STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Clarendon County
D. Craig Brown, Circuit Court Judge

THE STATE,

Respondent,

v.

JON SMART

Appellant.

Appellate Case No. 2017-001754

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I.

Whether the court erred in sentencing appellant to life without parole for an offense committed as a juvenile after a resentencing hearing where the court misapprehended and misapplied the requirement to consider the family and home environment that surrounded appellant as demonstrated by the court disregarding the testimony of Dr. Price and discounting the testimony of appellant's sister about appellant's impoverished and drug-ridden family and home life, despite the absence of contradictory evidence?

II.

Whether the court erred in sentencing appellant to life without parole for an offense committed as a juvenile after a resentencing hearing where the court misapprehended and misapplied the requirement to consider the chronological age of appellant and the hallmark feature of youth, including immaturity, impetuosity, and the failure to appreciate the risks and consequences, by failing to give youth constitutional significance?

1. Whether the court erred where it disregarded testimony from the only expert in the case that appellant had a neurocognitive disorder which resulted in him being cognitively much younger than his chronological age?

2. Whether the court erred where it considered appellant's drug use as aggravating rather than mitigating?

3. Whether the court erred where it disregarded testimony from the only expert in the case that appellant had a reduced capacity to conform his conduct to the law and appreciate the wrongfulness of his actions at the time of the offense?

III.

Whether the court erred in sentencing appellant to life without parole for an offense committed as a juvenile after a resentencing hearing where the court failed to place the burden of proving appellant irreparably corrupt beyond a reasonable doubt on the state, and where the court did not find appellant was irreparably corrupt, since that conclusion is necessary to sentence a juvenile to life without parole?

IV.

Whether the court erred in sentencing appellant to life without parole for an offense committed as a juvenile after a resentencing hearing where the court misapprehended and misapplied the requirement to consider appellant's possibility of rehabilitation, since the court disregarded testimony by the only expert in the case that it was his opinion based on a reasonable degree of medical certainty that appellant could be a productive member of society if release

from prison?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I.

(Appellant's Issues I, II, and IV).

Did the circuit court err in resentencing appellant to life without parole where the court recognized prior to sentencing it must consider all relevant factors including the hallmark features of youth, the family and home environment, circumstances of the homicide, incompetency associated with youth, and the possibility of rehabilitation, before applying each of the factors to the testimony presented and the facts of appellant's case, indicating the court did not ignore any evidence in the record before it?

II.

(Appellant's Issue III)

Did the circuit court err in failing to make a finding of irreparable corruptibility where such a finding is not required by our case law prior to sentencing a juvenile to life without parole and the burden is not on the State to prove appellant is irreparably corrupt beyond a reasonable doubt?

STATEMENT OF THE CASE

A Clarendon County grand jury indicted appellant for murder, armed robbery, escape, grand larceny of a motor vehicle, and conspiracy. (R.pp.401-05). Appellant pled guilty on May 25, 2001, before the Honorable Kenneth Goode and was represented by Frederick Hoefer. (R.p.1). As part of the plea negotiations, the State agreed not to seek the death penalty and to a sentence of life without parole in exchange for appellant's truthful testimony against his co-defendant.[1] (R.p.14, line 23-p.17, line 23).

Judge Goode relinquished jurisdiction and appellant appeared before the Honorable Thomas W. Cooper, Jr., for sentencing on August 9, 2001. (R.p.25; pp.147, line 18-p.148, line 12). Judge Cooper sentenced appellant to the negotiated sentence of life for murder, and concurrent terms of thirty years for armed robbery, fifteen years for escape, ten years for grand larceny, five years for conspiracy, and ordered substance abuse treatment. (R.p.164, line 19-p.165, line 12; p.167, lines 3-23).

Appellant moved for resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), on May 26, 2016, because he was sixteen-years-old at the time of the crime. (R.p.150, lines 2-4; pp.181-82). A resentencing hearing was held on May 24, 2017, before the Honorable D. Craig Brown. (R.pp.183-84). Jack Howle, Jr., represented appellant and Ernest Finney, III, represented the State. (R.p.184). At the end of the hearing, Judge Brown announced he would take the matter under advisement. (R.p.288, lines 7-8). On August 10, 2017, Judge Brown resentenced appellant to life without parole. (R.p.388, lines 17-24).

This appeal follows.

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[1] Appellant pled guilty prior to the decision holding the Eighth Amendment barred capital punishment for juvenile offenders. *See Roper v. Simmons*, 543 U.S. 551 (2005).

I.

> Did the circuit court err in resentencing appellant to life without parole where the court recognized prior to sentencing it must consider all relevant factors including the hallmark features of youth, the family and home environment, circumstances of the homicide, incompetency associated with youth, and the possibility of rehabilitation, before applying each of the factors to the testimony presented and the facts of appellant's case, indicating the court did not ignore any evidence in the record before it?

The resentencing judge did not err in sentencing appellant to life without parole for murder following an individualized sentencing hearing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). 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. The record demonstrates the judge considered the mitigating factors of youth prior to determining the sentence appropriate for appellant, especially given the lack of evidence to support a finding of rehabilitation.

Contrary to appellant's assertion, the resentencing judge considered all evidence before him, including testimony from appellant's expert, statements from the victim's family members, and the record from the previous proceedings. Our Supreme Court set forth the necessary procedure to ensure juveniles are afforded protection under the Eighth Amendment which appellant received. The *Aiken* 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 sentence is not cruel and unusual punishment under the Eighth Amendment, the resentencing judge did not err in determining the sentence following an individualized sentencing hearing.

Guilty Plea and First Sentencing Hearing

Appellant pled guilty to murder, armed robbery, escape, grand larceny of a motor vehicle, and criminal conspiracy on May 25, 2001. (R.p.1; p.14, lines 21-22; p.23, lines 9-15; pp.401-05). Appellant and his co-defendant, Stephen Hutto, were sent to the Rimini Marine Institute (RMI) in Clarendon County as part of a rehabilitation program at the Department of Juvenile Justice (DJJ) to work on property owned by the victim's family. (R.p.20, line 25-p.21, line 25). On August 12, 1999, appellant, his co-defendant, and the victim were working in the chicken houses. (R.p.32, line 23-p.33, line 4). Appellant had a lead pipe and used it to knock the victim off a ladder. (R.p.33, lines 17-21). Appellant beat the victim with the pipe, hitting him three to four times. (R.p.22, lines 1-4; p.33, lines 22-25). When investigators arrived, they found blood spatter on the ceiling and grooves in the wood where the pipe cut into it as appellant hit the victim. (R.p.34, lines 1-4).

After killing the victim, appellant and his co-defendant stole items from him and stopped to smoke a cigarette to talk about what to do next. (R.p.22, lines 5-7; p.34, lines 5-8). The co-defendants agreed to wrap the body and take it out to the woods. (R.p.22, lines 8-9; p.34, line 14-p.35, line 6). Appellant and his co-defendant stole the victim's truck, escaped, and drove to Bamberg. (R.p.22, lines 9-24; p.36, lines 2-6).

Once in Bamberg, the two changed clothes at the co-defendant's home, got a shotgun, and went to a Family Dollar. (R.p.36, lines 8-16). Appellant went inside with the loaded gun, pointed it at two cashiers, demanded cash, and took off with about $200. (R.p.36, line 22-p.37, line 11). Appellant and his co-defendant drove to Horry County, got into a chase with police, and appellant shot at officers.[2] (R.p.38, line 2-p.40, line 20). The co-defendant was driving and

[2] Pellets from the shotgun hit at least two patrol cars. (R.p.88, line 5-p.91, line 11).

eventually lost control of the vehicle. (R.p.40, line 21-p.41, line 22; p.48, line 25-p.49, line 2). The co-defendant was arrested at the scene while appellant took off running and was arrested about five hours later after a search. (R.p.40, lines 22-24; p.50, lines 19-23; p.51, lines 4-11).

In his statement to law enforcement, appellate indicated his co-defendant got into an argument with the victim, so appellant grabbed a pipe and hit and killed the victim. (R.p.51, lines 12-23). Appellant's co-defendant gave two statements. In the first, the co-defendant stated he was outside the chicken house and had no idea appellant killed the co-defendant until he went inside. (R.p.52, lines 3-5). However, his story changed and the co-defendant later admitted he was there when appellant killed the victim by hitting him three or four times, and he helped him decide what to do with the body. (R.p.52, lines 6-19).

Two juveniles who were at RMI at the same time as appellant also gave statements to law enforcement. (R.p.60, lines 12-21). A fifteen-year-old indicated he saw appellant and his co-defendant with a map in the "chow hall" and heard them talking about Bamberg and Greenville. (R.p.60, line 20-p.61, line 6). He also heard appellant tell his co-defendant, "I don't believe you got the guts to do it" and later, the fifteen-year-old heard them tell other young men they would not be working at the chicken house "in a couple of days." (R.p.61, lines 7-19). A second juvenile overheard a different conversation in which appellant told his co-defendant he did not think he "had the guts to do it." (R.p.61, line 19-p.62, line 6). The second juvenile also indicated he was working with appellant, his co-defendant, and the victim on an earlier occasion when appellant asked the victim about knocking him out or killing him and stealing his truck. (R.p.62, lines 7-17).

Appellant also testified at the first sentencing hearing in August 2001. He admitted he was huffing gas two days before the murder when his co-defendant talked about cutting the

victim's throat with a box cutter or stabbing him with a screwdriver, but appellant thought he was joking. (R.p.64, line 9-p.65, line 18). On the day of the crime, the co-defendant handed appellant the lead pipe and appellant later lied to the victim and said he had the pipe to help him get up on the ladder. (R. p.66, line 1-9). Appellant stated he huffed gas throughout the day. (R.p.65, line 20-p.66, line 1). Appellant saw his co-defendant mouthing, "do it," so he picked up the pipe and "it just happened." (R.p.66, lines 10-17). Appellant testified he hit the victim, but he could not remember how many times. (R.p.66, lines 17-19). Appellant went to the shed, got a tarp, wrapped the body, put it in a wheelbarrow, pushed it outside, and smoked a cigarette. (R.p.66, line 22-p.67, line 4). Appellant stated he saw blood everywhere and he tried to wash it off "as best [he] could," while "still thinking what we going to do with [the victim]." (R.p.67, lines 5-9).

Appellant testified they decided to put the victim's body in the woods. (R.p.67, lines 10-15). They went to his co-defendant's house to change clothes and he told his co-defendant he would take the blame for everything.[3] (R.p.67, line 22-p.68, line 4). Appellant testified they grabbed a gun in case they needed "to kill anybody else" and started drinking alcohol. (R.p.68, lines 5-10). Appellant also admitted he robbed the Family Dollar using the gun, used the money to buy marijuana, got into a police chase in Myrtle Beach, and shot at officers until he did not have any more shells. (R.p.68, line 23-p.70, line 4). Appellant testified he jumped out of the truck after the chase ended and ran into nearby woods where he passed out until the next morning when he was arrested. (R.p.70, lines 5-13).

On cross-examination, appellant acknowledged he understood the plea agreement was he

[3] Appellant acknowledged he wrote a letter to his co-defendant while in jail "telling him to keep his mouth shut" and "just don't say nothing," which his co-defendant's father turned over to the Clarendon County Sheriff's Department. (R.p.70, line 22-p.71, line 16).

would get life without parole if he testified truthfully against his co-defendant. (R.p.72, lines 3-10). Appellant also admitted again he hit and killed the victim, while his co-defendant was the one who handed him the lead pipe. (R.p.72, lines 11-19; p.75, lines 4-12).

The victim's family and friends spoke during the sentencing hearing. A victim's advocate read a statement from the family about the pain they felt by the loss of victim, the impact the acts of appellant and his co-defendant had on their lives and the victim's life, and asked for a life sentence. (R.p.92, line 4-p.93, line 22). Other family members expressed their love for the victim and told the court about the time he spent getting to know the young men he tried to mentor through DJJ, as well as declared their belief appellant and his co-defendant knew exactly what they were doing when they planned the murder of the victim and went on a crime spree. (R.p.94, line 6-p.104, line 10).

Prior to sentencing plea counsel indicated appellant was sixteen years old when he committed the crime and he was in DJJ custody because his family wanted a neighbor to press charges for a break-in. (R.p.150, lines 2-6; p.159, lines 7-17). Counsel indicated appellant's family was worried about his drug use, particularly his problem with huffing, and they hoped he would get counseling and help through the family court and DJJ. (R.p.150, line 12-p.154, line 10). Counsel stated it was his belief drugs contributed to the murder and crime spree and if appellant had gotten the help he needed, the crime may not have occurred. (R.p.154, line 11-p.155, line 20). Specifically, counsel told the court:

> We understand that children – we got this whole framework in place to get them and put them back on the right track, but it doesn't do any good unless we utilize the facilities that were available.
>
> And a family court judge recognized that this was a kid in trouble and ordered that he get this [drug] treatment. He never got it. If he had been sent to the treatment facility, well, he may not have been

> huffing that day.
>
> Been sent to a treatment facility, he wouldn't have been at RMI that day. If the counselor had gotten him the day before and taken his privileges, said you are not going anywhere, he wouldn't have been out with [the victim] that day.
>
> And the fact is I am absolutely convinced in my heart that it took two to commit this crime because I think they fed off of each other. One of them dared the other.

(R.p.155, line 21-p.156, line 13). Counsel went on to state the co-defendant took advantage of appellant's "state of intoxication" and convinced him to commit the murder. (R.p.156, lines 14-23). Counsel also indicated appellant has shown remorse for his actions "from day one" and already begun the process of rehabilitation by receiving his GED while incarcerated. (R.p.150, lines 10-11; p.156, line 24-p.157, line 14).

Appellant's father stated his son began using drugs when he was fourteen years old, he would steal money to fund his habit, and huff gasoline wherever he could find it. (R.p.158, line 20-p.159, line 20). Appellant's father detailed the family's effort to get drug treatment for appellant through the family court system and DJJ, but he never received help. (R.p.159, line 21-p.164, line 11).

During sentencing, the sentencing judge indicated he weighed the participation of both appellant and his co-defendant when he stated:

> I do not think that there was some voice speaking to [appellant] from across the room. I do not think that he was heeding [his co-defendant's] instructions when he did what he did. I think he did it because he wanted to do it. And I think that [his co-defendant] helped him do it and I think there is evidence that they had put some plan into this. Clearly it's not logical. It's not a logical plan.
>
> . . .
>
> The absolute brutality of the actions themselves as they were shown to me on the photograph have to lie at the feet of

> [appellant]. [The co-defendant] did not strike the blow, but he is responsible nonetheless.
>
> The attempts to conceal the act after that, the motive if there was one to see what it was like seems somewhat extreme.

(R.p.143, lines 9-17; p.144, lines 9-15). The judge sentenced appellant to the negotiated sentence of life for murder, and concurrent terms of thirty years for armed robbery, fifteen years for escape, ten years for grand larceny, five years for conspiracy, and ordered substance abuse treatment. (R.pp.164-65; p.167).

Resentencing Hearing Pursuant to *Aiken*

On May 26, 2016, appellant moved for resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), because he was sixteen-years-old at the time of the crime. (R.p.150, lines 2-4; pp.181-82). A resentencing hearing was held on May 24, 2017, before the Honorable D. Craig Brown. (R.p.184). At the start of the hearing, the judge acknowledged the "most important" things for him to consider when determining an appropriate sentence for appellant are the five factors "our Supreme Court addressed in the *Aiken v. Byars* case."[4] (R.p.189, lines 1-7).

Defense counsel first presented Tammy Smart (Tammy), appellant's sister. (R.p.191, lines 17-18). Tammy testified about their family life, telling the court her parents used drugs and appellant took care of her when they were young because her parents were never at home, and she did not have a good relationship with her parents. (R.p.192, line 7-p.193, line 17, p.194, line 22-p.195, line 6). Tammy stated witnessing her parents use drugs led to appellant's drug abuse and her own, but she stopped doing drugs. (R.p.193, line 25-p.194, line 9; p.196, lines 6-7). Tammy also testified her parents sold drugs occasionally and she would sometimes go to the

[4] The five factors are: (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. *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577 (citing *Miller v. Alabama*, 567 U.S. 460, 477-78 (2012)).

door when people stopped by the house and exchange the drugs for money because her mother "didn't like to talk to people." (R.p.195, line 16-p.196, line 5). Finally, Tammy stated her parents did not visit appellant when he was at Rimini Marine Institute and he could have had gone home for weekend visits, but his visitations were denied because he was huffing gasoline. (R.p.198, line 17-p.199, line 5).

Dr. David Price (Price), an expert in clinical psychology, testified he performed a forensic evaluation of appellant, met with him seven times, and reviewed "voluminous" records from his juvenile and criminal history, such as medical records and family records. (R.p.203, line 25-p.206, line 12; pp.323-43). Dr. Price also administered psychological testing and assessments of appellant. (R.pp.344-48).

Dr. Price testified the hallmark features of youth applied to appellant because he was sixteen years old at the time of the murder and crime spree, but cognitively he was younger because of his drug use. (R.p.207, lines 11-25). Dr. Price's evaluation of appellant's family environment indicated a violent home life with a lot of arguments when the drugs ran out, it was often appellant's responsibility to get more drugs, and appellant was often without parental supervision. (R.p.208, lines 1-6). Dr. Price also testified appellant was in and out of school, had problems with truancy, which led to contact with DJJ. (R.p.208, lines 6-9). Dr. Price opined appellant was "modeling [the] dishonest and unlawful behavior" exhibited by his parents and other members of his family which led to his own drug abuse. (R.p.211, line 22-p.212, line 10).

Dr. Price testified appellant was huffing eight to ten hours a day, impacting the frontal lobes and development of that part of the brain which controls impulsivity, aggressiveness, and judgment. (R.p.208, line 10-p.209, line 10). Dr. Price stated appellant was predisposed to give into peer pressure and act impulsively without concern for the consequences of his actions.

(R.p.212, lines 11-19). Dr. Price testified at the time of the murder, appellant had a reduced capacity to conform his impulsive behavior to the requirements of the law and appreciate the wrongfulness of his actions. (R.p.223, lines 11-25). In his report, Dr. Price noted appellant was found competent at the time of his plea, a finding with which he agreed. (R.pp.347-48). Dr. Price diagnosed appellant with a neuro-cognitive disorder to reflect the frontal lobe dysfunction, based on appellant's drug history. (R.p.209, line 17-p.210, line 2). Dr. Price testified the diagnosis was reflected in appellant's DJJ records which indicated difficulty with decision making. (R.p.213, line 11-18). When asked about the possibility of rehabilitation, Dr. Price acknowledged some cognitive recovery because appellant was no longer using drugs and his IQ scores had improved. (R.p.210, lines 3-10; p.213, line 19-p. 214, line 4). Dr. Price also noted appellant received his GED while at RMI. (R.p.210, line 25-p.211, line 2). Dr. Price opined if appellant were to be released, he could "be a productive member of society" and live within the guidelines society sets. (R.p.222, line 11-p.223, line 7).

The circuit court also examined Dr. Price to get more information about the *Miller* factors. The psychologist admitted he did not conduct an MRI and that one might have been beneficial to determine if there was any damage to appellant's frontal lobes from the drug use. (R.p.225, line 4-p.226, line 3). Dr. Price also told the court appellant was different than other juveniles who committed crimes because of the amount of huffing he did. (R.p.226, line 4-p.227, line 12). The court also asked Dr. Price specifically about the "incompetence of youth" factor which Dr. Price testified was not really impacted in appellant's case because he understood the plea proceeding, was able to assist his attorney, and was competent to plead guilty. (R.p.233, line 16-p.234, line 15). Further, Dr. Price stated appellant was not insane and opined, "I think that [appellant] could appreciate the wrongfulness [of his actions] by the way he hid the body

and whatnot. (R.p.238, lines 10-13). Dr. Price continued to testify appellant's efforts to conceal the victim's body were "a continuation of that huffing behavior and failing to appreciate the consequences . . . it was a series of impulsive and bad decisions." (R.p.238, line 5-p.239, line 24).

Finally, appellant's disciplinary record while incarcerated was discussed. Dr. Price acknowledged appellant had a history of disciplinary actions, including cell phone use, drug use, assaults, and other infractions. (R.p.229, lines 13-23; p.241, lines 7-25; pp.349-52). In fact, appellant also had two escape attempts since his 2001 convictions—one in 2008 and another in 2016. (R.p.349).

Some of the victim's family members also spoke at the resentencing hearing. The victim's brother testified he prayed for appellant and his co-defendant, but asked the circuit court to resentence appellant to life. (R.p.264, line 25-p.265, line 2; p.268, lines 15-23). Another brother testified the victim was "very caring" and "loved working with kids at the Rimini Marine Institute and thought he was doing a wonderful job." (R.p.270, lines 6-22).

Defense counsel argued peer pressure and drug abuse played roles in the murder. (R.p.275, lines 10-25). Counsel stated appellant was sixteen years old when the crime occurred and, while huffing was not a defense, it should be considered mitigation because appellant did not get the drug treatment he should have received. (R.p.278, lines 5-14). Counsel also asserted appellant's family life was a factor because he was left without proper supervision by parents who also used drugs, appellant did not regularly attend school, and he ended up with a drug addiction and frontal lobe dysfunction which led to a failure to appreciate risks and consequences. (R.p.276, lines 1-23). Counsel maintained there was a possibility of rehabilitation as evidenced by Dr. Price's evaluation, despite appellant's history of disciplinary

actions. (R.p.277, lines 6-21). Counsel argued the minimum sentence of thirty years for murder would be the appropriate sentence for appellant because of his youth and its mitigating factors at the time of the crime. (R.p.277, line 22-p.278, line 4; p.278, lines 14-21).

The State argued the record demonstrated appellant appreciated the risks and consequences of his actions because he and his co-defendant "planned to do something big" and when "the opportunity presented itself and they had huffed enough gas to give them the courage to do it, they went about doing what they planned to do," including commit a murder, hide the body, rob a store, and run from police. (R.p.282, line 3-p.283, line 10). The State also maintained the evidence presented the first sentencing judge considered the family and home environment because he heard from appellant's family members during the hearing and agreed to try and get treatment for appellant. (R.p.283, lines 11-24). Finally, the State asserted rehabilitation was not likely given records from the South Carolina Department of Corrections (SCDC) indicated appellant could not follow rules, continued to use drugs, and had other disciplinary problems. (R.p.286, line 16-p.287, line 6). The State asked the circuit court to resentence appellant to life without parole. (R.p.287, lines 6-12).

The circuit court took the matter under advisement. (R.p.288).

Resentencing Ruling

The circuit court reconvened on August 10, 2017. (R.p.356). The court recognized the five factors the *Aiken* Court held it must consider prior to sentencing a juvenile to life without parole and stated the factors "will be addressed by the court [] in rendering its decision," but noted the *Aiken* Court "went on to say that 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." (R.p.358, line 19-p.359, line 7).

The circuit court first explained the five factors set forth in *Aiken* are: (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.359, line 21-p.360, line 5, line 12); *see also Aiken*, 410 S.C. at 544, 765 S.E.2d at 577 (citing *Miller v. Alabama*, 567 U.S. 460, 477-78 (2012)). The court started with the circumstances of the crime, detailed facts from the record, and described the participation of appellant and his co-defendant. (R.p.360, line 13-p.371, line 5). The court noted he reviewed the first sentencing transcript "in its entirety," so he could take it into account as well as the "facts and circumstances surrounding the case from what was conveyed at the May 24th, 2017 [resentencing] hearing." (R.p.361, lines 3-9).

The circuit court next found appellant was sixteen years old at the time of the murder and every teenager that age "is immature." (R.p.371, lines 6-21). Specific to the hallmark features of youth, the court noted Dr. Price testified on behalf of appellant he was cognitively younger than sixteen years old given his drug use due to frontal lobe damage. (R.p.371, line 22-p.372, line 15; p.373, lines 1-22). The court noted Dr. Price also testified appellant's ability to make decisions was influenced by huffing gas, his family life, and diagnosis of attention deficit disorder. (R.p.373, line 22-p.374, line 2). The court also discussed previous evaluations of appellant which resulted in other diagnoses, such as oppositional defiant disorder which was challenging those in authority, and noted Dr. Price acknowledged an MRI might have been beneficial to show possible frontal lobe atrophy. (R.p.374, line 3-p.375, line 13). The court found Dr. Price testified appellant appreciated the wrongfulness of his conduct and the huffing of gas affected his aggressiveness. (R.p.375, lines 14-18). The court further found appellant was immature, but reviewing "all of the information pertaining to this case, reveals that it was not a sudden or rash

action on behalf of" appellant to commit murder given the statements made to police which reveal both young men knew what they were doing, the statements by the other juveniles who overheard conversations in which appellant and his co-defendant planned the crime, and the letter appellant wrote his co-defendant in which he told him to stick to their story. (R.p.375, line 18-p.377, line 25). The court found looking at the totality of the circumstances, appellant knew there could be consequences for his actions because, had he not, he would not have wrapped the victim in a tarp, moved the body, and tried to clean the scene. (R.p.378, lines 1-13).

As to appellant's home and family environment, the circuit court recounted the testimony of appellant's sister regarding their parent's drug use, their absence, and appellant taking care of her when they were young. (R.p.378, line 14-p.379, line 23). The court found Tammy's testimony was inconsistent with her father's statements from the first sentencing hearing in which he told the original sentencing judge how much he wanted appellant to get help for his drug abuse, and the part his family played in trying to get appellant into a treatment program. (R.p.379, line 24-p.382, line 13).

The circuit court found there was little concern regarding the incompetency of youth because appellant gave statements to police, there was a plea agreement he and plea counsel signed, and there was no indication from counsel he was not able to assist or understand the proceeding. (R.p.382, line 15-p.384, line 1). Finally, the court observed inconsistencies in Dr. Price's testimony regarding the possibility of appellant's rehabilitation. The court noted Dr. Price testified appellant had made cognitive improvements since incarceration because he had stopped using drugs, he was sober, and opined appellant could be a productive member of society. (R.p.384, line 2-p.385, line 20). The court also noted appellant's lengthy disciplinary history while incarcerated, which included two escape attempts, assaults, use of contraband, and other

charges, which Dr. Price did not acknowledge until asked by the court. (R.p.386, line 4-p.388, line 2). The court found further found appellant "has taken no efforts while incarcerated for rehabilitation" given his disciplinary record and observed it was not until cross-examination that Dr. Price admitted appellant was still using drugs while incarcerated, including inhalants. (R.p.388, lines 3-17).

The circuit court ruled, "believing this court has fully addressed each of the factors as set forth in *Aiken v. Byars*" to deny the motion to set aside appellant's life sentence. (R.p.388, lines 17-24).

Defense counsel objected to the findings particularly as it related to appellant's home and family environment. (R.p.389, lines 2-14). The circuit court noted the objection, but stated he looked at the entire record when making his ruling:

> Dr. Price, the only person Dr. Price talked to, and correct me if I'm wrong, the only person Dr. Price talked to and gathered information from was [appellant]. He reviewed now, voluminous amounts of records. Over 2,000 pages. And I remember that specifically.
>
> . . .
>
> And one of the last questions that I asked whether or not [appellant] had appreciated the consequences of his actions. In which Dr. Price says that he could appreciate. And then he does say, talks about the huffing and the aggressiveness. No question about that. There are questions about, there are issues pertaining to the failure for him to get certain amounts of treatment. There's problems there. I see that. But from the beginning of time, from the beginning of time, in no civilized society has murder been acceptable. Under any circumstances.
>
> In looking at all of this, his age, immaturity, impetuosity, failure to appreciate risk and consequences, his family and home environment, the circumstances of the offense, his participation, which there is no question, he committee a brutal murder. Beating the [victim] about his body, crushing his skull.

. . .

> The possibility of rehabilitation. There's always a possibility. But there are also impossibilities as well. And I think I have addressed all of those issues, in trying to address each one of those factors. . . . I looked at everything.
>
> . . .
>
> [This] is not a decision I have taken lightly, nor any decision I make up here, do I take lightly. I have methodically gone through each bit of information that's been provided to me. And made what I believe to be, not easy, not easy on my part, but made what I believe to be the right decision in this case.
>
> One of the hardest parts of my job, and I know having done criminal defense work. But one of the hardest parts of my job, to see the terrible, terrible decisions that children make, young people make. People in general make, that have tremendous consequences on their lives. Tremendous. It is with no pleasure at all that I affirm so to speak, or deny [appellant's] motion and impose a life sentence. There's nothing more than I've told countless defendants that have come in front of me, I want you to succeed. I want you to do the right thing. But at the end of the day, it's your decision. At the end of the day, albeit he was 16-years-old, it was his decision to huff gas. It was his decision to pick up that pole, that 15 or 16-pound pole, and beat Tracy Pack to death. It was his decision. I have taken all of these factors into consideration and I still believe it's the right decision. Will I lose sleep over it, probably so. Probably so. But I always wonder whether or not you did the right thing. These decisions aren't easy. . . And I've tried to hit on each of these points in coming to this conclusion. Again that's not – it wasn't easy. But I have tried to address each of those issues. Each of them. And I think I have. If I haven't, I am sorry, but I tried to.

(R.p.392, line 20-p.396, line 13).

Defense counsel again objected to the sentenced arguing the State failed its burden of proving appellant was incorrigible or beyond redemption and the circuit court was required to make such a finding before ruling. (R.p.396, lines 14-24). The court stated it had made its ruling and addressed all five factors as required. (R.p.396, line 25-p.397, line 1).

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).

Appellant Received Appropriate Sentence

In *Miller v. Alabama*, 567 U.S. 460 (2012), the United States Supreme Court held mandatory life without parole sentences for juvenile homicide offenders violated the Eighth Amendment's prohibition against cruel and unusual punishment. 567 U.S. at 465, 470. *Miller* did not categorically bar life sentences for juvenile murderers; rather, the Court held only that a sentencing court is required to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. The Court held a sentencing authority must consider youth as "more than a chronological fact," but also a factor which carries with it immaturity, irresponsibility, and recklessness. *Id.* at 476. Further, the defendant's family background, mental and emotional development, and possibility of rehabilitation must also be considered in assessing his culpability. *Id.* at 476, 478. 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. In other words, *Miller* mandated only that a sentencing court follow a certain process before imposing a particular penalty. *Id.* at 483.

Two years later, 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 schemes such as ours, our Court stated "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 and other features of youth, family life, circumstances of the crime, 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.

In 2016, the United States 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 constitutionally require judges to make ***any*** specific or formal factual findings when imposing sentences in juvenile homicide cases. *See id.* at 735 (explaining a sentencing court 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*). The Court also noted *Miller* did not require trial courts to make a finding of fact regarding a child's permanent incorrigibility, which speaks "to the degree of

procedure *Miller* mandated in order to implement its substantive guarantee." *Id.* A mandatory life sentence was problematic because it "disregard[ed] the possibility of rehabilitation even when the circumstances most suggest it," i.e. for all but the rare juvenile offender. *Miller*, 567 U.S. at 478.

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 psychologist and a family member. Not only did Dr. Price review numerous records and the plea transcript, he also met with appellant seven times and performed psychological testing. (R.p.203; p.206; pp.321-48). The resentencing judge made specific findings on the record based on the *Miller* factors. (R.pp.358-388); *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 his findings, his reading of the record, and the testimony presented at the resentencing hearing, it was his ruling that appellant "remain incarcerated for the balance of his natural life" for the murder charge. (R.p.388). The record demonstrates the judge acted within his discretion to tailor a sentence appropriate for appellant given all the information he had before him. 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).

Contrary to appellant's argument in his brief, the resentencing judge did not ignore or misapprehend any of the evidence before him. Taking the five *Miller* factors individually, the judge found:

1. Hallmark features of youth: the resentencing judge explained he considered Dr. Price's testimony when examined appellant's youth, including his immaturity and impetuosity surrounding his age of sixteen. (R.pp.371-72). The judge also detailed Dr. Price's testimony about appellant's drug use, prior evaluations, and other history. (R.pp.373-74). The judge noted Dr. Price's opinion appellant's ability to make decisions was influenced by huffing gas, family life, diagnosis of attention deficit disorder, and frontal lobe damage due to drug use. (R.pp.371-74). Dr. Price opined appellant could appreciate the wrongfulness of his actions which was evidenced "by the way he hid the body," and his efforts were a continuation of his drug use and series of impulsive decisions. (R.pp.238-39). However, the judge found Dr. Price failed to fully evaluate appellant to determine if any frontal lobe damage actually existed where he acknowledged an MRI was never conducted and might have been beneficial to his diagnosis. (R.pp.374-75). The judge found appellant was immature, but reviewing "all of the information pertaining to this

case, reveals that it was not a sudden or rash action" to commit murder given the evidence which revealed appellant and his co-defendant planned the crime. (R.pp.375-p.377).

2. Home and family environment: the resentencing judge also recounted the testimony of appellant's sister regarding their parent's drug use, their absence, and general home life. (R.pp.378-79). The judge found the sister's testimony was inconsistent with her father's statements from the first sentencing hearing about the part the family played in trying to get appellant into a drug treatment program. (R.pp.379-82). It can be inferred this was a credibility finding as it relates to appellant's sister, but there is no corresponding finding as it relates to their father because he did not testify before the resentencing judge at the hearing. The facts of this case are distinguishable from the post-conviction relief (PCR) case used by appellant in his brief to argue the judge made a credibility finding related to the father. Here, the resentencing judge made no comment about the father's testimony whereas the PCR judge actually found the victim's testimony credible. (*Compare* R.pp.378-82 with *Thompson v. State*, 423 S.C. 235, 246-47, 814 S.E.2d 487, 493 (2018)). Similarly, the contention in appellant's brief the judge ignored Dr. Price's testimony regarding appellant's home life is without merit. First, appellant's sister was in the best position to give the judge information about the family environment rather than a third party such as Dr. Price who would have relayed secondhand information. Second, as noted above, the judge, in fact, considered the "drug culture" that Dr. Price testified appellant grew up around and appellant's family life in his findings for the "hallmark features of youth" factor as he specifically referenced it, so it cannot be said the judge ignored the testimony.

3. Circumstances of the crime: while appellant does not analyze the resentencing judge's consideration of this factor in his brief, the judge properly detailed facts from the record about the murder, and described the participation of appellant and his co-defendant. (R.pp.360-71). The judge stated he reviewed the first sentencing transcript "in its entirety," so he could take it into account as well as the testimony from the resentencing hearing. (R.p.361). The judge noted it was appellant who struck and killed the victim and the young men worked together to hide the body. (R.pp.362-64).

4. Incompetency of youth: the resentencing judge found there was little concern regarding this factor because appellant gave statements to police, there was a plea agreement he and plea counsel signed, and there was no indication from counsel he was not able to assist or understand the proceeding. (R.pp.382-84). Moreover, Dr. Price also agreed appellant was competent at the time he plead guilty, and explained he understood the plea proceeding and could assist his attorney. (R.pp.233-34; pp.347-48).

5. Possibility of rehabilitation: the resentencing judge did not discount or misapprehend Dr. Price's testimony regarding the possibility of appellant's rehabilitation. However, the judge took the opportunity to note the inconsistencies in Dr. Price's statements. The judge explained Dr. Price testified appellant had made cognitive improvements since incarceration because he had stopped using drugs and opined appellant could be a productive member of society, yet it was not until cross-examination that Dr. Price admitted appellant was still using drugs while incarcerated, including inhalants. (R.pp.384-88; p.388). The court noted appellant's lengthy disciplinary history while incarcerated, which included two escape attempts, assaults, use of contraband, and other charges, which Dr. Price did not acknowledge until asked by the court. (R.pp.386-88).

The court found appellant "has taken no efforts while incarcerated for rehabilitation" given his disciplinary record. (R.p.388).

As the record demonstrates, the resentencing judge did not abuse his discretion in sentencing appellant to life without parole for murder. The judge carefully considered the *Miller* factors as he was constitutionally required to do. The judge actually evaluated, based on the testimony presented and the previous record, appellant's youth and attendant circumstances, and took into account the particularized evidence about appellant to determine if he was capable of demonstrating maturity and rehabilitation. *See Miller*, 567 U.S. at 480 (explaining courts must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison").

The point of evaluating the *Miller* factors is to decide if, given a defendant committed murder for which he is criminally responsible despite his juvenile status, a life sentence is proportionate for the particular defendant because he does not demonstrate the propensity for rehabilitation as required. *Montgomery*, 136 S.Ct. at 737. The Supreme Court left it to the states to develop appropriate procedure to enforce the constitutional restriction on the sentencing a juvenile under the age of eighteen to life without parole. *Montgomery*, 136 S.Ct. at 735-36. Appellant received the individualized sentencing hearing as constitutionally required. Specifically regarding rehabilitation, no one testified why or how appellant demonstrated the required propensity for rehabilitation or maturity beyond Dr. Price's testimony appellant could be a productive member of society, without any supporting evidence beyond appellant's cognitive recovery due to less drug use. (R.p.210; pp.213-14). However, there was testimony regarding appellant's failure to conform to the guidelines and rules within SCDC by Dr. Price's acknowledgment in cross-examination and during examination by the judge about appellant's

disciplinary record while incarcerated, including two escape attempts. (R.p.229, p.241; p.257, lines 7-23; pp.349-52). 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. Our Supreme Court set forth the necessary procedure to ensure juveniles are afforded protection under the Eighth Amendment which appellant received. Therefore, because the record demonstrates the resentencing judge did not misapprehend or ignore any of the testimony or evidence in the record before him, and because the judge followed the proper procedure in determining appellant's sentence, the judge did not err in sentencing appellant to life for murder.

II.

Did the circuit court err in failing to make a finding of irreparable corruptibility where such a finding is not required by our case law prior to sentencing a juvenile to life without parole and the burden is not on the State to prove appellant is irreparably corrupt beyond a reasonable doubt?

The resentencing judge did not err in failing to make a finding that appellant was permanently incorrigible because the Supreme Court does not mandate such a finding nor does *Miller* put the burden of proving irreparable corruptibility beyond a reasonable doubt. The judge considered all evidence before him before sentencing appellant. That included inconsistencies in testimony regarding the possibility of rehabilitation and a lengthy disciplinary record while incarcerated that was not in keeping with the "central intuition" of *Miller* that juveniles who commit even violent crimes are capable of change. Accordingly, appellant's sentence is not cruel and unusual punishment under the Eighth Amendment and the judge did not err in his sentencing determination.

Analysis

Standard of Review

In criminal cases, appellate courts only review errors of law. *Gamble*, 405 S.C. at 415, 747 S.E.2d at 787 (citing *Jacobs*, 393 S.C. at 586, 713 S.E.2d at 622). This Court reviews those questions of law *de novo*. *Whitner*, 399 S.C. at 552, 732 S.E.2d at 863 (citations omitted).

No Finding of Permanent Incorrigibility Required

As discussed above, while the Supreme Court requires an examination of specific factors prior to sentencing a juvenile to life without parole, it does not constitutionally require formal fact findings. The Court did not mandate the procedure necessary to ensure only "permanently incorrigible" children were sentenced to life without parole. *See Montgomery*, 136 S.Ct. at 735

(explaining a sentencing court 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*). The Court also noted *Miller* did not require trial courts to make a finding of fact regarding a child's permanent incorrigibility, which speaks "to the degree of procedure *Miller* mandated in order to implement its substantive guarantee." *Id.* A mandatory life sentence was problematic because it "disregard[ed] the possibility of rehabilitation even when the circumstances most suggest it," i.e. for all but the rare juvenile offender. *Miller*, 567 U.S. at 478. *Miller* and the cases applying it repeatedly emphasize the importance of considering actual and potential rehabilitation. *See, e.g.*, *Montgomery*, 136 S.Ct. at 733, 736 (discussing petitioner's submissions which he asserted showed his "evolution from a troubled, misguided youth to a model member of the prison community); *United States v. Grant*, 887 F.3d 131, 141 (3d Cir. 2018) (quoting *Miller*'s requirement to consider the possibility of rehabilitation); *Landrum v. State*, 192 So.3d 459, 466 (Fla. 2016) (noting the requirement to consider the possibility of rehabilitating the defendant in light of *Miller*).

The resentencing judge did not err in failing to make a finding regarding "permanent incorrigibility" because he was not constitutionally required to do so. Moreover, it was not the State's burden to prove the "irreparable corruption" beyond a reasonable doubt. The judge properly applied the testimony and evidence before him to find appellant did not demonstrate the required propensity for rehabilitation or maturity. The judge noted inconsistencies in Dr. Price's testimony regarding appellant's drug use while incarcerated, appellant's SCDC disciplinary history which included assaults, use of contraband, and two escape attempts which were not acknowledged by Dr. Price until asked by the court, and found appellant "has taken no efforts while incarcerated for rehabilitation" given his disciplinary record. (R.pp.384-88). Dr. Price's

testimony that appellant could be a productive member of society was not supported by the evidence. Dr. Price did not mention or testify he considered appellant's work history while incarcerated. Interestingly, some of the jobs appellant cites to in his brief ended because he was placed in special custody following a disciplinary action. (R.pp.349-52). Accordingly, the evidence before the judge supported the inference appellant failed to conform to the rules within SCDC which is not in keeping with the "central intuition" of *Miller* that juveniles who commit even violent crimes are capable of change. The judge considered the evidence of the type the Court in *Montgomery* declared relevant to the constitutionality of life without parole. *See Montgomery*, 136 S.Ct. at 736 (noting the evidence the petitioner sought to submit which demonstrated "his evolution from a troubled, misguided youth to a model member of the prison community").

The resentencing judge thoughtfully and thoroughly reviewed the evidence before him and properly applied it to the *Miller* factors. As discussed above, the judge 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 judge did not treat him as constitutionally different than an adult offender for sentencing purposes is meritless. The judge considered and gave effect to the mitigating evidence presented during the individualized sentencing hearing as required, including the lack of evidence of rehabilitation. Moreover, the court noted in its findings the brutality of the murder. Appellant stabbed to death a person he called a friend, a man who tried to help appellant and his co-defendant learn job skills they could use upon their release from DJJ. Therefore, because the resentencing judge was not required to make a finding of "permanent incorrigibility"[5] and because he did not misapprehend or ignore any of the

[5] Appellant does not indicate in his brief what such a finding would require from a sentencing

testimony regarding rehabilitation, the judge did not err in determining appellant's sentence.

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court. The resentencing judge acknowledged there was always a possibility someone could be rehabilitated, but noted the impossibility as well. (R.p.394). The judge found, looking at the evidence currently before him, not trying to determine a prospective impossibility, appellant had made no efforts at rehabilitation. (R.p.388). Several states and the Seventh Circuit have determined a sentencing authority is not required to make a finding of "irreparable corruption" and the United States Supreme Court has not been inclined to review those decisions. *See State v. Ramos*, 387 P.3d 650, 659, 665-55) (Wash. 2017) (explaining *Miller* does not required the state assume the burden of proving a standard range sentence should be imposed or make an explicit finding the offense reflects irreparable corruption on the part of the juvenile), *cert. denied* 138 S.Ct. 467 (2017); *State v. Valencia*, 386 P.3d 392, 395-96 (Ariz. 2016) (finding *Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility), *cert. denied*, 138 S.Ct. 467 (2017); *Newton v. State*, 83 N.E.3d 726, 743 (Ind. Ct. App. 2017) (quoting *Montgomery*, 136 S.Ct. at 735) (noting *Montgomery* did not "impose a strict procedural requirement on courts in sentencing such as requiring trial courts 'to make a finding of fact regarding a child's incorrigibility'"); *Brown v. State*, 2016 WL 1562981 at *6 (Tenn. Ct. App. Apr. 15, 2016) ("Importantly, the Court stopped just shy of requiring 'trial courts to make a finding of fact regarding a child's incorrigibility,' leaving that task, instead, to 'the State's sovereign administration of their criminal justice systems.'"), *cert. denied* 137 S.Ct. 1331 (2017); *see also Kelly v. Brown*, 851 F.3d 686, 687-88 (7th Cir. 2017) ("all [a juvenile is] entitled to under *Miller*" is for a sentencing court to have "considerable leeway" and to have "considered his age when deciding on the appropriate term").

CONCLUSION

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

Respectfully submitted,

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December 20, 2018.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Clarendon County
D. Craig Brown, Circuit Court Judge

THE STATE,

Respondent,

v.

JON PAUL SMART,

Appellant.

Appellate Case No. 2017-001754

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 20th day of December, 2018.

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