STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Williamsburg County
Michael G. Nettles, Circuit Court Judge

THE STATE,

Appellant,

v.

RONALD HAKEEM MACK,

Respondent.

Appellate Case No. 2017-002441

FINAL BRIEF OF APPELLANT

ALAN WILSON
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
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit
Post Office Box 836
Sumter, South Carolina 29150
(803) 436-2185

ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the circuit court err in finding respondent's term-of-years sentence for murder was the functional equivalent of a life sentence which entitled him to resentencing pursuant to *Aiken v. Byars*, where our Supreme Court and the United States Supreme Court limited their holdings to juveniles actually sentenced to life without parole and where the evidence the court relied on to support its ruling was irrelevant?

STATEMENT OF THE CASE

Respondent, Ronald Hakeem Mack, was sentenced to fifty years for murder and a concurrent thirty years for first-degree burglary following a guilty plea on August 24, 2010.[1] (R.p.1; p.32, lines 7-14). Respondent admitted he and three co-defendants drove to a teenager's home and shot and killed him over a drug debt owed to the gang to which they belonged. (R.p.7, lines 22-25; p.8, lines 1-3; p.8, line 8-p.12, line 20; p.16, line 15-p.17, line 13). Respondent was seventeen-years-old at the time.[2] (R.p.19, lines 4-5). Respondent pled guilty before the Honorable Clifton Newman and was represented by LeGrand Carraway. (R.p.1). Respondent did not appeal his guilty plea or sentences.

On August 5, 2011, respondent filed for post-conviction relief. (2011-CP-45-383). After an evidentiary hearing, the Honorable R. Ferrell Cothran, Jr. denied and dismissed with prejudice the application. Respondent filed a petition for writ of certiorari which presented, among other issues, the claim his case should be remanded for resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). The Supreme Court of South Carolina denied certiorari review on March 25, 2016. (Appellate Case No. 2014-001518).

On April 20, 2015, respondent filed a motion for resentencing pursuant to *Aiken*. (R.pp.39-41). The State submitted a response to the motion on April 28, 2015, and respondent replied on May 15, 2015. (R.pp.61-71). The Supreme Court vested the Honorable Michael G. Nettles with exclusive jurisdiction over the case on August 11, 2016. (R.p.82).

The State moved to dismiss the motion for resentencing on October 5, 2016, arguing

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[1] As part of the negotiations, the State dropped criminal conspiracy and weapons charges. (R.p.3, lines 15-19).

[2] Respondent was four months away from his eighteenth birthday. (R.pp.34-36).

respondent was not entitled to relief because he was not sentenced to life without parole, but received a term of fifty years and the plea judge considered all relevant information prior to sentencing. (R.pp.85-87). Respondent opposed the motion, asserting the term-of-years sentence he received was the functional equivalent of a life sentence such that he was part of the class entitled to resentencing. (R.pp.88-107).

On February 17, 2017, a hearing was held on appellant's motion before Judge Nettles. (R.p.117). Respondent was represented by Laura R. Baer, and the State was represented by Ernest A. Finney, III. (R.p.117). By order dated June 14, 2017, Judge Nettles denied the State's motion to dismiss, finding *Aiken* applied to *de facto* life sentences, fifty years was such a sentence, and the original sentencing hearing was insufficient. (R.pp.392-400). Accordingly, the judge found respondent was entitled to a resentencing hearing pursuant to *Aiken*. (R.p.401).

The State filed a motion to reconsider, and respondent opposed the motion. (R.pp.402-05). The State filed a lengthy memorandum waiving a reconsideration hearing and in support of its motion. (R.pp.406-34). Judge Nettles denied the motion for reconsideration by order dated November 15, 2017. (R.p.435).

The State served a notice of appeal on November 22, 2017. Respondent filed a motion to dismiss the appeal as interlocutory on December 19, 2017, which the State opposed. This Court denied the motion to dismiss by order dated February 1, 2018.

This appeal follows.

ARGUMENT

> Did the circuit court err in finding respondent's term-of-years sentence for murder was the functional equivalent of a life sentence which entitled him to resentencing pursuant to *Aiken v. Byars*, where our Supreme Court and the United States Supreme Court limited their holdings to juveniles actually sentenced to life without parole and where the evidence the court relied on to support its ruling was irrelevant?

Respondent is not entitled to resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), as he received a term-of-years sentence and will be released when he finishes his fifty-year sentence for murder. The circuit court erred in finding respondent's sentence was a *de facto* life sentence because the court deviated from existing precedent to create a cognizable claim under *Miller v. Alabama*, 567 U.S. 460 (2012), and its progeny. By their plain language *Miller* and *Aiken* apply only to juvenile homicide offenders sentenced to an actual sentence of life without parole and respondent is not part of that class.

Neither our Supreme Court nor the United States Supreme Court have extended the *Miller* rule to apply to any other type of sentence, or so broadly construed it to include the argument made by respondent that his sentence for murder is the functional equivalent of life without parole. The Supreme Court has never held a lengthy sentence for a juvenile offender who killed someone is the functional equivalent of life without parole. The sentencing scheme in *Miller* was unconstitutional because it denied juveniles convicted of murder all possibility of release, leaving them no opportunity or incentive for rehabilitation. But no one is guaranteed freedom. *See Miller*, 567 U.S. at 479 (citing *Graham v. Florida*, 560 U.S. 48, 75 (2010)) (forbidding a sentencing scheme that mandates life without parole for juvenile homicide offenders, while acknowledging a state is not required to guarantee eventual freedom but must provide some meaningful opportunity for release based on demonstrated maturity and

rehabilitation). By its express words, the Supreme Court has stated juveniles convicted of any offense are not guaranteed freedom under the Eighth Amendment or even freedom while they are still young. *See Graham*, 560 U.S. at 75 (explaining "[t]he Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life"); *see also Miller*, 567 U.S. at 480 (noting "we do not foreclose a sentencer's ability to make that judgment in homicide cases [to sentence a juvenile to life without parole], we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison); *Aiken*, 410 S.C. at 545, 765 S.E.2d at 578 ("Without question, the judge may still determine that life without parole is the appropriate sentence in some of these cases in light of other aggravating circumstances."). Moreover, the evidence presented in the form of life expectancy statistics and relied on by the circuit court to make its determination is irrelevant and deeply flawed. As will be discussed below, the information presented lacks risk factors specific to respondent and is too broad.

In addition, respondent's sentence, while lengthy, would not have triggered any requirement for the sentencing judge to make such findings of "irreparable corruption" or "permanent incorrigibility" because the judge did not give respondent a life without parole sentence. Regardless, the sentencing judge properly considered the cold-blooded nature of the murder and respondent's involvement, circumstances of his youth, and all the other relevant *Miller* factors before exercising his discretion to sentence respondent. Accordingly, respondent's sentence of fifty years for murder is not cruel and unusual punishment under the Eighth Amendment, and the circuit court erred in denying appellant's motion to dismiss respondent's motion for a resentencing hearing, and in finding respondent was entitled to resentencing

pursuant to *Aiken*.

Guilty Plea Hearing

Respondent pled guilty to murder and first-degree burglary on August 24, 2010 before the Honorable Clifton Newman. (R.p.1; pp.7-12; p.16, line 15-p.17, line 13; pp.34-36). Prior to accepting the plea, Judge Newman explained the rights respondent was giving up by pleading guilty, asked respondent repeatedly if he understood those rights, and discussed the potential sentences respondent faced, which included the possibility of two life sentences. (R.p.3, line 23-p.8, line 16). Respondent stated repeatedly he understood the proceeding and admitted he committed the crimes of murder and burglary. (R.p.7, lines 22-25; p.8, lines 1-3; p.8, lines 8-16).

The State told the plea judge briefly the facts of the case. On April 5, 2009, respondent was four months away from turning eighteen, when he and his co-defendants broke into the home of seventeen-year-old Kenyon Dorsey. (R.p.8, lines 18-23; pp.34-36). The victim's mother was also inside, heard what she thought were firecrackers, saw blood on the wall, and realized her son had been shot. (R.p.8, line 23-p.9, line 13). Police determined someone shot the victim four times—three times with a nine millimeter handgun and once with a shotgun. (R.p.9, lines 15-17; p.11, lines 11-14).

During the investigation, police learned respondent and Kenyon Dorsey used to be friends, but Antonio McClary (McClary) admitted respondent was mad at the victim. (R.p.9, line 18-p.10, line 7). Respondent called his mother, Tawanda Allen (Allen), and her boyfriend, Kelvin Bowen (Bowen) in Maryland and asked them to drive down, bring guns, and help him commit a murder. (R.p.10, lines 7-14). Allen and Bowen picked up respondent and McClary, drove them to the victim's house, and they broke in. (R.p.10, line 14-p.11, line 9). Respondent

walked behind the recliner where the victim was sleeping and shot him three times with the handgun. (R.p.11, lines 9-11). Bowen saw the victim move, stated, "He's not dead, we need to finish him off," and shot the victim again with the shotgun. (R.p.11, lines 12-14). The co-defendants got in their car and drove away. (R.p.11, line 14-p.12, line 7). All four were later arrested—respondent, Allen, and Bowen were found Maryland. (R.p.12, lines 7-12). A search of their home revealed the shotgun used in the murder and ammunition from a nine millimeter gun.[3] (R.p.12, lines 12-20). Given the "callous" nature of the crime, the solicitor stated she believed a life sentence would be appropriate. (R.p.14, line 25-p.15, line 2).

Following the State's recitation, Judge Newman asked respondent if that was true and respondent replied, "Yes, sir," but stated his mother and Bowen had nothing to do with the crime.[4] (R.p.12, line 21-p.13, line 3). Judge Newman accepted the plea as voluntarily and knowingly entered. (R.p.13, lines 6-7).

Prior to sentencing, the victim's mother spoke briefly of losing her son, and told Judge Newman she hoped respondent spent the rest of his life in prison. (R.p.13, lines 13-19). Respondent's defense counsel spoke at length on his behalf, in an effort to give the judge a better idea of respondent's social history and personality. Counsel described respondent as a soft spoken, smart, and nice young man who lived in South Carolina until the seventh grade when he moved to Maryland with his mother and stepfather, who eventually divorced. (R.p.15, line 9-

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[3] Respondent, Allen, and McClary co-defendant gave statements to police. (R.p.10, lines 3-7; p.14, line 23-p.15, line 1).

[4] A jury convicted Allen on September 1, 2010, and Judge Newman sentenced her to concurrent terms of forty-five years for murder, thirty years for first-degree burglary, and five years for criminal conspiracy. A jury convicted Bowen on February 4, 2011, and Judge Newman sentenced him to consecutive terms of ninety-nine years for murder, thirty years for first-degree burglary, five years for criminal conspiracy, and five years for possession of a weapon during the commission of a violent crime. McClary, pled guilty on October 14, 2010, to a negotiated sentence of twelve years' imprisonment for second-degree violent burglary. (R.p.421, n.8).

p.16, line 14). Counsel explained respondent later moved back to South Carolina. (R.p.20, lines 12-15). Respondent and the victim were involved in the Bloods gang, and the two helped distribute drugs, the victim owed the gang $78,000, and members of the gang told respondent it was his responsibility to "take care of this problem."[5] (R.p.16, line 15-p.18, line 6; p.19, lines 2-4).

Defense counsel told the sentencing judge respondent was "totally immersed" in the gang which brainwashed him and influenced him to the extent that respondent wanted to have the lifestyle of plenty of money from selling drugs and being an upper level member of the gang. (R.p.19, lines 21-p.20, line 12; p.21, line 24). Counsel revealed the gang became like another family to respondent. (R.p.20, line 20-p.21, line 17). Counsel explained further respondent would have done anything for the gang and if "the Bloods told him to put a gun in his mouth he would have done it" and "would have been happy to do it," but respondent was out of that mindset because he had spent time away from the gang and now understood the dangers of that life. (R.p.21, line 18-p.22, line 20). Counsel stated he did not believe justice would be served by giving respondent a harsh sentence, and asked the sentencing judge to give respondent the minimum thirty years given his mother's and the gang's involvement and influence over him. (R.p.22, line 20-p.23, line 23).

Respondent expressed remorse for the crime, asked for mercy and said he knew what he had done was wrong, but that he did it out of fear, was young at the time, and did it to prove his loyalty to the gang. (R.p.24, lines 1-7).

Defense counsel reemphasized the influence respondent's mother had over him and reiterated her role in the crime, and spoke of the possibility of respondent's rehabilitation, telling

[5] Bowen was allegedly a member of the same gang. (R.p.28, lines 18-19).

the sentencing judge:

> This was his mother who took him to that house. She drove him there. [. . .] These aren't three kids going to do this to where this is his mother taking him there, directing him basically to do this. That's what makes this completely different than anything else. He's not twenty-five. He was seventeen-years-old at the time, and that's what makes a difference here, Your Honor. That's what I guess what – you're not gonna find another case. You can go the whole world over and you're not gonna find a case where a mother is encouraging a son to commit a murder like this. [. . .] I believe the ends of justice would be served with a minimum thirty-year sentence for him to give this man another chance. You can imagine how much he's going to change, how much he's already changed, and away from mom and this gang, the person he will be in just a few years or whatever. He's gonna be in jail until for thirty years or whatever, Your Honor, but I would ask that who among us has been cursed enough to have a mother to take us to a murder site.

(R.p.25, line 20-p.26, line 21). Respondent admitted his mother drove him to the victim's home, and acknowledged she and her boyfriend, Bowen, "had a big influence on me doing a lot of things that I did" and his mother never tried to stop him from doing bad things. (R.p.26, line 22-p.28, line 21).

The sentencing judge stated, "the purpose of a sentence is to represent what society determines to be justice for a crime and to – not to send a message to the community, but to do what most law abiding citizens would expect the Court to do." (R.p.30, lines 16-20). The judge asked respondent:

> THE COURT: It's not about the future years of Mr. Mack. How about the lack of future years of [the victim]. He's the victim, the victim, the victim's family, the victim's loved ones. Mr. Mack is almost certainly a lost cause at this point based on all of the choices that he made. He's a lost cause as far as society is concerned. His future is not within society. His future, your future, is out of society. You've given up your freedom. You've given up the right to walk among free people. Why did you decide to give that up?

[RESPONDENT]: I don't know any better, Your Honor.

THE COURT: Sir?

[RESPONDENT]: I didn't know no better.

THE COURT: You didn't know no better? Unfortunately you'll never know any better because you – that's a – just as you snuffed out his life you snuffed out your future just the same. All of the great things that [defense counsel] said about you and all he thinks about you, I mean, I'm not questioning at all whether those things are true. But if you are to take advantage of those things it won't be – it will not be out in free society where you've given up your freedom and your right to anyone to trust you to walk the streets. And you'll have to do those good deeds behind bars. That's just a fact of the matter.

(R.p.31, line 6-p.32, line 6). Though life was a possibility, Judge Newman ultimately sentenced respondent to fifty years for murder and a concurrent thirty years for first-degree burglary.[6] (R.p.32, lines 7-14).

Motion for Resentencing and Subsequent Responses

On April 20, 2015, respondent moved for resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), and submitted a motion through counsel. (R.pp.39-41). Respondent asserted his fifty years sentence was a *de facto* life sentence and the judge's comments during sentencing indicated his intent that the sentence be such an equivalent. (R.pp.48-58). Further, respondent argued the judge did not fully consider the hallmark features of youth as required, but instead based respondent's sentence "purely on retribution and incapacitation." (R.pp.58-60).

[6] Prior to accepting the plea, Judge Newman explained to respondent murder and first-degree burglary each carried the possibility of a life sentence and respondent indicated he understood. (R.pp.3-4). Respondent knew the sentencing consequences—i.e. that he faced the possibility of two life sentences. Further, plea counsel and respondent both understood the only agreement entered into was to drop criminal conspiracy and weapons charges; there were no negotiations regarding sentencing. (R.p.3; p.5).

On October 5, 2016, the State moved to dismiss the motion for resentencing arguing respondent was not entitled to relief because he was not sentenced to life without parole, but received a term of fifty years. (R.pp.85-86). The State also asserted the plea judge considered all relevant information prior to sentencing. (R.p.86). Finally, the State maintained, while respondent's sentence was lengthy and he may spend a significant portion of his life in prison, "he has been given every benefit that the law requires since he will not have to spend the balance of his life in prison." (R.p.86).

Respondent filed a lengthy response in opposition, emphasizing cases from other jurisdictions which found *Miller* applied to *de facto* life sentences and reiterated the argument that respondent received such a sentence. (R.pp.93-104).

Hearing on *Aiken* Motion

A hearing on appellant's motion to dismiss was held on February 17, 2017, before the Honorable Michael G. Nettles. (R.p.117). The State argued respondent was not entitled to resentencing because he did not receive a life without parole sentence, but received a term-of-years sentence and *Miller* and its progeny, such as *Aiken*, were "pretty clear case[s] for our courts to have to interpret." (R.p.121, line 24-p.122, line 5). The State maintained the sentencing implications noted in *Aiken* were not at issue in respondent's case because he had the opportunity to obtain release. (R.p.122, lines 5-15). The State asserted the plea judge used his discretion to sentence respondent to a range between thirty years and life where respondent faced the possibility of two life sentences—one for murder and one for first-degree burglary. (R.p.122, lines 16-19). The State maintained defense counsel detailed respondent's life and the plea judge took that into consideration when determining respondent's sentence. (R.p.122, line 19-p.123, line 7). The State reiterated its position respondent was not part of the class entitled to relief

under *Aiken* because he would be released when his term-of-years sentence ended, even acknowledging the possibility that time spent in prison could lower a person's life expectancy. (R.p.124, lines 13-16; p.125, line 18-p.126, line 1; p.192, line 11-p.193, line 9; p.202, line 18-p.203, line 15; p.205, line 16-p.208, line 3).

Respondent's counsel called Vera Dolan (Dolan) to testify. (R.p.126, lines 8-9). Dolan described her educational and professional background and was qualified as an expert in life expectancy and epidemiology.[7] (R.p.127, line 18-p.132, line 17). She explained the average life expectancy of an eighteen-year-old black male in the general population was fifty-five years, so the person was expected to live to be seventy-three years old. (R.p.135, line 23-p.136, line 4). However, Dolan opined that was not a reliable indicator for those men who had been incarcerated for any time in the South Carolina Department of Corrections (SCDC) because prison was a "significant risk factor on someone's life expectancy." (R.p.136, lines 5-11). Using records of male inmates received from SCDC, which included the age of entry into prison and age of death, Dolan determined the life expectancy of an eighteen-year-old black male in SCDC was thirty-eight-point-two years, so the person was expected to live to be just over fifty-six years old. (R.p.140, line 12-p.148, line 20; p.152, lines 11-13). Because respondent was twenty-five-years-old at the time of the hearing, Dolan surmised he would live an additional thirty-two-point-two years, or until he was just over fifty-seven years old. (R.p.153, lines 13-19). Dolan opined being incarcerated took about twenty years off a person's life. (R.p.160, lines 6-10).

On cross-examination, Dolan acknowledged her opinion and results did not take into account any specific details about respondent's life, such as health problems or drug use, which might change his life expectancy. (R.p.156, line 17-p.166, line 2). Dolan also admitted her

[7] Dolan testified epidemiologists specialize in the statistical analysis of health, disease, and other risk factors that "have to do with death." (R.p.128, line 23-p.129, line 3).

tables represented a statistical average and not an individual's actual life expectancy. (R.p.167, lines 6-10). Dolan further affirmed if respondent was released from prison at age sixty-seven, fifty years after the age when he committed the crime, he would have a life expectancy of ten additional years. (R.p.166, line 19-p.167, line 5). Judge Nettles noted there were a number of things that could impact a person's life expectancy that would not be reflected in the numbers, such as being a member of a gang or other lifestyle choices, and it was "hard to say how jail affects the longevity" and Dolan agreed "We don't know," but that "a lot of deaths" in studies from Australia and Canada were due to "mental illness, had to do with suicide, had to do with overdose."[8] (R.p.173, line 13-p.174, line 19).

Following Dolan's testimony, respondent's counsel argued *Aiken* applied to *de facto* life sentences, respondent received such a sentence and was "similarly situated" to those defendants in *Aiken* who received relief, and respondent was entitled to resentencing. (R.p.179, line 3-p.191, line 21; p.195, line 1-p.202, line 15).

At the end of the hearing, Judge Nettles took the matter under advisement and left the record open for respondent's counsel to provide the details of an ACLU of Michigan study on the life expectancy of offenders sentenced to life. (R.p.191, line 22-p.194, line 22; p.209, lines 9-16).

Order Granting Resentencing Pursuant to *Aiken*

By order dated June 14, 2017, Judge Nettles denied the State's motion to dismiss, finding respondent was entitled to a resentencing hearing pursuant to *Aiken*. (R.p.401). In the order, the judge first summarized juvenile sentencing cases and the testimony and arguments presented at the hearing. (R.pp.371-93). Judge Nettles next found *Aiken* was applicable to *de facto* life

[8] When asked by the judge, Dolan acknowledged the records included people who died in prison and those who died after their release. (R.p.171, line 23-p.172, line 7).

sentences stating our Supreme Court "did not restrict the relief it granted to only those members of the class" sentenced to life without parole, but used the words "*to those similarly situated.*" (R.p.394) (emphasis in order). The judge found "it is logical to conclude that the *Aiken* Court did not mean to restrict its interpretation of the applicability of *Miller* to only those cases specifically denominated "life without parole," but rather intended to provide relief to anyone "irrevocably sentenced . . . to a lifetime in prison." (R.p.394). Judge Nettles cited with approval cases from other jurisdictions which found *Miller* and *Graham* applied to *de facto* life sentences, and the federal sentencing guidelines interpretation of a life sentence to determine he was "persuaded that defendants who are similarly situation to the offenders in *Aiken* include those subject to a term of years sentence that constitutes the functional equivalent of life without parole. This interpretation was not an expansion of *Aiken*, but rather an effectuation of its intent." (R.pp.394-96).

Next, Judge Nettles found the fifty-year sentence imposed in respondent's case was the functional equivalent of life without parole. (R.p.396). The judge noted the comments made by the sentencing judge regarding respondent's future spent behind bars, and recognized "the numerous statistical sources regarding life expectancy." (R.p.396). Judge Nettles found the tables codified in S.C. Code Ann. § 19-1-150 were not applicable to respondent's case because they were "outdated and did not account for the differences in race" and represented "only insured lives" so it was "not representative of the general population, much less the inmate population in South Carolina." (R.p.396). Instead, the judge found persuasive Dolan's testimony that incarceration drastically reduced life expectancy, the ACLU of Michigan's findings that "juvenile offenders sentenced to life in prison" had "an average age of death of 50.6 years," the federal sentencing commission's determination of what a *de facto* life sentence is, and the

jurisdictions which found terms of fifty and sixty years were the functional equivalents of life sentences. (R.pp.396-98). Judge Nettles found the "statistical sources support this Court's finding that the practical effect of [respondent's] sentence is that he will remain in prison for the rest of his days, with no meaningful hope of release." (R.p.398).

Finally, Judge Nettles found the original sentencing hearing in respondent's case was insufficient and did not comply with the constitutional requirements of *Aiken* and *Miller*. (R.p.398). The judge determined the "truncated presentation" by respondent's plea counsel "fell far below the full exploration of the factors associated with [respondent's] youth required by *Miller* and *Aiken*. (R.pp.398-99). Judge Nettles found the record did "not reflect that any of the mitigating factors pointed to by [plea counsel] were actually considered by the sentencing court," but rather the court's comments focused on the victim's youth and respondent's "sentence was based purely on retribution and incapacitation." (R.p.399).

Therefore, Judge Nettles found respondent was within the class of juvenile offenders for whom *Aiken* provides for resentencing as *Aiken* extended to juveniles who received *de facto* life sentences such as the fifty-year term given to respondent. (R.p.401). The judge denied appellant's motion to dismiss and granted respondent's motion for a resentencing hearing. (R.p.401).

Analysis

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).

Resentencing Only Applies to Life Without Parole Sentences

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* referenced only mandatory sentencing schemes, 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 non-mandatory scheme who received a life without parole sentence were 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. Further, 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, 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 sentences, 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.

Respondent Not Entitled to Resentencing: He Received a Term-of-Years Sentence

The circuit court erred in its application of *Miller* or *Aiken* as both cases hold the relief granted extends only to juveniles homicide offenders sentenced to life without parole. *See Miller*, 567 U.S. at 470 (holding mandatory life without parole sentences for juvenile offenders who committed murder violates the Eighth Amendment); *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577 (holding juveniles who received a life without parole sentence were entitled to resentencing to allow them to present evidence specific to their attributes of youth). Respondent received a fifty year sentence for murder and the circuit court erred in finding such a sentence was the functional equivalent of life such that he was within the class of juvenile offenders who the

courts were trying to protect from cruel and unusual punishment. *See Miller*, 567 U.S. at 471 (explaining because juveniles have diminished culpability and greater prospects for reform, they are less deserving of the most severe punishments) (citations omitted). *Miller* requires an individualized sentencing hearing only when a juvenile can be sentenced to life without the possibility of parole—a sentence respondent did not receive. Finding respondent was entitled to relief impermissibly extended the holdings in *Miller* and *Aiken* beyond their plain language and the circuit court improperly denied appellant's motion to dismiss and granted the motion for a resentencing hearing.

Appellant acknowledges, as the Supreme Court held, fundamental differences between juveniles and adults affect the proportionality analysis under the Eighth Amendment. However, neither our courts nor the United States Supreme Court have ever held the *Miller* rule applied to sentences other than life without parole, such as a *de facto* life sentence or, for that matter, defined or determined what constitutes a *de facto* life sentence. While the circuit court and respondent cited to cases which found a term-of-years was the functional equivalent of life, there are many other courts which have found otherwise. *See e.g.*, *Bunch v. Smith*, 685 F.3d 546, 552 (6th Cir. 2012) (determining until the Supreme Court rules term-of-year sentences resulting in the functional equivalent of life without parole offend the Eighth Amendment, such sentences do not violate clearly established federal law); *Contreras v. Davis*, 716 F. App'x 160, 163 (4th Cir. 2017) (declining to determine whether a 77-year sentence was a *de facto* life sentence that violated *Miller* and *Graham*); *In re Harrell*, 6th Cir. No. 16-1048, 2016 WL 4708184 (Sept. 8, 2016) (denying motion for successive federal habeas corpus petition, because defendant's 60-150 year sentence for murder when he was seventeen was not the functional equivalent of mandatory life without parole; defendant was eligible for parole at seventy-seven-years old); *State v.*

Nathan, 522 S.W.3d 881, 893 (Mo. 2017) (en banc) (holding sentencing a juvenile to consecutive, lengthy sentences for multiple non-homicide offenses along with homicide was not the functional equivalent of life without parole); *State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017) (holding *Miller* did not apply to consecutive life sentences with possibility of release on multiple counts of murder, even if such sentence, in aggregate, was functional equivalent of life without possibility of parole); *Hobbs v. Turner*, 431 S.W.3d 283, 285, 289 (Ark. 2014) (holding an aggregate term of 55 years was constitutional under *Miller* because *Miller* applies only to mandatory sentences of life without parole); *State v. Kasic*, 228 P.3d 410, 414 (Ariz. Ct. App. 2011) (finding a sentence of 139.75 years, exceeding life expectancy, was not constitutionally excessive). Accordingly, with such a clear split among the courts, the circuit court exceeded its authority in finding respondent's fifty-year sentence was a *de facto* life sentence, and made a determination that is reserved for higher courts.

Evidence Relied on is Irrelevant

The evidence the circuit court relied on to support its finding that respondent's sentence was the functional equivalent of life without parole is irrelevant and speculative. Vera Dolan's (Dolan) testimony focused only generally on the male inmate population at SCDC over the past twenty years, broken down by age and race. (R.pp.140-48). The figure included those who died either in or out of prison, regardless of length of incarceration. (R.pp.171-72). In addition, the court relied on a study from the ACLU in Michigan and the United States Sentencing Commission, neither of which contained data specific to South Carolina. (R.pp.139-40; p.144; p.146)

Life expectancy is difficult to determine and any attempt to determine such a number of years is suspect. Even so, a study to determine the expected date of death of an individual

juvenile is statistically reliable only when race, gender, family history, health, income, and other factors are considered. *See United States v. Johnson*, 685 F.3d 660, 662-63 (7th Cir. 2012) (finding that arguments regarding *de facto* life sentences, properly made, require correct use of life expectancy tables and an individual's health; even then, "the most refined statistical calculation of . . . life expectancy will leave considerable residual uncertainty"). Dolan acknowledged she did not consider any factors specific to respondent when determining his life expectancy, and she did not do so, in part, because her funding was provided through a source unrelated to respondent's case and her findings were meant to be broad. (R.pp.139-40). For example, the solicitor asked Dolan if she considered whether respondent used drugs or if she knew of any health problems and Dolan replied she did not know. (R.pp.165-66). Respondent has been disciplined multiple times since being incarcerated for drug use, a fact easily verified by checking respondent's inmate detail report.[9] Respondent was also a member of a gang prior to his conviction which was detailed during his plea hearing. Both of these are risk factors which could impact his life expectancy but would have no bearing on the constitutionality of his sentence. The analysis also fails to consider the advances in medicine and technology that may take place over the next few decades, or how respondent's life expectancy might change depending on his health, healthcare, or other factors. A defendant's average life expectancy is not a "guaranteed date of death,"[10] and it is difficult to draw a line to affirmatively conclude at

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[9] This Court can take judicial notice of the online report. *See* Rule 201(b)(2), SCRE (providing a judicially noticed fact must be one capable of accurate and ready determination by resorting to sources who accuracy cannot reasonably be questioned); *see also Tisdale v. S.C. Highway Patrol*, No. 09-cv-1009-HFF-PJG, 2009 WL 1491409, at *1, n. 1 (D.S.C. May 27, 2009), *aff'd*, 347 F. App'x 965 (4th Cir. Aug. 27, 2009) (finding courts may take judicial notice of factual information located in postings on government websites). Respondent's Inmate Detail Report can be found at http://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000342556.

[10] Even more, the Supreme Court recently held in a unanimous *per curiam* opinion that

what point a juvenile received a *de facto* life sentence so that his term-of-years sentence violates the constitution. The circuit court relied on general life expectancy charts without consideration of respondent's specific traits. Such a result does not promote *individualized* sentencing as both *Miller* and *Aiken* advance.[11] Accordingly, the circuit court's finding, based on irrelevant and speculative evidence, should be rejected.

Youth and Its Relevant Factors Considered at Sentencing Hearing

Finally, respondent's youth and its relevant factors were considered by Judge Newman during the sentencing hearing following his guilty plea. Even if the holding in *Miller* and *Aiken* were to be expanded to include *de facto* life sentences, respondent received the type of individualized sentencing hearing contemplated by our Supreme Court in *Aiken*. *See 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 chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate the risks and consequence;" (2) the "family and home environment" of the offender; (3) the circumstances

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Virginia's determination that its geriatric release program provided a "meaningful opportunity" for release for juvenile offenders was not "'contrary to . . . clearly established federal law.'" *Virginia v. LeBlanc*, 137 S.Ct. 1726, 1727-29 (2017) (*per curiam*). South Carolina utilizes a similar program which authorizes parole for inmates who are geriatric, terminally ill, or permanently incapacitated. *See* S.C. Code Ann. § 24-21-715 (providing that someone who is "geriatric" is an inmate who is seventy years of age or older and suffers from a chronic illness or disease related to aging, and further providing guidelines for release). At the very least, the presence of these programs tends to undercut the lesser estimate of life expectancy put forth below.

[11] More broadly, appellant's argument is a challenge to the sentencing range for a particular offense which remains a matter for the legislature to determine. *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 particular offense remains a matter of legislative prerogative). 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.

of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the offender's ability to deal with police officers or prosecutors, or the offender's capacity to assist his own attorneys;" and, (5) the "possibility of rehabilitation").

Here, an examination of the guilty plea hearing transcript demonstrates the sentencing judge examined all five factors. Beyond knowing respondent was almost eighteen-years-old when he broke into the victim's home and shot him, the judge also learned this was not an impetuous act. Respondent planned the murder by calling his mother and her boyfriend in Maryland and asked them to bring guns and drive down to help him commit the crime. (R.p.10). As noted by the State in its memorandum in support of consideration, respondent had many hours from that time until the couple arrived to contemplate his actions and the risks, but chose to go ahead with the murder. (R.p.427). Further, respondent was aware of the consequences of his actions. His plea counsel told the court respondent knew killing the victim would help with his standing in the gang because respondent told his counsel the other gang members told him it was his responsibility to take care of it. (R.pp.16-19). The level of planning and sophistication indicates respondent was not an impetuous or immature youth who was not aware of the risks or consequences of his actions.

Next, the sentencing judge heard and considered respondent's role in the murder. Beyond planning the crime, respondent was also aware of the victim's habits, his mother's work schedule, and knew the best time to break in. (R.p.429). Further, respondent was the first one to fire any shots, shooting the victim three times with a handgun. (R.p.11). No one pressured respondent to commit the crime—he solicited help from his mother, her boyfriend, and the third co-defendant.

Third, plea counsel spoke to the sentencing judge at length about the influence

respondent's mother had over him and his immersion in the gang lifestyle, and how the gang became like another family. (R.pp.21-22). The judge also heard respondent had the opportunity when he moved back to South Carolina to sever ties with the gang, but instead he became the link between South Carolina and Maryland for the gang's drug business. (R.pp.16-20).

Fourth, respondent told the plea judge repeatedly he understood the proceeding against him or was able to assist with his defense. (R.pp.3-8). Respondent also admitted his guilt multiple times. (R.pp.12-13; p.24; pp.26-28). There is no indication from the record that respondent's age prevented him understanding or participating in the judicial process.

Finally, the sentencing judge also heard from plea counsel about the possibility of respondent's rehabilitation. Counsel stated respondent had already begun the process because he had time away from the gang and understood the dangers of that lifestyle, and counsel asked for the minimum sentence. (R.pp.21-23). Respondent himself told the judge he understood what he had done was wrong. (R.p.24).

At the end of the lengthy sentencing hearing, the judge acknowledged the seriousness of the situation by asking respondent why he had given up his freedom and snuffed out his future before sentencing him to fifty years for murder and thirty years for first-degree burglary. (R.pp.31-32). Appellant's argument that the judge used harsh language or imposed a lengthy term-of-years sentence does not address the fact that the sentencing range was must greater and appellant faced the possibility of two life sentences.

From the record, it appears Judge Newman heard and considered all the factors specifically noted as the "hallmark features" of youth prior to sentencing. It cannot be said no court ever took into account respondent's age and its surrounding circumstances. Therefore, because respondent was sentenced to fifty years for murder, respondent is eligible for release,

and his sentence does not violate the Eighth Amendment, the circuit court erred in granting respondent's motion for resentencing pursuant to *Aiken*.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted the circuit court's decision granting the motion for resentencing should be reversed, and respondent's fifty-year sentence for murder should be left in place.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SHERRIE BUTTERBAUGH
Assistant Attorney General

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

BY: J. Bagh, on behalf of
SHERRIE BUTTERBAUGH

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

ATTORNEYS FOR RESPONDENT

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