that this Court overlooked or misapprehended important issues that were presented though the trial court’s sentencing order. Respondent believes that there should be a rehearing in order for these issues to be addressed once again and be considered by this Court.

CONCLUSION

For the reasons stated above, Respondent petitions for rehearing pursuant to Rule 221(a) SCACR, and requests this Court reinstate Appellant's conviction for murder.

Respectfully submitted,

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Columbia, South Carolina
November 14, 2023

RECEIVED

Nov 14 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
The Honorable William H. Seals, Circuit Court Judge
Appellate Case No. 2019-000521

THE STATE,.....RESPONDENT

v.

TERRIEL LESHAWN MACK,.....APPELLANT

PROOF OF SERVICE

I, Tommy Evans, Jr., the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Petition for Rehearing and Proof of Service has been forwarded to Petitioner's counsel, Kathrine H. Hudgins, Esq., via email today, November 14, 2023 to KHudgins@sccid.sc.gov, and to her assistant, Chris Stock at CStock@sccid.sc.gov

I further certify that all parties required by Rule to be served have been served.

This 14th day of November 2023.

s/Tommy Evans, Jr.
TOMMY EVANS, JR.

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ATTORNEY FOR RESPONDENT

The South Carolina Court of Appeals

The State, Respondent,

v.

Terriel Leshawn Mack, Appellant.

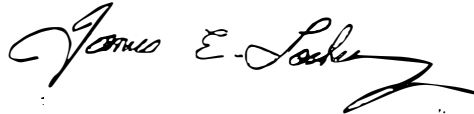
Appellate Case No. 2019-000521.

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



A.J.



A.J.

Columbia, South Carolina

cc:

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Donald J. Zelenka, Esquire

Melody Jane Brown, Esquire

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FILED
Nov 21 2023