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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chester County
Honorable Brian M. Gibbons, Circuit Court Judge
Appellate Case No. 2016-000425

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SC Court of Appeals

THE STATE,

Respondent,

vs.

ROBERT ISAIAH GRAHAM,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Appellant's constitutional challenge to his forty-five-year sentence, which he received for a murder he committed when he was just two months away from his eighteenth birthday, is not properly preserved for appellate review because Appellant did not raise any objections to his sentence during the sentencing proceedings and, therefore, cannot appropriately raise any objections to his sentence for the first time on appeal.

STATEMENT OF THE CASE

In July of 2014, Appellant Robert Isaiah Graham, who was seventeen years old at the time, was arrested following an investigation into the shooting death of a sixteen-year-old boy. In October of 2014, the Chester County Grand Jury indicted Appellant for one count of murder. On May 12, 2015, Appellant appeared in the Chester County Court of General Sessions and entered a guilty plea to murder before the Honorable Roger M. Young, Sr., circuit court judge. At the conclusion of the plea hearing, Judge Young accepted Appellant's guilty plea and deferred sentencing to grant defense counsel time to gather mitigation evidence. Thereafter, on February 22, 2016, a sentencing hearing was held in the Chester County Court of General Sessions with the Honorable Brian M. Gibbons, circuit court judge, presiding. At the conclusion of the hearing, Judge Gibbons sentenced Appellant to a term of imprisonment of forty-five years. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

On the evening of Wednesday, July 16, 2014, sixteen-year-old Shyheim Kennedy ("Victim") walked to a store down the street from his mother's home to get something to eat. (R. p. 12; p. 30). After visiting the store and purchasing some biscuits, Victim began walking towards the home of his grandmother, who lived nearby, at around 9:30 p.m. (R. p. 30; p. 33). As he did so, Appellant Robert Isaiah Graham, who was less than two months away from his eighteenth birthday, was congregating on the opposite side of the street with two other individuals. (R. pp. 30-31; p. 215). When Victim came into Appellant's view, Appellant—for reasons not fully known—crossed the street, approached Victim, and began arguing with him.[1] (R. p. 31). During the course of the argument, Appellant suddenly pulled out a .38-caliber handgun, and he proceeded to fatally shoot Victim in the chest.[2] (R. p. 12; p. 31; p. 36). Appellant then quickly fled from the area as Victim died on the street. (R. p. 31; p. 34).

Following the shooting, law enforcement officers from the Chester Police Department rapidly responded to the scene but were unable to do anything to save Victim's life. (R. p. 31). Meanwhile, Appellant reloaded his gun, concealed it in a bag along with some additional unspent ammunition, and hid the bag underneath some thick shrubbery. (R. p. 36). Appellant then abandoned the shell casings he removed during the reloading process along some railroad tracks while being careful to avoid getting his fingerprints on them. (R. p. 36). Once he was done attempting to conceal the evidence connecting him to the shooting, Appellant returned home to his mother's house long enough to take a brief shower and change clothing, and, while he was

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[1] At the time of the shooting, Appellant was a repeat criminal offender and, by his own admission, a devoted member of the Roundtree Circle gang. (R. pp. 34-35; pp. 42-58; pp. 60-78; pp. 128-141; State's Ex. # 1). Meanwhile, Victim was an accomplished athlete and had no criminal or juvenile record on any kind. (R. p. 160; p. 164). During sentencing proceedings, the solicitor opined Appellant killed Victim after mistaking him for a rival gang member. (R. p. 37).

[2] When he was shot, Victim was standing with his hands down by his sides. (R. pp. 36).

there, his mother alerted an officer who was looking for Appellant in connection to an unrelated probation violation of Appellant's return.[3] (R. pp. 31-33). However, no officers could immediately respond to the home due to the investigation into the shooting, and Appellant left before any were able to arrive. (R. pp. 32-33).

Subsequently, Appellant returned to his mother's home again some time later, and officers were finally able to arrest him for the probation violation. (R. pp. 32-33). Thereafter, as the investigation into the shooting continued, officers identified Appellant as a suspect based on surveillance footage and witness statements placing him near the scene of the crime at the time it occurred. (R. pp. 30-34). In response, several investigators interviewed Appellant at the detention center, and Appellant initially disavowed any knowledge of the murder, claimed he was nowhere near the scene of the crime, denied he had a gun, and insisted he had never fired a gun during his lifetime. (R. p. 35; State's Ex. # 1). He further claimed he had no involvement with the Roundtree Circle gang and repeatedly swore he was telling the truth. (State's Ex. # 1). However, as the interview progressed, Appellant changed his story, admitted he was present at the scene of the shooting, claimed he was close enough to the shooter to get gunshot residue on his clothing, and insisted the shooter was an individual with dreadlocks. (R. p. 35; State's Ex. # 1). Eventually though, Appellant admitted he personally shot and killed Victim, and he claimed he did so only after Victim stopped him, talked "shit," and reached for a gun.[4] (R. p. 12; p. 35; State's Ex. # 1). Appellant further acknowledged he pulled the trigger of his gun three times to shoot Victim because the gun jammed on his first two attempts, and he finally admitted he was

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[3] Earlier, Appellant's mother had reported Appellant threateningly pointed a gun at a woman on the night before Victim's murder and expressed a general desire to kill someone. (R. pp. 31-32).

[4] Later on during the interview, Appellant stated he killed Victim for two reasons: (1) because Victim threatened his life; and (2) because Victim had been talking "shit" about his "hood." (State's Ex. # 1).

actually a member of the Roundtree Circle gang, which he claimed to love "to the death of [him]." (R. pp. 36-37; State's Ex. # 1). Furthermore, after initially attempting to deceive the investigators, Appellant eventually admitted he hid the gun under some shrubbery at another location, and he showed the investigators where the gun was actually hidden along with where he had abandoned the shell casings from his gun. (R. p. 12; p. 36; State's Ex. # 1).

At the conclusion of the investigation into the shooting, Appellant was indicted for murder, and he elected to plead guilty instead of going forward to trial. (R. pp. 3-4; pp. 321-322). During the plea hearing, Appellant, who was eighteen years old at the time, confirmed he understood his constitutional rights, wished to waive them, and was aware he was facing a day-for-day sentence of thirty years to life without any possibility of parole. (R. pp. 4-7). He further indicated he was satisfied with defense counsel's representation of him, was pleading guilty based on his own personal choice, had not been promised anything by anyone, and did not have any physical, mental, or emotional conditions preventing him from understanding what he was doing. (R. pp. 7-10). The solicitor then briefly recounted the facts of the shooting, and Appellant indicated he did not dispute them. (R. pp. 12-13). At that point, the judge accepted Appellant's guilty plea and deferred sentencing until defense counsel had time to develop mitigating evidence on Appellant's behalf. (R. pp. 12-13).

A little over nine months later, a sentencing hearing was conducted to determine the appropriate sentence for Appellant in light of the appellate decisions in Miller v. Alabama, 567 U.S. 460 (2012), and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). (R. p. 19). At the outset of the hearing, Appellant personally moved to withdraw his guilty plea while claiming—contrary to his earlier statements—defense counsel had promised him he would only receive a sentence of fifteen to twenty years if he pled guilty. (R. p. 22). Additionally, Appellant blamed

Victim for the incident, claimed he was only protecting himself, denied being in a gang at any point in his life, asserted Victim would not be dead if he "wouldn't have ran up on [him]," directed a threatening remark at Victim's family members in the courtroom, and stated he was "irritate[d]" by what his own family was having to go through as a result of the shooting.[5] (R. pp. 22-23). In response, defense counsel attempted to use Appellant's remarks to his advantage and asserted the motion was a prime example of the "incompetencies associated with youth." (R. pp. 23-24). Defense counsel further asserted Appellant was fully aware of the actual sentencing range for murder when he pled guilty to that offense. (R. p. 24). At that point, Appellant began repeatedly referencing his racial identity and stated he would "stand up for what's right," and the sentencing judge had him temporarily removed from the courtroom. (R. pp. 24-25). The sentencing judge then denied Appellant's motion to withdraw the guilty plea before permitting him to return. (R. pp. 26-27; p. 30).

As the sentencing hearing proceeded forward, the solicitor recounted the facts of the Victim's murder along with Appellant's efforts to conceal his crime. (R. pp. 30-37). Additionally, the solicitor played key portions of a recording of Appellant's post-arrest interview for the sentencing judge.[6] (R. p. 39; State's Ex. # 1). The solicitor then proffered the testimony of a number of different witnesses. (R. p. 40; p. 84; p. 107; p. 128; p. 143).

Initially, Lydia Young, an intensive supervision officer at the Department of Juvenile Justice and Appellant's supervising agent in 2013, testified about Appellant's history with the Department of Juvenile Justice throughout his lifetime, which led her to opine he had a

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[5] Specifically, regarding the threatening remark directed at Victim's family, Appellant stated: "Y'all can say what you want to say, I'm telling you because I'll turn up quick." (R. p. 22).

[6] The redacted interview recording was introduced as an exhibit along with two other exhibits depicting the full interview and a written index for the redacted recording. (R. p. 39; State's Ex. # 1; State's Ex. # 2; State's Ex. # 3; State's Ex. # 4).

“propensity for violence.” (R. pp. 40-83). Regarding that history, she noted Appellant first entered the juvenile justice system in January of 2009 after assaulting another student in school, and Appellant was ultimately placed on probation as a result of that incident, ordered to continue participating in a mentoring program he had been involved with since he was nine years old, and ordered to participate in a program designed to help children involved in gangs.[7] (R. pp. 42-45). Subsequent to that, Appellant was charged with second-degree burglary in December of 2009 after he attempted to steal a bike while in possession of two other stolen bikes. (R. p. 46). As a result of that incident, Appellant was ordered to serve two weekends of confinement and was placed on indefinite probation. (R. p. 46). A few months later, Appellant was charged with assault and battery for striking his sister and mother, and he was placed into a therapeutic foster home. (R. p. 47). However, shortly after that, Appellant was removed from the foster home for fighting at school, outside of the home, and inside the home. (R. pp. 48-49). As a result, Appellant was ordered to remain on probation and continue receiving the services he was already receiving, which included mental health treatment. (R. p. 49). Thereafter, in August of 2010, Appellant threatened to kill his mother with a glass bottle, and he was again ordered to continue with his probation while also being placed at a camp designed to help children improve their behavior. (R. pp. 50-51). Appellant then served some time at the camp, was released, and was subsequently charged with public disorderly conduct for inappropriate behavior at school, which included Appellant making threatening remarks to a teacher. (R. pp. 52-54). As a result of that behavior, he was again ordered to serve a sentence of weekend confinement, remain on probation, and continue his treatment. (R. pp. 52-54). Then, just a few days after that, Appellant was charged with third-degree assault and battery and was placed in another therapeutic home.

[7] In addition to the mentoring program, Appellant also received assistance from Catawba Family Services from the time he was two years old. (R. p. 45).

(R. p. 55). However, less than a month later, Appellant was removed from the home because he threatened a foster parent with a fire extinguisher after she turned off a television program he was watching and then proceeded to punch holes in the wall while she barricaded herself in a bedroom for safety. (R. pp. 55-56). Based on that incident, Appellant was detained for seven days and then sent to the Department of Juvenile Justice's Upstate Evaluation Center for an evaluation. (R. p. 57). Following the evaluation, Appellant was sent back to the camp he had previously been sent to and remained there until September of 2011. (R. p. 65-66). After that, Appellant was sent to a group home in Columbia, South Carolina, and remained there until May of 2012. (R. p. 66). Subsequently, Appellant began attending South Pointe High School but was expelled just a few months later after he fought with other students on multiple occasions, non-consensually touched a female student, and engaged in sexual activity with another student on a school bus. (R. pp. 67-70). Following his expulsion from school, Appellant moved to Chester County in January of 2013 and was assigned to Young for supervision. (R. p. 71). While under her supervision, Appellant was argumentative, did not attend school, indicated he regularly smoked marijuana and drank alcohol, failed to attend scheduled counseling sessions, and stated he wanted to do what he wanted to do and would not abide by the conditions of his probation.[8] (R. pp. 72-75). Based on Appellant's numerous instances of failing to comply with the terms of his probation, a family court judge ordered Appellant to be placed in an intensive group home in May of 2013, but he was removed from the home less than two months later for fighting and possessing marijuana. (R. pp. 76-78). After that, Appellant was ordered to serve a ninety-day

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[8] During the course of her supervision of Appellant, Young attempted to meet with him at his mother's home, which is where he was living at the time. (R. p. 75). However, Appellant was not home, and his mother reported he only came home late at night, was doing poorly under supervision, was likely involved in a gang, and frequently showed her various burn marks and other wounds with pride. (R. pp. 75-76).

sentence, placed in a group for the time period of that sentence, and was released from probation at the completion of the sentence shortly after he reached the age of seventeen. (R. pp. 78-80).

Beyond her testimony on Appellant's history with the Department of Juvenile Justice, Young also testified about the information she was able to obtain from Appellant's mental health records. (R. pp. 60-64). Regarding that information, Appellant's records revealed he began exhibiting aggressive and hyperactive behavior at the age of two, pushed another child out of a second-story window at the age of six, choked another child to the point of unconsciousness at the age of nine, hit another child with a beer bottle in such a manner the child needed stitches at the age of ten, punched a student in the face at the age of twelve, committed second-degree burglary at the age of thirteen, forced his way into a sixteen-year-old girl's home before attempting to sexually assault her also at the age of thirteen, and, at the age of fourteen, threatened a teacher, stole personal property from a backpack, threatened his mother with a knife, and threatened a foster parent with a fire extinguisher. (R. pp. 60-64).

Similarly, Dr. Lisa Williams, the clinical director and supervising psychologist at the Department of Juvenile Justice's Upstate Evaluation Center, testified about Appellant's numerous evaluations during his time in the juvenile justice system. (R. pp. 84-105). Regarding those evaluations, she noted Appellant was first evaluated in the community in March of 2010 when he was thirteen years old. (R. p. 87). By the time of that evaluation, Appellant had set fire to grass outside of his apartment, sent two different children to the hospital through his aggressive actions, and rammed another child's head into a wall when he was only in kindergarten. (R. pp. 89-90). Based on the 2010 evaluation, Appellant was determined to have an overriding emotional state of anger and was diagnosed with an unspecified mood disorder,

oppositional defiant disorder, and attention deficit hyperactivity disorder.[9] (R. pp. 88-91). Thereafter, in May of 2011, Appellant was evaluated at the Upstate Evaluation Center. (R. p. 93). While being evaluated, Appellant was reported to have functioned well, but he engaged in at least one fight while at the center. (R. pp. 96-97). Based on the evaluation, Appellant was diagnosed with conduct disorder, cannabis abuse, nicotine dependence, attention deficit hyperactivity disorder, and borderline intellectual functioning.[10] (R. p. 94). Subsequently, Appellant was again evaluated at the center in 2013. (R. p. 99). At that time, Appellant was diagnosed with conduct disorder, cannabis abuse, and alcohol abuse, and he claimed to use large amounts of marijuana daily. (R. pp. 99-101).

Likewise, Dr. Richard Frierson, a forensic psychiatrist at the University of South Carolina Medical School and an expert in psychiatry, discussed his evaluation of Appellant, Appellant's mental health history, and the significance of that history. (R. pp. 107-127). During his testimony, Dr. Frierson noted Appellant was not taking any prescription medications at the time he evaluated him but indicated Appellant had previously been prescribed a number of medications from an early age in order to treat his attention deficit hyperactivity disorder and help him control his anger.[11] (R. pp. 110-111; p. 115). He further noted Appellant had been hospitalized at the age of eight after he threatened another child with a knife and at the age of

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[9] In the 2010 evaluation report, the evaluator indicated Appellant did not yet "appear to have embraced an antisocial lifestyle" at that time but noted Appellant was "spiraling out of control" and was at a high risk of engaging in criminal behavior. (R. p. 261).

[10] Regarding the conduct disorder diagnosis, Dr. Williams explained such a diagnosis meant Appellant had engaged in a pattern of actions, including violating others' rights, behaving aggressively, attacking others with weapons, inflicting serious injuries on others, attacking others without provocation, being cruel to animals, running away, setting fires, destroying property, being deceitful, stealing, breaking and entering, and committing shoplifting. (R. p. 98).

[11] Amongst the medications Appellant had been prescribed during his lifetime, Prozac was an anti-depressant medication, Zyprexa was an anti-psychotic medication, Trileptal was used to prevent seizures, and Clonidine was used to treat hyperactivity. (R. p. 115).

nine after he choked another child in such a manner school staff members were concerned Appellant would have killed the child if no one had intervened. (R. pp. 111-114). Based on his evaluation of Appellant and review of all the information associated with Appellant's case, Dr. Frierson diagnosed Appellant with alcohol dependence, cannabis dependence, attention deficit hyperactivity disorder, borderline intellectual functioning, and antisocial personality disorder, which previously could not have been diagnosed when Appellant was under the age of eighteen. (R. pp. 117-118). Regarding the antisocial personality disorder diagnosis, Dr. Frierson indicated there was no medication to treat that particular disorder and people with it were more likely to commit crimes. (R. p. 124). He further noted the common perception in the psychiatric community was people with that disorder tended to become less violent with age for a variety of different reasons, including because they were less likely to win the fights they engaged in as they grew older. (R. p. 125). However, he cautioned the long-term prognosis was worse for individuals with behavioral problems that manifested earlier, and he explained people with low intelligence coupled with antisocial personality disorder tended to be more violent long-term. (R. p. 127).

In addition to that testimony, Molly Leake, the agent in charge of the Chester County field office of the South Carolina Department of Probation, Parole, and Pardon Services, testified about Appellant's behavior while he was on probation for third-degree burglary during the time period leading up to the murder.[12] (R. pp. 128-142). Regarding that behavior, Appellant repeatedly tested positive for marijuana, repeatedly failed to attend scheduled meetings, refused to participate in treatment programs, violated an order prohibiting him from having contact with the victims of the burglary he committed, was arrested for and convicted of marijuana and

[12] Originally, Appellant was indicted for first-degree burglary but was permitted to plead guilty to the lesser charge of third-degree burglary. (R. p. 128).

alcohol charges, ran from police officers on several occasions, admitted he was involved in a gang, failed to report for DNA collection, was arrested while in possession of marijuana and unlawful prescription medication, committed an act of malicious injury to personal property, missed a court appearance, and left the probation office before he could be arrested for his many probations violations just days before he murdered Victim. (R. pp. 130-141). Leake further noted Appellant revealed he had a .40-caliber handgun hidden in a "stash spot" despite the fact he was not permitted to own or possess a firearm, and Appellant confirmed to his probation agent he understood he could not have a gun. (R. pp. 129-130).

Furthermore, Major Wayne Alley, the administrator of the detention center in Chester County, detailed Appellant's inappropriate behavior while incarcerated there, which began just days after his arrest and continued until shortly before his sentencing hearing. (R. pp. 143-158). Regarding that behavior, Appellant flooded his cell, damaged property, refused to comply with officers' commands, threatened to harm officers, promised to kill officers while referencing his gang, physically assaulted officers, used profanity, concealed a twelve-inch "shank" in his cell, threw items at officers, fought with other inmates, spit on other inmates, spit on officers, suddenly began punching an officer in the face on one occasion when he did not want to comply with the officer's commands, exposed his penis to female officers, masturbated in front of female officers, engaged in disruptive and riotous behavior with other officers, bit an officer's finger when the officer tried to restrain him, disabled an intercom system, used a command desk to shut off the lights in a unit, and had marijuana in his cell. (R. pp. 143-156; pp. 310-320). In a number of the repeated incidents Appellant engaged in, Quinton McClinton, the purported leader of the Roundtree Circle gang, was involved. (R. pp. 152-153; pp. 155-156). However, in many of the incidents, Appellant acted alone. (R. pp. 143-153; p. 155).

Finally, the solicitor noted Victim had no criminal or juvenile record of any kind, and several of Victim's family members discussed Victim and the impact of his loss. (R. pp. 160-164). Specifically, Olesha Campbell, a member of Victim's family, stated Victim was a happy and loveable individual, and she cautioned Appellant's behavior would not simply stop.[13] (R. pp. 161-162). Additionally, Sylvia Clark, Victim's mother, addressed the court and indicated Victim was well-mannered, universally loved, never disrespectful, never in trouble, and killed without reason. (R. pp. 162-163). Furthermore, Clarissa Curry, Victim's aunt, stated Victim was a good person who was always inspirational and encouraging for the family, whom she indicated had been greatly impacted by his death. (R. p. 163).

Following the presentation of that evidence and testimony, defense counsel proffered the testimony of Dr. Susan Knight, a forensic psychologist retained by the defense to conduct an evaluation of Appellant for sentencing purposes. (R. pp. 165-167). During her testimony, Dr. Knight noted she was familiar with the Miller factors, and she stated she consulted a variety of sources, spoke with several of Appellant's family members along with a mentor who had worked with Appellant when he was a child, and met with Appellant on one occasion for over two hours in order to conduct her evaluation. (R. pp. 167-168; pp. 172-173; pp. 181-182). Through her evaluation, Dr. Knight concluded Appellant was born prematurely and exposed to cannabis in utero, which she stated could lead to neuro-developmental problems and cognitive deficits. (R. p. 171). Additionally, in light of the information provided by his family members, she indicated Appellant's family life was chronically dysfunctional, his mother struggled with a crack cocaine addiction and mental illness, his father was mostly not present, and Appellant did not receive a consistent supportive family environment. (R. pp. 171-172). Dr. Knight further stated Appellant

[13] While Campbell was addressing the court, Appellant interrupted her and instructed her not to judge him because she did not know him. (R. p. 161).

personally reported his crime was impulsive and reactionary, noted Appellant was low-functioning intellectually and had difficulty controlling himself, and indicated it was important for Appellant to receive mental health treatment, which she explained would be available to him in prison. (R. p. 174; pp. 178-179). Regarding Appellant's prospects of rehabilitation, Dr. Knight indicated the "simple fact" of youth meant juveniles generally were more amenable to rehabilitation than adults, but she conceded she had no way of knowing what Appellant would be like as an adult. (R. p. 176). Dr. Knight further noted some social science findings suggested people aged out of violent crime by their forties, but she conceded not all offenders actually did. (R. p. 176; p. 184). Furthermore, Dr. Knight acknowledged Appellant had continued to reoffend despite receiving treatment, and she confirmed the best indicator of future behavior was past behavior. (R. p. 187).

At the conclusion of Dr. Knight's testimony, several of Appellant's family members and other acquaintances made statements on Appellant's behalf. (R. pp. 189-192). Specifically, Appellant's mother, Susan Graham, stated she loved Appellant, she did not want him to receive a life sentence, and his family also loved and supported him. (R. pp. 189-190). Similarly, Appellant's father, Robert Graham, indicated he was "sorry things happened like" they did and affirmed his love for his son. (R. p. 191). Likewise, defense counsel offered a letter from Michael Williams, who mentored Appellant when he was in the third grade. (R. p. 191; p. 242). In the letter, Williams noted Appellant had a troubled childhood, often struggled to control his emotions as a youth, and mainly responded with physical aggression. (R. p. 242). He further noted Appellant's behavior "never seemed to improve" despite his receipt of counseling. (R. p. 242). However, Williams asserted there were "signs of hope" with Appellant when he was given attention and love, and he encouraged the sentencing judge to ensure Appellant received mental

health treatment in prison. (R. p. 242). Finally, defense counsel offered a letter from Clayton Moton, who was an assistant principal at a middle school Appellant had attended. (R. pp. 191-192; p. 243). In his letter, Moton recounted Appellant frequently engaged in impulsive and inappropriate behavior, he indicated he saw some success from Appellant on different occasions, and he noted the staff attempted to help and support Appellant during his time at the school. (R. p. 243).

Thereafter, once all the testimony and remarks had been presented, defense counsel noted Miller, Aiken, and Montgomery v. Louisiana, __ U.S. __, 136 S. Ct. 718 (2016), were the important decisions relevant to the sentencing decision in Appellant's case, and he asserted those cases established life without parole should be a rare sentence for a juvenile offender. (R. pp. 192-193). With that in mind, defense counsel asserted life without parole was not warranted in Appellant's case because the murder was allegedly not unusual, sophisticated, or extraordinarily wicked. (R. pp. 194-196). Additionally, defense counsel contended he was personally aware of only two murderers who received sentences of more than thirty years in the last decade in Chester County, he noted some murderers in the county were permitted to plead guilty to voluntary manslaughter, and he argued some of the other crimes committed there were worse than Appellant's crime. (R. pp. 196-199). Similarly, defense counsel asserted the average age of inmates who died of natural causes in the South Carolina Department of Corrections between 2009 and 2011 was fifty for black males and fifty-three for white males. (R. pp. 200-201). For those reasons, defense counsel argued Appellant's case was not one that "crie[d] out" for a life without parole sentence, and he further asserted a sentence of a certain unspecified number of years would be the effective equivalent of a life without parole sentence. (R. p. 201). Importantly though, defense counsel specifically conceded he was not arguing the sentencing

judge "[couldn]'t decide whatever [he] want[ed] to decide in [Appellant's] case" by making the arguments he was making. (R. p. 200).

Following defense counsel's remarks, the solicitor countered Appellant was, in fact, deserving of a sentence of life without parole. (R. pp. 201-202). In making that contention, the solicitor argued Appellant committed a heinous murder of a child walking down the street, and she noted Appellant was not a typical child at the time of the crime, did not engage in childlike behavior, and had been hurting other people since he was very young.[14] (R. pp. 201-203). Additionally, the solicitor pointed out attempts had been made to help Appellant throughout his life and Appellant had been receiving consequences for his actions during that time, but Appellant had not shown remorse for his actions and had continued engaging in violent behavior, including when he was in therapeutic homes and foster homes as opposed to his mother's house. (R. pp. 202-204). Furthermore, the solicitor noted Appellant's actions appeared to have been gang-motivated and were consistent with his stated desire of killing someone. (R. p. 205). Based on those factors, the solicitor contended there was no possibility of rehabilitation for Appellant and he would continue hurting other people based on the fact he enjoyed doing it. (R. p. 205). As a result, the solicitor argued Appellant should be sentenced to life without parole. (R. pp. 205-206).

In rebuttal, defense counsel claimed it would be inaccurate to suggest the state had been doing "great things" for Appellant during the course of his life while asserting Appellant should have been committed at a much earlier age. (R. pp. 207-208). Additionally, defense counsel argued Appellant's actions were allegedly influenced by older gang members while contending Appellant needed to go to the prison to separate him from McClinton. (R. p. 208). Furthermore,

[14] During the solicitor's remarks regarding sentencing, Appellant stood up from his chair and had to be directed to remain quiet by the sentencing judge. (R. p. 202).

defense counsel asserted there was a reasonable chance Appellant would not live for thirty more years while asserting a sentence of "much more" than that number of years would effectively constitute a life sentence. (R. pp. 208-209). Defense counsel then asked the sentencing judge to take into consideration the relevant factors from Miller and Aiken when imposing Appellant's sentence. (R. p. 209).

Following those remarks, Appellant personally addressed the court, claimed he had cried for Victim, asserted he did not intend to kill Victim, and again blamed Victim for his own demise by stating Victim would not be dead if he had not "came at [him] how he came at [him]." (R. pp. 210-211). Additionally, Appellant opined he did not deserve a life sentence before once again blaming Victim for the killing. (R. p. 211). Furthermore, Appellant asserted it hurt him and his family that he was having to go through what he was having to go through, claimed he was remorseful, and asserted he was sorry for Victim's family. (R. p. 212). However, directly after making those remarks, Appellant angrily confronted Victim's family for allegedly smiling in the courtroom, informed then it should have been a sad moment for them, and contended "obviously" it was not a sad moment for him personally. (R. p. 212).

Thereafter, at the conclusion of the hearing, the sentencing judge indicated he had considered everything that had been presented to him along with the factors identified in Miller. (R. p. 213). He then sentenced Appellant to a forty-five-year term of imprisonment. (R. p. 213). At that point, neither Appellant nor defense counsel raised any objections to the sentence imposed on any grounds. (R. p. 213).

ARGUMENT

Appellant's constitutional challenge to his forty-five-year sentence, which he received for a murder he committed when he was just two months away from his eighteenth birthday, is not properly preserved for appellate review because Appellant did not raise any objections to his sentence during the sentencing proceedings and, therefore, cannot appropriately raise any objections to his sentence for the first time on appeal.

Appellant, who was seventeen years old at the time of his crime, contends his forty-five-year sentence for murder violates the constitutional prohibition against cruel and unusual punishment. In support of that contention, Appellant raises a number of arguments. Specifically, he maintains: (1) his forty-five-year sentence constitutes a "de facto" life sentence and will unconstitutionally deprive him of "an opportunity for release at a meaningful point in time" during his lifetime; (2) the sentencing judge erroneously imposed the forty-five-year sentence without making a specific finding he was irreparably corrupt; and (3) the sentencing judge was not capable of making a finding of irreparable corruption in light of the mitigation evidence he presented, which he characterizes as "compelling." Importantly though, none of those arguments was raised to the sentencing judge. Instead, during the sentencing proceedings, defense counsel merely offered reasons why the defense believed a life without parole sentence should not be imposed for Appellant's murder conviction while specifically assuring the sentencing judge he was not arguing the judge could not impose the sentence he believed was appropriate under the circumstances. Moreover, after the forty-five-year sentence was imposed, defense counsel did not raise **<u>any</u>** objections, including the constitutional objections Appellant is now raising in opposition to his sentence on appeal. Because Appellant's appellate arguments were never presented to the sentencing judge, the sentencing judge was wholly deprived on an opportunity to consider them or rule upon them. Under those circumstances, Appellant's constitutional challenge to his sentence is not properly preserved for appellate review and cannot

appropriately be considered or addressed for the first time on appeal. Appellant's conviction and sentence should be affirmed.

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Significantly, the application of issue preservation requirements ensures the trial court has an opportunity "to rule properly after it considered all relevant facts, law, and **arguments**." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (emphasis added); see generally Unemployment Compensation Comm'n of Alaska v. Aragan, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action.").

For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). If an issue—including a constitutional one—is not presented to and ruled upon by the circuit court judge, it cannot be raised for the first time to the appellate court. State

v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); see In re Care and Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to and ruled on by the trial court to be preserved for appeal."). Critically, on appeal, an appellant is limited solely to the grounds raised at trial. State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997); see State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

Moreover, in the context of sentencing issues, a criminal defendant is required to contemporaneously object to an alleged sentencing error during trial in order to preserve an issue with a sentence for appellate review. State v. Salisbury, 330 S.C. 250, 276, 498 S.E.2d 655, 669 (Ct. App. 1998); see State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) ("[A] challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review."). Importantly, an appellant's failure to timely object to or seek modification of a sentence in the trial court precludes him from pursuing the issue on appeal. State v. Winestock, 271 S.C. 473, 475, 248 S.E.2d 307, 308 (1978); see State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) ("No objection to sentencing was raised at trial and this issue is not properly before the court."); State v. Shumate, 276 S.C. 46, 47, 275 S.E.2d 288, 288 (1981) ("A defendant's failure to timely object to or seek modification of his sentence in the trial court precludes him from presenting his objection for the first time on appeal. Appellant's contention was not advanced at the probation revocation hearing where the results were most favorable to him. By failing to object to or seek modification of the revocation sentence in the trial court he is now foreclosed from doing so on appeal." (citations omitted)).

In the case sub judice, Appellant is seeking for his forty-five-year sentence for murder to be vacated on the basis it allegedly violated the constitutional prohibition against cruel and unusual punishment. In making such a contention, Appellant, who was seventeen years old at the time of the murder, maintains the sentence imposed by the sentencing judge was constitutionally infirm and must be vacated because: (1) a forty-five-year sentence constitutes a "de facto" life sentence; (2) the sentencing judge failed to make any specific findings he was irreparably corrupt and permanently incorrigible; and (3) the evidence presented during the sentencing proceedings—which he readily acknowledges addressed the various factors identified in Miller and Aiken—was insufficient to prove irreparable corruption and permanent incorrigibility. For those reasons, Appellant maintains he is constitutionally entitled to resentencing and "an opportunity to walk out of prison someday as an older, more mature adult."

Importantly though, during the sentencing hearing, defense counsel did **not** argue to the sentencing judge a life sentence—or, more specifically, a forty-five-year sentence—could not constitutionally be imposed on Appellant following his conviction for murder, did **not** argue the sentencing judge was required to make specific findings on the record in regard to irreparable corruption and permanent incorrigibility before imposing a sentence, did **not** ask the sentencing judge to make any such findings, and did **not** argue the evidence presented was insufficient to establish a life sentence was appropriate for Appellant. Instead, defense counsel merely offered the defense's view as to why a life sentence should not be imposed on Appellant while directly informing the sentencing judge he was not arguing the judge was without authority to impose the sentence he believed was appropriate under the circumstances.[15] See State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (recognizing an issue conceded during trial cannot

[15] Specifically, defense counsel stated: "I say all of this not to argue that you can't decide whatever you want to decide in this case[.]" (R. p. 200).

subsequently be argued on appeal); cf. State v. Pearson, 286 Or. App. 110, 111-112, 398 P.2d 506, 506-507 (Or. Ct. App. 2017) (holding a defendant's appellate argument his forty-year sentence for crimes he committed as a juvenile was unconstitutional in light of the United States Supreme Court's decision in Miller was neither preserved for appellate review nor plainly erroneous where the defendant merely argued to the sentencing judge he should receive a shorter sentence and never suggested a forty-year sentence would be unconstitutional in light of his status as a juvenile). Then, after the sentencing judge imposed a forty-five-year sentence in Appellant's case as opposed to a sentence of life without parole, defense counsel raised no objections to the sentence, made no argument the sentence was constitutionally infirm based on its length, presented no argument regarding the sufficiency of the sentencing judge's findings, and made no requests for the sentencing judge to clarify the basis for the sentence.[16] Cf. State v. Vang, 353 S.C. 78, 85, 577 S.E.2d 225, 228 (Ct. App. 2003) (finding any issue resulting from the trial judge's failure to take a particular action was not preserved for appellate review because Vang did not ask the trial judge during trial to take the action Vang contended on appeal should have been taken). In fact, defense counsel said absolutely nothing at all.[17]

Because defense counsel did not raise any of the arguments Appellant is now attempting to raise on appeal, the sentencing judge was wholly denied an opportunity to consider, address,

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[16] Notwithstanding the fact the sentencing judge was not asked to make any specific factual findings in imposing Appellant's sentence, the sentencing judge was **not** constitutionally required to do so. See Montgomery v. Louisiana, __ U.S. __, 136 S. Ct. 718, 735 (2016) (explaining a sentencing judge is **not** constitutionally required to make any specific findings of fact on the record when sentencing a juvenile offender pursuant to the guidelines of Miller).

[17] Significantly, the first time a contention was raised Appellant's sentence was improper in any way was in the paperwork filed along with the notice of appeal. (R. pp. 326-327). In that paperwork, defense counsel asserted: "Appellant believes [his forty-five-year sentence] was excessive and not in conformity with *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014)." (R. p. 326).

or rule upon those arguments in imposing Appellant's sentence. See Queen's Grant, 368 S.C. at 372-373, 628 S.E.2d at 919 ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." (citations omitted)). Critically, without first giving the sentencing judge an opportunity to address his constitutional claims regarding the propriety of his sentence, Appellant is precluded from raising those claims for the first time on appeal.[18] See State v. McCray, 222 S.C. 391, 394, 73 S.E.2d 1, 2 (1952) (finding McCray's appellate contention the sentence imposed was "cruel and excessive" was unavailable to him on appeal because that particular contention was not raised to the circuit court judge); see also I'On, 338 S.C. at 422, 526 S.E.2d at 724 ("The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."); see generally In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review."). As a result, Appellant's appellate challenge to his sentence is not properly preserved for appellate review and simply cannot appropriately be raised or addressed for the first time on appeal. See Johnston, 333 S.C. at 462, 510 S.E.2d at 425 ("[A] challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review."); State v. Walker, 252 S.C. 325, 327-328, 166 S.E.2d 209, 210 (1969) (declining to address Walker's appellate contention the sentence he received could not have properly been imposed "on the elementary ground that the question was not raised below"); see also State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393

[18] Notably, defense counsel merely asked the sentencing judge to consider the relevant factors identified in Miller and Aiken in imposing Appellant's sentence, and the sentencing judge expressly did just that. (R. p. 201; p. 209; p. 213). Under those circumstances, the sentencing judge provided Appellant with everything that was requested in regard to his sentence. See State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) ("Inasmuch as the appellant obtained the only relief he sought, this court has no issue to decide.").

(Ct. App. 1997) (instructing an appellate court "cannot address unpreserved errors"); cf. State v. Gulledge, 321 S.C. 399, 404-405, 468 S.E.2d 665, 669 (Ct. App. 1996) ("Gulledge . . . argues the State did not prove she had the resources to pay $210,000.00 in restitution and the trial court failed to state its findings and the underlying facts and circumstances of them. Because this argument was neither raised to nor addressed by the trial court, we need not deal with it." (citation omitted)). Appellant's conviction and sentence should be affirmed.[19]

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[19] Notwithstanding any issue preservation concerns, nothing appearing in the record establishes Appellant's forty-five-year sentence for murder is violative of the constitutional prohibition against cruel and unusual punishment. Critically, both the United States Supreme Court and the South Carolina Supreme Court have recognized even a sentence of life without parole is constitutionally permissible for a juvenile convicted of homicide. See Montgomery, 136 S. Ct. at 733 (recognizing a sentencing judge may encounter a rare juvenile offender for whom a life without parole sentence is justified); Miller v. Alabama, 567 U.S. 460, 479-480 (2012) (instructing a sentencing judge is not constitutionally foreclosed from sentencing a juvenile homicide offender to a life sentence while cautioning the "appropriate occasions for sentencing juveniles to the harshest possible penalty will be uncommon"); Aiken v. Byars, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014) (recognizing a sentencing judge "[w]ithout question" could still properly determine life without parole was an appropriate sentence for a juvenile murderer following an individualized hearing in which "the mitigating hallmark features of youth" were fully explored and noting the legislature's decision authorizing life without parole sentences for juveniles who committed murder would be honored on appeal). In the case at bar, Appellant was convicted of murdering his sixteen-year-old victim and did **not** receive a life without parole sentence even though one was constitutionally permissible for his crime. Instead, Appellant received a forty-five-year sentence that will only require him to be incarcerated until he reaches the age of sixty-two regardless of whether he ever matures, rehabilitates, or chooses to alter his criminal behavior. See People v. Applewhite, 409 Ill. Dec. 849, 855, 68 N.E.3d 957, 963 (Ill. Ct. App. 2016) ("[H]is 45-year sentence **does not** amount to a *de facto* life sentence, as he will be eligible for release at the age of 62." (emphasis added)); see also S.C. Code Ann. § 19-1-150 (listing the projected life expectancies of men and women of different ages in a table that can be used "to establish the life expectancy of a person from any period in his life"). Moreover, even if Appellant's forty-five-year sentence could be considered a "de facto" life sentence, the sentencing judge—before imposing that sentence—conducted a thorough sentencing hearing that fully complied with the constitutional requirements for juvenile sentencing, was presented with a great deal of evidence regarding Appellant's background and behavior both before and after the killing, and evaluated that evidence along with the relevant factors identified by the United States Supreme Court and the South Carolina Supreme Court in fashioning an appropriate sentence for Appellant, who was just two months shy of his eighteenth birthday when he callously killed his juvenile victim. See Applewhite, 409 Ill. Dec. at 854, 68 N.E.3d at 962 (finding a defendant's forty-five-sentence for a murder he committed when he was seventeen

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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years old was not unconstitutional where he "did not receive the 'harshest possible penalty' nor was he subjected to a sentencing scheme which mandated a sentence of life in prison without parole" and where the "sentencing authority retain[ed] some discretion to consider a juvenile's youth before imposing a severe sentence"); see also Miller, 567 U.S. at 476-477 (recognizing there is a difference between the culpability level of a fourteen-year-old offender versus a seventeen-year-old offender and criticizing mandatory sentencing schemes for failing to take that difference into account for sentencing purposes); cf. People v. Willover, 248 Cal. App. 4th 302, 324, 203 Cal. Rptr. 3d 384, 399 (Cal. Ct. App. 2016) ("While Miller did recognize that juveniles are generally immature, impetuous, and unable to appreciate risks and consequences, here defendant was nearly 18 years old at the time of his offenses, so the trial court could reasonably determine that defendant's age did not weigh strongly in favor of resentencing."). Under those circumstances, the sentencing judge took the appropriate actions to ensure he properly exercised his discretion in sentencing Appellant for murder, and the sentence he imposed was constitutionally proper regardless of whether Appellant now disagrees with the sentencing judge's discretionary sentencing decision. See Miller, 567 U.S. at 483 ("Our decision does not categorically bar a penalty for a class of offenders or type of crime . . . . Instead it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty."); see also Solem v. Helm, 463 U.S. 277, 290, n. 16 (1983) ("Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate."); cf. State v. Ramos, 187 Wash. 2d 420, 453, 387 P.3d 650, 667 (Wash. 2017) ("Although we cannot say that every reasonable judge would necessarily make the same decisions as the court did here, we cannot reweigh the evidence on review. The court clearly received and considered Ramos' extensive mitigation evidence, was fully aware of its authority to impose an exceptional sentence below the standard range, and reasonably considered the issues identified in Miller when making its decision. Ramos has not shown that his second resentencing violated Miller's minimal requirements."). Accordingly, even if Appellant had somehow properly preserved his constitutional challenge to his sentence for appellate review despite never raising it to the sentencing judge, Appellant's sentence was not cruel, unusual, or otherwise constitutionally improper.

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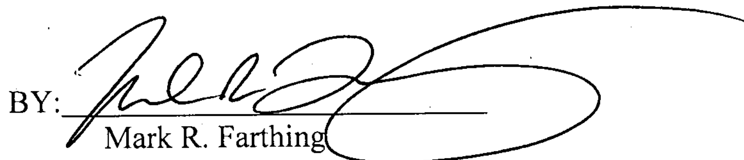

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November 1, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chester County
Honorable Brian M. Gibbons, Circuit Court Judge
Appellate Case No. 2016-000425

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SC Court of Appeals

THE STATE,

Respondent,

vs.

ROBERT ISAIAH GRAHAM,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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