THE STATE OF SOUTH CAROLINA
In The 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.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The trial court's erroneous admission at trial of the involuntary statement made by Settles, a youth under the age of 18, during police interrogation was not harmless, as it reasonably could have affected the jury's verdict in a case lacking any other credible evidence to support Settles' conviction.

Contrary to the State's contentions, *see* Br. of Resp't at 20-24, the admission of Settles' involuntary statement was not harmless because it dictated Settles' decision to testify at trial, and his statement was not merely cumulative of the State's other evidence. *See State v. Newell*, 303 S.C. 471, 401 S.E.2d 420 (Ct. App. 1991) (recognizing that the improper admission of a statement is not a harmless error if the improperly admitted statement, and not the State's other evidence, dictated the decision to testify). *State v. Davis*, 371 S.C. 170, 181–82, 638 S.E.2d 57, 63 (2006) ("Error is only harmless when it could not reasonably have affected the result of the trial.")

Other than Settles' statement to police, the State's only evidence connecting Settles to the crime was the testimony of the three other suspects of the murder. Br. of Appellant at 5. The State produced no other witness that identified Settles as being at or near the crime scene; nor did the State produce any forensic evidence linking Settles to the crime scene. The State also did not produce any murder weapon. *Id.*

With respect to the testimony of the other three suspects, only one—Markece Moore—testified that he witnessed Settles shoot the victim, and he was proven to be a liar. *Id.* In fact, based on questions by the jury to the trial court during deliberations, it is apparent that the jury did not believe Moore's testimony and very likely believed that Moore was the shooter. *Id.* at 5 n.4. Moreover, as the State admits, all three of the other suspects' testimony at trial was inconsistent and conflicted with their multiple prior statements to the police. Br. of Resp't at 23; Br. of Appellant at 5 n.3. The police officer

that interviewed each of the suspects also testified that he did not "think any of them were completely honest." (R. p.) (Tr. 242:19-20). The **only** thing that gave even an ounce of credibility to the three other suspects' testimony was that—other than with respect to who shot the victim—their testimony was somewhat consistent with Settles' statement to police. *See State v. Doctor*, 306 S.C. 527, 530, 413 S.E.2d 36, 38 (1992) ("When a witness' testimony is disputed or his credibility called into question, other testimony verifying the facts or opinions given by the witness is not merely cumulative.").

The State's case therefore hinged on Settles' statement. Settles' statement not only placed Settles near the scene of the crime, but it also verified certain portions of the three other suspects' otherwise inconsistent and conflicting testimony. Based on the lack of other evidence presented by the State and the complete lack of credibility of the only witnesses that linked Settles to the crime, and considering the State's evidentiary burden, if not for the trial court's improper admission of the statement, Settles most likely would not have decided to testify at the trial. And there is no credible argument that the presentation to the jury of Settles' statement—as well as the trial testimony that he would not have provided but for the trial court improperly admitting his statement—could not reasonably have affected the result of the trial or contributed to Settles' conviction.

II. Settles' sentence suffers from a "constitutional defect" because the trial court did not follow controlling precedent.

In *Aiken v. Byars*, the South Carolina Supreme Court reviewed and applied the United States Supreme Court's 2012 decision in *Miller v. Alabama* and established the "affirmative requirement" in South Carolina 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)). Because Settles was under the age of 18 at the time of the alleged crime and was, after his conviction, subject to a potential sentence of life imprisonment without the possibility of parole, the trial court was required to conduct this individualized and meaningful sentencing hearing mandated by *Aiken* and *Miller* for Settles in this case. Br. of Appellant at 10-18.

Accordingly, immediately following the trial and prior to Settles' sentencing hearing, Settles asked the trial court to follow *Aiken* and *Miller* and also renewed his pretrial motion for the appointment of a mitigation expert. Br. of Appellant at 11. However, the trial court expressly rejected the applicability of *Aiken* and *Miller* to Settles' sentencing, denied the request for a mitigation expert, and immediately proceeded with the sentencing hearing in the "way [the trial court was] accustomed to doing it." (R. p.) (Tr. 473:7-481:24); *see also* (R. p. (Order Den. Mot. for Recons. of Sentence Imposed) ("The court finds that the cases cited by the Defendant in support of a sentencing hearing do not apply under the facts of this case."))[1]. This was an obvious error of law.

In its Respondent's Brief, the State does not deny the applicability of *Aiken* and *Miller* and their sentencing requirements in this case. *See, e.g.*, Br. of Resp't at 27-28 ("For purposes of *Aiken's* prospective application, the fact that Appellant reached seventeen years of age and was statutorily an adult in South Carolina at the time of the crime and sentencing holds no bearing on whether an individualized sentencing hearing should apply

[1]The cases cited by Settles in his motion for reconsideration were *Aiken* and *Miller*. (R. p. (Mot. to Recons. Sentence)).

because our Supreme Courts' adoption of *Miller* explicitly extended to all defendants under the age of eighteen."). Nor does the State refute the fact that the trial court expressly rejected the applicability of *Aiken* and *Miller*. The State therefore effectively concedes that the trial court committed an error of law by refusing to follow *Aiken* and *Miller*.

The State nevertheless contends that this error of law should be excused because the trial court conducted the sentencing hearing in "the way [the trial court] was accustomed to doing it" and there was some testimony presented during the trial and during the sentencing hearing that touched on Settles' youth. Br. of Resp't at 32-36. The State claims that "*Aiken* does not condemn this procedure" and that, "despite only citing *Miller* as precedent governing the factors to review during the sentencing phase, Appellant's proceeding demonstrates that the trial judge did comport with *Aiken* and *Miller* in his sentencing considerations."[2] *Id.* at 32. This simply is incorrect.

First, the State's argument is almost identical to the argument raised by the dissent and specifically rejected by the majority in *Aiken*. As discussed in Settles' Initial Brief, the majority in *Aiken* held that "the principles enunciated in *Miller v. Alabama* apply

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[2] This latter assertion deserves attention. First, it is erroneous because, as explained *infra*, Settles' sentencing hearing did not "comport" with *Aiken* and *Miller*. It also is inaccurate because, as demonstrated by the very transcript excerpt cited by the State, the trial court specifically rejected the applicability of *Miller* and did **not** "cit[e] *Miller* as precedent governing the factors to review during the sentencing phase." (R. p.) (Tr. 481:12-25); *see also* (R. p. (Order Den. Mot. for Recons. of Sentence Imposed) ("The court finds that the cases cited by the Defendant in support of a sentencing hearing **do not apply** under the facts of this case.") (Emphasis added)). Further, this is one of several unsupported and disingenuous statements made by the State to disguise the fact that the trial court improperly rejected the applicability of *Aiken* and *Miller*. *See, e.g.,* Br. of Resp't at 30 (stating that the trial court took "due care to comport his sentencing considerations with those prescribed by *Aiken* and *Miller*"); 38 ("However, the trial court did consider the mandates of *Aiken* and *Miller*."). It simply cannot be argued that the trial court took "due care" to follow *Aiken* and *Miller* when the trial court expressly and specifically rejected the applicability of *Aiken* and *Miller*—a fact the State does not dispute.

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." *Aiken*, 410 S.C. at 545, 765 S.E. at 578. With respect to those individuals that had been sentenced prior to *Miller*, the majority held that they were entitled to resentencing and could file a motion for resentencing within one year of the Court's opinion.[3] *Id.* The dissent, however, criticized the majority for allowing resentencing for all individuals sentenced prior to *Miller* on the basis that such blanket resentencing did not consider the adequacy of each of the individuals' original sentencing hearing. *Id.* at 410 S.C. at 548, 765 S.E.2d at 579. Importantly, the majority responded to this criticism as follows:

> The dissent's discussion of the individual sentencing hearings . . . highlights the distinction between its reading of *Miller* and ours—we recognize and give credence to the [*Miller*] decision's command that courts afford youth and its attendant characteristics constitutional meaning. The dissent would simply continue to treat the characteristics of youth as any other fact. We are likewise unfazed by the dissent's criticism that we have failed to pinpoint an abuse of discretion; that admonition appears to arise from a fundamental misunderstanding of our holding. **We have determined that the sentencing hearings in these cases suffer from a constitutional defect—the failure to examine the youth of the offender through the lens mandated by *Miller*.**

Aiken, 410 S.C. at 543 n.8, 765 S.E. at 577 n.8 (Emphasis added). The majority therefore held that no individual review of what transpired during each of the prior sentencing

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[3] Since the decision in *Aiken*, the Supreme Court, through administrative order, has established the procedure for "the management and disposition of all motions for resentencing filed pursuant to [*Aiken*]," and numerous cases have been assigned by the Supreme Court to the circuit courts for resentencing. *In re Administrative Order*, 415 S.C. 460, 783 S.E.2d 534 (2016); *see, e.g.*, *Parker v. State*, — S.E.2d —, 2016 WL 4256914 (Aug. 12, 2016) (assigning case for resentencing pursuant to *Aiken*). The Supreme Court even has added a page to the South Carolina Judicial Department website dedicated the "Aiken v. Byars Judicial Appointment Orders," which identifies all the cases (approximately 60 cases for 2016 alone through August 16, 2016) that have been assigned for resentencing. *See* http://www.judicial.state.sc.us/courtOrders/indexAikenAppts.cfm.

hearings was required because they all suffered the same "constitutional defect" that demanded resentencing: "the failure to examine the youth of the offender through the lens mandated by *Miller*."

Because the trial court rejected the applicability of *Aiken* and *Miller* in sentencing Settles, the same "constitutional defect" is present in this case. By expressly refusing to follow *Aiken* and *Miller*, the trial court necessarily failed "to examine the youth of [Settles] through the lens mandated by *Miller*." In other words, by not following *Aiken* and *Miller* and by conducting the sentencing hearing "the way [the trial court] was accustomed to doing it," the trial court's sentencing decision is no different than those sentencing decisions made prior to *Miller*. Accordingly, like the petitioners in *Aiken* and all those similarly situated individuals that recently have been granted resentencing hearings, *see* discussion *supra* n.3, Settles is entitled to resentencing. *Aiken*, 410 S.C. at 543 n.8, 765 S.E. at 577 n.8.

Contrary to the State's primary argument, this conclusion is not changed, nor is the trial court's error of law excused, because some testimony related to Settles' youth was presented during the trial and sentencing hearing. As the majority in *Aiken* made clear, it does not matter what or how much information regarding a defendant's youth is **presented** to the sentencer if the sentencer then refuses to view this information "through the lens mandated by *Miller*" and "afford youth and its attendant characteristics constitutional meaning." *Aiken*, 410 S.C. at 543 n.8, 765 S.E. at 577 n.8. Here, the trial court, like those sentencing decisions discussed in *Aiken*, "treat[ed] the characteristics of youth like any other fact" and therefore erroneously minimized the factor of Settles' youth in sentencing him.

The failure of the trial court to follow *Aiken* and *Miller* is especially harmful in this case because the trial court referred to Settles as an "adult" during the trial and also stated during the sentencing hearing that the law considers a "17-year-old to be a man." (R. p.) (Tr. 212:7-8 ("I mean, the Defendant in this case was 17. So he's adult."); 496:10-13) Thus, not only did the trial court treat Settles' "youth like any other fact" by not following *Aiken* and *Miller*, it placed little to no weight on this important fact based on its mistaken belief that Settles' was an adult for purposes of sentencing. *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577 ("*Miller* requires the sentencing authority [to] 'take into account how children are different.'") (quoting *Miller*, 132 S.Ct. at 2469). This mistaken belief also resulted in the trial court placing more weight on Settles' perceived lack of remorsefulness, which may be a valid consideration with respect to an adult but must be carefully scrutinized and understood with respect to a juvenile. *See* Adam Saper, *Juvenile Remorselessness: An Unconstitutional Sentencing Consideration*, 38 N.Y.U. Rev. L. & Soc. Change 99, 102 ("Behaviors that judges cite as demonstrating a lack of remorse often indicate a juvenile's developmental immaturity and susceptibility to sociological pressures.").

The State's "proportionality" argument fails for these same reasons. By refusing to consider Settles' youth and attendant characteristics within the framework established by *Miller*, the trial court ensured that Settles' sentence was not and could not be "proportionate" under the Constitution. *Aiken*, 410 S.C. at 542-43, 765 S.E.2d at 576 ("[W]e must give effect to the proportionality rationale integral to *Miller*'s holding—youth has constitutional significance. As such, it must be afforded adequate weight in sentencing."). Simply put, "*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.

In sum, the trial court was required to conduct a sentencing hearing in accordance with the framework established by decisions in *Miller* and *Aiken*. The trial court refused to follow these holdings in sentencing Settles. Settles' sentence therefore suffers from a "constitutional defect" that entitles Settles to resentencing.[4]

Finally, in a footnote on page 39 of the Respondent's Brief, the State argues that the reversible errors and deficiencies related to Settles' sentencing should be excused because "Appellant's sentence has been entitled to a second review by the trial judge and has been reduced upon a showing of substantial assistance to the State." *Id.* at 39 n.10. This is a completely erroneous and disingenuous contention by the State.

Settles has not received the "benefit" of a "second review" of the sentencing decision in this case. *Id.* Rather, over five months after the trial and sentencing in this case, the **State** moved for Settles' sentence to be reduced by five years pursuant to S.C Code Section 17-25-65 for "substantial assistance" Settles provided in another matter wholly-unrelated to the instant case, which the assigned circuit court judge granted that same day.[5] The assigned circuit court judge did not reconsider Settles' sentence, and he

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[4] The State contends that the trial court's denial of Settles' motion for a mitigation expert does not constitute an abuse of discretion because "*Aiken* only **encourages** the court to consider relevant mitigating factors related to a youthful defendant's crime and circumstance." Br. of Resp't at 31 (Emphasis added). However, *Aiken* does not simply "encourage" a trial court to carefully consider a defendant's youth and attendant characteristics—it requires the trial court to do so. Moreover, because the trial court's decision not to grant Settles' motion for the appointment of a mitigation expert was based on its refusal to apply *Aiken* and *Miller*, its denial of Settles' motion was based on an error of law and therefore was an abuse of discretion. *See* Br. of Appellant at 17.

[5] S.C. Code Section 17-25-65 provides: "Upon the state's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing,

certainly did not sit in the capacity of this Court reviewing the prior sentencing decision. The assigned circuit court judge simply granted the State's motion without any consideration of the propriety of the previous sentencing decision.

Accordingly, the Court should flatly reject the State's attempt to forever deprive Settles of his right to appeal a constitutionally defective sentence simply because, upon the State's motion, Settles' 45-year sentence was reduced by five years pursuant to the "substantial assistance" statute.

CONCLUSION

For the reasons set forth above, in addition to those advanced in the Initial Brief, Settles' convictions should be reversed and this case remanded for a new trial. Alternatively, this case should be remanded for resentencing.

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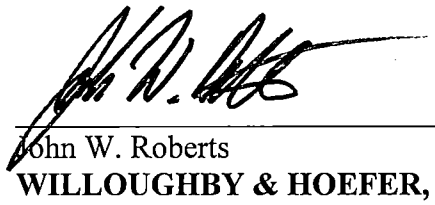
provided . . . substantial assistance in investigating or prosecuting another person. . . .The chief judge or a circuit court judge currently assigned to that county shall have jurisdiction to hear and resolve the motion. Jurisdiction to resolve the motion is not limited to the original sentencing judge."

Respectfully submitted,



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Certificate of Service

This is to certify that I, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **Reply Brief of Appellant** via first class mail to the following:

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VIA HAND DELIVERY

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

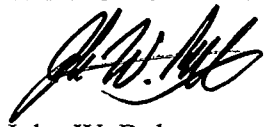
Dear Ms. Kitchings:

Enclosed for filing please find the original and one (1) copy of the **Reply Brief of Appellant** 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 Certificate 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.



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Enclosures

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