APPENDIX A

IN THE SUPREME COURT OF ALABAMA

April 12, 2019

1180332

Ex parte Nicholas Wilkerson. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Nicholas Wilkerson v. State of Alabama) (Jefferson Circuit Court, Bessemer Division: CC92-1758; Criminal Appeals : CR-17-0082).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on April 12, 2019:

Writ Denied. No Opinion. Bryan, J. - Parker, C.J., and Shaw, Mendheim, and Mitchell, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 12th day of April, 2019.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

APPENDIX B

REL: November 16, 2018

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-17-0082

Nicholas Wilkerson

v.

State of Alabama

Appeal from Jefferson Circuit Court, Bessemer Division (CC-92-1758)

JOINER, Judge.

In 1992, when he was 17, Nicholas Wilkerson murdered William Wesson during the course of a robbery. In 1994, Wilkerson was convicted of capital murder, see § 13A-5-40(a)(2), Ala. Code 1975. Following a resentencing hearing pursuant to Miller v. Alabama, 567 U.S. 460 (2012), the

circuit court sentenced Wilkerson to life imprisonment without the possibility of parole. We affirm.

Facts and Procedural History

Following Wilkerson's conviction for capital murder in 1994, see § 13A-5-40(a)(2), Ala. Code 1975,[1] the State and Wilkerson, with the approval of the circuit court, waived the right to a sentencing hearing before a jury, see § 13A-5-44(c), Ala. Code 1975, and the circuit court sentenced Wilkerson to life imprisonment without the possibility of parole.[2] This Court affirmed Wilkerson's conviction and

[1]At the time Wilkerson was convicted, a "capital offense" was defined as: "An offense for which a defendant shall be punished by a sentence of death or life imprisonment without parole according to the provisions of this article." § 13A-5-39(1), Ala. Code 1975. That statute was amended on May 11, 2016, to read:

> "An 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."

Act No. 2016-360, Ala. Acts 2016 (emphasis added).

[2]At the time Wilkerson was sentenced for capital murder, § 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

sentence. See Wilkerson v. State, 686 So. 2d 1266 (Ala. Crim. App. 1996).[3] The Alabama Supreme Court denied Wilkerson's petition for certiorari on November 22, 1996.

On June 13, 2013, Wilkerson filed his first Rule 32, Ala.

> 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 on 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."

[3]We take judicial notice of the record in that case. See, e.g., Nettles v. State, 731 So. 2d 626 (Ala. Crim. App. 1998).

R. Crim. P., petition. Wilkerson alleged in that petition that, pursuant to the United States Supreme Court's decision in Miller v. Alabama, 567 U.S. 460 (2012), his life-imprisonment-without-parole sentence was "unconstitutional in violation of his rights protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Alabama Constitution, and Alabama law," and he argued that he was entitled to be resentenced. (C. 8.)

On July 9, 2013, the State filed a motion to dismiss Wilkerson's petition. The State argued that the Supreme Court's decision in Miller was not retroactive and that Wilkerson's claim could have been, but was not, raised at trial or on direct appeal, pursuant to Rules 32.2(a)(3) and (a)(5), Ala. R. Crim. P.

In December 2014, the circuit court, pursuant to a joint motion, stayed the proceedings on Wilkerson's petition because the United States Supreme Court had granted certiorari in Toca v. Louisiana, ___ U.S. ___, 135 S. Ct. 781 (2014), to consider whether Miller applied retroactively. The United States Supreme Court subsequently granted certiorari in Montgomery v. Louisiana, 577 U.S. ___, 136 S. Ct. 718 (2016), another case

involving the same question.

In Montgomery, the United States Supreme Court held that its decision in Miller applied retroactively, and on February 1, 2016, the State and Wilkerson filed a joint motion notifying the circuit court of the decision in Montgomery. In light of the holding in Montgomery, both parties agreed that Wilkerson was entitled to the postconviction relief of a new sentencing hearing. On March 9, 2016, the circuit court granted Wilkerson's Rule 32 petition and scheduled a new sentencing hearing.

Before the sentencing hearing, the State filed a memorandum that included the following summary of the facts underlying Wilkerson's convictions:

> "On May 15, 1992, Nicholas Wilkerson, along with four other individuals went to Bill's Farmhouse Restaurant. Three of these [individuals] including Nicholas Wilkerson put stocking masks on their heads, covering their faces, and armed themselves with loaded guns. The three individuals pushed through the back door of the restaurant passing two employees who were taking out the garbage. While cursing and yelling they forced an older woman to get on the floor. They placed a shotgun to her head. This woman was Maxine Wesson (known as Nanny). They then pushed an older gentleman to the floor. They sat on him and took his wallet. This older gentleman was William Wesson. Nicholas Wilkerson was the individual who sat on Mr. Wesson and removed his wallet.

"William Wesson's son, Billy Wesson, was the owner of Bill's Farmhouse. William Wesson's wife, Maxine Wesson, worked for their son at the restaurant. She usually worked every night until around eight p.m., which was the time the restaurant closed. On this night, Maxine Wesson volunteered to stay later because a coworker had called in sick. William Wesson stayed to wait on his wife as they had plans to go camping that night.

"On the Sunday before Friday, May 15, 1992, one of the busboys, Johnny Williams, quit his job at Bill's Farmhouse. Johnny Williams quit his job over a dispute with Billy Wesson. Johnny Williams had wanted to leave work early, but Billy Wesson would not allow him to leave before his shift ended. At that point, Johnny Williams quit. The other busboy employed at Bill's Farmhouse was Roy Williams. Roy Williams is Johnny Williams's cousin. When Johnny Williams quit, Tyrone Parker was hired to replace him as a busboy.

"On Friday, May 15, 1992, the two busboys on duty were Tyrone Parker and Roy Williams. Other people at the restaurant on May 15, 1992, at closing time were Maxine Wesson and William Wesson. Maxine Wesson was going about her usual tasks of closing the restaurant. The front door had been locked as it was past closing time. It was also time to take the garbage out. As Tyrone Parker and Roy Williams were dragging the garbage out the kitchen door, three young men with stockings over their heads, armed with guns, came in the door. Roy Williams and Tyrone Parker ran away from the restaurant and hid in some weeds. Roy Williams saw someone in a parked car in the back of the restaurant with a gun pointed at him as he ran off to hide. The investigation later determined the person in the car was Johnny Williams. The three young men were later identified as Dontrell Holley, Anthony Millhouse, and Nicholas Wilkerson.

"Inside the restaurant one of the gunmen pointed a gun at Maxine Wesson and told her to get on the floor. As Maxine Wesson was sitting on the floor a gunman held a gun and pointed the gun at her. Another gunman was beating the cash register. Maxine Wesson heard a lot of cursing and beating of the register. The third gunman, later identified as Nicholas Wilkerson, was in the area of the restaurant where William Wesson had been talking on the telephone. William Wesson was forced to lay on the ground by Wilkerson while Wilkerson sat on his back. While sitting on his back Wilkerson took William Wesson's wallet from his pocket. At this point William Wesson was shot in the back by Wilkerson. The bullet exited the right side of William Wesson's neck. Paramedics found the bullet as they rolled William Wesson over to try to save his life. The bullet chipped the linoleum floor below William Wesson. William Wesson died on the floor of Bill's Farmhouse.

"The three gunmen ran out of the restaurant with William Wesson's wallet and its contents as well as money from the cash register in a bank bag. Shortly after leaving the restaurant that night, Nicholas Wilkerson and the other four involved in the Robbery and Murder split the contents of William Wesson’s wallet and the money bag.

"In the days that followed, Wilkerson gave three conflicting stories of the night's events to police. In the first statement he admitted to being present but stated that he never entered the restaurant. Less than three hours later he gave a second account. In this account he stated he did go in the restaurant but that someone named Andrew shot William Wesson while he was [lying] on the floor because he was white. In his third statement to the police Wilkerson stated that he was in fact the one who shot William Wesson but claimed it was accidental. He stated that the swinging door hit him causing him to shoot William Wesson.

> "During the investigation officers with Hueytown Police Department were able to learn that Richard Flowers had rented his red Ford Mustang to Johnny Williams, Wilkerson, Dontrell Holley, Reginald Johnson and Anthony Millhouse. All of these Defendants were students at Ensley High School. Richard Flowers had rented his car to them the day of the Robbery and Murder for 50 dollars. They rented his car and left in it just before 8:00 p.m. At approximately 8:30 p.m. they returned in his car and Flowers watched as they split up a lot of money from a bank bag. Flowers also saw William Wesson's wallet in his car and a .25 caliber pistol that was not his. The Defendant, in his third statement, stated he used a nine millimeter to kill William Wesson. This weapon has never been found."

(C. 106-07.)

In its memorandum, the State urged the circuit court to impose on Wilkerson a sentence of life imprisonment without the possibility of parole. According to the State, Wilkerson was not entitled to receive a sentence allowing for parole because, the State said, Wilkerson could not establish "that his crimes were the result of the '"transient immaturity of youth"' and not '"irreparable corruption."'" (C. 108 (quoting Click v. State, 215 So. 3d 1189, 1193, 1194 (Ala. Crim. App. 2016), quoting in turn Montgomery, 577 U.S. ___, 136 S. Ct. at 734 (2016)).)

On August 15, 2017, the circuit court held a new

sentencing hearing pursuant to Miller. The circuit court granted the State's motion to incorporate all testimony, exhibits, and other evidence submitted during the guilt phase of Wilkerson's trial. The State also presented testimony from three of Wesson's daughters regarding the impact Wesson's death had had on their family, and the State offered into evidence Wilkerson's disciplinary records from the Alabama Department of Corrections. Those records showed 65 alleged infractions including fighting, stealing, possessing weapons, possessing drugs (including cocaine) and alcohol, possessing cellular telephones, threatening to start a riot, and stabbing an inmate in the head and ear.

After the State rested, the circuit court asked for clarification on the State's burden in a Miller sentencing hearing. The State argued that there was no burden of proof--that "it is a sentencing hearing and not a trial." (R. 67.) The State noted that in Montgomery, supra, the Court had stated that, for a defendant who committed a crime as a juvenile to be sentenced to life in prison without the possibility of parole, the defendant's crime must reflect "irreparable corruption." (R. 67.) The State then asserted

that, although it did not think that it bore the burden of proof, the Montgomery standard had been met. Wilkerson's defense counsel argued, however, that the State had to demonstrate that Wilkerson was "irreconcilably or irretrievably corrupt" beyond a reasonable doubt. (R. 67.)

Following this discussion, Wilkerson presented testimony from several family members and from Dr. Joseph Ackerson, a licensed clinical psychologist, and Mike Farrell, an employee of the Foundry Recovery Center. Wilkerson's mother, Doris Wilkerson, testified that Wilkerson had a "normal childhood" and that he grew up in a home with both parents and two older siblings. (R. 74-75.) She testified that Wilkerson was a "special needs student" who had difficulties in school, making "Cs" and "Ds." (R. 73, 76.) Doris testified that Wilkerson had problems with reading comprehension and that he had a low IQ. She believed Wilkerson was more of a follower than a leader, and she testified that Wilkerson had a "stable life" and had not been in trouble before his involvement in the underlying crime. (R. 95.) Doris testified that, if released, Wilkerson could live with her or with other family members and he would be able to do janitorial work with his brother.

Wendy Evans, Wilkerson's aunt, testified about her experiences with Wilkerson before he went to prison. According to Evans, Wilkerson was a "leader," especially with her children and with their family. (R. 110-11.) Wilkerson taught Evans's three children how to swim, and Evans described him as "a typical teenager" who "was fun and happy-go-lucky." (R. 111.) Evans also described Wilkerson as "immature" because he "hung around" her family as a teenager and often played with her children, who were much younger than Wilkerson. (R. 112.) Evans further testified, however, that Wilkerson was not "emotionally or mentally immature" and that he did not appear to have any mental-health issues. (R. 113.)

Wilkerson's nephew, Terrance Wilkerson, testified that he was one year old when Wilkerson went to prison and that he visited Wilkerson in prison whenever he could. According to Terrance, Wilkerson often gave him life advice. (R. 118-19.)

Kellye Brooks, Wilkerson's older sister by about 13 years, testified that, based on what she perceived about Wilkerson's level of understanding and comprehension as a 17-year-old, he was not "on the 17-year-old level" and that he lacked good judgment and decision-making skills. (R. 133.) She

was not aware of Wilkerson's alcohol or drug use and never saw him under the influence of anything. (R. 140-41.) She further stated that, although Wilkerson knew right from wrong, she believed that he was easily influenced by his friends and often did not understand the consequences of his decisions. (R. 133-34.)

Barcardi Wilkerson, Wilkerson's older brother by about three years, testified that Wilkerson had trouble with reading and math and that he was "definitely a follower." Barcardi stated his brother was "easily influenced," immature for his age, and lacked the emotional maturity to deal with the police. Barcardi also stated that he was aware that Wilkerson used both alcohol and drugs. (R. 154-56.)

Dr. Ackerson also testified on Wilkerson's behalf.[4] Dr.

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[4]Dr. Ackerson testified regarding his occupation and training:

> "I am a licensed clinical psychologist that has had specialty and training and understanding about the brain and how it can affect the behavior, thinking, mood, et cetera. Within that, there is an additional specialty and additional training with pediatric populations under the age of 21 and are still in school to understand the specific academic impacts of the brain disorders."

(R. 177-78.)

Ackerson said he had been involved in tens of thousands of cases and, specifically, had been involved in five or six Miller cases. (R. 178-80.) In preparing his report and forming his opinion on Wilkerson, Dr. Ackerson did the following: interviewed Wilkerson once for a couple of hours and conducted a neuropsychological evaluation of him; talked to Wilkerson's mother on the phone; spoke with Wilkerson's defense counsel; spoke with mitigation specialist Sunny Lippert; read Dr. Alan Blotcky's and Wilkerson's testimony from Wilkerson's trial; read Dr. Blotcky's report; looked through some of Wilkerson's prison records and disciplinary reports; and briefly spoke with one correctional officer. (R. 183, 196-97, 226)

Based on his investigation and work, Dr. Ackerson opined that Wilkerson's family life had been stable and very supportive, and he noted that there was no family history of serious mental illness. (R. 185-86.) Based on the symptoms reported by Wilkerson's mother during the telephone interview, Wilkerson's clinical interview, and the "objective test data" he had received, Dr. Ackerson diagnosed Wilkerson as having had attention deficit/hyperactivity disorder ("ADHD") from a young age. Dr. Ackerson admitted that the ADHD diagnosis was

not made by Dr. Blotcky, despite Blotcky's reference at trial to certain symptoms being shown. (R. 189.) Also, based on what Wilkerson told him, Dr. Ackerson determined that Wilkerson had a "significant" history of alcohol and drug abuse that began at age 15, and on the day of the incident Wilkerson drank 8 or 9 beers and smoked 8 "blunts." Dr. Ackerson admitted that, if, in fact, Wilkerson was not abusing drugs or alcohol on the night of the murder and robbery as he stated, he would not have been as vulnerable to peer influence and that his thinking would not have been as impaired. (R. 189-90.)

Dr. Ackerson further testified that, during his evaluation of Wilkerson, a "battery of tests" was performed including "an IQ test and tests that look at his attention, reaction time, response, [and] measures of executive functioning."[5] (R. 201.) Dr. Ackerson testified that he determined that Wilkerson's IQ is 77, which Ackerson said is just above intellectual disability (Ackerson stated the average IQ is 85-115). (R. 202.) Dr. Ackerson stated that Wilkerson was a "fairly accurate reporter in terms of

[5]On cross-examination, Dr. Ackerson testified that his "technician" actually administered the tests to Wilkerson. (R. 224.)

personality testing," noting that "it was important [to Wilkerson that he] be viewed in positive terms ... [which] is not an uncommon finding." (R. 203.) Wilkerson did not seem to be untruthful on any of the testing. He did, however, demonstrate "a very classic pattern of somebody that has ADHD"--struggling with attention, focus, planning, organization, and concentration. (R. 203.) Wilkerson was "inefficient" in learning and had limitations on his overall comprehension and his impulse control. (R. 204.) In Dr. Ackerson's opinion, an individual with Wilkerson's IQ and ADHD would "almost never be[] considered a leader. They would be looking for other people to provide them with structure and guidance" and would be "extremely vulnerable to peer pressure." (R. 204-05.)

Dr. Ackerson testified that "ADHD is the inability to stop and think," which makes it "hard to bring the future into the present to contemplate if I act this way now, it is going to have these future consequences for me." (R. 205.) The negative effects of ADHD would be worsened by drug and alcohol use. (R. 206.)

Dr. Ackerson testified that a person with ADHD generally

has at least a two-year lag in brain development. Thus, at 17 years of age, Wilkerson would have had the reasoning capacity of a 15-year-old. (R. 207.) Dr. Ackerson opined that Wilkerson did not have any serious mental personality disorder, anxiety, or depression and that, in his opinion, Wilkerson was "redeemable," not "irreparably corrupt," and was "a pretty low risk" of engaging in violent behavior in the future. (R. 216-17, 220-22; 244.)

On cross-examination, Dr. Ackerson testified that, although he had stated in his report that what Wilkerson told him about the robbery-murder was consistent with Wilkerson's testimony at his trial, Wilkerson actually did not relate some facts to Ackerson the same as they had been presented at trial. For instance, Wilkerson did not tell Ackerson that Wilkerson alone stole the victim's wallet, which, Ackerson stated, would "be significant for the purpose of the Court and obviously for the purpose of the investigation." (R. 239-40.) Dr. Ackerson admitted that he had "scanned through" but had not thoroughly reviewed all of Wilkerson's disciplinary records from prison. (R. 241-42.) Dr. Ackerson stated that while he testified that someone like Wilkerson, with his IQ

and limitations, could never be a leader, he or she could be a leader if surrounded by other people with intellectual disabilities. Dr. Ackerson did not know whether Wilkerson's accomplices had any intellectual disabilities. (R. 247.) Dr. Ackerson testified that his opinion of Wilkerson's ability to stay out of trouble if released from prison depended on his remaining free of alcohol and drugs and not being around "other criminal elements." (R. 250.)

On August 19, 2017, the circuit court, in a detailed order, resentenced Wilkerson to life imprisonment without the possibility of parole.[6] (C. 128.) On October 2, 2017, Wilkerson filed a timely notice of appeal.

Discussion

I.

Wilkerson argues that this Court should hold: (1) that a circuit court conducting a resentencing required by Miller must consider that a sentence of life imprisonment without the possibility of parole is presumptively unconstitutional for a juvenile; (2) that the State bears the burden of proving

[6]On September 18, 2017, Wilkerson filed a motion for reconsideration of his sentence and later filed a second such motion. Nothing in the record indicates whether the circuit court ruled on either motion.

beyond a reasonable doubt that a juvenile defendant is "the rare irreparably depraved or corrupt offender warranting a life-without-parole sentence"; and (3) that, when reviewing a sentence imposed after a Miller resentencing hearing, this Court should focus on what Wilkerson says is Miller's "command that life-without-parole sentences should be rare and uncommon for juvenile defendants." (Wilkerson's brief, pp. 22-43.) We address each argument in turn.

A.

Wilkerson argues that, when conducting a resentencing required by Miller, a circuit court's process, deliberation, and conclusion "must reflect the presumption in Miller that life-without-parole sentences are generally unconstitutional" unless, in accordance with Montgomery, it is shown that "the juvenile sentenced evidenced irreparable corruption or depravity." (Wilkerson's brief, pp. 24-30.) The State argues, however, that Wilkerson's reading of Miller and Montgomery is incorrect. Specifically, the State argues that Wilkerson is wrong in his assertion that those cases require a "presumption" against sentences of life imprisonment without the possibility of parole for juvenile offenders. We agree.

In Betton v. State, (Ms. CR-15-1501, Apr. 27, 2018) ____ So. 3d ____, ____ (Ala. Crim. App. 2018), this Court summarized Miller, Montgomery, and the actions taken by the legislature and the Alabama Supreme Court to ensure that sentencing for juveniles convicted of capital murder complies with the United States Constitution:

> "'In Miller, the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders" because, "the mandatory sentencing schemes ... violate [the] principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment."' Click v. State, 215 So. 3d 1189, 1191–92 (Ala. Crim. App. 2016) (quoting Miller, 567 U.S. at 479, 132 S. Ct. 2455). The Miller Court reasoned:
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> > "'"Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him--and from which he cannot usually extricate himself--no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have

> affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys."'

"Click, 215 So. 3d at 1192 (quoting Miller, 567 U.S. at 477-78, 132 S. Ct. 2455). In striking down mandatory sentences of life in prison without the possibility of parole for juveniles who commit capital murder, the Court did not hold that juveniles are categorically exempt from such a sentence. Miller, 567 U.S. at 479, 132 S. Ct. 2455. 'Although Miller did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect "'irreparable corruption.'"' Montgomery, ____ U.S. ____, 136 S. Ct. at 726 (quoting Miller, 567 U.S. at 479-80, 132 S. Ct. 2455, quoting in turn, Roper v. Simmons, 543 U.S. 551, 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)). Thus, 'Miller "mandates ... that a sentencer follow a certain process--considering an offender's youth and attendant characteristics"--before "meting out" a sentence of life imprisonment without parole.' Click, 215 So. 3d at 1192 (quoting Miller, 567 U.S. at 483, 132 S. Ct. 2455). '"[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."' Click, 215 So. 3d at 1192 (quoting Miller, 567 U.S. at 483, 132 S. Ct. 2455). Consequently, '[a] hearing where "youth and its attendant characteristics" are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not.'

Montgomery, 577 U.S. at ___, 136 S. Ct. at 735 (quoting Miller, 567 U.S. at 465, 132 S. Ct. 2455). The Court explained that '[t]he hearing ... gives effect to Miller's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.' Montgomery, 577 U.S. at ____, 136 S. Ct. at 735.

"When Miller was decided, Alabama's capital-murder statute provided for two possible sentences--life in prison without the possibility of parole or death. See § 13A-5-39(1), Ala. Code 1975. Juveniles, however, were not eligible for a sentence of death; therefore, the only sentence available for a juvenile convicted of capital murder was life in prison without the possibility of parole. See Ex parte Henderson, 144 So. 3d at 1266-84; Miller v. State, 148 So. 3d 78 (Ala. Crim. App. 2013). In the wake of Miller, both the Alabama Supreme Court and the Alabama Legislature acted to amend our capital-murder statutes so as to provide juveniles with individualized sentencing and an opportunity to have a sentence imposed that includes the possibility of parole.

"First, in Ex parte Henderson, our Supreme Court was asked to order the dismissal of capital-murder indictments against two juveniles because Alabama law at the time mandated a sentence of life in prison without the possibility of parole. Ex parte Henderson, 144 So. 3d at 1262-84. The Alabama Supreme Court recognized that the Miller decision 'was not a categorical prohibition of a sentence of life imprisonment without parole for juveniles, but rather required the sentencer to consider the juvenile's age and age-related characteristics before imposing such a sentence.' Ex parte Henderson, 144 So. 3d at 1280. 'Miller mandates individualized sentencing for juveniles charged with capital murder rather than a "one size fits all" imposition of a sentence of life imprisonment without the possibility of parole.' Ex parte

Henderson, 144 So. 3d at 1280. However, the Henderson Court 'recognize[d] that a capital offense was defined under our statutory scheme as one punishable by the two harshest criminal sentences available: death and life imprisonment without the possibility of parole.' Ex parte Henderson, 144 So. 3d at 1280. To ameliorate the unconstitutional portion of Alabama's capital sentencing scheme as it applied to juveniles, the Alabama Supreme Court '[s]ever[ed] the mandatory nature of a life-without-parole sentence for a juvenile to provide for the ... possibility of parole.' Ex parte Henderson, 144 So. 3d at 1281.

"After severing from the statute the mandatory nature of a sentence of life in prison without parole for juveniles convicted of capital offenses, the Alabama Supreme Court established factors courts must consider when deciding whether life in prison with the possibility of parole would be an appropriate sentence for a juvenile. Id. at 1283–84. Specifically, the Court held

> "'that a sentencing hearing for a juvenile convicted of a capital offense must now include consideration of: (1) the juvenile'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; (2) the juvenile's diminished culpability; (3) the circumstances of the offense; (4) the extent of the juvenile's participation in the crime; (5) the juvenile's family, home, and neighborhood environment; (6) the juvenile's emotional maturity and development; (7) whether familial and/or peer pressure affected the juvenile; (8) the juvenile's past exposure to violence; (9) the juvenile's drug and alcohol history; (10) the juvenile's ability to deal with the police; (11) the

> juvenile's capacity to assist his or her attorney; (12) the juvenile's mental-health history; (13) the juvenile's potential for rehabilitation; and (14) any other relevant factor related to the juvenile's youth.'

"Ex parte Henderson, 144 So. 3d at 1284. See also Foye v. State, 153 So. 3d 854, 864 (Ala. Crim. App. 2013). The Court 'recognize[d] that some of the factors may not apply to a particular juvenile's case and that some of the factors may overlap.' Ex parte Henderson, 144 So. 3d at 1284.

"After the Alabama Supreme Court decided Ex parte Henderson, the Alabama Legislature amended our capital-sentencing statutes to comply with the guidelines of Miller. First, the Legislature amended § 13A-5-2(b) to provide that '[e]very person convicted of murder shall be sentenced by the court to imprisonment for a term, or to death, life imprisonment without parole, or life imprisonment in the case of a defendant who establishes that he or she was under the age of 18 years at the time of the offense, as authorized by subsection (c) of Section 13A-6-2.' The Legislature redefined 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.' § 13A-5-39(1), Ala. Code 1975. The Legislature also provided:

> "'If the defendant is found guilty of a capital offense or offenses with which he or she is charged and the defendant establishes to the court by a preponderance of the evidence that he or she was under the age of 18 years at the time of the capital offense or offenses, the sentence

> shall be either life without the possibility of parole or, in the alternative, life, and the sentence shall be determined by the procedures set forth in the Alabama Rules of Criminal Procedure for judicially imposing sentences within the range set by statute without a jury, rather than as provided in Sections 13A-5-45 to 13A-5-53, inclusive. The judge shall consider all relevant mitigating circumstances.'

"§ 13A-5-43(e), Ala. Code 1975. The Legislature further established that, '[i]f [a juvenile] defendant is sentenced to life [in prison with the possibility of parole] on a capital offense, th[at] defendant must serve a minimum of 30 years, day for day, prior to first consideration of parole.'[1] Id.

"_____

"[1]The Legislature amended § 13A-6-2(c), Ala. Code 1975, to provide:

> "'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.'"

In addition to rejecting the expansive reading of Miller and Montgomery urged by Wilkerson, Betton establishes that a "framework" for conducting a Miller hearing already exists. In Betton, this Court recognized that a circuit court conducting a Miller resentencing may impose a life-imprisonment-without-the-possibility-of-parole sentence only in accordance with Miller, Montgomery, and Ex parte Henderson. Betton, ___ So. 3d at ___. This Court in Betton instructed the circuit court to make specific written findings as to its consideration of the sentencing factors used in determining whether life imprisonment without parole was the appropriate sentence. Id.[7] Thus, Wilkerson is not entitled to relief on his claim that this Court must establish a new "framework" for Miller

[7]This Court has remanded other Miller cases for additional consideration as well. See, e.g., Click v. State, 215 So. 3d 1189, 1191-96 (Ala. Crim. App. 2016) (holding that the circuit court's summary dismissal of defendant's postconviction-relief petition constituted reversible error in light of Miller); Foye v. State, 153 So. 3d 584, 862-64 (Ala. Crim. App. 2013) (holding that Foye's sentence to a mandatory term of life imprisonment without the possibility of parole as a juvenile offender for the commission of capital murder was due to be reversed and the case remanded for the circuit court to conduct a new sentencing hearing at which it was required to consider the legal principles announced in Miller and the factors set forth by our Supreme Court in Henderson).

hearings.

B.

Wilkerson's second argument is that under Miller and Montgomery, the State bears the burden of proving beyond a reasonable doubt that a juvenile defendant is "the rare irreparably depraved or corrupt offender warranting a life-without-parole sentence" before that juvenile may be sentenced to life imprisonment without the possibility of parole. (Wilkerson's brief, pp. 30-38.) He analogizes this burden to the State's burden in a capital-murder case of proving beyond a reasonable doubt that an aggravating circumstance exists before a defendant may be sentenced to death. (Wilkerson's brief, pp. 32-36.) According to Wilkerson, unless there is a determination beyond a reasonable doubt that a juvenile's crime evidenced "permanent incorrigibility," "irreparable corruption," and "irretrievable depravity," the Eighth Amendment prohibits a court from sentencing him to life imprisonment without parole. (Wilkerson's brief, pp. 36-38.)

But as the State notes--and as this Court's discussion in Betton, supra, illustrates--the legislature has already answered the questions (1) who bears the burden of proving the

appropriate sentence for a juvenile defendant convicted of capital murder and (2) the degree of proof necessary to make that determination. Specifically, the legislature has placed those questions under the normal procedures applicable at a sentencing hearing. Thus, in capital cases involving juvenile offenders, both the State and the defendant may present evidence to the circuit court to assist in its sentencing determination under § 13A-5-43(e), Ala. Code 1975 and Rule 26.6, Ala. R. Crim. P. Whether the juvenile defendant convicted of capital murder is eligible for a sentence of life imprisonment without the possibility of parole is a question to "be determined by the preponderance of evidence." Rule 26.6, Ala. R. Crim. P.

Because the legislature has answered those questions adversely to Wilkerson, this Court is not free to disregard those answers unless, as Wilkerson argues, the United States Constitution via Miller and Montgomery compels us to do so. Wilkerson's argument in that regard, however, is unpersuasive.

A year after Miller was decided, the Missouri Supreme Court noted that "no consensus has emerged in the wake of Miller regarding: (a) whether the state or the defendant

should bear the risk of non-persuasion on the determination that Miller requires the sentencer to make, and (b) the burden of proof applicable to that determination." State v. Hart, 404 S.W.3d 232, 241 (Mo. 2013). Earlier this year, the Supreme Court of Wyoming noted:

> "There is no consensus regarding whether the State or a juvenile defendant should bear the burden of proving or disproving that the juvenile is irreparably corrupt or the burden of proof applicable to that determination. Some states have placed the burden on the State. In State v. Hart, 404 S.W.3d 232 (Mo. 2013), the Missouri Supreme Court held that '[u]ntil further guidance is received, a juvenile offender cannot be sentenced to life without parole ... unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances.' Id. at 241. Similarly, in Commonwealth v. Batts, the Pennsylvania Supreme Court found that Miller and Montgomery created a presumption against life without parole for juvenile offenders and placed the burden of overcoming that presumption on the government with proof beyond a reasonable doubt. Batts, 163 A.3d at 452-55. Other states have placed the burden on the offender. The Arizona Supreme Court announced, without providing rationale for its conclusion, that at a Miller hearing the defendant has 'an opportunity to establish, by a preponderance of the evidence, that [his] crimes did not reflect irreparable corruption but instead transient immaturity.' State v. Valencia, 241 Ariz. 206, 386 P.3d 392, 396 (2016). The Supreme Court of Washington recently concluded that Miller does not prohibit placing the burden on juvenile offenders 'to prove an exceptional sentence [below the standard range including life without parole or its functional equivalent] is justified.'

> State v. Ramos, 187 Wash. 2d 420, 387 P.3d 650, 659 (2017); see also Jones v. Commonwealth, 293 Va. 29, 795 S.E.2d 705, 726 (2017) (Powell, J., dissenting)."

Davis v. State, 415 P.3d 666, 680–81 (Wyo. 2018).

In People v. Skinner, 502 Mich. 89, 917 N.W.2d 292 (2018), the Supreme Court of Michigan, thoroughly analyzed Miller and Montgomery and rejected arguments similar to Wilkerson's. The Supreme Court of Michigan summarized Miller and Montgomery and the development of the law that resulted in those decisions as follows:

> "Apprendi [v. New Jersey], 530 U.S. [466,] 490, 120 S. Ct. 2348, held that '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' (Emphasis added.) In other words, any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury. Id. at 494, 120 S. Ct. 2348 (emphasis added). See also Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) ('[T]he "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.') (emphasis altered).
>
> "In Ring v. Arizona, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the Court held that the jury, rather than the judge, must determine whether an aggravating circumstance exists in order to impose the death penalty. In addition, in Hurst

v. Florida, 577 U.S. ___, ___, 136 S. Ct. 616, 619, 193 L. Ed. 2d 504 (2016), the Court held that '[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death' and that '[a] jury's mere recommendation [of a death sentence] is not enough' to satisfy the Sixth Amendment.

"Miller, 567 U.S. at 465, 132 S. Ct. 2455, held 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."' (Emphasis added.) Instead, 'a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.' Id. at 489, 132 S. Ct. 2455 (emphasis added). The Court indicated that the following factors should be taken into consideration: '[defendant's] chronological age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences'; 'the family and home environment that surrounds him--and from which he cannot usually extricate himself--no matter how brutal or dysfunctional'; 'the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him'; whether 'he might have been charged [with] and convicted of a lesser offense if not for incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys'; and 'the possibility of rehabilitation ....' Id. at 477-478, 132 S. Ct. 2455. Although the Court declined to address the 'alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger,' it stated:

> "'But given all we have said in Roper [v. Simmons, 543 U.S. 551 (2005)], Graham [v.

> Florida, 560 U.S. 48 (2010)], and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in Roper and Graham of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. [Id. at 479-480, 132 S. Ct. 2455 (citation omitted).]'

"Subsequently, in Montgomery v. Louisiana, 577 U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), the Court held that Miller applies retroactively to juvenile offenders whose convictions and sentences were final when Miller was decided because Miller announced a new substantive rule by rendering life without parole an unconstitutional penalty for a specific class of juvenile defendants. Id. at ___, 136 S. Ct. at 734 (citation omitted). Montgomery noted that Miller indicated that it would be the 'rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified' and that 'Miller made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."' Id. at ___, 136 S. Ct. at 733-734, quoting Miller, 567 U.S. at 479, 132 S. Ct. 2455. On this basis, Montgomery concluded:

> "'Miller, then, did more than require a

> sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "'unfortunate yet transient immaturity.'" Because Miller determined that sentencing a child to life without parole is excessive for all but "'the rare juvenile offender whose crime reflects irreparable corruption,'" it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"--that is, juvenile offenders whose crimes reflect the transient immaturity of youth. [Id. at ___, 136 S. Ct. at 734 (citations omitted).]'

"In response to the state's argument that 'Miller cannot have made a constitutional distinction between children whose crimes reflect transient immaturity and those whose crimes reflect irreparable corruption because Miller did not require trial courts to make a finding of fact regarding a child's incorrigibility,' the Court stated:

> "'That this finding is not required ... speaks only to the degree of procedure Miller mandated in order to implement its substantive guarantee. When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice

> systems. See Ford [v. Wainwright, 477 U.S. 399, 416-417, 106 S. Ct. 2595, 91 L. Ed. 2d 335] (1986) ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences[.]"). Fidelity to this important principle of federalism, however, should not be construed to demean the substantive character of the federal right at issue. That Miller did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, Miller established that this punishment is disproportionate under the Eighth Amendment. [Id. at ___, 136 S. Ct. at 735.]'
>
> "The Court concluded that 'prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.' Id. at ___, 136 S. Ct. at 736-737."

Skinner, 502 Mich. at 103-07, 917 N.W.2d at 293-301 (footnotes omitted).

The Michigan Supreme Court then examined its relevant statute for sentencing a juvenile to life imprisonment without the possibility of parole, M.C.L.A. 769.25, and its mandatory procedures such as (1) the filing of a motion by the prosecutor to seek a life-imprisonment-without-the-possibility-of-parole sentence and (2) the holding of a

hearing by the trial court to consider the Miller factors and to specify on the record the aggravating and mitigating circumstances the court considered and its reasons for the sentence it imposed. The Michigan court concluded that, despite those additional procedural requirements, the statute did "not require the trial court to make any particular factual finding before it can impose a life-without-parole sentence." ___ N.W.2d at ___.

The Michigan court then examined "whether the Eighth Amendment, under Miller or Montgomery, requires additional fact-finding before a life-without-parole sentence can be imposed." ___ N.W.2d at ___. The court answered that question in the negative, holding:

> "Given that Montgomery expressly held that 'Miller did not require trial courts to make a finding of fact regarding a child's incorrigibility,' id. at ___, 136 S. Ct. at 735, we likewise hold that Miller does not require trial courts to make a finding of fact regarding a child's incorrigibility.
>
> "Montgomery held that while the substantive rule is that juveniles who are not 'irreparably corrupt' cannot be sentenced to life without parole, the states are free to develop their own procedures to enforce this new substantive rule. In this sense, the 'irreparable corruption' standard is analogous to the proportionality standard that applies to all criminal sentences. See Montgomery, 577 U.S. at ___, 136 S. Ct. at 726 ('[A] lifetime in prison is a

disproportionate sentence for all but the rarest of children, those whose crimes reflect "irreparable corruption."') (quotation marks and citations omitted). Just as courts are not allowed to impose disproportionate sentences, courts are not allowed to sentence juveniles who are not irreparably corrupt to life without parole. And just as whether a sentence is proportionate is not a factual finding, whether a juvenile is 'irreparably corrupt' is not a factual finding. In other words, the Eighth Amendment does not require the finding of any particular fact before imposing a life-without-parole sentence, and therefore the Sixth Amendment is not violated by allowing the trial court to decide whether to impose life without parole.

"This conclusion is further supported by the fact that all the courts that have considered this issue have likewise concluded that the Sixth Amendment is not violated by allowing the trial court to decide whether to impose life without parole. See, for example, State v. Lovette, 233 N.C. App. 706, 719, 758 S.E.2d 399 (2014) ('[A] finding of irreparable corruption is not required ....'); State v. Fletcher, 149 So. 3d 934, 943 (La. App. 2014) ('Miller does not require proof of an additional element of "irretrievable depravity" or "irrevocable corruption"'); Commonwealth v. Batts, ___ Pa. ___, ___, 163 A.3d 410, 456 (2017) ('We further disagree with [the defendant] that a jury must make the finding regarding a juvenile's eligibility to be sentenced to life without parole.'); People v. Blackwell, 3 Cal. App. 5th 166, 194, 207 Cal. Rptr. 3d 444 (2016) ('Miller does not require irreparable corruption be proved to a jury beyond a reasonable doubt in order to "aggravate" or "enhance" the sentence for [a] juvenile offender convicted of homicide.'); State v. Ramos, 187 Wash. 2d 420, 436-437, 387 P.3d 650 (2017) ('Miller ... does not require the sentencing court ... to make an explicit finding that the offense reflects

> irreparable corruption on the part of the juvenile.')."

___ N.W.2d at ___ (footnotes omitted).

Unlike the defendant in Skinner, Wilkerson has not expressly asked this Court to hold that a jury, rather than a judge, must make a factual determination before he may be sentenced to life imprisonment without the possibility of parole. Even so, the above discussion in Skinner is relevant to what Wilkerson is asking this Court to hold: That a presumption exists against a finding that a juvenile should receive a life-imprisonment-without-the-possibility-of-parole sentence and that the State bears the burden of proving that a life-imprisonment-without-the-possibility-of-parole sentence is warranted.

As the Michigan Supreme Court explained, whether a juvenile who has been convicted of capital murder should be sentenced to life imprisonment without the possibility of parole is ultimately a moral judgment, not a factual finding. Skinner, 502 Mich. at 117 n.11, 917 N.W.2d at 305 n.11 ("'[T]erms [such as] consider, justify, [and] outweigh ... reflect a process of assigning weights to competing interests, and then determining, based upon some criterion, which of

those interests predominates. The result is one of judgment, of shades of gray; like saying that Beethoven was a better composer than Brahms. Here, the judgment is moral--for the root of "justify" is "just." ...' [United States v. Gabrion, 719 F.3d 511, 532-33 (6th Cir. 2013).] For the same reasons, a trial court's decision to impose life without parole after considering the mitigating and aggravating circumstances is not a factual finding, but a moral judgment.").

The Michigan Supreme Court's rationale is compelling, and we are persuaded by its holding that

> "neither Miller nor Montgomery imposes a presumption against life without parole for those juveniles who have been convicted of first-degree murder on either the trial court or the appellate court. Miller and Montgomery simply require that the trial court consider 'an offender's youth and attendant characteristics' before imposing life without parole. Miller, 567 U.S. at 483, 132 S. Ct. 2455. Indeed, there is language in Montgomery that suggests that the juvenile offender bears the burden of showing that life without parole is not the appropriate sentence by introducing mitigating evidence. Montgomery, 577 U.S. at ___, 136 S. Ct. at 736 ('[P]risoners ... must be given the opportunity to show their crime did not reflect irreparable corruption....')."

Skinner, 502 Mich. at 131, 917 N.W.2d at 314.

We likewise hold that Miller and Montgomery do not require a presumption against life-imprisonment-without-the-

possibility-of-parole sentences for juveniles convicted of capital murder and do not require the State to bear the burden of proving that a juvenile defendant is "the rare irreparably depraved or corrupt offender warranting a life-without-parole sentence" (Wilkerson's brief, p. 30) before that juvenile may be sentenced to life imprisonment without the possibility of parole.

C.

Wilkerson also argues that this Court, in evaluating a resentencing pursuant to Miller, must use a standard of review that focuses on what Wilkerson says is Miller's "command that life-without-parole sentences should be rare and uncommon for juvenile defendants." (Wilkerson's brief, p. 38.) Citing cases from other jurisdictions, Wilkerson argues that Miller and Montgomery require a more stringent standard of review than an abuse-of-discretion standard.

As noted in Part I.A., supra, after the Alabama Supreme Court decided Ex parte Henderson, the legislature amended Alabama's capital-sentencing statutes to comply with the requirements of Miller. As amended, the sentencing range for a juvenile convicted of capital murder includes life

imprisonment without the possibility of parole.

> It is well settled that
>
> "'[w]here a trial judge imposes a sentence within the statutory range, this Court will not disturb that sentence on appeal absent a showing of an abuse of the trial judge's discretion.' Alderman v. State, 615 So. 2d 640, 649 (Ala. Crim. App. 1992). 'The exception to this general rule is that "the appellate courts may review a sentence, which, although within the prescribed limitations, is so disproportionate to the offense charged that it constitutes a violation of a defendant's Eighth Amendment rights."' Brown [v. State, 611 So. 2d 1194,] 1197, n.6 [(Ala. Crim. App. 1992)], quoting Ex parte Maddox, 502 So. 2d 786, 789 (Ala. 1986)."

Adams v. State, 815 So. 2d 583, 585 (Ala. Crim. App. 2001). Because life imprisonment without the possibility of parole remains a sentencing option for juvenile offenders, even in light of the Supreme Court's decisions in Miller and Montgomery, the standard of review to be applied is an abuse-of-discretion standard. In the present case, particularly in light of the discussion and holdings in Part I.A. and Part I.B. of this opinion, we see no reason to create or apply a more stringent standard for reviewing a sentencing court's ultimate determination following a hearing conducted pursuant to Miller and Montgomery. Cf. Skinner, 502 Mich. at 137, 917 N.W.2d at 317 ("Miller's and Montgomery's emphasis on the

rarity of juveniles deserving of life-without-parole sentences does not counsel against applying an abuse-of-discretion standard. The trial court remains in the best position to determine whether each particular defendant is deserving of life without parole. All crimes have a maximum possible penalty, and when trial judges have discretion to impose a sentence, the imposition of the maximum possible penalty for any crime is presumably 'uncommon' or 'rare.' Yet this Court has never imposed a heightened standard of appellate review, and it should not do so in this instance.").

II.

Wilkerson argues that the circuit court erred in sentencing him to life imprisonment without the possibility of parole. (Wilkerson's brief, p. 43.) Specifically, Wilkerson argues that the circuit court's sentencing decision is "ripe with errors" and "clearly" demonstrates that the court failed to "faithfully apply" the factors established in Miller, Montgomery, and Ex parte Henderson. (Wilkerson's brief, pp. 45-68.) According to Wilkerson, the circuit court's sentencing decision focused on the circumstances of his offense to the exclusion of all other relevant sentencing factors and, as a

result, his sentence must be reversed. Id. We disagree.

In Click, 215 So. 3d at 1192, this Court stated:

> "Miller 'mandates only that a sentencer follow a certain process--considering an offender's youth and attendant characteristics'--before 'meting out' a sentence of life imprisonment without parole. Miller, 567 U.S. at 483, 132 S. Ct. at 2471. '[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.' Miller, 567 U.S. at 489, 132 S. Ct. at 2475."

As noted above, the Alabama Supreme Court in Ex parte Henderson established the following factors courts must consider when deciding whether life in prison with the possibility of parole would be an appropriate sentence for a juvenile:

> "(1) the juvenile'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; (2) the juvenile's diminished culpability; (3) the circumstances of the offense; (4) the extent of the juvenile's participation in the crime; (5) the juvenile's family, home, and neighborhood environment; (6) the juvenile's emotional maturity and development; (7) whether familial and/or peer pressure affected the juvenile; (8) the juvenile's past exposure to violence; (9) the juvenile's drug and alcohol history; (10) the juvenile's ability to deal with the police; (11) the juvenile's capacity to assist his or her attorney; (12) the juvenile's mental-health history; (13) the juvenile's potential for rehabilitation; and (14) any other relevant factor related to the juvenile's youth."

144 So. 3d at 1284. See also Foye v. State, 153 So. 3d 854, 864 (Ala. Crim. App. 2013). It should be noted, however, that "some of the factors may not apply to a particular juvenile's case and that some of the factors may overlap." Ex parte Henderson, 144 So. 3d at 1284.

The circuit court in Wilkerson's case expressly considered and addressed all 14 of the factors from Ex parte Henderson in reaching its decision. (C. 128-32.) Wilkerson challenges the court's determination on only a few of those factors.

A.

Wilkerson argues that the circuit court "failed to appropriately consider [his] youth as a mitigating factor." (Wilkerson's brief, p. 45.) According to Wilkerson, Miller requires that a "sentencing judge take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" (Wilkerson's brief, p. 46 (quoting Miller, 567 U.S. at 480).) He further contends that Miller recognized that "'youth is more than a chronological fact'" and is "'itself a relevant mitigating factor of great weight.'" Id. (quoting Miller, 567

U.S. 476). Wilkerson characterizes the circuit court's sentencing order as not "reflect[ing] any consideration of the mitigating qualities of youth," and he contends that his sentence is thus unconstitutional. (Wilkerson's brief, pp. 45-47.)

In its sentencing order, the circuit court stated the following with regard to Wilkerson'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":

> "Defendant Nicholas Wilkerson's date of birth is March 3, 1975. The Defendant was convicted of a Capital Murder that took place on May 15, 1992. Therefore, the Defendant was 17 years, 2 months, and 12 days old at the time of the offense. Defendant's chronological age makes him less than ten months shy of the age of majority. Under current Alabama law the Defendant would have automatically been treated as an adult for a capital offense. Ala. Code Section 12-15-34.
>
> "Dr. Joseph Ackerson, a pediatric neuropsychologist retained by the defense as an expert witness who examined the Defendant and subjected him to psychological testing, testified that the Defendant had a mental and emotional capacity of a 15 year old at the time of the offense. Accordingly, this Court finds that the Defendant was not so young in chronological age, nor did he suffer from such a defect of maturity, to not appreciate the nature and consequences of his actions at the time of the offense."

(C. 128-29.) Although Wilkerson contends that the court failed to give adequate weight to this factor, this factor is not dispositive; it is only 1 of the 14 factors from Ex parte Henderson. The circuit court acted within its discretion in its consideration of Wilkerson's age at the time of the offense, and Wilkerson is not entitled to relief on this claim.

B.

Next, Wilkerson argues that the circuit court erred by "placing too much importance on the circumstances of the offense." (Wilkerson's brief, p. 47.) Specifically, he contends that the circumstances of the murder-robbery underlying his capital-murder conviction were not meaningfully different from other murder-robberies, and, as such, the circuit court could not have reasonably concluded that his offense demonstrates that his crime reflects "irreparable corruption." (Wilkerson's brief, pp. 47-56.)

In its sentencing order, the circuit court addressed the circumstances of, and Wilkerson's participation in, the offense underlying his conviction as follows:

"The Circumstances of the Offense

> "[Wilkerson] and his codefendants carried out a detailed plan to commit an armed robbery of a restaurant. Carrying out the crime involved a series of steps to prepare for the crime. Most notably, the record establishes that [Wilkerson] waited until the optimal time to carry out the crime, just after the restaurant closed, giving him time to reflect on the potential consequences of the act he was about to commit.
>
> "The trial record establishes that [Wilkerson] sat on the back of William Wesson in one room, while one codefendant held his wife captive in an adjacent room, and another codefendant collected the restaurant's cash. Mr. Wesson was shot in the back while lying face down on the floor. Mr. Wesson was also robbed of his wallet and keys. The defendants then divided the money from the restaurant and Mr. Wesson's wallet.
>
> "The facts of the case show that [Wilkerson's] actions were those of a cold and calculated criminal.
>
> "The Extent of the Juvenile's Participation in the Crime
>
> "The evidence at trial establishes that [Wilkerson] is the most culpable of all the defendants in the death of William Wesson. He alone was the one who ordered William Wesson to the ground. [Wilkerson] alone is the one who sat on the back of William Wesson, took his wallet, and put it in his own pocket. [Wilkerson] pulled the trigger of the handgun that shot the victim in the head as he lay face down on the floor of the restaurant."

(C. 129.)

Wilkerson criticizes several aspects of these conclusions by the circuit court. Wilkerson's criticism, however, is based

largely on arguments about the appropriate weight to be given the evidence from Wilkerson's trial and from the Miller hearing. Wilkerson at his original trial maintained that he shot the victim accidentally. In the current proceeding he portrayed himself as a follower in the crime and not as the leader. The circuit court, however, was justified in rejecting Wilkerson's version of the events, as well as his minimization of his role in them. Wilkerson's disagreement with the circuit court does not entitle him to relief. Furthermore, nothing in the circuit court's order indicates that the court placed an inappropriate weight on these factors.

C.

Wilkerson contends that the circuit court also "inexplicably failed to consider [his] diminished intellectual capacity" in rendering its decision. (Wilkerson's brief, p. 56.) Wilkerson points out that his family members and Dr. Ackerson testified that he had a low IQ, that he was vulnerable to peer pressure, and that he lacked good judgment and decision-making skills. He argues that the State offered no evidence or testimony to dispute this information. (Wilkerson's brief, pp. 56-58.) According to Wilkerson, the

circuit court erred by failing to consider this "highly relevant" evidence in rendering its decision. (Wilkerson's brief, p. 58.)

The circuit court, however, addressed Wilkerson's mental-health history, albeit briefly, stating:

> "No evidence was presented at trial or at the resentencing hearing to suggest that [Wilkerson] had any significant mental health history. The only evidence of any mental health condition was the diagnosis of Dr. Ackerson, some 23 years after the crime, that [Wilkerson] suffered from ADHD in his youth."

(C. 131.) Although Wilkerson contends that the circuit court should have placed more emphasis on other aspects of his mental health, the circuit court was not required to do so.

This Court has previously recognized:

> "'The United States Supreme Court's decision in Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), requires that a circuit court consider all evidence offered in mitigation when determining a capital defendant's sentence. However,
>
> > "'"'[M]erely because an accused proffers evidence of a mitigating circumstance does not require the judge or the jury to find the existence of that fact. Mikenas [v. State, 407 So. 2d 892, 893 (Fla. 1981)]; Smith [v. State, 407 So. 2d 894 (Fla. 1981)].' Harrell v. State, 470 So. 2d 1303, 1308 (Ala. Cr. App. 1984), aff'd, 470 So. 2d 1309 (Ala.), cert. denied, 474 U.S. 935, 106 S. Ct. 269, 88 L. Ed. 2d 276 (1985)."

> "'Perkins v. State, 808 So. 2d 1041[, 1137] (Ala. Crim. App. 1999). "'Although the trial court must consider all mitigating circumstances, it has discretion in determining whether a particular mitigating circumstance is proven and the weight it will give that circumstance.'" Simmons v. State, 797 So. 2d 1134, 1182 (Ala. Crim. App. 1999), quoting Wilson v. State, 777 So. 2d 856, 893 (Ala. Crim. App. 1999). "'While Lockett [v. Ohio, 438 U.S. 586 (1978),] and its progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority.'" Ex parte Slaton, 680 So. 2d 909, 924 (Ala. 1996), quoting Bankhead v. State, 585 So. 2d 97, 108(Ala. Crim. App. 1989).'"

White v. State, 179 So. 3d 170, 236 (Ala. Crim. App. 2013) (quoting Albarran v. State, 96 So. 3d 131, 212-13 (Ala. Crim. App. 2011)). As demonstrated above, the circuit court considered Wilkerson's ADHD diagnosis; the weight the court assigned to that fact was within its discretion. The circuit court permitted Wilkerson to introduce evidence as to his IQ, as well as other evidence regarding his intellectual capacity. The circuit court was not, however, required to find that evidence, or any other evidence, mitigating, and nothing in the record before us indicates that the circuit court abused its discretion in its conclusions as to this factor. Accordingly, Wilkerson is due no relief on this claim.

D.

Wilkerson briefly argues that the circuit court "falsely stated twice in its order that [he] never expressed remorse for shooting the victim." (Wilkerson's brief, p. 58.) According to Wilkerson, this assertion is wrong because, at the end of his sentencing hearing, he stated on the record: "I would like to apologize for the family's loss" and "I'm sorry for everything I've done. And I pray they accept my apology." Id. (quoting R. 280.)

The circuit court's statement that Wilkerson never showed remorse for shooting Wesson was made in the following context:

"The Juvenile's Potential for Rehabilitation

> "While incarcerated in the Alabama Department of Corrections [Wilkerson] has been found guilty of approximately 65 infractions. Some of his infractions are major, violent infractions. In June of 2013 [Wilkerson] filed the Rule 32 Petition that led to his resentencing hearing. At that time [Wilkerson] should have known that he had a chance at parole at some point. And yet, [Wilkerson] has been found guilty of at least ten disciplinary infractions since then, including a major infraction for fighting with a weapon, an infraction where [Wilkerson] stabbed another inmate with a weapon.
>
> "At his resentencing hearing [Wilkerson] was given an opportunity to make a statement. [Wilkerson's] statement was very brief. He expressed no specific remorse, nor did he specifically take responsibility for [his] actions. In his original trial testimony he blamed the occurrence on an accident, claiming that he bumped into a door and

> the gun went off. At his resentencing he did not take the opportunity to correct that testimony and take full responsibility for his actions.
>
> "....
>
> "Conclusion
>
> "Defendant Nicholas Wilkerson participated in planning a restaurant robbery. During that robbery he alone shot and killed William Wesson with a handgun he was holding. He shot the victim in the back as he lay on the floor, and then be left the victim for dead. The crimes committed by this Defendant are not representative of an immature and impetuous youth, but rather a mature, cold and calculated criminal eager to cover his tracks at all costs. [Wilkerson] went to great lengths to participate in the robbery and murder of William Wesson and to cover his crime afterwards. [Wilkerson] expressed no remorse for his actions at the time of the incident or at his trial."

(C. 131, 132) (emphasis added). The circuit court was correct in noting that "at the time of the incident or at his trial," Wilkerson "expressed no remorse for his actions." Further, Wilkerson's statement that he was "sorry for everything [he's] done" could have been construed merely as an apology for his role, which he tried to minimize, in what he contended was an accidental shooting. The circuit court did not abuse its discretion in its conclusions, and Wilkerson is not entitled to relief on this claim.

E.

Wilkerson contends that the circuit court "erred in failing to recognize that it could not conduct a meaningful review of [his] age-related characteristics at the time of the crime." (Wilkerson's brief, p. 59.) According to Wilkerson, in conducting a Miller hearing, the court was required to evaluate his personal characteristics from more than 25 years ago. (Wilkerson's brief, pp. 59-63.) This, Wilkerson argues, is impossible and, therefore, the circuit court, "as a matter of law, [should have] held that [he] could not be sentenced to life-without-parole because it could not guarantee a sentencing hearing that fully and fairly complies with Miller." (Wilkerson's brief, pp. 59-60.)

Although his argument is not a model of clarity, Wilkerson appears to contend that the gap between the present Miller hearing and his original conviction rendered his resentencing hearing unfair and pointless. This argument is to some degree puzzling because Wilkerson is the one who petitioned the circuit court to have the hearing in the first place, and the circuit court granted him that relief. Regardless, neither Miller nor Montgomery hold or suggest that a lengthy gap between the date of the resentencing hearing and

the original conviction renders a Miller hearing fundamentally unfair. Wilkerson is not entitled to relief on this claim.

F.

Wilkerson argues that the analysis in the circuit court's sentencing order "evidences a failure to faithfully apply the proper presumptions under Miller and hold the State to the burden of proving the constitutionality of a life-without-parole sentence beyond a reasonable doubt." (Wilkerson's brief, p. 63.) Specifically, he argues that the order demonstrates that the circuit court believed that he, and not the State, bore the burden of proving that he was entitled to a life-imprisonment sentence as opposed to a life-imprisonment-without-parole sentence. Id. He further argues that the State encouraged the circuit court to disregard Miller's "presumption" that a life-imprisonment-without-parole sentence is unconstitutional and that "presumption" must be overcome by demonstrating that the juvenile evidences "permanent incorrigibility," "irreparable corruption," and "irretrievable depravity" and that the court followed the State's encouragement to do so. (Wilkerson's brief, p. 64.) Finally, Wilkerson contends that the court's order "brims with

advocacy for the State" and reflects a "lack of independent findings and conclusions." (Wilkerson's brief, p. 65.) We disagree.

First, as we held in Part I, there is no merit to Wilkerson's contention regarding the existence of a presumption against a sentence of life imprisonment without the possibility of parole for a juvenile defendant. Likewise, there is no merit to his argument that the State bears the burden of proof at a Miller sentencing hearing.

Second, in its sentencing order, the circuit court expressly considered the legal principles announced in Miller and Montgomery. (C. 128.) It also expressly considered all 14 factors announced by the Alabama Supreme Court in Ex parte Henderson and made written findings regarding the evidence presented to it during Wilkerson's resentencing hearing in considering those factors. (C. 128-32.) Additionally, in rendering its decision, the court reviewed the entire transcript from Wilkerson's original trial, all the documents in the court's file, testimony from witnesses at the resentencing hearing, admitted exhibits, the presentencing report from the Alabama Board of Pardons and Paroles, and the

statement Wilkerson made on his own behalf at the end of his resentencing hearing. (C. 128.)

After considering all this information, the circuit court concluded that Wilkerson's conduct both during the robbery and murder of William Wesson and since his incarceration demonstrated that "his crime was not the result of 'transient immaturity or youth,' but instead was the product of 'irreparable corruption' ... [and, thus,] this is the rare case where the original sentence of the judge was an appropriate sentence for a juvenile defendant convicted of capital murder." (C. 131.) Nothing in the circuit court's order or in the record indicates that, in sentencing Wilkerson to life imprisonment without the possibility of parole, the circuit court disregarded the legal principles announced in Miller or that it failed to make its own independent findings and conclusions. Wilkerson is not entitled to relief on this claim.

III.

Finally, Wilkerson briefly argues that this Court must take judicial notice that "there are three juvenile life-without-parole sentences now on appeal from the same

sentencing court." (Wilkerson's brief, p. 67.) In its entirety, Wilkerson's argument reads as follows:

> "Moreover, before this Court at this moment are three appeals, including this present case, from this same circuit court in which that court has imposed a life-without-parole sentencing on a juvenile defendant who has been granted a new sentencing hearing pursuant to Miller and Montgomery. See Christopher Michael Thrasher v. State of Alabama, CR-17-0393 and Carvin Stargell v. State of Alabama, CR-17-0353. See also Nettles v. State, 731 So. 2d 626, 629 (Ala. Crim. App. 1998) ('this Court may take judicial notice of its own records.') Despite the suggestion from the United States Supreme Court that a life-without-parole sentence will be uncommon for juvenile offenders, this same court has now believed three juvenile defendants that have come before it were the rare juvenile offenders whose crimes reflect irreparable corruption.
>
> "Miller commands that a juvenile life-without-parole sentence is presumptively unconstitutional, yet now this same court has imposed the very sentence three times in the span of months. The very fact that multiple juvenile defendants are now before this Court challenging these sentences should cause this Court to cast a suspicious eye on the level of review this sentencing court has been applying to Miller sentencing cases. If Miller and Montgomery's commands, protections and predictions were carefully taken to hear, it is hard to imaging three juvenile defendants would now be on appeal from this same court challenging the constitutionality of life-without parole sentences."

(Wilkerson's brief, pp. 67-68.)

Initially, we question whether this argument complies

with the requirements of Rule 28(a)(10), Ala. R. App. P. That rule requires that an argument contain "the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." "[W]e are not required to consider matters on appeal unless they are presented and argued in brief with citations to relevant legal authority." Zasadil v. City of Montgomery, 594 So. 2d 231, 231 (Ala. Crim. App. 1991). "Failure to comply with Rule 28(a)(10) has been deemed a waiver of the issue presented." C.B.D. v. State, 90 So. 3d 227, 239 (Ala. Crim. App. 2011).

Wilkerson's argument here is nothing more than a bare allegation. The only relevant authorities cited are Miller and Montgomery, and they are cited for a "suggestion that a life-without-parole sentence will be uncommon for juvenile offenders." That "suggestion" does not entitle Wilkerson to relief. Moreover, as the Michigan Supreme Court noted in Skinner:

> "Miller used the word 'uncommon' only once and the word 'rare' only once, and when those words are read in context it is clear that the Court did not hold that a trial court must explicitly find that a defendant is 'rare' or 'uncommon' before it can impose life without parole.

> "....
>
> "Montgomery quoted Miller's references to 'uncommon' and 'rare.' ... [T]hese statements simply make the point that juvenile offenders who are deserving of life without parole are rare. To begin with, only those juvenile offenders who have been convicted of first-degree murder can be subject to life without parole, which is a small percentage of juvenile offenders. In addition, since Miller, the only juvenile offenders who can be sentenced to life without parole are those who have been convicted of first-degree murder and whose mitigating circumstances do not require a lesser sentence. In other words, Miller and Montgomery simply noted that those juvenile offenders who are deserving of life-without-parole sentences are rare; they did not impose any requirement on sentencing courts to explicitly find that a juvenile offender is or is not 'rare' before imposing life without parole."

Skinner, 502 Mich. at 129, 917 N.W.2d at 312.

Wilkerson's arguments are without merit.

Conclusion

The judgment of the circuit court is due to be affirmed.

AFFIRMED.

Windom, P.J., and Welch, J., concur. Kellum, J., concurs in the result.

APPENDIX C

ELECTRONICALLY FILED
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CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
KAREN DUNN BURKS, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION

STATE OF ALABAMA	)	
	)	
V.	)	Case No.: CC-1992-001758.00
	)	
WILKERSON NICHOLAS RAMON	)	
Defendant.	)	

SENTENCING ORDER

This cause came on for hearing on August 15, 2017 following Defendant's Rule 32 Petition for resentencing, as required by Miller v. Alabama, 132 S.Ct. 2455 (2012). The Court reviewed the entire transcript of the original trial, reviewed all documents in the Court file, took testimony from witnesses, admitted exhibits, reviewed the Presentencing Report from the Board of Pardons and Paroles, and considered the statement of the Defendant on his own behalf.

Upon consideration thereof, the Court FINDS as follows:

Ala 13A-5-43 governs sentencing for juveniles convicted of Capital Murder. Under that code section this Court's sentencing options are Life with the possibility of Parole, or Life Without the possibility of Parole. Defendant filed a Motion to Declare Ala 13A-5-43 unconstitutional. For reasons explained below, that Motion is found to be moot.

The United States Supreme Court, in Miller v. Alabama, 132 S.Ct. 2455 (2012), held that a judge "must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." Id., at 2475. In Montgomery v. Louisiana, 136 S.Ct. 718 (2016) the Supreme Court made the Miller decision retroactive, and in so doing held that prisoners "must be given the opportunity to show their crime did not reflect irreparable corruption." Id., at 623. In making this determination the Alabama Supreme Court held in State v. Henderson, 144 So.3d1262, 1263 that a sentencing Court must consider fourteen factors, each of which is addressed by this Court below:

The juvenile'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

Defendant Nicholas Wilkerson's date of birth is March 3, 1975. The Defendant was convicted of a Capital Murder that took place on May 15, 1992. Therefore, the Defendant was 17 years, 2 months, and 12 days old at the time of the offense. Defendant's chronological age makes him less than ten months shy of the age of majority. Under current Alabama law the Defendant would have automatically been treated as an adult for a capital offense. Ala. Code

Section 12-15-34.

Dr. Joseph Ackerson, a pediatric neuropsychologist retained by the defense as an expert witness who examined the Defendant and subjected him to psychological testing, testified that the Defendant had a mental and emotional capacity of a 15 year old at the time of the offense. Accordingly, this Court finds that the Defendant was not so young in chronological age, nor did he suffer from such a defect of maturity, to not appreciate the nature and consequences of his actions at the time of the offense.

The Juvenile's diminished culpability

The evidence presented at trial established that the Defendant entered into an agreement with the other defendants willingly and knowingly. The defendants carried out a series of steps in preparation for the crime. They obtained a vehicle, obtained stocking caps, obtained weapons, and waited until the optimum time to commit the crime. Defendant's killing of the victim, who lay helplessly face down on the floor, suggests that the killing was intended to eliminate a possible witness to the crime. The evidence clearly establishes that the Defendant did not act recklessly, or on impulse. Rather, Defendant's conduct at the time of the crime is found by this Court to be deliberate and calculated.

The circumstances of the offense

The defendant and his co-defendants carried out a detailed plan to commit an armed robbery of a restaurant. Carrying out the crime involved a series of steps to prepare for the crime. Most notably, the record establishes that the Defendant waited until the optimal time to carry out the crime, just after the restaurant closed, giving him time to reflect on the potential consequences of the act he was about to commit.

The trial record establishes that the Defendant sat on the back of William Wesson in one room, while one co-defendant held his wife captive in an adjacent room, and another co-defendant collected the restaurant's cash. Mr. Wesson was shot in the back while lying face down on the floor. Mr. Wesson was also robbed of his wallet and keys. The defendants then divided the money from the restaurant and Mr. Wesson's wallet.

The facts of the case show that the Defendant's actions were those of a cold and calculated criminal.

The extent of the juvenile's participation in the crime

The evidence at trial establishes that the Defendant is the most culpable of all the defendants in the death of William Wesson. He alone was the one who ordered William Wesson to the ground. The Defendant alone is the one who sat on the back of William Wesson, took his wallet, and put it in his own pocket. The Defendant pulled the trigger of the handgun that shot the victim in the head as he lay face down on the floor of the restaurant.

The juvenile's family, home, and neighborhood environment

The undisputed evidence at trial and at the resentencing hearing is that the Defendant had a stable home environment where he lived with his mother, father, and brother. Dr. Ackerman reported that the Defendant grew up in a stable and supportive home with a childhood free of strife or violence.

The juvenile's emotional maturity and development

The testimony presented by Dr. Alan Blotcky indicates the Defendant could think things through clearly and logically. Dr. Blotcky also testified that the Defendant appeared to be goal oriented and able to direct himself in accordance with that goal. The Defendant was a student at Ensley High School when this incident occurred. Additionally, the Defendant was working at Maretha's restaurant and for Sparkling Cleaning Service at the time of the crime. At the time of trial the defendant had left Ensley High School due to his arrest but continued to work on obtaining his GED. This Court finds that the defendant demonstrated sufficient emotional maturity and development.

Whether familial and/or peer pressure effected the juvenile

Although Dr. Blotcky stated that the Defendant was a follower, he did not indicate that the Defendant was unable to make his own decisions or speak for himself. In fact he stated quite the opposite. The testimony presented by Dr. Alan Blotcky indicates the Defendant could think things through clearly and logically. Dr. Blotcky also testified that the Defendant appeared to be goal oriented and could direct himself in accordance with that goal. Further, the evidence at trial established that on the night of the crime no one told the Defendant to fire the shot that killed William Wesson. On the contrary, the Defendant acted on his own volition. At the resentencing hearing there was conflicting testimony from the family of the Defendant as to whether he was a leader or follower.

The juvenile's past exposure to violence

There was no evidence presented that the Defendant had been impacted by any past exposure to violence whatsoever, and no indication he had gang involvement in his past. Dr. Ackerson reports the Defendant grew up in a stable and supportive home with a childhood free of strife or violence. There was no additional evidence at the sentencing hearing suggesting that the Defendant had been exposed to a life of violence prior to the crime.

The juvenile's drug and alcohol history

At the resentencing hearing there was conflicting evidence about the Defendant's use of alcohol or drugs prior to the crime. The Defendant's own version of his alcohol and drug use has changed dramatically over time. His family all testified that he did not use alcohol or drugs at all. Although the Defendant testified at trial that on the night of the robbery and murder he had been drinking and smoking marijuana, a witness stated that no one had been drinking or smoking marijuana. Further, the mother of the Defendant did not testify at trial or at his

resentencing hearing that her son appeared to be intoxicated or under the influence of any drugs. In fact, the defendant recalled the events of the night clearly and in great detail.

The juvenile's ability to deal with the police. The Juvenile's capacity to assist his attorneys

These two prongs were addressed together in Miller wherein Justice Kagan wrote that a failure to consider these prongs "ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with police officers and prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." Miller, 132 S.Ct. at p. 2468.

As noted by Dr. Blotcky, the Defendant had no mental defects that would prohibit him from assisting his attorneys. Thus there is no reason to believe that the Defendant was unable to deal with police officers and to assist his attorney. In fact the Defendant was able to formulate and relate to the police three different stories as to what occurred in the restaurant, during the hours preceding the crime, and after the crime. All stories were told in an effort to mislead the police. The Defendant was able to recall all the various lies he told to the police in an effort to cover his crime and admitted during his testimony that he lied to the police on the different occasions.

No evidence was presented at the resentencing hearing that indicates that the Defendant had any trouble dealing with police or assisting his attorneys.

The juvenile's mental health history

No evidence was presented at trial or at the resentencing hearing to suggest that the Defendant had any significant mental health history. The only evidence of any mental health condition was the diagnosis of Dr. Ackerson, some 23 years after the crime, that Defendant suffered from ADHD in his youth.

The juvenile's potential for rehabilitation

While incarcerated in the Alabama Department of Corrections the Defendant has been found guilty of approximately 65 infractions. Some of his infractions are major, violent infractions. In June of 2013 the Defendant filed the Rule 32 Petition that lead to his resentencing hearing. At that time the Defendant should have known that he had a chance at parole at some point. And yet, Defendant has been found guilty of at least ten disciplinary infractions since then, including a major infraction for fighting with a weapon, an infraction where the Defendant stabbed another inmate with a weapon.

At his resentencing hearing the Defendant was given an opportunity to make a statement. Defendant's statement was very brief. He expressed no specific remorse, nor did he specifically take responsibility for actions. In his original trial testimony he blamed the occurrence on an accident, claiming that he bumped into a door and the gun went off. At his resentencing he did not take the opportunity to correct that testimony and take full responsibility for his actions.

Any other relevant factor related to the juvenile's youth

This Court finds that there is no other compelling evidence related to the Defendant's age, over 17 years, at the time of the crime that should result in a change of his sentence. The jury convicted the Defendant of Capital Murder during the Robbery of William Wesson after being presented with all the evidence in this case. Judge Reynolds then appropriately sentenced the Defendant to Life Without Parole for his cold, calculating, cruel, and heinous crime against an innocent victim. Judge Reynolds' sentence would have been appropriate even if he had the option to sentence the Defendant to a lesser term.

Conclusion

Defendant Nicholas Wilkerson participated in planning a restaurant robbery. During that robbery he alone shot and killed William Wesson with a handgun he was holding. He shot the victim in the back as he lay on the floor, and then he left the victim for dead. The crimes committed by this Defendant are not representative of an immature and impetuous youth, but rather a mature, cold and calculated criminal eager to cover his tracks at all costs. The Defendant went to great lengths to participate in the robbery and murder of William Wesson and to cover his crime afterwards. This Defendant expressed no remorse for his actions at the time of the incident or at his trial.

Notably, Defendant's conduct since his incarceration demonstrates that his crime was not the result of "transient immaturity or youth", but instead was the product of "irreparable corruption". Click v. State, 215 So.3d 1189, Ala.Crim App. (2016). Considering all the circumstances, this Court finds that this is the rare case where the original sentence of the trial judge was an appropriate sentence for a juvenile defendant convicted of Capital Murder.

WHEREFORE, IT IS THE JUDGMENT AND SENTENCE OF THIS COURT that Defendant NICHOLAS WILKERSON IS SENTENCED TO LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE.

DONE this 19th day of August, 2017.

/s/ DAVID CARPENTER
CIRCUIT JUDGE