STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

William H. Seals, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRIEL LESHAWN MACK,

APPELLANT

APPELLATE CASE NO. 2019-000521

FINAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. Did the court err as a matter of law by sentencing Appellant to life without parole for an offense committed as a juvenile where the court failed to find Appellant was irreparably corrupt, which is a necessary conclusion in order to sentence a juvenile to life without parole?

II. Did the court err as a matter of law by sentencing Appellant to life without parole for an offense committed as a juvenile where the court failed to give Appellant's age and the hallmark features of youth, including immaturity, impetuosity, and the failure to appreciate the risks and consequences, the constitutional significance required pursuant to Eighth Amendment jurisprudence?

III. Misinterpreting the Miller factor requiring consideration of Appellant's possibility of rehabilitation, did the court err in sentencing Appellant to life without parole for an offense committed as a juvenile where the court ignored the evidence – testimony and reports from expert witnesses – that Appellant could be rehabilitated?

IV. Misinterpreting the Miller factor requiring consideration of the family and home environment that surrounded Appellant, did the court err in sentencing Appellant to life without parole for an offense committed as a juvenile where the court faulted Appellant for not overcoming his circumstances to become a good, law-abiding citizen, like Elie Wiesel, Oprah Winfrey, and Tyler Perry, instead of considering his circumstances as militating in favor of a sentence less than life?

V. Misinterpreting the Miller factor requiring the sentencing court to consider an individual's incompetencies associated with youth, such as the individual's inability to deal with police officers or prosecutors, did the court err in sentencing Appellant to life without parole where the uncontradicted evidence showed (1) Appellant gave an incriminating statement to law enforcement after his request for counsel was ignored by his interrogators and (2) Appellant declined a favorable plea bargain due to his lack of understanding of the evidence against him?

STATEMENT OF THE CASE

On September 9, 2004, a Florence County grand jury indicted Appellant for murder (2004-GS-21-1084). R. 287 ll. 8-9; R. 685. Islam Horn and Gregory Johnson were indicted for murder as well. R. 683. On October 25-26, 2005, the state, represented by Jack Lawson and John Jepertinger, called the case to trial before the Honorable Edward R. Cottingham and a jury. R. 1; R. 287, ll. 5-7. Ultimately, Appellant was found guilty of murder and sentenced to life imprisonment without the possibility of parole (LWOP) for murder. R. 250, ll. 14-20; R. 252, ll. 2-4; R. 685.

On appeal, Appellant was represented by Joseph L. Savitz, III. State v. Mack, Op. No. 2008-UP-486 (S.C. Ct. App. filed Aug. 15, 2008). Savitz filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). Id. On August 15, 2008, this Court dismissed Appellant's appeal and granted Savitz's motion to be relieved. Id.

On April 28, 2016, Appellant filed a motion for re-sentencing. R. 675. The Honorable William H. Seals, Jr., presided over the re-sentencing hearing on February 19-20, 2019. R. 286. John Jepertinger and Dudley Saleeby represented the state. R. 286. Marshall Weaver and Brie R. Russell represented Appellant. R. 286. At the conclusion of the hearing, Judge Seals took the matter under advisement. R. 412, ll. 24-25. The parties reconvened on March 20, 2019. R. 414. At that time, Judge Seals announced that he was sentencing Appellant to LWOP yet again. R. 415, ll. 19-21. Appellant objected to the sentence as "cruel and unusual" "in violation of the Eight Amendment [to] the United States Constitution." R. 416, ll. 1-4.

On March 20, 2019, Judge Seals signed a sentencing order in which he sentenced Appellant to LWOP yet again. R. 677 R. 686. On March 27, 2019, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

The standard of review for determining whether a sentencing court complied with Miller v. Alabama, 567 U.S. 460 (2012) and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), has not been articulated by the appellate courts of South Carolina. Appellant respectfully requests this Court establish a standard of review for these matters. Further, Appellant humbly suggests this court review the sentencing court's legal conclusions de novo and review the sentencing court's factual findings pursuant to a heightened abuse of discretion.

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

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

In the wake of Miller and Montgomery, the appellate courts of several states have addressed the standard of review applicable to an appellate review of a Miller determination. These courts have noted Miller's instruction that occasions for imposing a life without parole sentence on a juvenile homicide offender should be "uncommon." Miller, 576 U.S. at 479.

Like South Carolina, when a legal conclusion presents a mixed question of fact and law, Pennsylvania's appellate courts "defer to the findings of fact made by the sentencing court as long as they are supported by competent evidence, but give no deference to that court's legal conclusions." Commonwealth v. Batts, 163 A.3d 410, 435-36 (Pa. 2017). In Batts, the Supreme Court of Pennsylvania reasoned that "in the absence of the sentencing court reaching a conclusion, supported by competent evidence, that the defendant will be forever incorrigible, without any hope for rehabilitation, a life-without-parole sentence imposed on a juvenile is illegal, as it is beyond the court's power to impose." Id. at 435. Thus, the Pennsylvania Supreme Court reasoned, an appellate court "must review the sentencing court's legal conclusion that [a juvenile] is eligible to receive a sentence of life without parole pursuant to a de novo standard and plenary scope of review." Id.

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

In Davis v. State, 415 P.3d 666, 688 (Wyo. 2018), the Supreme Court of Wyoming determined that its review would be "an abuse of discretion, but [it would] not be lenient." The Court explained it would "view the sentence as inherently suspect and demand rigor from the sentencing court in its factual findings, its application of the Miller factors, and the ensuing sentence." Id. All legal conclusions would be reviewed de novo. Id.

The Eighth Circuit Court of Appeals discussed situations that constitute an abuse of discretion in United States v. Haack, 403 F.3d 997 (8th Cir. 2005). The Eighth Circuit instructed that a discretionary sentencing ruling may be an abuse of discretion "if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only the appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case." Haack, 403 F.3d at 1004.

Appellant respectfully requests this Court establish the standard of review for appeals involving juvenile life without parole sentences. Further, Appellant suggests the following standard of review for juvenile life without parole sentences, which are inherently suspect: de novo review of legal conclusions and heightened abuse of discretion review to factual findings.

STATEMENT OF THE FACTS

On December 17, 2003, Legrand Gowdy, a traffic officer with the Florence Police Department heard three gunshots between 6:00 and 6:30 p.m. R. 3, ll. 1-17; R. 4, ll. 14-25. When he investigated the source of the gunshots, he found the deceased, Joseph Todd Wilson, lying on the ground. R. 5, ll. 1-4. Gowdy saw what appeared to be a bag of crack cocaine near the deceased. R. 10, ll. 21-25; see also R. 151, ll. 21-23. At the crime scene, the police found no evidence to "indicate a suspect." R. 167, ll. 1-3. Ultimately, the state's evidence would boil down to the words of two individuals who were also charged with murder and testified against Appellant in hopes of advantageous plea agreements. R. 84, l. 4 – R. 85, l. 10; R. 110, l. 14 – R. 111, l. 9; R. 128, l. 16 – R. 130, l. 1.

Eventually, the police arrested Appellant, Islam Horn, and Gregory Johnson for offenses related to Wilson's death. Horn and Johnson testified against Appellant. Horn claimed that he was with Johnson and Appellant on December 17, 2003. R. 49, ll. 17-19. Horn alleged that while they were riding down the road, Appellant saw the deceased walking down the street and asked to stop so that he could buy some drugs from him. R. 52, ll. 2-10. Appellant and Johnson got out of the car and approached the deceased. R. 53, ll. 20-25. Less than a minute later, Horn heard a gunshot. R. 54, ll. 1-3. Unable to see anything from his vantage point, Horn drove his car to a spot with a better view. R. 54, ll. 4-11. Once there, Horn claimed he saw the deceased on the ground with Appellant standing over him. R. 54, ll. 12-16. Horn claimed Johnson was no longer there, but that Appellant shot the deceased three times in the back. R. 54, ll. 12-16. Horn immediately left the area. R. 55, ll. 20-23.

Further, Horn claimed that while he was in the detention center with Appellant, he received an unsigned, undated letter from Appellant confessing to shooting the deceased. R. 5, ll. 23; R.

271, ll. 20-25.[1] Horn gave the letter to his lawyer, who provided it to the prosecution. R. 60, ll. 2-11. In the letter, the writer claimed responsibility for the shooting. R. 62, l. 10 – R. 64, l. 18. Horn was forced to admit on cross-examination that he also sent letters to Appellant, and these letters threatened to kill Appellant if Appellant did not accept responsibility for the killing. R. 87, l. 7 – R. 90, l. 15.

Johnson claimed that when Horn stopped the car, he and Appellant got out. R. 117, ll. 4-7. Johnson alleged Appellant called out to the deceased who turned around and approached Appellant. R. 118, ll. 14-17. According to Johnson, Appellant then shot the deceased in the head. R. 118, ll. 17-19. Johnson ran away, but claimed that he saw Appellant stand over the deceased and shoot him three more times. R. 119, l. 23 – R. 120, l. 5.

During the deliberations, the jury revealed they were "divided." R. 243, ll. 15-16. Additionally, the jurors wanted to know if they were to consider the conspiracy charge against Appellant, which had been discussed with the jury, but was not called by the state to trial. R. 243, ll. 3-12. Finally, the jury expressed a desire for transcripts of the testimony from Horn and Johnson. R. 243, ll. 12-13. In response to the jury's question about conspiracy, the judge *sua sponte* proposed instructing the jury on the hand of one is the hand of all. R. 243, ll. 3-12. Defense counsel objected to the proposal, but the judge overruled the objection and instructed the jury regarding accomplice liability. R. 244, ll. 2-10; R. 246, l. 21 – R. 248, l. 13. Shortly after receiving

[1] At his PCR hearing, Appellant denied writing the letter. R. 258, ll. 23-25. Although Appellant told trial counsel that he did not write the letter, trial counsel failed to retain a handwriting expert to review the letter and compare it to Appellant's handwriting. R. 259, ll. 1-13. At trial, it was only Horn's self-serving testimony that served to authenticate the letter. R. 38, ll. 23-24; R. 58, l. 25 – R. 59, l. 1. During the PCR hearing, trial counsel characterized the letter as "the most damning" evidence against Appellant. R. 272, ll. 10-11. However, trial counsel indicated that he would not normally get a handwriting expert in this circumstance. R. 276, ll. 1-6; R. 281, ll. 7-9. In fact, trial counsel indicated that in his twenty years of practice, he had never hired a handwriting expert. R. 269, 17-19; R. 281, ll. 10-11.

this additional instruction, the jury returned its verdict finding Appellant guilty of murder. R. 250, ll. 14-20. Judge Cottingham sentenced Appellant, who was seventeen years old at the time of the offense, to life imprisonment without the possibility of parole. R. 252, ll. 2-4; R. 685.

ARGUMENT

Introduction

"[C]hildren are constitutionally different from adults for purposes of sentencing." Miller v. Alabama, 567 U.S. 460, 471 (2012). In Aiken v. Byars, 410 S.C. 534, 540-541, 765 S.E.2d 572, 575-576 (2014), the South Carolina Supreme Court held that "Miller does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." The Court held the sentencing judge must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" and that this requirement "deserves universal application." Aiken, 410 S.C. at 543, 765 S.E.2d at 577.

The Miller Court repeatedly focused on the notion that the character traits of children are "more transitory and less fixed." Miller, 567 U.S. at 471. Children by definition lack maturity and responsibility; thus, they are more likely to act with "recklessness, impulsivity, and needless risk-taking." Id. (internal quotation omitted). Due to the innate characteristics of children at large, there is a "great difficulty … of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id. at 479 (internal quotation omitted). In fact, the Court stated, "incorrigibility is inconsistent with youth." Id. at 473. Emphasizing the potential for reform present in all juveniles, the Court discussed the mitigating qualities of youth and noted "[i]t is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.'" Id. at 476 (quoting Johnson v. Texas, 509 U.S. 350, 368 (1982)).

Children "have diminished culpability and greater prospects for reform," and therefore, "'they are less deserving of the most severe punishments.'" Id. at 471 (quoting Graham v. Florida, 560 U.S.

48, 68 (2010)). "[T]he distinctive attributes of youth diminish penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Id. at 472. As a result, "[a]n offender's age is relevant to the Eighth Amendment." Id. at 473 (citing Graham, 560 U.S. at 76). In light of the relevance to the ban on cruel and unusual punishment, "imposition of a state's most severe penalties on juvenile offenders cannot proceed as though they were not children." Id. at 474.

The Court required sentencers "to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 480. Thus, it is clear that sentencing authorities *must* consider a juvenile offender's age and consideration of such *must* be a mitigating factor.

Recognizing that Miller "did not expressly extend its ruling to states such as South Carolina whose sentencing scheme *permits* a life without parole sentence to be imposed on a juvenile offender but does not *mandate* it," the South Carolina Supreme Court held it "must give effect to the proportionality rationale integral to Miller's holding – youth has constitutional significance." Aiken, 410 S.C. at 542-543, 765 S.E.2d at 576. Therefore, youth "must be afforded adequate weight in sentencing." Id. at 543, 765 S.E.2d at 576. The Court found the Miller decision "clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution." Id. at 543, 765 S.E.2d at 576-577. The sentencing court must consider the following factors in crafting a sentence proportional to the offense and the juvenile offender:

> (1) the chronological age of the offender and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence; (2) the family and home environment that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the incompetencies associated with youth—for example, the offender's

> inability to deal with police officers or prosecutors (including on a plea agreement) or the offender's incapacity to assist his own attorneys; and (5) the possibility of rehabilitation.

Id. at 544, 765 S.E.2d at 577 (internal quotations omitted).

Discussing these factors, the Iowa Supreme Court explained they would "best serve their purpose if sentencing courts remain committed to several key observations." State v. Roby, 897 N.W.2d 127, 147 (Iowa).

> First, the five factors identify the primary reasons most juvenile offenders should not be sentenced without parole eligibility. A sentence of incarceration without parole eligibility will be an uncommon result. Second, the factors must not normally be used to impose a minimum sentence of incarceration without parole unless expert evidence supports the use of the factors to reach such a result. Third, the factors cannot be applied detached from the evidence from which they were created and must not be applied solely through the lens of the background or culture of the judge charged with the responsibility to apply them. Perceptions applicable to adult behavior cannot normally be used to draw conclusions from juvenile behavior.

Id.

Appellant was a juvenile at the time of the offense and was re-sentenced to LWOP following Aiken, supra. On appeal, Appellant challenges the imposition of the sentence as a violation of the Eighth Amendment's prohibition on cruel and unusual punishment. These principals, established by the United States Supreme Court and the South Carolina Supreme Court, govern review of his claims.

I. The court erred as a matter of law by sentencing Appellant to life without parole for an offense committed as a juvenile where the court failed to find Appellant was irreparably corrupt, which is a necessary conclusion in order to sentence a juvenile to life without parole.

Relevant facts

In deciding Appellant was deserving of the harshest sentence possible, the sentencing judge failed to find Appellant was irreparably corrupt. R. 677. Instead, his order noted his concern with

the "cold-blooded nature of the killing," "the fact that [Appellant] ha[d] shown little to no signs of rehabilitation," and that Appellant did not show remorse for the crime until the hearing, which the judge determined was a time when he had something to gain. R. 677. Nowhere in his order did the judge determine Appellant was permanently incorrigible arising from irreparable corruption; thus, the judge could not sentence Appellant to LWOP.

Discussion

In Montgomery v. Louisiana, 136 S. Ct. 718 (2016), the United States Supreme Court noted Miller recognized "that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." Montgomery, 136 S. Ct. at 733. However, "in light of children's diminished culpability and heightened capacity for change, Miller made clear that appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Id. at 733-34 (internal quotations omitted). "Because Miller determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status – that is, juvenile offenders whose crimes reflect the transient immaturity of youth." Id. at 734 (internal citations and quotations omitted). Miller barred "life without parole" "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." Id. "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." Id. (internal quotations omitted).

This conclusion was not surprising in light of the Court's prior jurisprudence in this area. In its landmark decision holding the Eighth Amendment prohibits the death penalty for juveniles,

the United States Supreme Court explained that while it could not "deny or overlook the brutal crimes too many juvenile offenders have committed," "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." Roper v. Simmons, 543 U.S. 551, 570-72 (2005). Later, when it determined LWOP sentences for a juvenile non-homicide offender were unconstitutional, the United States Supreme Court emphasized its conclusion in Roper that it is "the rare juvenile offender whose crime represents irreparable corruption," and noted that because juveniles are more capable of change than adults, "their actions are less likely to be evidence of irretrievably depraved character." Graham, 560 U.S. at 68-69.

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

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

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

A review of the United States Supreme Court decisions makes clear that a juvenile may be sentenced to LWOP only if the crime committed is indicative of permanent incorrigibility; that the crime was not the result of "unfortunate yet transient immaturity." "Youth has constitutional significance, and unless a juvenile offender suffers from 'irreparable corruption,' a sentence of life without the possibility of parole is improper." Robert M. Dudek, A Meaningful Opportunity for Release: Resentencing Hearings for Juvenile Offenders Sentenced to Life Without Parole

Following *Aiken v. Byars*, 68 S.C. L. Rev. 499, 499 (2017). In fact, "a sentence of life without the possibility of parole for a juvenile offender is presumptively wrong." Id.

State courts considering this question have come to the same conclusion – the Eighth Amendment requires a finding that the juvenile is irreparably corrupt in order for a life sentence to be imposed. The Iowa Supreme Court interpreted the decisions of the United States Supreme Court and concluded "[i]f life without the possibility of parole may be imposed at all under federal law, … it may be imposed only in cases where irretrievable corruption has been demonstrated by the rarest of juvenile offenders." State v. Sweet, 879 N.W.2d 811, 832 (Iowa 2016). The Iowa Court concluded "the United States Supreme Court, under the Federal Constitution, has preserved life without the possibility of parole for juveniles, even those who commit heinous crimes, only for a very small category of cases." Id. at 834.

In Illinois, "a juvenile defendant may be sentenced to life imprisonment without parole, but only if the trial court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." People v. Holman, 91 N.E.3d 849, 903 (Ill. 2017). "The court may make that decision only after considering the defendant's youth and its attendant characteristics." Id. Likewise, the Pennsylvania Supreme Court held

> [F]or a sentence of life without parole to be proportional as applied to a juvenile murderer, the sentencing court must first find, based on competent evidence, that the offender is entirely unable to change. It must find that there is no possibility that the offender could be rehabilitated at any point later in his life, no matter how much time he spends in prison and regardless of the amount of therapeutic interventions he receives, and that the crime committed reflects the juvenile's true and unchangeable personality and character.

Commonwealth v. Batts, 163 A.3d 410, 443 (Pa. 2017). Put simply, "in the absence of the sentencing court reaching a conclusion, supported by competent evidence, that the defendant will

forever be incorrigible, without any hope for rehabilitation, a life-without-parole sentence imposed on a juvenile is illegal, as it is beyond the court's power to impose." Id. at 444.

When confronted with this question, the Georgia Supreme Court concluded that the United States Supreme Court's case law required "a specific determination that [the defendant] is *irreparably corrupt*" in order to sentence a juvenile to LWOP. Veal v. State, 784 S.E.2d 403, 411 (Ga. 2016) (emphasis in original). The court vacated Veal's LWOP sentence and remanded for resentencing because the trial judge failed to "make any sort of distinct determination on the record that [Veal was] irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom an LWOP sentence is proportional under the Eighth Amendment." Id. at 412. See also Davis v. State, 415 P.3d 666, 695 (Wyo. 2018) (holding a lower court abused its discretion when it sentenced Davis to LWOP without making a finding that he was permanently incorrigible); Landrum v. State, 192 So.3d 459, 469 (Fla. 2016) (holding a sentence of LWOP for a juvenile is permissible "only in the most 'uncommon' and 'rare' case where the juvenile offender's crime reflects 'irreparable corruption'").

The sentencing judge failed to conclude that Appellant was within the narrow class of juvenile offenders who is irreparably corrupt and beyond redemption. This failure is not surprising in light of the evidence presented. Each of the factors weighed heavily in Appellant's favor as demonstrated by the evidence presented, including testimony from one expert, specifically addressing Appellant's potential for rehabilitation, two expert reports, details of Appellant's difficult family and home environment, and his immaturity during youth. Instead, the judge's brief order gave lip service to the Miller factors, relied exclusively on the state's evidence, and ignored Appellant's evidence. By failing to make the necessary finding that Appellant was irreparably corrupt, the sentencing judge erred as a matter of law by sentencing Appellant to LWOP.

II. The court erred as a matter of law by sentencing Appellant to life without parole for an offense committed as a juvenile where the court failed to give Appellant's age and the hallmark features of youth, including immaturity, impetuosity, and the failure to appreciate the risks and consequences, the constitutional significance required pursuant to Eighth Amendment jurisprudence.

Relevant facts

In his sentencing order, Judge Seals considered Appellant's age as an aggravating circumstance, instead of a mitigating circumstance as required by the Eighth Amendment. Specifically, Judge Seals found as follows:

> In regard to the age of the offender, [Appellant] was 17 years old at the time of the murder, and was 18 years old when he was convicted. The court considered that at the time of the murder, [Appellant] was within one year of being able to serve in the military to possibly fight and die for this country and had a driver's license. [Appellant] was within one year of an age whereby he would have immense responsibilities and considered an adult by law.

R. 677. Quite clearly, Judge Seals considered Appellant's tender age of seventeen years at the time of the offense to have no constitutional significance. Rather, Judge Seals determined that due to Appellant's age, he was an adult for purposes of sentencing – contrary to the Eighth Amendment. Further, expert testimony showed Appellant "was emotionally, perceptually, and cognitively (decision-making, problem-solving) a much younger person" than his seventeen years when the shooting occurred. R. 513.

Discussion

The constitutional impact of youth is not new. In Johnson v. Texas, 509 U.S. 350, 367 (1993), the United States Supreme Court recognized that a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered

actions and decisions." In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Oklahoma Court of Criminal Appeals refused to consider Eddings' personality disorder and family history as mitigating because, in its view Eddings "knew the difference between right and wrong," and the evidence did not "excuse" the behavior. Eddings, 455 U.S. at 113. The United States Supreme Court admonished the state appellate court from "consider[ing] only that evidence to be mitigating which would tend to support a legal excuse from criminal liability." Id. Emphasizing that "the chronological age of minor is a relevant mitigating factor of great weight," the Court held the background and mental and emotional development of a youthful defendant" must be "duly considered in sentencing." Id. at 116.[2]

"The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." Roper v. Simmons, 543 U.S. 551, 574 (2005).[3] Thus, the Court recognized that

[2] Concluding the Eighth Amendment prohibited the execution of a person who was under sixteen years of age at the time of his or her offense, the Court found "broad agreement on the proposition that adolescents as a class are less mature and responsible than adults." Thompson v. Oklahoma, 487 U.S. 815, 834 (1988). The Court "endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." Id. at 835. "Given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children," retribution as a goal for imposition of the death penalty "is simply inapplicable to the execution of a 15-year-old offender." Id. at 836. Likewise, the Court found "the deterrence rationale is equally unacceptable" "[f]or such a young offender." Id. at 836-837.

[3] "[I]f the neurological research and social science on which Miller was based conclude that cognitive abilities are not fully developed until around age twenty-five, it may be arbitrary and inconsistent to choose age eighteen as the age after which a defendant may be subject to mandatory life without parole." Kevin J. Holt, The Inbetweeners: Standardizing Juvenileness and Recognizing Emerging Adulthood for Sentencing Purposes After *Miller*, 92 Wash. U. L. Rev. 1393, 1396 (2015). "The distinction of adulthood beginning at age eighteen is arguably based on no more than traditional and outdated norms." Id. "The Court's Eighth Amendment jurisprudence and cognitive science articulated in Miller and its forebears may necessitate legal recognition of a stage of life between adolescence and adulthood often called 'emerging adulthood,' during which defendants should be entitled to further special consideration under the Eighth Amendment." Id. See also Alexandra O. Cohen, et al., When Does a Juvenile Become an Adult? Implications for Law and Policy, 88 Temp. L. Rev. 769 (2016).

"[d]rawing the line at 18 years of age" was subject to objection. Id. Nevertheless, the Court determined that "a line must be drawn." Id. The Court settled on eighteen because at the time "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood." Id. The Graham Court, relied upon developments in social science demonstrating the fundamental differences between juveniles and adults:

> [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults. It remains true that from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Graham, 560 U.S. at 68 (internal citations omitted).

As explained, the impetus for Miller, Graham, and Roper was not chronological age; rather, it was the characteristics of individuals associated with that age. "The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." Graham, 560 U.S. at 570. The Supreme Court's trilogy of cases, Roper, Graham, and Miller, emphasized their reliance on the growing body of scientific evidence establishing significant differences between adult and juvenile brains, which the Court deemed to be of constitutional import. Despite the Court's categorization of juveniles relative to chronological age, the focus of the decisions was the psychological and behavioral aspects inherent to the age group in general. See State v. O'Dell, 358 P.3d 359, 366 (Wash. 2015) (holding "a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender" because "advances in scientific literature," show that "age may well mitigate a defendant's culpability, even if that defendant is over the age of 18"); Cruz v. United States, No. 11-CV-787 (JCH), 2018

WL 1541898 (D. Conn. Mar. 29, 2018) (cataloguing state and federal statutes detailing sentencing schemes for juveniles and youthful offenders and examining (1) the 2017 report from the United States Sentencing Commission regarding youthful offenders, (2) an ABA Resolution urging the prohibition of capital punishment on individuals twenty-one years old or younger at the time of the offense, and (3) compelling scientific evidence regarding the brains of 18-year-olds).

This "factor draws upon the features expected to be exhibited by youthful offenders that support mitigation and allows for the introduction of evidence at the sentencing hearing to show the offender had more or less maturity, deliberation of thought, and appreciation of risk-taking than normally exhibited by juveniles." State v. Roby, 897 N.W.2d 127, 145 (Iowa 2017). "This factor is most meaningfully applied when based on qualified professional assessments of the offender's decisional capacity." Id.

Just as the judge in the instant matter relied heavily on Appellant's age of seventeen, in State v. Seats, 865 N.W.2d 545, 556 (2015), the Iowa Supreme Court confronted a case in which the trial court "emphasized that Seats was a seventeen-year-old at the time the crime was committed." The court explained that "current science demonstrates that the human brain continues to develop into the early twenties." Seats, 865 N.W.2d at 557. The court held that "[i]n light of the science, the fact that a defendant is nearing the age of eighteen does not undermine the teachings of Miller." Id.

Similarly, the sentencing judge in Davis, supra, failed to give youth its constitutional significance. Davis, 415 P.3d at 688-689. The sentencing judge noted that Davis "was literally days away from his eighteenth (18^{th}) birthday at the time of the crimes." Id. at 688. The Supreme Court of Wyoming held the sentencing judge "discounted the importance" of the Miller factor requiring consideration of a juvenile's chronological age and its hallmark features, including

immaturity, impetuosity, and failure to appreciate the risks and consequences. Id. at 688-689. Based on the language used by the sentencing court, the Wyoming Supreme Court warned that the court may have even ignored Davis' youth or even weighed his age against him. Id. at 689.

"[T]he Miller Court established that violation of the Eighth Amendment occurs when offenders 'under the age of 18 at the time of their crimes' are sentenced to mandatory life without parole." Id. "[A]ge is not a sliding scale that necessarily weighs against mitigation the closer the offender is to turning eighteen years old at the time of the crime." Id. (internal quotation omitted). "Miller contains no suggestion that a seventeen-year-old is more deserving of adult punishment than a sixteen-year-old." Id. Accordingly, the court held the sentencing court abused its discretion when it refused to take Davis' youth into account as a mitigating factor because there was no evidence to conclude Davis possessed features of maturity beyond his years. Id.

The sentencing judge devoted a single paragraph of his brief order to his consideration of Appellant's age and the hallmark features of youth. This solitary paragraph evinced how the judge actually used Appellant's age as an aggravating factor, and not the mitigating one required by the Eighth Amendment. Instead of considering the hallmark features of youth, the judge used Appellant's age of seventeen years to support his decision to treat Appellant as an adult. Not only was Appellant's age in and of itself a factor necessarily militating in favor of a sentence less than life, but the expert testimony, which was not contradicted, showed that at the time of the shooting, Appellant was functioning at a maturity level even below his seventeen years of life. The sentencing judge erred as a matter of law when he treated Appellant's age as an aggravating factor and failed to give youth the constitutional significance required by the Constitution.

III. Misinterpreting the *Miller* factor requiring consideration of Appellant's possibility of rehabilitation, the court erred in sentencing Appellant to life without parole for an offense committed as a juvenile where the court ignored the evidence – testimony and reports from expert witnesses – that Appellant could be rehabilitated.

Relevant facts

Dr. Geoffrey McKee, a forensic psychologist, assessed Appellant prior to his re-sentencing hearing. R. 340, ll. 5-21; R. 513. In his opinion, Appellant could be rehabilitated. R. 357, ll. 9-11; R. 513. The testing showed Appellant was "amenable for treatment." R. 357, ll. 11-13; 513. In fact, the testing showed Appellant displayed "positive amenability for treatment." R. 358, ll. 2-3; R. 513. In Dr. McKee's opinion, Appellant "remains amenable for treatment and his likelihood of rehabilitation is not dissipated." R. 358, ll. 3-5; R. 513. Dr. McKee noted that the number of Appellant's disciplinary infractions within the Department of Corrections was decreasing, which indicated he was increasing in maturity. R. 372 ll. 1-5; R. 513.

Appellant's educational history showed an individual capable of rehabilitation as well. Appellant scored perfect on his kindergarten reading test and made all A's in third grade. R. 619. His grades were exemplary until sixth grade. R. 619. Appellant's decrease in scholastic achievement coincided with his great grandmother's death. R. 619.

Additionally, Appellant presented a psychiatric evaluation conducted by Dr. Matthew E. Gaskins. R. 547. Dr. Gaskins explained that Appellant had "shown the ability to improve himself and others during his current incarceration." R. 547. Not only did Appellant obtain his GED while he was incarcerated, but he helped others do so as well. R. 547; R. 545. (explaining that Appellant was a tutor in the education department in Lieber in 2009); R. 546. (documentation of Appellant's

receipt of a GED in 2008). Appellant tutored and mentored other inmates, as well as engaging in a cultural awareness program. R. 547.

Regarding Appellant's disciplinary infractions while in prison, Dr. Gaskins noted that Appellant "had extended periods of time without behavioral infractions." R. 547. Further, Appellant explained that many of his behavioral problems were the result of self-defense or actions taken in order to survive. R. 547. For example, when Appellant was found to have a sharpened stick, he had recently undergone surgery on his shoulder, which left him vulnerable to attack from other inmates. R. 547. Also, Appellant's frustrations with the corrections system were evident – and rightly so – during his evaluation by Dr. Gaskins, who observed a roach crawl out of Appellant's food as it was delivered by the corrections staff. R. 547. Appellant told Dr. Gaskins that what he observed – the roach in Appellant's food – was a normal occurrence. R. 547.

Testing showed that when Appellant was seventeen-years old, his score on the dangerousness domain of the Risk-Sophistication Treatment Inventory would likely have fallen in the low risk category. R. 513. Likewise, his score on the sophistication-maturity domain would have fallen in the low range because the large majority of individuals his age would display greater maturity than he did at seventeen. R. 513. Based upon records available in 2003 and 2004, Dr. McKee placed Appellant in the "good" parole prognosis category. R. 513. This meant Appellant was in the second highest category to not reoffend. R. 513. Appellant's parole risk assessment score showed a high probability that he would be able to successfully complete community supervision. R. 513.

After his incarceration, Appellant wrote a letter to Dawn Renee Simmons, an author, in December 2013, discussing the incarceration of youth. R. 541. Simmons published the letter in her book, Letters to Our Sons, A Collection of Letters by Prisoners & Ex-prisoners to Stop Mass

Incarceration of Our Youth. R. 514. Further, multiple members of Appellant's family indicated support for his release and pledged to assist him in returning to society in a productive and contributing way. R. 542. (affidavit of aunt promising to support Appellant upon release); R. 543. (affidavit of cousin offering assistance to Appellant upon release); R. 544. (affidavit of father offering employment and housing upon Appellant's release).

In his order, Judge Seals discussed Appellant's possibility of rehabilitation. R. 677. However, he only considered Appellant's infractions at the Department of Corrections. R. 677. After listing Appellant's infractions, the judge noted that many were "serious and violent in nature." R. 677. Based solely on the "multitude of infractions," the judge determined Appellant's "ability to be rehabilitated [was] unlikely." R. 677. His order completely ignored Appellant's expert witnesses and additional evidence that he was capable of rehabilitation. R. 677.

Discussion

Prior to sentencing a juvenile for a homicide offense, a sentencer must consider the juvenile's possibility of rehabilitation. Miller, 567 U.S. at 478; Aiken, 410 S.C. at 544, 765 S.E.2d at 577. The sentencing judge must take into consideration that "[j]uveniles are more capable of change than are adults" and that as a result, "their actions are less likely to be evidence of 'irretrievably depraved character.'" Graham, 560 U.S. at 68. Most juveniles who engage in criminal activity are not fated to become criminals for life. Id. The potential for rehabilitation "supports mitigation for most juvenile offenders because the 'signature qualities of 'immaturity and irresponsibility, impetuousness, and recklessness' are all 'transient.'" Davis v. State, 415 P.3d 666, 693 (Wyo. 2018). "Most juveniles will outgrow the signature qualities of youth by the time their brain development is complete." Id. "Juveniles are more likely to change with available treatment." Id. "And, the seriousness of their crime does not alter these propositions." Id.

When examining an individual's prison record, it is important to consider that the person is serving a life without parole sentence, meaning the person has no hope of release. Davis, 415 P.3d at 693. "A life-without-parole sentence 'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." Id. In Davis, the sentencing court's order stated the following regarding rehabilitation:

> The Court must also consider the potential for rehabilitation – in this case, it appears that even though the Defendant has been presented with, and completed, a vast range of programs aimed at assisting incarcerated persons personal growth, Defendant still seems to maintain a violent and aggressive attitude based on statements he has made, and incidents he has been involved in …. This also seems consistent with the reports from Defendant's youth as described in the PSI, wherefore the Court finds that rehabilitation is unlikely at this stage in Defendant's life.

Id. at 675-676. Ultimately, the Wyoming Supreme Court held the sentencing court abused its discretion by "concluding that he was not capable of rehabilitation without the benefit of expert testimony concerning Mr. Davis's potential for rehabilitation, and for considering Mr. Davis's disciplinary record in prison without taking into account the fact that for the majority of his incarceration he had no hope of release, and without weighing his accomplishments and personal growth while in the penitentiary." Id. at 695-696.

It is important to recognize that "the seriousness of the offense (even homicide) is not a reliable predictor of future offending or rehabilitation failure." Elizabeth Scott et. al., Juvenile Sentencing Reform in A Constitutional Framework, 88 Temp. L. Rev. 675, 700 (2016). As explained by the Supreme Court of Iowa, in light of the fact that delinquency is normally transient and that juveniles are more malleable to change and reform in response to available treatment, "[t]he seriousness of the crime does not alter these proportions," and "judges cannot necessarily use the seriousness of a criminal act, such as murder, to conclude the juvenile falls within the

minority of juveniles who will be future offenders or are not amenable to reform." State v. Roby, 897 N.W.2d 127, 147 (Iowa 2017). Further, according to the Iowa Court, "any such conclusion would normally need to be supported by expert testimony." Id.

The Pennsylvania Supreme Court reversed a resentencing court's imposition of life without parole for a juvenile homicide offender where the sentencing court repeatedly made conflicting findings regarding the defendant's possibility of rehabilitation. Commonwealth v. Batts, 163 A.3d 410, 445 (Pa. 2017). The sentencing court concluded Batts' actions were not the result of transient immaturity because the murder was deliberate and premeditated. Id. at 446. "[I]t was the sentencing court's view that because Batts was not 'caught up in the heat of a stressful confrontation,' without 'time to plan and deliberate' or an 'appreciation for what might happen next,' there could be no finding that the murder was the result of youthful impulsiveness or poor judgment." Id. at 446-447. "Given this perspective, the conviction of any juvenile of first-degree murder would require the imposition of a sentence of life without parole" in light of Pennsylvania's definition of first-degree murder. Id. at 447.

The court noted that "although there [was] no question that the sentencing court thoroughly and completely reviewed the record and thoughtfully considered the testimony presented at the resentencing hearing, it overlooked the main premise of the United States Supreme Court's jurisprudence regarding juvenile sentencing issued over the last twelve years." Id. at 447. "The High Court has held, as a matter of law, that children are constitutionally different from adults for purposes of sentencing, in that they have diminished culpability and greater prospects for reform, making them less deserving of the most severe punishments." Id. (internal quotations omitted).

Appellant presented evidence from two experts who opined that rehabilitation was possible for Appellant. The state failed to present any expert testimony on this factor. Instead, the state

relied solely on the records of Appellant's disciplinary infractions while in the department of corrections, which were admitted through a records custodian who was unable to elaborate upon the information contained in the records. Many of Appellant's infractions showed his lack of maturity, such as being out of place on numerous occasions, failing to obey orders, and masturbation. Even the infractions that were considered more serious, such as possession of a weapon, were understandable given the dangerous environs of prison. Further, those infractions must be viewed through the reality of Appellant's sentence – he had no hope of release, and therefore, no reward for good behavior.

Appellant's expert evidence regarding his capacity for rehabilitation was unrebutted. In fact, Appellant's disciplinary infractions were explained by his experts as showing that when he was first incarcerated as a teenager, he engaged in the rebellious and non-conforming conduct that is typical of teenagers, but as he aged, his infractions decreased, showing signs of maturity. The sentencing judge misinterpreted the Miller factor requiring consideration of Appellant's possibility of rehabilitation where he simply ignored the evidence in the record that Appellant could be rehabilitated.

IV. Misinterpreting the *Miller* factor requiring consideration of the family and home environment that surrounded Appellant, the court erred in sentencing Appellant to life without parole for an offense committed as a juvenile where the court faulted Appellant for not overcoming his circumstances to become a good, law-abiding citizen, like Elie Wiesel, Oprah Winfrey, and Tyler Perry, instead of considering his circumstances as militating in favor of a sentence less than life.

Relevant facts

Appellant was born in 1986 to his sixteen-year old mother. R. 341, ll. 5-7; R. 513; 547. His biological father rejected him. R. 341, ll. 7-10; R. 513. Appellant's mother became involved with a man named Nathaniel, whom Appellant greatly admired and respected. R. 341, ll. 13-18; R. 513. However, Nathaniel had a dark side. When Appellant was eight-years old, Nathaniel severely beat Appellant's mother and destroyed their home. R. 342, ll. 5-8; R. 513; R. 523. The incident report revealed this was not the first time that Nathaniel beat Appellant's mother. R. 523. Then, when Appellant was ten-years old, Appellant contacted authorities because his mother hit him and his siblings, leaving a lump on Appellant's head. R. 342, ll. 8-12; R. 513; R. 525. According to the incident report, Appellant's mother beat her children "a lot." R. 525. Shortly thereafter, Nathaniel beat Appellant's mother again, including breaking one of her front teeth, which finally ended their relationship. R. 342, ll. 13-15; R. 513; R. 524. Due to these traumatic events, Appellant may have developed post-traumatic stress disorder. R. 343, ll. 1-20; R. 513.

As a single mother, Appellant's mother worked multiple jobs to make ends meet. R. 542. Unfortunately, her work schedule prevented her from being present in Appellant's life. R. 542. As a result, Appellant and his siblings "ran free in the neighborhood and did not have much guidance." R. 542. Appellant's mother "did not provide a lot of support or leadership" and she was "very inconsistent with parenting them." R. 542. "[T]he boys just seemed to make their own choices of where to be and when." R. 542. Often, there was no food in Appellant's refrigerator. R. 547. Thus, Appellant and his siblings stole food to eat. R. 547. Additionally, Appellant began living the "street life" to make money to buy food for his siblings. R. 547.

When Appellant was fourteen years old, his maternal great grandmother died. R. 346, ll. 9-15; R. 417; R. 513. She was the "rock of the family," and her death resulted in the family falling apart. R. 346, ll. 15-19; R. 513. Due to their close relationship, Appellant was very saddened by

her loss. R. 346, l. 20; R. 417 R. 513. Thereafter, Appellant's mother was in a series of relationships. R. 346, l. 25 – R. 347, l. 1; R. 513 R. 542. One of these men tried to remove any memory of Nathaniel from their lives – harkening to Appellant's biological father's rejection of him, and resulting in a series of undiagnosed and untreated major depressive episodes. R. 347, ll. 2-19; R. 513. These men continued to inflict abuse upon Appellant's mother. R. 528.

Appellant lost his virginity at age twelve to his seventeen-year old babysitter. R. 347, l. 19 – R. 348, l. 1; R. 513. It was at this age that Appellant began to use alcohol and marijuana as a form of self-medication. R. 349, ll. 1-3; R. 417; R. 513. During this time, Appellant began to run away from home. R. 350, ll. 2-23; R. 513. R. 526; R. 527. (Appellant's mother did not report the twelve-year-old missing until three days after he ran away). Appellant also began to have trouble at school. R. 352, ll. 2-5.

Throughout the 2000s, Appellant witnessed his mother as the repeated victim of domestic violence. R. 352, l. 1 – 353, l. 25; R. 529. (describing violence in a relationship, including punches to her face); R. 530; R. 531. On September 4, 2002, Appellant, who was only fifteen years old, defended his mother against the man who was beating her. R. 353, ll. 22-25; R. 351 (describing how one of the children was cut by a knife by the man). Instead of disengaging, the man beat Appellant causing injuries serious enough to require medical attention. R. 355, ll. 10-16; 533.

In 2002, fifteen-year old Appellant was evaluated at the Department of Juvenile Justice after he was adjudicated delinquent for breaking into cars and stealing cell phones while he was with other individuals. R. 417; R. 513. During this time, Appellant displayed "good manners," "got along with staff, obeyed the rules and had a good attitude toward supervision." R. 417. "He volunteered for several work details and demonstrated that he was responsible. He stayed out of trouble and made a good adjustment while at DJJ." R. 417. The DJJ teachers praised Appellant

for following directions, respecting authority, respecting the rights of others, adapting to class structure, demonstrating self-control, demonstrating responsibility, and demonstrating age-appropriate social skills. R. 417. The DJJ evaluator noted that Appellant employed the defense mechanism of denial, including the denial of the effect of his father's rejection on him and of his need for emotional closeness and support. R.417. Appellant readily rejected others in order to avoid being rejected first. R. 417. He engaged in substance abuse to "numb uncomfortable feelings." R. 417.

Although Appellant was placed on probation, as recommended by DJJ, he violated probation, resulting in a commitment to DJJ. R. 513. While at DJJ, Appellant participated in treatment groups, including anger management. R. 513. Although Appellant had some behavior problems, he made progress with anger management. R. 513. He was paroled from DJJ on November 14, 2003. R. 513. A short time later, Appellant was arrested for the shooting deat of Wilson. Psychological testing conducted in 2019 revealed that while Appellant "may have been chronologically 17 years old at the time of his arrest and subsequent confinement in jail awaiting trial, he was emotionally, perceptually, and cognitively (decision-making, problem-solving) a much younger person." R. 513.

While Appellant was incarcerated in the South Carolina Department of Corrections, he was prescribed various anti-psychotic medications and anti-depressants. R. 513. While in the Department of Corrections, he was diagnosed with Psychosis NOS and Post-traumatic Stress Disorder (PTSD). R. 513; R. 547. On June 15, 2018, he attempted suicide. R. 547 (describing a progress note in which Appellant reported he was found hanging in the shower and that he had reported suicidal ideation on multiple occasions). Subsequent evaluations concurred in the diagnosis of PTSD. R. 513; R. 547.

In his order, the judge "acknowledge[d] that [Appellant] 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." R. 677. Nevertheless, the court "recognize[d] 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." R. 677. The court was persuaded by the state "highlight[ing] 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. 677.

Discussion

The United States Supreme Court mandated consideration of a juvenile defendant's family and home environment. Miller v. Alabama, 567 U.S. 460, 478-479 (2012). Specific to the case before it, the Court declared that "if ever a pathological background might have contributed to a 14-year-old's commission of a crime, it is here. Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him . . . ." Id. Subsequently, the South Carolina Supreme Court held a sentencing court must consider "the family and home environment that surrounded the offender." Aiken v. Byars, 410 S.C. at 544, 765 S.E.2d at 577.

Consideration of the family and home environment is most familiar to those considering cases involving capital punishment. See Wiggins v. Smith, 539 U.S. 510, 533 (2003) ((citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C)(1989), which discussed the need to collect information related to a defendant's "family and social history"). In Eddings v. Oklahoma, 455 U.S. 104 (1982), the United States Supreme Court vacated the death sentence of a sixteen-year-old who killed a police officer where evidence showed Eddings experienced a neglectful and sometimes violent upbringing, had a personality

disorder, and that his mental and emotional age was younger than his chronological age. Eddings, 455 U.S. at 115-16. The Court held evidence presented was mitigating and must be considered by the sentencer, explaining "[e]ven the normal 16-year-old customarily lacks the maturity of an adult. In this case, Eddings was not a normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve." Id. at 116.

The Iowa Supreme Court explained "[t]his factor seeks to identify any familial dependency and negative influences of family circumstances that can be ingrained on children. State v. Roby, 897 N.W.2d 127, 146 (Iowa 2017). Additionally, the court observed that "expert testimony will best assess how the family and home environment may have affected the functioning of the juvenile offender." Id. "This factor does not rely on general perceptions, but specific measures of functioning," and "it is not limited to extremely brutal or dysfunctional home environments, but considers the impact of all circumstances and all income and social backgrounds." Id.

In another case, the Iowa Supreme Court reviewed an order imposing a life without parole sentencing on a juvenile in a case much like the one at bar in State v. Seats, 865 N.W.2d 545 (Iowa 2015). After the hearing, the sentencing judge noted that he had "considered the defendant's unfortunate background and the difficulties he faced in his youth." Seats, 865 N.W.2d at 552. While the court was "not unsympathetic to the bleakness and desperation of that life," the judge "failed to find here the 'attendant characteristics' of youth that might outweigh the seriousness of the crime or otherwise require a less sentence than one that would be imposed on an adult." Id. Reviewing the lower court's findings, the Iowa Supreme Court concluded that "[f]actually, the district court appeared to use Seat's family and home environment vulnerabilities together with his lack of maturity, underdeveloped sense of responsibility, and vulnerability to peer pressure as aggravating, not mitigating, factors." Id. at 557.

The High Court has repeatedly warned "that the gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption: 'The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.'" Adams v. Alabama, 136 S. Ct. 1796, 1800 (2016) (Sotomayor, J. concurring) (quoting Roper, 543 U.S. at 570). "The nature of the crime alone will generally be insufficient to support a conclusion that a juvenile is irreparably depraved." Davis v. State, 415 P.3d 666, 689 (Wyo. 2018). In fact, "the circumstances of the crime may not necessarily weigh against mitigation" because "the aggravating circumstances of a crime that suggest an adult offender is depraved may only reveal a juvenile offender to be wildly immature and impetuous." Id. at 690.

The sentencing judge failed to use Appellant's "bad home environment" as mitigating evidence. Instead, the judge showed that he did not consider "a bad home environment" and witnessing "several traumatic events [during one's] childhood," as matters that would weigh in favor of a sentence less than LWOP. According to the judge, individuals such as "Elie Wiesel, Oprah Winfrey, and Tyler Perry," had difficult childhoods, which they were able to overcome in order to become "good law-abiding citizens in the community." R. 677. Thus, in the judge's view, a difficult childhood was simply something to overcome. The judge transformed Appellant's mitigating evidence into aggravating evidence because Appellant was unable to pull himself up by his bootstraps in order to rise above his circumstances. In doing so, the judge erred in sentencing Appellant to life because he refused to consider Appellant's unrefuted mitigating evidence and give it the constitutional significance demanded by the Eighth Amendment.

V. Misinterpreting the *Miller* factor requiring the sentencing court to consider an individual's incompetencies associated with youth, such as the individual's inability to deal with police officers or prosecutors, the court erred in sentencing Appellant to life without parole where the uncontradicted evidence showed (1) Appellant gave an incriminating statement to law enforcement after his request for counsel was ignored by his interrogators and (2) Appellant declined a favorable plea bargain due to his lack of understanding of the evidence against him.

Relevant facts

During the re-sentencing hearing, the chief investigating officer, Melvin Godwin, testified on behalf of the state. According to Godwin, he interrogated Appellant following his arrest. At the time of the interrogation of Appellant, Godwin had been in law enforcement for approximately fourteen years. R. 301, ll. 4-10. In addition to Godwin, at least two other officers interrogated Appellant simultaneously. R. 302, ll. 7-9. Godwin advised Appellant of his rights, including his right to counsel. R. 303, ll. 15-24. However, when Godwin asked if Appellant understood, Appellant indicated that he wanted a lawyer. R. 303, l. 24 – R. 304, l. 3. Despite the law requiring Godwin to stop his interrogation and honor Appellant's invocation, Godwin continued. R. 304, ll. 4-20.

Additionally, during the re-sentencing hearing, the solicitor revealed that Appellant was offered a plea bargain whereby he would enter a guilty plea to voluntary manslaughter in exchange for a sentence of twenty years. R. 386, ll. 23-24. However, Appellant rejected the plea offer. R. 386, l. 24.

In his order, the sentencing court claimed he examined Appellant's "alleged mental deficiencies and the incompetencies associated with youth." R. 677. The judge noted the investigating officer testified Appellant "displayed no problems communicating with law

enforcement" and that he "clearly understood all questions, easily communicated with law enforcement, and was alert." R. 677. Further, the order stated that Appellant's trial counsel "never once suggested [Appellant] had any mental deficiencies or any incompetencies." R. 677.

Discussion

According to the United States Supreme Court, one of the reasons that mandatory life without parole for juveniles was unconstitutional was because it "ignore[d] that [the juvenile] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." Miller v. Alabama, 567 U.S. 460, 477-478 (2012). See also Aiken v. Byars, 410 S.C. 534, 544, 765 S.E.2d 572, 577 (2014). "[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." Graham v. Florida, 560 U.S. 48, 78 (2010). "Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it." Id. As a result, "[t]hey are less likely than adults to work effectively with their lawyers to aid their defense." Id. Children have "[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel, seen as part of the adult world a rebellious youth rejects," which leads to "poor decisions by one charged with a juvenile offense." Id.

Addressing interrogations specifically, the High Court held that a child's age is a necessary consideration for the in-custody question. J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011). "[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." Id. After recognizing that a child's age was far more than a chronological fact, the Supreme Court explained that children are less responsible than

adults, lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them, and more vulnerable to outside pressures than adults. Id. Quite simply, "children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." Id. at 273.

"[T]he right to have counsel present at [an] interrogation is indispensable to the protection of the Fifth Amendment privilege." Miranda v. Arizona, 384 U.S. 426, 469 (1966). This right to counsel includes "not merely a right to consult with counsel prior to questioning, but to have counsel present during any questioning." Id. at 470. According to the Supreme Court, a defendant may waive his rights. Id. at 444.

> If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

Id. at 444-445. The Fifth Amendment guarantees the right to speak with counsel upon request in a custodial setting. U.S. Const. Amend. V; Edwards v. Arizona, 451 U.S. 477 (1981). If a suspect invokes his right to counsel, police interrogation ***must*** cease unless the suspect himself initiates further communication with police. Id.; see also Davis v. United States, 512 U.S. 452, 458 (1994).

The Supreme Court "set forth a 'bright-line rule' that *all* questioning must cease after an accused requests counsel." Smith v. Illinois, 469 U.S. 91, 98 (1984) (citing Solem v. Stumes, 465 U.S. 638, 646 (1984)) (emphasis in original). This purpose of the prohibition is to eliminate "explicit or subtle, deliberate or unintentional" conduct by police that "might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance."

Id. (citing Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983); Fare v. Michael C. 442 U.S. 707, 719(1979)).

It simply cannot be denied in this case that Appellant invoked his right to counsel and the police failed to cease all interrogation by continuing to interrogate Appellant. Appellant was entitled to consult with counsel at any time during the interrogation. There was no suggestion, or even argument, that Appellant's request for counsel was anything but clear and unambiguous. The police knew Appellant sought legal advice, but instead of honoring that request, as the officers knew they were required to do pursuant to the United States Constitution, the officers continued the interrogation. Seventeen-year-old Appellant was unable to stand up to the three experienced interrogators. As an incompetent youth, he surrendered to their inquisition and provided an incriminating statement. The sentencing court failed to consider – or even acknowledge – the testimony in the record that Godwin and the other interrogators violated Appellant's Fifth Amendment right to counsel by continuing to question him after he unambiguously invoked his right to counsel. Had Appellant possessed the intestinal fortitude of an adult, he would not have succumbed to the inquisition and would have stood his ground in his demand for counsel.

Further, the judge ignored evidence in the record that Appellant's incompetencies associated with youth resulted in his rejection of a plea off for twenty years imprisonment for a conviction of voluntary manslaughter. At the conclusion of the trial, Judge Cottingham characterized the evidence against Appellant – which consisted of the self-serving testimony of his two co-defendants – as "absolutely simply overwhelming." R. 252, ll. 12-13. Due to his youth, Appellant was ill-equipped to consider the plea offer. He went to trial facing a maximum sentence of life imprisonment without the possibility of parole and could only hope for a minimum thirty-year sentence of which he would be required to serve every day. He rejected a plea offer of twenty years, of which he would not be

required to serve every single day as he would be able to serve a percentage of the sentence prior to being released. Had Appellant possessed the wisdom of an adult, he would have been able to evaluate the plea offer more carefully and determined its value to him.

The sentencing judge erred when he misinterpreted the factor requiring him to consider Appellant's incompetencies associated with youth by only considering the testimony from law enforcement that Appellant was able to converse with them. The judge's failure to consider Appellant's invocation of his right to counsel, which was ignored, and Appellant's rejection of a favorable plea offer was an abuse of discretion.

CONCLUSION

Appellant respectfully requests this Court vacate his LWOP sentence and remand for re-sentencing.

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

ATTORNEY FOR APPELLANT

This 17th day of August, 2020.

CERTIFICATE OF COUNSEL

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

August 17, 2020

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

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589