No. 267PA21 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	
FRANCISCO TIRADO	)	

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DEFENDANT-APPELLANT'S NEW BRIEF

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ISSUE PRESENTED

I. Whether the Court of Appels erred by failing to consider Mr. Tirado's challenge under Article I § 27 of the North Carolina Constitution?

STATEMENT OF THE CASE

On 1 December 1998, Francisco "Paco" Tirado was indicted for two counts of first-degree murder, two counts of first-degree kidnapping, two counts of robbery with a dangerous weapon, conspiracy to commit the felony of robbery with a dangerous weapon, conspiracy to commit the felony of first-degree kidnapping, and conspiracy to commit the felony of first-degree murder involving the victims, Susan Moore and Tracy Lambert. Mr. Tirado was also indicted for attempted first-degree murder, conspiracy to commit the felony of first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, first-degree kidnapping, and robbery with a dangerous weapon involving the victim Debra Cheeseborough. (Rpp 15-22). Mr. Tirado was seventeen at the time of the crimes. (Rpp 3-14). The case came for capital trial in front of the Honorable William Gore, Jr. at the 10 February 2000 criminal session of Cumberland County Superior Court. (Rp 1). The jury convicted Mr. Tirado as charged and Mr. Tirado was sentenced to death for both murders. (Rpp 31-65). The Supreme Court of North Carolina vacated Mr. Tirado's death sentences and remanded to the trial court for a new sentencing hearing. *State v. Tirado*, 358 N.C. 551, 599 S.E.2d 515 (2004); (Rpp 104-128).

On 13 September 2007, Mr. Tirado was resentenced to two consecutive life without parole sentences by the Honorable Lynn Johnson for the murders. (Rpp 130-133).

On 20 July 2018, the Honorable James Ammons, Jr. granted Mr. Tirado's motion for appropriate relief requesting a new sentencing hearing under *Miller v. Alabama* and N.C.G.S. § 15A-1340.19A, *et. seq*. 567 U.S. 460. (Rpp 144-147).

On 26 August 2019, Mr. Tirado and another co-defendant, Tameika Douglas, had *Miller* resentencing hearings in front of Judge Ammons in Cumberland County Superior Court. (T2p 1). At the end of the hearing, the trial court imposed two consecutive life without parole sentences for Mr. Tirado and left the remainder of his sentences undisturbed. (Rpp 161-164).

On 30 August 2019, Mr. Tirado gave oral notice of appeal from the judgment. (Rp 165). On 15 June 2020, the Court of Appeals issued an unpublished opinion which affirmed the trial court's decision, but expressly declined to review Mr. Tirado's as-applied Eighth Amendment and Article I, Section 27 challenges. *State v. Tirado*, 278 N.C. App. 149, 858 S.E.2d 628 (2021) (unpublished).

On 29 June 2021, Mr. Tirado filed a motion to stay the mandate and withdraw the opinion, or, in the alternative, for *en banc* consideration with the Court of Appeals. On 1 July 2021, the Court of Appeals denied the motion to stay the mandate and withdraw the opinion, but granted a stay of the mandate for consideration of the motion for *en banc* review. On 15 July 2021, the Court of Appeals denied the motion for *en banc* review and dissolved the stay of the

mandate and deemed the mandate issued that day.

Mr. Tirado filed a notice of appeal based on a substantial constitutional question and a petition for discretionary review to review whether the Court of Appeals erred by failing to consider Mr. Tirado's as-applied challenges under the North Carolina Constitution and the United States Constitution. *State v. Tirado*, No. 267P21, (N.C. Sep. 1, 2023). This Court dismissed Mr. Tirado's appeal and partially granted his petition for discretionary review. *Id.*

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Review of the decision of the Court of Appeals in this case is based upon this Court's order allowing in part Mr. Tirado's petition for discretionary review pursuant to N.C. R. App. P. 15 and N.C.G.S. § 7A–31.

STATEMENT OF THE FACTS

At the hearing that would determine if Paco would be sentenced to death for crimes he committed at the age of 17, his mother was precluded from testifying after arriving in court with a blood alcohol level of .27 and his father, who had not seen him since he was three, turned down the opportunity to spend time with Paco outside of the courtroom because he wanted to get back

home to his "family." (T1pp 2713, 2841; T2pp 113-14).[1] Paco had never been more than a "throwaway" child. (Def.Ex. S20).[2]

Paco was born to Alice Mae and Edgardo Tirado on 7 April 1981. (T1p 2820). Alice and Edgardo, both in the Army, were stationed in Germany at the time. (T1p 2820). Soon after moving to California in 1984, Edgardo caught Alice with another man and insisted she and Paco leave. (T1pp 2824-2825). Paco was three. (T1p 2825). Alice and Paco returned to North Carolina, where

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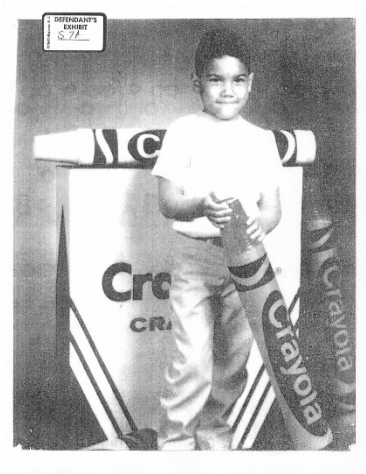
[1] References to the transcript of the first sentencing hearing, uploaded as transcripts but also admitted in the *Miller* resentencing hearing as exhibits are noted as T1. References to the transcript of the resentencing hearing are noted as T2.

[2] Defendant's exhibits from the first sentencing hearing were labeled with an S and then a number. Exhibits from the resentencing hearing were labeled with numbers only.

Alice had family. (T2p 96). Edgardo had virtually no contact with Paco after he left. (T1p 2831). When asked at the first sentencing hearing why he did not try to have more contact with Paco, Edgardo said "I wanted as away as possible as I could from [Alice]. And I didn't want to get her–or get my family, really, in that type of, you know, situation." (T1p 2831).

Alice was an alcoholic from an early age and never stopped drinking save one three-month period of sobriety. (Def.Ex. S15). Alice drank during her pregnancy with Paco and cited the time around his birth as when her drinking became "regular." (Def.Ex. S15; Def.Ex. 7p 6).

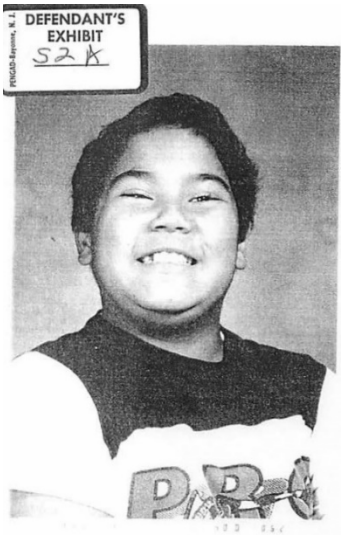


In February of 1987, when Paco was six, Alice asked her sister and brother-in-law, Magdalene and Roosevelt Robinson, to take Paco. (T1p 2761). At the time, Alice and Paco had been living in New York. (Def.Ex. 7p 7). Alice told Mr. Robinson Paco was at risk of going into foster care because a social worker had found Alice passed out drunk when she came for a visit. (Tp 2761).

Paco lived with the Robinsons on and off throughout his childhood. (T2pp 105-107). His time with them was disrupted by Alice's attempts to take Paco back, only to be sent back to the Robinsons when she would get arrested. (Def.Ex. 7p 7).

Paco, even as a young child, would "take care" of Alice during the periods of time he lived with her. (T1pp 165-166). He would make sure she ate and took her medicine. (T1pp 165-166).

In Paco's early elementary years, Alice lived with a man named Lee Grant. (T2pp 110-111). When Paco was seven, he watched Grant beat his mother with a frying pan. (Def.Ex. S20p 6). Paco tried to intervene, but Grant started to attack him. (Def.Ex. S20p 6).



When Paco was about eight, he had to ride his bike to get help after watching Grant beat Alice in the face with nunchucks. (T1p 2846-2847). Alice

was hospitalized after this attack. (T1p 2846-2847). The records show several other fights with Grant, at least some of which Paco witnessed. (T2pp 110-111, 170). Despite these attacks, and even with the benefit of hindsight, Alice reported she liked living with Mr. Grant "because he lived in a brick house." (Def.Ex. S23 p 4).

Around this time, Alice gave power of attorney to another sister, Janie Jones, to care for Paco. (Def.Ex. 7p 18; T1pp 2768-2769). This was done after DSS intervention. (Def.Ex. S16p 1; T1pp 2768-2769). Grant beat up Alice using a bat in front of Paco, and she entered a shelter only to return to Grant four days later. (Def.Ex. S16p 1). DSS closed the case less than a month after it was assigned. (Def.Ex. S16p 1). After about eight months, Janie returned Paco to Alice because Janie's husband was "mistreating" Paco. (T1pp 2769-2770).

When Paco was about 10 years old, Alice sent him back to the Robinsons, where he stayed for about a year. (T1p 2769). While he was living with the Robinsons, Paco's grades improved. (Def.Ex. S20p 3). Alice, on the other hand,

was hospitalized for alcohol detoxification and injuries sustained in a gang rape. (Def.Ex. S20p 3). Alice returned for Paco in September of 1992, drunk and belligerent. (T1p 2770). Mr. Robinson told her Paco was not leaving with her. (T1pp 2770-2771). Alice grabbed a saw and threatened Mr. Robinson with it and took Paco with her. (T1p 2771).

In March of 1993, Alice was hospitalized for another detox from alcohol and cocaine. While she was at the hospital, she was diagnosed with HIV. (Def.Ex. S20p 3).

Soon after, Alice began dating Bobby Pendergrass, another alcoholic and abusive boyfriend. (T2pp 170-171). After DSS responded to information that Pendergrass whipped Paco with a wire, Paco revealed that he witnessed violence between Pendergrass and his mother regularly and that they would "shoot up" in front of him. (Def.Ex. S16). Three weeks after opening the investigation, DSS substantiated "neglect" and closed the case. (Def.Ex. S16p 3).

About seven months later, Alice again sought help for her addiction and mental health issues. During this admission, Alice told providers Paco "just sees so much, I don't know how he could be a normal child." (Def.Ex. S15).

Around this time, the Robinsons had grown frustrated with their attempts to help Paco being interrupted by Alice. (T1p 2774). Alice was regularly leaving 12-year-old Paco at home by himself for days at a time while

she and Pendergrass went on drug binges. (T1pp 2774-2775). Mr. Robinson, not wanting to deal with Alice by taking Paco, brought Paco a television to "amuse him whenever she was not there." (T1p 2774). As time went on the family wanted to be "distanced from [Paco's] mother," so any assistance they provided to Paco lasted "only for a short period of time." (T1pp 2854-2855).

In March of 1994, DSS again opened an investigation. Paco revealed he had seen a lot of violence between Pendergrass and his mother, including an incident where Alice pulled a knife out in self-defense. Paco only wished he and his mother could "find a place to stay without violence." (Def.Ex. S16p 4). At the time of the investigation, Alice and Paco were staying in a shelter, but the shelter was kicking them out. (Def.Ex. S16p 5). Despite the investigation being "substantiated," a finding that "it is apparent that Paco has been subjected to an injurious environment," and Alice and Paco being asked to leave the shelter with no identified place to go, DSS closed the case a mere four days after it was opened. (Def.Ex. S16pp 5-6).

Later the same month, another referral came into DSS. (Def.Ex. S16p 6). With no stable place to stay after leaving the shelter, Alice gave Paco $0.60 to take the bus to the Robinsons' home. Paco had no way to get to school. The investigation revealed Alice had returned to Pendergrass. Alice told the social worker she was "afraid her lifestyle was dangerous to [Paco's] wellbeing and that it was not the way that a young man should grow up." The Robinsons were

willing to allow Paco to stay with them, but they wanted some assurance Alice would not be permitted to come over intoxicated. (Def.Ex. S16p 7). DSS substantiated neglect and filed a petition. (Def.Ex. S16p 8).

DSS records show Paco continued to live in the Robinsons' home through at least November of 1994. (Def.Ex. S16p 10). Mr. Robinson recalled Elvin McNeill, the DSS social worker, convincing him to let Paco go back to Alice. (T1pp 2779-2780). Mr. McNeill told Mr. Robinson that Alice was "a good woman." (T1p 2780). Mr. Robinson relented and called DSS and asked them to let Paco return to his mother. (T1p 2780). It was "one of the biggest mistakes [Mr. Robinson] ever made in [his] life." (T1p 2781). Alice "went right back to her old ways." (T1p 2781).

This resulted in the next DSS referral in December of 1995. Alice was selling her food stamps and beating Paco with various objects like a meat tenderizer, an extension cord, and curtain rods. (Def.Ex. S16p 10). By this point, Paco was being charged with crimes in juvenile court and accumulating suspensions at school. (Def.Ex. S16p 11). Alice told DSS that "she was an adult and could do what she wanted." Again, neglect was substantiated. (Def.Ex. S16p 12). The delinquency court ultimately ordered custody transferred to DSS. (Def.Ex. S16p 13).

In February of 1996, DSS placed Paco with another of Alice's sisters, Geraldine Hird. (T1p 2887; Def.Ex. S16p 13). He only lived there for six

months. (T1p 2888). During this time, Alice was often in "the cut," a place people drank and did drugs. (T1p 2889). Alice would come over in drunken rages, once even breaking windows. (T1p 2890). Alice was dating a man named "Slim" and told Geraldine she did not want Paco around because he "interfered" with her relationship with Slim. (T1p 2892). Paco was pistol whipped during this time period. He lost consciousness and his auditory hallucinations, which he had his entire life, increased after this point. (Def.Ex. S19p 1).

In a report dated 24 June 1996, a psychologist noted 15-year-old Paco seemed "hungry for reinforcement, validation, and encouragement." (Def.Ex. 15p 142). Paco was placed in a "therapeutic camping program" after living with Geraldine. (T1p 2985). After about six months, staff determined the program had not been effective and discharged him to Dorothea Dix Hospital, where he stayed for a month. (T1p 2987; Def.Ex. S16p 15). A report from that stay noted that the "lack of visitation with [Alice] over Christmas may have contributed to the difficulties that led this admission." (Def.Ex. S19).

Paco was then placed in a group home and interventions there were also unsuccessful. (Def.Ex. S16p 15). Alice wanted Paco placed in a training school. (Def.Ex. S16p 16). The juvenile court returned physical and legal custody to Alice on 17 March 1997. (Def.Ex. 15pp 23-24). He was committed to training school a week later. (Def.Ex. S16p 16).

Elvin McNeill, the DSS social worker who had been involved with the family, testified Alice was "defiant" and would make it "unbearable" for her relatives to keep Paco for any length of time. (T1p 2992-2993). McNeill testified that "from my interaction with Paco, when he did get some attention, it's a matter of responding positively. He responded back in basically the same way." (T1p 2994). Ultimately, DSS terminated services because Paco was "not amenable." (T1p 3022).

While Paco was in training school, Alice demanded the school stop Paco's psychiatric medications, which then included Depakote, Prozac, and Risperdal. (Def.Ex. 15pp 103-105). Paco's treating doctor had to request the juvenile court to order that he continue on the medications, detailing the extensive need for them and the exhaustive process it took to get the right balance to ensure Paco was not having any "break through psychosis" and noting he was currently diagnosed with schizoaffective disorder. (Def.Ex. 15pp 103-105).

Paco was released from training school on 18 May 1998. (Def.Ex. S20p 5; Def.Ex. 7p 30). While Paco made improvements at training school, he expressed concern about returning to the same neighborhood and family situation. (Def.Ex. 7p 9). Paco was discharged from training school with a 30-day supply of his medications, which were necessary to control the auditory hallucinations shown to lead to his violent behavior. (T1pp 3070-3071; Def.Ex. 22). The crime occurred almost exactly three months after his discharge. (Rpp

15-22). The night before the crimes, Paco called his cousin Janet Jones repeatedly to try to arrange a family gathering. (T1pp 116-117).

Original Sentencing Hearing

Paco was arrested for these crimes on 20 August 1998. (Def.Ex. S20p 5). Dr. Thomas Harbin saw him thirty-five times before his capital trial, with his first visit a week after Paco's arrest. (Def.Ex. S20p 1). His report in 2000 included several severe mental health diagnoses, including bipolar affective disorder and schizoaffective disorder. (Def.Ex. S20p 13). However, Harbin stated

> There is no diagnosis or combination of diagnoses that can adequately capture the seriousness and complexity of Mr. Tirado's psychological pathology. His development has been stunted and twisted from before he was born. Given the circumstances of the defendant's physical and social environment and his probable genetic endowment, it is not surprising that he would have serious psychological and behavioral difficulties. At the very least, he was exposed to at least cigarettes and alcohol *in utero.* He was probably exposed to other drugs as a fetus as well. His father abandoned him to his mother's influence and family when he was three years old. For the next ten years, he watched his mother smoke crack, inject intravenous drugs, engage in open sexual activity, and suffer regular and severe physical abuse at the hands of a succession of boyfriends. His mother abandoned him for weeks at a time, dropped him off with family so that she could go to obtain and use drugs, and regularly gave him to other family members to raise. He lived in at least eight different homes in the course of ten years and had no stable adult presence in his life. There was no parent, no teacher, no coach, and no Boy Scout leader present in his life. There was no adult present to provide any discipline, guidance, nurturance, or protection, except for short periods of time. His mother's family was reportedly continually fighting and abusing drugs and alcohol. The defendant was **a throwaway child, left**

to fend almost entirely for himself.

(Def.Ex. S20p 13) (emphasis added).

At Paco's original sentencing hearing, Alice arrived drunk. (T1p 2707). An Alcosensor administered by a deputy showed she had a .27 blood alcohol level. (T1p 2707). When trial counsel requested the trial court place Alice in custody to help her sober up before testifying, Alice told the court "I'm as capable as I'm ever gonna be." (T1p 2715). Amid concerns Alice might have tuberculosis, concerns over potential health ramifications of forced alcohol detoxification, and concerns over her current mental health state, Alice was released from the jail and advised to go to the hospital. (T1pp 2909, 2918-2919). She did not heed the advice. (T1p 3041-3042). She ultimately did not testify at the hearing to determine whether her only child would be sentenced to death.

Paco's father came to testify. (T1p 2811). It was the first time Edgardo had seen his son in person since Paco was three. (T1p 2826). The trial court offered Edgardo an opportunity to spend time with Paco, which he turned down in order to get back home. (T1p 2841; T2pp 113-114).

Prison

Paco has received continuous psychiatric help while in prison. These records indicate Paco is responsive to medication and therapy. (Def.Ex. 13).

His family continues to be entirely absent. He has had no one other than attorneys or media visit him in the twenty years he has been in prison. (Def.Ex.

14 p 19). There is a note in 2008 that Paco was able to speak to Alice on the phone for the first time in eight years. (Def.Ex. 13p 88).

Paco has received many infractions while in prison. Over the years, the frequency of these infractions has lessened. (Def.Ex. 14p Ex. 521). Additionally, the only infraction since 2010 involving anything resembling a threat or violence was an infraction in 2018 that a member of mental health staff noted was "pending an infraction for assaulting staff with weapon although the write up indicates he pushed a chair in the direction of an officer which, as written, does not sound nearly as violent as the infraction description leads one to believe." (Def.Ex. 9p Ex. 43). In fact, the most recent evaluation provided in the records found there is "no indication that [Paco] is at increased risk for assaultive or predatory behavior." (Def.Ex. 9p Ex. 43).

Paco has held many different jobs in prison. (Def.Ex. 14pp Ex. 690-691). He has completed courses in commercial cleaning and character education and completed both NA and AA. (Def.Ex. 14pp Ex. 678, 680). After learning he would have an opportunity at being resentenced under *Miller,* Paco expressed a desire to access vocational classes he is currently not eligible for due to his LWOP sentence. (Def.Ex. 14p Ex. 675).

The prison records note Paco's ongoing remorse for his participation in the crimes. While on death row in 2003, Paco's social worker noted he was "ponder[ing] his regrets" regarding the crime. (Def.Ex. 13p 249). In 2005, Paco

told his psychologist he was dealing with his remorse. (Def.Ex. 13p 212).

Miller Resentencing Hearing

Harbin testified at Paco's resentencing hearing. (T2p 58). He diagnosed Paco at this point with PTSD, bipolar disorder, panic disorder, and antisocial personality disorder. (T2p 72). Harbin found Paco to be redeemable and not incorrigible. (T2pp 76-77).

Paco testified at the resentencing hearing. (T2p 161). He talked about how he had to take care of his mother while she drank and "shot up." (T2pp 165-166). Paco explained the gang life attracted him because it was "a surrogate family." (T2p 173). Paco took responsibility for his role in the murders. (T2p 191).

In his closing, the district attorney acknowledged the original sentencing jury found Paco was immature and acted under the influence of the group. (T2p 233). He also "agree[d] with every one of the experts . . . . [Paco] had a horrible upbringing. There is no question about that." (T2p 235).

The Trial Court's Oral Ruling

The trial court issued an oral ruling from the bench. (Rpp 148-159; T2p 272-283). In the ruling, the trial court pointed to Paco's "intelligence," his infractions in prison, lack of remorse, continuing danger to society, Paco's "active participation" in the crime, his age being close to eighteen at the time of the crime, lack of immaturity, ability to appreciate the risk of his conduct,

Paco's criminal record, lack of "compelling" mental health mitigation, and lack of peer pressure. (T2p 272-280). The trial court ultimately found the "factors in mitigation" were "substantially outweighed by the other facts and circumstances of the crime and the defendant's conduct and participation in the crime." (T2p 281).

The Trial Court's Written Order

In a written order signed 20 March 2020 the trial court made 12 findings of fact related to the circumstances of the offenses, calling the murders "brutal." (RSupp. p 4). The trial court made 5 findings of fact related to Paco's circumstances:

1. The Defendant is highly articulate and intelligent
2. The Defendant has not been a model prisoner while in prison; his prison record indicates that he has committed or been found responsible for well over twenty infractions since he has been in prison.
3. The Defendant, while attempting to express remorse during the hearing, has not demonstrated remorse based on his actions, his statements, and his demeanor here in Court.
4. The Defendant had a juvenile record that exhibits a pattern of escalation of disruptive activity, disobedient behavior and criminal activity.
5. The Defendant is still a danger to society.

(RSupp. p 6).

Regarding the statutory mitigating factors, the trial court found these either nonexistent or without "significant mitigating weight." (RSupp. pp 6-10).

The trial court made three conclusions of law:

1. This Court concludes that the mitigating factors of youth found—that is chronological age [any others]—carry little mitigating weigh in this case based on careful consideration of all the evidence presented that the Court deems relevant to sentencing. Any mitigating circumstances attendant to the Defendant's youth did not in this case lessen his culpability or show any prospect for reform, as compared with if the Defendant had committed these crimes eight months later, when he reached the age of adult criminal responsibility.

2. The Court concludes, after considering "all the circumstances of the offense," "the particular circumstances of the defendant," and "any mitigating factors" of the Defendant's youth, both submitted and not submitted but considered, that the Defendant's crimes did not reflect "unfortunate yet transient immaturity" but rather reflected "irreparable corruption."

3. The Court therefore concludes, based on the totality of the circumstances surrounding the crime, the Defendant's instrumental role in these murders, the Defendant's history, the Defendant's conduct, the Defendant's current danger to society, and the substantial lack of persuasive mitigation evidence presented, and in the exercise of its discretion, that the Defendant should be sentenced to life without parole for both first-degree premediated murder convictions in this case.

(RSupp. pp 10-11).

Court of Appeals Opinion

The Court of Appeals reviewed Paco's claims in a 5 June 2021 unpublished decision. *State v. Tirado*, 278 N.C. App. 149, 858 S.E.2d 628 (2021) (unpublished). The court denied all claims. Paco had argued his LWOP sentence violated the Eighth Amendment and article 1, section 27 of the North

Carolina Constitution. The Court of Appeals determined "the resentencing in defendant's case complied with binding statutory authority and case law precedent as the sentence imposed was not mandatory and because the trial judge had the discretion to impose a lesser punishment in light of defendant's youth[,]" therefore, "we need not address any as-applied constitutional challenge." *Id.*

STANDARD OF REVIEW

The standard of review for this Court is whether there is any error of law in the opinion of the Court of Appeals. *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994). Constitutional issues are reviewed *de novo*. *State v. Whittington*, 367 N.C. 186, 190, 753 S.E.2d 320, 323 (2014). In *de novo* review, the appellate court considers the matter anew and freely substitutes its own judgment for that of the lower court. *State v. Williams*, 362 N.C. 628, 669 S.E.2d 290 (2008).

ARGUMENT

I. WHETHER THE COURT OF APPEALS ERRED BY FAILING TO CONSIDER PACO'S CHALLENGE UNDER ARTICLE I, § 27 OF THE NORTH CAROLINA CONSTITUTION?

A. Introduction

Paco Tirado indisputably had a harrowing, traumatic childhood from

which no one would emerge unscathed.[3] Paco spent his entire childhood literally and figuratively thrown around by his mother, her abusive boyfriends, and every person or system that was supposed to protect him. After his return to the mother who had vigorously fought for Paco to be deprived of the psychiatric drugs that prevented the auditory hallucinations that professionals found caused Paco to react violently, Paco participated in terrible crimes.

Paco has since spent every single day of his adult life in prison, while the criminal justice system has grappled with the emerging science of adolescent brain development and growing understanding of the implications of adverse childhood events. Paco was sentenced to death, then resentenced to life without the possibility of parole (LWOP). He had a new sentencing hearing at the trial level, in which, despite the overwhelming mitigation of Paco's age and surrounding circumstances, and clear improvement during his incarceration, Paco was cruelly found to be irreparably corrupt and not capable of rehabilitation. *See, State v. Kelliher*, 381 N.C. 558, 616, 873 S.E.2d 366, 405 (2022) (Newby, J., dissenting). ("Moreover, even in the worst of circumstances, is it good policy for a judge to tell a juvenile defendant, 'You are irredeemable'?

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[3] On resentencing, the prosecutor told the trial court he "agree[d] with every one of the experts . . . . [Paco] had a horrible upbringing. There is no question about that." (T2p 235).

What psychological impact would that statement have? Would not such a statement be cruel?").

When Paco brought his claims to the Court of Appeals, they refused to provide merits review of his claim that his sentence of LWOP was unconstitutional as-applied to him.

If North Carolina is going to permit trial courts to sentence children to die in prison, surely those children should receive the appellate review to which they are entitled. *See, Kelliher,* 381 N.C. at 604, 873 S.E.2d at 398 (Newby, J., dissenting). ("When raising a constitutional challenge, the party raising the challenge can bring a facial or as applied challenge to the allegedly unconstitutional act.").

B. Constitutional Background

Recognizing that children are profoundly different than adult offenders, the Supreme Court of the United States barred numerous categorical sentences for juvenile offenders on Eighth Amendment grounds over the past 15 years. In 2005, the Court barred capital punishment for crimes that the defendant committed while under the age of eighteen. *Roper v. Simmons*, 543 U.S. 551, 573 (2005). The Court observed three crucial differences between juveniles and adults that mitigated against the most severe punishment for child offenders: (1) juveniles have "[a] lack of maturity and an underdeveloped sense of responsibility," (2) they "are more vulnerable or susceptible to negative

influences and outside pressures" based in part on their lack of control over their environment, and (3) their character "is not as well formed." *Id.* at 569-70 (citation omitted).

Five years later, the Court extended this reasoning to prohibit sentences of life without parole for juveniles convicted of non-homicide offenses. *Graham v. Florida*, 560 U.S. 48, 68, 74 (2010). And then in 2012, the Court struck down mandatory sentences of life without parole for juvenile homicide offenders, because even where juveniles commit terrible crimes, the "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders. . . ." *Miller v. Alabama*, 567 U.S. 460, 471 (2012). The differences between adults and juveniles "counsel against irrevocably sentencing [juveniles] to a lifetime in prison. *Id.* (*quoting Roper*, 543 U.S. at 573). Accordingly, sentences of life in prison without parole "will be uncommon." *Id.*

The Supreme Court of the United States held that *Miller* was retroactive in *Montgomery v. Louisiana*. 136 S. Ct. 718, 736 (2016).

In 2021, the Supreme Court of the United States again addressed the sentencing of juveniles to LWOP. *Jones v. Mississippi*, 141 S. Ct. 1307, 1321 (2021). The holding in *Jones* is actually quite narrow. The *Jones* Court found that *Miller* and *Montgomery* do not require a sentencer to make a specific finding that the defendant is permanently incorrigible. 141 S. Ct. 1307 (2021);

577 U.S. 190 (2016). *Jones* is a purely procedural ruling. *Jones* affirmed that both *Miller* and *Montgomery* remain good law. 141 S. Ct. at 1321 ("Today's decision does not overrule *Miller* or *Montgomery*.").

C. *Jones* was a Procedural Holding and Does not Disturb As-Applied Challenges

The Supreme Court of the Unites State was clear that *Jones* was a narrow holding that simply clarified the procedural requirements already laid out in *Miller*. "As we will explain, the Court has already ruled that a separate factual finding of permanent incorrigibility is not required." 141 S. Ct. at 1313.

The Court compared the lack of a specific requirement for an explanation of the sentencing decision to the lack of corresponding requirement in capital cases: "In a series of capital cases over the past 45 years, the Court has required the sentencer to consider mitigating circumstances when deciding whether to impose the death penalty . . . . But the Court has never required an on-the-record sentencing explanation or an implicit finding regarding those mitigating circumstances." 141 S. Ct. at 1320.

The dissent in *Jones* cautioned not to read the majority as eliminating the substantive requirements of *Miller* and *Montgomery*, and stated that as-applied challenges can continue to be litigated: "No set of discretionary sentencing procedures can render a sentence of LWOP constitutional for a juvenile whose crime reflects 'unfortunate yet transient immaturity.'" 141 S.

Ct. at 1332, 209 L. Ed. 2d 390 (Sotomayor, J., dissenting), *see also* 141 S. Ct. at 1337, 209 L. Ed. 2d 390 n.8.

The majority opinion in *Jones* firmly stated that the protections in *Miller* and *Montgomery* are undisturbed: "Today's decision does not overrule *Miller* or *Montgomery*. *Miller* held that a State may not impose a mandatory life-without-parole sentence on a murderer under 18. Today's decision does not disturb that holding. *Montgomery* later held that *Miller* applies retroactively on collateral review. Today's decision likewise does not disturb that holding." 141 S. Ct. at 1321, 209 L. Ed. 2d 390. In fact, the *Jones* Court stated they were not reviewing an as-applied Eighth Amendment challenge only because there was not one appropriately presented in the case. 141 S. Ct. at 1322, 209 L. Ed. 2d 390.

Other states have continued to evaluate as-applied constitutional challenges since *Jones*. In fact, the defendant in the seminal *Miller* case recently came back before the Court of Criminal Appeals of Alabama, appealing his reinstated LWOP sentence. *Miller v. State*, No. CR-20-0654, 2023 WL 5315181 (Ala. Crim. App. Aug. 18, 2023) (Not Yet Release for Publication). That court, after a lengthy discussion of *Jones* and its own case law interpreting *Jones*, engaged in a proportionality review. *Id.*, at *19. Additionally, the Supreme Court of Georgia has engaged in proportionality review since *Jones* was decided. *Sillah v. State*, 315 Ga. 741, 754, 883 S.E.2d

756, 769 (2023).

The holding of *Jones* did nothing to eliminate as-applied challenges to individual sentences.

D. This Court has Held That *Jones* is a Procedural Holding Only

The North Carolina Court of Appeals held that "the resentencing in defendant's case complied with binding statutory authority and case law precedent as the sentence imposed was not mandatory and because the trial judge had the discretion to impose a lesser punishment in light of defendant's youth. For these reasons, and those discussed above, we need not address any as-applied constitutional challenge." *Tirado*, 278 N.C. App. 149, 858 S.E.2d 628 (citing *State v. Goodman*, 298 N.C. 1, 20, 257 S.E.2d 569, 582 (1979)). With this conclusion, the Court of Appeals simply did not review Paco's as-applied Eighth Amendment and Article I, Section 27 challenges to the trial court's decision to sentence him to LWOP.

Since *Miller*, the appellate courts in North Carolina have regularly conducted review of as-applied constitutional challenges, both in matters in which a juvenile was sentenced to LWOP and life with the possibility of parole. *See, e.g.*, *State v. Sims,* 260 N.C. App. 665, 818 S.E.2d 401 (2018), *review allowed,* 371 N.C. 792, 820 S.E.2d 809, 810 (2018), *State v. Williams*, 261 N.C. App. 516, 524, 820 S.E.2d 521, 526 (2018), *review allowed, writ allowed*, 372 N.C. 358, 828 S.E.2d 21 (2019), *and review allowed, writ allowed*, 372 N.C. 358,

828 S.E.2d 23 (2019), *State v. Seam*, 263 N.C. App. 355, 364, 823 S.E.2d 605, 612 (2018), *aff'd*, 373 N.C. 529, 837 S.E.2d 870 (2020), *State v. Dudley*, 265 N.C. App. 382, 826 S.E.2d 860 (2019).

Further, this Court has interpreted *Jones* as applying solely to procedural requirements and held it does not affect the substantive requirements of *Miller* and *Montgomery*:

> The problem with the State's proposed interpretation of *Jones* is that it is irreconcilable with the Supreme Court's own characterization of the question it was answering in *Jones*, the narrowness of its holding, and its description of the relationship between *Jones* and the Supreme Court's prior juvenile sentencing decisions. By its plain terms, *Jones* makes clear that the Supreme Court intended only to reject an effort to append a new procedural requirement to *Miller*'s and *Montgomery*'s substantive constitutional rule; the Court did not intend to retreat from the substantive constitutional rule articulated in those cases.

Kelliher, 381 N.C. at 575, 873 S.E.2d at 379.

E. The Trial Court Complied with *Kelliher*

This Court ordered the parties to address the question of whether Paco's resentencing complied with *Kelliher*. *State v. Tirado*, No. 267P21, (N.C. Sep. 1, 2023).

The trial court complied with the procedural requirements laid out in *Kelliher*.

a. *Kelliher* Does Not Impose a Higher Substantive Requirement Under the North Carolina Constitution Than SCOTUS Currently Mandates Under *Miller* and Progeny

Kelliher went into detail regarding the distinction between North Carolina's constitutional preclusion of cruel or unusual punishment with the United States' constitutional preclusion of cruel and unusual punishment. 381 N.C. 558, at 873 S.E.2d at 382. The difference in wording has widely been noted to be one of possible consequence. *See* Orth, John V., and Paul M. Newby, *The North Carolina State Constitution*, Oxford University Press, Incorporated, 2013 (citing *Medley v. Department of Correction*, 330 N.C. 837, 412 S.E.2d 654 (1992)) (noting the disjunctive language in that section and N.C.'s change of "the wording slightly to 'cruel nor unusual punishments'" is one that "may conceivably have practical consequences."). The *Kelliher* Court ultimately concluded that "article I, section 27 of the North Carolina Constitution need not be interpreted in lockstep with the Eighth Amendment to the United States Constitution." 381 N.C. at 584, 873 S.E.2d at 385.

After determining that North Carolina sets a higher bar, the *Kelliher* Court explained the independent grounds in the North Carolina Constitution that provide prohibition to sentencing a juvenile who can be rehabilitated to life without parole. 381 N.C. at 586, 873 S.E.2d at 387.

However, *Kelliher* did not establish that the North Carolina Constitution precludes sentences of life without parole categorically, like Iowa and

Massachusetts have. *State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016) ("For the above reasons, we adopt a categorical rule that juvenile offenders may not be sentenced to life without the possibility of parole under article I, section 17 of the Iowa Constitution."); *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 466 Mass. 655, 671, 1 N.E.3d 270, 284–85 (2013) ("we conclude that the discretionary imposition of a sentence of life in prison without the possibility of parole on juveniles who are under the age of eighteen when they commit murder in the first degree violates the prohibition against 'cruel or unusual punishment[ ]' in art. 26."). Nor did the *Kelliher* Court determine the state constitution imposes any higher substantive requirements than *Miller*.

Kelliher simply stated that Article I, § 27 independently compels the same substantive requirement provided for by *Miller* and *Montgomery*. "[W]e hold that sentencing a juvenile who can be rehabilitated to life without parole is cruel within the meaning of article I, section 27 of the North Carolina Constitution." 381 N.C. at 586, 873 S.E.2d at 387. Because *Jones* did not alter the substantive requirements of *Miller* and *Montgomery*, *Kelliher* does not provide a higher substantive bar to sentence a child to LWOP.

The only difference cited by *Kelliher* from current Eighth Amendment jurisprudence is the holding that the trial court must expressly find that a juvenile is unable to be rehabilitated in order to sentence the child to LWOP. 381 N.C. at 587, 873 S.E.2d at 387. Functionally, the *Kelliher* Court found

what *Jones* did not: that there is a *procedural* requirement of the specific finding prior to the imposition of an LWOP sentence.

In this case, the trial court's written order provided that the trial court found that Paco's crimes "did not reflect 'unfortunate yet transient immaturity' but rather reflected 'irreparable corruption[,]'" and that Paco is "unable to benefit from rehabilitation." (R. Ad. pp 9-10).

These findings satisfy the procedural requirement enunciated in *Kelliher* that rises above the federal constitutional requirements. The issue in this matter does not rely on *Kelliher's* holding that the North Carolina Constitution requires more than the United States Constitution, but rather on the complete denial of appellate review of Paco's as-applied challenge to his sentence.

F. The Court of Appeals Improperly Denied Merits Review Under Article 1 Section 27 of the North Carolina Constitution

The Court of Appeals' determination that Paco was not entitled to merits review of his as-applied constitutional claims because of the holding in *Jones* was an incorrect reading of *Jones* and inconsistent with the holdings of *Kelliher* and *Conner*.

The *Jones* Court expressly limited its holding to the requirements of proceedings under *Miller* and *Montgomery*:

> Under our precedents, this Court's more limited role is to safeguard the limits imposed by the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Court's precedents require a discretionary sentencing procedure in

> a case of this kind. The resentencing in Jones's case complied with those precedents because the sentence was not mandatory and the trial judge had discretion to impose a lesser punishment in light of Jones's youth. Moreover, this case does not properly present—and thus we do not consider—any as-applied Eighth Amendment claim of disproportionality regarding Jones's sentence.

Jones 141 S. Ct. at 1322 (citing Brief for United States as Amicus Curiae 23; *Harmelin v. Michigan*, 501 U.S. 957, 996–1009 (1991) (Kennedy, J., concurring in part and concurring in judgment)) (emphasis added).

It is helpful to reference the amicus brief cited by the Court when noting *Jones* does not present an as-applied challenge:

> [A] hearing involving "age" does not categorically preclude a later Eighth Amendment claim. If a sentencing court considers a child's "age," but is nevertheless legally foreclosed from considering certain "attendant characteristics" of it, the sentence may not constitute a proper judgment about whether the crime reflects transient immaturity. Or, even in the absence of such a structural impediment at sentencing, a reviewing court might later conclude that the sentencer's case-specific judgment was erroneous, such that the life-without-parole sentence is in fact unconstitutionally disproportionate.

Brief for United States as Amicus Curiae 23, *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), (internal citations omitted).

Indeed, the dissent in *Jones* pointed out that *Jones*' holding still allows as-applied Eighth Amendment challenges to go forward and offers that for a juvenile offender, "such a claim should be controlled by this Court's holding that sentencing 'a child whose crime reflects transient immaturity to life

without parole . . . is disproportionate under the Eighth Amendment.'" 141 S. Ct. at 1337 fn 6, quoting *Montgomery*, 577 U.S. at 211.

The entirety of the *Jones* opinion makes it clear that the holding in *Jones* does not affect the ability of a juvenile to raise an as-applied constitutional challenge. Nothing in *Jones* leads to the result that, so long as a trial court is able to consider something less than life without parole, the sentence imposed is automatically constitutional and proportionate.

Further, the same day *Tirado* was decided, the same panel issued a decision in a companion case, *State v. Douglas*. 278 N.C. App. 148, 858 S.E.2d 628 (2021) (unpublished). In *Douglas*, this Court vacated the defendant's sentence based on inadequate factual findings and noted "Defendant also challenges the constitutionality of the LWOP sentence. Because we vacate defendant's LWOP sentence on the grounds of insufficient findings of fact, we need not address defendant's as-applied challenge, which may be mooted based on the trial court's new findings or the new sentence imposed." *Id*. Certainly, there is an implication in this language that the Court could consider an as-applied challenge by the defendant in that case. Therefore, the Court had the ability to consider an as-applied challenge by Paco.

G. <u>This Case Should be Remanded to the Court of Appeals to Conduct Merits Review of the As-Applied Article 1 Section 27 Challenge</u>

When the Court of Appeals does not conduct review of issues raised, this

Court frequently remands for the Court of Appeals to do so. *See, e.g., State v. Goins*, 377 N.C. 475, 481, 858 S.E.2d 590, 595 (2021), *State v. Johnson*, 847 S.E.2d 410, 411 (N.C. 2020), *State v. Hudson*, 345 N.C. 729, 730, 483 S.E.2d 436, 437 (1997). Because this matter was not reviewed by the Court of Appeals due to the panel's misapplication of *Jones*, this Court should remand with instructions to review Paco's as-applied challenge.

CONCLUSION

For the foregoing reasons and authorities, Francisco Tirado, the Defendant-Appellant herein, respectfully requests this Court to vacate the decision of the Court of Appeals and remand for merits review of his as-applied constitutional challenge.

Respectfully submitted this, the 1st day of November, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that the original Defendant-Appellant's Brief has been duly filed, pursuant to Rule 26, by electronic means with the Clerk of the North Carolina Supreme Court.

I further certify that a copy of the foregoing Brief has been served upon Heidi M. Williams, Assistant Attorney General, by sending it electronically to the following current email address, hwilliams@ncdoj.gov.

This, the 1st day of November, 2023.

Electronically Submitted
Kellie Mannette
Attorney for Defendant-Appellant

No. 267PA21 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	
FRANCISCO TIRADO	)	

****

APPENDIX

****

2023 WL 5315181
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Evan MILLER
v.
STATE of Alabama

CR-20-0654
|
August 18, 2023

Synopsis

Background: After petitioner's convictions for capital murder and aggravated robbery committed when he was 14 years old and his mandatory sentence of life imprisonment were affirmed on direct appeal, 63 So.3d 676, petitioner sought writ of certiorari. Following grant of certiorari, the United States Supreme Court, 132 S.Ct. 2455, 567 U.S. 460, reversed and remanded. On remand the Court of Criminal Appeals, 148 So.3d 78, reversed as to sentence and remanded. On remand, the Circuit Court, Lawrence County, resentenced petitioner to life imprisonment without the possibility of parole. Petitioner appealed.

Holdings: The Court of Criminal Appeals, Minor, J., held that:

sentencing court's finding that petitioner lacked remorse was not an abuse of discretion;

sentence of life imprisonment without parole was not disproportionate to the crime or petitioner's circumstances;

evidence supported sentencing court's finding that petitioner was the principal aggressor that brought upon the death of victim; and

sentence of life imprisonment without the possibility of parole for capital murder and aggravated robbery that was committed when petitioner was 14 years old did not constitute cruel or unusual punishment.

Affirmed.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

Appeal from Lawrence Circuit Court (CC-06-68)

Opinion

MINOR, Judge.

***1** In this appeal, we consider Evan Miller's challenge to his resentencing to life imprisonment without the possibility of parole for his 2006 conviction for murder made capital because Miller, who was 14 years old at the time of the offense, committed it during the commission of a first-degree arson, see § 13A-5-40(a)(9), Ala. Code 1975. After review and with the benefit of oral argument, we affirm.

FACTS AND PROCEDURAL HISTORY

***2** On direct appeal in 2010, this Court summarized the evidence from Miller's 2006 trial:

> "[I]n July 2003, then 14-year-old Evan Miller and his 16-year-old codefendant, Colby Smith, robbed and savagely beat Miller's neighbor, Cole Cannon. After beating Cannon to the point that he could not get off the floor, Miller set Cannon's trailer on fire. Cannon's body was later discovered by firefighters, who were called to extinguish the fire.
>
> "Colby Smith testified that he became acquainted with Miller during high school and that they had known each other for approximately four or five months before the crime. On the evening of July 15, 2003, Smith was spending the night at Miller's trailer. Around midnight, Cannon came over complaining that he had burned his food and asking if they had something he could eat. Cannon appeared to have been drinking, and Smith smelled alcohol on his breath and noticed that he was 'staggering.' While Miller's mother was preparing some spaghetti for Cannon, Miller and Smith went over to Cannon's trailer to look for drugs, but they were unable to find any. The two, however, found and stole some of Cannon's baseball trading cards. Miller and Smith then returned to Miller's trailer.
>
> "When Cannon finished eating, he returned to his trailer. Miller and Smith then went back to Cannon's trailer intending to get Cannon intoxicated and to steal his money.

Miller and Smith smoked a joint and played drinking games with Cannon until he passed out on the couch. While Cannon was unconscious, Miller stole Cannon's wallet and took it into the bathroom where he split a little over $300 with Smith. While Miller was attempting to put the wallet back in Cannon's pocket, Cannon jumped up and grabbed Miller around the throat. Smith, who witnessed the altercation, grabbed a baseball bat and hit Cannon on the head. Miller then climbed onto Cannon and began hitting him in the face with his fists. Despite Cannon's pleas to stop, Miller picked up the bat, which Smith had dropped, and continued to attack Cannon by striking him with it repeatedly.

"Afterwards, Miller placed a sheet over Cannon's head and told him, 'I am God, I've come to take your life.' After Miller hit Cannon a final time with the bat, Miller and Smith returned to Miller's trailer. A few minutes later, however, Miller and Smith returned to Cannon's trailer and attempted to clean up the blood. Afterwards, Miller and Smith set several fires to cover up their crime. Initially, Smith used a lighter to start a fire on a couch in the back bedroom, while Miller set another fire on a different couch 'to cover up the evidence.' As they were leaving, Smith saw Cannon '[j]ust laying there.' Feeling sorry for Cannon, Smith placed a towel under his head in an attempt to stop the bleeding. Smith also turned on the faucet in the kitchen sink and stopped it up, hoping that the water would extinguish the fires. As they were leaving Cannon's trailer, Smith heard Cannon asking, 'Why are y'all doing this to me?' Approximately 10 minutes later, Smith returned to Cannon's trailer alone. He could hear Cannon coughing but 'smoke was coming out and [Miller was] coming behind [him,]' so he returned to the Miller's trailer.

***3** "Firefighters, who were called to the trailer park to extinguish the fire at Cannon's trailer, noticed blood on the coffee table and blood spatters on the wall. This led the firefighters to the discovery of Cannon's body in the hallway leading to the back bedroom. Fire Marshal Richard Montgomery, who conducted the initial investigation, concentrated on the north bedroom where most of the damage from the fire occurred. The investigation was later turned over to Investigator Tim Sandlin of the Sheriff's Department after Fire Marshal Montgomery indicated that the fire was 'obviously suspicious.' After talking with Cannon's family members, Investigator Sandlin became aware that certain items, including Cannon's wallet and some trading cards, were missing from the trailer. Cannon's wallet was eventually recovered from underneath the couch in his trailer, but his driver's license was missing. Investigator Sandlin also removed a baseball bat from underneath the couch.

"After this discovery, Investigator Sandlin went to Miller's trailer to speak with Miller and his mother, Susan. Susan gave Investigator Sandlin a box of trading cards, and Miller and his mother agreed to ride with him to the sheriff's office to give statements.

"At the sheriff's office, Investigator Sandlin obtained basic information from Miller and read him his rights from the juvenile Miranda form, which Miller and his mother both signed before Miller began recounting the events of the night of July 15 and the early morning of July 16. In his statement, Miller initially told Investigator Sandlin that on the evening of July 15, he was at his trailer watching a movie. Although he admitted that Cannon came over to their trailer, he denied going over to Cannon's trailer. Miller also claimed that he did not learn about the fire at Cannon's trailer until the fire department arrived the next morning. However, when Investigator Sandlin asked Miller to begin by describing the morning's events and work backwards to the previous evening, Miller became 'frustrated and agitated' and told Investigator Sandlin 'to forget all that, that that wasn't true.' Miller then requested that everyone except Investigator Sandlin leave the room. After Miller's mother and juvenile officers left the room, Miller gave Investigator Sandlin another statement, which Sandlin typed up for Miller to read and sign.

"In his second statement, Miller explained that, on the evening of July 15, his family was getting ready to go to bed when Cannon came over to use the telephone. While Cannon was at his trailer, Miller went over to Cannon's trailer where he found some trading cards that 'looked like they were worth money.' When Cannon came back to the Millers' trailer around midnight to get something to eat, Miller went to Cannon's trailer to get the cards. Around 2:00 or 3:00 a.m., Miller and Smith returned to Cannon's trailer to drink beer. According to Miller, as the evening progressed, Cannon became so intoxicated that he had trouble standing and eventually fell down, hitting his nose and lip on the table. Miller stated that when he tried to assist Cannon, Cannon grabbed him by the throat. Miller said Smith pushed Cannon off of him just as Cannon grabbed a bat and hit Miller on the arm. Smith then grabbed the bat from Cannon and hit Cannon on the arm. Afterwards, Smith threw the bat down and Miller kicked it under the couch. Miller then punched Cannon several times in the

face before seeing Cannon's wallet on the floor and taking about $300 in cash and a driver's license. After hearing Miller's mother knock on the front door and tell them that the police were on the way, Miller and Smith ran out the back door. As they were leaving, they could hear Cannon asking, 'Why did you do this to me?'

***4** "Based on Miller's statement, Investigator Sandlin called Deputy Fire Marshal Lyndon Blaxton to let him know that he had 'additional information' on the fire. As a result, Deputy Blaxton, Investigator Sandlin, and other law-enforcement agents agreed to meet at Cannon's trailer on July 24, 2003, to conduct a full fire investigation. During the investigation, Deputy Blaxton noticed blood spatters on the wall, a table, a pillow, and a towel. Deputy Blaxton also identified four points of origin for the fires, including a large one in the south bedroom, which spread down the hallway; a second one on the bed, which had been completely consumed by fire; a third one on the couch; and a fourth one, which originated from a cushion that had been placed on the floor before being set on fire.

"Forensic pathologist Dr. Adam Craig performed the initial external examination on Cannon's body. Because he claimed there was no indication that Cannon's death had resulted from a crime, Dr. Craig did not perform a full autopsy, and he initially ruled that Cannon's death was an accident caused by the inhalation of smoke and soot. After further investigation, however, Investigator Sandlin requested that Cannon's body be exhumed so that a full autopsy could be performed. On August 1, 2003, Dr. Craig performed a full autopsy and discovered several injuries not caused by the fire, including a two-inch contusion to the left side of the forehead caused by blunt force and six rib fractures on both sides of the body. Dr. Craig was also able to determine from hemorrhaging that these injuries occurred before Cannon died. Toxicology analysis showed Cannon's blood-alcohol level to be .216. Based upon these findings, Dr. Craig reaffirmed his initial finding that the cause of Cannon's death was 'inhalation of products of combustion,' but added that 'multiple blunt force injuries and ethanol intoxication' were contributing factors that made it more difficult for Cannon to breathe in the fire or to escape from the burning trailer.

"Deputy Tim McWhorter of the Lawrence County Sheriff's Department testified that on July 31, 2003, and August 4, 2003, he transported Miller from the Tennessee Valley Detention Center to two different mental-health evaluations. Deputy McWhorter stated that although he engaged in 'small talk' with Miller, he did not interrogate him, talk about the murder investigation, threaten him, or offer Miller any benefit for making a statement. During their first trip, Miller asked Deputy McWhorter 'if he had previously told something that wasn't true but now wanted to go back and tell the truth, would he get in any trouble.' Miller also told Deputy McWhorter that he deserved 'to do some time in a correctional facility, that he was not innocent and he had been involved in the assault on Mr. Cole Cannon.' Similarly, during their August 4 trip, Miller told Deputy McWhorter that he 'had been really messed up' when Cannon died, because he had taken two Klonopin tablets and had drunk most of a fifth of whiskey. Miller stated that he and Smith went to Cannon's trailer after Cannon told them that he had some 'acid,' but when they got there, Cannon refused to discuss anything but music. When they attempted to leave, Cannon grabbed Miller by the neck. Miller then 'slammed Mr. Cannon really hard' because he was 'really pissed off.' Miller knew that the autopsy would have revealed marks and bruises because 'they had roughed him up pretty good.' Miller said that he could not remember everything, but 'the more he thought about it, the more it made him think he started the fire.' The following morning, Smith told Miller that Cannon had died in the fire.

> "Nancie Jones, the head of the DNA section of the Huntsville Regional Laboratory of the Alabama Department of Forensic Sciences, testified that she examined numerous items for the presence of DNA. Several items, including an aluminum bat, a towel, and a portion of a gold cushion tested positive for human blood, but Jones was unable to obtain usable DNA profiles from the blood on the bat or the towel. Jones was able to use the blood taken from the gold cushion to create a DNA profile, which was consistent with the DNA sample taken from Cannon during the autopsy. Jones was also able to exclude both Miller and Smith as sources for the DNA found on the cushion. The bloodstains from the wall in Cannon's trailer were also consistent with Cannon's DNA profile and inconsistent with Miller's

> and Smith's DNA profiles. Jones also found bloodstains consistent with Miller's DNA profile on an Old Navy brand t-shirt and on the underarm portion of a Hanes brand t-shirt. Jones could not exclude Cannon as a second source of blood on the Hanes t-shirt; however, the blood spatters on the shirt were consistent with someone being hit with an object rather than being shot with a gun."

***5** Miller v. State, 63 So. 3d 676, 682-86 (Ala. Crim. App. 2010) (citations and footnote omitted), rev'd, Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

In 2003, the State charged Miller as a juvenile with two counts of capital murder. In March 2004, the juvenile court granted the State's motion to transfer Miller's case for him to be prosecuted as an adult. This Court affirmed the transfer, as did the Alabama Supreme Court. See E.J.M. v. State, 928 So. 2d 1077 (Ala. Crim. App. 2004); Ex parte E.J.M., 928 So. 2d 1081 (Ala. 2005).

The Lawrence County grand jury indicted Miller in January 2006 for two counts of capital murder: Count I charged Miller with murder made capital because Miller committed it during the commission of a first-degree robbery, see § 13A-5-40(a)(2), Ala. Code 1975, and Count II charged Miller with murder made capital because Miller committed it during the commission of a first- or second-degree arson, see § 13A-5-40(a)(9), Ala. Code 1975. In October 2006, a jury convicted Miller of capital murder under Count II (arson) and of the lesser offense of felony murder to the capital-murder charge in Count I. (Trial R. 1385.)[1] The trial judge, finding those verdicts inconsistent, reinstructed the jury (Trial R. 1387-88), and the jury then found Miller guilty of capital murder under Count II. Under Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), and the version of § 13A-5-39(1), Ala. Code 1975, then in effect,[2] the trial court sentenced Miller to the only sentence constitutionally available: life imprisonment without the possibility of parole.[3] (Trial R. 1396-99.) Miller moved for a new trial, arguing that his sentence constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution and that Alabama's mandatory sentencing scheme violated the Eighth and Fourteenth Amendments. (Trial C. 99.)

This Court affirmed Miller's conviction and sentence. Miller, 63 So. 3d 676. The United States Supreme Court granted Miller's petition for a writ of certiorari and, in a 5-4 decision, reversed this Court's judgment, holding "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " Miller v. Alabama, 567 U.S. 460, 465, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). In response to Miller, the Alabama Supreme Court in Ex parte Henderson, 144 So. 3d 1262, 1283-84 (Ala. 2013), established a procedure providing courts with the option of a sentence of life in prison with the possibility of parole for those who were under the age of 18 when they committed their crimes. This Court remanded Miller's case to the Lawrence Circuit Court in 2013 for that court to resentence Miller under the Henderson procedure. Miller v. State, 148 So. 3d 78 (Ala. Crim. App. 2013).

***6** After granting several continuances, the circuit court held a resentencing hearing over three days in March 2017. (R. 1-606.) The State called four witnesses: (1) Timothy Sandlin, who had been the primary case agent from the Lawrence County Sheriff's Office assigned to Miller's case; (2) Jodi Fuller, Cannon's daughter; (3) Sandy Cannon, Cannon's son; and (4) Candy Cheatham, Cannon's daughter. The State also offered into evidence letters from friends and relatives of Cannon and records from the St. Clair Correctional Facility showing disciplinary infractions for which Miller had received sanctions.

Miller called ten witnesses: (1) his sister, Aubrey Goldstein; (2) Tiffani Adamson Aldridge, a child of Miller's foster parents; (3) Toby Robertson, the administrator of the Tennessee Valley Juvenile Detention Center where Miller had been incarcerated after his arrest; (4) Robin Adamson Brown, Aldridge's mother and Miller's foster mother; (5) Hope Berryman, a case manager with the Moulton Lawrence Counseling Center who had worked with Miller from February 2003 until just after his arrest in July 2003; (6) Patrick Hitt, a long-time friend of Miller; (7) Brad Black, an instructor with Gadsden State Community College who worked with Miller and other inmates at the St. Clair Correctional Facility; (8) Judge Tiffany Johnson Cole, an

attorney and municipal court judge who had Miller speak to two public school assemblies; (9) David Wise; a former warden of St. Clair Correctional Facility; and (10) Dr. George Davis, a psychiatrist specializing in child and adolescent psychiatry. Miller also introduced hundreds of pages of documents, including records from the Department of Human Resources ("DHR"), records from law-enforcement agencies, court records, Miller's school records, and other documents.

Both parties filed post-hearing briefs. On April 27, 2021, the circuit court, with the consent of the parties, held a virtual hearing and resentenced Miller to life imprisonment without the possibility of parole. (R. 607-38.) Miller moved for a new trial on May 26, 2021, and filed a notice of appeal on June 3, 2021. (C. 179-91, 193-94.) See Rule 4(b)(1), Ala. R. App. P. The circuit court on June 26, 2021, entered a detailed written order applying the Henderson factors. (C. 205.) Two days later, the circuit court denied Miller's motion for a new trial. (C. 279.)

STANDARD OF REVIEW

We review a circuit court's decision to sentence a juvenile offender to life imprisonment without the possibility of parole for an abuse of discretion. Wilkerson v. State, 284 So. 3d 937, 956 (Ala. Crim. App. 2018) ("Because life imprisonment without the possibility of parole remains a sentencing option for juvenile offenders, ... the standard of review to be applied is an abuse-of-discretion standard.").

DISCUSSION

Although the Henderson Court did not require written findings on a circuit court's decision to sentence a juvenile offender to life imprisonment without the possibility of parole, the circuit court issued an extensive written order explaining its decision. Cf. Jones v. State, 355 So. 3d 361, 383-84 (Ala. Crim. App. 2021) (recognizing that written findings applying the Henderson factors are not required in every case). The circuit court judge likely felt compelled to do so, given the "ambiguous cloud" of uncertainty that the United States Supreme Court created in Miller and its later decision in Montgomery v. Louisiana, 577 U.S. 190, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016)—and given that Miller's was "the [case] that launch'd a thousand"[4] requests for resentencing by juvenile offenders sentenced to life imprisonment without the possibility of parole.[5] Miller challenges the circuit court's order on many grounds. To be safe, we address each issue Miller raises on appeal, but we reiterate that a circuit court is not required in each case to issue a detailed order explaining its decision to sentence a juvenile offender to life imprisonment without the possibility of parole.

***7** The circuit court summarized the evidence it considered regarding Miller's background and history before he murdered Cannon:

> "a. Mr. Miller's pre-crime life generally
>
> "Evan James Miller was born [in] November ... 1988, to his 31-year-old mother, Susan Jayne Bailey ('Susan'). The birth certificate listed 33-year-old David Wayne Miller ('David') as his father. By that time, David and Susan had been together around five years and had two older children together: John, born [in] August ... 1984, and Aubrey, born [in] June ... 1987. Even before [Miller] came into the family, Susan and David had already had at least four reports to DHR made against them, two involving physical abuse by David against John and Aubrey (then 9 months old), and two because of neglect. The family had already started a cycle of economic instability, having gone through two evictions (and they were evicted again shortly after [Miller's] birth). Over the course of the next 14 and one-half years, the family, including [Miller], would live lives of chaos and disruption, routinely interrupted by arrests of the parents (fourteen in the available records) and the investigations of DHR spread over a four-county area (at least thirteen reports of neglect or abuse), a family seemingly always on the move, never settling down for long. The children would move at least thirteen times, to at least twelve different residences, and attend thirteen different schools. The family would live in at least five different cities or towns (Huntsville, Cullman, Decatur, Arab and Moulton) in four counties (Cullman, Lawrence, Madison and Marshall).
>
> "The three children and Susan experienced regular fits of violence directed against them by David, an alcoholic and drug addict who fancied himself a disciplinarian of the worst sorts, the proverbial mean drunk. Slappings, whippings, beatings, with belts, belt buckles, fists, and feet were his modi operandi. On multiple occasions, [Miller] would report David's beating him and leaving bruises and marks, with [Miller's] self-reporting starting as early as

age three, with at least five total instances reported before [Miller's] 11th birthday. These included being hit with a belt when he was age five, leaving bruises observed by DHR. Another belt beating of [Miller] was reported when [Miller] was eight years old. When [Miller] was nine, David hit him nine times on his head.

"Disturbingly, Aubrey would later recall that [Miller] had it better than John, with John getting the worst (she described some horrible beatings of John, some of which [Miller] witnessed at an impressionable age, one involving David throwing John into a wall and John's head 'through a door'). At least according to the records before the court, none of [Miller's] injuries at David's hands resulted in any trips to the emergency room or in any trips for acute medical attention.

"David and Susan often had violent encounters, most witnessed, at least audibly, by the children, leaving Susan and the children in a constant state of fear, when David was home. Fortunately, because David was an over-the-road trucker, he was gone for long stretches at a time. David's violence ultimately culminated in his pointing a gun at the head of Susan. This, and the criminal charges that followed, led to his leaving the family to return to his native home in Indiana in 2000.

***8** "As if David's violent, alcohol-and-drug-fueled rampages were not enough for the children to bear, Susan's persistent neglect, handicapped by a vicious addiction to multiple drugs, created a constant state of dangerous chaos. From one parent they had violence, from the other, abject neglect. Early on, even prior to the birth of [Miller], DHR was called to the home because of neglect; John, a young toddler, was found alone, wandering in the road. A similar report about [Miller] would be made a few years later.

"Once David and the intense storms that he brought with him left the family in 2000, Susan's impaired parenting skills were tested and found significantly wanting. On multiple occasions (and this occurred while David was around as well, as noted above), the family was evicted from their home. And on multiple occasions, utility services were disconnected, leaving the family without electricity and sometimes without water. Once, while David was still in the home, during one of these periods of electrical service disconnection, he had the very bad idea of using a charcoal grill in the house to provide heat. Without proper ventilation, the entire family was exposed to carbon monoxide poisoning. Fortunately, relief arrived before all passed out or any needed emergent medical care.

"Susan, though described by her testifying children and by members of the foster family that would eventually be involved in the children's lives as 'loving,' 'a really intelligent woman' and genuinely desiring of doing the best for her children, was so impaired by severe drug and alcohol addictions, that her sincere sentiments never sufficiently equipped her to provide even basic care. Aubrey testified that Susan's drug usage was something that her mother never tried to hide from the children, consuming cocaine on a regular basis in the open areas of their homes. Cocaine was not her only drug. Her addiction knew little discrimination and no regulation. She had multiple driving under the influence arrests and convictions during the years when she was an influencer and itinerant parent to [Miller].

"Notwithstanding all of this and DHR's seeming omnipresence in their lives, the children were never placed into foster care (for more than a day) until July 1999, when they went into the therapeutic foster care family led by the Adamsons. For seventeen to eighteen months, [Miller], in Aubrey's words, 'flourished' under the nurturing but strict structure of this devoutly Christian family. His grades (never great) and standardized testing rose dramatically. He became involved in church and church groups for young adolescent males, a sort of 'Christian Boy Scouts' group. It would be the happiest days of his life.

"Part of that happiness derived from his relationship with the Adamson family. The father, mother and their three children all bonded with the Miller children, in ways that the Adamsons would never bond with any other of their charges. Particularly, Tiffani, younger than [Miller] by fourteen months, became close to [Miller] (Aubrey said that he, the youngest in his family, felt very protective of Tiffani, maybe because he finally had the chance to act as a 'big' brother to someone).

"Tiffani and her mother testified that [Miller] 'matured throughout,' quickly but surely learning that negative consequences followed disrespectful or disobedient behavior. Tiffani remembers [Miller] as someone who always wanted to be seen as 'cool' with his peers, wearing nice clothes and shoes (a possible outgrowth of [Miller's] being teased—in Aubrey's words, 'bullied'—by other children before foster care because of his clothing, a

product of poverty rather than fashion). Tiffani thought that [Miller] could be 'impulsive' but never violent.

***9** "This latter characterization differed substantially from a report, made roughly contemporaneous to the occurrence, made by Mrs. Adamson to a DHR worker that [Miller] once choked Tiffani and that he left a note that he wanted to kill Tiffani and 'make it painful for' her. Neither Tiffani nor her mother could recall the incident at the sentencing hearing,[6] but both accepted the truthfulness of the account. Dr. Davis stated that had such a report been made to him as a child psychiatrist, he would have recommended 'an emergency psych evaluation' of [Miller]. No testimony indicates that any emergency psychological interventions ensued from this incident.

"Therapeutic foster care is never meant to be permanent but, according to DHR's statutory mandate, DHR is to rehabilitate the home and reunite the family divided by juvenile dependency intervention. In 2001, the children moved back in with Susan, taken away from the only real home that they had ever known. While David's violence may have been gone, Susan's threatening neglect was as bad as ever.

"The drug abuse continued. On multiple occasions, Tiffani visited the home where [Miller] lived at the time of the murder. She found it always messy, inundated with 'strong odors' (assumedly, unpleasant). She states that it looked like there was a 'big party' going on over there. She even recalled that on at least one occasion, Susan offered her drugs, as though Susan's impaired sense of Southern hospitality demanded such an overture (Tiffani would have been no more than 13 years old at the time). Tiffani declined but was left with the firm impression that Susan was 'not ready' to have the Miller children, and the responsibilities that went along with raising and controlling a family.

"b. Department of Human Resources Interventions

"As noted above, DHR investigated various reports concerning the Miller family, starting prior to [Miller's] birth. The first involvement occurred in 1987, at the time of Aubrey's birth, upon the report of hospital officials. A second report to DHR involving neglect of John occurred in late 1987.

"After [Miller's] birth in 1988, at least nine separate reports of neglect of the Miller children by their parents were filed with DHR before more serious reports in September and October 1997 finally resulted in the 'official' opening of a case involving the family in December 1997. This ultimately resulted in the legal custody of all three children being vested in DHR in December 1998. Even under this supervision, reports of family instability (including multiple arrests of the parents on various misdemeanor charges), physical abuse by David and neglect continued to be made. This ultimately led to the July 17, 1999, vesting of physical custody of the children with DHR, and the therapeutic foster care placement of the children with the Adamsons referenced above. "DHR returned physical custody to Susan in December 2000, followed by full legal custody being returned to Susan in June 2002. During DHR's involvement with the Miller family over four counties, there were at least nineteen documented child protective services reports from the year prior to [Miller's] birth until he was incarcerated on this charge.

"c. Mr. Miller's Mental Health and Substance Abuse History

"In his fourteen and one-half years before the fateful night that brings this matter before the court, [Miller] evidenced signs of mental illness and drug and alcohol abuse. As early as six years old, [Miller] reportedly tried to kill himself by attempting to place his head through a belt loop fashioned for an apparent hanging. Reportedly [Miller] tried at age seven to kill himself by taking an 'overdose' of vitamins. However, there is no written report regarding these events and no report of significant psychological intervention following these events, save a verbal report by Susan that [Miller] started counseling at age six.

***10** "Regarding the significance of these 'attempts,' Dr. Davis states in [his report]:

> " 'Both hanging and vitamin overdose can be potentially lethal, although it is not clear that [Miller] knew that or what he actually expected to happen given his young age. The likelihood and frequency of suicidal ideation and intent in the general population at age six and seven is quite rare, and actual attempts by potentially lethal means is even rarer.'
>
> "Still, Dr. Davis making the apparent assumption that these were actual and intentional suicide attempts, without any written records or contemporaneous mental health interventions to corroborate the assumption, observed further:

> "'The suicide attempts indicate the extreme level of [Miller's] early childhood distress, the overwhelming failings of both parents, his expectation that the situation could not be changed and the continuous violent chaos of his household.'

"However undocumented the 'suicide' attempts at ages six and seven may have been, there is at least one suicide attempt that is detailed in medical records. The first, occurring when [Miller] was thirteen and fifteen months before a suicide attempt devolved into effectuated murder, was clearly intentional. [Miller] saved up a 'large quantity of pills and took an overdose.' [Dr. Davis's report, p. 10.] He was admitted to a hospital emergency room on April 5, 2002, as a result and then admitted to a psychiatric care center for follow-up, from which he was discharged thirty days later.

"As far as other mental health interventions in [Miller's] life prior to the murder, there is evidence of some treatment and therapy for some mental illnesses or near mental illnesses. For instance, the records indicate that when [Miller] was ten years old, he was prescribed Depakote, a mood stabilizer, by a psychiatrist. About a month later, that prescription was altered to Tenex for 'agitation and reactivity.' [Dr. Davis's report, p. 9.] Twenty-two months later, [Miller] was taking two prescribed medications, one a 'sedating antidepressant' and another for insomnia. Ten months later, another psychiatric visit showed that [Miller] was 'impulsive and irritable' with multiple 'psychosocial stressors.'

"The best evidence of [Miller's] drug and substance abuse reflects his activities in the months immediately preceding the murder. His usage increased dramatically, and some testimony indicated that he would be awake for 'days.'

"d. Mr. Miller's prior criminal activity

"[Miller's] criminal activity, prior to July 2003, 'took place in clusters at age nine and fourteen.' [Dr. Davis's report, p. 7.] Just before turning nine, [Miller] had a truancy charge resulting in an early warning from the Juvenile Court. About four months later, he had a charge of Criminal Mischief in the Second Degree, for which he was placed on probation.

"In March 2003, a little over three months preceding the murder, [Miller] was arrested for Assault in the Third Degree, a charge involving an alleged choking incident of a classmate. That charge was dismissed. Nine days later, he faced a Harassment charge that was also dismissed. As Dr. Davis summarized, prior to the murder, '[[Miller] had] no substantial history of criminal violence, and really no recorded history of violence in the family with his siblings or parents, nor is there any pattern of aggression in the school setting.' [Dr. Davis's report, p. 7.] Most of the evidence the court received validated Dr, Davis's summary on this point, with the notable exception of the 'choking' incident while in foster care."

***11** (C. 239-52 (footnotes and some citations omitted).)

The circuit court then summarized the evidence about Miller's life since his arrest:

"[Miller] ... was placed [in the Tennessee Valley Juvenile Detention Center] shortly following his arrest in July 2003, where he remained for two-and-one-half years. In August 2003, Robertson became administrator of [the Tennessee Valley Juvenile Detention Center]. According to Robertson, when [Miller] arrived, he 'was very angry ... upset a lot.' However, during his time there, his behavior changed. 'He became very compliant ... very good ... very polite.' Robertson, who served as administrator for nearly fourteen years since meeting [Miller], described [Miller] as a 'very smart student.'

"As to Mr. Miller's time in [the Department of Corrections ('DOC')], the court heard from two DOC employees, one then current and one a former warden. Mr. Black testified that Mr. Miller was in the 'honor dorm' at his prison, had a 'good attitude, very positive.' He stated that Mr. Miller was respectful and 'well-respected' by guards and inmates alike.

"Warden Wise testified that he did not know much about Mr. Miller because '[he] wasn't on my radar,' meaning that he did not have a record of causing so much trouble that it was brought to the Warden's attention. However, the Warden stated that disciplinary segregation 'should have been reserved for the most violent of the ones we needed removed from the facility setting because of true security and safety measures.'

> "St Clair's inmate records concerning Mr. Miller show that he was disciplined several times during his years in the facility, most for possession of contraband, most of these concerning possession of a cell phone or cell phone accessories. On at least four occasions, he received disciplinary segregation as his sanction, the longest of these being 90 days. None of the disciplinaries allege that Mr. Miller engaged in violent behavior toward others. However, the Warden testified that possession of cell phones is a serious infraction because it implicates the security of the facility."

(C. 264-65.) With that background, we turn to Miller's claims.

I. THE CIRCUIT COURT'S FINDINGS ABOUT MILLER'S LACK OF REMORSE

Miller first argues that "the sentencing court improperly punished [Miller] for exercising his constitutional rights." (Miller's brief, p. 21.) Miller asserts that the circuit court's sentencing decision was "in large part because [Miller] had exercised his right to appeal, which the court found inconsistent with remorse and rehabilitation." (Miller's brief, p. 22.) In support of that assertion, Miller cites this statement from the circuit court's order: "The remorseful stop looking out for themselves, throw themselves in humility at the feet of the society they harmed and all the individuals they hurt. They stop speaking as though they deserve mercy or second chances; they know and show that they know that they do not." (C. 271; see Miller's brief, pp. 24-25.) Miller asserts that "the only way [he] has sought a 'second chance' is by appealing his sentence." (Miller's brief, p. 25.) And he asserts that the circuit court "refus[ed] to consider evidence of rehabilitation because [Miller] appealed his earlier sentence." (Id.) He cites several authorities holding that a court may not punish a defendant for exercising his or her right to appeal. (Miller's brief, pp. 25-27.)

***12** Miller asserts that he presented "extensive evidence of rehabilitation and remorse" including letters from prison staff stating that Miller "has matured" and "would be a productive member of society"; testimony from Black, an instructor at Gadsden State Community College, describing Miller as "kind hearted" and a "good worker" who would be "employable"; testimony from Warden Wise describing Miller as not being an inmate who did "really violent things" in prison "that reflected the crime" that he was in prison for. (Miller's brief, p. 23 (citing C. 1243, 1246, 1248-49, 1262; R. 360, 363-67, 371-72, 429).) Miller also cites statements he made at his original sentencing and at his resentencing in which he apologized for his behavior. (Miller's brief, p. 23) Miller cites opinions from Judge Cole and Dr. Davis that Miller was remorseful. (Miller's brief, pp. 23-24.) Finally, Miller cites testimony from his foster mother, Brown, who testified that Miller had "never said a bad word concerning the victim's family even though he knows that they are adamant about him not getting out" and that "he can't change what he did," although "[h]e wishes he could." (Miller's brief, p. 24 (quoting R. 302).)

Miller's arguments misread the circuit court's sentencing order. Placed in context, the statement Miller cites from the court's order does not show that the circuit court "refused to consider" evidence of rehabilitation or that the court was punishing Miller for appealing his sentence:

> "Certainly, Mr. Miller's time in the Adamson home, in the juvenile detention facility and at the prison generally demonstrate the character traits of hard-work, initiative and intelligence that are essential to rehabilitation. But true rehabilitation must emanate from sincere remorse, a hitting bottom realization of the enormity of the wrong committed and of the general and great disorder brought to an ordered society's ongoing struggle to define itself by the best of us, not the worst of us. While this court has heard from many that the defendant is 'remorseful,' it has not seen evidence of that in this court's close observation of the defendant's demeanor during the resentencing hearing and, more specifically, during the defendant's 'allocution' statement[7] at the close of the hearing, have not seen that in this case. The remorseful stop looking out for themselves, throw themselves in humility at the feet of the society they harmed and all the individuals they hurt. They stop speaking as though they deserve mercy or second chances; they know and show that they know that they do not.

> "In short, this court finds that Mr. Miller has thrived in highly structured settings but that success, while commendable, is not evidence to give this court comfort that he would pursue a path of rehabilitation if free of constraints."

(C. 271-72 (emphasis added).) The circuit court clarified that its determination about remorse was based largely on its observation of Miller's demeanor—a determination that the circuit court had the discretion to make and to use in its sentencing decision. See, e.g., White v. State, 179 So. 3d 170, 233 (Ala. Crim. App. 2013) ("[T]he circuit court mentioned White's apparent lack of remorse when discussing why it had rejected the sentencing recommendation of the jury. Further, White's lack of remorse tended to undermine mitigation evidence ...."); Hosch v. State, 155 So. 3d 1048, 1096 (Ala. Crim. App. 2013) (holding it was not error for a circuit court to mention, in sentencing a defendant to death, a "lack of remorse" by the defendant); cf. United States v. Johnson, 903 F.2d 1084, 1090 (7th Cir. 1990) ("It is well established that a sentencing judge may consider lack of remorse when imposing a sentence."); Pickens v. State, 767 N.E.2d 530, 534-35 (Ind. 2002) ("In determining that the defendant's remorse was insincere, the court acknowledged that the defendant had professed remorse. However, the court concluded that the proclaimed remorse was an attempt to avoid consequences rather than a true expression. We find the court's determination to be similar to a determination of credibility. See Herrera v. State, 679 N.E.2d 1322, 1327 (Ind. 1997). Without evidence of some impermissible consideration by the court, we accept its determination of credibility. We find no impermissible considerations and thus no error.").

***13** In its order, the circuit court made several findings about "aspects of Mr. Miller's case that ameliorate any mitigation that may arise from the Henderson factors." (C. 272.) Those findings include:

> "The circumstances of the offense provide compelling evidence that Mr. Miller not only knew of the consequences of his choices but desired that they occurred. 'Cole, I am God, I've come to take your life' are some of the most chilling words this court has heard or read spoken by a real-life killer. And that killing intent continued when Mr. Miller returned to the trailer, heard Mr. Cannon fighting for his life in a trailer on fire, a fire set by Mr. Miller and Smith, and just walked away. This court is not convinced that the defendant, when he devised the plan to steal baseball cards and money, initially went to Mr. Cannon's trailer intending to cause his death, but once that murderous intent took hold, there was no impetuosity or recklessness or mere bad decision making. Mr. Miller's mind functioned perfectly well as it carried out his expressed intent to 'Take [Mr. Cannon's] life' as though he was the Omnipotent. He showed cunning, not clumsy rash thinking, when he concocted his plan to cover up his crime in the most certain and fearful way possible; destruction by fire. And he presented a very sly, intelligent way of dealing with the police when he devised lie after lie, lies he continued to maintain when he downplayed the truth of his role in Mr. Cannon's death speaking to a group of young people [8] at the expressed invite of a good-hearted soul."

(C. 273-74 (emphasis added).) The circuit court has discretion to assess the credibility of a convicted defendant's statements of remorse. Although Miller disagrees with the circuit court's assessment, he has not shown that the circuit court abused its discretion in making that assessment. Miller also has not shown that the circuit court "refused to consider" any evidence that he offered such as evidence of rehabilitation. Indeed, the circuit court considered that evidence and expressly found it "commendable" that "Miller has thrived in highly structured settings." (C. 272.) The circuit court, however, did not think that Miller "would pursue a path of rehabilitation if free of constraints." (C. 272.)

Miller is due no relief.

II. VICTIM-IMPACT EVIDENCE

At the resentencing hearing, Cannon's three children made statements about how his death had impacted them. (R. 96-136.) Miller repeatedly objected to their testimony. The State also introduced, over Miller's objection, victim-impact letters from other family members and friends. (C. 521-31; R. 136-37.) Miller asserts that "[a]lthough testimony 'about the victim and about the impact of the murder on the victim's family' is generally admissible, Payne [v. Tennessee], 501 U.S. [808,] 827 [111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)], the testimony here went well beyond that and crossed the line into

the type of inflammatory and prejudicial characterizations of [Miller], the offense, and the appropriate sentence that courts have long prohibited." (Miller's brief, pp. 28-29.) And Miller contends that the circuit court "relied heavily on the improper victim-impact testimony that was introduced by the State." (Miller's brief, p. 34.)

***14** "In Booth v. Maryland, 482 U.S. 496, 502, 107 S. Ct. 2529, 96 L.Ed. 2d 440 (1987), the United States Supreme Court held that a defendant's Eighth Amendment rights were violated by the sentencing authority's consideration of any victim-impact evidence. In Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L.Ed. 2d 720 (1991), the United States Supreme Court partially overruled Booth to allow the sentencing authority to consider evidence of the effect of the victim's death upon family and friends. Payne, 501 U.S. at 830 n.2, 111 S. Ct. 2597 ('Our holding today is limited to the holdings of [Booth] ... that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing.').

"In Ex parte McWilliams, 640 So. 2d 1015 (Ala. 1993), this Court noted that Payne had only partially overruled Booth and that it had left intact the proscription against victim-impact statements containing 'characterizations or opinions of the defendant, the crime, or the appropriate punishment.' 640 So. 2d at 1017. The Court in McWilliams held that a trial court errs if it 'consider[s] the portions of the victim impact statements wherein the victim's family members offered their characterizations or opinions of the defendant, the crime, or the appropriate punishment.' Id."

Ex parte Washington, 106 So. 3d 441, 445 (Ala. 2011).

The State offers no argument that all the victim-impact evidence was admissible. The State instead argues that Miller is due no relief because "[t]he sentencing order never referenced any of the information contained in the victim impact letters" and because "[i]n the order denying Miller's request for a new trial, the judge stated that ... 'the statements of which [Miller] so vigorously complains did not have any effect on the decision-making process in this particular case.' (C. 280.)" (State's brief, p. 45.) We agree with the State.

In Washington, the Alabama Supreme Court found plain error where the State presented inadmissible victim-impact evidence during the penalty phase of a capital-murder trial:

> "In this case, the victim's parents told the jury that Washington's crime was 'brutal, evil, terrible,' that Washington was 'someone without a conscience,' and that death was the appropriate punishment. The State concedes that it was error for the trial court to allow the victim's parents to testify in this manner. Despite this concession, the State contends that reversal is not required in this case because (1) there is no indication that the trial judge or the jury considered this testimony in determining Washington's sentence, and (2) because any error was harmless.
>
> 'The State argues that the trial court did not consider the victim-impact evidence, an argument we find to be without merit. The State's brief to this Court addresses only the trial judge's consideration of the evidence; it offers no argument or citation to the record tending to show that the jury did not consider this admittedly improper evidence. We note that it does not appear that the jury was given any instruction specifically addressing the victim-impact testimony.
>
> "Further, the State's assertion that the trial judge did not consider the parents' testimony is factually incorrect. At the sentencing hearing on remand, the State asked that the testimony of the victim's parents be adopted and made a part of the new presentence report in lieu of a formal written victim-impact statement. The trial judge stated in response: 'I have reviewed their testimony and will consider it as part of the presentence report.' (Emphasis added.) There is nothing in the record to indicate that the trial judge did not consider this testimony."

***15** 106 So. 3d at 446. The Court distinguished Ex parte McWilliams, 640 So. 2d 1015 (Ala. 1993), and Ex parte Land, 678 So. 2d 224 (Ala. 1996):

> "The State's reliance on McWilliams and Ex parte Land, 678 So. 2d 224 (Ala. 1996), is misplaced. In McWilliams, this Court remanded the case for the trial judge to state whether the judge did or did not consider victim-impact statements when deciding on a sentence. In the present case, the jury heard the victim-impact

testimony at issue, and the trial judge stated that she would consider it. In Ex parte Land, this Court found no reversible error where the trial judge read letters from members of the victim's family and from members of the defendant's family, some of which expressed opinions as to the appropriate punishment. As in McWilliams, however, the letters were not read to a jury; they were read only by the judge and only 'out of a respect for the families and for the limited purpose of possibly establishing a mitigating factor ....' Land, 678 So. 2d at 237. In the present case, no such limitations are involved and the testimony of the victim's parents was presented to the jury."

Washington, 106 So. 3d at 446 n.2.

As in Land, only the judge—not a jury—heard the challenged victim-impact evidence. And the circuit court expressly stated that the evidence "did not have any effect on the decision-making process in this particular case."[9] (C. 280.) Miller is due no relief.

III. PROPORTIONALITY

Miller argues that "[l]ife [imprisonment] without parole is a disproportionate sentence as applied to Evan Miller, an abused and neglected 14-year-old child who has shown that he is capable of rehabilitation." (Miller's brief, p. 36.) Miller cites the statements in Montgomery v. Louisiana, 577 U.S. 190, 195, 208, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), "that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption' " (quoting Miller, 567 U.S. at 479-80, 132 S.Ct. 2455) and that "a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." (Miller's brief, pp. 36-37.) Miller asserts that "the evidence presented at the resentencing hearing overwhelmingly showed that this crime was one of transient immaturity and that [Miller] is capable of rehabilitation." (Miller's brief, p. 37.)

***16** In Wynn v. State, 354 So. 3d 1007, 1038 (Ala. Crim. App. 2021), cert. denied (Ala. Nov. 19, 2021), cert. denied, —— U.S. ——, 142 S. Ct. 2756, 213 L.Ed. 2d 1000 (2022) this Court stated:

"[W]e reiterate that there is a substantive limit on sentences of life imprisonment without the possibility of parole for juvenile capital offenders under the Eighth Amendment. We also adhere to our statement in Bracewell [v. State, 329 So. 3d 29 (Ala. Crim. App. 2019),] that the central question for a trial court in determining the appropriate sentence for a juvenile capital offender—life imprisonment or life imprisonment without the possibility of parole —'is whether the juvenile and his or her crimes "reflect the transient immaturity of youth" or reflect such " ' "irreparable corruption" ' " and "irretrievable depravity that rehabilitation is impossible." ' 329 So. 3d at 35 (quoting Montgomery, 577 U.S. at 208, 136 S. Ct. 718 (citations omitted))."

This Court in Wynn also discussed Jones v. Mississippi, 539 U.S. ——, 141 S. Ct. 1307, 1322, 209 L.Ed.2d 390 (2021) in which

"the United States Supreme Court clarified its holdings in Miller and Montgomery. Brett Jones was convicted of murdering his grandfather, and he had received a mandatory sentence of life imprisonment without the possibility of parole. He was 15 years old at the time of the crime. After Jones received postconviction relief from his mandatory sentence, a new sentencing hearing was held at which the trial court considered Jones's youth and had discretion in selecting the appropriate sentence, and the trial court again sentenced Jones to life imprisonment without the possibility of parole. Jones argued on appeal 'that a sentencer's discretion to impose a sentence less than life without parole does not alone satisfy Miller' because to give effect to the holding in Montgomery that Miller substantively limited sentences of life imprisonment without the possibility of parole for juvenile offenders, a sentencer must make a finding, either explicitly or implicitly, that a juvenile is permanently incorrigible. The United States Supreme Court rejected Jones's argument that a finding of permanent incorrigibility is constitutionally required, instead holding that, '[i]n a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient.' 539 U.S. at ——, 141 S. Ct. at 1313 (emphasis added).

" 'Under our precedents, this Court's more limited role is to safeguard the limits imposed by the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Court's precedents require a discretionary sentencing procedure in a case of this kind. The resentencing in Jones's case complied with those precedents because the sentence was not mandatory and the trial judge had discretion to impose a lesser punishment in light of Jones's youth.'

"Jones, 539 U.S. at ——, 141 S. Ct. at 1322 (emphasis added).

"The Court noted that both Miller and Montgomery 'squarely rejected' the idea that a factual finding of permanent incorrigibility was required. 539 U.S. at ——, 141 S. Ct. at 1314. The Court then explained its holdings in Miller and Montgomery:

***17** " 'Miller repeatedly described youth as a sentencing factor akin to a mitigating circumstance. And Miller in turn required a sentencing procedure similar to the procedure that this Court has required for the individualized consideration of mitigating circumstances in capital cases such as Woodson v. North Carolina, 428 U.S. 280, 303-305, 96 S. Ct. 2978, 49 L.Ed. 2d 944 (1976) (plurality opinion), Lockett v. Ohio, 438 U.S. 586, 597-609, 98 S. Ct. 2954, 57 L.Ed. 2d 973 (1978) (plurality opinion), and Eddings v. Oklahoma, 455 U.S. 104, 113-115, 102 S. Ct. 869, 71 L.Ed. 2d 1 (1982). Those capital cases require sentencers to consider relevant mitigating circumstances when deciding whether to impose the death penalty. And those cases afford sentencers wide discretion in determining "the weight to be given relevant mitigating evidence." Id., at 114-115 [102 S. Ct. 869]. But those cases do not require the sentencer to make any particular factual finding regarding those mitigating circumstances.

" '... [T]he Miller Court mandated "only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing" a life-without-parole sentence. Id., at 483 [132 S. Ct. 2455]. In that process, the sentencer will consider the murderer's "diminished culpability and heightened capacity for change." Id., at 479 [132 S. Ct. 2455]. That sentencing procedure ensures that the sentencer affords individualized "consideration" to, among other things, the defendant's "chronological age and its hallmark features." Id., at 477 [132 S. Ct. 2455].

" '....

" 'In short, 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. Miller did not require the sentencer to make a separate finding of permanent incorrigibility before imposing such a sentence. And Montgomery did not purport to add to Miller's requirements.

" '....

" 'To break it down further: Miller required a discretionary sentencing procedure. The Court stated that a mandatory life-without-parole sentence for an offender under 18 "poses too great a risk of disproportionate punishment." 567 U. S. at 479, 132 S. Ct. 2455. Despite the procedural function of Miller's rule, Montgomery held that the Miller rule was substantive for retroactivity purposes and therefore applied retroactively on collateral review. 577 U.S. at 206, 212, 136 S. Ct. 718. But in making the rule retroactive, the Montgomery Court unsurprisingly declined to impose new requirements not already imposed by Miller ....

" 'The key assumption of both Miller and Montgomery was that discretionary sentencing allows the sentencer to consider the defendant's youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age. If the Miller or Montgomery Court wanted to require sentencers to also make a factual finding of permanent incorrigibility, the Court easily could have said so—and surely would have said so. ...'

"539 U.S. at ——, 141 S. Ct. at 1315-18.

"The Court expressly declined to overrule 'Montgomery's holding that Miller applies retroactively on collateral review [because b]y now, most offenders who could seek collateral review as a result of Montgomery have done so and, if eligible, have received new discretionary sentences under Miller.' Jones, 539 U.S. at —— n.4, 141 S. Ct. at 1317 n.4. However, the Court effectively rejected Montgomery's finding that Miller announced a new substantive rule of constitutional law. The Court recognized that it had employed a unique approach in determining in Montgomery that Miller created a new substantive rule, an approach that was 'in tension with the Court's retroactivity precedents that both pre-date and post-date Montgomery,' and the Court specifically pointed out that 'those retroactivity precedents—and not Montgomery—must guide the determination of whether rules other than Miller are substantive. 539 U.S. at —— n.4, 141 S. Ct. at 1317 n.4. More importantly, the Court pointed out no less than 11 times in its opinion that Miller requires only a discretionary sentencing process for juvenile offenders. As Justice Thomas noted in his opinion concurring in the judgment, the Court '[o]verrule[d] Montgomery in substance but not in name.' Jones, 539 U.S. at ——, 141 S. Ct. at 1327 (Thomas, J., concurring in the judgment)."

***18** Wynn, 354 So. 3d at 1020-22. On rehearing in Wynn, this Court also stated:

"The statement in our original opinion and our reference to Justice Thomas's opinion concurring in the judgment in Jones was not meant to suggest that Jones had overruled the holdings in Miller or Montgomery. Rather, it was simply an acknowledgment, as the Court in Jones acknowledged, that Montgomery's application of Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed. 2d 334 (1989), to reach the conclusion that Miller was a substantive rule for retroactivity purposes was 'in tension with' its other precedent applying Teague. Jones, 539 U.S. at —— n.4, 141 S. Ct. at 1317 n.4. Indeed, the Court in Jones, as we recognized, specifically noted that Montgomery's application of Teague was such an outlier that it could not properly be used to determine 'whether rules other than Miller are substantive.' Id. Jones did not overrule the holdings in Miller or Montgomery, and we did not—and do not—interpret it as doing so. Rather, Jones made it clear exactly what those holdings were: Miller held 'that a State may not impose a mandatory life-without-parole sentence on a murderer under 18,' 539 U.S. at ——, 141 S. Ct. at 1321, and ' "that a sentencer [must] follow a certain process—considering an offender's youth and attendant characteristics—before imposing" a life-without-parole sentence,' 539 U.S. at ——, 141 S. Ct. at 1316 (quoting Miller, 567 U.S. at 483, 132 S. Ct. 2455), and Montgomery held that 'the Miller rule was substantive for retroactivity purposes and therefore applied retroactively on collateral review.' 539 U.S. at ——, 141 S. Ct. at 1317.

"Second, this Court did not hold that there is no substantive limit under the Eighth Amendment to sentencing a juvenile capital offender to life imprisonment without the possibility of parole. Rather, we simply recognized that irreparable corruption is not, as Wynn asserts, the dispositive factor as to whether a life-without-parole sentence violates the Eighth Amendment. In holding that a sentencer need not make a factual finding, either explicitly or implicitly, that a juvenile is irreparably corrupt before imposing a sentence of life imprisonment without the possibility of parole, the Court in Jones specifically rejected the argument that Miller and Montgomery deemed irreparable corruption an 'eligibility criterion' for such a sentence, such as the lack of intellectual disability is an eligibility criterion for a sentence of death. 539 U.S. at ——, 141 S. Ct. at 1315. In other words, a juvenile capital offender does not have to be found to be irreparably corrupt for a sentence of life imprisonment without the possibility of parole to comply with Miller and Montgomery. Rather, such a sentence complies with Miller and Montgomery, the Jones Court held, if it 'was not mandatory and the trial

judge had discretion to impose a lesser punishment in light of [the juvenile's] youth.' Jones, 539 U.S. at ——, 141 S. Ct. at 1322.

"However, that does not mean that a sentence that complies with Miller and Montgomery does not violate the Eighth Amendment, which 'proscribes grossly disproportionate sentences.' Solem v. Helm, 463 U.S. 277, 288, 103 S. Ct. 3001, 77 L.Ed. 2d 637 (1983). Although the Court in Jones declined to address 'any as-applied Eighth Amendment claim of disproportionality regarding Jones's sentence' because that issue had not been raised, by holding that a sentencer did not have to find that a juvenile capital offender was irreparably corrupt before imposing a sentence of life imprisonment without the possibility of parole, the Court made it clear that irreparable corruption is not the determining factor of the constitutionality of a sentence. Jones, 539 U.S. at ——, 141 S. Ct. at 1322. Rather, as with any proportionality challenge to a sentence, a court faced with a proportionality challenge to a sentence of life imprisonment without the possibility of parole imposed on a juvenile capital offender must consider 'all the circumstances of the case to determine whether the sentence is unconstitutionally excessive,' Graham v. Florida, 560 U.S. 48, 59, 130 S. Ct. 2011, 176 L.Ed. 2d 825 (2010), because '[n]o single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment.' Solem, 463 U.S. at 290 n.17, 103 S. Ct. 3001."

***19** Wynn, 354 So. 3d at 1036-37 (opinion on reh'g).

Miller argues that "the evidence presented at the resentencing hearing overwhelmingly showed that this crime was one of transient immaturity and that [Miller] is capable of rehabilitation." (Miller's brief, p. 37.) Miller then reiterates some of the evidence he presented at the hearing:

— Testimony from Dr. Davis about the characteristics of a 14-year-old including that a 14-year-old is at the "very beginning" of the process of frontal-lobe development (R. 453) and that a young adolescent has the greatest capacity for change (R. 460-62);

— Testimony from Dr. Davis that Miller suffered from abuse and neglect as a young child, which impaired his development, making him less mature than the average 14-year-old (C. 770, R. 520-21, 541);

— Evidence indicating that Miller's father, David Miller, was an alcoholic and drug addict who physically abused Miller, his siblings, and his mother (C. 412-13);

— Evidence indicating that Miller's mother, Susan Miller, was an alcoholic and drug addict who never provided "even basic care" to Miller and his siblings (C. 415) and who used drugs and alcohol in front of and with her children (R. 192-96, 237-39);

— Evidence indicating that Miller began using drugs and alcohol at a young age and attempted suicide multiple times (C. 767-68, 774; R. 197-99);

— Testimony from Aubrey Goldstein that drug use was rampant and drugs were readily available to children in the Country Living Trailer Park where Miller lived (R. 195);

— Dr. Davis's opinion that Miller was less mature than the average 14-year-old and that his history made him more susceptible to addiction to drugs and alcohol (R. 520, 523, 541);

— Evidence indicating that Miller had used alcohol and taken Klonopin, methamphetamine, and alcohol on the day of the crime (Miller's brief, p. 42);

— The circuit court's statement that it did not think Miller went to Cannon's trailer at first with the intent to kill him (C. 273) and, Miller says, evidence indicating that Miller became violent only after Cannon "started choking" him (Miller's brief, p. 42 (citing Trial R. 984);

— Miller's "limited decision-making capacity in these circumstances due to his developmental status was also further compounded by his intoxication, lack of sleep, and the presence of [Smith]" (Miller's brief, p. 43);

— The "complete lack of any documented pattern of violence either before or after this offense" (Miller's brief, p. 43);

— Dr. Davis's opinion that since the crime, Miller's "development ... has been marked by a gradual but substantial growth in maturity, an absence of aggressive incidents, and a surprising degree of intellectual versatility. ... [Miller] appears to have developed past his

juvenile traits and liabilities, and it is clear that he is not what he initially appeared to be at fourteen" (C. 775);

— Testimony from Robertson that, while at the juvenile detention center, Miller became someone who earned special privileges by good behavior and encouraged others to comply with the rules (R. 256-63);

***20** — Testimony from former Warden Wise that, although Miller's prison record was not perfect, it did not show "anything of a violent nature or an immediate threat to safety and security" (R. 403);

— Prison records showing that Miller has had no disciplinaries for violent behavior and no disciplinaries since 2013 (C. 534-80);

— Miller's efforts to improve himself, including earning a GED and certificates in several courses (C. 1250-58);

— Evidence from supervisors and security personnel at the prison indicating that Miller is a "hard worker" who takes initiative to get tasks done and who is "kind-hearted" (R. 360, 363, 366, 369);

— Evidence indicating that Miller had been given positions of trust within the prison, including working in the maintenance department and the welding division and residing in the "honor dorm," reserved for a small number who have greater responsibilities and chances to participate in programs (R. 301, 360-62, 408-13); and

— Evidence indicating that Miller "has tried to give back to the community by speaking to young people about the dangers of the behavior he engaged in as a teenager" (Miller's brief, pp. 47-48 (citing C. 1245; R. 377-87)).

Miller asserts that "[t]he evidence clearly demonstrated that [he] is not beyond rehabilitation." (Miller's brief, p. 48.) Thus, he argues that, as applied to him, the sentence of life imprisonment without the possibility of parole is unconstitutionally disproportionate under the Eighth and Fourteenth Amendments to the United States Constitution, the Alabama Constitution, and Alabama law. (Miller's brief, p. 48.)

The circuit court thoroughly addressed this claim. The court first quoted Rule 26.8, Ala. R. Crim. P.:

" 'The sentence imposed in each case should call for the least restrictive sanction that is consistent with the protection of the public and the gravity of the crime. In determining the sentence, the court should evaluate the crime and its consequences, as well as the background and record of the defendant and give serious consideration to the goal of sentencing equality and the need to avoid unwarranted disparities.

" 'Judges should be sensitive to the impact their sentences have on all components of the criminal justice system and should consider alternatives to long-term institutional confinement or incarceration in cases involving offenders whom the court deems to pose no serious danger to society.' "

(C. 266.) The circuit court then stated:

"[T]he Miller decision requires that this court first determine what constitutionally permitted sentencing outcomes are available here. Thus, it must first decide if a life without possibility of parole sentence is unconstitutionally disproportionate in violation of the Eighth Amendment's prohibition against cruel and unusual sentences. If, using the analysis mandated by Henderson, this court concludes that such a sentence is unconstitutionally disproportionate, then the court's analysis is resolved because only one constitutionally acceptable sentence remains; life in prison with the possibility of parole. On the other hand, if, using the analysis mandated by Henderson, this court establishes that such a life without possibility of parole sentence is not unconstitutionally disproportionate, and, thus, may be imposed upon Mr. Miller without doing offense to the Eighth Amendment's prohibitions, then it must determine the appropriate sentence under Rule 26.8, where the inquiry becomes, 'What is the "least restrictive sanction that is consistent with the protection of the public and the gravity of the crime" ' and whether Mr. Miller poses 'no serious danger to society.' "

***21** (C. 266-67.)

Addressing Miller's claim that a sentence of life imprisonment without the possibility of parole would be unconstitutional as applied to him, the court found:

"On July 16, 2003, [Miller] committed a heinous act, worthy of the strongest possible condemnation in civilized

society. In both its nature as realized and the intention that birthed it, the murderous act of the defendant was, to adopt the State's characterization, 'predatory and depraved.' If [Miller] [had been] three and one-half years older when he raised a bat and beat a helpless man to the point of death and then coldly lit the fuse that ruthlessly extinguished his life one anguished, suffocated breath at a time, there can be little doubt that a jury of this state would have been entirely justified in imposing the ultimate penalty. If he had been eighteen when he filled the confused, frightened ears of his abandoned victim with the ghastly words 'I am God, I have come to take your life,' as he crushed the bat one last time into his defenseless victim's body—if he [had been] eighteen when he indifferently walked away, leaving his victim to die in a home engulfed in flame, as the victim filled his ears with the haunting words, 'Why are you doing this to me?,' a sentence of life without parole would have appeared most merciful. Most significantly to these proceedings, however, [Miller] was not yet eighteen when he deliberately undertook this course and thus the dilemma of what is the constitutionally acceptable response of the criminal justice system is presented and far less certain.

"In resolving the initial sentencing inquiry here, the court must consider the Mr. Miller's chronological age at the time of the offense and the hallmark features of youth, such as immaturity, impetuosity, and failure to appreciate risks and consequence. In this case, Mr. Miller was 14 years and 256 days old at the time of the offense. This court strongly considers this age and the presumed inherent deficits to decision-making, (1) in consideration of whether a life without parole sentence is constitutionally disproportionate to be applied to Mr. Miller in this particular case and (2) in mitigation of the 'least restrictive sanction that is consistent with the protection of the public and the gravity of the crime' and in analyzing whether Mr. Miller poses 'no serious danger to society.'

"On a related, overlapping factor, the court considers Mr. Miller's youth as a factor in mitigation because, if the presumed science is correct and the limitations on critical thinking and analysis are as impaired and undeveloped as stated generally for someone of that age by Dr. Davis, then there is diminished culpability.

"Further, this court has considered Mr. Miller's past exposure to violence, his use of drugs generally at that time, his mental health history, all in mitigation. These factors strongly work in mitigation of the sentence required.

"However, as to all of these factors the strength of the mitigation is lessened by the lack of evidence of any causal connection between these possible or even likely mental deficits and the choices and events that bring this matter back to this court. What may be scientifically true in a generic sense does not correlate to the crime here and the crime is the catalyst necessitating this resentencing.

***22** "This court is not sentencing Mr. Miller because Mr. Miller suffered some physical abuse at the hands of his father; even a cursory examination of capital caselaw or juvenile dependency caselaw yield to the inevitable conclusion that that which Mr. Miller suffered is on the lower end of the spectrum of that seen by too many victims of persistent abuse characterized by multiple medical interventions with long-standing or permanent injuries, scarring that they carry for the rest of their lives. [Miller] was not even the worst abused in his household; he had it better than [his brother] John. If Mr. Miller's physical abuse was 'horrific' to borrow his lawyer's adjective, then this court can only wonder, from the vast vocabulary in this English language, what word they would use to describe the abuse so prevalently discussed in the reported criminal cases.

"Mr. Miller's mental health history does appear derivative of extreme exposure to neglect but fortunately his suicide attempts were unsuccessful and hardly persistent, as is seen in the severely depressed, but this sentencing is not necessary because Mr. Miller suffered from a mental defect or disease. The record is abundantly clear that such was not the catalyst for those acts that brings this court to this occasion where Mr. Miller's future is at stake.

"Certainly, Mr. Miller's time in the Adamson home, in the juvenile detention facility and at the prison generally demonstrate the character traits of hard-work, initiative and intelligence that are essential to rehabilitation. But true rehabilitation must emanate from sincere remorse, a hitting bottom realization of the enormity of the wrong committed and of the general and great disorder brought to an ordered society's ongoing struggle to define itself by the best of us, not the worst of us. While this court has heard from many that [Miller] is 'remorseful,' it has not seen evidence of that in this court's close observation of [Miller's] demeanor during the resentencing hearing and, more specifically, during [Miller's] 'allocution' statement at the close of the hearing, have not seen that in this case. The remorseful stop looking out for themselves, throw themselves in humility

at the feet of the society they harmed and all the individuals they hurt. They stop speaking as though they deserve mercy or second chances; they know and show that they know that they do not.

"In short, this court finds that Mr. Miller has thrived in highly structured settings but that success, while commendable, is not evidence to give this court comfort that he would pursue a path of rehabilitation if free of constraints.

"Turning to aspects of Mr. Miller's case that ameliorate any mitigation that may arise from the Henderson factors, the court finds the following:

"1. Mr. Miller was the principal aggressor that brought upon the death of Mr. Cannon. Had he not made the decisions that night, Mr. Cannon would still be alive. Those decisions include:

"(a) The initial planning and scheming of the drinking game to lessen or eliminate Mr. Cannon's resistance to the plotted theft.

"(b) The continued beating with a bat of Mr. Cannon when he was helpless and posing no threat to [Miller].

"(c) The planning and execution of the arson to cover-up the crime, even though he knew that Mr. Cannon was alive and probably helpless to extricate himself from the fire.

"(d) The refusal to render aid to the victim once the fire was fully engaged and his refusing and interfering with Smith's remorseful efforts to save Mr. Cannon.

"2. The circumstances of the offense provide compelling evidence that Mr. Miller not only knew of the consequences of his choices but desired that they occurred. 'Cole, I am God, I've come to take your life' are some of the most chilling words this court has heard or read spoken by a real-life killer. And that killing intent continued when Mr. Miller returned to the trailer, heard Mr. Cannon fighting for his life in a trailer on fire, a fire set by Mr. Miller and Smith, and just walked away. This court is not convinced that [Miller], when he devised the plan to steal baseball cards and money, initially went to Mr. Cannon's trailer intending to cause his death, but once that murderous intent took hold, there was no impetuosity or recklessness or mere bad decision making. Mr. Miller's mind functioned perfectly well as it carried out his expressed intent to 'take [Mr. Cannon's] life' as though he was the Omnipotent. He showed cunning, not clumsy rash thinking, when he concocted his plan to cover up his crime in the most certain and fearful way possible: destruction by fire. And he presented a very sly, intelligent way of dealing with the police when he devised lie after lie, lies he continued to maintain when he downplayed the truth of his role in Mr. Cannon's death speaking to a group of young people at the expressed invite of a good-hearted soul.

***23** "These circumstances easily overcome any mitigation caused by the mere fact of his chronological age or his challenging upbringing or his suffering some physical and mental abuse.

"There is no evidence that his age lessened his ability to deal with police. Indeed, he demonstrated a sharp way of communicating with authorities on multiple occasions, beginning with absolute denial of his role and changing it to a mitigation of his role.

"Undergirded by the imprimatur of the United States Supreme court, [Miller] argues that his age and what is, per the evolving understanding in the field of adolescent neuroscience, a less-developed sense of restraint, coupled with his extremely challenging upbringing, mitigates the sentence, fair and just, due in the wake of his actions. He contends that the ultimate punishment of life in the penitentiary without any possibility of parole, essentially a death sentence of a different but no less definite type to that that may have applied if he had lived three and one-half years later, is unconstitutionally disproportionate.

"However, this was not a simple case of Mr. Miller acting immaturely or irresponsibly or impetuously or recklessly. These types of actions may indeed be transient, and often, if not always, are. They are functions of the unprepared, untutored, uninhibited mind meeting the unfortunate, unexpected and unprotected moment, where decisions are neither deliberate nor sober nor sound. Even adults in the chronological sense make such decisions, acting immaturely or irresponsibly or impetuously or recklessly. Immature, 'juvenile,' irresponsible criminal choices and actions are hardly the exclusive product of the minds of children.

"But as certainly as adults can act criminally with the immaturity and impetuosity of a child, so can children act criminally with the cold, cruel intent of a hardened adult. We would like to think otherwise, to envision our children as innocents, in need of our collective protection, vulnerable to the plots and schemes of evil men, not

the plotter, schemer or doer of evil. It is not merely disheartening, but disquieting, even frightening, to think that our children can be our threats. Yet, that is the reality of the world in which we live and, while some bemoan and blame a perceived breakdown of our social structures in the most recent years, years in which we have supposedly 'evolved our standards of decency,' the truth is that these harrowing realities have been our shared plight for decades, perhaps centuries.

"As the court observed concerning [Miller's] contentions regarding his upbringing, such could be made in numerous other cases, irrespective of the age of the offender. While a society that fails to fend off the injustices suffered by [Miller] may reap what it has sown by its failures, that society should not lose its ability to condemn in the strongest terms the contemptable, even though perhaps predictable, violent choices of those forgotten by its failures, even if the choosers are still children in the chronological sense.

"The sentencing outcome here is not easily derived, nor should it be. A violent, terrifyingly unnecessary death. A life of a 14-year-old boy in the balance. To speak of the enormity of the wrong—as a just notion of law must—and of the enormity of the loss of a child's life, thrown away in the dark hole of prison—as a civilized notion of law requires—in the same sentence, in the same pronouncement, one wonders if it can be credibly done.

***24** "[Miller] did not walk into the victim's trailer that night immune from suffering a life without parole sentence, no matter his choices or actions, though that is the natural inference arising from his contentions before the court. There is nothing about his particular actions that naturally derive from his age or his circumstances, save that the poverty from which he could not escape placed him in the time and place that provided the troubled backdrop of his vicious crime.

"BASED ON ALL OF THE FOREGOING and all law applicable to this case, and all facts as this court finds to exist by a preponderance of the credible evidence, this court first finds that a life without the possibility of parole sentence is not constitutionally disproportionate to the crime or his circumstances and may be imposed by this court. Further, applying all of the law and the mandates of the constitutions of the United States and the State, the statutes of this State and the Rules of Criminal Procedure, it is this court's reluctant but necessary conclusion that the only just sentence, after giving due to consideration to Mr. Miller's age at the time of the offense and all the limitations that his life circumstances may have created, is that he be sentenced to spend his life in the custody of the Alabama Department of Corrections, without the benefit of parole. Such a sentence is the 'least restrictive sanction that is consistent with the protection of the public and the gravity of the crime.' Further, based upon a preponderance of the evidence, this court cannot conclude that [Miller] poses no serious threat to society, if released."

(C. 267-78.)

This Court has held that the decision to sentence a juvenile to life imprisonment without the possibility of parole "'is ultimately a moral judgment.' " Boyd v. State, 306 So. 3d 907, 915 (Ala. Crim. App. 2019) (quoting Wilkerson v. State, 284 So. 3d 937, 955 (Ala. Crim. App. 2018), citing People v. Skinner, 502 Mich. 89, 117 n. 11, 917 N.W.2d 292, 305 n.11 (2018)). In Jones, the United States Supreme Court emphasized that sentencing courts have wide discretion in assigning weight to the facts and circumstances of each case:

"It is true that one sentencer may weigh the defendant's youth differently than another sentencer or an appellate court would, given the mix of all the facts and circumstances in a specific case. Some sentencers may decide that a defendant's youth supports a sentence less than life without parole. Other sentencers presented with the same facts might decide that life without parole remains appropriate despite the defendant's youth. But the key point remains that, in a case involving a murderer under 18, a sentencer cannot avoid considering the defendant's youth if the sentencer has discretion to consider that mitigating factor."

Jones, 539 U.S. at ——, 141 S. Ct. at 1319-20. In footnote 7 at the end of that paragraph, the Court emphasized that a potential violation of the Eighth Amendment could arise when a sentencing court expressly refuses as a matter of law to consider evidence of mitigating circumstances:

"This Court's death penalty cases recognize a potential Eighth Amendment claim if the sentencer expressly refuses as a matter of law to consider relevant mitigating circumstances. See Eddings v. Oklahoma, 455 U.S. 104, 114-115, 102 S. Ct. 869, 71 L.Ed. 2d 1 (1982). By analogy here, if a sentencer considering life without parole for a murderer who was under 18 expressly refuses as a matter of law to consider the defendant's youth (as opposed to, for

> example, deeming the defendant's youth to be outweighed by other factors or deeming the defendant's youth to be an insufficient reason to support a lesser sentence under the facts of the case), then the defendant might be able to raise an Eighth Amendment claim under the Court's precedents. In any event, we need not explore that possibility because the record here does not reflect that the sentencing judge refused as a matter of law to consider Jones's youth."

***25** 539 U.S. at —— n.7, 141 S. Ct. at 1320 n.7 (second emphasis added).

Miller has not shown that the circuit court abused its discretion in making the "moral judgment" to sentence Miller to life in prison without the possibility of parole. Miller has not shown that the circuit court abused its discretion in its application of the Henderson factors or that the court erred in its conclusion that a sentence of life imprisonment without the possibility of parole was not constitutionally disproportionate. And, as the above shows, the circuit court did not "expressly refuse[ ] as a matter of law to consider relevant mitigating circumstances." Jones, 539 U.S. at —— n.7, 141 S. Ct. at 1320 n.7. The circuit court considered the evidence Miller offered, but the court did not agree with Miller's characterization of the evidence or find the evidence persuasive in support of Miller's contention that he should be sentenced to life in prison with the possibility of parole. Although Miller disagrees with the circuit court, that disagreement does not show he is due relief. Jones, 539 U.S. —— n.7, 141 S. Ct. at 1320 n.7. See also Boyd, 306 So. 3d at 929 ("The circuit court was not required to agree with Boyd's characterization of the evidence, and Boyd has not demonstrated the circuit court abused its discretion in not doing so.").

IV. MILLER'S CLAIM THAT THE CIRCUIT COURT IMPROPERLY REQUIRED A "CAUSAL NEXUS" BETWEEN THE EVIDENCE HE OFFERED IN MITIGATION AND THE OFFENSE

Miller argues that the circuit "court imposed a requirement that [Miller's] youth and other mitigating circumstances have a causal connection to the offense in order to support a sentence of life with parole." (Miller's brief, p. 49.) He quotes this part of the court's order:

> "However, as to all of these factors the strength of the mitigation is lessened by the lack of evidence of any causal connection between these possible or even likely mental deficits and the choices and events that bring this matter back to this court. What may be scientifically true in a generic sense does not correlate to the crime here and the crime is the catalyst necessitating this resentencing."

(C. 269.) He also cites the circuit court's statements that it was "not sentencing Mr. Miller because Mr. Miller suffered some physical abuse at the hands of his father" (C. 270) and that Miller's mental-health history "was not the catalyst for [the crime]" (C. 270-71.) Miller argues that those statements show "the trial court's refusal to consider mitigating circumstances because [Miller] had not shown a causal connection between the mitigation and the offense." (Miller's brief, p. 51.)

The cases Miller cites in support of his argument in this section—decisions such as Tennard v. Dretke, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004), and Smith v. Texas, 543 U.S. 37, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004)—do not apply because in those cases, the trial courts refused to consider the evidence offered in mitigation. Cf. Woolf v. State, 220 So. 3d 338, 390-92 (Ala. Crim. App. 2014) (recognizing, in a capital case, that while a circuit court must consider all evidence the defendant offers as mitigating, the court need not find that evidence mitigating or assign to that evidence the weight the defendant thinks it should). Miller has not shown that the circuit court refused to consider—for any reason—any of the mitigating evidence he offered. The court considered Miller's age to be a mitigating circumstance. (C. 268.) The court also considered Dr. Davis's testimony summarizing scientific articles about juvenile brains and "diminished culpability." (C. 269.) The circuit court found mitigating several factors such as Miller's exposure to violence as a child, his use of drugs, and his mental-health history. (C. 269.)

***26** Although the circuit court considered all the evidence Miller offered as mitigating, the court did not have to assign that evidence the weight that Miller wanted. Jones, 539 U.S. at —— n.7, 141 S. Ct. at 1320 n.7; Boyd, 306 So. 3d at 929. The portions of the order that Miller cites above show that the circuit court assigned less weight to certain evidence Miller offered. Indeed, the circuit court assigned less weight to factors such as Miller's youth based on the court's finding that Miller was the "principal aggressor." (C. 272.) The court also noted that the crime was not impulsive

or the product of youthful impetuosity, and the court found particularly damning Miller's statements to Cannon, "I am God. I've come to take your life." (C. 272-73.)

Miller is due no relief on this claim.

V. CLAIM THAT MILLER'S SENTENCE DOES NOT COMPLY WITH MILLER, HENDERSON, OR STATE AND FEDERAL LAW

In this part of his brief, Miller challenges the circuit court's sentencing decision because, he says, it does not comply with Miller or accurately apply the Henderson factors. He asserts: "[I]n sentencing [Miller] to life without parole (C. 266-78), the sentencing court did not properly consider the Miller and Henderson factors as they apply in this case, rendered clearly erroneous findings of fact, and erroneously excluded relevant evidence from consideration. (Miller's brief, p. 53.) Many of Miller's arguments overlap with his arguments in other parts of his brief.

A.

Miller asserts that the circuit court found "that the crime negates [Miller's] youth" and "ignore[d] [Miller's] lack of maturity and emotional development." (Miller's brief, p. 54.) At root, Miller simply disagrees with the circuit court's weighing of the evidence. He continues to assert, for example, that the circuit court "failed to consider" evidence such as, he says, "undisputed evidence of [Miller's] lack of maturity and emotional development." (Miller's brief, p. 55.) That evidence includes testimony at the sentencing hearing from Berryman that Miller was "less mature" than other 14-year-olds (R. 328) and was very impulsive (R. 326) and similar testimony from Dr. Davis (R. 528). Miller also cites evidence from his trial from Dr. John Goff, who evaluated Miller at age 17 and testified that Miller seemed "younger than his stated age in terms of behavior and his physical appearance" and was "impulsive" (Trial R. 1151, 1188) and from a report from Dr. Brent Willis, who evaluated Miller at age 14, in which Dr. Willis stated that Miller had "serious problems with impulse control" (Miller's brief, p. 56 (quoting Record in CR-03-0915, C. 55).

As stated above, Miller has not shown that the circuit court refused to consider evidence. In its sentencing order, the court stated that it "strongly consider[ed]" Miller's "chronological age at the time of the offense and the hallmark features of youth, such as immaturity, impetuosity, and failure to appreciate risks and consequences." (C. 268.) But the circuit court did not assign the weight to that evidence that Miller believes it should have. Miller's disagreement with the circuit court's weighing of the evidence gives him no right to relief. Jones, supra; Boyd, supra.

B.

Miller challenges the circuit court's findings about "the circumstances of the offense" and that "Miller was the principal aggressor that brought upon the death of Mr. Cannon." (Miller's brief, p. 57 (citing C. 272-73).) Miller argues that the circuit court's findings were clearly erroneous.

Miller asserts that "there is no evidence in the record" to support the court's findings that Miller was responsible for the "initial planning and scheming of the drinking game" or for the "planning and execution of the arson to cover-up the crime." (Miller's brief, p. 57 (citing C. 272).) Without saying who planned it, Smith testified that he and Miller started playing a drinking game with Cannon where they pretended to drink while Cannon continued to drink. (C. 458.) Once Cannon passed out, Miller took Cannon's wallet and then took Smith to the bathroom and split the money with him. (C. 459.)

***27** When Miller tried to put the wallet back in Cannon's pocket, Cannon grabbed Miller by the throat. (C. 459-60.) Smith then struck Cannon with a baseball bat but then dropped the bat. (C. 460.) Miller then got on top of Cannon and repeatedly struck him with his fists while Cannon was telling Miller to stop. (C. 460.) Miller got the baseball bat "and started hitting him everywhere" while Cannon tried to crawl away. (C. 460.) Miller then put a sheet over Cannon's head and stated, "Cole, I am God, I've come to take your life." (C. 461.) This testimony directly supports the circuit court's finding that Miller was the "principal aggressor."

As for the circuit court's finding that Miller was responsible for the "planning and execution of the arson to cover-up the crime," Smith testified that Miller "lit the couch and said we had to do it to cover up the evidence." (C. 465.) Although Smith testified that he started a fire in the back bedroom (C. 463), given the totality of the evidence about Miller's behavior, the circuit court did not clearly err in finding that Miller was responsible for the planning and execution of the

plan of the arson and that Miller came up with the "drinking game" to incapacitate Cannon.

The rest of Miller's arguments in the part of his brief are merely disagreements with the circuit court's weighing of the evidence. (Miller's brief, pp. 58-60.) Miller has not shown that the circuit court erred. See Jones, 539 U.S. —— n. 7, 141 S.Ct. 1307; Boyd, 306 So. 3d at 929.

C.

Miller asserts that "[t]he sentencing court's finding that [Miller] has not shown rehabilitation and remorse is clearly erroneous." (Miller's brief, p. 61.) In Part I, we addressed many arguments Miller reiterates here, and we do not restate that discussion here.

Miller asserts that the circuit court "imposed an impossible standard of proof concerning a child's potential for rehabilitation," because, although the circuit court acknowledged that Miller had "thrived in highly structured settings," it was not convinced that he would do so "if free of constraints." (Miller's brief, p. 62 (quoting C. 271-72.) Miller writes that, because he has been "incarcerated since he was 14, [he] has not had the ability to be 'free of constraints' since the offense and could never meet the court's standard." (Miller's brief, p. 62.) Miller overstates the circuit court's finding—it did not "impose an impossible standard" that Miller could meet only by offering evidence of his behavior while free of constraints. Instead, the circuit court made a judgment based on the evidence before it, and it was not convinced that Miller would "thrive[ ] ... if free of constraints." (C. 272.) The record, which Miller presents in a positive light, includes evidence indicating that Miller, while in foster care, "grabbed [Tiffani Aldridge] by the throat and attempted to choke her" and then wrote a note stating that he wanted to kill her in a painful way (R. 241) and that he lied and blamed his misbehavior on other people (R. 243). As noted above, Warden Wise testified that Miller did not have disciplinaries for violence, but he did have repeated violations. (R. 404, 414.) The circuit court did not have to accept Miller's rendition of the evidence, and the record supports its findings. Miller is due no relief.

D.

Miller asserts, echoing his argument addressed in Part IV of this opinion, that the circuit court erred in "finding that there was no causal nexus between [Miller's] youth and background and the offense." (Miller's brief, p. 63.) Miller asserts that "there was ample evidence that the offense was causally related to [Miller's] youth and that this offense would not have occurred but for the environment [Miller] was in at the time and which, because of his age, he could not escape." (Miller's brief, pp. 63-64.) Among other things, Miller cites statements from Dr. Davis's 2017 evaluation of Miller that, when Miller killed Cannon, "[t]he supervision of his single mother was at its lowest point, the household was a chaos of people and events, and [Miller] was using multiple drugs heavily and simultaneously," all of which, Dr. Davis opined, "culminated in the context of that particular night and situation to produce an act of remarkably poor judgment and terrible impulse control." (C. 773, 775.)

***28** The record shows that the circuit court considered Miller's youth and background mitigating but did not assign that evidence the weight Miller contends it should have. Miller has not shown that he is due relief.

E.

Miller asserts that the circuit court clearly erred in its "findings regarding [Miller's] ability to deal with police and assist his attorney."[10] (Miller's brief, p. 65.) The circuit court found that "[t]here is no evidence his age lessened his ability to deal with police" and that he dealt with them in a "sharp," "very sly, intelligent way" because he told "lie after lie." (C. 273-74.) Miller contends, however, that his lying did not reflect "cunning" but was "consistent with his young age and background" including evidence from Miller's sister that their parents taught them "to lie to authorities." (Miller's brief, p. 66 (quoting R. 165).) Among other things, Miller cites an opinion from Dr. Goff that he did not think Miller "knew about his right to remain silent in the context of an interrogation." (Trial R. 1166.) Miller also asserts that his "inability to deal with police and with counsel is in stark contrast to [Smith] who was able to secure a plea deal and a life with parole sentence." (Miller's brief, p. 67.)

The circuit court had the discretion to reject Miller's rendition of the evidence, and the record supports the circuit court's findings. Miller is due no relief.

F.

Miller concludes this section by asserting that "[a]ny credible assessment of the Miller and Henderson factors in this case establishes that [he] is not one of those rare 'irreparable' offenders, and therefore his 'hope for some years of life outside prison walls must be restored.' " (Miller's brief, pp. 67-68 (quoting Montgomery, 577 U.S. at 213, 136 S.Ct. 718).) We disagree. The circuit court did not abuse its discretion in its application of Miller and Henderson.

VI. MILLER'S CLAIM THAT HIS SENTENCE IS "CRUEL AND UNUSUAL"

Miller asserts that his sentence violates the Eighth Amendment and state and federal law. He begins this part of his brief by asserting that he "is one of only three 14-year-olds nationwide who have been condemned to die in prison since the Supreme Court's decision in Miller." (Miller's brief, p. 68.) He reiterates that the United States Supreme Court has often recognized that there are "significant differences between children and adults." (Miller's brief, p. 69.) Miller asserts that the Constitution categorically prohibits a life-imprisonment-without-thepossibility-of-parole sentence for an offender who committed his or her crime as a 14-year-old. (Miller's brief, pp. 71-72.) He asserts that "39 states and the District of Columbia have rejected the practice of sentencing 14-year-olds to life without parole." (Miller's brief, p. 72.) And he asserts "that sentencing 14-year-olds to life without parole violates 'our society's evolving standards of decency.' " (Miller's brief, p. 73 (quoting Roper, 543 U.S. at 563, 125 S.Ct. 1183).)

Miller's claim lacks merit. Jones reiterates what the Supreme Court said in Miller's own case—the Constitution does not categorically bar sentencing a juvenile to life without the possibility of parole:

> ***29** "To be sure, Miller also cited Roper and Graham. 567 U.S. at 471-475, 132 S. Ct. 2455. Roper barred capital punishment for offenders under 18. And Graham barred life without parole for offenders under 18 who committed non-homicide offenses. But Miller did not cite those cases to require a finding of permanent incorrigibility or to impose a categorical bar against life without parole for murderers under 18. We know that because Miller said so: 'Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in Roper or Graham.' 567 U.S. at 483, 132 S. Ct. 2455."

Jones, 539 U.S. at ——, 141 S. Ct. at 1316 (emphasis added).

The Alabama Legislature has authorized the sentence that the circuit court imposed on Miller. § 13A-5-43(e), Ala. Code 1975. See Boyd, 306 So. 3d at 916. And the Alabama Supreme Court and this Court have repeatedly affirmed judgments in which judges used the process like the circuit court used in Miller's case. See, e.g., Henderson, 144 So. 3d 1262; Wynn, 354 So. 3d 1007; Boyd, 306 So. 3d 907; Thrasher v. State, 295 So. 3d 118 (Ala. Crim. App. 2019); and Wilkerson, 284 So. 3d 937.

Miller has no right to relief on this claim.

VII. MILLER'S CLAIM THAT HIS SENTENCE IS DISPROPORTIONATE WHEN COMPARED TO OTHER CASES

Miller contends that his "life-without-parole sentence is disproportionate when compared to sentences imposed in other similar cases both in Alabama and across the country." (Miller's brief, p. 74.) He cites examples from Alabama and from other jurisdictions. (Miller's brief, pp. 74-76.) But many other resentencing procedures have led to life-imprisonment-without-parole sentences for juvenile offenders. See, e.g., Wynn, 354 So. 3d 1007; Boyd, 306 So. 3d 907; Thrasher, 295 So. 3d 118; and Wilkerson, 284 So. 3d 937. As the Supreme Court recognized in Jones, "Some sentencers may decide that a defendant's youth supports a sentence less than life without parole. Other sentencers presented with the same facts might decide that life without parole remains appropriate despite the defendant's youth." 539 U.S. at ——, 141 S. Ct. at 1319.

We have reviewed Miller's challenge to his sentence, and it lacks merit. Miller's sentence is not disproportionate when compared to other cases.

CONCLUSION

The judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Kellum, McCool, * and Cole, JJ., concur.

All Citations

--- So.3d ----, 2023 WL 5315181

Footnotes

1 "Trial C." refers to the clerk's record in Miller's direct appeal of his conviction and sentence; "Trial R." refers to the reporter's transcript in the direct appeal. See Rule 28(g), Ala. R. App. P. See also Hull v. State, 607 So. 2d 369, 371 n.1 (Ala. Crim. App. 1992) (noting that this Court may take judicial notice of its own records).

2 When Miller committed the acts that led to his conviction, § 13A-5-39(1), Ala. Code 1975, defined a "capital offense" as "[a]n offense for which a defendant shall be punished by a sentence of death or life imprisonment without parole according to the provision of this article." That statute was amended by Act No. 2016-360, Ala. Acts 2016, effective May 11, 2016, to define a "capital offense" as:

> "[a]n offense for which a defendant shall be punished by a sentence of death or life imprisonment without parole, or in the case of a defendant who establishes that he or she was under the age of 18 years at the time of the capital offense, life imprisonment, or life imprisonment without parole, according to the provisions of this article."

(Emphasis added.)

3 In 2003, § 13A-6-2(c), Ala. Code 1975, provided:

> "Murder is a Class A felony; provided, that the punishment for murder or any offense committed under aggravating circumstances, as provided by Article 2 of Chapter 5 of this title, is death or life imprisonment without parole, which punishment shall be determined and fixed as provided by Article 2 of Chapter 5 of this title or any amendments thereto."

Section 13A-6-2(c) was amended effective May 11, 2016. As amended, that section provides:

> "Murder is a Class A felony; provided, that the punishment for murder or any offense committed under aggravated circumstances by a person 18 years of age or older, as provided by Article 2 of Chapter 5 of this title, is death or life imprisonment without parole, which punishment shall be determined and fixed as provided by Article 2 of Chapter 5 of this title or any amendments thereto. The punishment for murder

or any offense committed under aggravated circumstances by a person under the age of 18 years, as provided by Article 2 of Chapter 5, is either life imprisonment without parole, or life, which punishment shall be determined and fixed as provided by Article 2 of Chapter 5 of this title or any amendments thereto and the applicable Alabama Rules of Criminal Procedure.

"If the defendant is sentenced to life on a capital offense, the defendant must serve a minimum of 30 years, day for day, prior to first consideration of parole."

4 Christopher Marlowe, The Tragical History of Doctor Faustus (1616) ("Was this the face that lauch'd a thousand ships").

5 The circuit court, describing the Court's decisions as creating an "ambiguous cloud," stated:

"Following Miller [v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)], there arose the predictable plethora of state court decisions interpreting and applying the holdings and implication of Miller, trying to understand the procedural and substantive obligations constitutionally required in sentencing juvenile homicide offenders. The number of state court resentencings in view of Miller dramatically increased after the Supreme Court issued Montgomery v. Louisiana, 577 U.S. 190 [136 S.Ct. 718, 193 L.Ed.2d 599] (2016) ....

"Unfortunately, from the sentencers' perspectives, some of [the] language employed by the Court in Montgomery to explain how Miller announced a substantive change in the law (thereby justifying retroactive application), led to uncertainties concerning the questions that must be answered on resentencing following Miller."

(C. 229-30.)

6 The circuit court found this testimony "extremely incredible (i.e., as in lacking credibility)." (C. 245.) The court noted: "They both accepted the truth that it happened but repeatedly confessed no memory of it." (C. 245.)

7 Before the court pronounced sentence, Miller stated:

"Your dad Cole Cannon didn't deserve what happened to him. Your brother and father and husband didn't deserve to be murdered. You have a wonderful looking family, strong [b]ond. This whole case, this whole ordeal is not fair to any one of you. I'm sorry for taking a huge part of your family. I'm sorry for putting you all through this. But just saying that even for me isn't enough. Someone once said go and preach the gospel and necessary use words. I want [to] be more, I want to do more than just ... apologize[;] to be truly sorry you have to make amends. And I want to live my apology out through my actions. Hopefully out of all of this somehow we can break the chain of pain and hatred and I can make amends to the family. And I am sorry once again for stealing that joy from your lives."

(R. 605-06.)

8 Judge Cole testified at the hearing about inviting Miller to speak to high school students in Macon County. (R. 377.) Cole testified that, based on "his body language, his tone and just his interaction with the kids, I would

definitely say that I felt like he was remorseful." (R. 381.) Cole also testified, however, that Miller described the crime as involving an "altercation," that Miller said he and Smith burned the trailer only after they thought Cannon was dead, and that Miller told the assembly that "he never intended for anybody to die." (R. 380, 388.)

9 In his reply brief, Miller cites the circuit court's comments during its hearing pronouncing the sentence:

> "Ms. Cheatham, I want to thank you and your sister and your brother for your victim impact statements that I believe were legally authorized .... As I will relate in a moment, I have gone over your testimony and everybody's testimony multiple times."

(Miller's reply brief, pp. 21-23 (citing R. 617-18).) Miller also cites the circuit court's order referencing Miller's "evil" character and the court's statements that "our children can be our threats." (Miller's brief, p. 24 (citing C. 275).) Miller asserts that these statements "echo" Cheatham's statements about "evil" coming in the form of a 14-year-old. (Miller's reply brief, p. 23.) Miller cites R. 131 and R. 133 in support of this assertion. (Miller's reply brief, p. 23; Miller's brief, p. 30.) At R. 131, Cheatham testified about Miller's counsel, who Cheatham described as engaging in "propaganda, lies, ... unethical practices," and "[v]ictim blaming," and taking "advantage of liberal justices who entertain them." At R. 133, Cheatham testified that "[e]vil can come in the form of a fourteen year old as it clearly has here." (R. 133.)

Miller's argument is unpersuasive. First, as noted, the circuit court expressly disavowed any reliance on the testimony about which Miller complained. Cf. McWilliams, supra. Second, the circuit court's use of "evil" to describe Miller's or his crime is not so unique that the circuit court necessarily derived it from the challenged victim-impact evidence.

10 The circuit court did not make a specific finding about Miller's ability to deal with his attorney.

* Although Judge McCool did not attend oral argument in this case, he has listened to an audio recording of that oral argument.

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278 N.C.App. 148
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.
Court of Appeals of North Carolina.

STATE of North Carolina
v.
Tameika Rose DOUGLAS

No. COA20-214
|
Filed June 15, 2021

Appeal by defendant from judgment entered 30 August 2019 by Judge James F. Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 11 May 2021. Cumberland County, No. 99 CRS 1543

Attorneys and Law Firms

Joshua H. Stein, Attorney General, by Assistant Attorney General Robert C. Ennis, for the State.

Glenn Gerding, Appellate Defender, by Assistant Appellant Defender Amanda S. Hitchcock, for defendant.

Opinion

ARROWOOD, Judge.

***1** ¶ 1 Tameika Rose Douglas ("defendant") appeals from judgment entered 30 August 2019 resentencing defendant to life imprisonment without parole ("LWOP") for two first-degree murder convictions. For the following reasons, we vacate and remand.

I. Background [1]

¶ 2 Defendant's convictions stem from two separate gang-initiated criminal episodes during the night of 16 August 1998 and early morning hours of 17 August 1998. Defendant was one of nine members of the Crips gang who undertook a number of "missions," or criminal acts, during the night of 16-17 August 1998, in Fayetteville, North Carolina. In addition to defendant, the gang members included gang leader or "queen" Christina Walters ("Walters"), Ione Black ("Black"), Francisco Edgar Tirado ("Tirado"), Eric Queen ("Queen"), Carlos Frink ("Frink"), John Juarbe ("Juarbe"), Carlos Nevills ("Nevills"), and Darryl Tucker ("Tucker"). These individuals belonged to different "sets," or subgroups, of the Crips gang.

¶ 3 On 16 August 1998, the gang members, including defendant, gathered at Walters' residence to prepare for the evening's missions. Defendant, Walters, and an unidentified male drove to the local Wal-Mart to steal toiletries and clothing and purchase cartridges. Using fingernail polish from Walters' bedroom, Tirado painted the tips of the bullets blue, the color identified with the Crips gang.

¶ 4 After the group returned from Wal-Mart, Walters assigned a mission to defendant, Black, and Nevills, directing them to find a victim to rob, steal the victim's car, put the victim in the trunk of the car, then return to Walters' residence within an hour and a half. Walters and an unidentified male drove defendant, Black, and Nevills to a location, dropped them off, and provided Nevills with a gun.

¶ 5 Defendant, Black, and Nevills walked around looking for a car to steal, and at about 12:30 a.m., they spotted Debra Cheeseborough ("Ms. Cheeseborough") closing and locking the door to the Bojangles restaurant where she worked as a manager. Defendant and her crew abducted Ms. Cheeseborough at gunpoint and forced her into the back seat of her car. On the way back to Walters' residence, the gang members robbed Ms. Cheeseborough of her jewelry and money, and then remembering their instructions, stopped and forced her into the trunk. When they reached Walters' trailer, everyone gathered around the car, arguing over who would shoot Ms. Cheeseborough. Thereafter, defendant, Walters, Tirado, Tucker, and Queen drove Ms. Cheeseborough's car to Smith Lake, a location on the Fort Bragg military base. Ms. Cheeseborough was removed from the trunk, and defendant took from Ms. Cheeseborough a cross that she was wearing around her neck. Walters then pointed a handgun at her and pulled the trigger. When the pistol jammed, Walters recocked it and fired a bullet into Ms. Cheeseborough's right side, knocking her to the ground on her stomach. As she lay there, she heard a male say "[s]hoot her in the head." Walters fired another shot that passed through Ms. Cheeseborough's glasses, grazed her eyelid, and hit her in the thumb. Walters

fired additional shots into Ms. Cheeseborough's back, side, right leg, and chest. Ms. Cheeseborough feigned death and the gang members drove away. The next morning, a passerby found Ms. Cheeseborough. She was taken to a hospital and treated for multiple gunshot wounds. Ms. Cheeseborough ultimately survived.

***2** ¶ 6 After the group left Ms. Cheeseborough for dead, they returned to Walters' trailer, where the rest of the gang remained congregated. Walters then ordered a second "mission" to find another victim to kidnap, place in the trunk of his or her car, and bring the victim and vehicle back to the trailer. Defendant, Queen, Walters, and several others drove Ms. Cheeseborough's car to hunt for another victim. They eventually targeted a Pontiac Grand Prix driven by Susan Moore ("Ms. Moore") in which Tracy Lambert ("Ms. Lambert") was a passenger. After following the Grand Prix for some distance, Queen was able to trap it at the end of a dead-end road. Walters handed a gun to Tucker and someone in the car told him to "go ahead." Queen, Walters, and Frink then drove away in Ms. Cheeseborough's car after Queen directed defendant, Black, and Tucker to return to Walters' trailer in forty-five minutes. Defendant and Tucker forced Ms. Moore and Ms. Lambert into Ms. Moore's trunk at gunpoint, and then defendant, Black, and Tucker drove Ms. Moore's car to Walters' trailer. At one point during the drive, Tucker stopped the car so that defendant could open the trunk and rob Ms. Moore and Ms. Lambert of their jewelries.

¶ 7 Upon the group's arrival at Walters' trailer, the entire gang surrounded the car. While the gang divided Ms. Moore's and Ms. Lambert's money and jewelry and burned their purses and identifications, they discussed who would kill the women. On instructions from Walters, the gang members, including defendant, then drove Ms. Cheeseborough's and Ms. Moore's cars to a location in Linden, North Carolina. Ms. Moore and Ms. Lambert were forced out of the trunk of the Grand Prix. Both were pleading for mercy. Queen told Ms. Lambert to shut up, then shot her in the head. As Ms. Lambert fell, Queen walked back to the car and stood next to Tirado. When Tirado held a large knife to Ms. Moore's throat, Ms. Moore begged him not to cut her and to shoot her instead. In response, Tirado shot Ms. Moore in the back of the head. Both Ms. Lambert and Ms. Moore died of their wounds.

¶ 8 The gang members, including defendant, returned to Walters' trailer in Ms. Cheeseborough's and Ms. Moore's cars, and then split up. Defendant and six other gang members fled to Myrtle Beach, South Carolina, where they were later arrested in a motel room rented by Walters. Defendant was fifteen years of age at the time of the crimes committed in August 1998.

¶ 9 In January 1999, defendant was indicted in two separate cases stemming from the crimes discussed above. In Case No. 99 CRS 1543, defendant was charged with two counts of first-degree murder, two counts of first-degree kidnapping, two counts of robbery with a dangerous weapon, one count of conspiracy to commit first-degree murder, one count of conspiracy to commit first-degree kidnapping, and one count of conspiracy to commit robbery with a dangerous weapon, all involving the crimes committed against victims Ms. Moore and Ms. Lambert on 17 August 1998. On 22 February 1999, in Case No. 99 CRS 2708, defendant was charged with attempted first-degree murder, conspiracy to commit first-degree murder, assault with a deadly weapon with intent to kill inflicting serious bodily injury, first-degree kidnapping, and robbery with a dangerous weapon for crimes committed against Ms. Cheeseborough on 17 August 1998.

¶ 10 On 7 September 2000, defendant pled guilty to all charges. Defendant did not have a plea agreement with the State. However, the plea transcript noted that the trial court would consolidate all counts in both case files for sentencing on the condition that defendant provide truthful testimony in any proceedings requested by the State. Defendant received one consolidated sentence of LWOP.

¶ 11 In May 2011, defendant filed a motion for appropriate relief claiming that her sentence violated the United States and North Carolina Constitutions. On 11 July 2012, the motion was granted, awarding defendant a *de novo* resentencing hearing under *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012) (holding that mandatory life imprisonment without parole for persons under the age of eighteen at the time of their crimes violates the Eighth Amendment of the United States Constitution). After the resentencing hearing in August 2019, the trial court again sentenced defendant to LWOP.[2] Defendant gave oral notice of appeal at the close of the hearing. On 16 March 2020, the trial court entered a written order memorializing its findings of fact and conclusions of law supporting its LWOP sentence.

***3** ¶ 12 Defendant's appeal is properly before this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444.

II. Discussion

¶ 13 Defendant argues that the trial court erred by resentencing her to LWOP for crimes committed when she was fifteen years of age by failing to make adequate findings to justify the sentence. Defendant also contends that her sentence is unconstitutional and therefore that this Court should vacate her LWOP sentence and impose a sentence of life with parole.

¶ 14 The State concedes that the trial court failed to make adequate findings to support defendant's LWOP sentence. The State posits that this "case should be remanded to the trial court for an order containing adequate findings to support its sentencing decision." However, under the circumstances of this case, the State maintains that a sentence of LWOP is not unconstitutional and that this Court should remand to the trial court for the entry of an order containing adequate findings supporting the LWOP sentence.

¶ 15 On appeal of a sentence imposed on a juvenile convicted of first-degree murder, we review the trial court's findings of fact to determine if they are supported by competent evidence and, if so, such findings are binding on appeal. *State v. Ames*, 268 N.C. App. 213, 218, 836 S.E.2d 296, 300 (2019) (citation omitted). "The trial court's weighing of mitigating factors to determine the appropriate length of the sentence is reviewed for an abuse of discretion." *State v. Sims*, 260 N.C. App. 665, 671, 818 S.E.2d 401, 406 (2018) (citation omitted).

¶ 16 For juveniles convicted of premeditated and deliberate first-degree murder, "the court shall conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole, as set forth in G.S. 14-17, or a lesser sentence of life imprisonment with parole." N.C. Gen. Stat. § 15A-1340.19B(a)(2) (2019). At such a hearing, the defendant may submit any mitigating factor or circumstance to the trial court. *See* N.C. Gen. Stat. § 15A-1340.19B(c)(1)-(9) (enumerating non-exhaustive list of mitigating factors). The trial court "shall consider any mitigating factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of [LWOP]." N.C. Gen. Stat. § 15A-1340.19C(a) (2019). The trial court must then enter a sentencing order that "include[s] findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate to include in the order." *Id.* The sentencing court must "expressly state the evidence supporting or opposing those mitigating factors ...." *State v. Santillan*, 259 N.C. App. 394, 403, 815 S.E.2d 690, 696 (2018).

¶ 17 We agree with the parties that the trial court's findings are insufficient to warrant the imposition of defendant's LWOP sentence. The trial court failed to make findings addressing the presence or absence of each factor set out in N.C. Gen. Stat. § 15A-1340.19B(c) and also failed to delineate evidence supporting or opposing those mitigating factors. Moreover, the trial court failed to make ultimate findings on the absence or presence of said factors and assess evidence related to the same. Indeed, during the resentencing hearing, the prosecutor expressed concerns about resentencing defendant to LWOP.

***4** ¶ 18 We therefore vacate defendant's consolidated LWOP sentence and remand for a new sentencing hearing. *See State v. May*, 255 N.C. App. 119, 124, 804 S.E.2d 584, 587 (2017) (holding that trial court erred by entering judgment sentencing defendant to LWOP without making the required statutory findings and thus vacating and remanding for a new sentencing hearing); *see also State v. Antone*, 240 N.C. App. 408, 412, 770 S.E.2d 128, 131 (2015) (holding same). On remand, the trial court shall resentence defendant per the statutory obligations set out in N.C. Gen. Stat. § 15A-1340.19A *et seq.*, and pursuant to the standards set out in applicable case law. *See, e.g.*, *Miller*, 567 U.S. at 460, 183 L. Ed. 2d at 407; *State v. James*, 371 N.C. 77, 813 S.E.2d 195 (2018); *Ames*, 268 N.C. App. at 213, 836 S.E.2d at 296.

¶ 19 Defendant also challenges the constitutionality of the LWOP sentence. Because we vacate defendant's LWOP sentence on the grounds of insufficient findings of fact, we need not address defendant's as-applied challenge, which may be mooted based on the trial court's new findings or the new sentence imposed. *See Santillan*, 259 N.C. App. at 403, 815 S.E.2d at 696; *see also State v. Goodman*, 298 N.C. 1, 20, 257 S.E.2d 569, 582 (1979) (citations omitted) ("In accord with a well-established precept of appellate review, this court refrains from deciding constitutional questions when there is an alternative basis upon which a case may properly be decided.").

¶ 20 In addition, we decline the State's invitation to essentially affirm defendant's LWOP sentence and order the trial court to generate findings (which may or may not exist) to justify the sentence. Likewise, we decline defendant's request to impose a sentence of life with the possibility of parole. As we stated in *Ames* under similar circumstances, "sentencing is a task for the trial court." *Ames*, 268 N.C. App. at 227, 836 S.E.2d at 305 (citation omitted); *see also* *State v. Westall*, 116 N.C. App. 534, 551, 449 S.E.2d 24, 34 (1994) (citation omitted) ("It is not the role of an appellate court to substitute its judgment for that of the sentencing judge as to the appropriate length of the sentence."). Given the errors committed below, the appropriate remedy is to remand this matter to the superior court to conduct a new sentencing hearing. *See* *Ames*, 268 N.C. App. at 228, 836 S.E.2d at 306 (vacating LWOP sentence and remanding for resentencing under similar circumstances).

III. Conclusion

¶ 21 For the foregoing reasons, we vacate defendant's sentence of life without parole and remand for a new sentencing hearing with respect to her first-degree murder convictions.

VACATED AND REMANDED FOR RESENTENCING.

Report per Rule 30(e).

Judges COLLINS and GORE concur.

All Citations

278 N.C.App. 148, 2021-NCCOA-287, 858 S.E.2d 628 (Table), 2021 WL 2425629

Footnotes

1 Pursuant to N.C. Gen. Stat. § 7A-27(a)(1), Francisco Edgar Tirado and Eric Devon Queen, both of whom were members of the same gang as defendant and present at the times of the events giving rise to defendant's convictions, jointly appealed their convictions for first-degree murder and the resulting judgments imposing the sentence of death, which were entered 11 April 2000. Our Supreme Court allowed that appeal to bypass the Court of Appeals and rendered a decision in the matter on 13 August 2004. *See* *State v. Tirado*, 358 N.C. 551, 599 S.E.2d 515 (2004). While the issues raised in the instant appeal are different than those raised in Tirado and Queen's earlier appeal, the facts underlying the appeals are nearly identical. Therefore, we will recite many of the same facts and procedural events discussed by the Supreme Court in *State v. Tirado*.

2 Defendant and Tirado were resentenced together at the hearing in August 2019.

278 N.C.App. 149
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.
Court of Appeals of North Carolina.

STATE of North Carolina
v.
Francisco Edgar TIRADO

No. COA20-213
|
Filed June 15, 2021

Appeal by defendant from judgments entered 30 August 2019 by Judge James F. Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 11 May 2021. Cumberland County, No. 98 CRS 34831

Attorneys and Law Firms

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Law Office of Kellie Mannette, PLLC, by Kellie Mannette, for defendant.

Opinion

ARROWOOD, Judge.

***1** ¶ 1 Francisco Edgar Tirado ("defendant") appeals from judgments entered 30 August 2019 resentencing defendant to two consecutive life imprisonment without parole ("LWOP") sentences for two first-degree murder convictions. For the following reasons, we affirm.

I. Background [1]

¶ 2 Defendant's convictions stem from two separate gang-initiated criminal episodes during the night of 16 August 1998 and early morning hours of 17 August 1998. Defendant was one of nine members of the Crips gang who undertook a number of "missions," or criminal acts, during the night of 16-17 August 1998, in Fayetteville, North Carolina. In addition to defendant, the gang members included gang leader or "queen" Christina Walters ("Walters"), Ione Black ("Black"), Tameika Rose Douglas ("Douglas"), Eric Queen ("Queen"), Carlos Frink ("Frink"), John Juarbe ("Juarbe"), Carlos Nevills ("Nevills"), and Darryl Tucker ("Tucker"). These individuals belonged to different "sets," or subgroups, of the Crips gang.

¶ 3 On 16 August 1998, the gang members, including defendant, gathered at Walters' residence to prepare for the evening's missions. Thereafter, Walters, Douglas, and an unidentified male drove to the local Wal-Mart to steal toiletries and clothing and to purchase cartridges. The unidentified male returned alone to the trailer with a box of cartridges. Using fingernail polish from Walters' bedroom, defendant painted the tips of the bullets blue, the color identified with the Crips gang. Meanwhile, Queen directed Black and Nevills to return to Wal-Mart and retrieve Walters and Douglas.

¶ 4 After the group returned from Wal-Mart, Walters assigned a mission to Douglas, Black, and Nevills, directing them to find a victim to rob, steal the victim's car, put the victim in the trunk of the car, then return to Walters' residence within an hour and a half. After providing Nevills with a gun, Walters and the unidentified male drove away. Douglas, Black, and Nevills walked around looking for a car to steal, and at about 12:30 a.m., they spotted Debra Cheeseborough ("Ms. Cheeseborough") closing and locking the door to a Bojangles restaurant where she worked as a manager. They abducted Ms. Cheeseborough at gunpoint and forced her into the back seat of her car.

2** ¶ 5 On the way back to Walters' residence, the gang members robbed Ms. Cheeseborough of her jewelry and money, and then remembering their instructions, stopped and forced her into the trunk. When they reached Walters' trailer, everyone gathered around the car, arguing over who would shoot Ms. Cheeseborough. While defendant stated, "I'll shoot the b*," Queen, Walters, Douglas, and Frink drove away in Ms. Cheeseborough's car. *State v. Tirado*, 358 N.C. 551, 560, 599 S.E.2d 515, 523 (2004). The rest of the gang remained at Walters' trailer, where defendant mumbled several times, "Damn, they should have let me go." *Id.* at 561, 599 S.E.2d at 523.

¶ 6 Queen drove Ms. Cheeseborough's car to Smith Lake, a location on the Fort Bragg military base. Ms. Cheeseborough was removed from the trunk, and Douglas took from Ms. Cheeseborough a cross that she was wearing around her neck. Walters then pointed a handgun at her and pulled the trigger. When the pistol jammed, Walters recocked it and fired a bullet into Ms. Cheeseborough's right side, knocking her to the ground on her stomach. As she lay there, Walters fired another shot that passed through Ms. Cheeseborough's glasses, grazed her eyelid, and hit her in the thumb. Walters fired additional shots into Ms. Cheeseborough's back, side, right leg, and chest. Ms. Cheeseborough feigned death as the gang members drove away. The next morning, a passerby found Ms. Cheeseborough. She was taken to a hospital and treated for multiple gunshot wounds. Ms. Cheeseborough ultimately survived.

¶ 7 After the group left Ms. Cheeseborough for dead, they returned to Walters' trailer, where the rest of the gang remained congregated. Walters then ordered a second "mission" to find another victim to kidnap, place in the trunk of his or her car, and bring the victim and vehicle back to the trailer. Douglas, Queen, Walters, and several others drove Ms. Cheeseborough's car to hunt for another victim. They eventually targeted a Pontiac Grand Prix driven by Susan Moore ("Ms. Moore") and in which Tracy Lambert ("Ms. Lambert") was a passenger. After following the Grand Prix for some distance, Queen was able to trap it at the end of a dead-end road. Walters handed a gun to Tucker and someone in the car told him to "go ahead." *Id.* at 561, 599 S.E.2d at 524. Queen, Walters, and Frink then drove away in Ms. Cheeseborough's car after Queen directed Black, Douglas, and Tucker to return to Walters' trailer in forty-five minutes. Douglas and Tucker forced Ms. Moore and Ms. Lambert into Ms. Moore's trunk at gunpoint, and then Black, Douglas, and Tucker drove Ms. Moore's car to Walters' trailer. At one point during the drive, Tucker stopped the car so that Black and Douglas could open the trunk and rob Ms. Moore and Ms. Lambert of their jewelry.

¶ 8 Upon this group's arrival at Walters' trailer, the entire gang surrounded the car. While the gang divided Ms. Moore's and Ms. Lambert's money and jewelry and burned their purses and identifications, they discussed who would kill the women. On instructions from Walters, the gang members then drove Ms. Cheeseborough's and Ms. Moore's cars to a location in Linden, North Carolina. Ms. Moore and Ms. Lambert were forced out of the trunk of the Grand Prix. Both were pleading for mercy. Queen told Ms. Lambert to shut up, then shot her in the head. Defendant held a large knife to Ms. Moore's neck while she watched her friend be executed. Ms. Moore begged defendant not to cut her and to shoot her instead. Despite her cries for mercy, defendant shot Ms. Moore in the back of the head. Both Ms. Lambert and Ms. Moore died of their wounds.

***3** ¶ 9 The gang members returned to Walters' trailer in Ms. Cheeseborough's and Ms. Moore's cars, and then split up. Defendant and six other members of the gang fled to Myrtle Beach, South Carolina, where they were later arrested in a motel room. Defendant was seventeen years of age at the time of the crimes committed in August 1998.

¶ 10 In January 1999, defendant was indicted for two counts of first-degree murder, two counts of first-degree kidnapping, two counts of robbery with a dangerous weapon, one count of conspiracy to commit first-degree murder, one count of conspiracy to commit first-degree kidnapping, and one count of conspiracy to commit robbery with a dangerous weapon, all involving crimes committed against victims Ms. Moore and Ms. Lambert on 17 August 1998. Defendant was additionally indicted for attempted first-degree murder, conspiracy to commit first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, first-degree kidnapping, and robbery with a dangerous weapon for crimes committed against Ms. Cheeseborough on 17 August 1998.

¶ 11 Defendant was tried capitally before a jury at the 7 February 2000 Criminal Session of Superior Court, Cumberland County. On 3 April 2000, the jury found defendant guilty on all fourteen of the submitted charges. The verdicts of first-degree murder as to each victim were based both on premeditation and deliberation and on felony murder. The jury recommended that defendant be sentenced to death for the murders of Ms. Moore and Ms. Lambert, and the trial court entered judgments accordingly. The trial court also sentenced defendant to consecutive terms for the other twelve felony convictions. Defendant appealed.

¶ 12 On 13 August 2004, our Supreme Court issued an opinion vacating defendant's death sentence and remanding the case to the trial court for resentencing. *Tirado*, 358 N.C. at 604, 599 S.E.2d at 549. In the interim, the Supreme Court of the United States decided *Roper v. Simmons*, which prohibited the imposition of capital punishment on juvenile murderers. *See* *Roper v. Simmons*, 543 U.S. 551, 161 L. Ed. 2d 1 (2005) (holding that the execution of individuals who were under eighteen years of age at the time of their

capital crimes is prohibited by the Eighth and Fourteenth Amendments). Defendant was subsequently resentenced to two consecutive LWOP sentences for his first-degree murder convictions.

¶ 13 In September 2016, defendant filed a motion for appropriate relief arguing that his mandatory LWOP sentences violated the United States and North Carolina Constitutions citing *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012) (holding that mandatory life imprisonment without parole for persons under the age of eighteen at the time of their crimes violates the Eighth Amendment of the United States Constitution). On 20 July 2018, the trial court granted the unopposed motion, vacated defendant's LWOP sentences for his first-degree murder convictions, and ordered a resentencing hearing pursuant to *Miller*.

¶ 14 After the resentencing hearing in August 2019, the trial court again imposed consecutive LWOP sentences for defendant's first-degree murder convictions. Defendant gave oral notice of appeal at the close of the hearing. On 16 March 2020, the trial court entered a written order memorializing its findings of fact and conclusions of law supporting its LWOP sentence (the "Order").

***4** ¶ 15 Defendant's appeal is properly before this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444.

II. Discussion

¶ 16 Defendant argues that the trial court erred by resentencing him to two consecutive LWOP sentences. More specifically, defendant argues that the trial court erred by making findings of fact that were not adequately supported by the evidence and abused its discretion by failing to properly weigh mitigating factors militating against an LWOP sentence. Defendant also contends that the two consecutive LWOP sentences are unconstitutional and that the trial court applied the wrong legal standard in imposing the same. We address each argument in turn.

A. Findings of Fact

¶ 17 On appeal, defendant contends that two of the trial court's findings of fact in the Order were unsupported and contradicted by the evidence, namely, the first and third findings: *i.e.*, that defendant is highly articulate and intelligent and that defendant did not express remorse for his actions. We disagree.

¶ 18 On appeal of a sentence imposed on a juvenile convicted of first-degree murder, we review the trial court's findings of fact to determine if they are supported by competent evidence and, if so, such findings are binding on appeal even if the evidence is conflicting. *State v. Ames*, 268 N.C. App. 213, 218, 836 S.E.2d 296, 300 (2019) (citation omitted). " 'Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding.' " *State v. Ashworth*, 248 N.C. App. 649, 651, 790 S.E.2d 173, 176 (2016) (quoting *State v. Chukwu*, 230 N.C. App. 553, 561, 749 S.E.2d 910, 916 (2013)).

¶ 19 Competent evidence in the record supports both findings. With respect to defendant's intelligence and oratory abilities, defendant's own expert concluded that defendant was of "above-average intelligence" and test results from the Wechsler Adult Intelligence Scale confirmed the same. Moreover, according to defendant's expert, defendant's strengths included his "verbal reasoning, which was in the Very Superior range, and his non-verbal reasoning, which was in the Superior range." These findings were corroborated by evidence and testimony elicited at both the original sentencing hearing and the August 2019 resentencing hearing.

¶ 20 There is also competent evidence in the record to support the court's finding regarding defendant's remorse (or lack thereof). For example, at the original sentencing hearing, Dr. Thomas Hardin ("Dr. Hardin") testified that defendant had an anti-social personality disorder, a symptom of which is a tendency to "have very little remorse when you do something wrong." In addition, at the resentencing hearing, defendant unsympathetically testified to shooting Ms. Moore in the head because a fellow gang member kept dropping the gun and defendant did not like sand in his gun. Indeed, defendant's "remorse" appears to derive from his decision to shoot Ms. Moore in the head, as opposed to her body, so that death would be "quick." Furthermore, since defendant has been incarcerated, he has committed roughly twenty-eight infractions including disobeying orders, assault on the staff, profane language, misuse of medicine, selling medicine, theft, possession of a weapon, threats, escape, possession of a dead animal, gang involvement, fighting, bribery, and so on. In June 2019, just prior to the resentencing hearing, defendant was found guilty of assault with a deadly

weapon in a gang-related stabbing in the confinement facility. Prior to this episode, defendant had threatened to escape, become a terrorist, and kill military personnel. The infraction summary stated that it was "apparent that [defendant] had no concern for life of a person, violating any NC laws, etc." The actions described above do not comport with the actions of a remorseful individual, and the evidence in the record (including defendant's own testimony) does not show otherwise. Because the trial court's findings are supported by competent evidence, they are binding on appeal. *See* *Ames*, 268 N.C. App. at 218, 836 S.E.2d at 300; *accord* *State v. Johnston*, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994) (citations omitted) (acknowledging the lofty deference afforded to the trial court's findings of fact because the "trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence.").

B. Mitigating Factors

***5** ¶ 21 Defendant next argues that the trial court "abused its discretion by failing to appropriately weigh mitigating factors where the uncontroverted evidence supported the mitigating factors." We again disagree.

¶ 22 "The trial court's weighing of mitigating factors to determine the appropriate length of the sentence is reviewed for an abuse of discretion." *State v. Sims*, 260 N.C. App. 665, 671, 818 S.E.2d 401, 406 (2018) (citation omitted). For juveniles convicted of premeditated and deliberate first-degree murder, "the court shall conduct a hearing to determine whether the defendant should be sentenced to [LWOP], as set forth in G.S. 14-17, or a lesser sentence of life imprisonment with parole." N.C. Gen. Stat. § 15A-1340.19B(a)(2) (2019). At such a hearing, the defendant may submit any mitigating factor or circumstance to the trial court. *See* N.C. Gen. Stat. § 15A-1340.19B(c)(1)-(9) (enumerating non-exhaustive list of mitigating factors). The trial court "shall consider any mitigating factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of [LWOP]." N.C. Gen. Stat. § 15A-1340.19C(a) (2019). The trial court must enter a sentencing order that "include[s] findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate to include in the order." *Id.* The sentencing court must "expressly state the evidence supporting or opposing those mitigating factors ...." *State v. Santillan*, 259 N.C. App. 394, 403, 815 S.E.2d 690, 696 (2018). "To show that the trial court erred in failing to find a mitigating factor, the evidence must show conclusively that this mitigating factor exists, i.e., no other reasonable inferences can be drawn from the evidence." *State v. Canty*, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988) (citation omitted).

¶ 23 In this case, the trial court considered all relevant evidence of mitigating circumstances, including, but not limited to, evidence connected to the enumerated mitigating factors set out in N.C. Gen. Stat. § 15A-1340.19B(c)(1)-(9), such as defendant's immaturity, intellectual capacity, mental health, familial or peer pressure exerted upon defendant, and the likelihood that defendant would benefit from rehabilitation in confinement. The Order—which was entered following the August 2019 resentencing hearing—demonstrates that the trial judge carefully weighed the credibility of the evidence presented as to each mitigating factor set out in N.C. Gen. Stat. § 15A-1340.19B(c)(1)-(9). It is clear that the trial court also properly analyzed whether each individual mitigating factor existed in the first place, and, if so, whether it had mitigating value or not. During this process, the trial court considered all pertinent evidence supporting and opposing the same. We have emphasized that the "balance struck by the sentencing judge in weighing the aggravating against the mitigating factors, being a matter within his discretion, will not be disturbed unless it is 'manifestly unsupported by reason[.]' " *State v. Parker*, 315 N.C. 249, 258, 337 S.E.2d 497, 502-503 (1985) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). Based on the record before us, we conclude that the trial court properly considered and weighed the evidence concerning the statutory factors in N.C. Gen. Stat. § 15A-1340.19B(c) and that the trial judge's balancing of competing evidence regarding those factors was not manifestly unsupported by reason or so "arbitrary that it could not have been the result of a reasoned decision." *Id.* at 315 N.C. at 259, 337 S.E.2d at 503; *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985) (citation omitted); *State v. Jones*, 309 N.C. 214, 219, 306 S.E.2d 451, 455 (1983) (citations omitted) ("The sentencing judge, even when required to find factors proved

by uncontradicted, credible evidence, may still attribute whatever weight he deems appropriate to the individual factors found when balancing them and arriving at a prison term.").

C. Constitutionality of Sentence

***6** ¶ 24 Defendant next argues that the imposition of his consecutive LWOP sentences violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 27 of the North Carolina Constitution because the evidence established that defendant was not one of the "rare juveniles who is permanently incorrigible or irreparably corrupt." Applying the United States Supreme Court's recent decision in *Jones v. Mississippi*, we disagree. *See* *Jones v. Mississippi*, 141 S. Ct. 1307, —— U.S. ——, 209 L. Ed. 2d 390 (2021).

¶ 25 On 22 April 2021, the Supreme Court of the United States decided *Jones v. Mississippi* in which it held that *Miller* and its progeny do not require the sentencing judge to make a separate factual finding of permanent incorrigibility before sentencing a juvenile defendant to LWOP. *Jones*, 141 S. Ct. at 1309, —— U.S. at ——, 209 L. Ed. 2d at 395. In other words, per *Jones*, the sentencer is not required to provide an on-the-record sentencing explanation containing an implicit (or explicit) finding of the offender's permanent incorrigibility. *Id.* at 141 S. Ct. at 1321, —— U.S. at ——, 209 L. Ed. 2d at 407.

¶ 26 Our review of *Jones* leads us to conclude that the instant case is undisturbed by its holding. Here, the trial court conducted a resentencing hearing pursuant to *Miller* and its progeny and proceeded under the applicable statutory guidelines set out in N.C. Gen. Stat. § 15A-1340.19A *et seq.* The trial court applied North Carolina's discretionary sentencing procedure and considered all relevant mitigating circumstances and evidence before deciding whether to impose the LWOP sentences. *See* *Jones*, 141 S. Ct. at 1322, —— U.S. at ——, 209 L. Ed. 2d. at 408-409 ("The States, not the federal courts, make those broad moral and policy judgments in the first instance when enacting their sentencing laws. And state sentencing judges and juries then determine the proper sentence in individual cases in light of the facts and circumstances of the offense, and the background of the offender."). Defendant, moreover, does not challenge his LWOP sentences on the grounds that the trial court failed to make a finding of permanent incorrigibility; rather defendant argues that the "evidence established that [defendant] was not one of the rare juveniles who is permanently incorrigible or irreparably corrupt." As discussed herein, the evidence shows otherwise and *Jones* has no effect on defendant's sentence. Lastly, defendant fails to present this Court with any authority supporting his position that the imposition of two consecutive LWOP sentences is unconstitutional *per se* or that said sentences run afoul of any North Carolina statute.

¶ 27 In sum, the resentencing in defendant's case complied with binding statutory authority and case law precedent as the sentence imposed was not mandatory and because the trial judge had the discretion to impose a lesser punishment in light of defendant's youth. For these reasons, and those discussed above, we need not address any as-applied constitutional challenge. *See* *State v. Goodman*, 298 N.C. 1, 20, 257 S.E.2d 569, 582 (1979) (citations omitted) ("In accord with a well-established precept of appellate review, this court refrains from deciding constitutional questions when there is an alternative basis upon which a case may properly be decided.").

D. Legal Standard

¶ 28 Lastly, defendant maintains that the trial court erred by applying the incorrect legal standard and by improperly comparing defendant to adult offenders in contravention to *Miller* and *Ames*. Defendant's argument misses the mark.

***7** ¶ 29 In the case *sub judice*, the trial court applied the correct legal standard as set out in N.C. Gen. Stat. § 15A-1340.19C(a) and adhered to binding North Carolina and federal precedent in making its sentencing determination. In the Order, the trial court expressly recognized those standards and imposed a sentence after analyzing "all of the relevant facts and circumstances in light of the substantive standard enunciated in *Miller*." *State v. James*, 371 N.C. 77, 89, 813 S.E.2d 195, 204 (2018). After making numerous findings of fact and considering the relevant legal standards, the trial court concluded, in part, that "[a]ny mitigating circumstance attendant to the Defendant's youth did not in this case lessen his culpability or show any prospect for reform, as compared with if the Defendant had committed these crimes eight months later, when he reached the age of adult criminal responsibility." This determination is consistent with *Miller's*

directive requiring the sentencing court "to take into account the differences among defendants and crimes." *Miller*, 567 U.S. at 480 n.8, 183 L. Ed. 2d at 424 n.8. Unlike *Ames*, the trial court here appropriately considered all mitigating evidence as well as the statutorily enumerated mitigating factors and considered them through a lens consistent with the substantive standard enunciated in *Miller*. Put otherwise, the trial court applied the correct legal standard in determining that defendant is the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and LWOP is justified. *See* *Montgomery v. Louisiana*, 577 U.S. 190, 208, 193 L. Ed. 2d 599, 619 (2016). This disposition was not based on an improper comparison to adult offenders but rather upon a consideration of the totality of the circumstances in light of the relevant substantive standard set out in *Miller*. *See* *James*, 371 N.C. at 90, 813 S.E.2d at 205.

III. Conclusion

¶ 30 For the foregoing reasons, we affirm the judgements entered and the sentences imposed by the trial court in August 2019.

AFFIRMED.
Report per Rule 30(e).

Judges COLLINS and GORE concur.

All Citations

278 N.C.App. 149, 2021-NCCOA-291, 858 S.E.2d 628 (Table), 2021 WL 2425893

Footnotes

1 Pursuant to N.C. Gen. Stat. § 7A-27(a)(1), defendant and Eric Devon Queen jointly appealed their convictions for first-degree murder and the resulting judgments imposing the sentence of death, which were entered 11 April 2000. Our Supreme Court allowed that appeal to bypass the Court of Appeals and rendered a decision in the matter on 13 August 2004. *See* *State v. Tirado*, 358 N.C. 551, 599 S.E.2d 515 (2004). The Supreme Court vacated defendant's death sentence and remanded for a new sentencing hearing. *See id.* On 13 September 2007, the trial court resentenced defendant to two consecutive LWOP sentences. Because the factual background of defendant's instant appeal has not materially changed since the Supreme Court's decision in *State v. Tirado*, we recite many of the same facts and events discussed in the Supreme Court's 2004 decision.