STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable W. Greg Seigler, Family Court Judge
Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NAZARETH N SANCHEZ-PERALTA,

APPELLANT

APPELLATE CASE NO. 2023-001588

FINAL BRIEF OF APPELLANT

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[1] 383 U.S. 541 (1966)

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[2] 410 S.C. 534, 765 S.E.2d 572 (2014)

STATEMENT OF THE CASE

Appellant was charged by a Lexington County Grand Jury on April 29, 2021, with kidnapping in the disappearance of a minor [SA] from Richland County with an additional charge for murder following on April 30, 2021. R. 2679. Since appellant was a minor, the state petitioned the Lexington County Family Court for a transfer of jurisdiction to the Court of General Sessions. A hearing was held from May 2, 2022, through May 6, 2022, before the Honorable W. Greg Seigler. Rick Hubbard and Suzanne Mayes appeared on behalf of the state with Kathry McGrady, Hali Sellert, Robert Madison, and Jason Chehoski appearing on behalf of appellant. R. 1. By written order, Judge Seigler transferred the matter to General Sessions. R. 1080.

Appellant was tried before the Honorable Debra R. McCaslin and a jury from May 15 – 23, 2023. Rick Hubbard and Suzanne Mayes continued behalf of the state with Sarah Mauldin, David Mauldin, and Hali Sellert appearing on behalf of appellant. R. 1133. The jury returned a guilty verdict on all charges. A sentencing hearing was held on August 28, 2023, at which time Judge McCaslin sentenced appellant's two co-defendants who have pled guilty related to the murder charges and conducted a hearing on appellant's sentenced pursuant to Aiken v. Byers.[3] At the conclusion of the sentencing hearing, Judge McCaslin sentenced appellant to sixty-five years for the murder conviction and vacating the kidnapping conviction. R. 2624, l. 22 – 2625, l. 10. Following a motion to reconsider filed by appellant, a hearing was held on September 28, 2023. R. 2640. The motion to reconsider was denied.

This appeal follows.

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[3] 410 S.C. 534, 765 S.E.2d 572 (2014).

ARGUMENT PART I – JUVENILE PROCEEDINGS

I.

The family court erred in failing to find S.C. Code Ann. § 63-19-1210 was unconstitutional due to its improper reliance on the eight factors set forth in *Kent v. United States*[4] in violation of the due process protections of United States and South Carolina constitutions.

A. How the matter was addressed below.

Prior to the transfer hearing, counsel for appellant filed motion challenging the constitutionality of the proceeding on several grounds. By agreement of all parties, the matter was submitted on written briefs, with appellant filing an extensive objection raising several Constitutional concerns. At that start of the hearing, the Honorable Greg Seigler acknowledged the filings, and asked both parties if any additional material was to be argued. R. 12, ll. 2 – 24; R. 1031. The reliance on the now outdated Kent factors as a violation of due process was one of those grounds. R. 1031.

B. Discussion.

The Family Court has exclusive jurisdiction over cases involving children accused of criminal activity. S.C. Code Ann. § 20-7-400(A)(l)(d); *see also* State v. Pittman, 373 S.C. 527, 558, 647 S.E.2d 144, 160 (2007). However, S.C. Code Ann. § 63-19-1210 (2019) (hereinafter the transfer statute), allows the Family Court discretion to transfer jurisdiction over a child's criminal proceeding to the Court of General Sessions if the child is accused of certain serious offenses. The transfer statute allows such transfer "after full investigation" and consideration of the if retaining jurisdiction in Family Court is in the "best interest of the child or of the public."

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[4] 383 U.S. 541 (1966)

S.C. Code Ann. § 63-19-1210(4). The legislation lacks a clear picture about what this "full investigation" resembles. To fill the statutory void, the South Carolina Supreme Court instructed Family Court judges to apply the eight factors set forth in the Supreme Court' s (then) seminal decision in Kent v. United States, 383 U.S. 541 (1966); *see also* Pittman, 373 S.C. at 588, 647 S.E.2d at 160.

Under South Carolina law, the Family Court must consider the Kent factors of:

> (1) The seriousness of the alleged offense.
> (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner.
> (3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
> (4) The prosecutive merit of the complaint.
> (5) The desirability of trial and disposition of the entire offense in one court.
> (6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
> (7) The record and previous history of the juvenile, including previous contacts with law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation, or prior commitments to juvenile institutions.
> (8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available.

Pittman, 373 S.C.at 559, 647 S.E.2d at 160. In the present case, the Family Court order dutifully sets for a factual finding for each factor. R. 1080.

A review of those findings clearly demonstrates the dangers of continued reliance on the Kent factors in juvenile waiver hearings. The first five factors focus exclusively on the criminal event. While the sixth factor does encourage a consideration of the maturity level of a juvenile, it is undercut by the "record and previous history" requirement of the seventh factor. Finally, while the eight factors do incorporate prospects of rehabilitation, a component appellant

acknowledges as crucial, it adds a balance of "protection of the public" that, again, changes focus onto the severity of the crime charged. In short, the Kent factors, absent blatant overreach by the state, guarantee a transfer upon request for any serious crime.

The continued use of the Kent factors, as applied in transfer hearings, is Constitutionally invalid. The South Carolina transfer statute, as interpreted by our Supreme Court, should no longer be applied to any child, no matter how serious his or her alleged offense, because the transfer process violates the due process protections of the South Carolina and United States Constitutions. The transfer process fails to protect children's procedural due process rights by not fully accounting for their constitutional status. Due to continued adherence to the Kent factors that focuses the Family Court's decision to rely almost exclusively on the severity of the crime rather than their status as a minor offender, the transfer statute lacks the procedural safeguards required by due process, including confrontation of witnesses, as noted in Argument II, *infra*.

These constitutional infirmities stem from the acknowledged legal distinction between children and adults. In Roper v. Simmons, 543 U.S. 551 (2005), the United States Supreme Court held that juvenile offenders under the age of 18 are protected from capital punishment because of class-wide traits that categorically diminish their culpability.

The United States Supreme Court noted:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young.
>
> These qualities often result in impetuous and ill-considered actions and decisions.' Johnson, *supra*, at 367, 113 S. Ct. 2658; *see also* Eddings, *supra*, at 115–116, 102 S. Ct. 869 ("Even the normal 16–year–old customarily lacks the maturity of an adult"). It has been

> noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.

Roper, 543 U.S. at. 569.

Since Roper, courts have continued to extend the principle that children are constitutionally different to adults and are entitled to a different approach in punishment. The United State Supreme Court barred sentences of life without parole for non-homicide offenders who were under 18 at the time of their crimes because, given juveniles' diminished moral culpability, the punishment lacked "any legitimate penological justification" and there was a national consensus against it. Graham v. Florida, 560 U.S. 48, 71- 72 (2010). Two years later, the Court held in Miller v. Alabama, 567 U.S. 460 (2012), that that the Eighth Amendment prohibits the mandatory imposition of life without the possibility of parole for juvenile offenders, again because juveniles' diminished culpability made the punishment disproportionate for all but the rarest juveniles. Recently, in Montgomery v. Louisiana, 577 U.S. 190 (2016), the Court held that Miller was a substantive rule of criminal procedure and that it therefore was entitled to retroactive application to cases that were final on direct review at the time Miller was decided, effectively ordering new sentencing proceedings for hundreds of juvenile offenders.

Despite this growing acknowledgement that juveniles require a different methodology an approach to sentencing, South Carolina' transfer statute has remained firmly rooted in the Kent decision, made in 1966, which improperly tilts the balance in favor of punishing juveniles as adults. States have moved away from the strict framework envisioned under Kent and the earlier treatment of juvenile offenders. For example, Arizona mandates that courts consider, among

other factors, a juvenile's mental and emotional condition. Ariz. Rev. Stat. Ann. § 8-327 (2019). Idaho requires courts to consider a juvenile's "home, environment, emotional attitude, and pattern of living" in determining the juvenile's maturity. Idaho Code§ 20-508(8) (2019). In Wisconsin, courts must look at "the personality of the juvenile, including whether the juvenile has a mental illness or developmental disability, the juvenile's physical and mental maturity, and the juvenile's pattern of living, prior treatment history, and apparent potential for responding to future treatment," an expansion of Kent's simple requirement that a court consider the juvenile's maturity and prospects for rehabilitation. Wis. Stat. § 938.18(5)(a). Particular guidance can be seen in the approach to juvenile sentencing adopted in Washington where sentencing "hearings must therefore be forward looking, focusing on rehabilitation rather than on the past." State v. Haag, 495 P.3d 241, 247 (2021).

The South Carolina waiver statute is intended to serve as a procedural backstop to ensure that children are not treated like adults. *See* Pittman, 373 S.C. at 558-59, 647 S.E.2d at 160. In practice, however, it fails that purpose because it continues to base waiver decisions on the outdated Kent factors, which disproportionately result in children being treated like adults.

Transferring children and thus exposing them to harsher adult sentences contravenes the rehabilitative goals of the juvenile justice system and diminishes the penological justifications for harsh punishment. As the South Carolina Supreme Court has noted, harsh sentences of a juvenile raise substantial constitutional concerns and courts must "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). As our Supreme Court noted in Aiken:

> 'Roper and Graham emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.' Specifically, the Court noted juveniles differ from

> adults in their general 'lack of maturity and [ ] underdeveloped sense of responsibility,' 'vulnerab[ility] ... to negative influences and outside pressures, including family and peers,' and still evolving character and personality traits.

Aiken, 410 S.C. at 542, 765 S.E.2d at 576 (internal citations omitted).

In place of Kent, appellant would suggest that this Court look towards the Aiken factors themselves as a standard to guide the Family Court transfer decisions. Under Aiken, the Family Court should consider the following factors in determining whether to transfer a youthful offender to General Sessions to be tried as an adult offender:

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

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

In light of the substantial and substantive changes in the law and understanding of juvenile development since Kent was decided in 1966, this Court should abandon the continued reliance on the Kent factors as an element of S.C. Code Ann. § 63-19-1210, reverse appellant's conviction, and remand the matter to the Family Court for a determination based upon a more balanced examination of what is in the best interest of the public and the minor. This shift in focus would allow the Family Court to properly evaluate whether transfer of appellant as a juvenile for treatment as an adult offender was truly in the best interest of the offender and the public.

II.

The family court erred in finding the right to confront witnesses did not apply in transfer hearings despite the fundamental impact of its ability to transfer a juvenile only after a full investigation in contravention to the Confrontation Clause contained in both the United States Constitution and the South Carolina Constitution, as well as fundamental procedural due process rights of the minor.

A. How the matter was raised below.

As with Argument I, this matter was submitted on written briefs. At that start of the hearing, the Honorable Greg Seigler acknowledged the filings, and asked both parties if any additional material was to be argued. R. 12, ll. 2 – 24; R. 1020. The procedural defects of the transfer hearing, including the right to confront witnesses was raised and the Family Court specially referenced and denied the motion. R. 12, ll. 2 – 24; R. 1020.

The impact on the present case is most clearly demonstrated by the state's decision to play a recorded interview of Allon Adams during the transfer hearing. Appellant's culpability in the death of SA could not be directly established. Appellant told the police she was unaware her companions, Treveon Nelson and Jaylen Wilson, planned to kill SA. While admitting she was aware they planned to question and assault SA over earlier drive-by shootings of Treveon Nelson's home, and also admitting helping get SA to go with the group from her home, appellant denied any direct involvement with the murder. To counter these statements, the state used Adams. Adams claimed appellant admitted her active role in the murder during his recorded interview, free of any challenge to his credibility since he was not presented as a witness during the hearing. Counsel for appellant renewed her objection under the confrontation clause concerning the use of the Adams interview. R. 185, ll. 14 – 22; 337, ll. 3 – 18.

As it turns out, the state was wise to avoid presenting Adams as a live witness. During trial, he made several outlandish claims, including that he played an active role in assisting Treveon Nelson's assault on appellant on April 27, 2021. R. 2097, ll. 15 – 21. In addition, Adams indicating a supernatural ability to detect SA's murder:

> Q. What, if anything, did you feel was going on as far as how you were feeling? Was something off?
>
> A. Yes, sir.
>
> Q. Can you explain that?
>
> A. I said like the second or the last day they were there, I woke up that morning. It was like 8:00, 9:00 o'clock and I stepped outside and I felt the atmosphere in the air change. Something felt off. And I said something to them and when I did, they started -- I didn't know what they were thinking, but when I brought it to their attention, they started acting weird. But I had no thought of it. I didn't know somebody was dead –
>
> Q. What did you say?
>
> A. I feel like somebody dead nearby. I feel death. Something feels off. I just know something is dead near me. It just smelled weird and I felt
>
> Q. And what did they say?
>
> A. They didn't really say anything. They started acting funny.
>
> Q. What did they do?
>
> A. They left.

R. 2051, l. 9 – 2052, l. 7.

Adams was the state's star witness on the culpability of appellant in connection with the shooting of SA. Absent Adams' testimony, the state had appellant's statements to police that, while acknowledging involvement, fell well short of a confession for the actual murder.

B. Discussion on the Confrontation Clause challenge.

Appellant's transfer hearing violated her right to confront the witnesses against her in violation of both the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article I § 14 of the South Carolina Constitution as well as her due process rights protected by the Fourteenth Amendment and Article I, Section 3 of the S.C. Constitution.

The Confrontation Clause of the Sixth Amendment to the United States Constitution and the corresponding provision of the South Carolina Constitution provide that the accused in a criminal proceeding "shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI; S.C. Const. art. I § 14 ("Any person charged with an offense shall enjoy the right . . . to be confronted with the witnesses against him."). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the conte/ of an adversary proceeding before the trier of fact." Maryland v. Craig, 497 U.S. 836 (1990). Consistent with this underlying objective, the right to confrontation prohibits admission of "testimonial statements of witnesses" who are absent from the criminal proceeding unless "the declarant is unavailable" and the subject of the criminal proceeding "has had a prior opportunity to cross-examine." Crawford v. Washington, 541 U.S. 36, 59 (2004).

The United States Supreme Court has long recognized that juvenile proceedings must comply with due process safeguards. Kent v. United States, 383 U.S. 541(1966) (discussing critical importance of fundamental due process and fair treatment afforded juveniles in waiver proceedings); In re Gault, 387 U.S. 1 (1967) (holding the confrontation clause applies to adjudicatory hearings of delinquency in juvenile courts along with right to notice, to counsel, to

cross-examination and to privilege against self-incrimination); In re Winship, 397 U.S. 358 (1970) (finding proof beyond a reasonable doubt was a constitutional mandate).

While these cases focused on the delinquency hearing phase of juvenile justice, and in fact specifically noted they were not mandating such protections for all phases of the juvenile process, including the transfer of a juvenile to adult court as in the preset case, this trend in expanding and providing juveniles with fundamental due process protections provides the groundwork for expanding those protections to the South Carolina transfer statute.[5] This critical need for such expansion can been seen in the drastic impact the decision to transfer has on a juvenile.

> Because many juvenile systems require that the offender be released at a particular age or after a certain number of years, transfer decisions often present a choice between extremes: light punishment as a child or standard sentencing as an adult (here, life without parole).

Miller v. Alabama, 567 U.S. 460, 488–89 (2012).

Based upon the clear impact a transfer decision has on the life of a juvenile, other states have recognized a juvenile's right to confrontation in transfer proceedings. Guidance here can be found in West Virginia. It has long viewed the confrontation clause as a critical element of the transfer process. *See* In re C.B., 865 S.E.2d 68 fn. 11 (W.V. 2021) ("The State initially argues that the right to confrontation guaranteed by the Sixth Amendment and Article III, § 14 of the Constitution of West Virginia applies to trials, not transfer hearings. This is not the first time that this Court has been faced with this argument and rejected it."). Alabama court have "made it

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[5] South Carolina has codified confrontation as an essential element, dictating that in "any case where the delinquency proceedings may result in commitment to an institution in which the child's freedom is curtailed, the privilege against self-incrimination and the right of cross-examination must be preserved." S.C. Code Ann. § 63-3-590 (2008 as amended).

clear that evidence which could not be constitutionally admitted at a criminal trial should be excluded from a transfer hearing." O.M. v. State, 595 So. 2d 514, 517 (Ala. Crim. App. 1991).

While this is admittedly the minority view, South Carolina should follow the guidance of acknowledging the critical impact of a transfer ruling and require such matters be conducted under the protections afforded by the Confrontation Clause of the Sixth Amendment to the United States Constitution and the corresponding provision of the South Carolina Constitution provide that the accused in a criminal proceeding "shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI; S.C. Const. ail. I § 14

Under South Carolina law, in the context of a delinquency hearing before the Family Court, appellant's confrontation rights are preserved. *See* S.C. Code Ann. § 63-3-590 (2008 as amended) ("In any case where the delinquency proceedings may result in commitment to an institution in which the child's freedom is curtailed, the privilege against self-incrimination and the right of cross-examination must be preserved. In all cases where required by law, the child must be accorded all rights enjoyed by adults, and where not required by law the child must be accorded adult rights consistent with the best interests of the child."). As such, Family Court judges are well equipped to deal with confrontation challenges. The fact that this procedural safeguard exits if a juvenile is not transferred dictates an acknowledgement of its critical function during a transfer proceeding under S.C. Code Ann. § 63-19-1210 (2019).

Depriving appellant of the ability to cross-examine and challenge the credibility of the one witness who made her an active participant in the death of SA demonstrates the critical importance of the confrontation right in the present case. Depriving the Family Court of the ability to hear, for itself, the testimony of critical witnesses who are subjected to the rigors of cross-examination undermines the South Carolina's transfer process which, in theory, is intended

"to attempt to rehabilitate juveniles who have been deprived of their liberty" Alexander S. v. Boyd, 876 F. Supp. 773, 780 (D.S.C. 1995) and transfer when adjudication in adult court is in the juvenile's best interest. *See* S.C. Code Ann.§ 63-19-1210.

This Court should hold that transfer hearings under S.C. Code Ann.§ 63-19-1210 must comply with the confrontation clause requirements that allow a minor to challenge the testimony of those witnesses supporting transfer. As appellant's transfer hearing violated her right to confront the witnesses against her, reverse appellant's conviction, and remand the matter to the Family Court for a new waiver hearing in line with the safeguards contained in the Confrontation Clause of the Sixth Amendment to the United States Constitution and the corresponding provision of the South Carolina Constitution providing that the accused in a criminal proceeding "shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI; S.C. Const. art. I § 14.

C. Due Process challenge.

Even if the Confrontation Clause does not *per se* apply to all juvenile waiver hearings, the juvenile must be able to cross-examine the witnesses against them in order to satisfy the requirements of due process to which the juvenile is unquestionably entitled. *See* In re Gault, 387 U.S. I, 25-26 (1967). The United States Supreme Court "has long . . . recognized" that the basic tenants of due process encompass "[t]he right to confront and cross-examine witnesses." Chambers v. Mississippi, 410 U.S. 284, 294 (1973); *see also* United States v. Green, 670 F.2d 1148, 1154 (D.C. Cir. 1981) ("[W]hether we describe the right of cross-examination as deriving from the fundamental concepts embedded in the Due Process Clause or as implicit in the rules governing federal criminal proceedings, ... we have no doubt of the applicability of the right [at

a suppression hearing] or of its importance."). Under the constraints of due process, the question for assessing whether cross-examination is necessary hinges on the reliability of the evidence at issue and the harm to the accused if the right of confrontation is denied. *See* Chambers, 410 U.S. at 294-95 (due process guarantees an accused "a fair opportunity to defend against the State's accusations," to "test the witness' recollection," to "assure the 'accuracy of the truth-determining process'" and the right will only "bow to accommodate other legitimate interests" when those "competing interest[s]" are at least equally weighty (*quoting* Dutton v. Evans, 400 U.S. 74, 89(1970)).

And as the Supreme Court has repeatedly emphasized, "the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame" is heightened, not lessened, "when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice - that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing." Lilly v. Virginia, 527 U.S. 116, 137 (1999), abrogated on other grounds by Crawford, 541 U.S. 36.

The South Carolina Constitution provides greater protections and rights than the United States' Constitution in several areas. While the language in Article I, Section 3 of the South Carolina Constitution related to due process largely mirrors the language used in the 14th Amendment to the United States Constitution. However, Article I, Section 14 of the South Carolina Constitution guarantees the right of those charged with crimes to "be fully heard in his defense" which is language that is absent in the United States' Constitution. The additional protection for the due process rights under the South Carolina Constitution is in part rooted on this added protection once the criminal process begins. This "fully heard in his defense" clause

and the added due process protection it provides has been previously recognized, though not as a specific expansion of due process beyond the interpretation offered by the Supreme Court of the United States. *See* State v. Nelson, 431 S.C. 287, 308, 847 S.E.2d 480, 492 (Ct. App. 2020) (noting forcing a trial when a key witness is unavailable could deprive the defendant of his right to be fully heard). *See* Moore v. Stirling, 436 S.C. 207, 223, 871 S.E.2d 423, 432 (2022) ("The discussion in Pulley as to the Eighth Amendment is not controlling of a defendant's right to due process under our state constitution."); *see also* Planned Parenthood S. Atl. v. State, 438 S.C. 188, 199, 882 S.E.2d 770, 776 (2023) (holding South Carolinians enjoy "protection not found in the United States Constitution" to be secure from "unreasonable invasions of privacy"); State v. Counts, 413 S.C. 153, 174, 776 S.E.2d 59, 70 (2015) (holding police use of knock and talk to target homeowners must satisfy "the heighten privacy protection afforded by the South Carolina Constitution").

Guidance can be provided by the South Carolina Supreme Court's decision in State v. Roberts, 364 S.C. 583, 614 S.E.2d 626 (2005) (examining whether Art. I, § 14 of the South Carolina Constitution provided a state constitutional right to proceed *pro se* on direct appeal). While noting that a criminal defendant "clearly does not have a federal constitutional right to proceed *pro se*" on direct appeal, the South Carolina Supreme Court found "that language such as that contained in Art. I, § 14 of the South Carolina Constitution does not apply to appeals" but that the appellate court may "in its discretion, allow an appellant to proceed *pro se* in an appeal from a criminal conviction." Roberts, 364 S.C. at 588–89, 614 S.E.2d at 629. The Roberts holding, and its examination of the issue as a separate state constitutional matter rather than solely controlled by the interpretation of the Fourteenth Amendment, supports the conclusion

that Art. I, § 14 of the South Carolina Constitution provides even greater due process protections. Such protections would flow to juvenile transfer hearings under S.C. Code Ann.§ 63-19-1210.

This Court should follow the lead of the West Virginia approach in protecting a juvenile's due process rights during a transfer hearing, either under the protections of the Fourteenth Amendment or South Carolina's own constitution. West Virginia has acknowledged:

> substantial due process rights that must be accorded a juvenile at a transfer hearing, including: (1) an advance written notice of the grounds relied upon for transfer; (2) an opportunity to be heard in person and to present witnesses and evidence; (3) the right to confront and cross-examine adverse witnesses; (4) a neutral hearing officer; (5) the right to have counsel present including court-appointed counsel if indigent; (6) a record of the evidence of the hearing; (7) findings of fact and conclusions of law upon which the transfer decision is based; and (8) a right of direct appeal to this Court.

In re E. H., 276 S.E.2d 557, 563 (1981). South Carolina should recognize those same fundamental rights and protect the fairness of transfer hearings to comport with due process. Since South Carolina already recognizes and required confrontation as an essential element in juvenile delinquency hearings, this step would not create additional burdens on the Family Court judges charged with making transfer decisions. *See* S.C. Code Ann. § 63-3-590 (2008 as amended).

As the Family Court admitted evidence, particularly the testimony of Allon Adams, that violated appellant's right to confront the witnesses against her as well as her due process rights, this Court should reverse appellant's conviction and remand the matter to the Family Court for a new transfer hearing in line with the safeguards provided by due process protected by the Fourteenth Amendment and Art. I, § 3 and § 14 of the South Carolina Constitution.

ARGUMENT PART II – APPELLANT'S CRIMINAL TRIAL

III.

The trial court erred in admitting the statements of appellant made over the course of two days of interrogation by law enforcement in which appellant was visibly suffering from the impact of a physical assault, was isolated from her parents, not informed of her right to remain silent or right to have counsel, and subjected to coercive interrogation techniques in violation of the Due Process clause of the fourteenth amendment, the sixth amendment right to counsel, and the fifth amendment protection against self-incrimination.

A.Standard of Review

"A criminal defendant is deprived of due process if his conviction is based, in whole or in part, on an involuntary confession." State v. Pittman, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007) (*citing* Jackson v. Denno, 378 U.S. 368, 377 (1964)). "A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda ...." State v. Brewer, 438 S.C. 37, 45, 882 S.E.2d 156, 160 (2022) (*quoting* State v. Saltz, 346 S.C. 114, 135-36, 551 S.E.2d 240, 252 (2001)).

A question "of voluntariness presents a mixed question of law and fact" and this Court should "review the trial court's factual findings regarding voluntariness for any evidentiary support. However, the ultimate legal conclusion—whether, based on those facts, a statement was voluntarily made—is a question of law subject to de novo review." State v. Miller, 441 S.C. 106, 119, 893 S.E.2d 306, 313 (2023).

B. Relevant Facts.

Appellant was the subject of intense interest by law enforcement investigating the disappearance of SA on April 5, 2021. Investigator Molly Nations with the Richland County Sheriff's Department was actively looking for appellant based upon information provided by SA's younger sister that SA was last seen talking and planning to leave the family home with appellant and "some boys." R. 1255, l. 1 – 1257, l. 23. Nations initially spoke to appellant by phone on April 7, 2021, as a person of interest. R. 1260, l. 10 – 1261, l. 20. Nations attempted to physically locate appellant, but discovered appellant was on "run away status" since March 31, 2021, and could not immediately be located. R. 1258, l. 4 – 1259, l. 16. During the phone contact of April 7, 2021, appellant informed Nations that SA had departed on the night of her disappearance to visit SA's boyfriend named Raysean. R. 1262, ll. 4 – 21. Nations discovered the identity of the "boys" from SA's younger sister included Treveon Nelson, a person involved in a relationship with appellant for a number of years before April 7, 2021. R. 1264, 7 – 25. Nations tracked down appellant on April 27, 2021, following an alert that appellant had been assaulted on April 26, 2021, by Treveon Nelson and was recovering at appellant's home. R. 1265, 1-23. Nations was aware of appellant's juvenile status, 16 years old at this stage of the investigation. R. 1265, l. 24 – 1266, l. 1. Appellant's mother brought her to the Richland County Sherriff's Department the next day, sitting in the lobby area while appellant was interrogated. R. 1266, ll. 2 – 9.

While Nations indicated appellant was free to leave following the interviews on April 27, 2021, this was a fictional gesture. R. 1266, ll. 5 – 25. At this stage of the interrogation, the state already knew SA did not leave her home to visit her boyfriend but had instead departed the area with appellant as their cell phone location data had been synched to show them leaving the area

of SA's home and traveling together over some distance before SA stopped connecting to a cell phone tower. R. 1270, 3 – 23. The state also knew about the connection of a stolen Camry and its potential connection to SA. State's Ex. 6.

During the course of her interview on April 27, 2021 with Nations and Investigator Chris Linder, appellant related how she and Treveon Nelson and Jaylen Wilson had driven a vehicle owned by Wilson's mother to meet SA but that they all left after SA went to visit Reysean.[6] State's Exhibit 1; R. 1268, ll. 1 – 25.[7] Not liking the information being provided, since authorities already knew a direct connection existed between appellant and SA's disappearance, appellant was challenged with the cell phone data. R. 1270, 3 – 23. Now, the state has appellant admitting to departing SA's home with SA and Treveon Nelson and Jaylen Wilson to visit together at Wilson's home. State's Exhibit 4; R. 1270, l. 17 – 1271, l. 23. Interrogators challenged appellant about the use of the stolen Camry and her involvement in that crime. State's Exhibit 6. The state then changed interrogators, and over the course of the next two hours challenged appellant's story, gathering additional information that would be used to attack her credibility at trial, including the existence of the use of an Uber/ride share. State's Exhibit 8; R. 1282, l. 13 – 1283, l. 11. The interview has lasted several hours, and the RCSD now transports appellant to Lexington County in an attempt to locate the murder site and SA's body. R. 1295, l. 15 – 1296, l. 15. As a part of this effort, RCSD employs the assistance of the Lexington County Sherriff's Office (LCSD). Now appellant, under questioning by yet another, new officer (Pablo Carvajal), relates additional details regarding SA's murder at the hands of Treveon Nelson and Jaylen Wilson. R. 1300, l. 6 – 1301, l. 25. This included information regarding the motivation

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[6] Treveon Nelson is referenced as Tre and Jaylen Wilson as Smoove during testimony. R. 1268, l. 24 – 1269, l. 3.

[7] State's Exhibits 1 – 12 are portions of appellant's interview entered into evidence during trial and are included in the Record on Appeal for review by this Court.

for SA's murder, as a retaliation for the drive by shooting of Treveon Nelson's home by SA's boyfriend. R. 1301, ll. 10 – 25.

During this entire process, appellant can be seen with visual injuries from the Treveon Nelson assault. R. 1296, ll. 16 – 22. Interestingly, all the officers testifying during the suppression hearing relate the same concept – investigators are simply treating appellant, who they have known was lying to them from as early as the day after SA's disappearance when Nations originally spoke with appellant over the phone, as a witness and potential victim rather than a suspect. It is not until late in the day of April 28, 2021, when appellant was provided Miranda warnings.[8] State's Ex. 18.

Trial counsel moved to suppress following the testimony, arguing the state had failed to show the statements were voluntary:

> I'd argue that none of the statements should come in based on the fact that at the time that this happened, she was 16 years old. She had just been assaulted on the 25th, badly enough that when Officer Nations first encountered her, she was in bed. She was in visible pain, had swelling and bruising to her face that was still present days later.
>
> When Officer Carvajal interviewed her, had trouble moving her jaw. The interview with Richland County lasted at least two hours. The interview with Detective Carvajal started sometime after 2:00 and went until dark. And she was interviewed at length the second interview with Detective Carvajal and then again at the sheriff's department.
>
> We've heard some testimony about things being communicated to her mother and the fact that she was made available for different interviews. It has not been made clear that my client was ever advised that she didn't have to talk to officers up until she was *Mirandized.* Or that she was freely or that she didn't have to drive out to the field and pulling out anything that the officers -- at most of the point she was by herself through the interviews. Her mother accompanied her to Richland County --

[8] Miranda v. Arizona, 384 U.S. 436 (1966).

> THE COURT: That's on the 27th.
>
> MS. MAULDIN: Right. Certainly on the 28th when she took the officers to the location of the body, the mother was not there that day. And on that day she was alone. There were multiple members of law enforcement there with her. It wasn't a situation where she would have been giving any voluntary statement. So, Your Honor, for those reasons, I'd ask that you exclude her statements pursuant to the 5th amendment of the U.S. Constitution.

R. 1349, l. 11 – 1350, l. 21.

C. The law to the applied.

"There are two constitutional bases requiring any confessions admitted into evidence to be voluntary: the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment right against self-incrimination." State v. Miller, 441 S.C. 106, 120, 893 S.E.2d 306, 313 (2023) (*citing* Dickerson v. United States, 530 U.S. 428, 433, 120 S. Ct. 2326, 147 L.Ed.2d 405 (2000). Appellant asserts her statements are a violation of both of those rights.

Recently, our Supreme Court has had the opportunity to outline the legal issues to be addressed in reviewing the admissions against interests by minors in response to police interrogation.

> In analyzing whether a defendant's will was overborne and the resulting confession was offensive to due process, courts must consider the totality of the circumstances, including the details of the interrogation and the characteristics of the defendant. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L.Ed.2d 854 (1973). Ultimately, the determination will depend "upon a weighing of the circumstances of pressure against the power of resistance of the person confessing." Dickerson, 530 U.S. at 434, 120 S. Ct. 2326 (citation omitted). Courts may consider the impact of a number of factors, such as:
> 1. the youth and maturity of the accused;
> 2. the accused's lack of education or low intelligence;
> 3. the failure to advise the accused of his constitutional rights, particularly the rights to remain silent and have counsel present;
> 4. the presence of a written waiver signed by the accused regarding his constitutional rights;

> 5. the physical condition of the accused, including whether the accused was intoxicated at the time of the interrogation;
> 6. the mental health of the accused;
> 7. the length of the interrogation;
> 8. the location of the interrogation;
> 9. the continuity of the interrogation;
> 10. the repeated or prolonged nature of the interrogation;
> 11. the use of physical punishment, including both physical brutality as well as the deprivation of food or sleep;
> 12. whether law enforcement offered specific promises of leniency, rather than general remarks that a cooperative attitude would be to the accused's benefit; and
> 13. whether law enforcement made deliberate misrepresentations of the evidence against the accused.
>
> Likewise, when the accused is a juvenile, courts may also consider other "special concerns," including:
>
> *1. the presence and competence of parents;*
> *2. the minor's prior experience with law enforcement;*
> *3. the minor's background;*
> *4. whether the minor has the capacity to understand the nature of his Miranda warnings and the consequences of waiving those rights; and*
> *5. the minor's development of an alibi to conceal his involvement in the crime.*

Miller, 441 S.C. at 120–22, 893 S.E.2d at 313–14 (emphasis added).

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." The Court explained that the admissibility of a suspect's confession must pass the "voluntariness test." Dickerson, 530 U.S. at 432-433. Over the years, the Court had refined the voluntariness "test into an inquiry that examines 'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession." Id. at 434 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973)). "The due process test takes into consideration the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation." Id. (internal quotation omitted). "The determination depends upon a weighing of

the circumstances of pressure against the power of resistance of the person confessing." Id. (internal quotation omitted).

D. The April 27, 2021, interrogations.

At this stage, the state argued, and the trial court ruled, that appellant was not in custody and the statements were voluntarily made. However, this argument and ruling ignores the evidence investigators had already collected connecting appellant in some form to the disappearance of SA. The state knew about the cell phone tracking data connecting SA and appellant as being together when SA's phone stopped sending any further signals. The state knew about the existence of the stolen Camry and appellant's involvement with that crime and its likely connection to the SA disappearance. In short, the state was trapping appellant, who, as one would expect from a minor without the support of parents or counsel, dutifully fell into the trap. Her claimed status as a "mere witness" was very good cover for investigators to get exactly what they wanted: statements against interest from their prime suspect in the disappearance of SA without any consideration of appellant's due process rights or youthful condition as a chronological minor and one recovering from a physical assault.

Whether a suspect was in "custody is determined by an objective analysis of 'whether a reasonable man in the suspect's position would have understood himself to be in custody.'" State v. Ledford, 351 S.C. 83, 88, 567 S.E.2d 904, 907 (Ct. App. 2002). "To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." State v. Evans, 354 S.C. 579, 583, 582

S.E.2d 407, 410 (2003). A person is "in custody" when a person's freedom has been restricted. State v. Caulder, 287 S.C. 507, 515, 339 S.E.2d 876, 881 (Ct.App.1986).

Although youth is not a ground for holding a confession inadmissible, the age of the confessor is an important factor for determining whether the waiver of rights was voluntary, knowing, and intelligent. Haley v. Ohio, 332 U.S. 596, 600-601 (1948); Gallegos v. Colorado, 370 U.S. 49, 52 (1962). Confessions by juveniles must endure special scrutiny. Haley, 332 U.S. at 600-601; Fare v. Michael C., 442 U.S. 707, 725 (1979); Thomas v. North Carolina, 447 F.2d 1320, 1322 (4th Cir. 1971); State v. Pittman, 373 S.C. 527, 569, 647 S.E.2d 144, 165-166 (2007). When the police secure an admission from a juvenile without the presence of counsel, "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair." In re Gault, 387 U.S. 1, 55 (1967).

The factors to consider when examining a statement made to police by a juvenile include the juvenile's age, the length of the detention without counsel, and any failure to send for the juvenile's parents. Gallegos, 370 U.S. at 55; Williams v. Peyton, 404 F.2d 528, 531 (4th Cir. 1968). The United States Supreme Court explained the reason for such special scrutiny:

> [A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

Gallegos, 370 U.S. at 54.

Appellant was sixteen years of age during the interrogation. She had been beaten by a violent domestic partner and showed visible signs of both injuries and discomfort. She was

isolated from her mother. Despite being a known suspect in the disappearance of SA, with evidence she had already misled law enforcement, and was the active subject of a parallel investigation of a stolen vehicle, appellant was not read her Miranda rights. She was subjected to multiple interrogators, who continually challenged her veracity. The setting was custodial (the Richland County Sherriff's Office). Officers drove appellant to Lexington County, searching for a murder victim and continued the conversations without informing appellant of her Miranda rights. R. 1335 l. 17-1340 l. 19; Trial Ex. 18. Officers were in uniform and armed. Due to her age and emotional state, the custodial setting, the information known to authorities prior to the interviews, appellant was in custody on April 27, 2021, and should have been advised of her rights.

E. The April 28, 2021, interrogations.

Officers finally provided appellant with Miranda warnings late in the day on April 28, 2021, before again driving her to the scene of the murder to assist with the recovery of SA's body. However, this belated effort to cure the errors from the April 27, 2021, interrogations with a belated Miranda warning were insufficient and these additional statements should have also been suppressed under the rule announced in violation of the rule announced in Missouri v. Seibert, 542 U.S. 600 (2004) that prohibits this very tactic – asking incriminating questions first then warning the suspect under Miranda and continuing the interrogation to elicit the same incriminating responses. Against a minor under physical distress, this tactic is particularly alarming.

Our Supreme Court addressed this tactic in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010).

> In Seibert, the Court dealt with the police practice of questioning a suspect until incriminating information is elicited, then administering Miranda warnings. Following the warnings, the suspect is again questioned and the incriminating information re-elicited. The post-warning statement is then sought to be admitted. The factors to be considered in determining whether a constitutional violation occurred in this setting, according to the Seibert plurality opinion, are:
> 1) the completeness and detail of the question and answers in the first round of interrogation;
> 2) the timing and setting of the first questioning and the second;
> 3) the continuity of police personnel; and
> 4) the degree to which the interrogator's questions treated the second round as continuous with the first.

Navy, 386 S.C. at 302, 688 S.E.2d at 841–42.

Here, the Seibert factors dictate suppression of the April 28, 2021, statements. The first round of interrogation on April 27, 2021, was lengthy and extensive with interrogators obtaining extensive details of the murder of SA and the general location of the crime scene. During the drive to the location of the murder on April 27, appellant was questioned and in the presence of Officer Pablo Carvajal due to a shared language. On April 28, Carvajal once again took the lead in questioning appellant, treating the information of April 27 as continuing and appealing to appellant through their shared language:

> We both speak Spanish. There's a term that someone older can use and say mija, which means my daughter, term of endearment, kind of colloquial. And several times that's what I called her. I asked her, you know, to bring some closure to the family. To bring the victim home so that she can get a proper burial. I pointed out that we'd never stop looking for her, no matter what. And ultimately, she agreed to take us to the body.

R. 1307, ll. 14 – 23. Carvajal uses emotional levers to encourage appellant, a minor still visibly suffering from her assault and vulnerable, to continue making incriminating statements without the benefit of counsel or the presence of a parent to help guide appellant.

The trial court erred in failing to suppress appellant's statements of April 27 and 28. This Court should reverse and remand this matter for a new trial free of the improperly obtained statements.

IV.

The trial court committed an error of law by failing to conduct a Rule 404, SCRE, analysis on sexually explicit messages from appellant to her abusive domestic partner, Treveon Nelson, as the messages were improper character evidence and the probative value, if any, was outweighed by the danger of unfair prejudice under Rule 403, SCRE.

A. Standard of Review.

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. at 429–30, 632 S.E.2d at 848.

B. Relevant facts.

The state admitted, over objection, several sexually explicit voice messages left by appellant to Treveon Nelson. State's 252, 241, 242, and 243.[9] These were statements of a highly sexual nature by a minor. Appellant's counsel objected, noting that:

> And, Your Honor, it's our position that 252, 241, 242 and 243, those are all the sexually explicit messages and arguing it's child porn. She was a 16-year-old child at the time. They are very

[9] State's 252, 241, 242, and 243 are included as a part of the record and may be reviewed at the Court's discretion.

> damaging and, in fact, they're -- I don't think they should come in under 402, 403 or 404. I don't see how they're relevant.

R. 2151, ll. 15 – 21. Appellant's counsel specifically noted it went to character evidence. R. 2151, ll. 23 – 25.

In response, the state argued:

> They're relevant because the defense stood right here in front of the jury and said this little girl has been abused all her life, that everything that happened in this case, she was forced, coerced, by Treveon Nelson. They brought out that she was raped and assaulted by Treveon Nelson. That's them putting that in. Highly relevant.
>
> This is what is probative. Who is the real Nicolle Sanchez Peralta? This is after the murder, so it's clearly within the timeframe when she's supposed to be held hostage according to her testi -- her statements to law enforcement, and not only is she not held hostage, she is apart from him, longing for him and begging basically to have sex with him. She made it relevant. It is not pornography. There is no visual imagery. These are words. Her words. And certain keywords have been redacted because I think the jurors can figure out what the beep is, but they are very direct because she chose these words. She can say she's sixteen, but these aren't the words of somebody who's just some little innocent child on a school ground. This is someone who has portrayed herself as something in this courtroom, but when she is talking to Treveon Nelson, her abuser, she speaks very directly, and under 403 I think they're highly probative for this jury to determine was this woman forced into this situation or did she choose it.

R. 2152, l. 6 – 2153, l. 6.

Counsel for appellant noted that these arguments for the relevance of the material was covered by State's Exhibits 245 and 246 in which appellant made threatening statements.

> And, Your Honor, I think the videos or audio clips, 244 [sic], [10] 245 and 246, serve all those purposes. Those are the threatening ones. Those those accomplish all of the goals that he just listed to

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[10] Trial counsel's reference to 244 at this point is in error. State's 245 and 246 were admitted without objection shortly after the contested exhibits were admitted over objection. R. 2159, l. 21 – 25.

> you. I don't think we need to bring sexually explicit voice messages from a 16-year-old into the courtroom.

R. 2153, ll. 7 – 12.

The trial court ruled the sexually explicit messages both relevant and more probative than prejudicial. R. 2153, ll. 21 – 24. The trial court's ruling failed to address the impact of Rule 404, SCRE.

C. Discussion

Under Rule 404(b), evidence of a person's "other crimes, wrongs, or acts" are inadmissible to prove a person's general character "in order to show action in conformity therewith." Even if arguably relevant, evidence is properly excluded when its probative value is substantially outweighed by the danger of unfair prejudice. "Evidence of other bad acts is generally inadmissible to prove a defendant's guilt for the crime charged; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." State v. King, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018) (quoting Rule 404(b), SCRE.). The admission of this type of evidence is particularly prejudicial, as it "fundamentally demonstrates why certain prior bad act testimony is inadmissible, i.e., it is used by the jury to infer that the defendant did in fact commit the crime for which he is on trial." State v. Fletcher, 379 S.C. 17, 26, 664 S.E.2d 480, 484 (2008). Moreover, if bad act evidence is admitted under Rule 404(b), "the trial court must then conduct the prejudice analysis required by Rule 403, SCRE." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013) (*citing* State v. Wallace, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009).

Here, the back act evidence centers around the sexual desires and statements of a minor towards an individual even the state admitted was an abusive domestic partner. The motivation

of seeking to admit this evidence was clear: a direct attack on appellant's character. These are to contradict "her statements to law enforcement, and not only is she not held hostage, she is apart from him [Treveon], longing for him and begging basically to have sex with him." R. 2152, ll. 16 – 19.

"To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). Even if supported by clear and convincing evidence "it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000). Here, as in King, the trial court made no effort to conduct a Rule 404, SCRE, analysis. Here, as in King, there was no rationale basis to argue that a minor's sexualized statements towards an abusive partner were relevant to her participation in a murder.

The trial court's cursory reference to the probative value over the danger of unfair prejudice does not cure the error. Had the trial court conducted a Rule 404, SCRE, analysis as required by the objection of appellant's counsel, the admission of this material would have been an abuse of discretion. *See* State v. Robinson, 438 S.C. 421, 439, 882 S.E.2d 883, 892–93 (Ct. App. 2023) (noting the "State, through eliciting such a large quantity of gang-related evidence, essentially put Robinson on trial for being a member of a gang and the gang activity in his neighborhood. This type of prior bad act evidence is precisely what Rules 403 and 404(b), seek to exclude from trials.").

The trial court committed an error of law on admitting evidence of sexually explicit communication between a minor and her abusive domestic partner by failing to conduct an

analysis under Rule 404, SCRE. In addition, any potential relevance from such evidence was outweighed by its danger of unfair prejudice and it was an abuse of discretion to admit them under Rule 403, SCRE. Appellant is entailed to a new trial free from the taint of the improper, sexually explicit, material.

V.

The trial court erred in finding the testimony that appellant was assaulted by Treveon Nelson and threatened with a handgun a month before the murder of SA did not fall within the excited utterance exception to the hearsay rule.

A.Standard of Review.

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. at 429–30, 632 S.E.2d at 848.

"A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception." State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006). South Carolina courts have "generally allowed as excited utterances statements made by the victim to the police immediately following a physical attack." State v. Heath, 433 S.C. 506, 516, 860 S.E.2d 673, 678 (Ct. App. 2021).

B. Relevant facts.

The state admitted the relationship between Treveon Nelson and appellant was violent. As noted, on April 26, 2021, Treveon Nelson assaulted and severely beat appellant. This fact was reinforced by Allon Adams, the state's witness as to appellant's personal participation in the physical murder of SA. Adams[11] testified that appellant confided to him that she, Treveon Nelson, and Jaylen Wilson took turns shooting SA.

> She said they shot her one time. They shot her the second time and the girl started laughing. The girl that was getting shot started laughing and they shot her one more time and she started screaming again. She started screaming loud. And I guess they were taking turns.

R. 2056, ll. 7 – 12. Adams acknowledged his role in driving Treveon Nelson for the purpose of assaulting appellant on April 26, 2021. R. 2096, l. 5 – 2097, 21.

As part of this dangerous and abusive relationship, appellant's counsel called officer Sean Sinnott to as a witness for the defense. Sinnott was an officer with the Cayce Police Department and responded on February 3, 2021, to a domestic violence report. R. 2187, ll. 14 – 25. Sinnott encountered appellant around 12:20 a.m. at an Econo Lodge within 20 minutes of the initial call. R. 2187, l. 21 – 2188, l. 7. The state objected to any statements made by appellant to officer Sinnott based upon hearsay. R. 2188, ll. 19 – 25.

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[11] The state showed a remarkable lack of interest in the activities of Adams in connection with SA's abduction and murder in light of Adams admissions that he was on the run with Treveon Nelson when they were both arrested, that he had already been informed of the murder by both Treveon Nelson and appellant, that the murder occurred very close to his property, such that he could sense and smell that there had been a murder even before the alleged confession by appellant. Adams was also on social media seeking three guns shortly before the murder from David Williams, another known companion of Treveon Nelson. R. 2074, l. 11 – 2075, l. 23.

Counsel for appellant argued the statements by appellant to officer Sinnott fell under the excited utterance exception to the hearsay rule. To support that argument, Sinnott's testimony was proffered outside the presence of the jury:

> She explained to me that while she was at 1212 Decatur Street, which is also in Cayce, it's probably less than a mile up to the street from where I spoke to her at, while she was at that residence she was assaulted by Treveon Nelson where he was suspicious of her talking to other people. He struck her on the left side of the head with a closed fist and several times in the stomach. He then drew a black Smith & Wesson 9-millimeter from his pocket and pointed the pistol at her -- at her face and told her he would beat the truth out of her and then started swinging the gun back and forth in front of her face while holding onto the magazine of the -- of the gun. She further stated that Nelson told her to leave the property if she wanted to cry about the situation. That's why she ran down the street to the Econo Lodge to call us. She used she used somebody else's phone to call us.

R. 2189, l. 18 – 2190, l. 8

Despite encountering a petite minor, after midnight, who asserted a physical assault and use of a handgun, Sinnott claimed not to remember appellant's demeanor. R. 2188, ll. 8 – 14.

> Q. And you know that Mr. Nelson was later charged with DV Third as a result?
>
> A. According to the investigative notes in the report, yes.
>
> Q. And so we've got a young woman. How old was she then?
>
> A. Let's see. It looks like sixteen years old.
>
> Q. And this is happening in the middle of the night?
>
> A. (Nods head.)
>
> Q. And she's by herself?
>
> A. Correct.
>
> Q. And she had just asserted that she's had someone point a gun at her?

A. Yes.

Q. And that she's run to call for police?

A. Yes.

Q. And used somebody else's phone?

A. Yes.

R. 2190, ll. 9 – 25.

The trial court ruled the statements provided to Sinnott were not admissible since the officer could not recall appellant's demeanor to establish appellant's demeanor since the officer claimed to not remember anything about it. R. 2196, ll. 3 – 16. This lack of memory is particularly interesting in light of Sinnott returning appellant, who was a minor on run-away status that evening, to her home. R. 2197, ll. 11 – 25.

C. Discussion.

There "are three elements that must be met to find a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition." State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007).

The victim of domestic violence reporting being beaten and threatened with a handgun falls under a startling event. The timing of the report, within roughly half an hour, also supports a finding that appellant was under the stress of the event. "Rule 803(2), SCRE, requires that the declarant be under 'the stress of excitement,' not that the victim be excited." State v. Heath, 433 S.C. 506, 517, 860 S.E.2d 673, 679 (Ct. App. 2021). The trial court erred in focusing on the

convenient memory lapse of Officer Sinnott who claimed to have been unable to recall the demeanor of a petite minor female he found alone, after midnight, in connection with a reported physical assault and being threatened with a handgun. "[T]he intrinsic reliability of an excited utterance derives from the statement's spontaneity which is determined by the totality of the circumstances surrounding the statement when it was uttered." State v. Prather, 429 S.C. 583, 611, 840 S.E.2d 551, 566 (2020).

The trial court committed an error of law in focusing on Sinnott's convenient memory loss rather than evaluating the statements on their "intrinsic reliability" based upon the "totality of the circumstances." Appellant is entitled to a new trial and the testimony of officer Sinnott admitted into evidence for the jury to consider and evaluate.

ARGUMENT PART III – APPELLANT'S SENENCE

VI.

The sentencing of a sixteen-year-old juvenile in South Carolina to a functionally equivalent life without parole period of sixty-five years in prison violates Article I, Section 15, of the South Carolina Constitution prohibition against cruel or unusual or corporal punishment.

A. Appellant's sentence, being the functional equivalent of a life sentence, violates Article I, Section 15 of the South Carolina Constitution

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

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

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

Children "have diminished culpability and greater prospects for reform," and therefore, "'they are less deserving of the most severe punishments.'" Id. at 471 (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)). "[T]he distinctive attributes of youth diminish penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Id. at 472. As a result, "[a]n offender's age is relevant to the Eighth Amendment." Id. at 473 (citing Graham, 560 U.S. at 76). The Court required sentencers "to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 480. Thus, it is clear that sentencing authorities *must* consider a juvenile offender's age and consideration of such *must* be a mitigating factor.

The South Carolina Supreme Court recognized our courts "must give effect to the proportionality rationale integral to Miller's holding – youth has constitutional significance." Aiken, 410 S.C. at 542-543, 765 S.E.2d at 576. Therefore, youth "must be afforded adequate weight in sentencing." Id. at 543, 765 S.E.2d at 576. The Court found the Miller decision "clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution." Id. at 543, 765 S.E.2d at 576-577. The sentencing court must consider the following factors in crafting a sentence proportional to the offense and the juvenile offender:

> (1) the chronological age of the offender and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and

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

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

Appellant was a juvenile at the time of the offense. She was in an abusive domestic relationship with her older co-defendant who assaulted and beat her on more than one occasion. Despite her status as a juvenile, the trial court sentenced appellant to a greater sentence than her adult abuser and has imposed the functional equivalent of a life sentence. On appeal, Appellant challenges the imposition of the sentence as a violation of the Eighth Amendment's prohibition on cruel and unusual punishment and the South Carolina Constitution prohibition on "cruel, nor corporal, nor unusual punishment". See S.C. Const. art. I, § 15. Both following sentencing and on motion to reconsider the sentence, appellant's counsel asserted the imposition of a sixty-five year sentence of appellant violated both the 8th Amendment and Article I, § 15, of the South Carolina Constitution. R. 2625, ll. 14 – 25; R. 2668, ll. 2 – 5.

Recently, our Supreme Court and this Court have had the opportunity to review constitutional challenges to various aspects of this state's treatment of juveniles being tried and sentenced as an adult. In Jones v. State, 440 S.C. 14, 28, 889 S.E.2d 590, 598 (2023), our Supreme Court rejected a constitutional challenge that S.C. Code Ann. § 63-19-20 (2019) violated the 8th Amendment of the United States Constitution by automatically excluding juveniles of the statutory age from originating in the jurisdiction of the Family Court and

exposing them to statutory minimum sentences.[12] Importantly, our Supreme Court in Jones noted there was no assertion that the statute violated his rights under the South Carolina Constitution. Jones, 440 S.C. at n. 9, 889 S.E.2d at n. 9.

In State v. Smith, 428 S.C. 417, 421–22, 836 S.E.2d 348, 350 (2019), our Supreme Court rejected an 8th Amendment challenge of the mandatory minimum sentence for a juvenile convicted of murder. The Court noted with approval that there may a time "that the 'evolving standards of decency that mark the progress of a maturing society' will compel the United States Supreme Court to rule someday that the Eighth Amendment prohibits any minimum mandatory sentences for juvenile offenders, but Miller did not mark that day." Smith, 428 S.C. at 421–22, 836 S.E.2d at 350 (*quoting* Burrell v. State, 207 A.3d 137, 145 (Del. 2019)).

In State v. Slocumb, 426 S.C. 297, 827 S.E.2d 148 (2019), our Supreme Court rejected an application of the prohibition against automatic life without parole sentences of minors to a de facto life sentence. Importantly, the Court once again limited the impact of its decision to a narrow question:

> Our holding should in no way be read to signal the end of the debate on the underlying issues raised by aggregate term-of-years sentences imposed on juvenile offenders, whether for homicide or nonhomicide offenses. As the Supreme Court stated in Graham in the context of de jure life sentences for juveniles, it is for the states, in the first instance, to explore the means and mechanisms for complying with the Eighth Amendment

Slocumb, 426 S.C. at 313, 827 S.E.2d at 156.

To the extent that our Courts have felt bound by the limiting language in the cases from the United States Supreme Court in applying the 8th Amendment to life sentences, and their

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[12] Jones was convicted when the statutory age exclusion was 16 years old. The statutory age considered in Jones was increased in the current version of S.C. Code Ann. § 63-19-20 (2019).

functional equivalent, it is time for this State to depart from those perceived constraints and, for minors within this State, acknowledge their unique status.

The South Carolina's constitutional protections in this regard do not precisely track the language of the United States Constitution. In State v. Wilson, our Supreme Court analyzed this provision. 306 S.C. 498, 512, 413 S.E.2d 19, 27 (1992). In conducting this examination, the Court explained the state constitution "clearly ban[ned] cruel or unusual punishments; unlike the textual ban in the United Stated States Constitution, which literally reads that "cruel and unusual" punishments are forbidden." *Id.* (emphasis in original). Furthermore, the South Carolina Supreme Court has interpreted the state constitution more expansively than the federal constitution. *See, e.g.*, State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015). Finally, in support of a broader interpretation of the state constitution than the federal constitution is the simple fact that the South Carolina Constitution bars three distinct categories of punishment: cruel, corporal, and unusual. Quite simply, the inclusion of a third category of punishment, which appears nowhere in the Eighth Amendment, requires reading the state constitutional provision more broadly.

Thus, even if this Court were to determine that appellant's sentence of sixty-five years in prison does not violate the Eighth Amendment's ban on cruel and unusual punishment, as would be dictated by Slocumb, this Court must read the state constitution more broadly and hold the sentence, amounting to the functional equivalent of a life sentence without the possibility of parole, violates Article I, § 15, of the South Carolina Constitution, and appellant is entitled to a new sentencing hearing.

VII.

The trial court's sentence of appellant, which provided only a cursory reference to the factors outline in Aiken v. Byars[13], failed to comply with the requirement that a sentencing court consider the impact of youth and its accompanying mitigating factors in reaching a sentence that exceeded the sentence of the older, more culpable defendants charged with the same crime.

A. Standard of Review.

This Court has recently reviewed the standard of review as it relates to an alleged unconstitutional sentence of a minor.

> 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. Mack, 441 S.C. 526, 535–36, 894 S.E.2d 820, 825 (Ct. App. 2023) (*quoting* State v. Finley, 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019)).

However, other states have provided greater scrutiny than the traditional abuse of discretion framework cited in Mack in cases involving sentencing of juveniles. For example, in Davis v. State, 415 P.3d 666, 688 (Wyo. 2018), the Supreme Court of Wyoming determined that its review would be "an abuse of discretion, but [it would] not be lenient." The Court explained it would "view the sentence as inherently suspect and demand rigor from the sentencing court in its factual findings, its application of the Miller factors, and the ensuing sentence." Id.

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[13] 410 S.C. 534, 765 S.E.2d 572 (2014)

Appellant respectfully requests this Court consider the standard of review for appeals involving juvenile's facing a life without parole sentence or its functional equivalent. Appellant suggests such sentences are inherently suspect and should be reviewed *de novo* on all legal conclusions made by the sentencing court and a heightened abuse of discretion review to the court's factual findings.

B. Relevant facts.

During sentencing, appellant's counsel presented information supporting a considered application of the Aiken v. Byars factors. In addition, significant elements that supported mitigation under Aiken v. Byars were presented during trial.

Appellant is a young, petite female. Office Carvajal noted:

> Q. Back in April of 2021, Nicole Sanchez was 16 years old, right?
>
> A. Yes, sir -- yes, ma'am. Sorry.
>
> Q. No problem. And she's about five feet tall?
>
> A. Yeah, she's tiny.
>
> Q. Right. She's a small person?
>
> A. Yes, ma'am.
>
> Q. Back then, she weighed about 105, 110 pounds –
>
> A. Okay. I'll agree to that.

R. 1599, ll. 2 – 11.

This factor was important enough for the solicitor to use it in his argument against the two older, male co-defendants, as the solicitor flatly rejected the testimony from Treveon Nelson that SA's physical injuries were the result of a physical fight with the smaller appellant. R. 2649,

ll. 4 – 16. The trial court, in sentencing (discussed *infra*), focused on the autopsy and evidence of the physical beating SA endured during the crime, but even the solicitor's officer rejected the notion that such injuries were inflicted by appellant.

Importantly, the disappearance of SA was only resolved by the assistance of appellant. R. 1605, ll. 10 – 25; 1709, l. 20 – 1710, l. 12. Even if the jury believed appellant's account that she was unaware of her co-defendants plans to murder SA, as related over the course of her police interviews, the jury still could have convicted appellant under the trial court's charge regarding the hand of one. R. 2222, ll. 3 – 20; 2258, l. 3 – 2259, l. 1.

Appellant was physically assaulted by Treveon Nelson leading up to the murder of SA, though details of the assault were kept from the jury as argued herein. The day before her interrogation by police on April 27, 2021, appellant was severely beaten and assaulted by Treveon Nelson with the assistance of the state's star witness regarding appellant's active participation in the murder of SA, Allon Adams. R. 2096, l. 5 – 2097, 21.

The relationship between appellant and Treveon Nelson was toxic. Certainly, an abusive domestic relationship as that term is defined in South Carolina. See S.C. Code Ann. § 16-25-90 (2004 as amended).[14] Dr. Susan Knight, qualified as an expert in clinical psychology and forensic psychology during sentencing, noted the similarities to appellant's responses to the abuse from Treveon Nelson and the "'classic' thing that we would see from a domestic violence victim, blaming herself that he really deserves better." R. 2310, ll. 6 – 14; 2354, ll. 8 – 17.

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[14] Robinson v. State, 308 S.C. 74, 76, 417 S.E.2d 88, 90 (1992) noting "the battered woman's syndrome is identified by a series of common characteristics that appear in women who are abused for an extended period of time by the dominant male figure in their lives. These characteristics include fear, hyper-suggestibility, isolation, guilt, and emotional dependency, which culminate in a woman's belief that she should not and cannot escape her batterer."

Appellant's early childhood development was severely impacted. Appellant was abandoned at a very early age by her parents when they left her in Honduras and immigrated to the United States. R. 2332, ll. 1 – 25. Appellant's uncle became a father figure, but was murdered in Honduras when she was six. R. 2332, ll. 1 – 25. Shortly after, appellant's grandmother, serving as her "mother" died as well. R. 2332, l. 24 – 2333, l. 11. Appellant was unable to cope with the loses, was not provided any support, and was separated from her older siblings. R. 2333, ll. 1 – 25. Appellant grew up around violence and was bullied and ridiculed due to her looks and small size. R. 2333, l. 14 – 2334, l. 25. Appellant was sexually molested by an older adolescent in the home. R. 2336, ll. 7 – 18. She was smuggled into the United States by strangers, held for ransom during the journey, and abandoned in Texas to find her own way to a police station for assistance. R. 2338, l. 17 – 2339, l. 19. When finally reunited with her birth mother, she was resentful, and conflicts developed. R. 2340, l. 1. 3 – 2341, l. 22. Appellant eventually found what she believed to be love in the arms of Treveon Nelson. As developed extensively during trial and at sentencing by Dr. Knight, that relationship demonstrated several of the hallmark tendencies of adolescent youth.

C. Discussion.

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

those differences counsel against irrevocably sentencing them to a lifetime in prison" and that this requirement "deserves universal application." Aiken, 410 S.C. at 543, 765 S.E.2d at 577. The Miller Court repeatedly focused on the notion that the character traits of children are "more transitory and less fixed." Miller, 567 U.S. at 471. Children by definition lack maturity and responsibility; thus, they are more likely to act with "recklessness, impulsivity, and needless risk-taking." Id. (internal quotation omitted). Due to the innate characteristics of children at large, there is a "great difficulty ... of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id. at 479 (internal quotation omitted). In fact, the Court stated, "incorrigibility is inconsistent with youth." Id. at 473. Emphasizing the potential for reform present in all juveniles, the Court discussed the mitigating qualities of youth and noted "[i]t is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.'" Id. at 476 (*quoting* Johnson v. Texas, 509 U.S. 350, 368 (1982)).

Children "have diminished culpability and greater prospects for reform," and therefore, "'they are less deserving of the most severe punishments.'" Id. at 471. "[T]he distinctive attributes of youth diminish penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Id. at 472. The Court required sentencers "to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 480.

Our Supreme Court held it "must give effect to the proportionality rationale integral to Miller's holding – youth has constitutional significance." Aiken, 410 S.C. at 542-543, 765 S.E.2d at 576. Therefore, youth "must be afforded adequate weight in sentencing." Id., at 543, 765 S.E.2d at 576. The Court found it was "clear that it is the failure of a sentencing court to

consider the hallmark features of youth prior to sentencing that offends the Constitution." Id. at 543, 765 S.E.2d at 576-577. As such, our Supreme Court required the sentencing court to consider the following factors in crafting a sentence proportional to the offense and the juvenile offender:

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

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

Recently, this Court has outline the need for sentencing courts to provide more than mere lip service to the Aiken factors:

> The inquiry does not ask the court to use the success of others in overcoming their circumstances as the yardstick when considering the defendant's circumstances. Certainly, there are untold numbers of individuals—both public and private—who have been successful in overcoming abject poverty and a myriad of hardships and traumatic childhoods. And, others have failed. Nonetheless, this is not the appropriate rubric to be applied under the Aiken factors. *The inquiry requires the court to consider the impact of the defendant's family and home environment on his crimes. It is a specific and individualized inquiry.*

State v. Mack, 441 S.C. 526, 544, 894 S.E.2d 820, 829–30 (Ct. App. 2023).

Here, the trial court made passing reference to the brutal experiences appellant had endured leading up to her arrest and trial for the murder of SA.

> THE COURT: All right. Okay. I've listened to your lawyer, Ms. Peralta. I have listened to Dr. Knight. And I can tell you, I have considered your age. And I recognize that you were 15 at the time

of this murder, and that most 15 year olds are immature and they do not appreciate the risk and consequences of their actions. I have listened to her explain that she believes that you are in the mid-adolescent stage where risk taking is at its peak. And during this stage most adolescents can't avoid risk, where you would avoid risk. And that this is due to adolescents' brains not being fully developed.

I listened also about your family and home environment, and I recognize that your childhood was unfortunate. You were abused at a young age. You did not have the opportunity to bond or attach with your parents, which is really important. And you lived with relatives at a young age. You suffered bullying at school. And you witnessed violence in the neighborhood that you lived in.

And you also had issues with your parents over not taking you with them and leaving you when you were really young. As far as competency associated with you, I believe that you may not have fully understood the consequences of speaking with counsel. I know that your parents didn't. And I think that is important because they couldn't advise you one way or the other as to what to do.

On the possibility of rehabilitation, the law states that only the rarest, or case law states that children who are permanently incorrigible, I can tell you that I had a tough time with this, Ms. Peralta. I think that you are well on your way to being permanently incorrigible. Your conduct and behavior has been going on since you were 14 years old, chronic runaway, don't follow your parents rules, and you make false allegations. The consequences of which are just tremendous to your family.

And then I find you involved in what you are here in front of me for today. But even given that, and your role in the offense, your role in the offense is something that is a tragedy that we are going to discuss in just a moment. But after considering all of those factors and listening to your lawyer, I'm going to decline to impose a life sentence.

However, let me tell you, this Court has considered the violent and aggravating circumstances surrounding [SA]'s death. It is apparent to me, and from the testimony at trial, that your role was much more than mere presence. There was testimony at the trial that all three defendants took turns shooting the victim. That included you. And I'm going to tell you the thing that gets me the most is this autopsy report. I read this thing two or three times this weekend.

> This child suffered a broken eye socket, femur, ribs four and six on the left side, rib seven on the right side. Her left femur was fractured. So was her tibia. So was the ulna, the bone that runs here, which was more than likely a defensive wound. And even all of that -- not to mention that she was shot at least, at least 14 times. And then I look to where she was shot. The left forearm, the right hand, the left buttocks, the left thigh, the left thigh a couple of times, the left knee. And let's see, the right leg. And then finally two times to the chest.
>
> I can't think of more torture that that child went through, what y'all did to her. And you know, Ms. Peralta, she was your friend. She was supposed to be your best friend. She trusted you. She trusted you when she got into that car and it cost her her life. I don't believe you provided any mercy to Ms. Amenhotep at all, and she was your friend. And you deserve no mercy from this Court.
>
> Mr. Amenhotep, don't give up on peace. Please do not give up on peace. Sometimes you said the magic word, how do you wrap your head around this kind of violence. I can't. It is really hard. I don't understand when you have a difference with somebody or a problem with somebody, the answer is not picking up a gun and, Let's kill them. It is not. And our youth is killing each other. It is horrible. I sit up here all of the time and I see it and I'm just going to tell you, I can't wrap my head around it. So sorry for your loss. I'm at a loss for words for you. I am.

R. 2621, l. 10 - 2624, l. 18.

The Court's treatment of the Aiken 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.

Here, the trial court failed to acknowledge any impact of the chronological age of the appellant and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence, other than in passing regarding most adolescents. There was no "specific and individualized inquiry" on this factor as required by this Court in State v. Mack, 441 S.C. at 544, 894 S.E.2d at 829–30.

2. The family and home environment that surrounded the offender.

Appellant's family and home environment were also mentioned, but in passing. As with the hallmark features of youth, the sentencing court simply makes a vague acknowledgment of the trauma of appellant's early life and struggles to cope with parental abandonment, sexual and physical abuse, immigration, bullying, an abusive domestic partner, being sexualized as a young age. While the trial court makes nominal mention of these facts, it fails to provide a "specific and individualized inquiry" on this factor's impact on the sentencing decision as required by this Court in State v. Mack, 441 S.C. at 544, 894 S.E.2d at 829–30.

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.

While the nature of the crime was indefensible, and its brutality and impact on SA should not be minimized or ignored, the culpability of appellant in the actual homicide should have given the trial court pause. As has been noted, the main witness relied upon by the state to connect appellant to actual physical violence was Allon Adams. The trial court seemed to accept his testimony regarding appellant's role without question. Even assuming this acceptance was based upon a credibility assessment, the trial court ignored the role appellant played in resolving SA's disappearance. Appellant assisted law enforcement in finding the murder site, where substantial physical evidence was located, and provided direct testimony about the roles Treveon Nelson and Jaylen Wilson played. All without the benefit of counsel or consideration from the state regarding charges or potential sentencing. Rather than treat appellant as someone who in fact provided assistance, albeit delayed, in investigating and solving SA's murder, the trial court enhanced appellant's punishment beyond that of the older defendants. While the nature of the

crime favors a harsh penalty, appellant's assistance should have played some role in mitigating this element. Instead, it seemed to enhance her penalty.

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.

The trial court noted here that "I believe that you may not have fully understood the consequences of speaking with[15] counsel. I know that your parents didn't. And I think that is important because they couldn't advise you one way or the other as to what to do." R. 2622, ll. 7 – 22.

5. The possibility of rehabilitation.

The sentencing court did address rehabilitation, but apparently weighed the hallmark features of youth, including appellant's immaturity, impetuosity, and failure to appreciate the risks and consequence, as a factor against rehabilitation.

> On the possibility of rehabilitation, the law states that only the rarest, or case law states that children who are permanently incorrigible, I can tell you that I had a tough time with this, Ms. Peralta. *I think that you are well on your way to being permanently incorrigible. Your conduct and behavior has been going on since you were 14 years old, chronic runaway, don't follow your parents rules, and you make false allegations.* The consequences of which are just tremendous to your family.

R. 2622, ll. 13 – 22 (emphasis added). This treatment of factors that should serve as mitigation (running away from a home and parents that had abandoned appellant for years supports mitigation, not enhancement) and blaming appellant for problems in her home rather than acknowledging the substantial mitigating factor the life appellant had lived up to April of 2021,

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[15] Appellant believes the trial court intended to say "without" as appellant was questioned over a two day period without counsel, as the trial court addressed in pre-trial and addressed, *supra*.

is an abuse of discretion and an error of law. Here, the trial court actively applied elements of appellant's life that should have been considered for mitigation of sentence and used them as a basis for enhancement, which is an error of law.

This error of law mirrors that addressed by this Court in Mack, when his "age being near the age of majority was used against him without affording him full consideration of juvenility; and, he was faulted for not overcoming his circumstances." Id., 441 at 545–46, 894 S.E.2d at 830. The error here is compounded when contrasting the sentence the trial court provided Treveon Nelson (18 at the time of the crime) and Jaylen Wilson (17 at the time of the crime). Both were given less time than appellant. R. 2630, ll. 7 – 23; 2634, ll. 3 – 14; 2665, ll. 15 – 23.[16]

In an attempt to cure the error, counsel of appellant filed a motion requesting the trial court reconsider the sentence. Appellant's counsel attempted to pull the trial court into appreciating the unique legal status of appellant:

> Your Honor, I would just ask you again to consider the known factors that Dr. Knight went through; her age, the fact that at the age of 16, which she was at the time, that it is more normal than not for teenagers to engage in risk-taking behavior and impulsivity and following their peers and not being able to see consequences of their actions. Her tumultuous life up until the time that she was sixteen, upheaval people in her family, being abandoned in Honduras, her difficult immigration here, being molested, having her – basically her parental figures killed in Honduras, the struggle she went through to get here, and then, again, the abuse that she experienced at the hands of Treveon Nelson once she was here.
>
> You've heard about that controlling relationship, the different times that he had hurt her. You saw the pictures of the bruises and the blood on her face that he inflicted on her, injuries that were very similar to the ones that [SA] had on her face, which, again, connects Treveon rather than Nicolle to those injuries on [SA] her death.

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16 The trial court specifically noted it was not imposing a trial tax on appellant. R. 2433, l. 13 – 2434, l. 1. As such, the sentence disparity is difficult to explain in light of the trial court's obligation under *Aiken* to consider appellant's youth in connection with the sentence.

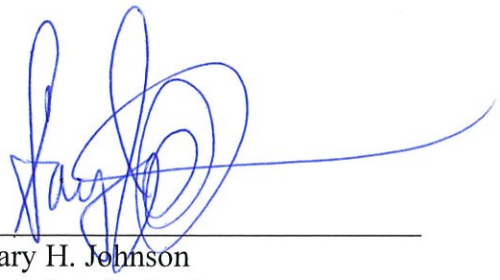
Motion to Reconsider hearing, p. 23, l. 20 – 24, l. 15.

Rather than reconsider the impact of appellant's youth as dictated by Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), the trial court again focused on the nature of the criminal act and the need for deterrence. R. 2675, l. 15 – 2676, l. 24. In fact, the trial court adds information provided by Allon Adams about appellant being in SA's home following the homicide as coming from SA's mother, Salameh Graham-Fleeming. R. 2676, ll. 10 - 12. This factual assertion lacks any support in the transcript, as SA's mother related visits to the home before her disappearance, not after. R. 2607, l. 23 – 2616, l. 11.

In light of the trial court's failure to consider, in a meaningful manner, the impact of appellant's youth during sentencing, the trial court's sentence violates the Eighth Amendment's prohibition on cruel and unusual punishments and Article I, § 15, of the South Carolina Constitution and is controlled based upon an error of law. In addition, the failure to apply a "specific and individualized inquiry" on this factor as required by Aiken v. Byars and State v. Mack mandate to a new sentencing hearing.

CONCLUSION

Based upon the foregoing arguments, appellant respectfully requests that the Court grant the relief requested concerning the errors outlined in each phase of appellant's case: the decision to transfer her from Family Court to General Sessions, the conduct of her trial, and the validity of her resulting sentence.



Gary H. Johnson
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SC Bar #8898

ATTORNEY FOR APPELLANT

This 25th day of September 2025.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Sep 25 2025
SC Court of Appeals

Appeal from Lexington County

Honorable W. Greg Seigler, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NAZARETH N SANCHEZ-PERALTA,

APPELLANT

APPELLATE CASE NO. 2023-001588

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon R. Brandon Larrabee, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 25th day of September 2025.

Gary H. Johnson
Appellate Defender
SC Bar #8898

ATTORNEY FOR APPELLANT