

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Nov 03 2022

S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Clarendon County
Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2021-000987

THE STATE*Respondent,*

v.

JON PAUL SMART*Petitioner.*

**BRIEF OF THE SOUTH CAROLINA PUBLIC DEFENDER
ASSOCIATION AND JUSTICE 360 AS *AMICI CURIAE* IN
SUPPORT OF THE PETITIONER**

LINDSEY S. VANN
HANNAH L. FREEDMAN
JUSTICE 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
(803) 765-1044

MELISSA A. INZERILLO
SIXTEENTH CIRCUIT PUBLIC DEFENDER
1675 York Highway
York, SC
(803) 628-3031

Counsel for Amicus Justice 360

*Counsel for Amicus South Carolina
Public Defender Association*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION	2
ARGUMENT	8
I. The Juvenile Offender Does Not Bear the Burden of Disproving that LWOP is Appropriate.	11
A. Judges continue to treat <i>Aiken</i> resentencing hearings as motions to vacate.	11
B. The court should impose the burden of proving the propriety of a LWOP sentence on the State.	14
II. Lower Courts Need More Guidance on How to Apply the <i>Aiken</i> Factors.	17
A. Courts across the country provide more detailed guidance about the kinds of mitigating information that is pertinent to consider in juvenile sentencing proceedings.	18
B. The lack of guidance in South Carolina has produced arbitrary sentencing outcomes.	21
CONCLUSION.....	23
 CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

CASES

	Page(s)
<i>Aiken v. Byars</i> , 410 S.C. 534, 765 S.E.2d 572 (2014) (plurality op.).....	<i>passim</i>
<i>Bear Cloud v. State</i> , 334 P.3d 132 (Wy. 2014).....	15
<i>Bowman v. State</i> , 422 S.C. 19, 809 S.E.2d 232 (2018).....	14
<i>Commonwealth v. Batts</i> , 163 A.3d 410 (Pa. 2017).....	16
<i>Commonwealth v. Felder</i> , 269 A.3d 1232 (Pa. 2022)	16
<i>Davis v. State</i> , 415 P.3d 666 (Wy. 2018).....	15-16
<i>Diatchenko v. Dist. Att’y for Suffolk Dist.</i> , 1 N.E.3d 270 (Mass. 2013).....	19
<i>Garrett v. State</i> , 320 S.C. 353, 465 S.E.2d 349 (1995).....	11, 12
<i>Geer v. State</i> , 417 S.C. 2, 788 S.E.2d 701 (2016) (mem. op.).....	11
<i>Goodman v. State</i> , 416 S.C. 620, 787 S.E.2d 847 (2016) (mem. op.)	11
<i>Graham v. Florida</i> , 560 U.S. 48 (2010)	9, 14
<i>Jones v. Commonwealth</i> , 763 S.E.2d 823 (Va. 2014).....	18
<i>Jones v. Mississippi</i> , 141 S. Ct. 1307 (2021).....	9
<i>Mack v. State</i> , 417 S.C. 33, 789 S.E.2d 571 (2016) (mem. op.).....	11
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012).....	<i>passim</i>
<i>Montgomery v. Louisiana</i> , 577 U.S. 190 (2016)	9, 14
<i>People v. Taylor</i> , No. 154994, 2022 WL 3008301 (Mich. July 28, 2022) (slip op.).....	15
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	3, 8, 14
<i>Rohweder v. State</i> , 130 Nev. 1237 (Nev. 2014).....	18
<i>State v. Barton</i> , 325 S.C. 522, 481 S.E.2d 439 (Ct. App. 1997).....	12
<i>State v. Bassett</i> , 428 P.3d 343 (Wash. 2018)	16, 19

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>State v. Delbosque</i> , 456 P.3d 806 (Wash. 2020).....	16
<i>State v. Grooms</i> , 343 S.C. 248, 540 S.E.2d 99 (S.C. 2000).....	14
<i>State v. Hart</i> , 404 S.W.3d 232 (Mo. 2013).....	15
<i>State v. Hicks</i> , 377 S.C. 322, 659 S.E.2d 499 (Ct. App. 2008).....	12
<i>State v. Montgomery</i> , 194 So.3d 606 (La. 2016)	19, 20
<i>State v. Morgan</i> , 433 S.C. 435, 858 S.E.2d 647 (Ct. App. 2021).....	11, 12
<i>State v. Riddle</i> , 301 S.C. 68, 71, 389 S.E.2d 665 (1990).....	13
<i>State v. Seats</i> , 865 N.W.3d 545 (Iowa 2015).....	15
<i>State v. Smart</i> , 433 S.C. 651, 861 S.E.2d 383 (Ct. App. 2021)	3, 5
<i>State v. Smith</i> , 276 S.C. 494, 280 S.E.2d 200 (1981)	11
<i>State v. Sweet</i> , 879 N.W.2d 881 (Iowa 2016).....	15, 19
<i>State v. Mack</i> , No. 2004-GS-21-108 (Ct. Gen. Sess. Mar. 20, 2019).....	18
<i>State v. Valencia</i> , 386 P.3d 392 (Ariz. 2016).....	16, 17
<i>Taylor v. State</i> , No. M2019-01312-CCA-R3-PC, 2020 WL 7491084 (Tenn. Crim. App. Dec. 21, 2020) (slip op.)	18
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	21
<i>Wasserman v. United States</i> , 468 U.S. 559 (1984).....	12
<i>White v. State</i> , 499 P.3d 762 (Okla. Crim. App. 2021))	16
<i>Wiley v. State</i> , 461 P.3d 4133 (Wy. 2020).....	15
<i>Wilkerson v. State</i> , 284 So.3d 937 (Ala. Crim. App. 2018).....	16
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	14

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND RULES

Ariz. Rev. Stat. § 13-716	16
D.C. Code § 24-403.03	19, 20
Ind. Code § 35-50-2-9.....	16
Iowa Stat. Ann. § 902.1	19, 20
Md. Code Ann. Crim. Pro. § 8-110.....	19, 20
Mo. Stat. § 558.047.....	15
N.D. Code § 12.1-32-04.....	19, 20
N.D. Code. § 12.1-32-13.1.....	19, 20
Or. Rev. Stat. § 144.397.....	19, 20
S.C. Code. Ann. § 16-3-20.....	14, 17
Tenn. Code § 39-13-204	16
Wy. Stat. § 6-10-301.....	15
W. Va. Code Ann. § 61-11-23	19, 20

OTHER AUTHORITIES

Aude Henin & Noah Berman, <i>The Promise and Peril of Emerging Adulthood: Introduction to the Special Issue</i> , 23 COGNITIVE & BEHAV. PRAC. 263 (2016).....	7
Birte Enough & Thomas Mussweiler, <i>Sentencing Under Uncertainty: Anchoring Effects in the Courtroom</i> , 31 J. OF APP. SOC. PSYCH. 1535 (2006).....	13
Bradley Taber-Thomas & Koraly Perez-Edgar, <i>Emerging Adult Brain Development</i> , in THE OXFORD HANDBOOK OF EMERGING ADULTS 126 (Jeffrey Jensen Arnett ed., 2016)	7
Cynthia Yang, <i>Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing</i> , 44 J. LEGAL STUD. 75 (2015)	22

TABLE OF AUTHORITIES—Continued

	Page(s)
Griffin Edwards, et al., <i>The Effects of Voluntary and Presumptive Sentencing Guidelines</i> , 98 TEXAS L. REV. 1 (2019)	22
<i>Inmate Search Detail Report: James Brandon Smith</i> , S.C. Dep’t of Corrections, https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000275590 (last visited Nov. 2, 2022).	21
<i>Inmate Search Detail Report: Stephen Hutto</i> , S.C. Dep’t of Corrections, https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000276637 (last visited Nov. 2, 2022).....	5
Jeong J. Choi, et al., <i>Preliminary Evidence for White Matter Tract Abnormalities in Young Adults Exposed to Parental Verbal Abuse</i> , 65 BIOLOGICAL PSYCHIATRY 227 (2009).....	7
Joshua Rovner, <i>Juvenile Life Without Parole: An Overview</i> , the Sentencing Project (May 24, 2021), https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview/	10
Marc D. Rudolph, et al., <i>At Risk of Being Risky: The Relationship Between “Brain Age” Under Emotional States and Risk Preference</i> , 24 DEVELOPMENTAL COGNITIVE NEUROSCIENCE 93 (2017).....	7
Martin H. Teicher & Jacqueline A. Samson, <i>Annual Research Review: Enduring Neurobiological Effects of Childhood Abuse and Neglect</i> , 57 J. CHILD PSYCH. & PSYCHIATRY 241 (2016)	7

STATEMENT OF INTEREST OF *AMICI CURIAE*

The South Carolina Public Defender Association (“PDA”) is a non-profit corporation created to promote and support the advancement of indigent defense in the State of South Carolina. Membership in the PDA is made up of the Circuit Public Defenders, along with their chiefs, deputies and assistant public defenders, from every Judicial Circuit in South Carolina, as well as attorneys of the South Carolina Commission on Indigent Defense (“SCCID”) in both the Appellate Defender and Capital Defender Divisions. With a total of more than 300 members, the PDA membership provides criminal defense services to indigents accused of criminal offenses in the State, County, and Municipal Courts throughout South Carolina. PDA members represent the majority of the people accused of serious misdemeanors and felonies in General Sessions Court throughout the state. A report from the Budget and Control Board estimated that, in 2006, PDA members handled eighty-five percent of the cases disposed of in General Sessions Court throughout South Carolina. PDA members routinely represent indigent clients in capital litigation and in cases in which the state is seeking life without the possibility of parole.

The PDA, through its officers and board of directors, has taken an active role as a stakeholder in South Carolina’s criminal justice system. The PDA provides training for its members; and is directly involved with SCCID in developing performance standards for indigent defense in South Carolina, with several of its board members acting as members of SCCID’s committee on standards and its president acting as vice chair of that committee. The PDA continues to actively participate in the state legislative process as a resource for the legislature, providing PDA membership’s unique knowledge of and professional experience in the legal representation of indigent people being criminally prosecuted by the government. Additionally, the PDA has submitted comments on proposed rules of criminal procedure and appeared before this Court to

present those comments. The PDA has appeared as amicus curiae before this Court and the South Carolina Court of Appeals in other cases.

Justice 360 is a nonprofit organization based in Columbia, South Carolina, whose mission is to promote fair and just process for individuals facing extreme criminal sentences (such as the death penalty and life without parole and its equivalent). As part of that mission, Justice 360 attorneys represent juvenile clients in criminal proceedings in South Carolina and have been involved in litigation and criminal justice reform efforts on behalf of juvenile clients since the Supreme Court of the United States’s decision in *Miller v. Alabama*, 567 U.S. 460, 471 (2012). Justice 360 currently handles individual cases involving juvenile clients facing life without parole and sentences that are the functional equivalent of life without parole. Additionally, Justice 360 gathers data, develops training materials, and serves as resource counsel to court-appointed counsel in cases where juveniles have been sentenced to life without parole or other similar punishments, or who are at risk of being sentenced to life without parole or a functional equivalent.

INTRODUCTION

At Petitioner Jon Smart’s 2017 hearing conducted pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014) (plurality op.), the trial court once again sentenced him to life without the possibility of parole (LWOP). During the hearing, the trial judge made clear that he viewed his job as doing nothing more than ruling on a motion to reconsider Petitioner’s sentence, announcing on the record that “this court believes that the appropriate conclusion in this matter is that the *defendant’s motion to set aside his life imprisonment sentence*, be denied. Therefore, he is to remain incarcerated for the balance of his natural life.” ROA 388 (emphasis added). In so doing, Judge Brown—like other judges have done in the wake of *Aiken*—effectively inverted the burdens of proof and persuasion. Instead of treating the initial sentencing hearing as null and void, as *Aiken*

requires, the lower court accepted the previously imposed unconstitutional sentence as the presumptively appropriate sentence from which it was being asked to depart. Viewing the hearing through this lens, the court departed from a faithful application of the *Aiken* factors, distorting the evidence that was presented at both the original sentencing hearing and the *Aiken* hearing fifteen years later. This situation is not uncommon in resentencing hearings that have taken place in the wake of *Aiken*. Accordingly, this Court's guidance is now necessary to clarify that *Aiken* mandated *de novo* sentencing hearings with no deference to the previous LWOP sentences. Additionally, this Court should follow the leads of courts in multiple other jurisdictions and give additional guidance to the trial courts as to the *Aiken* factors and how they apply.

Petitioner's case is illustrative of the broader issues the lower courts have encountered with *Aiken* hearings. In 2001, Petitioner was sentenced to LWOP after pleading guilty to murder and related offenses he and a codefendant committed when Petitioner was sixteen years old. *State v. Smart*, 433 S.C. 651, 655-57, 861 S.E.2d 383, 385-86 (S.C. Ct. App. 2021). At the time of the offense, Petitioner and his co-defendant were in the custody of the Department of Juvenile Justice (DJJ), working off-site at a farm. *See id.* While on the work detail, they killed their supervisor and stole his truck. 433 S.C. at 655-56, 861 S.E.2d at 385-86. Petitioner's sentencing hearing took place before the Supreme Court of the United States invalidated the death penalty for juveniles, *Roper v. Simmons*, 543 U.S. 551 (2005), and under threat of a death sentence, he took a guilty plea and was sentenced to LWOP at a hearing that treated his youth "as nothing more than a chronological fact in a vague plea for mercy." *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577. Then, in 2016, in the wake of *Aiken*, this Court assigned the Honorable D. Craig Brown to preside over Petitioner's resentencing hearing. Pet. Br. at 2. In 2017, Judge Brown resentenced Petitioner to LWOP. *See Smart*, 433 S.C. 651, 861 S.E.2d 383.

At Petitioner’s resentencing, his counsel presented evidence bearing on many of the *Aiken* factors. With respect to Petitioner’s “family and home environment,” *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577 (internal quotation marks omitted), his counsel put up evidence that Petitioner’s parents were largely absent in his childhood, selling cocaine and marijuana out of their house and privileging their drug business over meeting their children’s needs, ROA 194-96, 198.¹ Because of his parents’ neglect, Petitioner, who was only three years older than his youngest sister, became responsible for raising her, making sure that she got to school on time, making her meals, walking her home from school, and putting her to bed. ROA 192, 194-195, 201-03. In the words of the Supreme Court of the United States, Petitioner “ha[d] limited control over [his] own environment and lack[ed] the ability to extricate [himself] from horrific, crime-producing settings.” *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

In a juvenile attempt to cope with his circumstances, Petitioner began abusing alcohol at the age of eight and then began using marijuana, inhalants, opiates, amphetamines, and stimulants, and by the time he was incarcerated in DJJ, he had been diagnosed with a substance abuse disorder. ROA 207-09. This coping strategy is a hallmark of juvenility and reflects Petitioner’s “immaturity, impetuosity, and [a] failure to appreciate the risks and consequence[s]” of his decisions, *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577. Petitioner’s substance abuse disorder was sufficiently severe that he developed “frontal lobe dysfunction.” ROA 207-09. The brain damage, in turn, caused Petitioner’s brain to function like a developmentally “much younger” child than his chronological age would have predicted. *Id.*² Additionally, with respect to Petitioner’s “participation in the

¹ Petitioner’s sister testified that her parents would make her and her brothers collect the drug money for their operations. *Id.* She further testified that, despite her interest in doing so, her parents refused to visit Petitioner when he was in DJJ custody. *Id.*

² Dr. David Price, a clinical psychologist who evaluated Petitioner for his *Aiken* hearing, testified that Petitioner’s IQ at the time of the offense showed borderline intellectual functioning, with a

conduct” and the role of “peer pressures,” *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577, it was uncontested that Petitioner’s co-defendant, Stephen Hutto, created the plan to kill the victim, persuaded Petitioner to participate in it and, in general, exerted significant influence over him. ROA 275; *see also Smart*, 433 S.C. at 655-56, 862 S.E.2d at 385-86. Nevertheless, after Hutto’s *Aiken* hearing, he was resentenced to a term of thirty years. *Inmate Search Detail Report: Stephen Hutto*, S.C. Dep’t of Corrections, <https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000276637> (last visited Nov. 2, 2022).

Despite this evidence, and notwithstanding this Court’s admonition in *Aiken* that “the appropriate occasions for sentencing juveniles to the harshest possible penalty should be uncommon,” the trial court again sentenced Petitioner to LWOP. *Aiken*, 410 S.C. at 540, 765 S.E.2d at 575 (internal citation omitted). As is noted above, Judge Brown explicitly approached the *Aiken* hearing like a motion to set aside Petitioner’s previous sentence (which this Court had already set aside). Operating through that lens, the court proceeded to distort the *Aiken* factors by deferring to testimony adduced at the original sentencing hearing while discounting credible evidence at the 2017 resentencing and privileging the evidence and conclusions from the previous

score around 70. ROA 210. Since Petitioner has been incarcerated and has gotten off of drugs and had some time for recovery, his IQ has gone up to 103. *Id.* Petitioner also has Attention Deficit Disorder and Dr. Price indicated that he might have lingering effects from his mother’s abuse of drugs during her pregnancy with Petitioner. ROA 215.

Dr. Price further opined that he believes, based on his evaluation, that “the home environment and substantial substance abuse that was experienced in that home environment,” contributed significantly to Petitioner’s criminal activity, because he was raised in a “drug culture” which modeled “dishonest and unlawful behavior,” which was combined with a lack of parental supervision, all of which directly affected “impulsivity aggressiveness, poor judgment, failure to appreciate the consequences of your action,” and made him more susceptible to peer pressure. ROA 208-212, 214-15.

unconstitutional hearing over the information presented at the *Aiken* hearing. ROA 188-190, 360-370.

Petitioner’s sister testified at the *Aiken* hearing that the Smart parents were absent because they were dealing drugs, often out of Petitioner’s childhood home, but Judge Brown discounted this testimony because Petitioner’s parents had briefly testified at his original sentencing hearing and advocated for him to get treatment for his substance abuse while he was at DJJ. *See* ROA 378-383.³ Judge Brown also called into doubt the veracity of the opinions of Dr. Price, an expert forensic psychologist who evaluated Petitioner and reviewed thousands of pages of records, including from Petitioner’s childhood. Specifically, Judge Brown suggested that Dr. Price’s testimony could not be correct because Dr. Price described Petitioner as having begun abusing substances at age eight, while Petitioner’s father testified in 2001 that Petitioner only started using drugs when he was fourteen. ROA 381.⁴ Judge Brown also overemphasized Petitioner’s chronological age—treating it like “nothing more than a chronological fact,” *Aiken*, 410 S.C. at 543, 765 S.E.2d at 577—and ignored testimony about Petitioner’s brain damage and resulting developmental immaturity.⁵ Rather than considering Petitioner’s “family and home environment”

³ On the question of Petitioner’s sister’s credibility, Judge Brown said: “So when Tammy Smart comes in in May, and testifies to this perceived family life. It’s somewhat difficult for the court to coincide the fact that his own parents would be at the initial sentencing, that his parents played a part in having him committed to try and get him some help, if in fact all of this was going on within the home as she said it was. It just doesn’t add up.” ROA 382. Judge Brown’s read of the situation falls flat when considering that Ms. Smart spent the bulk of her testimony talking about how her parents actively ran a drug operation out of their house.

⁴ “But the testimony of his own father at the initial sentencing hearing to the court was that it was at 14. That’s when the drug abuse started.” *Id.* Petitioner’s father statement at the original sentencing hearing spans about six pages of the transcript and paints a self-serving picture of the Smart parents as attentive and dutiful caregivers who responsibly attempted to help their son get assistance for his substance dependency issues. ROA 158-64.

⁵ In the years since *Aiken* was decided, numerous neuroscientific studies have shown that the brain, and accordingly an individual’s character, is still developing beyond the age of eighteen. The

as mitigating factors, *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577, Judge Brown blamed Petitioner for his dependence on substances because he should have known by the age of sixteen that such drugs were illegal and should have refrained from using them. *E.g.*, ROA 207-209, 392-393.

Petitioner's case is illustrative of two problematic aspects of the post-*Aiken* landscape in South Carolina. First, although this Court was clear in *Aiken* that the hearings conducted pursuant to that case were to be new sentencing proceedings, the lower courts have ignored that fact and have instead treated the hearings, either as here explicitly, or in some cases implicitly, as motions to set aside the previously imposed unconstitutional LWOP sentences. Second, *Aiken* hearings must fully explore the mitigating circumstances of youth, making them more searching than a standard, non-capital sentencing hearing and requiring consideration of mitigation similar to what is presented in a capital sentencing hearing. Some trial courts, however, have discounted this aspect of *Aiken* and, because they view *Aiken* hearings as motions for new sentences, have not given the *Aiken* factors the weight to which they are legally entitled.

The result is that many juvenile offenders are not being sentenced in accordance with this Court's mandate in *Aiken*, but rather following proceedings that misunderstand the nature of the court's obligation and minimize or disregard the weight of youth and overemphasize the import of

scientific consensus establishes that these processes are not completed for most emerging adults until their early to mid-twenties. *See, e.g.*, Aude Henin & Noah Berman, *The Promise and Peril of Emerging Adulthood: Introduction to the Special Issue*, 23 COGNITIVE & BEHAV. PRAC. 263, 265 (2016); Bradley Taber-Thomas & Koraly Perez-Edgar, *Emerging Adult Brain Development*, in THE OXFORD HANDBOOK OF EMERGING ADULT 126, 126-27 (Jeffrey Jensen Arnett ed., 2016); Marc D. Rudolph, et al., *At Risk of Being Risky: The Relationship Between "Brain Age" Under Emotional States and Risk Preference*, 24 DEVELOPMENTAL COGNITIVE NEUROSCIENCE 93, 102 (2017). Additionally, adverse childhood experiences, such as substance abuse and neglect in the household, can slow brain development even further. *See, e.g.*, Jeong J. Choi, et al., *Preliminary Evidence for White Matter Tract Abnormalities in Young Adults Exposed to Parental Verbal Abuse*, 65 BIOLOGICAL PSYCHIATRY 227 (2009); Martin H. Teicher & Jacqueline A. Samson, *Annual Research Review: Enduring Neurobiological Effects of Childhood Abuse and Neglect*, 57 J. CHILD PSYCH. & PSYCHIATRY 241, 241-58 (2016).

the previously imposed sentence. And with only limited guidance as to how the *Aiken* factors apply, the lower courts have varied dramatically in how they approach these resentencing hearings, resulting in arbitrary disparities in sentencing outcomes—like the one between Petitioner and his codefendant. This Court must give clear and detailed guidance about what is required to recognize the constitutional protections set forth in *Aiken*. First, the Court should clarify that, pursuant to *Aiken*, the prior LWOP sentence carries no weight at the resentencing hearing, as the sentence was obtained through an unconstitutional procedure, rendering it null and void. Second, the Court should place the burden of proving sufficient aggravation exists to warrant imposing an uncommon and extreme sentence of life without parole on the state. Finally, the Court should provide more detailed guidance on how the *Aiken* factors are mitigating and the kinds of information that is mitigating to the courts so that a full exploration of youth occurs in sentencing hearings. Without such guidance, courts will arbitrarily impose severe sentences in proceedings that fail to afford the youth of South Carolina their full constitutional guarantees.

ARGUMENT

Beginning in 2005, the United States Supreme Court began to recognize that juvenile offenders, even when subjected to sentencing in adult court, require different and more protective constitutional considerations in criminal sentencing proceedings. *E.g.*, *Roper*, 543 U.S. 551 (sentencing any individual under the age of eighteen to death is cruel and unusual punishment prohibited by the Eighth Amendment). These developments are premised on understanding that children have less moral culpability for their actions and “studies show[] that only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior.” *Miller*, 567 U.S. at 471 (citation and quotation marks omitted). Following *Roper*, the United States Supreme Court recognized that it was always disproportionate to sentence

juveniles to LWOP for non-homicide offenses in *Graham v. Florida*, 560 U.S. 48 (2010), and to sentence juveniles to mandatory LWOP for homicide offenses in *Miller*, 567 U.S. 460.

In *Miller*, the Court recognized that, although LWOP was not categorically barred for a juvenile convicted of homicide, a sentencing court must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* at 480. The Court noted the difficulty of distinguishing “the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Id.* at 479-80.

While not articulating specific factual findings that must be made by a sentencing court, the Court set forth several factors that sentencing authorities must constitutionally examine before sentencing someone to life without parole for an offense they committed before they were eighteen. *Id.* at 476-83. The *Miller* Court required a sentencing court to consider youth as “more than a chronological fact,” but also a circumstance which carries with it immaturity, irresponsibility, and recklessness. *Id.* at 476. Moreover, the defendant’s family background, mental and emotional development, and the possibility of rehabilitation must be considered in assessing culpability. *Id.*⁶ The Supreme Court highlighted that youth is “a moment and condition of life when a person may be most susceptible to influence and to psychological damage.” *Id.* (internal quotation omitted).

⁶ Since *Miller* was decided, the United States Supreme Court has decided two cases implicating its holding and what is required to comply with *Miller*. See *Montgomery v. Louisiana*, 577 U.S. 190 (2016) and *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). In *Montgomery*, the Court clarified that *Miller*’s protections were retroactive and could be applied on collateral review. 577 U.S. at 212. In *Jones*, the Court confirmed that no specific written findings of permanent incorrigibility needed to be entered for a juvenile to be sentenced to life without parole, but the Court did need to fully weigh the factors articulated in *Miller*. 141 S. Ct. at 1318-22.

In *Aiken v. Byars*, this Court considered what was required after *Miller* in South Carolina and recognized that “youth has constitutional significance . . . [and] it must be afforded adequate weight in sentencing.” *See Aiken*, 410 S.C. at 543, 765 S.E.2d at 576.⁷ This Court ruled that “before a life without parole sentence is imposed upon a juvenile offender he must receive an individualized hearing where the mitigating hallmark features of youth are *fully explored*.” *Aiken*, 410 S.C. at 545, 765 S.E.2d at 578 (emphasis added). As guidance for the lower courts, this Court detailed five factors that all courts must consider as part of their full exploration of the mitigating features of youth in a sentencing hearing where a juvenile might be sentenced to LWOP. Those factors are:

(1) the chronological age of the offender and the hallmark features of youth, including “immaturity, impetuosity, and failure to appreciate the risks and consequence”; (2) the “family and home environment” that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the “incompetencies associated with youth—for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys”; and (5) the “possibility of rehabilitation.

Aiken, 410 S.C. at 544, 765 S.E.2d at 578 (internal quotation marks omitted).

The *Aiken* majority held that any pre-*Aiken* LWOP sentence was unconstitutional, regardless of what happened at the original sentencing, because youth carries a special constitutional weight and no pre-*Aiken* sentencing could have given it the “careful[] and

⁷ As is explored more fully below, virtually every jurisdiction has in some way addressed *Miller* since it was decided. States have taken different approaches but the general trends have been to move away from imposing any form of juvenile life without parole, either through legislative action or court decision, regardless of whether the prior sentencing scheme required mandatory life without parole. At the time of filing this brief, 35 states and the District of Columbia either prohibit life without parole for juvenile offenders or have no individuals serving life without parole for offenses committed while they were under eighteen. *See* Joshua Rovner, *Juvenile Life Without Parole: An Overview*, the Sentencing Project (May 24, 2021), <https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview/>.

thoughtful[.]” assessment the South Carolina Constitution requires. *See Aiken*, 410 S.C. at 543 n.8, 765 S.E.2d at 577 n.8. Additionally, this Court made clear that although *Aiken* proceedings need not identically “mirror the penalty phase of a capital case . . . the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings.” *Id.* at 544-45, 765 S.E.2d at 577.

Notwithstanding this Court’s guidance, some lower courts have failed to appreciate the nature of *Aiken* hearings, and this has given rise to two significant constitutional issues. First, lower courts are deferring to the original, unconstitutional LWOP sentence as presumptively appropriate instead of applying the *Aiken* factors on a blank slate. Second, lower courts are unclear about how to apply the *Aiken* factors. This Court’s guidance is again necessary, to ensure that lower courts are complying with *Aiken* and to ensure that similarly situated juvenile offenders receive similar outcomes across the state.

I. The Juvenile Offender Does Not Bear the Burden of Disproving that LWOP Is Appropriate.

A. Judges continue to treat *Aiken* resentencing hearings as motions to vacate.

Treating a post-*Aiken* sentencing hearing as the functional equivalent of a motion to reconsider or amend a sentence is inappropriate.⁸ Motions to reconsider or amend sentences are decisions “solely and exclusively” within the discretion of the trial judge. *E.g.*, *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (S.C. 1981). Generally, a sentencing court is afforded “broad

⁸ Petitioner is only one of many juvenile offenders whose post-*Aiken* resentencing proceedings have been considered under this incorrect framework. *See, e.g.*, *State v. Morgan*, 433 S.C. 435, 858 S.E.2d 647 (Ct. App. 2021); *Mack v. State*, 417 S.C. 33, 789 S.E.2d 571 (mem. op.) (2016) (order granting motion for resentencing and setting schedule for rehearing, at which Mack was resentenced to LWOP); *Goodman v. State*, 416 S.C. 620, 787 S.E.2d 847 (mem. opinion) (2016) (same); *Geer v. State*, 417 S.C. 2, 788 S.E.2d 701 (mem. op.) (2016) (order granting motion for resentencing and setting schedule for rehearing, at which Geer was resentenced to LWOP).

discretion in sentencing within statutory limits.” *Garrett v. State*, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995). This is a “very wide discretion in determining an appropriate sentence, and [the sentencer] must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed.” *State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (S.C. Ct. App. 2008) (citing *Wasserman v. United States*, 468 U.S. 559, 563 (1984)). A sentence that is within the statutorily prescribed limit will not be disturbed absent a showing of “partiality, prejudice, oppression, or corrupt motive” by the sentencing judge. *State v. Barton*, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (S.C. Ct. App. 1997).

Aiken makes clear that the resentencing hearings ordered by the Court are completely fresh sentencing hearings. At those hearings, judges must consider a range of potential sentences, based on the five factors described above and in light of the constitutionally significant fact that, because youth is transient and juveniles are capable of change and maturity, only the rarest juvenile offender will be deserving of an LWOP sentence. 410 S.C. at 534-44, 765 S.E.2d at 577. *See also State v. Morgan*, 433 S.C. at 442-43, 858 S.E.2d at 650-51 (recognizing that *Aiken* provided new considerations which a court must take into account when resentencing a juvenile that were not previously encapsulated in any sentencing procedure).

A judge considering a motion to amend or reconsider a sentence engages in a wholly different analysis than what is required by *Aiken*. In the context of a motion to amend or reconsider a sentence, the court operates under a presumption that the existing sentence is valid and appropriate and determines whether the defendant has met his burden by presenting extraordinary new evidence, bias, or prejudice at the original sentencing. The court, at its discretion, will grant a motion to amend or reconsider a sentencing decision only if the newly presented evidence persuades the court that the original sentencing was, in effect, a miscarriage of justice.

In *Aiken* cases, in contrast, this Court has already made that finding. The Court vacated all juvenile LWOP sentences because, the Court explained, none of the juveniles sentenced to LWOP in this state before *Aiken* received “the sort of hearing envisioned by *Miller*,” and “[t]he absence of this level of inquiry [into youth] produced a facially unconstitutional sentence for these petitioners.” *Aiken*, 410 S.C. at 543-44, 765 S.E.2d at 577. Thus, the previously imposed unconstitutional LWOP sentence has no bearing on the new hearing, just as at a capital resentencing, a jury could never be instructed to consider a previously imposed death sentence. *See State v. Riddle*, 301 S.C. 68, 71, 389 S.E.2d 665, 666-67 (1990) (vacating a death sentence where a resentencing jury had been informed of aggravating circumstances found by a previous jury because the aggravators “had no legal efficacy at the subsequent proceeding” and “their introduction injected an unreliable factor into the resentencing which subverted the jury’s responsibility”). Moreover, allowing the prior sentence to have any weight in an *Aiken* hearing means that the judge is more likely to impose a LWOP sentence, regardless of its propriety.⁹ This Court should clarify for the lower courts that a prior LWOP sentence carries no weight in an *Aiken* hearing and that such hearings should not be treated as motions to vacate or reconsider a previously imposed sentence.

⁹ The anchoring effect is a form of judgmental bias where an individual relies heavily on the first piece of information they receive in making a judgment. *See Birte Enough & Thomas Mussweiler, Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. OF APP. SOC. PSYCH. 1535, 1536-37 (2006). There are real concerns that allowing the prior sentence to be considered would create an anchor for the *Aiken* resentencing judge and bias their consideration of all evidence presented at the hearing, resulting in an overemphasizing of the appropriateness of a life without parole sentence in the given case.

B. The court should impose the burden of proving the propriety of a LWOP sentence on the State.

Traditionally, “sentencing courts have heard evidence and found facts without any prescribed burden of proof at all.” *State v. Grooms*, 343 S.C. 248, 540 S.E.2d 99 (S.C. 2000) (internal quotation omitted). However, for extreme sentencing, such as capital punishment, the state bears the burden of proving sufficient aggravation to warrant the imposition of a death sentence. *E.g.*, S.C. Code § 16-3-20(B)-(C) (in a capital case, the state has the burden of proof to establish beyond a reasonable doubt that at least one aggravating factor exists and that it outweighs any mitigation presented). This distinction between capital sentencing on the one hand and standard sentencing procedures on the other hand is a direct product of the fact that “death is qualitatively different from a sentence of imprisonment” due to the finality of the sentence, requiring “a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Bowman v. State*, 422 S.C. 19, 35-36, 809 S.E.2d 232, 241 (2018).

As this Court recognized in *Aiken*, juvenile LWOP is functionally equivalent to a death sentence for a juvenile offender. *Aiken*, 410 S.C. at 544-45, 765 S.E.2d at 577. In this way, capital sentencing proceedings and *Aiken* sentencing proceedings are unlike all other kinds of sentencing proceedings. Specifically, in *Aiken* cases, there is a presumption against imposing a sentence of LWOP because the vast majority of juvenile offenders are not beyond redemption or irretrievably corrupt. 410 S.C. at 534-44, 765 S.E.2d at 577. *See also Graham*, 560 U.S. at 68; *Miller*, 567 U.S. 479-80; *Montgomery*, 577 U.S. at 195. As with capital cases, *Aiken* cases require the court to consider the state’s evidence in aggravation and the defendant’s evidence in mitigation, including evidence related to the *Aiken* factors. In both capital cases and *Aiken* cases, the state bears the burden of proving aggravating factors and the defense bears the burden of proving mitigating

factors, and as with capital cases, the state should also bear the burden of proving that a sentence of LWOP is appropriate.

From a practical perspective, placing the burden on the state to prove that LWOP is appropriate carries few logistical issues, and other states facing this problem have adopted that approach. For example, the Michigan Supreme Court recently held that although a sentencing court is not required “to find a particular fact before it can impose an LWOP sentence . . . the prosecutor must prove facts and circumstances that rebut the presumption against LWOP by . . . clear and convincing evidence.” *People v. Taylor*, No. 154994, 2022 WL 3008301 at *10 (Mich. July 28, 2022) (slip op.). The Court explained that requiring the state to bear this burden was proper because the hallmark mitigating characteristics of youth create a strong presumption against LWOP. *Id.*

The Supreme Court of Wyoming reached the same conclusion. First, the court set standards for *Miller*-compliant hearing like those set by this Court in *Aiken*. *See Bear Cloud v. State*, 334 P.3d 132, 141-42 (Wy. 2014). Later, in *Davis v. State*, the court held both that there was a presumption against imposing a sentence of LWOP on a juvenile offender and that the state bears the burden of overcoming that presumption at a resentencing hearing. 415 P.3d 666, 681 (Wy. 2018).¹⁰ The court reached this conclusion based on *Miller*’s guidance that extreme sentencing of

¹⁰ Wyoming statutorily changed its sentencing law to automatically provide parole eligibility for any juvenile sentenced to LWOP after serving twenty-five years, *see* Wy. Stat. § 6-10-301. However, Wyoming also provides *Miller* resentencing hearings for individuals sentenced to *de facto* life sentences for offenses they committed as juveniles and has reaffirmed this burden of proof in that context. *See, e.g., Wiley v. State*, 461 P.3d 413 (Wy. 2020).

Missouri and Iowa also place the burden on the state. *See State v. Hart*, 404 S.W.3d 232, 241 n.7 (Mo. 2013); *State v. Seats*, 865 N.W.3d 545, 553-57 (Iowa 2015). Missouri later enacted a statute that superseded the decision in *Hart*. *See* Mo. Stat. § 558.047. In 2016, the Supreme Court of Iowa held that sentencing a juvenile to LWOP categorically violates the Iowa Constitution’s cruel and unusual punishment clause. *State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016). Additionally, although this discussion is focused solely on burdens of proof at resentencing hearings, several states have also imposed a similar heightened burden of proof on the state in *new* juvenile

juveniles should be “uncommon,” given their “diminished culpability and diminished capacity for change,” and that placing the burden on the juvenile defendant would undermine the central premise of *Miller*, “that as a matter of law, juveniles are categorically less culpable than adults.” *Id.* (citations omitted).¹¹

This Court has “counseled against” LWOP sentences for juvenile offenders. *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577. Requiring a petitioner in an *Aiken* hearing to prove that the most severe sentence is inappropriate undermines this directive. Moreover, requiring a defendant to disprove the appropriateness of the most severe possible sentence is counter to how this state

sentencing hearings where the state is seeking LWOP. *See, e.g.*, Tenn. Code § 39-13-204(i); Ind. Code § 35-50-2-9.

Pennsylvania—one of the states with the largest number of *Miller* resentencing cases—was able to resentence hundreds of juvenile offenders in the wake of *Miller* using a process that placed the burden on the state to prove the propriety of LWOP. *See Commonwealth v. Batts*, 163 A.3d 410, 453-55 (Pa. 2017); *but see Commonwealth v. Felder*, 269 A.3d 1232, 1246 (Pa. 2022) (recognizing that, in light of *Jones*, the Eighth Amendment does not require the state to prove that a juvenile is permanently incorrigible before imposing a sentence of LWOP). Of the of the 521 individuals who were eligible for *Miller* relief in that state, 474 were resentenced under this process, including 271 who were released on parole. *Felder*, 269 A.3d at 1246 n.16.

¹¹ Most states have not addressed the question of which party bears what burden at a *Miller* resentencing, but the majority of states that have addressed it place the burden on the state. Even in the minority of states that place the burden on the defendant, however, juvenile offenders are entitled to other protections. For example, in Arizona, juveniles sentenced to life with parole after serving a certain number of calendar years are entitled to mandatory parole eligibility after serving the minimum term articulated in their sentence. Ariz. Rev. Stat. § 13-716. There, the defendant bears the burden of proving, by a preponderance of the evidence, that they are entitled to *Miller* resentencing because their offense reflects transient immaturity and not irreparable corruption. *State v. Valencia*, 386 P.3d 392, 395-96 (Ariz. 2016). Similarly, the Washington Supreme Court held that neither party bears a burden of proof and that the *Miller* factors are simply considerations for the sentencer. *State v. Delbosque*, 456 P.3d 806, 815-16 (Wash. 2020). Of note, before deciding *Delbosque*, the Washington Supreme Court had categorically barred life without parole sentences for individuals who were juveniles at the time of their offenses. *See State v. Bassett*, 428 P.3d 343, 354 (2018). The court’s decision in *Delbosque* pertained to the “*Miller*-fix statute,” as applied to de facto life sentences, which the court had previously held also demanded *Miller* protections and considerations. *Delbosque*, 456 P.3d at 810, 815-16. *See also White v. State*, 499 P.3d 762, 769 (Okla. Crim. App. 2021) (state does not bear the burden of proving LWOP is appropriate); *Wilkerson v. State*, 284 So.3d 937, 955 (Ala. Crim. App. 2018) (same).

handles other extreme sentencing, where there is an additional burden on the state to affirmatively establish the crime is sufficiently aggravated to warrant such a severe sanction. *See* S.C. Code. Ann. § 16-3-20 (B)-(C). Finally, no other state puts the burden on a juvenile to affirmatively disprove a LWOP sentence in this context,¹² but that is in essence what the court below did. This Court should recognize that in an *Aiken* case, the state bears the burden of establishing not only that aggravation exists, but also that a defendant is one of the small number of juvenile offenders for whom LWOP is appropriate.

The court below placed the burden on Petitioner to disprove the propriety of an LWOP sentence. No other jurisdiction in the country applies that standard, and this Court should reject it. Because Petitioner is entitled to a sentencing hearing at which the state must prove its case, and because he has yet to receive such a hearing, the court should vacate his sentence and remand for a new sentencing hearing before a different trial judge.

II. Lower Courts Need More Guidance About How to Apply the *Aiken* Factors.

It is clear from Petitioner's resentencing hearing and other similar hearings that courts across the state require additional guidance about what is required to fully explore youth in *Aiken* hearings. Besides the fact that judges in these hearings are inappropriately considering the null and void prior sentences and are providing the sentence significant weight in rendering their decisions, there are also indications that they sometimes do not appropriately assess the *Aiken* factors. For example, courts in *Aiken* hearings tend to overemphasize a juvenile's chronological age in proximity to eighteen in violation of this Court's understanding that all juveniles under eighteen

¹² Arizona requires a defendant to establish his entitlement to a *Miller* resentencing hearing by establishing by a preponderance that their offense reflects transient immaturity and not irreparable corruption. However, it does not mandate a defendant bear the burden at the resentencing hearing for affirmatively disproving LWOP as the justified sentence. *Valencia*, 386 P.3d at 395-69.

are categorically provided protections and youth is “more than a chronological fact and carries with it immaturity, irresponsibility, impetuosity, and recklessness,” alongside the other considerations of youth.¹³ *Aiken*, 410 S.C. at 539, 765 S.E.2d at 574-75 (internal citations omitted). Arbitrariness not only creates an unreliable sentencing process, but also can create profound sentencing disparities that are most likely to be borne by non-white juvenile offenders.

A. Courts across the country provide more detailed guidance about the kinds of mitigating information that is pertinent to consider in juvenile sentencing proceedings.

The vast majority of states have addressed juvenile sentencing in light of the United States Supreme Court’s jurisprudence on the constitutional permissibility of sentencing juveniles to extreme sentences in order to ensure that their fact finders are properly considering the mitigating hallmark features of youth.¹⁴ Broadly speaking, the states have addressed *Miller* in three different ways. First, a minority of states have held that their pre-*Miller* sentencing schemes complied with *Miller* and they therefore had no reason to adopt any new procedures.¹⁵ Second, a number of states

¹³ This happened at Petitioner’s *Aiken* hearing, and it has also been documented in other *Aiken* resentencing decisions. For example, in the sentencing order from Terriel Mack’s *Aiken* resentencing hearing for an offense committed when Mr. Mack was seventeen, “[t]he court considered that at the time of the murder, the Defendant was within one year of being able to serve in the military . . . [and] was within one year of an age whereby he would have immense responsibilities and be considered an adult by law.” See Order, *State v. Mack*, Case No. 2004-GS-21-1084, at 1 (Ct. Gen. Sess. Mar. 20, 2019).

¹⁴ A handful of states have not had any cases about what is constitutionally required to sentence a juvenile to LWOP proceed to their highest courts in the wake of *Miller*. However, these states have either never provided a sentencing option of LWOP or have never pursued LWOP for an individual who committed an offense while under the age of eighteen.

¹⁵ E.g., *Rohweder v. State*, 130 Nev. 1237 (Nev. 2014); *Taylor v. State*, No. M2019-01312-CCA-R3-PC, 2020 WL 7491084 (Tenn. Crim. App. Dec. 21, 2020) (slip op.). Of note, some states, like Virginia, held that *Miller* was inapplicable as the existing sentencing scheme was discretionary, but later legislative efforts established *Miller* relief for individuals sentenced under those schemes in the form of a searching parole process. See *Jones v. Commonwealth*, 288 Va. 475, 763 S.E.2d 823 (Va. 2014).

abolished juvenile LWOP sentences all together in the wake of *Miller*.¹⁶ Third, the majority approach has been to establish detailed procedures to ensure that youth is fully explored either in a resentencing hearing, a hearing providing for sentence reduction after a set number of years served, or providing access to parole for individuals sentenced to LWOP in a parole proceeding that contains particular consideration of factors related to juvenility.

Courts from several states in the latter category have articulated specific mitigating factors that must be considered at any post-*Miller* hearing or parole hearing where a juvenile offender is facing or previously was sentenced to LWOP. These factors include: the defendant's intellectual capacity¹⁷; the defendant's mental and emotional health at the time of the offense¹⁸; the extent of defendant's participation in the offense¹⁹; the effect of familial or peer pressure on the defendant's actions²⁰; the impact of the offense on the community and victim's loved ones²¹; defendant's remorse or acceptance of responsibility²²; the circumstances of the offense²³; defendant's potential

¹⁶ While most states taking this action did so legislatively, several states found that the sentence all together violated the state's version of the cruel and unusual punishment clause in that state's constitution. *See Bassett*, 428 P.3d 343; *Sweet*, 879 N.W.2d 811; *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 466 Mass. 655, 1 N.E.3d 270 (2013).

¹⁷ *State v. Montgomery*, 194 So.3d 606, 608-09 (La. 2016); Md. Code. Ann. Crim. Pro. § 8-110; N.D. Code §§ 12.1-32-04, 12.1-32-13.1; W. Va. Code Ann. § 61-11-23; Or. Rev. Stat. § 144.397; Iowa Stat. Ann. § 902.1.

¹⁸ *Montgomery*, 194 So.3d at 608-09; W. Va. Code Ann. § 61-11-23; Or. Rev. Stat. § 144.397; Iowa Stat. Ann. § 902.1.

¹⁹ *Montgomery*, 194 So.3d at 608-09; Md. Code. Ann. Crim. Pro. § 8-110; N.D. Code §§ 12.1-32-04, 12.1-32-13.1; D.C. Code § 24-403.03; W. Va. Code Ann. § 61-11-23; Iowa Stat. Ann. § 902.1.

²⁰ *Montgomery*, 194 So.3d at 608-09; W. Va. Code Ann. § 61-11-23; Iowa Stat. Ann. § 902.1.

²¹ *Montgomery*, 194 So.3d at 608-09; Md. Code. Ann. Crim. Pro. § 8-110; N.D. Code §§ 12.1-32-04, 12.1-32-13.1; D.C. Code § 24-403.03; Iowa Stat. Ann. § 902.1.

²² W. Va. Code Ann. § 62-12-13b; Iowa Stat. Ann. § 902.1.

²³ *Montgomery*, 194 So.3d at 608-09; Md. Code. Ann. Crim. Pro. § 8-110; N.D. Code §§ 12.1-32-04, 12.1-32-13.1; D.C. Code § 24-403.03; W. Va. Code Ann. § 61-11-23; Or. Rev. Stat. § 144.397; Iowa Stat. Ann. § 902.1.

for rehabilitation or rehabilitation efforts while incarcerated²⁴; defendant's level of maturity²⁵; the likelihood that defendant will commit future offenses²⁶; whether defendant had a history of abuse, trauma, or previous involvement in the child welfare system²⁷; any special education records or evaluations²⁸; and subsequent growth and maturity while incarcerated²⁹.

Although this Court in *Aiken* noted that it was not proscribing any certain procedure for the lower courts in how *Aiken* was to be given effect in these proceedings, South Carolina was among the first states in the country to address this issue and the Court was therefore operating on a blank slate. 410 S.C at 545 n.10, 765 S.E.2d at 578 n.10. That is no longer true. In light of what has happened at sentencing hearings in South Carolina over the past eight years, it is now clear that the lower courts require more guidance to accurately account for *Aiken*. For example, substance abuse, diminished cognitive functioning, and parental neglect are commonly considered mitigating in the context of juvenile offenders, but the court below disregarded these things as mitigating at Petitioner's resentencing hearing. This Court should follow the lead of the many other states across the country that have adopted detailed factors for post-*Miller* hearings and develop a

²⁴ *Montgomery*, 194 So.3d at 608-09; La. Rev. Stat. § 15:574.4; Md. Code. Ann Crim. Pro. § 8-110; N.D. Code §§ 12.1-32-04, 12.1-32-13.1; D.C. Code § 24-403.03; Or. Rev. Stat. § 144.397; Iowa Stat. Ann. § 902.1.

²⁵ Md. Code. Ann Crim. Pro. § 8-110; N.D. Code §§ 12.1-32-04, 12.1-32-13.1; D.C. Code § 24-403.03; W. Va. Code Ann. § 61-11-23; Iowa Stat. Ann. § 902.1.

²⁶ N.D. Code §§ 12.1-32-04, 12.1-32-13.1; Iowa Stat. Ann. § 902.1.

²⁷ Md. Code. Ann Crim. Pro. § 8-110; N.D. Code §§ 12.1-32-04, 12.1-32-13.1; D.C. Code § 24-403.03; W. Va. Code Ann. § 61-11-23; Or. Rev. Stat. § 144.397; Iowa Stat. Ann. § 902.1.

²⁸ W. Va. Code Ann. § 61-11-23.

²⁹ La. Rev. Stat. § 15:574.4; Md. Code. Ann Crim. Pro. § 8-110; N.D. Code §§ 12.1-32-04, 12.1-32-13.1; D.C. Code § 24-403.03; W. Va. Code Ann. § 62-12-13b; Or. Rev. Stat. § 144.397.

list of specific information courts must take into account at *Aiken* hearings, to ensure that judges are properly and thoughtfully engaging with the constitutional mandates set forth in *Aiken*.

B. The lack of guidance in the lower courts has produced arbitrary sentencing outcomes.

When courts lack sufficient guidance in sentencing, sentencing outcomes are arbitrary. *United States v. Booker*, 543 U.S. 220, 249-67 (2005) (recognizing and upholding congressional intent of federal sentencing guidelines to provide guidance to help reduce overall disparities while still accounting for individualization in sentencing decisions). In post-*Aiken* cases in South Carolina, this has played out in a variety of ways, with similarly situated juvenile offenders receiving dramatically different outcomes without any legally discernible basis. For example, Petitioner was resentenced to LWOP, despite his average prison record and the significant mitigation presented as to his cognitive capacity and impoverished, neglectful home environment, while James Brandon Smith, whose crime similarly involved a co-defendant and him killing an adult man at his home during the course of a robbery, was resentenced to 38 years.³⁰

Several factors appear to be contributing to arbitrariness. First, the lower courts tend to overemphasize the chronological age of the juvenile offender if the individual is close to eighteen, regardless of whether information presented about how that individual's cognitive age and maturity might not align with their chronological age. Of thirty-one individuals who have been sentenced since *Aiken*, eleven of the fifteen sentences of forty years or more went to individuals

³⁰ See *Inmate Search Detail Report: James Brandon Smith*, S.C. Dep't of Corrections, <https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000275590> (last visited Nov. 2, 2022). Amici are aware of the facts of Smith's crime due to their work tracking juvenile resentencing cases across the state.

who were sixteen or older at the time of their offense. Ten of those sentences were for individuals who were seventeen.³¹

Second, the persistence of racial disparities in sentencing has specifically been linked to insufficiently guided discretion at sentencing. *E.g.*, Griffin Edwards, et al., *The Effects of Voluntary and Presumptive Sentencing Guidelines*, 98 TEXAS L. REV. 1, 58-62 (2019) (arguing that sentencing guidance that limits unbridled judicial discretion can help combat racial sentencing disparities); Cynthia Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75, 90-109 (2015) (after the sentencing guidelines became advisory rather than mandatory, increased sentence length correlates with race in the federal system). It is well documented that one result of allowing arbitrariness to enter sentencing schemes is racially disparate sentencing outcomes. In the juvenile sentencing context in South Carolina, it appears that race has played a role in outcomes in new *Aiken* cases. Specifically, as of July 2022, the new sentencing cases³² show that white juvenile offenders typically get shorter sentences than Black or Latinx juvenile offenders.³³ The average sentence for a white juvenile sentenced for a new murder

³¹ Four individuals who were fifteen and two individuals who were fourteen have been sentenced since *Aiken*. Four of these six individuals received sentences of forty years or more in their sentencing hearings.

³² Amici are aware of thirty-one juveniles who have been sentenced for new murder charges since *Aiken* was decided. While this may not be wholly representative of all the juvenile offenders who have been sentenced for murder charges in the wake of *Aiken*, this is the most comprehensive data amici is aware of. Six of those thirty-one juveniles are white, two are Latinx, and twenty-three are Black. Only one of the juveniles is female, Brittany Epps, who is Black and was seventeen at the time of her offense. The juveniles' ages at the time of the offense range from fourteen to seventeen years old. The age breakdown is: fourteen (two individuals), fifteen (four individuals), sixteen (five individuals), seventeen (twenty individuals).

³³ Amici are only aware of two new juvenile offenders who received life without parole since *Aiken* was decided by this Court. Damian Inman, a Black seventeen-year-old, was sentenced to LWOP in Dillon County in 2015. Jesse Osborne, a white fourteen-year-old, was sentenced to LWOP in 2019 in Anderson County.

charge since *Aiken* is 34 years, while the average for a Latinx juvenile is 37.5 years and the average for a Black juvenile is 38.64 years.

As set forth above, it is clear that South Carolina courts are struggling to apply the *Aiken* factors as properly mitigating in the context of juvenility, resulting in hearings where youth is not fully explored. This has resulted in concerning patterns in resentencing hearings and new sentencing hearings, suggesting that juveniles' constitutional protections are not being adhered to. In order to combat this, this Court should follow the guidance of other states not only clarify that youth is always constitutionally mitigating, but also should provide further guidance on the kinds of information that are further mitigating, such as prior abuse and trauma experiences, prior involvement with the child welfare system, mental and emotional health at the time of the offense, and lowered intellectual functioning and capacity above and beyond an average child of the age of the defendant at the time of his offense. Doing so would help ensure full, constitutional exploration of the mitigating circumstances of youth, as required by *Aiken*.

CONCLUSION

The lower court failed to provide Petitioner with a sentencing hearing that fully explored the hallmark mitigating circumstances of youth, as required by this Court and the United States Supreme Court to ensure that juvenile sentencing is proportional. This Court should provide further detailed guidance about how to conduct these *Aiken* hearings to ensure that juveniles across the state are being provided the searching sentencing hearings required by law. Specifically, the Court should find that the resentencing court cannot consider the previously imposed sentence in its determination; that the state bears the burden of establishing, beyond a reasonable doubt, that the life without parole sentence is warranted; the *Aiken* factors only need to be established by a

preponderance of evidence; and specific kinds of information must be considered mitigating in the context of considering the *Aiken* factors.

Respectfully submitted,

s/Lindsey Vann

LINDSEY S. VANN (No. 101408)

HANNAH L. FREEDMAN (No. 103373)

JUSTICE 360

900 Elmwood Avenue, Suite 200

COLUMBIA, SC 29201

(803) 765-1044

Counsel for Amicus Justice 360

MELISSA A. INZERILLO (No. 69416)

SIXTEENTH CIRCUIT PUBLIC DEFENDER

1675 York Hwy.

York, SC 29745

(803) 628-3031

*Counsel for Amicus South Carolina Public
Defender Association*

November 3, 2022.