Rel: December 16, 2020

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-17-0014

Debra Bracewell

v.

State of Alabama

Appeal from Covington Circuit Court
(CC-78-26)

On Return to Remand

PER CURIAM.

On March 8, 2019, this Court remanded this cause for the trial court to clarify whether its decision to resentence Debra Bracewell, pursuant to

Miller v. Alabama, 567 U.S. 460 (2012), to life imprisonment without the possibility of parole for her capital-murder conviction was based on its consideration of the factors set out by the Alabama Supreme Court in Ex parte Henderson, 144 So. 3d 1262 (Ala. 2013), that, in the wake of Miller, a sentencer must consider in sentencing a juvenile capital offender, or on its weighing of aggravating circumstances and mitigating circumstances under Alabama's adult capital-sentencing scheme. On remand, the trial court issued an order stating that its sentencing decision was based on its consideration of the Ex parte Henderson factors. We permitted the parties to file briefs on return to remand and, after oral argument, this cause was resubmitted to this Court on August 11, 2020. We now reverse and remand.

In Miller, the United States Supreme Court held that a sentence of "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.' " 567 U.S. at 465. "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." Betton v. State, 292 So. 3d 398, 403 (Ala. Crim. App. 2018). Rather, "Miller determined that sentencing a child to life without parole is excessive for all but ' "the rare juvenile offender whose crime reflects irreparable corruption," ' ... [and] it rendered life without parole an unconstitutional penalty for ... juvenile offenders whose crimes reflect the transient immaturity of youth." Montgomery v. Louisiana, 577 U.S. ___, ___, 136 S.Ct. 718, 734 (2016) (citations omitted). In Ex parte Henderson, the Alabama Supreme Court set out the following 14 factors that, if applicable,[1] must be considered in sentencing a juvenile capital offender in the wake of Miller:

> "(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

[1]The Court in Ex parte Henderson recognized "that some of the factors may not apply to a particular juvenile's case and that some of the factors may overlap." 144 So. 3d at 1284.

> 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. As noted in our opinion on original submission:

> "[B]ecause of the Eighth Amendment's substantive limit on sentencing juveniles to life imprisonment without the possibility of parole -- 'Miller determined that sentencing a child to life without parole is excessive for all but " 'the rare juvenile offender whose crime reflects irreparable corruption,' " ... [and] it rendered life without parole an unconstitutional penalty for ... juvenile offenders whose crimes reflect the transient immaturity of youth,' Montgomery, 577 U.S. at ___, 136 S.Ct. at 734 (citations omitted) -- the process of determining the appropriate sentence for a juvenile capital offender is not a matter of weighing the circumstances in aggravation against the circumstances in mitigation. Rather, in determining whether to sentence a juvenile capital offender to life imprisonment or to life imprisonment without the possibility of parole, the central question is whether the juvenile and his or her crimes 'reflect the transient immaturity of youth' or reflect such ' "'irreparable corruption' " ' and 'irretrievable depravity that rehabilitation is impossible.' Montgomery, 577 U.S. at ___, 136 S.Ct. at 733-34 (citations omitted). To answer that question, Rule 26.6(b)(2)[, Ala. R. Crim. P.,] permits a sentencer to consider 'any' evidence it deems probative to the issue of sentencing and Ex parte Henderson requires a sentencer to consider 14 specific factors, if applicable."

Bracewell, ___ So. 3d at ___.

> "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 Henderson 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, [Ms. CR-18-0288, October 25, 2019] ___ So. 3d ___, ___ (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." Williams v. State, 895 So. 2d 1012, 1016 (Ala. Crim. App. 2004).

We summarized the facts of the crime in our opinion on original submission, and a more detailed account can be found in this Court's

opinion affirming Bracewell's capital-murder conviction and sentence of life imprisonment without the possibility of parole.[2] See Bracewell v. State, 447 So. 2d 815, 818-20 (Ala. Crim. App. 1983), aff'd, 447 So. 2d 827 (Ala. 1984).

At the resentencing hearing, the State presented testimony from Marie Miller, who was the wife of the victim, Rex Carnley, at the time of his death, about the emotional and financial impact Carnley's murder had on her and her 3 sons, who were 18, 16, and 13 years old at the time of the murder. In addition, the State presented testimony from Nickey Carnley, Carnley's oldest son, and Kelley Carnley, Carnley's youngest son, about the impact their father's death had on them and on their brother Murray Carnley. The State introduced into evidence a transcript of the guilt

[2]Bracewell was originally convicted of capital murder in 1978 and was sentenced to death. That conviction and sentence were ultimately reversed on the authority of Beck v. Alabama, 447 U.S. 625 (1980), and Beck v. State, 396 So. 2d 645 (Ala. 1980). See Bracewell v. State, 401 So. 2d 119 (Ala. Crim. App. 1978), rev'd, 401 So. 2d 123 (Ala. 1979), on remand, 401 So. 2d 124 (Ala. Crim. App. 1980), judgment vacated by Bracewell v. Alabama, 449 U.S. 915 (1980), on remand, 401 So. 2d 130 (Ala. Crim. App. 1981). Bracewell was again convicted of capital murder on retrial in 1981 and was sentenced to life imprisonment without the possibility of parole.

phase of Bracewell's 1981 trial; a copy of Bracewell's January 23, 1978, statement to police; and a copy of the autopsy report. The State also introduced into evidence a copy of a letter Bracewell wrote in connection with a 2011 postconviction proceeding in which she claimed that Charles Bracewell was the shooter and that she was innocent, as well as a copy of a notarized letter from Charles proclaiming Bracewell's innocence; a letter Bracewell wrote to the Covington County District Attorney in 2008 claiming that the United States Supreme Court had reversed her 1978 conviction based on insufficient evidence and that she should not have been retried for capital murder in 1981, and also claiming that it was Carnley's wife, Marie, who had killed Carnley; and a copy of a 1989 letter addressed to then governor Guy Hunt and purporting to be from Marie (the letter was signed "Mrs. Carnley"), in which Marie allegedly confessed to killing her husband and stated that Bracewell was innocent -- a letter Marie Miller testified she did not write. In addition, the State introduced into evidence records from the Alabama Department of Corrections ("DOC") reflecting that Bracewell had multiple disciplinary citations in prison in the 1980s, including one in 1989 for attempting to escape, and

records from the Elmore Circuit Court indicating that Bracewell had pleaded guilty to first-degree escape in 1990.[3] Finally, the State introduced into evidence a "Psychological Interview/Data Entry Form" from the DOC indicating that, in 1986, Bracewell had a full-scale IQ score of 74 and suffered from no significant emotional problems or substance-abuse problems. (C. 1284.)[4]

Bracewell presented documentary and testimonial evidence about her childhood and adolescent years and about her life in prison over the last 40 years. Bracewell grew up in poverty and suffered both physical and sexual abuse at the hands of her father, Owen Fillman ("Owen"),

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[3]The record indicates two separate incidents involving Bracewell's escaping or attempting to escape from prison. A disciplinary report introduced into evidence by the State indicates that Bracewell attempted to escape in May 1989 by climbing to the top of the fence surrounding the prison and then climbing back down. (C. 1243.) A disciplinary report introduced into evidence by Bracewell indicates that she successfully escaped in February 1990 by climbing over the fence surrounding the prison and was recaptured later by local law enforcement. (C. 1375-76.)

[4]We note that the State declined to make a sentencing recommendation at the resentencing hearing, arguing that "it [wa]s up to the Court to decide" what sentence was appropriate for Bracewell. (R. 6.) However, at a pretrial hearing, the State took the position "that this defendant does not reach the level of those rare juveniles who would get life without." (R. 350.)

throughout her childhood and adolescent years. As the trial court noted in its sentencing order: "By all accounts, [Bracewell] grew up in the worst situation imaginable." (C. 218.) Bracewell's older brother Jimmy Fillman, older sister Peggy Jones, and paternal cousin Nancy Daniel testified about the abuse. Their testimony indicated that Owen rarely worked and that the family was "dirt poor," many times having little or no food to eat. (R. 92.) Owen abused Bracewell's mother and forced her to prostitute herself to earn money for groceries, which resulted in a half sister that Owen forced Bracewell's mother to put up for adoption when she was born.

Owen physically abused all of his children, including Bracewell, often beating them with a belt. When Bracewell was six or seven years old, Owen kicked her and pushed her into a fire, which resulted in severe burns on Bracewell's hands and buttocks, and when Bracewell was about eight years old, Owen threw Bracewell against a wall so hard that she broke her sternum. Bracewell never received medical treatment for her injuries. Owen also repeatedly sexually abused Bracewell, her sisters, and Daniel. The abuse began when Bracewell was "five, six, or seven," and when Bracewell attempted to resist, Owen severely beat her. (R.

100.) At one point, when Bracewell was 13 or 14 years old, Bracewell reported the sexual abuse to police and an arrest warrant was issued for Owen; when Owen learned of the warrant, he shot himself in an attempt to avoid going to jail.[5] Owen forced Bracewell to quit school in the seventh grade in order to babysit her younger siblings and to allow more time for him to abuse her.[6] Owen was described as "a monster." (R. 217.)

Bracewell "was a little bit on the slower side," had a speech impediment, and had been in special-education classes when she was in school, but was literate. (R. 105.) Fillman described Bracewell as "nice," "polite," and "very friendly," but "a little on the shy side." (R. 105.) He also said that, at 17 years old, Bracewell had the maturity level of a 15-year-old. Daniel said that Bracewell was "troubled," "withdrawn," "timid," "shy," and "easily controlled by others" as a result of the abuse she suffered. (R. 220.) A few months before the murder, Bracewell met Charles Bracewell, who was 10 to 12 years her senior and had been in and

[5]It appears that no action was taken on the complaint Bracewell filed.

[6]Other evidence indicated that Bracewell subsequently returned to school briefly and dropped out again in the ninth grade.

out of prison, and Charles provided Bracewell an avenue to escape Owen's abuse. Bracewell's mother did not want Bracewell seeing Charles, but Bracewell would sneak out of the house to meet him. Fillman said that Charles "had quite a bit of control over" Bracewell because Bracewell was desperate to escape her father's abuse and "didn't know any better." (R. 114.) Jones also described Charles as "controlling." (R. 233.) She testified that the one time she met Charles at her house, she cautioned Bracewell against staying with Charles and asked Bracewell not to leave with him, to which Bracewell responded, "I got to." (R. 233.) Charles apparently overheard their conversation, and when he and Bracewell got close to their vehicle to leave, he hit Bracewell in the face.

Bracewell also presented evidence indicating that she was intellectually disabled, having a full-scale IQ score of 62 when she was 15 years old and a full-scale IQ score of 67 when she was evaluated in 2017, at the age of 57, by Dr. John Goff, a clinical neuropsychologist. According to Dr. Goff, Bracewell could read only at a third-grade level, "which is just below a level required for functional literacy" (C. 1328); "her mathematical skills are rather extraordinarily limited" (C. 1329); and she suffered from

"adaptive skills deficits." (C. 1329.) Dr. Goff also indicated that Bracewell's school records reflected that her performance on "the IQ test from the California Test of Mental Maturity" was " 'too low to score.' " (C. 1325.) Bracewell also suffered from a mild speech defect that Dr. Goff believed was likely more severe when she was younger. Dr. Goff described Bracewell as being in the mild range of intellectual disability.

Dr. Goff testified that Bracewell was consistently described in her school records as immature and that all the records he reviewed regarding Bracewell "were reflective of considerably great immaturity." (R. 146.) Dr. Goff indicated that adolescents are generally immature, lack impulse control, have an inability to plan, are vulnerable to peer pressure, and have difficulty making rational decisions and that those traits were "magnified" in Bracewell because of her intellectual disability. (R. 145.) He indicated that individuals with intellectual disability like Bracewell are gullible and naive, have a " 'tendency to give in when under pressure,' " and have a desire to please others in order to be accepted. (C. 1329.) Dr. Goff opined that Bracewell's intellectual disability and her history of physical and sexual abuse made her even more vulnerable than

the average adolescent to the influence of others at the time of the crime. Dr. Goff also stated that Bracewell's adolescence, intellectual disability, and history of physical and sexual abuse likely would have made it "difficult" for her to deal with police and to assist her counsel at trial. (R. 154.) Further, Dr. Goff said that, although he did not perform any formal testing, at the time he interviewed her Bracewell appeared to be suffering from anxiety and possibly post-traumatic stress disorder as a result of the repeated physical and sexual abuse in her childhood and adolescence.

Finally, Bracewell presented evidence indicating that she had had positive inmate evaluations and progress reviews during her time in prison, particularly since the 1990s; that she had completed well over a dozen self-improvement, educational, and religious programs offered by the prison; that she was housed in the honor dorm; and that she had been, for several years, heavily involved in the prison ministry, assisting the chaplain with baptisms and ministering to other inmates, particularly new inmates.

At the conclusion of the hearing, the trial court resentenced Bracewell to life imprisonment without the possibility of parole. After summarizing pertinent portions of the opinion in Miller, the court stated:

> "What the Supreme Court is saying is that a juvenile cannot be sentenced to life without parole unless there's evidence that they are so terrible there's no hope for them in modern society. Apparently the fact that the juvenile would intentionally take another person's life without any justification is not enough evidence of horribleness for the Supreme Court.
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> "Where does Debra Bracewell fall on this spectrum? At the time, she was a 17 year old high school dropout suffering from a mild intellectual disability. She was the victim of physical and sexual abuse. And she had taken up with a ne'er-do-well by the name of Charles Bracewell, and it was his idea initially to rob Rex Carnley.
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> "This would seem to place her outside of those juveniles who deserve the most severe punishments for capital murder. Two factors seem to militate otherwise:
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> "One, she was already 17 years old and only eight months from reaching 18 years of age. That is the age at which she would be treated as an adult for sentencing purposes. Two, she was the one who stood up on a stool behind Rex Carnley and ended his life.
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> "I feel deep compassion for you, ma'am. Your home life was horrible and you fell in with a bad man. But those difficulties, as terrible as they were in my mind, do not provide

> you any special protection from your actions in taking the life of another human being.
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> "By your own words, you took a gun and shot Rex Carnley. And even a young lady as you were at the time would know that shooting a man in the back of the head would cause his death. You were in no danger and there's no evidence it was an accident.
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> "Because of your age the law has spared you the death penalty and you have your life.[7] For the most part you've made the best of your situation and I respect that. But I don't believe the law requires any further mercy on my part for what you did."

(R. 269-71.)

Subsequently, in its September 29, 2017, written sentencing order, the trial court summarized the evidence presented at the resentencing hearing that it believed was relevant to each of the Ex parte Henderson

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[7]This statement is incorrect. Bracewell was sentenced to life imprisonment without the possibility of parole after she was retried in 1981, see note 2, supra, over 25 years before the United States Supreme Court held that the Eighth Amendment prohibits the death penalty for individuals who were under 18 years old at the time of the capital offense. Roper v. Simmons, 543 U.S. 551 (2005). Had Bracewell been sentenced to death, Roper would certainly have mandated that the sentence be set aside. However, at the time Bracewell was sentenced in 1981, the death penalty was a legally permissible sentencing option. Thus, it was the trial court's decision, not the law, that "spared [her] the death penalty."

factors. It recognized that Bracewell was intellectually disabled and that her disability impacted her culpability, her emotional maturity and development, and her ability to deal with police, but it found that her disability did not impact her ability to assist her counsel and that there was no evidence indicating that she suffered from a mental illness at the time of the crime. The court found that there was no evidence indicating that Bracewell had a history of drug or alcohol use, but it recognized that Bracewell had suffered physical and sexual abuse at the hands of her father, finding that she had grown up "in the worst situation imaginable." (C. 218.) The court also summarized the offense, focusing on the fact that Bracewell had fired the first shot, which was fatal, and noting that, although there was evidence indicating that Charles had influence over her, her decision to pull the trigger was her own. Finally, the court noted that Bracewell's school records and prison records indicated that she had the potential for rehabilitation, which was negatively impacted only by her 1977 convictions for burglary and grand larceny, her 1990 conviction for escape, and the 1989 letter addressed to the governor and purporting to be from Carnley's wife, Marie, in which Marie allegedly confessed to

killing her husband and stated that Bracewell was innocent, a letter the court said "the State proved" had been written by Bracewell.[8] (C. 221.) The court then stated: "It would be difficult to fully explain all the factors that resulted in this decision. However, the Court notes [Bracewell's] age -- a few months shy of 18 years old -- and her perpetration of the actual shooting weighed heavily in the Court's final decision." (C. 223.)

Bracewell contends that the trial court erroneously used her age as a fact in aggravation supporting a sentence of life imprisonment without the possibility of parole instead of a fact in mitigation supporting parole eligibility and, in doing so, ignored the hallmark features of youth.[9] We agree.

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[8]We note that the only evidence presented by the State indicating that Bracewell wrote the letter was the testimony of Bracewell's brother that the handwriting in the letter "sort of looks like hers." (R. 116.)

[9]As noted in our opinion on original submission, "sentencing for juvenile capital offenders is governed by Rule 26.6[, Ala. R. Crim. P.,] and Ex parte Henderson." Bracewell, ___ So. 3d at ___. Rule 26.6(b)(2), Ala. R. Crim. P., authorizes a trial court to consider any "facts in aggravation or in mitigation of penalty." Although facts in aggravation are facts that weigh in favor of a harsher penalty, they should not be confused with aggravating circumstances under Alabama's adult capital-sentencing process, which, as explained in our opinion on original submission, is not applicable to juvenile capital offenders.

As already noted, at the resentencing hearing, the trial court found that Bracewell's age of 17 years and 4 months "militate[d]" against affording her parole eligibility. (R. 270.) In its sentencing order, the trial court again noted that, at the time of the crime, Bracewell was only 8 months from being 18 years old, "the age at which there would be no restrictions on the punishment available for a conviction of capital murder" (C. 214) and that her age was one of two factors that "weighed heavily" in its decision to sentence Bracewell to life imprisonment without the possibility of parole. (C. 223.) We agree with Bracewell that the trial court's oral and written findings indicate that it did, in fact, consider Bracewell's age as a fact in aggravation warranting the harshest possible sentence she could receive.

However, using a juvenile's age as a fact in aggravation defies the decision in Miller, which was grounded on the principle that "children are constitutionally different from adults for purposes of sentencing ... [and] have diminished culpability and greater prospects for reform." Miller, 567 U.S. at 471. Age is "the basis for the core constitutional protection extended to juvenile offenders," State v. Roby, 897 N.W.2d 127, 145 (Iowa

2017), and the "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Miller, 567 U.S. at 472 (emphasis added). As the Wyoming Supreme Court explained in Davis v. State, 415 P.3d 666 (Wyo. 2018):

> "Contrary to the district court's observation, the Miller Court established that violation of the Eighth Amendment occurs when offenders 'under the age of 18 at the time of their crimes' are sentenced to mandatory life without parole. Miller, 567 U.S. at 465, 132 S.Ct. at 2460. '[A]ge is not a sliding scale that necessarily weighs against mitigation the closer the offender is to turning eighteen years old at the time of the crime.' [State v.] Roby, 897 N.W.2d [127,] 145 [(Iowa 2017)]; see also Elizabeth S. Scott et al., Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy, 85 Fordham L. Rev. 641, 647 (2016) (developmental stages occur beyond the teenage years and into the early twenties). Miller contains no suggestion that a seventeen-year-old is more deserving of adult punishment than a sixteen-year-old. Rather, Miller recognized that 'youth is more than a chronological fact' and is 'itself a relevant mitigating factor of great weight.' Miller, 567 U.S. at 476, 132 S.Ct. at 2467 (citing Eddings v. Oklahoma, 455 U.S. 104, 115, 116, 102 S.Ct. 869, 877, 878, 71 L.Ed.2d 1 (1982)). Miller referred to 'youth' and 'chronological age' to distinguish youthful offenders from adults and rested the distinction upon firm scientific ground. Miller, 567 U.S. at 471-72, 132 S.Ct. at 2464 (referring to 'developments in psychology and brain science [that] continue to show fundamental differences between juvenile and adult minds').

> "In Poitra v. State, 368 P.3d 284 (Wyo. 2016), we rejected the argument that a nineteen-year-old should receive the same constitutional protections as juveniles, reasoning that 'the law has drawn a bright line at the age of eighteen' and juveniles under that age are subject to specialized sentencing protections. Id., 368 P.3d at 290. While science may support the suggestion that older teenagers and even offenders into their early twenties are still developing judgment and other qualities, see Scott, supra, 85 Fordham L. Rev. at 647, the law recognizes that juveniles under the age of eighteen have 'signature qualities' of 'immaturity, irresponsibility, impetuousness, and recklessness.' Miller, 567 U.S. at 476, 132 S.Ct. at 2467 (internal citation and quotation marks omitted). Thus, youth is a factor that 'supports the special sentencing consideration.' Roby, 897 N.W.2d at 146. That is not to say, however, that expert evidence or other facts may not be used to conclude any particular juvenile offender possessed features of maturity beyond his or her years. Id. Our review of the record reveals no such evidence with respect to Mr. Davis. Accordingly, we find that the district court abused its discretion when it refused to take Mr. Davis' youth into account as a mitigating factor."

415 P.3d at 689. See also J.M.H. v. State, [Ms. 2D17-3721, March 20, 2020] ___ So. 3d ___, ___ (Fla. Dist. Ct. App. 2020) (holding that the trial court improperly discounted the defendant's age when it focused on the fact that she was only 35 days shy of turning 18).

We agree with the Wyoming Supreme Court. A juvenile's age cannot be used as a fact in aggravation to support a sentence of life

imprisonment without the possibility of parole. See, e.g., Roby, 897 N.W.2d at 146 ("[C]ategorical age groups do not exist for children to justify using age alone as a factor against granting eligibility for parole."). Rather, a juvenile's age is, under Miller, a fact in mitigation. That is not to say, of course, that a trial court must afford a juvenile's age a certain weight, because what weight to afford mitigating evidence is generally within the trial court's discretion. See, e.g., Thrasher v. State, 295 So. 3d 118, 130-31 (Ala. Crim. App. 2019), and Wilkerson v. State, 284 So. 3d 937, 959 (Ala. Crim. App. 2018). However, in sentencing a juvenile capital offender, if a trial court affords the juvenile's age any weight, the court must weigh the juvenile's age as a fact in mitigation, not as a fact in aggravation, as the trial court did here.

We also agree with Bracewell that, by improperly considering her age as a fact in aggravation instead of as a fact in mitigation, the trial court ignored the hallmark features of youth. In addition to stating in its sentencing order that Bracewell was only 8 months from being 18 years old, "the age at which there would be no restrictions on the punishment available for a conviction of capital murder" (C. 214), the trial court found

no evidence indicating that Bracewell "was impetuous or did not appreciate the consequences of her behavior" because, the trial court stated, "there was no evidence of chronic misbehavior or unreasonable risk-taking as a child." (C. 214.) However, contrary to the trial court's belief, the lack of chronic misbehavior or unreasonable risk-taking does not, itself, undermine the expressly recognized failure of juveniles to appreciate risks and consequences and their tendency to make immature and impetuous decisions. As Bracewell notes in her brief on appeal, the court's finding in this regard effectively required that she be "especially immature or incapable of appreciating risk" (Bracewell's brief, p. 40) before it would consider her age and the hallmark features of youth as mitigating, which goes against the very basis of the decision in Miller, in which the United States Supreme Court recognized that

> "children have a ' "lack of maturity and an underdeveloped sense of responsibility," ' leading to recklessness, impulsivity, and heedless risk-taking. ... [They] 'are more vulnerable ... to negative influences and outside pressures,' including from their family and peers[, and they] ... have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. ... [And their] character is not as 'well formed' as an adult's ... [their]

> traits are 'less fixed' and [their] actions less likely to be 'evidence of irretrievabl[e] deprav[ity].' "

567 U.S. at 471 (citations omitted). Simply put, "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." Miller, 576 U.S. at 473. The trial court's statements indicate that it disregarded this maxim and, in doing so, it failed to adequately consider the hallmark features of youth. As in Davis, supra, in this case there was no evidence presented at the resentencing hearing indicating that Bracewell "possessed features of maturity beyond ... her years." 415 P.3d at 689. To the contrary, the only evidence presented regarding Bracewell's youthful characteristics indicated that she was, in fact, immature for her age.

For the foregoing reasons, we conclude that the trial court abused its discretion in treating Bracewell's age as a fact in aggravation supporting a sentence of life imprisonment without the possibility of parole and in failing to properly consider the hallmark features of youth. Therefore, the judgment of the trial court sentencing Bracewell to life imprisonment without the possibility of parole is reversed, and this cause is remanded

for the trial court to set aside the sentence and to reconsider the Ex parte Henderson factors and resentence Bracewell in light of this opinion. No return to remand need be filed. In the event Bracewell wishes to appeal her resentencing, she must file a new notice of appeal.

REVERSED AND REMANDED.

Cole, J., concur. Kellum, J., concurs in the result, with opinion. Minor, J., concurs in the result, with opinion. McCool, J., dissents, with opinion, which Windom, P.J., joins.

KELLUM, Judge, concurring in the result.

Although I agree with the main opinion that, in sentencing Debra Bracewell to life imprisonment without the possibility of parole, the trial court erred in weighing Bracewell's age as a fact in aggravation and in failing to consider the hallmark features of youth, I do not believe it is necessary to reach that issue in this case.

At the time of the crime, Bracewell was a 17-year-old, intellectually disabled juvenile who had suffered a lifetime of severe physical and sexual abuse at the hands of her own father. She had lived her entire life in abject poverty, with her mother being forced into prostitution simply to put food on the table. As the trial court noted in its sentencing order, Bracewell "grew up in the worst situation imaginable." (C. 218.) Bracewell's adolescence, intellectual disability, and history of abuse made her "considerably" immature for her age -- having the maturity level of a 15-year-old -- naive, gullible, and particularly vulnerable to the influence of others. "[I]f ever a pathological background might have contributed to a [17]-year-old's commission of a crime, it is here." Miller v. Alabama, 567 U.S. 460, 478-79 (2012). Despite her home situation, Bracewell was nice,

polite, and friendly to others, although often shy and timid, and she rarely caused trouble. However, when the opportunity to escape "the worst situation imaginable" presented itself in the form of Charles Bracewell -- a controlling, physically abusive, ex-convict some 10 years her senior -- Bracewell took it, despite the obvious downfalls, and, within a few months of meeting, Charles and Bracewell were committing crimes together -- burglary, grand larceny, and the robbery and murder of Rex Carnley. Despite the lack of any physical evidence connecting Bracewell to Carnley's murder, Bracewell confessed to her participation in the murder, admitting to police that it was Charles's idea to rob Carnley and that Charles had told her " 'to go behind the counter on the right side and get a gun out of the drawer and shoot' " Carnley. Bracewell v, State, 447 So. 2d 815, 819 (Ala. Crim. App. 1983), aff'd, 447 So. 2d 827 (Ala. 1984).

At the time of the resentencing hearing, Bracewell had been in prison for her crime for almost 40 years. Her actions and behavior over the course of those 40 years indicate that Bracewell not only has the potential for rehabilitation but that, for the most part, she has been actively trying to rehabilitate herself and has bettered herself while in

prison. Although in the 1980s, during her first few years in prison, Bracewell had multiple disciplinary infractions, had attempted to escape once, and had successfully escaped another time, Bracewell had only a few disciplinary infractions after that, and has had none since 2009. Bracewell has also completed numerous educational, religious, and therapeutic programs; has had positive inmate evaluations and progress reviews from the 1990s to the present; and has, for many years, been housed in the honor dorm and been heavily involved in the prison ministry, assisting the chaplain with baptisms and ministering to other inmates. In other words, the evidence unmistakably indicates that Bracewell has evolved "from a troubled, misguided youth to a model member of the prison community," which is exactly the type of evidence that demonstrates the potential for rehabilitation. Montgomery v. Louisiana, 577 U.S. ___, ___, 136 S.Ct. 718, 736 (2016).

The evidence in this case overwhelmingly establishes that Bracewell's actions when she was barely 17 years old reflect "the transient immaturity of youth," and, as the assistant attorney general representing the State in the trial court conceded, that Bracewell is not "the rare

juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible." Montgomery, 577 U.S. at ___, 136 S.Ct. at 733-34. Therefore, I believe that Bracewell's sentence of life imprisonment without the possibility of parole violates the Eighth Amendment under Miller and its progeny, and I would direct the trial court to resentence Bracewell to life imprisonment with the possibility of parole.

MINOR, Judge, concurring in the result.

I concur in the result. I agree with the central holding of the main opinion that, in its decision resentencing Debra Bracewell to life imprisonment without the possibility of parole, the circuit court improperly used Bracewell's age at the time of the offense as a factor weighing against a sentence of life imprisonment with the possibility of parole. Although Miller v. Alabama, 567 U.S. 460 (2012), and Montgomery v. Louisiana, 577 U.S. ___, 136 S. Ct. 718 (2016), are murky on this point,[10] I think a sentencing court should not, as the court did here, weigh

[10]Other than banning mandatory sentences of life imprisonment without the possibility of parole for offenders who committed crimes before the age of 18, Miller and Montgomery are unclear on many issues. This Court has held that those decisions "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" permanently incorrigible before a sentencing court may sentence such a defendant to life imprisonment without the possibility of parole. Wilkerson v. State, 284 So. 3d 937, 955 (Ala. Crim. App. 2018), cert. denied (No. 1180332, April 12, 2019) (Ala. 2019), cert. denied, ___ U.S. ___, 140 S. Ct. 2768 (2020). Other questions remain.

In our earlier opinion remanding this case, I cautioned that "trial courts should clearly state whether the individual being sentenced to life without the possibility of parole committed a crime 'reflect[ing]

heavily a defendant's age at the time of the offense against the defendant.[11]

In Boyd v. State, [Ms. CR-18-0288, Oct. 25, 2019] ___ So. 3d ___ (Ala. Crim. App. 2019), we rejected the appellant's argument that the circuit court had weighed his age at the time of the offense against him:

> "Boyd first attacks the circuit court's observation that Boyd committed the crime less than 4 months before he turned 18 and that Boyd's 'expert, clinical psychologist Dr. Robert D. Shaffer, acknowledged that [Boyd] would have been no more mature in four months on his 18th birthday.' (C. 327.) According to Boyd, '[c]hronological age is not to be analyzed to determine whether it might be a mitigating factor. It is a mitigating factor and must be weighed in favor of a parolable sentence.' (Boyd's brief, p. 40.) The circuit court's statements as to 'chronological age,' however, do not indicate that the circuit court refused to consider Boyd's age as a mitigating

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irreparable corruption.' " Bracewell v. State, [Ms. CR-17-0014, March 8, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019) (Minor, J., concurring specially). Recently, the United States Supreme Court heard arguments in Jones v. Mississippi (No. 18-1259), addressing whether the Eighth Amendment requires such a finding, but the Supreme Court has not yet issued a decision in that case.

[11]I share Judge McCool's concern about courts weighing the factors under Ex parte Henderson, 144 So. 3d 1262 (Ala. 2013), in Miller sentencing determinations. Rather than assigning "weight" to those factors, "Henderson ... simply requires the trial court to use its great discretion in 'consideration' of 14 factors." ___ So. 3d at ___ (McCool, J., dissenting).

> factor. Rather, they are merely statements of fact based on the evidence presented. This was not an abuse of discretion."

Likewise, in Wilkerson v. State, 284 So. 3d 937 (Ala. Crim. App. 2018), this Court rejected the appellant's argument that the circuit court had improperly considered his age at the time of the offense:

> "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[, 144 So. 3d 1262 (Ala. 2013)]. 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."

284 So. 3d at 957-58. Unlike the sentencing courts in Wilkerson and Boyd, the sentencing court in Bracewell's case weighed her age at the time of the offense against her.

Under the circumstances of this case, which show that the circuit court improperly weighed Bracewell's age at the time of the offense against her, I believe the appropriate remedy is to reverse the circuit court's judgment and give that court a chance to sentence Bracewell without improperly considering one of the factors set out in Ex parte Henderson, 144 So. 3d 1262 (Ala. 2013). I do not think this Court should be the first court to determine the appropriateness of the sentence when Bracewell's age at the time of the offense is properly considered, and I thus express no opinion on whether the other evidence presented at

Bracewell's resentencing hearing supports a sentence of life imprisonment without the possibility of parole.

McCOOL, Judge, dissenting.

Because I disagree with the decision to reverse the judgment of the trial court sentencing Debra Bracewell to life imprisonment without the possibility of parole, I respectfully dissent.

When Bracewell was 17 years old, during the commission of a robbery, she stood up on the rungs of a stool and fatally shot Rex Carnley in the back of the head from approximately 18 inches away. As the trial court found, there was no indication that Carnley put up a fight or that the shooting was accidental.

Approximately 30 years after Bracewell was convicted of capital murder and sentenced to life imprisonment without the possibility of parole, the United States Supreme Court issued a 5-4 decision in Miller v. Alabama, 567 U.S. 460 (2012), which 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.' " 567 U.S. at 465. Miller focused on the fact that the sentencing authority did not "have any discretion to impose a different punishment" and, thus, could not consider the defendants' "youth and its attendant

characteristics." Id. Furthermore, after stating the Court's holding, the majority in Miller stated that

> "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 [v. Simmons, 543 U.S. 551 (2005),] and Graham [v. Florida, 560 U.S. 48 (2010),] 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.' Roper, 543 U.S., at 573; Graham, 560 U.S., at 68."[12]

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[12]This statement, which follows the Court's explicit, specific holding, appears to be merely dictum. As Chief Justice Roberts recognized in his dissent in Miller, this statement is "entirely unnecessary to the rule [the Court] announces" and is a "gratuitous prediction." Miller, 567 U.S. at 500-01 (Roberts, C.J., dissenting). Also, Justice Alito recognized in his dissent that "[t]he majority goes out of its way to express the view that the imposition of a sentence of life without parole on a 'child' (i.e., a murderer under the age of 18) should be uncommon." Miller, 567 U.S. at 514 (Alito, J., dissenting). Nevertheless, in Montgomery v. Louisiana, 577 U.S. ___, 136 S. Ct. 718 (2016), a majority of the Court relied on this statement to find that Miller announced a new substantive rule of constitutional law that is retroactive. See Montgomery, 577 U.S. at ___, 136 S. Ct. at 734 (holding that, "[b]ecause Miller determined that sentencing a child to life without parole is excessive for all but ' "the rare juvenile offender whose crime reflects irreparable corruption," ' 567 U.S., at ___, 132 S. Ct., at 2469 (quoting Roper [v. Simmons, 543 U.S. 551,] 573 [(2005)]), 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").

Miller, 567 U.S. at 479. The Miller Court also stated that its decision did not foreclose a sentencer's ability to impose a sentence of life imprisonment without the possibility of parole on a juvenile convicted of homicide, but Miller requires the sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 567 U.S. at 480. Therefore, Miller did not categorically bar a sentence of life imprisonment without the possibility of parole for all juveniles convicted of homicide, but it did create a category of offenders who must receive individualized sentencing and cannot be subjected to a mandatory sentence of life imprisonment without the possibility of parole.

After Miller was decided, the Alabama Supreme Court issued its decision in Ex parte Henderson, 144 So. 3d 1262 (Ala. 2013). The Alabama Supreme Court recognized that "[t]he Miller Court was careful to clarify that its holding 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," and that "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." Henderson, 144 So. 3d at 1280. Further, while recognizing that "the Miller Court did not delineate specifically which factors to use in sentencing a juvenile convicted of a capital offense," the Alabama Supreme 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."

Henderson, 144 So. 3d at 1284. The Court also "recognize[d] that some of the factors may not apply to a particular juvenile's case and that some of the factors may overlap." Id.

In the present case, the main opinion holds that the trial court may not consider the age of the defendant at the time of the offense as a "fact in aggravation" supporting a sentence of life imprisonment without the possibility of parole but, instead, may consider the age of the defendant at the time of the offense only as a fact in mitigation supporting parole eligibility. In doing so, I believe that the main opinion is infringing on the great discretion given to the trial court in sentencing. Henderson does not diminish that discretion, but simply requires the trial court to use its great discretion in "consideration" of 14 factors.

Under Miller, a juvenile's chronological age at the time of the offense can and should be considered. In fact, it is the first factor set forth in Henderson. The main opinion holds that that factor can be used to support only a sentence of life imprisonment with the possibility of parole and relies on Davis v. State, 415 P.3d 666 (Wyo. 2018), in which the Wyoming Supreme Court stated that "Miller contains no suggestion that a seventeen-year-old is more deserving of adult punishment than a sixteen-year-old." I respectfully disagree with that assertion.

Miller considered two separate cases, and in each case a 14-year-old juvenile had been convicted of murder and sentenced to life imprisonment without the possibility of parole. In barring the imposition of mandatory life-without-parole sentences on juvenile homicide offenders, the Miller Court stated that one problem with such mandatory sentencing schemes is that "every juvenile will receive the same sentence as every other -- the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one." 567 U.S. at 476-77 (emphasis added). The Miller Court also stated:

> "Given our holding, and the dissents' competing position, we see a certain irony in their repeated references to 17-year-olds who have committed the 'most heinous' offenses, and their comparison of those defendants to the 14-year-olds here. See post, at 494 (opinion of ROBERTS, C.J.) (noting the '17-year old [who] is convicted of deliberately murdering an innocent victim'); post, at 495 ('the most heinous murders'); post, at 499 ('the worst types of murder'); post, at 513 (opinion of ALITO, J.) (warning the reader not to be 'confused by the particulars' of these two cases); post, at 510 (discussing the '17 1/2-year-old who sets off a bomb in a crowded mall'). Our holding requires factfinders to attend to exactly such circumstances -- to take into account the differences among defendants and crimes. By contrast, the sentencing schemes that the dissents find permissible altogether preclude considering these factors."

567 U.S. at 480 n.8. Thus, there is a suggestion in Miller that a 17-year-old is more deserving of life imprisonment without the possibility of parole than a 14-year-old. According to the United States Supreme Court, age is one of the factors that can be taken into account to differentiate among juvenile homicide offenders -- the only people to whom Miller applies.

In the present case, concerning consideration of Bracewell's age at the time of the offense, I would not forbid the consideration of age as a fact in aggravation. As the trial court stated, Bracewell's age can be considered as one of several factors to "militate" or "weigh" in favor of life imprisonment without the possibility of parole or against life imprisonment with the possibility of parole when comparing Bracewell to other juvenile homicide offenders who are less than 17 years old, such as the 14-year-olds in Miller.

I do not believe that the discretion of the trial court is diminished in any way by the requirement that the Henderson factors be considered by the court, and we should not read Henderson to so limit a trial court's discretion. To put it another way, the sentencing judge is free to use traditionally proper judicial discretion in crafting a sentence, ascribing to

each factor whatever weight he or she deems appropriate based on the evidence to reach a proper and just determination of the appropriate sentence in the particular circumstances of the case.

In my opinion, we must not lose sight of the fact that a resentencing hearing pursuant to Miller is, after all, simply a sentencing hearing. Miller holds that a mandatory sentence of life imprisonment without the possibility of parole is unavailable, and Henderson mandates that certain factors must be considered when sentencing a juvenile capital offender, but otherwise neither case limits the trial court's discretion in arriving at the proper sentence. As in all sentencing hearings, the trial court has great discretion in weighing the evidence concerning the applicable factors. Although the sentencing court cannot ignore the Henderson factors, that court is not required to ascribe any greater or lesser weight to any particular factor, unless the sentencing court determines based on the evidence that one or more factors is entitled to such greater or lesser weight. The trial court is free -- bound only by the evidence in the particular case -- to treat each Henderson factor in one of three ways: as a fact in aggravation, as a neutral fact, or as a fact in mitigation.

My concern today is that, under the language and reasoning of the main opinion, trial courts will be forced to begin their analysis with a presumption toward a sentence of life imprisonment with the possibility of parole, as opposed to starting from a neutral stance between the two possible sentences. This is the kind of bias this Court specifically forbade in Wilkerson v. State, 284 So. 3d 937, 955 (Ala. Crim. App. 2018), when this Court held that "Miller and Montgomery do not require a presumption against life-imprisonment-without-the-possibility-of-parole sentences for juveniles convicted of capital murder." The main opinion wrongly mandates that, "in sentencing a juvenile capital offender, if a trial court affords the juvenile's age any weight, the court must weigh the juvenile's age as a fact in mitigation." This language, in my opinion, misapplies the holdings in Miller and Henderson, and directly contradicts Wilkerson, and will wrongly lead the trial courts of this state to be predisposed toward a sentence of life imprisonment with the possibility of parole as opposed to a sentence of life imprisonment without the possibility of parole, when the trial courts should rather begin with an impartial stance between the two options.

In reality, Miller and Henderson simply require that, whereas an adult capital defendant would be subject to either the death penalty or life imprisonment without the possibility of parole, a juvenile capital defendant who is exempt from the death penalty may not face a mandatory sentence of life imprisonment without the possibility of parole. In considering a sentence for a juvenile capital defendant, a trial court must consider the Henderson factors, but should not start from a position of bias toward either life imprisonment without the possibility of parole or life imprisonment with the possibility of parole. Rather, the court should weigh all the evidence as it relates to the Henderson factors and render a decision on the sentence that is just and fair under the particular circumstances of the case.

In sum, I believe that the trial court's decision did not violate the controlling authority set forth in Miller, Montgomery, Henderson, and Wilkerson and, thus, that the trial court acted within its discretion when it sentenced Bracewell to life imprisonment without the possibility of parole. For these reasons, I respectfully dissent.

Windom, P.J., concurs.