THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2015-000980

The State, ...Respondent,

v.

Tavarious Settles, ...Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Based on the totality of the circumstances, did the trial court err by admitting the statement made by Settles, a youth under the age of 18, where the statement was obtained during police interrogation outside the presence of a guardian or attorney, there was testimony at the *Jackson v. Denno* hearing that the police misrepresented that Settles was restricted from making a phone call prior to his interrogation, and Settles was not, in fact, offered the opportunity to make a phone call until after his interrogation.

II. The South Carolina Supreme Court recently held that individualized and meaningful sentencing hearings are required for youths under the age of 18 at the time of the crime that are subject to a sentence of life imprisonment without the possibility of parole. Settles was under the age of 18 and was subject to a potential sentence of life imprisonment without the possibility of parole. Did the trial court err by refusing to conduct an individualized and meaningful sentencing hearing and by refusing to allow the testimony of mitigation experts?

STATEMENT OF THE CASE

This case was commenced against Appellant Tavarious Settles upon indictment 2013-GS-24-1538 for the charge of murder and indictment 2013-GS-24-1539 for the charge of possession of a firearm or knife during the commission of a crime. (Indictments dated September 27, 2013; Tr. 8:4-8) **(R. p.).** Settles was tried before a jury in Greenwood, South Carolina from March 30, 2015 through April 2, 2015. (Tr. Cover Sheet) **(R. p.).** Following deliberations, Settles was found guilty on both charges and thereafter sentenced by the trial court to 45 years in prison on the murder charge and a concurrent five year sentence on the possession of firearm charge. (Tr. 469:25-470:8; 497:10-17; Sentence Sheets) **(R. p.).** Settles timely filed a post-trial motion for reconsideration of the sentence imposed on April 8, 2015, which the trial court denied by order dated April 21, 2015. (Mot. to Reconsider Sentence; Order Den. Mot. for Recons. of Sentence Imposed) **(R. p.).** Settles timely served his notice of appeal on April 29, 2015. (Notice of Appeal) **(R. p.).**

STATEMENT OF THE FACTS

On the evening of May 30, 2013, Prudencio Chiquin Sis (Sis) was killed by multiple gunshot wounds. (Tr. 179:24-181:5) **(R. p.).** Immediately prior to his death, Sis was walking in a residential area in Greenwood, South Carolina. (Tr. 132:2-4; 159:23-25) **(R. p.).** A resident of the area, Jerry Turner, witnessed two males approach Sis, heard them exchange words with him, and then heard gunshots. (Tr. 132:2-24; 148:8-9) **(R. p.).** Mr. Turner immediately called 9-1-1 and police arrived within minutes of the call. (Tr. 132:23-24; State's Ex. 1) **(R. p.).** Multiple officers and crime scene investigators responded to the scene. (Tr. 180:23-181:18) **(R. p.).** Evidence was gathered, and Mr. Turner's statement was taken. (Tr. 230:23-231:8) **(R. p.).** No other resident of the area had any direct knowledge of the shooting. (Tr. 231:9-11) **(R. p.).**

Ultimately, the Greenwood City Police Department's investigation centered upon four individuals, Settles, Markece Moore, Michael Patten,[1] and Bryson Jefferson. (Tr. 231:20-22) **(R. p.).** Settles, Patten, and Jefferson were all under the age of 18 at the time of Sis' death; Moore was an adult. (Tr. 73:1-6; 83:6-18; 107:18-20; 205:15-20) **(R. p.).** Settles, Moore, and Patten were all charged with Sis' murder; Jefferson was not charged at all in connection with Sis's death.[2] (Tr. 121:25-122:2; 463:8-21) **(R. p.).**

Settles was arrested on June 13, 2013. (Tr. 195:13-22; 200:12-13, 22-23) **(R. p.).** At the time of his arrest, Settles was less than two months past his 17th birthday and was

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[1] The trial transcript incorrectly identifies Michael Patten as Michael Patton.

[2] Settles' case was the first of the three (and, to date, the only one) that the State brought to trial. (Tr. 494:8-24) **(R. p.);** *see* http://publicindex.sccourts.org/Greenwood/PublicIndex (Under searches for "Patten, Michael James" and "Moore, Markece"); *see also Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) ("[A]n appellate court can take judicial notice of something that was not before the trial court if it is indisputable.").

living with his grandmother. (Tr. 205:15-20; 206:10-14; 383:4-22) **(R. p.).** He was beginning the 11th grade at Greenwood High School and had no prior criminal record. (Tr. 383:7-8; 383:23-384:7; 493:2-9) **(R. p.).**

Prior to being booked into jail, Settles was taken to an interview room at the Greenwood City Detectives Office where he was interrogated by Greenwood City detective, Joe Collins. (Tr. 195:13-22) **(R. p.).** No one else was present during the interrogation. (Tr. 196:9-11; 204:8-13) **(R. p.).** Settles testified at the *Jackson v. Denno* hearing that he did not know that he had been charged with murder at the time he was interrogated. (Tr. 204:14-205:7) **(R. p.).**

According to the testimony of Detective Collins, Settles was not offered the opportunity to speak with a parent or guardian prior to being interrogated. (Tr. 201:12-13; 202:9-10) **(R. p.).** Settles also testified at the *Jackson v. Denno* hearing that he asked to make a phone call but was told he was restricted from making any phone calls. (Tr. 205:8-14; 205:24-206:2; 208:3) **(R. p.).** The State did not present any evidence or testimony that the police provided Settles the opportunity to make a phone call prior to him being interrogated. And, in fact, Detective Collins testified that he did not offer Settles the opportunity to make a phone call until after the interrogation. (Tr. 240:5-8) **(R. p.).** Settles testified that, if he had been given the opportunity, he would have called his grandmother to ask her to talk to a lawyer and come to the police station. (Tr. 205:25-206:14) **(R. p.).**

Detective Collins recorded only the last three and half minutes of his approximately 40-minute interrogation of Settles. (Tr. 196:12-16; 198:5-9; State's Ex. 34) **(R. p.).** Prior to Detective Collins beginning the recording, he had Settles sign an "Adult Waiver of Rights." (State's Exs. 33, 34; Tr. 203:2-6) **(R. p.).** Detective Collins testified that he also

verbally informed Settles of his rights briefly before the interrogation, but this was not captured on the recording. (State's Ex. 34; Tr. 201:17-20; 203:2-6) **(R. p.).** In the recorded statement, Settles states that he was with Moore, Patten, and Jefferson immediately before the shooting and that he witnessed Moore shoot Sis. (State's Ex. 34) **(R. p.).**

Other than the self-serving testimony of Moore, the only witness the State produced that had any direct knowledge of the circumstances surrounding the shooting was Mr. Turner. (Tr. 231:9-11) **(R. p.).** Mr. Turner gave only a vague description of the two males that had approached Sis and did not identify Settles or anyone else as one of those males. (Tr. 131:2-8) **(R. p.).** Mr. Turner testified that he saw "something shiny" that looked like a gun in the hand of one of the males that approached Sis but he was unsure which of the two males was holding it. (Tr. 148:10-17) **(R. p.).** Mr. Turner further testified that he only heard the shooting and did not see it. (Tr. 148:7-17) **(R. p.).**

The State's only evidence connecting Settles to the crime was the testimony of Moore, Patten, and Jefferson against Settles and Settles' statement to police after he was arrested and in police custody. The State did not produce any forensic evidence linking Settles to the crime scene. Nor did the State produce any murder weapon. Given the lack of credibility of Moore, Patten, and Jefferson,[3] the State's case hinged on Settles' statement.[4]

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[3] The testimony at trial of Moore, Patten, and Jefferson was inconsistent and conflicted with each of their multiple prior statements to the police. (Tr. 59:10-126:25). **(R. p.).** Indeed, Moore and Patten admitted to lying to the police multiple times, and it was demonstrated that Moore lied during his in-court testimony. (Tr. 71:10-21; 73:7-10; 75:9-76:4; 81:1-8; 85:8-10; 108:7-20; 376:1-25) **(R. p.).** Moreover, Patten and Jefferson did not witness the shooting, and only Moore that testified he witnessed Settles shoot Sis. (Tr. 76:10-15; 89:3-13; 108:21-109:5). **(R. p.).**

[4] This is confirmed by the fact that the only evidence specifically referenced by trial court in denying Settles' motion for a directed verdict was Settles' statement because of its relevance to the State's "hand of one, hand of all" theory. (Tr. 318:20-320:3) **(R. p.).** This is further confirmed by a question by the jury to the trial court during deliberations regarding the applicability of the

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Evidentiary rulings are within the sound discretion of the trial court, and such rulings will not be reversed absent an abuse of discretion or the commission of legal error that prejudices the defendant. *State v. Garner*, 389 S.C. 61, 65, 697 S.E.2d 615, 617 (Ct. App. 2010) (citing *State v. Rice*, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007)). On review, appellate courts are limited to determining whether the trial judge abused his discretion. *State v. Reed*, 332 S.C. 35, 503 S.E.2d 747 (1998). The trial court abuses its discretion when the ruling is based on an error of law or factual conclusion that is without evidentiary support. *Garner*, 389 S.C. at 65, 697 S.E.2d at 617 (citing *Rice*, 375 S.C. at 315, 652 S.E.2d at 415).

ARGUMENT

I. Based on the totality of the circumstances, the trial court erred by admitting the statement made by Settles, a youth under the age of 18, where the statement was obtained during police interrogation outside the presence of a guardian or attorney, there was testimony during the *Jackson v. Denno* hearing that the police misrepresented that Settles was restricted from making a phone call prior to his interrogation, and Settles was not, in fact, offered the opportunity to make a phone call until after his interrogation.

A statement obtained as a result of custodial interrogation is inadmissible unless the suspect voluntarily waived his rights. *Miranda v. Arizona*, 384 U.S. 436, 498-500 (1966). "[A]ny criminal trial use against a defendant of his involuntary statement is a denial of due process of law...." *State v. Hook*, 348 S.C. 401, 410, 559 S.E.2d 856, 860 (Ct. App. 2001), *aff'd as modified*, 356 S.C. 421, 590 S.E.2d 25 (2003) (citing *Jackson v. Denno*,

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"hand of one, hand of all" theory to the weapons charge, which demonstrates the jury did not believe Moore's testimony that Settles had a gun and shot Sis. (Court's Ex 6; Tr. 464:1-466:14) **(R. p.)**.

378 U.S. 368, 376 (1964) ("It is now axiomatic 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...."). "The State bears the burden of establishing voluntariness by a preponderance of the evidence...even where a defendant has signed a waiver of rights form...." *Hook*, 348 S.C. at 410, 559 S.E.2d at 860. "The test for determining the admissibility of a statement is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances." *Hook*, 348 S.C. at 410, 559 S.E.2d at 860; *see State v. Morris*, 307 S.C. 480, 487, 415 S.E.2d 819, 823 (Ct. App. 1991) ("The test of admissibility of an accused's statement against him is voluntariness.").

"The test of voluntariness is 'whether a defendant's will was overborne by the circumstances surrounding the given statement. 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.'" *State v. Miller*, 375 S.C. 370, 384, 652 S.E.2d 444, 451 (Ct. App. 2007) (quoting *Dickerson v. United States,* 530 U.S. 428, 434 (2000)). Accordingly, factors that the trial court should consider under the totality-of-circumstances analysis include: police coercion; police misrepresentations; the location of the interrogation; the age, education, maturity, background, experience, and conduct of the accused; and isolation of a minor from his or her parents. *Miller*, 375 S.C. 370, 384, 652 S.E.2d 444, 451. "Coercion is determined from the perspective of the suspect." *Id* at 386, 652 S.E.2d at 452.

At trial, Settles' defense counsel moved to suppress the statement Settles made during his custodial interrogation, and the trial court conducted a *Jackson v. Denno* hearing to determine the admissibility of the statement. (Tr. 194:8-16) **(R. p.).** Detective Collins

and Settles testified at the hearing. (Tr. 194:21-213:24) **(R. p.).** After this testimony, Settles' defense counsel argued that the statement was not given voluntarily considering the totality of the circumstances, including Settles' age, the fact that he was not offered the opportunity to make a phone call or contact his mother or grandmother prior to his interrogation, and the fact that the police misrepresented that he was restricted from making such a call. (Tr. 208:16-213:24). **(R. p.).** The trial court, however, determined that Settles voluntarily waived his rights and therefore denied Settles' motion to suppress the statement and allowed the State to present it to the jury. (Tr. 212:14-23) **(R. p.).**

The trial court based its ruling as to the voluntariness of Settles' statement largely on the fact that it believed Detective Collins' testimony that, as described by the trial court, "[Settles] was free to make a phone call if he wanted to" to be more credible than Settles' testimony that he had been told that he was restricted from making a phone call. (Tr. 213:12-24) **(R. p.).** However, Detective Collins never testified that "Settles was free to make a phone call if he wanted to" and never testified that he offered Settles the opportunity to make a phone call *prior* to interrogating Settles and obtaining his statement. Detective Collins' testimony was only that he offered Settles the opportunity to make a phone call; he did not specify that he made this offer prior to obtaining Settles' statement. And, in fact, he subsequently testified that he did not offer Settles the opportunity to make a phone call until after the interrogation. (Tr. 240:5-8) **(R. p.).** Accordingly, the trial court's finding in support of its ruling as to the voluntariness of the statement that "Mr. Settles was offered the opportunity to make a phone call and declined to do so" prior to being interrogated by the police has no evidentiary support in the record. Therefore, on this basis alone, the trial court abused its discretion by failing to suppress Settles' statement. *Garner*, 389 S.C. at 65,

697 S.E.2d at 617 ("The trial court abuses its discretion when the ruling is based on…[a] factual conclusion that is without evidentiary support.")

Moreover, in part because of the trial court's erroneous factual conclusion, the trial court did not properly apply—and could not have properly applied—the requisite totality-of-circumstances analysis. Indeed, through its erroneous factual finding, the trial court removed from its analysis a critical factor demonstrating the police's coercion and why Settles statement was not voluntary. Because by misrepresenting that Settles could not make a phone call and depriving him of the opportunity to do so prior to interrogating him, the police removed any way by which Settles could exercise his right to an attorney. Simply put, the right to consult with counsel is meaningless if it can be eliminated by depriving the suspect of his only avenue for contacting counsel. And while an adult experienced with the criminal justice system may not fall prey to this misrepresentation and might not waive the right to an attorney under similar circumstances, to Settles—a teenager with no prior involvement with the criminal justice system—the supposed waiver of his right to an attorney was essentially meaningless because, from his perspective, he had no way to exercise that right. *Miller* at 386, 652 S.E.2d at 452 ("Coercion is determined from the perspective of the suspect.") Long ago, the United States Supreme Court made this point abundantly clear:

> But 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 protest his own interests or how to get the benefits of his constitutional rights.
>
> …
>
> He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no

> way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights.

Gallegos v. Colorado, 370 U.S. 49, 54-55 (1962).

Although youth alone is not enough to render Settles' statement inadmissible, when the requisite totality-of-circumstances analysis is properly applied and his youth and inexperience with the criminal justice system are considered in combination with the restriction on his access or ability to contact his guardian or an attorney, Settles' statement was not voluntarily made and the trial court's contrary ruling was an abuse of discretion. Because Settles' conviction was based in large part on this involuntary and coerced statement, his conviction should be reversed. *Jackson v. Denno*, 378 U.S. at 376 ("It is now axiomatic 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..."). Further, because the State could not have avoided a directed verdict or proved Settles' guilt beyond a reasonable doubt without this statement, Settles should be granted a new trial.

II. The trial court erred by refusing to conduct the individualized and meaningful sentencing hearing required for youths under the age of 18 that are subject to a life sentence without the possibility of parole and by refusing to allow the testimony of mitigation experts.

In *Aiken v. Byars*, the South Carolina Supreme Court established an "affirmative requirement" that all youths under the age of 18 at the time of the alleged crime that "may be subject to a sentence of life imprisonment without the possibility of parole" are entitled

to an individualized and meaningful sentencing hearing that "fully explore[s] the impact of the defendant's juvenility on the sentence rendered." 410 S.C. 534, 543-545, 765 S.E.2d 572, 576-578 (2014) (applying *Miller v. Alabama*, — U.S. —, 132 S.Ct. 2455 (2012)). At the time of the alleged crime, Settles was under the age of 18. (Tr. 205:15-20) **(R. p.).** Because the jury found him guilty of murder, he was automatically subject to a potential sentence of life imprisonment without the possibility of parole. S.C. Code Ann. § 16-3-20(A).

The trial court, however, expressly rejected the applicability of *Byars* to Settles' sentencing as well as Settles' request for the appointment of a mitigation specialist or expert to assist in the presentation of mitigating evidence. (Tr. 28:15-30:4; 473:7-481:24; Mot. for Funding for a Mitigation Specialist/Investigator and Psychologist or Psychiatrist; Mot. to Reconsider Sentence; Order Den. Motion for Recons. of Sentence Imposed) **(R. p.).** Instead, the trial court conducted a perfunctory sentencing hearing within minutes of the jury's verdict that failed to comply with the requirements of *Byars* and then sentenced Settles to 45 years without parole on the murder charge.[5] (Tr. 481:12-497:12) **(R. p.).** This was erroneous and demands that, at the very least, this case be remanded for a new sentencing hearing and the appointment of and funding for mitigation experts.

In *Byars*, the South Carolina Supreme Court reviewed and applied the United States Supreme Court's 2012 decision in *Miller v. Alabama.* The United States Supreme Court held in *Miller* that mandatory sentences to life in prison without the possibility of parole for juvenile—under 18 years of age—offenders violated the Eighth Amendment's

[5] Although not bearing on the issue before the Court, the Court can take judicial notice of the fact that subsequent to the filing of Notice of Appeal, on September 18, 2015, the Solicitor moved the trial court to reduce Settles' sentence from 45 years to 40 years for Settles' "substantial assistance" in another matter, which the trial court granted the same day.

prohibition of cruel and unusual punishments. 132 S.Ct. at 2461; *see* U.S. Const. amend VIII. In reaching this decision, the United States Supreme Court examined two prior decisions—*Roper v. Simmons,* 534 U.S. 551 (2005) and *Graham v. Florida*, 560 U.S. 48 (2010)—in which the Court invalidated the death penalty for all juvenile offenders and life without parole sentences for juvenile nonhomicide offenders, respectively. *Miller*, 132 S.Ct. at 2463-69. The Court stated that "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing," a conclusion that "rested not only on common sense—on what 'any parent knows'—but on science and social science as well." *Miller*, 132 S.Ct. at 2464. As explained by the Court, this significant difference between adults and children manifested itself in three distinct ways:

> First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity.

Id. (citations and internal quotation marks and ellipsis omitted).

According to the Court, these "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 132 S.Ct. at 2465. Explaining further, the Court stated:

> [B]ecause the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. Similarly, incapacitation could not support the life-without-parole sentence [because] [d]eciding that a juvenile

> offender forever will be a danger to society would require making a judgment that he is incorrigible—but incorrigibility is inconsistent with youth.

Id. (citations and internal quotation marks omitted). For all of these reasons, the United States Supreme Court held that the mandatory sentencing schemes that prevent a sentencer from taking into account the youth of the offender and considering the differences between adult and juvenile offenders violate the Eighth Amendment. *Id.* at 2469.

In *Byars*, 15 inmates who were sentenced to life without parole as juveniles under South Carolina's current sentencing scheme petitioned the South Carolina Supreme Court for resentencing in light of the *Miller* decision. *Byars*, 410 S.C. at 536-37, 765 S.E.2d at 573-74. The question before the Court therefore was whether *Miller* extended to South Carolina's discretionary sentencing scheme which permits a life without parole sentence to be imposed on a juvenile but does not mandate it like those sentencing schemes at issue in *Miller*. The South Carolina Supreme Court held that it does, specifically stating that "the principles enunciated in *Miller v. Alabama* apply retroactively to these petitioners, to those similarly situated, and prospectively to all juvenile offenders who may be subject to a sentence of life imprisonment without the possibility of parole." *Byars*, 410 S.C. at 545, 765 S.E.2d at 578.

In reaching this holding, the South Carolina Supreme Court focused not on the sentences that were rendered but rather how those sentences were determined: "*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." *Id.* at 543, 765 S.E.2d at 577. "*Miller* is clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing

that offends the Constitution." *Id.* at 543, 765 S.E.2d at 576-77. The Court stated that it "must give effect to the proportionality rationale integral to *Miller*'s holding—youth has constitutional significance…[and] [a]s such, it must be afforded weight in sentencing." *Id.* at 542-43, 765 S.E.2d at 576. In short, "*Miller* requires the sentencing authority [to] 'take into account how children are different.'" *Id.* at 544, 765 S.E.2d at 577 (quoting *Miller*, 132 S.Ct. at 2469).

Examining the 15 cases before it, the Court found that, "although some of the hearings touch on the issues of youth, none of them approach the sort of hearing envisioned by *Miller* where the factors of youth are carefully and thoughtfully considered." *Id.* at 543, 765 S.E.2d at 577. In granting the petitions and ordering resentencing for the petitioners that would allow them to "present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight," the Court found that it was the "absence of this level of inquiry into the characteristics of youth [that] produced a facially unconstitutional sentence for these petitioners." *Id.* at 543-44, 765 S.E.2d at 577.

The Court further provided instruction for the "appropriate procedure" for sentencing hearings for juveniles going forward. *Id.* at 544, 765 S.E.2d at 577. Looking again towards *Miller*, the South Carolina Supreme Court found that "*Miller* establishes a specific framework, articulating that the factors a sentencing court consider at a hearing ***must*** include: (1) the chronological age of the offender and the hallmark features of youth, including 'immaturity, impetuosity, and failure to appreciate the risks and consequence'; (2) the 'family and home environment' that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct

and how familial and peer pressures may have affected him; (4) the 'incompetencies associated with youth—for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys'; and (5) the 'possibility of rehabilitation.'" *Byars*, 410 S.C. at 544-45, 765 S.E.2d at 577 (quoting *Miller*, 132 S.Ct. at 2468).

Here, the trial court expressly rejected the applicability of *Byars* and *Miller* to Settles' sentencing, both prior to the sentencing hearing and upon Settles' post-trial motion. (Tr. 481:14-24; Order Den. Mot. for Recons. of Sentence Imposed; Mot. to Reconsider Sentence) **(R. p.).** Consequently, the trial court did not conduct a sentencing hearing that complied with the requirements of these decisions and in which the "factors of youth [were] carefully and thoughtfully considered." *Byars,* 410 S.C. at 543, 765 S.E.2d at 577. This is fully demonstrated by the trial court's last minute denial of the appointment and funding of mitigation experts as well as its termination of witness testimony on Settles' behalf, stating that "[t]here's not going to be testimony" and "I do not believe a full-blown sentencing hearing is appropriate in these circumstances."[6] (Tr. 483:20; Tr. 486:7-15) **(R. p.).**

Instead of following the sentencing framework established by *Byars* and *Miller*, the trial court, like those sentencing decisions reversed in *Byars*, "treat[ed] the characteristics of youth as any other fact" and, thus, erroneously minimized the factor of

[6] Rather than allowing Settles to present witness testimony on his behalf, the trial court instructed Settles' counsel to just provide a summary because "that might be a much more ***efficient*** way for you to present the mitigation in this particular case." (Tr. 486:7-15 (emphasis added) **(R. p.).**

Settles' youth. *Id.* at 543 n.8, 765 S.E.2d at 577 n.8. Indeed, the trial court's entire consideration of Settles' youth consisted of the following:

> I agree with [defense counsel] that although the law might consider a 17-year-old to be a man there are certain developmental delays. *Maybe* you were not fully mature. *Maybe* emotionally you're not fully there.

(Tr. 496:10:13 (emphasis added)) **(R. p.).**[7] However, for purposes of sentencing, *Byars* and *Miller* make clear that the law does not consider a 17-year-old to be a "man." The trial court's hesitation and uncertainty as to whether Settles "maybe" was not fully mature or emotionally stable also is exactly why an individualized and meaningful sentencing hearing is required and the testimony of mitigation experts is needed.

Because the trial court rejected the applicability of *Byars* and *Miller* and conducted a sentencing hearing that ignored the framework and factors required to be considered by those decisions, Settles' sentence "offends the Constitution" and is the result of an error of law. *Byars*, 410 S.C. at 543, 765 S.E.2d at 576-77. Settles therefore is entitled to resentencing. *State v. Petty*, 245 S.C. 40, 42, 138 S.E.2d 643, 645 (1964) ("In the case of an illegal sentence, the well settled practice in this jurisdiction is to...set aside the sentence and remand the case to the trial court for the purpose of resentencing the defendant.").

Moreover, prior to the trial, Settles moved for the appointment and funding of a mitigation specialist and a psychologist or psychiatrist for sentencing purposes. (Tr. 28:17-30:3; Mot. for Funding for a Mitigation Specialist/Investigator and Psychologist or Psychiatrist). At that time, the trial court indicated that it would not be opposed granting

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[7] Strangely, although stating that there was no evidence in the record to support such a claim, the trial court spent more time discussing its personal perception that members of Greenwood's Hispanic community (Sis was Guatemalan) are often targeted because of the belief that some of them are not legally in the country than it did discussing Settles' youth and other attendant characteristics. (Tr. 495:15-496:3) **(R. p.).**

this request and that it was "going to keep an open mind and keep all my options open with regard to that request on this case." (Tr. 29:8-15; 30:1-3) **(R. p.).** Consistent with guidance, Settles renewed his request for the appointment and funding of a mitigation specialist and a psychologist or psychiatrist after the jury's verdict and explained the necessity and relevance of the testimony that these experts could provide. (Tr. 477:17-479:10) **(R. p.).**

Despite the trial court's previous indication that it would likely grant such a request and the State's suggestion that the sentencing hearing could be postponed until the next term of court to allow a mitigation expert to meet with Settles, the trial court inexplicably denied the request based on its erroneous view of the law and its determination that *Byars* and *Miller* did not apply to Settles' case. (Tr. 480:7-11; 481:12-24; Order Den. Mot. for Recons. of Sentence Imposed) **(R. p.);** *see Garner*, 389 S.C. at 65, 697 S.E.2d at 617 ("The trial court abuses its discretion when the ruling is based on an error of law"). This forced Settles to immediately—*i.e.*, within minutes of the jury's verdict—proceed with his sentencing hearing without the benefit of the relevant and meaningful testimony that such experts could provide, which significantly prejudiced him.

This significant prejudice to Settles is confirmed by the South Carolina Supreme Court's comparison of the sentencing of juvenile offenders subject to life without parole to the penalty phase of a capital case. *Byars*, 410 S.C. at 544-45, 765 S.E.2d at 577 ("[W]e are mindful that the *Miller* Court specifically linked the individualized sentencing requirements of capital sentencing to juvenile without parole sentences...Thus, the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings...."). The trial court therefore erred by failing to give Settles a reasonable opportunity to prepare for the sentencing

hearing and present expert testimony relevant to the mitigating factors *Byars* and *Miller* mandate that a sentencer consider when sentencing youths. *State v. Patterson*, 290 S.C. 523, 529, 351 S.E.2d 853, 856 (1986) (holding that trial judge's refusal to permit psychologist to testify as to mitigating factors during penalty phase of a capital case was reversible error).

Additionally, in denying Settles' post-trial motion for reconsideration of his sentence, the trial court found that "appointing a mitigation specialist, psychologist or psychiatrist would not have aided the court in deciding the sentence to impose." (Order Den. Mot. for Recons. of Sentence Imposed) **(R. p.).** However, this finding was necessarily based on the trial court's erroneous view that *Byars* and *Miller* did not apply and truly could only be made if the factors required to be considered by those decisions are ignored and the characteristics of youth are simply treated as any other fact. *Byars*, 410 S.C. at 543 n.8, 765 S.E.2d at 577 n.8; *see also Skipper v. S. Carolina*, 476 U.S. 1, 8 (1986) ("The exclusion by the state trial court of relevant mitigating evidence impeded the [sentencer's] ability to carry out its task of considering all relevant facets of the character and record of the individual offender."). Therefore, the trial court's last-minute denial of the appointment of and funding for mitigation experts and accompanying refusal to allow Settles to present testimony from such experts was an error and abuse of discretion that further requires resentencing in this case.

CONCLUSION

For the reasons set forth above, Settles' convictions should be reversed and this case remanded for a new trial. Alternatively, this case should be remanded for resentencing.

[Signature Page Follows]

Respectfully submitted,

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Columbia, South Carolina
February 10, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENWOOD COUNTY
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2015-000980

The State, ...Respondent,

v.

Tavarious Settles,...Appellant.

PROOF OF SERVICE

This is to certify that I, a legal assistant with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **Initial Brief of Appellant** and **Designation of Matter to be Included in the Record on Appeal** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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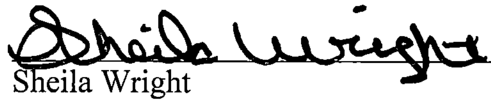
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Columbia, South Carolina
This 10th day of February 2016

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VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *The State v. Tavarious Settles*;
Appellate Case No. 2015-000980

Dear Ms. Kitchings:

Enclosed for filing please find the original and one (1) copy of the **Initial Brief of Appellant Tavarious Settles** and **Designation of Matter to be Included in the Record on Appeal** in the above-referenced matter. I would appreciate your acknowledging receipt of this document by file-stamping the extra copy and returning it to me via my courier.

By copy of this letter, I am serving counsel of record and enclose a Proof of Service to that effect. If you have any questions or if you need any additional information, please do not hesitate to contact me.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.

John W. Roberts

Enclosures

cc: Robert M. Dudek, Esquire
Donald J. Zelenka, Esquire

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