RECEIVED

Oct 21 2021

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
APPEAL FROM CLARENDON COUNTY
The Honorable 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

RETURN TO PETITION FOR A WRIT OF CERTIORARI
Appellate Case No. 2021-000987

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

TOMMY EVANS, JR.
Assistant Attorney General
S.C. Bar No. 65282

Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

HONORABLE ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit
(803) 436-2185

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S QUESTION 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?

RESPONDENT'S COUNTER STATEMENT OF QUESTION PRESENTED

1. Did the Court of Appeals err in affirming the decision of the Circuit Court in resentencing the Petitioner to a sentence of life without parole where the court recognized prior to sentencing it must consider all the relevant factors including the hallmark features of youth, the family and home environment, circumstances of the homicide, incompetency associated with youth, and the possibility of rehabilitation, before applying each of the factors to the testimony presented and the facts of appellant's case, indicating the court did not ignore any evidence in the record before it, and no burden exists on the State to prove a life sentence for the Petitioner was proper?

2. Did the Court of Appeals err in affirming the decision of the Circuit Court that after the Circuit Court considered the testimony of Dr. Price during direct, cross-examination, and the Circuit Court own examination, as well as testimony regarding the Petitioner's prison record while incarcerated concluded that there was no possibility of rehabilitation so the Petitioner's sentence of life without parole must remain?

STATEMENT OF THE CASE

A Clarendon County Grand Jury indicted the Petitioner for the offenses of murder, armed robbery, escape, grand larceny of a motor vehicle (GLMV), and criminal conspiracy. (Indictment No. 2000-GS-14-356). (R. p. 401- 403) On May 25, 2001, Petitioner appeared before the Honorable Kenneth Good to enter a plea of guilty. Present representing the Petitioner was attorney Frederick Hoefer, representing the State of South Carolina was Third Circuit Solicitor, C. Kelly Jackson. As part of plea negotiations, the State agreed to allow the Petitioner to plea to a sentence of life in prison without the possibility of parole, in exchange, the State would not seek the death penalty.[1] As part of plea negotiations, the Petitioner agreed to give truthful testimony against his co-defendant. (R. pp. 353-355)

Judge Goode later relinquished jurisdiction and on August 9, 2001, the Petitioner appeared before the Honorable Thomas W. Cooper, Jr. for sentencing. Present before the Court representing the Petitioner again was attorney Frederick Hoefer. Representing the State of South Carolina, Third Circuit Solicitor, C. Kelly Jackson, Second Circuit Solicitor, Barbara Morgan, and Thirteenth Circuit Solicitor, Greg Hembree. Each solicitor gave a recitation to the Court regarding the crimes occurring in their particular judicial district. Present were also numerous members of law enforcement, Ms. Rhonda Rainey, victim advocate for the Clarendon County Sheriff's Department, and numerous members of the victim's family and friends. Petitioner's father Richard Smart and Aunt Laurie Woods spoke on the behalf of the Petitioner.

At the conclusion of testimony by all interested parties the Sentencing Judge sentenced the Petitioner to a lifetime period of incarceration without the possibility of parole for the offense of

[1] This plea occurred prior to the United States Supreme Court decision that the Eighth Amendment barred capital punishment for juvenile offenders. *See, Roper v. Simmons,* 543 U.S. 551 (2005).

murder; thirty years for armed robbery; fifteen years for escape; ten years for GLMV; and five years for criminal conspiracy. The Court ordered that each of the offenses were to be served concurrently and that the Petitioner must submit to substance abuse treatment. (R. p. 167 lines 3-22).

While serving his sentence the United States Supreme Court decided the case of *Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455 (2012). Due to the *Miller* decision, this Court decided the case of *Aiken v. Byars,* 401 S.C. 534, 765 S.E.2d 572 (2014). In *Aiken*, this Court decided to apply the *Miller* standards to South Carolina juvenile life sentences

The Petitioner was sixteen when he committed this offense. Due to the *Aiken v. Byars* decision Petitioner decided to file a motion for resentencing pursuant to *Aiken* on May 26, 2016. (R. pp. 181-182) On June 7, 2016, this Court issued an order for resentencing pursuant to the *Aiken v. Byars* decision. This Court appointed the Honorable D. Craig Brown to preside over the resentencing hearing. This Court also ordered that within sixty (60) days of the date of the order Judge Brown must issue a scheduling order setting forth the schedule that shall be followed in this matter. (R. p. 183).

On May 24, 2017, a resentencing hearing was held before the Honorable D. Craig Brown. Representing the Petitioner was attorney Jack Howle, Jr., and representing the State of South Carolina was Third Circuit Solicitor Ernest A. Finney, III. Testifying on behalf of the Petitioner was his sister Tammy Smart and licensed clinical psychologist, Dr. David Price. Testifying for the State was Investigator Thomas Burgess, and two siblings of the victim Andy and Joe Pack. Without objection from either side the Court entered the transcript of the prior guilty plea and sentencing hearings into the record. (R. p. 189 line 7 – p. 190 line 7). At the conclusion of the hearing the trial

court took all of the evidence under advisement and decided that his final sentence would take place on August 11, 2017. (R. p. 288 lines 7-13).

However, on August 10, 2017, the actual sentencing took place in Clarendon County. At that time the trial court went over all of the *Miller* factors and how they pertain to the present case. At the conclusion of sentencing the trial court stated:

> "Having addressed, believing this court has fully addressed each of the factors as set forth in *Aiken v. Byars,* this 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. p. 388 lines 17-24).

After sentencing, the Petitioner filed a timely notice of appeal before the South Carolina Court of Appeals. Within the appeal the Petitioner alleged that prior to sentencing, the trial court (1) did not sufficiently consider the Petitioner's family and home environment; (2) only considered the Petitioner's chronological and not cognitive age; (3) did not make a specific finding that the Petitioner was irreparably corrupt; and, (4) did not properly consider the Petitioner's possibility of rehabilitation.

On July 7, 2021 the Court of Appeals issued a unanimous decision affirming the decision of the trial court. *State v. Smart,* 433 S.C. 651, 861 S.E.2d 383 (2021). The Respondent filed a return to this petition on August 2, 2021. The Court of Appeals denied this petition on August 10, 2021.

The Petitioner now requests a writ of certiorari seeking review from this Honorable Court. The Respondent will argue that the decision of the Court of Appeals does not fall within any of the parameters found in South Carolina Appellate Court rule 242, so this petition should be subject to dismissal. The return by the Respondent follows.

WHY CERTIORARI SHOULD BE DENIED

Pursuant to rule 242 of the South Carolina rules of the Appellant Court, a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicates the character of reasons which will be considered.

1. Where there are novel questions of law;
2. Where there is a dissent in the decision of the Court of Appeals;
3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
4. Where substantial constitutional issues are directly involved;
5. Where a federal question included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242 SCACR.

In reviewing each of these criteria the present case does not apply. The Court of Appeals properly and unanimously affirmed the decision of the trial court. This decision should not be subject to review.

In *Aiken v. Byars,* this Court decided that it is unconstitutional for a juvenile to receive a sentence of life *without* the possibility of parole unless a hearing is held where the trial court considers each of the factors laid out by the United States Supreme Court in *Miller v. Alabama.* Within his sentencing colloquy it is obvious the trial court examined and considered each of the *Miller* factors prior to sentencing. There was no dissent, the constitutional issue has already been decided in *Aiken*, and there was no decision that conflicted with a prior decision made by the United States Supreme Court. The Petitioner argues that there is a novel question of law pertaining

to the burden of proof. The Respondent disagrees. No burden of proof exists for either party. If this court wished for the State or defense to satisfy any burden of proof it would have been stated within the *Aiken* opinion.

It is clear all of the *Miller* factors were considered prior to sentencing. According to *Aiken,* all that must be revealed is that the trial court considered all of the *Miller* factors in order for this sentence to be considered Constitutional. This petition should be subject to dismissal.

STATEMENT OF FACTS

Petitioner and his co-defendant, Stephen Hutto, were sent to Rimini Marine Institute (RMI) in Clarendon County as part of a rehabilitation program at the Department of Juvenile Justice (DJJ) to work on property owned by the victim's family. (R. p. 20 line 25 – p. 21 line 9). On August 12, 1999, Petitioner, his co-defendant and the victim were working in the chicken houses. (R. p. 32 line 23 – p. 33 line 6). Armed with a lead pipe, Petitioner used it to knock the victim off a ladder. (R. p. 33 lines 17-21). Petitioner then used this lead pipe to beat the victim hitting him three or four times. (R. p. 22 lines 1-4). He beat the victim in the head so viciously that his brain was exposed through a crack in his skull. (R. p. 369 lines 7-11) When investigators arrived they found blood spatter on the ceiling and grooves in the wood where the pipe cut into it as Petitioner hit the victim. (R. p. 34 lines 1-4).

After killing the victim, Petitioner and his co-defendant stole items off of the victim's body, stopped to smoke a cigarette then got out of the truck and talked about what to do next. (R. p. 22 lines 5-7; p. 34 lines 5-8; p. 67 lines 3-4). Petitioner and his co-defendant then decided to steal the victim's truck, and drive to Bamberg the hometown of the co-defendant. (R. p. 22 lines 9-10; p. 36 lines 2-6). Once they arrived at the co-defendant's house, they changed clothes and the co-defendant pulls a shotgun from under the bed, and tells the Petitioner, "just in case I would have

to kill anybody else." (R. p. 68 lines 6-8). They wanted to buy marijuana so they went to a drug house, and discovered they did not have enough money. (R. p. 68 lines 14-19). So they went to rob a Family Dollar. The Petitioner went inside with the shotgun pointing it in the face of one clerk and in the chest of the other. He left the store with two-hundred ($200.00) dollars in cash. (R. p. 37 lines 6-10). In Myrtle Beach, Officer Patricia Hemray of the Myrtle Beach Police Department began to initiate a stop of the defendants because she saw their truck did not have any tail lights. (R. p. 38 lines 7-8). While following she checked the license plate, and found out the truck was reported stolen. (R. p. 38 lines 10-11). While the co-defendant was driving he began to pull to the side of the road. He then took off at a high rate of speed and was chased by law enforcement. (R. p. 38 line 19 – p. 39 line 1). This high speed chase went through Horry County, and during this chase Petitioner shot at officers. (R p. 88 line 5 – p. 91 line 11). This chase lasted for about thirty to forty miles. The co-defendant finally lost control of the vehicle and crashed. (R. p. 41 line 19-22). The co-defendant was arrested at the scene. (R. p. 51 lines 4-6). Petitioner fled on foot into the woods, he was apprehended some five hours later. (R. p. 41 lines 22-24).

ARGUMENTS

1. **The Court of Appeals did not err in affirming the decision of the trial court in resentencing the Petitioner to life without parole where the court recognized prior to sentencing that it considered all the relevant factors including the hallmark features of youth, family and home environment, circumstances of the homicide, incompetency associated with youth, and the possibility of rehabilitation. Applying each of these factors to the testimony presented and the facts of the Petitioner's case indicates the trial court did not ignore any evidence in the record nor did the court disregard the testimony of any witness prior to making their decision. There was no burden of proof placed on either side in the *Miller* or *Aiken* decisions, so no burden of proof must be satisfied by either party prior to the trial court's sentence.**

The resentencing judge did not err in sentencing Petitioner to life without parole for murder following an individualized sentencing hearing pursuant to *Aiken v. Byars.* Petitioner received the type of hearing deemed sufficient by the Supreme Court to protect juvenile offenders from the

unconstitutional sentence of mandatory life without parole. The record demonstrates the trial court considered all the mitigating factors of youth prior to determining a sentence appropriate for the Petitioner, especially given the lack of evidence to support a finding of rehabilitation.

Contrary to the Petitioner's assertion, the resentencing judge considered all the evidence and never disregarded the testimony of Dr. David Price or any other witness who testified before the trial court. This Court has set forth the necessary procedure to ensure juveniles are afforded protection under the Eighth Amendment. *Aiken,* required trial courts conduct individualized sentencing hearings where all of the *Miller* factors must be considered prior to resentencing. That occurred on behalf of the Petitioner, all of the "hallmark features of youth" were explored prior to the court imposing the resentence of life without parole.

The sentence given to the Petitioner cannot be considered cruel nor unusual punishment pursuant to the Eighth Amendment. The resentencing judge did not err in making the determination that although mitigating evidence was presented by the Petitioner, a life sentence was warranted under these circumstances.

Standard of Review

In criminal cases, appellate court only review errors of law. *State v. Baccus,* 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). When considering whether a sentence violates the Eighth Amendment's prohibition on cruel and unusual punishment, the appellate court's standard of review extends only to the correction of errors of law. *State v. Finley,* 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019). The Supreme Court reviews Court of Appeals by writ of certiorari only where special reasons justify exercise of that power. *Douglas v. State,* 369 S.C. 213, 216, 631 S.E.2d 542, 544 (2000). Credibility findings are treated as factual findings and therefore, the appellate inquiry is limited to reviewing whether the trial court's factual findings are supported by

any evidence in the record. *State v. Banda,* 371 S.C. 245, 639 S.E.2d 36, 39 (2006). The appellate court does not re-evaluate the facts based on its own view of the evidence but simply determines whether the trial court's ruling is supported by the evidence. *State v. Saltz,* 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001).

Analysis

Life without parole was the appropriate sentence

In *Miller,* the United States Supreme Court held that a mandatory life sentence without the possibility of parole for a juvenile offender violated the Eighth Amendment prohibition against cruel and unusual punishment.[2] *Miller,* 567 U.S. at 465, 470. In *Miller* the United States Supreme Court stated:

> "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." *Id.,* 567 U.S. at 477-478.

Miller did not categorically bar life sentences for juvenile murderers; rather, the Court held that a sentencing court is required to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* 567 U.S. at 476. The Court held a sentencing authority must consider youth as "more than a chronological

[2] Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const. Amend. VIII.

fact," but also a factor which carries with it immaturity, irresponsibility, and recklessness. *Id.* 567 U.S. at 476. The Court held a juvenile convicted of murder could still be sentenced to life without parole, but only after an individualized hearing in which the various mitigating factors were considered. *Id.* 567 U.S. at 479-480. *Miller* mandated that a sentencing court follow a process before imposing a particular penalty. *Id.* 567 U.S. at 483.

After *Miller,* this Court decided the case of *Aiken v. Byars* which applied the *Miller* factors to South Carolina juveniles sentenced with life without parole, and decided that it applied retroactively. *Aiken,* 410 S.C. at 540-541. This Court acknowledged that *Miller* applied only to mandatory sentencing schemes rather than discretionary schemes such as in South Carolina. In *Aiken,* this Court stated, "whether their sentence in mandatory or permissible, any juvenile offender who receives a sentence of life without the possibility of parole is entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment." *Id.* 410 S.C. at 544, 765 S.E.2d at 577. This Court held that juveniles previously sentenced under our discretionary scheme who receive a life without parole sentence were nevertheless entitled to resentencing to allow them "to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight." *Id,* 410 S.C. at 544, 765 S.E.2d at 57.

In *Aiken* this Court determine that the *Miller* factors must be considered during these separate hearings. In *Aiken* this Court specifically stated,

> "Consequently *Miller* establishes a specific framework, articulating that the factors a sentencing court consider at a hearing must include: (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 surround the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may

> have affected him; (4) the 'incompetencies associated with youth – for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys'; and, (5) the "possibility of rehabilitation." *Aiken* 410 S.C. at 544, 534 S.E.2d at 577, *quoting, Miller,* 132 S.Ct. at 2468.

Just as the *Miller* court held, this Court explained juveniles could still receive a sentence of life without parole, but only after "an individualized hearing where the hallmark features of youth are fully explored." *Id.,* 410 S.C. at 545, 765 S.E.2d at 578.

The Court of Appeals decided to affirm the decision of the trial court due to the fact the Petitioner received a hearing where the court considered all of the factors that were listed in the *Miller* and *Aiken* opinions. Even after the consideration of all of the *Miller* factors this was the appropriate sentence and the decision of the Court of Appeals does not suggest any review by this court is necessary.

During his hearing Petitioner's counsel presented testimony from a clinical psychologist Dr. David Price and his sister. Dr. Price testified that he reviewed numerous documents, the plea transcript, and met with the Petitioner seven times and performed psychological testing. (R. p. 203; p. 206 lines 1-17). His sister Tammy Smart testified as to she and the Petitioner's home life, living with two parents both on drugs and selling drugs out of their home. (R. p. 193 lines 3-10; R., p. 195 lines 10-15). The kids were not going to school and this life led to not only the Petitioner becoming addicted to drugs but also his sister too. Also testifying was investigator Thomas Burgess who was employed with the South Carolina Department of Corrections and was working with the Clarendon County Sheriff's Department at the time of this offense. Investigator Burgess testified to the planning done by the Petitioner and his co-defendant prior to this offense, revealing premeditation, and the extent of the crime scene which demonstrated the amount of violence that occurred during victim's murder. (R. p. 248 lines 4-17). Investigator Burgess also testified about

the Petitioner's prison disciplinary record, which included some forty-four (44) disciplinary actions including ones for striking an inmate, possession of a weapon, striking an employee with or without a weapon, striking an inmate with or without a weapon, numerous drug offenses, and an attempted escape. (R. p. 257 lines 7-23; R. pp. 349-352).

The trial court then considered its findings, its interpretation of the record, and the testimony presented at the resentencing hearing. Upon the conclusion of the court's detailed reading as to why it came to this conclusion, and his consideration of all the *Miller* factors the trial court decided to rule that the Petitioner "remain incarcerated for the balance of his natural life." (R. p. 388) The record clearly reveals the trial court acted within its discretion to make the appropriate sentence given the information which was presented, including the prior plea and sentencing hearing transcript which were allowed into evidence without objection. (R. p. 189 line 7 – p. 190 line 7)

The Petitioner argues that the trial court disregarded the testimony of Dr. Price and his sister regarding his prior home life. Quite the contrary, the trial court considered and did not ignore any evidence that was presented during this resentencing. In taking all of the *Miller* factors individually, this is what the trial court found:

1. Hallmark features of youth – The resentencing judge explained he considered Dr. Price's testimony when examining appellant's youth, including his immaturity and impetuosity at the age of sixteen. (R. pp. 371-372). The trial court also detailed Dr. Price's testimony about Petitioner's drug use, prior evaluations, and other history. (R. pp. 373-374). The trial court noted that Dr. Price's opinion on the Petitioner's ability to make decisions was influenced by huffing gas, family life, a diagnosis of attention deficit disorder, and frontal lobe damage due to drug use. (R. p. 371-374). Although the trial court questioned Dr. Price on the use of an MRI and whether it would have been beneficial, the trial court never doubted any frontal lobe damage existed. The court only questioned Dr. Price on the use of an MRI to determine the extent of this damage or if there was any atrophy.(R. p. 374 line 24 – p. 375 line 13) Dr. Price opined Petitioner could appreciate the wrongfulness of his actions which was evidenced "by the way he hid the body," and his efforts were a continuation of his drug use and series of impulsive decisions. (R. pp. 238-239). The trial court found Petitioner immature, but stated, "all of the information pertaining to this case

reveals it was not a sudden or rash action" to commit murder given the evidence which revealed Petitioner and his co-defendant planned the crime. (R. p. 375 line 21 - p. 377 line 25)

2. Home and family environment – The trial court recounted the testimony of the Petitioner's sister Tammy Smart. Her testimony revealed their parent's drug use, their absence, and generally bad home environment. (R. pp. 378 line 14 – p. 379 line 23). The trial court found the sister's testimony was inconsistent with her father's statements from the first sentencing hearing about the part the family played in trying to get Petitioner into a drug treatment program. (R. pp. 379 line 24 – p. 382 line 5). It can be inferred this was a credibility finding as it relates to the Petitioner's sister, but there is no corresponding finding as it relates to the father because he did not testify before the resentencing court.[3] The contention by the Petitioner that the trial court disregarded Dr. Price's testimony regarding the Petitioner's home life is without merit. First, Petitioner's sister was in the best position to give the trial court information about the family environment rather than a third party such as Dr. Price who would have relayed only information given to him by the Petitioner himself, or secondhand information. Second, as noted above, the trial court, in fact, considered the "drug culture" that Dr. Price testified that the Petitioner grew up around. Also considered Petitioner's family life along with the "hallmark features of youth" as Dr. Price specifically referenced it. It cannot be held that the trial court ignored the testimony.

3. Circumstances of the crime – While the Petitioner minimally analyzed the resentencing judge's consideration of this factor within his petition, the trial court properly detailed facts from the record about the murder, armed robbery, high speed car chase where the Petitioner fired shots at law enforcement officers and described the participation of the Petitioner and his co-defendant. (R. pp. 360 line 14 – p. 371 line 5). The trial court noted that it reviewed the first sentencing transcript "in its entirety," so he could take it into account as well as the testimony from the resentencing hearing. (R. p. 361 line 3-4). The trial court noted it was the Petitioner who struck and killed the victim and he worked with his co-defendant to hide his body. (R. pp. 363 line 1- line 20).

4. Incompetency of youth – The resentencing judge found there was little concern regarding this factor because Petitioner gave statements to law enforcement, there was a plea agreement that plea counsel signed, (R. p. 355), and there was no indication from counsel he was not able to assist or understand the proceeding. (R. pp. 382 line 15 – p. 384 line 1). Dr. Price also agreed that the Petitioner was competent at the time of his guilty plea, and explained he understood the plea proceeding and could assist his attorney. (R. pp. 233 line 16 – p. 234 line 14; pp. 347-348).

5. Possibility of rehabilitation – The resentencing judge did not discount or misapprehend Dr. Price's testimony regarding the possibility of Petitioner's rehabilitation. The trial court did take the opportunity to note the inconsistencies in Dr. Price's statements. The trial court

[3] The determination of credibility must be left to the trial judge who saw and heard the witnesses and is therefore in a better position to evaluate their veracity. *State v. Johnson,* 413 S.C. 458, 776 S.E.2d 367, 372 (2015).

explained that Dr. Price testified Petitioner had made cognitive improvements since incarceration because he had stopped using drugs and opined about Petitioner could be a productive member of society, yet on cross-examination Dr. Price admitted Petitioner was still using drugs while incarcerated, including inhalants. (R. p. 388 lines 11-14). The court noted the Petitioner's lengthy disciplinary history while incarcerated. This record included an escape attempt, assaults, use of contraband, and other charges. Dr. Price failed to acknowledge the Petitioner's actions while incarcerated until asked by the trial court. (R. p. 386 line 4 - p. 388 line 17). The trial court found Petitioner "had taken no efforts while incarcerated for rehabilitation" given his disciplinary record. (R. p. 388 line 3-7).

As the record demonstrated the resentencing judge did not abuse discretion in ordering the Petitioner to remain incarcerated for the remainder of his natural life without the possibility of parole. The trial court carefully considered all the *Miller* factors as was constitutionally required. The court evaluated, based on the testimony presented and the previous record, the Petitioner's youth and immaturity, family circumstances and the facts of the crime. The court also took into account the particularized evidence about the Petitioner to determine if he was capable of demonstrating maturity and rehabilitation.

The point of the *Miller* factors is to decide if a defendant committed a murder for which he is criminally responsible despite his juvenile status. A life sentence is proportionate for this particular defendant because he does not demonstrate the propensity for rehabilitation as required. Petitioner received the individualized sentencing hearing as constitutionally required. Specifically regarding rehabilitation, no one testified why or how Petitioner demonstrated the required propensity for rehabilitation or maturity beyond Dr. Price's testimony that Petitioner could be a productive member of society, without any supporting evidence beyond Petitioner's cognitive recovery due to less drug use. (R. p. 210 lines 9-10; pp. 213 line 22 – p. 214 line 9). However, there was testimony regarding the Petitioner's failure to conform to the guidelines and rules within the Department of Corrections. Dr. Price acknowledged during cross-examination and during

examination conducted by the trial court that Petitioner's disciplinary record while incarcerated, was not stellar.

Miller requires an individualized sentencing hearing where the hallmark features of youth are explored before a life without parole sentence is imposed on a juvenile homicide offender. This Court set forth the necessary procedures to ensure juveniles are afforded protection under the Eighth Amendment which the Petitioner received. The record demonstrates the trial court did not misapprehend, ignore, or disregard any testimony or any evidence in the record that was brought before them. The trial court followed the proper procedure in determining the Petitioner's sentence, so the trial court did not err in sentencing the Petitioner to life for murder. The Court of Appeals was correct in acknowledging that there exists no error in law that occurred during this hearing and sentencing and thereby affirming the sentence given by the trial court. Due to the proper rulings given by the Court of Appeals in the present case, certiorari should not be granted, this petition should be subject to dismissal.

Burden of Proof

Within this petition, the Petitioner argues that the burden of proof should be placed on the State to prove Petitioner deserves a sentence of life without parole. The Respondent will argue that the Court of Appeals was correct in deciding that this argument has no merit because it was never preserved by trial counsel, and a burden of proof was never established in neither Miller nor *Aiken.* It cannot be established that a burden of proof is necessary or it would have been addressed within at least one of these two opinions.

The Petitioner argues that the State should be obligated with the burden of proof on such resentencing hearings. The Court of Appeals found that this argument was never raised before the trial court; therefore, it cannot be raised on appeal, the Court of Appeals ruling was correct.

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, 97, 711 S.E.2d 878, 880 (2011). The issue as to who bears the burden of proof was never raised by the Petitioner. It was the opinion of the Court of Appeals that, "initially whether there is a presumption against LWOP sentences is not preserved for our review because Smart failed to raise this argument to the trial court." *Smart,* 861 S.E.2d at 391. This Court has previously ruled, "It is axiomatic that 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). Due to their failure to raise this issue before the trial court means it was not preserved for appeal, certiorari should not be accepted.

Even if applicable there was never any mention of a burden of proof within neither of the *Miller* or *Aiken* decisions. No burden must be satisfied when determining the proper sentence for a juvenile defendant in this circumstance. In *Montgomery,* the United States Supreme Court decided that they were going to leave it up to the States how they were going to apply the *Miller* standards for juvenile life without parole sentences. In *Montgomery* the Court stated, "We leave to the state[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Montgomery,* 577 U.S. at 211, quoting, *Ford v. Wainwright,* 477 U.S. 399, 416-417, 106 S.Ct. 2595 (1986). In *Aiken v. Byars* this Court established a procedure that would guarantee that the five *Miller* factors would be considered prior to resentencing any juvenile to life without parole. In *Aiken,* this Court also allowed for retroactive application of this sentencing procedure. The one thing *Aiken* did not address was burden of proof. In *Aiken* this Court entrusted the Circuit Court to make the proper decisions as to sentencing. In *Aiken* this Court noted it was not prepared to set out "a definite resentencing procedure, "but explained it trusted trial courts to exercise their discretion wisely to sentence juveniles within "the new constitutional

jurisprudence." *Aiken,* 410 S.C. at 545 n.10, 765 S.E.2d at 576 n.10 ("We have the utmost confidence in our trial judges to weigh the factors discussed herein and to sentence juveniles in light of this new constitutional jurisprudence."), *see, Wasman v. United States,* 468 U.S. 559, 563 (1984)(a judge or sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed.) All that must be shown to the sentencing court is mitigation from both sides, then it is up to the sentencing judge to consider all the mitigating evidence provided in order to provide a fair sentence. If this Court wanted to establish a burden of proof it would have done so like it was established for self-defense, *See, State v. Bixby,* 388 S.C. 528, 698 S.E.2d 572 (2010)(once raised by the Defendant, the State must disprove self-defense beyond a reasonable doubt), or insanity, *See, State v. Milian-Hernandez,* 287 S.C. 183, 379 S.E.2d 287 (1989)(A criminal defendant is presumed to be sane, the State does not have to prove sanity). A burden of proof was never addressed by this court so it should not be applied.

2. **The Court of Appeals did not err in affirming the decision of the Circuit Court after the Circuit Court considered the testimony of Dr. Price during direct, cross-examination and the Court's own examination as well as testimony regarding the five *Miller* factors, the Circuit Court found there was no possibility for rehabilitation so the life sentence given to the Petitioner was lawful.**

During the resentencing hearing, Dr. David Price, a licensed clinical psychologist testified. Dr. Price testified as to the result continued drug abuse had on the frontal lobe of the Petitioner's brain which is a part of the brain that is used to modulate behavior, planning and organizing. (R. p. 373 lines 11-16). Dr. Price stated that this damage greatly affected impulsivity, aggressiveness, poor judgment, and a failure to appreciate the consequences of your actions. (R. p. 373 lines 20-22).

Within the petition for writ of certiorari the Petitioner argues that the trial court disregarded the testimony of Dr. Price, and misapprehended and misapplied the requirement to consider the chronological age of the Petitioner. The Petitioner also argued that the trial court failed to consider the fact that the cognitive age of the Petitioner was much younger than his chronological age. The Respondent argues that the Court of Appeals was correct in their decision that *Miller* and *Aiken* only allowed consideration for, "the chronological age of the offender and the hallmark features of youth, including 'immaturity, impetuosity, and failure to appreciate the risks and consequences'" *Aiken,* 410 S.C. at 577, *quoting, Miller,* 132 S.Ct. at 2468. It is clear from the reading of the transcript the trial court considered each of the *Miller* factors, so the Court of Appeals affirming the decision of the trial court was correct and should not be subject to review.

Standard of Review

In criminal cases, appellate courts only review errors of law. *State v. Gamble,* 405 S.C. 409, 415, 747 S.E.2d 784, 787 (2013). The Supreme Court reviews Court of Appeals by writ of certiorari only where special reasons justify exercise of that power. *Douglas v. State,* 369 S.C. 213, 216, 631 S.E.2d 542, 544 (2000). When required by the interest of justice only, the court may interrogate witnesses. Rule 701(b) SCRE. A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. *State v. Chavis,* 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015). An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions. *State v. Douglas,* 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006).

Analysis

The Petitioner argues that the trial court disregarded the testimony of Dr. Price concerning his determination of Petitioner's neurocognitive disorder. The Court of Appeals determined that

there is nothing in *Aiken* that allows the court to consider the cognitive age of an offender. We agree. *Aiken* specifically states the courts must consider the "chronological age of the offender." *Aiken,* 410 S.C. at 543. The trial court did consider this factor. (R. p. 371 line 9 - 10).

The trial court stated in its finding that Dr. Price determined that due to the Petitioner's polysubstance abuse, he was much younger cognitively. (R. p. 373 line 5-10). The trial court also recognized Dr. Price's testimony concerning the effects on the frontal lobe of the brain which is used to modulate behavior, planning and organizing. (R. p. 373 lines 11-17). The Court also listed within its findings the testimony of Dr. Price as to how drugs, particularly early use, greatly affects impulsivity, aggressiveness, poor judgment, and failure to appreciate the consequences of your actions. (R. p. 373 lines 17-22). The Court considered Dr. Price's testimony concerning the Petitioner's inability to make correct decisions when he was sixteen. This was influenced by his huffing gas, as well as his family environment. The Petitioner's decision making was also affected by his attention deficit disorder, and his own drug use which in essence affected his cognitive reasoning. (R. p. 373 lines 22- p. 374 line 2).

However, the trial court is obligated to consider all the evidence presented not just that which favors the Petitioner. On cross-examination Dr. Price testified that in 1996 Petitioner was diagnosed with conduct disorder which is not necessarily related to drug use. (R. p. 374 lines 3-5). In 1998 the Petitioner was diagnosed with oppositional defiant disorder which means he has issues with authority and following rules. (R. p. 374 lines 8-12). In 1998, Petitioner was diagnosed with cannabis and alcohol abuse, and borderline intellectual functioning, both of these evaluations occurred prior to the murder. (R. p. 374 lines 13-17). The trial court itself in questioning Dr. Price inquired about an MRI being done on the Petitioner. Dr. Price answered no, but did state that it would have been beneficial to have one done. (R. p. 374 line 25 – p. 375 line 5). The trial court

then asked Dr. Price if an MRI would have revealed any scar tissue to determine the extent of damage to the frontal lobe. Dr. Price answered that it would have shown any atrophy. (R. p. 375 lines 5-13). In conclusion the trial court found per Dr. Price's testimony Petitioner appreciated the wrongfulness of his conduct, and the huffing of gas "had an effect on his aggressiveness." (R. p. 375 lines 14-18)

The trial court also addressed the Petitioner's impetuosity which Dr. Price did not specifically address. (R. p. 375 lines 20-21). Days before the murder the Petitioner talked with his co-defendant regarding cutting the victim's throat. (R. p. 376 lines 9-12). Two minors who were also housed in RMI told law enforcement they heard the Petitioner and his co-defendant talking about murdering the victim. (R. p. 376 lines 12-16). A jailhouse informant who was a cell mate of the Petitioner's co-defendant and knew the victim told law enforcement that the co-defendant told him that this murder was planned and they killed him because "they wanted to know what it felt to kill someone." (R. p. 376 lines 17-25). After reviewing and analyzing all of the testimony and evidence presented the trial court did not believe that this was a rash decision. The trial court believed that the Petitioner appreciated the risk, and knew the consequences. The Petitioner along with his co-defendant wrapped the victim in a tarp, removed him from the crime scene, cleaned up and then fled the scene. (R. p. 378 lines 1-13).

The Petitioner also argues that the trial court erred when they decided to use the Petitioner's drug use as an aggravating instead of mitigating factor. The trial court discussed the testimony of the Petitioner's father who testified that Petitioner started using drugs at fourteen. Dr. Price testified that the Petitioner was drinking alcohol at age eight. (R. p. 380 lines 17-21). The trial court also spoke about the Petitioner breaking into the house of a neighbor, stealing a ring and liquor. The neighbors did not want to press charges but Petitioner's parents pressed them to call

the police because they thought DJJ was the only way Petitioner could get treatment. (R. p. 381 lines 1-7).

The Petitioner also argues that the trial court stating that drug use is not a defense proves that he wished to use it has an aggravating instead mitigating factor. The Court of Appeals was correct when they concluded that,

> "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 compelling mitigating circumstance when considered with the other factors." *Smart,* 433 S.E.2d at 389.

There were more factors that the court was obligated to consider not just the Petitioner's drug addiction. It is obvious that the court considered all of the *Miller* factors which is all that is required pursuant to *Aiken.* The Petitioner wishes to focus on only two of the five *Miller* factors found in the *Aiken* decision. The Petitioner focuses on, the chronological age of the offender, his immaturity and impetuosity; and, the Petitioner's family and home environment. However, it is clear from the transcript the trial court considered all five factors.

Within the final recitation regarding the decision, the trial court went over the factors that were considered and how those decisions were made. Rehabilitation was just minimally mentioned by the Petitioner. However, it is certainly important when the trial court has to make a decision regarding the possibility of releasing a person who has committed murder into society one day. In *Smart,* rehabilitation was addressed by the Court of Appeals.

> "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." *Smart,* 861 S.E.2d at 390.

There were other factors the court was required to consider that revealed the mental state of the Petitioner at the time the crime was committed, the heinous acts of violence that occurred during the commission of this murder, and the lack of rehabilitation on the Petitioner's behalf after eighteen years incarceration.

In *Aiken,* this Court stated the following,

> "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. Our General Assembly has made the decision that juvenile offenders may be sentenced to life without parole, and we honor that decision. However, *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 features of youth are fully explored." *Aiken,* 410 S.C. at 545.

It is obvious that the trial court considered each of the *Miller* factors this Court listed in the *Aiken* decision. Once this was shown there were no ground for reversal of the trial court's decision. So the Court of Appeals was correct in their decision to affirm. This decision should not be reviewed by this Court. This petition should be subject to dismissal.

CONCLUSION

Based on the foregoing reasons, Respondent submits Petitioner has failed to show that the question presented warrants certiorari review. This Court should deny this petition for writ of certiorari and let stand the decision of the Court of Appeals.

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

TOMMY EVANS, JR.
Assistant Attorney General
S.C. Bar No. 65282

HONORABLE ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

BY: */s Tommy Evans, Jr.*
TOMMY EVANS, JR.
S.C. Bar No. 65282
P.O. Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

ATTORNEYS FOR RESPONDENT

October 21, 2021