REL: May 28, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-19-0589

Gregory Wynn

v.

State of Alabama

Appeal from Calhoun Circuit Court
(CC-98-934.80)

KELLUM, Judge.

Gregory Wynn appeals his resentencing, pursuant to Miller v. Alabama, 567 U.S. 460 (2012), to life imprisonment without the possibility of parole for his capital-murder convictions.

In 1999, Wynn was convicted of two counts of murder made capital because the murder was committed during the course of a robbery, see § 13A-5-40(a)(2), Ala. Code 1975, and two counts of murder made capital because the murder was committed during the course of a burglary, see § 13A-5-40(a)(4), Ala. Code 1975, in connection with the murder of Denise Bliss. The jury unanimously recommended that Wynn be sentenced to death for his capital-murder convictions, and the trial court followed the jury's recommendation and sentenced Wynn to death. This Court remanded the cause for the trial court to vacate one of Wynn's convictions for capital murder during a robbery and one of his convictions for capital murder during a burglary on the ground that those convictions violated double-jeopardy principles and to correct errors in its sentencing order. On return to remand, this Court affirmed Wynn's convictions on the other two counts of capital murder and his sentence of death. Wynn v. State, 804 So. 2d 1122 (Ala. Crim. App. 2000).[1]

[1]This Court may take judicial notice of its own records and we do so in this case. See Nettles v. State, 731 So. 2d 626, 629 (Ala. Crim. App. 1998), and Hull v. State, 607 So. 2d 369, 371 n.1 (Ala. Crim. App. 1992).

In 2003, Wynn filed a Rule 32, Ala. R. Crim. P., petition for postconviction relief. In 2005, while the petition was pending in the circuit court, the United States Supreme Court issued its opinion in Roper v. Simmons, 543 U.S. 551 (2005), holding unconstitutional a sentence of death imposed on individuals who were under 18 years old at the time of the capital offense. The circuit court resentenced Wynn, who was 17 years old at the time of the murder, to life imprisonment without the possibility of parole, which, at the time, was the only sentence other than death available for his capital-murder convictions. In 2012, the United States Supreme Court issued its opinion in Miller, supra, holding unconstitutional a mandatory sentence of life imprisonment without the possibility of parole for individuals who were under 18 years old at the time of the capital offense. Wynn's Rule 32 petition was still pending in the circuit court when Miller was issued, and he amended his petition to challenge the constitutionality of his sentence of life imprisonment without the possibility of parole. In 2015, the circuit court denied Wynn's Rule 32 petition, and Wynn appealed.

On appeal, this Court affirmed the circuit court's denial of the claims in Wynn's petition relating to the guilt phase of his capital trial, but we reversed the circuit court's denial of Wynn's challenge to his sentence of life imprisonment without the possibility of parole in light of the United States Supreme Court's opinion in Montgomery v. Louisiana, 577 U.S. 190 (2016), in which the Court held that the rule announced in Miller applied retroactively on collateral review, and we remanded the cause for the circuit court to vacate Wynn's sentence and to conduct a resentencing hearing. Wynn v. State, 246 So. 3d 163 (Ala. Crim. App. 2016). In doing so, we summarized the facts of the crime as follows:

> "At Wynn's trial, the State's evidence showed that in the early morning hours of April 9, 1998, an employee of the Hardee's fast-food restaurant off McClellen Boulevard in Anniston opened the restaurant, discovered a pool of blood on the floor, and immediately telephoned police. Police discovered the body of Denise Bliss in the walk-in refrigerator. The forensic pathologist testified that Bliss had been severely beaten, that she had many defensive wounds, that 40 or more blows had been inflicted to her body, and that she died of multiple blunt-force trauma to her head and neck. Testimony established that Bliss had been beaten with a window washing device, commonly known as a squeegee, and a metal pipe that the restaurant used to compact its trash. Approximately $1,100 in currency, checks, and coins was missing from the restaurant.

"The State's evidence presented against Wynn was compelling. There was testimony that Wynn had previously worked at Hardee's and that he had been fired by Bliss about two weeks before the murder. Two witnesses saw a black male very near Hardee's shortly before 10:00 p.m. on the night of the murder. At trial, one of those witnesses identified this male as Wynn. Randy Smith, a friend of Wynn's, testified that Wynn called him on the evening of April 8, 1998, and asked him for a ride to Hardee's because, he told Smith, he was going to rob the place and get some money. However, Smith said, he could not get his parents' car that evening.

"Seven people testified that Wynn confessed to them that he robbed and killed a woman at the Hardee's restaurant. Brandy Mancil testified that in April 1998 she was living in a trailer park, that she was at Brandy Yott's trailer on April 8, 1998, and that Wynn was with them. Mancil said that Wynn left the trailer at around 10:00 p.m. that evening on his bicycle but that he came back to the trailer later that night. Wynn wanted to talk to her, she said, and he told her that he had 'robbed Hardee's' and he showed her money that was in a 'blue like bank bag.' A little later, she said, he told her and Yott that he had killed a woman. Mancil testified to what Wynn told her:

> " 'He said that he walked into Hardee's and that he was going to rob them but he changed his mind so he walked out. And then he got halfway towards like Fun Fever [an arcade] and he turned around and he said, "F—— it," that he was going to go ahead and do it. And he went in and he hid behind the bathroom doors in the women's bathroom because I guess he knew they checked it before it closed. When the lady opened the door she didn't see him so I guess she went ahead and locked up.

> And he went in the back. And I can't remember, it was some kind of iron pole off of like a garbage disposal or something and he said that he had beat her with it. And then he -- he didn't -- he told her to give him all the money first and he said he wasn't going to kill her until she said, "Greg, please don't kill me. I won't call the police." And then after she said that he got scared and panicked I guess and just started beating her with that pole. And then he told me -- he said he didn't know if he had killed her or not. So if he didn't kill her he [dragged] her in the freezer and she would freeze to death before anyone found her the next day.'

"(Trial R. 1107-08.)

"Yott testified that in the early morning hours of April 9, 1998, Wynn came to the trailer where she was living to see her roommate Brandy Mancil. Yott said that she overheard Wynn tell Mancil that he had robbed somebody and 'wanted to know if we wanted to go get a room.' (Trial R. 1209.) Yott said that they went to a motel in Oxford, that Wynn paid for the room, and that Wynn gave her money to get beer. As Wynn was talking to them, she said, he told her and Mancil that he had 'killed a woman' at Hardee's and that he had beaten her with a 'stick or something.' (Trial R. 1213.) The next morning, she said, they walked over to a mall and Wynn paid for all the purchases that they made that day.

"Anthony Roper testified that he is a general manager for Hardee's. He testified that for each nightly deposit [the serial] number is recorded from the highest bill denomination that is deposited. The reason, he said, 'is in case the deposit gets lost or if it's stolen it [is] something the police could use to find it.' (Trial R. 832.) Reginald Elston testified that the day Wynn

> was arrested he was at Brandy's trailer with Wynn and Wynn asked him to give him change for a hundred dollar bill. That bill was traced to the daily deposit that had been prepared by Bliss on the night of the murder.
>
> "A search was conducted of Wynn's house, which was approximately one mile from Hardee's. On April 11, 1998, police discovered torn checks made out to Hardee's and dated the day of the robbery/murder. Bloody clothing was also discovered at Wynn's house."

Wynn, 246 So. 3d at 167-68 (footnote omitted). In addition, we note that Cledus Ferrell and Carlos McCallum testified that, the day after the murder, Wynn had composed rap-music lyrics about the killing, and Ferrell testified that Wynn indicated he wanted to get a tattoo of a teardrop to show that he had killed someone. Wynn's defense at trial was that someone else had murdered Bliss, specifically two black males who had been seen entering the Hardee's restaurant just before it closed the night of the murder.

In February 2020, the circuit court conducted a resentencing hearing in compliance with this Court's instructions, at which the State and Wynn presented a plethora of documentary and testimonial evidence. Among other things introduced into evidence were the record from Wynn's trial

and some of the exhibits from the trial; the record from Wynn's Rule 32 proceedings; Wynn's records from the Alabama Department of Corrections ("DOC"); Wynn's juvenile criminal records; Wynn's school records; and two reports prepared by experts. In addition, 12 witnesses testified at the hearing, and the State presented victim-impact statements from Bliss's mother and Bliss's best friend.

The State's evidence indicated that, in the six months before the murder, Wynn had been charged with multiple criminal offenses, including disorderly conduct, harassment, menacing, theft of property, burglary, and carrying a pistol without a permit. He had completed an anger-management class in November 1997, five months before the murder, and was described in his juvenile records as "physically and mentally mature." (C. 1943.) Before his capital trial, Wynn underwent a mental evaluation, and the report from that evaluation indicates that Wynn was in the "low-average range" of intelligence but that his thought process was "logical, relevant, and goal-directed" (C. 1935), that he "exhibited appropriate emotional and behavioral control" (C. 1938), and that he was aware of "the wrongfulness of [his] actions ... and the possible

consequences thereof." (C. 1937.) School records and testimony indicated that Wynn had performed poorly in school, ultimately dropping out, that he had tended to be disruptive in class, and that he had been disciplined for fighting. Wynn had 20 disciplinary infractions during his approximately 20 years in prison -- including citations for insubordination, failure to obey orders, possession of contraband, fighting without a weapon, and assault on a DOC official -- all but one of which occurred between 1999 and 2011. In addition, while incarcerated, Wynn had maintained an account with the social-media Web site Facebook under the name Greg Mann. The State also presented evidence indicating that, not long before the resentencing hearing, during a telephone call with his aunt, Wynn denied committing the murder and claimed that he did not need rehabilitation because he was innocent.

Wynn's evidence indicated that he was raised by his mother, Penny, his stepfather, Ronald Williams, and his grandmother. Penny was 16 years old when Wynn was born. She had been in a relationship with an older man, Frank English, who Penny maintained throughout Wynn's childhood was Wynn's biological father. Only later, after Wynn had gone

to prison, did Penny reveal that Wynn's true biological father was a man named Curtis Mann, and subsequent DNA testing confirmed the paternity. English drank heavily and used drugs, and he repeatedly beat Penny during their relationship. After Wynn was born, English denied he was Wynn's father, claiming that Wynn was "too black to be his." (R. 269.) Penny and English split up when Wynn was young, and Penny met and later married Williams, with whom she had two more children. According to Wynn's aunt, Rosaline Montgomery, Penny did not want to be a teenage mother and she verbally and physically abused Wynn throughout his childhood. Although abused by his mother, Montgomery said, Wynn had a close relationship with his grandmother, staying with her often and helping her monitor her diabetes.

James Garbarino, Ph.D., a developmental psychologist who evaluated Wynn for the resentencing hearing, described Wynn as "an immature and impulsive teenager who had grown up in [an] abusive and dysfunctional family" (C. 1827) and as an "untreated traumatized youth" (C. 1842) who "demonstrated immaturity of thought and emotional control, impetuous and impulsive action, and failure to appreciate the full

consequences of his criminal behavior." (C. 1844.) Dr. Garbarino testified that Wynn suffered from "psychological maltreatment" -- which he said includes "all the various forms of emotional abuse and neglect" -- that intensified Wynn's immaturity. (R. 371.) Specifically, Dr. Garbarino said, Wynn's mother rejected him, degraded him for his dark complexion, corrupted him by discouraging him from doing his schoolwork, and terrorized him with physical and verbal abuse. Wynn scored a 5 on the Adverse Childhood Experience ("ACE") scale, a questionnaire designed to capture the extent of adversity a person faced while growing up which, according to Dr. Garbarino, is "very powerful in predicting problems in life." (R. 387.) Three to four percent of the population scores a 5 on the ACE scale, and approximately one percent scores a 7 or higher. Dr. Garbarino stated that "the average score for particularly young people involved in murder has been seven." (R. 390.) Dr. Garbarino said, however, that Wynn likely underreported his childhood adversity when completing the questionnaire, which is common. Specifically, Wynn did not report suffering from domestic violence while growing up, although he did state that he suffered from emotional and physical assault and

parental separation, that he felt his family did not love him, and that he lived with someone who was mentally ill, depressed, or had attempted suicide. Wynn also did not report that he suffered from neglect. Dr. Garbarino opined that Wynn is not that rare juvenile offender who is incapable of rehabilitation.

Although Wynn performed poorly in school, in the eighth grade, Wynn and two other students won a regional science competition for designing a magnetic wheelchair to help one of their classmates, which resulted in recognition by local newspapers and a resolution by the Alabama Senate commending Wynn. In addition, when he took the general educational development ("GED") test in 2007, he scored in the 90th percentile or higher on four of the five sections. He failed the math section initially but later retook that section and passed.

Wynn also presented evidence indicating that, after he was removed from death row in 2006, he was transferred to William Donaldson Correctional Facility, a maximum security facility, where he was classified as a medium-custody inmate, the lowest level security facility and custody classification he could receive having a sentence of life imprisonment

without the possibility of parole. Despite 20 disciplinary infractions, his custody classification was never increased, and, for several years, he had been housed in the faith-and-character dorm, which typically houses only those inmates who display rehabilitative qualities. Wynn had also participated in work details since 2014, with consistently positive reviews of his work. In addition to obtaining his GED diploma in 2007, Wynn organized a book event for his fellow inmates for Black History Month in 2009 and took an art class in 2010 that resulted in one of his paintings being displayed in a gallery. He also completed 33 self-improvement and educational programs in prison, including programs offered by the University of Alabama at Birmingham ("UAB") and Auburn University, 31 of which were completed between 2013 and 2020. Amy Badham, director for the office of service learning and undergraduate research at UAB, who was involved in a lecture series offered at the prison by UAB, testified that Wynn was engaged, curious, and "an incredible student." (R. 579.)

Emmit Sparkman, a corrections expert, testified that he reviewed Wynn's DOC records and interviewed Wynn for approximately two hours.

Sparkman said that Wynn's DOC records reflect a typical young offender, with numerous disciplinary infractions during his first years in prison while he was in his teens and early twenties, and only one thereafter. According to Sparkman, this showed that Wynn had matured as he aged, and, coupled with Wynn's completion of 33 prison programs and his participation in work details, indicated that Wynn was trying to rehabilitate himself.

At the conclusion of the hearing, the circuit court resentenced Wynn to life imprisonment without the possibility of parole, and it issued a detailed written sentencing order. Wynn timely filed a motion for a new sentencing hearing or, in the alternative, to reconsider his sentence, which the circuit court denied. This appeal followed.

I.

Wynn contends that a sentence of life imprisonment without the possibility of parole for a juvenile offender is "categorically" barred by the Eighth Amendment because, he says, it would be "very difficult" to identify the juveniles who may be sentenced to life imprisonment without the possibility of parole under Miller, and because, he says, since Miller

was decided in 2012, the number of states barring a sentence of life imprisonment without the possibility for juveniles has quadrupled. (Issue VIII in Wynn's brief, pp. 73-74.) However, the fact that implementing Miller may be "difficult" or that other states have banned a sentence of life imprisonment without the possibility of parole for juvenile offenders does not render such a sentence unconstitutional under the Eighth Amendment. "Miller did not foreclose a sentencer's ability to impose life without parole on a juvenile." Montgomery v. Louisiana, 577 U.S. 190, 195 (2016). See also Miller v. Alabama, 567 U.S. 460, 483 (2012) ("Our decision does not categorically bar a penalty for a class of offenders or type of crime."). Indeed, as the United States Supreme Court recently recognized: "Under Miller v. Alabama, 567 U. S. 460 (2012), an individual who commits a homicide when he or she is under 18 may be sentenced to life without parole, but only if the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment." Jones v. Mississippi, 539 U.S. ___, ___, 141 S.Ct. 1307, 1311 (2021).

II.

Wynn also raises several constitutional challenges to his resentencing proceedings.

In Betton v. State, 292 So. 3d 398 (Ala. Crim. App. 2018), this Court summarized Miller v. Alabama, 567 U.S. 460 (2012), Montgomery v. Louisiana, 577 U.S. 190 (2016), and Alabama's procedures for sentencing juvenile capital offenders in the wake of those decisions:

> " 'In Miller, the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without 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:
>
> > " ' "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, 577 U.S. [195,] 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 [210], 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 [210], 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 [1262,] 1266–84 [(Ala. 2013)]; 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)[, Ala. Code 1975,] 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.' "

292 So. 3d at 403-06 (footnote omitted).

Recently, in Jones v. Mississippi, 539 U.S. ___, 141 S.Ct. 1307 (2021), the United States Supreme Court clarified its holdings in Miller and Montgomery. Brett Jones was convicted of murdering his grandfather, and he had received a mandatory sentence of life imprisonment without the possibility of parole. He was 15 years old at the time of the crime. After Jones received postconviction relief from his mandatory sentence, a new sentencing hearing was held at which the trial court considered Jones's youth and had discretion in selecting the appropriate sentence, and the trial court again sentenced Jones to life imprisonment without the possibility of parole. Jones argued on appeal "that a sentencer's discretion to impose a sentence less than life without parole does not alone satisfy Miller" because to give effect to the holding in Montgomery that Miller substantively limited sentences of life imprisonment without the possibility of parole for juvenile offenders, a sentencer must make a finding, either explicitly or implicitly, that a

juvenile is permanently incorrigible. The United States Supreme Court rejected Jones's argument that a finding of permanent incorrigibility is constitutionally required, instead holding that, "[i]n a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." 539 U.S. at ___, 141 S.Ct. at 1313 (emphasis added).

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

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

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

> "Miller repeatedly described youth as a sentencing factor akin to a mitigating circumstance. And Miller in turn required a

sentencing procedure similar to the procedure that this Court has required for the individualized consideration of mitigating circumstances in capital cases such as Woodson v. North Carolina, 428 U. S. 280, 303–305 (1976) (plurality opinion), Lockett v. Ohio, 438 U. S. 586, 597–609 (1978) (plurality opinion), and Eddings v. Oklahoma, 455 U. S. 104, 113–115 (1982). Those capital cases require sentencers to consider relevant mitigating circumstances when deciding whether to impose the death penalty. And those cases afford sentencers wide discretion in determining 'the weight to be given relevant mitigating evidence.' Id., at 114–115. But those cases do not require the sentencer to make any particular factual finding regarding those mitigating circumstances.

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

"....

"In short, Miller followed the Court's many death penalty cases and required that a sentencer consider youth as a mitigating factor when deciding whether to impose a life-without-parole sentence. Miller did not require the sentencer to make a separate finding of permanent incorrigibility before imposing such a sentence. And Montgomery did not purport to add to Miller's requirements.

> "....
>
> "To break it down further: Miller required a discretionary sentencing procedure. The Court stated that a mandatory life-without-parole sentence for an offender under 18 'poses too great a risk of disproportionate punishment.' 567 U. S., at 479. Despite the procedural function of Miller's rule, Montgomery held that the Miller rule was substantive for retroactivity purposes and therefore applied retroactively on collateral review. 577 U. S., at 206, 212. But in making the rule retroactive, the Montgomery Court unsurprisingly declined to impose new requirements not already imposed by Miller. ...
>
> "The key assumption of both Miller and Montgomery was that discretionary sentencing allows the sentencer to consider the defendant's youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age. If the Miller or Montgomery Court wanted to require sentencers to also make a factual finding of permanent incorrigibility, the Court easily could have said so -- and surely would have said so. ..."

539 U.S. at ___, 141 S.Ct. at 1315-18.

The Court expressly declined to overrule "Montgomery's holding that Miller applies retroactively on collateral review [because b]y now, most offenders who could seek collateral review as a result of Montgomery have done so and, if eligible, have received new discretionary sentences under Miller." Jones, 539 U.S. at ___ n.4, 141 S.Ct. at 1317 n.4. However, the

Court effectively rejected Montgomery's finding that Miller announced a new substantive rule of constitutional law. The Court recognized that it had employed a unique approach in determining in Montgomery that Miller created a new substantive rule, an approach that was "in tension with the Court's retroactivity precedents that both pre-date and post-date Montgomery," and the Court specifically pointed out that "those retroactivity precedents -- and not Montgomery -- must guide the determination of whether rules other than Miller are substantive. 539 U.S. at ___ n.4, 141 S.Ct. at 1317 n.4. More importantly, the Court pointed out no less than 11 times in its opinion that Miller requires only a discretionary sentencing process for juvenile offenders. As Justice Thomas noted in his opinion concurring in the judgment, the Court "[o]verrule[d] Montgomery in substance but not in name." Jones, 539 U.S. at ___, 141 S.Ct. at 1327 (Thomas, J., concurring in the judgment).

With this backdrop, we address each of Wynn's constitutional arguments.

A.

Wynn contends that "there is no statute under which life imprisonment without parole can be imposed in this case." (Issue II in Wynn's brief, p. 55; capitalization omitted.) Specifically, he argues that Article I, § 7, Ala. Const. 1901,[2] prohibits "judicially revising" the "statutes [in effect] at the time of the offense ... to provide standards by which a court determines whether a defendant is permanently incorrigible or irreparably corrupt" (Wynn's brief, pp. 55-57) and that, "to legally apply the applicable sentencing statute in this case, see Ala. Code § 13A-5-39 (1981), the statute would need to incorporate Miller's substantive holding by drawing 'a line between' the vast majority of juveniles and those 'rare children whose crimes reflect irreparable corruption.' " (Wynn's reply brief, p.12 (quoting Montgomery, 577 U.S. at 209).) Doing so, he says, "would require more than 'a merely procedural revision' to the statute; it would constitute an unequivocally substantive change to the statute

[2]That section provides, in relevant part, that "no person shall be punished but by virtue of a law established and promulgated prior to the offense and legally applied." Article I, § 22, Ala. Const. 1901, also provides "[t]hat no ex post facto law ... shall be passed by the legislature."

forbidden by Article 1, Section 7, of the Alabama Constitution." (Wynn's reply brief, p. 12 (quoting Thigpen v. Thigpen, 541 So. 2d 465, 467 (Ala. 1989).) He also argues that "[s]eparation-of-powers concerns buttress the conclusion that judicially revising capital sentencing statutes to implement Miller's substantive rule would be unconstitutional," because, he says, "[t]he task of creating a sentencing scheme to implement Miller's substantive limit is a legislative function." (Wynn's brief, pp. 58-59.) Finally, he argues that "[c]ourts are 'barred by the Due Process Clause from [creating ex post facto laws] by judicial construction' " and that "a revision to the capital sentencing statutes to comply with Miller would result in new and disadvantageous [to a juvenile defendant] changes to the law" because it would "create[] a new sentencing scheme in which the sentence can be increased to life without parole based on a factor that did not exist in Alabama law when the crime was committed." (Wynn's brief, pp. 59-60 (quoting Bouie v. City of Columbia, 378 U.S. 347, 353-53 (1964).)

Wynn does not acknowledge in his brief on appeal the 2016 amendments to Alabama's capital-sentencing statutes, which, as already explained, authorize a sentence of life imprisonment without the

possibility of parole for juvenile capital offenders. As can be seen from the above-quoted portions of Wynn's brief, Wynn focuses his arguments on appeal solely on the constitutionality of judicially revising the statutes that were in effect at the time of the offense, making the assumption, albeit unstated, that the revised sentencing statutes do not apply to him. That assumption is incorrect.

It is well settled that, "[u]nless the statute contains a clear expression to the contrary, the law in effect at the time of the commission of the offense 'govern[s] the offense, the offender, and all proceedings incident thereto.' " Hardy v. State, 570 So. 2d 871, 872 (Ala. Crim. App. 1990) (quoting Bracewell v. State, 401 So. 2d 123, 124 (Ala. 1979)). " 'As a general rule, a criminal offender must be sentenced pursuant to the statute in effect at the time of the commission of the offense, at least in the absence of an expression of intent by the legislature to make the new statute applicable to previously committed crimes.' " Zimmerman v. State, 838 So. 2d 404, 405 n.1 (Ala. Crim. App. 2001) (quoting 24 C.J.S. Criminal Law § 1462 (1989)). Here, the legislature's intent to make the amended sentencing statutes apply retroactively to previously committed crimes is

clearly expressed in § 13A-5-43.2, Ala. Code 1975, which provides that the 2016 amendments apply "to any person under the age of 18 years at the time an offense was committed who was sentenced to life without the possibility of parole under Section 13A-5-2, 13A-5-39, 13A-5-43, or 13A-6-2, whether the person is currently incarcerated or hereinafter convicted." Wynn was 17 years old at the time of the offense and was sentenced to life imprisonment without the possibility of parole pursuant to former §§ 13A-6-2(c) and 13A-5-43(d). Therefore, the 2016 amendments to Alabama's capital-sentencing statutes apply to Wynn, and judicial revision of the statutes that were in effect at the time of the offense is unnecessary. Because judicial revision is unnecessary, Wynn's arguments challenging the constitutionality of such revision are moot.[3]

[3]We note that Wynn does not argue on appeal that retroactively applying the 2016 amendments to him is unconstitutional. Although he raised that argument in the circuit court in his motion to bar retroactive application of the amended sentencing statutes, he has abandoned the argument on appeal by focusing in his brief solely on the constitutionality of a judicial revision of the statutes that were in effect at the time of the offense and failing to acknowledge the 2016 amendments to the capital-sentencing statutes.

B.

Wynn contends that permanent incorrigibility or irreparable corruption is the equivalent of an element of the offense because, he says, it is a fact that increases the maximum sentence a juvenile capital offender may receive beyond that authorized by the jury's verdict. According to Wynn, under Miller and Montgomery, a juvenile capital offender is not eligible to receive a sentence of life imprisonment without the possibility of parole unless the juvenile is found to be permanently incorrigible or irreparably corrupt. Thus, Wynn argues, pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000), and its progeny, permanent incorrigibility or irreparable corruption must be alleged in the capital-murder indictment and the State must prove beyond a reasonable doubt to a jury that a juvenile is permanently incorrigible or irreparably corrupt before a sentence of life imprisonment without the possibility of parole is authorized. Because his indictment did not allege that he was permanently incorrigible or irreparably corrupt and because the circuit court denied his request for a jury trial, Wynn maintains, his sentence of

life imprisonment without the possibility of parole is unconstitutional. (Issues V and VI in Wynn's brief.)

In light of the United States Supreme Court's recent opinion in Jones, supra, this argument is meritless because a finding of permanent incorrigibility is not a constitutional prerequisite to imposing a sentence of life imprisonment without the possibility of parole on a juvenile offender. Rather, "youth [i]s a sentencing factor akin to a mitigating circumstance." 539 U.S. at ___, 141 S.Ct. at 1315. The Court in Jones expressly recognized that its Sixth Amendment precedents would apply only "[i]f permanent incorrigibility were a factual prerequisite to a life-without-parole sentence." 539 U.S. at ___ n.3, 141 S.Ct. at 1315 n.3. See also People v. Skinner, 502 Mich. 89, 125, 917 N.W.2d 292, 311 (2018) ("[T]he 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."); and Raines v. State, 309 Ga. 258, 267-68, 845 S.E.2d 613, 621 (2020) ("[W]here [a sentence of life imprisonment without the possibility of parole] is authorized by state

statute, juvenile [life imprisonment without the possibility of parole] does not constitute a 'sentence enhancement' for Sixth Amendment purposes -- and thus does not require that a jury make specific findings to justify imposition of that sentence -- even when the Eighth Amendment has imposed additional constitutional limitations on the availability of that sentence.").

Therefore, it was not necessary to allege permanent incorrigibility or irreparable corruption in Wynn's indictment and the State was not required to prove beyond a reasonable doubt to a jury that he was permanently incorrigible or irreparably corrupt before a sentence of life imprisonment without the possibility of parole could be imposed.

C.

Wynn contends that "the framework for imposing life without the possibility of parole on Alabama juvenile offenders" is unconstitutionally vague and results in sentences of life imprisonment without the possibility of parole being imposed on juvenile capital offenders "in an arbitrary and discriminatory manner." (Issues III and IX in Wynn's brief, pp. 61 and 75.) Specifically, he argues that "Alabama statutes and case law provide

no substantive standards by to which" to distinguish between juveniles whose crimes reflect transient immaturity and juveniles whose crimes reflect irreparable corruption or permanent incorrigibility (Wynn's brief, p. 61); that the Alabama Supreme Court's opinion in Ex parte Henderson, 144 So. 3d 1262 (Ala. 2013), provides "no guidance on deciding the ultimate question of whether a juvenile offender is irreparably corrupt" (Wynn's brief, p. 62), and fails "to ensure that life without parole is rarely imposed on juvenile offenders" (Wynn's brief, p. 75); and that this Court "exacerbate[d] the problem" by holding in Wilkerson v. State, 284 So. 3d 935 (Ala. Crim. App. 2018), that whether to sentence a juvenile capital offender to life imprisonment without the possibility of parole is a moral judgment, and holding in Bracewell v. State, [Ms. CR-17-0014, March 8, 2019] ___ So. 3d ___ (Ala. Crim. App. 2019), that, pursuant to Rule 26.6(b)(2), [Ala. R. Evid.,] a court may consider, in addition to the Ex parte Henderson factors, any evidence it deems probative on the issue of sentencing. (Wynn's brief, p. 62.) According to Wynn, "Alabama law 'provides no reliable way to determine' whether a juvenile offender is substantively eligible for life without parole" and, therefore, it " 'invites

arbitrary enforcement by judges' because there is no objective benchmark by which to determine whether or not a defendant meets Miller's substantive standard." (Wynn's brief, p. 62 (internal citations omitted).)

"'Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.'" Barber v. Jefferson Cnty. Racing Ass'n, Inc., 960 So. 2d 599, 615 (Ala. 2006) (quoting City of Chicago v. Morales, 527 U.S. 41, 56 (1999)). "To withstand a challenge of vagueness, a statute [or ordinance] must: 1) give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, and, 2) provide explicit standards to those who apply the laws." Hughes v. State, [Ms. CR-17-0768, February 7, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020) (citations omitted). The United States Supreme Court "has invalidated two kinds of criminal laws as 'void for vagueness': laws that define criminal offenses and laws that fix the permissible sentences for criminal offenses." Beckles v. United States, 580 U.S. ___, ___, 137 S.Ct. 886, 892 (2017).

> "For the former, the Court has explained that 'the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.' [Kolender v. Lawson, 461 U.S. 352,] 357, 103 S.Ct. 1855 [(1983)]. For the latter, the Court has explained that 'statutes fixing sentences,' Johnson[v. United States, 576 U.S. 591, 596,] 135 S.Ct. [2551,] 2557 [(2015)] (citing United States v. Batchelder, 442 U.S. 114, 123, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979)), must specify the range of available sentences with 'sufficient clarity,' id., at 123, 99 S.Ct. 2198; see also United States v. Evans, 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823 (1948); cf. Giaccio v. Pennsylvania, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966)."

Beckles, 580 U.S. at ___, 137 S.Ct. at 892. Statutes that "unambiguously specify ... the penalties available upon conviction" are not unconstitutionally vague. United States v. Batchelder, 442 U.S. 114, 123 (1979). The Court "has 'never doubted the authority of a judge to exercise broad discretion in imposing a sentence within the statutory range' ... [and has] never suggested that a defendant can successfully challenge as vague a sentencing statute conferring discretion to select an appropriate sentence from within a statutory range, even when that discretion is unfettered." Beckles, 580 U.S. at ___, 137 S.Ct. at 893 (quoting United States v. Booker, 543 U.S. 220, 233 (2005)). As the State correctly points

out in its brief to this Court, "flexibility in sentencing does not equal vagueness." (State's brief, p. 22.)

Here, the statute under which Wynn was sentenced, § 13A-5-43(e), Ala. Code 1975, sets forth unambiguously and with sufficient clarity the range of punishment for a juvenile capital offender -- life imprisonment or life imprisonment without the possibility of parole -- and is not unconstitutionally vague. Contrary to Wynn's belief, the statute does not have to set out "substantive standards" on how to determine whether a juvenile offender is irreparably corrupt or provide "guidance" to ensure that a sentence of life imprisonment without the possibility of parole is rarely imposed on juvenile offenders. As already noted, the United States Supreme Court held in Jones, supra, that permanent incorrigibility or irreparable corruption is not a constitutional prerequisite to imposing a sentence of life imprisonment without the possibility of parole, and the Court further explained in Jones that "a discretionary sentencing procedure -- where the sentencer can consider the defendant's youth and has discretion to impose a lesser sentence than life without parole -- would itself help make life-without-parole sentences 'relatively rar[e]' for

murderers under 18." 539 U.S. at ___, 141 S.Ct. at 1318 (quoting Miller, 567 U. S. at 484 n.10).

Alabama has such a discretionary sentencing procedure. The Alabama Rules of Criminal Procedure apply to the sentencing of juvenile capital offenders and authorize consideration of any evidence deemed probative to sentencing. In addition, Ex parte Henderson requires courts to consider 14 specific factors, if applicable -- the same factors the United States Supreme Court held in Miller were essential for juvenile sentencing -- before determining whether to sentence a juvenile capital offender to life imprisonment or life imprisonment without the possibility of parole. Alabama's framework for sentencing juvenile capital offenders offers discretion to courts to ensure the individualized sentencing mandated by Miller and its progeny and is sufficient to allow courts to sentence juvenile capital offenders in a nonarbitrary and nondiscriminatory manner.

Therefore, this argument is meritless.

D.

Wynn contends that the circuit court erred in allowing the State "to incorporate by reference the entire record" of his original trial. (Issue VII in Wynn's brief, p. 73.) Relying on Crawford v. Washington, 541 U.S. 36 (2004), and Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), he argues that the Sixth, Eighth, and Fourteenth Amendments give "a defendant ... the right to cross-examine adverse witnesses during a capital sentencing proceeding," and that the record from his original trial included "testimonial statements that [he] could not cross-examine at the original trial because the question of whether he was permanently incorrigible or irreparably corrupt was not at issue in 1999." (Wynn's brief, p. 73.)

In Petric v. State, 157 So. 3d 176 (Ala. Crim. App. 2013), this Court stated:

> "All the post-Crawford decisions of the [United States] Courts of Appeals that have decided this issue have stated that Crawford does not apply to capital sentencing. Petric points to one pre-Crawford case from the Eleventh Circuit Court of Appeals that recognizes a right to cross-examination in the context of capital sentencing, 'at least where necessary to ensure the reliability of the witnesses' testimony.' See Proffitt,

> supra. However, that case disregards a United States Supreme Court decision that has never been overruled and that explicitly rejects a right to confront and to cross-examine at sentencing. See Williams [v. New York, 337 U.S. 241 (1949)], supra. Further, post-Crawford, the Eleventh Circuit has explicitly declined to decide whether Crawford applies at capital sentencing, even after recognizing its prior decision in Proffitt. See [United States v.] Brown, [441 F.3d 1330 (11th Cir. 2006),] supra."

157 So. 3d at 246. See Lockhart v. State, 163 So. 3d 1088, 1133 (Ala. Crim. App. 2013) ("We express doubt that the Confrontation Clause applies at sentencing, even in capital cases."). See also People v. Banks, 237 Ill.2d 154, 200-03, 934 N.E.2d 435, 460-62, 343 Ill.Dec. 111, 136-37 (2010); and Summers v. State, 122 Nev. 1326, 1331-33, 148 P.3d 778, 781-83 (2006) (both holding that Crawford does not apply to capital sentencing proceedings). We decline to apply Crawford to resentencing hearings under Miller. Therefore, this argument is meritless.

III.

Wynn also raises several challenges to the circuit court's decision to sentence him to life imprisonment without the possibility of parole. (Issues I and IV in Wynn's brief.)

> "In reviewing the circuit court's sentencing determination after a hearing conducted pursuant to Miller and Montgomery, this Court applies an abuse-of-discretion standard of review. Wilkerson [v. State], 284 So. 3d [937], 956 [(Ala. Crim. App. 2018)] ('Because life imprisonment without the possibility of parole remains a sentencing option for juvenile offenders, 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.'). Also, the circuit court's findings as to the evidence presented at the resentencing hearing, including its consideration and application of the [Ex parte] Henderson[, 144 So. 3d 1262 (Ala. Crim. App. 2013),] factors, are presumed correct and are reviewed for an abuse of discretion. See, e.g., Smiley v. State, 52 So. 3d 565, 568 (Ala. 2010) (' " 'When the evidence in a case is in conflict, the trier of fact has to resolve the conflicts in the testimony, and it is not within the province of the appellate court to reweigh the testimony and substitute its own judgment for that of the trier of fact.' " ' (quoting Ex parte R.E.C., 899 So. 2d 272, 279 (Ala. 2004), quoting in turn Delbridge v. Civil Serv. Bd. of Tuscaloosa, 481 So. 2d 911, 913 (Ala. Civ. App. 1985)))."

Boyd v. State, 306 So. 3d 907, 917-18 (Ala. Crim. App. 2019). "A trial court abuses its discretion only when its decision is based on an erroneous conclusion of law or where the record contains no evidence on which it rationally could have based its decision." Holden v. State, 820 So. 2d 158, 160 (Ala. Crim. App. 2001).

A.

Wynn contends that the circuit court erred in not making a specific factual finding that he was permanently incorrigible or irreparably corrupt. However, as explained above, the United States Supreme Court held in Jones, supra, that such a factual finding is not required. Therefore, this argument is meritless.

B.

Wynn contends that the circuit court "lost sight of Miller's 'central question' " and erroneously based it sentencing decision "on a finding that Wynn did not deserve mercy." (Wynn's brief, p. 65.) In support of this argument, he relies on a statement the circuit court made when pronouncing sentence.

After affording Wynn allocution, the circuit court stated:

> "Mr. Wynn, I want to tell you that I can identify with you and what you've done and what you've been going through in prison. The Bliss family, I can't identify with you in what you've gone through in the loss of a loved one and a friend and a family member, but that's -- I don't think that's a bad thing because as judges we're called upon to be impartial. We're called upon to make decisions that are free of bias, favoritism, or compassion. We're called upon to make decisions that are based on the law and based on the evidence, and I think that

> I -- I've done that and I -- and I have poured over this decision since we concluded last Thursday.
>
> "So, I've read all the documents. We've looked at all the [Ex parte] Henderson factors that we've discussed. I've read all these documents that you've given me, including what you've filed. So, Mr. Wynn, if you'll step up at this time.
>
> "All right. So anything else at this time, Mr. Wynn, that you'd like to say at this time before I pronounce sentence?
>
> "All right. So, Mr. Wynn, I have looked at your case. I have looked at your performance and the things that you've done in prison since this night. I've looked at the arguments for each side. I've looked at the expert reports that you have, I think by Mr. Sparkman and Dr. Garbarino. I've looked at those as it relates to your rehabilitation and those other factors that are listed in [Ex parte] Henderson, and for the most part, I think that you've made the most of your situation while you've been in prison. I respect the efforts that you made, but I don't believe the law requires any further mercy from me for what you did that night, so therefore, it's the sentence of this Court, and I hereby sentence you to life without the possibility of parole for this offense."

(R. 685-87; emphasis on portion relied on by Wynn.) In its sentencing order, the circuit court made factual findings regarding each of the Ex parte Henderson factors. Considering the record as a whole -- and not just a single statement by the circuit court when pronouncing sentence -- it is clear that the circuit court's sentencing decision was based on its

consideration of the Ex parte Henderson factors and not on an aversion to mercy for Wynn.

We note that Wynn argues that, although the circuit court followed the process required by Miller by holding a resentencing hearing and issuing a sentencing order with findings regarding the Ex parte Henderson factors, the circuit court's rejection of his assertion that a juvenile is ineligible for a sentence of life imprisonment without the possibility of parole unless the juvenile is found to be permanently incorrigible or irreparably corrupt affirmatively indicates that "the court used worthiness of mercy as its sentencing standard" and "fundamentally misunderstood the Miller inquiry." (Wynn's reply brief, p. 27.) However, as already explained, permanent incorrigibility or irreparable corruption is not a constitutional prerequisite to imposing a sentence of life imprisonment without the possibility of parole, and the circuit court's rejection of that argument does not indicate a misunderstanding of Miller.

Wynn also argues that this case is similar to Bracewell, supra (opinion on return to remand), because, he says, "[a]s in Bracewell, the circuit court's sentencing order repeatedly discounts evidence favoring a

parole-eligible sentence." (Wynn's reply brief, p. 28.) However, in a per curiam opinion in which one judge concurred and two judges concurred in the result, this Court reversed the sentence of life imprisonment without the possibility of parole in Bracewell, not because the circuit court had "repeatedly discount[ed]" evidence favorable to a sentence of life imprisonment but because the court had erroneously used the juvenile's age -- the one factor that formed the basis of the decision in Miller -- as a factor in aggravation weighing heavily in favor of a sentence of life imprisonment without the possibility of parole. The circuit court here did not commit the same error. Although the circuit court in Bracewell made a statement regarding mercy almost identical to the circuit court's statement here, that statement played no part whatsoever in this Court's reversal of the sentence in Bracewell. Therefore, Bracewell is inapposite.

C.

Wynn contends that the circuit court's findings regarding the first Ex parte Henderson factor -- 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 -- are

unreasonable and unsupported by the evidence. In its sentencing order, the circuit court stated the following with respect to this factor:

> "[Wynn] was born February 9,1981. The date of the murder was April 8, 1999. [Wynn] was 17 years and 2 months at the time of this offense. He was ten months shy of his 18th birthday which would have made him eligible for the death penalty, which was the previously imposed sentence after a unanimous recommendation by the jury that heard the case.
>
> "The Court finds Wynn to be mature for his age as indicated by his demeanor with law enforcement on the video interview with Anniston Police Detective Wayne Willis. Detective Willis testified, and it was shown on the video, that Wynn asked to see the warrant in this case. Willis said in hundreds of interviews, Wynn was the only individual that ever asked to see the warrant.
>
> "His actions were anything but impetuous. He planned the robbery. He tried to secure transportation to go 'hit a lick.' He secured a mask and gloves to conceal his identity. According to testimony, Wynn said he went to the store to rob it but changed his mind and starting walking toward the arcade. He changed his mind again, and he went back to Hardee's. He hid in the bathroom and waited, waited for the store to close. He beat Denise Bliss by striking her over 40 times. He beat her beyond recognition. In spite of her attempts to defend herself, he beat her with a squeegee until it broke. He also beat her with a metal pole. He hit her repeatedly and with brutal force. He thought enough to try to cover his tracks by wiping down the crime scene after the murder, and he left her in the freezer to freeze to death if the beating he administered was insufficient to accomplish that.

> He put a great deal of thought into this crime. The Court finds no impetuosity in his action.
>
> "This is especially true considering the fact that Wynn had completed an anger management class in November 1997, less than six months prior to his murder of Bliss. Any immaturity or impetuousness residing in Wynn did not survive after his learning about anger management and his involvement in the criminal-justice system following detentions or arrests for burglary, theft of property, menacing, harassment, and disorderly conduct. As Judge Monk observed in 1999, Wynn's actions during the commission of the offense were not in keeping with those of a child."

(C. 648.)

Wynn argues that the circuit court erred in relying on his demeanor and his request to see the warrant during his interview with police because, he says, "[n]othing about [his] appearance or demeanor" during the interview distinguished him from any other teenager and because, he says, his denial during the interview of any knowledge of Bliss's murder despite "repeatedly being caught in contradictions as he spoke ... reflects an 'inability to assess consequences.' " (Wynn's brief, p. 66 (quoting Miller, 567 U.S. at 472).) He also argues that the circuit court's findings that his actions were not impetuous and that he had put a great deal of thought into the murder are unreasonable and unsupported by the evidence

because, he says, "[t]he timeline for the murder" indicates that he asked a friend for a ride only "at the last minute" and then changed his mind repeatedly before committing the murder. (Wynn's brief, p. 67.) He further argues that the circuit court's conclusion that he tried to cover up the crime is unreasonable in light of his actions after the crime in bragging about the murder and spending the money he had stolen, which, he says, do not "reflect[] the foresight or planning of a mature person." (Wynn's brief, p. 67.) Finally, Wynn argues that the circuit court's finding that any impetuosity or immaturity "did not survive" his completion of an anger-management class and his multiple arrests thereafter is unreasonable because, he says, there was no evidence presented regarding what the anger-management class entailed or what the circumstances of his multiple arrests were and, thus, "there is no reason to assume they had any significant effect" on Wynn's impetuosity or immaturity. (Wynn's brief, p. 68.)

All of these arguments are addressed to the weight the circuit court afforded the evidence and "mere disagreement with the circuit court's weighing of the evidence does not entitle [Wynn] to relief." Boyd, 306 So.

3d at 919. We note that, although Wynn is correct that no evidence was presented regarding what the anger-management class entailed or what the circumstances of his multiple arrests were, a reasonable inference could be made, and common sense would indicate, that Wynn gained some knowledge and maturity from those experiences. The record supports the circuit court's findings regarding the first Ex parte Henderson factor.

D.

Wynn contends that circuit court erroneously "discounted" the fifth Ex parte Henderson factor -- the juvenile's family, home, and neighborhood environment -- based on his score on the ACE scale. (Wynn's brief, p. 68.) In its sentencing order, the circuit court stated the following with respect to this factor:

> "Wynn was born when his mother, Penny, was only sixteen (16) years old. His mother was not very happy to have a child at such a young age. She was still living at home with her three sisters and her mother in a dilapidated house, living off of WIC, welfare and food stamps. She was, according to testimony from her sister, in an abusive relationship with Frank English. She told English that he was Wynn's father. But English denied paternity because of the darkness of Wynn's skin. He was 'too black' to be his son, he said. Wynn observed domestic abuse between his mother and English, but he was so young (probably two years old or younger) it is

> difficult to say it had an impact on his life. However, he was degraded by his mother for the dark tint of his skin and the fact that [that] would prevent him from succeeding in life.
>
> "However, Wynn had stabilizing individuals in his life. His maternal grandmother was an ever present comforter. He loved her and followed her around the house like a puppy, according to his aunt, Rosaline Montgomery. She petted on him and loved on him. He lived with her when his mother would desert him. Their love for one another is undisputed. Another stabilizing individual was his aunt, Rosaline Montgomery and her husband. They would pick him up on weekends and take him to their house to spend time with their son. They also took Wynn to church. His uncle taught him how to fish and would often take Wynn fishing with the rest of the Montgomery family. His relationship with his Aunt Rosaline Montgomery continues today. They speak on the phone and Wynn often gives her advice on how to deal with her son, who is addicted to heroin. Yet another stabilizing individual in Wynn's life was his stepfather, Ronald Williams. Mr. Williams was described as a 'good man' by Rosaline Montgomery. He tried hard to help Penny and Wynn. Wynn cared for Mr. Williams. He called Mr. Williams during the police interview by Investigator Wayne Willis to let him know that the police suspected Wynn of committing the murder.
>
> "Additionally, Wynn presented the testimony of Dr. James Garbarino. Dr. Garbarino testified that Wynn scored a 5 on the Adverse Childhood Experiences questionnaire. According to Dr, Garbarino, the average score for a Miller defendant or murderer is a 7. In this context, Wynn had fewer adverse childhood experiences than the average juvenile killer, placing Wynn in the category of 'the rare juvenile offender.' "

(C. 650-51.)

Nothing in the circuit court's findings indicate that it "discounted" this factor based on Wynn's score on the ACE scale. Although Wynn's score was certainly something the circuit court considered, it also considered the plethora of other evidence that was presented relating to this factor, including the fact that Wynn had several "stabilizing individuals" in his life when growing up to counter his mother's treatment of him. The record supports the circuit court's findings regarding the fifth Ex parte Henderson factor.

E.

Wynn contends that the circuit court's findings regarding the sixth Ex parte Henderson factor -- the juvenile's emotional maturity and development -- were erroneous. In its sentencing order, the circuit court stated the following regarding this factor:

> "While Wynn was mature in his decision to commit this crime, in the way in which he killed Denise Bliss, and in the way he attempted to cover up his crime, he also acted immature at times by telling numerous people of his actions, making a rap song about the murder in which he called the victim a 'bitch,' showing and spending money in spite of the fact that he did not have employment.

> "However, Wynn was well aware of violent actions as illustrated by his prior arrest record and charges both as a juvenile and as a juvenile transferred to adult court. Wynn additionally showed some maturity in his willingness to ask questions of the original trial judge during his arraignment. Wynn also showed maturity throughout his police interview with investigator Willis. He was composed, showing emotional maturity beyond his age and that of an ordinary juvenile."

(C. 651.)

Wynn argues that, contrary to the circuit court's finding, his interview with police "reflects a teenager's poor judgment and failure to appreciate the circumstances he was in." (Wynn's brief, p. 69.) He also argues that the circuit court "clearly erred in equating Wynn's awareness 'of violent actions' and 'willingness to ask questions' of a judge to heightened maturity." (Wynn's brief, p. 69.) Again, these arguments are addressed to the weight the circuit court afforded the evidence and "mere disagreement with the circuit court's weighing of the evidence does not entitle [Wynn] to relief." Boyd, 306 So. 3d at 919. The record supports the circuit court's findings regarding the sixth Ex parte Henderson factor.

F.

Wynn contends that the circuit court erred in "discounting" the eighth Ex parte Henderson factor -- the juvenile's past exposure to violence -- "on the ground that it did not '[p]lay a role in the offense.' " (Wynn's brief, p. 69.) In its sentencing order, the circuit court made the following findings regarding this factor:

> "Evidence was offered at trial, and during the sentencing hearing, that Greg Wynn was exposed to corporal punishment during his youth. Additional evidence was elicited that Greg Wynn was alive during a period of time in which his mother may have been beaten by Frank English, although by Wynn's own admission he has no recollection of English ever having been in his life.
>
> "Whatever violence Wynn was exposed to during his childhood, the evidence does not establish that it played a role in the offense. During a November 3, 2019, phone call between Wynn and his Aunt LaTonya Gomez, Wynn denied his need for rehabilitation and asserted his innocence of the murder of Denise Bliss. Wynn's exchange with this family member makes any correlation or causation argument between his past exposure to violence and the murder of Denise Bliss unlikely."

(C. 651-52.) Wynn argues that the fact that "there is no direct line between the physical abuse Wynn suffered and the crime does not change the fact that a 'troubled history' is 'relevant to assessing a defendant's

moral culpability.' " (Wynn's brief, p. 69, quoting Wiggins v. Smith, 539 U.S. 510, 535 (2003).) He also argues that the circuit court's findings fail to take into account that Dr. Garbarino testified that the emotional and physical abuse inflicted by his mother was "significant." (Wynn's brief, p. 69.)

Although the circuit court did not expressly refer to Dr. Garbarino's testimony in its findings regarding Wynn's past exposure to violence, it did so in other parts of its order, thus indicating that the court considered his testimony. In addition, the circuit court's finding that Wynn's past exposure to violence did not play a role in Bliss's murder does not indicate that the circuit court did not consider Wynn's history, only that it gave that history little weight in light of Wynn's claim that he was innocent and did not need rehabilitation. " 'Merely because an accused proffers evidence of a mitigating circumstance does not require the judge or the jury to find the existence of that fact.' " Thrasher v. State, 295 So. 3d 118, 131 (Ala. Crim. App. 2019) (quoting Wilkerson, 284 So. 3d at 959). Once again, Wynn's arguments are directed to the weight afforded the evidence by the circuit court and "mere disagreement with the circuit court's

weighing of the evidence does not entitle [Wynn] to relief." Boyd, 306 So. 3d at 919. The record supports the circuit court's findings regarding the eighth Ex parte Henderson factor.

G.

Finally, Wynn challenges the circuit court's findings regarding the thirteenth Ex parte Henderson factor -- the juvenile's potential for rehabilitation -- and argues that the circuit court erred in finding that he was incapable of rehabilitation. In its sentencing order, the circuit court made the following findings regarding this factor:

> "It cannot be disputed that Wynn has availed himself of opportunities while incarcerated. He has earned his General Equivalency Diploma (GED) with an impressive score, which shows his intelligence. He has organized events for Black History Month. He has participated in a lecture series put on by the University of Alabama at Birmingham professors which was made better by recommendations that he made for the program's content and structure. He resides in the Faith and Character dormitory at Donaldson Correctional Facility. He is a talented artist as evidenced by several of his drawings and paintings.
>
> "However, Wynn has not always been a model prisoner. He has approximately twenty (20) disciplinaries during his incarceration. He has clearly violated the requirements of the Faith and Character Dorm by possessing a cellular phone and operating a prohibited social media account.

"The most probative evidence regarding this factor is a telephone call between Wynn and his Aunt LaTonya Gomez, played during the cross-examination o f Dr. Garbarino. During that call, Wynn rhetorically asked what he needed rehabilitation for, stating that he was never a monster and that he is an innocent man in prison. This evidence suggests that Wynn's activities in prison were not rehabilitative, as he does not see any personal need for rehabilitation.

"In 1999, Wynn addressed the family and friends of Denise Bliss. During his brief statement, Wynn stated that he could not imagine what they felt because he had never had a family member taken in such a violent manner, while denying his guilt in her death. In over twenty years, very little has changed. As recently as November 2019, Wynn reasserted his innocence during a call with LaTonya Gomez. These denials have persisted even though Wynn was identified by two eyewitnesses as the man entering Hardees just before it closed, even though checks taken from the April 8, 1998, Hardees deposit were recovered in Wynn's home (concealed in a trash can), even though Wynn personally provided a marked $100 'bait bill' to a witness, and even though Wynn admitted his involvement to numerous individuals after the murder. It is difficult, if not impossible, to find rehabilitative potential after two decades of denials of guilt in the face of overwhelming evidence, a continuing lack of remorse, and an inability to conform his behavior with the rules and regulations of the Alabama Department of Corrections.

"Therefore, the Court finds by a preponderance of the evidence that Greg Wynn lacks any potential for rehabilitation, as evidenced by his lack of empathy and remorse and his self-proclaimed lack of need for rehabilitation."

(C. 653-54.)

Wynn argues that "there are too many positive signs to conclude that [he] will never be rehabilitated." (Wynn's brief, p. 46.) He points to "moments" in his childhood when, he says, he "demonstrated empathy and regard" despite the fact that his "childhood was dark in many ways" and he argues that the fact that "he showed some promise even as a child" is inconsistent with a finding that he was incapable of rehabilitation. (Wynn's brief, pp. 46-47.) He also argues that, although he may not be "fully rehabilitated now," his prison record indicates that he is capable of rehabilitation. (Wynn's brief, p. 51.) These arguments are addressed, once again, to the weight the circuit court afforded the evidence and, as noted previously, "mere disagreement with the circuit court's weighing of the evidence does not entitle [Wynn] to relief." Boyd, 306 So. 3d at 919.

Wynn also argues that, for three reasons, the circuit court erred in relying on his failure to admit his guilt, to express remorse, and to acknowledge his need for rehabilitation to support its conclusion that he was incapable of rehabilitation. First, he argues that "public acknowledgments of guilt, remorse, and a need for reform" are not

"necessary conditions for future rehabilitation." (Wynn's brief, p. 52.) Although Wynn is correct that public acknowledgment of guilt, remorse, and a need for rehabilitation are not determinative as to whether a juvenile capital offender has the potential for rehabilitation, nothing indicates that the circuit court believed that to be the case, and such acknowledgments, or the lack thereof, are certainly relevant considerations.

Second, Wynn argues that, contrary to the circuit court's finding, he did acknowledge his guilt and express remorse at the resentencing hearing. At the resentencing hearing, Wynn apologized "for the bad choices that [he] made," stating that he felt "bad" about his choices and that he had "realized ... the pain that [he] caused." (R. 684.) However, as already noted, " '[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.' " Thrasher, 295 So. 3d at 131 (quoting Wilkerson, 284 So. 3d at 959). It is clear that the circuit court gave more credence to the evidence indicating that Wynn had denied his guilt for over 20 years than to Wynn's last-minute apology made only when faced with the chance

to receive a lesser sentence. Although Wynn obviously disagrees with the circuit court's weighing of the evidence in this regard, as previously noted, "mere disagreement with the circuit court's weighing of the evidence does not entitle [Wynn] to relief." Boyd, 306 So. 3d at 919.

Third, Wynn argues that, despite the fact that he told his aunt that he did not need rehabilitation, his prison record shows otherwise. Specifically, he argues that his completion of numerous prison programs and having only one disciplinary infraction after 2012 shows "that [he] understands that he needs to change, wants to improve, and has taken steps to that end." (Wynn's brief, p. 54.) Although Wynn interprets his prison record as showing his potential for rehabilitation, the circuit court obviously did not, instead giving credence to Wynn's own belief that he did not need rehabilitation and finding that belief to be indicative "that Wynn's activities in prison were not rehabilitative." Wynn's disagreement with the circuit court's interpretation and weighing of the evidence does not entitle him to relief.

The record supports the circuit court's findings regarding the thirteenth Ex parte Henderson factor.

IV.

Based on the foregoing, the judgment of the circuit court resentencing Wynn to life imprisonment without the possibility of parole for his capital-murder convictions is affirmed.

AFFIRMED.

McCool and Minor, JJ., concur. Cole, J., concurs in the result. Windom, P.J., recuses herself.