STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable Kristi Lea Harrington, Circuit Court Judge

THE STATE,……RESPONDENT

v.

KENNETH LAMONT ROBINSON, JR……APPELLANT

INITIAL BRIEF OF RESPONDENT
Appellate Case No. 2018-001269

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATUES

APPELLANT STATEMENT'S OF ISSUES ON APPEAL

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

II. Did the trial court err in permitting the State to introduce inadmissible gang-related evidence throughout the entire trial, including the improper opinion testimony of a lay witness?

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

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

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

RESPONDENT'S COUNTER ARGUMENT ON APPEAL

I. Did the trial court err in refusing to remand jurisdiction of the Appellant's case back to the family where the new evidence was not sufficient for the Family Court to revisit this cause of action?

II. Did the trial court err in permitting the State to introduce gang-related evidence in order to reveal motive of the initial shooting which led to the death of an innocent bystander?

III. Did the trial court err in failing to instruct the jury on the lesser included offense of voluntary manslaughter where the evidence did not reveal that all of the elements of voluntary manslaughter existed?

IV. Did the trial court err in failing to instruct the jury to consider the age of the Appellant when considering the doctrine of the "hand of one is the hand of all," thereby including an additional element where the State will not be given an opportunity to prove?

V. Did the trial judge err in sentencing the Appellant to a fifty year period of incarceration when it was the negotiated sentence made between the Appellant and Solicitor, there was no tax upon the Appellant to exercise his right to trial or appeal because these conditions were never brought to the Judge's attention as part of these negotiations, and does the Appellant have a right to raise a lesser sentence given to the co-defendants when the trial judge did not issue these sentences, and did the trial court considered all of the mitigating evidence presented during the sentencing hearing prior to the final sentencing?

STATEMENT OF THE CASE

In order for the court to get a complete understanding of the motives and reasons for the actual incident, a history of the gang war within this North Charleston community must be explained.

A street gang named the Young Gunnas was located in the Waylyn community of North Charleston, South Carolina. Terrell Wilson, AKA "Babe Lo" a member of this gang was murdered. (Trial T. p. 1447 l. 21-25) Law enforcement suspected the murder was committed by another member of the Young Gunnas named Terrence McNeil AKA "Lul T," who was possibly assisted by Jareem Miller. (Trial T. p. 1448 l. 2-5) Mr. McNeil was beginning to associate with an offshoot gang who called themselves the Loud Pack. (Trial T. p. 1448 l. 24-25) Mr. McNeil was later murdered, many believed his association with the Loud Pack, and him murdering Mr. Wilson was the motives for his murder. (Trial T. p. 1448 l. 16-18)

After these murders two members of the Young Gunnas, Daquan Lance, AKA "Mook" and Darnell Seegars AKA "Bam" became suspects of the murder of McNeil. (Trial T. p. 1449 l. 11-13) This murder cause a large number of shootings, incidents of shots fired being called into the police, and vandalism. (Trial T. p. 1449 l. 19-23) Each of these instances was in some way linked to these two rival gangs. (Trial T. p. 1449 l. 21 – p. 1450 l. 4)

On April 17, 2015, a drive by shooting occurred at 4036 Gary Lane in North Charleston. This home was owned by a Volisa Simmons who also owned the home where Mr. Wilson was murdered. Her son Demere Squire was also identified as a member of the Young Gunnas. (Trial T. p. 1450 l. 16-25) On May 9, 2015, another shooting occurred on 2770 Ranger Drive. Both Antonio Miller, AKA "Little T" and Stanley Green were suspects in this shooting. (Trial T. p. 1451 l. 21- p. 1452 l. 1) A few hours later the identical firearm in that shooting was used to shoot

an individual named Marvin Pressley, known to be associated with the Loud Pack. (Trial T. p. 1452 l. 15 – p. 1453 l. 4) After this shooting the residence of Stanley Green and Jareem Miller was attacked in a drive-by shooting. (Trial T. p. 1455 l. 4-10) All of these incidents led up to the infamous incident that led to the unfortunate murder of Ms. Kedena Brown.

On May 10, 2015, the Appellant's co-defendant Richard Simmons went to the Appellant's residence to pick up individuals on their way to a party. The Appellant asked to go but was refused. (Trial T. p. 701 l. 14-17) While at the Appellant's residence a vehicle rolled by and began shooting at the Appellant and Mr. Simmons. Everyone took cover then ran after the car which escaped. The police were called, however, only one officer responded. The officer took photographs of the damage to Mr. Simmons' vehicle, and collected shell casings. (Trial T. p. 580 l. 23-25) When the police arrived everyone left the area except Mr. Simmons. He had in his possession a weapon that he hid in an abandoned home prior to the police arriving. (Trial T. p. 704 l. 16-22) After the police left the residence, Mr. Simmons retrieved the weapon from the abandoned house and gave it back to an individual named Trell. (Trial T. p. 713 l. 8-11) After the shooting, Mr. Simmons called two individuals Derrontae and Sidney. He contacted Sidney, asking him to bring a gun. (Trial T. p. 709 l. 6-11) Sidney brought a .40 caliber handgun which ultimately became the murder weapon. (Trial T. p. 709 l. 10-13) After Sidney gave Mr. Simmons the weapon he left the scene but Derrontae remained. The Appellant also called his uncle nicknamed "Fur" who arrived with two other people. (Trial T. p. 1261 l. 1-20)(Trial T. p. 711 l. 1 – p. 712 l. 4)

Most all of the individuals that arrived on the scene after the initial shooting, were armed including the Appellant, who was armed with a .9 millimeter handgun. (Trial T. p. 714 l. 3-7) While wondering who initially shot at them, another car came with an individual once again shooting, however, this person did not shoot directly at anyone. (Trial T. p. 721 l. 13-22) Once the

shooting stopped, each individual in front of the Appellant's house got into a car and chased a Chrysler 300 where the shots came from. The Appellant got into a car driven by Mr. Simmons along with another individual named Keon Anderson. Mr. Anderson got into the back seat as the Appellant sat in the passenger seat. (Trial T. p. 723 l. 12-23) Four individuals were in the 300, Andrew Smalls, Jawan Nicks, Corey Watkins, and Donald Jackson. (Trial T. p. 364 l. 8-23) The Appellant along with his co-defendant chased the 300 through the streets of North Charleston going in speeds over one-hundred miles per hour. (Trial T. p. 735 l. 7-8) Everyone chasing the 300 was shooting at this vehicle including the Appellant. (Trial T. p. 730 l. 16-19) During this chase Mr. Simmons was encouraged to drive faster by the Appellant and Mr. Anderson. (Trial T. p. 735 l. 12-13)

During this chase the other two cars eventually backed off, however, Mr. Simmons continued his chase. (Trial T. p. 733 l. 8)(Trial T. p. 737 l. 2-3) He continued at a high rate of speed until he lost the 300. (Trial T. p. 738 l. 16-19) After losing the 300 he continued searching for the vehicle. During this search they noticed an identical 300 stopped at a red light. Mr. Simmons drove up to this vehicle. Since he earlier ran out of bullets he gave the Appellant his gun. (Trial T. p. 740 l. 4-10) The Appellant then gave Mr. Simmons back his gun, and Mr. Simmons shot into the 300 four times. (Trial T. p. 1046 l. 5-6) Inside this vehicle was Ms. Kedena Brown, an innocent victim, who was coming from a visit at her mother's house. Ms. Brown was shot twice, once to the left side of her head in which the bullet lodged into her skull. The second shot was to the soft tissues of her neck, which disrupted or damaged the jugular vein and the right carotid artery. (Trial T. p. 343 l. 25 – p. 344 l. 7) She bled to death at the scene.

After this shooting Mr. Simmons panicked and drove to "Fur's" house where they met all of the other individuals involved in the high speed chase and shooting. The four individuals in the

other 300 were later stopped for speeding by law enforcement. They were detained and brought into the station, Andrew Smalls and Jawan Nicks hands later tested positive for gunshot residue. (Trial T. p. 1104 l. 10 – p. 1105 l. 12)

An anonymous tip informed Investigator Robert Bailey of the North Charleston police department that the Appellant was involved in this shooting. (Trial T. p. 593 l. 19-23) The authorities went to the Appellant home and spoke with his mother. She informed them that night they were going to pick up her daughter from work when the shooting started, but after it happened, they all stayed at the Appellant's mother's home. (Trial T. p. 597 l. 15-20) The authorities became aware that the Appellant was wearing an ankle monitor from the Department of Juvenile Justice (DJJ) on the date of the incident. The monitor revealed that at 1:43am the exact time the victim was shot the Appellant was at the exact location of the shooting. (Trial T. p. 598 l. 18-21)(Trial T. p. 667 l. 15-16) Since this was inconsistent with what his mother told law enforcement they brought the Appellant in for questioning. At first, he told them he was with his mother all night. He then revised his story informing them that he was riding with his mother as people began shooting at them. He then admitted to being in the car with the shooter but entered into another car before the shooting occurred. (Trial T. p. 611 l. 21-22) After questioning they placed the Appellant in DJJ custody and charged his mother with obstruction of justice.

The Appellant was eventually charged with four counts of attempted murder and one count of murder in Family Court. On June 9, 2015, the solicitor petitioned the Family Court for each of these charges to be transferred to General Sessions Court pursuant to Section 63-19-1210(a) of the South Carolina Code of Laws. (Transfer of jurisdiction order pg. 1)

A waiver hearing was held before the Honorable Jocelyn B. Cate in family court on July 11, 2016. Present were assistant solicitors Spiros Ferderigos and Anne Seymour of the Ninth

Circuit Solicitor's office, attorneys Tammy Coppinger and Megan Ehirlich who represented the Appellant. This hearing was conducted over a three day period. During this hearing testimony was presented as to the events of the crime and the fact that the Appellant informed law enforcement that the co-defendant Richard Simmons was the actual shooter. Meanwhile, Mr. Simmons told law enforcement the exact opposite, that the Appellant was the shooter. During this hearing the Court was also informed about the numerous false statements made by the Appellant as well as his mother. There was also evidence presented regarding the Appellant's involvement in a prior incident occurring at Northwoods Mall in North Charleston, where he attempted to rob and shoot an individual. (Fam. Ct. waiver hearing T. p. 162 l. 2-14) He was eventually adjudicated in Family Court for assault of a high and aggravated nature (ABHAN) and attempted arm robbery. (Fam. Ct. waiver hearing T. p. 160 l. 4-19) There was also evidence presented that the Appellant was previously arrested for trafficking cocaine and unlawful possession of a weapon. (Fam. Ct. waiver T. p. 198 l. 13 – p. 199 l. 2) The drugs and the weapon were found hidden in a bathroom at his grandmother's house. (Fam. Ct. waiver T. p. 217 l. 13-16)

Multiple witnesses from DJJ also testified about their lack of supervision when the Appellant was on house arrest for the ABHAN and attempted arm robbery charges. He was later found to be out of place some 267 times in a six month period while on electronic monitoring.

Two psychologists testified, Ms. Candice J. Dunn the supervising psychologist at DJJ and Dr. Susan Knight, a forensic psychologist. They testified as to Appellant's mental health status compared to a normal sixteen year old. They also testified about the Appellant's difficulty connecting his behaviors to potential consequences and about the loss of rehabilitative services provided to him at DJJ if his case is waived up to General Sessions court. (Transfer of jurisdiction order pg. 14)

On July 25, 2016, Judge Cate issued a written order. Within this order she presented all of the factors regarding a waiver from Family Court to General Sessions found in *State v. Jones,* 392 S.C. 647, 709 S.E.2d 696 (2011). These factors are otherwise known as the *Kent* factors.[1] At the conclusion of this order the Family Court Judge decided, "the court is sympathetic to the life the juvenile was born into and the environment in which his parents raised him, but when all is said and done, it boils down to individual choices and personal accountability." (Transfer of jurisdiction order pg. 13) She also surmised that, "the juvenile's youth and attendant considerations surrounding his youth will be taken into consideration by the general sessions court should he be found guilty by plea or trial in the sentencing phase, as well as all of the other possible mitigating circumstances that have been revealed in this hearing." (Transfer of jurisdiction order pg. 14) For these and other reasons the Family Court Judge decided to grant the solicitor's petition for the transfer of this case to general sessions court.

Prior to trial Mr. Simmons admitted he was the person that actually shot Ms. Brown. Due to this confession, the Appellant sought to have his case remanded back to Family Court for another waiver hearing. This motion was ultimately denied by the trial court.

On February 12, 2018, the Appellant's case was called for trial before the Honorable Kristi Harrington. Present before the trial court representing the state of South Carolina was Chief Deputy Solicitor D. Bruce Durant and assistant solicitor E. Culver Kidd, IV, of the Ninth Circuit Solicitors office; representing the Appellant were Public Defenders' Megan Ehrlich and Michael Loigmon, and attorney Tamara J. Coppinger. The trial concluded on February 22, 2018. At the conclusion

[1] These factors were initially found in the United States Supreme Court case of *Kent v. U.S.,* 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed2d 84 (1966).

of this trial a jury of his peers found the Appellant guilty of four counts of assault and battery in the first degree and murder.

Due to the fact the Appellant was a juvenile when he committed this offense and facing a possible life sentence without the possibility of parole, he was entitled to a hearing pursuant to the South Carolina Supreme Court decision of *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). The Appellant was called to appear before the trial judge for the *Aiken v. Byars* hearing on June 6, 2018. Present before Judge Harrington representing the State of South Carolina was assistant solicitor Culver Kidd of the Ninth Circuit Solicitor's office and representing the Appellant was Public Defenders Megan Ehrlich and Michael Loigmon.

Prior to the beginning of this hearing, both sides negotiated a sentencing cap of fifty years. (*Aiken v. Byars* hearing T. p. 7 l. 8-9) So the Appellant's exposure would be between thirty and fifty years. The Court ruled that since the Appellant was not facing a sentence of life without the possibility of parole, any arguments to the constitutionality of a life sentence without parole were moot. However, the court did rule that the Appellant should be allowed to present evidence in mitigation. (*Aiken v. Byars* hearing T. p. 8 l. 7-10)

During the hearing the Appellant called numerous witnesses who were employees of DJJ during the time he was an inmate within that facility. There was also testimony regarding the Appellant's prior arrest for the offenses of disorderly conduct, trafficking cocaine, unlawful possession of a pistol by a minor, and adjudications for attempted armed robbery, ABHAN, unlawful possession of a weapon and contempt of court. Testimony showed that the Appellant was on house arrest when he committed the offenses currently before the court. There was also mitigating evidence presented revealing that he was a model prisoner while incarcerated in DJJ.

Dr. Susan Knight again testified regarding her applications of the *Miller* factors.[2] She also testified that the Appellant did associate himself with the Young Gunnas which he referred to as a "group." (*Aiken v. Byars* hearing T. p. 253 l. 4-10) Once the Appellant concluded his mitigation, the victim's family got an opportunity to address the court.

At the conclusion of this hearing the trial court acknowledged all of the *Miller* factors. She also acknowledged the lack of supervision by DJJ when the Appellant was under house arrest. However, the court also determined that the Appellant made a choice to get into that car. The trial court stated that the Appellant knew when he got into the car that he should not have been in that car, and the reason they were in court was due to his decisions. (*Aiken v. Byars* hearing T. p. 357 l. 17-18) The trial court also determined that the Appellant had the capability to understand and make choices. (Aiken v. Byars hearing T. p. 357 l. 19-21) The trial judge decided to sentence the Appellant to the maximum amount allowed pursuant to the negotiated deal.

Upon being sentenced to the fifty year period of incarceration, the Appellant's co-defendants both pled to negotiated deals. On January 10, 2018, Richard Simmons appeared before the Honorable Rodger M. Young, Sr. He received a sentence of thirty years incarceration for murder, and four counts of attempted murder. (R. Simmons sentencing sheets) On November 8, 2018, Keon Anderson appeared before Judge Young. He was sentenced to a period of fifteen years incarceration for four counts of assault and battery in the first degree, possession of a weapon during the commission of a violent offense and voluntary manslaughter. (K. Anderson sentencing sheets) Once the Appellant became aware of his co-defendant's sentences, he filed a motion to reconsider his sentence based on after discovered evidence. (Appellant's motion to reconsider) The Appellant's position is if the trial court was aware of these lesser sentences at the time of his

[2] *Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed2d 407 (2012)

sentencing, she would have possibly given him less than the fifty year sentence he received. They argued that since the co-defendants were sentenced after him, this evidence was not available at the time of trial, so it should be considered after discovered evidence.

A hearing on this motion was held on March 2, 2020, before the Honorable R. Markley Dennis.[3] Present were Chief Deputy Solicitor, D. Bruce DuRant, and assistant solicitor David DuTremble of the Ninth Circuit Solicitor's office, representing the Appellant was Public Defender Megan Ehrlich and Susan Hackett of South Carolina office of Appellate Defense. During this hearing the Appellant argued that the sentences of his co-defendants were much lower, and if the trial judge knew their sentences were lower she might have sentenced the Appellant differently. They argued that these sentences were after discovered evidence pursuant to Rule 29(b) of the South Carolina rules of criminal procedure.

During trial, the state argued that the Appellant lacked remorse so a fifty year sentence was justified. The Appellant believed this argument was vindictive, violating due process. The Appellant also argued that the South Carolina Supreme Court decision of *State v. South*, 310 S.C. 504, 427 S.E.2d 666 (1993) allowed for sentencing purposes new trials based on after discovered evidence.

The State argued that *South* was a capital case so there is no reason to extend Rule 29(b) in a non-capital case. They also argued that the sentences of the co-defendant's are not relevant to the Appellant's trial. The Appellant has raised no evidence that Judge Harrington would have given a lower sentence if she knew the sentences of the co-defendant. At the conclusion of this hearing

[3] At the time of this motion Judge Harrington had retired; therefore, each side consented on letting Judge Dennis hear this motion since he was the Chief Administrative Judge in Charleston County at the time.

the court took the arguments of both parties under advisement and decided to make his decision on a later date.

On March 20, 2020, Judge Dennis issued his final decision. The court decided to decline to extend rule 29(b) and apply it to this case. He also decided that the sentences of the co-defendants was not evidence. The court concluded that, "By definition, evidence is something that tends to prove or disprove the existence of an alleged fact." (Order denying motion for reconsideration pg. 3) The court also decided that the Appellant chose to accept the negotiated sentence, so there was nothing inappropriate about the trial judge's imposition of a fifty year sentence. (Order denying motion for reconsideration pg. 4) For these reasons the Court decided to deny the Appellant's motion for a new sentence based on after discovered evidence. (Order denying motion for reconsideration pg. 5)

Upon conviction the Appellant initially filed a notice of appeal before this court. While this appeal was pending, his co-defendant's were sentenced, so the Appellant decided to file a motion for reconsideration based on after discovered evidence. The Appellant requested this court stay this appeal until the motion can be heard and decided. This court decided to grant the Appellant's request to stay the appeal until the motion for reconsideration is decided. Once the court decided to deny the motion the stay was lifted and now this appeal is pending.

Within his initial brief the Appellant argues that the trial court erred by: refusing to remand the case back to Family Court based on new evidence; that the trial court erred in allowing inadmissible gang-related evidence be introduced throughout the entire trial; that the trial court should have instructed the jury on the lesser included offense of voluntary manslaughter; that the trial court should have instructed the jury to consider the Appellant's inability to foresee the

consequences of his actions regarding the "hand of one hand of all" doctrine; and, that the final sentence violated due process because it was a tax upon the Appellant's right to trial and appeal.

The Respondent argues that no grounds exist for this case to be remanded to Family Court, so the trial court was correct in denying their motion; that the gang related evidence established motive so the introduction of this evidence was permissible; there are no elements of the lesser included offense of voluntary manslaughter so the trial court was correct in not giving this instruction to the jury; the trial court instructed the jury on current South Carolina law regarding the "hand of one is the hand of all" doctrine, so the jury instruction given was lawful; and, the Appellant was sentenced to an agreed upon negotiated sentence, no stipulation regarding a waiver of appeals was ever presented to the court, this sentence was agreed to by both parties, so there was no tax on his right to appeal.

The Respondent now presents this initial brief supporting all of the above referenced offenses. The Respondent argues that there exists no error in law so this appeal should be affirmed.

ARGUMENTS

1. **The trial court did not err in not remanding the case back to the Family Court once it was discovered that the Appellant was not the shooter.**

STANDARD OF REVIEW

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827 (2001). In criminal cases, the appellate court is bound by factual findings of the trial court unless an abuse of discretion is shown. *State v. Blackwell-Selim*, 392 S.C. 1, 3, 707 S.E.2d 426, 427 (2011). The trial courts decision will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Mitchell Supply Co. v. Gaffney*, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988). An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual

conclusions. *Stokes – Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016). When an action is brought in a circuit court which, in the opinion of the judge, falls within the jurisdiction of the family court, he may transfer the action upon his own motion or the motion of any party. S.C. Code Ann. §63-19-1210(3)(2018)

DISCUSSION

The Appellant argues that the trial court erred when they did not remand his case back to the family court upon the finding that the Appellant was not the actual shooter. The Appellant argues that the Family Court relied on the statement of Mr. Simmons in order to make its decision on whether this case should be remanded to General Sessions Court. Within the Family Court order, there were many reasons listed for remanding this case to general sessions court. The fact that Mr. Simmons stated that the Appellant was the actual shooter was not one of them.

The Appellant at the age of fifteen was charged with murder, and four counts of attempted murder. Both classified as A-Felonies which carries a penalty of thirty years or more.[4] The solicitor's office issued a petition for his case to be remanded to general sessions court. According to South Carolina law,

> If a child fourteen, fifteen, or sixteen years of age is charged with an offense which, if committed by an adult, would be a Class A, B, C or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more, the court after full investigation and hearing, may determine it contrary to the best interest of the child or the public to retain jurisdiction. The court, acting as committing magistrate, may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offenses if committed by an adult.

[4] A person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life. S.C. Code Ann. §16-3-20 (2018). A person who, with intent to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder. A person who violates this section must be imprisoned for not more than thirty years. S.C. Code Ann. §16-3-29 (2018).

S.C. Code Ann. §63-19-1210(5)(1976).

The Appellant had also been adjudicated delinquent in Family court for the offenses of ABHAN, and attempted armed robbery. Both offenses carry a penalty greater than ten years.[5] South Carolina law also states,

> If a child fourteen years of age or older is charged with an offense which, if committed by an adult, provides for a term of imprisonment of ten years or more and the child previously has been adjudicated delinquent in family court or convicted in circuit court for two prior offenses which, if committed by an adult, provide for a term of imprisonment of ten years of more, the court, after full investigation and hearing, if it considers it contrary to the best interest of the child or the public to retain jurisdiction, acting as committing magistrate, may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offense if committed by an adult.

S.C. Code Ann. §63-19-1210(10)(1976)

On June 9, 2015, the Solicitor's office filed a petition for transfer pursuant to Section 63-19-1210(6) of the South Carolina Code of Laws.[6] On July 11, 2016, a hearing was held before the Honorable Jocelyn B. Cate, to determine if the Appellant case should be waived to general sessions court. During this hearing it was determined that it would be in the best interest for the Appellant and society if his case was held in general sessions court.

[5]A person who commits an assault and battery of a high and aggravated nature is guilty of a felony and must be imprisoned for not more than twenty years . S.C. Code Ann. §16-3-600(2018) A person who commits attempted robbery is guilty of a felony and upon conviction, must be imprisoned not more than twenty years. S.C. Code Ann. §16-11-330 (2018).

[6] In accordance with the jurisdiction granted to the family court pursuant to Sections 63-3-510, and 63-3-520, and 63-3-530, jurisdiction over a case involving a child must be transferred or retained as follows. . . (6) Within thirty days after the filing of a petition in the family court alleging the child has committed the offense of murder or criminal sexual conduct, the person executing the petition may request in writing that the case be transferred to the court of general sessions with a view of proceeding against the child as a criminal rather than as a child coming within the purview of this chapter. S.C. Code Ann. §63-3-19-1210(6)(2018).

In order to make this determination the Court had to consider what is called the eight *Kent* factors. In order to waive a case to general sessions court the family court must consider the following factors:

> (1) The seriousness of the alleged offense; (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; (3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted; (4) The prosecutive merit of the complaint; (5) The desirability of trial and disposition of the entire offense in one court; (6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living; (7) The record and previous history of the juvenile, including previous contacts with law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation, or prior commitments to juvenile institutions; (8) The prospects for adequate protection of the public and the likelihood or reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available.

State v. Jones, 392 S.C. 647, 651, 709 S.E.2d 696, 699 (2011), *citing, Kent,* 383 U.S. at 566-67, 86 S.Ct. at 1045.

Prior to the case being called for general sessions court, the Appellant made a motion for the court to remand the case back to the family court. The Appellant argued that the major reason that the family court waived his case to general sessions court was the fact that Mr. Simmons stated the Appellant was the actual shooter. Prior to trial, Mr. Simmons admitted that he actually shot Ms. Brown. The Appellant believes that since this confession was made, the case should go back to family court for another waiver hearing. The trial court ruled that the family court issued a fourteen page order revealing the investigation that produced court testimony and the reasons used to make this determination. The trial court decided to deny the Appellant's motion.

Within her order the family court listed the reasoning as to why this case should be heard in general sessions court. The order revealed that it considered all of the *Kent* factors. The court

determined that the first, second, third, fourth, fifth and seventh *Kent* factors applied to this case. (Transfer jurisdiction order pg. 10) So it concluded that in the best interest of the juvenile and the public, transfer should be made to general sessions court. (Transfer of jurisdiction order pg. 12) The Appellant argues that the fact Mr. Simmons admitted he shot the victim should cause this case to be remanded back to family court for another waiver hearing. The family court never used the fact that Mr. Simmons pointed the finger at the Appellant as a reason for the waiver. In the order it states:

> "The Juvenile denies that he did any of the shootings and implicates his adult co-defendants in both the shooting at the second vehicle and the shooting that resulted in the death of Ms. Brown. One of his adult co-defendants implicates the Juvenile as the shooter and gave a statement to the police that the Juvenile got into his vehicle with a gun and when they spotted what they believed was the car they had been chasing parked at the gas station, it was the Juvenile who instructed him to get closer and the Juvenile who pulled the trigger on the gun that killed Ms. Brown. **Under these circumstances, it would be desirable for the trial of all of the Defendants to take place in one court.**"

Transfer of jurisdiction order pg. 6 (emphasis added)

So this case was not waived up due to the statement of Mr. Simmons, the family court waived up the case due to the fact they were accusing each other. The family court was of the opinion that since they were pointing the fingers at each other justice would be better served if both of these cases were held in one tribunal. One of the *Kent* factors the Court must consider when determining if a case should be waived up to general sessions court.

In the refusal of waiving the case back to the family court the general sessions court was clear. A thorough investigation was completed and the family court judge did a good job of relaying their decision and the reasoning for this decision was found in the order. (Order denying the waiver back to family court) In their brief the Appellant never made any accusation that the

general sessions court made any error in law by not waiving the case back to family court. They are just implying that another waiver hearing should have been held once Mr. Simmons made the decision to confess. Any waiver back to family court would be totally left up to the general sessions court judge. This decision can only be reversed if the court abused its discretion. There is no allegation by the Appellant that the trial court ever abused discretion in denying their motion.

All of the circumstances of this case points to the family court doing the right thing in waiving this case to general sessions court. The statement of Mr. Simmons was not the reason that the case was waived up, so it should not be a basis that it be sent back for another waiver hearing. The family court presented that five of the eight *Kent* factors applied to this case. So the wavier was lawful and there is no reason for another hearing which would have given the same result. The Appellant argues that he was not the shooter, so his case should have been remanded back to family court; however, there is no disputing that he was in the vehicle when the shots were fired, and he provided the killer with the murder weapon. He was also accused of shooting at four people which the family court had to also consider.

The decision to transfer jurisdiction of a child accused of criminal activity lies within the discretion of the family court. The appellate court will affirm the family court's decision absent an abuse of discretion. *State v. Pittman,* 373 S.C. 527, 559, 647 S.E.2d 144, 162 (2007). Within his brief the Appellant argues that he showed great promise and the ability to rehabilitate. However, during his waiver hearing it was revealed that while on house arrest, awaiting an appearance in family court for trafficking cocaine and unlawful possession of a weapon, he was out of place over 200 times and then committed the offense of ABHAN and attempted armed robbery. Once he was adjudicated for those crimes, and again granted house arrest, and he was again out of place some

267 times in a four month period. While on house arrest he committed these offenses. This does not show an ability to reform nor rehabilitate.

Out of the eight *Kent* factors the family court determined that the first, second, third, fourth, fifth, and seventh applied to the current case. The family court clearly made the conclusion that in the best interest of the juvenile and the public, this case should appear in general sessions court.

When looking at the *Kent* factors the family court was correct, five of the eight factors did apply to this cause of action, *the seriousness of the offense,* the Appellant was charged with murder and four counts of attempted murder. Each of these offenses are classified as violent pursuant to South Carolina law.[7] *Whether the alleged offense was committed in an aggressive, violent, premediated or willful manner,* the Appellant and his co-defendant got into a high speed car chase with individuals while shooting at them in the middle of a South Carolina city. There was physical evidence and testimony revealing that the Appellant did shoot at the individuals in the other vehicle. There was also a murder of an innocent victim. Regardless if the Appellant was the individual who made the fatal shot, he was present and gave the gun to the actual shooter, so he was involved. *Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted,* the Appellant shot at four individuals and another innocent individual lost her life as a result of the actions of the Appellant and his co-defendants. The serious nature of the offenses is a major factor in the transfer decision. *Sanders v. State,* 281 S.C. 53, 56, 314 S.E.2d 319, 321 (1984). *The prosecutive merit of the complaint,* there was testimony that the ankle monitor the Appellant was wearing as part of his house arrest placed him at the scene of the murder. There was also testimony that the Appellant

[7] For purposes of definition under South Carolina law, a violent crime includes the offenses of: murder (Section 16-3-10); and attempted murder (Section 16-3-20) S.C. Code Ann. §16-1-60 (Supp. 2018).

was with the co-defendant shooting at the other vehicle. There is sufficient evidence that this crime occurred and the Appellant could have possibly participated. *The desirability of trial and disposition of the entire offense in one court*, the Appellant's other co-defendants were over the age of eighteen; therefore, their cases were in general sessions court. The family court judge specifically ruled since Mr. Simmons and the Appellant were blaming each other for this murder it would be more efficient if it is tried in one tribunal. This case was not waived up to general sessions court because Mr. Simmons stated that the Appellant was the shooter, it was waived up because they both implicated each other. The family court felt it would be more proper and easier if both cases would be heard in general sessions court. However, as shown by the previous examples, this was not the only reason this case was subject to a waiver to general sessions court. Any admission by Mr. Simmons would not have changed the other factors and still would have made this case proper for waiver to general sessions court. *The record and previous history of the juvenile including previous contacts with law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation, or prior commitments to juvenile institutions,* during the hearing it was presented to the court that the Appellant had prior arrest for trafficking cocaine, unlawful possession of a weapon, and adjudications in family court for ABHAN, and attempted armed robbery. The hearing also revealed that the Appellant was out of place on his electronic monitoring over 200 times in a four month period prior to this offense being committed. These factors caused the family court judge to determine that it was proper and benefited the Appellant as well as the community if this case was heard in general sessions court.

Pursuant to South Carolina law in order for the family court judge to waive a case to general sessions court they must order an efficient statement to reveal the reasons for, and considerations leading to that decision. *In Re Sullivan,* 274 S.C. 544, 548, 265 S.E.2d 527, 529 (1980) It was clear

in the order of the family court judge that all of the *Kent* factors were considered and the reasoning as to why this case should be subject to waiver to general sessions court. This order was sufficient to demonstrate that the statutory requirement of a full investigation had been met, and that the question has received full and careful consideration by the family court. *Id.* The general sessions court ruled that they found no reason to waive the case back to family court due to the fact the family court order was extensive and went above and beyond what was necessary to make the proper determination. (Order denying the waiver back to family court) The Respondent agrees, the fourteen page order went extensively into the information that was revealed during the hearing that was a result of the investigation done by law enforcement, but also the juvenile record of the Appellant revealing his past discretions with the law and his attitude while being incarcerated within DJJ. It also revealed the findings of two psychologist who examined the Appellant in order to present his mental state at the time these offenses occurred as well as his home life and surroundings prior to his offense.

The circuit court judge was certainly within the law not to allow this case to be waived back to family court. There was not sufficient evidence presented to the circuit court revealing that his case should warrant another waiver hearing in family court. This decision was proper and should not be subject to reversal by this Court. Jurisdiction of the family court over juveniles is a privilege rather than a matter of right. *Id.*

2. The court did not err in permitting the state to introduce gang-related evidence throughout the trial in order to show motive.

STANDARD OF REVIEW

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827 (2001). In criminal cases, the appellate court is bound by factual findings of the trial court unless an abuse of discretion is shown. *State v. Blackwell-Selim*, 392 S.C. 1, 3,

707 S.E.2d 426, 427 (2011). The trial courts decision will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Mitchell Supply Co. v. Gaffney,* 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988). An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions. *Stokes – Craven Holding Corp. v. Robinson,* 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016). In reviewing a trial court's ruling on admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb rulings absent a prejudicial abuse of discretion. *State v. Whitner,* 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012). Evidence of other crimes, wrongs, or acts is generally not admissible to prove the Defendant's guilt for the crime charge. Such evidence is however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of a mistake or accident or intent. *State v. Pagan,* 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the Defendant's guilt or innocence and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. *State v. Young,* 420 S.C. 608, 628, 803 S.E.2d 888, 899 (2017), *quoting*, *Delaware v. VanArsdall,* 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

DISCUSSION

Prior to trial, Appellant's counsel made a motion in *limine* requesting the court to exclude all gang related evidence. Upon the conclusion of their pre-trial motion the trial court decided to allow the evidence pursuant to Rule 401 of the South Carolina Rules of Evidence.[8] Within his brief

[8] "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401 SCRE

the Appellant argues that the trial court allowing this evidence violated his fifth, sixth, and fourteenth amendment rights. The Respondent argues the evidence admitted reveals motive; and therefore, is admissible. The Respondent will also argue that this evidence probative value outweighed any prejudicial effect it might have had toward the Appellant. However, if the court believes that allowing this evidence was in error, it should be considered harmless.

The solicitor thought it necessary that the introduction of any activity concerning this gang war would be beneficial. It revealed a motive that caused this high speed chase which ultimately led to the death of Ms. Brown. The Appellant argues that during their testimony many witnesses failed to confess to being in a gang. A gang member is not going to confess to gang activity in open court. However, Investigator Jerome Desheers of the North Charleston Police Department testified to the existence of gangs in the area and the amount of criminal acts occurring due to this gang activity. The Appellant argues that by giving his opinion, Investigator Desheers unlawfully testified as an expert, when the court deemed him not to be. Inv. Desheers gave factual testimony. He expressed to the jury the multiple pending shootings cases that had occurred in which a member of these gangs were involved, either as a victim or suspect. Although none of the individuals admitted that they were in a gang, two of the witnesses did testify regarding the Appellant being involved in gang activity. Both Richard Simmons and Keon Anderson as well as Kelley Green testified that the Appellant used to be a member of the Young Gunnas. (Trial T. p. 688 l. 16-19)(Trial T. p. 917 l. 13-14)(Trial T. p. 1129 l. 3-4) During the family court waiver hearing Candice Dunn the DJJ supervising psychologist testified about the Appellant being disciplined at school due to related gang activity. (fam. ct. waiver hearing T. p. 374 l. 4-8) She also testified that a school resource officer searched the Appellant Ipad and found images reflecting his involvement in the Young Gunnas and the four mile gang. (fam. ct. waiver hearing T. p. 375 l. 7-10) During the

Appellant's *Aiken v. Byars* hearing, Dr. Susan Knight a forensic psychologist, who interviewed the Appellant, testified that the Appellant admitted being a member of the Young Gunnas. She further stated that the neighborhood have different "groups" and he emotionally identified with a "group" called "the four." (*Aiken v. Byars* hearing T. p. 253 l. 8-10) Within his brief the Appellant attempted to argue that these are not street gangs, but a group of young men who like to hang out. Any group of people whose common purpose is to commit crimes are considered "street gangs" pursuant to South Carolina law."[9]

The Appellant also argued that the State relied on inadmissible hearsay in order to introduce evidence of the gang war. They raise the fact that most of the testimony made regarding murders and other shootings was not firsthand knowledge, but was brought in from witnesses informed of this information by a third party. Although this might be considered hearsay evidence, during trial the Appellant's counsel never objected during this testimony. Therefore, the argument was waived, and thereby is not preserved for appellate review. An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review. *State v. Nichols,* 325 S.C. 111, 120-21, 481 S.E.2d 118, 123 (1997). Where an objection and the ground therefore is not stated in the record, there is no basis for appellate review. *State v. Morris,* 307 S.C. 480, 485, 415 S.E.2d 819, 823, (Ct. App. 1991). A contemporaneous objection is required to preserve issues for direct appellate review. *State v. King,* 334 S.C. 504, 514, S.E.2d 578 (1999).

[9] "Criminal gang" means a formal or informal ongoing organization, association, or group that consists of five or more persons who form for the purpose of committing criminal activity and who knowingly and actively participate in a pattern of criminal gang activity. S.C. Code Ann. §16-8-230(2)(2018).

The Appellant argued that the gang-related evidence was unnecessary to show motive and was unfairly prejudicial. The Appellant alleges that the state used this to show that the he acted in conformity with a gang member to inject gang violence into the trial of a child. In order for this evidence is to be considered inadmissible the Appellant must show that the unfair prejudice outweighed the probative effect.

The Appellant wishes to make this court believe that he is a child due to the fact he was fifteen when he committed this offense. The Appellant wishes to make this court examine all fifteen year olds the same. This court cannot consider all persons that are age fifteen identical, because they are not. The State wishes to reveal that the Appellant acted like a gang member, and he injected gang violence into this trial, not the State. This is because of the Appellant's actions before and during this incident.

At the time of this incident, the Appellant was on house arrest with an active electronic monitor placed on him for being adjudicated delinquent for the offenses of ABHAN and attempted armed robbery. The drive-by shooting occurred at his house, and after the first drive-by the Appellant, along with one of his co-defendants, called other gang members to come and assist, bringing guns. The Appellant, along with his co-defendants, got into cars and chased the individuals suspected of shooting at them while firing shots and driving at speeds over one-hundred miles per hour in North Charleston residential neighborhoods. The Appellant argues that the State prejudiced him by calling their actions "Street Justice," however, after the second shooting they never called the police, they just began a high speed chase firing weapons. This should be considered "street justice." The Appellant wishes the court consider him your average fifteen year old. However, at the time of this offense, the Appellant had prior arrests for the offenses of trafficking cocaine, unlawful possession of a weapon, and adjudications for ABHAN

and attempted armed robbery. He also admitted to owning a Jaguar and inside of this vehicle the authorities found a handgun which he admitted was his gun. (fam. ct. waiver hearing T. p. 98 l. 13-16) An individual, not legally old enough to drive, owns a Jaguar along with a handgun. (Trial T. p. 1303 l. 6-15) The Appellant was not your typical fifteen year old, he was not a child as he puts it in his brief. He conducted himself as an adult with the offenses he committed and the lifestyle he chose to live. A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances. *State v. Dial*, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013).

The Appellant also argues that the lay testimony of Investigator Desheers was inadmissible because it was opinion testimony. The testimony given by Investigator Desheers was factual. His testimony revealed the reports of shootings currently being investigated by the North Charleston Police Department. All of these shootings occurred within the community, in which Investigator Desheers was a member of the gang task force, so he had direct knowledge of these crimes. There was also other testimony from officers who actually investigated these crimes. There was never any dispute as to any of these crimes ever occurring, so there introduction was relevant to show the existence of this gang war which was the motive for Ms. Brown's unfortunate murder.

Rule 701 of the South Carolina Rules of Evidence allows opinion testimony of a lay witness. Rule 701 states:

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

Rule 701 SCRE

Investigator Desheers testified regarding incidents that he had knowledge of that actually occurred. These crimes were never his opinion, and because of his knowledge of gang activity in the area, he testified as to how these crimes were connected to known gang members.

The Appellant also argued that Investigator Desheers made a prejudicial statement regarding innocent bystanders being jeopardized by this criminal activity. The Appellant's counsel objected to this statement which was sustained by the trial court. The court gave a curative instruction for the jury to disregard the statement. So it should not be considered for purposes of this appeal. (Trial T. p. 1454 l. 8-23)

Even if the inclusion of the evidence regarding gang activity was done in error it must be considered harmless. The Appellant argues that most of the gang testimony was hearsay evidence so thereby inadmissible. The proper admission of hearsay is harmless when it could not have reasonably affected the result of the trial. *State v. Brewer*, 411 S.C. 401, 408-09, 768 S.E.2d 656, 660 (2015). If it appears beyond a reasonable doubt that the error did not contribute to the verdict, then the error may be deemed harmless. *State v. Trapp,* 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012).

The Appellant argues that the inclusion of the gang related evidence violates his fifth, sixth, and fourteenth amendment rights. Most trial errors, even those which violate a defendant's constitutional rights are subject to the harmless error analysis. *State v. Rivera,* 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013). The court has applied the harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless. *Arizona v. Fulminate*, 499 U.S. 279, 306, 111 S.Ct. 1246, 1262, 113 L.Ed.2d 302 (1991).

Evidence of a gang war in which the Appellant was an active participant, does not excuse the fact there is physical and testimonial evidence revealing that the Appellant shot at four individuals which constitutes an attempted murder. The South Carolina Code of Laws states:

> A person who with intent to kill attempts to kill another person with malice a forethought, either expressed or implied, commits the offense of attempted murder.

S.C. Code Ann. §16-3-29 (2018)

The Appellant took shots at four individuals, physical evidence was discovered at the scene. Shell casings were found at the location where the Appellant fired at the four men in the first 300. There was also eyewitness testimony from Simmons and Anderson that the Appellant shot at these individuals. (Trial T. p. 730 l. 16-19)(Trial T. p. 898 l. 13-14) The gang information does not change this fact, it only gives it a motive as to why it occurred.

The Appellant was in the car with Mr. Simmons who was the person that made the fatal shot. The Appellant provided him with the murder weapon; therefore, he must be considered an accomplice. The Appellant argues that he made an attempt to persuade Mr. Simmons not to shoot the victim. That is not relevant as to guilt or innocence, he was at the scene and provided the murder weapon. Once he provided that weapon he was as guilty as the person who pulled the trigger pursuant to the doctrine of accomplice liability. Under the hand of one is the hand of all [of accomplice liability], one who joins another to accomplish an illegal purpose is liable criminally for everything done by his confederates incidental to the execution of the common design and purpose. *State v. Harry,* 420 S.C. 290, 299, 803 S.E.2d 272, 276 (2017). The Appellant got into the car armed with a weapon with his co-defendants, with the intent to commit harm to other individuals, any criminal result that came from those actions made him as guilty as the principle. Presence at the scene of a crime, pre-arrangement to aid encourage, or abet in the preparation of

the crime constitutes guilt as the principal. *State v. Hill,* 268 S.C. 390, 395-96, 234 S.E.2d 219, 221 (1977).

The evidence of gang activity does not change this fact, it gives the Appellant motive to be in that vehicle with his co-defendants who were also gang members. If the court determines that allowing this evidence was done in error it was error that did not cause the eventual conviction so it should be considered harmless.

3. The trial court did not err in refusing to instruct the jury on the lesser included offense of voluntary manslaughter.

STANDARD OF REVIEW

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827 (2001). In criminal cases, the appellate court is bound by factual findings of the trial court unless an abuse of discretion is shown. *State v. Blackwell-Selim,* 392 S.C. 1, 3, 707 S.E.2d 426, 427 (2011). The trial courts decision will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Mitchell Supply Co. v. Gaffney,* 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988). An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions. *Stokes – Craven Holding Corp. v. Robinson,* 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016). Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *State v. Pittman,* 427 S.C. 246, 249, 830 S.E.2d 904, 905 (2019). In reviewing jury instructions for error, the appellate court must consider the instruction as a whole in light of the evidence and issues presented at trial. *State v. Mattison,* 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010). A trial court may and should refuse to charge on a lesser-included offense where there is no evidence that the Defendant committed the lesser rather than the greater offense. *State v. Smith,* 315 S.C. 547, 549, 446 S.E.2d 411, 413 (1994).

DISCUSSION

The Appellant argues that Mr. Simmons committed this murder in the sudden heat of passion; therefore, under the doctrine of accomplice liability the trial court was required to give a jury instruction on the law of voluntary manslaughter. The Respondent argues that this offense did not include all of the elements of voluntary manslaughter so he was not entitled this jury instruction.

Mr. Simmons had plenty of time to "cool off" prior to the shooting of Ms. Brown. This was a premediated murder so the Appellant was not entitled to that jury instruction. "Provocation necessary to support a voluntary manslaughter charge must come from some act of or related to the victim in order to constitute sufficient legal provocation." *State v. Locklair*, 341 S.C. 352, 362, 535 S.E.2d 420, 425 (2000). The first drive by shooting occurred around midnight. (T. p. 578 lines 5-11) After this shooting Mr. Simmons and the Appellant called other individuals they knew in order to bring guns. The second shooting occurred at 1:30am. This is when they got into their cars and conducted the high speed chase after the individuals shooting at them. When the other two vehicles backed off, Mr. Simmons continued to search for the 300. At this time we have left sudden heat of passion and ventured into pre-meditation. While searching for the vehicle he told the other individuals in the car that "they have already – they shot at my car" (Trial T. p. 1512 l. 24-25) This does not show something that is sudden but planned, this is not to be manslaughter but murder. The murder occurred at 1:43, some thirteen minutes after the initial shooting. (Trial T. p. 596 lines 14-15) Even if Mr. Simmons was initially angry, the other cars left and he continued to search, there was definitely a cooling off period. Even when a person's passion was sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person

would have cooled, the killing would be murder and not manslaughter. *State v. Hughey*, 339 S.C. 439, 451, 529 S.E.2d 721, 728 (2000). The Appellant has not revealed that all of the elements involving voluntary manslaughter exist, so the court was correct in not instructing the jury as to voluntary manslaughter.

4. The trial court is not obligated to add another element to the doctrine of a "hand of one is a hand of all." If they are to add this element the State should be allowed an opportunity to prove this beyond a reasonable doubt.

STANDARD OF REVIEW

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827 (2001). In criminal cases, the appellate court is bound by factual findings of the trial court unless an abuse of discretion is shown. *State v. Blackwell-Selim*, 392 S.C. 1, 3, 707 S.E.2d 426, 427 (2011). The trial courts decision will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Mitchell Supply Co. v. Gaffney*, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988). An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions. *Stokes – Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016). Under the "hand of one is the hand of all" theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of common design and purpose. *State v. Thompson*, 374 S.C. 257, 261-62, 647 S.E.2d 702, 704-05 (Ct. App. 2017). In reviewing jury charges for error, this court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial. *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013). The court should charge the jury with only the law applicable to the case. *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835-36 (1989). If the trial judge refuses to give a specific charge, there is no error if the charge

actually given sufficiently covers the substance of the request. *Mattison,* 388 S.C. at 479, 697 S.E.2d at 578.

DISCUSSION

The Appellant objected to the jury being instructed under the doctrine of the hand of one is the hand of all, unless that instruction included a consideration of any diminished capacity due to the Appellant being a juvenile. The Respondent argues that all of the preceding cases regarding juvenile crimes relate to punishment, and not the elements of the offense. This is because once the case is waived to general sessions court, the juvenile is subject to the same elements as any adult. These elements must be proved by the State beyond a reasonable doubt, however, no extra elements should be added due to the Defendant's age at the time the offense occurred.

Due to the Appellant's age at the time the offense occurred, he was subject to an extra level of jurisprudence. The Appellant's charge was originally brought in family court, and the State had to petition the family court to determine different factors in order to make a determination as to whether it was better for the juvenile and the community if this case was heard in general sessions court. As part of this waiver hearing, the family court had already considered the possibility of diminished capacity of the Appellant due to his age at the time this offense was committed. It was determined that due to his prior criminal activity, the violence of this offense, and the evidence of gang activity, the Appellant did not have any diminished capacity as to the consequences of his actions. The family court also determined that the Appellant was not influenced by his peers when he decided to join his co-defendants in the high speed car chase through the streets of North Charleston and participated in the murder of Ms. Brown. The Appellant fully appreciated and realized the consequences of his actions, so the case should be heard in general sessions court, without any additional elements considered by the jury. The additional elements the Appellant

wishes to add were already considered by the family court. He does not deserve any additional elements, other than those existing pursuant to South Carolina law.

In his brief the Appellant cites the United State Supreme Court case of *J.D.B. v. North Carolina,* where the court determined, "age does not mean it would be determinative or even significant factor in every case, but it is a reality that courts cannot ignore." *J.D.B. v. North Carolina,* 564 U.S. 261 (2011). The Appellant was originally charged in family court and his case was subject to waiver pursuant to South Carolina law. The need to recognize his age was the reason he was originally charged in family court. The Appellant was allowed a waiver hearing where any diminished capacity because of his age was considered. It was also determined that because of his record and the violent nature of his offenses it would be more beneficial to the Appellant and the community if his case was heard in general sessions court. During his general sessions trial the State had the responsibility to prove all of the elements of his crime beyond a reasonable doubt. The Appellant cannot be allowed extra elements due to his age at the time he committed this offense.

All of the previous decisions regarding a juvenile being charged as an adult is related to punishment. *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)(invalidated the death penalty for all juvenile offenders under the age of 18), *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)(prohibits a sentence of life without the possibility of parole for all juveniles convicted of a non-homicide offense), *Miller v. Alabama,* 132 S.Ct. 2455, 183 L.Ed.2d 407(prohibit mandatory life imprisonment without parole for those under eighteen), *Aiken v. Byars,* 410 S.C. 534, 765 S.E.2d 572 (2014)(Applied *Miller* to all South Carolina juvenile offenses.) None of these decisions allowed a juvenile to apply extra elements to their crimes. Once the crime is waived to general sessions court the elements of the crime should remain the same as

any other defendant. All of the extra elements considered in *Miller* to determine the juvenile's capacity to distinguish from right or wrong were already determined by the family court.

Within his brief, the Appellant cited numerous psychological studies regarding the difference in decision making between a juvenile and an adult. None of these studies were guaranteed to apply to all juveniles. There are many fifteen year olds that are more mature than any adult. The Appellant wishes the court treat all juveniles the same and allow him an additional element to apply to the jury instructions regardless of what was decided by the family court. The Appellant fails to consider the violent crimes he committed prior to committing this offense, which was a major factor in the family court waiving this up to general sessions. These prior offenses did have an impact on his knowledge of the law and knowledge of any consequences if the laws are broken. It comes to a point where a defendant should be held accountable for his actions.

The Appellant wishes to add to the jury instructions thereby placing a blanket mindset on all juveniles, thereby, treating them all identical; however, we know no two juveniles are alike. Some are more mature than others, some grow faster than others. With a prior criminal record that exists for the Appellant, his knowledge of the judicial system and the consequences that will come to a person being convicted of a crime, was greater than most fifteen year olds.

If the court wishes to add this element to the doctrine of "hand of one is the hand of all," the State must be allowed to prove these elements beyond a reasonable doubt. No two juveniles are alike that is why in *Aiken v. Byars*, the South Carolina Supreme Court ordered that prior to a juvenile receiving a sentence of life without parole, a separate hearing be conducted in order for the trial court to determine that the mitigating hallmark features of youth can be fully explored. *Aiken*, 410 S.C. at 578, 765 S.E.2d at 580. So the State must be allowed to present evidence revealing that the Appellant did not have a lack of maturity, or an underdeveloped sense of

responsibility. *Miller*, 567 U.S. at 471. In order to prove in regards to these new elements, the prior events once presented at the Appellant's waiver hearing must be allowed to be introduced as evidence during trial. If an extra element is added, it is only fair that the State be allowed to present evidence to prove this element beyond a reasonable doubt. Such information includes the Appellant's prior record. This evidence would be logically relevant to a material element of the offense charged and should not be excluded merely because it may show guilt of another crime. *State v. Hamiliton,* 327 S.C. 440, 447, 486 S.E.2d 512, 516 (1997).

None of this is necessary however, because each of these elements have already been examined and ruled upon during the waiver hearing. Since the Appellant was a juvenile, he was originally charged in family court. He was then granted a waiver hearing lasting two days. During said hearing the State presented evidence of his past criminal behavior and they presented evidence of the crime he was currently being accused of committing. In mitigation, the Appellant presented numerous witnesses including supervising psychologist at DJJ Ms. Candice Dunn and Forensic Psychologist Dr. Susan Knight. They were called to testify as to the Appellant's background and surroundings that made him unable to consider the jeopardy he placed himself in when he committed these offenses. Under South Carolina law his charges were initially brought in family court. This waiver hearing is a benefit not given to other defendants, but given to the Appellant because he was a juvenile. He was allowed to present this mitigation, and the family court judge determined by the family court judge that the Appellant knew the consequences, and "it boils down to individual choices and personal accountability." He is not entitled to extra elements being added to the jury instructions. All of these factors were already determined prior to the Appellant going to general sessions court.

The extra elements the Appellant wants added to these instructions are also not applicable to this case because they are not elements of the crime. The extra suggestions made by the Appellant to be added to these instructions will only create confusion for the jury. Superfluous and inapplicable instructions should be meticulously avoided, for the purpose of jury instructions is to enlighten the jury; redundant instructions and those not in conformance with the facts of the case only operate to imbue unwarranted confusion in the minds of the jurors. *State v. Fair,* 209 S.C. 439, 445, 40 S.E.2d 634, 637 (1946).

There is no objection to the law that was applied in the instruction given by the trial court. The Appellant is requesting to add additional elements to the instructions that were adequately given to the jury during the trial. The instruction that was given adequately covered South Carolina law. The court did not commit any error in not instructing the jury as to the additional elements requested by the Appellant since those are not included in South Carolina law. The trial court is required to charge only the current and correct law of South Carolina. *Mattison*, 388 S.C. at 479, 697 S.E.2d at 583 (2010). A jury charge is correct if when read as a whole, the charge adequately covers the law. *Logan*, 405 S.C. at 90, 747 S.E.2d at 448 (2013).

The instructions given applied to the evidence presented by the State. Therefore, this instruction was proper and not subject to reversal. In reviewing jury charges for error the court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial. *Id*. The Appellant is not arguing that the instructions given were unlawful or that it did not follow South Carolina law. They are requesting that an additional element be added when the Appellant is a juvenile. Since the actual instruction given followed South Carolina law, the decision by the court is not subject to reversal. To warrant reversal the jury charge must be both erroneous and prejudicial to the defendant. *State v. Burkhart,* 350 S.C. 252, 261, 565 S.E.2d 298,

303 (2002). An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. *State v. Pittman,* 373 S.C. 327, 570 S.E.2d 144, 167 (2007). A jury charge that is substantially correct and covers the law does not require reversal. *State v. Faust,* 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996).

5. The Appellant's sentence was not a violation of his due process rights nor a tax on his right to appeal. The trial court did not use the Appellant's age as an aggravated circumstance.

STANDARD OF REVIEW

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827 (2001). In criminal cases, the appellate court is bound by factual findings of the trial court unless an abuse of discretion is shown. *State v. Blackwell-Selim*, 392 S.C. 1, 3, 707 S.E.2d 426, 427 (2011). The trial courts decision will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Mitchell Supply Co. v. Gaffney*, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988). An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions. *Stokes – Craven Holding Corp. v. Robinson,* 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016). The trial courts decision will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Mitchell Supply Co. v. Gaffney*, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988). An issue cannot be raised for the first time on appeal. *State v. Cope*, 405 S.C. 317, 338, 748 S.E.2d 194, 205 (2013). In order to preserve an issue for appellate review a party must both raise that issue to the trial court and obtain a ruling. *Foster v. Foster,* 393 S.C. 95, 99, 711 S.E.2d 878, 880 (2011).

DISCUSSION

The Appellant argues that his case was waived to general sessions court because the family court judge believed he was the actual shooter. This is untrue, the actual reason for the waiver up to general sessions court were multiple. But as reflected in their order the family court determined that since there were conflicting statements the family court thought it would be more efficient if all defendants cases were heard in one tribunal.

The Appellant also argues that the negotiated sentencing of a cap of fifty years was a tax on his right to appeal. The Appellant alleges that a condition of this sentencing negotiation was the fact that he must waive his appeal. That offer was never presented to the trial court, the only negotiation presented to the trial court was the fifty year cap. The Respondent will argue that it was never part of the negotiated deal so it is not an issue that should be under review by this court. Terms, conditions and reasons for any plea agreement must be disclosed to the trial judge. *State v. Thrift*, 312 S.C. 282, 296, 440 S.E.2d 341, 349 (1994). The State cannot enforce an agreement which does not appear on the record. Those conditions were never placed on the record, it was never considered by the court so it should not be an issue for appeal. This issue was not raised before the court nor was ever a part of the sentencing negotiations. An issue cannot be raised for the first time on appeal. *Cope*, 405 S.C. at 338, 748 S.E.2d at 205 (2013). Prohibiting an Appellant from raising an issue for the first time on appeal ensures that the trial court is able "to rule properly after it has considered all relevant facts, law, and arguments. *Id.*

Due to the lesser sentences given to his co-defendants the Appellant decided to file a motion for new sentence based on after discovered evidence. The Respondent will argue that these sentences cannot be considered after discovered evidence, because this "new evidence" will not change the outcome of trial. To obtain a new trial based on after-discovered evidence, the party

must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; (5) not merely cumulative or impeaching. *South,* 310 S.C. at 427 S.E.2d at 669 (1993).

In *South* the court decided that the *Caskey* conditions can apply to a motion for resentencing such that the newly discovered evidence must be material to any mitigating or aggravating circumstance.[10] *South,* 310 S.C. at 509, 427 S.E.2d at 670. In *South* the circuit court judge determined "there is a significant possibility that the outcome of the sentencing could have been different." *Id.* This was never determined by the court in the present case and was never proven by the Appellant. The Appellant only presented presumptions that if the trial court knew of the lesser sentences given to his co-defendant he would have gotten a lower sentence. In *Caskey* and *South* the new evidence would **probably** change the result of a new trial.

In the present case both co-defendants testified. Even though no deals were given prior to trial for their testimony a lower sentence was definitely a possibility. The trial court knew through the testimony of Richard Simmons that he was the shooter and not the Appellant. With all of these facts the trial court still gave the Appellant the fifty year sentence. If the trial court knew the sentences of the co-defendants were lower it would have made no difference in the sentence given to the Appellant.

At the conclusion of this motion for a new sentence the trial court ruled that Rule 29(b) of the South Carolina rules of Criminal Procedure applies to motions for new trials not for new sentences. The Appellant argued that in *State v. South* the South Carolina Supreme Court did allow

[10] The denial of a motion for a new trial will not be reversed absent an abuse of discretion. *State v. Caskey,* 273 S.C. 325, 256 S.E.2d 737 (1979).

for a new sentencing hearing due to it being a capital case. Appellant argues that he should have been awarded a new sentence because if the trial court was aware of the co-defendant's lesser sentence he would also have been given a lower sentence. No evidence was ever presented during this motion that proves this allegation. In *State v. Brewington,* 267 S.C. 97, 226 S.E.2d 249 (1976) the court ruled that the sentence imposed upon a co-defendant for the same offense and upon others for similar offenses are among the wide variety of factors which may be properly considered in determining a proper punishment. *Brewington,* 267 S.C. at 103, 226 S.E.2d at 251. However, a co-defendant convictions and receipt of a life sentence for victim's murder were irrelevant to establish the Defendant's character nor did they demonstrate mitigating evidence of the crime. *State v. Charping,* 333 S.C. 124, 508 S.E.2d 851 (1998) The fact that the co-defendant got lesser sentences is not a factor that the trial judge was obligated to consider.

Appellant argues that the solicitor, stating that the Appellant's failure to cooperate with police justifies a fifty year sentence, taxes his right to appeal. The Appellant argues that as a condition of this plea he had to waive his appeals which violate due process. There was no evidence of this condition being brought before the Court. During sentencing the court asked the Appellant's counsel if he was advised of his right to appeal. (T. p. 173 lines 19-21) The waiver of the Appellant's right to appeal was never brought to the attention to the trial court as a condition of his sentence negotiations. So this should not be an issue before this court. During this hearing the court advised the Appellant of his right to appeal, proving this condition was never brought before the court's attention. (T. p. 174 line 24 – p. 175 line 2). During sentencing the trial court mentions the negotiation of a cap of fifty years. Nothing was mentioned about the Appellant waiving his right to appeal.

The Appellant argues that the trial court used his age as an aggravating circumstance. The trial court did determine that the Appellant made the decision to get into the car so he should have known the possible outcome once he got into that vehicle. The Appellant is of the opinion that instead of using the standards that exist in the *Miller* and *Byars* as mitigation the trial court used them against him in imposing this fifty year sentence.

At the conclusion of the *Aiken v. Byars* hearing the court concluded that the Appellant did have the capacity to assist his lawyer and cooperate with law enforcement. And according to Dr. Knight the Appellant's decision to reject plea offers and not to cooperate with the authorities was heavily impacted by his family members. On the record the court explained that all of the factors pursuant to *Aiken v. Byars* was considered prior to final sentencing. (Trial T. p. 178 line 7 – p. 182 line 15). The Appellant decided to get into the car from which a shot was fired that killed the victim. The court decided that the Appellant's actions were the sole reason all of parties were in the courtroom regarding this proceeding. The court determined that the Appellant made a choice. When he got into that car he knew he should not have been in that car. (Trial T. p. 183 lines 10-15). The trial court also determined that the Appellant had the capability to understand and make changes. (Trial T. p. 184 lines 19-21).

In the South Carolina Supreme Court decision of *Aiken v. Byars* the court determined that a juvenile cannot be sentenced to life without parole until he receives an individualized hearing where the mitigating hallmark features of youth are fully explored. *Byars*, 410 S.C. at 544, 765 S.E.2d at 578 (2014). The trial court fully explained in their decision all of the factors that were considered prior to sentencing which applied to the *Aiken* decision.

The Appellant argues that the fifty year sentence was made as a punishment for him exercising his right to a jury trial. Each defendant was offered a lower sentence by the state if they

decided to plead guilty. The Appellant was the only individual who decided to exercise his right to a jury trial. The Appellant received a greater sentence than his co-defendants even though he was the youngest. The Appellant argues that the sentence given to him was unlawful and vindictive because he decided not to accept the offer given by the State. A presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence. *U.S. v. Goodwin,* 457 U.S. 368, 375, 102 S.Ct. 2485, 2490 (1982). The trial court sentenced the Appellant after he agreed to a cap between thirty and fifty years. He was sentenced to fifty years which is between the cap negotiated between the parties. Prior to sentencing, the Appellant was given a hearing pursuant to *Aiken v. Byars* that lasted two days. The Appellant was allowed to bring in numerous witnesses to provide mitigating evidence. Before sentencing the trial court stated on the record all of the considerations that fell under the *Miller* and *Aiken* decisions. There was not only mitigating evidence, but the State presented evidence of the Appellant's prior adjudications in family court for the offenses of ABHAN and attempted armed robbery. In comparing the prior record of the Appellant to his co-defendants the Appellant's prior record was much worse than his co-defendants.[11] The Appellant also committed his prior offense of ABHAN and attempt armed robbery only forty days before this offense. While on house arrest the Appellant was out of place over two-hundred times in that forty day span.

At the conclusion of this hearing the trial court also made the realization that although the Appellant was raised in dire circumstances, and DJJ failed in their supervision, he knew what could be the result of getting in that car armed and should be responsible for his actions. There is plenty of objective information revealing that there exists no vindictiveness in sentencing. The sentence

[11] Richard Simmons prior record consist of assault and battery 3rd and unlawful carrying of a pistol, Keon Anderson only had a prior of unlawful carrying of a pistol.

was lawful and the sentences of the co-defendant was not made by the trial court but another judge. This court cannot rule that that trial court made an unlawful decision on a decision made by another judge.

The Appellant argues that the trial court's fifty year sentence was vindictive and punishment for him exercising his right to a jury trial. The Appellant argued that at the conclusion of trial he was offered a thirty year sentence if he would forgo his right to appeal. This offer was never placed on the record nor presented to the court so it should not be considered on appeal. The court will not consider any point which was not presented and considered below unless it involves the jurisdiction of the court. *Elam v. S.C. Dept. of Transportaton*, 361 S.C. 9, 23, 602 S.E.2d 772, 780 (2004).

Negotiations were made between the State and Appellant upon conviction. They negotiated that the Appellant would not receive greater than a fifty year sentence. Due to the fact no person can receive less than thirty years for the offense of murder[12], the Appellant was facing a sentence between thirty and fifty years.

Within his brief the Appellant raises elements that were presented during the *Aiken v. Byars* hearing. However, the Appellant failed to present before the court the non-mitigating evidence that occurred prior to committing this offense. The Appellant was adjudicated delinquent for two offenses that are classified as violent prior to committing this offense. The Appellant was on house arrest for a prior offense for only forty days prior to committing this offense. While on house arrest the Appellant was found out of place over 200 times in a forty day period. The Appellant also actively participated in this crime, going with the co-defendant, and shooting at the four victims.

[12] A person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life. S.C. Code Ann. §16-3-20(2018).

He had the murder weapon in his possession because his weapon ran out of bullets, and then provided Mr. Simmons with the weapon that would eventually kill Ms. Brown.

The Appellant argues that due to his upbringing and circumstances he deserved a lesser sentence. As the trial court stated prior to sentencing the Appellant knew what could be the final result by getting into that car with a deadly weapon. The Appellant wishes the court to believe that all fifteen year olds are at the identical level of maturity. Untrue, that is why the Supreme Court provided a hearing so for the court can make a determination as to maturity. Looking at his prior offenses the Appellant had more than a basic knowledge as to what consequences can befall on an individual when involved in criminal activity. The Appellant is not your average fifteen year old. He owns a Jaguar before he was old enough to legally drive, and in this car the police found a gun which he admitted was his. The Appellant also has a litany of prior violent offenses on his record prior to turning sixteen. The determination of the court to give this sentence was within the parameters pursuant to South Carolina law, and the Appellant has not presented evidence of any legal error or abuse of discretion. A trial judge has broad discretion in sentencing within statutory limits. *Brooks v. State,* 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997). A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support. *State v. Rice*, 375 S.C. 302, 315, 652 S.E.2d 409, 415 (Ct. App. 2007), rev'd on other grounds, *State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011).

The Appellant argued that neither the trial judge nor the court, during his motion for reconsideration, ever explained the reasoning for the harsh sentence. The trial court addressed what was considered prior to final sentencing. The trial court could not address any reasoning for the harsher sentence given to the Appellant than his co-defendants because his co-defendants had yet to be sentenced. The court in the denial of the motion for reconsideration never addressed the

harsher sentence because he was not obligated to do so. He addressed the reasoning for the denial of their motion, that was the courts only obligation.

The Appellant argues that the sentencing of fifty years was using his age as an aggravating circumstance because the Appellant made a choice of getting in the car. He argues that co-defendant Simmons, who was an adult and made the identical decision, received a sentence twenty years lower. The trial judge did not sentence either co-defendant. And the Appellant did make choices. There is no decision that precludes a juvenile to receive a fifty year sentence. The Appellant will try to argue that all juveniles are alike. That is not so, which is the reason for an *Aiken v. Byars* hearing. The sentencing judge determined all of the mitigating evidence provided but also used detrimental evidence such as the Appellant's prior record and the Appellant's actions during the commission of this crime.

The trial court did not use the age of the Appellant as a detrimental factor. In *Aiken v. Byers* and the other juvenile sentencing decisions the mental health of juveniles, the impulsiveness, lack of decision making and the lack of ability to recognize the consequences of their actions are not the same for every juvenile. That is why these circumstances must be taken into consideration. *See, Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). A hearing must be held where all of these mitigating factors are presented for the court's consideration pursuant to *Aiken v. Byars.*

All of the mitigating factors were presented and considered by the trial court. But what the Appellant failed to mention was what was also considered, the prior record of ABHAN, attempted armed robbery, the numerous gun charges, his actions that night calling other individuals to bring weapons, entering a vehicle while armed, shooting at individuals on a city street, and providing the co-defendant the murder weapon that he took from him due to the Appellant running out of

bullets. All of these actions present a juvenile that has had previous run-ins with law enforcement, with an understanding of the consequences of his decisions. He went with individuals to carry out the actions of an attempt to kill which ultimately resulted in the death of an innocent individual.

The Appellant argues that his sentence equates to a life sentence without parole, that is not true. At fifteen the Appellant was sentenced to a fifty year period of incarceration. Meaning at the time of his release he would be sixty-five years old. This sentence was within the agreed amount presented to the court as part of a negotiated sentence. In the South Carolina Supreme Court of *State v. Slocumb*, 426 S.C. 297, 827 S.E.2d 148 (2019). Conrad Slocumb is currently serving a one hundred and thirty year aggregate sentence after being resentenced to fifty years imprisonment for burglary first, to be served consecutively with the eighty years previously sentenced for additional violent offenses. Unlike the Appellant, Conrad Slocumb is currently serving essentially a life without parole sentence regarding offenses he committed as a juvenile. In *Slocumb* the South Carolina Supreme Court decided::

> Neither *Graham* nor the 8th Amendment, as interpreted by the Supreme Court, currently prohibits the imposition of aggregate sentences for multiple offenses amounting to a de facto life sentence on a juvenile non-homicide offender. We therefore decline to provide Slocumb relief from his 130-year sentence stemming from his multiple and violent crimes.

Slocumb, 426 S.C. at 312, 827 S.E.2d at 156

Although Slocumb was convicted of some heinous and egregious violent offenses he was never part of a murder. Unlike the Appellant, Mr. Slocumb would never be released under his current sentence, and the Supreme Court still refused to reverse the conviction. This is due to the fact the de-facto life sentences was never addressed by the United States Supreme Court. Only life without parole sentences. The South Carolina Supreme Court determined, as an inferior court they should not extend federal constitutional protections under the Eighth Amendment beyond the boundaries

the United States Supreme Court set in *Graham*. *Slocumb*, 426 S.C. at 306, 827 S.E.2d at 153. Mr. Slocumb is currently serving a one hundred and thirty year, eighty-five percent sentence. His projected release date is December 20, 2109, eighty-nine years from now. Considering Mr. Slocumb is currently forty-one years old, the chances are impossible that he would live to see his release from incarceration. With a certain life without parole sentence, the Supreme Court was still not prepared to make a ruling on his sentence. The Appellant is currently serving a sentence that would allow his release when he is sixty-five. Even though the Appellant argues that he is currently serving a sentence that will cause him to die in prison it is conceivable, and very likely that he will one day complete this sentence. Since the United States Supreme Court has yet to rule on lengthy juvenile sentences it is not a violation of the Eighth Amendment for a juvenile to receive a lengthy sentence, even it means the juvenile will spend the rest of his life incarcerated, which is not the situation with the Appellant.

CONCLUSION

For all of the foregoing reasons the Respondent respectfully request this court affirm the decision of the lower court.

Respectfully submitted,

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December 16, 2020

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
Dec 16 2020
SC Court of Appeals

Appeal from Charleston County
The Honorable Kristi Lea Harrington, Circuit Court Judge

THE STATE,

Respondent,

v.

KENNETH LAMONT ROBINSON, JR.,

Appellant.

Appellate Case No. 2018-001269

CERTIFICATE OF SERVICE

I, Donna D'Alessio, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Initial Brief of Respondent and Designation of Matter, and Certificate of Service has been forwarded to Appellant's counsel, Susan B. Hackett, Esq., to shackett@sccid.sc.gov, and to her assistant at kkasperski@sccid.sc.gov, as well as to John H. Blume, III, Esq. at john@blumelaw.com, via email today, December 16, 2020.

I further certify that all parties required by Rule to be served have been served.

This 16th day of December, 2020.

Donna D'Alessio

Donna D'Alessio,
Legal Assistant to Tommy Evans, Jr.
Assistant Attorney General

Donna D'Alessio

From: Donna D'Alessio
Sent: Wednesday, December 16, 2020 4:04 PM
To: 'shackett@sccid.sc.gov'; 'john@blumelaw.com'
Cc: Kasperski, Katriel (kkasperski@sccid.sc.gov)
Subject: Robinson, Kenneth R. - Appellate Case No. 2018-001269 - Initial Brief of Respondent, Designation of Matter, and Cert of service
Attachments: Initial Brief of the Respondent 12-16-2020 - Kenneth L. Robinson (02449977xD2C78).pdf

Dear Ms. Hackett and Mr. Blume:

Attached is a scanned copy of the Initial Brief of Respondent, Designation of Matter, and Certificate of Service regarding the above matter. The Initial Brief and supporting documents are being submitted to the South Carolina Court of Appeals through e-filing, along with a copy of this email.

Hope you are well, and thank you.

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