

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

SEP 17 2018

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

S.C. SUPREME COURT

Appellate Case No. 2015-000980

The State, .....Respondent,

v.

Tavarious Settles, .....Petitioner.

**APPENDIX  
VOLUME II**

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Attorneys for Respondent

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**THE FOLLOWING EXHIBITS ARE ON FILE WITH THE COURT OF APPEALS:**

**STATE'S EXHIBIT #1 (9-1-1 call CD) & #34 (Statement)**

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WITNESSES

Nicholas Futch  
Greenwood Police Department

WARRANT NUMBER

2013A2420100678

Town 8:11

*[Signature]*

Foreman of the Grand Jury

Date: 9/22/13

VERDICT

Foreman

TESTA BLUE CAR  
ANGELA WOODHURST  
CCCP AND GS  
GREENWOOD COUNTY  
S.C.

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

COURT OF GENERAL SESSIONS

September Term, 2013

Indictment # 15GS24- 1539

THE STATE

VS.

Tavarious DeQuan Settle

INDICTMENT FOR

POSSESSION OF A FIREARM OR KNIFE  
DURING THE COMMISSION OF A CRIME  
16-23-0490

CJR: 0549

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

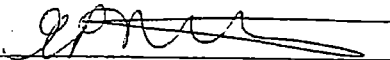
INDICTMENT FOR

POSSESSION OF A FIREARM OR KNIFE  
DURING THE COMMISSION OF A CRIME  
16-23-0490

At a Court of General Sessions, convened on the 27th day of September, 2013, the Grand Jurors of Greenwood County present upon their oath:

That Tavarious DeQuan Settles did, in Greenwood County, on or about June 30, 2013 possess a firearm or visibly displayed what appeared to be a firearm, or visibly displayed a knife during the commission of a violent offense, to wit: Murder, or any lesser included violent offense, in violation of Section 16-23-490 of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

  
Assistant Solicitor

## STATE OF SOUTH CAROLINA

COUNTY OF GreenwoodSTATE VS.Tavarious DeQuan Settles

AKA:

Race: AFRICAN AME Sex: M Age: 18DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]City, State, Zip: Greenwood, SCDL#: 102744027 SID#: [REDACTED]\*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was  
TO: Weapons / Poss. weapon during violent crime, if not also sentenced to life witho

## IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 13GS24-1539A/W#: 2013A2420100678Date of Offense: 6/30/2013S.C. Code §: 16-23-0490CDR Code #: 0549

## SENTENCE SHEET

in violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549  
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: [Signature]

White, Elizabeth

SC Bar# 71182

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,  
for a determinate term of 5 (Five) days/months/years or ☐ under the Youthful Offender Act not to exceed \_\_\_\_\_ years  
and/or to pay a fine of \$ \_\_\_\_\_; provided that upon the service of \_\_\_\_\_ days/months/years and/or payment  
of \$ \_\_\_\_\_; plus costs and assessments as applicable\*; the balance is suspended with probation for \_\_\_\_\_months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of  
probation, which are incorporated by reference. CONCURRENT☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied  
by the State Department of Corrections. credit for time served since June 13, 2013.  
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal  
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

## SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_

Payment Terms:

☐ Set by SCDPPPS

Recipient: \_\_\_\_\_

|                                        |         |                  |
|----------------------------------------|---------|------------------|
| *Fine:                                 |         | \$               |
| § 14-1-206 (Assessments 107.5 %)       |         | \$               |
| § 14-1-211(A)(1) (Conv. Surcharge)     | \$100   | \$ <u>100.00</u> |
| § 14-1-211(A)(2) (DUI Surcharge)       | \$100   | \$               |
| § 56-5-2995 (DUI Assessment)           | \$12    | \$               |
| § 56-1-286 (DUI Breath Test)           | \$25    | \$               |
| Proviso 47.9 (Public Def/Prob)         | \$500   | \$               |
| § 14-1-212 (Law Enforce. Funding)      | \$25    | \$ <u>25.00</u>  |
| § 14-1-213 (Drug Court Surcharge)      | \$150   | \$               |
| § 50-21-114(BUI Breath Test Fee)       | \$50    | \$               |
| § 56-3-2942(J) (Vehicle Assessment)    | \$40/ca | \$               |
| Proviso 90.5 (SCCA Surcharge)          | \$5     | \$ <u>5.00</u>   |
| 3% to County (if paid in installments) |         | \$ <u>35.00</u>  |
| TOTAL                                  |         | \$ <u>133.50</u> |

Clerk of Court/ Deputy Clerk: [Signature]Court Reporter: Tara Scott

SCCA/217 (03/2011)

PTUP \_\_\_\_\_ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. \_\_\_\_\_

May serve W/E beginning \_\_\_\_\_

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly  
pmts. of \$ \_\_\_\_\_ beginning \_\_\_\_\_

\$ \_\_\_\_\_ paid to Public Defender Fund

Other: \_\_\_\_\_

☐ Appointed PD or appointed other counsel,  
§ 47.12 requires \$500 be paid to Clerk  
during probation.Presiding Judge: [Signature]Judge Code: 2155Sentence Date: 4/2/2015

COPY

FILED GENERAL SESSIONS  
IN JUDICIAL CIRCUIT  
GREENWOOD, SC  
THIS APR - 2 PM '15ANGELA WOODHULL  
CCCP ANG 155  
GREENWOOD COUNTY  
S.C.

## STATE OF SOUTH CAROLINA

COUNTY OF Greenwood  
 STATE VS.  
Tavarious DeQuan Settles

AKA:

Race: AFRICAN AME Sex: M Age: 18DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]City, State, Zip: Greenwood, SCDL#: 102744027 SID#: [REDACTED]\*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was  
 TO: Murder / Murder

## IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 13GS24-1538A/W#: 2013A2420100677Date of Offense: 5/30/2013S.C. Code § : 16-03-0010CDR Code #: 0116

## SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0010 of the S.C. Code of Laws, bearing CDR Code # 0116  
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC) ☐ §17-25-45  
 w/minor 1st or Lewd Act)

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: [Signature] 71182

White, Elizabeth

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,  
 for a determinate term of 45 (Forty-five) days/months/years or ☐ under the Youthful Offender Act not to exceed \_\_\_\_\_ years  
 and/or to pay a fine of \$ \_\_\_\_\_; provided that upon the service of \_\_\_\_\_ days/months/years and/or payment  
 of \$ \_\_\_\_\_; plus costs and assessments as applicable\*; the balance is suspended with probation for \_\_\_\_\_

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of  
 probation, which are incorporated by reference. Concurrent

☐ ~~CONCURRENT~~ or ☒ CONSECUTIVE to sentence on: 13-65-24-1539  
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied  
 by the State Department of Corrections. Credit for time served since June 13, 2013  
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal  
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

## SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_

Payment Terms: \_\_\_\_\_

☐ Set by SCDPPPS \_\_\_\_\_

Recipient: \_\_\_\_\_

|                                        |         |                  |
|----------------------------------------|---------|------------------|
| *Fine:                                 |         | \$               |
| § 14-1-206 (Assessments 107.5 %)       |         | \$               |
| § 14-1-211(A)(1) (Conv. Surcharge)     | \$100   | \$ <u>100.00</u> |
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| § 14-1-213 (Drug Court Surcharge)      | \$150   | \$               |
| § 50-21-114(BUI Breath Test Fee)       | \$50    | \$               |
| § 56-5-2942(J) (Vehicle Assessment)    | \$40/ea | \$               |
| Proviso 90.5 (SCCJA Surcharge)         | \$5     | \$ <u>5.00</u>   |
| 3% to County (if paid in installments) |         | \$ <u>3.90</u>   |
| TOTAL                                  |         | \$ <u>133.90</u> |

Clerk of Court/ Deputy Clerk: [Signature]Court Reporter: Tara Scott

SCCA/217 (03/2011)

PTUP \_\_\_\_\_

\_\_\_\_\_ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. \_\_\_\_\_

May serve W/E beginning \_\_\_\_\_

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly  
 pmts. of \$ \_\_\_\_\_ beginning \_\_\_\_\_

\$ \_\_\_\_\_ paid to Public Defender Fund

Other: \_\_\_\_\_

☐ Appointed PD or appointed other counsel,  
 § 47.12 requires \$500 be paid to Clerk  
 during probation.

Presiding Judge [Signature]Judge Code: 2159Sentence Date: 4/2/2015

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY  
Court of General Sessions

Frank R. Addy Jr., Circuit Court Judge

Case Nos. 13-GS-24-1538 and -1539

The State,

Respondent,

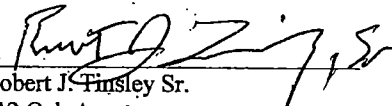
v.

Tavarious Settles,

Appellant.

NOTICE OF APPEAL

Tavarious Settles appeals his conviction and sentence in this case. The sentence was imposed by the Honorable Frank R. Addy Jr. on April 2, 2015. This appeal is taken from the order of the Honorable Frank R. Addy Jr., dated April 21, 2015, which denied Appellant's post-trial motion. Appellant received written notice of entry of this order on April 21, 2015.

  
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Greenwood, SC 29646  
(864)223-0770  
Attorney for Appellant  
S.C. Bar No. 5581

Other Counsel of Record:  
David Matthew Stumbo  
Eighth Circuit Solicitor  
PO Box 516  
Greenwood, SC 29648

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SC Court of Appeals

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8th JUDICIAL CIRCUIT  
GREENWOOD, SC  
2015 SEP 18 AM 9:59

|                           |   |                                                           |
|---------------------------|---|-----------------------------------------------------------|
| STATE OF SOUTH CAROLINA   | ) | IN THE COURT OF GENERAL SESSIONS                          |
| COUNTY OF GREENWOOD       | ) | EIGHTH JUDICIAL CIRCUIT                                   |
| State of South Carolina,  | ) | Indictments #2013-GS-24-1538; -1539                       |
| -vs-                      | ) | <b>Motion for Reduction of Sentence for "Substantial</b>  |
|                           | ) | <b>Assistance" Pursuant to S.C. Code Section 17-25-65</b> |
| Tavarious DeQuan Settles, | ) |                                                           |
| Defendant.                | ) |                                                           |

PLEASE TAKE NOTICE that the undersigned Solicitor for the 8<sup>th</sup> Judicial Circuit will move before this Honorable Court on September 18, 2015 for a reduction in the sentence for Defendant Tavarious Dequan Settles pursuant to S.C. Code Section 17-25-65 for "substantial assistance rendered to the State" within one year of his sentence.

Defendant Settles was tried in the Greenwood County Court of General Sessions during the term of March 30, 2015 on indictments for Murder and Possession of a Firearm during the Commission of a Violent Crime. He was convicted as charged on April 2, 2015 by the jury on both counts, and was sentenced by the Honorable Frank Addy, Jr. to forty-five (45) years in prison for murder, and a concurrent five (5) year sentence on the weapon charge.

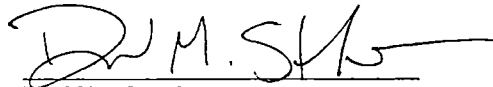
Defendant Settles was also charged with Murder (2014-GS-01-214) on an unrelated case out of Abbeville County. His co-Defendant in the Abbeville murder was an individual by the name of Karlita Desean Phillips. Karlita Phillips was tried on indictments of (1) Accessory Before the Fact of Murder and (2) Solicitation of a Minor to Commit a Crime during the week of July 20, 2015 in Abbeville County. During the trial of Ms. Phillips, Defendant Settles changed his position and offered testimony regarding this incident before the State closed its case-in-chief. In his testimony, Settles admitted to being the triggerman in the murder of Jamil Phillips. Settles also testified to new

details concerning how Karlita Phillips asked him to kill her husband (Dale Phillips, Jr. the deceased's brother), and that she drove him to the scene of the crime at the Phillips' house in Abbeville County. Settles offered this testimony of his own free will and accord, with no promises, negotiations, or plea offers from the State in exchange for his testimony.

After consultation of all parties involved, it is the State's position that Defendant Settles' testimony in the Karlita Phillips trial qualifies as "substantial assistance to the State" under section 17-25-65, as it applies to the prosecution of another person. Accordingly, the State moves for a reduction in Settles' sentence from forty-five (45) years down to forty (40) years incarceration as to indictment 2013-GS-24-1538. As part of the negotiations, the State respectfully requests that the Court run the Greenwood sentence concurrently with the negotiated forty (40) year sentence on Defendant's guilty plea to Murder on the Abbeville County charge being entered in court today.

IT IS SO MOVED.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read "D.M. Stumbo", with a long horizontal flourish extending to the right.

David M. Stumbo  
Solicitor, 8<sup>th</sup> Judicial Circuit

September 18, 2015  
Greenwood, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENWOOD )  
 )  
 State of South Carolina, )  
 )  
 -vs- )  
 )  
 Tavarious DeQuan Settles, )  
 )  
 Defendant. )

IN THE COURT OF GENERAL SESSIONS  
 EIGHTH JUDICIAL CIRCUIT

Indictments #2013-GS-24-1538; -1539

**ORDER FOR SENTENCE REDUCTION**

FILED  
 2015 SEP 18 PM 2:00  
 GREENWOOD COUNTY  
 CLERK

The State moved before this Court on September 18, 2015 for a reduction in the sentence for Defendant Tavarious DeQuan Settles pursuant to S.C. Code Section 17-25-65 for "substantial assistance rendered to the State" within one year of his sentence. The State's motion was made in conjunction with a guilty plea on a murder charge for Defendant Settles out of Abbeville County at a hearing at the Greenwood County Courthouse on September 19, 2015. The State was represented by 8<sup>th</sup> Circuit Solicitor David M. Stumbo. The Defendant was represented by his attorneys Robert J. Tinsley, Sr., Esq. and Joshua Nasrollahi, Esq.

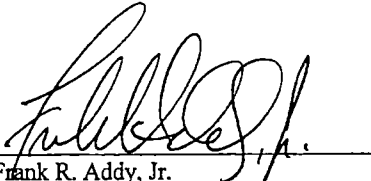
Defendant Settles was tried in the Greenwood County Court of General Sessions during the term of March 30, 2015 on indictments for Murder and Possession of a Firearm during the Commission of a Violent Crime. He was convicted as charged on April 2, 2015 by the jury on both counts, and was sentenced by this Court to forty-five (45) years in prison for murder, and a concurrent five (5) year sentence on the weapon charge.

Defendant Settles was also charged with Murder (2014-GS-01-214) on an unrelated case out of Abbeville County before this Court. Settles' co-defendant in the Abbeville murder was an individual by the name of Karlita Phillips. Karlita Phillips was tried on indictments of Accessory Before the Fact of Murder (2014-GS-01-213) and Solicitation of a Minor to Commit a Crime (2014-

GS-01-212) during the week of July 20, 2015 in Abbeville County. During the trial of Ms. Phillips, Defendant Settles changed his position and offered testimony regarding this incident before the State closed its case-in-chief. In his testimony, Settles admitted to being the triggerman in the murder of Jamil Phillips. Settles also testified to new details concerning how Karlita Phillips asked him to kill her husband (Dale Phillips, Jr. the deceased's brother), and that she drove him to the scene of the crime at the Phillips' house in Abbeville County. This Court finds that Settles offered this testimony of his own free will and accord, with no promises, negotiations, or plea offers from the State in exchange for his testimony.

This Court agrees with the State that Defendant Settles' testimony in State v. Karlita Phillips trial qualifies as "substantial assistance to the State" under S.C. Code Section 17-25-65, as it applies to the prosecution of another person. Therefore, this Court orders a reduction in Defendant Settles' sentence from forty-five (45) years down to forty (40) years incarceration as to his Greenwood County murder conviction (2013-GS-24-1538). As part of the negotiations between the parties, this Court also orders this sentence reduction will run concurrently with the negotiated forty (40) year sentence on Defendant's sentence on the Abbeville County murder conviction (2014-GS-01-214).

IT IS SO ORDERED.

  
Frank R. Addy, Jr.  
Chief Administrative Judge  
8<sup>th</sup> Judicial Circuit

September 18, 2015  
Greenwood, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF GREENWOOD

EIGHTH JUDICIAL CIRCUIT  
IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA, )  
 )  
 PLAINTIFF, )  
 )  
 )  
 -VS- )  
 TAVARIOUS DEQUAN SETTLES, )  
 DEFENDANT. )  
 \_\_\_\_\_ )

2013-GS -24-1538, -1539  
2014-GS-01-214  
TRANSCRIPT OF RECORD

SEPTEMBER 18, 2015  
GREENWOOD, SOUTH CAROLINA

B E F O R E:

THE HONORABLE FRANK R. ADDY, JR., JUDGE

A P P E A R A N C E S:

ATTORNEY FOR PLAINTIFF:  
DAVID STUMBO, SOLICITOR

ATTORNEYS FOR DEFENDANT:  
JOSH NASROLLAHL, ESQUIRE  
ROBERT TINSLEY, ESQUIRE

TARA T. SCOTT, CVR  
CIRCUIT COURT REPORTER

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(NO EXHIBITS WERE ADMITTED DURING THIS HEARING)

1           MR. STUMBO: Judge, for the record I know we're waiting  
2   on Mr. Tinsley, but we can go ahead and put on the record  
3   the caption of the case. Today we're here to essentially  
4   deal with two matters, Your Honor. Before you is Tavarious  
5   Dequan Settles with his attorneys, Mr. Josh Nasrollahi and  
6   Mr. Robert Tinsley, both of the Greenwood County Bar. Mr.  
7   Settles is here today to plead guilty to murder on a charge  
8   of murder out of Abbeville County, 2014-GS-01-214 is the  
9   indictment number. Judge, this is for the murder of one  
10   Jameel Phillips. I know Your Honor is very familiar with  
11   this case because we tried the co-defendant, Ms. Karlita  
12   Phillips back in July over in Abbeville. Mr. Settles ended  
13   up being a witness for the State in that trial.

14           Your Honor, I do have the indictment and sentencing  
15   sheet on the Abbeville charge. I also will be passing up to  
16   Your Honor a motion based on code section 17-25-65. That is  
17   the state statute that deals with sentence reductions. The  
18   motion essentially is part of the negotiations today to  
19   reduce the 45 year sentence on indictment 2013-GS-24-1538.  
20   That was, as Your Honor is familiar with, a case you tried  
21   in Greenwood. Mr. Settles murdered a Guatemalan individual  
22   down in -- not too far from the courthouse here, and Your  
23   Honor sentenced him to 45 years. Also, I'm passing up the  
24   State's motion in a proposed order for Your Honor in regards  
25   to the sentence reduction and what this plea we'll do here

1 today is essentially wrap this up into a 40 year resolution  
2 to this case. If I may approach, Your Honor.

3 MR. NASROLLAHI: Judge, Mr. Tinsley and I have both  
4 received copies of the motion. We have reviewed the motion  
5 and we've also reviewed the proposed order. If Your Honor  
6 is inclined to accept the negotiations this morning we have  
7 no issue that I'm aware of with regard to the proposed  
8 order.

9 THE COURT: Mr. Nasrollahi, I think that you are  
10 representing Mr. Settles on the Abbeville case that we're  
11 addressing by plea today. You have explained to Mr. Settles  
12 that, of course, the offense of murder carries a minimum of  
13 30 years and a maximum of life?

14 MR. NASROLLAHI: Yes, Your Honor.

15 THE COURT: You've also gone over with him the  
16 collateral consequences of this plea, mainly that it's  
17 classified as a most serious offense, violent offense, and  
18 things of that nature?

19 MR. NASROLLAHI: Yes, Your Honor.

20 THE COURT: The 40 years would have to be served day for  
21 day. Is that your understanding?

22 MR. NASROLLAHI: Yes, Your Honor. We are also waiving  
23 venue as this is an Abbeville case.

24 THE COURT: Correct. You have then reviewed with Mr.  
25 Settles all the penalties, ramifications, and the other

1 consequences of this plea; is that correct?

2 MR. NASROLLAHI: Yes, Your Honor. Because of Miller vs.  
3 Alabama and the Byers case also we discussed potential  
4 sentences and mitigating and aggravating factors at length  
5 in the course of representation.

6 THE COURT: A 40 year sentence concurrent with the  
7 Greenwood charges is what has been negotiated; correct?

8 MR. NASROLLAHI: Yes, Your Honor.

9 THE COURT: Based upon your investigation of the facts  
10 and circumstances surrounding this Abbeville charge, do you  
11 believe that the State possesses sufficient credible  
12 evidence to prove Mr. Settles' guilt beyond a reasonable  
13 doubt and that if he were to stand trial his conviction  
14 would be likely?

15 MR. NASROLLAHI: Yes, Your Honor.

16 TAVARIOUS SETTLES, having first been duly  
17 sworn to tell the truth, testified as follows:

18 EXAMINATION BY THE COURT

19 Q Sir, are you Tavarious Dequan Settles?

20 A Yes, sir.

21 Q Mr. Settles, they tell me you want to plead guilty to  
22 the murder case arising out of Abbeville County. Is that  
23 correct?

24 A Yes, sir.

25 Q Obviously I was present at the time that you testified

1 during the trial, so I'm already familiar with the  
2 background and the facts, and the assistance that you gave  
3 to the State on Wednesday or Thursday when that case was  
4 tried. You do understand, of course, that murder carries a  
5 minimum of 30 years and a maximum of life. Do you  
6 understand that, sir?

7 A Yes, sir.

8 Q In this case, Mr. Settles, apparently you, your  
9 attorney, and the State have negotiated a 40 year sentence  
10 which would run concurrent with a 40 year sentence on a  
11 charge out of Greenwood that involved Mr. Seace. Is that  
12 your understanding?

13 A Yes, sir.

14 Q Do you understand that that 40 year sentence would have  
15 to be served day for day. Do you understand that?

16 A Yes, sir.

17 Q It's also, of course, classified as a most serious  
18 offense and a violent offense. A most serious offense, Mr.  
19 Settles, means that once you get finished serving this 40  
20 year sentence if you were convicted subsequently for another  
21 most serious offense the State would seek life without the  
22 possibility of parole against you. Do you understand that,  
23 sir?

24 A Yes, sir.

25 Q I mentioned this, but this has to be served day for

1 day. Do you understand that, sir?

2 A Yes, sir.

3 Q Mr. Settles, because this is a negotiated sentence, if  
4 I accept your plea I have to impose a sentence of 40 years  
5 on this and a 40 year sentence on the Greenwood charge. Do  
6 you understand that, sir? I cannot go below 40 years.

7 A Oh, yes, sir.

8 Q So if I accept your plea today I have to give you 40  
9 years on this charge as well as the Greenwood charge  
10 concurrent. Do you understand, sir?

11 A Yes, sir.

12 Q Mr. Settles, in the last twenty-four hours have you  
13 taken any medication, drugs, or alcohol that affects your  
14 thinking now?

15 A No.

16 Q Have you ever been treated for any mental illness  
17 issues or problems understanding what is taking place, or  
18 were you in special education when you were in school?

19 A No.

20 Q Mr. Settles, are you, in fact, guilty of these  
21 particular charges, sir?

22 A Yes, sir.

23 Q I'm very familiar with the facts, but for the benefit  
24 of the record and for your benefit I'm going to ask the  
25 Solicitor to give me the facts in the Abbeville charge.

1     Then I will ask you if you agree that's what you did. Go  
2     ahead, Solicitor.

3           MR. STUMBO: Thank you, Judge. I'll try to keep it  
4     brief, but just to make a record. This incident did occur  
5     March 25, 2013. It occurred at 1522 Old Douglas Mill Road  
6     in Abbeville County. That's between Abbeville and Hodges,  
7     not too far from the Greenwood County line, but it is in  
8     Abbeville County. Obviously, we do waive venue here today  
9     for the purpose of this plea in Greenwood. Judge, the  
10    victim in this case is Jameel Phillips. The intended target  
11    of this murder was Dale Phillips, Jr., Judge, who is  
12    standing here behind me. I know Your Honor heard from him  
13    during the Karlita Phillips trial at sentencing. Dale  
14    Phillips, Jr. was married to Karlita Phillips. They were  
15    separated. There was a contentious separation. Karlita  
16    Phillips moved to Greenwood and Dale Phillips moved in with  
17    his parents, Mr. Dale Phillips, Sr. and Martha Phillips who  
18    are here to my left. Also living at the home was his  
19    brother, who was the victim in this case, Jameel Phillips.

20           The night of March 25<sup>th</sup> Jameel comes home from work,  
21    starts to go into the door, and he is shot and killed by Mr.  
22    Settles. Judge, this case was not solved in Abbeville for  
23    about nine months. He was able to get away. There was a  
24    link back to Ms. Karlita Phillips because of the  
25    relationship and the silver car that was seen by neighbors

1 in an adjacent driveway. Ultimately Ms. Phillips was a  
2 suspect from the beginning of this case. Through witnesses  
3 and further investigation, law enforcement developed Mr.  
4 Settles as a suspect and ultimately, Your Honor, Tavarious  
5 Settles' DNA was found on four cigarette butts there at the  
6 house and that was linked up by SLED later via lab testing  
7 on the DNA. Of course the Greenwood charge that Mr. Settles  
8 later caught was what provided the DNA that helped solve the  
9 Abbeville case even though the Abbeville murder of Jameel  
10 Phillips happened before this one in Greenwood.

11 Those are the facts of the case, Your Honor. Mr.  
12 Settles ultimately did testify. He was tried in Greenwood  
13 for the murder of Mr. Seace. He indicated at the beginning  
14 of the Karlita Phillips trial that he was not going to  
15 testify, but ultimately changed his mind. He was not given  
16 any kind of offer or promises on sentences at the time he  
17 testified -- before the time he testified in the Karlita  
18 Phillips trial. Ms. Phillips was ultimately convicted, as  
19 Your Honor knows.

20 We have been in discussion with the family since then.  
21 In fact, I've had the pleasure of seeing Mr. Dale Phillips,  
22 Sr. at different events in the community. He came by my  
23 office and we just had a good chat one day. The family, I  
24 think, is at peace going forward with this 40 year offer  
25 today. Obviously, they're heartbroken. I don't think any

1 of them want to speak today. Just speaking on their behalf,  
2 Your Honor, they're glad to get some closure today where  
3 they don't have to keep coming back to court on this  
4 anymore. We have talked about this and we believe that the  
5 40 year offer, not only on the Abbeville case, but knocking  
6 the five years off of the Greenwood charge. We've discussed  
7 that not only with the Phillips family but also with the  
8 girlfriend of Mr. Seace who is not here today. My Victim  
9 Advocate, Ms. Stroup, spoke with her on the phone even this  
10 morning and earlier this week as well. She's not able to  
11 come to court, but was in agreement with what we're doing  
12 today, Your Honor.

13 THE COURT: That was going to be my next question  
14 whether she agreed and understood the reasons for what is  
15 happening.

16 Q Mr. Settles, you've heard what the State alleges  
17 happened in March 2013. Is it true that you murdered Mr.  
18 Phillips?

19 A Yes, sir.

20 Q So you are guilty of this charge?

21 A Yes, sir.

22 THE COURT: Mr. Tinsley, you represented Mr. Settles on  
23 the Greenwood charge. Because the sentence reduction on the  
24 Greenwood charge is part and parcel to this, did the  
25 Solicitor correctly state the negotiations that have been

1     agreed to with regard to the charge that you tried with Mr.  
2     Settles?

3           MR. TINSLEY: Yes, Your Honor, he did. It's basically  
4     his decision and that's the decision that he made. I asked  
5     for 30 to 35. He was firm on the 40. The way we read the  
6     statute that's pretty much his determination. I am  
7     certainly grateful for any reduction that Mr. Settles can  
8     get. There's still a couple of co-defendants out there. I  
9     will point that out for the Court in this matter. That sums  
10    up that answer, Your Honor.

11          MR. STUMBO: Just to clarify. I think Mr. Tinsley is  
12    referring to the Greenwood case. Not any co-defendants left  
13    out there on the Abbeville case as it pertains to Mr.  
14    Phillips.

15          THE COURT: I do agree that the way the code section is  
16    written it looks like the Solicitor would be the moving  
17    party seeking reduction for any assistance provided to the  
18    State once the case has been resolved. I think it may very  
19    well be an open question as to whether or not it's in the  
20    discretion of the Court or the Solicitor as far as how much  
21    of a reduction could take place, but quite candidly as I  
22    related to everybody in chambers -- quite candidly, this  
23    judge would be very hesitant to go below 40 years in any  
24    event. Based upon what has transpired concerning Mr.  
25    Settles. I just put that on the record because I think it

1 is a relatively new statute.

2 MR. TINSLEY: Right, Your Honor, and I'd like to respond  
3 to that. I said to Solicitor Stumbo -- I said, "Judge Addy  
4 is in the unique position and he is in the business of  
5 sentencing. And it would be fine with me to leave it with  
6 the discretion of the Court." And I understand your  
7 position. So that was part of our discussion. I think Mr.  
8 Stumbo will agree with that.

9 MR. STUMBO: It is, Your Honor. And quite frankly, we  
10 trust Your Honor's discretion too. That wasn't part of  
11 this. We --

12 MR. TINSLEY: No. I'm not making any --

13 MR. STUMBO: We felt that providing some closure and  
14 certainty for this family walking in here today was  
15 appropriate considering what they have been through.

16 THE COURT: Certainly. All right. Mr. Settles, I need  
17 to briefly review with you rights that you're giving up by  
18 pleading guilty on the Abbeville indictment. Again, you've  
19 been through a jury trial so you know what it's like. If  
20 you don't understand something, stop me and I will let you  
21 talk to either Mr. Nasrollahi or Mr. Tinsley as long as you  
22 need to. Okay, sir?

23 A Yes, sir.

24 Q Obviously, Mr. Settles, we're located here in Greenwood  
25 County and you have the right to have this matter heard in

1 Abbeville County. I can accept your plea today, but you'll  
2 have to waive venue and allow it to be heard here in  
3 Greenwood. Are you willing to do that, sir?

4 A Yes, sir.

5 Q Additionally, you understand, sir, that you don't have  
6 to plead guilty. You could have a jury trial on this case  
7 just like you had in the Greenwood case. Do you understand  
8 that?

9 A Yes, sir.

10 Q In a jury trial you and Mr. Nasrollahi would help pick  
11 12 people. They would be the jury and the State would have  
12 the burden of proving you guilty beyond a reasonable doubt  
13 on the Phillips case just like they had that same burden on  
14 the Seace case. Do you understand, sir?

15 A Yes, sir.

16 Q All 12 jurors would have to agree on your guilt before  
17 you could be punished in any way. You would not have to  
18 prove the first thing. They would attempt to do that by  
19 calling witnesses against you. You and your attorney would  
20 have a chance to see, confront, and cross-examine those  
21 witnesses. At trial you could also call your own witnesses  
22 even though you have no burden of proof, and you could of  
23 course take the stand in your own defense. Do you  
24 understand that?

25 A Yes, sir.

1 Q If you chose not to take the stand, however, I would  
2 instruct the jury that they couldn't hold that against you.  
3 They couldn't use that as evidence of guilt. Do you  
4 understand that, sir?

5 A Yes, sir.

6 Q That's your Fifth Amendment right against self  
7 incrimination. By pleading guilty you waive that right in  
8 that you admit to me that you did commit this crime.  
9 Additionally, at trial you would be presumed innocent of any  
10 wrongdoing. I would explain that presumption of innocence  
11 to the jury. You would also be able to present any defense  
12 you might have or challenge the State's evidence. I have a  
13 general feel for the evidence that they've got against you  
14 because I tried the Phillip's case and obviously you  
15 testified in that case under oath. So I do understand some  
16 of the evidence against you and I'm sure you've had a chance  
17 to review that evidence with Mr. Nasrollahi. Is that  
18 correct?

19 A Yes, sir.

20 Q You do understand though that by pleading guilty you  
21 waive that right to challenge any of the State's evidence.  
22 You also waive your right to present any defense that you  
23 have. I understand that you did take the stand and admit to  
24 being the shooter in the Phillip's case. You do understand  
25 though, Mr. Settles, you could still maintain your innocence

1 and you could still take this case to trial and present a  
2 defense. Do you understand that, sir?

3 A Yes, sir.

4 Q If you plead guilty you waive those rights. Are you  
5 sure you still want to waive those rights and plead guilty?

6 A Yes, sir.

7 THE COURT: Mr. Nasrollahi, are you satisfied with  
8 discovery response from the State?

9 MR. NASROLLAHI: Yes, Your Honor. I've dealt mostly  
10 with Mr. Brown and he can attest that there are multiple  
11 follow up questions that I have sent to him and he has  
12 complied with. There's been a lot of discovery passed back  
13 and forth in this case and we are satisfied.

14 THE COURT: Very good. And you've reviewed that with  
15 Mr. Settles?

16 MR. NASROLLAHI: I have.

17 THE COURT: To the extent he has needed or wanted?

18 MR. NASROLLAHI: Yes, Your Honor.

19 Q Mr. Settles, are you happy with the way Mr. Nasrollahi  
20 and Mr. Tinsley have represented you, sir?

21 A Yes, sir.

22 Q Any complaints to make against either one of them with  
23 regard to these cases?

24 A No, sir.

25 Q So they've done everything that you've wanted them to

1 do?

2 A Yes.

3 Q Have you understood all of your conversations with Mr.  
4 Nasrollahi?

5 A Yes.

6 Q So you're totally happy with his help and Mr. Tinsley's  
7 help?

8 A Yes, sir.

9 Q Mr. Settles, do you have any complaints to make against  
10 your attorneys, the Solicitor, law enforcement  
11 personnel, anyone involved in these cases?

12 A No, sir.

13 Q Aside from the 40 years and I'm assuming the firearm  
14 thing will be dismissed?

15 MR. STUMBO: That's correct.

16 Q Aside from the straight sentence of 40 years on both  
17 cases has anyone promised you anything else or held out  
18 any other hope or reward?

19 A No, sir.

20 Q Has anyone tried to force you, coerce you, threaten you  
21 in any way to make you plead guilty?

22 A No, sir.

23 Q Mr. Settles, are you in fact pleading guilty of your  
24 own free will because you did, in fact, commit this  
25 crime?

1 A Yes, sir.

2 Q Have you understood all of my questions, sir?

3 A Yes, sir.

4 Q Is there anything that you need to ask me about  
5 anything that we have discussed?

6 A No, sir.

7 Q Do you need any more time to talk to your lawyers?

8 A No.

9 Q Very good. Are you certain that you want to plead  
10 guilty, sir?

11 A Yes, sir.

12 THE COURT: Very good. I do find there is a substantial  
13 factual basis for this plea. It is freely, voluntarily,  
14 knowingly, and intelligently made. Mr. Settles is satisfied  
15 with counsel of both Mr. Tinsley and Mr. Nasrollahi. I will  
16 accept his pleas. Mr. Nasrollahi?

17 MR. NASROLLAHI: Thank you, Judge. I will be very  
18 brief. This is a very tragic conclusion to this case. It  
19 is tragic for three families. Mr. Settles' family, the  
20 Phillip's family. The gentleman from Greenwood. But this  
21 is the ultimate conclusion. I know Your Honor was there in  
22 Abbeville and Your Honor heard the testimony. You heard my  
23 client take the stand and testify. He was 17 at the time  
24 that this happened. Mr. Tinsley and I have both -- I think  
25 we expressed our outrage at the way that this woman, Karlita

1     Phillips manipulated this young man. He's taking  
2     responsibility for his part, for his complicity in what  
3     happened in Abbeville. But we and I think the Solicitors  
4     Stumbo and Solicitor Brown in addition to Sheriff Watson  
5     over in Abbeville -- we all have the main understanding that  
6     the person behind this, the person that really pulled that  
7     trigger was Karlita Phillips and she is serving a life  
8     sentence.

9             We believe that Mr. Settles' testimony in Abbeville  
10    when he came forward and did the right thing and he  
11    testified for the State significantly and substantially  
12    helped that case. He has done the right thing. He is a  
13    young man now and he will be a very old man when he is  
14    released from prison and that is tragic. But he has got his  
15    family here in support of him. He has expressed remorse to  
16    us for what has happened. We just believe that this  
17    negotiation is fair and reasonable in light of everything  
18    that has happened. We would ask that the Court accept a  
19    negotiated sentence.

20            THE COURT: Thank you. Mr. Tinsley, any additional  
21    comments?

22            MR. TINSLEY: Briefly, Your Honor. I was appointed by  
23    you for a few days on the Abbeville case. That's when I met  
24    with Sheriff Watson who wanted me to assist him in getting  
25    probable cause for a warrant for Ms. Phillips, which Mr.

1 Settles did. We met with the Abbeville Sheriff's Department  
2 and SLED and gave them their probable cause. The Sheriff  
3 has been very appreciative. He was actually 16 at the time  
4 of the Abbeville case. She was 38. She was plying him with  
5 sex and marijuana and things like that. I think Your Honor  
6 made the comment that the Seace event may not have occurred  
7 but for Karlita Phillips. Very heinous situation there,  
8 Your Honor. He did take the stand in the Greenwood case.  
9 He was convicted by a jury, but he admitted presence and I  
10 believe that the jury convicted him on the hand of one is  
11 the hand of all. He is willing to testify for the State  
12 again in the matter of the co-defendants in the Greenwood  
13 case.

14 But the last thing I want to say. This is one of the  
15 toughest cases I've ever handled in 36 years. I was taken  
16 off the case. I think some rule at OID caused that. But to  
17 the Phillips family I will say this from the bottom of my  
18 heart. I have two sons similar in age to these young men.  
19 I cannot imagine the agony that you've gone through. My  
20 sympathies are extended to you. I hope that as good  
21 Christian people that I know you are that you will forgive  
22 or at least try to understand the position that this woman  
23 put this kid in. Sixteen years old. He was going to  
24 Greenwood High. He was doing okay until he met Karlita  
25 Phillips who offered him \$13,000 in addition to those other

1 incentives and she got her just deserts in Abbeville County.  
2 And this young man made sure she got them. Thank you and I  
3 love you and God bless every one of you. Thank you, Judge.

4 THE COURT: Mr. Settles, is there anything that you  
5 would like to say, sir?

6 MR. SETTLES: No.

7 THE COURT: Do you want to say anything, Solicitor?

8 MR. STUMBO: I think they said all they needed to say  
9 over in Abbeville. It has been a long road. It is time for  
10 them to be able to move on so they can focus on grieving for  
11 Jameel, which they have been doing, but certainly coming  
12 back to court is a major feat here today. Thank you.  
13 That's all from the State.

14 MR. NASROLLAHI: I would make one request and I don't  
15 know what the Solicitor's response is going to be. We would  
16 just ask that this sentence be back dated to the time that  
17 he was sentenced in Abbeville. It is just a matter of  
18 months.

19 MR. TINSLEY: Well, actually when the warrant was served  
20 in Abbeville. He was locked up June 13, 2013. So I'm  
21 asking you to give him credit from that day. I think it's  
22 only fair because we were working with the Sheriff's  
23 Department and that sort of thing shortly thereafter.

24 THE COURT: I am following the negotiations that have  
25 been entered into in this case. In the for what it's worth

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

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Appellate Case No. 2015-000980

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The State, .....Respondent,

v.

Tavarious Settles, .....Appellant.

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**THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:**

**STATE’S EXHIBIT #1 (9-1-1 call CD) & #34 (Statement)**

1 category I do believe it is appropriate. I did preside over  
2 both trials and certainly there are times when the State  
3 must seek the assistance of individuals who they would  
4 perhaps otherwise not deal with in order to make sure that  
5 justice is done for everyone involved. So I certainly agree  
6 with and understand what has taken place, both with respect  
7 to the Abbeville charge and with respect to the Greenwood  
8 charge and would agree that it is appropriate.

9 Mr. Settles, on the Abbeville case the sentence of the  
10 Court is that you are committed to the South Carolina  
11 Department of Corrections for 40 years. This sentence will  
12 run concurrently with the Greenwood charges on indictment  
13 13-1538 and -1539. I've noted here that you will be given  
14 credit for the time that you have served since June 13, 2013  
15 in the Department of Corrections. On indictments 13-GS-24-  
16 1538 and -1539, whichever one of those is the homicide  
17 charge, I have signed the order reducing the sentence from  
18 45 years to 40 years and that will, of course, run  
19 concurrent with the Abbeville charge as well. I do find  
20 that Mr. Settles provided substantial assistance to the  
21 State during the course of the Karlita Phillip's case or the  
22 trial of that case, and he is entitled to the benefit of  
23 that statute. The Court has reduced his sentence  
24 accordingly to 40 years.

25 Gentlemen, does this comply with your negotiations?

1     Solicitor?

2             MR. STUMBO: It does, Your Honor.

3             THE COURT: Mr. Tinsley?

4             MR. TINSLEY: Yes, Your Honor.

5             THE COURT: Mr. Nasrollahi?

6             MR. NASROLLAHI: Yes, Your Honor.

7             THE COURT: Good luck to all of you.

8             (END OF REQUESTED TRANSCRIPT OF RECORD.)

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## 1                   Certificate of Reporter

2           I, the undersigned, Tara T. Scott, CVR, Official Court  
3 Reporter for the Eighth Judicial Circuit of the State of  
4 South Carolina, do hereby certify that the foregoing is a  
5 true, accurate, and complete transcript of record of all the  
6 proceedings had and evidence introduced in the trial/hearing  
7 of the captioned case, relative to appeal, in the Circuit  
8 Court for Greenwood County, South Carolina, on the 18th day  
9 of September, 2015.

10          I do further certify that I am neither of kin, counsel,  
11 nor interest to any party hereto.

12

13

14

*Tara T. Scott*

15

Tara T. Scott, CVR

16

Circuit Court Reporter

17

June 15, 2016

18

19

20

21

22

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25

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

Appellate Case No. 2015-000980

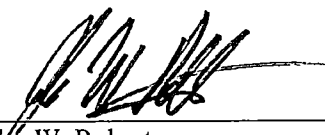
The State, .....Respondent,

v.

Tavarious Settles, .....Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties, material required by Rule 210(c), SCACR, and not any other material.

  
\_\_\_\_\_  
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Attorneys for Appellant

Columbia, South Carolina  
September 21, 2016

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

Appellate Case No. 2015-000980

**RECEIVED**  
OCT 10 2016  
SC Court of Appeals

The State, .....Respondent,

v.

Tavarious Settles, .....Appellant.

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### STATEMENT OF ISSUES ON APPEAL

- I. Based on the totality of the circumstances, did the trial court err by admitting the statement made by Settles, a youth under the age of 18, where the statement was obtained during police interrogation outside the presence of a guardian or attorney, there was testimony at the *Jackson v. Denno* hearing that the police misrepresented that Settles was restricted from making a phone call prior to his interrogation, and Settles was not, in fact, offered the opportunity to make a phone call until after his interrogation.
- II. The South Carolina Supreme Court recently held that individualized and meaningful sentencing hearings are required for youths under the age of 18 at the time of the crime that are subject to a sentence of life imprisonment without the possibility of parole. Settles was under the age of 18 and was subject to a potential sentence of life imprisonment without the possibility of parole. Did the trial court err by refusing to conduct an individualized and meaningful sentencing hearing and by refusing to allow the testimony of mitigation experts?

### STATEMENT OF THE CASE

This case was commenced against Appellant Tavarious Settles upon indictment 2013-GS-24-1538 for the charge of murder and indictment 2013-GS-24-1539 for the charge of possession of a firearm or knife during the commission of a crime. (R. pp. 12; 473). Settles was tried before a jury in Greenwood, South Carolina from March 30, 2015 through April 2, 2015. (R. p. 5). Following deliberations, Settles was found guilty on both charges and thereafter sentenced by the trial court to 45 years in prison on the murder charge and a concurrent five year sentence on the possession of firearm charge. (R. pp. 383-84; 411). Settles timely filed a post-trial motion for reconsideration of the sentence imposed on April 8, 2015, which the trial court denied by order dated April 21, 2015. (R. pp. 414-417). Settles timely served his notice of appeal on April 29, 2015. (R. p. 475).

### **STATEMENT OF THE FACTS**

On the evening of May 30, 2013, Prudencio Chiquin Sis (Sis) was killed by multiple gunshot wounds. (R. pp. 142-44). Immediately prior to his death, Sis was walking in a residential area in Greenwood, South Carolina. (R. pp. 100; 127). A resident of the area, Jerry Turner, witnessed two males approach Sis, heard them exchange words with him, and then heard gunshots. (R. pp. 100; 116). Mr. Turner immediately called 9-1-1 and police arrived within minutes of the call. (R. pp. 100; State's Ex. 1). Multiple officers and crime scene investigators responded to the scene. (R. pp. 143-44). Evidence was gathered, and Mr. Turner's statement was taken. (R. pp. 187-88). No other resident of the area had any direct knowledge of the shooting. (R. p. 188).

Ultimately, the Greenwood City Police Department's investigation centered upon four individuals, Settles, Markece Moore, Michael Patten,<sup>1</sup> and Bryson Jefferson. (R. p. 188). Settles, Patten, and Jefferson were all under the age of 18 at the time of Sis' death; Moore was an adult. (R. pp. 44; 54; 78; 162). Settles, Moore, and Patten were all charged with Sis' murder; Jefferson was not charged at all in connection with Sis's death.<sup>2</sup> (R. pp. 92-93; 377).

Settles was arrested on June 13, 2013. (R. pp. 152; 157). At the time of his arrest, Settles was less than two months past his 17th birthday and was living with his grandmother. (R. pp. 162; 163; 297). He was beginning the 11th grade at Greenwood High School and had no prior criminal record. (R. pp. 297-98; 407).

---

<sup>1</sup> The trial transcript incorrectly identifies Michael Patten as Michael Patton.

<sup>2</sup> Settles' case was the first of the three (and, to date, the only one) that the State brought to trial. (R. p. 408); see <http://publicindex.sccourts.org/Greenwood/PublicIndex> (Under searches for "Patten, Michael James" and "Moore, Markece"); see also *Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) ("[A]n appellate court can take judicial notice of something that was not before the trial court if it is indisputable.").

Prior to being booked into jail, Settles was taken to an interview room at the Greenwood City Detectives Office where he was interrogated by Greenwood City detective, Joe Collins. (R. p. 152). No one else was present during the interrogation. (R. pp. 153; 161). Settles testified at the *Jackson v. Denno* hearing that he did not know that he had been charged with murder at the time he was interrogated. (R. pp. 161-62).

According to the testimony of Detective Collins, Settles was not offered the opportunity to speak with a parent or guardian prior to being interrogated. (R. pp. 158-59). Settles also testified at the *Jackson v. Denno* hearing that he asked to make a phone call but was told he was restricted from making any phone calls. (R. pp. 162-63; 165). The State did not present any evidence or testimony that the police provided Settles the opportunity to make a phone call prior to him being interrogated. And, in fact, Detective Collins testified that he did not offer Settles the opportunity to make a phone call until after the interrogation. (R. p. 197). Settles testified that, if he had been given the opportunity, he would have called his grandmother to ask her to talk to a lawyer and come to the police station. (R. pp. 162-63).

Detective Collins recorded only the last three and half minutes of his approximately 40-minute interrogation of Settles. (R. pp. 153; 155; State's Ex. 34). Prior to Detective Collins beginning the recording, he had Settles sign an "Adult Waiver of Rights." (R. pp. 160; 466; State's Ex. 34). Detective Collins testified that he also verbally informed Settles of his rights briefly before the interrogation, but this was not captured on the recording. (R. pp. 158; 160; State's Ex. 34). In the recorded statement, Settles states that he was with Moore, Patten, and Jefferson immediately before the shooting and that he witnessed Moore shoot Sis. (State's Ex. 34).

Other than the self-serving testimony of Moore, the only witness the State produced that had any direct knowledge of the circumstances surrounding the shooting was Mr. Turner. (R. p. 188). Mr. Turner gave only a vague description of the two males that had approached Sis and did not identify Settles or anyone else as one of those males. (R. p. 99). Mr. Turner testified that he saw “something shiny” that looked like a gun in the hand of one of the males that approached Sis but he was unsure which of the two males was holding it. (R. p. 116). Mr. Turner further testified that he only heard the shooting and did not see it. (R. p. 116).

The State’s only evidence connecting Settles to the crime was the testimony of Moore, Patten, and Jefferson against Settles and Settles’ statement to police after he was arrested and in police custody. The State did not produce any forensic evidence linking Settles to the crime scene. Nor did the State produce any murder weapon. Given the lack of credibility of Moore, Patten, and Jefferson,<sup>3</sup> the State’s case hinged on Settles’ statement.<sup>4</sup>

### STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Evidentiary rulings are within the

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<sup>3</sup> The testimony at trial of Moore, Patten, and Jefferson was inconsistent and conflicted with each of their multiple prior statements to the police. (R. pp. 30-97). Indeed, Moore and Patten admitted to lying to the police multiple times, and it was demonstrated that Moore lied during his in-court testimony. (R. pp. 42; 44; 46-47; 52; 56; 79; 290). Moreover, Patten and Jefferson did not witness the shooting, and only Moore that testified he witnessed Settles shoot Sis. (R. pp. 47; 60; 79-80).

<sup>4</sup> This is confirmed by the fact that the only evidence specifically referenced by trial court in denying Settles’ motion for a directed verdict was Settles’ statement because of its relevance to the State’s “hand of one, hand of all” theory. (R. pp. 262-64). This is further confirmed by a question by the jury to the trial court during deliberations regarding the applicability of the “hand of one, hand of all” theory to the weapons charge, which demonstrates the jury did not believe Moore’s testimony that Settles had a gun and shot Sis. (R. pp. 378-80; 463).

sound discretion of the trial court, and such rulings will not be reversed absent an abuse of discretion or the commission of legal error that prejudices the defendant. *State v. Garner*, 389 S.C. 61, 65, 697 S.E.2d 615, 617 (Ct. App. 2010) (citing *State v. Rice*, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007)). On review, appellate courts are limited to determining whether the trial judge abused his discretion. *State v. Reed*, 332 S.C. 35, 503 S.E.2d 747 (1998). The trial court abuses its discretion when the ruling is based on an error of law or factual conclusion that is without evidentiary support. *Garner*, 389 S.C. at 65, 697 S.E.2d at 617 (citing *Rice*, 375 S.C. at 315, 652 S.E.2d at 415).

### ARGUMENT

- I. **Based on the totality of the circumstances, the trial court erred by admitting the statement made by Settles, a youth under the age of 18, where the statement was obtained during police interrogation outside the presence of a guardian or attorney, there was testimony during the *Jackson v. Denno* hearing that the police misrepresented that Settles was restricted from making a phone call prior to his interrogation, and Settles was not, in fact, offered the opportunity to make a phone call until after his interrogation.**

A statement obtained as a result of custodial interrogation is inadmissible unless the suspect voluntarily waived his rights. *Miranda v. Arizona*, 384 U.S. 436, 498-500 (1966). “[A]ny criminal trial use against a defendant of his involuntary statement is a denial of due process of law....” *State v. Hook*, 348 S.C. 401, 410, 559 S.E.2d 856, 860 (Ct. App. 2001), *aff’d as modified*, 356 S.C. 421, 590 S.E.2d 25 (2003) (citing *Jackson v. Denno*, 378 U.S. 368, 376 (1964) (“It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession....”)). “The State bears the burden of establishing voluntariness by a preponderance of the evidence...even where a defendant has signed a waiver of

rights form....” *Hook*, 348 S.C. at 410, 559 S.E.2d at 860. “The test for determining the admissibility of a statement is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances.” *Hook*, 348 S.C. at 410, 559 S.E.2d at 860; see *State v. Morris*, 307 S.C. 480, 487, 415 S.E.2d 819, 823 (Ct. App. 1991) (“The test of admissibility of an accused’s statement against him is voluntariness.”).

“The test of voluntariness is ‘whether a defendant’s will was overborne by the circumstances surrounding the given statement. The due process test takes into consideration the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.’” *State v. Miller*, 375 S.C. 370, 384, 652 S.E.2d 444, 451 (Ct. App. 2007) (quoting *Dickerson v. United States*, 530 U.S. 428, 434 (2000)). Accordingly, factors that the trial court should consider under the totality-of-circumstances analysis include: police coercion; police misrepresentations; the location of the interrogation; the age, education, maturity, background, experience, and conduct of the accused; and isolation of a minor from his or her parents. *Miller*, 375 S.C. 370, 384, 652 S.E.2d 444, 451. “Coercion is determined from the perspective of the suspect.” *Id* at 386, 652 S.E.2d at 452.

At trial, Settles’ defense counsel moved to suppress the statement Settles made during his custodial interrogation, and the trial court conducted a *Jackson v. Denno* hearing to determine the admissibility of the statement. (R. p. 151). Detective Collins and Settles testified at the hearing. (R. pp. 151-70). After this testimony, Settles’ defense counsel argued that the statement was not given voluntarily considering the totality of the circumstances, including Settles’ age, the fact that he was not offered the opportunity to make a phone call or contact his mother or grandmother prior to his interrogation, and the

fact that the police misrepresented that he was restricted from making such a call. (R. pp. 165-70). The trial court, however, determined that Settles voluntarily waived his rights and therefore denied Settles' motion to suppress the statement and allowed the State to present it to the jury. (R. p. 169).

The trial court based its ruling as to the voluntariness of Settles' statement largely on the fact that it believed Detective Collins' testimony that, as described by the trial court, "[Settles] was free to make a phone call if he wanted to" to be more credible than Settles' testimony that he had been told that he was restricted from making a phone call. (R. p. 170). However, Detective Collins never testified that "Settles was free to make a phone call if he wanted to" and never testified that he offered Settles the opportunity to make a phone call *prior* to interrogating Settles and obtaining his statement. Detective Collins' testimony was only that he offered Settles the opportunity to make a phone call; he did not specify that he made this offer prior to obtaining Settles' statement. And, in fact, he subsequently testified that he did not offer Settles the opportunity to make a phone call until after the interrogation. (R. p. 197). Accordingly, the trial court's finding in support of its ruling as to the voluntariness of the statement that "Mr. Settles was offered the opportunity to make a phone call and declined to do so" prior to being interrogated by the police has no evidentiary support in the record. Therefore, on this basis alone, the trial court abused its discretion by failing to suppress Settles' statement. *Garner*, 389 S.C. at 65, 697 S.E.2d at 617 ("The trial court abuses its discretion when the ruling is based on...[a] factual conclusion that is without evidentiary support.")

Moreover, in part because of the trial court's erroneous factual conclusion, the trial court did not properly apply—and could not have properly applied—the requisite

totality-of-circumstances analysis. Indeed, through its erroneous factual finding, the trial court removed from its analysis a critical factor demonstrating the police's coercion and why Settles statement was not voluntary. Because by misrepresenting that Settles could not make a phone call and depriving him of the opportunity to do so prior to interrogating him, the police removed any way by which Settles could exercise his right to an attorney. Simply put, the right to consult with counsel is meaningless if it can be eliminated by depriving the suspect of his only avenue for contacting counsel. And while an adult experienced with the criminal justice system may not fall prey to this misrepresentation and might not waive the right to an attorney under similar circumstances, to Settles—a teenager with no prior involvement with the criminal justice system—the supposed waiver of his right to an attorney was essentially meaningless because, from his perspective, he had no way to exercise that right. *Miller* at 386, 652 S.E.2d at 452 (“Coercion is determined from the perspective of the suspect.”) Long ago, the United States Supreme Court made this point abundantly clear:

But a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protest his own interests or how to get the benefits of his constitutional rights.

...

He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult

protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights.

*Gallegos v. Colorado*, 370 U.S. 49, 54-55 (1962).

Although youth alone is not enough to render Settles' statement inadmissible, when the requisite totality-of-circumstances analysis is properly applied and his youth and inexperience with the criminal justice system are considered in combination with the restriction on his access or ability to contact his guardian or an attorney, Settles' statement was not voluntarily made and the trial court's contrary ruling was an abuse of discretion. Because Settles' conviction was based in large part on this involuntary and coerced statement, his conviction should be reversed. *Jackson v. Denno*, 378 U.S. at 376 ("It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession..."). Further, because the State could not have avoided a directed verdict or proved Settles' guilt beyond a reasonable doubt without this statement, Settles should be granted a new trial.

**II. The trial court erred by refusing to conduct the individualized and meaningful sentencing hearing required for youths under the age of 18 that are subject to a life sentence without the possibility of parole and by refusing to allow the testimony of mitigation experts.**

In *Aiken v. Byars*, the South Carolina Supreme Court established an "affirmative requirement" that all youths under the age of 18 at the time of the alleged crime that "may be subject to a sentence of life imprisonment without the possibility of parole" are entitled to an individualized and meaningful sentencing hearing that "fully explore[s] the impact of the defendant's juvenility on the sentence rendered." 410 S.C. 534, 543-545,

765 S.E.2d 572, 576-578 (2014) (applying *Miller v. Alabama*, — U.S. —, 132 S.Ct. 2455 (2012)). At the time of the alleged crime, Settles was under the age of 18. (R. p. 162). Because the jury found him guilty of murder, he was automatically subject to a potential sentence of life imprisonment without the possibility of parole. S.C. Code Ann. § 16-3-20(A).

The trial court, however, expressly rejected the applicability of *Byars* to Settles' sentencing as well as Settles' request for the appointment of a mitigation specialist or expert to assist in the presentation of mitigating evidence. (R. pp. 15-17; 387-95; 414-18). Instead, the trial court conducted a perfunctory sentencing hearing within minutes of the jury's verdict that failed to comply with the requirements of *Byars* and then sentenced Settles to 45 years without parole on the murder charge.<sup>5</sup> (R. pp. 395-411). This was erroneous and demands that, at the very least, this case be remanded for a new sentencing hearing and the appointment of and funding for mitigation experts.

In *Byars*, the South Carolina Supreme Court reviewed and applied the United States Supreme Court's 2012 decision in *Miller v. Alabama*. The United States Supreme Court held in *Miller* that mandatory sentences to life in prison without the possibility of parole for juvenile—under 18 years of age—offenders violated the Eighth Amendment's prohibition of cruel and unusual punishments. 132 S.Ct. at 2461; see U.S. Const. amend VIII. In reaching this decision, the United States Supreme Court examined two prior decisions—*Roper v. Simmons*, 534 U.S. 551 (2005) and *Graham v. Florida*, 560 U.S. 48 (2010)—in which the Court invalidated the death penalty for all juvenile offenders and

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<sup>5</sup> Although not bearing on the issue before the Court, the Court can take judicial notice of the fact that subsequent to the filing of Notice of Appeal, on September 18, 2015, the Solicitor moved the trial court to reduce Settles' sentence from 45 years to 40 years for Settles' "substantial assistance" in another matter, which the trial court granted the same day.

life without parole sentences for juvenile nonhomicide offenders, respectively. *Miller*, 132 S.Ct. at 2463-69. The Court stated that “*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing,” a conclusion that “rested not only on common sense—on what ‘any parent knows’—but on science and social science as well.” *Miller*, 132 S.Ct. at 2464. As explained by the Court, this significant difference between adults and children manifested itself in three distinct ways:

First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child’s character is not as well formed as an adult’s; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity.

*Id.* (citations and internal quotation marks and ellipsis omitted).

According to the Court, these “distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.” *Miller*, 132 S.Ct. at 2465. Explaining further, the Court stated:

[B]ecause the heart of the retribution rationale relates to an offender’s blameworthiness, the case for retribution is not as strong with a minor as with an adult. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. Similarly, incapacitation could not support the life-without-parole sentence [because] [d]eciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible—but incorrigibility is inconsistent with youth.

*Id.* (citations and internal quotation marks omitted). For all of these reasons, the United States Supreme Court held that the mandatory sentencing schemes that prevent a

sentencer from taking into account the youth of the offender and considering the differences between adult and juvenile offenders violate the Eighth Amendment. *Id.* at 2469.

In *Byars*, 15 inmates who were sentenced to life without parole as juveniles under South Carolina's current sentencing scheme petitioned the South Carolina Supreme Court for resentencing in light of the *Miller* decision. *Byars*, 410 S.C. at 536-37, 765 S.E.2d at 573-74. The question before the Court therefore was whether *Miller* extended to South Carolina's discretionary sentencing scheme which permits a life without parole sentence to be imposed on a juvenile but does not mandate it like those sentencing schemes at issue in *Miller*. The South Carolina Supreme Court held that it does, specifically stating that "the principles enunciated in *Miller v. Alabama* apply retroactively to these petitioners, to those similarly situated, and prospectively to all juvenile offenders who may be subject to a sentence of life imprisonment without the possibility of parole." *Byars*, 410 S.C. at 545, 765 S.E.2d at 578.

In reaching this holding, the South Carolina Supreme Court focused not on the sentences that were rendered but rather how those sentences were determined: "*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. "*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." *Id.* at 543, 765 S.E.2d at 576-77. The Court stated that it "must give effect to the proportionality rationale integral to *Miller's* holding—youth has constitutional significance...[and] [a]s such, it must be afforded

weight in sentencing.” *Id.* at 542-43, 765 S.E.2d at 576. In short, “*Miller* requires the sentencing authority [to] ‘take into account how children are different.’” *Id.* at 544, 765 S.E.2d at 577 (quoting *Miller*, 132 S.Ct. at 2469).

Examining the 15 cases before it, the Court found that, “although some of the hearings touch on the issues of youth, none of them approach the sort of hearing envisioned by *Miller* where the factors of youth are carefully and thoughtfully considered.” *Id.* at 543, 765 S.E.2d at 577. In granting the petitions and ordering resentencing for the petitioners that would 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,” the Court found that it was the “absence of this level of inquiry into the characteristics of youth [that] produced a facially unconstitutional sentence for these petitioners.” *Id.* at 543-44, 765 S.E.2d at 577.

The Court further provided instruction for the “appropriate procedure” for sentencing hearings for juveniles going forward. *Id.* at 544, 765 S.E.2d at 577. Looking again towards *Miller*, the South Carolina Supreme Court found that “*Miller* establishes a specific framework, articulating that the factors a sentencing court consider at a hearing must include: (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.'" *Byars*, 410 S.C. at 544-45, 765 S.E.2d at 577 (quoting *Miller*, 132 S.Ct. at 2468).

Here, the trial court expressly rejected the applicability of *Byars* and *Miller* to Settles' sentencing, both prior to the sentencing hearing and upon Settles' post-trial motion. (R. pp. 395; 414-17). Consequently, the trial court did not conduct a sentencing hearing that complied with the requirements of these decisions and in which the "factors of youth [were] carefully and thoughtfully considered." *Byars*, 410 S.C. at 543, 765 S.E.2d at 577. This is fully demonstrated by the trial court's last minute denial of the appointment and funding of mitigation experts as well as its termination of witness testimony on Settles' behalf, stating that "[t]here's not going to be testimony" and "I do not believe a full-blown sentencing hearing is appropriate in these circumstances."<sup>6</sup> (R. pp. 397; 400).

Instead of following the sentencing framework established by *Byars* and *Miller*, the trial court, like those sentencing decisions reversed in *Byars*, "treat[ed] the characteristics of youth as any other fact" and, thus, erroneously minimized the factor of Settles' youth. *Id.* at 543 n.8, 765 S.E.2d at 577 n.8. Indeed, the trial court's entire consideration of Settles' youth consisted of the following:

I agree with [defense counsel] that although the law might consider a 17-year-old to be a man there are certain developmental delays. *Maybe* you were not fully mature. *Maybe* emotionally you're not fully there.

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<sup>6</sup> Rather than allowing Settles to present witness testimony on his behalf, the trial court instructed Settles' counsel to just provide a summary because "that might be a much more *efficient* way for you to present the mitigation in this particular case." (Emphasis added). (R. p. 400).

(Emphasis added). (R. p. 410).<sup>7</sup> However, for purposes of sentencing, *Byars* and *Miller* make clear that the law does not consider a 17-year-old to be a “man.” The trial court’s hesitation and uncertainty as to whether Settles “maybe” was not fully mature or emotionally stable also is exactly why an individualized and meaningful sentencing hearing is required and the testimony of mitigation experts is needed.

Because the trial court rejected the applicability of *Byars* and *Miller* and conducted a sentencing hearing that ignored the framework and factors required to be considered by those decisions, Settles’ sentence “offends the Constitution” and is the result of an error of law. *Byars*, 410 S.C. at 543, 765 S.E.2d at 576-77. Settles therefore is entitled to resentencing. *State v. Petty*, 245 S.C. 40, 42, 138 S.E.2d 643, 645 (1964) (“In the case of an illegal sentence, the well settled practice in this jurisdiction is to...set aside the sentence and remand the case to the trial court for the purpose of resentencing the defendant.”).

Moreover, prior to the trial, Settles moved for the appointment and funding of a mitigation specialist and a psychologist or psychiatrist for sentencing purposes. (R. pp. 15-17; 418). At that time, the trial court indicated that it would not be opposed granting this request and that it was “going to keep an open mind and keep all my options open with regard to that request on this case.” (R. pp. 16-17). Consistent with guidance, Settles renewed his request for the appointment and funding of a mitigation specialist and

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<sup>7</sup> Strangely, although stating that there was no evidence in the record to support such a claim, the trial court spent more time discussing its personal perception that members of Greenwood’s Hispanic community (Sis was Guatemalan) are often targeted because of the belief that some of them are not legally in the country than it did discussing Settles’ youth and other attendant characteristics. (R. pp. 409-10).

a psychologist or psychiatrist after the jury's verdict and explained the necessity and relevance of the testimony that these experts could provide. (R. pp. 391-93).

Despite the trial court's previous indication that it would likely grant such a request and the State's suggestion that the sentencing hearing could be postponed until the next term of court to allow a mitigation expert to meet with Settles, the trial court inexplicably denied the request based on its erroneous view of the law and its determination that *Byars* and *Miller* did not apply to Settles' case. (R. pp. 394; 395; 416-17); see *Garner*, 389 S.C. at 65, 697 S.E.2d at 617 ("The trial court abuses its discretion when the ruling is based on an error of law"). This forced Settles to immediately—*i.e.*, within minutes of the jury's verdict—proceed with his sentencing hearing without the benefit of the relevant and meaningful testimony that such experts could provide, which significantly prejudiced him.

This significant prejudice to Settles is confirmed by the South Carolina Supreme Court's comparison of the sentencing of juvenile offenders subject to life without parole to the penalty phase of a capital case. *Byars*, 410 S.C. at 544-45, 765 S.E.2d at 577 ("[W]e are mindful that the *Miller* Court specifically linked the individualized sentencing requirements of capital sentencing to juvenile without parole sentences...Thus, the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings...."). The trial court therefore erred by failing to give Settles a reasonable opportunity to prepare for the sentencing hearing and present expert testimony relevant to the mitigating factors *Byars* and *Miller* mandate that a sentencer consider when sentencing youths. *State v. Patterson*, 290 S.C. 523, 529, 351 S.E.2d 853, 856 (1986) (holding that trial judge's refusal to

permit psychologist to testify as to mitigating factors during penalty phase of a capital case was reversible error).

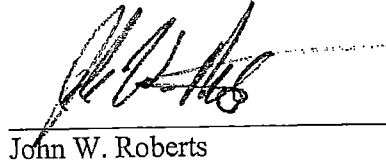
Additionally, in denying Settles' post-trial motion for reconsideration of his sentence, the trial court found that "appointing a mitigation specialist, psychologist or psychiatrist would not have aided the court in deciding the sentence to impose." (R. pp. 416-417). However, this finding was necessarily based on the trial court's erroneous view that *Byars* and *Miller* did not apply and truly could only be made if the factors required to be considered by those decisions are ignored and the characteristics of youth are simply treated as any other fact. *Byars*, 410 S.C. at 543 n.8, 765 S.E.2d at 577 n.8; *see also Skipper v. S. Carolina*, 476 U.S. 1, 8 (1986) ("The exclusion by the state trial court of relevant mitigating evidence impeded the [sentencer's] ability to carry out its task of considering all relevant facets of the character and record of the individual offender."). Therefore, the trial court's last-minute denial of the appointment of and funding for mitigation experts and accompanying refusal to allow Settles to present testimony from such experts was an error and abuse of discretion that further requires resentencing in this case.

### **CONCLUSION**

For the reasons set forth above, Settles' convictions should be reversed and this case remanded for a new trial. Alternatively, this case should be remanded for resentencing.

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Respectfully submitted,



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October 10, 2016

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

Appellate Case No. 2015-000980

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SC Court of Appeals

The State, ..... Respondent,

v.

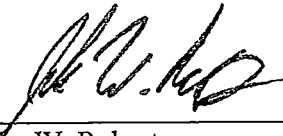
Tavarious Settles, ..... Appellant.

**CERTIFICATE OF COUNSEL**

The undersigned hereby certifies that the Final Briefs of Appellant Tavarious Settles comply with Rule 211(b), SCACR.

[SIGNATURE PAGE FOLLOWS]

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October 10, 2016

**STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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**Appeal from Greenwood County  
Honorable Frank R. Addy, Jr., Circuit Court Judge**

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**THE STATE,**

**Respondent,**

**v.**

**TAVARIOUS SETTLES,**

**Appellant**

**Appellate Case No. 2015-000980.**

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**FINAL BRIEF OF RESPONDENT**

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## APPELLANT'S STATEMENT OF THE ISSUES ON APPEAL

- I. Based on the totality of the circumstances, did the trial court err by admitting the statement made by Settles, a youth under the age of 18, where the statement was obtained during police interrogation outside the presence of a guardian or attorney, there was testimony at the *Jackson v. Denno* hearing that the police misrepresented that Settles was restricted from making a phone call prior to his interrogation, and Settles was not, in fact, offered the opportunity to make a phone call under after his interrogation.
- II. The South Carolina Supreme Court recently held that individualized and meaningful sentencing hearings are required for youths under the age of 18 at the time of the crime that are subject to a sentence of life imprisonment without the possibility of parole. Settles was under the age of 18 and was subject to a potential sentence of life imprisonment without the possibility of parole. Did the trial court err by refusing to conduct an individualized and meaningful sentencing hearing and by refusing to allow the testimony of mitigations experts?

## RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Did the trial court abuse its discretion in ruling Appellant's statement admissible where, considering Detective Collins and Appellant's testimony both at the *Denno* hearing and before the jury during trial, the totality of the circumstances demonstrate that Appellant made a knowing, voluntary waiver of his *Miranda* rights and was not deprived of his independent decision-making ability by any coercive tactic, even in light of his age.
- II. Did the trial court err in denying Appellant's attempt to present his mitigation case via individualized, sworn testimony where no precedent establishes a particular procedure that the court must follow before sentencing an individual under the age of eighteen to a term-of-years sentence and where the sentencing court heard evidence related to and gave due consideration to Appellant's age, individual history and characteristics, and family circumstance prior to issuing a forty-five year sentence.

## STATEMENT OF THE CASE

In September 2013, The Greenwood County Grand Jury indicted Appellant Tavarious Settles for the May 30, 2013, murder of Prudencio Sis. Settles was also indicted for possession of a weapon during the commission of a violent crime. (R. pp. 469 - 472).

Represented by Robert Tinsley, Esquire, Appellant proceeded to trial in Greenwood County beginning March 30, 2015. The Honorable Frank R. Addy, Jr. Presided. Assistant Eighth Circuit Solicitors Elizabeth White and C. Yates Brown prosecuted the case, which lasted four days. (R. p. 5).

Settles was convicted of both charges, and Judge Addy sentenced him to 45 years for murder and a concurrent five years on the weapons charge. Settles received credit for time served. (R. p. 411, lines 10-17).

Following sentencing, Settles, by and through counsel, moved for the court to reconsider the sentence imposed. (R. pp. 414 – 415). Judge Addy denied that motion on April 21, 2015. (R. pp. 416 – 417). Notice of this appeal followed. (R. p. 475).

On September 18, 2015, Eighth Circuit Solicitor David Stumbo moved for Settles' sentence to be reduced as a result of Settles' offering substantial assistance to the State by testifying in another matter. (R. pp. 476 - 477). Judge Addy granted the State's motion, reducing Settles' sentence on the murder charges from 45 to 40 years, and running it concurrent to other charges. (R. pp. 478 - 479).

## STATEMENT OF FACTS

“Take your pants off,” Appellant Tavarious Settles told the victim of the armed robbery he set out to hit the night of May 30, 2013. (R. p. 37, lines 1-6). “Then Prudencio tried to grab the gun, but he had hands up because he didn’t know English, but he tried to grab the gun and that’s when Settles snapped away.” (R. p. 37, lines 8-10). Armed with a forty caliber Glock, Appellant fired multiple shots in the middle of Greenwood’s Franklin Street, striking Prudencio Sis, a stranger. (R. p. 73, line 11 – p. 74, line 24). Prudencio had been walking home from a visit with his fiancée. (R. p. 240, lines 1-25). She recalled hearing the shots shortly after Prudencio left her home at nine that night, but she did not think anything of it at the time. (R. p. 242, lines 4-17).

From the altercation’s inception, an eyewitness gazed into the street smoking a cigarette, concealed as he stood in the yard behind his home. (R. p. 98, line 25 – p. 99, line 2). He kept his eyes trained on two young men approaching the victim in the middle of Franklin Street—one tall with his shirt looped over his head, the other short with little “Shirley Temple” twisted dreadlocks. (R. p. 99, lines 2-14). Their presence made the eyewitness uneasy. They made “no friendly gesture.” (R. p. 99, lines 16-24). He hoped they did not see him as he began backing into his home. (R. p. 100, lines 1-8). It was at this point that the eyewitness heard one of the dangerous looking men exclaim, “We got you now, Mother-----.” (R. p. 100, line 13). The victim put his hands up, saying “no, no, no, no” and appearing to reach for a pocketbook. (R. p. 100, lines 14-19). As the eyewitness backed into the safety of his home, he heard one of the guys say “I got you.” (R. p. 100, lines 19-22). Then he heard two pops of gunfire. (R. p. 100, line 22). According to this eyewitness, the shorter individual with the twisted hair had something shiny in

his hand, which the eyewitness believed to be the gun. (R. p. 101, line 2 – p. 102, line 15; R. p. 116, lines 10-13). He called 911 to report a shooting. (R. p. 100, lines 9-24; State's Exhibit 1).

Prudencio was dead on arrival. (R. p. 143, lines 15-25; R. p. 148, lines 1-11; R. pp. 464 – 465 State's Exhibit 4). He had been struck by Appellant's gunfire five times: once in the lower right back, once near the upper right shoulder, once to his abdomen; once in a graze wound to his right finger sustained from a bullet buzzing by his hand; and once in the chest by a nearly instantaneously fatal shot. (R. p. 251, line 16 – p. 257, line 18). The forensic pathologist recovered two projectiles from his body during autopsy. (R. p. 250, lines 10-13). Each projectile was consistent with a forty caliber firearm, potentially a Glock. (R. p. 234, lines 3-9). In addition to the projectiles recovered from the victim's autopsy, four forty caliber shell casings were recovered from the crime scene. (R. p. 210, lines 2-9; R. p. 236, lines 4-6). The State's firearm and toolmark examiner concluded that those four casings were fired from the same gun. (R. p. 236, line 18 – p. 237, line 10). Gunshot residue was also detected on the victim's right palm and the back of his left hand. (R. p. 223, line 22 – p. 224, line 3).

It was around nine o'clock that night when Michael Patten drove Appellant, Markece Moore, and Bryson Jefferson a couple blocks from a house on Taggart street to Franklin Street, looking to hit a lick. (R. p. 68, line 1 – p. 69, line 16). Jefferson, fifteen years old at the time, recalled seeing Appellant with a black gun prior to his getting out of the car. (R. p. 88, lines 20-25; R. p. 91, lines 14-19). The foursome saw "somebody on the side of the road right there by the [Carolina Pride] Packing Plant entrance, and somebody was helping him get their car fixed." (R. p. 70, lines 14-20). They considered robbing that person, but did not go through with it because there was another man assisting him on the side of the road. (R. p. 70, line 24 – p. 71, line 5).

The foursome continued to the next street and saw the victim emerging onto Franklin Street from a wooded path. (R. p. 71, lines 6-21). Patten stopped the car so that Appellant, known as Purp, and Markece Moore, known as Lank, could get out of the car. (R. p. 72, lines 3-8). Purp had a black forty caliber Glock. (R. p. 72, lines 11-25). "There you go, Purp," Patten told Appellant. (R. p. 33, line 7 – p. 34, line 1).

Jefferson and Patten stayed in the car, driving another couple blocks away to "the dirt" to get some cigarettes. (R. p. 73, lines 6-10; R. p. 89, lines 1-13). Patten did not see the robbery take place, but knew that Appellant and Lank were planning on robbing the pedestrian and heard some gunshots. (R. p. 73, lines 11-25).

Lank testified that he got out of the car with Appellant and walked away towards his own home. (R. p. 34, lines 2-7). At that point, Lank heard Appellant tell the victim: "take your pants off." (R. p. 36, line 25 – p. 37, line 4). Lank testified that the victim tried to grab the gun and Appellant fired away with his Glock. (R. p. 37, lines 7-22). Lank looked on as Prudencio sustained a gunshot to the arm. (R. p. 38, line 14 – p. 39, line 11). Then Lank turned and ran to his apartment, hearing more gunshots. (R. p. 38, lines 19-23). Lank left his apartment and ran back to the car. (R. p. 39, line 23 – p. 40, line 10).

According to Patten, Lank jumped back in the car when Jefferson and Patten were still at "the dirt" and said "Purp had shot the Mexican and he took off running and heard more gunshots."<sup>1</sup> (R. p. 73, line 21 – p. 74, line 11). According to each co-defendant, when Jefferson

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<sup>1</sup> At trial, Jefferson initially testified that Appellant did not say anything specifically about the shooting when he got back in the car. (R. p. 90, line 24 – p. 91, line 4). When prompted to recall his recorded statement to law enforcement, Jefferson testified that he remembered Appellant saying he shot a Mexican three to four times. (R. p. 92, lines 9-13).

and Patten left “the dirt” to head to their next destination, Appellant rejoined the group in the car. (R. p. 40, line 20 – p. 41, line 3; R. p. 74, lines 2-24; R. p. 89, line 14 – p. 90, line 19).

The would-be victim who was assisting his friend with car trouble on the side of the road just a block or so away testified that he heard hollering and gunshots. (R. p. 137, lines 1-13). “[R]oughly five minutes later a guy came out of the woods and approached [the men] and said, ‘What’s up, man,’ and kept passing [by].” (R. p. 137, lines 13-16). A second guy followed. (R. p. 137, lines 16-18). Five minutes later, law enforcement arrived to take this witness’ statement. (R. p. 137, lines 18-22). He identified the men as a “short and stocky [guy] with the shorts on” that came out of the woods, and a second one as “a tall skinny guy with dreadlocks.” (R. p. 139, lines 1-17). The witness did not get a good enough look to be able to select either perpetrator from a lineup. (R. p. 138, line 25 – p. 139, line 1).

Back in the co-defendant’s car, Patten saw the gun in Appellant’s waistband. (R. p. 75, lines 10-16). When the foursome got back to the house on Taggart Street, Appellant “put the gun on the floor of [Patten’s] car and then went and burned a shirt” in a barrel. (R. p. 41, lines 4-14; R. p. 75, lines 17-23). Appellant took his gun with him when he parted ways with the foursome later that night. According to Patten, Appellant sold the gun thereafter.<sup>2</sup> (R. p. 76, lines 1-17).

On June 13, 2013, Greenwood Detective Joe Collins arrested, Mirandized, and interrogated Appellant about Prudencio’s murder. (R. p. 189, line 2 – p. 193, line 13; R. p. 466 State’s Exhibit 33). At the time of arrest, Appellant had short “Shirley Temple” twisted dreadlocks. (R. p. 467 – 468 State’s Exhibit 35). He also established that he is shorter than Lank.

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<sup>2</sup> A defense witness testified that on the day after the shooting, he witnessed Lank trading a gun to his friend in exchange for three grams of crack. (R. p. 294, lines 2-15).

(R. p. 194, lines 2-12). In his statement to law enforcement and in his testimony at trial, Appellant maintained that Lank shot the victim. (State's Exhibit 34; R. p. 309, lines 1-4).

Appellant maintained that the foursome planned to "hit a lick, as in rob somebody" that night, and he and Lank got out of the car when Patten "pointed out the Mexican and [said] there you go." (R. p. 303, line 22 – p. 306, line 8). According to Appellant, he was the one backing up as the victim reached for Lank's gun and Lank started shooting. (R. p. 307, lines 1-13). He stated he saw the first shot and ran up the hill to the apartments, hearing the gun fire three more times. (R. p. 307, lines 7-17). Appellant testified that he was unarmed. (R. p. 306, lines 21-24).

## ARGUMENT

- I. The trial court did not abuse its discretion in ruling Appellant's statement admissible because considering Detective Collins and Appellant's testimony both at the *Denno* hearing and before the jury during trial, the totality of the circumstances demonstrate that Appellant made a knowing, voluntary waiver of his *Miranda* rights and was not deprived of his independent decision-making ability by any coercive tactic, even in light of his age.

Prior to the trial testimony of Greenwood Detective Joe Collins, counsel requested and engaged in a *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964), hearing regarding the admissibility of Appellant's three-and-a-half minute recorded statement. (R. p. 151, lines 6-18). At this point in the trial, no testimony related to either law enforcement's development of Appellant as a suspect or Appellant's apprehension had been elicited. *In limine*, Detective Collins testified that he was called to the crime scene on May 30, that he thereafter developed Appellant as a suspect, and that he interviewed Appellant prior to booking him into the county detention center.<sup>3</sup> (R. p. 152, lines 4-22).

Detective Collins advised Appellant of his *Miranda*<sup>4</sup> rights and Appellant signed the adult waiver of rights form, completing the form and initialing next to each individual right. (R. p. 153, line 22 – p. 154, line 21; R. p. 466). At the time that Appellant provided his formal waiver of rights, he had been in custody for 30 to 60 minutes. (R. p. 153, lines 12-14). According to Detective Collins, Appellant appeared to understand his conversation with the detective regarding waiver. (R. p. 153, lines 21-21). Appellant asked no questions before signing the form. (R. p. 154, lines 22-24). Appellant did not ask for an attorney at any time during his interrogation. (R. p. 157, lines 16-19). Detective Collins also testified that he offered Appellant a phone call but he did not make one. (R. p. 159, lines 12-21).

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<sup>3</sup> Earlier, another officer arrested Appellant as he stood on a street corner. (R. p. 164, lines 5-15).

<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

Detective Collins then questioned Appellant in an interview room for approximately 40 minutes. (R. p. 153, lines 15-16; R. p. 157, lines 13-15). Appellant appeared calm and relaxed throughout the duration of the interrogation. (R. p. 155, lines 17-19). Appellant agreed to provide a recorded version of his statement, and did so at approximately 9:00 PM on June 13, 2013. (State's Exhibit 34; R. p. 155, lines 3-4). At the outset of the recording, Detective Collins established that Appellant waived his *Miranda* rights by having Appellant identify his initials and signature on the waiver of rights form. (R. p. 156, lines 15-21; State's Exhibit 34 at 00:21-00:38). According to Detective Collins, Appellant's recorded statement varied only slightly from his initial statement, but not materially. (R. p. 155, lines 10-16). The trial judge reviewed the recording. (R. p. 157, lines 4-7; State's Exhibit 34).

Appellant testified next. (R. p. 160, line 13). According to Appellant, Detective Collins interviewed him and recorded his statement before charging him with murder. (R. p. 161, lines 14-25). Appellant testified that he was uncomfortable in the interview room with Detective Collins. (R. p. 161, lines 8-13; R. p. 162, lines 21-23). Appellant also testified that he asked to make a phone call and that "they told [him he] was on phone restriction." (R. p. 162, lines 8-14). Appellant then testified that had he been able to make a phone call, he would have called his grandmother, who he lived with at the time, to ask her to come down to the station, provide him with advice, and "talk to a lawyer" on his behalf. (R. p. 162, line 25 – p. 163, line 14). Appellant acknowledged that he did not ask for an attorney during the recording, and that he initialed and signed a waiver of his *Miranda* rights. (R. p. 165, lines 6-10). Appellant was seventeen at the time of both the crime and interview. (R. p. 162, lines 15-20).

Following this testimony, Appellant's counsel argued for suppression, citing *State v. Parker*, 381 S.C. 68, 871 S.E.2d 619 (Ct. App. 2008) (finding sixteen-year-old's confession

admissible after consideration of totality of the circumstances surrounding his three-and-a-half hour interrogation). (R. p. 160, lines 16-22; R. p. 165, lines 16-18). Counsel argued “the youth of the accused” as his “primary consideration,” in addition to “the status of his education” as a rising high school junior. (R. p. 165, lines 22-25). Additionally, counsel cited “[t]he lack of phone call” as a means of undue coercion. (R. p. 165, line 25; R. p. 166, lines 5-6; R. p. 166, line 23 – p. 167, line 2). Counsel conceded that there existed “no allegation of any force or anything like that” lending to the confession in this case, (R. p. 165, line 25 – p. 166, line 3), but remained focused on the premise that Appellant’s “denial of contact with at least one outside party much older and wiser than he was a clear violation of his constitutional right.” (R. p. 168, lines 3-6).

In rebuttal, the State noted that the defendant’s statement in *Parker* was found admissible after a *Denno* hearing even when the Appellant had, *inter alia*, spent the night outside in the cold and had been shot at by law enforcement prior to apprehension. (R. p. 167, lines 5-18 (citing *State v. Parker, supra*)).

The trial court considered the *Denno* testimony under totality of the circumstances, looking to determine whether, by a preponderance of the evidence, Appellant’s statement appeared voluntary. (R. p. 165, lines 18-21; R. p. 168, lines 7-12). And it ruled that the statement was indeed admissible under this standard:

Did he make a statement at the first inquiry. I don’t think there seems to be any dispute he did.

Were *Miranda* rights given. State’s 33 indicates that they were. The officer has testified that they were. And I don’t know that Mr. Settles necessarily took issue with his rights being provided to him by the officer when Mr. Settles testified just a moment ago.

Did he knowingly and intelligently waive those rights. You know, the Court has to view a number of factors. Age is certainly one of the factors that the court takes into account. But just reading the law here, background, experience, conduct of

accused, length of custody, police misrepresentations, isolation of minor from parents, any threats of violence or promises of leniency, mental capacity. There's been no evidence here indicating diminished mental capacity. The questioning here, as Mr. Brown correctly points out, or alludes to, is quite different from the questioning in *Parker* where Mr. Parker had been outside in the cold all night. Clearly this tape recording only took a few minutes. He was not isolated for an extended period of time.

I do not know and I'm unfamiliar with it, because – I mean, the Defendant in this case was [seventeen]. So he's an adult. And I can take into account the fact that he is [seventeen] under the age prong. But as far as whether the State had a legal obligation to provide a guardian ad litem for him or get his parents up there or his grandma up there, I don't know that that's necessarily something that the State is compelled to do under these circumstances. Long story short, I've taken everything into account and I do find that he knowingly and intelligently waived those rights. It clearly appears to be voluntary.

Obviously this is just a threshold determination. The State has the obligation to prove voluntariness beyond a reasonable doubt, and Mr. Tinsley, you'll be entitled to argue that to the jury. If they don't feel that this confession or this statement was voluntarily given, obviously the jury will have to disregard it. That will be my ruling on this issue.

(R. p. 168, line 12 – p. 169, line 23 (spacing modified from original)).

Appellant's counsel thereafter argued that Detective Collins misrepresented Appellant's right to make a phone call, stating that the "misrepresentation" constitutes a "weighing factor that the Court fail[ed] to grasp." (R. p. 169, line 24 – R. p. 170, line 11).

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

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

(R. p. 170, lines 12-24). In so ruling, the trial court harkened back to Detective Collins' testifying

that he offered Appellant a phone call and Appellant did not make one. (R. p. 159, lines 12-21).

Next, Detective Collins published State's Exhibit 34, Appellant's recorded statement, to the jury in conjunction with his testimony. (R. p. 173, lines 8-15; R. p.189, line 2 – p. 193, line 13).

- A. Law enforcement did not coerce Appellant into providing the statement at issue because the *Denno* record is clear that he voluntarily waived his rights of silence and the assistance of counsel, even when considering his age and the circumstances of his apprehension.

A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his or her rights under *Miranda*. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). "If a suspect is advised of his *Miranda* rights, but chooses to make a statement, the burden is on the State to prove by a preponderance of the evidence that his rights were voluntarily waived." *State v. Arrowood*, 375 S.C. 359, 366-67, 652 S.E.2d 438, 442 (Ct. App. 2007); *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001). A voluntary waiver need not be express. Rather, "(1) the waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception' and (2) the waiver must be 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *State v. Moses*, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (2010) (quoting *Berghuis v. Thompkins*, 560 U.S. 370, 382, 130 S.Ct. 2250, 2260 (2010)). "In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession." *Id.*; *Schneekloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047 (1973).

"[E]ach case requires careful scrutiny of all the surrounding circumstances." *State v.*

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

A trial court ruling regarding the voluntariness of a confession will not be disturbed on appeal unless so “manifestly erroneous as to constitute an abuse of discretion.” *State v. Arrowood*, 375 S.C. at 365, 652 S.E.2d at 441; *see State v. Myers*, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). This standard binds the appellate court to the lower court’s “fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law.” *State v. Asbury*, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997). “When reviewing a trial court’s ruling concerning voluntariness, this Court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court’s ruling is

supported by any evidence.” *State v. Saltz*, 346 S.C. at 136, 551 S.E.2d at 252. Similarly, when a determination regarding the voluntariness of a defendant’s confession comes down to a question of credibility, the trial court’s credibility finding should not be disturbed absent an abuse of discretion. *State v. McClure*, 312 S.C. 369, 371-72, 440 S.E.2d 404, 405-06 (1994).

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

Juvenile and young adult confessions have also been upheld when the defendant has

confessed after enduring arguably more extreme apprehension and interrogation circumstances than are present in this case. In *State v. Moses, supra*, a learning disabled seventeen-year-old's custodial statement was upheld as being freely, knowingly, and voluntarily made "regardless of his age, learning disability, and separation from his mother." 390 S.C. at 515, 702 S.E.2d at 402. In this case, only one officer questioned the special education student, the record did not demonstrate administration of any threats or a lengthy interrogation, and Moses twice testified that he understood his *Miranda* rights and that he was not coached regarding what to say when executing his waiver. *Id.* Of note, "the trial court failed to specifically mention his mother's alleged request to be present during questioning," but our Supreme Court did not find that factor dispositive on the issue of voluntariness. *Id.*

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

*Miranda* rights not credible. *Id.* at 83-84, 671 S.E.2d at 626-27. In so ruling, the trial court focused its analysis of the totality of the circumstances surrounding Parker's confession in a manner similar to the trial judge in the case at bar. *Compare id. and R.* p. 168, line 12 – p. 169, line 23.<sup>5</sup> This Court upheld the voluntariness determination, focusing in part on the trial court's "opportunity in the *Denno* hearing to listen to the testimony, assess the demeanor and credibility of the witnesses, view the taped portion of the confession, and weigh the evidence accordingly." *Id.* at 93, 671 S.E.2d at 632.

Moreover, nothing during the arrest and interrogation process entitles a seventeen-year-old defendant to the comfort and advice of a parent or relative in the interview room. "Although a juvenile's request for a parent may be considered when determining the voluntariness of the confession, an adult's request for someone other than an attorney does not invoke a Fifth Amendment right to speak with counsel." *State v. Register*, 323 S.C. at 477, 476 S.E.2d at 157 (citing *Fare v. Michael C.*, 442 U.S. 707, 99 S.Ct. 2560 (1979) (a request for a non-attorney third party does not invoke a Fifth Amendment invocation of counsel during custodial police interrogation); see S.C. Code Ann. § 63-19-20 (2010) (a juvenile is an individual less than seventeen years of age). During his interrogation, Register "stated that he was not talking 'about [the crimes]' until he saw his mother.'" *State v. Register*, 323 S.C. at 478, 476 S.E.2d at 157. Law enforcement ceased questioning at that point, spoke with Register's mother directly, and then re-initiated the interview, at which point Register confessed. *Id.* Register, an eighteen-year-old and thus an adult, had no recognized right to invoke the counsel of a parent or relative. *Id.*

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<sup>5</sup> That trial judge broke his ruling into four questions, with the State bearing the burden of proving each by a preponderance of the evidence: (1) did the defendant make the statement, (2) did law enforcement advise the defendant of his *Miranda* rights, (3) did the defendant make a knowing and intelligent waiver of those rights, and (4) did the defendant voluntarily make his statement. *Id.* at 83-84, 671 S.E.2d at 626-27.

While *Moses*, *Parker*, and *Register* make compelling comparisons for voluntariness in the present case, the “[d]etermination of whether a statement is involuntary ‘requires more than a mere color-matching of cases.’ It requires careful evaluation of all the circumstances of the interrogation.” *Mincey v. Arizona*, 437 U.S. 385, 401, 98 S. Ct. 2408, 2418 (1978) (quoting *Reck v. Pate*, 367 U.S. 433, 442, 81 S.Ct. 1541, 1547 (1961)). The totality of the circumstances surrounding Appellant’s confession supports the trial court ruling. Consider the environment of Appellant’s confession as told by Detective Collins. Only one law enforcement officer interacted with Appellant through the duration of his questioning in the interview room. (R. p. 152, lines 18-19; R. p. 153, lines 9-11). There were not multiple officers involved, a factor which may increase a defendant’s perception of undue coercion. Also, the timing of Appellant’s waiver and confession are not accompanied by any indicators of a drawn-out detention. Detective Collins questioned Appellant for less than three-quarters of an hour. (R. p. 153, lines 15-16). Appellant’s entire statement lasts just over three minutes, wherein Appellant simply states his version of the facts leading to the murder. The recording includes little-to-no follow-up questioning or probe for detail. (State’s Exhibit 34). And Appellant had been taken into custody and detained for only 30 to 60 minutes prior to questioning. (R. p. 153, lines 12-14). It thus appears from the time frame between arrest and booking that both Detective Collins and Appellant were forthright in their objectives, and that law enforcement did not employ lengthy interrogation tactics which may be perceived as unduly coercive. As to any evidence in the record of coercion, Appellant merely testified that he felt “uncomfortable” in the interview room. (R. p. 162, lines 21-23).

The record’s dearth of duress is bolstered by testimony that Appellant at no time asked any questions regarding the waiver. (R. p. 154, lines 22-24). Appellant did not appear to suffer from the influence of drugs or alcohol. (R. p. 153, lines 17-19). According to Detective Collins,

Appellant “seemed very calm, relaxed.” (R. p. 155, lines 17-19). He exhibited a comprehension of the rights he was waiving and the significance of his conversation with Detective Collins. (R. p. 153, line 20 – p. 154, line 24). Appellant never asked for an attorney, nor asked to make a phone call to summon the advice of a loved one. (R. p. 157, lines 16-18; R. p. 159, lines 8-11). Instead, Appellant completed the waiver form in its entirety, not only initialing by the common-language waiver of each right, but transcribing Detective Collins’ name as his sole interrogator and signing in acceptance of the waiver’s unequivocal language:

I now state that I DO wish to answer questions at this time and that I do NOT wish to have a lawyer here during questioning.

My decision to answer questions now, without a lawyer, is made freely and is my own choice. No one has threatened me in any way or promised me special treatment. To show my decision, I am signing my name in the space below.

(R. p. 466 (emphasis in original)).

The record further lacks indicia sufficient to rebut the State’s burden of proving voluntariness by a preponderance of the evidence. Appellant has at no time contested his willing execution of the waiver of rights form. (R. p. 165, lines 4-10). Appellant merely takes to task conflicting testimony regarding his ability to make a phone call. Appellant testified that “they” put him “on phone restriction,” denying his request to make a phone call. (R. p. 162, lines 8-12). Appellant does not specify who “they” are, but insinuates that Detective Collins expressly rejected Appellant’s request to contact a family member. Conversely, Detective Collins testified that he offered Appellant a phone call but Appellant refused. (R. p. 159, lines 12-21). The trial judge found Detective Collins’ testimony on this point more credible. (R. p. 170, lines 12-24).

Not only does Appellant’s testimony fail to establish that Appellant was prohibited from independently invoking his right to counsel, it also fails to establish that Appellant faced undue

coercion where he entertained no entitlement to the advice of a relative. In regards to Appellant's testimony that he would have called his grandmother to ask her to "talk to a lawyer" and meet him at the police station, (R. p. 163, lines 1-7), no testimony supports any contention that Appellant summoned a relative at any point during the interview. Appellant testified that Detective Collins "didn't give [him] a chance" to call his grandmother and only asked Appellant if he wanted a lawyer. (R. p. 164, lines 22-25). At the time of his arrest, Appellant presented as an able-minded seventeen-year-old with an eleventh grade education. Nothing required law enforcement to inquire as to whether Appellant, an adult, wanted to meet with a relative. *State v. Register, supra*. The trial court correctly considered this point in conjunction with Appellant's age:

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

(R. p. 169, lines 7-14).

Here, "the question of the voluntariness of such a confession can come down to a question of credibility, which may be resolved by the trial court in favor of the officers." *State v. Thompson*, 413 S.C. 590, 608, 776 S.E.2d 413, 423 (2015); *State v. McClure*, 312 S.C. at 371-72, 440 S.E.2d at 405-06. Did Appellant lack any knowledge of the charge he was suspected of, and was he refused a phone call after specifically asking for one in the interview room? The totality of the evidence tends to answer both questions in the negative. Nothing in the record dispels the trial court's credibility determination in favor of Detective Collins. Another point of controversy between the Detective and Appellant's testimonies in fact lends support to this credibility determination. Appellant maintained that he was not charged until after he was

arrested, after he was interviewed, and after he gave his statement. (R. p. 161, lines 16-25; R. p. 164, line 5-21). However, Appellant was advised that his questioning pertained to victim's murder prior to making his statement—"Appellant was arrested on warrants just prior to [the Detective] interviewing him." (R. p. 159, lines 4-5). Detective Collins further testified, and it is apparent from the recorded statement, Appellant was advised of the charge in conjunction with his interrogation. (R. p. 154, lines 3-7; State's Exhibit 34).

Appellant argues that later trial testimony contradicts testimony upon which the *Denno* hearing outcome was based and, thus, that the trial court's ruling finds no evidentiary support in the record. (Br. of Appellant, p. 8 (citing to R. p. 197, lines 5-8)). That argument is erroneously premised upon evidence not presented at the *Denno* hearing. Nothing in the record lending to the threshold voluntariness ruling indicates that Appellant's recorded confession did not appear voluntary by a preponderance of the evidence. The record instead demonstrates that the State met its burden during the *Denno* hearing: there exists no evidence of police coercion, misrepresentation, concealment of the right to invoke the advice of legal counsel, or immaturity on the part of Appellant which may disable a defendant's decision-making. Appellant's waiver can only be construed as a deliberate choice and Appellant's testimony fails to persuasively contradict Detective Collins on this point.

The trial judge properly submitted Appellant's inculpatory statement to the jury to "determine whether the statement was given freely and voluntarily beyond a reasonable doubt." *State v. Parker*, 381 S.C. at 75, 671 S.E.2d at 622. And the jury was duly charged on that point. (R. p. 363, line 24 – p. 365, line 9).

- B. Any error in the trial court's preliminary ruling proves harmless because, in addition to evidence of overwhelming guilt, trial testimony regarding the voluntariness of Appellant's statement fails to undermine the trial court's threshold determination on that issue, corroborates that determination, and in fact adds confidence to the trial court's earlier credibility finding.

Even where a defendant's due process rights are concerned, harmless error may apply where a consideration of the entire record lends the reviewing court to determine beyond a reasonable doubt that the error complained of did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967). "[T]he test is whether there is a reasonable probability that the statements contributed to the defendant's conviction of the crime, or if the defendant's statements were merely cumulative." *State v. Clute*, 324 S.C. 584, 591-92, 480 S.E.2d 85, 89 (Ct. App. 1996) *overruled on other grounds by State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000). Harmless error also applies when voluntariness is only reasonable inference to be drawn from evidence regarding a defendant's confession. *See State v. Victor*, 300 S.C. 220, 224, 387 S.E.2d 248, 50 (1989).

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

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

Detective Collins testified as to the same series of events surrounding the nature of Appellant's confession as he testified to during the *Denno* hearing. (*Compare* R. p. 189, line 2 – p. 193, line 13 *with* R. p. 152, line 18 – p. 160, line 6). Even when Appellant's counsel cross-examined Detective Collins on the issue of voluntariness, counsel failed to elicit any testimony

from the Detective that undermined the court's threshold determination on that issue. (R. p. 195, line 9 – p. 197, line 18). Detective Collins's cross-examination instead revealed that during the interview he was aware that Appellant turned seventeen shortly before the crime; that he did offer Appellant a phone call at the end of the interview but Appellant refused; that Appellant did not otherwise ask to make a phone call during the interview process; that Appellant was placed on phone restriction after the interview and after being booked into the jail; and again that Appellant was advised of his rights, including that of counsel. (R. p. 196, line 5 – p. 197, line 10). The Detective ultimately testified that he "was not" satisfied that Appellant offered a truthful version of events. (R. p. 206, lines 6-8).

Detective Collins also testified that he had no knowledge that Appellant's mother had arrived at the interview location. (R. p. 196, lines 12-14; R. p. 197, lines 11-18). Appellant's mother later testified in her son's defense. Her testimony too failed to dispel the voluntariness of Petitioner's confession. Although she testified that law enforcement rebuffed her efforts to see her son until the day following his arrest, (R. p. 284, line 10 – p. 288, line 9), no other testimony in the record demonstrates that Appellant *asked* to see her. And, her testimony demonstrates that she arrived at the police station between 9:00 and 10:00 PM on the evening of Appellant's arrest. (R. p. 285, lines 4-8). Appellant executed his recorded statement at approximately 9:00 PM. (State's Exhibit 35). Thus, Appellant's mother's testimony fails to establish that she made it to the police station in time to intercept Appellant's interrogation had she been requested to do so.

Finally, to the extent that it was elicited at trial, Appellant's own testimony agreed with that of Detective Collins. Appellant agrees that questioning lasted somewhere around half an hour. (R. p. 309, lines 8-10). Appellant testified that he "asked the people in the detention center" if he could use the phone and was told he was on phone restriction at that time, indicating that

Appellant did not seek to reach out to his family until after the interview. (R. p. 311, lines 12-22). Thus, voluntariness remains the only reasonable inference to be drawn from the evidence lending towards Appellant's engagement in recording an inculpatory statement.

ii. *The remainder of the record provides overwhelming evidence probative of Appellant's guilt.*

Each co-defendant testified against Appellant in a corroborative manner. It remained clear throughout trial that Michael Patten, Markece Moore ("Lank") and Bryson Jefferson accompanied Appellant to and from the scene. (R. p. 68, line 1 – p. 69, line 16; R. p. 87, line 23 – p. 88, line 17; R. p. 90, lines 1-16). Testimony established that the plan that night was for Appellant "to rob somebody"—that was the sole reason that Appellant got out of the car on Franklin Street. (R. p. 69, lines 12-16; R. p. 73, lines 11-17). They targeted the victim simply because he happened to be walking down the street upon which the young men drove seeking to hit a lick upon any victim who may happen upon them. (R. p. 33, line 7 – p. 34, line 1; R. p. 73, lines 18-20).

Lank accompanied Appellant out of the car but ran after witnessing the first shot. (R. p. 60, lines 1-13). According to Lank, Appellant was the aggressor. (R. p. 37, lines 1-10). Lank ran back to the car first and told Patten and Jefferson that "Purp [Appellant] had shot the Mexican." (R. p. 74, lines 7-11). Appellant confessed the same to Patten when he rejoined the young men in the car. (R. p. 74, lines 13-24). Patten and Lank also witnessed Appellant burn his shirt in a barrel following the incident. (R. p. 41, lines 7-14; R. 74, lines 18-21).

Each of the young men knew Appellant to carry a gun which they believed to be a Glock. (R. p. 37, line 13 – p. 38, line 5; R. p. 72, line 11 – p. 73, line 3; R. p. 75, lines 10-16; R. p. 88, lines 20-25; R. p. 91, lines 14-19; R. p. 91, lines 17-19). Patten testified that he learned that

Appellant sold his gun following the incident. (R. p. 76, lines 6-20). The State's firearm and toolmark examiner testified that a Glock could have fired the two projectiles recovered from the victim's body. (R. p. 234, lines 3-9).

An eyewitness who was unaffiliated with the young men testified that the shorter perpetrator with small twisted dreadlocks held something shiny in his hand which the witness believed to be the gun that fired two shots. (R. p. 100, line 22 – p. 102, line 15; R. p. 116, lines 10-13). At the time of arrest, Appellant had short twisted dreadlocks. (R. pp. 467 – 468). Testimony also established that he is shorter than Moore. (R. p. 194, lines 2-12).

Appellant's own trial testimony did not isolate him from culpability. Appellant testified that he got in the car knowing that he was accompanying the others in hitting a lick. (R. p. 303, line 14 – p. 304, line 10; R. p. 316, lines 4-22). When it came to the shooting, he denied having a gun and pointed the finger at Lank. (R. p. 306, line 21 – p. 307, line 3; R. p. 309, lines 1-4; State's Exhibit 35). Appellant's testimony then created a mirror-image of that offered by Lank during the State's case-in-chief. Appellant testified that when he witnessed the first shot, he backed up and ran away. (R. p. 307, lines 8-23).

The jury, however, had a choice between whose version of the shooting merited more weight in their deliberations. Appellant's cross-examination of Detective Collins highlighted the existence of discrepancies in Appellant's and his co-defendants' statements. (R. p. 198, line 20 – p. 201, line 20). Detective Collins stated that he did not "think any of them were completely honest throughout the interview in the beginning." (R. p. 199, lines 19-20). But given the choice among whom to believe, the totality of the evidence against Appellant demonstrates his culpability beyond a reasonable doubt. The greater weight of the testimony, all but Appellant's, exhibits that he acted as the shooter. At the very least, the State established Appellant's guilt

under the theory of the hand of one, for even if the jury determined that Appellant did not act as the triggerman, the evidence shows that Appellant acted as an accomplice in the lick that the young men set out to hit that night. No rational conclusion can be reached from the evidence presented at trial which would exculpate Appellant from the acts that resulted in the victim's death.

II. The trial court did not err in denying Appellant's attempt to present his mitigation case via individualized, sworn testimony because no precedent establishes a particular procedure that the court must follow before sentencing an individual under the age of eighteen to a term-of-years sentence and because the sentencing court heard evidence related to and gave due consideration to Appellant's age, individual history and characteristics, and family circumstance prior to issuing a forty-five-year sentence.

South Carolina employs a constitutionally permissible sentencing scheme in which juvenile homicide offenders are subject to a discretionary sentence ranging from a minimum of 30 years to a maximum of life without the possibility of parole. S.C. Code. Ann. § 16-3-20(A); *Aiken v. Byars*, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014) *cert. denied*, 135 S. Ct. 2379, 192 L. Ed. 2d 179 (U.S.S.C. 2015); *see Miller v. Alabama*, — U.S. —, 132 S.Ct. 2455 (2012) (the Eighth Amendment forbids a juvenile offender's receipt of a life sentence without the possibility of parole when the charge mandates the life sentence); *Graham v. Florida*, 560 U.S. 48, 82, 130 S.Ct. 2011, 2034 (2010) (the Constitution prohibits juvenile non-homicide offenders from receiving a sentence of life without parole); *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005) (unconstitutional to subject a juvenile to a capital sentence). Upon conviction, the trial judge sentenced Appellant to a term of 45 years. (R. pp. 473 – 474). The trial judge denied Appellant's motion to reconsider that sentence, but later reduced Appellant's sentence to 40 years upon motion by the State. (R. pp. 416 – 417; R. pp. 478 – 479).

This Court will not overturn a sentence unless it determines the sentencing court abused its discretion in issuing a ruling; that is, the trial court's ruling must amount to an error of law. *State v. Dawson*, 402 S.C. 160, 163, 740 S.E.2d 501, 502 (2013). Generally, appellate courts will only interfere with the discretion of a judge in the imposition of a sentence in rare and unusual circumstances. *State v. Ferguson*, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952). "Absent partiality, prejudice, oppression, or corrupt motive, [the appellate court] lacks jurisdiction to

disturb a sentence that is within the limit prescribed by statute.” *State v. Barton*, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997). Appellant now asks this Court to find that the trial judge erroneously applied new jurisprudence, dicta, concerning juvenile sentencing proceedings in light of the seventeen-year-old’s homicide conviction. No such abuse can be found to result from the trial court’s handling of Appellant’s sentencing proceeding.

Indeed, in light of recent United States Supreme Court jurisprudence, courts have been called to reexamine sentencing proceedings involving individuals under the age of eighteen. These holdings stem from our courts’ collective adoption of the principle that juveniles have lessened culpability and are therefore less deserving of the most severe punishments without due consideration of discrete attendant circumstances. *See Graham v. Florida*, 560 U.S. at 68, 130 S.Ct. at 2026 (“ . . . developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.”). The judiciary has recognized that the maturity level of a juvenile is subject to special consideration of a youth’s “transient rashness, proclivity for risk, and inability to assess consequences.” *Miller v. Alabama*, *supra* at —, 130 S.Ct. at 2027. The Court denoted that the appraisal of juvenile sentencing proceedings stems not from history, but rather from “the evolving standards of decency that mark the progress of a maturing society.” *Id.* at —, 130 S.Ct. at 2455 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 290 (1976)). A juvenile defendant “is not absolved on responsibility for his actions” based upon age alone, but recent jurisprudence has starkly decided that a juvenile’s “transgression ‘is not as morally reprehensible as that of an adult.’” *Id.* at 68, 130 S.Ct. at 2026 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S.Ct. 2687, 2699 (1988)). Most fundamentally, *Graham* broadly insists that youth matters in determining the appropriateness of

a lifetime of incarceration without the possibility of parole.” *Miller v. Alabama, supra* at —, 130 S.Ct. at 2455.

As a result, “[t]he judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals” of deterrence, retribution, and rehabilitation. *Graham* at 67-68, 130 S.Ct. at 2026 (internal citations omitted). Thus, *Miller* instituted a procedural component for all juvenile sentencings: the sentencer must “consider a juvenile offender’s youth and attendant characteristics before determining that life without parole is a proportionate sentence.” *Montgomery v. Louisiana*, — U.S. —, —, 136 S.Ct. 718, 734 (2016). “*Miller* did not require trial courts to make a finding of fact regarding a child’s incorrigibility.” *Id.* at —, 136 S.Ct. at 734.

The framework to apply to Appellant’s sentencing hearing, however, lies in dicta, for even our own state Supreme Court declined to delineate any specific procedure and instead held that “*Miller* requires that before a life without parole sentence is imposed upon a juvenile offender, he must receive an individualized hearing where the mitigating hallmark features of youth are fully explored.” *Aiken v. Byars*, 410 S.C. at 545, 765 S.E.2d at 578. Our state Supreme Court instructed that the “sentencing authority must ‘take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.’” *Id.* at 544, 765 S.E.2d at 577 (quoting *Miller, supra* at —, 132 S.Ct. at 2469). For purposes of *Aiken*’s prospective application, the fact that Appellant reached seventeen years of age and was statutorily an adult in South Carolina at the time of the crime and sentencing holds no bearing on whether an individualized sentencing hearing should apply because our Supreme

Court's adoption of *Miller* explicitly extended to all defendants under the age of eighteen. *Id.* at 537, n.1, 765 S.E.2d at 573, n.1.

In practice:

*Miller* establishes a specific framework, articulating that the factors a sentencing court consider at a hearing must include: (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.”

*Aiken v. Byars*, 410 S.C. at 544, 765 S.E.2d at 577 (quoting *Miller v. Alabama*, *supra* at —, 132 S.Ct. at 2468)).<sup>6</sup>

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<sup>6</sup> “[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*, — N.E.3d —, —, 2016 IL App (5th) 100587-B, ¶ 33 (Ill.App. Mar. 3, 2016); see *State v. Riley*, 315 Conn. 637, 654 n.5, 110 A.3d 1205, 1214 n.5 (Conn. 2015) (noting that “there is no clear consensus”). Some courts, like our own, have found that *Miller* requires consideration of set factors associated with youth. *E.g.*, *Riley*, 315 Conn. at 358, 110 A.3d at 1216; *People v. Gutierrez*, 58 Cal.4th 1354, 1388, 324 P.3d 245, 268–69 (Cal. 2014) (describing five factors courts must consider before sentencing juvenile defendants to life in prison without parole); *Bear Cloud v. State*, 294 P.3d 36, 47 (Wyo. 2013) (setting forth seven factors courts must consider in sentencing juveniles to life in prison without parole (quoting *Miller v. Alabama*, *supra* at —, 132 S.Ct. at 2467–68)).

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

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

Withholding all subtlety, *Aiken*'s majority explicitly declined any "invitation to set out a specific process for trial court judges to follow when considering whether to sentence a juvenile to life without parole." *Aiken*, 410 S.C. at 545, n.10, 765 S.E.2d at 578, n.10. The majority furthered:

The United States Supreme Court did not establish a definite resentencing procedure and we likewise see no reason to do so. We have the utmost confidence in our trial judges to weigh the factors discussed herein and to sentence juveniles in light of this new constitutional jurisprudence.

*Id.*

Also of significance in the assessment of Appellant's sentencing proceeding, our Supreme Court expressly stated that their adoption of the *Miller* framework does not suggest "that the sentencing of a juvenile offender subject to a life without parole sentence should mirror the penalty phase of a capital case." *Miller* has only been interpreted by our court to contemplate that "the *type* of mitigating evidence permitted in death penalty sentencing hearing unquestionably has relevance to juvenile life without parole sentencing hearings, in addition to the factors illustrated above." *Aiken*, 410 S.C. at 544-45, 765 S.E.2d at 577 (emphasis added).

However, even given this framework, the trial judge retains broad discretion in imposing a sentence within the statutory limits. *State v. Barton, supra*. "A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." *State v. Hicks*, 377 S.C. 322,

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

325, 659 S.E.2d 499, 500 (Ct. App. 2008). Such discretion also indubitably applies to the sentencing hearing. Each trial judge will no doubt reach a sentencing decision after assigning distinct weight to the Appellant's age, background, and circumstance which motivate the imposition of a particular sentence upon a juvenile offender convicted of homicide.

Practically speaking, *Aiken* mandates no more than the procedure taken up by Appellant's sentencer, who took due care to comport his sentencing considerations with those prescribed by *Aiken* and *Miller*.

- A. The trial court did not abuse its discretion in denying Appellant's funding motion because *Aiken's* effect on juvenile sentencing proceedings did not inject any requirement that the offender be granted expert funding for mitigation

As Appellant's trial reached the sentencing phase, Appellant again argued a pre-trial motion to cap Appellant's sentence at 30 years.<sup>7</sup> (R. p. 387, line 13 – p. 389, line 9). Appellant additionally requested to defer sentencing upon resolution of the separate Abbeville County charge, which would allow time to conduct a mitigation investigation if the court deferred the sentencing hearing and granted Appellant the requested funding for a mitigation investigator. (R. p. 389, lines 3-9). The State opposed deferring sentencing insofar as the deferral may relate to the

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<sup>7</sup> Appellant sought prospective application of *Aiken v. Byars, supra*, and *Miller v. Alabama, supra*, by written motion pre-trial. Appellant moved to cap Appellant's sentence on the murder charge, should he be convicted, at 30 years. (R. pp. 419 – 421). Appellant also moved to obtain "funding for a mitigation specialist/investigator and psychologist or psychiatrist" in response to his age. (R. p. 418). Appellant addressed these motions pre-trial, additionally representing to the court that Appellant's funding motion was perhaps joined by separate counsel representing Appellant on a similar but unrelated Abbeville County charge. (R. p. 15, line 17 – p. 17, line 25). Appellant's Greenwood County trial counsel stated that counsel on the Abbeville County charge was "a more likely subject to make such a motion" because Appellant's future on that charge "probably would benefit more from it than" the present Greenwood County charge. (*Id.*). The court took both motions under advisement to be readdressed at the time of sentencing. (R. p. 17, lines 1-3; R. p. 18, lines 19-24).

Abbeville County charge, as that charge stemmed from an entirely separate, unresolved, incident.<sup>8</sup> (R. p. 393, line 23 – p. 394, line 1). But the State did not oppose the request for an extension of time to complete a mitigation investigation should the trial court find it appropriate. (R. p. 394, lines 3-11). The court ruled that the sentencing procedure would go forward on the Greenwood County charge at that time, and without any mitigation investigation. (R. p. 394, line 15 – p. 395, line 9).

“Authorization for expenditure of funds for expert witnesses is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of that discretion.” *State v. Matthews*, 291 S.C. 339, 345, 353 S.E.2d 444, 448 (1986). Funds for expert services may be authorized based upon a finding “that investigative, expert, or other services are reasonably necessary for the representation of the defendant.” S.C. Code Ann. § 17-3-50(B); *see* S.C. Code Ann. § 16-3-26 (same application to capital cases).

Our state Supreme Court’s invocation of *Miller* does not go so far as to require funding for a mitigation investigation such as a capital defendant would not doubt incur. *Aiken* only encourages the court to consider relevant mitigating factors related to a youthful defendant’s crime and circumstance. *Aiken*, 410 S.C. at 544-45, 765 S.E.2d at 577. The trial court here found no necessity to fund a mitigation investigation and was instead prepared to consider circumstances attendant to Appellant’s age during the sentencing proceeding. As the remainder of the record demonstrates, and as is discussed below, Appellant put forth ample evidence from which the trial court could reach a sentencing determination sympathetic to Appellant’s age, family circumstance, and personal experience.

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<sup>8</sup> Appellant was sixteen at the time he incurred the Abbeville charge. (R. p. 392, lines 12-13).

B. The trial court employed a thorough sentencing hearing which allowed Appellant to put forward testimony in direct support of the factors required for consideration by *Aiken*.

As far as the sentencing procedure itself, the State agreed that *Aiken* and *Miller* contemplate a sentencing hearing which may include testimony put forward by Appellant's counsel. (R. p. 390, lines 4-18). However, the trial court asked, and the State opined, that *Aiken* and *Miller* may not define the extent of any juvenile sentencing hearing, but rather call for the trial court to "hear whatever [Appellant's counsel] wants to offer in mitigation," make a finding on the record as to a number of enumerated factors and then proceed with issuing a sentence in the court's discretion. (R. p. 391, lines 2-16). After a brief recess to consider the totality of the arguments related to whether the sentencing hearing should proceed, the trial court ruled that it would, and that it would proceed in "the way [he was] accustomed to doing it." (R. p. 394, line 15 – p. 395, line 25). That is, by taking testimonials from the victim's family as offered by the State, and then, in turn, by taking testimonials from any person the defense put forward to further Appellant's mitigation case. (R. p. 396, line 1 – p. 397, line 18). *Aiken* does not condemn this procedure—the trial court thusly exercised its discretion in sentencing procedure absent any error of law.

And, despite only citing *Miller* as precedent governing the factors to review during the sentencing case, Appellant's proceeding demonstrates that the trial judge did comport with *Aiken* and *Miller* in his sentencing considerations. (See R. p. 395, lines 12-25). Consider the evidence before the trial court in relation to Appellant's youth. The entirety of Appellant's mitigation case flows from trial through sentencing—the trial judge presided over the whole presentation. In his case-in-chief, Appellant put forward his grandmother, adult cousin, and his mother as fact witnesses who also testified in relation to Appellant's age and maturity. Notably, these

witnesses' testimonies breathed life into Appellant's family circumstance.

Through Appellant's grandmother Brenda Settles, the trial court learned that Appellant grew up in Greenwood County with his mother. (R. p. 268, lines 3-13). Appellant's mother, Jacqueline Calhoun, explained that Appellant moved once before he reached the age of one. (R. p. 280, lines 2-16). After that, the family home remained in Hodges through Appellant's childhood and until the time that he moved in with his grandmother. (R. p. 280, lines 15-25). As a teenager, Appellant moved in with his grandmother in lieu of staying with his mother, whose living situation perhaps lacked same permanency at this stage. (R. p. 268, lines 14-22). His mother had gone "out of [her] own" and left Hodges at this point. (R. p. 282, lines 4-8). He lived with his grandmother for over a year prior to his arrest. (R. p. 266, lines 1-5; R. p. 268, line 23 – p. 269, line 1).

During this time, Appellant attended school regularly and was cared for financially, maintaining an allowance from his grandmother as well as a working cell phone. (R. p. 266, line 8 – p. 267, line 10). He did not appear to change schools irregularly through his childhood. (R. p. 282, lines 9-14). Sometimes his grandmother carried him to or from Greenwood High, where he was a "decent student." (R. p. 267, line 20 – p. 268, line 2; R. p. 282, lines 15-22). His mother considered him "smart, intelligent." (R. p. 282, lines 21-22). Appellant did not complete his tenth grade year with enough credits to elevate to the eleventh grade the following fall, but he completed online and after school courses in order to make up those missed credits. (R. p. 282, line 23 – p. 283, line 6). As a result, Appellant was only one semester behind the remainder of his classmates. (R. p. 283, lines 7-14).

From Appellant's cousin, Maquitta Shay Higgins, the court learned of the close relationship Appellant cultivated with Ms. Higgins. She invited Appellant into her home "on a

daily basis” to spend time together eating, talking, watching TV, and fostering a relationship akin to that of an adult aunt and her adolescent nephew. (R. p. 276, line 13 – p. 277, line 14). Appellant testified that he looked after Ms. Higgins’ young children. (R. p. 300, lines 3-12). Together, Ms. Higgins and her brother “helped [Appellant’s mother] look out for him when [she] couldn’t be the eyes.” (R. p. 284, lines 5-7).

The court also learned that Appellant’s grandmother expected to hear from him regularly or when he needed assistance, a sign of dependability from a teenager. (R. p. 269, line 5 – p. 271, line 21). The court heard that “Tavarious was a pretty responsible person. He was good hearted, caring and giving and he helped [his grandmother] out a good bit. He had a good heart for helping . . . [a]nd he loved his family.” (R. p. 271, line 24 – p. 272, line 3). Ms. Settles furthered that he was “no bad person,” the police did not come around looking for him, and he attended church to some extent. (R. p. 271, lines 10-16; R. p. 272, lines 3-8).

During sentencing, the trial court invited Appellant, through counsel, to present anything: “Mr. Tinsley, I’m happy to entertain anything that you may want to say or anything that certainly Mr. Settles’ family or he himself may want to relate to me, sir.” (R. p. 397, lines 15-18). But the court did not want sworn, question-and-answer testimony: “I’m just going to hear from her [Appellant’s grandmother].” (R. p. 397, lines 20-25). And so, Ms. Settles related her mitigation case to the trial court, pleading’s Appellant’s lack of record, making a wrong choice, and her belief that his being caught up in the present offense did not match the remainder of his character. (R. p. 398, lines 1-7). Appellant’s counsel elicited answers to specific questions despite the trial court’s ruling. In doing so, Appellant’s counsel established the following in relation to the factors enunciated for consideration by *Miller* and *Aiken*: Appellant’s April 18, 1993, birthday made him seventeen at the time of the murder; Appellant showed no tendencies of

violence while under his grandmother's roof; Appellant was not "a troubled child"—he appeared obedient and did not cause his grandmother problems; "he was mature," "good-hearted," "willing to learn," and "getting himself together in school." (R. p. 398, line 9 – p. 399, line 25).

As defense counsel sought to elicit more testimony on this point, the trial judge reiterated that he appreciated Appellant's age and the influence associated with the co-defendants in the car with Appellant before and after the crime, including the dispute regarding who acted as the triggerman, but the trial court wanted to "hear whatever it is that's been related to [counsel] as opposed to [counsel] questioning [Ms. Settles]." (R. p. 400, lines 2-15). The trial court directed Appellant's counsel to present his mitigation case in the manner the trial court requested. (R. p. 400, lines 12-15). Counsel offered a summary. (R. p. 400, line 16). The court approved. (R. p. 400, line 17). *This would be the manner in which the trial court would be most persuaded by the mitigation:* "I think that would probably be the best way for the Court to get a true picture of your client if you could summarize where he was emotionally and where he saw himself as far as this entire – I mean, you've already touched on a lot of this. But if you would do it in that manner that might be more beneficial[.]" (R. p. 400, lines 17-23).

Appellant's counsel continued with the question-and-answer to elicit information that Appellant's parents never married and did not live together, but that his father remained part of his life "ever since he was born" because the family lived near each other. (R. p. 401, lines 1-21). In fact, Ms. Settles stated that "his mother got along with his father. We all love one another. We [are] helping Tavarious." (R. p. 401, lines 10-11).

Appellant also spoke during sentencing. (R. p. 404, lines 6-8). Appellant said that he "still remain[s] innocent to [him]self because [he] know[s] what happened." (R. p. 404, lines 12-14). He apologized, but did not accept sole responsibility. (R. p. 404, line 17 – p. 405, line 3; R.

p. 408, lines 2-24). Appellant also answered more questions posed by counsel, stating that he did not own a gun, was not a fighter, did get out of the car, and that he felt “like [he] needed to get away from the situation” as it unfolded. (R. p. 405, line 4 – p. 406, line 2).

Between Ms. Settles and Appellant’s testimony at sentencing, Appellant’s counsel made two additional pleas for mitigation by summarizing facts already placed before the trial judge and again arguing the application of *Aiken* and *Miller* due to Appellant’s age. (R. p. 402, line 7 – p. 404, line 5; R. p. 406, line 3 – p. 407, line 1). Even prior to this portion of the hearing, during the motions leading to the issue on appeal, Appellant’s counsel made an additional plea before the sentencing court:

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

(R. p. 387, line 17 – p. 389, line 9).

- C. The forty-five-year sentence issued is not violative of *Aiken* or the Eighth Amendment because it considers Appellant’s age, attendant circumstances related to youth, and is not disproportionate to the crime.

Notwithstanding a trial judge’s authority to impose a sentence falling within the statutory limits, the Eighth Amendment of the United States Constitution prohibits the imposition of cruel

and unusual punishment. *See* U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). Considering South Carolina’s constitutionally permissible sentencing scheme where juveniles are subject only to discretionary imposition of life imprisonment upon conviction for homicide, those sentences which are graduated and proportioned to the offense do not constitute cruel and unusual punishment. *Graham v. Florida*, 560 U.S. at 59, 130 S.Ct. at 2021; *see also Aiken v. Byars*, *supra*. The United States Supreme Court emphasizes that the requirement of proportionate sentencing lies central to the protection afforded by the Eighth Amendment. *Miller v. Alabama*, *supra* at —, 132 S.Ct. at 2463; *Graham v. Florida*, *supra*. Yet, “[t]he Eighth Amendment does not require strict proportionality between crime and sentence,” forbidding only extreme sentences which are ‘grossly disproportionate to the crime.’” *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S.Ct. 2680, 2705 (1991) (internal citation omitted)). That is, Appellant’s term-of-years sentence must not be grossly disproportionate to the circumstances particular to his case. *Graham v. Florida*, *supra* at 59, 130 S.Ct. at 2021.

Given all of the facts gleaned prior to and during sentencing, including that put forward by the State, the trial court assigned credence to Appellant’s age and lack of prior criminal record. (R. p. 407, lines 2-9). He proceeded with the issuance of a 45-year sentence reasoned as follows:

Mr. Settles, out of fairness to you I feel obliged to tell you what has gone into this sentence. Ms. Castro’s comments are something that are – they’re succinct and they’re dead-on. You’ve got your life. Your family has you. Mr. Sis does not have his anymore. And that is because of actions that you and three others took that evening, and it’s as simple as that. Does the Court believe, based upon the jury’s verdict, that you are the person who shot Mr. Sis? Yes. Mr. Settles, the jury has spoken in this case and I understand perhaps some hesitation that you have to accept full responsibility for this, but understand, sir, that you had numerous options that evening for avoiding where you have found yourself

today. You could have gotten out of the car. You could have told them to stop and pull over and just stepped out. You could have tried to discourage the other guys from doing this. And it's not lost on this Court, Mr. Settles, that very often members of our Hispanic community here in Greenwood are sometimes targeted because the belief is some of them are not here legally and, therefore, if a crime is committed against those individuals who are not here legally the likelihood of them reporting that crime is less. Now, there's no evidence in the record in this case that you or any of the other fellows in that car specifically targeted a Hispanic individual, and clearly I'm not going to take into account any ethnic background or any nation of origin in calculating a sentence because in all, at least in my mind, Mr. Settles, a man is a man whether he's black, white, Hispanic, American Indian, whatever. It does not matter. And it does not matter, as Ms. White correctly pointed out the other day, it doesn't matter whether Mr. Sis was here legally or not. He has a right to exist. He has a right that every individual has and that's the right to breathe clean air and not have that right taken from him. You took that from him. I've taken into account the fact that you have no prior history. **I agree with Mr. Tinsley that although the law might consider a [seventeen]-year-old to be a man there are certain developmental delays. Maybe you were not fully mature. Maybe emotionally you're not fully there. And that certainly mitigates somewhat the horrible crime that you did commit.**

Now, there are several other individuals charged with this offense. There will be a day of reckoning for them. Mr. Settles, your protestations of, shall we say, less active participation in this, the Court's just not buying it. I heard you testify, and I understand that it's the policy of this Court, and it's well known, that **I try to encourage people and reward people who are willing to take responsibilities for their actions with as much leniency as possible. And that's what Mr. Tinsley was talking about with regard to the 30 year sentences, Mr. Settles. But sometimes it's best to try a case so that the Court can get a full and complete picture of the horror that was inflicted on an innocent person who wanted nothing more than to do what the rest of us want to do and that is earn a living, get married, provide for a family and grow old. Well, you've robbed Mr. Sis for every day that he's going to have for the rest of his life. You should be happy that at some point in time you will, in fact, sir, be getting out of prison.**

(R. p. 408, line 25 – p. 411, line 22 (emphasis added)).

The trial court found no persuasion in Appellant's hesitancy to take full responsibility for the victim's fate. And the facts of the crime, as previously recited, indicate cold-bloodedness. However, the trial court did consider the mandates of *Aiken* and *Miller*. The court found age to constitute a mitigating circumstance in applying a term-of-years sentence in lieu of the potential

maximum. Before the court's consideration 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 co-defendants and the potential that Appellant acted in response to peer pressure, his inexperience with the criminal justice system, and other hallmarks of youth and maturity developed throughout the duration of Appellant's trial. These are the very considerations delegated by *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577.

But the court also had before it aggravating circumstances, including the senseless targeting of an unknown pedestrian by a group of young men on a spring night. The victim sustained several gunshots in an unprovoked attack.

Only after considering all of the above did the trial court invoke a term-of-years sentence. *Miller* and *Aiken* were intended to protect against the imposition of life without parole upon a juvenile.<sup>9</sup> Since Appellant did not receive a sentence of life without parole, the trial court accordingly did not abuse its discretion in proceeding with the sentencing hearing in the manner employed in this case, especially considering that the trial court implored Appellant's counsel to stick to a familiar format in his mitigation presentation.<sup>10</sup> In the eyes of the trial court, Appellant did receive "a full blown sentencing hearing," a concept *Aiken* purposely left undefined.

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<sup>9</sup> Respondent further posits that the totality of the record clearly demonstrates that the trial court never once indicated that life without parole constituted a proper sentence for Appellant based upon his age alone.

<sup>10</sup> To any extent that this Court finds error in the trial court's handling of Appellant's sentencing hearing, Appellant was entitled to the benefit of a second sentencing decision when he later waived jurisdiction over an Abbeville County charge and pled guilty in Greenwood County. That plea was heard in tandem with the State's motion to reduce Appellant's sentence for the present Greenwood County murder. Appellant in fact pled guilty for a negotiated forty-year sentence on the Abbeville County charge, to run concurrent with the reduced sentence on the Greenwood conviction. (R. pp. 480 – 502 (September 18, 2015, guilty plea hearing transcript); R. p. 482, line 14 – p. 483, line 23). Thus, Appellant's sentence has been entitled to a second review by the trial judge and has been reduced upon a showing of substantial assistance to the State.

Our courts have otherwise found the trial court's cogitation of relevant circumstances attendant to the youth of a defendant under the age of eighteen necessary in sentencing. Appellant's sentencer did just that. Based upon the entirety of the factual record in this case, proportionality reigns.

### CONCLUSION

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

Respectfully submitted,

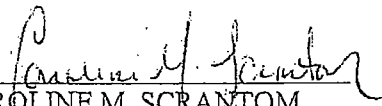
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**STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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**Appeal from Greenwood County  
Honorable Frank R. Addy, Jr., Circuit Court Judge**

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**THE STATE,**

**Respondent,**

**v.**

**TAVARIOUS SETTLES,**

**Appellant**

**Appellate Case No. 2015-000980.**

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**CERTIFICATE OF COMPLIANCE**

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

Respectfully submitted,

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THE STATE,

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v.

TAVARIOUS SETTLES,

Appellant

Appellate Case No. 2015-000980.

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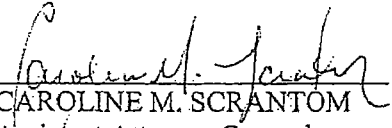
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I, Caroline M. Scrantom, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appeal by depositing two (2) copies of the same in the United States mail, addressed to his attorneys of record at:

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I further certify that all parties required by Rule to be served have been served. This 30<sup>th</sup> day of September, 2016.

  
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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

**RECEIVED**

OCT 10 2016

SC Court of Appeals

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

Appellate Case No. 2015-000980

The State, ..... Respondent,

v.

Tavarious Settles, ..... Appellant.

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## ARGUMENT

- I. The trial court's erroneous admission at trial of the involuntary statement made by Settles, a youth under the age of 18, during police interrogation was not harmless, as it reasonably could have affected the jury's verdict in a case lacking any other credible evidence to support Settles' conviction.**

Contrary to the State's contentions, *see* Br. of Resp't at 20-24, the admission of Settles' involuntary statement was not harmless because it dictated Settles' decision to testify at trial, and his statement was not merely cumulative of the State's other evidence. *See State v. Newell*, 303 S.C. 471, 401 S.E.2d 420 (Ct. App. 1991) (recognizing that the improper admission of a statement is not a harmless error if the improperly admitted statement, and not the State's other evidence, dictated the decision to testify). *State v. Davis*, 371 S.C. 170, 181–82, 638 S.E.2d 57, 63 (2006) ("Error is only harmless when it could not reasonably have affected the result of the trial.")

Other than Settles' statement to police, the State's only evidence connecting Settles to the crime was the testimony of the three other suspects of the murder. Br. of Appellant at 5. The State produced no other witness that identified Settles as being at or near the crime scene; nor did the State produce any forensic evidence linking Settles to the crime scene. The State also did not produce any murder weapon. *Id.*

With respect to the testimony of the other three suspects, only one—Markece Moore—testified that he witnessed Settles shoot the victim, and he was proven to be a liar. *Id.* In fact, based on questions by the jury to the trial court during deliberations, it is apparent that the jury did not believe Moore's testimony and very likely believed that Moore was the shooter. *Id.* at 5 n.4. Moreover, as the State admits, all three of the other suspects' testimony at trial was inconsistent and conflicted with their multiple prior statements to the police. Br. of Resp't at 23; Br. of Appellant at 5 n.3. The police officer

that interviewed each of the suspects also testified that he did not “think any of them were completely honest.” (R. p. 199). The **only** thing that gave even an ounce of credibility to the three other suspects’ testimony was that—other than with respect to who shot the victim—their testimony was somewhat consistent with Settles’ statement to police. *See State v. Doctor*, 306 S.C. 527, 530, 413 S.E.2d 36, 38 (1992) (“When a witness’ testimony is disputed or his credibility called into question, other testimony verifying the facts or opinions given by the witness is not merely cumulative.”).

The State’s case therefore hinged on Settles’ statement. Settles’ statement not only placed Settles near the scene of the crime, but it also verified certain portions of the three other suspects’ otherwise inconsistent and conflicting testimony. Based on the lack of other evidence presented by the State and the complete lack of credibility of the only witnesses that linked Settles to the crime, and considering the State’s evidentiary burden, if not for the trial court’s improper admission of the statement, Settles most likely would not have decided to testify at the trial. And there is no credible argument that the presentation to the jury of Settles’ statement—as well as the trial testimony that he would not have provided but for the trial court improperly admitting his statement—could not reasonably have affected the result of the trial or contributed to Settles’ conviction.

**II. Settles’ sentence suffers from a “constitutional defect” because the trial court did not follow controlling precedent.**

In *Aiken v. Byars*, the South Carolina Supreme Court reviewed and applied the United States Supreme Court’s 2012 decision in *Miller v. Alabama* and established the “affirmative requirement” in South Carolina that all youths under the age of 18 at the time of the alleged crime that “may be subject to a sentence of life imprisonment without the possibility of parole” are entitled to an individualized and meaningful sentencing

hearing that “fully explore[s] the impact of the defendant’s juvenility on the sentence rendered.” 410 S.C. 534, 543-545, 765 S.E.2d 572, 576-578 (2014) (applying *Miller v. Alabama*, — U.S. —, 132 S.Ct. 2455 (2012)). Because Settles was under the age of 18 at the time of the alleged crime and was, after his conviction, subject to a potential sentence of life imprisonment without the possibility of parole, the trial court was required to conduct this individualized and meaningful sentencing hearing mandated by *Aiken* and *Miller* for Settles in this case. Br. of Appellant at 10-18.

Accordingly, immediately following the trial and prior to Settles’ sentencing hearing, Settles asked the trial court to follow *Aiken* and *Miller* and also renewed his pretrial motion for the appointment of a mitigation expert. Br. of Appellant at 11. However, the trial court expressly rejected the applicability of *Aiken* and *Miller* to Settles’ sentencing, denied the request for a mitigation expert, and immediately proceeded with the sentencing hearing in the “way [the trial court was] accustomed to doing it.” (R. pp. 387-95); *see also* (R. pp. 416-17) (“The court finds that the cases cited by the Defendant in support of a sentencing hearing do not apply under the facts of this case.”))<sup>1</sup>. This was an obvious error of law.

In its Respondent’s Brief, the State does not deny the applicability of *Aiken* and *Miller* and their sentencing requirements in this case. *See, e.g.*, Br. of Resp’t at 27-28 (“For purposes of *Aiken*’s prospective application, the fact that Appellant reached seventeen years of age and was statutorily an adult in South Carolina at the time of the crime and sentencing holds no bearing on whether an individualized sentencing hearing should apply because our Supreme Courts’ adoption of *Miller* explicitly extended to all

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<sup>1</sup>The cases cited by Settles in his motion for reconsideration were *Aiken* and *Miller*. (R. pp. 414-15).

defendants under the age of eighteen.”). Nor does the State refute the fact that the trial court expressly rejected the applicability of *Aiken* and *Miller*. The State therefore effectively concedes that the trial court committed an error of law by refusing to follow *Aiken* and *Miller*.

The State nevertheless contends that this error of law should be excused because the trial court conducted the sentencing hearing in “the way [the trial court] was accustomed to doing it” and there was some testimony presented during the trial and during the sentencing hearing that touched on Settles’ youth. Br. of Resp’t at 32-36. The State claims that “*Aiken* does not condemn this procedure” and that, “despite only citing *Miller* as precedent governing the factors to review during the sentencing phase, Appellant’s proceeding demonstrates that the trial judge did comport with *Aiken* and *Miller* in his sentencing considerations.”<sup>2</sup> *Id.* at 32. This simply is incorrect.

First, the State’s argument is almost identical to the argument raised by the dissent and specifically rejected by the majority in *Aiken*. As discussed in Settles’ Initial Brief, the majority in *Aiken* held that “the principles enunciated in *Miller v. Alabama* apply

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<sup>2</sup> This latter assertion deserves attention. First, it is erroneous because, as explained *infra*, Settles’ sentencing hearing did not “comport” with *Aiken* and *Miller*. It also is inaccurate because, as demonstrated by the very transcript excerpt cited by the State, the trial court specifically rejected the applicability of *Miller* and did **not** “cit[e] *Miller* as precedent governing the factors to review during the sentencing phase.” (R. p. 395); *see also* (R. pp. 416-17) (“The court finds that the cases cited by the Defendant in support of a sentencing hearing **do not apply** under the facts of this case.”) (Emphasis added)). Further, this is one of several unsupported and disingenuous statements made by the State to disguise the fact that the trial court improperly rejected the applicability of *Aiken* and *Miller*. *See, e.g.*, Br. of Resp’t at 30 (stating that the trial court took “due care to comport his sentencing considerations with those prescribed by *Aiken* and *Miller*”); 38 (“However, the trial court did consider the mandates of *Aiken* and *Miller*.”). It simply cannot be argued that the trial court took “due care” to follow *Aiken* and *Miller* when the trial court expressly and specifically rejected the applicability of *Aiken* and *Miller*—a fact the State does not dispute.

retroactively to these petitioners, to those similarly situated, and prospectively to all juvenile offenders who may be subject to a sentence of life imprisonment without the possibility of parole.” *Aiken*, 410 S.C. at 545, 765 S.E. at 578. With respect to those individuals that had been sentenced prior to *Miller*, the majority held that they were entitled to resentencing and could file a motion for resentencing within one year of the Court’s opinion.<sup>3</sup> *Id.* The dissent, however, criticized the majority for allowing resentencing for all individuals sentenced prior to *Miller* on the basis that such blanket resentencing did not consider the adequacy of each of the individuals’ original sentencing hearing. *Id.* at 410 S.C. at 548, 765 S.E.2d at 579. Importantly, the majority responded to this criticism as follows:

The dissent’s discussion of the individual sentencing hearings . . . highlights the distinction between its reading of *Miller* and ours—we recognize and give credence to the [*Miller*] decision’s command that courts afford youth and its attendant characteristics constitutional meaning. The dissent would simply continue to treat the characteristics of youth as any other fact. We are likewise unfazed by the dissent’s criticism that we have failed to pinpoint an abuse of discretion; that admonition appears to arise from a fundamental misunderstanding of our holding. **We have determined that the sentencing hearings in these cases suffer from a constitutional defect—the failure to examine the youth of the offender through the lens mandated by *Miller*.**

*Aiken*, 410 S.C. at 543 n.8, 765 S.E. at 577 n.8 (Emphasis added). The majority therefore held that no individual review of what transpired during each of the prior sentencing

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<sup>3</sup> Since the decision in *Aiken*, the Supreme Court, through administrative order, has established the procedure for “the management and disposition of all motions for resentencing filed pursuant to [*Aiken*],” and numerous cases have been assigned by the Supreme Court to the circuit courts for resentencing. *In re Administrative Order*, 415 S.C. 460, 783 S.E.2d 534 (2016); *see, e.g., Parker v. State*, — S.E.2d —, 2016 WL 4256914 (Aug. 12, 2016) (assigning case for resentencing pursuant to *Aiken*). The Supreme Court even has added a page to the South Carolina Judicial Department website dedicated the “*Aiken v. Byars* Judicial Appointment Orders,” which identifies all the cases (approximately 60 cases for 2016 alone through August 16, 2016) that have been assigned for resentencing. *See* <http://www.judicial.state.sc.us/courtOrders/indexAikenAppts.cfm>.

hearings was required because they all suffered the same “constitutional defect” that demanded resentencing: “the failure to examine the youth of the offender through the lens mandated by *Miller*.”

Because the trial court rejected the applicability of *Aiken* and *Miller* in sentencing Settles, the same “constitutional defect” is present in this case. By expressly refusing to follow *Aiken* and *Miller*, the trial court necessarily failed “to examine the youth of [Settles] through the lens mandated by *Miller*.” In other words, by not following *Aiken* and *Miller* and by conducting the sentencing hearing “the way [the trial court] was accustomed to doing it,” the trial court’s sentencing decision is no different than those sentencing decisions made prior to *Miller*. Accordingly, like the petitioners in *Aiken* and all those similarly situated individuals that recently have been granted resentencing hearings, *see* discussion *supra* n.3, Settles is entitled to resentencing. *Aiken*, 410 S.C. at 543 n.8, 765 S.E. at 577 n.8.

Contrary to the State’s primary argument, this conclusion is not changed, nor is the trial court’s error of law excused, because some testimony related to Settles’ youth was presented during the trial and sentencing hearing. As the majority in *Aiken* made clear, it does not matter what or how much information regarding a defendant’s youth is **presented** to the sentencer if the sentencer then refuses to view this information “through the lens mandated by *Miller*” and “afford youth and its attendant characteristics constitutional meaning.” *Aiken*, 410 S.C. at 543 n.8, 765 S.E. at 577 n.8. Here, the trial court, like those sentencing decisions discussed in *Aiken*, “treat[ed] the characteristics of youth like any other fact” and therefore erroneously minimized the factor of Settles’ youth in sentencing him.

The failure of the trial court to follow *Aiken* and *Miller* is especially harmful in this case because the trial court referred to Settles as an “adult” during the trial and also stated during the sentencing hearing that the law considers a “17-year-old to be a man.” (R. p. 169) (“I mean, the Defendant in this case was 17. So he’s adult.”); (R. pp. 169; 410). Thus, not only did the trial court treat Settles’ “youth like any other fact” by not following *Aiken* and *Miller*, it placed little to no weight on this important fact based on its mistaken belief that Settles was an adult for purposes of sentencing. *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577 (“*Miller* requires the sentencing authority [to] ‘take into account how children are different.’”) (quoting *Miller*, 132 S.Ct. at 2469). This mistaken belief also resulted in the trial court placing more weight on Settles’ perceived lack of remorsefulness, which may be a valid consideration with respect to an adult but must be carefully scrutinized and understood with respect to a juvenile. See Adam Saper, *Juvenile Remorselessness: An Unconstitutional Sentencing Consideration*, 38 N.Y.U. Rev. L. & Soc. Change 99, 102 (“Behaviors that judges cite as demonstrating a lack of remorse often indicate a juvenile’s developmental immaturity and susceptibility to sociological pressures.”).

The State’s “proportionality” argument fails for these same reasons. By refusing to consider Settles’ youth and attendant characteristics within the framework established by *Miller*, the trial court ensured that Settles’ sentence was not and could not be “proportionate” under the Constitution. *Aiken*, 410 S.C. at 542-43, 765 S.E.2d at 576 (“[W]e must give effect to the proportionality rationale integral to *Miller*’s holding—youth has constitutional significance. As such, it must be afforded adequate weight in sentencing.”). Simply put, “*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.” *Id.* at 543, 765 S.E.2d at 576.

In sum, the trial court was required to conduct a sentencing hearing in accordance with the framework established by decisions in *Miller* and *Aiken*. The trial court refused to follow these holdings in sentencing Settles. Settles’ sentence therefore suffers from a “constitutional defect” that entitles Settles to resentencing.<sup>4</sup>

Finally, in a footnote on page 39 of the Respondent’s Brief, the State argues that the reversible errors and deficiencies related to Settles’ sentencing should be excused because “Appellant’s sentence has been entitled to a second review by the trial judge and has been reduced upon a showing of substantial assistance to the State.” *Id.* at 39 n.10. This is a completely erroneous and disingenuous contention by the State.

Settles has not received the “benefit” of a “second review” of the sentencing decision in this case. *Id.* Rather, over five months after the trial and sentencing in this case, the **State** moved for Settles’ sentence to be reduced by five years pursuant to S.C. Code Section 17-25-65 for “substantial assistance” Settles provided in another matter wholly-unrelated to the instant case, which the assigned circuit court judge granted that same day.<sup>5</sup> The assigned circuit court judge did not reconsider Settles’ sentence, and he

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<sup>4</sup> The State contends that the trial court’s denial of Settles’ motion for a mitigation expert does not constitute an abuse of discretion because “*Aiken* only **encourages** the court to consider relevant mitigating factors related to a youthful defendant’s crime and circumstance.” Br. of Resp’t at 31 (Emphasis added). However, *Aiken* does not simply “encourage” a trial court to carefully consider a defendant’s youth and attendant characteristics—it requires the trial court to do so. Moreover, because the trial court’s decision not to grant Settles’ motion for the appointment of a mitigation expert was based on its refusal to apply *Aiken* and *Miller*, its denial of Settles’ motion was based on an error of law and therefore was an abuse of discretion. See Br. of Appellant at 17.

<sup>5</sup> S.C. Code Section 17-25-65 provides: “Upon the state’s motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing,

certainly did not sit in the capacity of this Court reviewing the prior sentencing decision. The assigned circuit court judge simply granted the State's motion without any consideration of the propriety of the previous sentencing decision.

Accordingly, the Court should flatly reject the State's attempt to forever deprive Settles of his right to appeal a constitutionally defective sentence simply because, upon the State's motion, Settles' 45-year sentence was reduced by five years pursuant to the "substantial assistance" statute.

### **CONCLUSION**

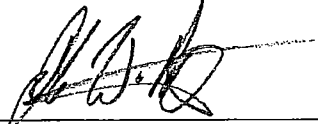
For the reasons set forth above, in addition to those advanced in the Initial Brief, Settles' convictions should be reversed and this case remanded for a new trial. Alternatively, this case should be remanded for resentencing.

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provided . . . substantial assistance in investigating or prosecuting another person. . . . The chief judge or a circuit court judge currently assigned to that county shall have jurisdiction to hear and resolve the motion. Jurisdiction to resolve the motion is not limited to the original sentencing judge."

Respectfully submitted,



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