

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Clarendon County
D. Craig Brown, Circuit Court Judge

Opinion No. 5830 (S.C. Ct. App. Filed July 7, 2021)

THE STATE,

RESPONDENT,

V.

JON PAUL SMART,

PETITIONER

APPELLATE CASE NO. 2017-001754

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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INDEX

INDEX i

CERTIFICATE OF COUNSEL1

QUESTIONS PRESENTED.....2

STATEMENT OF THE CASE.....4

REASONS WHY CERTIORARI SHOULD BE GRANTED5

STATEMENT OF FACTS6

ARGUMENT

1.

The Court of Appeals erred in affirming Petitioner’s sentence of life without parole for an offense committed as a juvenile after a resentencing hearing where the trial court placed the burden of proof on Petitioner, since the burden of proof should be on the State to show a life sentence was proper13

2.

The Court of Appeals erred in affirming Petitioner’s sentence of life without parole for an offense committed as a juvenile after a resentencing hearing where the trial court misapprehended and misapplied the requirement to consider the family and home environment that surrounded Petitioner, as demonstrated by the trial court disregarding the testimony of Dr. Price and discounting the testimony of Petitioner’s sister about Petitioner’s impoverished and drug-ridden family and home life, despite the absence of contradictory evidence16

3.

The Court of Appeals erred in affirming Petitioner’s sentence of life without parole for an offense committed as a juvenile after a resentencing hearing where the court misapprehended and misapplied the requirement to consider Petitioner’s possibility of rehabilitation, since the trial court disregarded testimony by the only expert in the case that it was his opinion based on a reasonable degree of medical certainty that Petitioner could be a productive member of society if released from prison.18

4.	
	The Court of Appeals erred in affirming Petitioner’s sentence of life without parole for an offense committed as a juvenile after a resentencing hearing where the trial court misapprehended and misapplied the requirement to consider the chronological age of Petitioner and the hallmark features of youth, including immaturity, impetuosity, and the failure to appreciate risks and consequences, by failing to give youth constitutional significance20
i.	
	Where the trial court disregarded testimony from the only expert in the case that Petitioner had a neurocognitive disorder which resulted in him being cognitively much younger than his chronological age.20
ii.	
	Where the trial court considered Petitioner’s drug use as aggravating rather than mitigating22
iii.	
	Where the trial court disregarded testimony from the only expert in the case that Petitioner had a reduced capacity to conform his conduct to the law and appreciate the wrongfulness of his actions at the time of the offense23
	CONCLUSION.....25

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 10, 2021.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred in affirming Petitioner's sentence of life without parole for an offense committed as a juvenile after a resentencing hearing where the trial court placed the burden of proof on Petitioner, since the burden of proof should be on the State to show a life sentence was proper?

2.

Whether the Court of Appeals erred in affirming Petitioner's sentence of life without parole for an offense committed as a juvenile after a resentencing hearing where the trial court misapprehended and misapplied the requirement to consider the family and home environment that surrounded Petitioner, as demonstrated by the trial court disregarding the testimony of Dr. Price and discounting the testimony of Petitioner's sister about Petitioner's impoverished and drug-ridden family and home life, despite the absence of contradictory evidence?

3.

Whether the Court of Appeals erred in affirming Petitioner's sentence of life without parole for an offense committed as a juvenile after a resentencing hearing where the trial court misapprehended and misapplied the requirement to consider Petitioner's possibility of rehabilitation, since the trial court disregarded testimony by the only expert in the case that it was his opinion based on a reasonable degree of medical certainty that Petitioner could be a productive member of society if released from prison?

4.

Whether the Court of Appeals erred in affirming Petitioner's sentence of life without parole for an offense committed as a juvenile after a resentencing hearing where the trial court

misapprehended and misapplied the requirement to consider the chronological age of Petitioner and the hallmark features of youth, including immaturity, impetuosity, and the failure to appreciate risks and consequences, by failing to give youth constitutional significance?

i.

Where the trial court disregarded testimony from the only expert in the case that Petitioner had a neurocognitive disorder which resulted in him being cognitively much younger than his chronological age?

ii.

Where the trial court considered Petitioner's drug use as aggravating rather than mitigating?

iii.

Where the trial court disregarded testimony from the only expert in the case that Petitioner had a reduced capacity to conform his conduct to the law and appreciate the wrongfulness of his actions at the time of the offense?

STATEMENT OF THE CASE

On May 25, 2001, Petitioner pleaded guilty before the Honorable Kenneth Goode to murder, armed robbery, grand larceny of a motor vehicle, criminal conspiracy and escape; offenses which occurred on August 12, 1999. R. 1; R. 401 – 403. On August 9, 2001, the Honorable Thomas W. Cooper, Jr., sentenced Petitioner to imprisonment for life without the possibility of parole for murder. Petitioner received concurrent sentences of ten years for grand larceny, five years for criminal conspiracy, fifteen years for escape, and thirty years for armed robbery. R. 404; R. 25; R. 148, ll. 2-11; R. 167, ll. 3-22.

On May 26, 2016, Petitioner moved for resentencing pursuant to *Miller v. Alabama*,¹ *Roper v. Simmons*,² *Graham v. Florida*,³ and *Aiken v. Byars*.⁴ R. 181 – 182. This Court issued an order vesting the Honorable D. Craig Brown with jurisdiction over Petitioner's motion for resentencing. R. 183. On May 24, 2017, a resentencing hearing was held. R. 288, ll. 7-8. R. 184, 1. On August 10, 2017, the court resentenced Petitioner to life in prison without the possibility of parole. R. 388, ll. 17-24; R. 404.

The Court of Appeals affirmed in a published opinion, *State v. Jon Smart*, Op. No. 5830 (S.C. Ct. App. Filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 18). Petitioner moved for rehearing and the State made its return. The Court of Appeals denied rehearing.

This petition for a writ of certiorari follows.

¹ *Miller v. Alabama*, 567 U.S. 460 (2012).

² *Roper v. Simmons*, 543 U.S. 551 (2005).

³ *Graham v. Florida*, 560 U.S. 48 (2010).

⁴ *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).

REASONS WHY CERTIORARI SHOULD BE GRANTED

This Court should grant certiorari because there is a novel question of law: What is the burden of proof and who bears it in a juvenile life without parole sentencing hearing in South Carolina? Absent guidance from this Court on this issue, juveniles facing life without parole may face disparate treatment or be denied due process. For example, a judge in Aiken county may place the burden on the defense to show beyond a reasonable doubt that a life without parole sentence is improper, while a judge in Kershaw county may place the burden on the State to show by a ponderance of the evidence that the *Miller* factors weigh in favor of life without parole. Substantial constitutional issues are therefore involved. *See* Rule 242(b), SCACR.

Substantial constitutional issues are also involved since the Eighth Amendment's cruel and unusual punishment prohibition is implicated in whether the trial court misapprehended and misapplied the *Miller* factors. "The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller v. Alabama*, 567 U.S. at 469 (quoting *Roper v. Simmons*, 543 U.S. at 560). *See* Rule 242(b), SCACR.

Moreover, the decision of the Court of Appeals is in conflict with *Aiken*. The sentencing judge in a juvenile life without parole case must "consider such evidence [on the *Miller* factors] in the light of its constitutional weight." *Aiken v. Byars*, 410 S.C. at 544, 765 S.E.2d at 577. Because it failed to consider to the mitigating evidence in light of its constitutional weight here, the trial court erred when it sentenced Petitioner to life without the possibility of parole. *See* Rule 242(b), SCACR.

This Court should remedy these errors by granting certiorari. *See* Rule 242(b), SCACR.

STATEMENT OF FACTS

Petitioner was sixteen years old when he was charged with murder for beating Tracey Pack (Decedent) to death with a pipe. R. 401 – 403. In 2001, to avoid the death penalty, Petitioner pleaded guilty to murder, armed robbery, grand larceny of a motor vehicle, criminal conspiracy, and escape, and he was sentenced to imprisonment for life without the possibility of parole for murder and term-of-years sentences for the other offenses. R. 167, ll. 3-23; R. 354; R. 401 – 404.

Petitioner routinely abused inhalants and other drugs, and he was diagnosed with “polysubstance dependence” by the Department of Juvenile Justice (DJJ) prior to the commission of these offenses. R. 220, ll. 1-8; R. 211, ll. 8-25. Petitioner was at the Rimini Marine Institute in DJJ’s custody for burglary when he committed the murder. R. 151, ll. 3-6; R. 220, ll. 1-8. Petitioner’s codefendant, Stephen Hutto, was also at Rimini. R. 112, l. 13. Rimini was attached to a chicken farm owned and operated by the Pack family. R. 31, ll. 10-15.

As part of their DJJ placement, Petitioner and Hutto worked in the Packs’ chicken houses, where they were supervised by and worked with Decedent. R. 32, l. 4 – 33, l. 4. Petitioner continued to huff (inhale fumes from) gasoline while in DJJ custody. R. 243, ll. 18-23; R. 226, l. 16 – 227, l. 4. A day or two before Decedent was killed, Petitioner and Hutto were huffing gasoline stolen from a generator when Hutto suggested they kill Decedent and take his truck. R. 64, ll. 9-15. There was additional evidence the murder was planned. R. 54, l. 10 – 55, l. 24; R. 62, ll. 7-17.

The day of Decedent’s death, Petitioner was again huffing gasoline. R. 65, l. 25 – 66, l. 1. Hutto gave Petitioner a metal pipe and he said Petitioner should use it to hit Decedent. R. 65, l. 25 – 66, l. 4. After Petitioner huffed more gasoline, Hutto mouthed at Petitioner to “do it, do it.”

R. 66, l. 13-16. Petitioner hit Decedent in the head and bludgeoned him to death. R. 66, ll. 17-18; R. 33, l. 22 – 34, l. 4. Hutto and Petitioner hid Decedent’s body and the two went on to commit more crimes, including the armed robbery of a dollar store, before they were arrested in Myrtle Beach. R. 66, l. 19 – 70, l. 5; R. 22, ll. 16-19. According to the solicitor, “Hutto was the brains, [Petitioner] was the muscle.” R. 108, ll. 16-17.

Petitioner was granted resentencing pursuant to *Miller v. Alabama*,⁵ *Roper v. Simmons*, *Graham v. Florida*, and *Aiken v. Byars*, *supra*, on the murder. R. 181 – 184. At an evidentiary hearing on May 24, 2017, the Honorable D. Craig Brown received evidence from two defense witnesses (David Price, a forensic psychologist, and Petitioner’s sister, Tammy Smart) and three prosecution witnesses (Thomas Burgess, a former police investigator, and Joe and Andy Pack, Decedent’s brothers).

According to David Price, an expert in clinical psychology, Petitioner came from a family with a “drug culture,” where his parents abused marijuana, cocaine, crack cocaine, and methamphetamine. R. 205, l. 12 – 206, l. 25; R. 322; R. 212, l. 1. Dr. Price explained Petitioner “lived in an impoverished environment in which a lot of the income went to purchase drugs. There were violent family arguments between his parents over when drugs ran out. His responsibility was to go score more drugs.” R. 208, ll. 1-6. Petitioner’s parents modeled

⁵ *Miller v. Alabama*, 567 U.S. at 479, held that the “Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.” *Miller* further held that before sentencing a juvenile to life without parole, a sentencer must consider: (1) the chronological age of the offender and the hallmark features of youth, including “immaturity, impetuosity, and failure to appreciate the risks and consequence”; (2) the “family and home environment” that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender’s participation in the conduct and how familial and peer pressures may have affected him; (4) the “incompetencies associated with youth—for example, inability to deal with police officers or prosecutors (including on a plea agreement) or incapacity to assist his own attorneys”; and (5) the “possibility of rehabilitation.” *Id.* at 477-78. (hereafter referred to as the *Miller* factors).

“dishonest and unlawful behavior and [he had] just a lack of basic parental supervision.” R. 212, ll. 8-10. The testimony of Petitioner’s sister, Tammy Smart, tracked with Dr. Price’s testimony— Smart confirmed Petitioner’s parents abused drugs and left them unsupervised. R. 192, l. 7 – 193, l. 17.

Dr. Price opined Petitioner’s substance abuse at the time of the offense was related to his home life. R. 211, ll. 16-25. Dr. Price told the court that although Petitioner was chronologically sixteen years old at the time of the offense, “if we look at cognitive age he was much younger than that and it was related to the history of poly-substance dependence that he had.” R. 207, ll. 11-15. Dr. Price diagnosed Petitioner with “a neuro-cognitive disorder to reflect a frontal lobe dysfunction.” R. 209, ll. 17-19. He explained, “when you do a substantial amount of drugs, particularly early, it [a]ffects the functioning of the frontal lobes and it directly affects impulsivity, aggressiveness, poor judgment, failure to appreciate the consequences of your action.” R. 209, ll. 2-7; R. 213, ll. 3-6; R. 215, ll. 5-16.

Dr. Price determined that the attack on Decedent was “influenced by [Petitioner’s] instant drug use superimposed on the organic damages secondary to his years of drug usage on a developing brain, and specifically his frontal lobes.” R. 348. Dr. Price told the court that Petitioner’s huffing and neurocognitive disorder “certainly predispose[d] him to act impulsively without concern for the consequences of his actions.” R. 212, ll. 11-19. He further explained that, combined with Petitioner’s drug use, the neurocognitive disorder caused Petitioner to “act without regard for others” and resulted in “primitive” behavior. R. 213, ll. 7-10.

Dr. Price noted that Petitioner had undergone good “cognitive recovery” since being incarcerated, he had average behavior for an inmate, and he was not psychotic or delusional. R. 214, l. 4; R. 235, ll. 6-19; R. 236, ll. 7-10. Petitioner had been employed while incarcerated. R.

352. Dr. Price did not think Petitioner would be “aggressive” if released from prison. R. 222, ll. 11-23. The solicitor asked Dr. Price: “Do you have an opinion based on a reasonable degree of medical certainty that [Appellant] could come out of prison early, earlier than the sentence he’s got now, and be a model citizen?” R. 223, ll. 1-4. Dr. Price responded: “I think he can—you’d have to define model citizen; but I think he can be a productive member of society, yes.” R. 223, ll. 5-7.

The court placed the burden of proof for resentencing on Petitioner. R. 190, ll. 9-16. Defense counsel argued that the burden of proof was on the State to show a life sentence was proper. R. 396, ll. 14-25. At the conclusion of testimony, defense counsel argued that because the factors listed by *Miller* and *Aiken* had been favorable, Petitioner’s sentence should be reduced. R. 277, l. 25 – 278, l. 21.

The trial court indicated it believed Petitioner was required to present more evidence in order to obtain relief under *Miller* and *Aiken*. The court stated that “no MRI was ever performed on this defendant” “to determine the extent of damage of the frontal lobe that could result from such drug usage.” R. 374, l. 24 – 20, l. 5. The court said of Dr. Price’s testimony: “Impetuosity, he didn’t specifically address that.” R. 375, ll. 20-21. The court stated Petitioner had not been found incompetent to stand trial, and that Petitioner was “not insane.” R. 383, ll. 15-20; R. 386, ll. 2-3. The court remarked that Dr. Price “brought no documents of any kind” “for the court to look at . . .” R. 393, ll. 4-8.

In issuing its sentence, the trial court acknowledged Dr. Price testified that “he believed to a reasonable degree of medical certainty, that [Petitioner] could be a productive member of society.” R. 385, ll. 18-20; R. 223, ll. 1-7. The court did not find this testimony was not credible;

instead it found: “The possibility of rehabilitation, there is a possibility. There is always a possibility. But there are impossibilities as well.” R. 394, ll. 12-13.

The court stated: “I believe it is safe to say that every 16-year-old, and at least that I’ve been around, is immature.” R. 371, ll. 17-19. It found “every 16-year old” has an undeveloped brain. R. 389, ll. 15-24. The court further found Petitioner’s drug abuse “doesn’t excuse what he did” because “voluntary intoxication is not a defense.” R. 385, l. 25 – 386, l. 1; R. 389, l. 16 – 390, l. 4.

The court explained it had considered the brutality of the killing “ad nauseum.” R. 394, ll. 8-9. “I affirm so to speak, or deny your client’s motion and impose a life sentence.” R. 395, ll. 15-18. “[T]his court believes that the appropriate conclusion in this matter is that the defendant’s motion to set aside his life imprisonment sentence, be denied. Therefore, he is to remain incarcerated for the balance of his natural life.” R. 388, ll. 19-24.

The Court of Appeals affirmed in *State v. Jon Smart*, Op. No. 5830 (S.C. Ct. App. Filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 18). Petitioner argued the trial court erred by failing to place the burden of proof on the State. At the time, Petitioner argued the State was required to show and the judge was required to find Petitioner irreparably corrupt beyond a reasonable doubt. *Jones v. Mississippi*, 141 S.Ct. 1307, 1319-21 (2021), was decided while this direct appeal was pending, and the United States Supreme Court held that *Miller* and *Montgomery* did not require the sentencer to find permanent incorrigibility in a juvenile life without parole sentencing hearing. Recognizing *Jones*, on rehearing, Petitioner argued the trial judge still erred by failing to place the burden of proof on the State. Specifically, Petitioner submitted the burden of proof should be on the State to show beyond a reasonable doubt that a life sentence is proportional where exceptional circumstances outweigh mitigating factors. App. 17-21.

The Court of Appeals found the trial court did not err by placing the burden of proof on Petitioner, because, “First, the Supreme Court did not establish a particular burden in *Miller*,” and “Second, [this Court] has not addressed whether a particular party bears the burden.” The Court of Appeals concluded that “the hearing was consistent with the [*Aiken v.*] *Byars* requirements.” *State v. Jon Smart*, Op. No. 5830 (S.C. Ct. App. Filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 28). The Court of Appeals found “the trial court sufficiently considered Smart’s family and home environment,” and “did not abuse its discretion when applying *Miller*’s ‘possibility of rehabilitation’ factor . . .” *State v. Jon Smart*, Op. No. 5830 (S.C. Ct. App. Filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 26-27).

The Court of Appeals further concluded cognitive age was irrelevant under *Miller* and *Aiken*, since those cases mandated only consideration of chronological age. “*Miller* and [*Aiken v.*] *Byars* do not require consideration of a juvenile’s cognitive age. Under those cases, the court must consider the ‘**chronological age** of the offender’ and the ‘immaturity, impetuosity, and failure to appreciate the risks and consequence[s]’ flowing from the offender’s youth.” *State v. Jon Smart*, Op. No. 5830 (S.C. Ct. App. Filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 24) (quoting *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577; *Miller*, 567 U.S. at 477) (emphasis added by Court of Appeals).

The Court of Appeals found the “trial court’s statement that Smart’s drug use ‘was not a defense’ does not indicate the court viewed the drug use as an aggravating factor. Rather, it indicates the court did not find it to be a compelling mitigating circumstance when considered with other factors.” *State v. Jon Smart*, Op. No. 5830 (S.C. Ct. App. Filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 24).

Finally, as to Petitioner’s argument that the trial court erred when it disregarded favorable expert testimony about his reduced capacity to conform his conduct to the law, the Court of Appeals found that Dr. Price testified Petitioner could “appreciate the wrongfulness of his actions,” and it discussed evidence of malice. *State v. Jon Smart*, Op. No. 5830 (S.C. Ct. App. Filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 25).

ARGUMENT

1.

The Court of Appeals erred in affirming Petitioner’s sentence of life without parole for an offense committed as a juvenile after a resentencing hearing where the trial court placed the burden of proof on Petitioner, since the burden of proof should be on the State to show a life sentence was proper.

The Court of Appeals did not determine which party should have had the burden of proof at Petitioner’s juvenile life without parole (LWOP) resentencing hearing, but simply affirmed the trial court, which placed the burden on Petitioner. Despite favorable expert testimony on the *Miller* factors, the trial court found Petitioner needed to present more evidence to receive a non-LWOP sentence. R. 190, ll. 9-16. It listed things such as an MRI, a finding of incompetency or insanity, and printed materials, that it believed Petitioner should have provided the court to justify a lesser sentence. R. 374, l. 24 – 386, l. 3; R. 393, ll. 4-8.

This Court should hold that in order for a court to impose a life without parole sentence on a juvenile defendant, the burden of proof is on the State to show a life sentence is proper. Petitioner suggests that burden should be a requirement to prove beyond a reasonable doubt that exceptional circumstances of aggravation outweigh mitigating factors, including the *Miller* factors. In *Jones*, the Supreme Court recently reiterated that states may impose specific procedural requirements at these hearings, and noted many options were available to the states in that regard. *Jones v. Mississippi*, 141 S.Ct. at 1323. In *Aiken*, this Court explained, “Without question, the judge may still determine that life without parole is the appropriate sentence in some of these cases in light of other aggravating circumstances.” *Id.* at 545, 765 S.E.2d at 578. “[T]he type of mitigating evidence permitted in death penalty sentencing hearings

unquestionably has relevance to juvenile life without parole sentencing hearings, in addition to the [Miller factors].” *Id.* at 544-45, 765 S.E.2d at 577. Petitioner submits a determination that the aggravating circumstances should outweigh mitigating circumstances in order to support a sentence of LWOP for a juvenile would be in keeping with *Aiken*.

Because this is a criminal case, the burden of proof should be beyond a reasonable doubt. The standard of proof “serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.” *Addington v. Texas*, 441 U.S. 418, 423 (1979). “The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error.” *In re Winship*, 397 U.S. 358, 363 (1970). The reasonable doubt standard “impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.” *In re Winship*, 397 U.S. at 364 (quoting Dorsen & Reznick, *In Re Gault and the Future of Juvenile Law*, 1 Family Law Quarterly, No. 4, pp. 1, 26 (1967)). Here, the reasonable doubt standard would reduce the risk of a juvenile LWOP sentence resulting from factual error, and it would also denote the importance of the ultimate decision.

An application of the four-part test identified by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), also demonstrates that due process supports a reasonable doubt standard in these cases when the following points are considered.

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. at 335. The private interest is the loss of liberty and the ability to demonstrate rehabilitation over time. The risk of an erroneous deprivation of that interest would result in an irrevocable loss of liberty. The probable value of a beyond a reasonable doubt standard of proof is therefore high. And, the State, which has no legitimate interest in a constitutionally disproportionate sentence, commonly undertakes the same burden of proof in the guilt phase of these cases.

In keeping with the principles laid out in *Miller* and *Montgomery*—that youth “counsel[s] against” irrevocable lifetime sentences and that LWOP is only permitted for juveniles in exceptional circumstances—the burden of proof should be on the State. *Miller*, 567 U.S. at 480; *Montgomery*, 577 U.S. at 209.

To support a sentence of life without parole for a juvenile, the prosecution should be required to show that aggravating circumstances (including the facts of the case and other relevant facts) outweigh the mitigating factors (including the *Miller* factors and death penalty-type mitigation). Given expert testimony by Dr. Price that Petitioner was capable of rehabilitation, was substance-abuse dependent and huffing gasoline when he killed Decedent, that Petitioner had a chaotic home and family life (where his parents abused drugs), and that he had a neurocognitive disorder due to drug use which caused aggression, the State was unable to show a life sentence is proper.

2.

The Court of Appeals erred in affirming Petitioner’s sentence of life without parole for an offense committed as a juvenile after a resentencing hearing where the trial court misapprehended and misapplied the requirement to consider the family and home environment that surrounded Petitioner, as demonstrated by the trial court disregarding the testimony of Dr. Price and discounting the testimony of Petitioner’s sister about Petitioner’s impoverished and drug-ridden family and home life, despite the absence of contradictory evidence.

The trial court disregarded testimony by Dr. Price about Petitioner’s family background in passing sentence. As seen, Dr. Price, who was qualified as an expert in clinical psychology without objection, opined that Petitioner came from a family with a culture of drug use. Dr. Price found Petitioner’s substance abuse at the time of the offense was related to his home life. R. 205, l. 12 – 211, l. 25; R. 322.

The trial court’s conclusion that Petitioner should receive life without parole was error because the court misapprehended and misapplied the second *Miller* factor. The court failed to adhere to *Miller* and *Aiken*’s recognition that differences in children counsel against sentencing them to LWOP, by failing to give any mitigating weight to the expert testimony on this factor. No evidence was presented to contradict Dr. Price’s testimony. The testimony of Petitioner’s sister, Tammy Smart, was consistent with Dr. Price’s testimony—she recounted a home life of parental neglect and substance abuse. Yet her testimony received no mitigating weight either. R. 192, l. 9 – 193, l. 17.

“*Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant’s juvenility on the sentence rendered.” *Aiken*, 410 S.C. at 543, 765 S.E.2d at 577. “*Miller* requires

the sentencing authority take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* at 544, 765 S.E.2d at 577 (internal quotations omitted) (quoting *Miller*). This Court explained that, “youth has constitutional significance. As such, it must be afforded adequate weight in sentencing.” *Aiken*, at 542-543, 765 S.E.2d at 576.

The Supreme Court of Iowa has observed of the second *Miller* factor: “expert testimony will best assess how the family and home environment may have affected the functioning of the juvenile offender.” *State v. Roby*, 897 N.W.2d 127, 146 (Iowa 2017). The facts and expert opinion regarding Petitioner’s home and family environment were overwhelmingly mitigating. Although the court articulated some of those facts when it passed sentence, it failed to consider them in light of their constitutional weight. *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577.

3.

The Court of Appeals erred in affirming Petitioner’s sentence of life without parole for an offense committed as a juvenile after a resentencing hearing where the trial court misapprehended and misapplied the requirement to consider Petitioner’s possibility of rehabilitation, since the trial court disregarded testimony by the only expert in the case that it was his opinion based on a reasonable degree of medical certainty that Petitioner could be a productive member of society if released from prison.

The court had the benefit of expert testimony that Petitioner could become a productive member of society if released from prison. The court heard expert testimony Petitioner was unlikely to be aggressive if released and that Petitioner was an average inmate. R. 222, l. 11 – 223, l. 7; R. 235, ll. 17-19. Dr. Price explained that Petitioner had experienced significant cognitive recovery, and the court saw that Petitioner had been employed for approximately nine years within the Department of Corrections. R. 210, l. 7 – 214, l. 4; R. 235, ll. 6-7; R. 352.

Miller and *Aiken* require that when a juvenile is facing the possibility of life without parole, the sentencing court fully explore and consider the fifth *Miller* factor: the juvenile’s possibility of rehabilitation. *Miller v. Alabama*, 567 U.S. at 477-78; *Aiken v. Byars*, 410 S.C. at 544, 765 S.E.2d at 577. It is important to recognize that “the seriousness of the offense (even homicide) is not a reliable predictor of future offending or rehabilitation failure.” Elizabeth Scott et. al., *Juvenile Sentencing Reform in A Constitutional Framework*, 88 Temp. L. Rev. 675, 700 (2016).

Of Petitioner’s potential for rehabilitation, the court determined: “The possibility of rehabilitation, **there is a possibility**. There is always a possibility. But there are also impossibilities in as well.” R. 394, ll. 12-15 (emphasis added). The court’s conclusion that

Petitioner was eligible for life without parole was error because the court found that Petitioner could be rehabilitated yet failed to afford any weight to that finding. Moreover, in finding there is “always a possibility” of rehabilitation, the trial court improperly discounted the importance of this *Miller* factor. *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577.

4.

The Court of Appeals erred in affirming Petitioner’s sentence of life without parole for an offense committed as a juvenile after a resentencing hearing where the trial court misapprehended and misapplied the requirement to consider the chronological age of Petitioner and the hallmark features of youth, including immaturity, impetuosity, and the failure to appreciate risks and consequences, by failing to give youth constitutional significance.

i.

Where the trial court disregarded testimony from the only expert in the case that Petitioner had a neurocognitive disorder which resulted in him being cognitively much younger than his chronological age.

Petitioner’s diagnosis of a neurocognitive disorder was directly relevant to the first *Miller* factor: age, immaturity, impetuosity, and failure to appreciate risks and consequences. Dr. Price explained this disorder predisposed Petitioner to act impulsively without concern for the consequences of his actions, and is characterized by impulsiveness, sensation-seeking, and possible aggression. R. 207, l. 11 – 215, l. 16.

Despite Dr. Price’s testimony, of Petitioner’s age, the trial court said “every 16-year-old” is immature. R. 389, ll. 16-25. The court found “regardless of” Petitioner’s gasoline huffing and neurocognitive disorder, that did not “excuse” what Petitioner did. R. 389, ll. 16-25; R. 390, ll. 2-4. The court focused on the fact that there had been some “planning.” R. 391, ll. 9-13. The court stated it had considered the brutality of the murder “ad nauseam.” R. 394, ll. 9-10.

The court’s treatment of this factor was a failure to give youth constitutional significance. “[Y]outh has constitutional significance. As such, it must be afforded adequate weight in sentencing.” *Aiken v. Byars*, at 542-543, 765 S.E.2d at 576. Petitioner was not a typical sixteen-

year-old. The court cast aside that Petitioner was cognitively much younger than his chronological age, had a history of drug dependence, and was intoxicated from huffing gasoline at the time of the offense.

A useful comparison can be found in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), where the Oklahoma Court of Criminal Appeals had conceded Eddings' personality disorder and family history, but cast this evidence aside on the basis that he "knew the difference between right and wrong," and the evidence did not "excuse" the behavior. *Id.* at 113. The United States Supreme Court observed: "From these statements it appears that the Court of Criminal Appeals also considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability." *Id.* This was error: "just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing." *Id.* at 116.

It appears from the record that the court believed evidence to be mitigating only if it supported a legal excuse from criminal liability. R. 389, ll. 16-25; R. 390, ll. 2-4. As was held in *Eddings*, it was error to disregard mitigating evidence simply because it did not rise to the level of legal excuse. *Miller* recognized that juvenile homicide offenders may be deserving of lesser sentences even when they commit terrible crimes—the defendant in *Roper* committed a horrific murder, kidnapping a woman, duct-taping her face and throwing her off a bridge. *Roper*, 543 U.S. at 556. So too, did the defendant in *Miller*, coming back to finish the incapacitated victim off by arson. *Miller*, 567 U.S. at 467-68. Yet *Miller* counsels against sentencing juveniles to life without parole for murder. *Miller*, 567 U.S. at 480.

Petitioner's diagnosis of a neurocognitive disorder was mitigating as to age, immaturity, impetuosity, and failure to appreciate risks and consequences, since the disorder predisposed

Petitioner to act impulsively without concern for the consequences of his actions. *Miller*, 567 U.S. at 477-78. However, the court erred when it did not afford this evidence weight in sentencing Petitioner to life without parole. *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577.

ii.

Where the trial court considered Petitioner’s drug use as aggravating rather than mitigating.

Dr. Price opined Petitioner’s substance abuse was related to his home life and he noted that at times Petitioner was even responsible for obtaining drugs for his parents. R. 205, l. 12 – 212, l. 10; R. 322. Dr. Price opined that Petitioner’s drug use, both at the time of the offense and earlier in life, contributed to the attack on Decedent. R. 348; R. 212, l. 11 – 213, l. 10. However, the trial court found that “voluntary intoxication is not a defense,” and “doesn’t excuse what he did.” R. 385, l. 25 – 386, l. 1; R. 389, l. 16 – 390, l. 4. As seen, the Court of Appeals surprisingly concluded that evidence that Petitioner’s drug use caused him to suffer from a cognitive disorder was irrelevant since *Miller* requires consideration of chronological age, not cognitive age. *State v. Jon Smart*, Op. No. 5830 (S.C. Ct. App. Filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 24). However, this conclusion overlooks that cognitive age informs immaturity, impetuosity, and failure to appreciate risks and consequences.

In *Miller*, the United States Supreme Court recognized the defendant’s drug use as a factor which mitigated against life without parole for a juvenile homicide offender. “No one can doubt that [Miller] and Smith committed a vicious murder. But they did it when high on drugs and alcohol consumed with the adult victim.” *Id.* at 478. “*Miller* repeatedly described youth as a sentencing factor akin to a mitigating circumstance.” *Jones v. Mississippi*, 141 S.Ct. 1307, 1315. “Evidence of voluntary intoxication is a proper matter for consideration by the jury in mitigation

of punishment.” *State v. Pierce*, 289 S.C. 430, 435, 346 S.E.2d 707, 710-11 (1986), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *Council v. State*, 380 S.C. 159, 177, 670 S.E.2d 356, 365 (2008); *State v. Stone*, 350 S.C. 442, 449, 567 S.E.2d 244, 248 (2002); *State v. Plemmons*, 296 S.C. 76, 78, 370 S.E.2d 871, 872 (1988).

The trial court erred when it concluded that evidence Petitioner used drugs should weigh against him rather than weigh in mitigation, particularly where the testimony was that Petitioner’s drug use was related to his family’s “drug culture.” R. 212, l. 1. In doing so, the court misapprehended and misapplied the requirement to give youth constitutional significance. *Miller*, 567 U.S. at 478; *Aiken*, 410 S.C. at 542-43.

iii.

Where the trial court disregarded testimony from the only expert in the case that Petitioner had a reduced capacity to conform his conduct to the law and appreciate the wrongfulness of his actions at the time of the offense.

Petitioner’s neurocognitive disorder coupled with his drug use affected his ability to reason, exercise judgment, and appreciate the consequences of his actions. Dr. Price opined that at the time of the incident, Petitioner had “the reduced capacity to conform his impulsive behavior to the requirements of the law and to appreciate the wrongfulness of his action and the outcome of his behavior.” R. 223, ll. 18-25; R. 348. Dr. Price explained that attempts to conceal the body occurred after the murder was committed, and he explained Petitioner’s huffing of gasoline contributed to his “failing to appreciate the consequences of . . . a series of impulsive and bad decisions.” R. 227, l. 10 – 239, l. 15.

However, the trial court focused on Petitioner’s sanity: “Dr. Price testified that [Petitioner] appreciated the wrongfulness of his conduct” and “he appreciate risks.” R. 375, ll.

15-16; R. 389, ll. 16-18. As seen, Dr. Price testified that Petitioner's condition led to impulsivity and a reduced ability to appreciate the wrongfulness and consequences of his actions.

Miller and *Aiken* expressly require the sentencing court to consider the "hallmark features of youth," including "immaturity, impetuosity, and failure to appreciate the risks and consequence." *Miller*, 567 U.S. at 477-78; *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577. "[T]he type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings, in addition to the factors illustrated above." *Aiken*, 410 at 544-45, 765 S.E.2d at 577. South Carolina law provides that mitigating circumstances in a death penalty case include: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." S.C. Code Ann. § 16-3-20(C)(b)(6) (1976).

The court disregarded the constitutional significance of Petitioner's youth by failing to weigh and consider testimony Petitioner had a reduced capacity to conform his conduct to the law and to appreciate the wrongfulness of his actions. This evidence went to Petitioner's age and the hallmark features of youth, including immaturity, impetuosity, and the failure to appreciate the risks and consequence. Additionally, this was mitigating evidence permitted in death penalty sentencing hearings that was relevant to juvenile life without parole determinations. *Miller*, 567 U.S. at 477-78; *Aiken*, 410 S.C. at 544-45, 765 S.E.2d at 577.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.

Respectfully Submitted,

s/ Joanna K. Delany

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This 9th day of September, 2021.