STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
The Honorable William H. Seals, Circuit Court Judge
Appellate Case No. 2019-000521

THE STATE,

Respondent,

vs.

TERRIEL LESHAWN MACK,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Respondent accepts Appellant Terriel Lashawn Mack (Mack)'s Statement of the Case for purposes of this appeal.

STATEMENT OF FACTS PRESENTED AT 2005 TRIAL

Viewed in the light most favorable to the State, the evidence presented at trial showed that Mack murdered Joseph Todd Wilson (the victim) on December 17, 2003, as a favor to his friend, Marcus Martin (a/k/a White Boy or WB), and in order to gain rank in his gang. The victim's offense that necessitated his murder? He survived the murder of another man and an attempt on his own life the previous day, and he could identify Martin as the assailant in that shooting.

Patrolman Legrand Gowdy, of the City of Florence Police Department, testified that after his shift ended on December 17, 2003, he headed back to headquarters between 6:00 and 6:30 pm. His route took him down Oakland Ave., in the City of Florence. As he passed Oakland Plantation Apartments, he saw three men standing in the parking lot, facing each other and wearing dark clothes.[1] Seconds later, he heard three "loud bangs," which sounded like "either gunshots or fireworks." So, he turned his car around and went to the parking lot to investigate. ***R. 2-5***.

By the time Patrolman Gowdy reached the parking lot, two of the three men that he had seen were no longer present.[2] However, the victim was lying on the pavement with a gunshot wound to the head, there was a pool of blood around his head, and he did not have a pulse. Another man was present and Patrolman Gowdy detained the man for his protection.[3] Patrolman Gowdy

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[1] Although it was dark, there was adequate lighting in the area for him to see the men, but he could not to identify them. ***R. 9-11***.

[2] He testified that there was a path in the area that leads to another street.

[3] This man was a Mr. Reed. Patrolman Gowdy knew that Reed was not one of the people he had seen seconds earlier because Reed was wearing a white t-shirt, but he handcuffed Reed and put

immediately got on his radio and alerted other patrol officers in the area as to what he had discovered. Officer Bruce Moore arrived shortly and Patrolman Gowdy radioed for investigators to come. He then remained on the scene, protecting it and putting up crime scene tape, until they arrived. He turned over the scene to them at that point. ***R. 5-8***.

Ms. Virginia Robinson testified that her home is only "about half a block" from the crime scene. Gregory Johnson is her stepson and she has known him since he was twelve. Between 6:30 and 7:00 pm. on December 17, 2003, Johnson came to her house with a man who said his name was "Black." She identified this man in court as Mack. Both men were wearing dark clothing with long sleeves. Because it was unusual for Johnson to come to her home, Ms. Robinson asked why he was there. He claimed that he was on his way home from a girl's house. ***R. 12-15; 17-18***.

When she opened the door again, she heard "a lot of hollering and stuff out there." She asked what had happened and made the comment that "somebody must be got hurt in the projects[,] must be got cut up or kill[,] or something." (Sic). Johnson and Mack just looked at each other and did not respond to her question. Unaware of what had occurred, Ms. Robinson went into her den. Her granddaughter, Michelle Lane, came to the house several minutes later and spoke to Johnson. Johnson thereafter came to the den and asked if he could use her phone to call a cab. She gave him permission to do so, and he and Mack left when the cab got there. ***R. 14-18***.

Michelle Lane testified that she is Johnson's stepsister and that Ms. Robinson is her grandmother. When Michelle arrived at Ms. Robinson's house shortly before 7:00 pm. on December 17, 2003, her grandmother, her mother, her stepfather, Johnson, and another male were there. She was shocked to see Johnson because it was unusual for him to come by, whereas she

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Reed in his patrol car to be safe. ***R. 5-6***. Mr. Reed later told Sgt. Melvin Godwin that he saw the shooting but did not know who had done it. ***R. 180-81***.

was often there. She asked Johnson why he was there and Johnson claimed that he was "just chilling." She then went into her grandmother's den and saw that her mother was crying. Michelle asked her mother why. That is when she learned that the victim had been killed. ***R. 19-22; 28***.

After briefly stepping outside to investigate, Michelle came back inside and spoke to Johnson and the other man. She asked this man what his name was and he said, "Black." Michelle tried to speak with Black but he was not very talkative. She also testified that Black was wearing a black hoodie while Johnson was wearing a dark blue hoodie. The men stayed for roughly an hour before leaving in a cab. Before they left, Johnson asked for something to eat because his stomach was bothering him. ***R. 21-22; 28-30***.

After they left, Michelle went and talked to her grandmother. She learned that the suspects in the victim's murder were wearing "all dark clothing." She thought it was suspicious that Johnson and Black "pop[ped] up" wearing dark clothes. So, she called a friend, who had the police contact her. When Sgt. Melvin Godwin showed her two photographic lineups on December 28, 2003, she immediately selected Mack's photo from State's Ex. 1 and Johnson's photograph from State's Ex. 2. She testified that she did not have any doubt that they were the men that she had seen on December 17th. ***R. 23-27; 185-88***.

Co-defendant Gregory "Gangsta Fred" Johnson testified that he was charged with murder and conspiracy in connection with this case. Although his attorney had spoken to the State, he had not been given a deal in exchange for his testimony. ***R. 110-11; 128-29***. On the afternoon of December 17, 2003, he was "walking the hood" until he met up with Horn and Mack in East Florence shortly after 5:30 pm. Horn was driving his Buick and Mack was in the front passenger seat. They agreed to give Johnson a ride and he got into the back seat. ***R. 112-13***.

Horn wanted to go see a girl who lived in North Florence but did not know where she lived. So, Johnson agreed to direct him there. After briefly stopping at the home of Johnson's mother, the men headed to North Florence. While they were travelling on Oakland Ave., Mack saw the victim and asked Johnson if that was "Todd who snitched on … White Boy." Johnson looked but could not see him. Mack and Horn then had a conversation that Johnson could not hear over the loud music in the car. ***R. 114-15***. Following this conversation, Horn made a series of right hand turns so that they returned to the victim's location on Oakland Ave. ***R. 115-17***.

Asked what happened next, Johnson testified that:

> [Mack] just get out the car [and] he said, I'll talk to him. And I want to see who he was talking about, so I got out of the car. And when I got to the corner, I seen a person with a chain on. So I ain't know what was gone happen the remark about the chain made me think about it, I thought he was gone take his chain. And so I seen the police coming down the street and cars behind him and I told him don't even worry. Don't need to do that. So I tried to talk him out of it, but he kept going. And so I cross the street trying to talk him out of it, but he call the victim back. When the victim turn around, they was coming to each other talking and I stopped. And I seen when they met each other, I seen him shoot the victim in the head.

R. 117.[4]

Mack and the victim were only about an "[a]rm's length" away from each other and had only spoken for "a couple of seconds" when this shot was fired. Also, Johnson had seen a police car before Mack fired the shot and warned Mack. Mack's reply was, "F that." Johnson immediately ran past Mack and the victim after the first shot, but he saw Mack shoot the victim "three more times in the back" as he fled the scene. Johnson did not stop running until he was close to Mrs. Robinson's house. ***R. 119-21***.

[4] Johnson explained that Mack had gotten the victim's attention by calling out for "Tellie," which was the victim's nickname. ***R. 118***.

Mack caught up with him at this point and they went to Mrs. Robinson's house, where they remained for roughly ninety minutes. Johnson spoke with Michelle while they were there, even though she mostly stayed in the back of the residence. He and Mack eventually left in a cab that Mack had called and they went to the residence of Marcus May. Johnson went home roughly thirty minutes later and did not see Mack again between the 17th and his own arrest on January 29, 2004. ***R. 121-26***.

Johnson corroborated that Mack wore a black hoodie, and that he wore a blue jeans and a black shirt on the 17th. He also admitted that State's Ex. 33, which police seized when they arrested him, was his .38 caliber revolver. ***R. 117-18; 123-24***. *See also* ***R. 188-89***. Finally, he gave police a statement on January 29, 2004, and the key details that he provided, such as Mack being the shooter, were consistent with his trial testimony. *See* ***R. 134-41***.

Co-defendant Islam Horn testified that on December 17, 2003, he met up with Mack, a/k/a "Black," and "Gangsta" Fred Johnson at the home of Maurice Bostic in East Florence. They remained at Bostic's home most of the day before deciding to go to North Florence, so that Horn could see a girl. Both Johnson and Mack rode with him in his blue Buick. By then, it was after 6:00 pm. Horn asked Johnson to go because Johnson knew where the girl lived and Horn did not. Horn drove, Mack sat in the front passenger seat, and Johnson sat in the back seat. ***R. 48-52***.

As Horn was driving down Oakland Ave., Mack saw the victim between Oakland Plantation Apartments and a nearby park. Mack told Horn that "he wanted to holler at [the victim] [because he [knew] Todd [sold] drow," which is a type of marijuana. In order to go back to the victim's location, Horn made the series of right hand turns described by Johnson and parked in the Oakland Plantation parking lot. "Gangsta Fred and Black got out of the car" and Horn heard a gunshot "30 or 40 seconds later." ***R. 51-54***.

Horn could not see the shot from where he had parked. However, he cranked up his car and pulled out of the parking lot immediately after the first shot. When he reached a stop sign, he looked over and saw the victim lying "face down on the ground. I didn't see Gangsta Fred, but I seen Black stand over [the victim] and shoot him three more times in the back." Horn recognized Mack, whom he had known for four years, by the clothes Mack was wearing and he could clearly see because Mack was "right under a street light. ***R. 54-56***.

Following the shooting, Horn pulled out onto Oakland Ave. and headed back to his sister's residence in East Florence. Before he left, he saw Patrolman Gowdy's car pull into Oakland Plantation Apartments. ***R. 54-55***. Horn was arrested on the night of the murder at the residence of Keith Johnson. According to Horn, Mack always carried a .38 after his release from jail in November 2003. Both Johnson and Horn also carried .38s on December 17, 2003. ***R. 56-57; 95-96***.

The police recovered Horn's .38 caliber pistol from the wheel of a car when he was arrested that night. Police recovered a flattened projectile from the concrete underneath the victim's body. State's Ex. 36. ***R. 80-82; 146-47; 151; 158-59; 161; 165; 181-85***. Johnson left Florence shortly after the murder and stayed in Coward, South Carolina for a period of time. As a result, he was not arrested until January 29, 2004. At that time, police recovered his .38 caliber revolver, State's Ex. 33. ***R. 130-31; 140; 147***.

Following Mack's arrest, police searched his residence pursuant to a search warrant. They recovered a baggie of marijuana and two weapons: a 9 mm. semi-automatic and a .32 caliber revolver from the crawl space underneath the residence. ***R. 174-76***.

At the time of the victim's murder, Florence police were actively working on another homicide that had occurred on the night of December 16th. ***R. 182***. Inv. Smith testified that after

working the crime where the shooting had occurred on the 16th, he went to the hospital to check on the shooting victims who had been taken there. By the time he arrived, Antonio McCall had died. The other shooting victim was Joseph Todd Wilson, the victim in this case, and he identified the person who shot him as White Boy. Inv. Smith later learned that "White Boy" was Marcus Martin. ***R. 104-05; 107-08***.

The State also introduced a statement written by Mack to Horn (State's Ex. 30). This letter contained a detailed account of the murder by Mack and provided evidence of motive and malice, both of which support a sentence of life imprisonment.[5] The letter is written in a cryptic language of gang jargon, which was obviously designed to confound an unintended recipient. Once translated by one familiar with this jargon, the letter reveals a persuasive writing by a motivated author. It was designed to gain the assistance and advice of its intended audience, Horn, who was something of a mentor for Mack. The letter also reveals that Mack is apparently enamored with an evil, corrupt, and - in his mind - glamorous lifestyle, and that he is someone who gladly killed simply for the thrill of killing and to raise his standing among fellow gang members. The note, as published to the jury, reads as follows:

> Yo, son, on some real shit, thank you, for showing me the ropes to some shit bitch nig's don't know - don't have no clue about.[6] Now a nig will never go broke. This shit went down like this. I got out the car me and Gangsta[7] and I call that nig like, Yo, that my nig Tellie.[8] Then he started walking back towards me. Gangsta was

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[5] Horn initially told Mack to remain silent but ultimately sent a note asking Mack to tell him what had happened because Mack had talked to police. ***R. 79-80; 95***.

[6] Horn testified that this is Mack thanking Horn, for teaching Mack the "dope game[,] selling weed" ***R. 65-66***. So, the letter starts with an appeal to Horn's sense of camaraderie.

[7] This begins Mack's account to Horn of the events surrounding Victim's murder. *See* ***R. 65***.

[8] Horn testified that Mack is informing him of how Mack got Tellie's, or the victim's attention. ***R. 65-66***.

like, Yo, the jakes[9] is over there. I was like fuck that nig. I ain't got no time to waste. Plus, I don't give a fuck about jakes anyway. Son, I had hollows in the chamber[10] and I blew the bitch nig brains out. You know how I get down holiday style.[11] That nig shit splattered everywhere and he drop like a rag doll, like he had spaghetti legs or some shit, put three in his back.[12] Redrum had me drink as a bitch.[13] Gangsta didn't even get the drink none because soon as I let off he ran.[14] So that's my shit feel me. In my mind I was thinking Gangsta was scared. And all these nig's talking about I'm jake[15] when I'm the one drop that nig by myself. When war gets deep, beef is everlasting.[16] Did that shit for WB and my nig BG[17] rest in peace, birthday present. Rank wasn't the only thing gained.[18] Respect got earned and loyalty got

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[9] "Jakes" means police. ***R. 66***.

[10] "Hollows in the chamber" means that he had hollow-point bullets in his weapon. ***R. 66***. The bullet fragments recovered were consistent with semi-jacketed hollow point ammunition. ***R. 211***.

[11] "Holiday style" is a term used by a rap group, but Horn did not know the term's meaning. ***R. 66***.

[12] Lieutenant Ira Parnell, an expert in firearms testified that the hollow-point projectile is "design[ed] to expend its energy within the first target that it encounters to cause more shock, knock down and not to over penetrate in most cases." ***R. 212***. This explains Mack's observations that his victim dropped "like a rag-doll" and like he had "spaghetti legs."

[13] "Redrum" is an anadrome for murder, and it means murder according to Horn. ***R. 66***. Respondent notes that "redrum" has been used in this manner at least since the 1977 Stephen King novel, "The Shining," which Stanley Kubrick made into a 1980 classic horror film. The solicitor made a reasonable inference from the term "had me drink as a bitch" in his closing argument, arguing that Mack was describing getting a rush from having committed the killing. ***R. 237***.

[14] "[L]et off" means shoot. ***R. 67***. This portion of the letter corroborates Johnson's testimony. ***R. 119-20***.

[15] Based on Horn's testimony, "talking about I'm jake" apparently means that Mack is upset that his friends were accusing him of being a snitch, even though he actually killed Todd Wilson on his own, because Johnson was scared. *See* ***R. 67***.

[16] This sentence suggests a gang war or other conflict over some long, deep-seated, grudge. Horn explained it was another phrase by a rap group. ***R. 67***.

[17] The victim named WB as one of the shooters when interviewed by Officer Ron Smith. ***R. 104-05***. This suggests that Mack killed Todd to protect Martin from prosecution. The killing also serves, in Mack's mind, as a tribute to BG, who is apparently deceased.

[18] Horn testified that this is a reference to being promoted in the Hoover Deuce Crips gang for killing Todd. ***R. 68***.

portrayed. Nig's ain't real, son, that's word. Stouk, KB, Poncho, them nigs don't get down how me and you get down, son. You my brother, nig. And I meant that shit when I said it to the heart. Nigs got to die holiday style word up. My lil nigs on the redrum charge too, they gone beat that shit I know. I wouldn't be surprised as Poncho, jake on my lil nig.[19] Word, son, that nig need to get handled.[20] Stu jake on you and Gangsta - Stouk jake on you and Gangsta son. KB I find out he straight bitch. Don't even associate with them nigs no more.[21] Nigs is jakes AKA backstabbers. Man, they didn't have no evidence, but I promise mom. Dukes, I would tell the truth if they ask me anything. I gave them two stories. The first one I said the same shit, but I said you dropped us off at Gangsta's peep's house and you was on yo way to Big Al' s crib. Then I said what you said. Then I told them Beans had the same [thing].[22] The reason why I told them that is so it could look like I was lying when Beans didn't give them the thing, feel me. I gave it to him because he needed protection. Plus, he swore on his life he would never let nobody get it, feel me.[23] So I'm thinking that mean the jakes too. Then my parole office[r] came to ask me do you have - do you know anything about a snubnose .38, a .32, a nine, and a long nose .38.[24] I was like what the fuck, that shit got me heated, son. I told him, hell no. So that shit got me thinking Beans gave to jakes that shit or either Gangsta or whoever know I had that shit told them about it, feel me. If they got it, I'm fucked, but fuck that shit.[25] Yo, son, always looked up to you and you know that because I always know that you were keep it real with a nig who keep it real with you. I wasn't who you want wit it. You wit who I want wit it. Any nig can get it, that's word. I told myself the only thing I was coming back to jail for was either bricks or bodies and I stuck to my word.[26] Anyway, who is 203204207208 must be

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[19] Horn testified that Mack is accusing KB and Poncho of being snitches. Horn also testified that he and Mack were indeed as close as Mack asserts. ***R. 70-71***.

[20] Horn testified this means Poncho (Marcus May) needs to die. ***R. 71***.

[21] Horn explains that means do not talk to these people, because they will snitch. ***R. 71-72***.

[22] It seems the term is actually "thing-thing" which means gun. ***R. 73***.

[23] “Beans” swore he would never give up the gun Mack gave him. Horn testified that "feel me" means "believe me." ***R. 73***.

[24] Horn testified that the snub-nose was his gun and the long-nose was Johnson's gun, but Horn did not know about the .32 or the 9 mm. ***R. 74***.

[25] In the preceding four sentences. Mack is writing that he is mad, and that if Beans gives the police the gun. Mack would be convicted since the police will have a valuable piece of evidence. ***R. 74***.

[26] “Bricks” means drugs, and “bodies” means murder victims. ***R. 75-76***.

> in this fuck them. Them nigs in here must be folks or something. Nigs got to tell you who they be.[27] You know what's real, son, holler back. Grave yard to the grave yard on.

R. 62-64 (footnotes added).

Dr. Janice Ross, the forensic pathologist who performed the autopsy on the victim, testified that the victim had four gunshot wounds and that three would have been fatal. The first wound was into his left forehead and was fatal. It then traveled "backwards and across through the brain." Dr. Ross opined that this was "an intermediate range shot" and that "tattooing" was present. Although not a contact wound, it was fired from between "three or four inches to 18 inches." The wound "would cause immediate unconsciousness" and the victim would have immediately collapsed. ***R. 193-97***.

The second wound was in the victim's back "just to the left of the middle." The bullet went underneath the victim's skin and it was found under the skin in the back of his neck. Because the bullet did not hit any vital organs or arteries, Dr. Ross opined that it would not have been fatal. The third gunshot wound entered the victim's left back and was also fatal. It travelled "from back to front and a little bit and upward. It "went through the heart and caused a lot of bleeding in the chest cavity." ***R. 197***. *See also* ***R. 194-195; 199-200***.

The fourth gunshot wound was likewise fatal. This bullet entered the victim's back, "went through all the lobes of the right lung" before it exited his body. In doing so, it "caused a lot of bleeding internally … [and] would have been fatal also by itself." ***R. 197***. Dr. Ross explained that the third and fourth wounds caused the victim to bleed over a third of the blood in his body into his chest cavity. ***R. 200***.

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[27] This was a reference to inmates that Horn was trying to identify and Mack was apparently unable to help him. ***R. 76***. Also, the note was adorned with gang symbols representing the Hoover Deuce Crips. ***R. 77***.

Dr. Ross recovered the bullets that caused the first three wounds (State's Ex. 35) and she provided them to the police. ***R. 147-48; 194-95***. She opined that the cause of death was exsanguination caused by gunshot wounds to the chest and "contusion of the brain due to laceration of the brain," caused by a gunshot wound to the head. She opined that the manner of death was homicide. ***R. 202-03***.

SLED Agent Ira Parnell testified that he was the supervisor of SLED's firearm and tool mark identification laboratory. Initially, he was asked to determine the caliber of the bullets and to compare the .38 caliber bullets and fragments in State's Exs. 35 and 36 with Horn's .38 (State's Ex. 32). Johnson's .38 (State's Ex. 33) was submitted at a later date. Agent Ira Parnell explained that the bullets were "all consistent with [semi-jacketed] hollow point ammunition, … which is design[ed] to expend its energy within the first target that it encounters to cause more shock, knock down and not to over penetrate in most cases." Following his testing, he opined that all of the bullets in State's Exs. 35 and 36 were fired by the same weapon and that neither State's Ex. 32 nor State's Ex. 33 fired the bullets. ***R. 204-13***.

STANDARD OF REVIEW

An appellate court will not overturn a sentence unless the sentencing court abused its discretion in issuing a ruling; that is, the sentencing judge's ruling must amount to an error of law. *State v. Dawson*, 402 S.C. 160, 163, 740 S.E.2d 501, 502 (2013). Also, "[i]n criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous." *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012); *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The issue of whether a criminal defendant is serving an illegal or unconstitutional sentence constitutes a question of law, *Bordeaux v. State*, 410 S.C. 495, 499, 765 S.E.2d 143, 145 (2014), and errors of law are reviewed *de novo*

by an appellate court. *Id*. *See also Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

ARGUMENT

I. The sentencing judge complied with the Eighth Amendment in sentencing Mack to life without parole for a murder committed when he was seventeen years old, where the record unequivocally reflects that the sentencing judge considered the mitigating factors of youth required by *Miller* and *Aiken* in imposing the sentence and where his factual findings are supported by the record.

On appeal, Mack claims that the sentencing judge's Order sentencing him to life without parole (LWOP) violated the Eighth Amendment in five different respects. Notwithstanding his complaints, Respondent submits that the sentencing judge properly complied with the Eighth Amendment in imposing an LWOP sentence for a murder committed when he was seventeen years old because the record reflects that the sentencing judge fully considered the mitigating factors of youth required by *Miller v. Alabama*, 567 U.S. 460 (2012), and *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), *cert. denied,* 135 S.Ct. 2379 (2015), in imposing sentence, and because his factual findings are supported by the record.

A. Evidence presented at the resentencing hearing.

1. The State's evidence.

The State provided a copy of Mack's trial transcript to the sentencing judge and he read it before the February 19-20, 2019 resentencing hearing. ***R. 376, ll. 22-24***. At the resentencing hearing, the State presented Inv. Melvin Godwin who testified about the facts leading up to Mack's prosecution for murdering Todd Wilson. Although most of this evidence was heard by the jury, Inv. Godwin also testified to a statement that Mack had given to police and indicated that Mack had admitted to killing the victim in this statement. ***R. 289-98***.

Inv. Godwin testified that Mack never asked for his mother when he gave the statement, that he was alert, that he appeared to understand the questions being asked of him, and that he was forthcoming. Further, Inv. Godwin had spoken to trial counsel, Mr. Floyd, prior to trial and Mr. Floyd never indicated that Mack did not understand what was "going on," that Mack was unintelligent or that he thought that Mack might have a mental problem. R***. 297-98***. Finally, Inv. Godwin "[s]adly" agreed that in his twenty-nine years of being a detective, it was "not uncommon to have someone that had a [shoddy] home life growing up … wind[ing] up in the criminal justice system[.]" ***R. 308-09***.

The State presented the sentencing judge with a computer "printout from the department of juvenile justice that shows [Mack's] prior engagement with the juvenile justice system [with] convictions of vehicle damage and tampering. And then a violation of his probation." ***R. 310***. The State likewise introduced a November 11, 1986 psychological exam performed by a contract psychologist, Dr. Deanna Lanier, while Mack was in DJJ's Midlands Evaluation Center as State's Ex. 1, ***R. 417-25***. *See also* ***R. 310-11***.

Under "**Behavioral Observations**," Dr. Lanier found that Mack "presented as an emotionally isolated individual, who was angry with a 'chip' on his shoulder, as evidenced by his tone of voice, perfunctory responses to questioning and body language." State's Ex. 1, ***R. 421***. Under "**Behavioral/Emotional/Personality Measures**," she stated that:

> The MACI[28] profile was valid and indicated that Terriel is cool and indifferent to the feelings and welfare of others. He may tend to take advantage of others to obtain personal advantage or to achieve personal goals. He does not appear interested in developing close relationships with others, and ties to others are generally based on sharing similar antisocial or unempathetic attitudes. Relationships that are formed tend to be shallow and lacking in loyalties.

[28] MACI is an acronym for Millon Adolescent Clinical Inventory.

State's Ex. 1, ***R. 421*** (footnote added). *See also* ***R. 310-11***.[29]

The State noted that another evaluation from earlier in the year of the murder (2003) indicated that Mack was "enmeshed in street justice and views it as his responsibility to take the law into his own hands, which we think is consistent with the note[] that he wrote in jail with regard to the motive for killing the victim." ***R. 311***.

Michael Stobbe testified that he is the branch chief of records management and release for the South Carolina Department of Corrections and that he is the Department's records custodian. The State introduced Mack's disciplinary history while incarcerated in SCDC as State's Ex. 2, ***R. 437-512***. This Exhibit reflects that Mack had committed at least twenty-seven disciplinary infractions while incarcerated, many of which are for violent acts:

- striking an employee (4 convictions);
- possession of a weapon (2 convictions);
- throwing chemicals on a correctional officer (1 conviction);
- threatening to inflict bodily harm (3 convictions);
- evading a security device (1 conviction);
- refusing to comply with an order (2 convictions);
- disorderly conduct (1 conviction)
- destroying property (1 conviction);

[29] Dr. Lanier's fourth recommendation was that:

> Terriel needs to be referred for general counseling to uncover and deal with his anger, to fully accept *responsibility for his behaviors, to learn socially acceptable coping skills,* and to resolve conflicts related to his father's absence in his life. This may be incorporated into his drug and alcohol counseling.

State's Ex. 1, ***R. 425*** (emphasis added).

- use of marijuana or narcotics (2 convictions);
- flooding his cell (1 conviction);
- public masturbation (7 convictions); and
- being out of place (2 convictions).

See ***R. 318***; ***324-25; 327-28;*** State's Ex. 2, ***R. 437-512***.

Mack had attended school and worked while incarcerated. However, seven jobs ended with him being placed in lockup pending a disciplinary hearing. Further, State's Ex. 2 reflects that he was then under investigation for homicides that occurred at Lee Correctional Institution (LCI). ***R. 318-19;*** State's Ex. 2, ***R. 511-12***.

Joe Todd Wilson's father, Perry Mungo, offered victim impact testimony. Mr. Mungo testified that the victim was eighteen year old and had a fourteen month old child when murdered. Also, the murder turned family members' lives "around." Both the victim's mother and his brother saw him dead at the scene. ***R. 330-32***.

The victim's mother was "the first family member at the scene" and she saw him lying on the concrete "in a pool of blood dead." His murder "just destroyed her life." She had spoken to him shortly before the murder and he had planned to come to the house to get a car. Minutes later she heard the gunshots,[30] went outside to investigate, and heard that someone had been shot on Oakland Ave. She tried calling the victim and went to the scene when he did not answer. She died in 2012. ***R. 331-32***.

Mr. Mungo testified that the murder

> took away my life because I … in his memory … always remember his birthday coming. We always celebrate his birthday, [and] Christmas. And then I turn around I had to be the father [to his daughter] and, you know, like most of us when we want to be the grandparent – [a] grandparent is different from the parent itself. …

[30] They lived three blocks from the murder scene. ***R. 331***.

> [T]he parent disciplines the child. The grandparent [is] [supposed] to keep them happy and enjoy them, that's our time in our life when we got older we can enjoy being with the kids our own kids are grown, [it] just took all that away from me.

R. 333.

Also, Mr. Mungo places a cross at the crime scene several times a year, as do some of the victim's friends. The murder has also been hard on the victim's daughter. R***. 333-35***.

2. Mack's evidence.

Mack presented Dr. Geoffrey McKee, a forensic psychologist, who testified that he performed a "forensic psychological evaluation on Mack pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012), and he prepared a report with his findings, which Mack introduced as Def.'s Ex. 1. *See* ***R. 513-22***. Because Dr. McKee had to address the *Miller* factors years after the trial, he conducted a "retrospective evaluation," in which he tried to "psychometrically reconstruct and give his best estimate as to Mack's psychological, emotional, behavioral, and cognitive functioning at the time of sentencing. ***R. 338-40; 364-65;*** Def.'s Ex. 1. ***R. 513-22***. In order to make this assessment, Dr. McKee reviewed Mack's birth certificate; the trial transcript; medical, school, and hospital records for Mack; SCDC inmate and medical records; Florence County Sheriff's Office incident reports; "DJJ Institutional Records, including 6/27/02 Psychosocial Evaluation;" the DJJ Discharge Summary; and February 5, 2019 affidavits from Terry McLaughlin, Shante McLaughlin, and Nourise McLaughlin. Def.'s Exs. 13-15, ***R. 542-44***.

Dr. McKee concluded that by the time Mack was thirteen, he had Post-Traumatic Stress Disorder (PTSD) caused by witnessing physical violence by his stepfather towards his mother. He also had major depressive episodes resulting from the death of his grandmother, and his mother's subsequent boyfriend throwing away all reminders of his stepfather. He likewise experienced traumatic episodes that resulted from having sex at a very young age and because his biological

father denied paternity even after paternity was conclusively established by DNA. Mack began using alcohol and marijuana by the age of thirteen because of these problems. Further, he ran away from home, at least twice, only to be returned. **R. *349-51;*** Def.'s Exs. 1, 5, & 6, ***R. 513; 526; 527***.

Mack "started to get into trouble at school" between the ages of thirteen and seventeen. Although he had been a good student through the sixth grade, he was suspended and engaged in "incidents that ended up with him coming to the attention of [DJJ]." Dr. McKee testified that the best data that he had for this period of time was the DJJ report introduced as State's Ex. 1. This report summarized incidents where Mack ran away from home and matters that led him to be placed in DJJ. Additionally, Mack introduced three incident reports involving domestic violence against his mother for events occurring on December 7, 1999, January 22, 2000, August 16, 2002, and September 4, 2002, as Def.'s Exs. 7-10, respectively. Mack attempted to defend his mother in the September 4th incident. ***R. 351-54***. Also, a report from McLeod Regional Medical Center (Def.'s Ex. 11) reflected that, following the September 4th incident, Mack was treated for bites to his head and neck and other minor injuries. ***R. 533***.

Dr. McKee opined that the domestic violence in the household

> would actually have more impact on his PTSD in that each of those episodes is an reenactment of [re-experiencing] the trauma that led to the symptoms of PTSD, which also include[s] anxiety and depression. So here he is with now a new stepfather, that stepfather physically abusive to his mother to the point where he finally steps between them in an attempt to stop the abuse on his mother. So it would be very deleterious to his emotional health and to his feelings of stability and nurturance and also those things that constitute a loving and caring family.

R. 354.

Dr. McKee explained Mack's then-current mental status as follows

> … [W]hen I saw him, he was alert. He was oriented. He was cooperative. He was responsive to questions. He gave forth good effort on all psychological testing that

> I did with him on two of the three sessions that I saw him spanning [overall] some six hours of direct contact with him. His answers often exceeded the scope of the question that I 'would ask. He had good eye contact. He was not especially restless or hyperactive suggestive of attention deficit hyperactivity disorder. … [H]is expressive vocabulary which means his ability to convey his feelings and his thoughts to others was in the average range. His receptive vocabulary which means his ability to understand and comprehend questions or statements to him was within the normal limits. And there were no overt signs of a psychotic symptom which is to say evidence of delusions which are fixed-false beliefs that persist even despite contradictory, realistic information or hallucinations, auditory and visual experiences of seeing things that aren't really there or hearing things that aren't really there. At the time I was seeing Mr. Mack he was prescribed and had been prescribed for some by this time seven years, … And he … also had been taking various antipsychotic medications that would manage and control those kinds of symptoms. And he was also had been taking … a series of different antidepressants that have been prescribed over the years. So some of the lack of psychotic symptoms or depressive symptoms were probably mediated to some extent by those medications, but all in all he was responsive and cooperative. And I felt he gave good effort throughout the entire assessment procedurally.
>
> ***R. 356-57***

Dr. McKee opined that Mack had not been malingering his symptoms and that he could be rehabilitated. Further, Mack introduced four affidavits that Dr. McKee had reviewed in arriving at his conclusions. ***R. 357-58***. Dawn Renee Simmons' affidavit (Def.'s Ex. 12) states she was the author of "Letters To Our Sons, A Collection of Letters By Prisoners & Ex-prisoners To Stop Mass Incarceration of Our Youth," which was published in October, 2018. She avers that Mack submitted a December 31, 2013 letter to her that was used in her book. ***R. 359; 541***.

Nourise McLaughlin's affidavit (Def.'s Ex. 13) states that she is Mack's paternal aunt and that she has known Mack his entire life. Mrs. McLaughlin further states that Mack's mother "worked multiple jobs at times." His mother was also inconsistent in her parenting. Consequently, she was not "present" in the lives of Mack and his brother, and "[t]he boys ran free in the neighborhood and did not have much guidance growing up." Likewise, she "had many different relationships with men, which appeared to be more important to her than her sons. "Many of these

men have been arrested and did not treat Dawn or her kids the way they deserved to be treated. Dawn would stand up for the men and tell her children to toughen up now or you will get your [behind] beat later." ***R. 360.***

Mrs. McLaughlin further avers that Mack and his brothers are "intelligent young men but everything positive they learned was in school and everything else was learned in the streets." Without anyone teaching them "the importance of an education," … they did not succeed in school as they got older." Mrs. McLaughlin states that she lives in Florence County and that that she and her family would "do everything we can to help [Mack] be successful in our community if he was released. ***R. 360-61***.

Shante McLaughlin's affidavit (Def.'s Ex. 14) states that she is Mack's cousin and that she has known him his entire life. She avers that he was a good student, helped other family members with schoolwork, was in the chess club and enjoyed playing sports, before he went to DJJ. He spent a lot of time with her and family before going to DJJ, but "he stopped hanging out with us" after his release from DJJ. Instead, he "only spent time with the three or four guys in our neighborhood that were in DJJ with him." **R.** ***360-61***.

These other associates, "seemed to change his way of thinking and how he spent his time. He did not seem to focus on school at all and was mostly just spending time the neighborhood with them. Finally, Shante avers that if Mack was released, she would "help him and support him with anything he needs including making sure he has somewhere to live and somewhere to work," and that her entire family would help him successfully transition back into the community. ***R. 543***.

Terry McLaughlin, Mack's biological father, avers in Def.'s Ex. 15 that Mack would have a job working for his uncle and Mr. McLaughlin, if released. Mr. McLaughlin states that Mack is "very bright" and "would easily pick up on the work we do." Although Mr. McLaughlin refused

to acknowledge paternity in Mack's past, his affidavit claims that he would be "available to my son for anything [Mack] needs, from a place to stay to a warm meal." ***R. 361***. Additionally, Mack offered affidavits from Rodriguez Doe (Def.'s Ex. 16) and Vera Dolan (Def.'s Ex. 19). Mr. Doe avers that Mack "was a tutor in the education department" at Lieber Correctional Institution when Doe was incarcerated there in 2009. He describes Mack as "very intelligent and just a good dude," and avers that Mack assisted him and other inmates get their GEDs. ***R.361-62***. Ms. Dolan is an epidemiologist and consultant from Las Vegas, Nevada, who had previously investigated and developed "a life table" with the estimated life expectancy for a male entering SCDC as a juvenile. *See* Def's Ex. 19, ***R. 561-68***.

Further, Mack introduced the report of Dr. Matthew E. Gaskins, a forensic psychiatrist who evaluated Mack on February 15, 2019. *See* Def.'s Ex. 18, ***R.547-60***. During the evaluation, Mack said that he "believe[d] that he has PTSD based on several traumatic events which occurred throughout his life. ***R. 552***.[31] After Dr. Gaskins' evaluation of Mack, he opined that "Mr. Mack meets the diagnostic impression for Posttraumatic Stress Disorder" based on Mack allegedly

> having clinically significant symptoms that result from his exposure to multiple traumas (e.g. witnessing and experiencing abuse as a child; witnessing and participating in violent acts while incarcerated; witnessing intensely violent acts during the riot of April 2018). Based on the totality of information Mr. Mack's has experienced symptoms of PTSD including intrusive memories, nightmares, increased psychological stress when exposed to reminders of the violence, attempts to avoid reminders of trauma, avoidance of discussing trauma (e.g. minimally communicative with providers), persistent negative emotional state (i.e. descriptions of appearing depressed), feeling estranged from others (i.e. feeling alone), irritability/anger outbursts with little to no provocation, hypervigalence, and sleep disturbance.

R. 556.

[31] The traumatic experiences are those to which Dr. McKee had testified. See ***R. 341-50***.

Dr. Gaskins noted that SCDC medical records "have also offered the diagnosis of malingering," which is "the intentional feigning or exaggeration of symptoms in order to obtain secondary gain (e.g. medication, preferential placement, money, removal of restrictions)." However, Dr. Gaskins discounted this diagnosis because psychological testing for that diagnosis was not administered at SCDC and because the SCDC records do not list Mack's motives for malingering, "other than in reference to the suicidal ideation following the riot Lee Correctional Institution." ***R. 556-57***.

Likewise, Dr. Gaskins noted that the SCDC records also listed a diagnosis of Antisocial Personality Disorder (ASPD)[32] and acknowledged that Mack showed" clinically significant signs/symptoms of this diagnosis," which included "aggressiveness, lack of remorse, and

[32] The Diagnostic and Statistical Manual of Mental Disorders (DSM-V), p. 659 (5th ed. 2013) lists the following diagnostic criteria for ASPD:

> A. A pervasive pattern of disregard for and violation of the rights of others, occurring since age 15 years, as indicated by three (or more) of the following:
>
> 1. Failure to conform to social norms with respect to lawful behaviors, as indicated by repeatedly performing acts that are grounds for arrest.
> 2. Deceitfulness, as indicated by repeatedly lying, use of aliases, or conning others for personal profit or pleasure.
> 3. Impulsivity or failure to plan ahead.
> 4. Irritability and aggressiveness, as indicated by repeated physical fights or assaults.
> 5. Reckless disregard for safety to self or others.
> 6. Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.
> 7. Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another
>
> B. The individual is at least age 18 years.
>
> C. There is evidence of conduct disorder with onset before age 15 years.
>
> D. The occurrence of antisocial behavior is not exclusively during the course of schizophrenia or bipolar disorder.

impulsivity while in corrections." When those traits were combined with the earlier diagnosis of a "conduct disorder and other violations of the rights of others as an adolescen[t]," Dr. Gaskins conceded that Mack "meets the diagnostic criteria for Antisocial Personality Disorder." However, he disagreed with the diagnosis because Mack "has not been able demonstrate his adult behavior/personality outside of correctional settings" and because "these traits seem to have been adaptively beneficial for Mr. Mack to survive 'street life' and while in prison. It is not clear that he would continue this pattern of behavior as an adult in a non-correctional setting." ***R. 557***. Dr. Gaskins' analysis of the *Aiken* factors essentially echoed Dr. McKee's. See ***R. 557-60***.

Although Mack did not testify, he addressed the sentencing judge. After thanking the sentencing judge for the opportunity to speak, he apologized for his "involvement in the death of Mr. Wilson." ***R. 378-379***. He also asked the victim's "love[d] ones" and the judge to find it "in their heart[s] to forgive me for the *mistakes I made as a child*." He added, that at the time of his arrest, he was "was a 17-year-old child that was the under false impression that I was a grown man because at least since the age of 13 I have been running around town with people I thought were my friends doing what we thought grownups did alcohol, doing drugs and living every day like life was a game people … press restart press a restart button on." ***R. 379*** (emphasis added).

He admittedly had not thought about the consequences of his actions. His mother raised him. He loved her, even though she was hard on the children and especially him because he was the oldest. His mother's "extreme physical abuse" and that of her various male partners led him to often running away from home to escape it. Those men fighting his mother led to his involvement in the fights, in an effort to protect his mother. He said, "I'm not trying to shift the blame on anyone, but that's what led me to run the streets and become friends with people who never had my best interest at heart." ***R. 379-80***.

He admitted that he and his friends did not have their fathers in their lives and that they "chose the wrong role model." He was arrested for murder just thirty-two days after his seventeenth birthday and before he "knew anything about living life in general." R***. 380***. He complained about the representation he had received at trial and said that after his conviction, he found himself "on the prison yard just days after I turn[ed] 19, still yet a child mentality only now in a closed environment of adults, that is not structured to breed faith in anything positive." ***R. 380-81***.

> There were … very few limited opportunities provided by administration to do anything constructive. I wound up growing up in the penitentiary and learning the hard way. I received disciplinary infractions as a result of many things, some entirely my fault, but others range from being unable to communicate with staff, misunderstandings. And on numerous occasions being falsely accused and unable to prove my innocence of the infraction due the fact that the staffs' word [was] always taken as more credible than mine. After a while, I began to learn how prison operates and my disciplinary infractions became lesser and lesser to the point where I was able to refrain to remain disciplinary free for years at times. And I also [have been] ten years drug free.

R. 381.

In addition to trying to stay out of trouble, he took it upon himself "to learn more and do positive things" in prison. For instance, he obtained his GED at age twenty-two. After that, he and several inmates in his dorm began a tutoring program to help other inmates likewise get their GEDs. "The more I learn, the more I strive to help others learn." He also joined a "culture awareness committee which organize[s] educational programs to spread a positive message and promote change in spite of prison conditions." ***R. 382***.

Further, he "contributed in a collective effort to reach out to the youth and stop violence and mass incarceration of the youth in the book Letters To Our Sons," and he has become a Christian and joined the prison ministry program." While incarcerated, he has been assaulted by staff, seen others die because of neglect by staff, and he has witnessed gang murders and rapes.

He said that prison was not a place in which he wanted to spend any more time. It had changed him "entirely from my core and expose[d] me expose me to an institution of lifestyle I never thought imaginable especially here in America." ***R. 382***.

Finally, he told the sentencing judge that his "overall message was that "when you know better you can do better. He knows "a lot more now" than he did at seventeen and he has grown, matured and developed "into a rational, compassionate adult. He concluded by saying, "I believe I will make this Court proud … if a fair sentence was pass down to me, so that I may spend a portion of my life with my family to work hard in our community and be an upstanding citizen in today's society. Thank you." ***R. 382-83***.

B. The parties' arguments for sentencing.

The State argued that "the crime in total" was a relevant consideration in sentencing. While Mack was asking for a "second chance to be a productive citizen," the victim was dead and Mack could not bring him back. The State also argued the negative impact of the murder on the victim's daughter and his parents, and it observed that the murder was "horrific," "malignant[,] and planned." Mack did not commit the murder because of either familial or peer pressure. Rather, he murdered the victim "to make rank" and to help White Boy by getting rid of the victim, who was a witness to a murder White Boy committed. ***R. 383-84***.

The victim never fired a shot, but Mack fired four shots: one to the victim's head and three to his back. Three of those shots would have been fatal. The State also argued that his trial counsel performed well.[33] ***R. 384-85***. Further, the State noted that Mack wrote a letter in 2013. ***R. 383***. Yet,

[33] Additionally, Mack had rejected a plea bargain to voluntary manslaughter with a twenty year sentence even though he knew that he killed the victim. ***R. 385-86***.

> Nowhere in that letter did he express any remorse, ask for any forgiveness for his involvement and his not involvement, his planned act, his planned murder, how he characterized the crime at that time and it was all **self-focused**. What he said was the next thought that comes after that is I'm only 27. I spent the last ten years of my life incarcerated for mistakes I made as a child. It's not a mistake he made as a child. It is a murder that he committed without remorse until Aiken vs. Byars[34] comes up. That shows his character and he wrote that letter back in 2013 when he was 27 years of age after he been incarcerated for at least ten years from 2003 until the present.

R. 384 (emphasis in original) footnote added).

Although the State did not contest the circumstances of Mack's upbringing, it noted that the "vast majority" of criminal defendants had shoddy home lives; that it was not uncommon to have an abusive parent, an absent father, to be raised in poverty, or to witness violence; and it contended that many famous people had overcome similar circumstances. The State noted that it is a "terrible situation" when people make "wrong choices;" that Mack made "wrong choices;" that DJJ could not rehabilitate him even though that is the agency's purpose and even though he was neither intellectually disabled nor psychotic; and that the DJJ evaluation found that "he was interested in street justice." The State noted that Dr. McKee's opinions were based on Dr. McKee's efforts to reconstruct what Mack was like at age seventeen. Also, everything Mack did and everything Dr. McKee looked at came down to choices that Mack made. ***R. 386-87***.

The State pointed out that Mack had committed numerous infractions while incarcerated in SCDC, that many of these were for violent offenses, and that some involved having a weapon. The State then argued that he made choices that show he cannot conform his conduct to "the norms of a prison situation," and that there was no guarantee he could conform his conduct "to the norms of society where there is no control" of his conduct. The State noted that *Aiken* required the judge to consider the immaturity and impetuosity and failure to appreciate the risk consequences."

[34] *See Aiken v Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).

However, the State suggested that the letter he wrote to Islam Horn demonstrated that he clearly understood the consequences of his actions because he knew that if police found the murder weapon "his goose was cooked." The State concluded by describing the murder as "a hit, … an assassination." ***R. 387-89***.

Mack's counsel argued that the United States Supreme Court in *Miller* held that a mandatory sentence of life without parole sentences on juveniles violates the Eighth Amendment and that each juvenile was entitled to individualized consideration of his sentence. South Carolina accepted *Miller* and applied it retroactively in *Aiken*. Counsel stated that the judge was required to consider five factors to determine whether a sentence of less than LWOP was proper: "immaturity, impetuosity and failure to appreciate the risks, the circumstances of the homicide itself and the participation offender's participation and how the conduct and familial peer pressures may have affected him, the family and home environment of the defendant, the incompetency ... [associated] with youth … and … the possibility of rehabilitation." With respect to the immaturity, impetuosity and Mack's failure to appreciate the risk and consequences of his actions, counsel noted that DJJ records observed that although he was sixteen "on March 26, 2003, he was still acting childishly in class and was written up for not obeying instruction because he was involved in horse play." This was only nine months before the murder. ***R. 390-92***.

Counsel suggested that Horn's testimony showed the circumstances of the murder were that: (1) Mack met up with Horn and Johnson, (2) they stopped so Mack could talk to the victim about buying marijuana, (3) Johnson and Mack exited the vehicle, and (4) Horn thereafter saw Mack shoot victim. Peer pressure was involved, as reflected by the co-defendant's involvement, as well as Mack thanking Horn for "showing him the ropes", or "guns" and other things, and Mack's statement that he felt that he earned respect from the killing. ***R. 392-94***. Counsel went

through the psychological impact of Mack's violent familial history on him, to which Dr. McKee had testified. Counsel argued that witnessing his mother being beaten by the only father figure in his life at age eight made him "more susceptible to … peer pressure from the other individuals." Moreover, Dr. McKee testified that Mack had a diagnosis of PTSD and had experienced major depressive episodes by the age of thirteen. Counsel also pointed out that the State had not presented an expert to refute Dr. McKee's testimony. ***R. 394-99; 411-12***.

In an effort to show Mack's immaturity and his failure to appreciate the risks and consequences of his actions, counsel pointed to Mack's statement to law enforcement, which he gave to three officers after invoking his right to counsel. ***R. 400-03***.[35] Counsel argued that Mack had been unable to properly assist his attorney at trial because his trial attorney was only appointed eighty-one days before the trial and suggested that Mack might have been better able to assist trial counsel if there had been more time, such as providing more information in mitigation of punishment. Counsel likewise noted that DMH did not evaluate his competency to stand trial as an adult and contended that, if he had been evaluated, "it would [have been] much more difficult to assume that he was able to communicate." ***R. 403-05***.

Counsel then pointed out that Dr. McKee's expert opinion was that Mack could be rehabilitated and that Dr. Gaskins had explained that many of Mack's disciplinary problems while in SCDC were either necessary to defend himself or to survive prison life because he could not show weakness. Also, Mack had not been convicted of fighting while incarcerated. Additionally, he had not committed a homicide or rape, and there was no evidence of his gang involvement while in prison. However, he had improved himself while incarcerated, by obtaining his GED and helping others get their GEDs. ***R. 406-08***.

[35] The State did not introduce the statement at trial.

Next, counsel noted that Petitioner had written a letter for Ms. Simmons' book, "Letters To Our Sons, A Collection of Letters By Prisoners & Ex-prisoners To Stop Mass Incarceration of Our Youth," and counsel read the letter into the record. Further, counsel noted that the life expectancy evidence for inmates incarcerated in SCDC as juveniles was 38.2 years and that a thirty-eight year sentence equated to a life sentence. ***R. 409-10***. Finally, counsel argued that the original sentencing had no bearing on the appropriate sentence under *Aiken* and his Memorandum had facts of other cases and the sentences imposed in those cases. ***R. 410-11***.

The sentencing judge took the matter under advisement. ***R. 412-13***. When proceedings resumed on March 20, 2019, the sentencing judge announced that he had signed an order and was sentencing Mack to life imprisonment. ***Sent. 3***. Counsel "object[ed] to the sentencing as it being cruel and unusual and in violation of the Eighth Amendment of the United States Constitution." *See* ***R. 415-16***.

C. The Sentencing Order.

The sentencing judge's March 20, 2019 Sentencing Order expressly states that he considered the factors set forth in *Miller* and *Aiken* and explains in detail his reasons for imposing a life sentence following his considering those factors. ***R. 677-81***. The sentencing judge's conclusion was that:

> While the Defendant presented some mitigating evidence including his immaturity at the time of the murder, some mental health diagnoses, and growing up in a difficult environment, this Court believes these limited mitigating factors are substantially outweighed by the areas mentioned above pursuant to *Aiken v. Byars*. This Court is extremely concerned by the cold-blooded nature of the killing, and the fact that the Defendant has shown little to no signs of rehabilitation. Furthermore, the Defendant … has shown no remorse for his crime until this hearing, whereby he potentially has something to gain. The Court carefully and deliberately considered all the factors as outlined in *Aiken v. Byars*, and after doing so, based on the above and the entire record of the sentencing hearing, this Court sentences the Defendant to life in the custody of the Department of Corrections.

R. 680.

D. Discussion.

South Carolina employs a constitutionally permissible sentencing scheme in which juvenile homicide offenders are subject to a discretionary sentence ranging from a minimum of thirty years imprisonment to a maximum of life without the possibility of parole. S.C. Code. Ann. § 16-3-20(A); *Aiken*, 410 S.C. at 545, 765 S.E.2d at 578. In *Miller*, the United States Supreme Court held that mandatory life without parole sentences for juvenile homicide offenders violated the Eighth Amendment. 567 U.S. at 465, 470. *Miller* did not categorically bar life sentences for juvenile murderers. Instead, the Court held a sentencing court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*. at 480. The Court noted the difficulty of distinguishing "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id*. at 479-80. Yet, the Court did not articulate or require any specific factual findings.

In stating the factors that must be examined before sentencing a juvenile to life, *Miller* explained that a sentencing authority must consider youth a "more than a chronological fact," but also as a circumstance which carries with it immaturity, irresponsibility, and recklessness. *Id*. at 476. Further, the defendant's family background, mental and emotional development, and the possibility of rehabilitation must be considered in assessing his culpability. *Id*. The Court held that a juvenile convicted of murder could still be sentenced to life without parole, but only after an individualized hearing in which the various mitigating factors were considered. *Id*. at 479-80. In other words, *Miller* mandated only that a sentencing court follow a certain process before imposing a particular penalty and did not require specific words be used. *Id*. at 483.

Likewise, our Supreme Court explicitly declined any "invitation to set out a specific process for trial court judges to follow when considering whether to sentence a juvenile to life without parole." *Aiken*, 410 S.C. at 545 n.10, 765 S.E.2d at 578 n.10. The Court held that *Miller* applied to a discretionary sentencing scheme such as ours, and that juveniles previously sentenced to life without parole, such as Mack, were entitled to resentencing to allow them "to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight." *Id*. at 544, 765 S.E.2d at 577. The Court determined that the factors in *Miller* were those which must be considered during resentencing, such as the offender's age and other features of youth, family life, circumstances of the crime, understanding of the legal process, and the possibility of rehabilitation. *Id*. at 544-45, 765 S.E.2d at 577-78.

Critically, the *Aiken* majority noted that "[t]he United States Supreme Court did not establish a definite resentencing procedure and we likewise see no reason to do so," and explained that it trusted trial courts to exercise their discretion wisely to sentence juveniles. *Id*. at 545 n.10, 765 S.E.2d at 578 n.10; *see also Wasman v. United States*, 468 U.S. 559, 563 (1984) (holding a sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed). The Court also explained it was not going "so far" as to hold a juvenile's individualized sentencing hearing "should mirror the penalty phase of a capital case," but "the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings."[36] *Aiken*, 410 S.C. at 544-45, 765 S.E.2d at 577.

[36] "[S]tate courts that have addressed the question of how to apply *Miller* in the context of discretionary natural-life sentences have reached differing conclusions." *People v. Holman*, 58 N.E.3d 632, 641 (Ill. App. Mar. 3, 2016); *see State v. Riley*, 110 A.3d 1205, 1214 n.5 (Conn. 2015)

In 2016, the United States Supreme Court held its rule in *Miller* was retroactive on state collateral review. See *Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016). It is notable that the Court, when revisiting its holding in *Miller*, did not constitutionally require judges to make *any specific or formal factual findings* when imposing sentences in juvenile homicide cases. *Id*. at 735 (explaining a sentencing court is not constitutionally required to make any specific findings of fact on the record when sentencing a juvenile offender pursuant to the guidelines of *Miller*). The Court explained that the decision not to require specific findings spoke "to the degree of procedure *Miller* mandated in order to implement its substantive guarantee." *Id.*

Nothing in *Miller* suggests that a judge use any particular verbiage or recite any phrase prior to imposing a sentence. Therefore, a closing reading of *Miller* requires an examination of certain factors prior to sentencing a juvenile to life without parole. However, neither the United States Supreme Court nor our Supreme Court requires formal fact findings or a specific procedure. Respondent again submits that the sentencing judge properly complied with the Eighth Amendment in sentencing Mack because the record reflects that the sentencing judge fully

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(noting "there is no clear consensus"). Some courts, like our own, have found *Miller* requires consideration of factors associated with youth. *See e.g.*, *Riley*, 110 A.3d at 1216; *People v. Gutierrez*, 324 P.3d 245, 268-69 (Cal. 2014) (describing five factors courts must consider before sentencing juvenile defendants to life in prison without parole); *Bear Cloud v. State*, 294 P.3d 36, 47 (Wyo. 2013) (setting forth seven factors courts must consider in sentencing juveniles to life in prison without parole (quoting *Miller*, 567 U.S. at 476-77)). Yet other courts have found, while *Miller* requires the sentencing authority to consider mitigating circumstances related to youth, *Miller* does not bind the court to consider a predetermined list of particular factors. *Holman*, 58 N.E.3d at 642, *State v. Ali*, 855 N.W.2d 235, 256-57 (Minn. 2014) (explaining sentencing courts must consider "any mitigating circumstances," including those discussed by the *Miller* Court); *State v. Long*, 8 N.E.3d 890, 895 (Oh. 2014) (finding the factors adopted by the Wyoming Supreme Court in *Bear Cloud, supra*, "may prove helpful" to courts sentencing juvenile defendants, but refusing to require sentencing courts to make explicit findings with respect to any enumerated factors); *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012) (holding the sentencing court complied with the requirements of *Miller* by taking into account how juveniles are different from adults "'and how those differences counsel against irrevocably sentencing them to a lifetime in prison'").

considered the mitigating factors of youth that the Eighth Amendment requires and that his factual findings are not clearly erroneous. *See Brown*, 401 S.C. at 87, 736 S.E.2d at 265.

1. The failure to find that Mack is "irreparably corrupt."

Mack first attacks the sentencing court's failure to find that Mack is "irreparably corrupt." As noted, however, neither the United States Supreme Court nor the Supreme Court of South Carolina require any specific factual findings. Rather than emphasizing some hypothetical fact-finding for the jury or trial judge, *Miller*s holding was limited: "*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that [LWOP] is a proportionate sentence." *Montgomery*, 136 S.Ct. at 735 (citing *Miller*, 567 U.S. at 483).

Indeed, although the Court in *Montgomery* stated that "*Miller* did bar life without parole …. for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility," *Montgomery*, 136 S.Ct. at 734, it also acknowledged that *the sentencer is not required to find the juvenile defendant is "irreparably corrupt*." *Id*. at 735 (emphasis added). A number of courts from other jurisdictions have likewise held that the sentencer is not required to make such a finding.[37] Further, it is clear that the sentencing judge implicitly found that Mack is

[37] *See, e.g.*, *People v. Blackwell*, 3 Cal. App. 5th 166, 194, 207 Cal.Rptr.3d 444 (2016) ("*Miller* does not require irreparable corruption be proved to a jury beyond a reasonable doubt in order to 'aggravate' or 'enhance' the sentence for [a] juvenile offender convicted of homicide"). see also *Id*. at 192 ("'[I]rreparable corruption' is not a factual finding, but merely 'encapsulates the [absence] of youth-based mitigation'") (alteration in original); *White v. State*, 837 S.E.2d 838, 844 (Ga. 2020) ("White also argues that Veal requires that the trial court find beyond a reasonable doubt that he is irreparably corrupt before sentencing him to life without parole. But nothing in Veal says that, and nothing in *Miller* or *Montgomery* says that, either. Moreover, language in *Miller* and *Montgomery* is contrary to White's argument that those cases demand that the State prove permanent incorrigibility beyond a reasonable doubt"); *State v. Fletcher*, 149 So.3d 934, 943 (La App. 2014) ("*Miller* does not require proof of an additional element of 'irretrievable depravity' or 'irrevocable corruption'"); *State v. Lovette*, 233 N.C.App. 706, 719, 758 S.E.2d 399, 408 (N.C. Ct.App. 2014) ("The findings of fact must support the trial court's conclusion that defendant should be sentenced to life imprisonment without parole, and a finding of 'irreparable corruption' is not required."); *Garcia v. State*, 903 N.W.2d 503, 512 (¶ 26) (N.D. 2017) ("*Miller* did not impose a

irreparably corrupt even though there was no express finding that Mack to this effect because he found that in light of the many "violent and serious" offenses that Mack had committed in SCDC, "[Mack's] ability to be rehabilitated is unlikely. In fact, this Court is concerned for the safety of the public should [Mack] ever be released from the Department of at any age." *See* ***R. 678-79***. This finding, which is supported by the record, is consistent with the admonition in *Montgomery* that "[t]hose prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." *Montgomery*, 136 S.Ct. at 736. Accordingly, the failure to make an express finding of irreparable corruption did not amount to an error of law. Also, the sentencing judge's factual findings are supported by the record,[38]

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formal factfinding requirement .... *Miller* 'mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty'"); *Brown v. State*, No. W2015-00887-CCA-R3-PC, 2016 WL 1562981, at *7 (Tenn. Crim. App. Apr. 15, 2016) (unpublished op.) ("[*Montgomery*] reiterated that '*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility'"), *appeal denied* (Tenn. Aug. 19, 2016), *cert. denied*, 137 S.Ct. 1331 (2017); *Jones v. Commonwealth*, 293 Va. 29, 795 S.E.2d 705, 709 n.3 (Va. 2017) ("*Montgomery* acknowledged that '*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility' and 'did not impose a formal factfinding requirement' on this mitigation issue"). Mack's reliance upon contrary authority is misplaced, since much of it predates the Court's decision in *Montgomery* and because neither the United States Supreme Court nor the Supreme Court of South Carolina require such an express factual finding.

[38] In his brief, Mack relies upon capital case, such as *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). However, any argument based upon these cases is not properly before this Court on appeal because they were not presented to the sentencing judge, either in Mack's Sentencing Memorandum (Def.'s Ex. 20) or in argument at the hearing. See ***R. 390-412***. See also *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal"). Moreover, these capital case are irrelevant both because "death is different, *see, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 303–04 (1976); *Ford v. Wainwright*, 477 U.S. 399, 411, 106 S.Ct. 2595, 2602, 91 L.Ed.2d 335 (1986) (Marshall, J., plurality opinion) ("In capital proceedings generally, this Court

2. Alleged failure to properly consider Mack's "age and the hallmark features of youth.

There is likewise no merit to Mack's claim that the sentencing judge failed to properly consider his "age and the hallmark features of youth, including immaturity, impetuosity, and the failure to appreciate the risks and consequences." *See Miller*, 567 U.S. at 477 ("Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"). To the contrary, the sentencing judge's order states that he "considered" each of the factors set forth in *Aiken*. ***R. 677***. Also, the order expressly states that he "examined the Defendant's alleged mental deficiencies and the incompetencies associated with youth." ***R. 678***.

However, the sentencing judge found that "these limited mitigating factors are substantially outweighed by" evidence that (1) he was "within one year of being able to serve in the military" and "within one year of an age whereby he would have immense responsibilities and be considered an adult by law;" (2) the facts of the murder showed Mack was "the shooter" and intentionally shot the victim in the head at "'point blank range;'" (3) he shot the victim "three more times in the back while the victim was on the ground;" (4) he wrote the letter to Horn, in which he bragged about the murder and failed to show remorse; (5) the motive for the murder was to kill "a witness to another crime so as to benefit an associate;" (6) the murder was a "premeditated … cold-blooded assassination," for which Mack not only did not show remorse but was "actually proud of the killing," see *Miller*, 567 U.S. at 477;[39] (7) the investigating officer testified that he did not display

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has demanded that factfinding procedures aspire to a heightened standard of reliability.... This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different"), and because he was never subject to a possible sentence of death in light of *Roper v. Simmons*. 543 U.S. 551 (2005).

[39] *Miller* observed that mandatory LWOP sentence for murder "neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and

any problems "communicating with law enforcement," he "clearly understood all questions, easily communicated with law enforcement, and was alert; (8) he was competently represented at trial and his trial counsel "never once suggested that …[Mack] had any mental deficiencies or any incompetencies;" (9) his statements during the sentencing hearing "reflect that he is very intelligent, communicates well, and shows no signs of any mental deficiencies;" and (10) his conduct while incarcerated reflect his ability to be rehabilitated is unlikely." ***R. 677-80***.

As the State noted at the sentencing hearing, Mack's contention that he did not fully appreciate the consequences of murdering the victim is completely refuted by his letter to co-defendant Horn (State's Ex. 30), in which he expresses his concern that law enforcement had found the murder weapon because he would be convicted if they had. In the letter, he also limits his trust in others to Horn, accuses "KB" and "Poncho" of being snitches, states that Poncho needed to die, and he warns Horn that others may snitch on Horn. *See* ***R. 62-64; 70-71***. Thus, his handwritten letter clearly reflects that Mack fully appreciated the consequences of his actions.

Nor did the sentencing judge consider Mack's age "as an aggravating circumstance, instead of a mitigating circumstance." Rather, he simply recognized that Mack was less than a year away from being eighteen. As a result, he is unlike many other juveniles convicted of murder who have committed their offense at a more tender age. Moreover, the sentencing judge specifically stated why he found that Mack's age did not sufficiently mitigate the other factors found by the judge so as to warrant less than a life sentence and the record supports his findings.

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peer pressures may have affected him." *Id*. Here, Mack was the shooter and neither "familial [nor] peer pressures" impacted his decision. Rather, he carried out a gang-related and gang-motivated hit, to eliminate a witness to another murder committed the previous day. Further, his letter to Horn reflects that their third co-defendant, Johnson, fled when the shooting started. See State's Ex. 30.

Likewise, the sentencing judge was not bound to accept the expert testimony presented by Mack, even though the State did not present any expert testimony. First, the State did introduce the November 11, 1986 psychological exam performed by a contract psychologist, Dr. Deanna Lanier, while Mack was in DJJ's Midlands Evaluation Center as State's Ex. 1, ***R. 417-36***. This evaluation rebuts the expert testimony Mack presented as does evidence that he has received a diagnosis of ASPD while incarcerated at SCDC. Secondly, the State could rely upon the evidence of Mack's actions at the time of and subsequent to the murder to meet its burden. *Cf. State v. Williams*, 386 S.C. 503, 516, 690 S.E.2d 62, 69 (2010) ("We have long held that a lay witness may testify as to a defendant's mental state"); *State v. Smith*, 298 S.C. 205, 379 S.E.2d 287 (1989) (holding that where defendant presents expert testimony regarding his insanity, the State may introduce lay testimony in rebuttal).

Further, this is only one of the factors a sentencer is required to consider under *Miller* and *Aiken*. Underlying Mack's present argument and his other claims of error is his apparent belief that the sentencing judge was obligated to accept the evidence as credible and warranting a life sentence, while disregarding contrary evidence presented by the State. Neither *Miller* nor *Aiken* place such unreasonable restrictions on a judge as the fact-finder and *Miller* does not impose a "rebuttable presumption ... in favor of parole eligibility for juvenile offenders." *Chandler v. State*, 242 So.3d 65, 69 (Miss. 2018).

3. Alleged failure to consider expert evidence that Mack could be rehabilitated.

Notwithstanding Mack's contrary argument, the sentencing judge did not fail to consider evidence from expert witnesses that he could be rehabilitated. Rather, he considered Mack's evidence but found that the State's contrary evidence of Mack's numerous disciplinary infractions

to be more persuasive on the possibility of Mack's rehabilitation. Again, his findings in this regard are supported by the record.

Of the multitude of disciplinary offenses that Mack has committed while incarcerated in SCDC, many of them were for violent or disruptive offenses that threatened the safety of correctional officers, other inmates, and anyone else in the prison. The evidence of his prison misconduct refutes the conclusions of his experts that he can be rehabilitated because it shows that, in fact, he has not been rehabilitated. Also, his SCDC disciplinary offenses refuted evidence from Mack and several defense mitigation witnesses.

For instance, Mack testified that he obtained his GED at age twenty-two, and that he and several other inmates began a tutoring program to help other inmates likewise get their GEDs after he obtained his own. He also allegedly joined a "culture awareness committee which organize[s] educational programs to spread a positive message and promote change in spite of prison conditions." ***R. 382***. Yet, Mack turned twenty-two in late 2008. *See* Defense Ex. 20, Appellant's Sentencing Memorandum, ***R. 620*** (setting forth Mack's - now redacted - birthdate).

SCDC records reflect that he committed two disciplinary infractions within months before turning twenty-two (***R. 316***) and he that he thereafter committed at least *fifteen* disciplinary offenses, many of which were violent or otherwise very serious. His infractions continued until March 8, 2018. ***R. 316-18***.[40] Accordingly, the record supports the sentencing judge's conclusion

[40] Among other offenses, he was found guilty of possession of contraband, refusing to comply with instructions, three counts of striking an employee, throwing chemicals on a correctional officer, threatening to inflict harm, possession of a weapon, and evading a security device. He was also terminated from seven jobs in SCDC because of disciplinary infractions. *See* ***R. 316-19***. Dr. McKee's opinion that Mack's offenses were decreasing (***R. 372***) ignores that the serious offenses continued until less than a year before the resentencing hearing, despite the fact Mack was a named party in *Aiken* and was presumably aware, following the denial of certiorari in 2015, that a resentencing hearing would be held.

that Mack "has shown little to no signs of rehabilitation." ***R. 680***. Moreover, the sentencing judge's reliance on Mack's inability or unwillingness to be rehabilitated as a reason for imposing an LWOP sentence is consistent with the Supreme Court's admonition that "[t]hose prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." *Montgomery*, 136 S.Ct. at 736.

4. Allegedly faulting Mack for "not overcoming his circumstances to become a good, law-abiding citizen… instead of considering his circumstances as militating in favor of a sentence less than life."

There is also no merit to Mack's claim that the sentencing judge "faulted" him for "not overcoming his circumstances to become a good, law-abiding citizen… instead of considering his circumstances as militating in favor of a sentence less than life." Specifically, Mack complains of the following findings:

> While examining the Defendant's family and home environment, the Court acknowledges that the Defendant grew up in a bad home environment, whereby he witnessed several traumatic events in his childhood, and was affected by these events as well as many other things in his life. However, the court recognizes that many successful people grew up in chaotic and violent environments, and were able to adhere to the law and become productive members of society. Additionally, the State highlighted the childhoods of Elie Wiesel, Oprah Winfrey, and Tyler Perry, and how they all were able to overcome traumatic experiences in their childhoods and home life and become good, law-abiding, citizens in the community.

R. 680.

Respondent submits that it is clear the sentencing judge did not ignore the circumstances of Mack's youth and home environment, or how those circumstances may have negatively impacted Mack's life. Rather, as stated in the Order, he was merely recognizing that people are sometimes able to overcome such traumatic circumstances and be productive citizens. Further, *Miller* and *Aiken* make clear that a juvenile offender's family life is but one of the factors to be

considered in determining whether LWOP or a lesser sentence is appropriate. *See Miller*, 567 U.S. at 479-80; *Aiken*, 410 S.C. at 544-45, 765 S.E.2d at 577-78. Here, the sentencing judge considered the circumstances of Mack's upbringing and family life; he simply found that the circumstances of the murder, Mack's lack of true remorse, and Mack's unwillingness or inability to be rehabilitated – factors clearly supported by the record – justified an LWOP sentence, in spite of Mack's traumatic youth.[41] There was no error.

5. Failure to consider the "incompetencies associated with [Mack's] youth."

Mack's remaining claim is that the sentencing judge failed to consider "incompetencies associated with [Mack's] youth," such as his inability to deal with police officers or prosecutors. Once again, Respondent submits that there was no error.

In support of this claim, Mack points to his refusal to accept what, in hindsight, was a favorable plea bargain to the offense of voluntary manslaughter with a twenty year sentence. *See* ***R. 385***. He suggests that this demonstrated his lack of understanding of the legal process. *See Aiken*, 465 S.C. at 544-45, 765 S.E.2d at 577-78. Mack testified that he did not understand the concept of a "plea offer" or the "pros and cons" of receiving a jury trial as opposed to pleading guilty. ***R. 380-81***. Yet, he was represented by counsel whom the sentencing judge found was competent ***(R. 678***) when he rejected the plea bargain and his failure to accept the plea bargain does not show any failure to "appreciate the risks and consequences that is peculiar to youth." *See Miller*, 567 U.S. at 477.

[41] Although not referenced in the Sentencing Order, Respondent notes that Mack's circumstances are not too different from those faced by former President William Jefferson Clinton, who had to repeatedly intervene when his alcoholic stepfather physically abused his mother. *See, e.g.*, https://en.wikipedia.org/wiki/Roger_Clinton_Sr. ("Though Bill loved his stepfather, Roger's alcoholism and subsequent abuse of his mother and half-brother would lead to Bill's intervening on numerous occasions with physical force, each time resulting in his stepfather's arrest").

Many adult defendants refuse plea bargains because they wish to take their chances with a twelve person jury or they do not wish to admit guilt to any offense, and they are later convicted of the indicted offense(s) after a jury trial. Other defendants are not even offered an opportunity to plea bargain. *See Ex parte Littlefield*, 343 S.C. 212, 218-19, 540 S.E.2d 81, 84 (2000) ("Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense or they may simply decide not to prosecute the offense in its entirety") (quoting *State v. Thrift*, 312 S.C. 282, 291-92, 540 S.E.2d 341, 346 (1994)). *See also Missouri v. Frye*, 566 U.S. 134, 148 (2012) ("[A] defendant has no right to be offered a plea ... nor a federal right that the judge accept it"). *At most*, these defendant's – whether juvenile or adult - may have made a decision that they later regret.

Also, Mack does not claim on appeal that his decision to exercise his right to a jury trial – a right expressly granted by the Sixth Amendment, and one which was made after receiving the advice of counsel - was not a knowing and intelligent decision. *See Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) ("[A] defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived"). Additionally, in his original PCR proceedings, he did not allege an ineffective assistance of counsel with respect to advice on whether or not to plead guilty to manslaughter. *Davie v. State*, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009) ("[C]ounsel is required to fully communicate with the client so that the client can make an informed decision regarding any proposals by the State").[42] All he has shown is that he made a decision

[42] If he believed that he had received ineffective assistance of counsel in regard to his decision, the time for asserting such a claim was in his original PCR action, 2009-CP-21-609. *See State v. Kornahrens*, 290 S.C. 281, 287, 350 S.E.2d 180, 184 (1986) (ineffectiveness of counsel is an issue that can only be asserted in proceedings under the Post-Conviction Relief Act).

that, in retrospect, was not a good one. *Cf. Turner v. Calderon*, 281 F.3d 851, 879-81 (9th Cir. 2002) (defendant claimed counsel was ineffective for not pushing him harder to accept a plea when he later received the death penalty); *Smith v. United States*, 348 F.3d 545, 552 (6th Cir. 2003) (failure to "insist" on guilty plea is not a basis for an ineffective assistance of counsel claim).

Mack also points to his interview with law enforcement following his arrest even after he had invoked his right to counsel. *See* ***R. 302-04***. However, Respondent submits that he still has not shown actions reflecting "incompetencies associated with youth." To the contrary, the testimony from Sgt. Godwin was that Mack appeared to understand his rights when read to him and that never asked for his mother to be present during questioning. *See Fare v. Michael C.*, 442 U.S. 707, 725-26 (1979) (" Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination. At the same time, that approach refrains from imposing rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior record who knowingly and intelligently waives his Fifth Amendment rights and voluntarily consents to interrogation"); *State v. Parker*, 381 S.C. 68, 92, 671 S.E.2d 619, 631 (Ct. App. 2008) ("A juvenile's request for a parent may be considered when determining the voluntariness of his confession"). *Cf. J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (holding, in a case involving thirteen year old defendant, that a child's age properly informs the *Miranda* custody analysis, so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer). Also, he was "alert" and "forthcoming." ***R. 297-98***.

Rather than evidence of "incompetencies associated with youth," by answering questions from officers after he had invoked his right to counsel Mack has merely shown that he lacked an attorney's understanding of Fifth Amendment jurisprudence. Neither *Miller*, *Montgomery*, nor *Aiken* require an accused to have such a sophisticated understanding of Constitutional law.

Respondent submits that a more reasonable interpretation of *Miller*'s discussion of juveniles not being able to deal with police is the Court was referring to the it's recognition in *Michael C.* that a younger, unsophisticated juvenile's "request for his probation officer or his parents" may be an invocation of his right to remain silent, since they also recognize that experienced older juveniles with a prior record, such as Mack, are able to make a knowing and intelligent waiver of his rights. *See Michael C.*, 442 U.S. at 725-26. *See also Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (the totality of the circumstances includes "the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep"). Once again, his conduct was no different from many adult defendants. *See*, *e.g.*, *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (holding that once accused requests counsel, law enforcement may not reinitiate questioning "until counsel has been made available" to him); *State v. Henderson*, 286 S.C. 465, 470, 334 S.E.2d 519, 522 (Ct. App. 1985) ("The statement given by the defendant during the second interrogation … was obtained in violation of the constitutional principles enunciated in *Edwards* and was not admissible"). Therefore, there was no error.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and sentence of the circuit court should be affirmed.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
The Honorable William H. Seals, Circuit Court Judge
Appellate Case No. 2019-00521

THE STATE,

Respondent,

v.

TERRIEL LESHAWN MACK,

Appellant

CERTIFICATE OF COMPLIANCE

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

This11th day of August, 2020.

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