ORIGINAL

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

THE STATE,

Respondent,

v.

TERRELL ARTIETH SMITH,

Appellant.

Appellate Case No. 2017-001178

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SHERRIE BUTTERBAUGH
Assistant Attorney General
S.C. Bar No. 101477
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the thirty year mandatory minimum sentence for murder set forth in the S.C. Code Ann. § 16-3-20(A) violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution as applied to juvenile offenders because it does not treat juveniles as constitutionally different for sentencing purposes as required by *Miller v. Alabama*, 567 U.S. 460 (2012) and *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014)?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Did the trial court err in sentencing appellant to a term-of-years sentence following a thorough individualized sentencing hearing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), in which the court considered the mitigating factors of youth and the circumstances of the murder as required by case law and the constitution, where the mandatory minimum sentence for murder does not constitute cruel and unusual punishment, and our Supreme Court has already set forth the procedure by which juvenile homicide offenders are afforded protections under the Eighth Amendment?

STATEMENT OF THE CASE

A Charleston County grand jury indicted appellant, Terrell Artieth Smith, for murder, attempted murder, first-degree burglary, and possession of a weapon during the commission of a violent crime. (R.pp.757-65). Appellant proceeded to a jury trial on September 19, 2016, before the Honorable Kristi L. Harrington, and was represented by Ben Lewis and Megan Ehrlich. (R.p.1). Charles Patrick and Chad Simpson of the Ninth Circuit Solicitor's Office represented the State. (R.p.1).

Judge Harrington directed a verdict on the first-degree burglary charge. (R.p.300, line 18-p.301, line 10). On September 22, 2016, the jury found appellant guilty of the remaining charges. (R.p.417, lines 12-21). Judge Harrington deferred sentencing. (R.p.418, line 19-p.420, line 11). After an individualized sentencing hearing held May 9, 2017, pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), the judge sentenced appellant to concurrent terms of thirty-five years for murder, thirty years for attempted murder, and five years for the weapons charge. (R.p.511, lines 1-14).

This appeal follows.

STATEMENT OF FACTS

A father fought to save his son's life, but later held the teenager's head in his lap as he lay dying on a bedroom floor. (R.p.45, lines 9-13; p.62, line 24-p.63, line 5). Darryl Bennett (Bennett) testified he and his son, Brandon, had a close relationship prior to his death. (R.p.46, lines 6-11). Bennett woke up at about seven on the morning of June 11, 2014, and Brandon was still asleep, but Bennett later heard a shuffling noise coming from his son's bedroom. (R.p.51, lines 14-23; p.54, lines 2-25).

Bennett went to the bedroom, saw appellant on top of his son, and heard appellant say, "Didn't I tell you I was going to get you." (R.p.55, lines 9-13). Bennett ran over and grabbed appellant who swung out, and Bennett testified that was when he saw a knife and realized appellant was stabbing Brandon. (R.p.55, lines 13-17). Bennett and appellant fell back into a small storage room and started struggling with each other. (R.p.56, lines 17-25). Brandon stumbled toward the pair and collapsed near the doorway. (R.p.57, lines 1-10). Bennett testified he told appellant, "You killed my son," and appellant laughed and said, "I'll kill you too, motherfucker." (R.p.57, lines 10-20). Bennett stated appellant tried to stab him in his neck, face, and side. (R.p.58, lines 18-21). Bennett bit appellant's arm to try and get him to drop the knife, and eventually appellant dropped the weapon, but appellant bit Bennett's neck then took off running. (R.p.60, lines 3-16). Bennett ran after appellant and yelled at a neighbor, who was standing outside, to call 911, but went back inside to be with Brandon, and held him while they waited for help to arrive. (R.p.61, line 24-p.63, line 7).

The first officer on the scene testified he saw the father and son together on the floor, and saw a stab wound in Brandon's arm and at least one in his chest. (R.p.11, lines 7-10; p.18, lines 10-12; p.19, lines 18-22; p.21, line 17-p.22, line 10; p.23, line 21-p.24, line 6). The officer stated

he heard Brandon make a gurgling sound and knew from his training Brandon's lungs were filling with blood. (R.p.24, lines 7-25).

Bennett testified he was at the police department when he learned Brandon had died. (R.p.72, line 17-p.73, line 1). Bennett stated he recognized appellant as one of his son's friends who had been over to their house on "many occasions." (R.p.69, line 21-p.70, line 5; p.70, line 19-p.71, line 17). Bennett only knew appellant's nickname of "Little Rell," so he described appellant to some of their neighbors and Brandon's friends and one of them had a picture of appellant on a cell phone, along with appellant's name, and because Bennett was positive it was the same person, he gave the information to police. (R.p.70, line 23-p.71, line 1; p.84, line 25-p.86, line 1). The police showed Bennett a photo lineup later that afternoon and he testified he recognized appellant in the lineup, "As soon as I saw him." (R.p.86, line 2-p.88, line 9).

Following Bennett's positive identification, police got an arrest warrant and learned appellant fled to Alabama. (R.p.129, line 11-p.130, line 4). Appellant was found and arrested in Birmingham, and extradited to South Carolina. (R.p.130, line 25-p.131, line 8; p.150, lines 14-15; p.151, line 22-p.154, line 15). A picture was taken of the bite mark on appellant's arm, and a technician took a swab of the bite mark on Bennett's neck to check for DNA. (R.p.68, lines 14-22; p.130, lines 17-24; p.131, line 9-p.132, line 22; p.180, line 22-p.182, line 9). Tests later confirmed the "DNA profile of the major contributor to [the mixture found in the bite on Bennett's neck] matched the DNA profile" of appellant. (R.p.250, line 10-p.252, line 16; p.253, lines 3-25; p.259, lines 5-22). Further, the State presented testimony from the pathologist that appellant stabbed Brandon three times—once in the arm and twice in the chest—and he died from internal bleeding. (R.p.263, line 23-p.264, line 9; p.266, lines 8-10; p.267, line 1-p.270, line 24; p.284, lines 5-16).

Appellant testified he was seventeen at the time of the murder. (R.p.302, lines 6-7). He stated he left work at a Mexican restaurant at about three on the morning of the crime and went to his great-grandmother's house. (R.p.307, lines 1-21). Appellant testified he wanted to smoke marijuana and walked to Brandon's house because he knew he was always welcome there. (R.p.308, line 5-p.309, line 2). When appellant arrived, he knocked on the window and Brandon opened the front door. (R.p.310, line 18-p.311, line 2). Appellant testified he pulled his phone out of his pocket to get the number for his marijuana dealer, some dice fell out, and Brandon wanted to play. (R.p.312, line 19-p.313, line 23). Appellant stated Brandon got mad when appellant kept winning, so appellant quit and grabbed the money he won. (R.p.316, line 6-p.319, line 9). Appellant testified Brandon felt like he had been cheated and told appellant, "I'm going to kill for my money," and Brandon came at appellant with a knife. (R.p.319, line 10-p.320, line 19). Appellant stated he got the knife away from Brandon, but they continued to struggle and he stabbed Brandon at least once. (R.p.320, line 19-p.321, line 13). Appellant testified Bennett came in and tackled him, they fell into the storage room, and Brandon came up and all three of them struggled as he tried to get away. (R.p.322, lines 4-23). Appellant testified he felt like "they would have killed me in that house," so he swung out and stabbed Brandon in the chest. (R.p.322, lines 13-23). Appellant stated he ran out of the house as soon as he could to get away. (R.p.323, lines 1-4; p.323, lines 12-14).

On cross-examination, appellant admitted he did not call police following the incident and he threw away his clothes and the dice, that he "got rid of everything that had to do with the situation." (R.p.324, lines 15-24; p.326, lines 18-25). Appellant also acknowledged he did not tell anyone in his family he was leaving the state for Alabama and never told anyone Brandon attacked him first until his testimony at trial, so there was no one to verify his story. (R.p.351,

line 8-p.352, line 13).

The trial court charged the jury extensively, including an instruction on self-defense. (R.p.402, line 23-p.416, line 14). The jury found appellant guilty of murder, attempted murder, and possession of a weapon.[1] (R.p.417, lines 12-21). As will be discussed in more detail below, the court deferred sentencing so the parties could hold an individualized sentencing hearing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). (R.p.418, line 19-p.420, line 11).

[1] The court previously directed a verdict on the first-degree burglary charge, finding the State failed to prove appellant entered the victim's house without consent. (R.p.299, line 14-p.301, line 10).

ARGUMENT

The trial court did not err in sentencing appellant to a term-of-years sentence following a thorough individualized sentencing hearing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), in which the court considered the mitigating factors of youth and the circumstances of the murder as required by case law and the constitution, the mandatory minimum sentence for murder does not constitute cruel and unusual punishment, and our Supreme Court has already set forth the procedure by which juvenile homicide offenders are afforded protections under the Eighth Amendment.

The trial court did not abuse its discretion in sentencing appellant to a term-of-years sentence within the statutory range for murder following an individualized sentencing hearing pursuant to *Aiken*. Appellant received the type of hearing deemed sufficient by the Supreme Court to protect juvenile offenders from the unconstitutional sentence of mandatory life without parole where the court considered the mitigating factors of youth prior to determining the sentence appropriate for him. By its plain language, the case on which *Aiken*'s holding relies, *Miller v. Alabama*, 567 U.S. 460 (2012), specifically addresses only the constitutionality of mandatory life without parole sentences and says nothing about any other type of sentence, such as mandatory minimums.

Contrary to appellant's assertion, the statutory mandatory minimum sentence for murder is constitutional and this Court does not need to find otherwise. Our Supreme Court has already set forth the necessary procedure to ensure juveniles are afforded protection under the Eighth Amendment. The *Aiken* Court recognized it must give deference to the legislature's statutory sentencing range and the Court required trial courts to conduct individualized sentencing hearing such as the one that occurred in appellant's case where the "hallmark features of youth" are explored prior to imposing a life without parole sentences. *Aiken*, 410 S.C. at 545, 765 S.E.2d at 578.

Accordingly, appellant's term-of-years sentence is not cruel and unusual punishment under the Eighth Amendment, the trial court did not err in determining the sentence following an individualized sentencing hearing, and it is not necessary to declare the mandatory minimum sentence for murder unconstitutional.

How the Issue Was Raised

Individualized Sentencing Hearing

On May 9, 2017, the trial court held an individualized sentencing hearing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). (R.p.421; p.424, lines 20-24). At the start of the hearing, the State indicated it would leave sentencing in the court's discretion, although it maintained the minimum was not appropriate given the facts of the case. (R.p.425, lines 11-17). Next, defense counsel made two motions. The first was to preclude life without parole as a punishment for appellant and declare the sentence itself unconstitutional as it applied to juveniles, which the court denied. (R.p.426, line 4-p.428, line 8; pp.749-56). The second was a motion objecting to the statutory mandatory minimum sentence of thirty years for murder and a request to declare it unconstitutional as applied to juveniles. (R.p.428, line 12-p.429, line 4; pp.741-48). Specifically, counsel argued the mandatory nature of the minimum sentence did not take into account the differences between juveniles such as appellant and an adult offender as required by the constitution and recent case law, and requested the court sentence appellant under the manslaughter statute. (R.p.429, line 5-p.430, line 7; pp.742-48). The court denied the motion. (R.p.430, lines 8-9).

Susan Knight (Knight), an expert in clinical and forensic psychology, testified she performed a *Miller*[2] evaluation on behalf of appellant which "is a specialized forensic

[2] *Miller v. Alabama*, 567 U.S. 460 (2012).

psychological evaluation conducted with individuals who are seventeen years old, or younger, at the time of their charges" and applies the *Miller* factors to the person's case. (R.p.431, line 4-p.432, line 24; p.433, lines 6-14). Knight explained there are five *Miller* factors: (1) the hallmark features of youth; (2) the family and home environment; (3) circumstances of the homicide; (4) incompetency associated with youth and how they navigate the legal system; and; (5) the possibility of rehabilitation. (R.p.433, lines 15-20; p.450, line 16-p.451, line 1). For the evaluation, Knight reviewed records, such as school reports and documents from the South Carolina Department of Corrections (SCDC), administered psychological testing of appellant, and conducted eleven hours of interviews with appellant, as well as interviews with family members, and others who knew appellant during his developmental years. (R.p.433, line 21-p.435, line 6).

Knight testified the hallmark features of youth applied to appellant because he was seventeen years old at the time of the crime, and the features indicated juveniles had more difficulty regulating impulses, emotional expressions, or controlling behavior, and considering long-term consequences of their actions. (R.p.435, line 14-p.439, line 19). Knight's evaluation of appellant's home and family environment indicated he was the child of teenaged parents and was at a higher risk to discontinue school, for incarceration, and physical abuse, all of which Knight testified happened to appellant. (R.p.439, line 23-p.441, line 9). Further, appellant's father was absent, other family members had criminal histories, he did not have consistent parental supervision, and he lived in a violent community in downtown Charleston. (R.p.441, line 10-p.444, line 12). Finally, Knight testified the lack of supervision led to heavy marijuana use by the time appellant was fourteen years old. (R.p.444, line 13-p.445, line 18).

Moving on to the third factor, Knight examined the circumstances of the homicide and

stated appellant had stopped going to school by the time of the crime, was using marijuana, gambling, making bad decisions, and not looking toward the future. (R.p.446, line 20-p.447, line 10). Knight testified the State's and appellant's version of events in the trial transcript both revealed risky and reckless behavior, an emotional reaction to the event rather than a rational one, and appellant's version reflected adolescent behavior of seeking drugs, peer socialization, and staying up late. (R.p.448, lines 9-22; p.448, line 23-p.450, line 15). As for incompetency of youth, Knight stated that factor was not strongly implicated in appellant's case because the record revealed he did not "have difficulty navigating the legal system." (R.p.450, line 19-p.451, line 20).

Finally, Knight addressed the fifth factor and testified there was evidence appellant could be rehabilitated given he had already received his GED while incarcerated which he indicated was important to him. (R.p.451, line 21-p.453, line 5). Knight stated the kind of focus and diligence needed to get a GED showed a capacity for rehabilitation, and she recommended vocational programs which would help with his re-entry to society following the end of his sentence. (R.p.453, lines 6-9; p.455, line 22-p.456, line 14). Moreover, Knight testified appellant had no major disciplinary infractions in 2017, showed remorse for what he did, and realized drugs played a role in the previous problems in his life. (R.p.453, line 10-p.454, line 18; p.455, lines 2-18).

Knight testified it was her opinion appellant demonstrated a diminished culpability due to his age at the time of crime and he had the capacity to change and rehabilitate. (R.p.458, line 9-p.459, line 15).

On cross-examination, Knight acknowledged appellant was seventeen years and seven months old at the time of the murder, so he was legally and chronologically close to the age of

eighteen for purposes of the *Miller* factors. (R.p.462, line 14-p.463, line 24). Knight also admitted there were periods of stability in appellant's family life, his grandmother was a parental figure, and his grades were not terrible while in school. (R.p.464, line 3-p.465, line 12). Finally, Knight also acknowledged appellant was the only participant in the crime and no one pressured him to commit the murder. (R.p.466, line 15-p.468, line 16; p.469, lines 5-12).

Next, appellant's aunt spoke and told the trial court the family would support appellant and asked for the minimum sentence so that he had "a meaningful opportunity for release." (R.p.477, lines 1-19).

Defense counsel argued for the minimum sentence for appellant, but maintained even such a sentence could be considered the functional equivalent of a life sentence given the life expectancies of incarcerated inmates. (R.p.480, line 4-p.492, line 18). During the argument, the trial court asked counsel if it remained "within the bounds of our law" that appellant could receive a life sentence even under *Aiken*, and counsel replied, "Absolutely. If you take into consideration each of the [*Miller*] factors. . . ." (R.p.478, line 25-p.479, line 10). The State argued appellant appreciated the risks and consequences of his actions by fleeing to Alabama following the murder, he knew to assert his right to counsel and refuse to speak to police, appellant lived in a stable environment with his grandmother and mother at the time of the offense, and rehabilitation was not a certainty given appellant previously failed a drug treatment program at SCDC. (R.p.492, line 25-p.496, line 22). The State asked the court to consider those factors when deciding the sentence for "the person on the cusp of adulthood who stabbed another young man in the bed, tried to stab his father, fled the state, verbally confirmed his intent and refusal to accept responsibility." (R.p.496, lines 12-22).

The victim's family members and friends also spoke at the hearing. Latrease Smalls was

the victim's mother and told the trial court she had forgiven appellant, but she never received a letter or other sign of remorse from him. (R.p.497, line 2-p.499, line 6). Darryl Bennett said appellant was a coward who ran from police, was not remorseful, and asked the court to sentence appellant to life. (R.p.499, line 13-p.501, line 5). Jasmine Washington was the victim's friend and classmate who told the court appellant committed an adult crime and should be held responsible for his actions. (R.p.501, line 7-p.502, line 18). Finally, the victim's aunt said people know right from wrong, and appellant and the victim were young men at the time of the crime, not children and not juveniles. (R.p.502, line 20-p.505, line 8).

The trial court indicated she considered the *Miller* factors as required prior to determining appellant's sentence. (R.p.507, line 20-p.508, line 10). The court found appellant was seventeen years old at the time of the offense, and four months away from his eighteenth birthday, left the state after the crime and was located in Birmingham, Alabama. (R.p.508, lines 11-16). The court found appellant's family and home life were troubled, including allegations of abuse, drug use, a violent community, lack of parental supervision for most of appellant's teenaged life, and had a traumatic relationship with his father. (R.p.508, line 17-p.509, line 14). As to the circumstances of the offense, the court found there were multiple victims, it took place in the victim's home, and noted "the horrific nature of the event" and the argument at trial that appellant was acting in self-defense. (R.p.509, lines 15-25). The court noted the fourth *Miller* factor was not addressed in detail given there was no statement to law enforcement, no plea agreement, and little interaction with police. (R.p.510, lines 1-6). Finally, the court observed the defense provided details of the "strong possibility" of appellant's rehabilitation, such as increased maturity, SCDC's record of good behavior, and GED certificate. (R.p.510, lines 7-19).

Based on the *Miller* factors, her observations during trial, and the testimony presented at

the sentencing hearing, the trial court sentenced appellant to concurrent terms of thirty-five years for murder, thirty years for attempted murder, and five years for the weapons charge. (R.p.510, line 20-p.511, line 14).

Standard of Review

In criminal cases, appellate courts only review errors of law. *State v. Gamble*, 405 S.C. 409, 415, 747 S.E.2d 784, 787 (2013) (citing *State v. Jacobs*, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011)). This Court reviews those questions of law *de novo*. *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012) (citations omitted).

Analysis

Appellant Received Appropriate Sentence

The Eighth Amendment prohibits cruel and unusual punishment. U.S. Const. amend. VIII. In *Miller v. Alabama*, 567 U.S. 460 (2012), the United States Supreme Court held mandatory life without parole sentences for juvenile offenders who committed murder violated the prohibition against such punishment. 567 U.S. at 470. The Court held a sentencing authority must be allowed to consider youth as "more than a chronological fact," but a factor which carries with it immaturity, irresponsibility, and recklessness. *Id.* at 476. Further, the age of the defendant, along with his family background, and mental and emotional development must be considered in assessing his culpability. *Id.* The Court held a juvenile convicted of murder could still be sentenced to life without parole, but only after an individualized hearing in which the various mitigating factors were considered. *Id.* at 479-80.

Our Supreme Court held *Miller* applied retroactively to juveniles in South Carolina previously sentenced to life without parole. *Aiken*, 410 S.C. at 540-41, 765 S.E.2d at 575. Acknowledging *Miller* applied only to mandatory sentencing schemes rather than discretionary

ones such as ours, our Court focused on the imposition of life without parole, stating, "whether their sentence is mandatory or permissible, any juvenile offender who receives a sentence of life without the possibility of parole is entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment." *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577. The Court held juveniles previously sentenced under our discretionary scheme who received a life without parole sentence were nevertheless entitled to resentencing to 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." *Id.* at 544, 765 S.E.2d at 577. The Court determined the factors in *Miller* were those which must be considered during the hearings, such as the offender's age, family life, extent of his participation in the murder, understanding of the legal process, and possibility of rehabilitation. *Id.* at 544-45, 765 S.E.2d at 577-78. Just as the *Miller* court held, our Court explained juveniles could still receive life without parole, but only after "an individualized hearing where the mitigating hallmark features of youth are fully explored." *Id.* at 545, 765 S.E.2d at 578.

Two years later, the Supreme Court held its rule in *Miller* was retroactive on state collateral review. *Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016). It is notable the Court, when revisiting its holding in *Miller*, did not take the opportunity to equate any term of years sentence for juveniles, even those that do not result in release until old age, to life without parole. Instead, it again distinguished life from other sentences and stated states could remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than resentencing them. *Id.* The Court explained life without parole was "just and proportionate" for juveniles only when "exceptional circumstances" were present. *Id.* In all other cases, "hope for some years of life outside prison walls" must be provided. *Id.* at 737. However, the Court did

not hold that there was any minimum number for those years.

Appellant received the appropriate sentence given the serious nature of the charges against him and following a thorough individualized sentencing hearing that explored all five of the *Miller* factors. Appellant, a juvenile homicide offender, received the relief mandated by the Supreme Court and the constitution. Defense counsel presented testimony from a clinical forensic psychologist and a family member. Not only did the expert review numerous records and the trial transcript, she also spent eleven hours interviewing appellant, performed psychological testing, and conducted interviews with family members. (R.pp.433-35). The sentencing judge considered appellant's age as more than just a chronological fact and took into account how he grew up, his life at home and his interactions with his family, the circumstances of the crime, and heard from an expert about the possibility of rehabilitation. The judge also heard from the victim's family about the loss of their son and friend, and requested the sentence reflect the crime. (R.pp.497-505).

The sentencing judge made specific findings on the record based on the *Miller* factors. (R.pp.507-511); *see also Aiken*, 410 S.C. at 544, 765 S.E.2d at 577 (quoting *Miller*, 567 U.S. at 477-78) (listing the factors a sentencing court must consider including; (1) the age of the offender and the hallmark features of youth; (2) his family and home environment; (3) the circumstances of the homicide offense, including the extent of the offender's participation; (4) the offender's ability to deal with legal process; and, (5) the possibility of rehabilitation). The judge then stated based on her findings, her observations during trial, and the testimony presented at the sentencing hearing she was sentencing appellant to thirty-five years for murder, thirty years for attempted murder, and five years for the weapons charge. (R.pp.510-11). It is clear from the record the judge acted within her discretion to tailor a sentence appropriate for

appellant given all the information she had before her. Our Supreme Court in *Aiken* noted it was not prepared to set out "a definite resentencing procedure," but explained it trusted trial courts to exercise their discretion wisely to sentence juveniles within "the new constitutional jurisprudence." *See Aiken*, 410 S.C. at 545 n.10, 765 S.E.2d at 578 n.10 ("We have the utmost confidence in our trial judges to weigh the factors discussed herein and to sentence juveniles in light of this new constitutional jurisprudence."); *see also Wasman v. United States*, 468 U.S. 559, 563 (1984) (holding a judge or sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed). Accordingly, the record demonstrates the trial court did not abuse its discretion in sentencing appellant to thirty-five years for murder.

Mandatory Minimum Sentence is Not Unconstitutional

The sentence appellant received was also within the statutory range for murder and was not unconstitutional. Appellant's argument is an attempt to impermissibly expand the holdings of *Miller* and *Aiken* and declare unconstitutional a discretionary sentencing determination by a trial court. More broadly, appellant's assertion is a challenge to the sentencing range for a particular offense which remains a matter for the legislature to determine.[3] *See State v. Burdette*, 335 S.C. 34, 41, 515 S.E.2d 525, 529 (1999) (holding the severity of a sentence designated for a

[3] Moreover, the legislature set out the punishment for murder as thirty years to life imprisonment. S.C. Code Ann. § 16-3-20(A). The argument advanced by defense counsel in the sentencing memorandum and at the hearing that appellant could be sentenced pursuant to the manslaughter statute is fundamentally flawed given appellant's murder conviction. A trial court has no authority to sentence a defendant for an offense of which he was not convicted. *See e.g.*, *State v. Tisdale*, 321 S.C. 153, 467 S.E.2d 270 (1996) (holding a trial court does not have the authority to suspend an entire sentence under the DWI statute given the language used by the legislature when enacting the law which required imprisonment). Accordingly, the trial court's determination in appellant's case to sentence him within the statutorily authorized range was reasonable, constitutional, and not an abuse of discretion.

particular offense remains a matter of legislative prerogative); *see also Chapman v. United States*, 500 U.S. 453, 467 (1991) (recognizing the legislature has the power to define criminal punishments without giving the courts any sentencing discretion).

As our Court in *Aiken* recognized, "Our General Assembly has made the decision that juvenile offenders may be sentenced to life without parole, and we honor that decision," but *Miller* requires an individualized sentencing hearing where the hallmark features of youth are explored before a life without parole sentence is imposed on a juvenile homicide offender. *Aiken*, 410 S.C. at 545, 765 S.E.2d at 578. There is no need to declare unconstitutional the statutory mandatory minimum sentence for murder as appellant suggests because our Supreme Court has set forth the necessary procedure to ensure juveniles are afforded protection under the Eighth Amendment. Looking specifically at the holding in *Miller*:

> We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. *Cf. Graham [v. Florida]*, 560 U.S. [48,] 75 [(2010)] ("A State is not required to guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."). By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.

Miller, 567 U.S. at 479. The holding refers only to mandatory life without parole sentences as those are the ones which provide no opportunity for release. *Miller* did not address any other type of sentence, such as mandatory minimums, and neither did our Court in *Aiken*.

Importantly, while a life sentence was a possibility for appellant, he did not receive one and is eligible for release when his term-of-years sentence ends. Appellant offers no precedent that demonstrates a range of thirty years to life imprisonment for murder is constitutionally invalid, or even suspect. *See generally State v. Zarate*, 908 N.W.2d 831, 844-45 (Iowa 2018)

(noting national consensus on mandatory minimum sentences). In appellant's case, the trial court did not impose the mandatory minimum or otherwise indicate she would have imposed a lesser sentence but for the statutory requirement she sentence appellant to at least thirty years for murder. As discussed above, the court considered the robust *Miller* evaluation as presented by defense counsel, as well as the witnesses and argument presented by the State. Appellant's assertion that the court did not treat him as constitutionally different than an adult offender for sentencing purposes is meritless. The court considered and gave effect to the mitigating evidence presented during the individualized sentencing hearing as required and sentenced appellant to a term of years within the range our legislature has deemed appropriate for offenders who commit murder. Moreover, the court noted in its findings the "horrific nature" of the murder and attempted murder. Appellant stabbed to death a person he called a friend, tried to kill that person's father, and then fled to Alabama to avoid police. A jury found appellant guilty beyond a reasonable doubt. It is generally agreed the "punishment should be directly related to the personal culpability of the criminal defendant." *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) (citation omitted). Even for juveniles. Therefore, because appellant received an appropriate sentence within the statutory range for murder, his sentence does not violate the Eighth Amendment, and the trial court did not err in determining his sentence.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SHERRIE BUTTERBAUGH
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: _____
SHERRIE BUTTERBAUGH

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

August 7, 2018.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

THE STATE,

Respondent,

v.

TERRELL ARTIETH SMITH,

Appellant.

Appellate Case No. 2017-001178

CERTIFICATE OF COMPLIANCE

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

This 7th day of August, 2018.

SHERRIE BUTTERBAUGH
Assistant Attorney General

ATTORNEY FOR RESPONDENT

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CERTIFICATE OF SERVICE

I, Sherrie Butterbaugh, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Lara M. Caudy, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. 401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 7th day of August, 2018.

SHERRIE BUTTERBAUGH
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT