

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Florence County  
William H. Seals, Jr., Circuit Court Judge  
2011-GS-21-1197

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Appellate Case No. 2012-211593

THE STATE,

RECEIVED

MAR 18 2015

S.C. Supreme Court

Respondent,

v.

TAVARIO DORMELL BRUNSON,

Appellant

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**RESPONDENT'S PETITION FOR REHEARING AND  
PETITION TO STAY REMITTITUR**

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The Respondent State of South Carolina hereby makes a Petition for Rehearing pursuant to Rule 221 of the South Carolina Appellate Court Rules and alternately a Petition to Stay Remittitur Pending Resolution of Certiorari before the United States Supreme Court in Byars v. Aiken et al., 14-1021 (cert. pending).

In its opinion filed March 4, 2015, the Court “reversed pursuant to Rule 220(b)(1), SCACR, and the following authority: Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). We stay this relief until all stays issued in Aiken are lifted.” State v. Tavarrio Dormell Brunson, Appellate Case No. 2012-211593, Memo. Op. No. 2015-MO-009 (S.C.Sup.Ct. filed March 4, 2015).

Respondent submit that rehearing is required to correct the disposition of “reversal” to “vacate and remand for re-sentencing on the murder convictions” assuming the Court denies the

remainder of the Petitioner relating to the merits and inapplicability of Miller v. Alabama to the particular case.

### **STANDARD OF REVIEW**

“[A] petition for rehearing must ‘state with particularity the points supposed to have been overlooked or misapprehended by the court.’ ” Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) (quoting Rule 221(a), SCACR). Similarly, “[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” Kennedy v. S.C. Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, *Appellate Practice in South Carolina* 309 (1999)).

### **INAPPLICABILITY OF MILLER TO NON-MANDATORY LWOP SENTENCE**

Respondent submits that rehearing is appropriate on the merits of the issue related to the applicability of Miller v. Alabama, 132 S. Ct. 2455 (2012) to non-mandatory sentences of life without parole. Respondent submits that rehearing is appropriate on the applicability of Miller to Appellant’s non-mandatory LWOP sentence.

As noted by the Court in this case, the general issue concerning its applicability to the South Carolina sentencing structure for murder by a less than 18 year old is presently pending certiorari before the Court in Byars v. Aiken, et al. Respondent acknowledges a split among the states concerning the applicability of Miller to non-mandatory LWOP sentencing schemes. We note that, although some cases simply consider whether Miller is violated if the sentencer has discretion to impose a sentence of life without parole, others also consider whether the sentencer was required to consider the offender's youth as a mitigating factor when exercising that discretion. Some courts have concluded that Miller only applies to sentences of mandatory life

without parole yet have made a point of concluding that the discretionary procedure conformed to Miller because the trial court considered the offender's youth. However, there is no clear consensus on this issue. Compare State v. Agbogghidi, Docket No. 2 CA-CR 2013-0497-PR, 2014 WL 1572742 (Ariz.App. April 21, 2014) (treating as colorable claim that Miller applies to life sentence imposed under exercise of discretion), People v. Gutierrez, 58 Cal.4th 1354, 1379, 324 P.3d 245, 171 Cal.Rptr.3d 421 (2014) (“[u]nder Miller, a state may authorize its courts to impose life without parole on a juvenile homicide offender when the penalty is discretionary and when the sentencing court's discretion is properly exercised in accordance with Miller ”); Daugherty v. State, 96 So.3d 1076, 1079 (Fla.App.2012) ( Miller applies to discretionary scheme), Diatchenko v. District Attorney, 466 Mass. 655, 668-71, 1 N.E.3d 270 (2013) (concluding that discretionary scheme allowing imprisonment without parole for juvenile offender violates state constitution but relying on reasoning of Graham and Roper in so concluding), State v. Long, 138 Ohio St.3d 478, 484, 487, 8 N.E.3d 890 (2014) (The court initially stated that “Ohio's sentencing scheme does not fall afoul of Miller, because the sentence of life without parole is discretionary” but later stated: “Because the trial court did not separately mention that [the defendant] was a juvenile when he committed the offense, we cannot be sure how the trial court applied this factor. Although Miller does not require that specific findings be made on the record, it does mandate that a trial court consider as mitigating the offender's youth and its attendant characteristics before imposing a sentence of life without parole.” [Emphasis omitted.] ), Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014) (“Miller does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered”), and Garcia v. Bertsch, No. 1:13-CV-021, 2013 WL 1533533 (D.N.D. April 12, 2013) (dismissing,

without prejudice, habeas petition challenging discretionary sentencing scheme, noting that “the reasons given by the controlling opinions in *Graham* and *Miller* for why juveniles should be treated differently from adults in this context arguably could be extended to life sentences for juveniles in homicide cases that foreclose a later opportunity for parole”), with *Bun v. State*, \_\_ S.E.2d \_\_, 2015 Westlaw 662302 (Ga. 2015), citing *Foster v. State*, 294 Ga. 383, 387, 754 S.E.2d 33 (2014) (*Miller* not violated by sentencing scheme that allows life without parole sentences for juveniles as matter of discretion), *Conley v. State*, 972 N.E.2d 864, 876 (Ind.2012) (concluding that, although sentencing court effectively applied *Miller* factors, *Miller* did not apply to discretionary sentencing schemes like Indiana's), *State v. Ali*, 855 N.W.2d 235, 258 (Minn.2014) (“[b]ecause the imposition of consecutive [life] sentences was not mandatory, but was discretionary, [the defendant's] reliance on *Miller* is misplaced”), *Randell v. State*, Docket No. 61232, 2013 WL 7158872, \*1 n. 1 (Nev. December 12, 2013) (“*Miller* only applies in states where a juvenile is convicted of a homicide and the law mandates a sentence of life without the possibility of parole”), *State v. James*, Indictment No. A-4153-08T2, 2012 WL 3870349, \*13 (N.J.Super.App.Div. September 7, 2012) (“the distinction between the *Miller* mandatory sentences and [the] defendant's discretionary one renders *Miller* inapposite”), *Arredondo v. State*, 406 S.W.3d 300, 306 (Tex.App.2013) (“*Miller* prevented the mandatory imposition of life without parole for juvenile offenders, but specifically allowed a discretionary sentence of life without parole when the circumstances justify it” [emphasis omitted] ), *State v. Redman*, Docket No. 13-0225, 2014 WL 1272553, \*3 (W.Va. March 28, 2014) (“*Miller* does not bar a discretionary life sentence without parole for a juvenile but only bars a mandatory life sentence without parole”); *United States v. Lewis*, Nos. CRIM. 04-20115-04, 05-20080-01, 2013 WL 5935228, \*3 (W.D.La. November 1, 2013) (“holding of *Miller* is limited to juveniles whose

offense involved homicide and who received a mandatory life sentence without the possibility of future release”); Davis v. McCollum, 2015 Westlaw 566543 (N.D. Okla. Feb. 11, 2015) (Miller does not apply to discretionary LWOP sentence); Bell v. Uribe, 748 F.3d 857 (4th Cir. 2014) (sentencing juvenile offender to life in prison without possibility of parole did not violate Eighth Amendment when sentenced under a non-mandatory scheme). See also State v. Riley, \_\_ A.3d \_\_, 315 Conn. 637, 2015 Westlaw 854827 (Conn. March 10, 2015) (Miller applies to nonmandatory LWOP). Because of Miller’s inapplicability to the South Carolina scheme and Appellant’s non-mandatory LWOP sentence, rehearing is requested.

**INAPPLICABILITY OF MILLER TO APPELLANT’S CASE WHERE AGE WAS PROPERLY CONSIDERED BY THE SENTENCER**

In Aiken v. Byars, the Court stated that: “Miller establishes a specific framework, articulating that the factors a sentencing court consider at a hearing must include: (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." 132 S. Ct. at 2468.

The Miller Court emphasized its decision “does not categorically bar a penalty for a class of offenders or type of crime.... Instead, it mandates only that a sentencer follow a certain process - *considering an offender's youth and attendant characteristics* - before imposing a particular penalty.” Id. at p. 2471 (italics added). This was allowed and done in Appellant’s

case. Respondent submits resentencing should be rejected where it is not mandated by Miller, either explicitly or implicitly.

This Court may have overlooked that Appellant Brunson had an individualized sentencing proceeding with the opportunity to present mitigating evidence in regard to his age and circumstances on each of the factors. Each of the Miller factors was presented to the sentencer within the evidence actually presented to Judge Seals.

#### MILLER FACTOR ONE

This Court may have overlooked that Miller Factor (1) “the chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate the risks and consequence" was presented to the sentencer. The sentencing judge was aware that Appellant was 17 at the time of the incident. ROA p. 140, l. 9-10, p. 142, l. 24-p. 143, l. 2.

#### MILLER FACTOR TWO

This Court may have overlooked that Miller Factor (2) “the "family and home environment" that surrounded the offender” was presented to the sentencer. Judge Seals was aware that Brunson’s mother and her family suggested a background where the criminal activity would not have been expected. ROA p. 143, l. 7-15.

#### MILLER FACTOR THREE

This Court may have overlooked that Miller Factor (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” was presented to the Court. The trial court was aware from the trial testimony On April 12, 2011, the Appellant, Tavarion Brunson ran into the front door of Rick’s Pawn Shop with a gun just prior to its closing at 6 PM. The Appellant’s

head was covered at the time with a stocking and dressed all in black. ROA 2-5. Donna Robinson described Chris Deaver being shot “instantaneously” when he came into the store. ROA p. 5, l. 10-11. Robinson described trying to run to a back room in the store , but the man came around the corner, pointing the gun at her and telling her to get up. He demanded that she show him where the gold was. As she passed by where Chris was lying, the perpetrator stopped and shot Chris again at close range on his head. ROA p. 7, l. 4-5. She stated that the victim was making noise and the perpetrator cursed at him to shut up. Robinson tried to leave, but he put the gun on her again. She then went to the cabinets and put the gold into the trash bag . ROA 7-8, 16. Robinson stated that, when she was putting the items in the trash bag, he got upset with her as being slow. At that time he again had the gun on her and began throwing the cases after they emptied them. ROA 16-18, 20. She stated that she also gave him the money out of the register. ROA 20. After that, the Appellant told her to lay down on the floor and put her face down. He put the gun on her head and tried to ask him not to shoot her and that she just wanted to go home. She stated that he got mad at her, claimed she was stalling and started cursing at her. She feared that if she put her head down he was going to shoot her. She stated that she then put her head down and he shot her above her eye. ROA 21. She stated after she was shot, she held her breath and pretended to be dead. So he would not shoot her again. ROA 21. She heard rustling and then heard the doorbell ring and she knew that he had left. ROA 21. She described crawling to the phone and getting her gun, then calling for help. ROA 22.

Robinson described telling the circumstances that she had lost an eye as a result of the shooting and that she was also unable to open her mouth for a period and was fed through a stomach tube and had a trach in her throat. However, she stated that now other than her sight, everything was okay. ROA 23.

After the incident was called in, a perimeter was set up in search of the perpetrator. ROA 25. The Appellant was stopped and a blue latex glove was found. ROA 44-47. He was also wearing black pants and a grey tank top at the time. ROA 44-45, 58-59. A trash bag and other items were recovered on April 12, 2011 which included jewelry, a t-shirt and a skull cap. ROA 70-76, 81-82. 87-92, 95-97.

After the Appellant was Mirandized, he gave a statement to the Florence Police Department on April 12, 2011. ROA 108-122. In the statements, he admitted going into the store, telling everyone to get on the ground, shooting the victim twice, telling the woman to put everything in the bag, telling her to get on the ground and shooting her when he thought she was reaching for something. ROA 108, 113. He claimed to have shot 4 or 5 times in the store. ROA 114. He claimed to have thrown away some of his clothes and that he threw the gun at some point. ROA 116-17. Brunson stated that he went into the store to rob it because **“I was just trying to help my family . . . they were struggling . . . money was short.”** ROA p. 120, l. 2- 12 (emphasis added). . He claimed he shot because he was scared and panicked. ROA 120-21.

Clearly, this information provided the sentence with an adequate basis under Miller’s factor 3.

#### MILLER FACTOR FOUR

The Court may have overlooked the presence of evidence of Miller factor (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.” As stated, the Appellant gave a statement to law enforcement.<sup>1</sup>

Sergeant Lee Davis testified about his interaction with the Appellant during the interrogation of

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<sup>1</sup> A Jackson v. Denno hearing was held before the trial judge. Trial Transcript, p. 97-130. It was not included in the Record on Appeal. The Court may wish to supplement the record pursuant to Rule 212, SCACR.

the Appellant. ROA 99-127. He described the three hour interview process with the Appellant. The officer stated that Appellant initially stated he was at his grandmother's house with his girlfriend, rather than at Rick Pawn Shop. ROA 107. Sgt. Davis stated that when he asked Appellant a question, he would hold his head down and look away a lot. He stated that the Appellant became emotional at some point during the interview and *cried for about ten minutes* after being asked to walk the officer through what happened at the pawn shop. ROA 108.

#### MILLER FACTOR FIVE

The Court may have overlooked that evidence of Miller Factor (5) the "possibility of rehabilitation" was presented to Judge Seals. In the sentencing portion, the prosecution, while noting that he and the judge had sons, presented Appellant's prior criminal history which included a record in Family Court of bringing a weapon on school property and resisting arrest in that event resulting in probation which was violated. ROA p. 140, l. 9-15. A suspended commitment resulted in an assessment from Pee Dee Mental Health which was provided to the sentencing judge and summarized that he had no mental issues, although it was reflected in the report that Brunson had commented then that he had thought about taking another person's life and that he liked to kill animals. ROA 140. Further, the prosecution noted that the report reflected that Brunson often lost his temper, argued with adults, was deviant against the rules, blamed others for his anger and was resentful. ROA p. 141, l. 1-7. The prosecution asked for a sentence of life in prison. ROA p. 141, l. 8-12.

Defense counsel asked for mercy for Appellant. ROA p. 143, l. 16-18. Importantly, the defense was not restricted in making comments or presentation in mitigation for Brunson. When

asked if there was anything further, counsel stated that there was nothing further. ROA p. 143, l. 19-20.<sup>2</sup>

#### REVERSAL AND REMAND NOT APPROPRIATE ON THIS RECORD

There were no restrictions or limitations imposed by the courts to prevent Brunson and his counsel from presenting any mitigating facts or arguments they wished to advance in an effort to convince the judge not to impose an LWOP sentence. Most importantly however, is the fact that the same characteristics described in Miller and Aiken about the differences between

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<sup>2</sup> In addition, the prosecution presented a series of victim impact statements from members of the murder victim's family and the victim of the attempted murder. The surviving victim initially noted the Appellant's taped statement about the family's hard times and whether he did not mean to hurt anyone when he brought a gun. She further noted that inconsistency in his statement that he shot the murder victim because he saw him reaching for something, but it did not explain why he shot him again when he was lying lifeless while posing no threat. ROA 131-32. She challenged his claim that he was afraid and nervous, when she described Brunson looking at her face and then trying to shoot her. ROA p. 132, l. 2-7. She questioned his inability to recall certain facts at the incident, stating that he was cursing with anger and ordering her around at the point of a gun. She held him accountable for his actions and prayed that this is comfort for the victims' families and that he would ultimately be judged by God "with all the vengeance and justice that a father should when one of his children is murdered." ROA 132.

The victim's aunt, Dale Ginn, stated that his family would never be the same after the death, describing the mother's inability to sleep and constant crying. ROA p. 133, l. 10-20. His father feels similar pain from the death and his daughter misses her father. *Id.* She described the impact extended to the victim's cousins who will share his loss at a wedding and noted the loss in the victim's many friends. ROA 134. Cousin Kevin Deaver stated that he had researched the Appellant noting that it reflected gang involvement and that punishment will act as a deterrent to future crimes for those "walking the fence deciding whether they want to go into this lifestyle." ROA p. 135, l. 10-20.

Amanda Deaver, the victim's step-mother, stated that the victim was a special person to her. She described the fact that they had a normal life until the incident and described the hurt that has since occurred to her husband and family. ROA 136.

The victim's father, Stephen Deaver, stated the difficulty he had sustaining his family since the incident and thanked God for sparing Donna to be an eyewitness to the incident. ROA 136. He described his relationship with his son as his friend and their plans, even on the day he was shot. ROA 137. He noted that he had anger, but stated that his son had accepted Christ. He stated that we have consequences for our actions. He closed thanking the police, the solicitor and the court. He requested the maximum penalty for the Appellant. ROA 138-39.

Cammie Carroll, the mother of the victim's five year old daughter, described the impact his loss had on both of them and the victim's "love for life." She stated that it was "pure hell" to think about the possibility that he would walk out of jail some day and stated he deserves to get life. ROA p. 139, l. 5-22.

children and adults in regard to diminished culpability and capacity for reform were known and available to Brunson when he was sentenced.

Assuming Miller was applicable, the Court may have overlooked that, that the Miller factors were present in this record and implicitly considered by Judge Seals before he decided to sentence the Appellant to a life sentence rather than thirty years or more. Rehearing is appropriate under these circumstances where reversal and remand for resentencing is unnecessary where reconsideration after Aiken v. Byars shows the life sentence satisfies its requirements.

“REVERSAL” WAS NOT THE APPROPRIATE DISPOSITION WHEN A LIMITED VACATE AND REMAND FOR RESENTENCING ON THE MURDER CONVICTION WOULD BE THE PROPER LIMITED DISPOSITION UNDER AIKEN AND THE JUDGMENT OF CONVICTION MUST BE AFFIRMED.

In the heading of this Court’s opinion, the Court stated “REVERSED” and in the body stated reversed. However, the only issue raised before the Court in Appellant’s brief was a request for the Court “to declare sentences of LWOP for juveniles unconstitutional and vacate his sentence of LWOP for the murder conviction and remand the case for resentencing” or “in the alternative, Appellant respectfully requests this Court vacate the sentence of LWOP for murder and remand the case for re-sentencing in compliance with Miller, supra.” Final Brief of Appellant, p. 15.

On April 11, 2012, the Appellant was convicted as charged. ROA p. 128, l. 25- p. 129, l. 14. The Appellant was sentenced to life in prison on murder, **thirty (30) years on attempted murder, thirty (30) years on armed robbery, fifteen (15) years on burglary in the second degree, and five (5) years imprisonment on the possession of a weapon conviction. ROA 143-44. Judge Seals ordered each of the sentences to run consecutively.**

Specifically, because Appellant only appealed from the sentence for the murder conviction, the unappealed convictions and sentences are the law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case).

The judgment of this Court should be corrected to reflect that the judgment on all the convictions are affirmed and that only the life without parole murder sentence is at issue and subject to a remand under Aiken, assuming the remainder of the petition is denied. The convictions and consecutive sentences of thirty (30) years on attempted murder, thirty (30) years on armed robbery, fifteen (15) years on burglary in the second degree, and five (5) years imprisonment on the possession of a weapon conviction for an aggregate sentence 80 years remains effective. ROA 143-44.

#### STAY OF ACTION ON PETITION AND REMITTITUR

The Respondent submits that the State is pursuing certiorari before the United States Supreme Court in Byars v. Aiken et al. The petition for writ of certiorari was filed on February 9, 2015 raising similar issues to those presented in this action, although Appellant Brunson is not a named party and his case was not considered in the pleadings in Aiken. The juvenile's counsel has received an extension until April 22, 2015 to file its responsive pleading in the United States Supreme Court. Since Tavario Brunson was not named in the Aiken matter upon entry of an order on the petition for rehearing the matter will be subject to the filing of certiorari by either side within 90 days. Under the current disposition as written the relief from the reversal would be stayed pending the Aiken v. Byars stay.

In light of these circumstances, the Court may wish to defer ruling on the petition for rehearing and remittitur until the decision on certiorari in Byars v. Aiken is resolved since it is the only issue in this action before this Court.

### CONCLUSION

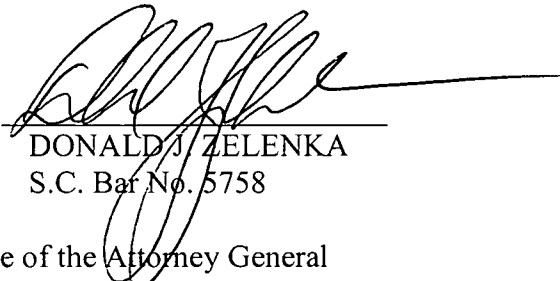
For all the foregoing reasons, Respondent State, submits that the petition for rehearing should be granted .

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. MCINTOSH  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Senior Assistant Deputy Attorney General

BY:   
DONALD J. ZELENKA  
S.C. Bar No. 5758

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211-1549  
(803) 734-6305

ATTORNEYS FOR RESPONDENT

March 18, 2015  
Columbia, South Carolina.

STATE OF SOUTH CAROLINA  
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THE STATE,

Respondent,

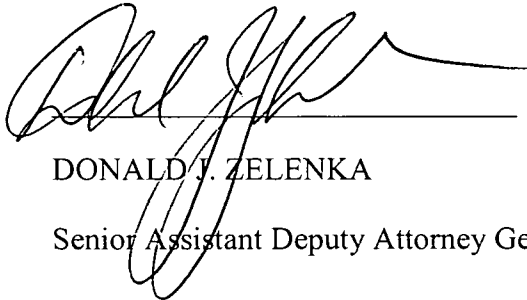
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TAVARIO DORMELL BRUNSON,

Appellant

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Respondent's Petition for Rehearing in the foregoing action by depositing copies in the InterAgency Mail to Susan Hackett, Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 18th day of March, 2015.



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DONALD J. ZELENKA

Senior Assistant Deputy Attorney General