

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from York County
Grace Gilchrist Knie, Circuit Court Judge

THE STATE,

Respondent,

v.

JOSHUA K. CRAMER,

Appellant.

Appellate Case No. 2017-002471

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I.

Did the trial judge err in dismissing appellant's motion for resentencing where a life sentence imposed upon an eighteen-year old sharing the same developmental qualities and characteristics as offenders under age eighteen violates federal and state constitutional requirements of an individualized, proportionate sentence?

II.

Did the trial judge err in dismissing appellant's motion for resentencing where a life sentence imposed upon an eighteen-year old sharing the same developmental qualities and characteristics as offenders under age eighteen violates the federal and state constitutional requirements of equal protection under the law?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I.

Did the circuit court err in ruling appellant is not entitled to resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), where appellant was an adult at the time he committed two murders, the court properly found the law only applies to juvenile homicide offenders, and where the science of brain development was already considered by the United States Supreme Court when determining the relief for an unconstitutional sentence?

II.

Is there a valid equal protection claim where there was no requisite discriminatory state action because the circuit court was effectuating a judicially created classification in *Miller*? Moreover, even if there was a valid equal protection claim, were appellant's rights violated by the decision to dismiss his motion for resentencing where he cannot demonstrate he is similarly situated to juveniles because the classification meets the rational basis test, appellant was legally an adult at the time he committed two murders and treated similarly to other adults, and where the science of brain development previously withstood constitutional scrutiny?

STATEMENT OF THE CASE

Appellant was almost nineteen-years old at the time he committed two murders, a fact acknowledged by all parties.¹ (Tr.p.5, line 21). On July 28, 1998, appellant pled guilty to two counts of murder, accessory before the fact of murder, third-degree arson, two counts of possession of a weapon during the commission of a violent crime, and distribution of marijuana. (Tr.p.5, lines 17-20; R* (indictments)).

Thomas A. McKinney and John Rhea represented appellant during the plea proceeding. (Plea, p.1). Through negotiations, it was agreed the State would not seek the death penalty, and some charges would be dismissed. (Plea, p.2). The parties also agreed to life sentences, but left it in the judge's discretion whether the sentences would be served concurrently or consecutively. (Tr.p.6, lines 12-16; Plea, p.2). The Honorable John C. Hayes, III, accepted appellant's guilty pleas and sentenced him to two consecutive life sentences for murder and concurrent terms of life for accessory before the fact of murder, ten years for arson, and five years for the marijuana charge. (Tr.p.6, lines 16-18; R* (sentencing sheets)).

Appellant filed a resentencing motion pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), on September 17, 2015, and sought appointment of counsel. (*Aiken* motion). Appellant wrote to the Clerk of Court on September 19, 2016, asking about the status of his motion and the Clerk responded Appellant's age at the time of his arrest could affect whether he qualified for resentencing. (Sept. 9, 2016 & Oct. 2, 2016 letters). The Clerk forwarded both letters to the solicitor's office. Deputy Solicitor Willy Thompson informed Appellant by letter his motion would not be considered due to his age. (Tr.p.6, line 23-p.7, line 1; May 15, 2017

¹ Appellant was eighteen-years and ten months old at the time of the crimes. (Tr.p.5, line 21; *Aiken* memo, p.1).

letter). Appellant appealed the letter and, on June 7, 2017, the Supreme Court issued an order dismissing the appeal as the letter from the solicitor's office was not a decision by a lower court. (Tr.7, lines 2-3; June 7, 2017 order). However, the Court remanded the case to the circuit court to determine if the motion for resentencing was properly filed. (Tr.p.7, lines 3-7; June 7, 2017 order).

Pursuant to a "Memo to File," the chief administrative judge appointed the Sixteenth Circuit Public Defender's Office to represent appellant. (June 27, 2017 memo). On September 6, 2017, the Supreme Court assigned the Honorable Grace Gilchrist Knie to preside over the motion for resentencing. (Sept. 6, 2017 order). Judge Knie appointed the public defender's office to represent appellant by order dated September 26, 2017, and set a scheduling order for the case. (Sept. 26, 2017 order).

On November 6, 2017, a hearing was held on appellant's motion before Judge Knie. (Tr.p.1). Appellant was represented by Harry Dest and Melissa Inzerillo, and the State was represented by Willy Thompson. (Tr.p.1). At the end of the hearing, the judge took the matter under advisement. (Tr.p.33, lines 9-19). By order dated November 20, 2017, Judge Knie denied appellant's motion for resentencing, finding *Aiken* did not apply to appellant's case because he was not a juvenile at the time he committed murder. (*Aiken* order, p.1; p.3).

This appeal follows.

I.

The circuit court did not err in ruling appellant is not entitled to resentencing pursuant to *Aiken* as appellant was an adult at the time he committed two murders, the court properly found the law only applies to juvenile homicide offenders, and the science of brain development was already considered by the United States Supreme Court when determining the relief for an unconstitutional sentence.

Appellant is not entitled to re-sentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), as he was an adult at the time he committed two murders. All parties acknowledge appellant was almost nineteen years old. By their plain language, *Aiken* and the case on which it relies, *Miller v. Alabama*, 567 U.S. 460 (2012), apply only to juvenile homicide offenders and appellant is not part of that class. Neither our courts nor the United States Supreme Court have extended the *Miller* rule to apply to any other type of offender.

Moreover, the science appellant relies on to argue his brain was developmentally that of a juvenile was virtually identical to that already considered by the *Miller* Court when it drew the line for purposes of juvenile sentencing at age eighteen. If the Court had intended its new rule to apply to offenders near to, rather than under, eighteen, it had the scientific facts to do so. The Supreme Court chose not to. The circuit court properly followed precedent. Accordingly, appellant's sentence is not cruel and unusual punishment, and the circuit court did not err in denying his motion for resentencing.

Facts of the Murders

Appellant pled guilty to two counts of murder, accessory before the fact of murder, arson, two weapons charges, and distribution of marijuana. (Tr.p.5; R* (indictments)). In a written statement, appellant admitted he shot Marcus Hinton and Tyrone Anthony in the head on March 2, 1998, because he thought they were part of a plan to steal a pound of marijuana from him, and

later burned their bodies in a car. (Stmt., pp.1-4). Appellant also admitted he tried to shoot Gregory Sims, but his gun misfired. (Stmt., p.4). Two co-defendants later told appellant they shot and killed Sims for him. (Stmt., pp.4-6). Appellant indicated he threw his “gun and clip” in a lake and tried to clean blood from his driveway. (Stmt., pp.5-6). Appellant further stated, Ryan, the person who actually stole the marijuana later called to ask if he had seen the victims, and told appellant “he wanted to bring the drugs back and that he just wanted out.” (Stmt., p.5). Appellant indicated the marijuana was not returned and admitted he discussed killing Ryan “because he was the last link.” (Stmt., pp.5-6).

Through negotiations, it was agreed the State would not seek the death penalty, and some charges would be dismissed. (Plea, p.2). The judge accepted appellant’s guilty pleas and sentenced him to two consecutive life sentences for murder and concurrent terms of life for accessory before the fact of murder, ten years for arson, and five years for the marijuana charge. (Tr.p.6; R* (sentencing sheets)).

Motions for Resentencing and Return

On September 17, 2015, appellant moved for resentencing pursuant to *Aiken*, and submitted a *pro se* motion. (*Aiken* motion). In his motion, appellant asserted he was entitled to resentencing because he “was a teenager at the time of arrest” and sentenced to life without parole. (*Aiken* motion, p.1). Following appointment of the Sixteenth Circuit Public Defender’s Office, Harry Dest and Melissa Inzerillo submitted a motion and memorandum in support of appellant’s request for resentencing to present at the hearing. (June 27, 2017 memo; Sept. 26, 2017 order; *Aiken* memo). Counsel argued appellant was entitled to resentencing pursuant to *Aiken* because he “exhibited the same attendant characteristics of youth as those under” eighteen, “and is therefore similarly situated to the class” protected by *Miller* and *Aiken*. (*Aiken* memo,

pp.2-3). Counsel asserted to find otherwise violated appellant's due process and equal protection rights. (*Aiken* memo, pp.3-16). Specifically, counsel maintained "[i]t is now widely accepted scientifically that 'children are different,' and that these differences result from how a child's brain develops" and "[i]t is generally accepted that this development continues until about the age of 25." (*Aiken* memo, pp.4-5). Counsel asserted appellant should be treated the same as juvenile homicide offenders given the science of brain development regardless of the fact he was over the age of eighteen at the time he committed murder. (*Aiken* memo, pp.5-16). Counsel concluded appellant was entitled to resentencing. (*Aiken* memo, p.16).

The State responded and argued *Aiken* did apply because appellant was not legally a juvenile at the time he committed the crimes. (Return p.1). The State maintained appellant did not meet the requirements set out by the United States Supreme Court in *Miller* or our Supreme Court in *Aiken*, and the circuit court was without legal authority to resentence appellant. (Return pp.1-2).

Hearing on *Aiken* Motion

A hearing on appellant's motion was held on November 6, 2017, before Judge Knie. (Tr.p.1). Defense counsel argued appellant was entitled to resentencing because even at eighteen he exhibited the same characteristics of youth the Supreme Court mandated a court examine prior to sentencing a juvenile to life without parole, and to find otherwise violated appellant's due process and equal protection rights. (Tr.p.9, line 1-p.10, line 21). Counsel asserted the psychological and neurological studies *Miller* and *Aiken* relied on applied to appellant despite the fact that he was eighteen. (Tr.p.8, lines 18-25). Counsel detailed the science behind brain development, such as the "widely accepted" concept the brain is not fully developed until a person's mid-twenties, the last part of the brain to develop is the prefrontal cortex which deals

with a person's ability to assess risk, studies which suggest the emotional reaction of people between the ages of sixteen and nineteen "are basically the same" and, while people between the ages of eighteen and twenty-five have the cognitive abilities of an adult, they still exhibit the emotions "associated with teenagers." (Tr.p.10, line 22-p.11, line 13).

Defense counsel also asserted varying state statutes treated individuals beyond the age of eighteen differently such as the Youthful Offender Act (YOA) or sentencing within the Department of Juvenile Justice. (Tr.p.11, lines 14-23). Counsel argued even the Supreme Court acknowledged it was "an arbitrary line that defines a juvenile as one under the age of" eighteen. (Tr.p.11, line 24-p.12, line 11). Counsel maintained the *Miller* factors should apply to appellant particularly because he could demonstrate rehabilitation in prison and failure to consider the factors resulted "in a violation of the prohibition against cruel and unusual punishment." (Tr.p.13, line 1-p.14, line 6). Counsel requested a resentencing hearing pursuant to *Aiken* for the reasons articulated in his argument and in the brief before the court. (Tr.p.14, lines 7-11).

The deputy solicitor argued an examination of the *Miller* factors, though not required or necessary, demonstrated a life sentence was warranted in appellant's case given the brutal nature of the crime, appellant was the "key defendant," i.e. the ringleader, and because three people were killed following the theft of marijuana. (Tr.p.15, line 20-p.17, line 8). The solicitor also noted the age of majority was eighteen pursuant to the South Carolina constitution and state law which was the age when a person could vote, purchase firearms, enter contracts, enter the military, and enjoy other adult rights. (Tr.p.17, lines 8-19). The solicitor further asserted the United States Supreme Court in *Miller* and our Supreme Court in *Aiken* already considered the science of brain development when setting out the relief for juvenile homicide offenders. (Tr.p.17, line 20-p.18, line 25).

Finally, the deputy solicitor argued the *Aiken* Court specifically referred in its opinion only to juveniles, as did the case on which it relied, *Miller*, so that appellant was not entitled to relief because he was undisputedly an adult at the time of his crimes. (Tr.p.19, line 1-p.20, line 11). The solicitor argued the court did not have the authority to resentence appellant because the case law did not allow resentencing for adults in these situations. (Tr.p.20, line 12-p.21, line 8). The solicitor contended appellant was an adult at the time he entered into the plea agreement—a contract with the State—and the court could not interfere with the terms particularly where appellant was represented by attorneys who, through the post-conviction relief process, were determined to be effective.² (Tr.p.21, line 9-p.22, line 13). The solicitor argued “the Constitution is upheld by treating an adult as an adult” and appellant’s due process and equal protection rights were protected. (Tr.p.25, lines 7-11). The solicitor explained it would open “Pandora’s box” to extend the resentencing rule established in *Miller* to homicide offenders older than eighteen based “solely on what experts say regarding someone’s mental capacity in their youth” because there must be a line drawn somewhere.³ (Tr.p.25, line 11-p.26, line 6). The solicitor argued appellant was an adult when he committed the crime, was sentenced as an adult, and was not entitled to resentencing pursuant to *Aiken*. (Tr.p.26, line 15-p.27, line 2).

Following a brief argument in reply, Judge Knie took the matter under advisement.

(Tr.p.33).

² The solicitor also argued Justice Beatty’s order remanding the case to circuit court was not a comment on the merits of appellant’s case, but followed guidelines set out in a prior order of the Court which required automatic appointment of a judge and an attorney because it contemplated those who filed *Aiken* actions would be juvenile homicide offenders rather than adults. (Tr.p.22, line 14-p.25, line 6).

³ It was also noted that those eligible for the YOA were nonviolent offenders, not violent criminals, and they were certainly not responsible for three murders like appellant. (Tr.p.26, lines 7-14).

Order Denying Resentencing Pursuant to *Aiken*

By order dated November 20, 2017, Judge Knie denied appellant's motion for a resentencing hearing, finding *Aiken* did not apply to appellant's case because he was not a juvenile at the time of the crimes. (*Aiken* order, p.3). Specifically, the judge found appellant was not under the age of eighteen as required by *Miller* and *Aiken*, and "did not present any evidence or testimony on the issue of his age at the time of the incident to contest this information at the hearing." (*Aiken* order, pp.2-3). Judge Knie explained the procedural posture of *Aiken*:

A small group of plaintiffs were selected as part of a class of juveniles incarcerated at the time serving a life sentence. The questions before the South Carolina Supreme Court were whether the rule in *Miller* applied retroactively and whether that subclass of plaintiffs could be afforded an individualized sentencing hearing wherein the sentencing court could determine a sentence based on evidence presented on factors associated with youth and the circumstances of the crime.

(*Aiken* order, p.2). The judge noted the *Aiken* Court considered juveniles anyone under the age of eighteen for purposes of relief. (*Aiken* order, pp.2-3). Judge Knie found appellant did not fit the definition of a juvenile as set out in *Miller* and *Aiken* and denied resentencing. (*Aiken* order, p.3).

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)). The appellate court is bound by the lower court's factual findings unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). This Court reviews questions of law *de novo*. *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012) (citations omitted).

Resentencing Does Not Apply to Adult Homicide Offenders

The Eighth Amendment prohibits cruel and unusual punishment. U.S. Const. amend. VIII. In *Miller v. Alabama*, 567 U.S. 460 (2012), the United States Supreme Court held mandatory life without parole sentences for juvenile homicide offenders violated the Eighth Amendment's prohibition against such punishment. 567 U.S. at 465, 470. *Miller* did not categorically bar life sentences for juvenile murderers; rather, the Court held 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 a factor which carries with it immaturity, irresponsibility, and recklessness. *Id.* at 476. Further, the age of the defendant, along with his family background, and mental and emotional development must be considered in assessing his culpability. *Id.* The Court held a juvenile convicted of murder could still be sentenced to life without parole, but only after an individualized hearing in which the various mitigating factors were considered. *Id.* at 479-80.

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

Two years later, 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). Recognizing the potential burden on states tasked with re-litigating cases where a juvenile received mandatory life without parole, the Court explained states could remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than resentencing them. *Id.* The Court found allowing “those offenders to be considered for parole ensures those whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.” *Id.* However, *Miller*, *Aiken*, and *Montgomery*, address only juvenile homicide offenders—those defendants who were under the age of eighteen at the time they committed their crimes.

Appellant Not Similarly Situated to Class of Juveniles in Aiken

Appellant asserts the *Aiken* Court held the principles of *Miller* were not restricted to only the fifteen inmates who were part of the class before the Court, but applied to those “similarly situated” such as himself who was an adult and exhibited the same characteristics of youth as those under the age of eighteen. However, such a reading of the language used by the Court in

Aiken is too broad and outside the scope of the case's procedural posture and context at the time it was decided. Tyrone Aiken and the named plaintiffs were part of a class of about three dozen inmates serving sentences of life without parole for homicide offenses committed while they were juveniles. When the Court used the phrase "similarly situated," it was referring to those people beyond the fifteen named plaintiffs—i.e. the two dozen or so inmates not named in the case, but also serving life without parole. The Court was not referring to someone such as appellant who is outside of the class of inmates serving life because he was an adult at the time he committed murder and was sentenced as such. Read in context, the holding in *Aiken* only applies to juvenile homicide offenders. See *Aiken*, 410 S.C. at 545, 765 S.E.2d at 578 ("We hold the principles enunciated in *Miller v. Alabama* apply retroactively to those petitioners, to those similarly situated, and prospectively to all juvenile offenders who may be subject to life imprisonment without the possibility of parole."). *Aiken* and *Miller* do not apply to any other type of offender and have not been so broadly construed to include the argument made by appellant that he is entitled to resentencing because he was the "functional equivalent" of a juvenile at the time he committed murder.

U.S. Supreme Court Precedent Establishes Age of Juveniles

As the circuit court properly noted, and as our Supreme Court has already acknowledged, the United States Supreme Court precedent establishes a bright line of eighteen between being a juvenile and an adult. *Miller* explicitly recognized the line in its holding. 567 U.S. at 465. The *Miller* Court did not make any exceptions for young adults, anyone slightly older than eighteen, or any offender other than someone younger than eighteen. Following the Supreme Court, our Court in *Aiken* similarly defined juveniles in South Carolina as a person less than eighteen and noted:

In South Carolina, pursuant to Section 63-19-20 of the South Carolina Code (2010), a juvenile is a person less than seventeen years of age. However, *Miller* extends to defendants under eighteen years of age and therefore for the purposes of this opinion we consider juveniles to be individuals under eighteen.⁴

410 S.C. at 537 n.1, 765 S.E.2d at 573. Neither Supreme Court has extended the *Miller* rule beyond the age of eighteen.

Courts around the country that have considered this issue have overwhelmingly determined the holding in *Miller* does not apply to offenders over the age of eighteen. See *United States v. Chavez*, 894 F.3d 593, 609 (4th Cir. 2018), *cert. denied*, 139 S.Ct. 278 (2018) (rejecting the argument by two defendants who were eighteen and nineteen years old when sentenced to mandatory life for murder in aid of racketeering that their sentences were unconstitutional pursuant to *Miller*); *United States v. Young*, 847 F.3d 328, 364-65 (6th Cir. 2017) (finding *Miller* did not apply because the offender was twenty-two years old at the time of offense); *Cruz v. Muniz*, No. 2:16-cv-00498, 2017 WL 3226023, at *6 (E.D.C.A. July 31, 2017) (citing *Miller*, 567 U.S. at 479) (dismissing a habeas petition based in part on *Miller* by noting “the fact that petitioner was three months shy of his nineteen birthday as the time he committed the crime of conviction does not affect the Eighth Amendment analysis dictated by the Supreme Court. Although petitioner was young, he was not legally a juvenile”); *Thomas v. Arnold*, No. 3:16-cv-02986-WQH-NLS, 2017 WL 2424133, at *3 (S.D. Cal. June 2, 2017) (“Petitioner, whose crime was committed at age twenty, cannot rely on Supreme Court authority applicable to juveniles.”); *Guzman v. Rozum*, No. 13-7083, 2017 WL 1344391, at *17 (E.D. Pa. Apr. 12, 2017) (finding because defendant was nineteen years old at time of offense *Miller* did not apply); *Tate v. Link*, No. 17-365, 2017 WL 1363335, at *2 (E.D. Pa. Mar. 23, 2017) (“*Miller* does not

⁴ The statutory definition will change effective July 1, 2019, to “a person less than eighteen years of age.”

apply to Tate because Tate was twenty years old at the time of his crime.”); *Adkins v. Wetzel*, No. 3-3652, 2017 WL 1030704, at *3 (E.D. Pa., Mar. 17, 2017) (finding defendant conceded he was not younger than eighteen years of age at time of offense so he was not entitled to relief); *Ricciardi v. Lane*, No. 16-266, 2017 WL 3084589, at *3, 17 (W.D. Pa., Mar. 8, 2017) (finding *Miller* did not apply because defendant was twenty at time of the offense); *White v. Delbalso*, No. 17-cv-443, 2017 WL 939020, at *2 (E.D. Pa. Feb. 2, 2017) (finding *Miller* does not apply because White was twenty-three years old at the time of his crime); *Martinez v. Pfister*, No. 16-cv-2886, 2017 WL 219515, at *5 (N.D. Ill. Jan. 19, 2017) (citing *Miller*, 567 U.S. at 470) (finding meritless the *Miller* claim because Martinez was not a juvenile at the time he committed the crimes for which he was convicted); *Meas v. Lizarraga*, No. 15-cv-4368, 2016 WL 8451467, at *14 (C.D. Cal. Dec. 14, 2016) (citing *Miller* and *Graham v. Florida*, 560 U.S. 48, 75 (2010)) (finding petitioner was not a juvenile at the time he committed his crimes because he was nineteen years old and “under existing Supreme Court precedent, Petitioner cannot establish that his sentence violates the Eighth Amendment on the basis of his age at the time of his crimes”); *Miller v. Warden Mooney*, No. 2:16-cv-5041, 2016 WL 7375015, at *13 n.3 (E.D. Pa., Dec. 19, 2016) (finding *Miller* has no applicability to Petitioner because he was twenty-two years of age at the time of the offense); *Buckner v. Montgomery*, No. 16-8471 JAK (JCG), 2016 WL 7975311, at *2 (C.D. Cal. Dec. 2, 2016) (finding *Miller* applied only to those under the age of eighteen and because petitioner committed his crimes at the age of eighteen, “any newly recognized right stemming from *Miller* decision is not applicable to” him). The case law demonstrates the conclusion *Miller* and its holding apply only to individuals younger than eighteen.

Few courts have extended the *Miller* rule to homicide offenders beyond the age of

eighteen. Two such cases appellant relies on in support of his position are easily distinguishable. The first is *People v. House*, 72 N.E.3d 357 (Ill. App. Ct. 2015). In that case, the Illinois Court of Appeals ruled a life sentence imposed on a nineteen year old violated the *state* constitution. *House*, 72 N.E.3d at 384, 389. However, *House* has since been vacated by the Illinois Supreme Court, stating:

In the exercise of this Court's supervisory authority, the Appellate Court, First District, is directed to vacate its judgment in *People v. House*, case No. 1-11-0580 (12/24/15). The appellate court is directed to consider the effect of this court's opinion in *People v. Harris*, 2018 IL 121932, on the issue of whether defendant's sentence violates the Proportionate Penalties Clause of the Illinois Constitution.

People v. House, 111 N.E.3d 940 (Ill. 2018) (Table).

Next, the United States District Court for the District of Connecticut also recently granted a new sentencing hearing to a habeas petitioner who was eighteen years and twenty weeks old at the time he committed his offense. *Cruz v. United States*, No. 11-cv-787 (JCH) 2018 WL 1541898, at *1 (D. Conn. Mar. 29, 2018). Yet, the holding in *Cruz* was expressly rejected by two federal district courts. *See Commonwealth v. Mabine*, No. 1009 EDA 2018, 2018 WL 5262369, at *3 (Pa. Super. Ct. Oct. 23, 2018) (“We find appellant’s reliance on this case, which was decided by a federal trial court, unavailing.”); *Heard v. Snyder*, No. 16-14367, 2018 WL 2560414, at *2 (E.D. Mich. June 4, 2018) (finding the defendants had not they were entitled to relief and “the new non-binding case out of the district court of Connecticut does not change this determination,” the court noted further, “The federal courts, now save one, have drawn a bright line and refused to extend to defendants over the age of eighteen, the Supreme Court’s holding in *Miller*.”). As noted by the court in *Heard*, “The Connecticut court’s holding is a lone outlier.” *Heard*, 2018 WL 2560414, at *3.

Beyond *Miller* is years of Supreme Court precedent holding the bright line between adults and juveniles is eighteen for purposes of the Eighth Amendment's prohibition against cruel and unusual punishment. Before *Miller*, the Court in *Graham* prohibited imposing life without parole on juvenile offenders under the age of eighteen who did not commit homicide. 560 U.S. at 74-75, 82. The Supreme Court also recognized the line in *Roper v. Simmons*, 543 U.S. 551, 574-75 (2005) (holding capital punishment cannot be imposed on defendants under the age of eighteen). While the Court in *Roper* acknowledged drawing a line at eighteen was subject "to the objections always raised against categorical rules," it explained, "The qualities that distinguish juveniles from adults do not disappear when an individual turns [eighteen]. By the same token, some under [eighteen] have already attained a level of maturity some adults will never reach. *Id.* at 574. Nevertheless, *Roper* concluded a line must be drawn and, "[t]he age of [eighteen] is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest." *Id.* The *Miller* opinion cited to both *Roper* and *Graham* and drew the line for sentencing purposes at age eighteen. That is the appropriate line in Eighth Amendment jurisprudence. Accordingly, appellant's sentence is not unconstitutional because he was almost nineteen when he committed his crimes.

Science of Brain Development Already Considered When Determining Relief in Miller

Finally, the science appellant relies on to argue his brain was developmentally the same as a juvenile so that he is entitled to resentencing is virtually identical to that already considered by the Supreme Court in *Miller*. Had the Court meant for its holding to include those whose age exceeded the age of eighteen, it had the scientific facts available to do so. Instead, the Court chose to draw the line at eighteen. The circuit court properly followed precedent and this Court

should decline to revisit an issue already decided by the Supreme Court.

At the hearing on appellant's motion and in the brief before this Court, appellant detailed the science of brain development, included the concept the brain is not fully developed until a person's mid-twenties and the last part of the brain to develop is the prefrontal cortex which deals with a person's ability to assess risk. (Tr.p.10, line 22-p.11, line 13; FBOA, p.*). This is the same type of scientific evidence the Supreme Court heard in *Miller*. The Court in the *Miller* opinion explained "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,— for example in parts of the brain involved in behavior control." *Miller*, 567 U.S. at 471-72. In support, the Court cited to scientific articles and *amicus* briefs submitted by other experts in the field. *Id.* If the Supreme Court had intended its new rule to apply to those near to, rather than under, the age of eighteen, it certainly had the scientific facts to hold so explicitly. Yet it chose not to. Given that there is essentially no difference in the scientific evidence presented, this Court should not reach a conclusion different from *Miller*.

Therefore, because appellant was an adult at the time he committed murder, his sentence is not cruel and unusual punishment, and the circuit court did not err in denying his motion for resentencing.

II.

Appellant's equal protection right argument fails because there was no requisite discriminatory state action as the circuit court was effectuating a judicially created classification in *Miller*.

Appellant fails to make a valid equal protection claim because there was no discriminatory state action which treated him differently. The circuit court was effectuating a judicially created classification by the Supreme Court in *Miller* which distinguished between juvenile and adult homicide offenders. Regardless, even if this Court were to find an equal protection claim, appellant's rights were not violated by the circuit court's decision to deny his motion for resentencing. The classification distinguishing adults and juveniles for sentencing purposes meets the rational basis test. Appellant cannot demonstrate he is similarly situated to juveniles convicted of homicide because he was legally an adult at the time he committed his crimes.

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). The appellate court is bound by the lower court's factual findings unless they are clearly erroneous. *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829. This Court reviews questions of law *de novo*. *Whitner*, 399 S.C. at 552, 732 S.E.2d at 863. When evaluating an equal protection challenge, if there is no suspect or quasi-suspect class and no fundamental right abridged, the "rational basis" standard is used to determine whether the classification falls into a prohibited group. *Bodman v. State*, 403 S.C. 60, 69, 742 S.E.2d 363, 367 (2013) (citing *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004)).

No Cognizable Equal Protection Claim

Respondent first notes the circuit court did not rule on appellant's equal protection argument when denying his motion for resentencing. The court simply ruled appellant was not a juvenile at the time he committed his crimes pursuant to relevant case law which was not decided on equal protection grounds, and granted the State's motion to dismiss the request for resentencing. Additionally, appellant did not file a post-hearing motion seeking a ruling on the issue. Consequently, it is questionable whether the argument is preserved for review in this Court. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal."). However, because the issue was presented to the lower court in a memorandum and during the hearing, respondent addresses it out of an abundance of caution.

Second, respondent asserts appellant fails to make a valid equal protection claim because there was no state action he can attack. In granting the State's motion to dismiss appellant's request for resentencing, the circuit court was effectuating a judicially created distinction by the Supreme Court in *Miller* which treats juvenile homicide offenders differently than adults for sentencing purposes. *Miller*, 567 U.S. at 465, 480. Our state Supreme Court adopted *Miller*'s definition of juveniles in *Aiken*, extending the statutory language, and acknowledged it was doing so. *Aiken*, 410 S.C. at 537 n.1, 765 S.E.2d at 573. Neither of these were state actions or choices the state made to create a classification. Accordingly, appellant fails to make a cognizable equal protection claim.

Appellant's Equal Protection Rights Were Not Violated

The Equal Protection Clause of the United States Constitution guarantees: "No State shall

... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The South Carolina Constitution provides no “person shall be denied the equal protection of the laws.” S.C. Const. art. I, § 3. A person making an equal protection claim must show similarly situated persons received disparate treatment. *State v. Walker*, 422 S.C. 89, 92, 810 S.E.2d 38, 40 (2018) (citing *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995)). Not all classifications are unconstitutional—for “[t]he equal protection clause only forbids irrational and unjustified classifications.” *Bodman v. State*, 403 S.C. 60, 69, 742 S.E.2d 363, 367 (2013).

A classification will survive rational basis review when it bears a reasonable relation to the legislative purpose sought to be achieved, members of the class are treated alike under similar circumstances, and the classification rests on a rational basis. *Doe v. State*, 421 S.C. 490, 504, 808 S.E.2d 807, 814 (2017); *Bodman*, 403 S.C. at 69, 742 S.E.2d at 367. As our Supreme Court cautioned, “a challenger coming under rational basis review fac[es] a steep hill to climb:”

[T]hose who challenge the validity of [a classification] under rational basis review must “negate every conceivable basis which might support it.” Furthermore, “it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.” The classification also does not need to completely achieve its purpose to withstand constitutional scrutiny. Moreover, “[t]he fact that the classification may result in some inequity does not render it unconstitutional.”

Bodman, 403 S.C. at 69-70, 742 S.E.2d at 367-368 (internal citations omitted). Appellant cannot show a state created division, but if he could, he also cannot meet the rational basis test because he cannot demonstrate adult homicide offenders and juvenile homicide offenders are similarly situated.

Appellant’s equal protection rights were not violated by the circuit court’s dismissal of

his resentencing motion. The classification—distinguishing between adults and juveniles for sentencing purposes—meets the rational basis test. The classification bears a reasonable relation to the legislative purpose sought to be achieved. The purpose is to allow those offenders convicted of the most serious crime to also face the most serious punishment, and to protect the public, while still adhering to the constitutional prohibition against cruel and unusual punishment. Appellant was legally an adult at the time he committed murder as identified by decades of Supreme Court precedent, the state constitution, and a pending change to the statutory language.

Members of the class are treated alike under similar circumstances. All adults who meet the elements of the crime of murder will be treated the same. They will face the same charge, can raise whatever defenses available at trial or choose to plead guilty as appellant did here, but they cannot argue they are juveniles and enjoy the protections afforded someone under the age of eighteen. Despite appellant's argument to the contrary, he is not *legally* similarly situated to juveniles. As respondent asserted above, the phrase "similarly situated" used in *Aiken* referred to those inmates beyond the fifteen named plaintiffs—the two dozen or so people not named in the case, but also serving life without parole. The Court was not referring to someone such as appellant who is an adult. Read in context, the holding in *Aiken* only applies to juvenile homicide offenders. *See Aiken*, 410 S.C. at 545, 765 S.E.2d at 578 (holding "the principles enunciated in *Miller v. Alabama* apply retroactively to those petitioners, to those similarly situated, and prospectively to all juvenile offenders who may be subject to life imprisonment without the possibility of parole"). Appellant was an adult and treated similarly as other adult homicide offenders.

Finally, the classification rests on a rational basis. Our legislature enacted laws, such as

S.C. Code Ann. § 16-3-10 and -20, and § 63-19-20, to define murder and provide for its sentence, and define a juvenile. The language in the statutes is rationally based on the legislature's policy of defining crimes and sentences to inform the public of what is expected of them, and its policy of promoting a safe community. As explained above, the science appellant relies on to argue his brain was developmentally the same as a juvenile so there can be no rational basis for treating him differently, ignores the fact that the evidence was already considered in the constitutional context by the Supreme Court in *Miller*. The Court heard science detailing how a brain develops, understood the differences between the juvenile and adult brain, and chose to draw the line for sentencing purposes at age eighteen. The equal protection claim appellant alleges, particularly based on the science, has already withstood constitutional scrutiny. *See Bodman*, 403 S.C. at 69-70, 742 S.E.2d at 367-368 (cautioning "a challenger coming under rational basis review fac[es] a steep hill to climb" because he must "negate every conceivable basis which might support it" and "[t]he fact that the classification may result in some inequity does not render it unconstitutional").

As a result, the classification based on distinguishing between juveniles and adults for purposes of sentencing for murder has a rational basis in the promotion of the legislative policy of promoting the safety of the public and allow those offenders convicted of the most serious crime to also face the most serious punishment. At the same time, it adheres to the constitutional prohibition against cruel and unusual punishment by providing individualized sentencing for those who are legally juveniles at the time they commit murder. Appellant was not legally a juvenile at the time he committed his crimes. Accordingly, there is no violation of the Equal Protection Clause.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted the decision of the circuit court granting the State's motion to dismiss and denying the request for resentencing should be affirmed.

Respectfully submitted,

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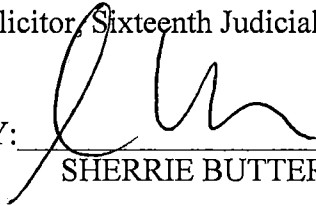
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February 19, 2019.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from York County
Grace Gilchrist Knie, Circuit Court Judge

RECEIVED
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SC Court of Appeals

THE STATE,

Respondent,

v.

JOSHUA K. CRAMER,

Appellant.

Appellate Case No. 2017-002471

CERTIFICATE OF SERVICE

I, Sherrie Butterbaugh, counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, addressed to his attorney of record: Susan B. Hackett, 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 19th day of February, 2019.



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ATTORNEY FOR RESPONDENT



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February 19, 2019

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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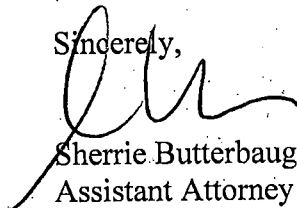
SC Court of Appeals

Re: *The State v. Joshua K. Cramer*
Appeal from York County
Appellate Case No. 2017-002471

Dear Ms. Kitchings:

Enclosed for filing please find the original Initial Brief of Respondent and Designation of Matter, together with Proof of Service in the above-referenced case. If you should have any questions, please feel free to contact me.

Sincerely,



Sherrie Butterbaugh,
Assistant Attorney General

SB

Enclosures

cc: Susan B. Hackett, Esq. (w/two copies of encls.)
The Honorable Kevin S. Brackett, Solicitor 16th Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)