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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JON PAUL SMART,

APPELLANT

APPELLATE CASE NO. 2017-001754

Appeal from Clarendon County

D. Craig Brown, Circuit Court Judge

Opinion No. 5830

PETITION FOR REHEARING

On July 7, 2021, this Court affirmed Appellant's resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), in a published opinion. *State v. Smart*, Op. No. 5830 (S.C. Ct. App. filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 18). Pursuant to Rule 221(a), SCACR, counsel for Appellant respectfully requests this Court rehear the matter based upon significant points overlooked and/or misapprehended by this Court.

Appellant respectfully asserts this Court overlooked and/or misapprehended that 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. Appellant also asserts

this Court overlooked and/or misapprehended the resentencing court’s failure to give the mitigating factors of youth applicable to Appellant constitutional weight, as well as the resentencing court’s erroneous weighting of some mitigating evidence as aggravating.

FACTS

At the age of sixteen, Appellant was charged with murder for beating Tracey Pack (Decedent) to death with a pipe. R. 401 – 403. In, 2001, Appellant 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. 401 – 404.

Appellant moved for, and was granted resentencing pursuant to *Miller v. Alabama*,¹ *Roper v. Simmons*,² *Graham v. Florida*,³ and *Aiken v. Byars*⁴ on the murder. R. 181 – 184. At an evidentiary hearing in 2017, the Honorable D. Craig Brown received evidence from two defense witnesses (David Price, a forensic psychologist, and Appellant’s sister, Tammy Smart) and three

¹ *Miller v. Alabama*, 567 U.S. 460 (2012). *Miller* held that the “Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.” *Id.* at 479. *Miller* further held that before sentencing a juvenile facing the possibility of 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).

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).

prosecution witnesses (Thomas Burgess, a former police investigator, and Joe and Andy Pack, Decedent's brothers).

The court placed the burden of proof for resentencing on Appellant. 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.

According to Dr. David Price, an expert in clinical psychology, Appellant came from a chaotic and dysfunctional family, where his parents abused marijuana, cocaine, crack cocaine, and methamphetamine. R. 205, l. 12 – 206, l. 25; R. 322. Appellant's parents modeled "dishonest and unlawful behavior and [he had] just a lack of basic parental supervision." R. 212, ll. 8-10. The family was impoverished, with much of their income going to purchase drugs. Appellant was responsible for "scor[ing]" drugs for his parents when they ran out. R. 208, ll. 1-7. Dr. Price opined Appellant's substance abuse at the time of the offense was related to his home life. R. 211, ll. 16-25.

Appellant abused inhalants and other drugs, and he was diagnosed with "polysubstance dependence" by the Department of Juvenile Justice. R. 220, ll. 1-8; R. 211, ll. 8-25. Appellant was at Rimini Marine Institute, in the custody of DJJ, when he committed the murder.⁵ R. 220, ll. 1-8. Appellant's codefendant, Stephen Hutto, was also at Rimini Marine Institute. 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, Appellant and Hutto worked in the Packs' chicken houses, where they were supervised by and worked with Decedent. R. 32, l. 4 – 33, l. 4. Appellant continued to huff gasoline while in DJJ custody, "carrying a rag of gasoline in his pocket that he would huff with."

⁵ DJJ was aware that Appellant huffed gasoline, yet DJJ employees gave Appellant a work assignment which gave him access to gasoline for lawnmowers. *Pack v. Associated Marine Institutes, Inc.*, 362 S.C. 239, 242, 608 S.E.2d 134, 136 (Ct. App. 2004).

R. 243, ll. 18-23; R. 226, l. 16 – 227, l. 4. A day or two before Decedent was killed, Appellant and Hutto were huffing gasoline stolen from a generator when Hutto suggested they kill Decedent and take his truck. R. 64, ll. 9-15.

The day of Decedent's death, Appellant was huffing gasoline. R. 65, l. 25 – 66, l. 1. Hutto gave Appellant a metal pipe, and said Appellant should use it to hit Decedent. R. 65, l. 25 – 66, l. 4. After Appellant huffed more gasoline, Hutto mouthed at Appellant to “do it, do it.” R. 66, l. 13-16. Appellant hit Decedent in the head and bludgeoned him to death. R. 66, ll. 17-18; R. 33, l. 22 – 34, l. 4. Hutto and Appellant hid Decedent's body, and went on to commit more crimes before they were arrested in Myrtle Beach. R. 66, l. 19 – 67, l. 16; R. 22, ll. 16-19. According to the solicitor, “Hutto was the brains, [Appellant] was the muscle.” R. 108, ll. 16-17. “Each time there was an act it was done by [Appellant], the planning and getting there was mostly done by Hutto.” R. 108, ll. 19-21.

Dr. Price told the resentencing court that although Appellant 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 Appellant with “a neuro-cognitive disorder to reflect a frontal lobe dysfunction.” R. 209, ll. 17-19. Dr. Price explained that Appellant had a lessened ability to reason: “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. 215, ll. 5-16.

Dr. Price determined that the attack on Decedent was “influenced by [Appellant'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

Appellant’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 explained that neurocognitive disorder is “characterized by failure to appreciate the consequences of your actions, impulsiveness, can be aggressiveness, sensation seeking.” R. 213, ll. 3-6. He further explained that, combined with Appellant’s drug use, the neurocognitive disorder caused Appellant to “act without regard for others” and resulted in “primitive” behavior. R. 213, ll. 7-10.

Dr. Price opined that if Appellant was to be released from prison, he could “be a productive member of society [].” R. 223, l. 5-7. Dr. Price noted that Appellant had undergone good “cognitive recovery,” had average behavior for an inmate, and was not psychotic or delusional. R. 214, l. 4; R. 235, ll. 6-19; R. 236, ll. 7-10. Appellant had been employed while incarcerated. R. 352. Dr. Price did not think Appellant would be “aggressive” if released from prison. R. 222, ll. 11-23.

The court resentenced Appellant to life in prison without the possibility of parole. R. 184; R. 388, ll. 17-24; R. 404.

ARGUMENT

Burden of proof

First, Appellant asserts this Court overlooked and/or misapprehended that the burden of proof should be on the State to show beyond a reasonable doubt that a life without parole sentence is proportional because exceptional circumstances outweighed mitigating factors. Appellant argued in Issue 3 that the court erred in sentencing him to life without parole for an offense

committed as a juvenile where the court failed to place the burden of proof on the prosecution to show a sentence of life without parole was proper.⁶

This Court addressed Appellant’s argument that the State should have the burden of proof as follows.

Regarding Smart’s argument that the trial court erred as to the burden of proof, we disagree. First, the Supreme Court did not establish a particular burden in *Miller*. See *Montgomery*, 577 U.S. at 211, 136 S.Ct. 718 (“[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.” (alterations in original) (quoting *Ford*, 477 U.S. at 416–17, 106 S.Ct. 2595)). Other states interpreting the Supreme Court’s rulings have reached different results. Compare *Commonwealth v. Batts*, 640 Pa. 401, 163 A.3d 410, 416 (2017) (holding there is a presumption against LWOP sentences that the prosecution must overcome by proof beyond a reasonable doubt), with *State v. Valencia*, 241 Ariz. 206, 386 P.3d 392, 396 (2016) (noting the Supreme Court in *Montgomery* stated prisoners “must be given the opportunity to show their crime did not reflect irreparable corruption” and holding the defendant bore the burden of showing by the preponderance of the evidence that his or her crime reflected transient immaturity (quoting *Montgomery*, 577 U.S. at 213, 136 S.Ct. 718)). Second, our supreme court has not addressed whether a particular party bears the burden. Although the court referenced our death penalty sentencing procedure—in which the State bears the burden of proof—it specifically stated that it was not requiring the resentencing hearings to mirror death penalty hearings and declined to establish a particular procedure. See *Byars*, 410 S.C. at 544–45, 545 n.10, 765 S.E.2d at 577, 578 n.10; see also § 16-3-20(B)–(C). We decline to extend federal constitutional protections beyond the bounds established by the Supreme Court and our supreme court. *Slocumb*, 426 S.C. at 306, 827 S.E.2d at 153 (“[A] long line of Supreme Court precedent prohibits us from extending federal constitutional protections beyond the boundaries

⁶ Appellant argued in Issue 3 that the court erred in resentencing him to life without parole where it failed to place the burden of proving Appellant irreparably corrupt beyond a reasonable doubt on the State, and where the court did not find Appellant was irreparably corrupt, since that conclusion is necessary to sentence a juvenile to life without parole. However, in *Jones v. Mississippi*, 141 S.Ct. 1307, 1319-21 (2021), which was decided while this appeal was pending, the United States Supreme Court held that *Miller* and *Montgomery* did not require trial courts to make a finding of fact, whether implicit or explicit, regarding permanent incorrigibility in a juvenile life without parole sentencing hearing.

the Supreme Court itself has set.”); *id.* at 307, 827 S.E.2d at 153 (“[W]hile we are duty-bound to enforce the Eighth Amendment consistent with the Supreme Court’s directives, our duty to follow binding precedent is fixed upon case-specific holdings rather than general expressions in an opinion that exceed the scope of any particular holding.”). Accordingly, based on our review of the record, we find the hearing was consistent with the *Byars* requirements. Therefore, we affirm the trial court on this issue.

State v. Smart, Op. No. 5830 (S.C. Ct. App. filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 28-29).

This Court did not determine which party should have properly had the burden of proof at Appellant’s juvenile life-without-parole resentencing hearing. As it stands, this Court’s decision does not assist the bench and bar in deciding and presenting juvenile life without parole sentencing hearings, which will lead to inconsistencies across the state. For example, a judge in Aiken County may decide the burden of proof is on the defendant to show by a preponderance of the evidence that a life without parole sentence is not proportional, while a judge in Richland County may decide the burden is on the State to show beyond a reasonable doubt that the *Miller* factors weigh in favor of the defendant receiving a life without parole sentence. This Court’s decision on this matter is also insufficient to permit meaningful appellate review of Appellant’s resentencing.

Consistent with *Miller v. Alabama* and *Aiken v. Byars*, 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 beyond a reasonable doubt that exceptional circumstances outweigh mitigating factors, including the *Miller* factors. Although the United States Supreme Court left it to the states to determine how to implement *Miller*, when it issued the *Aiken* decision, the South Carolina Supreme Court “decline[d] . . . to set out a specific process for trial court judges to follow when considering whether to sentence a juvenile to life without parole.” *Aiken v. Byars*, 410 S.C. at 545 n.10, 765 S.E.2d at 578 n. 10. However, the Court observed that “*Miller* requires that before

a life without parole sentence is imposed upon a juvenile offender, he must receive an individualized hearing where the mitigating hallmark factors of youth are fully explored.” *Id.* at 545, 765 S.E.2d at 578.

Because this is a criminal case, the State should have the burden of proof and the burden 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). As this Court has recognized, “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.” *State v. Liberte*, 336 S.C. 648, 654-55, 521 S.E.2d 744, 747-48 (Ct. App. 1999) (quoting *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 (1970) (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 be instrumental in reducing the risk of a juvenile life without parole sentence resulting from factual error, and it would also denote the importance of the ultimate decision. Placing the burden on the State is also in keeping with the central premise of *Miller*—that youth “counsel[s] against” irrevocable lifetime sentences, and the emphasis in *Montgomery*—that life without parole is only permitted for juveniles in exceptional circumstances. *Miller*, 567 U.S. at 480; *see Montgomery*, 577 U.S. at 209 (*Miller* “bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility).

Essentially, the court ruled as though a non-life without parole sentence was only proper for the best of the best, instead of ruling as though a life without parole sentence was only proper

for the worst of the worst. This was error. To support a sentence of life without parole for a juvenile, the prosecution should be required to show that exceptional circumstances (including the facts of the case and facts about the defendant) outweigh the mitigating factors (including the *Miller* factors). Here, the prosecution did not show that exceptional circumstances outweighed mitigating factors, given expert testimony by Dr. Price that Appellant was capable of rehabilitation, was substance-abuse dependent and huffing gasoline when he killed Decedent, had a chaotic home and family life (where his parents abused drugs), and had a neurocognitive disorder due to drug use which caused aggression.

Failure to weigh Miller factors

Second, Appellant asserts this Court overlooked and/or misapprehended the resentencing court's failure to give the constitutional weight due to the mitigating factors of youth applicable to Appellant. Appellant argued in Issues 1, 2, and 4 that the court misapprehended and misapplied the requirement to consider several of the *Miller* factors: a) chronological age and hallmark features of youth including immaturity, impetuosity, and failure to appreciate risks and consequences; b) family and home environment; and c) the possibility of rehabilitation. Appellant argued the court erred by failing to give the mitigating evidence presented on these factors the constitutional weight it was due, and by considering certain evidence on youth as aggravating rather than mitigating.

“*Miller* repeatedly described youth as a sentencing factor akin to a mitigating circumstance.” *Jones v. Mississippi*, 141 S.Ct. at 1315. “*Miller* followed the Court’s many death penalty cases and required that a sentencer consider youth as a mitigating factor when deciding whether to impose a life-without-parole sentence.” *Jones*, 141 S.Ct. at 1316. The South Carolina Supreme Court explained that the petitioners in *Aiken v. Byars*, 410 S.C. at 544, 765 S.E.2d at

577, were entitled to resentencing hearings to allow them “to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight.” *See also J.M.H. v. State*, 311 So. 3d 903, 918 (Fla. Dist. Ct. App. 2020) (reversible error where trial court improperly focused on facts of defendant’s offenses without duly considering the mitigating qualities of her background and youth and her rehabilitative status).

a. *chronological age and hallmark features of youth including immaturity, impetuosity, and failure to appreciate risks and consequences*

This Court addressed Appellant’s argument that the resentencing court failed to give constitutional weight to uncontradicted expert testimony that drug abuse caused Appellant to suffer from a neurocognitive disorder as follows.

As to Smart’s argument that the trial court erred in failing to consider his cognitive age, we disagree. *Miller* and *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, not whether the offender has reached full cognitive functioning. *Byars*, 410 S.C. at 544, 765 S.E.2d at 577 (emphasis added) (quoting *Miller*, 567 U.S. at 477, 132 S.Ct. 2455). Therefore, the trial court did not abuse its discretion and we affirm. *See Allen*, 370 S.C. at 94, 634 S.E.2d at 656 (stating an abuse of discretion occurs when the trial court’s ruling is based on factual conclusions without evidentiary support or is based on an error of law).

State v. Smart, Op. No. 5830 (S.C. Ct. App. filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 24). (emphasis in original).

Appellant respectfully submits that this Court misapprehended his argument or misapprehended the record regarding his cognitive age. This Court found no error because it concluded that cognitive age is irrelevant to chronological age, as recited above. However, as Dr. Price explained, cognitive age is directly relevant to immaturity, impetuosity, and failure to appreciate risks and consequences. Dr. Price opined, “[I]f we look at cognitive age [Appellant]

was much younger than that [his chronological age of sixteen] and it was related to his history of poly-substance dependence that he had.” R. 207, ll. 11-15. Dr. Price diagnosed Appellant with “a neuro-cognitive disorder to reflect a frontal lobe dysfunction,” which resulted in Appellant having significant impairment in reasoning: “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. 2-19; R. 215, ll. 5-16.

Dr. Price opined that the attack on Decedent was “influenced by [Appellant’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. 347. Dr. Price told the court that Appellant’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 Appellant’s drug use, the neurocognitive disorder caused Appellant to “act without regard for others” and resulted in “primitive” behavior. R. 213, ll. 7-10.

However, the resentencing court erroneously did not weigh this evidence as mitigating. The court said: “regardless of” Appellant’s huffing and neurocognitive disorder, that did not “excuse” Appellant’s actions. R. 389, l. 18 – 390, l. 4. The court said it did not understand how Appellant’s neurocognitive disorder made him any different from “every 16-year-old.” R. 389, ll. 18-24. The court improperly weighted this evidence against Appellant because he made the “choice” to use drugs, and because “voluntary intoxication is not a defense.” R. 389, l. 18 – 390, l. 4; R. 386, l. 1. It was error to fail to give this mitigating evidence of youth regarding Appellant’s neurocognitive disorder its constitutional weight simply because it did not rise to the level of excuse. *See Eddings v. Oklahoma*, 455 U.S. 104, 113-16 (1982) (failure to consider only that

evidence to be mitigating which would support a legal excuse from criminal liability was error since the mental and emotional development of a youthful offender must be duly considered in sentencing); *Aiken v. Byars*, 410 S.C. at 544, 765 S.E.2d at 577 (juveniles must be allowed “present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight”).

This Court addressed Appellant’s arguments that the resentencing court erred where it considered Appellant’s drug use as aggravating rather than mitigating, and erred where it failed to give constitutional weight to evidence that Appellant had a reduced capacity to conform his conduct to the law and appreciate the wrongfulness of his actions, as follows.

As to Smart’s argument that the trial court considered his drug use as an aggravating factor instead of a mitigating circumstance when it said his drug use “was not a defense,” we disagree. *See Byars*, 410 S.C. at 544–45, 765 S.E.2d at 577 (stating the mitigating circumstances considered in a death penalty sentencing hearing are relevant when considering whether to sentence a juvenile to LWOP); see also § 16-3-20(C)(b)(2), (6) (stating in a death penalty sentencing hearing, the fact finder must consider, among other facts, whether the murder was committed while the defendant was under the influence of an emotional or mental disturbance or whether the defendant’s capacity to appreciate the wrongfulness of his or her actions or to conform his or her conduct to the law was substantially impaired); *State v. Pierce*, 289 S.C. 430, 435, 346 S.E.2d 707, 710–11 (1986) (“Evidence of voluntary intoxication is a proper matter for consideration by the jury in mitigation of punishment.”), overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). **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 the other factors.

Moreover, the record shows the trial court considered Dr. Price’s testimony regarding Smart’s drug use and his ability to appreciate the wrongfulness of his actions. *See Byars*, 410 S.C. at 544, 765 S.E.2d at 577 (“[A] sentencing court [must] consider ... the chronological age of the offender and the hallmark features of youth, including ‘immaturity, impetuosity, and failure to appreciate the

risks and consequence[s]’” (quoting *Miller*, 567 U.S. at 477, 132 S.Ct. 2455)). While discussing its reasoning, the trial court stated that Dr. Price offered an opinion regarding the negative effect Smart’s drug habit had on his mental health. **However, the trial court noted Dr. Price also testified that Smart appreciated the wrongfulness of his actions.** The court further discussed (1) Smart’s attempt to conceal the crime, (2) his conflicting statements to law enforcement and letters to Hutto trying to fabricate a version of Victim’s murder, and (3) the evidence that Hutto and Smart previously considered killing Victim. Therefore, the trial court did not abuse its discretion regarding this factor, and we affirm this issue. *See Allen*, 370 S.C. at 94, 634 S.E.2d at 656 (stating an abuse of discretion occurs when the trial court’s ruling is based on factual conclusions without evidentiary support or is based on an error of law).

State v. Smart, Op. No. 5830 (S.C. Ct. App. filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 24-25) (emphasis added).

Appellant respectfully submits that this Court overlooked and/or misapprehended his argument or the record regarding drug use as a mitigating factor. The resentencing court stated that huffing gasoline “affected his aggressiveness. That doesn’t excuse what he did.” R. 389, l. 15 – 390, l. 4. This statement shows the trial court erroneously believed that drug use must arise to the level of legal excuse to be weighted as mitigation evidence. But, this evidence should have been weighted as mitigation evidence. Appellant’s drug use affected his adolescent brain development and resulted in a neurocognitive disorder, as Dr. Price testified.

This Court reasoned, as seen above, that the trial court considered Appellant’s drug use in the context that he was able to appreciate the wrongfulness of his actions. However, Dr. Price’s testimony was that Appellant had the **reduced** capacity to appreciate the wrongfulness of his actions at the time of the offenses, a fact which the resentencing court failed to give weight. R. 223, ll. 18-25; R. 377, ll. 1-13.

b. *family and home environment*

This Court addressed Appellant’s argument that the resentencing court misapprehended and misapplied the requirement to consider Appellant’s home and family environment as follows.

As to Smart’s argument that the trial court did not consider Sister’s and Dr. Price’s testimony regarding Smart’s family environment, we disagree. During Dr. Price’s testimony, the court questioned Dr. Price and stated he and Sister “ha[d] given [it] some information to consider” regarding Smart’s family and home environment. When reciting its reasoning, the trial court referred to Dr. Price’s testimony concerning Smart’s family environment. Furthermore, Sister and Dr. Price offered similar testimony detailing Smart’s family and home environment: (1) Smart and Sister’s parents were neglectful, (2) Smart and Sister’s parents abused drugs, and (3) Smart began using drugs at an early age. **Although the trial court did not specifically mention Dr. Price when it discussed Smart’s family and home environment, it referenced Sister’s testimony** and referred to the three facts listed above. Therefore, we find the trial court sufficiently considered Smart’s family and home environment. Accordingly, we affirm this issue. *See Allen*, 370 S.C. at 94, 634 S.E.2d at 656 (stating an abuse of discretion occurs when the trial court’s ruling is based on factual conclusions without evidentiary support or is based on an error of law).

State v. Smart, Op. No. 5830 (S.C. Ct. App. filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 26) (emphasis added). Appellant submits this Court misapprehended and/or overlooked that nowhere did the resentencing court indicate that it allocated any mitigating weight to testimony regarding Appellant’s impoverished, drug ridden, and violent home life. The court did not even acknowledge Dr. Price’s testimony when it recited its ruling as to this factor, despite the fact that expert testimony may be the best assessment of a juvenile’s home and family life. *See State v. Roby*, 897 N.W.2d 127, 146 (Iowa 2017) (when considering *Miller* factors, “expert testimony will best assess how the family and home environment may have affected the functioning of the juvenile offender”).

According to Dr. Price, Appellant’s parents abused marijuana, cocaine, crack cocaine, and methamphetamine, and modeled “dishonest and unlawful behavior,” with much of their income going to purchase drugs. His parents even held Appellant responsible for obtaining drugs for them. R. 322; R. 212, ll. 8-10; R. 208, ll. 1-7. Dr. Price opined that Appellant’s substance abuse at the time of the offense was related to his home life. R. 211, ll. 16-25. As seen, Dr. Price also opined that Appellant’s drug use caused his neurocognitive disorder, which in turn predisposed him to behave “primitively.” In other words, according to Dr. Price, Appellant’s family life led to his drug use, which led to his neurocognitive disorder, which led to his violent, aggressive and impulsive acts. R. 213, ll. 3-10; R. 348; R. 212, ll. 11-19. The record here simply does not reflect that the court gave this evidence the constitutional weight it was due when sentencing Appellant.

c. possibility of rehabilitation

This Court addressed Appellant’s argument that the resentencing court misapprehended and misapplied the requirement to consider the possibility that Appellant could be rehabilitated as follows.

[W]e find the trial court properly considered Smart’s possibility of rehabilitation. The record shows that the trial court concluded—based on all the evidence presented to it, including Dr. Price’s testimony—an LWOP sentence was appropriate because Smart’s actions did not reflect the “transient immaturity” attendant to youth and rehabilitation was unlikely. After stating there is always a possibility for rehabilitation, the court noted “[b]ut there [are] also impossibilities ... as well.” The trial court noted Dr. Price’s opinion regarding Smart’s mental improvement and chance to become a productive member of society, but it also noted Smart’s disciplinary history following his incarceration, which included five convictions for assaultive violations and forty convictions for non-assaultive violations. The court reviewed transcripts containing testimony of the events and considered that Smart, while already in the custody of DJJ, continued to huff gasoline, planned an escape and the murder of Victim with Hutto, bludgeoned Victim to death, concealed Victim’s body, robbed a store, and shot at police officers during a high-speed chase. The court also noted Smart had not participated

in any rehabilitative or educational programs. We find these facts support the trial court's conclusion. Accordingly, the trial court did not abuse its discretion when applying *Miller's* "possibility of rehabilitation" factor, and we affirm this issue. *See Allen*, 370 S.C. at 94, 634 S.E.2d at 656 (stating an abuse of discretion occurs when the trial court's ruling is based on factual conclusions without evidentiary support or is based on an error of law).

State v. Smart, Op. No. 5830 (S.C. Ct. App. filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 27) (footnote omitted).

Appellant submits this Court misapprehended and/or overlooked that the resentencing court erred where it found that Appellant was capable of rehabilitation and yet sentenced him to life without parole, given the other mitigating evidence. Moreover, in relying on Appellant's SCDC disciplinary history, the court did not take into account that Appellant was serving a life without parole sentence at the time of his disciplinary infractions. "This sentence 'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days.'" *Graham v. Florida*, 560 U.S. at 70 (quoting *Naovarath v. State*, 779 P.2d 944 (Nev. 1989) (alterations omitted)).

Dr. Price opined that Appellant was capable of rehabilitation, was unlikely to be aggressive if released, was an average inmate, and had made significant cognitive recovery since he committed the crimes at age sixteen. "[Y]outh has constitutional significance. As such, it must be afforded adequate weight in sentencing." *Aiken v. Byars*, 410 S.C. at 542-43, 765 S.E.2d at 576. Here, however, the resentencing court failed to give mitigating evidence its constitutional weight.

CONCLUSION

Based on the above arguments, counsel for Appellant respectfully seeks rehearing pursuant to Rule 221(a), SCACR, due to the significant points overlooked and/or misapprehended by the Court in affirming Appellant's resentencing.

Respectfully Submitted,

s/ Joanna K. Delany
JOANNA K. DELANY
Appellate Defender

This 22nd day of July, 2021.

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Jul 22 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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D. Craig Brown, Circuit Court Judge

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APPELLANT

APPELLATE CASE NO. 2017-001754

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Jon Paul Smart, #277378, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 22nd day of July, 2021.

sl. Joanna K. Delany

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT