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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Florence County
Honorable William H. Seals, Circuit Court Judge

Opinion No. 6031 (S.C. Ct. App. Filed July 12, 2023
Withdrawn, Substituted and Refiled November 1, 2023)
Lower Court Case No. 2004-GS-21-1084

THE STATE,

PETITIONER,

V.

TERRIEL LESHAWN MACK,

RESPONDENT

APPELLATE CASE NO. 2023-001962

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

PETITIONER'S QUESTIONS PRESENTED

1. Did the Court of Appeals err in deciding that the resentencing court erred in failing to adequately consider whether defendant's crimes were affected by his chronological age and the hallmark features of youth?
2. Did the Court of Appeals err in deciding that the resentencing court erred in its interpretation of the *Aiken* factors regarding the Respondent's home life?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES

1. Did the Court of Appeals correctly find that the resentencing court erred as a matter of law by sentencing Respondent 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?

2. Did the Court of Appeals correctly find that the resentencing court erred as a matter of law by sentencing Respondent to life without parole for an offense committed as a juvenile where the court failed to consider the family and home environment that surrounded Respondent as mitigating in favor of a sentence less than life and instead faulting Petitioner for not overcoming his circumstances to become a good, law-abiding citizen, like Elie Wiesel, Oprah Winfrey, and Tyler Perry?

STATEMENT OF THE CASE

On September 9, 2004, the Florence County Grand Jury indicted Respondent and two co-defendants, Islam Horn and Gregory Johnson, for murder, indictment #2004-GS-21-1084. (App. pp. 687-688). On October 25-26, 2005, Respondent proceeded to jury trial before the Honorable Edward R. Cottingham. Scott Floyd represented Respondent at trial. Jack Lawson and John Jepertinger prosecuted the case. The jury found Respondent guilty of murder. Judge Cottingham sentenced Respondent to life imprisonment without the possibility of parole (LWOP). (App. p. 690).

A timely notice of intent to appeal was filed and a brief filed pursuant to Anders v. California, 386 U.S. 738 (1967). On August 15, 2008, the South Carolina Court of Appeals dismissed the appeal. State v. Mack, Op. No. 2008-UP-486 (S.C. Ct. App. filed Aug. 15, 2008).

On April 28, 2016, Respondent filed a motion for re-sentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). (App. pp. 680-681). On February 19, 2019, a resentencing hearing was held before the Honorable William H. Seals, Jr. (App. pp. 291-418). Marshall Weaver and Brie R. Russell represented Respondent at the resentencing hearing. John Jepertinger and Dudley Saleeby represented the State. At the conclusion of the hearing, Judge Seals took the matter under advisement. (App. pp. 417-418). The parties reconvened on March 20, 2019. (App. pp. 419-421). Judge Seals announced that he was sentencing Respondent to LWOP again and signed the sentencing sheet. (App. p. 420, lines 16-21; p. 691). Respondent objected to the sentence as "cruel and unusual" "in violation of the Eight Amendment [to] the United States Constitution." (App. p. 421, lines 1-4).

A timely notice of intent to appeal was filed and the direct appeal perfected. On March 16, 2022, a three-judge panel of the Court of Appeals heard oral argument. The initial opinion was filed on July 12, 2023. A timely petition for rehearing was filed (App. pp. 798-817) and on November 1, 2023, the Court of Appeals withdrew the initial opinion and filed a substituted opinion reversing the resentencing judge and remanding for a new sentencing hearing. State v. Mack, 441 S.C. 526, 894 S.E.2d 820 (Ct. App. 2023) (App. pp. 819-835). The State filed a petition for rehearing that was denied on November 21. 2023. (App. pp. 836-842). The State filed a petition for writ of certiorari with this Court on December 20, 2023. This return follows.

REASONS WHY CERTIORARI SHOULD BE DENIED

The Court of Appeals correctly found that the resentencing court failed to consider the mitigating hallmark features of youth and Respondent's upbringing when imposing a sentence of life without parole.

Rule 242, SCACR, provides considerations governing the grant of certiorari as follows:

> A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:
>
> **(1)** Where there are novel questions of law.
>
> **(2)** Where there is a dissent in the decision of the Court of Appeals.
>
> **(3)** Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
>
> **(4)** Where substantial constitutional issues are directly involved.
>
> **(5)** Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

The present case does not involve any of the five reasons provided in the rule. The present case does not involve a novel question of law. Instead, as correctly found by the Court of Appeals, the present case involves a misapplication of the law by the resentencing court. The present case does not involve special circumstances. The decision by the Court of Appeals protects Respondent's substantial constitutional rights under the Eighth Amendment of the United States Constitution and the similar safeguard under the South Carolina Constitution. Although this Court has wide discretion and power to grant review, in the present case, the petition for writ of certiorari should be denied.

STATEMENT OF 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. (App. p. 8, lines 1-17; p. 9, lines 14-25). When he investigated the source of the gunshots, he found the deceased, Joseph Todd Wilson, lying on the ground. (App. p. 10, lines 1-4). Officer Gowdy saw what appeared to be a bag of crack cocaine near the deceased. (App. p. 15, lines 21-25; see also App. p. 156, lines 21-23). At the crime scene, the police found no evidence to "indicate a suspect." (App. p. 172, lines 1-3). The State's evidence against Respondent was primarily based on the words of two co-defendants who were also charged with murder and testified against Respondent in hopes of advantageous plea agreements. (App. p. 89, line 4 – p. 90, line 10; App. p. 115 line 14 – p. 116, line 9; App. p. 133, line 16 – p. 134, line 1).

Eventually, the police arrested Respondent, Islam Horn, and Gregory Johnson for offenses related to Wilson's death. Horn and Johnson testified against Respondent at trial. Horn testified that he was with Johnson and Respondent on December 17, 2003. (App. p. 54, lines 17-24). Horn alleged that while they were riding down the road, Respondent saw the deceased walking down the street and asked to stop so that he could buy some drugs from him. (App. p. 57 lines. 2-10). Respondent and Johnson got out of the car and approached the deceased. (App. p. 58 lines. 20-25). Less than a minute later, Horn heard a gunshot. (App. p. 59 lines 1-3). Unable to see anything from his vantage point, Horn drove his car to a spot with a better view. (App. p. 59 lines 4-11). Once there, Horn claimed he saw the deceased on the ground with Respondent standing over him. (App. p. 59 lines 12-16). Horn claimed Johnson was no longer there, but that Respondent shot the deceased three times in the back. (App. p. 59. lines 12-16). Horn immediately left the area. (App. p. 60 lines 20-23).

Horn claimed that while he was in the detention center with Respondent, he received an unsigned, undated letter from Appellant confessing to shooting the deceased. (App. pp. 62 – 64; App. p. 276 lines 20-25).[1] Horn gave the letter to his lawyer, who provided it to the prosecution. (App .p. 65, lines 2-11). In the letter, the writer claimed responsibility for the shooting. (App .p. 67, line 10 – p. 69, line 18). Horn was forced to admit on cross-examination that he also sent letters to Respondent, and these letters threatened to kill Respondent if Respondent did not accept responsibility for the killing. (App. p. 92, line. 7 – p. 95, line 15).

Johnson testified that when Horn stopped the car, he and Respondent got out. (App. p. 122, lines 4-17). Johnson testified Respondent called out to the deceased who turned around and approached Respondent. (App. p. 123, lines 14-17). According to Johnson, Respondent then shot the deceased in the head. (App. p. 123, lines 17-19. Johnson ran away, but claimed that he saw Respondent stand over the deceased and shoot him three more times. (App. p. 124, line 23 – p. 125, line 5).

During the deliberations, the jury revealed they were "divided." (App. p. 248, lines 15-16). Additionally, the jurors wanted to know if they were to consider the conspiracy charge against Respondent, which had been discussed with the jury, but was not called by the State to trial. (App. p. 248, lines 3-12). Finally, the jury expressed a desire for transcripts of the testimony from Horn and Johnson. (App. p. 248, lines 12-13). In response to the jury's question

[1] At his PCR hearing, Respondent denied writing the letter. (App. p. 263, lines 23-25). Although Respondent 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 Respondent's handwriting. (App. p. 264, lines 1-13) . At trial, it was only Horn's self-serving testimony that served to authenticate the letter. (App. p. 43, lines 23-24; App. p. 63, line 25 – p. 64 line 1). During the PCR hearing, trial counsel characterized the letter as "the most damning" evidence against Appellant. (App. p. 277, lines 10-11). However, trial counsel indicated that he would not normally get a handwriting expert in this circumstance. (App. p. 281, lines 1-6; App. p. 286, lines 7-9). In fact, trial counsel indicated that in his twenty years of practice, he had never hired a handwriting expert. (App. p. 274, lines 17-19; App. p. 286, lines 10-11).

about conspiracy, the judge *sua sponte* proposed instructing the jury on the hand of one is the hand of all. (App. p. 248, lines 3-12). Defense counsel objected to the proposal, but the judge overruled the objection and instructed the jury regarding accomplice liability. (App. p. 249 lines 2-10; p. 251, line 21 – p. 252, line 13). Shortly after receiving this additional instruction, the jury returned its verdict finding Respondent guilty of murder. (App. p. 255, lines 14-20). Judge Cottingham sentenced Respondent, who was seventeen years old at the time of the offense, to life imprisonment without the possibility of parole. (App. p. 257, lines 2-4; p. 690).

STANDARD OF REVIEW

"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) (citations omitted).

ARGUMENTS

1. **The Court of Appeals correctly found that the resentencing court erred as a matter of law by sentencing Respondent 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.**

Introduction

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

The Miller Court repeatedly focused on the notion that the character traits of children are "more transitory and less fixed." Miller, 567 U.S. at 471. Children by definition lack maturity and responsibility; thus, they are more likely to act with "recklessness, impulsivity, and needless risk-taking." Id. (internal quotation omitted). Due to the innate characteristics of children at large, there is a "great difficulty ... of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender

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

Children "have diminished culpability and greater prospects for reform," and therefore, "'they are less deserving of the most severe punishments.'" Id. at 471 (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)). "[T]he distinctive attributes of youth diminish penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Id. at 472. As a result, "[a]n offender's age is relevant to the Eighth Amendment." Id. at 473 (citing Graham, 560 U.S. at 76). In light of the relevance to the ban on cruel and unusual punishment, "imposition of a state's most severe penalties on juvenile offenders cannot proceed as though they were not children."[2] 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 resentenced 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.

Argument

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.

(App. p. 682). 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. (App. p. 523).

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]

[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

"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] 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. 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

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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).

factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." Graham, 560 U.S. at 570. The Supreme Court's trilogy of cases, Roper, Graham, and Miller, emphasized their reliance on the growing body of scientific evidence establishing significant differences between adult and juvenile brains, which the Court deemed to be of constitutional import. Despite the Court's categorization of juveniles relative to chronological age, the focus of the decisions was the psychological and behavioral aspects inherent to the age group in general. See State v. O'Dell, 358 P.3d 359, 366 (Wash. 2015) (holding "a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender" because "advances in scientific literature," show that "age may well mitigate a defendant's culpability, even if that defendant is over the age of 18"); Cruz v. United States, No. 11-CV-787 (JCH), 2018 WL 1541898 (D. Conn. Mar. 29, 2018) (cataloguing state and federal statutes detailing sentencing schemes for juveniles and youthful offenders and examining (1) the 2017 report from the United States Sentencing Commission regarding youthful offenders, (2) an ABA Resolution urging the prohibition of capital punishment on individuals twenty-one years old or younger at the time of the offense; and (3) compelling scientific evidence regarding the brains of 18-year-olds).

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

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

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

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

factor because there was no evidence to conclude Davis possessed features of maturity beyond his years. Id.

The sentencing judge devoted a single paragraph of his brief order to his consideration of Petitioner's age and the hallmark features of youth. The language used in this short paragraph shows how the judge actually used Petitioner's age as an aggravating factor, and not the mitigating one required by the Eighth Amendment. Instead of considering the hallmark features of youth, the judge used Petitioner's age of seventeen years to support his decision to treat Petitioner as an adult. Not only was Petitioner's age in and of itself a factor necessarily mitigating 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. (App. p. 523). 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 correctly finding that the resentencing 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 the Eighth Amendment the Court of Appeals wrote:

> 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, 132 S.Ct. 2455). 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.

State v. Mack, 441 S.C. 526, 542–43, 894 S.E.2d 820, 829 (Ct. App. 2023).

The Court of Appeals correctly reversed based on the resentencing court's failure to consider the hallmark features of youth. The resentencing court's discussion of the facts of the offense (App. p. 683) is not the equivalent of a consideration of the hallmarks of youth as argued by Petitioner. (petition for writ of certiorari p. 12). The process undertaken by the resentencing judge did not comply with Miller and Aiken because the judge failed to properly consider Respondent's youth. The sentencing order fails to demonstrate that the resentencing court considered the hallmark features of youth as required by the Eighth Amendment.

2. **The Court of Appeals correctly found that the resentencing court erred as a matter of law by sentencing Respondent to life without parole for an offense committed as a juvenile where the court failed to consider the family and home environment that surrounded Respondent as mitigating in favor of a sentence less than life and instead faulting Petitioner for not overcoming his circumstances to become a good, law-abiding citizen, like Elie Wiesel, Oprah Winfrey, and Tyler Perry.**

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.

Respondent's difficult family and home life is discussed in the briefs and documents submitted to the courts below and included in the Appendix. (App. pp. 518-527; pp. 624-644). Respondent incorporates by reference those facts in this petition. In the sentencing order, the judge "acknowledge[d] that [Respondent] 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." (App. p. 685). 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." (App. p. 685). 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." (App. p. 685).

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 Respondent'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." (App. p. 685). Thus, in the judge's view, a difficult childhood was simply

something to overcome. The judge transformed Respondent's mitigating evidence into aggravating evidence because Respondent was unable to pull himself up by his bootstraps in order to rise above his circumstances. In doing so, the judge erred in sentencing Respondent to life because he refused to consider Respondent's unrefuted mitigating evidence and give it the constitutional significance demanded by the Eighth Amendment.

In finding that the resentencing judge failed to consider Respondent's home environment as a mitigating factor in favor of a sentence other than life without parole the Court of Appeals correctly found:

> 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.

State v. Mack, 441 S.C. 526, 544, 894 S.E.2d 820, 830 (Ct. App. 2023).

The Court of Appeals correctly reversed based on the resentencing court's failure to consider Respondent's home life. The resentencing order reflects that the judge failed to consider Respondent's family and home environment as a mitigating factor in favor of a sentence other than life without parole. The process undertaken by the resentencing judge 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 Respondent's age as an aggravating rather than mitigating factor, the resentencing judge improperly used

Respondent's inability to overcome a difficult home environment as an aggravating rather than mitigating factor.

CONCLUSION

Based on the above arguments, this Court should deny the petition for writ of certiorari.

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ATTORNEY FOR RESPONDENT

This 18th day of January, 2024.