STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Honorable Kristi F. Curtis, Circuit Court Judge

RECEIVED

Jul 29 2020

S.C. SUPREME COURT

TERVIN GOODMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001992

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I.

Whether the PCR court erred in finding that Petitioner had failed to meet his burden of proving he did not voluntarily and intelligently waive his right to appeal and that counsel was not ineffective where counsel failed to file an appeal of Petitioner's life sentence following a resentencing hearing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765, S.E.2d 572 (2014), where counsel for Petitioner did not file an appeal because he mistakenly believed he had to submit a "legal basis" to support an appeal, where Petitioner had expressed a desire to appeal, and where Petitioner had meritorious grounds to appeal?

II.

Whether the PCR court erred in finding that counsel for Petitioner was not ineffective because he presented proper mitigation at the resentencing hearing where counsel testified that he was advised to prepare for the resentencing hearing as if it were a death penalty sentencing case, then counsel only called one witness to testify on behalf of Petitioner during the hearing, and where that witness was a social worker that primarily relied on a battery of twelve year old psychological, personality, and IQ tests to form his expert opinion, since counsel was not effective under these circumstances?

STATEMENT OF THE CASE

Petitioner was raised by a single mother with multiple half-brothers and half-sisters. In his early years his family lived in Florida. There Petitioner had two uncles that were involved in his life as positive male role models. Just as Petitioner was beginning grade school the family moved to South Carolina. In order for his mother to work and have affordable housing, the family was often forced to move. The frequent moving meant Petitioner was in a different school almost every year. App. 58, ll. 17-25.

At a young age Petitioner began drinking and experimenting with drugs. App. 56, ll. 6-18. Petitioner first entered the criminal justice system shortly after he turned thirteen. Petitioner was charged with various burglaries and an armed robbery in February or March of 2004 which had occurred when Petitioner was only twelve years old. The charges were processed through Family Court and Petitioner was sentenced to a term of incarceration at DJJ. App. 33-35. Petitioner was in the custody of DJJ for approximately three years. App. 57, ll. 16-17.

At age fourteen, while in the custody of DJJ, Petitioner underwent a battery of personality and psychological tests[1]. App. 53, ll. 3-21. The various tests and evaluations indicated that Petitioner had a low average IQ, that his school level functioning was slightly delayed and below his grade level, that his visual motor integration skills were low average, that he had a conduct disorder and difficulty with authority, that he used drugs and alcohol, and that Petitioner had a general tendency to resolve social and personal problems without regard to societal rules and expectations. App. 54-56.

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1 Petitioner was given the Wechsler Abbreviated Scale of Intelligence Test, a standard IQ test, the California Achievement Test, a school functioning test, the Beery-Buktenica Development Test of the Visual-Motor Integration, a test measuring developmental adjustment, the Minnesota Multiphasic Personality Inventory-Adolescent Test, a personality inventory, the Substance Abuse Screening Inventory Adolescent Test, and the Jesness Inventory-Revised Test, a personality and psychotherapy evaluation for children and adolescents. App. 54-56.

During his time at DJJ, Petitioner was able to join the JROTC and maintain membership in the program. Petitioner was also able to earn his GED. Additionally, Petitioner participated in a multidisciplinary treatment program that worked to address not only his behavioral problems but his drug and alcohol use as well. App. 57, l. 24-App. 58, l. 7.

Petitioner was released from DJJ and placed on community supervision roughly ten to twelve months before his June 2008 arrest. App. 34, ll. 7-13; App. 68, l. 12. Initially, Petitioner moved to Florida to live with his older sister. There his uncles who had previously positively impacted Petitioner and helped create stability took an active role in his life. During the roughly six months that Petitioner was in Florida he was able to maintain gainful employment and stayed out of trouble. A traffic ticket for driving without a license caused Petitioner to return to South Carolina. App. 59, ll. 6-24.

Back in South Carolina Petitioner lived with his mother and some of his half-brothers. While around these new individuals Petitioner started using drugs and alcohol again. Petitioner once again began to make poor decisions and was eventually arrested in June of 2008 for murder, first degree burglary, and grand larceny. App. 68, l. 18-App. 69, l. 10. Petitioner was just seventeen years old at the time of his arrest. App. 38, ll. 3-4.

Guilty Plea and First PCR

A Sumter County grand jury indicted Petitioner on the murder, first degree burglary, and grand larceny charges during the November 2009 term. App. 162-163. Petitioner's trial was set to begin on September 19, 2011, before the Honorable Howard P. King. Prior to the start of the trial Petitioner decided to enter a guilty plea[2] to the murder and burglary charges. App. 1-2.

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2 The grand larceny charge was dismissed as part of the plea deal. App. 3, ll. 8-12.

At the guilty plea the state was represented by John Meadors. Petitioner was represented by Charles Brooks. App. 1. In support of the plea the state alleged that Petitioner entered the home of the decedent to commit a burglary. While looking around the home, Petitioner was surprised by the decedent and he struck her over the head with a ceramic vase which caused her death. The decedent's blood was found in various places in the home and Petitioner's fingerprints were found on the ceramic vase. Petitioner fled the decedent's home in her car. Petitioner and various friends and family members used the decedent's car and cellphone over the course of the next four days. After being confronted by law enforcement, Petitioner eventually admitted to the burglary and murder. App. 12-26. Judge King accepted Petitioner's guilty plea and sentenced Petitioner to two consecutive terms of life imprisonment. App. 43-44. Petitioner, who had been incarcerated since his arrest in 2008, was twenty years old when he pled guilty. App. 4, ll. 12-13.

Petitioner filed an initial PCR application on May 16, 2012, only challenging the constitutionality of his life sentence on the first degree burglary conviction pursuant to Graham v. Florida, 560 U.S. 48 (2010) (holding the Eight Amendment prohibits the imposition of a life without parole sentence on juvenile offenders who did not commit homicide). An evidentiary hearing was convened before the Honorable Brooks P. Goldsmith on March 17, 2016. At the hearing the state conceded that the life sentence on the burglary charge was unconstitutional and that Petitioner was entitled to resentencing on that charge. The order granting PCR on the limited issue of the unconstitutionality of a juvenile being give a life sentence without parole for a nonhomicide offense under Graham, *supra*, was filed on April 7, 2016. App. 152.

The Resentencing Hearing

After the initial PCR hearing but prior to the resentencing hearing, Timothy Murphy, counsel for Petitioner, filed a petition for resentencing on the murder charge pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014) (holding life without parole sentences for juveniles without individualized consideration of their youth constituted cruel and unusual punishment under the Eight Amendment). App. 48. The resentencing hearing was convened before the Honorable William H. Seals, Jr. on October 5, 2017. App. 46. The state was represented by Ernest Finney, III, and Lisa Beharry. Petitioner was represented by Timothy Murphy. App. 46.

The sole witness that Counsel Murphy presented on behalf of Petitioner was Jim Manning, a licensed social worker. Manning was qualified as an expert in "social history and child development." App. 50, l. 24-App. 51, l. 1. To prepare for the resentencing hearing Manning spoke with Petitioner on two occasions. Manning also interviewed various members of Petitioner's family, reviewed the facts of the underlying case, and reviewed the records from Petitioner's time in Sumter County public schools, DJJ, Sumter County Detention Center, and SCDC. App. 51, ll. 18-25. In examining those records Manning also reviewed the various psychological and personality test that Petitioner had been given at age fourteen. App. 53, ll. 3-21. Manning did not conduct any testing or evaluation of his own. Additionally, he testified that he was not aware of Petitioner undergoing any subsequent tests or evaluations. App. 57, ll. 2-11.

Manning testified that the tests revealed Petitioner's low average IQ, his delayed school functioning, his low average visual motor skills integration, his conduct disorder and difficulties with authority, his drug and alcohol use at a young age, and his tendency to resolve problems without regard for societal rules and expectations. App. 54-56. Manning also testified to the success that Petitioner achieved during his incarceration at DJJ and how Petitioner continued

building on that success when he was in the structured, stable, positive environment in Florida. App. 58, ll. 3-10; App. 59, ll. 17-24.

Manning stated that, at the time of the June 2008 incident, Petitioner was a "follower-type" who "thought in the moment" and did not think about the long-term consequences of his actions. App. 60, ll. 1-5; App. 61, ll. 6-12. He testified that there was no indication of a well thought out and planned approach to avoid being held responsible for the crimes. App. 61, ll. 3-5. Manning opined that Petitioner was capable of rehabilitation in a structured environment, and that over time, Petitioner could be released back into society. App. 61, l. 25-App. 62, l. 15.

The state cross-examined Manning on Petitioner's disciplinary record within DJJ and SCDC. App. 63, ll. 6-24; App. 70-71. The state also elicited testimony that Petitioner was not prescribed any medication for his attention or conduct disorder diagnoses, that Petitioner's older siblings had had some prior trouble with law enforcement but were now gainfully employed, and that it appeared Petitioner committed the crimes he had been arrested for entirely by himself. App. 64, ll. 5-9; App. 65, ll. 8-22; App. 66, ll. 9-13.

Once Counsel Murphy rested Petitioner's case, the state called Irene Culsek to the stand. Culsek was a detective with the Sumter Police Department and had been involved in the investigation of the 2008 crimes. Culsek testified to the details of the crimes and the investigation that led to Petitioner's arrest. App. 73-83. Culsek also testified to Petitioner's ability to interact with law enforcement during the time of the investigation and stated that she believed Petitioner acted "appropriately" for his age. App. 83-87. On cross examination Culsek did concede that it was unusual for an offender to continue to openly use property they had taken from a crime and that she found it odd that Petitioner had continued to use the decedent's vehicle and cellphone after the crimes. App. 90-91.

The state next called Gayle Wenzel, the decedent's daughter, Joseph Horger, the decedent's younger brother, and Charles Horger, the decedent's eldest brother. Each family member offered victim impact testimony and spoke about how the loss of the decedent had affected them. All three also testified that they were in favor of the life sentence that had been originally pronounced. App. 92-101.

After the state rested its case, Petitioner stood and made a statement to the court. In his statement Petitioner expressed his remorse for committing the crimes and repeatedly apologized to the decedent's family. Petitioner stated that he had changed in the nine years since the murder and that he was not the same person anymore. Petitioner took responsibility for the crimes but noted that he was young when they occurred and simply asked that he not receive the "harshest punishment." App. 101-102.

At the conclusion of the resentencing hearing Judge Seals reviewed the five factors[3] set forth in Miller v. Alabama, 567 U.S. 460 (2012) (holding that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violated the Eighth Amendment's prohibition on cruel and unusual punishments). As to factor one Judge Seals found that, at seventeen, Petitioner was "pretty much a grown man … one step away from manhood." The court further found that Petitioner had "plenty of time to grow up and mature while at DJJ" and that based on his juvenile record that he "understood the risks and consequences" associated with his actions. App. 109, l. 20-App. 110, l. 16.

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3 The five factors set out in Miller are: 1) the chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate the risks and consequence"; 2) the "family and home environment" that surrounded the offender; 3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; 4) the "incompetencies associated with youth—for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys"; and 5) the "possibility of rehabilitation." Miller at 477-478.

As to factor two Judge Seals ruled that Petitioner's home environment was "relatively stable…much better that many other defendants that I have come in contact with." He found the home environment to be "way better than average" and stated that Petitioner "doesn't seem like he's even trying to learn that there are consequences for what he does." App. 110, l. 17-App. 111, l. 8. As to factor three, Judge Seals found that Petitioner acted alone in the commission of the crimes. He stated there was "no mention of gangs … [t]here was no mention of any peer pressure. He simply did a horrendous act by himself." App. 111, ll. 9-14.

Regarding factor four Judge Seals found that Petitioner's IQ was in the average range and that "[i]t may have been on the low end of average but mine may be, too, but we're all in average." The court stated that Petitioner was able to obtain his GED while in DJJ, that he carried on conversations like a normal person would, and that there was no indication of any mental health issues or drug and alcohol impairment. Further the court stated that Petitioner was "smart enough to try to give a false statement, implicating other people, trying to save himself. So he had some savvy." App. 111, l. 15-App. 112, l. 6.

As to factor five Judge Seals found that Petitioner had had multiple run-ins with law enforcement, "essentially all of his life, including many crimes very similar to this one." He stated that Petitioner had been housed in a secure facility "in hopes that he would learn something, maybe correct himself … it obviously hasn't worked." App. 112, ll. 7-14.

In handing down the sentence Judge Seals stated, "[i]n this Court's opinion the best thing that we can do at this time is to protect society." Judge Seals sentenced Petitioner to life without parole on the murder charge and a consecutive thirty years on the burglary charge. App. 112, ll. 14-18. Petitioner was twenty-six years old at the time of the resentencing hearing.

The PCR Hearing

Petitioner filed the present PCR application on August 6, 2018, alleging ineffective assistance of counsel during the resentencing hearing. App. 114-121. The state filed a return and partial motion to dismiss dated October 22, 2018. App. 122-129. An evidentiary hearing was convened before the Honorable Krisit F. Curtis on March 27, 2019. Janell Gregory appeared on behalf of the state. Petitioner was represented by Timothy Griffith. App. 130.

At the PCR hearing Petitioner testified that when he asked Counsel Murphy about appealing the outcome of the resentencing hearing Counsel Murphy told him that he could not file an appeal. Specifically, Petitioner testified that Counsel Murphy told him "no" when he asked if he could appeal Judge Seal's ruling. App. 136, l. 22-App. 137, ll. 5. Petitioner further testified that the only mitigation evidence presented at the hearing were the tests from when he was fourteen years old in DJJ. Petitioner stated that he had never again been tested or evaluated in the fourteen years between when he committed the crimes and the PCR hearing. App. 138, ll. 5-App. 139, ll. 2.

Counsel Murphy testified that the Office of Indigent Defense had advised him to prepare for the resentencing hearing as if he was handling "a death penalty case." Therefore, he hired a mitigation expert, Margaret O'Shea. App. 142, ll. 3-8. Sometime after hiring O'Shea, Counsel Murphy hired Jim Manning because O'Shea "didn't like to testify." Manning reviewed the records and tests from Petitioner's past and spoke with Petitioner and his family to prepare for the hearing. App. 142, ll. 15-24. Counsel Murphy said that the test from when Petitioner was young "helped explain his state of mind" which is why he presented them in mitigation. App. 143, ll. 15-24.

Counsel Murphy's overall strategy was to present Petitioner as someone who was capable of maturing. He stated that in presenting the tests he was showing that Petitioner "had learning issues, issues with authority, those kind of things" and was immature at the time of the incident. App. 143, l. 24-App. 144, l. 7. Counsel Murphy testified that there were no other favorable tests or reports that could have been presented to the resentencing court. App. 144, ll. 17-19.

Regarding the appeal, Counsel Murphy testified he discussed, in general, the appeal process with Petitioner during their first meeting. Counsel Murphy stated that he did not think Petitioner asked him about the appeal and that he told Petitioner there were not any legal issues to appeal. He testified that he would never tell a client they could not appeal but that he tells clients when there are not any legal bases for an appeal because "it's a waste of time most of the time." Further, Counsel Murphy stated that he would have had to provide a basis for the appeal to the Court of Appeals and that he believed there were not any legal bases to appeal from Petitioner's resentencing hearing. Counsel Murphy stated that if Petitioner had asked for an appeal, he would have filed one with an explanation to the court that he was only filing the appeal to preserve his client's right to appeal. App. 147-149.

An order of dismissal was issued on April 15, 2019. App. 151-161. The order found that Counsel Murphy had provided effective representation and presented proper mitigation at the resentencing hearing. The PCR court further ruled that Petitioner had failed to prove that he did not voluntarily and intelligently waive his right to appeal after the resentencing hearing. App. 158-160.

This petition for writ of certiorari follows.

ARGUMENT

I.

The PCR court erred in finding that Petitioner had failed to meet his burden of proving he did not voluntarily and intelligently waive his right to appeal and that counsel was not ineffective where counsel failed to file an appeal of Petitioner's life sentence following a resentencing hearing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765, S.E.2d 572 (2014), where counsel for Petitioner did not file an appeal because he mistakenly believed he had to submit a "legal basis" to support the appeal, where Petitioner had expressed a desire to appeal, and where Petitioner had meritorious grounds to appeal.

Counsel Murphy's failure to file an appeal was deficient performance that resulted in prejudice to Petitioner as he was denied appellate review of a life sentence for an offense he committed as a juvenile. Considering that the South Carolina appellate courts have not articulated the standard of review to determine whether a sentencing court has compiled with Miller v. Alabama, 567 U.S. 460 (2012) and Aiken v. Byars, *supra*, counsel had no way of determining that Petitioner did not have a meritorious appeal. Further, Petitioner had expressed a desire to appeal, and therefore Counsel Murphy had an obligation to file a notice of appeal.

In Roe v. Flores-Ortega, 528 U.S. 470, 478 (2000), the United States Supreme Court rejected a *per se* rule that found counsel deficient for failing to file a notice of appeal absent specific instructions from a defendant not to file an appeal. The Court held that the *per se* rule was inconsistent with Strickland's holding that "the performance inquiry must be whether counsel's assistance was *reasonable considering all the circumstances*." Id at 478 *citing* Strickland v. Washington 466 U.S. 668 at 688 (1984) (emphasis added). The Court announced a new standard of review and held, that "counsel has a constitutionally imposed duty to consult

with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Id. at 480. The Court stated that in considering the factors lower courts "must take into account all the information counsel knew or should have known." Id.

In White v. State, 263 S.C. 110, 208 S.E.2d. 35 (1974) this Court held that a defendant must knowingly and intelligently waive the right to appeal from his conviction and sentence. Since then, this Court has announced two distinct standards for evaluating ineffective assistance of counsel claims for failure to file an appeal. For guilty pleas, this Court has held that "absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995). For convictions following a trial this Court has held that "[i]n the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967)." Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008).

In the present matter, there is no evidence in the record to support a finding that Petitioner knowingly and voluntarily waived his right to appeal. Petitioner testified that when he asked if he could appeal the resentencing hearing Counsel Murphy told him "no." While Counsel Murphy denied telling Petitioner that he could not appeal, he did admit that he told Petitioner that there were not any "legal issues" to appeal. Further, Counsel Murphy testified that he only spoke to Petitioner about the appellate process "in general" at the beginning of the representation and that it was his usual practice to discuss the appeal process with clients *"involved in a plea."* Notably, Counsel Murphy never definitively stated that Petitioner did not

show an interest in filing an appeal and could only testify that he *did not think* Petitioner had asked him about an appeal.

In Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 740 (2010), this Court found the PCR court erred in denying Simuel a belated appeal pursuant to White v. State, *supra*, because there was "no probative evidence that Petitioner knowingly waived his right to a direct appeal" nor was there any probative evidence that counsel "made certain Petitioner was fully aware of his right to appeal." At the PCR hearing counsel testified that he "normally discusses an appeal with defendants after trials, but was not sure whether he did so with Petitioner." Id. at 270, 701 S.E.2d at 739. He further testified that Simuel never asked him to file an appeal. Id. at 269, 701 S.E.2d at 739. The PCR court found counsel's testimony credible and Simuel's testimony not credible. The court rule that based on the testimony of counsel, Simuel was not entitled to a belated appeal because he did not request counsel file an appeal on his behalf. Id.

In reversing the decision of the PCR court and granting Simuel a belated appeal, this Court explained: "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Id. (internal quotations omitted) (quoting Sheppard v. State[4], 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)). "Even considering the PCR judge's credibility findings, there is no *probative evidence* that: (1) Petitioner knowingly waived his right to a direct appeal, and (2) [trial counsel] made certain Petitioner was fully aware of his right to appeal." *Id*. at 271, 701 S.E.2d 739-40 (emphasis added).

Here, as in Simuel, even considering the courts credibility findings, there was no *probative* evidence that Petitioner knowingly waive his right to a direct appeal or that Counsel Murphy made certain that Petitioner was fully aware of his right to appeal. In ruling that

4 Overruled on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

Petitioner had not proven that he did not voluntarily waive his right to appeal the PCR court failed to consider the holding in Simuel. Under the holding in Simuel, Counsel Murphy's failure to fully consult with Petitioner about his appellate rights and his subsequent failure to file an appeal constituted ineffective assistance of counsel.

Further, despite Counsel Murphy's belief that there were "no legal issues" to appeal, Petitioner did, in fact, have meritorious grounds for an appeal. Notably, Counsel Murphy was mistaken in his belief that he was required to provide a "legal basis" to justify the appeal to the Court of Appeals. Counsel Murphy incorrectly believed that Rule 203(d)(1)(B)(iv), SCACR, which requires a "written explanation showing that there is an issue which can be reviewed on appeal" be submitted when an appeal is from a guilty plea, applied to Petitioner's potential appeal from his resentencing hearing. Petitioner's original conviction and sentence were the result of a guilty plea and an appeal from that hearing would have required explanation under Rule 203(d)(1)(B)(iv), SCACR. However, any appeal from the resentencing hearing would not have required an explanation of any appealable issues.

Counsel Murphy's mistaken understanding of the appellate process and his failure to file an appeal after Petitioner had demonstrated a reasonable interest in appealing by asking about filing an appeal was deficient performance that prejudiced Petitioner. While Petitioner is only required to demonstrate that, but for counsel's deficient conduct, he would have appealed, Petitioner can also show that there were potentially meritorious grounds for an appeal. Roe v. Flores-Ortega, 528 U.S. at 486.

In re-sentencing Petitioner to life without the possibility of parole the sentencing court ignored the key factor that it was supposed to consider – that Petitioner was in fact a juvenile at the time of the murder. Instead of considering "the hallmark features of youth prior to

sentencing" as required by Miller and Aiken the resentencing court ruled that at age seventeen Petitioner "pretty much was a grown man." In evaluating the Miller factors, the sentencing court failed to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Aiken, 410 S.C. at 543, 765 S.E.2d at 577.

Importantly, the sentencing judge also failed to make a finding of irreparably depravity or corruption, as required by federal case law, before sentencing Petitioner to life without parole. See Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2010); Montgomery v. Louisiana, 136 S.Ct. 718 (2016); Tatum v. Arizona, 137 S.Ct. 22 (2016). Multiple state courts considering the imposition of a life sentence on a juvenile offender have also come to the same conclusion as the federal courts – that the Eight Amendment requires a finding that the juvenile is irreparably corrupt in order for a life sentence to be imposed. Absent such finding, the defendant is entitled to a new sentencing hearing. See State v. Sweet, 879 N.W.2d 811 (Iowa 2016); Veal v. State, 784 S.E.2d 403 (Ga. 2016); Landrum v. State, 192 So.3d 459 (Fla. 2016); People v. Holman, 91 N.E.3d 849 (Ill. 2017); Commonwealth v. Batts, 163 A.3d. 410 (Pa. 2017);; Davis v. State, 415 P.3d 666 (Wyo. 2018).

While the appellate courts of this state have yet to set forth a standard of review for determining whether a sentencing court complied with the Miller factors, in Aiken v. Byars, *supra*, this Court observed that "Miller is clear that it is the *failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution*." Aiken at 543, 765 S.E.2d at 576-77 (emphasis added). When, as here, the sentencing court disregards the age of the juvenile offender and resentences that juvenile to the "harshest possible punishment" it was incumbent upon counsel to file an appeal. Montgomery v. Louisiana, 136 S.Ct. 718 (2016) (in light of children's diminished culpability and heightened capacity for

change, Miller made clear that appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon).

As the United States Supreme Court stated in Lafler v. Cooper, 566 U.S. 156, 165 (2012), "ineffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because *any amount of additional jail time has Sixth Amendment significance*." (internal quotations and alterations omitted) (quoting Glover v. United States, 531 U.S. 198, 203 (2001)) (emphasis added). Although not required to do so, Petitioner has shown actual prejudice by outlining one of the many appealable issues that could have arisen from his resentencing hearing. However, in the present action prejudice should be presumed because Petitioner was denied access to the appellate process, even after Petitioner demonstrated he was interested in filing an appeal. Roe v. Flores-Ortega, 528 U.S. at 483 (the even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right, similarly demands a presumption of prejudice).

II.

The PCR court erred in finding that counsel for Petitioner presented proper mitigation at the resentencing hearing where counsel testified that he was advised to prepare for the resentencing hearing as if it were a death penalty sentencing case, where counsel only called one witness to testify on behalf of Petitioner during the hearing, and where that witness was a social worker that primarily relied on a battery of twelve year old psychological, personality, and IQ tests to form his expert opinion.

Counsel Murphy failed to adequately prepare and present mitigating evidence at Petitioner's resentencing hearing. From the record it appears that the expert witness who testified only did cursory interviews with Petitioner and his family members and reviewed records from when Petitioner was a juvenile. Counsel Murphy presented no other information in mitigation. The inadequate investigation and limited presentation was deficient performance that prejudiced Petitioner.

"[S]entencing is a critical stage of the criminal proceeding at which [a defendant] is entitled to the effective assistance of counsel." Gardner v. Florida, 430 U.S. 349, 358 (1977). The Sixth Amendment provides a right to counsel during sentencing in both noncapital and capital cases. Lafler v. Cooper, 566 U.S. 156, 165 (2012). "Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because *any amount of additional jail time has Sixth Amendment significance*." Id. (internal quotations and alterations omitted) (quoting Glover v. United States, 531 U.S. 198, 203 (2001)) (emphasis added).

Importantly, the jurisprudence of this state sets forth the principle that, where it falls to the court to determine the appropriate punishment to be imposed, and there is any discretion as to

the punishment, it is the correct practice that the court hear evidence in mitigation or aggravation of the punishment. See, State v. Adcock, 194 S.C. 234, 9 S.E.2d 730, 732 (1940); State v. Green, 220 S.C. 315, 318, 67 S.E.2d 509, 510 (1951). It is therefore incumbent upon counsel to bring to the court's attention any relevant mitigating evidence prior to sentencing.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. 668, 691, (1984). Counsel's failure to either discover reasonably available mitigating evidence or present mitigating evidence at sentencing can support a finding of ineffective assistance of counsel. See Pike v. Gross, 936 F.3d 372, 379 (6th Cir. 2019) *citing* Williams v. Taylor, 529 U.S. 362, 395-96 (2000); *citing* Wiggins v. Smith, 539 U.S. 510, 521 (2003). See also Campbell v. Polk, 447 F.3d 270, 282 (4th Cir. 2006). In Council v. State, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008), this Court held that counsel was ineffective for failing to adequately investigate and present mitigating evidence. This Court further held that counsel's failure to present mitigating evidence could not be excused as a reasonable strategic decision. Id. at 175, 670 S.E.2d at 363.

In Council the only evidence that was presented in mitigation was the testimony of petitioner's mother. This testimony was extremely limited and brief, informing the jury that petitioner had received some mental health treatment between the ages of seven and fourteen. However, there was no medical evidence or other testimony describing petitioner's mental health issues. Id. at 177, 670 S.E.2d at 365. Further, counsel failed to investigate and obtain the records of petitioner's immediate family members and he failed to develop a social history of petitioner, despite being provided the funds to hire a social history investigator. Id. at 173-174, 670 S.E.2d at 363. This Court noted that "even the limited information obtained should have put

counsel on notice that Respondents background, with additional investigation, could yield powerful mitigating evidence. Id. at 173, 670 S.E.2d at 363.

Here, as in Council, Counsel Murphy failed to adequately investigate and present proper mitigating evidence to the resentencing court. The record supports the conclusion that Counsel Murphy did little to no investigation himself. While he hired a mitigation expert and social worker to speak with Petitioner and Petitioner's family, it is apparent that Counsel Murphy himself did not interview any family members or investigate Petitioner's background and character. The sole witness to testify at the resentencing hearing was the social worker who was provided with twelve-year-old records and nothing else. At no point was any in depth testimony elicited about Petitioner's conduct disorder diagnosis, Petitioner's drug and alcohol use which started as early as age twelve, Petitioner's economic and social upbringing or Petitioner's homelife. Counsel Murphy's "investigation" led to the resentencing court only being given generalities about Petitioner's state of mind some twelve years prior.

Further, Counsel Murphy's failure to adequately investigate and present proper mitigation to the resentencing court cannot be excused as a reasonably strategic decision. Counsel Murphy testified that his strategy was to show that Petitioner was capable of maturing and therefore he used the old tests to show the court that Petitioner was immature at the time of the incident. However, Counsel Murphy presented no evidence to the court to show that Petitioner had matured or was capable of maturing. The tests from when Petitioner was fourteen only showed only a snapshot of Petitioner at a very specific point in time. Without other evidence of Petitioner's life, education, mental health, learning difficulties, and ability to mature, the resentencing court was left with little to rely on in terms of mitigation.

In analyzing the prejudice of an ineffective assistance of counsel claim whether a court "require[s] the defendant to show actual prejudice - a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different - or whether [a court] instead presume[s] prejudice, turns on the magnitude of the deprivation of the right to effective assistance of counsel." Flores-Ortega, 528 U.S. 470 at 482 (internal quotations and citations removed). "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." Strickland, 466 U.S. at 692 *citing* United States v. Cronic, 466 U.S., at 659, and n. 25. "Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." Id.

Courts "normally apply a strong presumption of reliability to judicial proceedings and require a defendant to overcome that presumption by showing how specific errors of counsel undermined the reliability of the [proceedings]." Flores-Ortega, 528 U.S. 470 at 482 (internal quotations and citations removed). However, "in some cases the defendant alleges not that counsel made specific errors in the course of representation, but rather that during the judicial proceeding he was - either actually or constructively - denied the assistance of counsel altogether." Id. at 483. "Under such circumstances, no specific showing of prejudice is required, because the adversary process itself is presumptively unreliable." Id.

This Court has not announced the proper framework under which to analyze any possible prejudice arising from deficient performance of counsel during a resentencing hearing pursuant to Aiken, *supra*. In Strickland, the U.S. Supreme Court noted that a "capital sentencing proceeding … is sufficiently like a trial in its adversarial format and in the existence of standards for decision … that counsel's role in the proceeding is comparable to counsel's role at trial—to

ensure that the adversarial testing process works to produce a just result under the standards governing decision." Strickland 466 U.S. at 686-687. The Court held that "when a defendant challenges a death sentence, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695.

Respectfully, a resentencing hearing of a juvenile offender pursuant to Aiken, *supra*, is, much like a death penalty sentencing proceeding, sufficiently like a trial in its adversarial format and in its existence of standards for decision. The resentencing hearings do not "involve informal proceedings and standardless discretion in the sentencer." Strickland, at 686. Thus, Petitioner submits that in cases involving ineffective assistance of counsel claims arising from counsel's performance at an Aiken hearing, the prejudice questions should be whether there is a reasonable probability that, absent counsel's errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant a life without parole sentence.

In the present case, Counsel Murphy's failure to adequately investigate and present proper mitigation at the resentencing hearing was so deficient that Petitioner was constructively denied the assistance of counsel. The lack of investigation, preparation, and presentation can be seen in the minimal and generalized testimony of the social worker at the resentencing hearing. Further, Counsel Murphy's investigation and presentation of evidence only supported a portion of his "strategy" – that Petitioner was immature at the time of the incidents. The evidence presented did not show that Petitioner had matured or was capable of maturing. Here, Counsel

Murphy failed to provide an adversarial challenge to the state, and, thus, prejudice from deficient performance should be presumed. Nance v. Ozmit, 367 S.C. 547, 626 S.E.2d 878 (2006).

Importantly, Petitioner can also show actual prejudice. Even the minimal investigation that occurred should have alerted Counsel Murphy to the fact that additional investigation and testing could yield powerful mitigation. As stated above, there was no evidence presented that explained or expounded upon Petitioner's conduct disorder diagnosis, Petitioner's drug and alcohol use which started as early as age twelve, Petitioner's economic and social upbringing or Petitioner's homelife. Petitioner was therefore prejudiced because the resentencing court was not provided with the specific mitigating circumstances it needed to be able to make an informed decision. As the Indiana Court of Appeals held in McCarty v. State, 802 N.E.2d 959 (2004),

> "[T]he prejudice McCarty suffered arose not because the court declined to recognize the mitigators but *because the mitigating circumstances were not placed before the court at all*; the court was therefore unable to even consider them. McCarty was *prejudiced by trial counsel's failure to investigate and present the available mitigation evidence because it deprived the sentencing court of the information it needed to make an informed decision and left the court little to balance against the aggravating circumstances*."

Id., at 967 (emphasis added).

Here, as in McCarty, *supra*, the court was deprived of the information it needed to make an informed decision. The resentencing court was only given generalized mitigation evidence from a narrow point in Petitioner's life. Without more, the resentencing court was left with little to balance against the aggravating factors of the incident. Therefore, Petitioner was actually prejudiced by Counsel Murphy's deficient performance.

STATEMENT OF ISSUES ON APPEAL

I.

Whether the court erred as a matter of law by sentencing Appellant to life without parole for an offense committed when Appellant was a juvenile where the court failed to find that Appellant was irreparably corrupt, which was a necessary finding that had to be made prior to sentencing a juvenile to life without parole?

II.

Whether the court erred as a matter of law by sentencing Appellant to life without parole for an offense committed when Appellant was a juvenile where the court failed to properly apply the factors from Miller v. Alabama, by (1) not giving Appellant's age and the hallmark features of youth, including immaturity, impetuosity, and the failure to appreciate the risks and consequences, the constitutional significance required pursuant to Eighth Amendment jurisprudence; and, (2) misinterpreting the Miller factor requiring consideration of the family and home environment that surrounded Appellant where the court only considered the family and home life of Appellant in the four to six months preceding the incident instead of considering the entire history of Appellant's family and home life which offered mitigating evidence in favor of a sentence of less than life without parole?

CONCLUSION

By reason of the foregoing arguments, this Court should grant Petitioner's writ of certiorari to allow full briefing on these issues.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of July, 2020.