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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Florence County
William H. Seals, Jr., Circuit Court Judge
2011-GS-21-1197

Appellate Case No. 2012-211593

THE STATE,

Respondent,

v.

TAVARIO DORMELL BRUNSON,

Appellant

INITIAL BRIEF OF RESPONDENT AND DESIGNATION OF MATTER

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
S.C. Bar No. 5758
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

EDGAR L. CLEMENTS, III
Solicitor, Twelfth Judicial Circuit
Box Q, City-County Complex
Florence, SC 29501
(843) 665-3091
ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

The trial court violated the Eighth Amendment's ban on cruel and unusual punishment by sentencing Appellant, who was seventeen-years old at the time of the crime, to life imprisonment without parole on the charge of murder where such a sentence is prohibited. In the alternative, Appellant's sentence violates the Eighth Amendment because the trial court failed to consider Appellant's age as a mitigating factor and failed to provide constitutionally adequate sentencing procedures.

RESPONDENT'S STATEMENT OF THE CASE

The appellant, Tavario Dormell Brunson, was indicted at the Court of General Sessions for Florence County for murder, attempted murder, armed robbery, possession of a weapon during the commission of a violent crime, and burglary in the first degree at the July 21, 2011 term. Indictment 2011-GS-21-1197. ROA _ . The Appellant was represented by Scott Floyd and William Vickery Meetze of the Florence County Bar. The indictment was prosecuted by Solicitor E.L. "Ed" Clements III and Assistant Solicitor Todd Tucker of the Twelfth Circuit Solicitor's Office. The matter was called for trial on April 9, 2012 before the Honorable William H. Seals, Presiding Judge. At trial, the indictment was amended to burglary in the second degree - business. Tr.p. 228-230, 286.

On April 11, 2012, the Appellant was convicted as charged. Tr.p. 453, l. 25- 454, l. 14. The Appellant was sentenced to life in prison on murder, thirty (30) years on attempted murder, thirty (30) years on armed robbery, fifteen (15)years on burglary in the second degree, and five (5) years imprisonment on the possession of a weapon conviction. Tr.p. 469-470. Judge Seals ordered each of the sentences to run consecutively.[1]

The Appellant timely filed an appeal in this case. The Appellant is represented by Susan B. Hackett of the South Carolina Commission on Indigent Defense, Division of Appellate Defense.

On December 17, 2012, the Appellant, through counsel Hackett, made a motion in the

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[1]However, Solicitor Clements pointed out that the five year weapon charge should be subsumed in the life sentence. Tr.p. 470, l. 11-14. See S.C. Code Section 16-23-490 (A) ("[T]his five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime").

Court of Appeals to stay the filing of an initial brief of appellant and designation of matter pending the Court's ruling in of Aiken, et al. .v. Byars, Appellate Case No. 2012-213286 (cert. granted May 6, 2013) in its original jurisdiction. On January 2, 2013, the Respondent made opposition to the stay motion asserting the issue was not preserved by an appropriate objection to the sentence. On January 8, 2013, the Appellant, on request of the Court of Appeals, made a reply to the opposition.

On May 8, 2013, the Supreme Court of South Carolina certified the appeal from the Court of Appeals pursuant to Rule 204(b), denied Appellant's motion to stay, and ordered that a brief be filed.[2] The Initial Brief of Appellant was filed on May 14, 2013.

This Brief of Respondent follows.

RESPONDENT'S STATEMENT OF THE FACTS

On April 12, 2011, the Appellant, Tavario Brunson ran into the front door of Rick's Pawn Shop with a gun just prior to it closing at 6 PM. The Appellant's head was covered at the time with a stocking and dressed all in black. Tr.p. 142-145. Donna Robinson described Chris Deaver being shot "instantaneously" when he came into the store. TR.p. 145, l. 10-11. Robinson described trying to run to a back room in the store , but the man came around the corner, pointing the gun at her and telling her to get up. He demanded that she show him where the gold was. As she passed by where Chris was lying, the perpetrator stopped and shot Chris again at close range on his head. Tr.p. 147, l. 4-5. She stated that the victim was making noise and the perpetrator cussed at him to shut up. Robinson tried to leave, but he put the gun on her again. She then went

[2]Up to the Appellant's motion for stay, the Appellant had five extensions on the filing of an initial brief of appellant noting in its November 26, 2012 that it was a final motion.

to the cabinets and put the gold into the trash bag . Tr.p. 147-148, 156. Robinson stated hat when she was putting the items in the trash bag, he got upset with her as being slow. At that time he again had the gun on her and began throwing the cases after they emptied them. Tr.p. 156 - 158, 160. She stated that she also gave him the money out of the register. Tr.p. 160. After that, the Appellant told her to lay down on the floor and put her face down. He put the gun on her head and tried to ask him not to shoot her and that she just wanted to go home. She stated that he got mad at her, claimed she was stalling and started cursing at her. She feared that if she put her head down he was going to shoot her. She stated that she then put her head down and he shot her above her eye. Tr.p. 161. She stated after she was shot, she held her breath and pretended to be dead. So he would not shoot her again. Tr.p. 161. She heard rustling and then heard the door bell ring and she knew that he had left. Tr.p. 161. She described crawling to the phone and getting her gun, then calling for help. Tr.p. 162.

Robinson described telling the circumstances that she had lost an eye as a result of the shooting and that she was also unable to open her mouth for a period and was fed through a stomach tube and had a trach in her throat. However, she stated that now other than her sight, everything was okay. Tr.p. 163.

After the incident was called in, a perimeter was set up in search of the perpetrator. Tr.p. 171. The Appellant was stopped and a blue latex glove was found. Tr.p. 190-193. He was also wearing black pants and a grey tank top at the time. Tr.p. 190-91, 204-205. A trash bag and other items were recovered on April 12, 2011 which included jewelry, a t-shirt and a skull cap. Tr.p. 216-222., 241-242. 247-252, 296-298.

After the Appellant was Mirandized, he gave a statement to the Florence Police

Department on April 12, 2011. In the statement, he admitted going into the store, telling everyone to get on the ground, shooting the victim twice, telling the woman to put everything in the bag, telling her to get on the ground and shooting her when he thought she was reaching for something. Tr.p. 377. He claimed to have shot 4 or 5 times in the store. Tr.p. 378. He claimed to have thrown away some of his clothes and that he threw the gun at some point. Tr.p. 380-381. Brunson stated that he went into the store to rob because " I was just trying to help my family . . . they were struggling . . .money was short" Tr.p. 384, l. 2- 12. He claimed he shot because he was scared and panicked. Tr.p. 384-385.

ARGUMENT

I. Appellant is not entitled to vacation of his sentence of life imprisonment without parole for murder and new sentencing hearing where:

(1) no objection to the life sentence was made to the trial judge under any factor and no mitigating evidence was excluded by the Court for a lesser sentence of thirty years;

(2) Miller v. Alabama merely held the Eighth Amendment prohibits *mandatory* life without parole (LWOP) sentences for juveniles convicted of homicide, but did not prohibit or otherwise create a presumption against non-mandatory LWOP sentences which was available to Brunson and the sentencing court's consideration; and

(3) Brunson was provided an individualized sentencing proceeding with the opportunity to present mitigating evidence in regard to his age and the circumstances of the crime and family background.

On June 25, 2012, while Tavario Brunson's appeal from his murder and additional convictions was pending, the United States Supreme Court announced its decision in Miller v. Alabama, _ U.S. _, 132 S.Ct. 2455, 2469, 183 L.Ed.2d 407 (2012), that the Eighth Amendment forbids sentencing a juvenile defendant to life without parole when there has been no consideration of the particular circumstances of the crime or the offender's age and development. "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." Id. Miller does not hold that a pre-18 offender never can receive this sentence for murder. It holds only that life without parole may not be imposed unless the sentencer is given an opportunity to consider the individual facts and circumstances that might make such a sentence unjust or disproportionate. Since South Carolina authorizes a sentence of thirty years to life for murder in this case and consideration by the sentencer of youth and other factors, Miller provides no basis for either

vacation of his life sentence or a new sentencing proceeding. However, the issues he seeks to present to the Court this day were never preserved in the trial court. For these reasons, the appeal should be denied.

1. The Federal Constitutional Claim Is Not Preserved.

Respondent initially submits that the issue of whether Tavario Brunson was improperly sentenced to life imprisonment on his conviction for murder is not properly before this Court. Simply put, no objection was made after the sentence of life imprisonment for murder was given. Tr.p. 470. Further, as noted below, comments made about the case then pending in the U.S. Supreme Court were inadequate to state any objection because he never claimed that a life sentence could not be given in his case. Tr.p. 468-469. As stated in the Respondent's previous opposition to the "Motion to Stay Pending the Court's decision in Aiken, et al. v. Byars" before the Court of Appeals, no objection was made in the record to the Appellant's life sentence. Although the Appellant correctly noted the existence of a case pending in the U.S. Supreme Court, counsel for the defense acknowledged that he did not know anything about it. Tr.p. 468, l. 20- p. 469, l. 6. This retrospective attempt to preserve an issue in the direct appeal is wholly insufficient to preserve this claim.

In his brief before this Court, Brunson asserts that preservation was adequate in a series of conflicting theories. First, he admits under State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003) and Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), that South Carolina "requires" that an issue be raised and ruled upon by the trial judge in order to be preserved for appellate review. *Initial Brief of Appellant*, p. 9. He follows it with an assertion that

the objecting party is not required "to use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground," citing Dunbar, 356 S.C. at 142, 587 S.E.2d at 694. He then claims that merely informing the trial court of the existence of case pending on appeal in the United States Supreme Court challenging the application of a life sentence to individuals less than 18 years old was "[c]learly, this was an objection to the imposition of a life sentence" because "the only purpose trial counsel would have had in informing the trial court of the pending case was to object." *Initial Brief of Appellant*, p. 10.

What Defense Counsel Actually Said

However, a review of defense counsel's actual remarks - not the characterization of them - makes it less questionable. Particularly, defense counsel Meetze stated:

> Counsel Meetze: . . . as of today Mr. Brunson has been incarcerated for 366 days. The Court has obviously sat through that trial and is familiar with the case and the facts and all of that and is familiar with the punishments for these charges. Murder by itself carries a minimum of thirty years and up to a life sentence. . . .So either way you slice that, it's a long time.
>
> It's my understanding ***and I don't know anything specifically about it***, but it is my understanding that there is currently a case pending in the Supreme Court along the lines that Mr. Clements referenced as it pertains to the 17-year-old and the death penalty.[3] I think there's a case currently on appeal in the U.S.

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[3]Solicitor Clements in his sentencing remarks stated:

> . . .we ask . . .that you give Tavario Brunson the maximum sentence allowed by law. If he was not 17 years old at the time of this offense, my office would have sought the death penalty, but since that is not allowable by the United States Supreme Court, we did not.
>
> I ask, Your Honor, that you give him life, you give him the maximum on the other charges and , Your Honor, I ask that you consider making them consecutive. If life ever gets changed by our legislature so that it's no longer a

> Supreme Court with regards to a 17-year-old as it pertains to a life sentence as well as the same issues involved , whether that would be cruel and unusual punishment. Nothing has been decided in that regard so there's no law in that regard right now, but at - - at some point in time there may well be. . ."

Tr.p. 468, l. 13- p. 469, l. 6. Counsel Meetze continued noting the sentencing function of judges is difficult, that based upon the Appellant's family background this is not something that would have been expected and " we would just ask the Court to consider some kind of mercy on his behalf, understanding your job is indeed a difficult one. Tr.p. 469, l. 7-18. At that point, Judge Seals sentenced the Appellant to life for murder. Tr.p. 469, l. 22-25. No objection was made after the sentence of life imprisonment without parole for murder. Tr.p. 470.

Why the Constitutional Claim Is Not Preserved.

The Appellant never objected to the life sentence. The Appellant never claimed that a life sentence was forbidden under the federal constitution to him for his convicted crime of murder, particularly under the Eighth Amendment cruel and unusual punishment clause. Simply put, Brunson never asked the trial court to address the federal constitutional claim he is presenting today.

It is well settled that issues not raised and ruled on in the trial court will not be considered on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003); State v. Passmore, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct.App.2005). Thus, "a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999). In State v. Bonner, 400 S.C. 561, 735

> natural life, I would ask that you consider a consecutive sentence.

Tr.p. 467, l. 20- p. 468, l. 5.

S.E.2d 525 (2012), the Court of Appeal declared that an exception to the general rule of issue preservation exists authorizing the appellate court to consider an unpreserved issue in the interest of judicial economy under appropriate circumstances, citing State v. Vick, 384 S.C. 189, 203, 682 S.E.2d 275, 282 (Ct.App.2009) (vacating a kidnapping sentence in the interest of judicial economy, even though the issue was not preserved for review); see also Jeter v. S.C. Dep't of Transp., 369 S.C. 433, 441 n. 6, 633 S.E.2d 143, 147 n. 6 (2006) (holding the appellate court would address an issue in the interest of judicial economy despite any preservation problems).

However, unlike Bonner, Vick, and Johnston, the Respondent do not concede error in sentencing Appellant, who was seventeen at the time of the crime and sentencing, to a sentence of life without parole. As set forth, he was not facing or sentenced to a mandatory sentence of life without parole. Unlike Bonner who received a life without parole sentence for a non-homicide which was forbidden by Graham v. Florida, 560 U.S. 48 (2010), which the State had conceded was improper, Miller v. Florida, does not expressly forbid a life without parole sentence in a murder case committed by a 17 year old. Unlike Johnston, who the court found that the sentence that the State had conceded was erroneous and excessive and that the defendant could have remain in custody beyond the term of the correct sentence, nether circumstance exist in Brunson's case. Further, reliance upon Vick is misplaced here also because there the State had conceded that Vick's kidnapping sentence was improper. Thus, the judicial economy seen in each of those cases is not present here. Here, prior to the filing of the Appellant's brief, the State had already taken a position on preservation and lack of merit in n its opposition to the stay request. Therefore, the "extraordinary circumstances" present in Johnston, Vick and Bonner are not present here.

Clearly, the Appellant was asking for a sentence in plea of mitigation for mercy - a sentence of less than life without parole, but was not claiming that such a sentence was forbidden or that a different sentencing proceeding was required. As the Supreme Court has stated, "a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999); State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991); State v. Shumate, 276 S.C. 46, 275 S.E.2d 288 (1981); State v. Winestock, 271 S.C. 473, 248 S.E.2d 307 (1978).

2. *Miller v. Florida Does Not Preclude a Life Without Parole Sentence Upon Appellant As A Matter of Law.*

In Miller v. Alabama, two separate juvenile defendants were found guilty of murder—one of murder in the course of arson and the other of capital murder. Id. at 2461. Both sentencing schemes provided a mandatory sentence of either death or life without parole when convicted of either of those offenses. Because the Supreme Court had previously invalidated the death penalty for juvenile offenders, the trial court had only one possible option in sentencing upon conviction - life without parole. Id.; see Roper v. Simmons, 543 U.S. 551, 575, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (holding the death penalty cannot be imposed upon juvenile offenders). A sentence of life without parole was the required, mandatory sentence for a juvenile offender convicted under the statute and was automatically imposed upon conviction, with no exercise of discretion as to whether such a sentence was appropriate. The Miller Court held such a sentencing scheme providing for a required, mandatory sentence of life without parole for juvenile offenders violated the Constitution, and precluded a sentencer from taking into account an offender's age, life circumstances, and the circumstances of the homicide offense. Miller, 132

S.Ct. at 2464, 2467–68. However, the Court did not hold that discretionary life without parole sentences violate the Eighth Amendment. See id. at 2469 ("[A] sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty."). Instead, in regards to life-without-parole sentences for juvenile offenders, the Miller Court stated, "[a]lthough we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. The Court emphasized its decision "does not categorically bar a penalty for a class of offenders or type of crime.... Instead, it mandates only that a sentencer follow a certain process - *considering an offender's youth and attendant characteristics* - before imposing a particular penalty." Id. at p. 2471 (italics added).

In sum, Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011 (2010) prevented the imposition of life without parole for juvenile offenders convicted of non-homicide offenses.[4] Miller

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[4] In Graham, the juvenile defendant pled guilty to armed burglary and attempted armed robbery, for which he was placed on deferred adjudication probation pursuant to a plea bargain. Id. at 2018. When he violated his probation, the trial court found him guilty of the offenses and sentenced him to life without parole for the armed burglary and fifteen years' imprisonment for the attempted armed robbery, both non-homicide offenses. Id. at 2020. The Court held the Eighth Amendment forbids a State from imposing a sentence of life without parole on a juvenile offender who does not commit homicide. Id. at 2030. However, in clarifying its ruling, the Court noted:

> Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.

prevented the *mandatory* imposition of life without parole for juvenile offenders, but specifically allowed a discretionary sentence of life without parole when the circumstances justify it. Therefore, nothing prevents such a discretionary sentence when, as here, Appellant has been found guilty of both a homicide offense of murder and non-homicide offenses in a particularly heinous crime.

Unlike the sentences in Miller, Appellant Brunson's sentence of life without parole was not the mandatory sentence for his murder conviction. He was sentenced pursuant to S.C. Code Section 16-3-20 (A) which provided: " a person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life. . ." This sentencing statute did not require a mandatory sentence of life without possibility of parole (nor even create a presumption of LWOP), but vested the sentencing courts with the discretion to sentence Brunson to a term of thirty years to life. As such, this did not violate the proscription against cruel and unusual punishment set forth in Miller. Respondents submit Miller also fails to support wholesale resentencing.

In an attempt to justify their request, Appellant seeks to distort the United States Supreme Court's opinion in Miller by selectively focusing on particular words and phrases out of context. Contrary to Appellant's assertion, Miller does not create a presumption against sentences of life without parole for juveniles. Rather, in specifically rejecting Miller's alternative argument "that the Eighth Amendment requires a categorical bar on life without parole for juveniles," the Supreme Court simply noted that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," Miller at 567, 132 S.Ct. at 2469 (emphasis added). The

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Id. at 2023.

Court reiterated the difficulty, recognized in Roper and Graham, 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,'" and held: "Although we do not foreclose a sentencer's ability to make that judgment in a homicide cases, we require it to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at ___, 132 S.Ct. at 2469. The Court went on to explain that: "Our holding requires factfinders . . . to take into account the differences among defendants and crimes. By contrast, the sentencing schemes that the dissents find permissible altogether preclude considering these factors." Id. at ___ n.8, 132 S.Ct. at 2469 n.8 (emphasis added). It is precisely this preclusion the Court found unconstitutional, not that all juvenile life without parole sentences are unconstitutional, as posited by Miller himself. This distinction and the Court's conscious decision to decline expanding the Eighth Amendment's reach are important. At best they suggest an examination of sentencing proceedings on a case-by-case basis where each Petitioner can attempt to show that he or she did not receive the benefit of the individual consideration described in Miller. But, as addressed in detail above, even this suggestion is in doubt since Miller is procedural and not substantive in nature and does not constitute a watershed ruling.

Likewise in Miller, the Supreme Court did not explicitly or implicitly import Eighth Amendment capital sentencing principles into cases where juveniles face the possibility of a sentence of life without parole. Instead, in discussing how "mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics attendant to it," and noting that "[i]n meting out the death penalty, the elision of all these

differences would be strictly forbidden," the Miller Court finds that "a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison." Miller at 567, 132 S.Ct. 2467-68 (emphasis added). Thus the "similar rule" is not a mandate to provide a sentencing proceeding identical to the sentencing proceeding conducted in capital cases, but is a "similar rule" that prohibits a mandatory death sentence where the sentencer's ability to consider individualized characteristics has been eliminated or precluded. Miller holds that the exclusion of an individual defendant's age and circumstances from the sentencing judge's consideration would violate the Eighth Amendment when imposing a sentence of life without parole.

Here, by comparison, Appellant's age and circumstances was necessarily included in the discretionary decision to impose a sentence of life without parole rather than the mandatory minimum thirty year sentence. Tr.p. 469-470. Indeed, as described by the South Carolina Supreme Court over forty-five years ago:

> A sentencing judge is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant, if not essential, to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.") (emphasis added). The "fullest information possible concerning [a juvenile] defendant's life and characteristics" necessarily encompasses his or her age, mental capacity, maturity, etc.

State v. Cantrell, 250 S.C. 376, 379-80, 158 S.E.2d 189, 191 (1967) (emphasis added).

Presumably the judge in Brunson's case sentenced in accordance with this principle by considering Appellant's age, mental capacity and maturity. Furthermore, the Miller court's comment about juvenile LWOP sentences being "uncommon" already appears to be the case in South Carolina. According to the United States Census Bureau, there were 1,080,474 individuals

under the age of eighteen living in South Carolina in 2010. According to the South Carolina Department of Corrections there are currently forty-five individuals serving LWOP sentences in South Carolina for crimes committed when those individuals were under the age of eighteen. With only approximately forty-two ten-thousandths of one percent (.0042%) of the juvenile population in South Carolina serving an LWOP sentence, it is indeed an uncommon occurrence.

Brunson Had A Constitutionally Adequate Individualized Sentencing Hearing.

In Roper, the Supreme Court implicitly recognized the legitimacy of a juvenile receiving a sentence of life without parole for committing murder. In discussing the minimal deterrent effect on a juvenile facing possible execution, the Supreme Court noted: "To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." Roper at 572, 125 S.Ct. at 1196. The Supreme Court went on to explain that: "When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life, and his potential to attain a mature understanding of his own humanity." Id. at 573-74, 125 S.Ct. at 1197 (emphasis added). That potential is not extinguished by a sentence of life without parole. The legitimacy recognized in Roper was not impugned by Miller, except in the case of mandatory sentences to life imprisonment without parole. Thus, existing Eighth Amendment law does not prohibit the sentences imposed in Petitioners' cases, and that law controls this Court's review of the Federal Constitution.

The Miller Court emphasized its decision "does not categorically bar a penalty for a class of offenders or type of crime.... Instead, it mandates only that a sentencer follow a certain

process - *considering an offender's youth and attendant characteristics* - before imposing a particular penalty." Id. at p. 2471 (italics added). This was allowed and done in Appellant's case. Respondent submits resentencing should be rejected where it is not mandated by Miller, either explicitly or implicitly.

This is particularly the case where Appellant Brunson had an individualized sentencing proceeding with the opportunity to present mitigating evidence in regard to his age and circumstances. The sentencing judge was aware that Appellant was 17 at the time of the incident. Tr.p. 466, l. 9-10, p. 468, l. 24-p. 469, l. 2. He was aware that Brunson's mother and her family suggested a background where the criminal activity would not have been expected. Tr.p. 469, l. 7-15. Defense counsel asked for mercy for Appellant. Tr.p. 469, l. 16-18. Importantly, the defense was not restricted in making comments or presentation in mitigation for Brunson. When asked if there was anything further, counsel stated that there was nothing further. Tr.p. 469, l. 19-20. [5]

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[5]In the sentencing portion, the prosecution , while noting that he and the judge had sons, presented Appellant's prior criminal history which included a record in Family Court of bringing a weapon on school property and resisting arrest in that event resulting in probation which was violated. Tr.p. 466, l. 9-15. A suspended commitment resulted in an assessment from Pee Dee Mental Health which was provided to the sentencing judge and summarized that he had no mental issues, although it was reflected in the report that Brunson had commented then that he had thought about taking another person's life and that he like to kill animals. Tr.p. 466. Further, the prosecution noted that the report reflected that Brunson often lost his temper, argued with adults, was deviant against the rules, blamed other for his anger was resentful. Tr.p. 467, l. 1-7. The prosecution asked for a sentence of life in prison. Tr.p. 467, l. 8-12.

In addition, the prosecution presented a series of victim impact statements from members of the murder victim's family and the victim of the attempted murder. The surviving victim initially noted the Appellant' taped statement about the family's hard times and whether he did not mean to hurt anyone when he brought a gun. She further noted that inconsistency in his statement that he shot the murder victim because he saw him reaching for something, but it did not explain why he shot him again when he was lying lifeless while posing no threat. Tr.p. 457-458. She challenged his claim that he was afraid and nervous, when she describe Brunson

There were no restrictions or limitations imposed by the courts to prevent Brunson and his counsel from presenting any mitigating facts or arguments they wished to advance in an effort to convince the judge not to impose an LWOP sentence. Most importantly however, is the fact that the same characteristics described in Miller about the differences between children and adults in regard to diminished culpability and capacity for reform were known and available to Brunson when he was sentenced.

In 1979 the Supreme Court specifically commented on the psychological differences between adults and children. Bellotti v. Baird, 443 U.S. 622 (1979). Referring to the juvenile

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looking at her face and then trying to shot her. Tr.p. 458, l. 2-7. She questioned his inability to recall certain facts at the incident, stating that he was cursing with anger and ordering her around at the point of a gun. She held him accountable for his actions and prayed that this is comfort for the victims families and that he would ultimately be judged by God "with all the vengeance and justice that a father should when one of his children is murdered." Tr.p. 458.

The victim's aunt, Dale Ginn stated that his family would never be the same after the death, describing the mother's inability to sleep and constant crying. Tr.p. 459, l. 10-20. His father feels similar pain from the death and his daughter misses her father. Id. She described the impact extended to the victim's cousins who will share his loss at a wedding and noted the loss in the victim's many friends. Tr.p. 460. Cousin Kevin Deaver stated that he had researched the Appellant noting that it reflected gang involvement and that punishment will act as a deterrent to future crimes for those "walking the fence deciding whether they want to go into this lifestyle." Tr.p. 461, l. 10-20.

Amanda Deaver, the victim's step-mother stated that the victim was a special person to her. She described the fact that they had a normal life until the incident and described the hurt that has since occurred to her husband and family. Tr.p. 462.

The victim's father, Stephen Deaver, stated the difficulty he had sustaining his family since the incident and thank God for sparing Donna to be an eyewitness to the incident. Tr.p. 462. He described his relationship with his son as his friend and there plans, even on the day he was shot. Tr.p. 463. He noted that he had anger, but stated that his son had accepted Christ. He stated that we have consequences for our actions . He closed thanking the police, the solicitor and the court. He requested the maximum penalty for the Appellant. Tr.p. 464-465.

Cammie Carroll, the mother of the victim's five year old daughter, described the impact his loss had on both of them and the victim's love for life." She stated that it was "pure hell" to think about the possibility that he would walk out of jail some day and stated he deserves to get life. Tr.p. 465, l. 5-22.

court system, the Supreme Court noted: " . . . the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention." Id. at 635 (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971)). Three years later the Supreme Court described youth as "a time and condition of life when a person may be most susceptible to influence and psychological damage" and said that "minors . . . especially in their early years, generally are less mature and responsible than adults." Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982). The Supreme Court noted that: "Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. Id. at 116 (quoting Bellotti at 635). Six years later, in 1988, the Supreme Court again recognized that children are psychologically different from adults stating:

> Thus, informing the judgment of the Court today is the virtue of consistency, for the very assumptions we make about our children when we legislate on their behalf tells us that it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate that the existence of a fully rational, choosing agent, who may be deterred by the harshest of sanctions and toward whom society may legitimately take a retributive stance.

Thompson v. Oklahoma, 487 U.S. 815, 825 n.23 (1988). As acknowledged by the Miller court: "Everything we said in Roper and Graham about that stage of life [youth] also appears in these decisions." Miller, 567 U.S. at ___, 132 S.Ct. at 2467 (citing Sumner v. Shuman, 483 U.S. 66 (1987); Eddings, supra; Lockett v. Ohio, 438 U.S. 586 (1978); Johnson v. Texas, 509 U.S. 350 (1993)) (emphasis added). In other words, the concept that "children are different" was a well-established precedent when Petitioners were sentenced.

In Roper and Miller the Supreme Court certainly provided a more specific account of the differences of youth; however, even that specificity was based on scientific studies and concepts

developed during the second half of the twentieth century. See Roper, 543 U.S. at 568-70 (citing Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992) & E. Erickson, *Identity: Youth and Crisis* (1968)). Respondents submit that since Brunson was sentenced in 2012, he had the opportunity to present essentially the same arguments and mitigating evidence described in Miller.[6]

Despite being provided this opportunity in South Carolina, Brunson claims the sentencing proceeding was insufficient - an issue never presented in the state court. *Initial Brief of Appellant*, p. 13-14. It has been argued that since "a number of state courts have similarly concluded that Miller mandates individualized sentencing to take into account a number of factors related to the defendant's age and culpability," similar reasoning calls for this Court to order resentencing in pre-18 murder LWOP cases in South Carolina. Respondents disagree and submit that while the "legal developments" described by Petitioners in Aiken, et al v Byers, Appellate Case No. 2012-213286, certainly present an interesting study on how other jurisdictions have interpreted and responded to the portions of Miller which directly impacted the unconstitutional statutes, practices, or procedures previously followed in those jurisdictions, the noted developments have little if any relevance to South Carolina and the constitutionally sound statutes, practices and procedures followed here and in Brunson's case in particular.

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[6]Respondent further submits that the principles espoused in Miller are reflected in the statistics from South Carolina. Of the forty-five (45) inmates serving LWOP sentences for crimes committed when they were juveniles, five (5) were fifteen (15) years old, eleven (11) were sixteen (16) years old, and twenty-nine (29) were seventeen (17) years old when the homicides were committed. (See Aiken, et al v Byers, Appellate Case No. 2012-213286, Initial Brief of Respondents, Exhibit #1: Affidavit of Charles Bradberry with attached statistics). Thus, an increase in the juvenile's age and maturity appears to coincide with an increase in the likelihood of receiving an LWOP sentence.

First, Brunson may rely on Hye v. State, 2013 WL 2303518 (Miss. Ct. App. May 28, 2013). In Hye, a direct appeal, the Court of Appeals of Mississippi implemented Miller in the context of Mississippi being one of the twenty-seven jurisdictions in the United States with pre-Miller statutes that made life-without-parole sentences mandatory for juvenile aggravated murderers adjudicated in adult court. See Miss. Code Ann. § 43-21-151(1)(a) & (3) (2011); § 47-7-3(l)(f) (2011); § 97-3-21 (2006); & § 99-19-101 (2007). The Mississippi court referenced Miller's suggested factors in regard to determining whether a juvenile should be sentenced to life or life without parole, "including chronological age and its hallmark features, family and home environment, circumstances of the homicide offense, and the possibility of rehabilitation," Id. at*5 (citations and quotation marks omitted); however, those factors had previously been precluded from consideration in Hye's case by Mississippi's mandatory sentencing scheme. Again, rather than preclude these same factors, South Carolina included their consideration in Petitioners' cases. Cantrell, supra. More relevant for purposes of Appellant's request is the fact that the Mississippi court simply remanded for resentencing without importing capital sentencing procedures, or requiring any specific mandates regarding qualifications of counsel or funding for investigative or expert services. Hye, 2013 WL 2303518 at *5. Thus even in situations where Miller does apply, courts in other jurisdictions have not supported the kind of resentencing sought by Appellant here.

The other state court opinions relied upon by Petitioners likewise involve jurisdictions with mandatory sentencing schemes. See Bear Cloud v. State, 294 P.3d 36 (Wyoming 2013) (Wyo. Stat. Ann. §§ 6-2-101 & 6-10-301 (C); State v. Bennett, 820 N.W.2d 769 (Iowa Ct. App. 2012) (Iowa Code § 232.45 (West Supp. 2011) & § 902.1 (West 2003) (amended by Iowa Acts

2011 S.F. 533 § 147, eff. July 27, 2011)); State v. Williams, 108 So.3d 1169 (La. 2013). As in Hye, the courts in these jurisdictions were addressing particular state statutes Miller found unconstitutional. South Carolina is simply not in a like position.

In regard to People v. Siackasorn, 211 Cal. App. 4th 909 (Cal. 2012), the California Court of Appeal for the Third District reviewed the trial court's application of a California statute which includes a "presumption" in favor of life without parole. No such presumption exists in South Carolina, so Siackasorn would be inapplicable. In any event, the Third District Court of Appeal's opinion was superseded when the California Supreme Court granted the People's petition for review in March of this year. People v. Siackasorn, ___ P.3d ___, 2013 WL 1150621 (Cal. 2013). In Daugherty v. State, 96 So.3d 1076 (Fla. Ct. App. 2012), the Florida Court of Appeals reviewed a juvenile life-without-parole sentence still pending on direct appeal and remanded for a new sentencing hearing for the court to consider "whether any of the numerous "distinctive attributes of youth" referenced in Miller apply in this case so as to diminish the "penological justifications" for imposing a life-without-parole sentence." Id. at 1080. As argued above, South Carolina already takes this approach, and placed no statutory limits on the type or extent of mitigating evidence that could be presented on Petitioners' behalves when they were originally sentenced. In addition, unlike Daugherty, Petitioners' cases are on collateral review and not on direct appeal.

To the extent Brunson may rely in reply on legislative developments from other jurisdictions, Respondent submits any such amendments also appear to have come from the twenty-seven jurisdictions with pre-Miller statutes that made life-without-parole sentences mandatory for aggravated murderers transferred from juvenile court. See, e.g., N.C. Gen. Stat. §

14-17; 42 Pa. Cons. Stat. Ann. § 6137(a)(1) & 18 Pa. Cons. Stat. Ann. § 1102; Wyo. Stat. Ann. §§ 6-2-101 & 6-10-301 (C). While it may be appropriate or even advisable to consider amending South Carolina's juvenile sentencing laws based on Miller and the line of United States Supreme Court cases that have interpreted evolving Eighth Amendment standards, the debate over any proposed changes and the changes themselves are solely in the province of the South Carolina General Assembly, not this Court.

Indeed, Respondent submits that any effort by this Court to establish particular sentencing procedures not already contemplated by existing statutes would exceed the scope of its judicial authority and invade the province of the legislature, thereby violating the doctrine of separation of powers. S.C. Const. Art 1, § 8; See also State v. Corey D., 339 S.C. 107, 120-21, 529 S.E.2d 20, 27 (2000) (citing Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (the Court does not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly)); Henderson v. Evans, 268 S.C. 127, 130, 232 S.E.2d 331, 333 (1977) ("[c]ertainly it is not the province of this Court to perform legislative functions."); State v. Byrd, 267 S.C. 87, 91-92, 226 S.E.2d 244, 246 (1976) ("We bear in mind that when a court is called upon to determine the constitutionality of a legislative enactment, it must be careful not to usurp the legislative function."); Page v. Winter, 240 S.C. 516, 518, 126 S.E.2d 570, 571 (1962) ("[I]t is the function of the legislature, not the courts, to make, amend or repeal laws. . . . We do not have the right 'to repeal, alter, modify, or change the law of the land, even when it plainly appears that the law in force may be wrong.' " (citations omitted)); Hadden v. South Carolina Tax Comm'n, 183 S.C. 38, 190 S.E. 249, 253 (1937) ("This court is not a lawmaking body[.]"); State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the

statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute."). Thus, while Respondents appreciate the presumably noble motives and the passion behind the efforts of those advocating for Petitioners in this matter, they find it curious that similar efforts are not being made before the General Assembly, the only branch of government with authority to amend sentencing laws in South Carolina.

Miller simply reminds sentencing judges to continue looking at the facts of the offense and the circumstances of each case, including taking into account "how children are different" when deciding the "appropriate occasions for sentencing juveniles to this harshest possible penalty." Miller at 567, 132 S.Ct. at 2469. It further reminds defense attorneys to present all relevant arguments and evidence in regard to mitigation when given the opportunity to do so. Here, there was no restriction on either. A request for resentencing must be denied.

CONCLUSION

For all the foregoing reasons, the appeal should be dismissed and judgment of conviction affirmed.

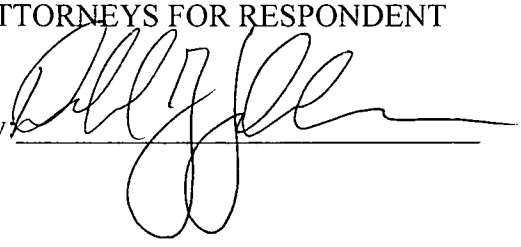
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: 

Columbia, South Carolina
August 28, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
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S.C. Supreme Court

Appeal from Florence County
William H. Seals, Jr., Circuit Court Judge
2011-GS-21-1197

Appellate Case No. 2012-211593

THE STATE,

Respondent,

v.

TAVARIO DORMELL BRUNSON,

Appellant

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the ***Initial Brief of Respondent*** in the foregoing action by depositing copies in the United States Mail, postage prepaid, to Susan B. Hackett, Appellant Defender, Division of Appellate Defense, P. O. Box 11589, Columbia, SC 29211 this 28th day of August, 2013.

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General