ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County

Honorable D. Craig Brown, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JON SMART

APPELLANT

APPELLATE CASE NO. 2017-001754

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

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

2.

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

i.

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

ii.

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

iii.

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

3.

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

4.

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

STATEMENT OF THE CASE

On May 25, 2001, Appellant pleaded guilty before the Honorable Kenneth Goode to the offenses of murder, armed robbery, grand larceny of a motor vehicle, criminal conspiracy, and escape, which occurred on August 12, 1999. R. 1; R. 401 – 403. Judge Goode relinquished jurisdiction and on August 9, 2001, the Honorable Thomas W. Cooper, Jr., sentenced Appellant. R. 25; R. 148, ll. 2-11. Appellant was represented by Frederick Hoefer; C. Kelly Jackson, Greg Hembree, and Barbara Morgan appeared on behalf of the state. R. 25.

Appellant was sentenced to imprisonment for life without the possibility of parole. R. 404. This sentence was negotiated: Appellant pleaded guilty to a negotiated sentence of life without parole in exchange for the state's promise not to seek the death penalty if Appellant cooperated with the state in the investigation of the offenses and the prosecution of his codefendant, and agreed to waive his rights to appeal and post-conviction relief. R. 358, ll. 3-6; R. 349 – 352.

On May 26, 2016, Appellant moved for resentencing pursuant to *Miller v. Alabama*,[1] *Roper v. Simmons*,[2] *Graham v. Florida*,[3] and *Aiken v. Byars*.[4] R. 181 – 182. The South Carolina Supreme Court issued an order vesting the Honorable D. Craig Brown with exclusive jurisdiction over Appellant's motion for resentencing. R. 183. On May 24, 2017, a resentencing hearing was held: Jack Howle, Jr., represented Appellant, and Ernest Finney, III, appeared on behalf of the state. The court took the matter under advisement. R. 288, ll. 7-8. R. 184, 1.

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1 *Miller v. Alabama*, 567 U.S. 460 (2012).

2 *Roper v. Simmons*, 543 U.S. 551 (2005).

3 *Graham v. Florida*, 560 U.S. 48 (2010).

4 *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).

On August 10, 2017, the court resentenced Appellant to life in prison without the possibility of parole. R. 388, ll. 17-24; R. 404.

This appeal follows.

STANDARD OF REVIEW

The standard of review for determining whether a sentencing court complied with *Miller* and *Aiken* has not been articulated by the appellate courts of South Carolina. Appellant submits this Court should apply de novo review to the sentencing court's legal conclusions, and the court's factual findings should be given a heightened abuse of discretion standard of review.

"In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." *State v. Laney*, 367 S.C. 639, 643, 627 S.E.2d 726, 729 (2006). The appellate courts of South Carolina "review questions of law de novo, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012).

The South Carolina Supreme Court observed: "*Miller* is clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution." *Aiken v. Byars*, 410 S.C. at 543, 765 S.E.2d at 576-77. In *Montgomery v. Louisiana*, 136 S. Ct. 718, 729-30 (2016), *as revised* (Jan. 27, 2016), the United States Supreme Court said that "when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful."

In the wake of *Miller* and *Montgomery*, the appellate courts of several states have addressed the standard of review applicable to an appellate review of a *Miller* determination. These courts have noted *Miller*'s instruction that occasions for imposing a life without parole sentence on a juvenile homicide offender should be "uncommon." *Miller*, at 479.

Like South Carolina, when a legal conclusion presents a mixed question of fact and law because it is premised upon testimony and a court's credibility determinations, Pennsylvania's appellate courts "defer to the findings of fact made by the sentencing court as long as they are supported by competent evidence, but give no deference to that court's legal conclusions." *Commonwealth v. Batts*, 163 A.3d 410, 435-36 (Pa. 2017).

In *Batts*, the Supreme Court of Pennsylvania reasoned that under *Miller* and *Montgomery*, "in the absence of the sentencing court reaching a conclusion, supported by competent evidence, that the defendant will be forever incorrigible, without any hope for rehabilitation, a life-without-parole sentence imposed on a juvenile is illegal, as it is beyond the court's power to impose." *Id.* at 435. The Pennsylvania Supreme Court concluded that an appellate court therefore "must review the sentencing court's legal conclusion that [a juvenile] is eligible to receive a sentence of life without parole pursuant to a de novo standard and plenary scope of review." *Id.*

In *People v. Hyatt*, 891 N.W.2d 549, 576 (Mich. Ct. App. 2016), the Court of Appeals of Michigan "clarif[ied] what the abuse-of-discretion standard should look like in the context of life-without-parole sentences for juveniles." The Michigan Court of Appeals held that a "heightened" degree of scrutiny is needed, even under this deferential standard. *Id.* "[A]ppellate review, although done under the abuse of discretion standard, should consider a juvenile life-without-parole sentence as inherently suspect." *Id.* at 577. The reviewing court is "justifiably skeptical" of a sentence to life without parole for a juvenile; "review of that sentence requires a searching inquiry into the record with the understanding that, more likely than not, a life-without-parole sentence imposed on a juvenile offender is disproportionate." *Id.*

The Iowa Supreme Court recently "elaborate[d] on the use of the abuse-of-discretion standard in the juvenile sentencing context," concluding that it would apply a heightened abuse

of discretion standard of review to a juvenile's sentence after a resentencing hearing. *State v. Roby*, 897 N.W.2d 127, 137-38 (Iowa 2017). "[W]hile the review is for abuse of discretion, it is not forgiving of a deficiency in the constitutional right to a reasoned sentencing decision based on a proper hearing." *Id.* at 138.

In *Davis v. State*, 415 P.3d 666, 688 (Wyo. 2018), the Supreme Court of Wyoming agreed that in reviewing individualized juvenile sentencing hearings, it would review legal conclusions de novo, and factual determinations for an abuse of discretion with a heightened scrutiny.

> Our review is for an abuse of discretion, but will not be lenient. Like the Iowa Supreme Court, we will view the sentence as inherently suspect and demand rigor from the sentencing court in its factual findings, its application of the *Miller* factors, and the ensuing sentence. And, like the Pennsylvania Supreme Court, we will review the sentencing court's legal conclusions de novo.

Id.

The Wyoming Supreme Court and the Michigan Court of Appeals both imported guidance from the Eighth Circuit in *United States v. Haack*, 403 F.3d 997 (8th Cir. 2005), which discussed situations that constitute an abuse of discretion. The Eighth Circuit instructed that a discretionary sentencing ruling may be an abuse of discretion

> if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.

Id. at 1004; *Davis*, 415 P.3d at 687; *Hyatt*, 891 N.W.2d at 578.

Appellant submits this Court should apply de novo review to the sentencing court's legal conclusions, and the court's factual findings should be given a heightened abuse of discretion standard of review, viewing a juvenile life without parole sentence as inherently suspect.

ARGUMENT

1.

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

Statement of facts

At age sixteen, Appellant was charged with murder for beating Tracey Pack (Decedent) to death with a pipe on August 12, 1999. R. 401 – 403. Appellant pleaded guilty to a negotiated sentence of life without parole in exchange for the state's agreement not to seek the death penalty if he cooperated with the criminal investigation and the prosecution of his codefendant. R. 353 – 355.

Appellant moved for resentencing in 2016 pursuant to *Aiken v. Byars*, *Miller v. Alabama*, *Roper v. Simmons*, and *Graham v. Florida*, and a hearing was held before the Honorable D. Craig Brown. R. 184; R. 181 – 183. At that hearing, the court heard from: Tammy Smart, Appellant's sister; David Price, Ph.D., a forensic psychologist; Thomas Burgess, a former Clarendon County Sheriff's investigator; and Joe and Andy Pack, the Decedent's brothers. R. 185.

Appellant's sister Tammy Smart testified about the family and home life that surrounded Appellant. Smart was three years younger than Appellant, and described an environment of physical neglect in which both parents abused drugs. R. 192, l. 25 – 193, l. 5; R. 201, ll. 8-10.

Smart said their parents abused alcohol, marijuana, cocaine, methamphetamine or crank, and crack cocaine. R. 193, ll. 6-15. Appellant's parents sold illegal drugs, and used at least one child to exchange the drugs for money with customers. R. 195, l. 12 – 196, l. 5. Smart also recounted physical abuse: "when they were high, they used to—if we, the kids got on their nerves they would always grab the oldest. That's the reason why [Appellant's older brother] left." R. 193, ll. 20-22.

Appellant's parents would often leave the children home alone, unsupervised. R. 192, ll. 13-18. "[M]ost of the time I didn't know where my parents were." R. 192, ll. 11-12. Smart said Appellant took care of her: "he would watch me, get me up for school, you know, make sure I matched and, I mean, fix me food and everything." R. 192, ll. 18-24. Smart failed school the year Appellant was jailed due to absenteeism. R. 197, ll. 4-7.

Appellant was placed at Rimini Marine Institute by the South Carolina Department of Juvenile Justice (DJJ) for the daytime burglary of a neighbor's home to steal mini-bottles of liquor. R. 150, l. 7 – 151, l. 6; R. 158, ll. 7-9. Appellant's parents were using crank or methamphetamine, and smoking crack when Appellant "got sent away." R. 193, ll. 13-17. Smart did not see her brother while he was in DJJ custody: "my mom wouldn't go visit him." R. 198, ll. 17-21. "My parents wouldn't go visit. They wouldn't take me down there." R. 198, ll. 23-24. Appellant wrote his sister letters from DJJ saying that he was not coming home, but that "he was gonna come and pick me up and take care of me because my parents weren't taking care of me and they weren't taking care of him." R. 202, ll. 16-24.

Dr. David Price reviewed voluminous records,[5] interviewed Appellant, performed a forensic psychological evaluation on Appellant, and issued a report of his findings. R. 205, l. 22 – 206, l. 19. Dr. Price was qualified as an expert in clinical psychology without objection,[6] and he was familiar with *Aiken v. Byars*. R. 205, ll. 12-18; R. 206, ll. 22-25. The state did not present any expert testimony at the hearing. Dr. Price's forensic psychological evaluation report was made a court's exhibit, and states that Appellant: "came from a chaotic and dysfunctional family. Drug abuse by members of the family, including parents, indicated the use of marijuana, cocaine, crack cocaine, and methamphetamine." R. 322.

Dr. Price told the court Appellant "was raised in an atmosphere—he was raised in a drug culture, there were drugs plentiful in the home lying around." R. 207, ll. 17-20. Dr. Price explained Appellant "lived in an impoverished environment in which a lot of the income went to purchase drugs. There were violent family arguments between his parents over when drugs ran out. His responsibility was to go score more drugs. He was basically unsupervised. He was in and out of school." R. 208, ll. 1-7.

Dr. Price observed of Appellant's family: "They've all been into drugs. None of them finished high school." R. 210, l. 25 – 211, l. 1. Appellant's parents were "certainly modeling a dishonest and unlawful behavior and just a lack of basic parental supervision." R. 212, ll. 8-10. Dr. Price added that Appellant's parents even stole from Appellant to buy drugs. R. 212, ll. 5-6. Dr. Price opined Appellant's substance abuse at the time of the offense was related to his home

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5 Dr. Price reviewed numerous records regarding Appellant, including: medical, psychiatric, law enforcement, detention, correctional, juvenile justice, and other records. R. 321 – 348.

6 Dr. Price's curriculum vitae was made a court's exhibit, and reveals he has been a licensed clinical psychologist in South Carolina since 1983, and has extensive experience in psychological, neuropsychological, and forensic evaluations, as well as childhood developmental disorders. Dr. Price also holds academic positions at MUSC and USC Spartanburg. R. 290 – 320.

life. R. 211, ll. 16-25. "It's exactly related to that. He lived in a, that family had a drug culture, and they used multiple drugs and they would do anything to get it." R. 211, l. 25 – 212, l. 2.

Appellant's father, mother, and aunt appeared at his initial sentencing in 2001. R. 158, ll. 15-17. Appellant's father said that Appellant had a drug abuse problem, and the family asked the burglary victims to press charges in hopes that Appellant would receive drug abuse treatment through DJJ. R. 158, l. 25 – 159, l. 15; R. 159, ll. 21-23. Appellant's aunt asked the court if Appellant would get help with his drug abuse. R. 164, ll. 20-22.

In resentencing Appellant to life without parole, the court addressed "the second element under *Aiken v. Byars*, the family and home environment surrounding the offender . . ." R. 378, ll. 14-16. The court acknowledged Tammy Smart's testimony: "that most of the time they didn't know where their parents were," that Appellant got her to and from school, and cooked for her. R. 379, ll. 2-7. The court recognized Smart's testimony "about the drug abuse in the home by her mom and father," "[t]hat her mom was an alcoholic, and that cocaine was present in the house and home." R. 379, ll. 8-12. The court recited Smart's testimony there was crack cocaine in the home, drugs were being sold from the home, and Appellant's mother used a child to collect the money for drugs from buyers. R. 379, ll. 13-22.

However the court discounted Tammy Smart's testimony, instead citing the transcript of Appellant's father and aunt's requests at Appellant's sentencing in 2001 that Appellant receive help for drug addiction. R. 380, l. 13 – 382, l. 5. The court said given the family members' statements in the 2001 transcript, Smart's testimony before the court May 24, 2017, about "this perceived family life," "[it] just doesn't add up." R. 382, ll. 6-7; R. 382, l. 13. "It's somewhat difficult for the court to coincide the fact that his own parents would be at the initial sentencing,

that his own parents played a part in having him committed to try to get him some help, if in fact all of this was going on within the home as she said it was."[7] R. 382, ll. 7-13.

Appellant's counsel took exception to this finding by the court. Defense counsel said: "In going over the factors, as far as parents and referring to what they said, obviously, they're not going to get in court and admit to using drugs and everything else." R. 389, ll. 2-6. Counsel continued: "I think they were covering up a lot of things there." R. 389, ll. 8-9.

The court responded: "I understand what you're saying with regards to parents, and you're exactly right. I don't think any parent that's involved in the drug scene, wherein their kids are going in the same struggle, I think they would try to hide it. But I have a hard time lining up, why would they even come to court. Why would they even come to court, speak on his behalf, tell Judge Jenkins and tell Judge Cooper, he needs help. We need to get him help. That doesn't to me, it doesn't line up." R. 392, ll. 8-17. The court continued: "I have got in essence two different lines of testimonies as it relates to that family background." R. 392, ll. 18-19.

Discussion

In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the United States Supreme Court vacated the death sentence of a sixteen-year-old who killed a police officer. Evidence was presented that the defendant experienced a neglectful and sometimes violent upbringing, had a personality disorder, and that his mental and emotional age was younger than his chronological age. *Id.* at 115-16. The Court found this was mitigating evidence that must be considered. "Even the normal 16-year-old customarily lacks the maturity of an adult. In this case, Eddings was not a

[7] Notably, there is no indication in the record Appellant's parents or aunt appeared at either of the resentencing hearings in 2017.

normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve." *Id.* at 116.

In *Roper v. Simmons*, 543 U.S. 551, 578 (2005), the United States Supreme Court held that the "Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." The Court reasoned that a juvenile's diminished culpability and greater prospects for reform make the imposition of the law's most severe penalty disproportional. *Id.* at 570-71.

The United States Supreme Court explained that "[t]hree general differences between juveniles under 18 and adults demonstrate that juveniles cannot with reliability be classified among the worst offenders." *Id.* at 569. First, a lack of maturity and underdeveloped sense of responsibility found in youth often result in impetuous and ill-considered decisions. *Id.* Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.* (citing *Eddings*). Third, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* at 570.

In *Graham v. Florida*, 560 U.S. 48 (2010), the United States Supreme Court revisited sentence proportionality for juveniles under the Eighth Amendment. Graham had been sentenced to life imprisonment for armed burglary and attempted armed robbery, after violating probation for those offenses by committing a home invasion robbery, another attempted robbery, and leading police on a high-speed chase. *Id.* at 53-55. In overturning Graham's life sentence, the United States Supreme Court confirmed that "*Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments." *Id.* at 68. The court noted that "[l]ife without parole is an especially harsh punishment for a juvenile," and explained

that a "16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Id.* at 70.

In *Miller v. Alabama*, 567 U.S. at 481, the United States Supreme Court again analyzed sentence proportionality for juveniles, holding that mandatory life without parole for juveniles violates the Eighth Amendment's prohibition on cruel and unusual punishments. The Court noted the concept of proportionality is central to the Eighth Amendment when considering life without parole offenses imposed on juveniles, and that it had previously likened life without parole for juveniles to the death penalty for adults. *Id.* at 469-70. "[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* at 472.

In *Miller*, 567 U.S. at 478-79, the United States Supreme Court recognized the importance of considering the defendant's family and home environment, saying that "if ever a pathological background might have contributed to a 14-year-old's commission of a crime, it is here. Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him . . ." Mandatory life without parole for juveniles was held unconstitutional, as it precluded consideration of:

> (1) the chronological age of the offender and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence; **(2) the family and home environment that surrounded the offender**; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the incompetencies associated with youth—for example, the offender's inability to deal with police officers or prosecutors (including on a plea agreement) or the offender's incapacity to assist his own attorneys; and (5) the possibility of rehabilitation.[8]

Aiken v. Byars, 410 S.C. at 544, 765 S.E.2d at 577; *Miller*, at 477-78 (internal quotations omitted) (emphasis added).

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[8] Hereinafter referred to as the *Miller* factors.

In *Aiken*, the South Carolina Supreme Court determined that *Miller* applied retroactively to juveniles who received a sentence of life without parole under a non-mandatory sentencing scheme. *Id.* at 545, 765 S.E.2d at 578. "*Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." *Id.* at 543, 765 S.E.2d at 577.

The South Carolina Supreme Court held that "*Miller* requires the sentencing authority take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 544, 765 S.E.2d at 577 (internal quotations omitted) (quoting *Miller*). The South Carolina Supreme Court noted *Miller's* holding, saying that "youth has constitutional significance. As such, **it must be afforded adequate weight** in sentencing." *Aiken*, at 542-543, 765 S.E.2d at 576 (emphasis added). The Court explained that a sentencing court must consider the *Miller* factors listed above during juvenile resentencing hearings. *Id.*

Miller and *Aiken* explicitly require a sentencing court to consider, among other factors, "the family and home environment that surrounded the offender." *Aiken,* 410 S.C. at 544, 765 S.E.2d at 577; *Miller*, 567 U.S. at 477. Relevant "environmental vulnerabilities" include family violence, childhood abuse or neglect, susceptibility to psychological damage or emotional disturbance, household instability or dysfunction, and familial drug or alcohol abuse.[9] *Miller*, 567 U.S. at 473, 476-79.

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9 "Relevant environmental vulnerabilities include evidence of childhood abuse or neglect, familial drug or alcohol abuse, lack of adequate parenting or education, prior exposure to violence, and susceptibility to psychological damage or emotional disturbance." *People v. Gutierrez*, 324 P.3d 245, 268-69 (Cal. 2014) (internal quotations omitted) (quoting *Miller*).

In *Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487 (2018), the South Carolina Supreme Court gave no deference to a PCR court's findings regarding the credibility of witnesses that were based on a review of the trial transcript, because the PCR court did not have the opportunity to directly observe these witnesses. *Id.* at 247, 814 S.E.2d at 493. The South Carolina Supreme Court emphasized that a court reviewing the trial transcript is in no position to judge the credibility of the trial witnesses, where that assessment is "based upon factors the PCR court did not directly observe." *Id.*

In sentencing Appellant to life without parole, the court said: "I have got in essence two different lines of testimonies as it relates to that family background." R. 392, ll. 18-19. Apparently, the court was speaking of Tammy Smart's testimony at the resentencing hearing versus the transcript containing remarks by Appellant's family members in 2001. However, the remarks by the parents were not testimony that the court could observe in order to pass on their credibility, as these people were not before the court. The court was unable to judge the credibility of Appellant's father and aunt based on his reading of the plea transcript, just as the PCR court in *Thompson* was unable to judge the credibility of trial witnesses from reading a trial transcript.[10] Moreover, the court stated it agreed with defense counsel's position that a parent who abused drugs would hide that fact if their child was having the same struggle. Therefore, under the court's own reasoning, the remarks by Appellant's family members in 2001 were compatible with the testimony by Tammy Smart.

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10 Additionally, Appellant's father and aunt were not witnesses, as they were never sworn at the 2001 hearing. Rule 603, SCRE provides: "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."

Inexplicably, the court entirely disregarded testimony by Dr. Price about Appellant's family background, never mentioning Dr. Price's testimony in its analysis of this factor. The Supreme Court of Iowa has observed of the second *Miller* factor: "expert testimony will best assess how the family and home environment may have affected the functioning of the juvenile offender." *State v. Roby*, 897 N.W.2d 127, 146 (Iowa 2017). Dr. Price had been qualified as an expert in clinical psychology without objection. He testified unequivocally in his expert capacity that Appellant had a lack of basic parental supervision, his family had a "drug culture," and that Appellant's substance abuse at the time of the offense was directly related to his family and home environment.

The court's conclusion that Appellant was eligible for life without parole was legal error and an abuse of discretion, because the court misapprehended and misapplied the second *Miller* factor. The court heard testimony that Appellant's home and family environment were characterized by family violence, physical neglect, household dysfunction, and familial drug and alcohol abuse. However, the court failed to heed *Miller* and *Aiken*'s instruction that differences in children counsel against irrevocably sentencing them to a lifetime in prison, by failing to give weight to the testimony of Dr. Price and Tammy Smart. This was mitigating evidence entitled to weight in the court's determination of whether Appellant was eligible for a sentence of life without parole. The court's dismissal of testimony by Tammy Smart and disregard of Dr. Price's testimony about Appellant's neglected and drug-ridden childhood was arbitrary, and a misapplication of *Miller* and *Aiken*. No evidence was presented to contradict this testimony.

2.

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

Statement of facts

Dr. David Price[11] told the court that although Appellant was chronologically sixteen years old at the time of the offense, "if we look at cognitive age he was much younger than that and it was related to the history of poly-substance dependence that he had." R. 207, ll. 11-15. Dr. Price diagnosed Appellant with "a neuro-cognitive disorder to reflect a frontal lobe dysfunction." R. 209, ll. 17-19. Dr. Price explained that Appellant had a lessened ability to reason: "when you do a substantial amount of drugs, particularly early, it [a]ffects the functioning of the frontal lobes and it directly affects impulsivity, aggressiveness, poor judgment, failure to appreciate the consequences of your action." R. 209, ll. 2-7; R. 215, ll. 5-16.

Although all adolescents experience slow development of the frontal lobes, this was magnified in Appellant's case because it was coupled with huffing. R. 208, l. 14 – 209, l. 10. Specifically, Appellant "liked to huff gas, but he'd huff anything. He'd huff embalming fluid; he'd huff paint. He would spend up to eight to ten hours a day huffing . . ." R. 208, ll. 11-14; R. 226, l. 16 – 227, l. 4.

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11 As discussed above in Issue 1, Dr. Price reviewed voluminous records, interviewed Appellant, performed a forensic psychological evaluation on Appellant, and issued a report of his findings. R. 205, l. 22 – 206, l. 19. Dr. Price was qualified as an expert in clinical psychology without objection, and he was familiar with *Aiken v. Byars*. R. 205, ll. 12-18; R. 206, ll. 22-25. Dr. Price's curriculum vitae was made a court's exhibit. R. 290 – 320.

Dr. Price's forensic psychological evaluation report, a court's exhibit, stated that he diagnosed Appellant with a neurocognitive disorder. The report says that Appellant "after two days of 'huffing gas,' did murder [Decedent] with a metal pipe. This aggressive behavior was influenced by his instant drug use superimposed on the organic damages secondary to his years of drug usage on a developing brain, and specifically his frontal lobes." R. 347.

Dr. Price opined that the huffing and neurocognitive disorder "certainly predisposes him to act impulsively without concern for the consequences of his actions." R. 212, ll. 11-19. Neurocognitive disorder is "characterized by failure to appreciate the consequences of your actions, impulsiveness, can be aggressiveness, sensation seeking." R. 213, ll. 3-6. Combined with Appellant's drug use, it "certainly causes you to act without regard for others. It[] makes you pretty primitive in some ways." R. 213, ll. 7-10.

Appellant was evaluated by DJJ on June 30, 1999, at Rimini Marine Institute. R. 220, ll. 1-3. At that time, he was diagnosed with "polysubstance dependence." R. 220, ll. 1-8. DJJ "was aware that [Appellant] had a problem with becoming violent after huffing."[12] *Pack v. Associated Marine Institutes, Inc.*, 362 S.C. 239, 242, 608 S.E.2d 134, 136 (Ct. App. 2004). Dr. Price confirmed that Appellant was dependent on inhalants and other illegal substances during the time period surrounding the offenses. R. 211, ll. 8-25.

Appellant was placed at Rimini by DJJ for a daytime burglary to steal mini-bottles of liquor. R. 150, l. 7 – 151, l. 6; R. 158, ll. 7-9. In committing Appellant to DJJ custody, the family court "ordered substance abuse counseling to specifically address the huffing." R. 151, ll.

12 Appellant's father revealed that when Appellant was intoxicated from huffing, he once "hit [his mother] repeatedly because he did not know who she was." R. 160, ll. 14-18. "[W]hen [Appellant] realized who she was, he stopped and he started crying and he ran out of the house." R. 160, ll. 19-21.

17-20. While at Rimini, DJJ "tested" Appellant "to determine if his purported huffing addiction was true by making gasoline accessible to him." After he attempted to steal the gas, he received counseling, but was still given work furlough with access to gas for lawnmowers. *Pack*, 362 S.C. at 242, 608 S.E.2d at 136; R. 153, l. 24 – 154, l. 1; R. 274, l. 20 – 275, l. 4. Appellant continued to huff gasoline when he had the opportunity, "carrying a rag of gas in his pocket that he would huff with." R. 243, ll. 18-23; R. 226, l. 16 – 227, l. 4.

Appellant's codefendant Stephen Hutto was also placed at Rimini Marine Institute by DJJ. R. 112, l. 13. Rimini was attached to a chicken farm owned and operated by the Pack family. R. 31, ll. 10-15. As part of their DJJ placement, Appellant and Hutto worked in the Pack's chicken houses where they removed dead chickens, threw them away, and checked and replaced foggers on top of the chicken houses. R. 32, ll. 4-12; R. 32, l. 23 – 33, l. 4. Decedent supervised and worked with the boys in the chicken houses. R. 32, ll. 19-21.

A day or two before Decedent was killed, Appellant and Hutto were huffing gasoline stolen from a generator when Hutto suggested they kill Decedent and take his truck. R. 64, ll. 9-15; *Id.* Hutto suggested cutting Decedent's throat, and encouraged Appellant to stab Decedent with a screwdriver or hit him in the head with a pipe. R. 64, l. 13 – 65, l. 18. Appellant thought Hutto was joking. R. 64, ll. 15-21. Both juveniles were within days or weeks of release from Rimini Marine Institute. R. 254, ll. 13-18.

The day of Decedent's death, Appellant and Hutto were deliberately breaking the foggers in chicken houses so that Decedent was distracted and they could huff unobserved. R. 33, ll. 5-9; R. 65, ll. 21-24. Appellant "became intoxicated by huffing gasoline he had secretly funneled from [Decedent's] truck." *Id.* Appellant poured gas on a rag and walked around huffing it. R. 65, l. 25 – 66, l. 1. While they were both huffing, Hutto gave Appellant a metal pipe, and said

Appellant should use it to hit Decedent. R. 65, l. 25 – 66, l. 4. After Appellant huffed more gasoline, Hutto mouthed at Appellant to "do it, do it." R. 66, l. 13-16. Appellant hit Decedent in the head an unknown number of times, bludgeoning him to death. R. 66, ll. 17-18; R. 33, l. 22 – 34, l. 4. Hutto immediately wanted to flee, but Appellant wanted to hide Decedent's body so that his family would not see it.[13] R. 66, ll. 19-24.

The two went on to commit more crimes before they were arrested in Myrtle Beach.[14] R. 22, ll. 16-19. According to the solicitor, it was the state's "belief that Hutto was the brains, [Appellant] was the muscle." R. 108, ll. 16-17. "Each time there was an act it was done by [Appellant], the planning and getting there was mostly done by Hutto." R. 108, ll. 19-21.

Hutto never expressed remorse for the crimes, instead he bragged about the murder. R. 109, ll. 12-24. In contrast, Appellant expressed remorse, saying at his sentencing in 2001: "I'm very sorry for what happened. It wasn't supposed to happen." R. 78, ll. 17-21. Appellant apologized to the Decedent's family, and said: "I think about [Decedent] every day. I think about y'all. That's not going to bring him back I know, and I'm very sorry." R. 165, l. 18 – 166, l. 5. Appellant became tearful when discussing Decedent's death and the events surrounding it with Dr. Price. R. 323.

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13 The boys put Decedent's body in a tarp, hid the body in the woods, and tried to clean up the crime scene. R. 66, l. 24 – 67, l. 16.

14 The pair took Decedent's truck, committed an armed robbery at the Family Dollar, and got into a high-speed police chase where they shot at an occupied police car. R. 35, l. 1; R. 35, ll. 22-25; R. 36, l. 22 – 37, l. 14; R. 39, ll. 2-17.

In sentencing Appellant to life without parole, the court addressed the first *Miller* factor,[15] noted Appellant's chronological age was sixteen and said: "I believe it is safe to say that every 16-year-old, and at least that I've been around, is immature. Impetuosity referring to sudden and rash action, and failure to appreciate the risks and consequences." R. 371, ll. 17-21; R. 373, ll. 5-7.

The court acknowledged Dr. Price's testimony that Appellant was much younger cognitively, and that he had an "inability to make right decisions . . ." due to huffing of gas, "which in essence affected his cognitive reasoning." R. 373, ll. 7-10; R. 373, l. 22 – 374, l. 2. The court recognized Dr. Price testified that "when you do a substantial amount of drugs; particularly early, it affects the functioning of the frontal lobes. As it greatly affects, impulsivity, aggressiveness, poor judgment, failure to appreciate the consequences of your actions." R. 373, ll. 17-22. The court said: "So in addressing Factor No. 1, the immaturity. He's certainly immature. Impetuosity, [Dr. Price] didn't specifically address that." R. 375, ll. 18-21. The court said its "review of all the information pertaining to this case, reveals that it was not a sudden or rash action on behalf of [Appellant]." R. 375, ll. 21-24.

Appellant's defense counsel protested the court's conclusion as to the first *Miller* factor, saying that clearly "his using drugs and huffing, I think it really made the ability to comprehend and [] appreciate the risk of what he was doing, just not there." R. 389, ll. 2-3; R. 389, ll. 9-13.

15 The chronological age of the offender and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate risks and consequences. *Miller*, 567 U.S. at 477; *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577.

The court responded that "Dr. Price opined otherwise, that he appreciated the risks and consequence—risks. Where he appreciated risks . . ."[16] R. 389, ll. 16-18.

The court said: "**regardless** of whether he was huffing or not, the inability or the underdeveloped portion of the frontal lobe of the brain at 16-year-old, recognizing that that is in every, every 16-year-old. Not just [Appellant]. It happened to you, me, everybody else that's ever had the offense of murder. By his own choices of huffing, tremendously impacted that." R. 389, ll. 16-25 (emphasis added). "And his ability, it affected his aggressiveness. **That doesn't excuse what he did.**" R. 390, ll. 2-4 (emphasis added). The court continued, saying everyone in the courtroom knows that using alcohol or drugs "affects our abilities in some way, shape, or form." R. 390, ll. 20-23. The judge said: "voluntary intoxication is not a defense." R. 385, l. 25 – 386, l. 1.

The court focused on the elements of the offense of murder itself—that the killing was with malice aforethought. "I believe the evidence in this case throughout shows some plan . . . that there was some albeit, not very good, that there was some planning throughout here." R. 391, ll. 4-10. "But from the beginning of time, from the beginning of time, in no civilized society, has murder been acceptable. Under any circumstances." R. 393, ll. 17-19. "[T]here is no question, he committed a brutal murder." R. 393, ll. 24-25. "So the mere brutality of this murder at the hands of [Appellant], of which I have gone into ad nauseam . . ."[17] R. 394, ll. 8-10. "At the

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16 This statement is not supported by the record. There is no testimony by Dr. Price that Appellant appreciated risks. As noted above, Dr. Price testified that Appellant's condition led to impulsivity and an inability to appreciate consequences.

17 The court discussed the injury to Decedent's head, that his "skull was absolutely crushed on the left side of his head," and that one of the defendants mentioned being able to "see into his skull." R. 369, l. 8 – 370 l. 2. The court also commented on the innocence of Decedent, someone who "was there to aid, assist and to help, even offering to take these young men to church if they chose to do so." R. 362, ll. 3-6.

end of the day, albeit he was 16-years-old, it was his decision to huff gas. It was his decision to pick up that pole, that 15 or 16-pound pole, and beat [Decedent] to death. It was his decision." R. 395, l. 22 – 396, l. 1.

Discussion[18]

i.

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

Miller and *Aiken* expressly require the sentencing court to consider the "chronological age of the offender and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence." *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577; *Miller*, 567 U.S. at 477-78 (internal quotations omitted).

In *Johnson v. Texas*, 509 U.S. 350, 367 (1993), the United States Supreme Court recognized that a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."

In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Oklahoma Court of Criminal Appeals had conceded Eddings' personality disorder and family history, but cast this evidence aside on the basis that he "knew the difference between right and wrong," and the evidence did not "excuse" the behavior. *Id.* at 113. The United States Supreme Court observed: "From these statements it appears that the Court of Criminal Appeals also considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability." *Id.* This was

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18 Appellant incorporates the legal discussion section from Issue 1, *supra*, into the discussion of Issue 2.

error: "just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing." *Id.* at 116.

As in *Eddings*, it appears from the court's statements here that it considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability. The court said: "regardless of" Appellant's huffing and neurocognitive disorder, that does not "excuse" what Appellant did. R. 389, ll. 16-25; R. 390, ll. 2-4. As was held in *Eddings*, it was error to disregard mitigating evidence simply because it did not rise to the level of legal excuse.

After *Miller*, the Supreme Court of Connecticut overturned a juvenile homicide offender's sentence of one hundred years, explaining: "the record does not clearly reflect that the court considered and gave mitigating weight to the defendant's youth and its hallmark features when considering whether to impose the functional equivalent to life imprisonment without parole." *State v. Riley*, 110 A.3d 1205, 1217-18 (Conn. 2015). Instead, "[t]he main thrust of the court's comments at sentencing related to the innocence of the victims and the choice made by the defendant to commit these senseless crimes." *Id.*

Similarly in *Batts*, 163 A.3d at 437, the Pennsylvania Supreme Court said: "[a]s we read the sentencing court's opinion, it becomes clear that its conclusion that [the defendant's] actions were not the result of his 'unfortunate yet transient immaturity' was based exclusively on the fact that the murder was 'deliberate and premeditated.'" *Id.* "Given this perspective, the conviction of any juvenile of first-degree murder would require the imposition of a sentence of life without parole, as first-degree murder in Pennsylvania is by definition 'deliberate and premeditated.'" *Id.*

Here, the court emphasized the innocence of the victim, and that the offense was the result of Appellant's own "choice" and "decision." The court was preoccupied with the fact that

there had been some "planning." As in *Riley* and *Batts*, in sentencing Appellant to life without parole, the court was focused on Appellant's malice aforethought—an element needed to secure any conviction for murder in South Carolina. The court erred by giving significant weight to the fact that the elements of the offense of murder were met, an improper and irrelevant factor in a *Miller* analysis.

In passing sentence, the court stated it had considered the brutality of the murder "ad nauseam." However, *Miller* recognized that juvenile homicide offenders may be deserving of lesser sentences "even when they commit terrible crimes." Indeed, the defendant in *Roper* committed a horrific murder, kidnapping a woman, duct-taping her entire face and throwing her off a bridge. *Roper*, 543 U.S. at 556. So too, did the defendant in *Miller*, cruelly delivering the final blow and coming back to finish the victim off by arson. *Miller*, 567 U.S. at 467-68. Yet *Miller* counsels against sentencing juveniles to life without parole for murder. 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." *Miller*, 567 U.S. at 480 (emphasis added).

Appellant's diagnosis of a neurocognitive disorder was directly relevant to the first *Miller* factor: age, immaturity, impetuosity, and failure to appreciate risks and consequences. Dr. Price explained this disorder predisposed Appellant to act impulsively without concern for the consequences of his actions, and is characterized by impulsiveness, possible aggression, and sensation-seeking. However, the court afforded this evidence no weight in sentencing Appellant to life without parole. The South Carolina Supreme Court said: "youth has constitutional significance. As such, it must be afforded **adequate weight** in sentencing." *Aiken v. Byars,* at 542-543, 765 S.E.2d at 576 (emphasis added).

Of Appellant's age, the court said "every 16-year-old" is immature. R. 389, ll. 16-25. This was a failure to give youth constitutional significance. Moreover, Appellant was not a typical sixteen-year-old. The court cast aside that Appellant had a neurocognitive disorder—being cognitively much younger than his chronological age, had a history of drug dependence, and was intoxicated from huffing gasoline at the time of the offense. The court erred when it failed to consider this relevant mitigating evidence that should have received significant weight.

ii.

The court erred where it considered Appellant's drug use as aggravating rather than mitigating.

Dr. Price opined Appellant's substance abuse at the time of the offense was related to his home life. R. 211, ll. 16-25. "It's exactly related to that. He lived in a, that family had a drug culture, and they used multiple drugs and they would do anything to get it." R. 211, l. 25 – 212, l. 2.

The judge said that "voluntary intoxication is not a defense," and held Appellant's "decision to huff gas" against him. However, use of drugs and alcohol is a mitigating circumstance in sentencing. "Evidence of voluntary intoxication is a proper matter for consideration by the jury in mitigation of punishment." *State v. Pierce*, 289 S.C. 430, 435, 346 S.E.2d 707, 710-11 (1986), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *Council v. State*, 380 S.C. 159, 177, 670 S.E.2d 356, 365 (2008); *State v. Stone*, 350 S.C. 442, 449, 567 S.E.2d 244, 248 (2002); *State v. Plemmons*, 296 S.C. 76, 78, 370 S.E.2d 871, 872 (1988).

In *Miller*, the United States Supreme Court recognized the defendant's drug use as a factor mitigating against life without parole for a juvenile homicide offender. "No one can doubt

that [Miller] and Smith committed a vicious murder. But they did it when high on drugs and alcohol consumed with the adult victim." *Id.* at 478.

The court erred when it concluded that evidence Appellant used drugs should weigh against him rather than weigh as a mitigating factor, particularly where the testimony was that Appellant's drug use was related to his family's "drug culture." In doing so, the court misapprehended and misapplied the requirement to give youth constitutional significance.

iii.

<u>The court erred where it disregarded testimony from the only expert in the case that Appellant had a reduced capacity to conform his conduct to the law and appreciate the wrongfulness of his actions at the time of the offense.</u>

Miller and *Aiken* expressly require the sentencing court to consider the "hallmark features of youth," including "immaturity, impetuosity, and failure to appreciate the risks and consequence." *Miller*, 567 U.S. at 477-78; *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577.

In *Aiken*, the South Carolina Supreme Court explained: "the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings, in addition to the factors illustrated above." *Id.* at 544-45, 765 S.E.2d at 577. South Carolina law provides that mitigating circumstances in a death penalty case include: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." S.C. Code Ann. § 16-3-20(C)(b)(6) (1976).

Appellant's neurocognitive disorder coupled with his drug use affected his ability to reason, exercise judgment, and appreciate the consequences of his actions. Dr. Price opined that at the time of the incident, Appellant had "**the reduced capacity to conform his impulsive**

behavior to the requirements of the law and to appreciate the wrongfulness of his action and the outcome of his behavior." R. 223, ll. 18-25 (emphasis added). His forensic psychological evaluation report, a court's exhibit, reflects the same. R. 348.

The judge asked how Dr. Price arrived at this conclusion since the attempts to hide the body, clean up the scene, and flee, illustrated to the judge the boys knew what they did was wrong. R. 233, l. 5 – 239, l. 6. Dr. Price explained that "after the fact he realized, he and Mr. Hutto realized it was wrong and they tried to conceal." R. 239, ll. 9-11. However, Dr. Price said Appellant impulsively hit Decedent, and that Appellant's huffing contributed to "failing to appreciate the consequences of . . . a series of impulsive and bad decisions." R. 227, l. 10 – 239, l. 15.

However, the court only considered that "Dr. Price testified that [Appellant] appreciated the wrongfulness of his conduct." R. 375, ll. 15-16. Appellant's counsel correctly objected to the court's finding, saying: "clearly between his upbringing and exposure to drugs, his using drugs and huffing, I think it really made the ability to comprehend and appreciate the risk of what he was doing, just not there." R. 389, ll. 9-13. The court responded that "Dr. Price opined otherwise, that he appreciated the risks and consequence—risks. Where he appreciated risks . . ." R. 389, ll. 16-18. This statement is not supported by the record. There is no testimony by Dr. Price that Appellant appreciated risks. As noted above, Dr. Price testified that Appellant's condition led to impulsivity and an inability to appreciate consequences.

In addition to concluding that Dr. Price said Appellant appreciated risks and consequences when this was not contained in the record, the court disregarded the constitutional significance of Appellant's youth by failing to weigh and consider testimony Appellant had a "reduced capacity to conform his impulsive behavior to the requirements of the law and to

appreciate the wrongfulness of his action and the outcome of his behavior." In doing so, the court misapprehended and misapplied the requirement to consider the chronological age of Appellant and the hallmark features of youth, including immaturity, impetuosity, and the failure to appreciate the risks and consequence. Additionally, this was mitigating evidence permitted in death penalty sentencing hearings that unquestionably has relevance to juvenile life without parole determinations.

3.

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

Statement of facts

At the beginning of the resentencing hearing, the court placed the burden of proof on Appellant. The court said: "since it's your motion, Mr. Howle, or your client's motion. I will propose turning the matter in its entirety over to you and let you present whatever you so desire in addressing those five factors as set forth in *Aiken v. Byars*. Therefore, I will turn it over to you at this time unless there's anything, Mr. Finney, you'd like to add." R. 190, ll. 9-16.

The solicitor argued that the court did not need to consider each factor articulated in *Miller* and *Aiken*; that the court only needed to "look back at what Judge Cooper heard and saw and ask questions about back in 2001 to see if he hit these five factors, if they were covered in front of him. If they were not, then you have the opportunity today to fill in those gaps to see if it would make a change."[19] R. 281, ll. 11-18. The solicitor said: "we ask the court to consider the evidence that's been placed in and to take his petition and deny it with, all due respect, because the Court had opportunity to do that in 2001. They made the right decision and we think you should affirm that decision today." R. 287, ll. 6-10.

19 Appellant pleaded guilty to a **negotiated** sentence of life without parole in exchange for the state's agreement not to seek the death penalty. R. 353 – 355.

Defense counsel responded that "the *Byars* case specifically spells out these things." R. 287, ll. 17-18. The defense said the *Miller* and *Aiken* factors: "certainly counsel against sentencing [Appellant] to a life time in prison." R. 277, ll. 6-21. Defense counsel cited the reduced life expectancy of someone who is in prison. R. 277, l. 25 – 278, l. 4. The defense said the factors listed by *Miller* and *Aiken*: "have been shown and [Appellant's] sentence should be not only changed from life without parole . . ."

Importantly, the court did not make a determination that Appellant was irreparably corrupt in sentencing him to life without parole. As discussed in more detail below in Issue 4, the court determined that there was a possibility Appellant could be rehabilitated. The court acknowledged Dr. Price testified that "he believed to a reasonable degree of medical certainty, that [Appellant] could be a productive member of society." R. 385, ll. 18-20; R. 223, ll. 1-7. The court said that as to the possibility Appellant could be rehabilitated: "The possibility of rehabilitation, there is a possibility." R. 394, ll. 12-13.

However, the court did make statements indicating it believed Appellant was required to present more evidence in order to obtain relief under *Miller* and *Aiken*. The court stated that "no MRI was ever performed on this defendant" "to determine the extent of damage of the frontal lobe that could result from such drug usage." R. 374, l. 24 – 20, l. 5. The court said of Dr. Price's testimony: "Impetuosity, he didn't specifically address that." R. 375, ll. 20-21. The court said Appellant had not been found incompetent to stand trial, and that Appellant was "not insane." R. 383, ll. 15-20; R. 386, ll. 2-3. The court remarked that although Dr. Price reviewed over two-thousand documents in forming his opinions, "he brought no documents of any kind" "for the court to look at . . ." R. 393, ll. 4-8.

The court concluded: "I affirm so to speak, or deny your client's motion and impose a life sentence." R. 395, ll. 15-18. "[T]his court believes that the appropriate conclusion in this matter is that the defendant's motion to set aside his life imprisonment sentence, be denied. Therefore, he is to remain incarcerated for the balance of his natural life." R. 388, ll. 19-24.

Appellant's counsel said: "We would object to the sentence." R. 396, l. 6. "[T]he solicitor did not prove that [Appellant] is incorrigible or non-redemption." R. 396, ll. 17-18. "The burden is on the state to make that showing. And I don't think that the lack of rehabilitating or incorrigible or beyond redemption, was made by the state." R. 396, ll. 20-23. The court responded: "Well I made a ruling." R. 396, l. 25.

Discussion[20]

In determining the Eighth Amendment prohibits the death penalty for juveniles, the United States Supreme Court noted that while it could not "deny or overlook the brutal crimes too many juvenile offenders have committed," "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of **irretrievably depraved character**." *Roper v. Simmons*, 543 U.S. at 570-72 (emphasis added).

In barring life without parole for a juvenile non-homicide offender, the United States Supreme Court in *Graham* emphasized its conclusion in *Roper* that it is "the rare juvenile offender whose crime represents **irreparable corruption**," and noted that because juveniles are more capable of change than are adults, "their actions are less likely to be evidence of irretrievably depraved character." *Id.* at 68-69 (emphasis added).

In *Miller*, 567 U.S. at 479, the United States Supreme Court said: "given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened

[20] Appellant incorporates the legal discussion section from Issue 1, *supra*, into the discussion of Issue 3.

capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be **uncommon**." *Id.* (emphasis added). The Court explained: "That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime represents **irreparable corruption**." *Id.* at 479-80 (internal quotations omitted) (emphasis added).

In *Montgomery v. Louisiana*, 136 S. Ct. at 736, the United States Supreme Court concluded *Miller* had retroactive effect. The Court observed that *Miller* "bar[red] life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect **permanent incorrigibility**." *Id.* at 734 (emphasis added). Montgomery had spent forty-six years knowing he would die in prison. "Perhaps it can be established that, due to exceptional circumstances, this fate was a just and proportionate punishment for the crime he committed as a 17-year-old boy." *Id.* at 736. However, "prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored. *Id.* at 736–37.

In *Tatum v. Arizona*, 137 S. Ct. 11 (2016) (mem.), the United States Supreme Court decided to grant, vacate, and remand five cases of juvenile homicide offenders sentenced to life without parole.

> It is clear after *Montgomery* that the Eighth Amendment requires more than mere consideration of a juvenile offender's age before the imposition of a sentence of life without parole. It requires that a sentencer decide whether the juvenile offender before it is a child "whose crimes reflect transient immaturity" or is one of "those rare children whose crimes reflect **irreparable corruption**" for whom a life without parole sentence may be appropriate. 577 U.S., at ——, 136 S.Ct., at 734. There is thus a very meaningful task for the lower courts to carry out on remand.

Id. at 13. (Sotomayor, J., concurring) (emphasis added).

The United States Supreme Court decisions unambiguously permit a life-without-parole sentence for a juvenile offender only if the crime committed is indicative of permanent incorrigibility; that the crime was not the result of "unfortunate yet transient immaturity." *See Montgomery*, 136 S.Ct. at 726, 734; *Miller*, 567 U.S. at 479; *Graham*, 560 U.S. at 73; *Roper*, 543 U.S. at 573. "Youth has constitutional significance, and unless a juvenile offender suffers from 'irreparable corruption,' a sentence of life without the possibility of parole is improper."[21]

As the Pennsylvania Supreme Court said: "in the absence of the sentencing court reaching a conclusion, supported by competent evidence, that the defendant will forever be incorrigible, without any hope for rehabilitation, a life-without-parole sentence imposed on a juvenile is illegal, as it is beyond the court's power to impose." *Commonwealth v. Batts*, 163 A.3d 410, 435.

A sentence of life without parole is presumptively wrong for a juvenile offender: "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller*, 567 U.S. at 479. *State v. Riley*, 110 A.3d 1205, 1214 (Conn. 2015) (*Miller* suggests the mitigating factors of youth establish a presumption against life without parole for a juvenile offender that must be overcome by evidence of unusual circumstances); *Commonwealth v. Batts*, 163 A.3d at 452 ("[A] faithful application of the holding in *Miller*, as clarified in *Montgomery*, requires the creation of a presumption against sentencing a juvenile offender to life in prison without the possibility of parole); *Cf. People v. Gutierrez*, 324 P.3d 245, 249 (Cal.

21 Robert M. Dudek, *A Meaningful Opportunity for Release: Resentencing Hearings for Juvenile Offenders Sentenced to Life Without Parole Following Aiken v. Byars*, 68 S.C. L. Rev. 499 (2017) (citing *Roper*; *Miller*); *State v. Sweet*, 879 N.W.2d 811, 834 (Iowa 2016) (Supreme Court in *Roper* and its progeny has declared the opportunity for parole can be denied, if at all, only to irretrievably depraved or irreparably corrupt juvenile offenders); *Cf. State v. Garza*, 888 N.W.2d 526, 536 (Neb. 2016), *cert. denied*, 138 S. Ct. 83, 199 L. Ed. 2d 54 (2017) (because defendant was not sentenced to life imprisonment without parole, the sentencing court was not required by *Miller* or *Tatum* to make a specific finding of "irreparable corruption").

2014) (statutory sentencing scheme passes constitutional muster once it is understood not to impose a presumption in favor of life without parole).

Here, the court stated: "The possibility of rehabilitation, there is a possibility. There is always a possibility. But there are also impossibilities in as well." R. 394, ll. 12-15. Critically, the court did not determine that Appellant was irreparably corrupt—the conclusion needed to sentence a juvenile to life without parole.

The Supreme Court of Wyoming recently observed that there is no national consensus regarding which party bears the burden of proof applicable to the determination that a juvenile is irreparably corrupt. *Davis v. State*, 415 P.3d at 680. However, a sentencing court must begin its analysis with the premise that life without parole must be "uncommon," and is presumptively wrong for a juvenile. Wyoming joined Pennsylvania and Missouri in concluding "that the State bears the burden of overcoming that presumption at sentencing." *Id.* at 681. The Pennsylvania Supreme Court reasoned that "a presumption places the burden of proof and the burden of production on the party that seeks to rebut the presumed fact." *Batts*, 163 A.3d at 453.

The Supreme Court of Pennsylvania explained that "any suggestion of placing the burden on the juvenile offender is belied by the central premise of *Roper*, *Graham*, *Miller*, and *Montgomery*—that as a matter of law, juveniles are categorically less culpable than adults." *Id.* at 452. "Therefore, the presumption against the imposition of [life without parole] is rebuttable by the Commonwealth upon proof that the juvenile is removed from this generally recognized class of potentially rehabilitable offenders." *Id.*

The Supreme Court of Missouri also found the state to have the burden of proof of beyond a reasonable doubt. "Until further guidance is received, a juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentencer

beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances." *State v. Hart*, 404 S.W.3d 232, 241 (Mo. 2013).

To determine the standard of proof required to satisfy due process, the Wyoming Supreme Court and Pennsylvania Supreme Court employed the four-part balancing test identified in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). *Davis*, 415 P.3d at 682; *Batts*, 163 A.3d at 454. After weighing "(1) the private interest affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used; (3) the probable value of any alternative procedures; and (4) the government's interest," the Wyoming Supreme Court "conclude[d] that the appropriate standard of proof in this instance is proof beyond a reasonable doubt." *Davis,* 415 P.3d at 683. Likewise, the Pennsylvania Supreme Court determined that "the Commonwealth must prove that a juvenile is constitutionally eligible for [life without parole] beyond a reasonable doubt." *Batts*, 163 A.3d at 455.

The court here placed the burden of proof on Appellant, pointing out such things as the defense's failure to provide an MRI to the court. Defense counsel properly objected to Appellant's sentencing on the basis that the state had not proven Appellant incorrigible and incapable of rehabilitation. Absent proof by the state and a finding that exceptional circumstances demonstrated Appellant was irreparably corrupt beyond a reasonable doubt, sentencing him to life without parole was error.

4.

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

Statement of facts

Dr. David Price[22] opined that Appellant was capable of rehabilitation. The solicitor asked Dr. Price: "Do you have an opinion based on a reasonable degree of medical certainty that [Appellant] could come out of prison early, earlier than the sentence he's got now, and be a model citizen?" R. 223, ll. 1-4. Dr. Price responded: "I think he can—you'd have to define model citizen; but I think he can be a productive member of society, yes." R. 223, ll. 5-7.

Appellant experienced marked improvement in his intellectual abilities since he committed the offense. Dr. Price discussed Appellant's 1996 and 1998 evaluations that reflected Appellant had borderline intellectual functioning. "[T]hat would be an IQ of 70's. His IQ today, having been off drugs and with some recovery, is about 103." R. 210, ll. 7-10. "He's had some cognitive recovery;" "overall, he's made good recovery." R. 214, l. 4; R. 235, ll. 6-7.

22 As discussed above, Dr. Price reviewed voluminous records, interviewed Appellant, performed a forensic psychological evaluation on Appellant, and issued a report of his findings. R. 205, l. 22 – 206, l. 19. Dr. Price was qualified as an expert in clinical psychology without objection, and he was familiar with *Aiken v. Byars*. R. 205, ll. 12-18; R. 206, ll. 22-25. His curriculum vitae was made a court's exhibit. R. 290 – 320. The state did not present any expert testimony at the hearing.

Dr. Price said of Appellant's behavior while incarcerated: "he's not the perfect inmate, he's not the worst inmate either. He's probably in the average range for inmates." R. 235, ll. 17-19. Also relevant to rehabilitation, Dr. Price observed Appellant was not psychotic or delusional, and that Appellant "had a relationship with a female out in the community that they would hope to marry someday if he ever gets out of jail." R. 236, ll. 7-10; R. 214, ll. 6-9. Dr. Price noted Appellant had made the first step towards recovery—sobriety—due to his incarceration. R. 213, ll. 11-24.

When asked his opinion on whether he thought Appellant would be aggressive outside of prison, Dr. Price said: "I wouldn't see him as being aggressive." R. 222, ll. 11-17. Dr. Price explained: "Particularly as he ages, and [it's] true for the prison population, as they age they tend to become more social and more able to live within the guidelines that society sets for [them] and I would expect him to as well." R. 222, 19-23.

Appellant's South Carolina Department of Corrections (SCDC) classification summary report was made a court's exhibit. R. 185. This report lists Appellant's disciplinary history, history of movement between institutions, and history of work assignments. R. 349 – 352. The report reflects that Appellant had been employed while incarcerated. R. 352. Appellant worked within SCDC as a general worker, custodial worker, teacher aide, and library helper from 2001 – 2006, and 2013 – 2015.[23] R. 352.

The court asked regarding Appellant: "has he taken any classes in an effort to better himself since he's been incarcerated? He got this GED at Rimini, but has he done anything else?" R. 230, ll. 2-5. Dr. Price responded: "It's my understanding by the terms of his plea agreement that he cannot participate in those programs so he was restricted in that regard." R.

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23 Interestingly, Appellant's gap in employment from 2006 – 2011 corresponds with episodes of mental illness documented in Dr. Price's review of SCDC health services records. R. 338 – 343.

230, ll. 6-8. The court stated it saw nothing in the plea agreement that prohibited Appellant from participating in rehabilitative programs. R. 230, l. 23 – 231, l. 4. Appellant's counsel attempted to clarify this might be a matter of SCDC policy due to Appellant's life without parole sentence. R. 231, ll. 5-7.

In sentencing Appellant to life without parole, the court acknowledged Dr. Price's testimony that Appellant had experienced cognitive recovery, and that "he believed to a reasonable degree of medical certainty, that [Appellant] could be a productive member of society." R. 384, ll. 7-16; R. 385, ll. 18-20. However, the court said: "contrary to Dr. Price's belief, without any evidence to the contrary, [Appellant] has taken no efforts while incarcerated for rehabilitation." R. 388, ll. 4-7.

The court seemingly ignored the expert testimony that Appellant could be rehabilitated, saying: "The possibility of rehabilitation, there is a possibility. There is always a possibility. But there are also impossibilities in as well." R. 394, ll. 12-15. Moreover, the court said Appellant's plea agreement did not prohibit him from participating in rehabilitation or education or programs. R. 385, ll. 5-8. The court also cited Appellant's disciplinary infractions documented in Appellant's SCDC classification summary report.[24] R. 388, 11-17.

Discussion[25]

Miller and *Aiken* require that the sentencing court fully explore and consider the fifth *Miller* factor: the juvenile's possibility of rehabilitation. *Miller*, at 477-78; *Aiken v. Byars*, 410

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24 Although Appellant had no assaultive disciplinaries since 2008, the court cited seven "convictions for use, possession of narcotics, marijuana, unauthorized drug or inhalant. Not knowing what the drug may or may not have been, the inhalant is certainly within that category of what he claims resulted in the killing of [Decedent]." R. 387, l. 3 – 388, l. 2.

25 Appellant incorporates the legal discussion section from Issue 1, *supra*, into the discussion of Issue 4.

S.C. at 544, 765 S.E.2d at 577. As the Wyoming Supreme Court noted, "[t]his factor supports mitigation for most juvenile offenders because the signature qualities of immaturity and irresponsibility, impetuousness, and recklessness are all transient." *Davis v. State*, 415 P.3d at 693 (internal quotations omitted) (quoting *Miller*; *Johnson v. Texas*).

It is important to recognize that "the seriousness of the offense (even homicide) is not a reliable predictor of future offending or rehabilitation failure."[26] The Supreme Court of Iowa observed in *State v. Roby*, 897 N.W.2d at 147, that "judges cannot necessarily use the seriousness of a criminal act, such as murder, to conclude the juvenile falls within the minority of juveniles who will be future offenders or are not amenable to reform. Again, any such conclusion would normally need to be supported by expert testimony."

In *Davis*, 415 P.3d at 695-96, the Wyoming Supreme Court found the sentencing court abused its discretion in relying on the defendant's "disciplinary record in prison without taking into account the fact that for the majority of his incarceration he had no hope of release, and without weighing his accomplishments and personal growth while in the penitentiary." In *Davis*, the sentencing court did not have the benefit of expert testimony concerning the defendant's potential for rehabilitation. *Id.* The Court said: "Perhaps this would be one area where expert evaluation or input would be helpful. Without such input, however, Mr. Davis' prison record simply does not support a conclusion that he is incapable of rehabilitation." *Id.* at 693.

In *Commonwealth v. Batts*, 163 A.3d 410, the Pennsylvania Supreme Court reversed a resentencing court's imposition of life without parole for a juvenile homicide offender. There, although it sentenced the defendant to life without parole, the court "made the conflicting finding that there remained a possibility that Batts could be rehabilitated." *Id.* at 436. The Court found

26 Elizabeth Scott et. al., *Juvenile Sentencing Reform in A Constitutional Framework*, 88 Temp. L. Rev. 675, 700 (2016).

ample support for the defendant's potential for rehabilitation in the record, and said: "although there is no question that the sentencing court thoroughly and completely reviewed the record and thoughtfully considered the testimony presented at the resentencing hearing, it overlooked the main premise of the United States Supreme Court's jurisprudence regarding juvenile sentencing issued over the last twelve years." *Id.* at 437. "The High Court has held, as a matter of law, that children are constitutionally different from adults for purposes of sentencing, in that they have diminished culpability and greater prospects for reform, making them less deserving of the most severe punishments." *Id.* (internal quotations omitted) (quoting *Miller*; *Graham*).

Here, the court had the benefit of expert testimony. It heard expert testimony that to a reasonable degree of medical certainty, Appellant was capable of becoming a productive member of society if released from prison. The court heard expert testimony Appellant was unlikely to be aggressive if released, and that Appellant was an average inmate. Expert testimony was provided that Appellant had experienced significant cognitive recovery, and the court saw that Appellant had been employed for approximately nine years within SCDC.

Although the court said Appellant's plea agreement did not facially prohibit him from participating in education or rehabilitative programs, the United States Supreme Court expressly recognized this was a problem in juvenile life without parole cases in *Graham*. "In some prisons, moreover, the system itself becomes complicit in the lack of development." *Graham*, 560 U.S. at 74. "[I]t is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration." *Id.* at 79.

Of Appellant's potential for rehabilitation, the court determined: "The possibility of rehabilitation, **there is a possibility.** There is always a possibility. But there are also impossibilities in as well." R. 394, ll. 12-15 (emphasis added). The court's conclusion that

Appellant was eligible for life without parole was legal error and an abuse of discretion, because, as in *Batts*, the court made the conflicting finding that Appellant could be rehabilitated.

Moreover, the court erred when it disregarded: expert opinion to a reasonable degree of medical certainty that Appellant could be a productive member of society if released; expert testimony Appellant had made good cognitive recovery since the offense; expert testimony Appellant was behaviorally in the average range for inmates; expert testimony Appellant was unlikely to be aggressive outside of prison; and evidence Appellant had been employed with SCDC for nine years. The court also erred in not taking into account *Graham*'s recognition that it is the policy in some prisons to withhold rehabilitation programs from inmates ineligible for parole.

Here, as in *Batts*, although the court thoughtfully reviewed the record and listened to the testimony, it misapprehended and misapplied the main premise of *Miller* and *Aiken*—that children are constitutionally different from adults for sentencing purposes.

CONCLUSION

Based on the foregoing arguments, Appellant requests the order of the resentencing judge be reversed and the case remanded. In addition, Appellant respectfully requests this Court appoint a different judge for resentencing.

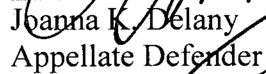
Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of December, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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This 21st day of December, 2018.

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