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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM ARTHUR KELLY,

APPELLANT

APPELLATE CASE NO. 2024-001153

INITIAL BRIEF OF APPELLANT

JOANNA K. DELANY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

STATEMENT OF ISSUES ON APPEAL

I.

Whether the court erred in resentencing Appellant to life without parole for an offense committed while he was a juvenile, where, as to the first *Aiken v. Byars* factor,[1] the court failed to take into account the hallmark factors of youth, where Dr. Knight, whom the court found credible, opined Appellant was socially and cognitively less mature than his chronological age?

II.

Whether the court erred in resentencing Appellant to life without parole for an offense committed while he was a juvenile, where, as to the second *Aiken v. Byars* factor, the court found the circumstances of the crime were unrelated to Appellant's horrific family and home environment, since this finding was wholly without support in the record?

III.

Whether the court erred in resentencing Appellant to life without parole for an offense committed while he was a juvenile, where, as to the third *Aiken v. Byars* factor, the court failed to account for how the circumstances of the offense were affected by Appellant's familial pressures, where Dr. Knight, whom the court found credible, opined Appellant's desperation to

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[1] *Aiken v. Byars*, 410 S.C. 534, 544, 765 S.E.2d 572, 577 (2014), held that when a juvenile is facing the possibility of a life without parole sentence, the sentencer must consider the following factors: (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. *See also Miller v. Alabama*, 567 U.S. 460, 477-78 (2012) (discussing same factors).

get out of the abusive home motivated him to commit the robbery and his repressed anger from years of abuse triggered the rage that came out during the homicide?

IV.

Whether the court erred in resentencing Appellant to life without parole for an offense committed while he was a juvenile, where, as to the fourth *Aiken v. Byars* factor, the court failed to take into account how youth-related incompetencies affected Appellant's capacity to assist his attorneys, where Dr. Knight, whom the court found credible, opined these incompetencies precluded Appellant from giving his attorneys a coherent and consistent account of the offense they could present to the jury?

V.

Whether the court erred in resentencing Appellant to life without parole for an offense committed while he was a juvenile, where, as to the fifth *Aiken v. Byars* factor, the court failed to take into account evidence regarding rehabilitation, including evidence that Appellant had committed no violent acts in his twenty-five years at SCDC?

STATEMENT OF THE CASE

During the November term of 1996, a Lexington County Grand Jury indicted William Kelly, Appellant, for murder, kidnapping, armed robbery, and possession of a weapon during the commission of a violent crime. R. *(indictments). Appellant was seventeen years old when the crimes were committed. Tr. 6, ll. 3-4. Appellant was tried before the Honorable Gary E. Clary and a jury, from September 14 – 19, 1998. Solicitor Donald Myers, along with Francis Humphries, Jr., and Gerald Chase, prosecuted the case. Elizabeth Fullwood, Hervery Young, and Wesley Kirkland, Jr., represented Appellant. R. *(State's Exhibit # 300 – 301, 1). Appellant was convicted as indicted, and he was sentenced to death for murder, thirty years for armed robbery, and five years for possession of a weapon during the commission of a violent crime, to be served consecutively. No sentence was imposed for kidnapping since Appellant was convicted of murder. R *(State's Exhibit # 300 – 301, 2094, l. 18 – 2097, l. 10).

Appellant's death sentence was reversed by the United States Supreme Court based on a jury instruction error. *Kelly v. South Carolina*, 534 U.S. 246, 258 (2002). Thereafter, the United States Supreme Court held the Eighth and Fourteenth Amendments prohibited the imposition of the death penalty on juvenile offenders. *Roper v. Simmons*, 543 U.S. 551, 575 (2005). On July 14, 2006, the Honorable William P. Keesley resentenced Appellant to life without parole for murder. R. *(2006 sentence sheet); R. *(State's Exhibit #302, 1; 13, ll. 14-19).

On July 11, 2016, Appellant moved for resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). R. *(motion for resentencing). A resentencing hearing pursuant to *Aiken v. Byars* was held before the Honorable Brian M. Gibbons, from May 20 – 22, 2024. Sarah Mauldin represented Appellant. Rick Hubbard and Suzanne Mayes appeared on behalf of the State. Tr. 1. At the conclusion of the hearing, the court took the matter under advisement.

Tr. 520, l. 2 – 523, l. 1. Both parties submitted sentencing memoranda. R. *(sentencing memorandum; state's response to defendant's sentencing memorandum). On or about July 1, 2024, the court issued an order resentencing Appellant to life without parole. R. *(resentencing order).

This appeal follows.

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).

ARGUMENT

I.

The court erred in resentencing Appellant to life without parole for an offense committed while he was a juvenile, where, as to the first *Aiken v. Byars* factor,[2] the court failed to take into account the hallmark factors of youth, where Dr. Knight, whom the court found credible, opined Appellant was socially and cognitively less mature than his chronological age.

A. Appellant committed a brutal homicide when he was a juvenile.

On January 5, 1996, seventeen-year-old Appellant repeatedly stabbed twenty-five-year-old Shirley Shealy (Decedent), killing her. Decedent was married and six months pregnant, and the baby died with her. The killing occurred during Appellant's after-hours robbery of the KFC restaurant in Batesburg-Leesville. Decedent was a manager at the restaurant, and she had keys to the building and to the safe. Appellant was her former employee. Decedent's hands were duct-taped behind her back. The crime scene was very bloody because Decedent was stabbed thirty-one times. There was money scattered all over, but the safe, which was locked, was empty. Tr. 6, l. 3 – 8, l. 17; Tr. 176, ll. 13-16; Tr. 14, l. 23 – 15, l. 21; Tr. 58, l. 17 – 59, l. 21; Tr. 106, l. 10 – 107, l. 19; Tr. 191, l. 15 – 192, l. 15.

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[2] *Aiken v. Byars*, 410 S.C. 534, 544, 765 S.E.2d 572, 577 (2014), held that when a juvenile is facing the possibility of a life without parole sentence, the sentencer must consider the following factors: (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. *See also Miller v. Alabama*, 567 U.S. 460, 477-78 (2012) (discussing same factors).

After the decedent was found, Appellant's mother, at the request of the police, filed a missing person's report, in which she referred to Decedent as Appellant's "girlfriend." Defendant's Exhibit #6; Tr. 57, l. 10 – 58, l. 12. Appellant was apprehended at his sister's home in Massachusetts. Tr. 63, l. 24 – 67, l. 10. He was interrogated, waived his *Miranda* rights,[3] and provided a statement to the police in which he admitted stabbing Decedent and stealing money from KFC. Tr. 63, l. 14 – 85, l. 13. Appellant told law enforcement in Massachusetts that Decedent had "fondled" him and "come onto" him sexually while they worked together. He said the night of the crime, he went by KFC and found Decedent still inside. He denied they had a sexual relationship,[4] but said Decedent started "coming onto" him so he duct-taped her hands, became enraged, and called her degrading names before cutting her throat and stabbing her. Then he stole the money to try to get away. Tr. 77, l. 18 – 84, l. 3. Forensic evidence connected Appellant to the crime. For instance, Appellant had money and clothes with Decedent's blood on it. Tr. 60, l. 3 – 61, l. 18; Tr. 156, l. 15 – 157, l. 16. Footwear impressions from the scene were also identified as Appellant's. Tr. 120, ll. 7-18.

There was evidence presented by the State to support its theory that Appellant hid in the back of Decedent's car and, after she was on her way home, forced her to go back to the store where he robbed the store and killed her. Tr. 16, l. 21 – 18, l. 4; Tr. 22, l. 21 – 24, l. 1; Tr. 49, l. 21 – 51, l. 19. After Appellant was sentenced to death, he confessed again to an SCDC employee during intake. In that statement, Appellant said he hid in the back of Decedent's car,

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3 *Miranda v. Arizona*, 384 U.S. 436 (1966).

4 During the resentencing hearing, the parties contested whether Appellant and Decedent were in a sexual relationship. Tr. 367, l. 2 – 369, l. 3; Tr. 376, ll. 6-10; Tr. 433, l. 16 – 437, l. 9; Tr. 478, l. 8 – 483, l. 17. The resentencing judge concluded that they were, finding Appellant was "engaged in adult sexual conduct." R. *(resentencing order at 3).

duct-taped her hands while he robbed the store, and killed her because he thought she would turn him in. State's Exhibit #157.

B. Credible expert testimony established that that Appellant was less mature than his chronological age.

At the resentencing hearing, Appellant presented testimony from Dr. Susan Knight. Dr. Knight was qualified as an expert in forensic psychology without objection. Tr. 382, ll. 20-25. Dr. Knight interviewed Appellant six times over the course of six years, and she undertook an exhaustive review of Appellant's life as part of an evaluation for purposes of this hearing. She interviewed Appellant's family members, relatives, former attorneys, and others. She reviewed his discovery and other legal documents. She reviewed the investigative memos Appellant's defense team created to prepare for his death penalty trial. She reviewed medical records, school records, and other records related to Appellant and his family, and she reviewed Appellant's SCDC records, among other things. Tr. 384, ll. 21-24; Tr. 386, l. 6 – 388, l. 24; R. *(Defendant's Exhibit #2 at 2 – 6). In addition to her testimony, Dr. Knight's evaluation report was admitted as Defendant's Exhibit #2. R. *(Defendant's Exhibit #2).

Dr. Knight testified about her findings and how they related to the first *Aiken v. Byars* factor, the chronological age of the offender and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence. Appellant was socially awkward, withdrawn, quiet, a little slower than other children, and well-behaved in school. He was bullied at school. R. *(Defendant's Exhibit #2 at 10); Tr. 394, l. 13 – 397, l. 1. Dr. Knight testified that Appellant's age placed him in the development stage of mid-adolescence. She stated that the hallmark features of adolescence include "increased impulsivity, increased risk taking, increased recklessness, not a very sophisticated ability to consider risk and

consequence of decisions." Tr. 389, ll. 14-21. She stated adolescents have "poor future orientation. They lack a strong ability to project themselves to understand how their actions today are going to affect them. They also have more difficulty . . . considering alternative actions." Tr. 390, ll. 1-7. She testified the "cognitive control center" of the brain is underdeveloped. Tr. 390, l. 23 – 391, l. 11. As to how these hallmark features affected Appellant, she noted his own words that he "could not project himself into the future" at the time of the crime. She discussed the extensive information that she received from other sources on this topic, which bore out Appellant's self-assessment in that regard. She concluded that Appellant was "slower socially and cognitively than his peers, so functioning lower than his chronological age." Tr. 392, l. 14 – 393, l. 16. She discussed that adolescence is a time of "identity exploration." Tr. 392, ll. 2-13. Her report noted that Appellant's "adolescent identity formation was heavily impacted by his father's abuse, such that he suffered poor self-image, low self-esteem, and struggled to form a 'sense of self,' separate from the abuse dynamics." R. *(Defendant's Exhibit #2 at 29). Dr. Knight concluded the "most prominent developmental factor during Mr. Kelly's childhood was severe physical and emotional abuse from his father." R. *(Defendant's Exhibit #2 at 15). The abuse will be discussed in Issues II and III.

The court's resentencing order stated the court found Dr. Knight's testimony was credible: "the Court finds the Defendant's expert to be credible[.]" R. *(resentencing order at 3).

C. The court did not account for the mitigating evidence regarding this factor, but it held Appellant's age against him.

The resentencing order stated the court's findings with respect to each *Aiken v. Byars* factor. As to the first factor, the chronological age of the offender and the hallmark features of

youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence, the order stated the following.

> While the Court finds the Defendant's expert to be credible and offered great insight as to the childhood of the Defendant, the Court weighs this evidence against what the State presented. The **Defendant's age was only 5 months shy of the age of 18 at the time of this horrific crime.** Further, the Court notes the Defendant showed many characteristics of a mature adult including but not limited to the fact that the Defendant: 1) had multiple jobs, 2) obtained a driver's license and had his own car, and 3) was engaged in adult sexual conduct. As to impetuosity, there was overwhelming evidence to establish premeditation and planning of the crimes committed (the gloves, the gas canister, the kidnapping, the duct tape, the chair, the fake alibi).

R. *(resentencing order at 3) (emphasis added). The resentencing order three times cited to Appellant's age as an aggravating circumstance rather than a mitigating circumstance: "At the time the crimes were committed on January 5th, 1996, the Defendant, was 17 years and 7 months of age"; "The Defendant's age was only 5 months shy of the age of 18"; "Mr. Kelly was only 5 months shy of being an adult." R. *(resentencing order at 1; 3; 5).

The order concluded that the court was sentencing Appellant to life without parole: "As Mr. Kelly stated to the court at the conclusion of the hearing, 'By all rights you should give me a life sentence, to be honest with you. Because it is a life for a life... not one, but two.'" R. *(resentencing order at 6).

D. The court was required to take into account how the hallmark features of youth counsel against life without parole.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). "The provision

is applicable to the States through the Fourteenth Amendment." *Id.* "The United States Supreme Court sequentially has interpreted the protections of the Eighth Amendment to hold that juveniles are entitled to different treatment in sentencing when the death penalty or a life-without-parole sentence is imposed." *Jones v. State*, 440 S.C. 14, 26, 889 S.E.2d 590, 597 (2023). *See Roper v. Simmons*, 543 U.S. at 575 (Eighth Amendment prohibits capital punishment for murder where offenders were under eighteen at time of crime); *Graham v. Florida*, 560 U.S. 48, 74 (2010) (Eighth Amendment prohibits life without parole for offenders who were under eighteen and committed nonhomicide offenses); *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (mandatory life without parole for those under age eighteen at time of homicide violates the Eighth Amendment).

The constitutional import of youth in sentencing cannot be overstated. It is the "rare juvenile offender whose crime reflects irreparable corruption." *Roper v. Simmons*, 543 U.S. at 57. "[B]ecause juveniles have lessened culpability they are less deserving of the most severe punishments." *Graham v. Florida*, 560 U.S. at 68. "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Id.* "[A]ppropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller v. Alabama*, 567 U.S. at 479. "Although 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.*, 567 U.S. at 480.

"[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.*, 567 U.S. at 489. "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." *Montgomery v. Louisiana*, 577 U.S. 190, 210 (2016) (quoting *Miller*, 567 U.S. at 465).

"We have followed United States Supreme Court precedent in interpreting the Eighth Amendment as applied to South Carolina law. *See Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014) (holding inmates sentenced to life without parole as juveniles before *Miller* were entitled to resentencing because their sentences violated the Eighth Amendment)." *Jones v. State*, 440 S.C. at 27, 889 S.E.2d at 597. *Aiken* requires juveniles receive an individualized hearing where the mitigating hallmark features of youth are fully explored before they may be sentenced to life without parole. *State v. Smart*, 439 S.C. 641, 648, 889 S.E.2d 573, 577 (2023).

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

Aiken v. Byars, 410 S.C. at 544, 765 S.E.2d at 577 (cleaned up). "[T]he type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings, in addition to the factors illustrated above. *Id.*, 410 S.C. at 544-45. "[W]e are mindful that juveniles are entitled to careful sentencing under the Eighth Amendment, and we direct circuit court judges to consider the mitigating factors of youth articulated in *Aiken v. Byars*." *Jones v. State*, 440 S.C. at 25, 889 S.E.2d at 596.

A "textbook example of what a proper *Aiken* hearing affords" is one in which the resentencing court: listened to testimony from an expert psychologist who examined the

defendant and reviewed his records; received testimony from a number of witnesses regarding the circumstances of the crime and the defendant's background; weighed the evidence; considered counsel's arguments; and analyzed the *Aiken* factors before imposing a sentence. *Jones v. State*, 440 S.C. at 32, 889 S.E.2d at 600 (Hearn, Acting J., concurring). *Cf. State v. Mack*, 441 S.C. 526, 545, 894 S.E.2d 820, 830 (Ct. App. 2023) ("the resentencing court's order does not reflect a careful and thorough consideration of the *Aiken* factors").

As to the first *Miller v. Alabama* factor (i.e. the first *Aiken v. Byars* factor), 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.* "[C]urrent science demonstrates that the human brain continues to develop into the early twenties." *State v. Seats*, 865 N.W.2d 545, 557 (Iowa 2015). "In light of the science, the fact that a defendant is nearing the age of eighteen does not undermine the teachings of *Miller*[.]" *Id.* "[T]he fact that an offender is seventeen rather than a younger age is relevant to the inquiry." *State v. Mack*, 441 S.C. at 541, 894 S.E.2d at 828. "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." *Id.* Where the sentencing court only considers the defendant's "age as a chronological fact," it errs by "failing to adequately consider whether [the defendant's] crimes were affected by his chronological age and the hallmark features of youth." *Id.*, 441 S.C. at 543, 894 S.E.2d at 829.

E. The court erred by misapplying the first *Aiken v. Byars* factor.

The court found Dr. Knight's testimony to be credible, but it ignored her testimony as it related to this factor. The order failed to account for Dr. Knight's testimony that Appellant's age placed him in the development stage of mid-adolescence, the hallmark features of which include increased risk taking, increased recklessness, and a reduced ability to consider risks and consequences. The order failed to account for her testimony that Appellant had poor future orientation and was cognitively and socially functioning lower than his chronological age. It failed to account for the fact that Appellant's maturity was stunted by his continuous physical abuse. The court's findings in its order simply mirror the state's arguments in its sentencing memorandum. *See* R. *(state's response to defendant's sentencing memorandum at 1 – 2). This does not demonstrate a thoughtful consideration of the law and the facts. The court did not adequately consider whether the crime was affected by Appellant's age and the hallmark features of youth. *Mack*, 441 S.C. at 543, 894 S.E.2d at 829; *Miller*, 567 U.S. at 480.

The order also shows the court considered Appellant's age to be aggravating rather than mitigating, since the court repeatedly emphasized that Appellant was seventeen, elevating this fact as though it justified a life sentence. In its findings on this factor, the court's order stated: "The Defendant's age was only 5 months shy of the age of 18 at the time of this horrific crime." The fact that a defendant is nearing the age of eighteen does not undermine the teachings of *Miller*. *Seats*, 865 N.W.2d at 557. Because Appellant was under eighteen, he was entitled to careful consideration of this factor. *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577; *Jones*, 440 S.C. at 25, 889 S.E.2d at 596. By considering Appellant's age only as a chronological fact justifying a life sentence, the court erred. *Mack*, 441 S.C. at 543, 894 S.E.2d at 829.

The court's ultimate conclusion that it was sentencing Appellant to a "life for a life" illustrates a global misunderstanding of *Aiken v. Byars*. A "life for a life" is not the correct framework for juvenile sentencing. *Aiken* requires a careful consideration of the chronological age of the offender and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence. The court erred when it failed to give Appellant's youth the constitutional significance it was due. These errors were an abuse of discretion. *E.g.*, *State v. Finley*, 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019) (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).

II.

The court erred in resentencing Appellant to life without parole for an offense committed while he was a juvenile, where, as to the second *Aiken v. Byars* factor, the court found the circumstances of the crime were unrelated to Appellant's horrific family and home environment, since this finding was wholly without support in the record.

A. Credible expert testimony established that Appellant was horrifically and continually abused, and his family and home life contributed to the offense.

Dr. Knight's testimony and report confirmed that Appellant's father viciously and relentlessly abused his wife and children, including Appellant. Tr. 398, l. 1 – 402, l. 5. Appellant's father also continually molested one of Appellant's sisters, but Appellant did not know this at the time. Tr. 327, l. 19 – 328, l. 15; Tr. 399, ll. 23-25. The family's home was very rural, and Appellant's father built it "from scratch." They did not have running water or electricity in the early years. R. *(Defendant's Exhibit #2 at 7); Tr. 394, ll. 6-10. An extended family member described the living conditions in the home as "disgusting," with "animals living in the house, garbage/trash in the yard, the living conditions were bad." R. *(Defendant's Exhibit #2 at 23).

An in-law recalled the house was "out in the middle of the woods, you could scream and scream and get no help." R. *(Defendant's Exhibit #2 at 24). According to Dr. Knight, the isolation of the home served to perpetuate the abuse. Tr. 403, l. 19 – 404, l. 1; R. *(Defense Exhibit #2 at 32). Dr. Knight reported that repetitive and prolonged abuse impacts children, and impacted Appellant, by increasing the risk of aggression and social isolation. R. *(Defendant's Exhibit #2 at 33). She concluded that the abuse present in Appellant's family and home environment "left him ineffectual in extricating himself from his abusive circumstance." R.

*(Defendant's Exhibit #2 at 33). Dr. Knight testified that the "most prominent dynamic" in the home was the abuse. Tr. 398, ll. 1-4.

Dr. Knight testified that Appellant's mother was a "battered woman." In addition to hitting, kicking, and punching her, Appellant's father degraded her. He made Appellant's mother tell the children "why she didn't have sex with him. He would treat her like the family dog, make her kneel on the floor, pet her in front of the children[.]" Tr. 399, ll. 2-12. Appellant's father once threw his mother out of a moving car during an argument. R. *(Defendant's Exhibit #2 at 23). Appellant's mother would "get other women to have sex" with Appellant's father in hopes that it would keep him from molesting Appellant's sister, but it did not work. R. *(Defendant's Exhibit #2 at 20).

A former in-law of the family described in his own words that Appellant's father treated Appellant and his brother "like dogs." R. *(Defense Exhibit #2 at 24). Dr. Knight testified that Appellant's father beat Appellant and the other children with a belt or with objects, leaving bruises, cuts, and welts on him. Appellant's father called him "very cruel" names. He worked second shift, and he would violently wake Appellant up to beat him when he got home if "something wasn't done correctly or to his satisfaction." Appellant learned to stay awake because it was so "jarring" to be woken that way. Tr. 398, l. 6 – 399, l. 1. The last beating occurred when Appellant was seventeen, two weeks before the offense, with a shovel. Tr. 407, ll. 19-23; R. *(Defendant's Exhibit #2 at 30). "During the last beating, 'dad hit me with a shovel, it was a pivotal point in my life, the bigger I got, the bigger the utensil.'" R. *(Defendant's Exhibit #2 at 16).

Appellant remembered being forced to stand in an ant hill, being made to shoot the family's puppies when there were too many litters, being forced to cut the grass with scissors,

being threatened with a gun, and being beaten and whipped with objects. R. *(Defendant's Exhibit #2 at 30). Dr. Knight's findings regarding the abuse were not based only on her interviews with Appellant, but were also based on information and statements from his brother, sister, half-sister, brother-in-law, and many extended family members. Family members called Appellant's father "psycho-angry," "explosive," "full of venom and anger," a "very mean man," and a "physical abuser." R. *(Defendant's Exhibit #2 at 31; 46).

Dr. Knight noted she relied on sixteen different sources who described the abuse, which "increases the reliability of that information." Tr. 400, ll. 9-21. Dr. Knight's findings regarding the abuse were buttressed by the resentencing hearing testimony of Appellant's older brother and his best friend. Appellant's older brother Michael testified that his father beat the children, including Appellant, and enforced his rules with his belt, his hands, and his feet. Michael said the abuse never stopped. Tr. 320, ll. 20-21; Tr. 322, l. 7 – 324, l. 18. It was "[a]t least once a week." Tr. 329, ll. 17-20. Michael, who was in his forties, was a military veteran. He cried when testifying about the abuse. His body is still scarred from it. Tr. 321, l. 2-5; Tr. 326, l. 22 – 327, l. 14. Michael entered the Navy and eventually moved to Washington state, as far away from home as he could. R. *(Defendant's Exhibit #2 at 20).

Michael recalled instances of horrific abuse, such as when their father forced Appellant to "stand in a fire ant bed" for what "seemed like forever." Tr. 324, l. 19 – 325, l. 3. Michael confirmed their father would wake them up and pull them out of bed to beat them. Tr. 325, l. 23 – 326, l. 7. He remembered their father forcing Appellant to kill a kitten with a malformed leg. Tr. 327, ll. 9-18. He remembered their father slapping and punching their mother. Tr. 328, ll. 20-24. Michael said their mother was "trapped," and they never reported the abuse because their father "would hurt us if we did." Tr. 330, ll. 7-12. Michael said his own abuse did not end until

the day he joined the Navy, on June 7, 1995. Tr. 330, ll. 13-15. While this took him out of the home, it left Appellant there with his with his abusive father and battered mother. Tr. 335, ll. 17-23.

Michael testified he did not tell Appellant's lawyers for the death penalty case about the abuse because their mother was still living at home with their father, and their father told the family not to talk about it. This was consistent with Michael's statement to Dr. Knight that his father "intimidated" him into not saying anything. Tr. 337, l. 21 – 338, l. 13; R. *(Defense Exhibit #2 at 20). It was consistent with other information Dr. Knight found in her work on the case, such as her conversation with a former mitigation investigator from the death penalty case who recalled that although Appellant told her about the abuse, "dad said that was a lie. And dad controlled mom and mom would not say anything." R. *(Defendant's Exhibit #2 at 17). Dr. Knight found multiple memos from the death penalty defense team that stated "Mr. Kelly's father was adamant, and even threatening, that the family not speak with the defense team for fear of exposing the family's negative side." R. *(Defendant's Exhibit #2 at 18).

Jessie Johnson also testified at the resentencing hearing. Jessie had cerebral palsy and became friends with Appellant in elementary school, when Appellant would push his wheelchair around and carry his books. Tr. 346, l. 23 – 349, l. 6. He was Appellant's only friend. R. *(Defendant's Exhibit #2 at 11). Jessie confirmed that Appellant's father was a "mean man" and a "tyrant." Jessie recalled a time when Appellant's father "jacked him up" and "knock[ed] him around," but Appellant just "took it like always." Tr. 357, l. 2 – 359, l. 20. Jessie remembered Appellant's father's treatment of Appellant's mother. "He was mean to her . . . He would call her bitch, call her names, push her around." Tr. 360, ll. 16-22. Jessie testified that once Appellant began working, he hoped he could save money to move out, but Appellant's father

made Appellant pay bills for the family home with the money. Tr. 366, ll. 9-20. Jessie remembered Appellant talking about wanting to rob a store and leave town. Tr. 380, l. 18 – 381, l. 13.

The abuse was generational abuse. Appellant's father was severely abused as a child; additionally, he was later diagnosed with post-traumatic stress disorder (PTSD) as a result of his military service in Vietnam. Tr. 402, l. 6 – 403, l. 16.

Dr. Knight concluded that Appellant's family and home environment was "significant for chronic and severe abuse, which adversely impacted his social development. The abuse also cultivated increasing anger, for which he had no outlet." R. *(Defendant's Exhibit #2 at 34). "Simultaneously, he felt increasingly trapped in his abusive circumstance. These factors converged at the time of the homicide offense[.]" R. *(Defendant's Exhibit #2 at 34).

B. Although the court acknowledged the abuse, it concluded that the "crime committed was unrelated to the defendant's upbringing and home life." There was no evidentiary support for this finding.

As to the second *Aiken v. Byars* factor, the family and home environment that surrounded the offender, the order stated the following.

> According to the defense, the Defendant grew up in a home with his mother, father, sister, and brother. Testimony confirmed that the Defendant's father was angry, abusive, and impulsive. Testimony further suggested that the Defendant's father abused the Defendant as well as the Defendant's mother and brother. **This abuse caused the Defendant to develop a sense of anger towards his father, therefore linking this anger as a large factor in the commission of the crimes.** While the court has considered this mitigating factor, it does not weigh heavily in the courts sentence. **The crime committed was unrelated to the Defendant's upbringing and home life.** The victim was killed as part of a planned robbery of the KFC. The victim was the focus of the Defendant's own malice towards her. The Defendant's father

> has no relation to the victim or the robbery of the KFC. The victim [sic] never assaulted his father or anyone else other than the victim.

R. *(resentencing order at 3 – 4) (emphasis added).

C. Evidence of extremely brutal child abuse is a mitigating circumstance.

A juvenile's family and home environment must be considered when deciding whether to sentence the offender to life without parole. *Miller v. Alabama*, 567 U.S. 460, 478-79 (2012); *Aiken v. Byars*, 410 S.C. 534, 544, 765 S.E.2d 572, 577 (2014). The sentencer must be able to take into account "the family and home environment that surrounds [the juvenile offender]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional." *Miller*, 567 U.S. at 477. "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

"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[.]" *Miller*, 567 U.S. at 478-79. "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." *State v. Mack*, 441 S.C. 526, 543, 894 S.E.2d 820, 829 (Ct. App. 2023) (citing *State v. Roby*, 897 N.W.2d 127, 146 (Iowa 2015)).

> 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.

Mack, 441 S.C. at 543, 894 S.E.2d at 829 (quoting *Roby*, 897 N.W.2d at 146) (emphasis added).

"Applying the *Aiken* factors involves more than repeating the words; it requires applying the substantive content of those factors." *Mack*, 441 S.C. at 544, 894 S.E.2d at 830.

D. The court erred by misapplying the second *Aiken v. Byars* factor.

Case law discusses "physical abuse" and "extremely brutal or dysfunctional home environments" as examples of mitigating circumstances. *Roby*, 897 N.W.2d at 146; *Miller*, 567 U.S. at 478-79. Appellant established horrific and continual abuse, but the court did not import those facts into the framework of the law. The court's findings on this factor do not reflect a meaningful consideration of the evidence of Appellant's family and home life.

The only witness that addressed whether the crime was related to Appellant's home and family life was Dr. Knight, who concluded the two things were connected. Tr. 393, l. 17 – 406, l. 14; R. *(Defendant's Exhibit #2 at 30 – 34). This was not a case of dueling experts. Dr. Knight gave the only testimony on this issue. As seen, the court found Dr. Knight credible. The order acknowledged Dr. Knight found the abuse was linked to the crime. It acknowledged Appellant's anger caused by the abuse "was a large factor in the commission of the crimes." However, it gave the evidence no weight by finding it was unrelated to the offense, and it instead focused on the circumstances of the offense. This was error. The court again relied on the State's sentencing memorandum in writing its order. The order adopts the State's arguments from its memorandum on this factor as if they were the relevant facts. *See* R. *(state's response to defendant's sentencing memorandum at 2). The solicitor and the court both focused on the circumstances of the offense in analyzing this factor. The circumstances of the offense are the next factor. This factor is about the defendant's home and family environment. The circumstances of the homicide are not a stand-in for each of the five *Aiken v. Byars* factors.

The court's conclusion that the "abuse caused the Defendant to develop a sense of anger towards his father, therefore linking this anger as a large factor in the commission of the crimes" cannot be squared with its conclusion that the "crime committed was unrelated to the Defendant's upbringing and home life." The conclusion that the crime was unrelated to Appellant's horrific and continual lifelong abuse was directly contradicted by Dr. Knight's testimony. The court found Dr. Knight credible. Dr. Knight was the only expert who offered testimony on this factor, and expert testimony is the best way to assess this factor. *See Mack*, 441 S.C. at 543, 894 S.E.2d at 829; *Roby*, 897 N.W.2d at 146.

There was no evidence to support the conclusion Appellant's horrific abuse by his father did not affect the crime. This was an abuse of discretion. *E.g.*, *State v. Finley*, 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019) (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).

III.

The court erred in resentencing Appellant to life without parole for an offense committed while he was a juvenile, where, as to the third *Aiken v. Byars* factor, the court failed to account for how the circumstances of the offense were affected by Appellant's familial pressures, where Dr. Knight, whom the court found credible, opined Appellant's desperation to get out of the abusive home motivated him to commit the robbery and his repressed anger from years of abuse triggered the rage that came out during the homicide.

A. Credible expert testimony established that familial pressures contributed to the circumstances of the offense.

As it related to the third *Aiken v. Byars* factor, the circumstances of the homicide offense, including any contributary familial pressures, Dr. Knight concluded the abuse contributed to the offense. "I found significant, in my opinion, contributory familial pressures." Dr. Knight opined that Appellant's helpless and increasing anger at his father "was just building for many years. He was becoming desperate to leave his home. His brother just left for the military months ago. This leaves him as the only child in the home. He had been—the abuse was not stopping." Tr. 406, l. 15 – 407, l. 17. "I think his desperation was increasing to get out of those circumstances. He wasn't really able to think through a plan that would really work very well for him . . . he planned an armed robbery to get money to leave his abusive home, and of course the homicide occurred during that robbery, probably due to some sort—something that went wrong and triggered Mr. Kelly's anger and rage that came out during the homicide." Tr. 407, l. 24 – 408, l. 8. Dr. Knight noted that Appellant had never before and never after been violent. Tr. 410, l. 20 – 411, l. 6.

Dr. Knight concluded that Appellant's "entire development was shaped by his father's physical and emotional abuse, accompanied by constant fear and intimidation. As the abuse progressed into adolescence, Mr. Kelly's anger from the abuse also progressed . . . however, he had no outlet for his anger." "His suppression of anger led to, 'anger rumination' which was also present, and contributory." Dr. Knight concluded the circumstances of Appellant's home life and the circumstances of the robbery "resulted in an eruption of rage, representing years of suppressed anger." R. *(Defendant's Exhibit #2 at 45). She found that the violent crime was "related to dynamics isolated to adolescence." R. *(Defendant's Exhibit #2 at 46). She concluded that "but for" "familial pressures," the offense "would likely not have occurred." R. *(Defendant's Exhibit #2 at 47).

She summarized that Appellant's family and home environment "consisted of severe physical and emotional abuse, and domestic violence, perpetrated by his father, who exerted 'coercive control.'" The circumstances of the homicide "were an extension of these factors due to repressed anger and desperation; in addition to adolescent traits of underestimating risk and consequence, and difficulty thinking beyond immediate situational factors." R. *(Defendant's Exhibit #2 at 1). She noted evidence that "anger rumination increases aggressive behavior not only towards the 'provocateur' [abuser] but 'even towards innocent others.'" R. *(Defense Exhibit #2 at 34).

B. After giving no weight to evidence of inescapable abuse by Appellant's father when it evaluated the second *Aiken v. Byars* factor (family and home environment), the court gave no weight to evidence the abuse and its resulting desperation culminated in Appellant's commission of the crime when it evaluated the third *Aiken v. Byars* factor (the effect of familial pressures on the circumstances of the offense).

As to the third *Aiken v. Byars* factor, 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, the order stated the following.

> On January 5, 1996, the victim, Shirley Shealy, was working as manager at the Kentucky Fried Chicken (KFC) restaurant in Lexington County. As the manager, Shealy was the only employee to know the combinations to the safe located within the KFC. Shealy also knew the Defendant as they used to work together. The victim, age 25, was six months pregnant at the time of the of crimes. The Defendant waited for hours in his car outside the restaurant until all employees had left, and hid his car at the auto parts store behind the KFC before hiding in the back of the victim's car with the murder weapon. Upon entering the KFC, Defendant tied Shealy's hands behind her back with duct tape, cut her throat, and proceeded to stab her approximately 31 times before robbing the restaurant. The Defendant used latex gloves during the commission of the crimes in effort to not leave any fingerprints behind. After the murder the Defendant fled to his Sister's residence in Massachusetts in attempt to escape.
>
> There [sic] state presented overwhelming evidence to show premeditation and planning as indicated above. The evidence further established that the Defendant intended to flee the state, which of course he did. The Court also focuses on the nature of the crime. The crime scene was one of the most gruesome this Court has ever seen. The Defendant was the sole offender of an extremely aggravated crime of violence, and Shirley Shealy was the sole focus of the Defendant's malice, rage, premeditation, and planning. The victim's throat was cut, and she was stabbed approximately 31 times to her back and torso. The victim's hands were tied behind her back, and there were no signs of any defensive wounds.

R. *(resentencing order at 4).

C. Appellant was entitled to meaningful consideration of the abuse evidence at some point. If the court did not misapply the second *Aiken v. Byars* factor, then it misapplied the third, or both.

"*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." *Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d 572, 577 (2014). The facts of this case are brutal. However, it does not follow that Appellant was not entitled to meaningful consideration of mitigating evidence he provided on this factor. *See Miller*, 567 U.S. 460, 468 (2012) (juvenile was entitled to resentencing where juvenile stole his neighbor's wallet, struck the neighbor repeatedly with a baseball bat, placed a sheet over his neighbor's head and announced: "I am God, I've come to take your life," before striking him again, and returned to set fire to the neighbor's home, leaving his neighbor to die from his injuries and smoke inhalation).

Juveniles' "vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Roper v. Simmons*, 543 U.S. 551, 570 (2005). This is why a sentencer must consider both: (2) the *family . . . environment* that surrounded the offender; and (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how *familial . . . pressures* may have affected him. *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577. Both of these factors are implicated by the severe and pervasive physical and emotional abuse suffered by Appellant at the hands of his father.

The court's findings on the third *Aiken* factor did not account at all for Dr. Knight's testimony regarding the effect of familial pressures on Appellant's offense. As argued in Issue II, above, the court's findings on the second *Aiken* factor likewise reflect the court gave no meaningful consideration to credible expert testimony on the relentless abuse of Appellant by his father. Dr. Knight, whom the court found credible, opined that Appellant was desperate to leave

home after years of abuse, his anger was increasing, and he was now the only child left in the home. She testified he embarked on an ill-conceived plan commit a robbery to get money to leave his abusive home, and something occurred during the robbery that "triggered Mr. Kelly's anger and rage that came out during the homicide." Tr. 407, l. 24 – 408, l. 8. Dr. Knight concluded the circumstances of Appellant's home life and the circumstances of the robbery "resulted in an eruption of rage, representing years of suppressed anger," and "but for" "familial pressures," the offense "would likely not have occurred." R. *(Defendant's Exhibit #2 at 45; 47).

The court based its findings on this factor solely on the facts of the offense, which are unchanging. This was an error of law. *Aiken* requires the sentencer to consider "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.*" *Aiken v. Byars*, 410 S.C. at 544, 765 S.E.2d at 577 (emphasis added). *See also Jones v. State*, 440 S.C. 14, 19, 889 S.E.2d 590, 593 (2023) ("circuit court judges must consider the mitigating factors of youth as identified in *Aiken v. Byars* when sentencing"). *Cf. Buchanan v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 442 S.C. 393, 406, 899 S.E.2d 600, 607 (Ct. App. 2023) (discussing whether a juvenile sentenced to life with the possibility of parole can receive meaningful parole review where the parole board bases its decisions largely on facts and circumstances related to the offense which do not change).

Appellant was entitled to "meaningful consideration" of this evidence. *E.g.*, *State v. Mack*, 441 S.C. 526, 543–44, 894 S.E.2d 820, 829 (Ct. App. 2023) ("We are concerned only with whether the resentencing court's order shows a meaningful consideration of the evidence about Mack's home life."). The court erred when it failed to give the abuse evidence meaningful

consideration when applying the *Aiken* factors. These errors were an abuse of discretion. *E.g.*, *State v. Finley*, 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019) (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).

IV.

The court erred in resentencing Appellant to life without parole for an offense committed while he was a juvenile, where, as to the fourth *Aiken v. Byars* factor, the court failed to take into account how youth-related incompetencies affected his capacity to assist his attorneys, where Dr. Knight, whom the court found credible, opined Appellant's incompetencies precluded him from giving his attorneys a coherent and consistent account of the offense they could present to the jury.

A. Credible expert testimony established that Appellant's youth-related incompetencies interfered with his ability to assist his attorneys.

Dr. Knight testified she concluded that youth-related incompetencies likely resulted in Appellant having "difficulty working with his attorneys and problems with his statements." Tr. 411, l. 22 – 412, l. 10.

> Speaking with three trial attorneys, they all reported the same thing: Mr. Kelly was disengaged, he was non-participatory, withdrawn. They couldn't really get him involved or motivated in his case. One of the attorneys, Beth Fullwood, said he was not well socialized. Another attorney, Mr. Kirkland, told me that he was just immature and naive, and **they really could not engage him the way that they might have been able to engage an adult client. They could not obtain a coherent consistent account of the offense**, which is very frustrating to them because they are **going into a capital trial** without a consistent account.

Tr. 412, ll. 13-25 (emphasis added). Dr. Knight noted that Appellant was "submissive," did not trust his attorneys, and lied by providing inconsistent statements throughout the case. She opined that some of this was due to characteristics common to all juveniles but some of it was due to Appellant's upbringing. Tr. 413, l. 3 – 416, l. 21. She opined that because Appellant was "shut down, non-participatory, and mistrustful" of his attorneys, he was "unable to engage in an effective attorney-client relationship, or utilize their assistance, as an adult might," and these

"factors were a product of his adolescence." Defendant's Exhibit #2 at 49. She stated Appellant's "changing versions of the homicide offense, and the inability to relate a truthful account to his attorneys adversely impacted their ability for effective representation." R. *(Defendant's Exhibit #2 at 52). Appellant provided Dr. Knight with an account of the robbery and murder that his attorneys could have used at his trial. R. *(Defendant's Exhibit #2 at 43 – 45).

B. The court did not account for the mitigating evidence regarding this factor, and it once again improperly held Appellant's age against him.

As to the fourth *Aiken v. Byars* factor, the incompetencies associated with youth including the offender's incapacity to assist his own attorneys, the order stated the following.

> The Court must also explore the incompetency associated with youth. The defense argues that this hearing is not to focus on whether Mr. Kelly was competent, but rather how the incompetency of youth is applied. The Court acknowledges, as stated earlier, that **Mr. Kelly was only 5 months shy of being an adult**. The Court considered that Kelly waived his *Miranda* rights. He provided voluntary statements to the police. Mr. Kelly used a road map while driving through a blizzard to get to Massachusetts. Mr. Kelly was represented by two death penalty qualified attorneys, and had a full defense and mitigation team. The defense also consulted with multiple psychologists. This incompetency factor weighs against the defense.

R. *(resentencing order at 5) (emphasis added).

C. The court was required to take into account how the incompetencies associated with youth affected the case.

Miller and *Aiken* require the sentencer to take into account: (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. *Aiken v. Byars*, 410 S.C. 534, 544, 765 S.E.2d 572, 577 (2014); *Miller v. Alabama*, 567 U.S. 460, 477–78 (2012).

Aiken requires juveniles receive an individualized hearing where the mitigating hallmark features of youth are fully explored before they may be sentenced to life without parole. *Smart*, 439 S.C. at 648, 889 S.E.2d at 577. "[J]uveniles are entitled to careful sentencing under the Eighth Amendment, and we direct circuit court judges to consider the mitigating factors of youth articulated in *Aiken v. Byars*." *Jones v. State*, 440 S.C. 14, 25, 889 S.E.2d 590, 596 (2023). Where the sentencing court only considers the defendant's "age as a chronological fact," it errs by "failing to adequately consider whether [the defendant's] crimes were affected by his chronological age and the hallmark features of youth." *State v. Mack*, 441 S.C. 526, 543, 894 S.E.2d 820, 829 (Ct. App. 2023).

D. The court erred by misapplying the fourth *Aiken v. Byars* factor.

The court's findings on this factor ignored evidence that Appellant's inability to trust his attorneys and tell them the real story, was, to his detriment, informed by his juvenility. Tr. 411, l. 22 – 417, l. 6; R. *(Defendant's Exhibit #2 at 47 – 52). Once again the findings in the order largely mirror the arguments in the State's memorandum. *See* R. *(state's response to defendant's sentencing memorandum at 2 – 3). Had Appellant not had these youth-related incompetencies, he could have given an accurate accounting of the facts for his attorneys to use in the sentencing phase of his trial.

Notably, however, the resentencing order three times cited to Appellant's age as an aggravating circumstance rather than a mitigating circumstance, including in its findings regarding this factor: "Mr. Kelly was only 5 months shy of being an adult." R. *(resentencing order at 1; 3; 5). The fact that a defendant is nearing the age of eighteen does not undermine the

teachings of *Miller*. *Mack*, 441 S.C. at 543, 894 S.E.2d at 829. Because Appellant was under eighteen, he was entitled to careful consideration of this factor. *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577; *Jones*, 440 S.C. at 25, 889 S.E.2d at 596. The court erred by failing to give the mitigating evidence on this factor the consideration it was constitutionally due.

The court also stated it was sentencing Appellant to a "life for a life... not one, but two.'" R. *(resentencing order at 6). The use of Appellant's age as evidence of aggravation and the concept of a juvenile sentencing framework that is a "life for a life" illustrate the circuit court's misunderstanding regarding how to discharge its duties pursuant to *Aiken v. Byars*. These errors were an abuse of discretion. *E.g.*, *State v. Finley*, 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019) (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).

V.

The court erred in resentencing Appellant to life without parole for an offense committed while he was a juvenile, where, as to the fifth *Aiken v. Byars* factor, the court failed to take into account evidence regarding rehabilitation, including evidence that Appellant had committed no violent acts in his twenty-five years at SCDC.

A. The court was presented with mitigating evidence from an SCDC official as well as testimony from a credible expert regarding Appellant's prospects for rehabilitation.

Appellant was convicted in 1998. This hearing was held in 2024. An SCDC official testified Appellant had thirteen "assaultive disciplinaries" at SCDC, the most serious of which was for possessing two shanks in 2003. Tr. 215, l. 13 – 217, l. 14. The SCDC employee admitted that Appellant had never been in trouble for actually assaulting anyone at SCDC, neither inmates nor guards. He also conceded Appellant had never been in trouble for threatening any inmates or guards. Tr. 237, ll. 14-25. He conceded that Lee Correctional was a "rough" institution. He agreed Appellant had never been involved in a riot. He agreed there was no evidence Appellant ever used the shanks he was caught with in 2003, and he agreed that the shanks were found underneath Appellant while he was sleeping. Tr. 229, l. 22 – 234, l. 8.

Dr. Knight opined that it appeared Appellant "has been on a path of successful rehabilitation." Tr. 417, ll. 7-14. She found it "significant" that he was currently at the "lowest [security] level you can be with a life sentence." Tr. 417, l. 15 – 418, l. 5. She also noted that his disciplinary history should be considered in the context that it took place over twenty-five years: "That is a very good record in SCDC." Tr. 421, ll. 19-20. Dr. Knight discussed Appellant's explanation about the shanks, which was that he had just been placed at Lee

Correctional, was young, "was assaulted by a group of other inmates," and "procured the weapon[s] and slept on them in case he needed them[.]" Tr. 422, ll. 2-25.

Dr. Knight testified that the homicide was committed by Appellant at the age when violent crime spikes, the mid to late adolescent period. "At 45, he's now on the other side of that curve, the more flattened side." Tr. 423, l. 18 – 425, l. 10. "[H]e is not using aggression to solve problems or to interact with people. He's reflective. He has self-reflection on his life now. He has much better insight into who he is. He is able to view himself in the future, think about the future, and think about how actions now will affect his future." Tr. 425, ll. 11-20. She noted Appellant had no violent infractions at SCDC. R. *(Defendant's Exhibit #2 at 64).

She also noted Appellant was religiously observant and prayed five times a day. R. *(Defendant's Exhibit #2 at 59). Dr. Knight identified a letter written by Appellant in 2020 which illustrated his rehabilitation. In the letter, Appellant wrote that "prison saved him" because it "gave him an opportunity to get away from his father. He felt like if he remained in the community, he would have become his father, who he termed 'the worst of the worst.'" Tr. 428, l. 8 – 429, l. 25; R. *(Defendant's Exhibit #23).

B. The court did not account for favorable evidence regarding Appellant's prospects for rehabilitation.

As to the fifth *Aiken v. Byars* factor, the possibility of rehabilitation, the order included the following.

> While this court agrees that a life sentence for a juvenile should be cautioned given the diminished culpability and heightened capacity for change of juveniles as explained in *Miller*, a life sentence is appropriate in extreme cases where redemption may not be possible and society's need for protection can only be accomplished by a life sentence.

> The State presented evidence that Mr. Kelly has been convicted of one assaultive disciplinary action while incarcerated, where he was found to have two shanks. Further, Mr. Kelly has also been convicted of a number of other disciplinary actions while incarcerated including: Possession of contraband, refusal to obey corrections officer, several possession of cell phones (contraband), use/ possession of marijuana or narcotics for testing positive and refusing to test. As far as education, the Court acknowledges that Mr. Kelly received his GED. However, he is not excluded from furthering his education through other educational programs offered while incarcerated and has not done such. Mr. Kelly also has not participated in any character or personal development programs offered.

R. *(resentencing order at 5).

C. Appellant was entitled to meaningful consideration of the mitigating rehabilitation evidence.

Prior to sentencing a juvenile for a homicide offense, a sentencer must consider the juvenile's possibility of rehabilitation. *Miller v. Alabama*, 567 U.S. 460, 478 (2012); *Aiken v. Byars*, 410 S.C. 534, 544, 765 S.E.2d 572, 577 (2014). The sentencer 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 v. Florida*, 560 U.S. 48, 68 (2010). The potential for rehabilitation "supports mitigation for most juvenile offenders because the 'signature qualities of 'immaturity and irresponsibility, impetuousness, and recklessness' are all 'transient.'" *Davis v. State*, 415 P.3d 666, 693 (Wyo. 2018). When examining an offender'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. *Id.*, 415 P.3d at 693.

D. The court erred in misapplying the fifth *Aiken v. Byars* factor.

The court's findings on this factor ignored evidence that Appellant had matured, developed insight, become religiously observant, and was on the path to successful rehabilitation. It also ignored evidence that Appellant's possession of the shanks, which was more than twenty years ago, occurred while he was sleeping on top of the shanks after being attacked by other inmates. Context matters. Tr. 417, l. 7 – 429, l. 25; Defendant's Exhibit #1; R. *(Defendant's Exhibit #2 at 53 – 69). Once again the order mirrors the State's sentencing memorandum. R. *(state's response to defendant's sentencing memorandum at 3 – 4).

The court abused its discretion when it misinterpreted the fifth *Aiken* factor where the court ignored the evidence in the record that Appellant could be rehabilitated. *E.g.*, *State v. Finley*, 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019) (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).

CONCLUSION

Appellant respectfully requests this Court vacate his life without parole sentence and remand for resentencing.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of March, 2025.