



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

**TREY M. MILLER,** )  
 )  
Defendant Below, )  
Appellant, )  
 )  
v. ) No. 241, 2018  
 )  
**STATE OF DELAWARE,** )  
 )  
Plaintiff Below, )  
Appellee. )

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE

**STATE'S ANSWERING BRIEF**

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DATE: October 26, 2018

# TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS .....	ii
NATURE AND STAGE OF THE PROCEEDINGS .....	1
SUMMARY OF THE ARGUMENT .....	2
STATEMENT OF FACTS .....	3
ARGUMENT	
I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING MILLER’S MOTION FOR SENTENCE MODIFICATION .....	9
CONCLUSION .....	18

## TABLE OF CITATIONS

	<u>Page</u>
<b>Cases</b>	
<i>Baker v. State</i> , 906 A.2d 139 (Del.2006).....	11
<i>Carr v. State</i> , 554 A.2d 778 (Del. 1989).....	10
<i>Cruz v. State</i> , 990 A.2d 409 (Del. 2010).....	11, 12, 15
<i>Dabney v. State</i> , 12 A.3d 1101 (Del. 2009).....	16
<i>Ellerbe v. State</i> , 2000 WL 949625 (Del. May 11, 2000).....	16
<i>Fink v. State</i> , 817 A.2d 781 (Del. 2002).....	12
<i>Gamble v. State</i> , 728 A.2d 1171 (Del. 1999).....	12
<i>Harris v. State</i> , 695 A.2d 34 (Del. 1997).....	9
<i>Jacobs v. State</i> , 358 A.2d 725 (Del. 1976) .....	16
<i>Mayes v. State</i> , 604 A.2d 839 (1992).....	12, 13, 15
<i>North Carolina v. Pearce</i> , 395 U.S. 711 (1969).....	16
<i>Pipkin v. State</i> , 2004 WL 2419087 (Del. Oct. 26, 2004).....	9, 10
<i>State v. Culp</i> , 152 A.3d 141 (Del. 2016).....	9, 10
<i>State v. Liket</i> , 2002 WL 31133101 (Del. Super.).....	17
<i>State v. Miller</i> , No. 1208012177, Clarke Streett, J. (Apr. 10, 2018).....	1, 3, 8, 11
<i>State v. Sloman</i> , 886 A.2d 1257 (Del. 2005) .....	12
<i>Wainwright v. State</i> , 504 A.2d 1096 (Del.1986) .....	11
<i>Weston v. State</i> , 832 A.2d 742 (Del. 2003).....	12

**Statutes**

11 Del. C. § 4334 .....12

**Other Authorities**

SENTAC Benchbook 2017.....14

**Rules**

Super. Ct. Crim. R. 35.....10

Supr. Ct. R. 6.....10

Supr. Ct. R. 8.....9, 11

## NATURE AND STAGE OF THE PROCEEDINGS

On March 18, 2012, Trey Miller (“Miller”) was arrested, and later charged with second and third degree burglary, motor vehicle theft, two counts of felony theft, two counts of misdemeanor theft, two counts of criminal mischief and second degree conspiracy. Super. Ct. Docket Item (“DI”) 1-2. (A1, 22-26). While the charges were pending, on August 16, 2012, Miller was arrested and charged with second degree robbery. (DI 1; A11, 27). On March 5, 2013, he pled guilty in both cases to: (1) second degree burglary, felony theft, second degree conspiracy; and (2) second degree robbery. (A3-4, 11-12, 29-38).

Miller violated his probation three times. (A1, 11). The first two times, the Superior Court sentenced Miller to probation after serving six months at Level V. Jan. 6, 2014 & April 13, 2015 VOP Sent. Ords. (B9-16). Miller extended the time for his third violation of probation hearing by repeatedly failing to appear for court dates. (A7-9). The Superior Court sentenced Miller to a total of eleven years at Level V, with drug treatment and TASC monitored probation. (A92-96).

Miller did not appeal his sentence. Instead, he filed a motion for sentence modification three days after his VOP sentence hearing. (A89, 97). The Superior Court denied his motion.<sup>1</sup> Miller appealed that denial, and filed his Opening Brief on Appeal. This is the State’s Answering Brief.

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<sup>1</sup> *State v. Miller*, No. 1208012177, Clarke Streett, J. (Apr. 10, 2018) (A97-100).

## **SUMMARY OF ARGUMENT**

**I. DENIED.** The Superior Court did not abuse its discretion in denying Miller's Motion for Sentence Modification. No new information was presented in the motion beyond that which was presented at the sentencing hearing. Miller cannot collaterally attack the Superior Court's imposition of his VOP sentence on appeal from denial of his motion for sentence modification in which he did not raise the claims. At most, his sentence is reviewed for plain error, which he has not established.

## STATEMENT OF FACTS

Miller's guilty pleas resolved two cases that arose from two separate instances. The Superior Court summarized the two incidents as follows:

In March 2012, Defendant and another person burglarized a residence, while its occupants were asleep, and stole money, electronic equipment, and car keys. The Defendant and his accomplice then stole one of the occupant's vehicles, became involved in a collision, and the vehicle sustained extensive damage when it flipped over several times. In July 2012, the Defendant accosted a woman in the Wawa parking lot and demanded her purse. He then ripped it from her arm and fled.<sup>2</sup>

The affidavits of probable cause provide more detailed facts of these incidents.

(A102-11). After robbing the University of Delaware students, and totaling the car, Miller and his accomplice fled the accident, stashed the computers under a bush, but were apprehended because one of the victims used an application to track his stolen iPhone. (A41, 102-111). While on pretrial release for that offense, Miller forcefully obtained a ride to the Wawa where he stole the woman's purse. (A102-11).

On March 5, 2013, Miller acknowledged he faced a penalty of up to 17 years in prison, and pled guilty to four charges from the two incidents. (A34-38). Due to the minimum mandatory sentence for the burglary conviction, the Superior Court revoked Miller's bail and held him for sentencing pending a presentence

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<sup>2</sup> *State v. Miller*, No. 1208012177, at 1, Clarke Streett, J. (Apr. 10, 2018) (A97-100).

investigation. (A37-38).

On May 17, 2013, the Superior Court sentenced Miller to a total of 17 years at Level V, with credit for 36 days served, to be suspended after 3 years and successful completion of the Key Program, for 2 years at Level III Crest Aftercare, and ordered mental health and substance abuse evaluations. (A46-48, 56-58). The court also ordered Miller to undergo mental health and substance abuse evaluations, obtain his GED, have no contact with the victims and pay restitution. (A47).

After the Superior Court sentenced Miller, Miller's grandmother, Mrs. Poindexter, approached and addressed the court at some length. (A48-54). Mrs. Poindexter told the court that she and her husband raised Miller in a stable environment and taught him to respect people and the difference between right and wrong. (A48-49, 51). She told the court that Miller "[did not] have a drug or alcohol problem. This just happened when he was with his friend, [when he] decided to take some pills and decided to drink." (A50). She said that Miller was very sorry for what he had done, but that his incarceration had been very hard on her and asked the court for mercy. (A50-52).

The Superior Court considered Mrs. Poindexter's statement, and declined to change the sentence. The court noted that a portion of the sentence was mandatory, that Miller had "violence in his history," "was using drugs and



drinking,” and that the Key program would “help him deal with his drug usage as well as . . . some of his anger issues.” (A52-53). Miller did not appeal.

In June and December, 2013, Miller filed motions for sentence modification, which the Superior Court denied. (DI 28-29, 32-33; A13-14). Miller filed a third motion and obtained a mental health evaluation. *Id.* On October 14, 2014, the Superior Court reduced Miller’s non-suspended Level V sentence from 3 to 2 years. Oct. 14, 2014 Mod. Sent. Ord. (B1-8).

On January 6, 2015, the Superior Court found Miller in violation of his probation (“VOP”), and sentenced him to a total of 13 years, 6 months at Level V, to be suspended after 6 months for 2 years at Level III, with a TASC evaluation and monitoring. Jan. 6, 2014 VOP Sent. Ord. (B19-12). In February 2015, the Superior Court denied Miller’s request for relief from his sentence. (DI 44; A16).

On April 26, 2016, the Superior Court found Miller in violation of his probation for a second time. (DI 50; A16). The court sentenced Miller to a total of 13 years, 6 months at Level V, with credit for 22 days served, suspended for 2 years at Level III, followed by 1 year at Level II, with TASC monitoring and zero tolerance for missed appointments. Apr. 13, 2015 VOP Sent. Ord. (B13-16).

In an August 3, 2016 VOP Report, the Department of Correction alleged that Miller violated terms 1, 3, and 7 of his conditions of probation. VOP Report, at 3. (B19). The report stated Miller had been arrested for disorderly conduct, failed to

report to probation four times, failed to report to TASC six times, refused one urine screen and the two screens he submitted to tested positive for opiates and marijuana. *Id.* Miller failed to appear for VOP hearings in September 2016, November 2016, and January 2017. (DI 64; A18). On April 12, 2017, TASC terminated its monitoring due to Miller's failure to appear. (DI 65; A18).

Miller reported to probation on October 28, 2016, but failed to report again on October 31. (A74). The Department of Correction filed a supplemental VOP report, which alleged violation of condition 9 of his probation by failing to comply with TASC monitoring. (A74).

On March 8, 2017, the Delaware State Police arrested Miller and charged him with Reckless Endangering in the First Degree; however, that charge was dropped. (A74). Miller failed to report the police contact to probation. (A75).

In April 2017, August 2017 and February 2018, Miller failed to appear in Superior Court for his pending violation of probation hearing after he posted bond in JP Court. (DI 66-84; A18-20). Miller was returned on a *capias* on February 20, 2018. (DI 86; A20).

On March 6, 2018, having been held in default of bond, Miller appeared for his VOP hearing. The Department of Correction recommended a total of one year at Level V and that Miller then be discharged from probation as unimproved.<sup>3</sup>

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<sup>3</sup> "Discharge as Unimproved" is recommended where "continued supervision of

Miller admitted he violated his probation by missing appointments with both probation and TASC. (A77). Miller asked the court to consider sentencing him to six months, claiming he is employable at the mushroom farms, has family support and has a place to reside. (A76-77).

The court asked for an explanation for the many times Miller failed to appear after being released on bond, to which defense counsel cited Miller's drug use to self-medicate rather than seek counseling. (A78). Miller responded that he was better than a criminal, asked the court to give him a chance to show that "I'm done with this life," and claimed he was not on the run, but instead working and living with his grandparents when he failed to report to probation. (A79). The Superior Court found:

I've seen you now for quite some time and its clear to me that you don't take your sentencing seriously. Somehow you feel that you don't have to follow what probation wants you to do or the fact that you were supposed to go to TASC or do the things you were told to do on your probation.

Furthermore, you've come in here in this Court before and cried bitter tears and begged and somehow tried to manipulate the Court, promising to come back when you're supposed to come back and you haven't done that.

Apparently your family has been able to post bail for you in the past when you have been picked up on your capiases and even though you were released on some type of bail on those capiases, you did not

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the probationer is unlikely to have a beneficial effect, even though one or more terms of the probation order have not been fulfilled." SENTAC Benchbook 2017, at 151.

come back. So, apparently, you disregard the Court and everything that the Court has to say to you and your family is not able to control you.

(A79-80). The Superior Court sentenced Miller to a total of 11 years at Level V, to be suspended after 9 years (with 3 years of inpatient drug treatment), followed by 1 year of Level IV home confinement, to be suspended after 6 months for Level III probation. Mar. 6, 2018 VOP Sent. Ord. (Op. Br. Ex. A). Miller did not appeal his VOP sentence.

Three days later, on March 9, 2018, through counsel, Miller filed a motion for sentence modification pursuant to Superior Court Criminal Rule 35(b). (A85-90). Miller asked the Superior Court to reduce his sentence to completion of the Key program, followed by TASC monitoring, to align with the DOC recommendation and “both punish Miller for his failures on probation but also provide him with in-patient drug treatment.” (A88). The Superior Court denied his motion.<sup>4</sup>

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<sup>4</sup> *State v. Miller*, No. 1208012177, at 4. (A100).

**I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING MILLER’S MOTION FOR SENTENCE MODIFICATION.**

**Question Presented**

Whether the Superior Court abused its discretion in denying Miller’s motion for sentence modification.

**Scope and Standard of Review**

This Court reviews a trial court’s denial of a Rule 35(b) motion for sentence modification for abuse of discretion.<sup>5</sup> The Court reviews claims not raised below for plain error.<sup>6</sup>

**Argument**

For the first time on appeal, Miller raises new claims that the Superior Court sentenced him with a closed mind and acted with vindictiveness at both sentencing and in denying his motion for sentence reduction. He cannot collaterally attack his VOP sentence by appealing the denial of his motion.<sup>7</sup> The Superior Court did not abuse its discretion in denying Miller’s motion for sentence reduction, which merely reiterated his statements at sentencing. Miller’s claim has no merit.

In his original and amended notices of appeal, Miller cited his March 6, 2018 VOP sentencing and the Superior Court’s April 10, 2018 denial of his motion

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<sup>5</sup> *State v. Culp*, 152 A.3d 141, 144 (Del. 2016).

<sup>6</sup> Supr. Ct. R. 8; *see Harris v. State*, 695 A.2d 34, 40 (Del. 1997).

<sup>7</sup> *Pipkin v. State*, 2004 WL 2419087, at \*1 (Del. Oct. 26, 2004).

for sentence modification as the orders from which he appeals. Miller filed his original notice of appeal on May 4, 2018. Time is a jurisdictional requirement and when an appeal is not filed within the statutory time period, the Court is without jurisdiction to hear the appeal.<sup>8</sup> Miller cannot obtain review of his March 6, 2018 VOP sentence where he failed to appeal that sentence within thirty days of sentencing.<sup>9</sup> In *Pipkin v. State*, this Court addressed the same situation:

Rather than filing a direct appeal to this Court from the finding of a VOP, [the defendant] instead chose to file a motion for sentence modification pursuant to Rule 35. However, [the defendant] may not use the instant appeal from the Superior Court's denial of his Rule 35 motion to collaterally attack the merits of his VOP conviction.<sup>10</sup>

Miller's appeal, therefore, is limited to review of the Superior Court's denial of his motion for sentence modification.

Superior Court Criminal "Rule 35(b) permits the Superior Court to 'reduce a sentence of imprisonment on a motion made within 90 days after the sentence is imposed.'"<sup>11</sup> Miller's motion for reduction of sentence recited the same bases for a reduced sentence that Miller presented at his VOP sentencing—he offered no new information and raised no objections to the evidence previously relied upon by the Superior Court. In considering his motion, the Superior Court reviewed the

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<sup>8</sup> *Carr v. State*, 554 A.2d 778, 779 (Del. 1989).

<sup>9</sup> *Id.*; Supr. Ct. R. 6.

<sup>10</sup> *Pipkin v. State*, 2004 WL 2419087, at \*1 (Del. Oct. 26, 2004).

<sup>11</sup> *State v. Culp*, 152 A.3d at 144 (citing Super. Ct. Crim. R. 35(b)).

convictions for which Miller was on probation, his past violations, his *capias* history, and his prior criminal history.<sup>12</sup> The Superior Court found he had “an inability or unwillingness to follow the rules of probation” and that “it does not appear as though his family network is able to get Defendant to abide by the rules of probation or appear on Court dates.” The court determined Miller’s sentence remained appropriate and denied his motion.<sup>13</sup> The Superior Court did not abuse its discretion in reaching that determination.

To obtain reversal by allegations of vindictiveness or closed mindedness where those claims were not raised below or on appeal, Miller must establish plain error.<sup>14</sup> “[T]he doctrine of plain error is limited to material defects which are apparent on the face of the record, which are basic, serious, and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.”<sup>15</sup> Miller has failed to establish plain error.

“[O]nce a defendant violates the terms of his probation, the Superior Court has the authority to require a defendant to serve the sentence imposed, or any lesser

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<sup>12</sup> *State v. Miller*, No. 1208012177, at 1-4 (A97-100).

<sup>13</sup> *Id.*

<sup>14</sup> *Cruz v. State*, 990 A.2d 409, 412 (Del. 2010) (citing Supr. Ct. R. 8) (finding that where the defendant made no objection to the Superior Court’s basis or findings at the hearing, the claim is reviewed only for plain error.).

<sup>15</sup> *Id.* (citing *Baker v. State*, 906 A.2d 139, 150 (Del.2006) quoting *Wainwright v. State*, 504 A.2d 1096, 1100 (Del.1986)).

sentence.”<sup>16</sup> The Superior Court may re-impose any portion of a previously suspended prison term.<sup>17</sup> In *Fink v. State*, this Court explained:

[I]n reviewing a sentence within statutory limits, this Court will not find error of law or abuse of discretion unless it is clear from the record that a sentence has been imposed on the basis of demonstrably false information or information lacking a minimal indicia of reliability. In reviewing a sentence within the statutory guidelines, this Court will not find error unless it is clear that the sentencing judge relied on impermissible factors or exhibited a closed mind.<sup>18</sup>

““A judge sentences with a closed mind when the sentence is based on a pre-conceived bias without consideration of the nature of the offense or the character of the defendant.””<sup>19</sup>

There is no evidence that the Superior Court acted out of vindictiveness or with a closed mind.<sup>20</sup> At the hearing, the Superior Court listened to the probation officer, Miller’s counsel, and Miller’s statements. The court then asked Miller to address his history of failing to comply with the court’s orders, and found his explanation unavailing. Contrary to Miller’s assertions, the court reviewed the

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<sup>16</sup> *State v. Sloman*, 886 A.2d 1257, 1260 (Del. 2005) (citing 11 Del. C. § 4334(c)).

<sup>17</sup> *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999); *Mayes*, 604 A.2d 839, 845 (Del. 1992).

<sup>18</sup> *Fink v. State*, 817 A.2d 781, 790 (Del. 2002) (citations omitted).

<sup>19</sup> *Cruz v. State*, 990 A.2d at 416 (quoting *Weston v. State*, 832 A.2d 742, 746 (Del. 2003)).

<sup>20</sup> See 990 A.2d at 417 (“[G]iven Cruz’s history of violating probation, it was well within the Superior Court’s discretion to revoke his probation and impose a prison sentence, notwithstanding the probation officer’s recommendation to the contrary.”) (quotations omitted)).



facts and thoroughly explained its conclusion. The Superior Court's findings reflect that the Superior Court was open to hearing from Miller, and Miller's responses did not satisfy the court that his behavior would improve. Despite his many opportunities to establish that he could comply with probation and the court's orders, Miller flagrantly failed to report to probation, TASC, and to court when ordered to appear, and only appeared for the VOP hearing at issue because he was held for default of bond. The Superior Court's order denying Miller's motion reflects that the court again reviewed his request and again found it unavailing.

To the extent Miller claims the Superior Court considered improper factors, his claim also fails. "In Delaware, a sentencing court has broad discretion to consider 'information pertaining to a defendant's personal history and behavior which is not confined exclusively to conduct for which that defendant was convicted.' The United States Constitution endorses such a broad inquiry. Sentencing courts are specifically entitled to rely upon information regarding other, unproven crimes."<sup>21</sup> Miller alleges the court improperly referenced his prior criminal history; however, this was an appropriate consideration. Not only is his past conviction a *proven* crime, but the SENTAC Benchbook also specifically provides that "prior violent criminal conduct" is an aggravating factor for

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<sup>21</sup> *Mayer v. State*, 604 A.2d at 842-43 (citations omitted).

sentencing.<sup>22</sup>

The Superior Court deviation from the SENTAC Guidelines is not evidence of sentencing with a closed mind and it does not establish plain error. In addressing “Violation of Probation Sentencing Policy,” the SENTAC Benchbook, although non-binding, specifically provides that, where “[t]he behavior of the offender is repetitive and flagrantly defies the authority of the court,” the court has a basis for raising an offender’s supervision by more than one level, as occurred here.<sup>23</sup> The Benchbook also provides guidance for the length of the VOP sentence:

When a period of incarceration is determined to be the sanction of choice for a violation of probation, a Level V sanction should be in accordance with the current SENTAC standard presumptive sentence for the original crime for which probation is being served. If the presumptive sentence is less than level V, the sentence for violation of probation should be UP TO 25% of the statutory maximum.<sup>24</sup>

The maximum sentence for second degree burglary is 8 years, with a presumptive sentence of 2 years. The maximum sentence for second degree robbery is 5 years, with a presumptive sentence of up to 15 months. The maximum sentences for felony theft and second degree conspiracy are two years, and the presumptive sentence is up to 1 year at Level 2. Following the above guidance, the *presumptive* sentence for Miller’s VOP where incarceration was found to be appropriate, was 3

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<sup>22</sup> See SENTAC Benchbook 2017, at 132-33 (“Aggravating and Mitigating Factors” and “Description of Aggravating Factors for Exceptional Sentences”).

<sup>23</sup> SENTAC Benchbook 2017, at 150.

<sup>24</sup> *Id.*

years and 9 months.

Miller's sentence exceeded the presumptive sentence; however, this was Miller's third violation of probation. In *Mayes v. State*, this Court stated:

It is established Delaware law that a defendant has no legal or constitutional right to appeal a statutorily authorized sentence simply because it does not conform to the sentencing guidelines established by the Sentencing Accountability Commission. . . .

“The sentencing standards are considered voluntary and non-binding; thus, no party to a criminal case has any legal or constitutional right to appeal to any court a statutorily authorized sentence which does not conform to the sentencing standards.”<sup>25</sup>

The *Mayes* Court also explained that failure to put the reasons for deviation from the guidelines on the record is not a basis for reversal:

Defendant contends that the court violated 11 Del. C. § 4204(m) in failing to make a matter of record its reasons for imposing a sentence in excess of the SENTAC guidelines. Defendant states that the court failed to comply with section 4204(m) by giving a basis for the enhanced sentence and identifying the aggravating factors justifying the sentence imposed. However, section 4204(m) may not be reasonable construed as a mandate or basis for reversible error since we have previously ruled that the SENTAC guidelines provide “no basis for appeal.”<sup>26</sup>

Where the guidelines are non-binding and not a basis for appeal, they do not support plain error. There is no record support for Miller's contentions that the Superior Court's deviation from the guidelines was the result of a closed mind.<sup>27</sup>

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<sup>25</sup> *Mayes v. State*, 604 A.2d at 845 (citations omitted).

<sup>26</sup> *Id.*

<sup>27</sup> *See Cruz v. State*, 990 A.2d at 417 (defendant “failed to establish that his

To the extent Miller asks this Court to apply the same rules to a VOP sentence that are applied when a defendant is re-sentenced after a reversal, the rule is inapplicable for two reasons. First, the two scenarios are not factually comparable. Second, the rule, adopted from *North Carolina v. Pearce*, “applies where the total sentence in the second sentencing exceed the total sentence in the first sentencing.”<sup>28</sup> Here, Miller’s VOP sentence was less than his original sentence, and less than the suspended Level 5 time remaining on his sentence.

Finally, Miller claims his failures on probation are attributable to the loss of his infant daughter in September 2016. Relying on that loss, however, does not explain Miller’s numerous missed office visits or two positive urine screens in the August 2016 VOP Report. (B21-22). Miller asserted that he has received no formal therapy to deal with his grief and depression (A87-88); however, he previously obtained a mental health evaluation in connection with a motion for reduction of sentence (A14-15), and could have requested another. Further, to the

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sentence was imposed with a closed mind” despite deviation from the guidelines.”); *Ellerbe v. State*, 2000 WL 949625, at \*1 (Del. May 11, 2000) (finding no evidence of a “closed mind” and determining, “[g]iven the defendant’s previous history of such conduct, the resulting sentence was well within the range of reasonableness,” where defendant was sentenced to a total of 25 years out of a maximum of 33 years, with a presumptive sentence of 12 years).

<sup>28</sup> *Dabney v. State*, 12 A.3d 1101, 1104 (Del. 2009) (citing *Jacobs v. State*, 358 A.2d 725, 729 (Del. 1976) and *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969)).

extent Miller attempts to rely on his grandmother's needs as a basis for his reduced sentence, he should have taken that into consideration before violating the terms of his probation.<sup>29</sup>

Miller's motion for sentence reduction was a restatement of his argument for lenity that he presented at sentencing. The Superior Court denied the motion, noting its broad discretion and its determination that the sentence was appropriate. Miller has failed to establish that the Superior Court abused its discretion in this decision, or that the Superior Court committed plain error.

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<sup>29</sup> *See State v. Liket*, 2002 WL 31133101, \*3 (Del. Super.) (“The considerations of familial hardship and financial difficulties were important factors that Defendant should have considered before undertaking the criminal acts for which he was convicted.”).

## CONCLUSION

The judgment of the Superior Court should be affirmed.

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## CERTIFICATE OF SERVICE

I, Abby Adams, being a member of the Bar of the Supreme Court of Delaware, hereby certify that on October 26, 2018, I caused the attached document to be served by File and Serve to:

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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT  
AND TYPE-VOLUME LIMITATION**

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word 2016.
2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 3,971 words, which were counted by Microsoft Word 2016.

Dated: October 26, 2018

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