THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2018-001662

THE STATE,

Respondent,

v.

TAVARIOUS SETTLES,

Petitioner.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

CAROLINE M. SCRANTOM
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina, 29211
(803) 734-6305

THE HONORABLE DAVID STUMBO
Solicitor, Eighth Judicial Circuit
Post Office Box 516
Greenwood, South Carolina 29648-0516
(864) 942-8800

ATTORNEYS FOR RESPONDENT

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I. Did the Court of Appeals err in deciding that the trial court did not abuse its discretion by failing to suppress the statement made by Settles, a youth under the age of 18, where the statement was obtained during police interrogation outside the presence of a guardian or attorney, there was testimony at the *Jackson v. Denno* hearing that the police misrepresented that Settles was restricted from making a phone call prior to his interrogation, and Settles was not, in fact, offered the opportunity to make a phone call under after his interrogation?

II. This Court held in *Aiken v. Byars* that individualized and meaningful sentencing hearings are required for youths under the age of 18 at the time of the crime that are subject to a sentence of life imprisonment without the possibility of parole. Settles was under the age of 18 and was subject to a potential sentence of life imprisonment without the possibility of parole. Did the Court of Appeals err in deciding that the trial court did not abuse its discretion by refusing to conduct an individualized and meaningful sentencing hearing and by refusing to allow the testimony of mitigation experts?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Was the admissibility of Petitioner's statement to law enforcement properly affirmed where the totality of the circumstances as presented at the *Denno* hearing fail to demonstrate the Petitioner was deprived of his independent decision-making ability by any coercive tactic, even in light of his age, and where Petitioner was not deprived of any requirement that he be offered a phone call prior to his interview?

II. Did the Court of Appeals err in affirming Petitioner's sentencing proceeding where no precedent establishes a particular procedure that the court must follow before sentencing an individual under the age of eighteen to a term-of-years sentence, and where, while the trial court declined to hear individualized, sworn testimony during the sentencing hearing and denied funding for a mitigation investigation, it accepted statements in mitigation and gave due consideration to Petitioner's age and other individual characteristics prior to issuing a 45-year sentence?

STATEMENT OF THE CASE

In September 2013, The Greenwood County Grand Jury indicted Appellant Tavarious Settles for the May 30, 2013, murder of Prudencio Sis. Settles was also indicted for possession of a weapon during the commission of a violent crime. (App. 487-90). Represented by Robert Tinsley, Esquire, Appellant proceeded to trial in Greenwood County beginning March 30, 2015. The Honorable Frank R. Addy, Jr. Presided. Assistant Eighth Circuit Solicitors Elizabeth White and C. Yates Brown prosecuted the case, which lasted four days. (App. 23). The jury convicted Settles of both charges. Judge Addy sentenced him to 45 years for murder and a concurrent five years on the weapons charge. Settles received credit for time served. (App. 429, lines 10-17).

Following sentencing, Settles, by and through counsel, moved for the court to reconsider the sentence imposed. (App. 432-33). Judge Addy denied that motion on April 21, 2015. (App. 434-35). A few months later, on September 18, 2015, Eighth Circuit Solicitor David Stumbo moved for a sentence reduction on Petitioner's behalf, premising the motion upon Petitioner's substantial assistance to the State by testifying in another matter. (App. 494-95). Judge Addy granted the State's motion, reducing the sentence on the murder charge from 45 to 40 years, and running it concurrent to other charges. (App. 496-97).

Notice of appeal followed imposition of the initial 45-year sentence. (App. 493). Petitioner raised the same issues before the Court of Appeals as presented herein. (App. 531). The Court of Appeals affirmed on both issues raised herein, additionally finding abandoned any argument that Petitioner was denied a right to make a phone call before his interview with law enforcement. (App. 1-4). That court denied the petition for rehearing and the petition for a writ

of certiorari followed. (App. 5-17). Petitioner is presently serving the reduced 40-year sentence within the custody of the South Carolina Department of Corrections. (App. 491-92 and 496-97).

STATEMENT OF FACTS

Settles was out to hit a lick the night of May 30, 2013. When he approached his victim, he ordered, "Take your pants off." (App. 55, lines 1-6). "Then Prudencio tried to grab the gun, but he had hands up because he didn't know English, but he tried to grab the gun and that's when Settles snapped away." (App. 55, lines 8-10). Armed with a forty caliber Glock, Settles fired multiple shots in the middle of Greenwood's Franklin Street, striking Prudencio Sis, a stranger. (App. 91, line 11 – 92, line 24). Prudencio had been walking home from a visit with his fiancée. (App. 258, lines 1-25). She recalled hearing the shots shortly after Prudencio left her home at nine that night, but she did not think anything of it at the time. (App. 260, lines 4-17).

From the altercation's inception, an eyewitness gazed into the street smoking a cigarette, concealed as he stood in the yard behind his home. (App. 116, line 25 – 117, line 2). He kept his eyes trained on two young men approaching the victim in the middle of Franklin Street—one tall with his shirt looped over his head, the other short with little "Shirley Temple" twisted dreadlocks. (App. 117, lines 2-14). Their presence made the eyewitness uneasy. They made "no friendly gesture." (App. 117, lines 16-24). He hoped they did not see him as he began backing into his home. (App. 118, lines 1-8). It was at this point that the eyewitness heard one of the dangerous looking men exclaim, "We got you now, Mother------." (App. 118, line 13). The victim put his hands up, saying "no, no, no, no" and appearing to reach for a pocketbook. (App. 118, lines 14-19). As the eyewitness backed into the safety of his home, he heard one of the guys say "I got you." (App. 118, lines 19-22). Then he heard two pops of gunfire. (App. 118, line 22). He saw the shorter individual with the twisted hair had something shiny in his hand, which the eyewitness believed to be the gun. (App. 119, line 2 – 120, line 15; App. 134, lines 10-13). He called 911 to report a shooting. (App. 118, lines 9-24; State's Exhibit 1).

Prudencio was dead on arrival. (App. 161, lines 15-25; App. 166, lines 1-11; App. 482-83). He had been struck by Settles' gunfire five times: once in the lower right back, once near the upper right shoulder, once to his abdomen; once in a graze would to his right finger sustained from a bullet buzzing by his hand; and once in the chest by a nearly instantaneously fatal shot. (App. 269, line 16 – 275, line 18). The forensic pathologist recovered two projectiles from his body during autopsy. (App. 268, lines 10-13). Each projectile was consistent with a forty caliber firearm, potentially a Glock. (App. 252, lines 3-9). In addition to the projectiles recovered from the victim's autopsy, four forty caliber shell casings were recovered from the crime scene. (App. 228, lines 2-9; App. 254, lines 4-6). The State's firearm and toolmark examiner concluded that those four casings were fired from the same gun. (App. 254, line 18 – 255, line 10). Gunshot residue was also detected on the victim's right palm and the back of his left hand. (App. 241, line 22 – p. 242, line 3).

It was around nine o'clock that night when Michael Patten drove Settles, Markece Moore, and Bryson Jefferson a couple blocks from a house on Taggart street to Franklin Street, looking to hit a lick. (App. 86, line 1 – 87, line 16). Jefferson, fifteen years old at the time, recalled seeing Settles with a black gun prior to his getting out of the car. (App. 106, lines 20-25; App. 109, lines 14-19). The foursome saw "somebody on the side of the road right there by the [Carolina Pride] Packing Plant entrance, and somebody was helping him get their car fixed." (App. 88, lines 14-20). They considered robbing that person, but did not go through with it because there was another man assisting him on the side of the road. (App. 88, line 24 – 89, line 5). The foursome continued on and saw the victim emerging onto Franklin Street from a wooded path. (App. 89, lines 6-21).

Patten stopped the car so that Settles, known as Purp, and Markece Moore, known as Lank, could get out of the car. (App. 90, lines 3-8). Purp had a black forty caliber Glock. (App. 90, lines 11-25). "There you go, Purp," Patten told Settles. (App. 51, line 7 – 52, line 1). Jefferson and Patten stayed in the car, driving another couple blocks away to "the dirt" to get some cigarettes. (App. 91, lines 6-10; App. 107, lines 1-13). Patten did not see the robbery take place, but knew that Settles and Lank were planning on robbing the pedestrian and heard some gunshots. (App. 91, lines 11-25).

Lank testified that he got out of the car with Settles and walked away towards his own home. (App. 52, lines 2-7). At that point, Lank heard Settles tell the victim, "Take your pants off." (App. 54, line 25 – 55, line 4). Lank testified that the victim tried to grab the gun and Settles fired away with his Glock. (App. 55, lines 7-22). Lank looked on as Prudencio sustained a gunshot to the arm. (App.56, line 14 – 57, line 11). Then Lank turned and ran to his apartment, hearing more gunshots. (App. 56, lines 19-23). Lank left his apartment and ran back to the car. (App. 57, line 23 – 58, line 10).

According to Patten, Lank jumped back in the car when Jefferson and Patten were still at "the dirt" and said "Purp had shot the Mexican and he took off running and heard more gunshots."[1] (App. 91, line 21 – 92, line 11). According to each co-defendant, as Jefferson and Patten left "the dirt" to head to their next destination, Settles rejoined the group in the car. (App. 58, line 20 – 59, line 3; App. 92, lines 2-24; App. 107, line 14 – 108, line 19).

[1] At trial, Jefferson initially testified that Settles did not say anything specifically about the shooting when he got back in the car. (App. 108, line 24 – 109, line 4). When prompted to recall his recorded statement to law enforcement, Jefferson testified that he remembered Settles saying he shot a Mexican three to four times. (App. 110, lines 9-13).

The would-be victim who was assisting his friend with car trouble on the side of the road just a block or so away testified that he heard hollering and gunshots. (App. 155, lines 1-13). "[R]oughly five minutes later a guy came out of the woods and approached [the men] and said, 'What's up, man,' and kept passing [by]." (App. 155, lines 13-16). A second man followed. (App. 155, lines 16-18). Five minutes later, law enforcement arrived to take this witness' statement. (App. 155, lines 18-22). He identified the men as a "short and stocky [guy] with the shorts on" that came out of the woods, and a second one as "a tall skinny guy with dreadlocks." (App. 157, lines 1-17). The witness did not get a good enough look to be able to select either perpetrator from a lineup. (App. 156, line 25 – 157, line 1).

Back in the co-defendant's car, Patten saw the gun in Settles' waistband. (App. 93, lines 10-16). When the foursome got back to the house on Taggart Street, Settles "put the gun on the floor of [Patten's] car and then went and burned a shirt" in a barrel. (App. 59, lines 4-14; App. 93, lines 17-23). Settles took his gun with him when he parted ways with the foursome later that night. According to Patten, Settles thereafter sold the gun.[2] (App. 94, lines 1-17).

On June 13, 2013, Greenwood Detective Joe Collins arrested, Mirandized, and interrogated Settles about Prudencio's murder. (App. 207, line 2 – 211, line 13; App. 484). At the time of arrest, Settles had short "Shirley Temple" twisted dreadlocks. (App. 485-86). He also established that he is shorter than Lank. (App. 212, lines 2-12). In his statement to law enforcement and in his testimony at trial, Settles claimed that Lank shot the victim. (State's Exhibit 34; App. 327, lines 1-4).

[2] A defense witness testified that on the day after the shooting, he witnessed Lank trading a gun to his friend in exchange for three grams of crack. (App. 312, lines 2-15).

Settles maintained that the foursome planned to "hit a lick, as in rob somebody" that night, and he and Lank got out of the car when Patten "pointed out the Mexican and [said] there you go." (App. 321, line 22 – 324, line 8). According to Settles, he was the one backing up as the victim reached for Lank's gun and Lank started shooting. (App. 325, lines 1-13). He stated he saw the first shot and ran up the hill to the apartments, hearing the gun fire three more times. (App. 325, lines 7-17). Settles testified that he was unarmed. (App. 324, lines 21-24).

ARGUMENT

I. The totality of the circumstances demonstrate that Settles made a knowing, voluntary waiver of his *Miranda* rights and was not deprived of his independent decision-making ability by any coercive tactic, even in light of his age.

A. Standard of Review

A trial court ruling regarding the voluntariness of a confession will not be disturbed on appeal unless so "manifestly erroneous as to constitute an abuse of discretion." *State v. Arrowood,* 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct. App. 2007). This standard binds the appellate court to the lower court's "fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." *State v. Asbury,* 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997). "When reviewing a trial court's ruling concerning voluntariness, this Court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." *State v. Saltz,* 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001). Similarly, when a determination regarding the voluntariness of a defendant's confession comes down to a question of credibility, the trial court's credibility finding should not be disturbed absent an abuse of discretion. *State v. McClure,* 312 S.C. 369, 371-72, 440 S.E.2d 404, 405-06 (1994).

B. The *Denno* Hearing

After arrest, Settles provided a three-and-a-half minute recorded statement to Detective Collins. (App. 169, lines 6-18). At the time of the *Denno*[3] hearing, no testimony had been elicited regarding either Settles' apprehension or law enforcement's development of Settles as a suspect. *In limine,* Detective Collins testified that he was called to the crime scene on May 30,

[3] *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964).

that he thereafter developed Settles as a suspect, and that he interviewed Settles prior to booking him into the county detention center.[4] (App. 170, lines 4-22). Collins advised Settles of his *Miranda*[5] rights and Settles signed the adult waiver of rights form, completing the form and initialing next to each individual right. (App. 171, line 22 – 172, line 21; App. 484). At the time that Settles provided his formal waiver of rights, he had been in custody for 30 to 60 minutes. (App. 171, lines 12-14). According to Collins, Settles appeared to understand his conversation with the detective regarding waiver. (App. 171, lines 21-21). Settles asked no questions before signing the form. (App. 172, lines 22-24). Settles did not ask for an attorney at any time during his interrogation. (App. 174, lines 16-19). Collins also testified that he offered Settles a phone call but he did not make one. (App. 177, lines 12-21).

Detective Collins then questioned Settles in an interview room for approximately 40 minutes. (App. 171, lines 15-16; App. 175, lines 13-15). Settles appeared calm and relaxed throughout the duration of the interrogation. (App. 173, lines 17-19). Settles agreed to provide a recorded version of his statement, and did so at approximately 9:00 PM on June 13, 2013. (State's Exhibit 34; App. 173, lines 3-4). At the outset of the recording, Collins established that Settles waived his *Miranda* rights by having Settles identify his initials and signature on the waiver of rights form. (App. 174, lines 15-21; State's Exhibit 34 at 00:21-00:38). According to Collins, the recorded statement varied only slightly from Settles' initial statement, but not materially. (App. 173, lines 10-16). The trial judge reviewed the recording. (App. 175, lines 4-7; State's Exhibit 34).

Settles also testified at the *Denno* hearing. (App. 178, line 13). According to Settles,

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[4] Earlier, another officer arrested Settles as he stood on a street corner. (App. 182, lines 5-15).
[5] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966).

Detective Collins interviewed him and recorded his statement before charging him with murder. (App. 179, lines 14-25). Settles testified that he was uncomfortable in the interview room with Collins. (App. 179, lines 8-13; App. 180, lines 21-23). Settles also testified that he asked to make a phone call and that "they told [him he] was on phone restriction." (App. 180, lines 8-14). Settles said had he been able to make a phone call, he would have called his grandmother, who he lived with at the time, to ask her to come down to the station, provide him with advice, and "talk to a lawyer" on his behalf. (App. 181, lines 1-14). Settles acknowledged that he did not ask for an attorney during the recording, and that he initialed and signed a waiver of his *Miranda* rights. (App. 183, lines 6-10). Settles was seventeen at the time of both the crime and interview. (App. 180, lines 15-20).

Trial counsel argued for suppression, citing *State v. Parker*, 381 S.C. 68, 871 S.E.2d 619 (Ct. App. 2008) (finding sixteen-year-old's confession admissible after consideration of totality of the circumstances surrounding his three-and-a-half hour interrogation). (R. p. 160, lines 16-22; App. 183, lines 16-18). Counsel argued "the youth of the accused" as his "primary consideration," in addition to "the status of his education" as a rising high school junior. (App. 183, lines 22-25). Additionally, counsel cited "[t]he lack of phone call" as a means of undue coercion. (App. 183, line 25; App. 184, lines 5-6; App. 184, line 23 – 185, line 2). Counsel conceded that there existed "no allegation of any force or anything like that" lending to the confession in this case, (App. 183, line 25 – 184, line 3), but remained focused on the premise that Settles' "denial of contact with at least one outside party much older and wiser than he was a clear violation of his constitutional right." (App. 186, lines 3-6).

In rebuttal, the State noted that the defendant's statement in *Parker* was found admissible even when the defendant in that case was interviewed after spending the night outside in the cold

evading law enforcement and was, among other thing, shot at by law enforcement prior to apprehension. (App. 185, lines 5-18).

The trial court considered the *Denno* testimony under totality of the circumstances, looking to determine whether, by a preponderance of the evidence, Settles' statement appeared voluntary. (App. 183, lines 18-21; App. 186, lines 7-12). The court found the statement admissible:

> Did he make a statement at the first inquiry. I don't think there seems to be any dispute he did.
>
> Were *Miranda* rights given. State's 33 indicates that they were. The officer has testified that they were. And I don't know that Mr. Settles necessarily took issue with his rights being provided to him by the officer when Mr. Settles testified just a moment ago.
>
> Did he knowingly and intelligently waive those rights. You know, the Court has to view a number of factors. Age is certainly one of the factors that the court takes into account. But just reading the law here, background, experience, conduct of accused, length of custody, police misrepresentations, isolation of minor from parents, any threats of violence or promises of leniency, mental capacity. There's been no evidence here indicating diminished mental capacity. The questioning here, as Mr. Brown correctly points out, or alludes to, is quite different from the questioning in *Parker* where Mr. Parker had been outside in the cold all night. Clearly this tape recording only took a few minutes. He was not isolated for an extended period of time.
>
> I do not know and I'm unfamiliar with it, because – I mean, the Defendant in this case was [seventeen]. So he's an adult. And I can take into account the fact that he is [seventeen] under the age prong. But as far as whether the State had a legal obligation to provide a guardian ad litem for him or get his parents up there or his grandma up there, I don't know that that's necessarily something that the State is compelled to do under these circumstances. Long story short, I've taken everything into account and I do find that he knowingly and intelligently waived those rights. It clearly appears to be voluntary.
>
> Obviously this is just a threshold determination. The State has the obligation to prove voluntariness beyond a reasonable doubt, and Mr. Tinsley, you'll be entitled to argue that to the jury. If they don't feel that this confession or this statement was voluntarily given, obviously the jury will have to disregard it. That will be my ruling on this issue.

(App. 186, line 12 – 187, line 23 (spacing modified from original)).

Trial counsel thereafter argued that Detective Collins misrepresented Settles' right to make a phone call, stating that the "misrepresentation" constitutes a "weighing factor that the Court fail[ed] to grasp." (App. 187, line 24 – 188, line 11).

In response, the trial court noted that the evidence presented at the *Denno* hearing included

> . . . conflicting evidence on that question. Mr. Settles claim[ed] that he was placed on phone restriction by Mr. Collins. . . . Mr. Collins said he was free to make a phone call if he wanted to. So it becomes a credibility question, and I do find [Detective] Collins' testimony in that regard is simply more credible than that of Mr. Settles. To the extent that the Defense is hanging their hat on that element or on that consideration the Court would rule on a credibility basis that Mr. Settles was offered the opportunity to make a phone call and declined to do so.

(App. 188, lines 12-24).

The State published Settles' statement through Detective Collins and the trial court admitted it subject to the prior objection. (App. 211, lines 3-11; State's Exhibit 34).

C. Law enforcement did not coerce Settles into giving a statement because the *Denno* record is clear that he made a voluntary waiver and because the law lacks support for the contention that he was required to be provided a phone call prior to interrogation.

A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his or her rights under *Miranda. Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). "If a suspect is advised of his *Miranda* rights, but chooses to make a statement, the burden is on the State to prove by a preponderance of the evidence that his rights were voluntarily waived." *State v. Arrowood,* 375 S.C. at 366-67, 652 S.E.2d at 442; *State v. Saltz,* 346 S.C. at 136, 551 S.E.2d at 252. A voluntary waiver need not be express. Rather, "(1) the waiver must be 'voluntary in the sense that it was the product of a free

and deliberate choice rather than intimidation, coercion, or deception' and (2) the waiver must be 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *State v. Moses,* 390 S.C. 502, 513, 702 S.E.2d 395, 401 (2010) (quoting *Berghuis v. Thompkins,* 560 U.S. 370, 382, 130 S.Ct. 2250, 2260 (2010)). "In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession." *Id.*; *Schneckloth v. Bustamonte,* 412 U.S. 218, 226, 93 S.Ct. 2041, 2047 (1973).

"[E]ach case requires careful scrutiny of all the surrounding circumstances." *State v. Pittman,* 373 S.C. 527, 647 S.E.2d 144 (2007). The factors to be considered when making a voluntariness determination have been oft-examined and broadly defined by our courts. They include, but are not limited to the: "youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep." *Id.* (citing *Schneckloth v. Bustamonte, supra*)). Looking further, our courts have considered the accused's background, experience, conduct, age, maturity, physical condition, mental health, misrepresentations by law enforcement, isolation of a minor from a parent, direct or indirect promises (however slight), repeated and prolonged questioning, and exertion of improper influence. *State v. Moses,* 390 S.C. at 513-14, 702 S.E.2d at 401 (citing *Withrow v. Williams,* 507 U.S. 680, 113 S.Ct. 1745 (1993)) (also citing *Schneckloth v. Bustamonte, supra*)); *State v. Salisbury,* 330 S.C. 250, 272, 498 S.E.2d 655, 666 (Ct. App. 1998) (the existence or nonexistence of police coercion "is a necessary predicate" to determining a statement's voluntariness).

Our courts have routinely upheld juvenile and young adult confessions. "A confession of a juvenile is not per se involuntary simply because it is obtained without the presence of counsel, a parent, or other interested adult." *In re Tracy B.,* 391 S.C. 51, 66, 704 S.E.2d 71, 79 (Ct. App. 2010)) (fourteen-year-old); *State v. Pittman, supra* (twelve-year-old); *State v. Register*, 323 S.C. 471, 476 S.E.2d 153 (1996) (eighteen-year-old); *State v. Boys,* 302 S.C. 545, 397 S.E.2d 529 (1990) (seventeen-year-old); *State v. Parker, supra* (sixteen-year-old); *State v. Avery,* 374 S.C. 524, 649 S.E.2d 102 (Ct. App. 2007) (age unlisted in opinion); *In Interest of Christopher W.,* 285 S.C. 329, 329 S.E.2d 769 (Ct. App. 1985) (eleven-year-old); *but see State v. Smith,* 259 S.C. 496, 192 S.E.2d 870 (1972) (thirteen-year-old confession inadmissible because law enforcement did not repeat *Miranda* warnings immediately prior to oral confession). Youth by itself does not render a statement inadmissible. *Id.* The same examination of surrounding circumstances applies even where the confessor is a juvenile. *State v. Parker,* 38 S.C. 68, 72, 671 S.E.2d 619, 622 (2008). However, a seventeen-year-old is not a juvenile for purposes of determining the voluntariness of an inculpatory statement. S.C. Code Ann. § 63-19-20 (2010) (a "juvenile" is a person less than seventeen years of age); *but see Aiken v. Byars,* 410 S.C. 534, 537 n.1, 765 S.E.2d 572, 573 n.1 (2014) *cert. denied* 135 S. Ct. 2379, 192 L. Ed. 2d 179 (2015) (considering individuals under the age of eighteen as juveniles for the limited purpose of resentencing in light of *Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455 (2012)).

Juvenile and young adult confessions have also been upheld when the defendant has confessed after enduring arguably more extreme apprehension and interrogation circumstances than are present in this case. In *State v. Moses, supra,* a learning disabled seventeen-year-old's custodial statement was upheld as being freely, knowingly, and voluntarily made "regardless of his age, learning disability, and separation from his mother." 390 S.C. at 515, 702 S.E.2d at 402.

In *Moses*, only one officer questioned the special education student, the record did not demonstrate administration of any threats or a lengthy interrogation, and Moses twice testified that he understood his *Miranda* rights and that he was not coached regarding what to say when executing his waiver. *Id.* Of note, "the trial court failed to specifically mention his mother's alleged request to be present during questioning," but our Supreme Court did not find that factor dispositive on the issue of voluntariness. *Id.*

As argued before the trial court, the voluntariness of a sixteen-year-old's confession in *State v. Parker, supra,* was upheld on appeal when the inculpatory statement was taken after the defendant endured a tumultuous night in the woods evading law enforcement and a lengthy interrogation wherein he rejected his right to invoke counsel. 381 S.C. at 81, 671 S.E.2d at 625. All told, the interrogation and taking of Parker's statement took approximately three and a half hours and involved multiple officers. *Id.* at 80-82, 671 S.E.2d at 624-26. At his *Denno* hearing, Parker testified that no one presented him with a written or verbal waiver of his *Miranda* rights. *Id.* He also testified that he did not learn the charge against him until the serving of his warrants days later on January 9. *Id.* at 83, 671 S.E.2d at 625-26. Parker did not ask for a parent to be present, but when an interrogator inquired whether he would like to see his father, the juvenile answered yes, and law enforcement complied. *Id.* at 77, 671 S.E.2d at 623. These factors aside, the trial court ruled Parker's statement voluntarily made, finding no invocation of Parker's right to counsel, despite asking for his father when prompted, and further finding Parker's testimony regarding the lack of *Miranda* rights not credible. *Id.* at 83-84, 671 S.E.2d at 626-27. In so ruling, the trial court focused its analysis of the totality of the circumstances surrounding Parker's confession in a manner similar to the trial judge in the case at bar. *Compare id. and*

App. 186, line 12 – 187, line 23.[6] This Court upheld the voluntariness determination, focusing in part on the trial court's "opportunity in the *Denno* hearing to listen to the testimony, assess the demeanor and credibility of the witnesses, view the taped portion of the confession, and weigh the evidence accordingly." *Parker* at 93, 671 S.E.2d at 632.

Settles takes to task conflicting testimony regarding his ability to make a phone call. He testified that "they" put him "on phone restriction," denying his request to make a phone call. (App. 180, lines 8-12). He further testified that he would have called his grandmother to ask her to "talk to a lawyer" and meet him at the police station. (App. 181, lines 1-7). Settles testified that Detective Collins "didn't give [him] a chance" to call his grandmother and only asked Settles if he wanted a lawyer. (App. 182, lines 22-25). Settles insinuates that Detective Collins expressly rejected a request to contact a family member. Conversely, Detective Collins testified that he offered Settles a phone call but Settles refused. (App. 177, lines 12-21). The trial judge found Collins' testimony on this point more credible. (App. 188, lines 12-24). But, in accord with the abandonment finding by the Court of Appeals in this case, nothing during the arrest and interrogation process entitles a seventeen-year-old defendant to the comfort and advice of a parent or relative in the interview room. "Although a juvenile's request for a parent may be considered when determining the voluntariness of the confession, an adult's request for someone other than an attorney does not invoke a Fifth Amendment right to speak with counsel." *State v. Register*, 323 S.C. at 477, 476 S.E.2d at 157 (citing *Fare v. Michael C.,* 442 U.S. 707, 99 S.Ct. 2560 (1979) (a request for a non-attorney third party does not invoke a Fifth Amendment

[6] That trial judge in that case broke his ruling into four questions, with the State bearing the burden of proving each by a preponderance of the evidence: (1) did the defendant make the statement, (2) did law enforcement advise the defendant of his *Miranda* rights, (3) did the defendant make a knowing and intelligent waiver of those rights, and (4) did the defendant voluntarily make his statement. *Id.* at 83-84, 671 S.E.2d at 626-27.

invocation of counsel during custodial police interrogation)); *see* S.C. Code Ann. § 63-19-20 (2010) (a juvenile is an individual less than seventeen years of age). During his interrogation, Register "stated that he was not talking 'about [the crimes]' until he saw his mother.'" *State v. Register,* 323 S.C. at 478, 476 S.E.2d at 157. Law enforcement ceased questioning at that point, spoke only with Register's mother directly, and then re-initiated the interview, at which point Register confessed. *Id.* Register, an eighteen-year-old, had no recognized right to invoke the counsel of a parent or relative. *Id.*

While *Moses, Parker,* and *Register* make compelling comparisons for voluntariness in the present case, the "[d]etermination of whether a statement is involuntary 'requires more than a mere color-matching of cases.' It requires careful evaluation of all the circumstances of the interrogation." *Mincey v. Arizona*, 437 U.S. 385, 401, 98 S. Ct. 2408, 2418 (1978) (quoting *Reck v. Pate*, 367 U.S. 433, 442, 81 S.Ct. 1541, 1547 (1961)). The totality of the circumstances support the affirmance of the admission of Settles' statement. Consider Settles' environment as narrated by Detective Collins. Only one law enforcement officer interacted with Settles through the duration of his questioning in the interview room. (App. 170, lines 18-19; App. 171, lines 9-11). There were not multiple officers involved, a factor which may increase a defendant's perception of undue coercion. Also, the timing of Settles' waiver and confession are not accompanied by any indicators of a drawn-out detention. Detective Collins questioned Settles for less than 45 minutes. (App. 171, lines 15-16). The entire statement lasts just over three minutes, wherein Settles simply states his version of the facts lending to the murder. The recording includes little-to-no follow-up questioning or probe for detail. (State's Exhibit 34). And Settles had been taken into custody and detained for only 30 to 60 minutes prior to questioning. (App. 171, lines 12-14). As to any evidence in the record of coercion, Settles merely testified that he

felt "uncomfortable" in the interview room. (App. 180, lines 21-23).

On this record, it cannot be said that Settles was not informed of his right to contact any attorney, and he had no entitlement to contact another adult. *State v. Register, supra.* Rather, Settles was duly informed and chose not to invoke the right to counsel. Settles at no time asked any questions regarding the waiver. (App. 172, lines 22-24). Settles did not appear to suffer from the influence of drugs or alcohol. (App. 171, lines 17-19). According to the Detective, Settles "seemed very calm, relaxed." (App. 171, lines 17-19). He exhibited a comprehension of the rights he was waiving and the significance of his conversation with Collins. (App. 171, line 20 – 172, line 24). Settles never asked for an attorney, nor asked to make a phone call to summon the advice of a loved one. (App. 175, lines 16-18; App. 177, lines 8-11). Settles has at no time contested his willing execution of the waiver of rights form. (App. 183, lines 4-10). Instead, Settles completed the waiver in its entirety, not only initialing by the common-language waiver of each right, but transcribing Detective Collins' name as his sole interrogator and signing in acceptance of the waiver's unequivocal language:

> I now state that I DO wish to answer questions at this time and that I do NOT wish to have a lawyer here during questioning.
>
> My decision to answer questions now, without a lawyer, is made freely and is my own choice. No one has threatened me in any way or promised me special treatment. To show my decision, I am signing my name in the space below.

(App. 484 (emphasis in original)).

At the time of his arrest, Settles presented as an able-minded seventeen-year-old with an eleventh grade education. There was no requirement for law enforcement, who was conducting a homicide investigation, to inquire as to whether Settles wanted to meet with a relative. *State v. Register, supra.* The trial court correctly considered this point in conjunction with Settles' age:

> [T]he Defendant in this case was [seventeen]. So he's an adult. And I can take into account the fact that he is [seventeen] under the age prong. But as far as whether the State had a legal obligation to provide a guardian ad litem for him or get his parents up there or his grandma up there, I don't know that that's necessarily something that the State is compelled to do under these circumstances.

(App. 187, lines 7-14).

The record demonstrates that the State met its burden during the *Denno* hearing: there exists no evidence of police coercion, misrepresentation, concealment of the right to invoke the advice of legal counsel, or immaturity on the part of Settles which may have disabled the defendant's decision-making. Settles' waiver can only be construed as a deliberate choice. The law does not support any contention that Settles was automatically entitled yet was denied the right to call upon a relative prior to the interview and Settles' testimony failed to persuasively contradict Detective Collins on this point. Here, "the question of the voluntariness of such a confession can come down to a question of credibility, which may be resolved by the trial court in favor of the officers." *State v. Thompson,* 413 S.C. 590, 608, 776 S.E.2d 413, 423 (2015); *State v. McClure,* 312 S.C. at 371-72, 440 S.E.2d at 405-06.

The trial judge thus properly submitted Settles' interview to the jury to "determine whether the statement was given freely and voluntarily beyond a reasonable doubt." *State v. Parker,* 381 S.C. at 75, 671 S.E.2d at 622. The jury was duly charged on that point. (App. 381, line 24 – 383, line 9). And the Court of Appeals was correct to affirm. (App. 1-4).

D. Any error in the trial court's preliminary ruling proves harmless because, in addition to evidence of overwhelming guilt, trial testimony regarding the voluntariness of Settles' statement fails to undermine the trial court's threshold determination on that issue.

Harmless error may apply where a consideration of the entire record lends the reviewing court to determine beyond a reasonable doubt that the error complained of did not contribute to the verdict. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967). "[T]he test is whether

there is a reasonable probability that the statements contributed to the defendant's conviction of the crime, or if the defendant's statements were merely cumulative." *State v. Clute*, 324 S.C. 584, 591-92, 480 S.E.2d 85, 89 (Ct. App. 1996) *overruled on other grounds by State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000). Harmless error also applies when voluntariness is only reasonable inference to be drawn from evidence regarding a defendant's confession. *See State v. Victor,* 300 S.C. 220, 224, 387 S.E.2d 248, 50 (1989).

i. Appellant's recorded statement remains cumulative to and corroborative of his own trial testimony.

Trial testimony offered by both Detective Collins and Settles fails to undermine the trial court's threshold ruling on the issue of voluntariness. In fact, the trial testimony on this issue bolsters the trial court's ruling because it so nearly corroborates and further explains any question of coercive behavior on behalf of law enforcement.

Detective Collins testified as to the same series of events surrounding the nature of Settles' confession as he testified to during the *Denno* hearing. (*Compare* App. 207, line 2 – 211, line 13 *with* App. 170, line 18 – 178, line 6). Even when trial counsel cross-examined Collins on the issue of voluntariness, counsel failed to elicit any testimony from the Detective that undermined the court's threshold determination on that issue. (App. 213, line 9 – 197, line 18). Collins's cross-examination instead revealed that during the interview he was aware that Settles turned seventeen shortly before the crime; that he did offer Settles a phone call at the end of the interview but Settles refused; that Settles did not otherwise ask to make a phone call during the interview process; that Settles was placed on phone restriction after the interview and after bring booked into the jail; and again that Settles was advised of his rights, including that of counsel. (App. 214, line 5 – 215, line 10). Collins ultimately testified that he "was not" satisfied that

Settles offered a truthful version of events. (App. 224, lines 6-8).

Collins also testified that he had no knowledge that Settles' mother had arrived at the interview location. (App. 214, lines 12-14; App. 215, lines 11-18). Settles' mother later testified, but failed to dispel the voluntariness with which the statement was made. Although she testified that law enforcement rebuffed her efforts to see her son until the day following his arrest, (App. 312, line 10 – 306, line 9), no other testimony in the record demonstrates that Settles *asked* to see her on the night of the interview. And, her testimony demonstrates that she arrived at the police station between 9:00 and 10:00 PM on the night of the arrest and interrogation. (App. 303, lines 4-8). Settles executed his recorded statement at approximately 9:00 PM. (State's Exhibit 35). Thus, the mother's testimony fails to establish that she made it to the police station in time to intercept Settles' interrogation had she been requested to do so.

Finally, to the extent that it was elicited at trial, Settles' own testimony agreed with that of the Detective. Settles agreed that questioning lasted somewhere around half an hour. (App. 327, lines 8-10). Settles testified that he "asked the people in the detention center" if he could use the phone and was told he was on phone restriction at that time, indicating that Settles did not seek to reach out to his family until after the interview. (App. 329, lines 12-22). Thus, voluntariness remains the only reasonable inference drawn from the evidence of Settles' engagement in the interview room.

ii. The remainder of the record provides overwhelming evidence probative of guilt.

Each co-defendant testified against Settles in a corroborative manner. It remained clear throughout trial that Michael Patten, Markece "Lank" Moore and Bryson Jefferson accompanied Settles to and from the scene. (App. 86, line 1 – 87, line 16; App. 69, line 23 – 70, line 17; App. 108, lines 1-16). Testimony established that the plan that night was for Settles "to rob

somebody"—that was the sole reason that Settles got out of the car on Franklin Street. (App. 87, lines 12-16; App. 91, lines 11-17). They targeted the victim simply because he happened to be walking down the street and they were looking for a victim. (App. 51, line 7 – 52, line 1; App. 91, lines 18-20).

Lank accompanied Settles out of the car but ran after witnessing the first shot. (App. 78, lines 1-13). According to Lank, Settles acted as the aggressor. (App. 55, lines 1-10). Lank ran back to the car first and told Patten and Jefferson that "Purp [Settles] had shot the Mexican." (App. 92, lines 7-11). Settles confessed the same to Patten when he rejoined the young men in the car. (Rapp. 92, lines 13-24). Patten and Lank witnessed Settles burn his shirt in a barrel following the incident. (App. 59, lines 7-14; App. 92, lines 18-21).

Each of the young men also knew Settles to carry a gun which they believed to be a Glock. (App. 55, line 13 – 56, line 5; App. 90, line 11 – 91, line 3; App. 93, lines 10-16; App. 106, lines 20-25; App. 109, lines 14-19). Patten testified that he learned that Settles sold his gun following the incident. (App. 94, lines 6-20). The State's firearm and toolmark examiner testified that a Glock could have fired the two projectiles recovered from the victim's body. (App. 252, lines 3-9).

An eyewitness unaffiliated with the young men testified that the shorter perpetrator with small twisted dreadlocks held something shiny in his hand which the witness believed to be the gun that fired two shots. (App. 118, line 22 – 120, line 15; App. 134, lines 10-13). At the time of arrest, Settles had short twisted dreadlocks. (App. 485-86). Testimony also established that Settles was shorter than Moore. (App. 212, lines 2-12).

Settles' own trial testimony did not isolate him from culpability. He testified that he got in the car knowing that he was accompanying the others in hitting a lick. (App. 321, line 14 –

322, line 10; App. 334, lines 4-22). When it came to the shooting, he denied having a gun and pointed the finger at Lank. (App. 324, line 21 – 325, line 3; App. 327, lines 1-4). Settles' testimony then created a mirror-image of that offered by Lank during the State's case-in-chief. Settles testified that when he witnessed the first shot, he backed up and ran away. (App. 325, lines 8-23). Cross-examination of Detective Collins highlighted the existence of discrepancies in Settles' and his co-defendants' statements. (App. 216, line 20 – 219, line 20). Collins stated that he did not "think any of them were completely honest throughout the interview in the beginning." (App. 216, lines 19-20).

The jury deliberated over whose version of the shooting merited more weight. But given the choice among whom to believe, the totality of the evidence against Settles demonstrates his culpability beyond a reasonable doubt. The greater weight of the testimony, all but that by Settles himself, exhibits that he acted as the shooter. At the very least, the State established Settles' guilt under the theory of the hand of one, for even if the jury determined that he did not act as the triggerman, the evidence shows that Settles acted as an accomplice in the lick that the young men set out to hit that night. No rational conclusion can be reached from the evidence presented at trial which would exculpate Settles from the acts that resulted in the victim's death.

I. No precedent mandates a particular procedure that the court must follow at a sentencing proceeding concerning an individual who was under the age of eighteen at the time of the crime, and the sentencing court in this case accepted statements in mitigation and gave due consideration to Petitioner's age and *Miller's* other individual characteristics prior to issuing a 45-year, term-of-years sentence.

Upon conviction, the trial judge sentenced Settles to a term of 45 years. (App. 491-92). The trial judge denied the defendant's motion to reconsider that sentence, but later reduced the sentence to 40 years upon motion by the State. (App. 434-35; App. 496-97). Petitioner asks this Court to find that the Court of Appeals erroneously affirmed the sentencing procedure employed by the trial court when it denied funding for a mitigation investigation and imposed a term-of-years sentence upon Petitioner. However, neither the trial court nor the Court of Appeals misapplied this Court's precedent or dicta regarding juvenile sentencing proceedings and there exists no conflict with *Aiken v. Byars*, 410 S.C. 534, 785 S.E.2d 572 (2014) *cert. denied*, 135 S.Ct. 2379 (2015), or *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455 (2012), warranting resentencing for a juvenile homicide offender sentenced to a term-of-years less than life without parole.

A. Standard of Review

This Court will not overturn a sentence unless it determines the sentencing court abused its discretion in issuing a ruling; that is, the trial court's ruling must amount to an error of law. *State v. Dawson,* 402 S.C. 160, 163, 740 S.E.2d 501, 502 (2013). Generally, appellate courts will only interfere with the discretion of a judge in the imposition of a sentence in rare and unusual circumstances. *State v. Ferguson*, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952). Absent "prejudice, oppression, or corrupt motive by the trial court," the appellate court is without authority to disturb a sentence that is within the limit prescribed by statute. *State v. Green*, 412 S.C. 65, 87, 770 S.E.2d 424, 436 (Ct. App. 2015) (citing *State v. Franklin*, 267 S.C. 240, 246,

226 S.E.2d 896, 898 (1976)). Additionally, "[a]uthorization for expenditure of funds for expert witnesses is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of that discretion." *State v. Matthews*, 291 S.C. 339, 345, 353 S.E.2d 444, 448 (1986).

B. Juvenile Sentencing Procedure after *Aiken v. Byars*

South Carolina employs a constitutionally permissible sentencing scheme in which juvenile homicide offenders are subject to a discretionary sentence ranging from a minimum of 30 years to a maximum of life without the possibility of parole. S.C. Code. Ann. § 16-3-20(A); *Aiken v. Byars,* 410 S.C. at 545, 765 S.E.2d at 578; *see Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455 (2012) (the Eighth Amendment forbids a juvenile offender's receipt of a life sentence without the possibility of parole when the charge mandates the life sentence); *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011 (2010) (the Constitution prohibits juvenile non-homicide offenders from receiving a sentence of life without parole); *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005) (unconstitutional to subject a juvenile to a capital sentence). This Court has instructed in *Aiken v. Byars* that the sentencing authority must "'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Aiken* at 543, 765 S.E.2d at 577 (quoting *Miller, supra* at 480, 132 S.Ct. at 2469).

The proscriptions in *Aiken* flow from the collective reexamination of juvenile sentencing proceedings by the judiciary. Courts have in recent years adopted the principle that individuals under the age of eighteen have lessened culpability and are therefore less deserving of the most severe punishments without due consideration of discrete attendant circumstances. *Graham v. Florida*, 560 U.S. at 68, 130 S.Ct. at 2026 (finding that a juvenile defendant "is not absolved of responsibility for his actions" based upon age alone, but that a juvenile's criminal "transgression 'is not as morally reprehensible as that of an adult'") (quoting *Thompson v. Oklahoma,* 487 U.S.

815, 835, 108 S.Ct. 2687, 2699 (1988)). Our judiciary has recognized that the maturity level of a juvenile is subject to special consideration of a youth's "transient rashness, proclivity for risk, and inability to assess consequences." *Miller v. Alabama,* 567 U.S. at 472, 132 S.Ct. at 2564 (quoting *Graham v. Florida, supra* at 68, 130 S.Ct. at 2026). The appraisal of juvenile sentencing proceedings stems not from history, but rather from "'the evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 469, 132 S.Ct. at 2463 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 290 (1976)).

"Most fundamentally, *Graham* broadly insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Miller v. Alabama, supra* at 473, 132 S.Ct. at 2465. "The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals" of deterrence, retribution, and rehabilitation. *Graham v. Florida, supra* at 67-68, 130 S.Ct. at 2026 (internal citations omitted). Thus, in *Miller*, the United States Supreme Court instituted, as a component for all juvenile sentencings, a requirement that the sentencer "consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Montgomery v. Louisiana,* — U.S. —, —, 136 S.Ct. 718, 734 (2016). "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility." *Id.* at —, 136 S.Ct. at 734.

This Court has held only that "*Miller* requires that before a life without parole sentence is imposed upon a juvenile offender, he must receive an individualized hearing where the mitigating hallmark features of youth are fully explored." *Aiken v. Byars,* 410 S.C. at 545, 765

S.E.2d at 578 (emphasis added). Our state Supreme Court instructed that the "sentencing authority must 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Id.* at 544, 765 S.E.2d at 577 (quoting *Miller, supra*). *Aiken* adopted *Miller's* set of express considerations related to a juvenile offender's "hallmark features of youth":

> (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" that surrounded the offender; (3) the circumstances 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 "incompetencies associated with youth—for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys"; and (5) the "possibility of rehabilitation."

Id. at 544, 765 S.E.2d at 577 (quoting *Miller v. Alabama, supra* at 477-78, 132 S.Ct. at 2468)).[7]

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[7] "[S]tate courts that have addressed the question of how to apply *Miller* in the context of discretionary natural-life sentences have reached differing conclusions." *People v. Holman*, 58 N.E.3d 632, 641, 2016 IL App (5th) 100587-B, ¶ 33 (Ill.App. Mar. 3, 2016); *see State v. Riley,* 315 Conn. 637, 654 n.5, 110 A.3d 1205, 1214 n.5 (Conn. 2015) (noting that "there is no clear consensus"). Some courts, like our own, have found that *Miller* requires consideration of set factors associated with youth. *E.g., Riley,* 315 Conn. at 358, 110 A.3d at 1216; *People v. Gutierrez,* 58 Cal.4th 1354, 1388, 324 P.3d 245, 268–69 (Cal. 2014) (describing five factors courts must consider before sentencing juvenile defendants to life in prison without parole); *Bear Cloud v. State,* 294 P.3d 36, 47 (Wyo. 2013) (setting forth seven factors courts must consider in sentencing juveniles to life in prison without parole (quoting *Miller v. Alabama, supra* at 476-77, 132 S.Ct. at 2467–68)).

Yet other courts have concluded that where the life sentence remains discretionary, *Miller* is not violated. *E.g., Foster v. State,* 294 Ga. 383, 754 S.E.2d 33, 37 (Ga. 2014); *Arredondo v. State,* 406 S.W.3d 300, 307 (Tex.App. 2013).

And some courts have found that while *Miller* requires the sentence to consider mitigating circumstances related to youth, *Miller* does not bind the sentencing court to consider a predetermined list of particular factors. *People v. Holman, supra* at 642, 2016 IL App at ¶ 34; *e.g., State v. Ali,* 855 N.W.2d 235, 256–57 (Minn. 2014) (explaining that sentencing courts must consider "any mitigating circumstances," including those discussed by the *Miller* Court); *State v. Long,* 138 Ohio St.3d 478, 483, 8 N.E.3d 890, 895 (Oh. 2014) (finding that the factors adopted by the Wyoming Supreme Court in *Bear Cloud, supra,* "may prove helpful" to courts sentencing

The framework for South Carolina's post-*Miller* sentencing procedure otherwise lies in dicta. *Aiken's* majority explicitly declined any "invitation to set out a specific process for trial court judges to follow when considering whether to sentence a juvenile to life without parole." *Aiken,* 410 S.C. at 545, n.10, 765 S.E.2d at 578, n.10. The majority furthered: "The United States Supreme Court did not establish a definite resentencing procedure and we likewise see no reason to do so. 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." *Id.*

Also of significance is this Court's express statement that their adoption of the *Miller* framework does not suggest "that the sentencing of a juvenile offender subject to a life without parole sentence should mirror the penalty phase of a capital case." *Aiken v. Byars, supra* at 544, 765 S.E.2d at 577. *Miller* has only been interpreted by this Court to contemplate that "the type of mitigating evidence permitted in death penalty sentencing hearing unquestionably has relevance to juvenile life without parole sentencing hearings, in addition to the factors illustrated above." *Id.* 544-45, 765 S.E.2d at 577.

Importantly, while a close reading of *Miller* requires an examination of specific factors prior to sentencing a juvenile to life without parole, neither the United States Supreme Court nor this Court require formal fact findings or procedure. But, as noted, many of the Court's concerns are not implicated here because Settles did not receive a life sentence.

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juvenile defendants, but refusing to require sentencing courts to make explicit findings with respect to any enumerated factors); *Conley v. State,* 972 N.E.2d 864, 876 (Ind. 2012) (holding that the sentencing court in that case complied with the requirements of *Miller* by taking into account how juveniles are different from adults "'and how those differences counsel against irrevocably sentencing them to a lifetime in prison'" (quoting *Miller, supra* at 480, 132 S.Ct. at 2469)).

C. The Sentencing Proceeding

As Settles' trial reached the sentencing phase, trial counsel renewed a pre-trial motion to cap Settles' sentence at 30 years.[8] (App. 405, line 13 – 407, line 9). Settles additionally requested to defer sentencing upon resolution of the separate Abbeville County charge, which would allow time to conduct a mitigation investigation if the court deferred the sentencing hearing and granted Settles' motion for funding for a mitigation investigator. (App. 407, lines 3-9). The State opposed deferring sentencing insofar at the deferral may relate to the Abbeville County charge, as that charge stemmed from an entirely separate, unresolved, incident.[9] (App. 411, line 23 – 412, line 1). But the State did not oppose the request for an extension of time to complete a mitigation investigation should the trial court find it appropriate. (App. 412, lines 3-11). The court ruled that the sentencing procedure would go forward on the Greenwood County charge at that time, and without any mitigation investigation. (App. 412, line 15 – 413, line 9).

As far as the sentencing procedure itself, the State agreed that *Aiken* and *Miller* contemplate a sentencing hearing which may include testimony put forward by trial counsel. (App. 408, lines 4-18). However, the trial court asked, and the State opined, that *Aiken* and *Miller* may not define the extent of any juvenile sentencing hearing, but rather call for the trial

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[8] Settles sought prospective application of *Aiken v. Byars, supra,* and *Miller v. Alabama, supra,* by moving to cap the sentence on the murder charge, should he be convicted, at 30 years. (App. 437-39). Settles also moved to obtain "funding for a mitigation specialist/investigator and psychologist or psychiatrist" in response to his age. (App. 436). Settles additionally represented to the court that the funding motion was perhaps joined by separate counsel representing Settles on a similar but unrelated Abbeville County charge. (App. 33, line 17 – 35, line 25). Greenwood County trial counsel stated that counsel on the Abbeville County charge was "a more likely subject to make such a motion" because Settles' future on that charge "probably would benefit more from it than" the present Greenwood County charge. (*Id.*). The court took both motions under advisement to be readdressed at the time of sentencing. (App. 35, lines 1-3; App. 36, lines 19-24).

[9] Settles incurred the Abbeville charge at the age of sixteen. (App. 410, lines 12-13).

court to "hear whatever [trial counsel] wants to offer in mitigation," make a finding on the record as to a number of enumerated factors and then proceed with issuing a sentence in the court's discretion. (App. 409, lines 2-16). After a brief recess to consider the totality of the arguments related to whether the sentencing hearing should proceed, the trial court ruled that it would, and that it would proceed in "the way [he was] accustomed to doing it." (App. 412, line 15 – 413, line 25). That is, by taking testimonials from the victim's family as offered by the State, and then, in turn, by taking testimonials from any person the defense put forward to further Settles' mitigation case. (App. 414, line 1 – 415, line 18).

Settles received a 45-year sentence.[10] (App. 429). Initially, because Settles did not receive a sentence of life without the possibility of parole, any issue concerning the trial court's compliance with *Aiken* is moot. *Aiken v. Byars,* 410 S.C. at 545, 765 S.E.2d at 578 ("*Miller* requires that before a life without parole sentence is imposed upon a juvenile offender, he must receive an individualized hearing where the mitigating hallmark features of youth are fully explored."). The Court of Appeals thus correctly concluded that, because the trial court did not impose a life sentence, a separate sentencing hearing was not required. (App. 3). Absent the imposition of a life sentence, there exists no abuse of discretion or prejudice in the trial court's refusal to take sworn testimony at sentencing or to authorize funding for mitigation specialists. *See State v. Green, supra* at 87, 770 S.E.2d at 436.

However, even disregarding mootness, *Aiken* mandates no more than the procedure taken up by Petitioner's sentencer, who took due care to comport his sentencing considerations with those prescribed by the applicable case law—and who then imposed a term-of-years sentence. (App. 426-29). The Court of Appeals correctly concluded that Petitioner was not prejudiced by

[10] Later reduced to 40 years. (App. 494-97).

the trial court's sentencing procedure because, prior to issuing a term-of-years sentence, "the trial court considered mitigating factors presented by both parties" and did so "by taking testimonials from any person the defense put forward . . . ." (App. 3). *Aiken* does not condemn this procedure—the trial court thus exercised its discretion in sentencing procedure absent any error of law.[11] (App. 412-26). Even given *Aiken's* framework, the trial judge retains broad discretion in imposing a sentence within the statutory limits. "A judge or other 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." *State v. Hicks,* 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008). Furthermore, as to funding for any mitigation presentation, funds for expert services may be authorized only based upon a finding "that investigative, expert, or other services are reasonably necessary for the representation of the defendant." S.C. Code Ann. § 17-3-50(B); *see* S.C. Code Ann. § 16-3-26 (same application to capital cases).

Despite only citing *Miller* as precedent governing the factors to review during the sentencing case, Settles' sentencing proceeding demonstrates that the trial judge did comport with both *Aiken* and *Miller*. (*See* App. 413, lines 12-25). The Court must consider what evidence had gone before the trial court in relation to Settles' youth. The entirety of the evidence available in furtherance of mitigation flows from trial through sentencing. In his case-in-chief, Settles put forward his grandmother, adult cousin, and his mother as fact witnesses who also testified in relation to the age and maturity of the defendant. Notably, these witnesses' testimonies breathed

[11] For purposes of *Aiken's* prospective application, the fact that Petitioner reached seventeen years of age and was statutorily an adult in South Carolina at the time of the crime and sentencing holds no bearing on whether an individualized sentencing hearing should apply because our Supreme Court's adoption of *Miller* explicitly extended to all defendants under the age of eighteen. *Aiken v. Byars, supra* at 537, n.1, 765 S.E.2d at 573, n.1.

life into Settles' family circumstance.

Settles' mother and grandmother testified about how the defendant grew up within their care. (App. 286 and 298-99). Settles specifically lived with his grandmother for over a year prior to his arrest. (App. 286). Testimony established that Settles attended school regularly and was cared for financially, maintaining an allowance from his grandmother as well as a working cell phone. (App. 284-85). Family described Settles as a decent student. (App. 285-86 and 300). Settles did not complete his tenth grade year with enough credits to elevate to the eleventh grade, but he completed online and after school courses in order to make up those missed credits. (App. 300-01). As a result, Settles was only one semester behind the remainder of his classmates. (App. 301). A cousin testified that Settles cultivated a close relationship with her. He visited her home "on a daily basis" eating, talking, and watching TV. (App. 294-95 and 300). Together, Settles' cousins "helped [his mother] look out for him when [she] couldn't be the eyes." (App. 302). The court also learned that Settles' grandmother expected to hear from him regularly or when he needed assistance; a sign of dependability from a teenager. (App. 287-89). The court heard that "Tavarious was a pretty responsible person. He was good hearted, caring and giving and he helped [his grandmother] out a good bit. He had a good heart for helping . . . [a]nd he loved his family." (App. 289-90). Ms. Settles furthered that he was "no bad person," the police did not come around looking for him, and he attended church to some extent. (App. 289-90).

Later, at sentencing, Settles' grandmother related her mitigation case to the trial court, pleading that Settles lacked a criminal record, made a wrong choice, and that she believed that his being caught up in the present offense did not match the remainder of his character. (App. 416). Trial counsel questioned the grandmother at the sentencing presentation and established the following in relation to the factors enunciated for consideration by *Miller* and *Aiken*: an April 18,

1993, birthday made Settles seventeen at the time of the murder; Settles showed no tendencies of violence while under his grandmother's roof; Settles was not "a troubled child"—he appeared obedient and did not cause his grandmother problems; "he was mature," "good-hearted," "willing to learn," and "getting himself together in school." (App. 416-17).

As defense counsel sought to elicit more testimony on this point, the trial judge reiterated that he appreciated Settles' age and the influence associated with the co-defendants in the car before and after the crime, including the dispute regarding who acted as the triggerman. (App. 418). The trial court re-directed defense counsel, who had been questioning the grandmother, to present his mitigation case in the manner the trial court requested. (App. 418). Counsel offered a summary. (App. 418). The court approved. (App. 418). This would be the manner in which the trial court would be most persuaded by the mitigation: "I think that would probably be the best way for the Court to get a true picture of your client if you could summarize where he was emotionally and where he saw himself as far as this entire – I mean, you've already touched on a lot of this. But if you would do it in that manner that might be more beneficial[.]" (App. 418).

Counsel continued with the question-and-answer to elicit information that Settles' parents never married and did not live together, but that his father remained part of his life "ever since he was born" because the family lived near each other. (App. 419). Settles' grandmother stated that "his mother got along with his father. We all love one another. We [are] helping Tavarious." (App. 419).

Even prior to this portion of the hearing, during the motions lending to the issue on appeal, trial counsel further pled before the sentencing court:

> Mr. Settles, of course, has no record. He's currently about to turn to the age of [nineteen]. He was [seventeen] and six weeks when this happened . . . . He felt from the way things occurred that he really didn't have much choice in this matter

> based upon the fact that he was unable to wrap it all up, and he – I think he's been forthright, honest. He got himself in a situation with an older guy who, I think, had nefarious plans pr[e]ying on youth and he was one of those victims. Case in question, he went to school that day. He was at Ms. Shay's. They burned his phone up until they got him involved. They witnessed against him. Certainly they were together. They put together a plan that would, you know, put Mr. Settles in an awkward not knowing situation that they had put together. . . . There's no question it was [the older co-defendant] Lank's lick. Markece Moore's. This man got out with him, used poor judgment, and finds himself here convicted of murder. But under the prongs of *Miller v. Alabama* and the Eighth Amendment to the Constitution, as well as due process of the Fourteenth Amendment, we submit that a 30 year sentence would be appropriate . . . .

(App. 405-07).

Before the court's consideration at the time of sentencing were facts related to Petitioner's age; education level; his family and home environment leading up to and at the time of the offense; the circumstances of the offense including the involvement of co-defendants and the potential that Petitioner acted in response to peer pressure; his inexperience with the criminal justice system; and other hallmarks of youth and maturity developed throughout the duration of Settles' trial and sentencing proceeding. These are the very considerations delegated by *Aiken v. Byars*, *supra* at 544, 765 S.E.2d at 577 (quoting *Miller v. Alabama, supra* at 477-78, 132 S.Ct. at 2468)). But the trial court also had before its consideration the details of a cold-blooded robbery-turned-murder and Petitioner's hesitancy to take responsibility for the victim's fate. *See Graham v. Florida, supra* at 59, 130 S.Ct. at 2021 (term-of-years sentence must not be grossly disproportionate to the circumstances particular to the case). Ultimately, the court expressly found age a mitigating circumstance requiring the application of a 45-year sentence in lieu of the potential maximum.[12] (App. 425). The sentencer reasoned as follows:

[12] Settles received the benefit of a second sentencing decision when he later waived jurisdiction over an unrelated Abbeville County charge and pled guilty in Greenwood County. That plea was heard in tandem with the State's motion to reduce Settles' sentence for the present Greenwood

Mr. Settles, out of fairness to you I feel obliged to tell you what has gone into this sentence. Ms. Castro's comments are something that are – they're succinct and they're dead-on. You've got your life. Your family has you. Mr. Sis does not have his anymore. And that is because of actions that you and three others took that evening, and it's as simple as that. Does the Court believe, based upon the jury's verdict, that you are the person who shot Mr. Sis? Yes. Mr. Settles, the jury has spoken in this case and I understand perhaps some hesitation that you have to accept full responsibility for this, but understand, sir, that you had numerous options that evening for avoiding where you have found yourself today. You could have gotten out of the car. You could have told them to stop and pull over and just stepped out. You could have tried to discourage the other guys from doing this. And it's not lost on this Court, Mr. Settles, that very often members of our Hispanic community here in Greenwood are sometimes targeted because the belief is some of them are not here legally and, therefore, if a crime is committed against those individuals who are not here legally the likelihood of them reporting that crime is less. Now, there's no evidence in the record in this case that you or any of the other fellows in that car specifically targeted a Hispanic individual, and clearly I'm not going to take into account any ethnic background or any nation of origin in calculating a sentence because in all, at least in my mind, Mr. Settles, a man is a man whether he's black, white, Hispanic, American Indian, whatever. It does not matter. And it does not matter, as Ms. White correctly pointed out the other day, it doesn't matter whether Mr. Sis was here legally or not. He has a right to exist. He has a right that every individual has and that's the right to breathe clean air and not have that right taken from him. You took that from him. I've taken into account the fact that you have no prior history. **I agree with Mr. Tinsley that although the law might consider a [seventeen]-year-old to be a man there are certain developmental delays. Maybe you were not fully mature. Maybe emotionally you're not fully there. And that certainly mitigates somewhat the horrible crime that you did commit.**

Now, there are several other individuals charged with this offense. There will be a day of reckoning for them. Mr. Settles, your protestations of, shall we say, less active participation in this, the Court's just not buying it. I heard you testify, and I understand that it's the policy of this Court, and it's well known, that **I try to encourage people and reward people who are willing to take responsibilities for their actions with as much leniency as possible. And that's what Mr. Tinsley was talking about with regard to the 30 year sentences, Mr. Settles. But sometimes it's best to try a case so that the Court can get a full and complete picture of the horror that was inflicted on an innocent person**

County murder due to his providing substantial assistance to the State in the Abbeville matter. Settles ultimately pled guilty for a negotiated forty-year sentence on the Abbeville County charge, to run concurrent with the reduced sentence on the Greenwood conviction. (App. 482-524).

> **who wanted nothing more than to do what the rest of us want to do** and that is earn a living, get married, provide for a family and grow old. Well, you've robbed Mr. Sis for every day that he's going to have for the rest of his life. You should be happy that at some point in time you will, in fact, sir, be getting out of prison.

(App. 426, line 25 – 429, line 22 (emphasis added)).

As the sentencing record bears out, the trial court assigned credence to Settles' age and lack of prior criminal record. (App. 424). When the court issued its sentence, it reasoned that Petitioner had available "numerous options that evening for avoiding where [he] found himself today." (App. 427). The trial court expressly considered Settles' age as an indicator that he was "not fully mature." (App. 427). But the trial court also had before its consideration Settles' refusal to take responsibility for his involvement in the murder[13] and the crime's attendant aggravating circumstances, including the senseless targeting of an unknown pedestrian by a group of young men. The victim sustained several gunshots in an unprovoked attack. (App. 361-70).

Since the trial court expressly considered the hallmarks of Petitioner's youth at sentencing, and since Petitioner did not receive a sentence of life without parole, the Court of Appeals did not err in affirming the sentencing hearing employed in this case. Petitioner did, for the aims of his trial court, receive "a full blown sentencing hearing," a concept *Aiken* purposely left undefined. *Aiken* only encourages the court to consider relevant mitigating factors related to a youthful defendant's crime and circumstance. *Aiken v. Byars, supra* at 544-45, 765 S.E.2d at 577; *Cf. Miller v. Alabama, supra.* The trial court here found no necessity to fund a mitigation

[13] When Settles addressed the court sentencing he said he "still remain[s] innocent to [him]self because [he] know[s] what happened." (App. 422). He apologized, but did not accept sole responsibility. (App. 422-23 and 426). Settles also answered more questions posed by counsel, stating that he did not own a gun, was not a fighter, did get out of the car, and that he felt "like [he] needed to get away from the situation" as it unfolded. (App. 423-24).

investigation and was instead prepared to consider circumstances attendant to Settles' age and issue a term-of-years sentence. Our courts have found the trial court's reflection of relevant circumstances attendant to the youth of a defendant under the age of eighteen necessary in sentencing. Settles' sentencer did just that and no abuse of discretion results.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should affirm the convictions and sentence for murder and possession of a weapon during the commission of a violent crime.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

CAROLINE M. SCRANTOM
Assistant Attorney General

THE HONORABLE DAVID STUMBO
Solicitor, Eighth Judicial Circuit

By: 
CAROLINE SCRANTOM
SC Bar No. 101357
Office of Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

January 22, 2019
Columbia, South Carolina

RECEIVED
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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2018-001662

THE STATE,

Respondent,

v.

TAVARIOUS SETTLES,

Petitioner.

PROOF OF SERVICE

I, Caroline Scrantom, counsel for the Respondent, certify that I have served the within Brief of Respondent by depositing two (2) copies of the same in the United States mail, addressed to his attorneys of record at:

John W. Roberts, Esq.
Willoughby & Hoefer, P.A.
P.O. Box 8416
Columbia, South Carolina 29202

Robert Dudek, Esq.
SCCID/Division of Appellate Defense
1330 Lady Street, Suite #401
Columbia, South Carolina 29201

I further certify that all parties required by Rule to be served have been served. This 22nd day of January, 2019.

CAROLINE SCRANTOM
Assistant Attorney General
SC Bar No. 101357