STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Spartanburg County
Edward W. Miller, Circuit Court Judge

THE STATE,

Respondent,

v.

ERIC DALE MORGAN,

Appellant.

Appellate Case No. 2018-001465

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I.

Did the trial court err when it denied appellant—a juvenile offender serving a life without parole sentence imposed in 200[6]—a resentencing hearing pursuant to the South Carolina Supreme Court's decision in *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), which granted new sentencing hearings to all juvenile offenders serving previously imposed life without parole sentences?

II.

Did the trial court err in admitting Judge J. Derham Cole's testimony regarding his 200[6] decision to sentence appellant to life without parole, where the testimony was not relevant to the question of appellant's entitlement to a resentencing hearing and where the State cannot satisfy its burden under *In re Whetstone*, 354 S.C. 213, 580 S.E.2d 447 (2003), to establish the testimony was "critical" to address the question of appellant's entitlement to a resentencing hearing?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I.

Did the circuit court err in dismissing appellant's motion for resentencing where appellant already received the relief contemplated in *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), at which time the previous sentencing judge had expressly examined, although not articulated at the time, the factors set out in *Miller v. Alabama*, 567 U.S. 460 (2012), and *Aiken* during the resentencing hearing, and gave due consideration to the mitigating hallmark features of youth?

II.

Is the argument the State failed to meet its burden of demonstrating Judge J. Derham Cole's testimony was critical evidence preserved for appellate review where the assertion was not advanced below? Further, did the circuit court err in admitting evidence of the factors of youth considered in appellant's previous resentencing where it was relevant to determining the limited issue of whether he was entitled to another resentencing hearing?

STATEMENT OF THE CASE

A Spartanburg jury convicted appellant of murder, armed robbery, and possession of an explosive device on March 9, 2004. (*Aiken* order, pp.1-2). Appellant was seventeen-years old at the time of the crime, and sixteen days away from turning eighteen. (*Aiken* Tr.p.15, lines 9-11). Clay T. Allen, James R. Poole, and Karen Quimby represented appellant at trial. (*Aiken* order, p.2). The Honorable J. Derham Cole on return of the jury's recommendation[1] of a death sentence imposed the sentence, and sentenced appellant to a consecutive thirty years for armed robbery and a concurrent fifteen years for possession of an explosive device.[2] (R.* (sentencing sheets); *Aiken* order, p.2).

During appellant's direct appeal, the Supreme Court vacated his sentence of death pursuant to *Roper* based on appellant's age at the time he committed the murder. *State v. Morgan*, 367 S.C. 615, 626 S.E.2d 888 (2006). The Court remanded the case to Judge Cole for resentencing and held appellant could present evidence that he was entitled to a sentence less than life imprisonment. *Id.* at 618-19, 626 S.E.2d at 889. Following a resentencing hearing on March 17, 2006, Judge Cole sentenced appellant to life without the possibility of parole. (*Aiken* order, p.2). Appellant did not appeal the sentencing determination.

Appellant moved for resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), on July 12, 2016, because he was seventeen-years-old at the time of the crime. (*Aiken* mot.). The State moved to dismiss the action arguing appellant already had the benefit of

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[1] Although termed recommendation, a death sentence is mandatory and the jury must be instructed the recommendation will be followed. *State v. Davis*, 306 S.C. 246, 250, 411 S.E.2d 220, 222 (1991).

[2] Appellant was tried prior to the United States Supreme Court's decision holding the Eighth Amendment barred capital punishment for juvenile offenders. *See Roper v. Simmons*, 543 U.S. 551 (2005).

a resentencing hearing meeting the requirements of *Aiken* when Judge Cole heard evidence appellant should be sentenced to less than life. (State mot.). A hearing was held on November 15, 2017, before the Honorable Edward W. Miller. (*Aiken* Tr.p.1). Lindsey S. Vann represented appellant and Barry Barnette and Derrick Bulsa represented the State. (*Aiken* Tr.p.1). At the end of the hearing, Judge Miller announced he would take the matter under advisement. (*Aiken* Tr.p.40, lines 18-20). On March 2, 2018, the judge ordered the State's motion to dismiss be granted. (*Aiken* order, p.1; p.6). Judge Miller found relief was not warranted because "Judge Cole properly analyzed and considered the necessary youth characteristics when sentencing [appellant] to life without parole. Therefore, the 2006 resentencing hearing conforms to *Aiken v. Byars* and there is no evidence to suggest it was improperly conducted." (*Aiken* order, p.4).

Appellant filed a Rule 59(e), SCRCP, motion to alter or amend the ruling, and the State opposed the motion in a written response. (59(e) mot.; State resp.). By order filed August 3, 2018, Judge Miller denied the motion to alter or amend the judgment. (59(e) order).

This appeal follows.

I.

The circuit court did not err in ruling appellant is not entitled to resentencing as he already received the relief contemplated in *Aiken*, and the court properly found the previous sentencing judge had expressly examined, although not articulated at the time, the factors set out in *Miller* and *Aiken* during the resentencing hearing, and gave due consideration to the mitigating hallmark features of youth.

The circuit court did not abuse its discretion in finding appellant was not entitled to resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), as appellant already received a new sentencing proceeding in which the mitigating factors of youth were fully explored. Neither *Aiken* nor *Miller v. Alabama*, 567 U.S. 460 (2012), mandate a certain procedure be followed prior to resentencing. The only requirement is an examination by the sentencer of factors related to youth and the record demonstrates Judge Cole considered the necessary information prior to sentencing appellant. Critically, the judge testified he received a "relatively complete picture" of appellant's youth from testimony presented at the resentencing hearing, a review of the death penalty trial and sentencing transcripts, and statements made by appellant. Life was not a foregone conclusion during the resentencing hearing. Judge Cole explicitly stated he considered all possible sentences for murder, including a term-of-years. It was only after a full examination of the factors, although not articulated as such at the time, set out in *Miller* and *Aiken* that the judge sentenced appellant to life without parole. Accordingly, appellant is not entitled to a new resentencing hearing because the first one comported with *Miller* and its progeny.

Motion for Resentencing and Response

On July 12, 2016, appellant moved for resentencing pursuant to *Aiken*, and submitted a motion through counsel. (*Aiken* mot.). Appellant asserted he was entitled to a new sentencing

hearing because he received a life sentence for a murder he committed when he was seventeen years old. (*Aiken* mot., p.2).

The State moved to dismiss the motion and argued *Aiken* did not apply to appellant's case. (State mot., p.2). The State asserted appellant had the benefit of a resentencing hearing meeting the requirements of *Aiken* in 2006 when Judge Cole heard evidence appellant should be sentenced to less than life. (State mot., pp.1-2). The State argued appellant already had the opportunity to present mitigating evidence of the factors of youth. (State mot., p.2).

Aiken Hearing

A hearing on appellant's motion was held on November 15, 2017, before Judge Miller. (*Aiken* Tr.p.1). The State first moved into evidence without objection all five volumes of the Record on Appeal in appellant's direct appeal following his death penalty trial. (*Aiken* Tr.p.4, line 19-p.5, line 2). The State then argued for dismissal because appellant was not entitled to relief pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), given his second sentencing hearing when evidence was considered he was entitled to a sentence of less than life. (*Aiken* Tr.p.8, line 15-p.9, line 2). The State called Judge Cole to the stand and defense counsel objected. (*Aiken* Tr.p.9, lines 17-19). Counsel argued "a judge should not be called to impeach or vouch for his own verdict" and it was similar to Rule 606, SCRE, which limits when a juror can be called to testify. (*Aiken* Tr.p.9, lines 21-24). Counsel also asserted an *Aiken* resentencing was a "de novo resentencing," and it was "not relevant to consider what Judge Cole determined at the prior sentencing hearing." (*Aiken* Tr.p.9, line 24-p.10, line 5).

The parties acknowledged the transcript from the 2006 hearing was not available.[3]

[3] The transcript is not available because appellant did not appeal the ruling from the 2006 resentencing and any court reporter tapes have been destroyed. (*Aiken* Tr.p.39); *see also* Rule 607(i), SCACR (providing for court reporters to retain records for a period of five years).

(*Aiken* Tr.p.10, lines 6-10). Judge Miller allowed Judge Cole's testimony over defense counsel's objection, and ruled it would be "directed at a reconstruction of the record" and confined to what he considered during sentencing. (*Aiken* Tr.p.10, lines 11-15).

Judge Cole testified he had been a circuit court judge for twenty-five years and indicated he presided over previous death penalty cases, including appellant's trial. (*Aiken* Tr.p.12, lines 8-24). The judge testified he recalled appellant's age, evidence of premeditation and planning, and indicated those were factors he considered before resentencing appellant. (*Aiken* Tr.p.14, line 24-p.16, line 3). The judge also recalled appellant wore latex gloves during the robbery because he did not want to leave fingerprints at the scene and admitted it during his statement to law enforcement. (*Aiken* Tr.p.16, lines 4-13).

Judge Cole also testified about the sentencing phase of the trial. The judge stated the defense presented witnesses such as appellant's mother, a teacher, and friends which gave him a "relatively complete picture" of appellant's youth. (*Aiken* Tr.p.16, line 19-p.17, line 5; p.22, lines 9-13). An expert also testified who provided a social history for appellant. (*Aiken* Tr.p.17, lines 6-12; p.17, lines 20-23).

Judge Cole testified he reviewed everything from the death penalty trial prior to the resentencing hearing in 2006. (*Aiken* Tr.p.18, lines 6-14). The judge acknowledged he dealt with issues related to youth in and out of the courtroom whether it was from defendants or his own children, and young defendants do not always understand the risks and consequences of their actions, and that is something he "always" considers during trial. (*Aiken* Tr.p.18, line 15-p.19, line 12). The judge testified he considered appellant's family life and home life prior to resentencing appellant. (*Aiken* Tr.p.19, lines 13-20). Judge Cole also considered appellant's interactions with his peers which revealed itself in his statement and his interactions with police

and attorneys from his statement and actions at trial. (*Aiken* Tr.p.19, line 21-p.20, line 2; p.20, line 10-p.21, line 4). The judge also considered the circumstances of the crime when determining the proper sentence for appellant. (*Aiken* Tr.p.20, lines 3-9). Finally, Judge Cole testified evidence of appellant's rehabilitation was presented and considered in 2006. (*Aiken* Tr.p.21, lines 5-11). The judge acknowledged he considered a sentence of less than life for appellant, but believed a term of life was proportional to the crime even given the mitigating factors he considered. (*Aiken* Tr.p.21, line 12-p.24, line 2).

On cross-examination, Judge Cole admitted *Miller* and *Aiken* had not been decided at the time of appellant's resentencing, but testified he considered the same factors contemplated in those decisions. (*Aiken* Tr.p.24, line 15-p.25, line 3). The judge stated he did not make any specific fact-findings regarding the factors, but such a requirement was not necessary. (*Aiken* Tr.p.25, lines 4-6).

Following the testimony, the solicitor argued resentencing was not warranted because Judge Cole considered the same factors contemplated in *Miller* and *Aiken*, including the possibility of rehabilitation. (*Aiken* Tr.p.26, line 3-p.27, line 18). The solicitor maintained a third sentencing hearing was not necessary, particularly given the evidence presented from the expert, school teacher, and other mitigating factors. (*Aiken* Tr.p.27, line 19-p.28, line 8). Defense counsel countered juvenile sentencing had evolved since 2006 and *Aiken* recognized the shift by finding judges previously were not considering the constitutional significance of youth and they must do so. (*Aiken* Tr.p.28, line 21-p.29, line 25). Counsel asserted the *Miller* factors did not exist at the time of resentencing so appellant's sentence could not be constitutional. (*Aiken* Tr.p.30, lines 1-9).

The court questioned whether the Supreme Court articulation of the factors in *Aiken*

mandated a new sentencing hearing when "the sentencing judge considered the factors at the original hearing." (*Aiken* Tr.p.30, lines 13-19). Defense counsel argued *Aiken* contemplated that scenario and the Court determined, even when testimony about youth was presented, it was still constitutionally defective because it was not examined through the lens of *Miller*. (*Aiken* Tr.p.30, line 20-p.31, line 12). Counsel asserted youth had more significance now and life without parole could only be considered for the rarest of juveniles. (*Aiken* Tr.p.32, line 7-p.33, line 3; p.35, line 22-p.37, line 15). Counsel also maintained it was not clear what was considered in 2006 because of the lack of a transcript. (*Aiken* Tr.p.33, line 4-p.34, line 7). Counsel stated the investigation and presentation would be different at an *Aiken* resentencing hearing than during a death penalty trial, but she was not sure what evidence that would be presented because the case had not yet been investigated fully. (*Aiken* Tr.p.34, line 13-p.35, line 12).

The solicitor countered appellant's case was different because he had the benefit of a death penalty sentencing hearing, a resentencing hearing in 2006, and testimony the factors of youth were considered by the judge even if they were not articulated as such. (*Aiken* Tr.p.41, lines 4-19). The circuit court took the matter under advisement. (*Aiken* Tr.p.40).

Order Denying Resentencing

By order dated March 2, 2018, Judge Miller denied appellant's petition for a resentencing hearing and granted the State's motion to dismiss, finding *Aiken* did not apply to appellant's case because "Judge Cole properly analyzed and considered the necessary youth characteristics when sentencing [appellant] to life without parole. Therefore, the 2006 resentencing hearing conforms to *Aiken v. Byars* and there is no evidence to suggest it was improperly conducted." (*Aiken* order, p.4; p.6). The judge first explained the case arose from the armed robbery and shooting death of a convenience store employee on May 3, 2000. (*Aiken* order, p.1). Appellant admitted

he shot the victim once in the head as he closed the store, stole a bag of money, and he and his co-defendant originally planned to blow a hole in the back of the store with a pipe bomb. (*Aiken* order, p.1; Stmt. 2, pp.2-4).

Judge Miller next detailed the history of juvenile sentencing cases. He explained they forbid sentencing schemes that mandate life without parole for juvenile offenders and require a sentencing judge to fully consider the mitigating hallmark features of youth. (*Aiken* order, pp.2-3). The judge discussed Judge Cole's testimony and found he considered appellant's age, premeditation of the crime, appellant's "thought process given his age," his immaturity, the way appellant interacted with his peers, appellant's "participation in the crime," the way he interacted with police officers and his own attorneys, and the possibility of rehabilitation. (*Aiken* order, p.3). Judge Miller found the record supported Judge Cole's testimony given the evidence presented at the sentencing hearing of the death penalty trial which included numerous witnesses in mitigation, such as a social worker who testified about appellant's childhood, his performance in school, and incarceration record. (*Aiken* order, pp.3-4). The judge found the evidence presented examined appellant's home environment and "maturity among other aspects of his life." (*Aiken* order, p.3). Ultimately, Judge Miller found no legal basis for an additional resentencing hearing because the "trial record form[s] a basis from which the five *Aiken v. Byars*, factors could be considered" and "Judge Cole also testified he considered all of the factors." (*Aiken* order, p.4).

Judge Miller went on to find he could not overrule another judge "absent a significant and substantial change in circumstances," and Judge Cole "properly analyzed and considered the necessary youth characteristics" when resentencing appellant in 2006. (*Aiken* order, p.4). The judge found the resentencing hearing conformed to *Aiken* and "it would be improper to have

another sentencing hearing with the objective to either affirm or set aside Judge Cole's 2006 ruling." (*Aiken* order, p.4). Judge Miller also noted, unlike the hearings at issue in *Aiken* where age was only mentioned as a "vague plea for mercy," appellant had the benefit of a death penalty sentencing which demanded "a thorough presentation of mitigating evidence that meets the highest standard." (*Aiken* order, p.5). Judge Miller found Judge Cole had the benefit of the complete trial record including the sentencing hearing when resentencing appellant to life in 2006 and there was nothing to suggest the sentencing hearing was defective. (*Aiken* order, pp.5-6). The judge denied relief and granted the State's motion to dismiss the resentencing motion. (*Aiken* order, pp.5-6).

Motion to Reconsider and Subsequent Order

Appellant filed a Rule 59(e), SCRCP, motion to alter or amend the ruling. (59(e) mot.). Appellant asserted the judge "fundamentally misinterprets" his role in the "post-*Aiken* juvenile sentencing era." (59(e) mot., p.1). Appellant argued he should be allowed to present evidence specific to the attributes of youth at a de novo hearing "to allow the judge to consider such evidence in light of its constitutional significance." (59(e) mot., pp.1-2). Appellant argued the judge incorrectly relied on the 2006 resentencing hearing to find Judge Cole considered appellant's youth prior to resentencing "despite the fact the factors [in *Aiken*] did not exist at the time of the hearing." (59(e) mot., pp.2-3). Appellant reiterated his objection to Judge Cole's testimony and asserted it should be barred under Rule 606(b), SCRE, because it was "no different from a juror being asked to testify about matters occurring during deliberations." (59(e) mot., p.3 n.4).

The State opposed the motion in a written response. (State resp.). The State reasserted its argument appellant already had a resentencing hearing as contemplated by *Aiken*

demonstrated by Judge Cole's testimony in which he "gave particulars of his consideration of [appellant's] youth, relying 'on the entire trial record as well as his independent memory of [appellant].'" (State resp., p.2). The State maintained the nature of appellant's case, given it began as a death penalty trial, was one in which all mitigating factors were considered by and appellant's age "would have been a point of contemplation for all involved" and "given particular attention by someone with Judge Cole's knowledge of South Carolina law." (State resp., p.3).

By order filed August 3, 2018, Judge Miller denied the motion to alter or amend the judgment. (59(e) order).

Analysis

Standard of Review

In criminal cases, appellate courts review errors of law only. *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).

When Resentencing is Warranted in Juvenile Cases

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. 567 U.S. at 465, 470. *Miller* did not categorically bar life sentences for juvenile murderers; rather, the Court held a sentencing court must "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 noted the difficulty of distinguishing "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 479-80. Yet, the Court did not articulate or require any specific factual findings.

In expressing the factors that must be examined prior to sentencing a juvenile to life, the *Miller* Court held a sentencing authority must consider youth a "more than a chronological fact," but also a circumstance which carries with it immaturity, irresponsibility, and recklessness. *Id.* at 476. Further, the defendant's family background, mental and emotional development, and the possibility of rehabilitation 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. In other words, *Miller* mandated only that a sentencing court follow a certain process before imposing a particular penalty and did not require specific words be used. *Id.* at 483.

Likewise, our Supreme Court 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 Court held *Miller* applied to a discretionary sentencing scheme such as ours, and juveniles previously sentenced to life without parole were entitled to resentencing to allow them "to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight." *Id.* at 544, 765 S.E.2d at 577. The Court determined the factors in *Miller* were those which must be considered during resentencing, 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. Critically, the *Aiken* majority

noted, "The United States Supreme Court did not establish a definite resentencing procedure and we likewise see no reason to do so," and explained it trusted trial courts to exercise their discretion wisely to sentence juveniles. *Id.* at 545 n.10, 765 S.E.2d at 578 n.10; *see also Wasman v. United States*, 468 U.S. 559, 563 (1984) (holding a 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). The Court also explained it was not going "so far" as to hold a juvenile's individualized sentencing hearing "should mirror the penalty phase of a capital case," but "the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings."[4] *Aiken*, 410 S.C. at 544-45, 765 S.E.2d at 577.

In 2016, the United States Supreme Court held its rule in *Miller* was retroactive on state collateral review. *Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016). It is notable the Court,

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[4] "[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 (Ill. App. Mar. 3, 2016); *see State v. Riley*, 110 A.3d 1205, 1214 n.5 (Conn. 2015) (noting "there is no clear consensus"). Some courts, like our own, have found *Miller* requires consideration of factors associated with youth. *See e.g., Riley*, 110 A.3d at 1216; *People v. Gutierrez*, 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*, 567 U.S. at 476-77)). Yet other courts have found, while *Miller* requires the sentencing authority to consider mitigating circumstances related to youth, *Miller* does not bind the court to consider a predetermined list of particular factors. *Holman*, 58 N.E.3d at 642, *State v. Ali*, 855 N.W.2d 235, 256-57 (Minn. 2014) (explaining sentencing courts must consider "any mitigating circumstances," including those discussed by the *Miller* Court); *State v. Long*, 8 N.E.3d 890, 895 (Oh. 2014) (finding the factors adopted by the Wyoming Supreme Court in *Bear Cloud, supra*, "may prove helpful" to courts sentencing 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 the sentencing court 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'").

when revisiting its holding in *Miller*, did not take the opportunity to constitutionally require judges to make any specific or formal factual findings when imposing sentences in juvenile homicide cases. *See id.* at 735 (explaining a sentencing court is not constitutionally required to make any specific findings of fact on the record when sentencing a juvenile offender pursuant to the guidelines of *Miller*). The Court explained the decision not to require specific findings spoke "to the degree of procedure *Miller* mandated in order to implement its substantive guarantee." *Id.* Nothing in *Miller* suggests the judge use any particular verbiage or recite any phrase prior to imposing a sentence. Therefore, a closing reading of *Miller* requires an examination of certain factors prior to sentencing a juvenile to life without parole, but neither the United States Supreme Court nor our Supreme Court requires formal fact findings or a specific procedure.

New Resentencing Not Warranted Because Appellant Already Received Relief

The circuit court did not err in its application of *Miller* or *Aiken* because the record demonstrates appellant already received the relief contemplated in both cases. Judge Cole proceeded over appellant's death penalty trial and the 2006 resentencing in which he explicitly testified he considered all possible sentences for murder, including less than life, and he considered factors similar to those set out in *Miller* and *Aiken*. (*Aiken* Tr.p.12; p.14; pp.19-24); *see also Morgan*, 367 S.C. at 618-19, 626 S.E.2d at 889 (remanding appellant's case for resentencing and holding appellant could present evidence that he was entitled to a sentence less than life imprisonment). Judge Cole testified he reviewed the previous penalty phase transcript and relevant statements made by appellant to refresh his memory, and recalled appellant's age, details of his home environment, history in school, evidence of premeditation and planning, and indicated those were factors he considered before resentencing appellant. (*Aiken* Tr.pp.14-16; pp.19-21). During the first trial, an expert testified about the psychosocial assessment she

conducted to determine how appellant grew up, what his home life was like, and to identify successes. (2004 Tr.p.2115, line 19-p.2120, line 21; p.2121, line 6-p.2122, line 18). Judge Cole and the jury heard appellant had a disorganized home life, his parents were not together, both parents were absent a lot, his mother was chronically unemployed or underemployed, appellant did not do well in school, was in some special education classes, and dropped out in the ninth grade. (2004 Tr.p.2126, lines 9-25; p.2128, line 4-p.2129, line 6). The expert testified the overarching themes in appellant's life included loss and abandonment issues, he lacked good judgment about friendships, had limited intellectual ability, and he was introduced early to drugs and alcohol. (2004 Tr.p.2129, line 21-p.2132, line 24).

In addition, family and friends testified on appellant's behalf. A cousin discussed appellant's home life, including the death of his brother when appellant was young and the custody struggles he endured following his parents' break-up, including an absent father after his mother regained custody. (2004 Tr.p.2086, line 25-p.2087, line 3; p.2089, lines 12-24; p.2092, line 2-p.2093, line 13). The cousin also testified about appellant's struggles in school, but stated he was "very good at working with his hands." (2004 Tr.p.2094, line 15-p.2095, line 18). Appellant's mother and grandmother testified about the difficulties appellant faced, such as the lack of a consistent father figure, appellant could not read or write well, his mother's constant struggle to find employment, but appellant was a quiet child who minded adults well. (2004 Tr.p.2110, lines 12-13; p.2111, line 23-p.2115, line 4; 2157, lines 24-25; p.2159, line 25-p.2161, line 7; p.2164, line 21-p.2165, line 4; p.2167, lines 4-18; p.2168, lines 3-24; p.2170, line 24-p.2171, line 13). Others reiterated the general themes of appellant's life, including a friend, teacher, and employer. (2004 Tr.p.2176, line 14-p.2177, line 23; p.2182, lines 16-24; p.2198, lines 9-21; p.2199, line 17-p.2201, line 12; p.2207, line 22-p.2208, line 8). Appellant's previous

employer testified appellant was a great worker who was willing to learn, but he was fired after failing to show up for a couple of days. (2004 Tr.p.2208, lines 12-24; p.2209, line 4-p.2210, line 3).

Judge Cole and the jury also heard about the circumstances of the crime and from the family of the victim. An investigator testified appellant gave three statements in which he admitted to killing the convenience store worker. (2004 Tr.p.1985, line 18-p.1986, line 22). In the first statement, appellant denied any involvement. (2004 Tr.p.2306). Following that, appellant apologized for previously lying to investigators. (2004 Tr.p.2000, lines 9-25). In the second statement, appellant admitted he and friend planned the robbery and described loading the .22 rifle, seeing the worker come out of the store, and appellant shot him because it looked like he was trying to grab a gun. (2004 Tr.pp.2307-09). Appellant and his co-defendant put the body in the victim's car, hid the gun and stolen money in a car in a junkyard, and "ditched" the body and victim's car. (2004 Tr.pp.2309-10; p.2319). Appellant said he committed the crime because he was broke. (2004 Tr.pp.2312-13). Appellant also described the robbery plan, which originally included the use of a pipe bomb to blow a hole in the store's wall, but he and his friend decided that was "stupid." (2004 Tr.p.2312; p.2318). Appellant did not think he would get caught and used latex gloves so he would not leave fingerprints while driving the victim's car. (2004 Tr.p.2313; p.2315). Appellant stated he did not mean to hurt anyone, but things went "haywire." (2004 Tr.p.2313). In the third statement, appellant clarified for investigators where he got the rifle shells and how he built the pipe bomb. (2004 Tr.pp.2327-32).

The co-defendant's sister testified about the night of the murder. She stated appellant would not let her go with him to pick up her brother from the convenience store, and she gave appellant latex gloves she used to bleach her hair after he asked for them. (2004 Tr.p.2002, lines

11-24; p.2003, line 4-p.2005, line 20). The sister testified her brother took a .22 rifle, but she did not see or hear him use it. (2004 Tr.p.2005, line 21-p.2007, line 18). She also stated appellant, who lived with them at the time, was pale after returning home later that night, and he was not acting like himself. (2004 Tr.p.2002; p.2014, line 15-p.2015, line 19).

The victim's nephew told the jury his uncle was a good man and everyone loved him, was easy to talk to, and he was missed. (2004 Tr.p.2044, lines 4-23). Two of the victim's brothers also testified. One stated the victim was good at running businesses and he looked up to him. (2004 Tr.p.2048, line 25-p.2050, line 6). He testified he saw appellant and his co-defendant in the store the night of the murder and saw them leave, but later saw them sitting in a car outside and he did not know why they were still there. (2004 Tr.p.2062, line 2-p.2065, line 16). The other brother testified about the family's early life. He said they grew up poor and the victim went to work in a mill after their father died to help make ends meet. (2004 Tr.p.2-69, lines 19-23; p.2072, lines 12-17; p.2073, lines 4-9). The brother testified everyone like the victim, and appellant's co-defendant had been hired to help the victim lock up the convenience store, which was one of several in the family-owned business. (2004 Tr.p.2073, lines 16-24; p.2075, line 1-p.2076, line 20).

The testimony and appellant's statements to law enforcement were all considered by Judge Cole prior to resentencing in 2006. Judge Cole recalled the detail about the latex gloves and appellant's statement he wore them so he would not leave fingerprints. (*Aiken* Tr.p.16). The judge also stated testimony from people who knew appellant and the expert gave him a "relatively complete picture" of appellant's youth. (*Aiken* Tr.pp.16-17; p.22). Also during resentencing, the judge testified he considered appellant's family life and home life prior to resentencing appellant; his interactions with his peers, police, and his attorneys. (*Aiken* Tr.pp.19-

21). Judge Cole also considered the circumstances of the crime and heard evidence about appellant's rehabilitation. (*Aiken* Tr.pp.20-21). While not articulated as such at the time, Judge Cole considered factors that mirror those set out in *Miller* and *Aiken*. *See Aiken*, 410 S.C. at 544, 765 S.E.2d at 577 (citing *Miller*, 567 U.S. at 477-78) (explaining the factors to be considered by a sentencing court are (1) the hallmark features of youth; (2) the family and home environment; (3) circumstances of the homicide; (4) incompetency associated with youth and how they navigate the legal system; and; (5) the possibility of rehabilitation). In addition, the judge considered a term-of-years sentence as a possibility for appellant, exactly the relief contemplated in *Miller* and its progeny.

Aiken mandates no more than the procedure taken by appellant's sentencer, who took due care to consider all the information before him. *See Aiken*, 410 S.C. at 545 n.10, 765 S.E.2d at 578 n.10 (noting "[t]he United States Supreme Court did not establish a definite resentencing procedure and we likewise see no reason to do so," and explaining it trusted trial courts to exercise their discretion wisely to sentence juveniles). Appellant was sentenced to death, resentencing was ordered, and a new sentencing hearing was held. Judge Cole considered mitigating factors presented by the defense, evidence from the previous proceeding, and then exercised his discretion in sentencing appellant. Judge Cole specifically considered the exact type of information required in *Aiken* and *Miller*, and testified he believed life was the appropriate sentence. (*Aiken* Tr.pp.21-24); *see also Miller*, 567 U.S. at 483 (mandating only that a sentencing court follow a certain process before imposing a particular penalty and did not require specific words be used). Before the judge's consideration at the time of resentencing were facts related to appellant'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 a co-defendant, his inexperience with the criminal justice system, and other hallmarks of youth and maturity developed throughout the duration of appellant's trial and first sentencing proceeding, as well as that developed at the 2006 hearing. But Judge Cole also had before him the details of a cold-blooded robbery-turned-murder, the planning involved in the crime, and appellant's initial hesitancy to take responsibility for it. The information presented to Judge Cole was more than the "vague plea for mercy" referenced in *Aiken*, and the circuit court properly found the judge's analysis comported with *Aiken*. (*Aiken* order, pp.3-4).

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. Judge Cole heard the evidence twice—in 2004 and in 2006—and the circuit court did not abuse its discretion in denying appellant a third chance at sentencing. The judge also expressly relied on evidence of the factors in 2006 when determining a new sentence for appellant. Therefore, because appellant's sentencer considered the hallmark features of appellant's youth at sentencing, the circuit court properly dismissed his petition for resentencing pursuant to *Aiken*. This Court should affirm the circuit court's ruling.

II.

Whether the State met its burden of demonstrating Judge Cole's testimony was critical evidence is not preserved for this Court's review because the argument was not advanced below. Regardless, the circuit court did not err in admitting evidence of the factors of youth considered in appellant's previous resentencing because it was relevant to determining the limited issue of whether he was entitled to another resentencing hearing.

The circuit court did not abuse its discretion in admitting testimony from Judge Cole who previously sentenced appellant. The testimony was relevant and necessary for the limited issue before the court—whether appellant's life sentence entitled him to a third sentencing hearing. Judge Cole's testimony provided details about the information he considered, which included the mitigating characteristics of youth we now consider the *Miller* factors. Notably, the argument that the State failed to meet its burden of demonstrating Judge Cole's testimony was critical to the hearing was never raised to the circuit court. Accordingly, the circuit court did not err in admitting the evidence.

Analysis

Standard of Review

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion "accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 429-30, 632 S.E.2d at 848.

Argument on Appeal is Not Preserved for Review

Part of the argument appellant raises in his brief regarding Judge Cole's testimony is not preserved for this Court's review. Appellant argues the judge's "testimony was inadmissible for

[a] second, independent reason" because a judge should not testify as a witness about actions he took in his official capacity. (FBOA, *). Appellant cites to *In re Whetstone*, 354 S.C. 213, 580 S.E.2d 447 (2003), to contend the State cannot meet its burden of demonstrating the judge's testimony was critical. (FBOA, *).

Appellant did not raise this argument during the hearing before the circuit court or in the Rule 59(e), SCRCP, motion. *See State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004) (explaining for an issue to be preserved for appellate review, it must have been: (1) raised to and ruled upon by the trial court; (2) raised by appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity). The issue raised below was limited to whether Judge Cole "should not be called to impeach or vouch for his own verdict" because it was similar to Rule 606, SCRE, which provides when a juror can be called to testify. (*Aiken* Tr.p.9). Appellant also asserted it was not relevant what Judge Cole considered at the prior sentencing hearing. (*Aiken* Tr.pp.9-10). Appellant reiterated the argument in the motion to amend the ruling. (59(e) mot., p.3 n.4). Appellant never sought, from the State or the circuit court, an argument or determination of whether Judge Cole's testimony was critical to the issue of whether appellant was entitled to a resentencing hearing, or whether it could be obtained by other means. *See State v. Freiburger*, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) (holding if an issue is not presented to and ruled upon by the circuit court, it cannot be raised for the first time to the appellate court). Because this issue was never raised, the circuit court was denied an opportunity to consider, address, or rule upon the argument. Importantly, appellant concedes the issue was not raised below because he asserts this is a "second, independent reason" to find Judge Cole's testimony should have been excluded. As a result, the claim is not properly presented for appellate review to this Court.

Evidence Relevant to Issue Before the Court

On the merits, Judge Cole's testimony was relevant because it allowed the parties to better understand what was presented during the 2006 resentencing hearing and what he considered prior to determining the appropriate sentence for appellant. As all parties acknowledged, the transcript from the new sentencing hearing was destroyed because the ruling was not appealed. Judge Miller allowed Judge Cole's testimony because it aided in a reconstruction of the record. (*Aiken* Tr.p.10); *see also Whitehead v. State,* 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002) (finding when a transcript has been lost or destroyed, an appellate court may remand to have the record reconstructed); *State v. Ladson*, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (Ct. App. 2007) (recognizing the authority of the trial court to reconstruct the record for appellate purposes and holding "the inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present a sufficient ground for reversal") (citations omitted). It was not known at the time the transcript was destroyed, likely in 2011, it would be needed as part of a record for a second resentencing request, particularly given appellant's failure to file a direct appeal or otherwise make a motion to preserve the transcript.

The State presented the testimony of Judge Cole because it was relevant to the question before Judge Miller—i.e. whether appellant was entitled to a third sentencing hearing. *See* Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Judge Miller was not tasked with determining the appropriate sentence for appellant. He was charged with conducting a de novo hearing to determine whether appellant should receive relief pursuant to *Aiken*. In other words, Judge Miller reviewed appellant's existing sentence to determine whether it comported with the Eighth

Amendment's prohibition against cruel and unusual punishment. *See Harmelin v. Michigan*, 501 U.S. 957, 1001, 1004-05 (1991) (forbidding only extreme sentences grossly disproportionate to the crime and holding the appropriate analysis involving a case-specific challenge to a sentence involves comparing the gravity of the offense to the severity of the sentence imposed). Importantly, no single factor is dispositive in the proportionality analysis. *See Solem v. Helm*, 463 U.S. 277, 291, n. 17 (1983) ("[N]o single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment."). Relevant to the determination were the factors considered during the previous sentencing hearings. It was important to know Judge Cole considered appellant's home environment, the circumstances of the crime, how appellant interacted with peers or law enforcement, and other factors relevant to appellant's youth. As Judge Miller properly found, "the trial record form[s] a basis from which the five *Aiken v. Byars* factors could be considered." (*Aiken* order, p.4). Judge Cole's testimony was relevant and necessary to Judge Miller's analysis.

Therefore, because the evidence of the factors considered previously was relevant to the issue before the circuit court, it did not abuse its discretion in admitting and considering Judge Cole's testimony.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment of the trial court as to both issues should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

August 23, 2019.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Spartanburg County
Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

Respondent,

v.

ERIC DALE MORGAN,

Appellant.

Appellate Case No. 2018-001465

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 (2) copies of the same in the United States mail, postage prepaid, and addressed to his attorneys of record: Lindsey S. Vann, Esq., and Hannah L. Freedman, Esq., c/o Justice 360, 900 Elmwood Avenue, Suite 200, Columbia, South Carolina 29201.

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

This 23rd day of August, 2019.

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August 23, 2019

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

Re: *The State v. Eric Dale Morgan*
Appeal from Spartanburg County
Appellate Case No. 2018-001465

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/dmd
Enclosures
cc: Lindsey S. Vann, Esq. (w/two copies of encls.)
Hannah L. Freedman, Esq. (w/two copies of encls.)
The Honorable Barry J. Barnette, Solicitor 7th Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)