

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

KENNETH LAMONT ROBINSON, JR.

APPELLANT

APPELLATE CASE NO. 2018-001269

INITIAL BRIEF OF APPELLANT

JOHN H. BLUME
Cornell Law School
159 Charles Evans Hughes Hall
Ithaca, NY 14850

MEGAN S. EHRLICH
Charleston County Public Defender Office
101 Meeting Street, 5th Floor
Charleston, S.C. 29401
(843) 958-1850

SUSAN B. HACKETT
Appellate Defender
SCCID - Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err by refusing to remand jurisdiction over Appellant to the Family Court in light of substantial new evidence meriting reconsideration of the transfer order?
- II. Did the trial court err in permitting the State to introduce inadmissible gang-related evidence throughout the entire trial, including the improper opinion testimony of a lay witness?
- III. Did the trial court err in refusing to instruct the jury on the lesser included offense of voluntary manslaughter where evidence in the record required the instruction?
- IV. Did the trial court err in failing to instruct the jury to consider Appellant's age and resulting inability to foresee the consequences of his actions in determining his liability as a non-trigger person under the "hand of one, hand of all" doctrine?
- V. When the judge sentenced Appellant to serve fifty years in prison, did she violate Appellant's right to due process because the sentence constituted a tax upon Appellant's exercise of his rights to trial and appeal, and thereafter, did the judge err in denying Appellant a new sentencing hearing where Appellant presented newly discovered evidence that his co-defendants, who entered into plea bargains with the state, received significantly shorter sentences, which enhanced Appellant's argument that his sentence was a tax on his exercise of his rights, demonstrated that his sentence was disproportionate in violation of state and federal law, and revealed the judge used Appellant's age as an aggravating circumstance instead of a mitigating factor as required by federal and state law?

STATEMENT OF THE CASE

On May 15, 2015, the State accused Kenneth Lamont Robinson, Jr., of having committed murder and four counts of attempted murder when he was fifteen-years old. R. *(Juvenile petitions). The state moved to transfer jurisdiction to the Court of General Sessions. R. *(Motion to transfer). A hearing on the state's motion convened before the Honorable Jocelyn B. Cate on July 11th, 2016. Family Court Tr. 1. Spiros S. Ferderigos and Anne Seymour represented the state. Family Court Tr. 1. Tamara J. Coppinger and Megan S. Ehrlich represented Kenneth. Family Court Tr. 1. By an order filed July 25, 2016, Judge Cate transferred jurisdiction to the Court of General Sessions. R. *(Transfer Order).

Thereafter, the state, represented by D. Bruce Durant and E. Culver Kidd, IV, called the case to trial before the Honorable Kristi Harrington and a jury on February 12–22, 2018. Trial Tr. 1. Ehrlich, Coppinger, and Michael R. Loignon represented Kenneth. Trial Tr. 1. The jury found Kenneth guilty of murder and four counts of assault and battery in the first degree. Trial Tr. 1644–1645. On June 6–7, 2018, Judge Harrington presided over a sentencing hearing for Kenneth for consideration of the hallmarks of youth in light of his age at the time of the offense. Sentencing Tr. 1. At the conclusion of the hearing, Judge Harrington sentenced Kenneth to concurrent terms of fifty years imprisonment for murder and to ten years imprisonment for each count of assault and battery. Sentencing Tr. 357; R. *(Sentence sheets).

Subsequently, Kenneth moved to reconsider his sentence. R. *(Motion to reconsider). Judge Harrington denied the motion on June 25, 2018. R. *(Order denying reconsideration). On July 3, 2018, Kenneth served his notice of appeal.

After Kenneth's co-defendants received prison sentences that were significantly shorter than his despite the differences in age and culpability, Kenneth filed a motion to hold his appeal

in abeyance and remand to the circuit court for consideration of a motion for a new sentencing hearing in light of the newly discovered evidence. This Court granted the motion on May 3, 2019. Thereafter, Kenneth filed a motion for resentencing based on after-discovered evidence in the circuit court. R. *(Amended motion for resentencing). The Honorable R. Markley Dennis convened a hearing on the motion on March 2, 2020. Motion for New Sentencing Tr. 1. By an order filed March 20, 2020, Judge Dennis denied the request for new sentencing. R. *(Order denying new sentencing).

This brief follows.

STATEMENT OF FACTS

The events leading to Kenneth's arrest, indictment, and convictions took place during the evening hours of May 9, 2015, in North Charleston, when Kenneth was fifteen-years old. Richard Simmons had gone to Kenneth's house, followed by several young men. They were gathered outside Kenneth's home in the Dorchester-Waylyn neighborhood when someone drove by and shot at Simmons, who was sitting in his car. Trial Tr. 702–03. Simmons armed himself and then chased the assailant's car on foot but the car sped away. Trial Tr. 804. Kenneth's mother and younger sister, who were at home at the time of the shooting, were terrified. Trial Tr. 804.

Shortly after the shooting, the police arrived, but only gathered a few spent shell casings before leaving. Discouraged by the perceived police inaction, Simmons drove to meet his brother to explain what had occurred. He then returned to Kenneth's home; others again gathered; a number were armed. The consensus view was that they were fired upon by “guys off the Waylyn” who had shot at them earlier. While they talked, someone—presumably connected to the initial drive-by shooting—shot at them again. Trial Tr. 715. Quickly entering several

vehicles, those gathered at Kenneth's home that evening began chasing after the car from which the shots were fired. Simmons was the driver of a Honda CRV while both Kenneth and Keon Anderson were passengers in the car. Trial Tr. 722. The other cars involved gave up the chase after losing sight of the vehicle, but Simmons continued on desperately chasing taillights. Trial Tr. 736, 738. He pulled up beside a car he thought contained the individuals who shot at him. Kenneth and Anderson told him not to shoot, that it was the wrong car. Simmons ignored them, pushed Kenneth out of his way, and fired several shots into the vehicle, killing Kedena Brown in what Simmons later referred to as a case of "mistaken identity." Trial Tr. 739, 827—828.

Given Kenneth's age at the time of the homicide, his case originated in Family Court. Trial Tr. 143. The State moved for the case to be transferred to the Court of General Sessions, thus authorizing Kenneth to be tried as an adult. Trial Tr. 143. After a multi-day waiver hearing at which Kenneth's attorneys presented substantial evidence supporting a decision to keep Kenneth in the juvenile justice system, the Family Court Judge, relying heavily on a conflict between Kenneth's statements to law enforcement that Simmons was the shooter (subsequently established to be truthful) and Simmons' statements to law enforcement that Kenneth "was the Juvenile who instructed him [Simmons] to get closer and the Juvenile who pulled the trigger on the gun that killed Ms. Brown" (later proven to be false), the judge determined that Kenneth should be "waived up" to adult court so that "the trial of all of the Defendants" could "take place in one court." Family Court Tr. 6.

Prior to trial, Kenneth's attorneys learned that Simmons had finally come (mostly) clean, admitting, that he shot and killed Ms. Brown. Relying on this information, Kenneth's attorneys asked the trial judge to remand the case back to Family Court on the grounds that new information was available proving that Kenneth was not the shooter and that he had told

Simmons not to shoot because it was the wrong car. Trial Tr. 146–47. The judge denied the motion, stating that she had “heard nothing that would cause me to remand it back to juvenile court, even taking into consideration the initial information.” Trial Tr. 162. The trial judge also rejected defense counsel’s pre-trial motion *in limine* to exclude evidence of Kenneth’s alleged membership in a neighborhood “gang” (the “Young Gunnas”) and their ongoing “turf-war” with another neighborhood gang (the “Loud Pack”), an allegation the prosecution maintained was necessary to provide a supposed motive for the two drive-by shootings and resulting high-speed chase that ended in Ms. Brown’s death.

Capitalizing on the trial judge’s pre-trial ruling, the State sounded the “gang war” theme in its opening statement, telling the jury that they were “about to be exposed to a side of Charleston” that they hoped its members “didn’t know existed,” describing a scene where “there is cars, homes riddled with bullets” and where “there is good people who are afraid to walk outside their homes.” Trial Tr. 266. The actual testimony was, however, more limited, as many of the State’s witnesses maintained they had no, minimal, or only hearsay knowledge of the Young Gunnas and the Loud Pack. For the most part, the State was forced to elicit hearsay evidence by asking witnesses questions like “what do the streets say?” The State attempted to shore up the weakness in this evidence by attempting to qualify Detective James Desheers as a gang expert. The trial judge agreed with defense counsel that Desheers was not qualified as an expert given his lack of training and experience in the area, Trial Tr. 1441, but nevertheless allowed him to give his opinion, based on his hearsay knowledge of other incidents that had taken place in North Charleston, that this crime was part of an ongoing “gang” war. Trial Tr. 1439–41.

At the jury-charge conference, defense counsel requested the trial judge also submit the lesser included offense of voluntary manslaughter given that Simmons was reacting to being shot at several times on the evening in question. She refused to do so. Trial Tr. 1515. Counsel also objected to the use of the standard “hand of one, hand of all” accomplice liability charge, based on neuroscience establishing that juveniles’ still developing brains do not have the same ability as adults’ brains to foresee consequences. Trial Tr. 1558. The trial judge refused to modify the standard instruction. Trial Tr. 1559.

During summation, the State returned to the gang war theme, arguing that the events were “all about a conflict with Gunnas and Loud Pack” and that the State was merely asking the jury to “end the cycle of violence.” Trial Tr. 1585. Imploring them to remember that since “we cannot allow street justice to prevail,” “it doesn’t matter who pulled the trigger.” Trial Tr. 1587; Trial Tr. 1585.

Kenneth was subsequently found guilty of murder and four counts of assault and battery in the first degree. Trial Tr. 1644–45. The sentencing hearing mandated by *Aiken v. Byars* convened several months later. 410 S.C. 534, 544–45, 765 S.E.2d, 577–78 (2014) (holding that juveniles facing a potential life without parole sentences are entitled to individualized sentencing hearings); Trial Tr. 1665; Sentencing Tr. 5. Defense counsel presented a robust case in mitigation that included the testimony of a forensic clinical psychologist and a number of employees of the Department of Juvenile Justice and the Charleston County Jail who had interacted with Kenneth during his pre-trial confinement there.

Prominent among the various mitigation themes that emerged at sentencing was the lack of a stable, nurturing home environment and both his family’s and the criminal justice system’s failure to provide him with needed oversight, monitoring, and services after he was placed on

probation for an unrelated incident. Sentencing Tr. 17. Dr. Susan Knight, who was qualified by the court as an expert in clinical and forensic psychology, interviewed Kenneth's mother, his grandmothers, and his aunts and concluded that Kenneth's childhood "was significant for [his exposure to] domestic violence" and that there "was lots of community criminality surrounding Mr. Robinson during his upbringing." Sentencing Tr. 225–28. Knight also revealed that Kenneth's father, who was in and out of the family home, had been killed mere months before Ms. Brown's homicide in "an alleged drug deal." Sentencing Tr. 226. Kenneth's prior crimes, Dr. Knight pointed out, frequently involved much older individuals, and she attributed his prior criminal history to being the byproduct of growing up around "criminal peers, delinquent peers." Sentencing Tr. 226. Knight explained further that Kenneth's involvement in Ms. Brown's death was a function of his youth; since Kenneth was the "youngest person there with his peers" there was "added pressure for him as an adolescent to go along with that." Sentencing Tr. 261. She also informed the trial court that at the time, Kenneth was "more susceptible to that kind of peer behavior" at age fifteen than he would be as an adult. Sentencing Tr. 261. Dr. Knight testified that these risks had been previously acknowledged by DJJ evaluators and that they had strongly recommended mandatory alternative placement for Kenneth rather than return him to his home prior to these events. That did not happen, which DJJ acknowledged was a failure on their part. Sentencing Tr. 228.

Employees of the Department of Juvenile Justice, who grew to know Kenneth during the several years he spent with in the Department of Juvenile Justice facility in Columbia following his arrest on these charges, testified in glowing terms about the progress he made once he was finally in a structured environment and separated from these negative peer influences. They raved about how determined he was to obtain his GED ("one of the top students in the class," he

was the first in his family to earn a GED or high school diploma), how he participated in numerous other programs, and how “he was a leader among leaders” who thrived in the JROTC program and on the basketball team. Sentencing Tr. 200. Quite simply, Kenneth took advantage of every opportunity presented to him. Sentencing Tr. 205. These achievements, they argued, spoke to Kenneth’s great potential for rehabilitation and the changes Kenneth had already made. The DJJ officials were so impressed by Kenneth’s reformation that he was a featured speaker at graduation ceremonies for DJJ security officers. Sentencing Tr. 189.

Kenneth’s former English teacher Rebecca Calloway, for example, attributed Kenneth’s potential to the fact that at his core Kenneth is “a good and kind person” and explained that Kenneth’s positive attitude allowed him to succeed while at the DJJ in spite of all the charges that were pending against him. Sentencing Tr. 151. Ms. Calloway was emphatic that Kenneth would continue to benefit from any rehabilitative services offered to him, and stated that “if he were given the opportunity to go out in the world and use the talents that he has and the strength that he has within himself that he would do amazing things.” Sentencing Tr. 158. When Kenneth finally earned his GED after months of tireless dedication, his teachers cried “because they knew he put in the work.” Sentencing Tr. 198.

Kenneth’s chaplain Stephen Singleton explained that Kenneth’s separation from his negative peers while under DJJ supervision allowed Kenneth to finally “realize that there was more that life had to offer.” Sentencing Tr. 211. Dr. Knight reiterated what others had said, namely, that Kenneth had “made great strides in rehabilitation” and that since “[he] has tried things and stayed with them even though they had been very difficult,” it “bodes well for future rehabilitation” Sentencing Tr. 285.

During its sentencing summation, the State requested that the court impose a sentence of fifty years, twenty more than the mandatory-minimum term for murder. The State's insistence that this draconian sentence was justified for a fifteen-year-old child who didn't pull the trigger was based on its erroneous assertion that Kenneth failed to cooperate because he was more worried about being labeled a "snitch" and about his "street cred." Sentencing Tr. 326. Thus, the prosecution dismissed the extensive mitigation evidence from experienced DJJ employees and Dr. Knight regarding Kenneth's rehabilitative acts and potential as a "lie." Sentencing Tr. 326. This proposed sentence was in stark contrast with the twenty-three-year sentence the prosecution offered to Kenneth if he would forego his right to jury trial and instead plead guilty to manslaughter, and the thirty-year sentence it offered following Kenneth's convictions in exchange for his waiving his right to appeal to this Court any errors made by the trial judge.

The trial judge imposed the State's requested punishment, sentencing Kenneth to fifty years for Ms. Brown's murder and four concurrent ten-year sentences on the assault and battery charges. Sentencing Tr. 356–358. Although acknowledging the "DJJ's colossal failure and society's colossal failure" to Kenneth, the trial judge justified giving Kenneth the functional equivalent of a life sentence on the grounds that fifteen-year-old Kenneth "made a choice to get in the car." Trial Tr. 357.

Trial counsel objected to the sentence on multiple grounds and filed a motion for reconsideration. R. *(Motion for reconsideration). Among the grounds raised for reconsideration were that Kenneth was "taxed" for exercising his Sixth Amendment right to jury trial and his Fourteenth Amendment right to direct appeal. R. *(Motion for reconsideration). The trial judge denied the motion, allowing the fifty-year sentence to stand.

At subsequent proceedings, Simmons and Anderson appeared before the Honorable Roger Young for sentencing.¹ The State was again represented by Culver Kidd at both hearings. Simmons, the adult shooter, who lied repeatedly to law enforcement about his role in Ms. Brown's death, entered into a negotiation with the State in which he was allowed to enter a guilty plea to murder and four counts of attempted murder in exchange for a sentence of thirty years imprisonment – the statutory minimum. Simmons Sentencing Tr. 4. Likewise Keon Anderson, an adult whose role in the offense was substantially similar to Kenneth's, entered into a negotiation with the State that allowed him to enter a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to one count of voluntary manslaughter and four counts of assault and battery in the first degree in exchange for a sentence of fifteen years. Anderson Sentencing Tr. 4.

Based on the disparity in the sentences, undersigned counsel filed a motion for new sentencing based on after-discovered evidence. R. *(Motion for New Trial). Kenneth argued he was entitled a new sentencing hearing to permit a judge to consider the negotiated sentences with the adult co-defendants, including the shooter. R. *(Motion for New Trial). The negotiated sentences between the state and the co-defendants were important to analyze whether Kenneth's sentence violated the proportionality principle embodied within the federal and state constitutions. R. *(Motion for New Trial). Further, the negotiated sentences between the state and the co-defendants were important to analyze whether the sentence imposed upon Kenneth was the result of Kenneth exercising his rights to trial and appeal. R. *(Motion for New Trial). After reviewing the evidence and the argument presented, the presiding judge denied the motion for a new sentencing hearing. R. *(Order denying Motion for a New Trial).

¹ Simmons entered a guilty plea on January 10, 2018, prior to Kenneth's trial. Simmons guilty plea Tr. 1.

ARGUMENT

- I. The trial court erred by refusing to remand jurisdiction over Appellant to the Family Court in light of substantial new evidence meriting reconsideration of the transfer order.

A. STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” *In re Walter M.*, 386 S.C. 387, 390, 688 S.E.2d 133, 135 (2009). “The appellate court is limited to determining whether the trial court abused its discretion.” *State v. Halcomb*, 382 S.C. 432, 438, 676 S.E.2d 149, 152 (Ct. App. 2009). The appellate court “is bound by the trial court’s factual findings unless they are clearly erroneous.” *State v. Rios*, 388 S.C. 335, 337, 696 S.E.2d 608, 610 (Ct. App. 2010). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law.” *Halcomb*, 382 S.C. at 438, 676 S.E.2d at 152.

B. INTRODUCTION

At Kenneth’s Family Court transfer hearing, one of the central issues contested by the parties was whose version of events to credit: Kenneth (who maintained that he was not the actual shooter) or Richard Simmons (who claimed that Kenneth fired the fatal shots). The State leaned heavily on Simmons’ statements, and the ambiguity regarding who was the “shooter” informed the Family Court’s decision to transfer Kenneth for trial in the Court of General Sessions. After the transfer order, but before trial, defense counsel became aware that Simmons admitted that he had fabricated significant portions of his original story and that it was, in fact, Simmons who fired the shots that killed Kedena Brown. Additionally, it came to light through the other co-defendant, Keon Anderson, that Kenneth and Keon both warned Simmons not to shoot at Ms. Brown’s car. Defense counsel filed a motion presenting this new information and, at a hearing on the motion, requested that the case be remanded to the Family Court for a new transfer hearing. The trial judge, however, refused to even consider the extent to which this new

evidence bore on the transfer order. Given the significant discrepancy between the facts available to the family court and the facts available after Simmons revised his story, the trial court judge erred in not remanding Kenneth's case to the family court. This Court should now vacate Kenneth's conviction and order that a new transfer hearing be held in order to decide whether to retain Kenneth in the Family Court or transfer him to the Court of General Sessions to be tried as an adult, based on a materially accurate record.

C. RELEVANT FACTS

In July 2016, the Honorable Jocelyn B. Cate presided over a three-day hearing to determine whether to waive jurisdiction over Kenneth's case, thus permitting the State to try him in the Court of General Sessions. Family Court Tr. 1. At the hearing, both the State and the defense presented multiple witnesses to testify about the circumstances surrounding the offense. Defense counsel also presented substantial information regarding Kenneth himself, including his social history, past interactions with the Department of Juvenile Justice ("DJJ"), psychological profile, and excellent behavior in the custody of DJJ. The State opened its case by calling Investigator Eric Jourdan, who—as will be set forth below—testified extensively regarding the facts of the case (as they were then known). Family Court Tr. 13–157. He also detailed the statements provided to law enforcement by both fifteen-year-old Kenneth and twenty-year-old Simmons. Family Court Tr. 13–157, 75–90, 91–97. The conflict between these two statements became a focal point of the waiver hearing and the Family Court's decision to transfer Kenneth to the Court of General Sessions.

Following Jourdan's testimony, the State briefly called Detective Robert Bailey, Officer Robert Sherwood, Ms. Octamiece Smalls, and Mr. Randall Green, all of whom testified to Kenneth's prior involvement with DJJ. Family Court Tr. 159–84, 185–94, 196–286, 289–365.

Of particular note, it came to light during these individuals' testimony that, despite a recommendation of mandatory alternative placement, he had been returned to his home with a GPS monitor, and for several months prior to the offense at issue here, DJJ utterly failed to actually check his monitor reports. Family Court Tr. 210–11. In addition, the testimony revealed that during this period, Kenneth was not provided any services from DJJ, such as counseling, mentorship, or peer support services. Family Court Tr. 242–43.

Following the testimony from the police officers and DJJ employees, the State's final witness was Dr. Candice Dunn, a DJJ psychologist who performed the court-ordered pre-waiver psychological evaluation on Kenneth. Family Court Tr. 365–460. Dr. Dunn testified that she based her findings on a single, multi-hour interview with Kenneth and a phone call with his mother. Family Court Tr. 371. Dr. Dunn testified that Kenneth was not experiencing any functional impediments, emotional issues, or behavioral problems. Family Court Tr. 371–72. She further testified that Kenneth "had difficulty in connecting his behaviors to potential consequences," and that he was no more sophisticated or mature than the average 16-year-old. Family Court Tr. 380–81. Finally, she gave her opinion that Kenneth had a good family support system and the ability to empathize with others, and that, at the age of 16, there was still sufficient time to work towards Kenneth's rehabilitation if he was retained in the juvenile justice system. Family Court Tr. 390, 397, 406–07. Pursuant to DJJ's policy, however, she did not make an ultimate recommendation about the appropriateness of waiver to the Court of General Sessions. Family Court Tr. 389.

Directly after Dr. Dunn's testimony, the Defense's first witness, clinical forensic psychologist Dr. Susan Knight, testified to her psychological examination of Kenneth. Family Court Tr. 462–525. Dr. Knight based her findings not only on multiple, extensive interviews

with Kenneth and his mother, but also on social history and correctional records and on a number of collateral interviews. Family Court Tr. 465–66. Consistent with Dr. Dunn, Dr. Knight concluded that Kenneth’s sophistication and maturity was that of an average 16-year-old—that is, “biologically undeveloped compared to an adult.” Family Court Tr. 468–69. Dr. Knight also testified about the troubled environment Kenneth grew up in, consisting of significant parental conflict at home as well as living in a very violent neighborhood, and gave her opinion that Kenneth spent the entirety of his young life “in an environment that was filled with negative influences that were outside of his control.” Family Court Tr. 470–75. Dr. Knight further testified that Kenneth was capable of feeling empathy and remorse, an opinion she based on her interviews both with Kenneth himself and with the DJJ employees who spoke with Kenneth on a regular basis. Family Court Tr. 475–76. Finally, Dr. Knight echoed Dr. Dunn’s opinion that Kenneth was “almost flourishing” in his commitment at DJJ and that there was “no indication of a barrier” to his continued rehabilitation at DJJ. Family Court Tr. 483–85, 487.

Finally, the Defense called five DJJ witnesses: Ms. Nele Karamus, Ms. Beverly Jackson, Ms. Rebeccah Calloway, Ms. Rebecca Morrison, and Mr. Charles Chandler. Family Court Tr. 527–49, 550–64, 565–73, 573–86, 586–610. All five DJJ employees testified to their involvement with Kenneth during his DJJ detention, and all five praised his good character and efforts to rehabilitate himself. Ms. Karamus testified that Kenneth was doing well at DJJ, particularly at avoiding negative peer influence, and praised him as “very resilient . . . I think he tries to see the best out of situations.” Family Court Tr. 531–32, 537. Ms. Jackson testified that Kenneth was one of the best-behaved children she worked with and that he “handles himself very well,” even in difficult situations. Family Court Tr. 553–54. Ms. Calloway, an English teacher at DJJ, testified that Kenneth put in extra effort to improve his reading skills to pass that

section of the GED and that Kenneth was “the complete and polar opposite of what I am used to experiencing. . . . He is always respectful towards staff, teachers, administration, and even his other students in the middle of a pretty chaotic environment.” Family Court Tr. 567–568. Ms. Morrison, an upholstery instructor, testified that Kenneth was conscientious and “particular about his work” and that Kenneth “is a reminder for [other students]” in terms of behavior. Family Court Tr. 578–79. Finally, Mr. Chandler, the leader of a selective DJJ program called “Insiders,” testified that he had seen “awesome leadership” from Kenneth and that he believed Kenneth was motivated to change his life. Family Court Tr. 594–95.

As noted above, the precise nature of the facts and circumstances surrounding the offense, including Kenneth’s role in it, was a hotly-contested topic at the transfer hearing. The State, through Investigator Jourdan, presented the following statement by Richard Simmons:

Q: Who did Richard Simmons state was in that Honda CRV—Honda SUV?

A: Kenneth Robinson Jr.

Q: And who did Richard Simmons state had possession of the gun?

A: He said that Kenneth Robinson had a gun.

Q: And, did he state whether or not he already had a gun or didn’t have a gun when Mr. Simmons arrived?

A: He said that he had the gun when he got in.

[. . .]

Q: Who did [Mr. Simmons] state was shooting the gun?

A: Kenneth Robinson Jr.

[. . .]

Q: What did Mr. Simmons state that Kenneth Robinson stated when they saw that Chrysler 300 on Ashley Phosphate Road?

A: That that was the car and told him to get closer to it.

Q: So according to Mr. Simmons, Kenneth Robinson said, that's the car and told him to go up to the vehicle?

A: Yes.

Q: What did Mr. Simmons state happened next?

A: That Kenneth Robinson Jr. fired at or shot at the vehicle four or five times.

Family Court Tr. 93–96.

The State also elicited testimony from Mr. Jourdan about Kenneth's statements to the police: "Q: Now, did y'all have an opportunity to interview Mr. Kenneth Robinson? A: Yes, he was interviewed. Q: Did Mr. Kenneth Robinson give you consistent statements of what occurred that night throughout the interview process? A: No, he did not." Family Court Tr. 75. These statements contradicted the statements given by Simmons, who despite his prevarication subsequently entered into a cooperation agreement with the State and would be a main witness at trial: "Q: Who did [Kenneth] say shot the alleged victim, Ms. Kadena [sic] Brown? A: He said that he saw Richard Simmons shooting." Family Court Tr. 88. On cross-examination, defense counsel elicited further information about Kenneth's account of the offense: "Q: [Kenneth] denies having a gun? A: Yes. He denies shooting a gun? A: Yes . . . Q: And, he tells you that Black was the shooter? A: Yes. Q: And, Black was Richard? A: Yes." Family Court Tr. 112.

Less than two weeks after the waiver hearing, Judge Cate issued an order transferring jurisdiction of the case to the Court of General Sessions. R *(Transfer Order). She found "there is no more serious offense to the community than murder and attempted murder." R *(Transfer Order 4). Thereafter, she set forth a recitation of her understanding of the facts of the case, including a summary of the offense, Kenneth's past involvement with DJJ, and the psychological

assessments offered at the hearing. R *(Transfer Order 4–6, 7–9, 10–11). Acknowledging the competing narratives presented at the hearing, the judge stated:

The Juvenile denies that he did any of the shootings and implicates his adult co-defendants One of his adult co-defendants implicates the Juvenile as the shooter and gave a statement to the police that the Juvenile got into his vehicle with a gun and when they spotted what they believed was the car they had been chasing parked at the gas station, it was the Juvenile who instructed him to get closer and the Juvenile who pulled the trigger on the gun that killed Ms. Brown.

R *(Transfer Order, 6).

Judge Cate found that, because of the differing statements of Kenneth and Simmons as to who fired the fatal shots, “it would be desirable for the trial of all of the Defendants to take place in one court.” R *(Transfer Order, 6). She concluded by emphasizing its finding that “the charges facing the Juvenile are the most serious of criminal offenses. There can be no more despicable of crimes than the murdering of an innocent person and the attempted killing of multiple persons.” R *(Transfer Order, 12).

In the year and a half between Kenneth’s waiver hearing and his trial, Simmons’ story changed significantly. After numerous interrogations by the police, it was clear that Simmons had significantly minimized his role in the offense. Not only was Simmons motivated by a desire to obtain favorable treatment from the State, but he falsely accused Kenneth of being the shooter because he wanted revenge after he learned that Kenneth told the police that Simmons was the shooter. Trial Tr. 829-831.

When defense counsel learned that Simmons finally told the truth, defense counsel moved to remand the case to the Family Court pursuant to S.C. Code Ann. § 63-19-1210. Trial Tr. 142–44; R *(Motion to Remand Jurisdiction). Defense counsel specifically disclaimed any intention of asking the Court to review the transfer order, instead merely requesting a remand for proper consideration of the newly-available information about Kenneth’s participation in the

offense. Trial Tr. 144–45; R. *(Motion to Remand Jurisdiction, 2–3). Defense counsel outlined this newly-available information as follows:

. . . Richard Simmons has admitted, not only to being the driver of the car involved in this incident, thereby in control of the vehicle, but he’s also admitted that he fired the fatal shot that killed Kedena Brown. Information has also been provided that Kenneth Robinson may have even warned Mr. Simmons that the car he was about to shoot at was not the right vehicle. Since the waiver hearing[,] an additional adult co-defendant, Keon Anderson, has also been charged with these offenses Keon Anderson then provides a statement to the State’s benefit and corroborated both Kenneth Robinson’s statement and Richard Simmons’ own statement implicating himself, with Richard saying that he is, in fact, the person who fired the gun at the victim’s vehicle and caused her death.

Trial Tr. 146–47.

However, the trial judge denied the motion, stating:

You know, I have reviewed the fourteen page order by Judge Cate. She did an exceptional job of articulating the basis and going through the factors that she considered; her findings of fact, which are required by law, but I think that particularly Ms. Cate, Judge Cate, went above and beyond. . . .

Trial Tr. 162. Accordingly, despite the new information provided by defense counsel on the critical issue of who fired the fatal shots, the trial judge determined, “I have heard nothing that would cause me to remand it back to juvenile court.” Trial Tr. 162–63.

Following Judge Harrington’s refusal to remand the case to the Family Court, the trial proceeded as planned. Simmons and Anderson testified to the same facts provided by the defense in its motion to remand. Specifically, Simmons testified as follows:

Q: What did you do?

A: Mistaken identity.

Q: I know, but what did you do?

A: Shoot the wrong car.

[. . .]

Q: Where is the gun? Did you have the gun in your hand, or someone else got it, or where is it in the car?

A: I grabbed it from “BJ”.

[. . .]

Q: And what did you do?

A: Mistaken the wrong car.

Q: You shot?

A: Yeah.

Trial Tr. 739–40. Later, Simmons clarified that he actually pushed Kenneth out of his way so that he could shoot into the car. Trial Tr. 828. Similarly, according to Anderson, “And then we start getting close to where the scene of the crime and that and we see a Chrysler. Mr. Simmons thought it was the Chrysler. Me and Robinson telling him like ‘no, that’s not the right Chrysler. That’s a lady.’ And you could tell it ain’t the right Chrysler.” Trial Tr. 906–07.

D. RELEVANT LEGAL PRINCIPLES

Before entering a transfer order, the Family Court has the responsibility to conduct a full investigation and set forth a sufficient statement of reasons for its decision, including the salient facts on which the order is based. *In re Sullivan*, 274 S.C. 544, 548, 265 S.E.2d 527, 529 (1980). Ordinarily, the merits of a transfer order are reviewed under the abuse of discretion standard, *State v. Pittman*, 373 S.C. 527, 559, 647 S.E.2d 144, 161 (2007), bearing in mind that “[t]he term ‘abuse of discretion’ has no opprobrious implication and may be found if the conclusions reached by the lower court are without reasonable factual support.” *State v. Corey D.*, 339 S.C. 107, 118, 529 S.E.2d 20, 26 (2000) (recognizing that adherence to proper procedure is not a sufficient basis to affirm a transfer decision); *see also State v. Miller*, 363 S.C. 635, 641–46, 611 S.E.2d 309, 312–14 (2005) (noting that if the transfer order is “without evidentiary support,” the

family court has abused its discretion in approving transfer) (quoting *Engle v. Engle*, 343 S.C. 444, 449–50, 539 S.E.2d 712, 714 (Ct. App. 2000)). Although “[t]he serious nature of the offense is a major factor in the transfer decision,” *Sanders v. State*, 281 S.C. 53, 56, 314 S.E.2d 319, 321 (1984), the Family Court and appellate courts reviewing transfer decisions must also give appropriate weight to the other considerations set forth by the Supreme Court in its seminal decision in *Kent v. United States*, 383 U.S. 541, 566–67 (1966). In *Kent*, the Supreme Court noted the following factors for determining the appropriateness of transfer of a juvenile in the District of Columbia:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Kent v. United States, 383 U.S. at 566-67.²

This, however, is not an ordinary case. While the family court may have abused its discretion in its transfer decision, given the weight of the evidence as to Kenneth’s rehabilitative potential, he is not challenging that ruling (based on the record on which it was made). Rather, the issue before this Court is whether the Court of General Sessions erred in refusing to remand the case back to the Family Court to reassess the waiver determination based on new evidence significantly reducing Kenneth’s role in the crime and therefore, his moral culpability. This is an issue of first impression in this state. *Cf. State v. Pittman*, 373 S.C. 527, 560, 647 S.E.2d 144,

² South Carolina continues to make waiver determinations based on the outdated factors first outlined in *Kent*, despite a sea change in juvenile sentencing law since *Kent* was decided. The first wave was *Roper v. Simmons*, 543 U.S. 551 (2005), when the Supreme Court of the United States held that sentencing juveniles to death was cruel and unusual punishment barred by the Eighth Amendment. In doing so, the Court, for the first time, looked to neuroscience and common sense—what “any parent knows”—to identify three constitutionally relevant differences between juveniles and adults: (1) “a lack of maturity and an underdeveloped sense of responsibility,” *id.* at 569 (internal quotation marks omitted); (2) “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” *id.*; and (3) “the character of a juvenile is not as well formed as that of an adult,” *id.* at 570. Based on those three traits, the Court next barred life-without-parole sentences for juveniles who commit non-homicide offenses, *Graham v. Florida*, 560 U.S. 48 (2010), and mandatory life-without-parole sentences for juvenile offenders, *Miller v. Alabama*, 567 U.S. 460 (2012). *See also Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (giving *Miller* retroactive application); *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014) (applying *Miller* retroactively to all juvenile offenders in South Carolina serving life-without-parole sentences). Thus, although juvenile sentencing has undergone a complete evolution, the waiver process in South Carolina has not incorporated any of the changes detailed above. In South Carolina, a child accused of murder can still be waived into adult court, regardless of age, based on the seriousness of the alleged offense and the prosecutorial merit of the complaint. *See State v. Corey D.*, 339 S.C. 107, 118, 529 S.E.2d 20, 26 (2000). And because South Carolina continues to use the *Kent* factors, including the desirability of trying all defendants in one venue, the waiver process in cases like Kenneth’s, where a teenager has adult codefendants, takes into account a factor that *Miller* and its progeny condemned: a juvenile who participates in a crime with adults should be treated differently than the adults because juveniles “are more vulnerable to negative influences and outside pressures.” *Miller*, 567 U.S. at 471. By ignoring this foundational shift in juvenile sentencing law, South Carolina’s waiver process fails to identify the least culpable juveniles that are the most deserving of the protections and rehabilitative opportunities available in the juvenile system.

161 (2007) (finding that additional, post-hearing evidence of defendant's amenability to rehabilitation was not sufficient to require reconsideration of Family Court's evaluation of *Kent* factors). But other state supreme courts that have considered this question have found it appropriate to provide a remedy to defendants who discover new information between the transfer determination and trial. *In re Vairin M.*, 647 N.W.2d 208, 210 (Wis. 2002) (holding that defendant who discovers "compelling new grounds bearing on waiver" after transfer to adult criminal court may request that trial court relinquish jurisdiction and transfer matter back to juvenile court); *Commonwealth v. Brown*, 402 A.2d 1007, 1008 (Pa. 1979) (holding that discovery of new evidence would merit reconsideration of family court's transfer decision by trial judge). In Wisconsin, a trial court may transfer such a case back to the juvenile court if the juvenile alleges a new factor that "(1) was not in existence at the time of the waiver decision or, if it was in existence, was unknowingly overlooked by all parties; (2) is highly relevant to the criteria for waiver under [the relevant statute]; and (3) likely would have affected the juvenile court's determination that it would be contrary to the best interests of the juvenile or of the public for the juvenile court to hear the case." *In re Vairin M.*, 647 N.W.2d at 210.

E. DISCUSSION

The family court judge's decision to waive jurisdiction was based on a fundamental misapprehension of the facts of the case. Accordingly, Kenneth's case must be remanded to the Family Court for reconsideration of the transfer decision in light of the newly-available and accurate information regarding who was and was not directly responsible for Ms. Brown's death.

In evaluating the *Kent* factors and the overall seriousness of the offense, Judge Cate relied heavily on facts and statements which were later proven to be false. In its transfer order, the court repeated Simmons' false testimony that "the Juvenile got into his vehicle with a gun

and . . . it was the Juvenile who instructed [Simmons] to get closer and the Juvenile who pulled the trigger on the gun that killed Ms. Brown.” R. *(Transfer Order 6). The court further found that, based on Simmons’ testimony, “it would be desirable for the trial of all of the Defendants to take place in one court.” R. *(Transfer Order 6). “The desirability of trial and disposition of the entire offense in one court” is the fifth of the eight *Kent* factors that a family court must consider in making the transfer determination. *Kent*, 383 U.S. at 566–67. Given the changed factual circumstances in this case, the trial court should have considered whether newly-available information potentially impacted any of the *Kent* factors and remanded the case to the family court for reconsideration.

“The desirability of trial and disposition of the entire offense in one court” is not the only *Kent* factor implicated by the significant change in Simmons’ testimony. In particular, the Supreme Court of South Carolina has held that the first *Kent* factor, the seriousness of the offense, “is a major factor in the transfer decision.” *Sanders v. State*, 281 S.C. at 56, 314 S.E.2d at 321. In Kenneth’s case, this particular *Kent* factor, perhaps more than any other, is significantly cast into doubt by the discrepancy between Simmons’ story as told through police officers at the waiver hearing and his testimony at trial. There are fundamental differences between being the shooter and being a passenger in a car who tells the shooter not to shoot. He went from being the actual shooter in the murder to a mere accomplice. Given that the seriousness of the offense is a major factor in the transfer decision, the trial court should have remanded to the family court to accurately consider whether Kenneth’s offense, as the facts are now known to be, was serious enough to merit transfer.

Further, the evidence presented on Kenneth’s behalf at the waiver hearing already strongly supported retaining him in Family Court. Without Simmons’ false statements distorting

the strength of the State's evidence under *Kent* factors 1 and 5, Kenneth's evidence under a number of other *Kent* factors should have prevailed. Under *Kent* factor 6, for example, Kenneth was able to present significant evidence that his maturity and sophistication levels were commiserate with his tender age, not that of someone significantly older or more sophisticated in the criminal world. Further, through the testimony of Dr. Dunn and Dr. Knight and through the extensive testimony provided by those who knew him at DJJ, Kenneth showed he had developed in an environment that was filled with negative influences that were outside of his control, which impacted his ability to mature responsibly and positively; however, when those negative influences were removed and adequate resources and a support system were provided, Kenneth showed great promise in his ability to mature into a responsible young man. In fact, the family court's transfer order specifically found that "Both [Dr. Dunn and Dr. Knight] agree that the Juvenile possesses the ability to improve his level of sophistication and maturity and has demonstrated that while he has been in commitment." R. *(Transfer Order 11). Additionally, under *Kent* factor 8, the family court conceded that both Dr. Dunn and Dr. Knight shared the conclusion that "if the Juvenile was committed for an indeterminate period of incarceration to the Department of Juvenile Justice that the public would be adequately protected from any further criminal acts committed by the Juvenile." R. *(Transfer Order 11). The court went on to admit that the evidence presented at the waiver hearing showed "that the Juvenile is not only amenable to the services being provided . . . but that he has been flourishing in the secured and structured setting of DJJ." R. *(Transfer Order 12). Given the unusual strength of the evidence supporting most of the *Kent* factors, Judge Cate may well have concluded, in the absence of Simmons' false testimony, that Kenneth should have been retained in the Family Court.

While courts in South Carolina have not yet had the occasion to consider the appropriate remedy for defendants who discover considerable new evidence bearing on the transfer decision after such a decision has been reached, other jurisdictions that have considered this question have found it appropriate to provide a remedy at the trial court level. See *In re Vairin M.*, 647 N.W.2d at 210; *Commonwealth v. Brown*, 402 A.2d at 1008. As previously mentioned, the Wisconsin Supreme Court, in particular, has provided a detailed standard for evaluating when it is appropriate for a trial judge to reconsider the juvenile court's transfer order: such a reconsideration is appropriate when the juvenile introduces a new factor that "(1) was not in existence at the time of the waiver decision or, if it was in existence, was unknowingly overlooked by all parties; (2) is highly relevant to the criteria for waiver under [the relevant statute]; and (3) likely would have affected the juvenile court's determination that it would be contrary to the best interests of the juvenile or of the public for the juvenile court to hear the case." *In re Vairin M.*, 647 N.W.2d at 210.

Here, the newly-discovered information that Kenneth was not the shooter and attempted to get Simmons not to shoot would clearly meet Wisconsin's standard for allowing the trial court to remand the case to the juvenile court. Simmons' truthful testimony was certainly not available at the time of the waiver decision. Trial Tr. 146–47. As articulated above, this information is highly relevant to at least two of the *Kent* factors and is therefore highly relevant to South Carolina's criteria for waiver. And, given that South Carolina premises the question of what is in the best interests of the juvenile or of the public on the seriousness of the offense in question, Simmons' corrected testimony is clearly highly relevant to that determination as well. Under Wisconsin's standard, therefore, it would have been appropriate for the trial judge in Kenneth's case to remand on the basis of the corrected testimony.

Whatever standard is applied, the trial court in this case should have examined the defense's newly-available evidence to determine whether remand was appropriate. Rather than evaluate the sufficiency of the defense's evidence, however, the trial judge simply found that, because Judge Cate "went above and beyond" in articulating her basis for transfer, the trial judge would not even consider the new circumstances. Trial Tr. 162–63. Given the disparity between the family court's findings of fact and the actual facts of the case, the trial court should have remanded the case to the juvenile court, and this Court should now vacate and remand for a new transfer hearing in order to decide whether to retain or waive Kenneth to the Court of General Sessions, based on a materially accurate record.

- II. The trial court erred in permitting the state to introduce inadmissible gang-related evidence throughout the entire trial, including the improper opinion testimony of a lay witness.

A. 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). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.* "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 429–30, 632 S.E.2d at 848. *See also State v. Fripp*, 396 S.C. 434, 438, 721 S.E.2d 465, 467 (Ct. App. 2012).

B. RELEVANT FACTS

1. Motion to exclude gang-related evidence

Prior to Kenneth's trial, defense counsel filed a motion in limine to exclude testimony of Kenneth's alleged gang involvement because it violated South Carolina Rules of Evidence 403 and 404 and Kenneth's 5th, 6th, and 14th Amendment rights to due process, a fair trial, and confrontation. R. *(Def.'s Mot. To Exclude Test. Of Gang Involvement, 1–2). Directly before trial, the court held a hearing to address the motion. Trial Tr. 181. The State argued that gang evidence was relevant to establish Kenneth's motive and intent. Trial Tr. 182. The defense responded that the shootings that happened at Kenneth's house earlier that evening provided sufficient evidence of motive and that the gang evidence was inadmissible character evidence under Rule 404(b). Trial Tr. 186, 189, 250. The defense also argued that the evidence fell on the wrong side of Rule 403's balancing equation because it was unfairly prejudicial, inflammatory, and confusing. Trial Tr. 186, 189, 202, 250. Further, the defense maintained that it would violate Kenneth's due process and confrontation rights by creating a "back door" to introduce prejudicial character evidence. Trial Tr. 250, 251.

The trial judge denied the motion, ruling that the evidence was relevant under Rule 401 because "it [would] assist the jury to understand the case." Trial Tr. 253. Moreover, the judge found that "evidence of the defendant's involvement in the gang ha[d] been established by clear and convincing evidence as presented." Trial Tr. 254. The judge deemed the evidence admissible under Rule 404(b) to show motive, intent, or common scheme because it involved documented shootings, prior convictions, forensic firearm analysis, and witness testimony, which it described as indicative of a gang war, Trial Tr. 254–55, and that any Rule 403 risk of unfair prejudice that stemmed from the inference that Kenneth acted in conformity with the character of a gang member did not substantially outweigh the evidence's probative value, Trial Tr. 255–56.

Throughout trial, the State repeatedly attempted, with quite limited success, to elicit information from multiple witnesses about two so-called gangs, the Young Gunnas and the Loud Pack, and an alleged “gang” war between them.³ In total, the State elicited gang-related testimony from sixteen of its witnesses.⁴ Over defense objection, a prosecution witness testified that he had “heard” of the Young Gunnas, while Keon Anderson, who was in the car with Kenneth and Simmons, echoed this vague knowledge: “I heard of them when I been in school, but I don’t too much know of them like that.” Trial Tr. 440, 872. When the State asked another of its witnesses whether he was “familiar with some friction that was going on back in The Waylyn back in 2015,” he responded, “No, not really.” Trial Tr. 254–55. When the State pressed him further what they got was “I—I guess people getting killed. Bad Blood. I don’t know.” Trial Tr. 443. Anderson likewise responded to the same question, “I heard of it, but that’s just street talk, nothing that I know for sure.” Trial Tr. 879. When the State asked Richard Simmons a similar question, he also answered, “Somebody died. People getting killed, I guess. Nobody knows for sure.” Trial Tr. 719.

During its direct examination of five different witnesses, the State repeatedly attempted to confirm Kenneth’s involvement in the Young Gunnas. Two witnesses, including Keon Anderson, testified that Kenneth was involved with the Young Gunnas, but others denied having any knowledge. *See, e.g.*, Trial Tr. 507–08, 911, 1129. While Simmons eventually responded

³ Taken at face value, these two groups of juveniles are not easily classifiable as “gangs” based on the evidence presented. At best, the Young Gunnas and the Loud Pack were two groups of young African-American males who lived in the same North Charleston neighborhood. There was no evidence that either group was affiliated with any “traditional” gangs.

⁴ These witnesses were: Jawan Nicks, Donald Jackson, Sergeant Robert Bailey, Richard Simmons, Keon Anderson, Leroy Manigault, Scott Wyant, Kelley Green, Investigator Raymond Haupt, Officer Jacqueline Ong, Officer Anita Moore, Officer Tiffany Adams, Officer Andre Besancon, Officer Sarah Fortier, SLED Agent Suzann Cromer, and Detective Jerome Desheers.

that Kenneth was a Young Gunna after the State asked him a second time, Simmons initially replied, “I don’t think so,” when the State asked him, over defense objection, about Kenneth’s involvement in the Young Gunnas. Trial Tr. 688. After the State asked another witness if Kenneth was a Young Gunna, he responded, “I’m not sure” and only identified Kenneth as a Young Gunna in response to the following line of leading questions:

State: You remember—you met with me three or four times, right?

Witness: Yeah.

State: Every time that you told me “BJ” was Young Gunna?

Witness: Yes, sir.

Trial Tr. 1020.

The State also tried to identify others as affiliated with either the Young Gunnas or the Loud Pack. However, Simmons denied that both he and Anderson were Young Gunnas. Trial Tr. 689, 692. Likewise, one witness testified that both Simmons and Anderson were merely “associated” with the Young Gunnas, and even still, Anderson was only “kind of half and half.” Trial Tr. 1128. The State also asked Simmons if the occupants of the Chrysler 300—Donald Jackson, Corey Watkins, Jawan Nicks, and Andrew Smalls—were associated with the Loud Pack. Trial Tr. 719. Simmons responded, “I think—I don’t know.” Trial Tr. 719. One witness testified that he considered Smalls part of the Loud Pack, but another testified that Jackson, Nicks, and Watkins were all part of the “500.” Trial Tr. 1019–20, 1134. According to this witness, the 500 did not have any association with the Loud Pack. Trial Tr. 1136.

The State also questioned six witnesses about two murders that happened in the neighborhood and about the decline of the Young Gunnas. For example, the State asked Simmons during his direct examination if he knew whose death created friction in the

neighborhood, and he responded “Lul T.” Trial Tr. 719–20. The State then asked Simmons a series of questions regarding Lul T’s murder:

State: Do you know who killed “Lul T?”

Simmons: No.

State: Do you know what the streets were saying about who killed “Lul T?”

Simmons: Yeah.

State: Who?

Simmons: “Mook.”⁵

Trial Tr. 720–21. The State similarly inquired of another of its witnesses, “Who did the streets say was responsible for killing ‘Babe Lo?’” Trial Tr. 1014. Additionally, the State asked a further witness, “Who did the streets say killed ‘Babe Lo?’” and “Who does the streets say killed ‘Lul T?’” Trial Tr. 1130, 1131. The State also questioned Anderson about the murders of “Babe Lo” and “Lul T”:

State: Who do the streets say who killed “Babe Lo?”

Anderson: I heard he got set up was a lot of street talk, but nothing that I know for sure that I can tell you . . .

State: [D]o you know who killed [“Lul T”]?

Anderson: I don’t know who killed him, but I heard different stories from the street talks and stuff.

State: Did you hear “Mook” killed [“Lul T”]?

Anderson: I heard that, but I also heard he was set up.

State: Okay. Did you hear “Lul T” killed “Babe Lo”?

⁵ Daquan Lance, referred to as “Mook,” was not involved in the immediate incident that occurred on May 10, 2015.

Anderson: I heard that, but I don't believe that. Nothing that I know for sure, like that's just things that I hear from the streets.

State: That's what people in the streets are saying?

Anderson: Yeah.

Trial Tr. 879, 880. The State also examined Anderson about whether these murders caused the decline of the Young Gunnas. Trial Tr. 981. Anderson responded, "I believe it split them up, but as I also told you when I testified, this is stuff I heard, nothing that I know for sure." Trial Tr. 981.

The State also asked its witnesses to identify the parties responsible for the shootings outside of Kenneth's house on the night of the incident. Simmons testified that the men who gathered outside of Kenneth's house had theorized that "[s]ome guys off The Waylyn," including "Mike Mike," shot at Kenneth's house. Trial Tr. 715. When the State asked Simmons if "Mike Mike" was "a part of another gang," Simmons responded, "I wouldn't say it's a gang, but . . . a group . . . I guess Loud Pack." Trial Tr. 715. Another witness testified that "them boys out the back of The Waylyn" were responsible, and he responded affirmatively when the State asked him if he "associate[d] Smalls and them with them boys out the back of The Waylyn." Trial Tr. 1001–02.

In an effort to construct its narrative about an alleged "gang" war, the State introduced testimony from seven law enforcement officers about various shootings that occurred around the time of the incident. On direct examination of a former police officer that responded to one of the shootings, the State introduced twelve spent shell casings and photographs from a shooting at Rusty and Houston Street and five spent shell casings from a shooting at XXX Ranger Drive on May 9, 2015. Trial Tr. 1056–57, 1070–74, 1451. Two police officers testified that shots were fired at Marvin Pressley's house at XXX Crestline Drive on May 12, 2015. Trial Tr. 647–48,

1363. Pressley was allegedly a member of the Loud Pack. Trial Tr. 1453. Over defense objection, Leroy Manigault testified that he shot at Stanley Green's studio on Suffolk Street on May 13, 2015, because "[Green] had shot up at us." Trial Tr. 1015, 1016. The State introduced photos of the damage from these shootings through three police officers, despite objection from defense counsel. Trial Tr. 1333–49, 1351–58, 1361–67. According to a SLED Agent, shell casings recovered from Suffolk Street matched those recovered from Houston and Rusty Streets. Trial Tr. 1403. There was *no* evidence demonstrating that Kenneth was present at any of these incidents, and any evidence that could have potentially indicated his knowledge of these incidents was weak and circumstantial. Trial Tr. 1267–68, 1282, 1572.

The State also repeatedly referenced the characteristics of gang members in its closing argument. In describing his perception of gang dynamics, the solicitor stated, "[Y]ou know Discovery Shark Week, you know that there is that feeding frenzy? You just have one shark, it's scary enough, right? It's feeding, but if you get three or four, they work each other up into like a feeding frenzy. Well, that's the gang mentality." Trial Tr. 1567. The solicitor further argued, "We have a group of people taking justice into their own hands. Street justice. It's revenge. It's not real justice. It's behavior that we cannot tolerate as a society." Trial Tr. 1568. The solicitor similarly ended his closing, "Ladies and gentlemen, what we are asking you to do here today is end the cycle of violence. We cannot allow people to take the law in their own hands. We cannot allow street justice to prevail." Trial Tr. 1587, 1002.

2. Objection to the State's gang expert

The State also attempted to call Detective Jerome Desheers as a gang expert. Trial Tr. 1418–19. Defense counsel challenged his qualifications and argued that any other testimony that he would give would be hearsay. Trial Tr. 1420, 1441. In proffering his qualifications, Desheers

testified that he had been a member of the FBI's Safe Streets Task Force for three years, he attended two organized crime conferences and he was raised in Jamaica/Queens, which he classified as "kind of a gang area." Trial Tr. 1422–24. He had never been qualified as a gang expert before. Trial Tr. 1429. The trial judge found that Desheers was not qualified as an expert under Rule 702 or 703, Trial Tr. 1441) however, she concluded that he could present gang-related testimony "as long as it [was] admissible under other ways." Trial Tr. 1441.

On direct, the State asked Desheers about where the Young Gunnas and the Loud Pack operated in The Waylyn neighborhood. Trial Tr. 1445–47. In describing the "heart of The Waylyn," Desheers testified, "So this is the crime ridden—basically the main area that we see or have seen the Gunnas associating with this kind of—been in that area, based on where people live, members and associates." Trial Tr. 1455. When asked what occurred in this neighborhood following Lul T's murder, Desheers testified:

So we ultimately saw a large number of shootings, shots fired calls, sometimes labeled as vandalism by gunfire where people may or may not have been hit. And a lot of these came in as reports through the police department for people whose houses got struck or other property. And then during the investigations through—with the detectives and the officers **we kind of identified a trend as who some of the—some of the people participating in these crimes, whether victims or suspects, and linked them back to some of the Loud Pack members, as well as some of the—some of the Gunnas, I'm sorry.**"

Trial Tr. 1449–50 (emphasis added).

The State also asked Desheers about the various shootings that had occurred in the area.

State: Are you familiar with [the shooting at XXX Gary on April 17, 2015]?

Desheers: Yes. . . .

State: Are you at least somewhat familiar with [the shooting at XXX Ranger Drive on May the 9th of 2015]?

Desheers: Yes, I have reviewed this report and the information in it.

Trial Tr. 1450–51. Toward the end of Desheers’ direct, the State asked him about the implications of his testimony.

State: Now, since the death of “Babe Lo” and “Lul T” and this rash of shootings and the shell casings and the analysis used in this variety of incidents, **what does that indicate to you?**

Desheers: That to me **this indicates that there is an ongoing battle between both sides.** And as you noted in the 2906 Charlene Drive incident where a member of the Loud Pack was shot, that both sides are shooting back and forth. **Then it’s also indicative of a whole lot of the innocent, what we consider innocent bystanders or the [residents] of the neighborhood that are not related to the violence.**

Trial Tr. 1453–54 (emphasis added). The defense reiterated its objection to Desheers’ testimony and also argued that the State was “[t]rying to inflame the jury [by] talking about innocent members of the community.” Trial Tr. 1454. The trial judge sustained the defense objection to Desheers’ reference to “innocent bystanders or the residents of the neighborhood” because it was “not appropriate” but struck only that portion of the testimony. Trial Tr. 1454.

After the close of the jury charge, defense counsel renewed its objection to the gang-related evidence. Trial Tr. 1638. Following the jury verdict, the defense once again renewed its objection Trial Tr. 1649. The trial judge denied both objections. Trial Tr. 1659.

C. RELEVANT LEGAL PRINCIPLES AND DISCUSSION

1. Inadmissible character evidence

While it may be admissible to show motive or intent, evidence of other crimes, wrongs, or acts is not admissible to prove a person’s character to show action in conformity with that character. Rule 404(b), SCRE. Such evidence “must logically relate to the crime with which the defendant has been charged.” *State v. Stokes*, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009). But the court must still exclude character evidence if the danger of unfair prejudice that it poses

substantially outweighs its probative value. See Rule 403, SCRE; *Stokes*, 381 S.C. at 404, 673 S.E.2d at 441; *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). Further, evidence that constitutes hearsay is inadmissible unless an exception applies. Rule 802, SCRE. Evidence constitutes hearsay if it contains a statement, other than one made by the declarant while testifying at trial, that is offered to prove the truth of the matter asserted. Rule 801(c), SCRE.

Although the State argued that it was offering otherwise inadmissible character evidence to establish Kenneth's motive and intent, it failed to connect the gang evidence to either because it did not demonstrate how the gang evidence logically related to the crimes with which Kenneth was charged. Moreover, a significant part of this hearsay evidence fell within no recognized exception.

a. *The State failed to establish that Kenneth had any gang affiliation.*

First, the State did not definitively establish that either group was actually a gang rather than just groups of young black men, some of whom were teenagers, that lived in a poor neighborhood in North Charleston. Nor did the State establish that Kenneth or those in the car with him (Anderson and Simmons) were affiliated with the Young Gunnas. While two witnesses, including Keon Anderson, testified that Kenneth was a Young Gunna, other witnesses did not confirm this. Trial Tr. 507–08, 911, 1129. Richard Simmons, the actual killer, and another witness both initially denied Kenneth's affiliation with the Young Gunnas and only responded affirmatively after the State repeatedly asked them about Kenneth's affiliation with leading questions. Trial Tr. 688, 1020. Simmons also denied that he himself was a Young Gunna, and another witness similarly testified that Simmons was merely "associated" with the Young Gunnas. Trial Tr. 689, 1128. Additionally, Simmons denied that Anderson was a Young

Gunna, while another witness described Anderson as “associated” with the Young Gunnas but only “kind of half and half.” Trial Tr. 692, 1128. Because the State failed to clearly establish that Kenneth, Simmons, and Anderson were Young Gunnas, it did not demonstrate how this gang-related testimony logically related to Kenneth’s motive and intent in the attempted murder and murder charges against him.

Further, the State never conclusively demonstrated that the occupants of the Chrysler 300 were affiliated with the Loud Pack, who the State alleged was at odds with the Young Gunnas. The State **did not even ask** any of the witnesses who were in the Chrysler 300 about their potential gang affiliation. In response to the State’s question about whether the men in the Chrysler 300 were associated with the Loud Pack, Richard Simmons was only able to say, “I think—I don’t know.” Trial Tr. 719. Simmons also explained that the men who gathered outside of Kenneth’s house theorized that “[s]ome guys off The Waylyn” had shot at Kenneth’s house earlier that night, but he testified that they were not part of a gang. Trial Tr. 715. Rather, he described them as a “group” and hesitantly identified them as the “Loud Pack.” Trial Tr. 715. One witness likewise testified that “them boys out the back of The Waylyn” were responsible, but he did not describe them as having any gang affiliation. Trial Tr. 1001. The same witness testified that he just considered Smalls part of the Loud Pack without reference to the other men in the Chrysler 300. Trial Tr. 1019. While a witness did identify Donald Jackson, Jawan Nicks, and Corey Watkins as “500[s],” the State did not establish how this identification connected to the shootings on the night of the incident or to Kenneth’s motive or intent. Trial Tr. 1134. In fact, the witness testified that the 500 did not have any association with the Loud Pack. Trial Tr. 1136. The gang testimony thus did not demonstrate Kenneth’s motive or his intent, as the State never concretely established the gang affiliation of those in the Chrysler 300, connected any

gang affiliation to the car chase itself, or proved that the Young Gunnas or the Loud Pack were even gangs at all. Accordingly, the gang evidence did not logically relate to Kenneth's attempted murder and murder charges.

- b. *The State failed to connect the evidence that it presented of shootings that occurred in the area and of an alleged "gang war" to Kenneth, his co-defendants, or the incident.*

The State also did not indicate how the various shootings throughout 2015 were connected to the immediate incident, to his co-defendant Richard Simmons, or to Kenneth himself. While the State introduced testimony, photographs, shell casings, and forensic analysis from shootings at Crestline Drive, Ranger Drive, Suffolk Street, and Houston and Rusty Streets, the State never clearly connected these incidents to the drive by shootings at Simmons and others gathered outside Kenneth's house the night of the homicide. Trial Tr. 647–48, 1015–17, 1056–66, 1070–74, 1333–49, 1351–58, 1361–67, 1403, 1451, 1453. The State also did not provide substantial evidence that implicated Kenneth or Simmons in any of these shootings, and even evidence that may have arguably indicated Kenneth's knowledge of these incidents was merely circumstantial. Trial Tr. 1267–68, 1282, 1572. Although Leroy Manigault testified that he himself was involved in the Suffolk Street shooting, Kenneth and Simmons were not connected to it. Trial Tr. 1015–17. Throughout the trial, evidence regarding Kenneth's role in these collateral incidents was noticeably lacking. Because the State failed to link Kenneth (and Simmons) to these other shootings, the shootings did not bear on Kenneth's intent or motive for the alleged charges against him. The shootings were not logically related to these charges, and therefore, the trial judge erroneously admitted evidence regarding them.

The State also did not connect its evidence of a "gang war," including the murders of "Babe Lo" and "Lul T," to the car chase and gunfire that ensued on the night of the incident.

Testimony related to witness knowledge of the Young Gunnas, Loud Pack, and an alleged feud between them was insignificant. For example, two witnesses had only “heard” of the Young Gunnas. Trial Tr. 440, 872. When asked whether he knew about “friction that was going on back in The Waylyn back in 2015,” one witness initially responded, “No, not really,” and simply answered, “I—I guess people getting killed. Bad Blood. I don’t know” when the State pressed him further. Trial Tr. 442–43. Anderson and Simmons also denied having any in-depth knowledge about a feud. Anderson testified, “I heard of [friction between the Loud Pack and the Young Gunnas], but that’s just street talk, nothing that I know for sure.” Trial Tr. 979. Similarly, Simmons answered, “Somebody died. People getting killed, I guess. Nobody knows for sure.” Trial Tr. 719. By failing to establish this supposed gang war, the State simultaneously failed to demonstrate how the gang evidence connected to Kenneth’s and Simmons’ motive and intent, as well as how it logically related to the charges against Kenneth.

c. A substantial portion of the gang-related evidence that the State elicited was inadmissible hearsay.

Notably, much of this evidence was inadmissible hearsay because the witnesses often referred to what they “heard” from others, instead of testifying to what they personally knew. The State elicited this testimony to prove the truth of the matter asserted, i.e., whether or not these were gangs, and whether a feud between them, existed. The State specifically relied on hearsay in unsuccessfully attempting to connect the murders of “Lul T” and “Babe Lo” to this alleged gang war. Two witnesses, including Anderson, testified that they “heard” of the Young Gunnas, and Anderson “heard” of the friction between the Young Gunnas and the Loud Pack. Trial Tr. 440, 872, 979. The State asked Simmons, “Do you know **what the streets were saying** about who killed ‘Lul T’?” and asked another witness, “**Who does the streets say** killed ‘Lul T’?” Trial Tr. 720–21, 1130–31 (emphasis added). In answering the same question, Anderson

responded, “I don’t know who killed him, but I heard different stories from the street talks and stuff . . . I heard that [‘Mook’] killed ‘Lul T’], but I also heard he was set up.” Trial Tr. 880. Further, the State similarly asked a witness, “Who did **the streets say** was responsible for killing ‘Babe Lo’? Trial Tr. 1014 (emphasis added). It also asked Anderson and another witness about **who “the streets say”** killed “Babe Lo.” Trial Tr. 879, 1130 (emphasis added). Anderson once again answered, relying on what he “heard” from “street talk.” Trial Tr. 879–80. By repeatedly allowing the State to elicit rank hearsay regarding what the “streets” were saying about who killed “Lul T” and “Babe Lo” for the “truth” about an alleged gang war, the trial judge deprived Appellant of a fundamentally fair trial and violated his right to confront the witnesses against him. Defense counsel could not cross-examine the streets about what they were saying. The alleged gang feud evidence never materialized via competent admissible evidence and thus Kenneth’s convictions should be reversed.

d. *Gang-related evidence was unnecessary to show Kenneth’s motive or his intent and was unfairly prejudicial.*

Further, such gang evidence was unnecessary, as the State had the opportunity to present evidence of Kenneth’s (and his co-defendant Simmons’) motive and intent; the State presented evidence of two shootings that occurred outside of Kenneth’s house immediately before the car chase. Because the gang evidence was unnecessary for these purposes, it constituted inadmissible character evidence. Instead, the State used this evidence in an attempt to show that Kenneth acted in conformity with the character of a gang member in this incident and to inject the issue of gang violence in Charleston County into the trial of a child.

Because the gang-related evidence had minimal probative value, it only served to unfairly prejudice Kenneth. Indeed, the solicitor’s closing argument capitalized upon the danger of unfair prejudice that this character evidence posed by describing the “gang mentality” as a “feeding

frenzy.” Trial Tr. 1567. In doing so, the State violated Rule 404(b) by implying that Kenneth acted in conformity with this “gang mentality” through his involvement in this incident. Moreover, the State’s plea to the jury that alleged gang behavior was “behavior that we cannot tolerate as a society” and the State’s request that the jury “end the cycle of violence” unfairly “arouse[d] jurors’ passions [and] prejudices” because it suggested that the jury’s role went beyond deciding the case before it but also sending a message to other gang members and stopping violence in the community. Trial Tr. 1568, 1587; *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998) (“A solicitor’s closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors’ passions or prejudices, and its content should stay within the record and reasonable inferences to it.”) (citing *State v. Copeland*, 321 S.C. 318, 468 S.E.2d 620 (1996)). Accordingly, the danger of unfair prejudice that this gang-related evidence presented substantially outweighed its negligible probative value, and thus, the trial court should have excluded it. This evidence “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Simmons*, 331 S.C. at 338, 503 S.E.2d at 166–67.

2. Inadmissible lay opinion testimony and hearsay

According to South Carolina Rule of Evidence 701:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Id.; see *United States v. Garcia*, 413 F.3d 201, 213, 215–16 (2d Cir. 2005); cf. *State v. Kelly*, 285 S.C. 373, 374, 329 S.E.2d 442, 443 (1985). Further, testimony that constitutes hearsay is inadmissible unless an exception applies. Rule 802, SCRE. Testimony constitutes hearsay if it

contains a statement, other than one made by the declarant while testifying at trial, that is offered to prove the truth of the matter asserted. Rule 801(c), SCRE.

Detective Desheers was not, and could not have been, qualified as an expert given the paucity of his relevant experience; yet, he provided opinion testimony that required special knowledge, skill, experience and training. Further, Desheers provided opinion testimony that was not rationally based on his perceptions. Additionally, much of his testimony relied upon inadmissible hearsay, which was not otherwise admissible under a hearsay exception.

- a. *Despite not being qualified as an expert, Desheers gave opinions that were not rationally based on his own perceptions and that required special knowledge.*

Despite the fact that he was not qualified as an expert, Detective Desheers gave his opinion on matters such as the geographic locations of the Young Gunnas and the Loud Pack. Trial Tr. 1445–47. Within those locations, he provided his opinion on what areas were “crime ridden” and what gang activity occurred there. Trial Tr. 1455. He did so without relying on his own perceptions, as Rule 701 requires. *See United States v. Garcia*, 413 F.3d 201, 213 (2d Cir. 2005) (concluding that the investigator’s opinion was not based on his own perception but rather on “the totality of information gathered by various persons in the course of an investigation” and was therefore inadmissible under Rule 701); *cf. State v. Kelly*, 285 S.C. 373, 374, 329 S.E.2d 442, 443 (1985) (explaining that a police officer’s speculation about the cause of an accident was inadmissible because he “may only testify regarding his direct observations unless he is qualified as an expert”). Further, Desheers also provided testimony about shootings within the local community without relying upon his own perceptions. For example, while Desheers confirmed that he was “familiar” with the shooting that occurred on Gary Drive, he did not explain what the basis of his familiarity was. Trial Tr. 1450. Indeed, Desheers testified that his familiarity with

the shooting on Ranger Drive stemmed from information in a report that he reviewed, rather than what he himself perceived. Trial Tr. 1450–51. Therefore, this testimony did not meet Rule 701’s foundational requirements.

Moreover, Desheers also gave testimony that required the special knowledge of a gang expert. When the State asked Detective Desheers about what “the death of ‘Babe Lo’ and ‘Lul T’ and this rash of shootings and the shell casings and the analysis used in this variety of incidents” indicated to him, Desheers once again gave his opinion, answering:

That to me **this indicates that there is an ongoing battle between both sides.** And as you noted in the 2906 Charlene Drive incident where a member of the Loud Pack was shot, that both sides are shooting back and forth. **Then it’s also indicative of a whole lot of the innocent, what we consider innocent bystanders or the [residents] of the neighborhood that are not related to the violence.**

Trial Tr. 1453–54 (emphasis added).

Desheers also gave his opinion about the events that followed Lul T’s murder:

So we ultimately saw a large number of shootings, shots fired calls, sometimes labeled as vandalism by gunfire where people may or may not have been hit. And a lot of these came in as reports through the police department for people whose houses got struck or other property. And then during the investigations through—with the detectives and the officers **we kind of identified a trend as who some of the—some of the people participating in these crimes, whether victims or suspects, and linked them back to some of the Loud Pack members, as well as some of the—some of the Gunnas, I’m sorry.**

Trial Tr. 1449–50 (emphasis added). As a non-expert that had only attended two organized crime conferences, had taken some investigations courses, and was raised in a “kind of gang area,” Desheers was not qualified to give such opinions. Trial Tr. 1422–24; *cf. United States v. Garcia*, 413 F.3d at 215–16 (explaining that Rule 701 does not “permit a law enforcement agent to testify to an opinion so based and formed if the agent’s reasoning process depended, in whole or in part, on his specialized training and experience,” but instead, “a lay opinion must be the

product of reasoning processes familiar to the average person in everyday life”). Yet the court allowed Desheers to testify as if he was an expert, even though he had never been qualified as an expert and did not have sufficient training or experience to so testify. Trial Tr. 1429, 1441.

b. *Desheers’ testimony was impermissibly based on inadmissible hearsay.*

Further, most, if not all, of Detective Desheers’ testimony relied upon inadmissible hearsay, and – given that he was not qualified as an expert – no hearsay exception applied. Detective Desheers testified about investigations in which he was not involved and based his conclusions on reports of others that he reviewed to form conclusions about shootings in the area.⁶ Trial Tr. 1451; *see State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (finding that an investigator’s testimony about the defendant’s rank within a gang was inadmissible hearsay when it was “solely based” on statements from informants). Therefore, the trial court erred when it admitted this testimony.

III. The trial court erred in refusing to instruct the jury on the lesser included offense of voluntary manslaughter where evidence in the record required the instruction.

A. STANDARD OF REVIEW

“In criminal cases, appellate courts sit to review only errors of law.” *State v. Sams*, 410 S.C. 303, 307, 764 S.E.2d 511, 513 (2014); *see also State v. Baccus*, 367 S.C. 41, 625 S.E.2d 216 (2006); *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001). An appellate court is bound by a trial court’s factual findings unless they are clearly erroneous. *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829.

“The law to be charged to the jury is determined by the evidence presented at trial.” *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). “The trial court is required to charge

⁶ “Q: Are you at least somewhat familiar with [the shooting at XXX Ranger Drive on May the 9th of 2015]? A: Yes, I have reviewed this report and the information in it.” Trial Tr. 1451.

a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense.” *Sams*, 410 S.C. at 308, 764 S.E.2d at 513; see also *State v. Drafts*, 288 S.C. 30, 340 S.E.2d 784 (1986); *State v. Gourdine*, 322 S.C. 396, 472 S.E.2d 241 (1996). “An appellate court will not reverse the trial [court]’s decision absent an abuse of discretion.” *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” *Id.* at 570, 647 S.E.2d at 166–67. “The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law.” *Id.* at 570, 647 S.E.2d at 167. “In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant.” *Sams*, 410 S.C. at 308, 764 S.E.2d at 513 (citing *State v. Cole*, 338 S.C. 97, 525 S.E.2d 511 (2000)). “The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense.” *Id.* (citing *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996); *State v. Cooney*, 320 S.C. 107, 463 S.E.2d 597 (1995); *State v. Gadsden*, 314 S.C. 229, 442 S.E.2d 594 (1994)).

B. RELEVANT FACTS

As most of the relevant facts have been discussed previously, a truncated version will be presented before delving into the relevant legal principles and argument. Richard Simmons, the trigger-man in the homicide giving rise to the murder charge against Kenneth, was shot at twice on the evening in questions. The first drive by shooting occurred around midnight as a car rolled by. One of the shots fired barely missed Simmons, lodging in his car’s passenger seat. Trial Tr. 703. Simmons gave chase on foot but he quickly lost sight of the car as it sped away, and he was

not able to identify who shot at him. Trial Tr. 702–03. The police were called, and the responding officer came, took a few pictures, collected several shell casings, and soon left. Trial Tr. 1588–89. Simmons remained focused on “trying to figure out who was shooting” at him. Trial Tr. 708. Over the course of the next few hours or so, friends of Simmons and Kenneth congregated outside of Kenneth’s home. Trial Tr. 708–15.

About an hour and a half after the first incident, a car drove by and, again, shot at Simmons and others gathered in the yard. Trial Tr. 721. Simmons could not see who was shooting at them, but he was convinced it was the same car and the same people who tried to kill him earlier that evening. Trial Tr. 808. Simmons and a number of other people gathered jumped into several different cars and gave chase. *Id.* Simmons was driving a car that was also occupied by Kenneth and Keon Anderson. Trial Tr. 722. While the other cars in the high-speed chase soon slowed down, Trial Tr. 733–34, 737. Simmons stayed the course. Trial Tr. 735. By his own admission, Simmons was fixated on chasing the fleeing car’s taillights. Trial Tr. 735–36. After losing sight of the vehicle for a moment, but still driving at an extremely high speed, Simmons thought he saw the vehicle come back into view and make a turn. Trial Tr. 737–38. When the car Simmons believed to hold those responsible for (twice) shooting at him stopped at a red light, Simmons pulled up next to it prepared to even the score. Trial Tr. 739. Kenneth and Keon Anderson attempted to convince Simmons that, while similar, it was the wrong car. Trial Tr. 827. But Simmons did not believe them, pushed Kenneth out of the way, and proceeded to fire. Trial Tr. 740, 828. One of the bullets struck and killed Kedena Brown. Trial Tr. 739.

During the charge conference, defense counsel requested that the trial judge instruct the jury on the lesser included offense of voluntary manslaughter. Trial Tr. 1510–11. Defense counsel’s argument was straight-forward—there had been sufficiently adequate provocation

from the individuals who tried to kill Simmons earlier that evening to warrant giving the jury the option to determine that the crime was manslaughter, not murder. In short, counsel argued that Simmons was acting under “heat of passion,” driving at a high rate of speed, making dangerous decisions, and shooting despite the other occupants of the car telling him that he was shooting at the wrong car. Trial Tr. 1512–13. He repeatedly stated that “they shot at my car” and someone had to pay. *Id.* The prosecution objected to submitting the lesser included offense and the trial judge refused to do so. Trial Tr. 1515. With no lesser-included-offense option available for its consideration, the jury found Kenneth guilty of murder.

C. RELEVANT LEGAL PRINCIPLES

Under South Carolina’s “Hand of One Hand of All” theory of accomplice liability, if, in the execution of a common purpose, a homicide is committed by one, as a probable or natural consequence of the acts done in pursuant to the common purpose, all participants are as guilty as the one who committed the fatal act. *State v. Cannon*, 49 S.C. 550, 555, 27 S.E. 526, 530 (1897). Therefore, if Simmons would have been entitled to a jury instruction on the lesser included offense of voluntary manslaughter (if he had elected to proceed to trial), then the trial court erred in failing to give Kenneth’s jury the same option.

Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation. Sudden heat of passion and sufficient legal provocation do not have to be so strong as to “entirely dethrone reason” or “shut out knowledge and destroy volition.” *State v. Davis*, 50 S.C. 405, 423–24, 27 S.E. 905, 911 (1897). Thus, the underlying facts taken as a whole, are only required to be such as would “naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do

violence.” *Id.*; see also *State v. Gardner*, 219 S.C. 97, 104, 64 S.E.2d 130, 134 (1951) (“In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing”). If, on the other hand, “passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary person would have cooled,” manslaughter is not an appropriate instruction. *State v. Hughey*, 339 S.C. 439, 451, 529 S.E.2d 721, 728 (2000). In determining whether a reasonable time for cooling off had elapsed, all the circumstances surrounding the event are relevant: “the nature of the provocation, the prisoner’s physical and mental constitution, his condition in life and peculiar situation at the time of the affair, his education and habits (not of themselves voluntary preparations for crime), his conduct, [and] manner and conversation throughout the transaction.” *State v. Goodson*, 140 S.C. 357, 362, 138 S.E. 816, 818 (1927) (quoting *State v. McCants*, 28 S.C.L. 384, 391 (1843)).

When the defendant requests that the trial judge submit the lesser included offense of manslaughter in a murder trial, the court is obligated to do so unless “there is no evidence whatsoever tending to reduce the crime from murder to manslaughter.” *State v. Gardner*, 219 S.C. at 104 (citing *State v. Norton*, 28 S.C. 572, 579, 6 S.E. 820, 823–24 (1888)). In making this assessment, the evidence must be viewed in the light most favorable to the defendant. *State v. Cottrell*, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008).

This case also involves an unresolved legal issue in this state, i.e., transferred intent in the manslaughter context. Ms. Brown was not the person who shot at Simmons (and others) earlier in the evening, and thus she was not personally the source of the provocation. She was also killed by Simmons in an instance, in his words, of “mistaken identity.” Trial Tr. 739. Thus, the

issue specifically left open in *State v. Wharton*, 381 S.C. 209, 215, 672 S.E.2d 786, 789 (2009) (“the applicability of the doctrine of transferred intent to voluntary manslaughter cases where the defendant kills an unintended victim upon sufficient legal provocation committed by a third party remains an unsettled question in South Carolina”) is also before the Court.

D. DISCUSSION

Viewed in the light most favorable to Kenneth, there is significant evidence indicating that Simmons was acting with more rage than reason. He had been shot at twice, once several hours before the homicide and once right before the case that resulted in Ms. Brown’s tragic death. *See State v. Niles*, 400 S.C. 527, 534, 735 S.E.2d 240, 244 (2012) (finding that an “unprovoked attack” with a deadly weapon can constitute sufficient legal provocation supporting a manslaughter charge); *State v. Knoten*, 347 S.C. 296, 307, 555 S.E.2d 391, 397 (2001) (“There can be little argument that an unprovoked knife attack constitutes sufficient legal provocation to warrant [a voluntary manslaughter] charge”). After the second drive-by shooting, events unfolded quickly and there was no cooling down period and it is clear from his testimony, and his actions, that his passions had not cooled. Trial Tr. 800 (“It happened quick. I didn’t pay attention to the time”). Under these circumstances, it is apparent that had he, in fact, killed one of the persons who shot at him, and had he been tried for murder, he would have been entitled to a manslaughter instruction. Thus, since the State was proceeding against Kenneth under an accomplice liability theory, if Simmons would have been entitled to have the lesser-included offense put to the jury, then so was Kenneth.⁷

⁷ Keon Anderson, who like Kenneth was a passenger in the car and did not kill the victim, was allowed to enter a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) to voluntary manslaughter and was sentenced to fifteen years in prison. And, as set forth in more detail in Issue V, Kenneth was offered a sentence of twenty-three years if he would plead guilty to manslaughter. Since there has to be a factual basis for a guilty plea in South Carolina, *see, e.g.*,

The only remaining issue involves the question of transferred intent. While this is an open issue, a number of cases support the applicability of transferred intent in such cases. See, e.g., *State v. Williams*, 189 S.C. 19, 24, 199 S.E. 906, 908 (1938) (holding that it is a “well-settled principle of law” that, when a defendant intends to kill or seriously injure one person, but kills another, he may be found guilty of either murder or manslaughter); see also *State v. Fennell*, 340 S.C. 266, 272, 531 S.E.2d 512, 515 (2000) (finding that in a homicide case, the law is concerned with the killer’s state of mind, not with the identity of the victim); *State v. Childers*, 373 S.C. 367, 377, 645 S.E.2d 233, 238 (2007), (Pleicones, J., dissenting) (reasoning that the jury could have found heat of passion in the defendant’s testimony (i.e. that he was only shooting back at the brother-in-law out of fear that he would be shot at again but killing a third party)); *State v. Young*, 429 S.C. 155, 166, 838 S.E.2d 516, 522 (2020) (finding that defendant who did not kill an innocent bystander, but who was engaged in mutual combat, could be found guilty of murder under a theory of transferred intent).

Several cases from other jurisdictions support Appellant’s position. In *Coker v. State*, 433 S.E.2d 637 (Ga. Ct. App. 1993), a defendant lost a bet and drove, with a friend, to the winner’s home to demand, at gunpoint, the return of his money. *Id.* at 638. Shots were exchanged between the defendant and his friend on one hand and the winner and his friends on the other. *Id.* Ultimately, a shot fired by someone other than the defendant strayed and killed an innocent bystander. *Id.* The appellate court found that these circumstances warranted treating the homicide as voluntary manslaughter. *Id.* Like the instant case, the defendant in *Coker* was not the actual shooter and the victim was not the intended target.

Gaines v. State, 335 S.C. 376, 380, 517 S.E. 2d 439, 441 (1999), the pleas that Anderson accepted and Kenneth was offered point to the existence of evidence that also entitled Kenneth to a manslaughter instruction at his trial.

In *State v. Solomon*, 421 N.E.2d 139 (Ohio 1981), the defendant inadvertently shot the wife of a man with whom he had been in a daylong dispute. Throughout the day, the two men had engaged in a physical altercation, gone to their respective homes to retrieve guns, and re-emerged to confront one another. *Id.* at 140. The defendant was found guilty of aggravated murder. *Id.* The Supreme Court of Ohio held that the trial court erred in refusing to instruct the jury on the lesser-included offense of voluntary manslaughter where the state's evidence was ambiguous regarding the issue of prior calculation and design and where it was possible to determine from the evidence that the defendant appeared to have panicked at the time of the killing so as to suggest that he was under extreme emotional distress reasonably sufficient to incite him to use deadly force. *Id.* at 144. Here, the emotionally-charged and impulsive nature of the high-speed car chase evinces similar ambiguity and panic.

These cases support Appellant's contention that under circumstances where an individual intends to kill or seriously injure one person, but kills another, he may be found guilty of either murder or manslaughter. *See State v. Williams*, 189 S.C. at 24, 199 S.E. at 908. Additionally, the fact that manslaughter occurs upon a sudden heat of passion arising from a sufficient legal provocation does not limit the offense to the person who actually committed the fatal act when "several were present and engaged in a common quarrel." *State v. Putman*, 18 S.C. 175, 178 (1882). Under these circumstances, it is for a jury to decide which charge is more applicable. *See State v. Jones*, 90 S.C. 290, 292, 73 S.E. 177, 178 (1912). The trial judge erred in not giving Appellant's jury the option to do so.

Kenneth did not kill anyone—but he was in a car with someone who did. Under established South Carolina law, if Simmons would have been entitled to a voluntary manslaughter charge had he gone to trial, Kenneth's jury should also have been given that

option. Viewing the totality of the record evidence in the light most favorable to the defense, Simmons was acting with heat of passion and under provocation without a sufficient cooling down period. Therefore, the trial judge's refusal to submit the lesser included offense of manslaughter was error and Kenneth is entitled to a new trial.

IV. The trial court erred in failing to instruct the jury to consider Appellant's age and resulting inability to foresee the consequences of his actions in determining his liability as a non-trigger person under the "hand of one, hand of all" doctrine.

A. STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.*

B. RELEVANT FACTS

Given that Kenneth neither fired the fatal shots nor was driving the vehicle from which those shots were fired, the State proceeded on the murder count under an accomplice liability theory. Prior to the jury receiving its instructions, trial counsel objected to the trial judge's use of the standard "hand of one, hand of all" charge, arguing that given Kenneth's age (fifteen at the time of the homicide), and thus his diminished ability to fully appreciate and foresee the consequences of certain actions, he should not be held to the same standard as that of an adult. Trial Tr. 148, 1558. The trial judge refused to modify the instruction, and counsel renewed her objection following the court's jury charge. *Id.* 1635–36. Kenneth was found guilty of murder. In this case of first impression, this Court must resolve, in light of the Supreme Court's decisions

regarding juvenile culpability grounded in the neuroscience of youth decision making, the manner in which South Carolina’s “hand of one, hand of all” accomplice liability doctrine should be applicable to juveniles. Due to the characteristics the Supreme Court has recognized are inherent in all juveniles, which directly impact their ability to foresee the consequences of their actions, they should only be accountable for those that were foreseeable to a reasonable child. *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (adopting reasonable child standard for *Miranda* custody purposes). Because the trial judge erred in refusing to modify the hand of one hand of all charge accordingly, Kenneth’s conviction should be reversed, and his case remanded for consideration by a jury permitted to use a reasonable child standard.

C. RELEVANT LEGAL PRINCIPLES AND DISCUSSION

The Supreme Court of the United States has made clear that juveniles are categorically different from adult offenders because of their lack of maturity, inability to make reasoned decisions, and limited ability to resist negative outside pressures and influences. *Roper v. Simmons*, 543 U.S. 55, 569–70 (2005). Relying on *Roper*’s understanding of juvenile culpability, the Court subsequently determined in *Graham v. Florida*, 560 U.S. 48 (2010), that the imposition of Life Without Parole (LWOP) for juveniles for non-homicide offenses was cruel and unusual punishment. Then, in *Miller v. Alabama*, 567 U.S. 460 (2012), the Court held that mandatory life without parole for juvenile offenders also violated the Eighth Amendment. In all three cases, the Court explicitly recognized that children as a class are fundamentally different than adults for purposes of assessing culpability. *See also Aiken v. Byars*, 410 S.C. at 542–43, 765 S.E.2d at 576 (stating the Court was giving effect to “the proportionality rationale integral to *Miller*’s holding” and emphasizing that the characteristics of youth must be afforded adequate weight in sentencing).

1. South Carolina should recognize the applicability of the immutable characteristics of youth outside the confines of the juvenile life without parole doctrine.

The decisions detailed above were rooted in modern neuroscience's findings regarding juvenile brain development. The Supreme Court specifically discussed findings related to the prefrontal cortex, the area of the brain that governs impulse control which only develops fully in late adolescence. See Sara B. Johnson, Robert W. Blum & Jay N. Giedd, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216, 217 (2009). This, in turn, explains why juveniles seek out and engage in risky behavior. See Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 115–17 (2013); Kathryn L. Mills et al., *The Developmental Mismatch in Structural Brain Maturation During Adolescence*, 36 DEVELOPMENTAL NEUROSCIENCE 147, 148 (2014). Interior brain regions responsible for cognition and processing (predominantly the hippocampus, amygdala, and nucleus accumbens) are some of the brain's first regions to develop and continue rapid growth throughout childhood; however, in late adolescence, these brain areas begin to decrease in size in a process called pruning. See Christian K. Tamnes et al., *Longitudinal Development of Hippocampal Subregions from Childhood to Adulthood*, 30 DEVELOPMENTAL COGNITIVE NEUROSCIENCE 212, 217, 219 (2018). While there is some variability in rates of cellular pruning, recent research has established that socioeconomic status, adolescent cultural expectations, and peer environment all contribute to this period's changes in brain size, density, and neural activity. But the reality is that the combination of these different aspects of brain development results in the tumultuous period of adolescence during which juveniles perceive risk but fail to understand its extent and

consequences. See Lucy Foulkes & Sarah-Jayne Blakemore, *Studying Individual Differences in Human Adolescent Brain Development*, 21 NATURE NEUROSCIENCE 315, 320 (2018).

Scientists have also discovered that that juvenile risk-taking is exacerbated by environmental factors, such as peer pressure, that further diminish their capacity to make sound decisions. See Cheryl B. Preston & Brandon T. Crowther, *Legal Osmosis: The Role of Brain Science in Protecting Adolescents*, 43 HOFSTRA L. REV. 447, 455–60 (2014); see also Eva H. Telzer, Michelle E. Miernicki, & Karen D. Rudolph, *Chronic Peer Victimization Heightens Neural Sensitivity to Risk Taking*, 30 DEVELOPMENTAL PSYCHOPATHOLOGY 1, 13–26 (2017). Finally, studies have established that it takes enormous energy and focus for juveniles to exercise appropriate executive functioning and emotional control because of underdeveloped neural pathways in the juvenile brain. See Laurence Steinberg, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 77 (2014); see also Sarah-Jayne Blakemore, *Imaging brain Development: The Adolescent Brain*, 61 NEUROIMAGE 397, 403 (2012) (adolescents think harder and longer than their child and adult counterparts when attempting to put themselves in someone else’s shoes).

In sum, juveniles possess weaker top-down control over their impulses due to a propensity to engage in risky behavior without the executive functioning required to properly assess the consequences of their actions. The gas pedal works fine, the brakes, not so much. These findings are especially salient in cases involving accomplice liability for juvenile defendants.

2. South Carolina’s “hand of one, hand of all” doctrine relies on assumptions incongruent with juvenile development.

Based on the above considerations, South Carolina’s “hand of one, hand of all” doctrine should not be applied to juveniles according to an adult standard. The “hand of one, hand of all”

doctrine is a theory of accomplice liability, see *State v. Thompson*, 346 S.C. 257, 263–64, 647 S.E.2d 702, 706 (Ct. App. 2007), but it differs from traditional accomplice liability in its scope. “Under accomplice liability theory, ‘a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.’” *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999) (quoting *State v. Austin*, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989)). By contrast, “[u]nder the ‘hand of one is the hand of all’ theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.” *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (2002).

The word “incidental” is defined formally as “occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part.” Angus Stevenson, *Incidental*, *Adj. and N.*, OXFORD DICTIONARY OF ENGLISH (3D ED. 2014), www.oed.com/view/Entry/93467. In other words, it refers to something that is likely to happen as a consequence of an activity. The basic difference is that under the “hand of one, hand of all” doctrine, the accomplice is culpable for collateral crimes committed in furtherance of a principal crime rather than merely for aiding and abetting the principal crime and derives from early South Carolina cases such as *State v. Cannon*, 49 S.C. 550, 27 S.E. 526 (1897), which specifically apportions culpability to individuals for crimes that arise as “a probable or natural consequence of the acts done in pursuance of the common design.” 49 S.C. at 555, 27 S.E. at 530. The natural and probable consequence doctrine itself represents an exception to the general rule in accomplice liability that intent to aid one crime is insufficient as proof of intent to aid a different crime. See Evan Goldstick, *Accidental Vitiating: The Natural and Probable Consequence of*

Rosemond v. United States on the Natural and Probable Consequence Doctrine, 85 FORDHAM L. REV. 1281, 1289 (2016). It is broadly accepted that a probable event is something predictable and therefore reasonably foreseeable. Thus, with regard to the “hand of one, hand of all” doctrine, an accomplice is presumably culpable based on his implied embrace or callous disregard of the probable or foreseeable risk that a collateral crime might occur in the commission of the common criminal objective. *See State v. Ciesielski*, 213 S.C. 513, 517–18, 50 S.E.2d 194, 196 (1948); *Cannon*, 49 S.C. at 555, 27 S.E. at 530.

However, as has been shown above, the developmental mismatch present in juveniles prevents them from correctly foreseeing the consequences of their actions. Treating juveniles as though they have the foresight to comprehend the range of natural and probable outcomes of an action to which such outcomes may or may not be directly correlated is misguided given that juvenile brains are immaturely formed, “plagued by immature thought processes and, as a result, [have] an inability to thoughtfully plan or anticipate consequences, minimize risk and danger, or adapt or reason in unfamiliar or stressful situations.” Erin H. Flynn, Comment, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post-Roper v. Simmons*, 156 U. PA. L. REV. 1049, 1070 (2008); see also Kimberly Thomas, *Reckless Juveniles*, 52 U.C. DAVIS L. REV. 1665 (2019) (calling into question the practice of holding youth responsible for offenses that require actual foresight of the consequences of their risk behavior). Convictions under South Carolina’s “hand of one, hand of all” doctrine are strict liability in nature, and they remove a jury’s discretion to take into account the unique characteristics intrinsic to the defendant’s age and how such characteristics affect the juvenile assessment of risk and how juveniles’ inability to appropriately assess risk pertains to their culpability. *See id.* at 1068.

3. South Carolina should adopt a reasonable juvenile standard for “hand of one, hand of all” crimes.

For the reasons set forth above, South Carolina should follow the precedent set by the Supreme Court in *J.D.B. v. North Carolina*, 564 U.S. 261 (2011), and establish a separate reasonableness standard for juveniles in accomplice liability cases. In *J.D.B.*, the Court acknowledged not only that a “child’s age is far ‘more than a chronological fact,’” but also that this fact generates commonsense conclusions about behavior and perception. *Id.* at 272 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). The Court noted specifically that children often lack “the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.” *Id.* at 272–73 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)); see also *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (events that “would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens”). Furthermore, the Court stressed that the law has historically recognized that “children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them” and emphasized that children have accordingly not been treated as adults as it pertains to reasonableness standards. *J.D.B.*, 564 U.S. at 273. From these facts, the Court concluded that a separate reasonableness standard for juveniles should exist for custody inquiries. *Id.* at 277.

Cases involving juveniles tried under South Carolina’s “hand of one, hand of all” doctrine of accomplice liability present an analogous situation in which the Court’s reasoning in *J.D.B.* is applicable. In these cases, determining culpability is dependent on inquiries into the probability of a crime occurring incidentally to the furtherance of a separate criminal objective. A conviction on this theory logically only serves legitimate penological interests if the accused hypothetically possesses the ability to engage in a similar inquiry and could potentially foresee the possibility of the collateral crime’s occurring. See generally *J.R v. Alaska*, 62 P. 3d 114

(Alaska 2003) (adopting a reasonable juvenile standard for determining whether a juvenile defendant charged with murder in the second degree on a theory of recklessness). As noted in *J.D.B.*, however, juveniles are as a class unable to recognize and avoid situations that put them in situations where they make detrimental choices. This fact, and the limited capacity of juveniles to assess risk and perceive the consequences of their actions, is also emphasized in the aforementioned scientific literature. Logically, then, this court should adopt a standard that is reflective of these facts and that recognizes the unique characteristics pertinent to youth, and juries should be instructed accordingly.

4. Adopting a reasonable juvenile standard for “hand of one, hand of all” crimes in South Carolina would require minimal adjustment to the archetypical “hand of one, hand of all” charge giving by South Carolina trial courts.

As set forth below, South Carolina’s “hand of one, hand of all charge” standard can be easily modified to meet the concerns set forth above with holding a juvenile to an adult standard of foreseeability. We have included, in bold letter below, changes to the standard charge which would allow juries to make more nuanced and accurate assessments of whether a juvenile should be held liable for the acts of others. Because Kenneth’s jury was not able to use a reasonable child standard in determining whether he should be convicted as an accomplice, his murder conviction should be reversed.

Proposed Instruction

If a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the acts done in carrying out the common plan and purpose. **In determining whether a juvenile defendant should be held accountable for actions which are the probable or natural consequence of the acts done in carrying out the common plan or purpose, you are required to consider that the defendant was a juvenile at the time of the events in question and that juveniles do not have the same ability to understand the probable and natural**

consequences of certain acts. Thus, juvenile defendants are not held to the same standard of foreseeability as adults. **Instead, in deciding whether “the hand of one is the hand of all” theory applies to a juvenile defendant, you should consider whether a child of similar age, experience, and intelligence as the defendant would have understood that the offense was the natural and probable consequence of the acts done in carrying out the common plan or purpose.**

Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of that crime. Mere knowledge that another person is going to commit a crime, even if the defendant is present when the crime is committed, is not sufficient to convict the defendant as a principal. Guilt as a principal is shown by actual or constructive presence at the scene as a result of a prior arrangement. Therefore, a finding of a prior arranged plan or common scheme is necessary for a finding of guilt as a principal. The state must prove beyond a reasonable doubt by competent evidence the theory of the hand of one is the hand of all. A principal in a crime is one who either actually commits the crime or who is present aiding, abetting, or assisting in committing the crime. When a person does an act in the presence of and with the assistance of another, the act is done by both. Where two or more acting with a common plan or intent are present at the commission of a crime, it does not matter who actually commits the crime. All are guilty. The hand of one is the hand of all. Present at the commission of a crime means to be sufficiently near to aid and abet and assist in the commission of the crime. However, mere presence at the scene of a crime is not sufficient to convict one as a principal under the theory of aiding and abetting. Intent is also a necessary element, for there must have been a common design or intent to commit a crime and the crime must have been committed pursuant thereto with the person aiding and abetting by some overt act. Intent means intending the result which actually occurs; not accidentally or involuntarily. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent. The state must prove these elements beyond a reasonable doubt. **In determining a juvenile’s intent, you are to consider what is expected from an adolescent of similar age and development. You are to recognize that adolescents do not necessarily think or behave like adults and that their judgments, thought patterns, and emotions are different from adults’. You are also to recognize that in comparison to adults, juveniles lack maturity and have an underdeveloped sense of responsibility, and that they lack “the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”** *J.D.B. v. North Carolina*, 564 U.S. 261, 272-273 (2011).

Mere presence at the scene is not sufficient to prove someone guilty of a crime. A defendant’s presence where a crime is being committed, or mere association with the person who commits the crime does not make a defendant an accomplice or an aider and abettor of the person committing the crime.

The burden on the State to prove every element of the crime charged. If you find, after reviewing all of the evidence, that the State has proved that the defendant was only present at the scene of the crime and that they have not proved beyond a reasonable doubt

any other participation in the crime, you must find the defendant not guilty. **In making a determination of actual or constructive presence, you are to consider that juveniles have less control, or are less experienced with having control, over their environments and are often unable to remove themselves from certain settings.** The law is that proof of mere presence at the scene of the crime is not sufficient to find someone guilty.

- V. When the judge sentenced Appellant to serve fifty years in prison, she violated Appellant's right to due process because the sentence constituted a tax upon Appellant's exercise of his rights to trial and appeal, and thereafter, the judge erred in denying Appellant a new sentencing hearing where Appellant presented newly discovered evidence that his co-defendants, who entered into plea bargains with the state, received significantly shorter sentences, which enhanced Appellant's argument that his sentence was a tax on his exercise of his rights, demonstrated that his sentence was disproportionate in violation of state and federal law, and revealed the judge used Appellant's age as an aggravating circumstance instead of a mitigating factor as required by federal and state law.

A. STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” *State v. Vick*, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009) (quoting *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001)). The appellate court is “bound by the trial court’s factual findings unless they are clearly erroneous.” *Id.* The reviewing court “does not re-evaluate 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. Slocumb*, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (S.C. Ct. App. 2015). “A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support.” *In re M.B.H.*, 387 S.C. 323, 325, 692 S.E.2d 541, 541 (2010).

B. RELEVANT FACTS

After some initial denials, Kenneth quickly cooperated with law enforcement. Trial Tr. 609–12. His co-defendant—the actual shooter, Richard Simmons—repeatedly lied to the police. Trial Tr. 617–18. In fact, Simmons maintained for years that Kenneth was the shooter. Family

Court Tr. 94–96; Trial Tr. 747–50. Law enforcement and the prosecution initially believed Simmons, and Kenneth was “waived up” from the Family Court to General Sessions on the mistaken assumption that he shot and killed Kedena Brown. Simmons finally admitted that he was the one who pulled the trigger. Trial Tr. 619, 740. After the truth about Kenneth’s culpability came to light, the solicitor offered to allow Kenneth to plead guilty to voluntary manslaughter in exchange for a twenty-three-year sentence. Trial Tr. 41. Kenneth declined the State’s offer. Trial Tr. 41.

At trial, Kenneth’s co-defendant Keon Anderson, testifying for the prosecution, explained to the jury that not only did Kenneth not shoot at Ms. Brown, but that he and Anderson told Simmons not to shoot because it was the wrong car. Trial Tr. 906–07. Simmons ignored them and fired, killing Ms. Brown. *Id.*

The jury found Kenneth guilty of murder under a “hand of one, hand of all” theory. Trial Tr. 1579, 1585, 1628, 1645. Following the guilty verdict, the solicitor offered Kenneth another deal: waive the right to direct appeal on any trial error made by the judge in exchange for a sentence of thirty years. Kenneth again rejected the State’s offer. R. *(Motion to Reconsider Sentence).

Immediately prior to the sentencing hearing, the solicitor offered to enter into a negotiated cap of fifty years in order to alleviate any constitutional concerns regarding Kenneth receiving a life sentence. Sentencing Tr. 7–12. Following a sentencing hearing, at which a wealth of mitigating evidence was presented demonstrating institutional failure in failing to remove Kenneth from a dysfunctional home, psychological trauma from witnessing violence in his home and community, as well as his remorse and capacity for growth and change, the solicitor asked Judge Harrington to impose a sentence of fifty years—the negotiated cap.

Sentencing Tr. 328. Specifically, the solicitor argued for a fifty-year sentence because Kenneth “ha[d] not accepted any semblance of responsibility for his actions.” Sentencing Tr. 325. In the solicitor’s view, Kenneth’s failure to accept the prior plea offers meant that “everything people said about reformation and wanting to change his life [was] a lie.” Sentencing Tr. 325–26.

Trial counsel objected to the sentence because it demonstrated that the prosecution and the trial judge “taxed” Kenneth for exercising his state and federal constitutional rights to a trial by jury and to an appeal. Specifically, defense counsel asked that the court not hold it against Kenneth that he refused to accept the state’s plea offers, including the state’s offer that he waive his appeals for a certain sentence. Sentencing Tr. 343–44. Thereafter, Judge Harrington sentenced Kenneth in accordance with the solicitor’s request, telling him that “he had a choice” about getting in the car that night. Sentencing Tr. 358. After imposition of the sentence, defense counsel filed a motion for reconsideration. R. *(Motion to Reconsider). Defense counsel argued the sentence was vindictive because it punished Kenneth for exercising his right to trial and appeal. R. *(Motion to Reconsider). Despite the evidence in the record, the trial judge denied the motion to reconsider sentence. R. *(Order denying reconsideration).

Subsequently, Richard Simmons entered into a negotiation with the same solicitor who prosecuted Kenneth whereby he was sentenced to the mandatory minimum term of thirty years imprisonment. Simmons Sentencing Tr. 4. Keon Anderson was sentenced to a fifteen-year prison term after entering an *Alford* plea to voluntary manslaughter. Anderson Sentencing Tr. 4. Based upon these disparate sentences, Kenneth filed a motion for new sentencing based on after-discovered evidence. R. *(Motion for new sentencing).⁸

⁸ The sentences were imposed on the co-defendants while Kenneth’s appeal was pending. Therefore, Kenneth moved this Court to remand his case to the circuit court to enable him to file

During the hearing on the motion, counsel argued the newly discovered evidence: (1) enhanced his argument that the judge taxed him for exercising his right to appeal; (2) demonstrated that his sentence was unconstitutionally disproportionate; and, (3) showed the judge treated his age as an aggravating circumstance.

While explaining how the sentences of the co-defendants enhanced Kenneth's argument that the judge imposed a unconstitutional tax on him, counsel noted that when the state argued for imposition of the fifty-year sentence, the state repeatedly referred to Kenneth's alleged failure to accept responsibility or show remorse to support imposing the requested fifty-year sentence. Motion for New Sentencing Tr. 13–14. Just as the state had done during its closing argument at the sentencing hearing, the state argued that the court should deny Kenneth's motion for reconsideration of his sentence because the state had "yet to see any semblance of responsibility, remorse, or humility" from Kenneth. Motion for New Sentencing Tr. 13; R. *(State's opposition to motion to reconsider). Further, the state argued that Kenneth had "never been able to give accountability, personal responsibility, assistance, or apology." Motion for New Sentencing Tr. 13; R. *(State's opposition to motion to reconsider). In its brief in opposition the motion for new sentencing, the state continued this theme by arguing Kenneth was not entitled to new sentencing because he failed to accept responsibility for his criminal conduct, which can only mean, in context, because he would not plead guilty but instead exercised his right to jury trial. Motion for New Sentencing Tr. 13–14; R. *(State's brief in opposition to new sentencing). Even during the hearing, the state emphasized that Simmons and Anderson "both cooperated with the State." Motion for New Sentencing Tr. 21, 24, 28. Despite this evidence, the judge denied the motion for new sentencing. R. *(Order denying new sentencing).

a motion for new sentencing based upon after-discovered evidence and to hold his appeal in abeyance. This Court granted the motion and remanded.

C. RELEVANT LEGAL PRINCIPLES AND DISCUSSION

In accordance with Rule 29(b) of the South Carolina Rules of Criminal Procedure, “[a] motion for [resentencing] based on after-discovered evidence must be made within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence . . . [and] may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion. . . .” Rule 29(b), SCRCrimP; *see also State v. South*, 310 S.C. 504, 508–09, 427 S.E.2d 666, 669–70 (1993) (applying the elements for a motion for a new trial based on after-discovered evidence to a resentencing proceeding). Additionally, to prevail on a resentencing motion, the defendant must show the after-discovered evidence: (1) is such that it would probably change the result if a new sentencing hearing were granted; (2) has been discovered since the sentencing; (3) could not in the exercise of due diligence have been discovered prior to the sentencing; (4) is material to the sentencing; and (5) is not merely cumulative or impeaching. *See State v. Spann*, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999) (internal citations omitted); *South*, 310 S.C. at 508, 427 S.E.2d at 669–70.

Contrary to the judge’s conclusion that Rule 29(b) applies only to motions for new trial, the Supreme Court’s decision in *South* presents significant authority that motions based upon the discovery of new evidence apply for new sentencing hearings as well. The circuit court refused to “extend” *South* beyond capital sentencing proceedings as it found that to do so would “tortur[e] the plain language of Rule 29(b).” R. *(Order denying resentencing). As the Court’s *South* decision demonstrates, very few alterations of the plain language of Rule 29(b) are required in order to apply the rule to sentencing proceedings. In fact, the Court made those alterations and directed lower courts to follow them. *South*, 310 S.C. at 509, 427 S.E.2d at 669–

70. Further, *South* does not limit its application to capital sentencing proceedings only. Had the Court intended such a limitation, it could have said so very easily.

Additionally, the circuit court erred in determining the sentences of Simmons, Anderson, and the other co-defendants were not evidence to support a motion for new sentencing. The circuit court limited the definition of evidence to “something that tends to prove or disprove the existence of an alleged fact.” R. *(Order denying new sentencing). Even using this restrictive definition, the sentences of the co-defendants tends to prove the existence of multiple facts—that the judge taxed Kenneth for exercising his rights to trial and appeal, that the sentence he received was disproportionate under federal and state law, and that Kenneth’s age was used as an aggravating circumstance.⁹

1. Unconstitutional to punish for exercise of the right to trial or appeal

The Supreme Court of the United States has established that a defendant cannot be punished for exercising a constitutional right; to do so constitutes a violation of due process. *Bordenkircher v. Hayes*, 434 U.S. 357, 357 (1978) (“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is ‘patently unconstitutional.’”) (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 32–33, n.20 (1973)); *United States v. Jackson*, 390 U.S. 570, 583 (1968) (holding that the government may not penalize “the assertion of a constitutional right”). More specifically, the

⁹ Traditionally, the courts have treated sentences as evidence. See e.g., *State v. Mizzell*, 349 S.C. 326, 333–34, 563 S.E.2d 315, 318–19 (2002) (holding a defendant has a right to cross examine a witness about a sentence the witness received in order to show bias or motive to lie). Without question, had Simmons and Anderson been sentenced prior to Kenneth’s trial, defense counsel would have been permitted to question them on the sentences they received in order to explore any biases or motivations to lie in light of the favorable treatment. In other words, defense counsel would have been able to present *evidence* of the sentences.

Court held in *North Carolina v. Pearce*, 395 U.S. 711 (1969), that penalizing a defendant for pursuing a statutory right of appeal or collateral remedy violates due process. *Id.* at 724 (“[a] court is without right to put a price on an appeal;” a defendant’s “exercise of a right of appeal must free and unfettered.”).¹⁰ Thus the Court created the following legal framework:

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 726.

The Supreme Court later extended *Pearce* to cases where the threat of a more onerous sentence for following through with an appeal comes from the prosecutor. *Blackledge v. Perry*, 417 U.S. 21, 27 (1974). In *Perry*, the defendant exercised his right—under North Carolina law—to a *de novo* retrial of his misdemeanor conviction. In response, the prosecution charged the defendant with a felony offense for the same conduct. Respondent was convicted and sentenced to a (substantially) longer sentence. The defendant argued that the felony indictment constituted an unconstitutional penalty for pursuing a lawful appeal. The Supreme Court agreed, recognizing that if prosecutors are allowed to “up[] the ante” through a felony indictment

¹⁰ In *Alabama v. Smith*, 490 U.S. 794 (1989), the Supreme Court explained that the evil the *Pearce* Court sought to prevent was not the imposition of longer sentences after a new trial but the vindictiveness of a sentencing judge. *Id.* at 799 (citing *Texas v. McCullough*, 475 U.S. 134, 138 (1986)). The Supreme Court explained that the *Pearce* presumption applies in situations where the relevant sentencing factors remained the same between the initial, shorter sentence—whether from a plea deal or a judge—and the later increased sentence: the same judge, the same facts, the same evidence, the same proceeding. Such a scenario creates a “reasonable likelihood” that the increased sentence was the product of actual vindictiveness on the part of the sentencing authority in part because a court was being asked to do over what it had already done correctly. *Id.* at 799.

whenever a convicted misdemeanant pursues his statutory appellate remedy-the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial.” *Id.* at 28. The Court further made clear that the *Pearce* presumption “was not grounded upon the proposition that actual retaliatory motive must inevitably exist.” *Id.* Rather, the fear of such vindictiveness permits a defendant to be free of the “apprehension of such retaliatory motivation.” *Id.* (“[A] person convicted of an offense is entitled to pursue his statutory rights to a trial *de novo*, without the apprehension that the State will retaliate by . . . subjecting him to a significantly potential period of incarceration”) (citing *United States v. Jackson*, 390 U.S. 570 (1968)).

The South Carolina Supreme Court utilized the *Pearce* presumption in *State v. Higgenbottom*, 344 S.C. 11, 542 S.E.2d 718 (2011). The judge extended Higgenbottom’s probationary sentence to twenty-four months when Higgenbottom filed a motion for reconsideration. 344 S.C. at 13, 542 S.E.2d at 719. The Supreme Court reversed, holding that “without objective evidence of a proper motivation to increase the sentence, the *Pearce* presumption applies to find a due process violation.” 344 S.C. at 15, 542 S.E.2d at 720. The Court held that without a record-based and articulated justification, the trial court’s decision to extend the probationary sentence one day after the original sentence was imposed—where the only intervening event was the motion to reconsider—the *Pearce* vindictiveness presumption applied. The Court reversed and reinstated the eighteen-month probationary sentence. 344 S.C. at 17, 542 S.E.2d at 721.¹¹

¹¹ Prior to *Pearce*, the Seventh Circuit decided *United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960). Wiley’s co-defendant was sentenced to two years and Wiley to three years. The Seventh Circuit set aside Wiley’s sentence and rejected “the theory that a person may be punished because in good faith he defends himself when charged with a crime, even though his efforts prove unsuccessful.” Finding that the record showed that the district court was fully informed as to the serious prior criminal records of convictions of all of Wiley’s co-defendants, and the district court’s own remarks show that it considered Wiley to be only “a minor participant who

Other courts have recognized that the due process rule prohibiting penalizing defendants for exercising rights applies in other situations including claims of prosecutorial vindictiveness in connection with plea negotiations. *See e.g., Izaguirre v. Lee*, 856 F. Supp. 2d 551, 577 (E.D.N.Y. 2012) (holding that “[b]ecause the *Pearce* presumption applies to Petitioner at sentencing, the County Court was required to affirmatively state sufficient reasons for the sentence imposed in order to rebut the presumption that it was motivated by actual vindictiveness in imposing the maximum statutory sentence as promised”).

In *United States v. Mazzaferro*, the defendant, along with co-defendants Foley and Murray, were charged in a multi-count indictment with various drug offenses. 865 F.2d 450, 451–52 (1st Cir. 1989). A large quantity of marijuana was found by the Coast Guard in a locked below-deck boat cabin. *Id.* at 451. Foley identified himself as the master of the vessel while Murray and Mazzaferro identified themselves as crew members. *Id.* Mazzaferro’s co-defendants entered into plea agreements with the government in which they plead guilty to being a person aboard a vessel with intent to distribute a controlled substance in exchange for the remaining counts being dismissed. *Id.* at 452. Foley and Murray also agreed to testify against Mazzaferro and received assurances that the government would abstain from making sentence recommendations. *Id.*

Mazzaferro was convicted at trial and sentenced to a twenty-year term of imprisonment plus a \$25,000.00 fine on being a person aboard a vessel with intent to distribute a controlled substance, and concurrent twenty-year sentences on the remaining two counts. *Id.* at 453. Thereafter, Foley and Murray were each sentenced to a ten-year prison term. *Id.* On appeal,

stood trial.” *Id.* at 503. Thus, the disparity between the sentence imposed by the district court on Wiley, an accessory, and his co-defendant, the principal, made it evident “that the punishment imposed by the district court on Wiley was—at least in part—a tax for availing himself of his right to a trial. *Id.* at 504.

Mazzaferro claimed that he received an unduly harsh sentence in retaliation for his refusal to plea bargain and his insistence upon availing himself of his constitutional right to a trial. *Id.* at 457.

After assessing Mazzaferro's role in the offense vis-a-vis Foley and Murray, the First Circuit agreed that the sentencing disparity was suggestive of vindictiveness. *Id.* Important to the court's consideration was

that Foley was captain of the vessel and Mazzaferro was only a crew hand; that Foley "took care of everything;" that it was not even certain that Mazzaferro would be present on the trip until they left anchor; that Foley loaded the marijuana onto the vessel and that Mazzaferro may not even have been aware of the loading; and that Foley alone locked the cabin door where the marijuana was stored. Nor was there any evidence that Mazzaferro had any financial interest in the boat or the contraband.

Id.

In sum, the court determined that Mazzaferro's role was limited. *Id.* The court noted that—other than the fact that Mazzaferro exercised his Sixth Amendment right to jury trial—it was "difficult to understand why Mazzaferro received a sentence twice as long as that of Foley." *Id.* at 458. Despite the fact that Foley had a more substantial criminal record than Mazzaferro and was the architect of the importation scheme, the trial judge gave no reason for sentencing Mazzaferro to a term of imprisonment twice as long as the sentence Foley received. *Id.* at 459. Citing *Pearce*, the court concluded that the retaliation inference was so substantial that Mazzaferro was entitled to be resentenced by a different judge. *Id.* at 460.¹²

¹² The *Mazzaferro* court relied on *Longval v. Meachum*, 693 F.2d 236 (1st Cir. 1982), in which the trial judge told the defendant mid-trial that given the weight of the evidence against him he should consider a plea or risk a "substantial prison sentence." *Id.* at 237. The defendant rebuffed the trial judge's "suggestion" and, following conviction, was sentenced to 40 to 50 years, while his co-defendant, who pleaded guilty, was sentenced to 3 years. *Id.* at 238. The court stated that the disparity in the co-defendant's sentences and the draconian sentence imposed on Longval

Similarly, in *United States v. Capriola*, 537 F.2d 319 (9th Cir. 1976), the appellant argued that more severe sentences were imposed on him because he exercised his Sixth Amendment trial right. Capriola, who received a term of six years' imprisonment, emphasized the disparity in his sentence and the lesser imprisonment terms (between five months and three years) imposed on the other co-conspirators who pleaded guilty. *Id.* at 320. The court concluded that while there may have been good reasons for the substantial disparity in sentences, the record did not adequately explain it. *Id.* at 321 (“[w]hen there is substantial disparity in sentences imposed upon different individuals for engaging in the same criminal activity, the preservation of the appearance of judicial integrity and impartiality requires that the sentencing judge record an explanation”).

This Court confronted a similar situation in *State v. Brouwer*, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001). Brouwer's co-defendant entered a guilty plea immediately prior to what was to be a joint trial. *Brouwer*, 346 S.C. at 378, 550 S.E.2d at 917. The judge sentenced the co-defendant to “two years plus a \$5,000 fine, provided that upon payment of a fine of \$750 plus costs the balance of the sentence would be suspended. The court also placed [co-defendant] on probation for two years.” *Id.* After a jury convicted Brouwer, he requested a sentence comparable to his co-defendant. 346 S.C. at 387, 550 S.E.2d at 921–22. The judge declined, explaining the co-defendant received a more lenient sentence because she admitted guilt. 346 S.C. at 387, 550 S.E.2d at 922.

According to the judge there was no “rhyme or reason” to give the same sentence to someone who went to trial as someone who pled guilty. *Id.* Although the judge indicated he would never punish someone for exercising his right to a jury trial, this Court held “the mere

were too great to allay a reasonable apprehension that the judge's sentencing decision resulted from the defendant's refusal to give up the remainder of his right to trial by jury. *Id.*

disavowal of wrongful intent cannot remove the taint inherent in the court’s commentary.” 346 S.C. at 388, 550 S.E.2d at 922. Thereafter, this Court held the record failed to reflect an “otherwise appropriate basis for Brouwer’s disparate sentence.” *Id.* Accordingly, this Court reversed Brouwer’s sentence and remanded for resentencing. *Id.* See also *Castro v. State*, 417 S.C. 77, 83–84, 789 S.E.2d 44, 47 (2016) (holding that a trial judge improperly considered Castro’s decision to exercise his right to a jury trial in sentencing Castro and concluding that other, valid reasons for a sentence considered by the trial judge “do not negate the abuse of discretion that occurs when one of the sentencing factors considered by the trial judge was the defendant’s decision to proceed to trial); *Davis v. State*, 336 S.C. 329, 333, 520 S.E.2d 801, 803 (1999) (holding that trial counsel provided ineffective assistance by failing to object to the trial judge’s statements at sentencing that he was not sentencing Davis to a sentence comparable to that received by similarly situated defendants because the other defendants had pled guilty and Davis had not, which showed the judge improperly considered Davis’s decision to proceed with a jury trial); *State v. Hazel*, 317 S.C. 368, 369–70, 453 S.E.2d 879, 879–80 (1995) (holding a trial judge abused his discretion in refusing to sentence Hazel under the Youthful Offender Act where the judge relied heavily upon Hazel’s exercise of his right to a jury trial as weighing against sentencing under the Act).

The facts of Kenneth’s case raise a straightforward inference of vindictiveness, first for Kenneth’s rejection of the State’s pretrial offer of twenty-three years if he pled guilty to manslaughter and then for his refusal to forego challenging his convictions on direct appeal in exchange for a thirty-year term. Following these decisions to go to trial and appeal to this Court, the prosecutor recommended and the judge imposed a sentence of fifty years, which ultimately proved to be twenty more years than the sentence the more culpable adult trigger-man Richard

Simmons received, and thirty-five more years than the other person in the car received. The trial evidence did not raise any additional wrongdoing or enhanced culpability on Kenneth's part unknown to the prosecution at the time of the initial plea offer: rather, it was clear by then that fifteen-year-old Kenneth was not the person who killed the victim, that he did not attempt to kill the victim, and that he expressly warned his co-defendant, who did kill the victim, not to shoot because it was the wrong person.

Following the jury's assessment that Kenneth's conduct satisfied South Carolina's "hand of one, hand of all" accomplice liability doctrine, the State again approached Kenneth with an offer to recommend the mandatory-minimum sentence of thirty years if he would waive his right to challenge any trial error on direct appeal. Kenneth again refused. The sentencing hearing also divulged no new information enhancing Kenneth's culpability. Rather, the testimony revealed that he was raised in a poverty ridden, drug-infested, violent neighborhood in North Charleston who, not surprisingly given the lack of adequate parental supervision and positive role models had adapted to his environment selling drugs for his father. The testimony also established that once he was removed from that environment, he blossomed in DJJ, obtained his GED, and demonstrated significant rehabilitative potential. Despite the strong—if not overwhelming—evidence that Kenneth's involvement in this offense was a product of his age and circumstances, not his character, the trial judge, at the State's urging, imposed a fifty-year sentence, which, for all practical purposes, means he will almost certainly die in prison. *See R. *(Defendant's Exhibit #6—Affidavit of Vera Dolan).* Based upon the evidence in the record, the most likely explanation for the recommendation and imposition of a de facto life sentence is retaliation for Kenneth's decisions to exercise his right to trial and to a direct appeal.

After defense counsel filed a motion for reconsideration of the sentence imposed, the prosecution filed a response in which they explained the alleged reasons why Kenneth's sentence was not vindictive. R. *(State's opposition to motion to reconsider). The State claimed that its sentence recommendation was based on its alleged knowledge of: (1) Kenneth's association with a gang; (2) his lack of cooperation; and, (3) alleged lack of remorse. R. *(State's opposition to motion to reconsider). These purported reasons cannot rebut the *Pearce* presumption.

First, Kenneth's alleged association with a gang was something the prosecution knew from the very beginning of the case, and thus were well aware of it at the time they offered to let him plead guilty to manslaughter, offered to recommend the mandatory-minimum if he waived his right to appeal and when it entered into the plea negotiations with Simmons and Anderson. If anything, the evidence at trial was weak on Kenneth's affiliation with multiple prosecution witnesses disavowing any knowledge of his gang involvement, and the State's gang "expert" was found not to be qualified as such.

Second, Kenneth did, in fact, cooperate with the prosecution. Although Kenneth initially denied any knowledge of the shooting, he quickly admitted he was involved. Contrary to the State's repeated assertions that Kenneth failed to cooperate, Kenneth actually "named names" by giving the police the name of the shooter. In fact, the information he provided to law enforcement provided probable cause for a series of warrants used to access cell-phone data and residences and arrest individuals, including the real shooter, Simmons. In contrast, Simmons, the ultimate beneficiary of the State's largess, repeatedly lied, minimizing his own involvement and blaming Kenneth for his own actions. Finally, the State's lack of remorse contention is flatly refuted by the record. During the sentencing hearing, Dr. Susan Knight explained that Kenneth felt "mad, he felt bad . . . he felt disgusted with Mr. Simmons" after he shot Ms. Brown.

Sentencing Tr. 250. Kenneth further confided in Dr. Knight that he felt very badly that someone lost their life, and he was particularly upset that it was a mother who died. Sentencing Tr. 250–51. Kenneth expressed deep regret and continuously explained that he had lost his father shortly before Ms. Brown’s death. *Id.* Other witnesses who testified at the sentencing hearing confirmed his genuine remorse. Sentencing Tr. 123, 126.

Importantly, the disparity in sentencing between Kenneth and Keon Anderson could not be explained by some vague notion of acceptance of responsibility. Anderson entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), which permitted Anderson to maintain his innocence. Nevertheless, during the plea hearing, the solicitor indicated that he negotiated a fifteen-year sentence with Anderson because he wanted to create “balance” with the sentence that Simmons received—thirty years. Anderson Sentencing Tr. 11. The solicitor claimed the negotiations were the result of consideration of “not just their level of culpability, but their acceptance of responsibility, their prior records or lack thereof . . . and try to put it in some sort of perspective where the sentences make sense with one another.” Anderson Sentencing Tr. 11. To this point, the solicitor added, “In our opinion, the 15-year negotiated sentence accounts for Mr. Anderson’s culpability and his degree of acceptance of responsibility.” *Id.* It is clear that there was no attempt to put Kenneth’s sentence into “some sort of perspective,” *id.*, other than as punishment for exercising his rights to trial and appeal.

At the sentencing hearing for Simmons, the solicitor indicated Simmons was getting “a pretty significant break” because he entered into a proffer agreement with the state and cooperated. Simmons Sentencing Tr. 3. Additionally, Simmons testified for the state against Kenneth. *Id.* According to the State, Simmons’ cooperation resulted in the state “seeking justice against a lot of the parties” involved, and as a result, he “deserved a break.” *Id.* Further, the

judge's comments displayed a fundamental misunderstanding of the underlying facts of the case and Simmons' cooperation. When the family of Kedena Brown protested the negotiated sentence, the judge indicated that prior to Simmons' cooperation, the State "had no understanding of what happened, and in order to put all the pieces together in the puzzle, so you can say, oh, that's what the deal is, that's what happened that night, sometimes you have to make a deal with the devil." Simmons Sentencing Tr. 6–7. To the contrary, the State knew that Simmons was the shooter based on the information provided by Kenneth during his interrogation, but the State simply chose not to believe him. To the extent Simmons clarified what happened to Brown, he eventually confessed to being the shooter, something Kenneth had told law enforcement years earlier.

The disparate sentences between Kenneth and his co-defendants, and the lack of objective reasons for the disparity, trigger the *Pearce* presumption. The sentences of Richard Simmons and Keon Anderson—who both entered into plea negotiations—are substantially less than Kenneth's, the only defendant who chose to exercise his constitutional rights. Furthermore, the record shows that the sentencing judge failed to put on the record objective reasons for the harsher sentence, both during the sentencing hearing and during the motion for reconsideration. Thus, the *Pearce* presumption is applicable and has not been rebutted.¹³ Kenneth's sentence should be vacated and the case should be remanded for a new sentencing hearing.

2. Proportionality

"To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing

¹³ If the sentence in this case is allowed to stand, it will legitimize and incentivize prosecutors to attempt to force defendants to accept plea offers and appellate waivers or risk being penalized for not doing so.

society.” *Graham v. Florida*, 560 U.S. 48, 58 (2010) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). “Embodied in the Constitution’s ban on cruel and unusual punishment is the ‘precept of justice that punishment for the crime should be graduated and proportioned to [the] offense.’” *Id.* at 59 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). Over the years, the cases addressing the proportionality of sentences have developed along two general lines. The first is concerned with the particular circumstances of the case and whether the defendant’s sentence for a term of years is grossly disproportionate given the particular offense. *Graham*, 560 U.S. at 59; *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991). The second classification of cases is concerned with categorical rules as applied to groups of offenses or groups of offenders. *Graham*, 560 U.S. at 60–61. For example, Supreme Court categorical rulings related to categories of offenses prohibit the imposition of the death penalty for non-homicide crimes against individuals. *Kennedy v. Louisiana*, 554 U.S. 407 (2008). Categorical rulings prior to *Graham* prohibited the death penalty for defendants who committed their crimes before the age of eighteen, *Roper v. Simmons*, 543 U.S. 551 (2005), or whose suffered from intellectual disability, *Atkins v. Virginia*, 536 U.S. 304 (2002).

“The cruel and unusual punishment clause requires the duration of a sentence not be grossly out of proportion with the severity of the crime.” *State v. Jones*, 344 S.C. 48, 56, 543 S.E.2d 541, 545 (2001) (citing *Solem v. Helm*, 463 U.S. 277 (1983)). When confronted with the question of whether a sentence violates the Eighth Amendment’s requirement of proportionality, the South Carolina Supreme Court assesses three factors: (1) the gravity of the offense compared to the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences for the same crime in other jurisdictions. *Jones*, 344 S.C. at 56, 543 S.E.2d at 545.

No one disputes the gravity of the offense or the tragic loss that resulted. Likewise, no one disputes Kenneth’s role in the offense, as he was convicted as a non-shooter under accomplice

liability. *But see* Issue IV, *supra* (arguing that the foreseeability standard for accomplice liability should be that of a reasonable child instead of a reasonable adult). Thus, although the offense was grave, Kenneth played a relatively limited role. Comparing Kenneth's sentence to sentences imposed on others in the same jurisdiction directly involves comparing Kenneth's sentence to that of his co-defendants. The sentences imposed on Simmons and Anderson permit a practical and non-theoretical way to make a direct comparison among individuals involved in the same offense with varying levels of culpability. Kenneth's culpability was akin to Anderson's, but he received a sentence of more than three decades longer than Anderson. Simmons was the most culpable, as he was the actual shooter, and even his sentence was two decades shorter than Kenneth's. Furthermore, attempts to find a juvenile non-shooter who received a greater sentence than an adult shooter proved futile. Despite an examination of the available records, there was simply no other instance like the one presented here—where a fifteen-year old non-shooter received a sentence greater than the adult shooter. Finally, while other jurisdictions permit a fifty-year sentence for the offense of murder, finding another jurisdiction where a juvenile non-shooter receives a fifty-year sentence and the adult shooter gets the statutory minimum is daunting—if not impossible—task. In light of the direct comparison permitted through an examination of Kenneth's sentence and his co-defendants' sentences, it is clear that Kenneth's sentence violates the Eighth Amendment's ban on cruel and unusual punishment.

In addition to the Eighth Amendment's ban on cruel and unusual punishment, the South Carolina Constitution prohibits cruel *or* unusual punishment. *See* S.C. Const. art. I, § 15. Precisely, the Constitution states: "Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained." S.C. Const. art. I, § 15. In *State v. Wilson*, the Supreme

Court analyzed this provision. 306 S.C. 498, 512, 413 S.E.2d 19, 27 (1992). The Court was examining whether Wilson’s death sentence violated the federal and state constitutions. *Id.* In conducting this examination, the Court explained the state constitution “clearly ban[ned] cruel *or* unusual punishments; unlike the textual ban in the United States Constitution, which literally reads that “cruel *and* unusual” punishments are forbidden.” *Id.* (emphasis in original). However, the Court noted, that “[d]espite this difference in verbiage,” “the United States Supreme Court effectively treats the ‘and,’ as an ‘or’ in their Eighth Amendment analysis.” *Id.* According to the South Carolina Supreme Court, the United States Supreme Court “still considers it their constitutional obligation to judge whether the ‘nexus between the punishment imposed and the defendant’s blameworthiness is proportional.’” *Id.* The Court described this “formulation of a test of whether the punishment is cruel,” and that requiring this analysis in all death penalty cases was to read “and” as “or.” *Id.* Thus, the Court concluded that South Carolina’s “use of the disjunctive ‘or’ rather than ‘and’” was “of no importance” in Wilson’s case because the analysis was the same under both constitutions. *Id.*

While the two constitutions may employ the same analysis in the context of the death penalty, the two constitutions do not employ the same analysis outside the context of the death penalty. Justice Pleicones explained that while he would not have reached the same conclusion as the majority in pursuant to the Eighth Amendment, he would reach the same result under the South Carolina Constitution. *Aiken v. Byars*, 410 S.C. at 545–46, 765 S.E.2d at 578 (Pleicones, J., concurring). Furthermore, the South Carolina Supreme Court has interpreted the state constitution more expansively than the federal constitution. *See, e.g., State v. Counts*, 413 S.C. 153, 776 S.E.2d 59 (2015); *State v. Weaver*, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007); *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001). Finally, in support of a

broader interpretation of the state constitution than the federal constitution is the simple fact that the South Carolina Constitution bars three distinct categories of punishment: cruel, corporal, and unusual. Quite simply, the inclusion of a third category of punishment, which appears nowhere in the Eighth Amendment, requires reading the state constitutional provision more broadly.

The Court has not delineated what greater protections the state constitutional prohibition on cruel or unusual or corporal punishment may afford South Carolinians. The drafters of the South Carolina Constitution chose to use the disjunctive “or” to protect people against the government’s use of cruel *or* unusual *or* corporal punishment. In other words, a punishment need be only cruel or unusual, not both, in order to run afoul of the provision. Interpreting its constitution, which also bars cruel or unusual punishments, the Michigan Supreme Court explained “[t]he prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition.” *People v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992). Additionally helpful to determining what additional protections the constitutional provision affords is the South Carolina Supreme Court’s noted “concern” with its proportionality review in capital cases. *State v. Dickerson*, 395 S.C. 101, 125 n.8, 716 S.E.2d 895, 908 n.8 (2011). The Court explained that “restricting [its] statutorily-mandated proportionality review to only similar cases where death was actually imposed is largely a self-fulfilling prophecy as simply examining similar cases where the defendant was sentenced to death will almost always lead to the conclusion that the death sentence under review is proportional.” *Id.*

Thus, even if this Court were to determine that Kenneth’s sentence of fifty years in prison does not violate the Eighth Amendment’s ban on cruel *and* unusual punishment, this Court must read the state constitution more broadly and hold Kenneth’s sentence violates its ban on cruel *or*

unusual punishment. The evidence of the sentences received by the co-defendants is particularly probative of the proportionality analysis necessary for a judge to consider prior to imposing a sentence, especially given that Simmons was the actual shooter. He even pushed Kenneth out of the way to do so. Yet Simmons, who was legally an adult at the time of the offense, received a sentence twenty years lighter than Kenneth's despite his admitted greater culpability in the homicide. In contrast, Kenneth was a fifteen-year-old juvenile with diminished culpability, charged and convicted under an accomplice liability theory. Anderson was sentenced to thirty-five years less than Kenneth, although he was also legally an adult at time. The result of Kenneth's sentencing would probably be different, considering that a codefendant with a similar role to Kenneth's role in the incident and the codefendant responsible for the shooting received much shorter sentences than Kenneth.

Indeed, the trial court never had the opportunity to consider Kenneth's codefendants' sentences at his sentencing. *See State v. Brewington*, 267 S.C. 97, 103, 226 S.E.2d 249, 251 (1976) ("The sentence imposed upon a codefendant for the same offense and upon others for similar offenses are among a wide variety of factors which may be properly considered in determining a proper punishment."). If the court had been presented with evidence that the shooter in the incident and a fellow non-shooter received sentences shorter than fifty years, it probably would have taken those sentences into account in its determination of Kenneth's sentence. Preventing Kenneth from presenting this evidence in sentencing deprived him of the opportunity to present evidence of a salient factor in the sentencing determination. *See State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) ("A judge . . . 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."); *Brouwer*, 346 S.C. at 387, 550 S.E.2d at 922 (reversing a sentence disproportionate to

similarly situated codefendants because it punished Brouwer for exercising his right to a jury trial when the “record fails to reflect an otherwise appropriate basis for Brouwer's disparate sentence” and the trial judge “explain[ed] that [the codefendant] received a more lenient sentence because she admitted guilt”).

In light of the sentences imposed upon the adult shooter and the adult non-shooter, who was similarly situated to Kenneth, a juvenile, Kenneth’s sentence violates the proportionality principle embodied within the South Carolina Constitution. Nor does his sentence reflect his level of culpability. The shooter received *twenty years less* than Kenneth and the person whose culpability was most like Kenneth’s received *thirty-five years less*. Such a disparity must be cruel and should be unusual.

3. Unconstitutional use of age as an aggravating circumstance

The Supreme Court of the United States has repeatedly referenced three class characteristics which require that children be treated differently than adults by the criminal justice system. Grounded in modern neuroscience, the Court has concluded that: (1) juveniles have “a lack of maturity and an underdeveloped sense of responsibility,” *Roper v. Simmons*, 543 at 569 U.S. 551 (2005) (internal quotation marks omitted); (2) they “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” *id.*; and, (3) “the character of a juvenile is not as well formed as that of an adult,” *id.* at 570.¹⁴ *See also*

¹⁴ Outside influences, especially peer participation, significantly impact juvenile decision-making processes by heightening risk-taking behavior and further restricting in the moment reflection on long-term consequences. *See* Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain’s Reward Circuitry*,¹⁴ DEVELOPMENTAL SCI. F1, F7 (“age difference in reward system activity was dependent on social context... presence of peers differentially sensitizes adolescents to the reward value of risky choices. . . . Adolescents demonstrated significantly greater activation of [ventral striatum] VS and [orbitofrontal cortex] OFC as they rendered decisions about risk, but only when they were aware that their friends were watching them.”); *see also* Laurence Steinberg & Kathryn C. Monahan, *Age Differences in*

Graham, 560 U.S. at 68, 71–72, 130; *Miller v. Alabama*, 567 U.S. 460, 470–71 (2012). The South Carolina Supreme Court pointed to these same factors in *Aiken*, 410 S.C. at 765, S.E.2d at 572 (citing *Miller*, 567 U.S. at 470–71) when it vacated all juvenile life without parole sentences in the state because the sentencing hearings which produced those sentences did not give those factors sufficient mitigating weight.

The aspects of youth that the Supreme Court noted in its recent juvenile sentencing decisions as reducing a juvenile’s culpability include impulsivity and a significantly diminished capacity to engage in rational decision-making, especially in stressful situations. *Miller*, 567 U.S. at 471–72 (noting fundamental differences between the brains of juveniles and adults in areas “involved in behavior control”) (quoting *Graham*, 560 U.S. at 68). Because the brains of juveniles are not “‘fully mature in regions and systems related to higher executive functions such as impulse control, planning and risk avoidance,’” juveniles have a constitutionally different level of moral blameworthiness than adults. *Id.* at 472 n.5 (quoting Br. for Am. Psych. Ass’n et al. as Amici Curiae in Support of Pets., *Miller v. Alabama*, 567 U.S. 460 (nos. 10-9646, 10-9647), at *4).¹⁵

Resistance to Peer Influence, 43 DEV. PSYCH. 1531, 1538–39 (2007) (finding weak resistance to peer influence in adolescents). Cognitive processing in social groups is compounded by already dampened responses to risk in people under 21 years of age due to adolescent synaptic pruning and subsequent myelination (increases in brain maturation and processing speeds) that only begins in early adulthood. See Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78, 94 (2008); see also Lars T. Westlye et al, *Life-Span Changes of the Human Brain White Matter: Diffusion Tensor Imaging (DTI) and Volumetry*, 20 CEREBRAL CORTEX 2055, 2062 (2010).

¹⁵ See also Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 BRAIN & COGNITION 160, 162 (2010) (“From this perspective, middle adolescence (roughly 14–17) should be a period of especially heightened vulnerability to risky behavior, because sensation-seeking is high and self-regulation is still immature. And, in fact, many risk behaviors follow this pattern, including unprotected sex, criminal behavior, attempted suicide, and reckless driving.”); Sarah-Jayne Blakemore, *Imaging Brain Development: The*

Despite acknowledging the uncontradicted evidence of Kenneth’s accomplishments and rehabilitation while in DJJ, Judge Harrington sentenced him to fifty years in prison because Kenneth, who was fifteen at the time of the offense, “had a choice” when he got into the car on the night of the offense. Sentencing Tr. 356. Of course, Richard Simmons, who was twenty at the time of the offense, had choices too. He chose to jump in his car and give chase, he chose to shoot Kedena Brown despite Kenneth and Anderson urging him not to do so, and he chose to lie to the police, denying that he was the shooter and blaming Ms. Brown’s death on Kenneth for more than two years after his arrest. For his choices, which were objectively worse than those made by Kenneth, he was rewarded with the mandatory-minimum sentence of thirty years. Kenneth, on the other hand, unless this Court intervenes, will die as an inmate.

The fundamental problem with the trial judge’s decision to impose a draconian sentence on a fifteen-year-old non-shooter based on the fact that he had a “choice” is that she turned the very same characteristics that the Supreme Court has recognized as legally mitigating—the impulsiveness and poor decision-making of youth—into a reason to enhance his sentence; his impaired decision-making ability justified her decision to ensure death by incarceration.¹⁶ His choice, which was a direct result of the characteristics identified by the Supreme Court:

Adolescent Brain, 61 NEUROIMAGE 397, 404 (2012) (“The plentiful data that consistently paint a picture of the adolescent brain as relatively immature might speak against the relatively young age of criminal responsibility and harsh sentences for adolescents.”).

¹⁶ Kenneth was released from custody of the Department of Juvenile Justice (DJJ) and allowed to return home forty-five days before the crime in question. DJJ evaluators recommended that Kenneth, despite a score requesting commitment, be placed in a mandatory alternative placement in a group care facility due both to the “negative peer associations and a need for structure” and his need for “a higher level of care than community supervision.” Family Court Tr. 311–12, 315. However, instead of placing Kenneth in a facility that provided structure, rules, and educational opportunities, Judge Long released him on probation and house arrest back into his home community on March 31, 2016. Family Court Tr. 313.

immaturity, peer pressure, and the lack of a well-formed character became aggravating, not mitigating, circumstances.¹⁷

The Eighth Amendment prohibits courts and jurors from using what is legally deemed mitigating evidence, such as young age or evidence of a defendant's mental illness, as an aggravating circumstance. See *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (citing *Miller v. State*, 373 So. 2d 882, 885–86 (Fla. 1979) (vacating death sentence where the judge sentenced defendant to death to avoid his potential release from prison because defendant suffered from an incurable mental illness)). When an aggravating factor arises directly out of evidence that would otherwise be mitigating, the factor cannot be used to enhance a defendant's punishment. *Miller v. State*, 373 So. 2d at 886. In other words, evidence that is supposed to extenuate an individual's moral culpability cannot be twisted and used against the defendant to increase the severity of his sentence.

However, Judge Harrington did exactly that; she penalized Kenneth for having an impaired ability to choose. By resting the fifty-year sentence on the fact that he made a “choice” she not only taxed him for exercising his right to trial and to appeal, but she also converted Kenneth's youth, and its hallmark features, into an aggravating circumstance. Judge Harrington used Kenneth's youthful impulsiveness and inability to make rational decisions as a reason to sentence Kenneth to nearly twice as much time as the adult trigger-person, Richard Simmons,

¹⁷ The impaired decision-making ability present in all teenagers was especially salient in Kenneth's case. The uncontradicted expert testimony at his sentencing hearing revealed that he suffered from both Borderline Intellectual Functioning and Post-Traumatic Stress Disorder. Dr. Knight testified that Kenneth's cognitive and intellectual maturity is lower than that of his same age peers, and that he had specific deficits in cognitive processing speed. Sentencing Tr. 232-33. Thus, Kenneth's individual deficits, in addition to the immature brain development present in all fifteen-year-old adolescents, made him more susceptible to making poor choices when required to make a quick decision, i.e., whether to get into a car to chase people who shot at him and his acquaintances. Sentencing Tr. 229-32.

ultimately received. The Eighth Amendment prohibits using characteristics that result from evidence that would be mitigating (here, the impetuosity resulting from youth) as a reason to give a defendant a more severe sentence. *See Zant*, 462 U.S. 862, 885; *Miller v. State*, 373 So. 2d at 885–86.

4. The newly discovered evidence would change the result and is material.

The after-discovered evidence would probably change the result of Kenneth’s sentencing and allow him to challenge the violation of his rights to a jury trial and due process. As explained the after-discovered evidence demonstrated that Kenneth was “taxed” for rebuffing the State’s plea and appeal waiver offers and electing to go to trial and appeal, the disparate sentences indicate that Kenneth’s sentence is disproportionate to his role in the offense, and that the judge used his age as an aggravating circumstance.

Further, the evidence is material to Kenneth’s case, as it directly relates to whether the sentence that the trial court imposed on him was appropriate and proportional, in light of his age and role in the crime, or rather, the product of retaliation for Kenneth’s choice to exercise his rights to a jury trial and to appeal and a judge’s misinterpretation of constitutional mandates to give youth constitutional significance. Kenneth, who was fifteen years old when the incident occurred, was a non-shooter, but he received a fifty-year sentence. But Simmons, the adult shooter, received thirty years after accepting a plea bargain, while Anderson, a fellow non-shooter, only received fifteen years after similarly accepting an *Alford* plea. Accordingly, this after-discovered evidence is highly probative to whether Robinson’s sentence was appropriate and whether his constitutional rights were violated.

In sum, Kenneth easily satisfied the remaining prongs of the *South* test in order to obtain a new sentencing because the sentences of his co-defendants were not discovered, and could not

be discovered until after Kenneth's trial where the co-defendants were not sentenced until the end of Kenneth's trial and sentencing, and the evidence was not merely cumulative or impeaching of any evidence already presented to the sentencing judge. The judge erred in denying Kenneth's motion for new sentencing based upon after-discovered evidence.

CONCLUSION

Regarding Issue I, Appellant respectfully requests this Court vacate the order transferring jurisdiction and remand for a new transfer hearing in order to decide whether to retain or waive Kenneth to the Court of General Sessions based on a materially accurate record. Regarding Issues II, III, and IV, Appellant respectfully requests this Court reverse his convictions and remand for a new trial. Finally, regarding Issue V, Appellant respectfully requests this Court vacate his fifty-year sentence and remand for a new sentencing hearing.

s/John H. Blume
John H. Blume
Cornell Law School

s/Megan S. Ehrlich
Megan S. Ehrlich
Charleston County Public Defender Office

s/Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEYS FOR APPELLANT

This 30th day of June, 2020.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Jun 30 2020

Appeal from Charleston County

SC Court of Appeals

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH LAMONT ROBINSON, JR.

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is, MBrown@scag.gov and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Kenneth Lamont Robinson, #376714, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 30th day of June, 2020.

s/Susan B. Hackett

Susan B. Hackett

Appellate Defender

ATTORNEY FOR APPELLANT