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**Jan 13 2025**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

DON LEEQUIN BROWN,

APPELLANT

APPELLATE CASE NO. 2023-001336

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INITIAL REPLY BRIEF OF APPELLANT

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## ARGUMENT IN REPLY

**The imposition of a sentence of life without parole is not a condition precedent to the requirement of an individualized sentencing hearing to consider the factors required by Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). The trial judge erred in refusing to reconsider the forty-five (45) year sentence imposed as a violation of the Eighth Amendment's prohibition on cruel and unusual punishments and South Carolina Constitution's article I, section 15 prohibition against cruel, corporal, or unusual punishment because Appellant was seventeen (17) years old at the time of arrest and faced a sentence of life without parole for murder, but prior to sentencing the judge failed to conduct an individualized sentencing hearing and failed to consider the factors required by Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014).**

In the conclusion of the majority opinion in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572, (2014), the Court wrote, “We hold the principles enunciated in *Miller v. Alabama* apply retroactively to these petitioners, to those similarly situated, and **prospectively to all juvenile offenders who may be subject to a sentence of life imprisonment without the possibility of parole**. Accordingly, any individual affected by our holding may file a motion for resentencing within one year from the filing of this opinion in the court of general sessions where he or she was originally sentenced.” 410 S.C. at 545, 765 S.E.2d at 578 (emphasis added). Respondent, however, argues, “South Carolina precedent repeatedly emphasizes that an *Aiken* hearing is warranted only when the juvenile received a LWOP sentence.” (IBOR p. 10). In support of the State’s position that an Aiken hearing is only required when the juvenile is sentenced to life without parole, the State cites State v. Morgan, 433 S.C. 435, 858 S.E.2d 647 (Ct.App. 2021); State v. Smith, 428 S.C. 417, 836 S.E.2d 348 (2019); State v. Slocumb, 426 S.C. 297, 827 S.E.2d 148 (2019); and State v. Finley, 427 S.C. 419, 831 S.E.2d 158 (Ct.App. 2019). (IBOR p. 10). These cases do not support the State’s position, contrary to the clear language in Aiken v. Byars, that an Aiken hearing is only required when the juvenile is sentenced to life without parole.

In State v. Morgan, 433 S.C. 435, 858 S.E.2d 647 (Ct.App. 2021), the Court of Appeals found that Morgan was entitled to a **resentencing** hearing following the Aiken v. Byars decision

because he was a juvenile and sentenced to life without parole. In 2006, Morgan’s death sentence was overturned and he was sentenced to life without parole. Ten years later in 2016, Morgan moved for resentencing pursuant to Aiken v. Byars. In Morgan the Court of Appeals wrote:

In Aiken, our supreme court held the U.S. Supreme Court's decision in Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), applied retroactively. See Aiken, 410 S.C. at 534, 765 S.E.2d at 572. Miller held that mandatory imposition of LWOP sentences on juveniles was cruel and unusual punishment. See Miller, 567 U.S. at 489, 132 S.Ct. 2455. Aiken held that juvenile offenders were entitled to an individualized sentencing hearing if they were “convicted for homicides committed while they were juveniles” and “were sentenced to [LWOP] according to existing sentencing procedures, which made no distinction between defendants whose crimes were committed as an adult and those whose crimes were committed as a juvenile.” 410 S.C. at 537, 765 S.E.2d at 573.

433 S.C. at 439, 858 S.E.2d at 649 (Ct. App. 2021).

The present case does not involve retroactive application of Miller v. Alabama or a resentencing hearing years after the imposition of sentence like in Morgan. Instead, the present case involves a reconsideration of the original sentence imposed without an individualized sentencing hearing as required by Aiken v. Byars and Miller v. Alabama. Morgan does not support the State’s position that an Aiken hearing is only required when the juvenile is sentenced to life without parole.

In State v. Smith, 428 S.C. 417, 836 S.E.2d 348, (2019), the South Carolina Supreme Court held that the mandatory minimum sentence of thirty years for murder, imposed on a juvenile, was constitutional. In Smith the Court wrote:

Following a jury trial, Smith was convicted of murder, attempted murder, and possession of a weapon during the commission of a violent crime. Because Smith was seventeen at the time of the murder and faced a potential sentence of life without the possibility of parole, he was given an individualized sentencing

hearing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014) (plurality opinion). At the Aiken hearing, a mitigation expert testified at length about each of the five factors of youth identified in Miller and Aiken and how those factors applied to Smith.

428 S.C. at 419, 836 S.E.2d at 349. Smith, like Appellant, was not sentenced to life without parole. Smith was sentenced to thirty-five years for murder and thirty years concurrent for attempted murder. Importantly, Smith, unlike Appellant in the present case, received an individualized sentencing hearing pursuant to Aiken v. Byars. Smith does not support the State's position that an Aiken hearing is only required when the juvenile is sentenced to life without parole.

State v. Slocumb, 426 S.C. 297, 827 S.E.2d 148 (2019), involved a challenge to a *de facto* life sentence of 130 years for nonhomicide offenses as violating Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (prohibiting courts from imposing a sentence of life without the possibility of parole on a juvenile offender convicted of a nonhomicide offense). In Slocumb the South Carolina Supreme Court held that, "Neither *Graham* nor the Eighth Amendment, as interpreted by the Supreme Court, currently prohibits the imposition of aggregate sentences for multiple offenses amounting to a *de facto* life sentence on a juvenile nonhomicide offender." 426 S.C.at 314–15, 827 S.E.2d at 157. The issue in the present case involves sentencing a juvenile who faced a sentence of life without parole for murder without an individualized sentencing hearing in violation of Aiken v. Byars and Miller v. Alabama. Slocumb does not support the State's position that an Aiken hearing is only required when the juvenile is sentenced to life without parole.

Like State v. Morgan, in State v. Finley, 427 S.C. 419, 831 S.E.2d 158 (Ct.App. 2019), Finley moved for **resentencing** following the Aiken v. Byars decision. In 1993 Finley, who was seventeen years old at the time of the offenses, pled guilty and was sentenced to concurrent

life sentences for murder and burglary first degree with parole eligibility after the service of thirty years. In 2016, Finley moved for resentencing pursuant to Aiken v. Byars. The Court of Appeals found that Finley was not entitled to **resentencing** because he was eligible for parole. Again, as discussed above with regard to State v. Morgan, the present case does not involve retroactive application of Miller v. Alabama or a resentencing hearing years after the imposition of sentence. Instead, the present case involves a reconsideration of the original sentence imposed without an individualized sentencing hearing as required by Aiken v. Byars and Miller v. Alabama. Finley does not support the State's position that an Aiken hearing is only required when the juvenile is sentenced to life without parole.


The sentencing hearing in the present case failed to meet the requirements of Miller and Aiken. The judge failed to consider the hallmark features of youth and the attorney mentioned Appellant's age of seventeen (17) as nothing more than a chronological fact in a vague plea for mercy. As noted in Aiken, "[A]lthough some of the hearings touch on the issues of youth, none of them approach the sort of hearing envisioned by Miller where the factors of youth are carefully and thoughtfully considered. Many of the attorneys mention age as nothing more than a chronological fact in a vague plea for mercy. Miller holds the Constitution requires more." 410 S.C. at 543, 765 S.E.2d at 577. (n. #8 omitted). In State v. Mack, 441 S.C. 526, 544, 894 S.E.2d 820, 830 (Ct. App. 2023), the South Carolina Court of Appeals wrote, "Applying the Aiken factors involves more than repeating the words; it requires applying the substantive content of those factors." The sentencing judge failed to apply the substantive content of the Aiken factors in deciding the sentence to impose.

The judge failed to consider Appellant's home and family environment. The judge failed to consider Appellant's limited role in the offense as reflected when the judge said, "I'm going to

deny your motion. I remember this trial. It was hand of one is the hand of all, and the jury found that they were all acting together in aiding and abetting one another; so, therefore, the guilt of one is the guilt of all of them, and I'll deny your motion.” (Aug 10, 2023, Tr. p. 4, lines 17-22). The judge sentenced Appellant to the same forty-five (45) year sentence that Whittington, the most culpable of the co-defendants, received. The judge failed to consider the incompetencies associated with youth, and failed to consider the possibility of rehabilitation especially in light of the fact that Appellant had no prior record. The judge failed to consider the factors required by Aiken prior to sentencing Appellant. “Miller is clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution.” 410 S.C. 534, 543, 765 S.E.2d 572, 576–77 (2014). The failure in the present case violates Appellant’s right to be free from cruel and unusual punishment pursuant to the 8th Amendment of the U.S. Constitution and Article I Section 15 of the South Carolina State Constitution. The failure to consider the Aiken factors constitutes an error of law.

**CONCLUSION**

Based on the above argument this Court should reverse the sentence imposed and remand the case to the circuit court for an individualized sentencing hearing where the judge must consider the factors required by Miller v. Alabama and Aiken v. Byars.

  
Kathrine H. Hudgins  
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of January, 2025.

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CERTIFICATE OF SERVICE

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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies true copies of the Initial Reply Brief of Appellant in the above-referenced case have been served upon Kaylee C. Kemp, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 13th day of January, 2025.



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**Subject:** 2023-001336 The State v. Don L. Brown Initial Reply Brief of Appellant  
**Date:** Monday, January 13, 2025 12:14:00 PM  
**Attachments:** [AG Cover Letter - Reply Brief.pdf](#)  
[2023-001336 The State v. Don L. Brown Initial Reply Brief of Appellant.pdf](#)

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Good Afternoon Ms. Kemp,

Attached for service in the above-referenced case is the Initial Reply Brief of Appellant, which will be filed with the Court of Appeals today, January 13, 2025, via email filing.

Thank you,

**Sara McInnis**

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