

STATE OF SOUTH CAROLINA

COUNTY OF Richland  
STATE VS.

Demarco Johnson

AKA: \_\_\_\_\_

Race: \_\_\_\_\_

DOB: \_\_\_\_\_

Address: \_\_\_\_\_

DL# \_\_\_\_\_ SID# SC00913437

IN THE COURT OF GENERAL SESSIONS  
INDICTMENT/CASE#:

00 -GS- 40 - 47714

A/W#: 324691

Date of Offense: 12-14-99

S.C. Code §: 16-11-330(A)

CDR Code #: 011319

CASE RESTORED

SENTENCE  
 PLEA  TRIAL

CONVICTED OF or  PLEADS

In disposition of the said indictment comes now the Defendant who was Armed Robbery

in violation of § 16-11-330(A) of the S.C. Code of Laws, bearing CDR Code # 011319

NON-VIOLENT  VIOLENT  SERIOUS  MOST SERIOUS  17-25-45

The charge is:  As Indicted  Lesser Included Offense  Defendant Waives Presentment to Grand Jury

The plea is:  Without Negotiations or Recommendation  Negotiated Sentence  Recommendation by the State

ATTEST: Vana Pellizz  
Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center, for a determinate term of \_\_\_\_\_ days/months/years and/or to pay a fine of \$ \_\_\_\_\_ and/or to pay a fine of \$ \_\_\_\_\_ plus costs and expenses, if applicable, the balance is suspended with probation for \_\_\_\_\_ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which conditions are hereby incorporated by reference. LIFE WITHOUT PAROLE

The Defendant is to be given credit for \_\_\_\_\_ days/months jail time.  
 CONCURRENT or  CONSECUTIVE to sentence on: 2/7/01

SPECIAL CONDITIONS:

RESTITUTION:  Heard,  Waived,  Ordered  
Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_

Payment Terms: \_\_\_\_\_  
 set by SCDPPPS

Recipient: \_\_\_\_\_  
\*Fine: \_\_\_\_\_ \$  
§ 1-1-206 (Assessments 100%) \_\_\_\_\_ \$  
§ 14-1-211(A)(1) (Surcharge) \_\_\_\_\_ \$  
§ 14-1-211(A)(2) (Surcharge) \_\_\_\_\_ \$  
§ 56-5-2995 (DUI Assessment) \_\_\_\_\_ \$  
3% to County (if paid in installments) \_\_\_\_\_ \$  
TOTAL \_\_\_\_\_ \$

Barbara McCall  
Clerk of Court/ Deputy Clerk

Court Reporter: R. D. Reese  
Filer - Clerk Green - Corrections

RECEIVED  
AUG 07 2018  
SC Court of Appeals  
PTUP \_\_\_\_\_ days/hours Public Service Employment  
Obtain GED \_\_\_\_\_  
Attend Voc Rehab. or Job Corps \_\_\_\_\_  
May serve W/E beginning \_\_\_\_\_  
Substance Abuse Counseling \_\_\_\_\_  
Random Drug/Alcohol Testing \_\_\_\_\_  
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ \_\_\_\_\_ beginning \_\_\_\_\_  
\$ \_\_\_\_\_ paid to Public Defender Fund.  
Other: \_\_\_\_\_

PRESIDING JUDGE: [Signature]  
Judge Code: D101612  
Sentence Date: 2/7/01

Convoy - Probation Filer - Defendant

STATE OF SOUTH CAROLINA

COUNTY OF Richland  
STATE VS.

Demarco Johnson

AKA: \_\_\_\_\_

Race: \_\_\_\_\_ Sex: \_\_\_\_\_ Age: 21

DOB: \_\_\_\_\_ SS#: \_\_\_\_\_

Address: \_\_\_\_\_

DL# \_\_\_\_\_ SID# 3C0091343

IN THE COURT OF GENERAL SESSIONS  
INDICTMENT/CASE#:

00 GS- 40-47716

A/W#: 6246914

Date of Offense: 12-14-99

S.C. Code §: 16-3-910

CDR Code #: 0101915

CASE RESTORED

SENTENCE

PLEA  TRIAL

CONVICTED OF or  PLEADS

In disposition of the said indictment comes now the Defendant who was  
TO: Kidnapping  
in violation of § 16-3-910 of the S.C. Code of Laws, bearing CDR Code # 0101915

NON-VIOLENT  VIOLENT  SERIOUS  MOST SERIOUS  17-25-45

The charge is:  As Indicted,  Lesser Included Offense,  Defendant Waives Presentment to Grand Jury.  
The plea is:  Without Negotiations or Recommendation,  Negotiated Sentence,  Recommendation by the State.

ATTEST:  
Diana Phillips  
Solicitor

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Attorney for Defendant

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center,  
for a determinate term of \_\_\_\_\_ days/months/years or  under the Youthful Offender Act not to exceed \_\_\_\_\_ years  
and/or to pay a fine of \$ \_\_\_\_\_ provided that under the course of \_\_\_\_\_ days/months/years and/or payment  
of \$ \_\_\_\_\_ plus costs of \_\_\_\_\_ the balance is suspended with probation for \_\_\_\_\_  
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of  
probation, which are incorporated by reference. LIFE WITHOUT PAROLE.

The Defendant is to be given credit for \_\_\_\_\_ days/months/jail time.  
 CONCURRENT or  CONSECUTIVE to sentence on: 2/7/01

SPECIAL CONDITIONS:

RESTITUTION:  Heard,  Waived,  Ordered  
Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_

Payment Terms:  
 set by SCDPPPS \_\_\_\_\_

Recipient: \_\_\_\_\_  
\*Fine: ..... \$ \_\_\_\_\_  
§14-1-206 (Assessments 100%) ..... \$ \_\_\_\_\_  
§14-1-211(A)(1) (Surcharge) ..... \$ \_\_\_\_\_  
§14-1-211(A)(2) (Surcharge) ..... \$ \_\_\_\_\_  
§56-5-2995 (DUI Assessment) ..... \$ \_\_\_\_\_  
3% to County (if paid in installments) ..... \$ \_\_\_\_\_  
TOTAL ..... \$ \_\_\_\_\_

Bernarda Dent  
Clerk of Court/ Deputy Clerk

Court Reporter: R. DeFoele

White - Clerk

Green - Corrections

Orange - Probation

Pink - Defendant

PRESIDING JUDGE: [Signature]  
Judge Code: 010116  
Sentence Date: 2/7/01

RECEIVED  
AUG 01 2000  
SC COURT OF APPEALS

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS  
INDICTMENT/CASE#:

COUNTY OF Greenville  
STATE VS.

GS-06-1771

AKA: \_\_\_\_\_

A/W#: \_\_\_\_\_

Race: \_\_\_\_\_ Sex: M Age: 31

Date of Offense: \_\_\_\_\_

DOB: 01/17/87 SS#: \_\_\_\_\_

S.C. Code §: 16-3-710

Address: \_\_\_\_\_

CDR Code #: 0101915

DL# \_\_\_\_\_ SID#: 260915437

CASE RESTORED

SENTENCE

PLEA  TRIAL

In disposition of the said indictment comes now the Defendant who was  CONVICTED OF or  PLEADS TO:

in violation of § 16-3-710 of the S.C. Code of Laws, bearing CDR Code # 0101915

NON-VIOLENT  VIOLENT  SERIOUS  MOST SERIOUS  17-25-45

The charge is:  As Indicted,  Lesser Included Offense,  Defendant Waives Presentment to Grand Jury.

The plea is:  Without Negotiations or Recommendation,  Negotiated Sentence,  Recommendation by the State.

ATTEST:

[Signature]  
Solicitor

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Attorney for Defendant

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center, for a determinate term of \_\_\_\_\_ days/months/years or  under the Vocational Offender Act not to exceed \_\_\_\_\_ years and/or to pay a fine of \$ \_\_\_\_\_ provided for upon the service of \_\_\_\_\_ days/months/years and/or payment of \$ \_\_\_\_\_; plus costs and assessments as applicable; the balance is suspended with probation for \_\_\_\_\_ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

The Defendant is to be given credit for \_\_\_\_\_ days/months jail time.  
 CONCURRENT or  CONSECUTIVE to sentence on: \_\_\_\_\_

SPECIAL CONDITIONS:

RESTITUTION:  Heard,  Waived,  Ordered  
Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_  
Payment Terms: \_\_\_\_\_  
 set by SCDPPPS \_\_\_\_\_

PTUP \_\_\_\_\_ days/hours Public Service Employment  
Obtain GED \_\_\_\_\_  
Attend Voc Rehab. or Job Corps \_\_\_\_\_  
May serve W/E beginning \_\_\_\_\_  
Substance Abuse Counseling \_\_\_\_\_  
Random Drug/Alcohol Testing \_\_\_\_\_  
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ \_\_\_\_\_ beginning \_\_\_\_\_  
\$ \_\_\_\_\_ paid to Public Defender Fund.  
Other: \_\_\_\_\_

Recipient: \_\_\_\_\_  
\*Fine: ..... \$ \_\_\_\_\_  
§14-1-206 (Assessments 100%) ..... \$ \_\_\_\_\_  
§14-1-211(A)(1) (Surcharge) ..... \$ \_\_\_\_\_  
§14-1-211(A)(2) (Surcharge) ..... \$ \_\_\_\_\_  
§56-5-2995 (DUI Assessment) ..... \$ \_\_\_\_\_  
3% to County (if paid in installments) ... \$ \_\_\_\_\_  
TOTAL ..... \$ \_\_\_\_\_

PRESIDING JUDGE [Signature]  
Judge Code: 0111012  
Sentence Date: 8/1/18

\_\_\_\_\_  
Clerk of Court/ Deputy Clerk

\_\_\_\_\_  
Court Reporter:

Photo - Clerk

Greene - Corrections

Conroy - Probation

Park - Defendant

SCCA-217 (1/2001)

RECEIVED  
AUG 01 2018  
SC COURT OF APPEALS

STATE OF SOUTH CAROLINA

COUNTY OF Richland  
STATE VS

Demareo Johnson

AKA:

Race: B Sex: M Age: 21

DOB: [REDACTED] SS#: [REDACTED]

Address: [REDACTED]

DL# \_\_\_\_\_ SID#: SC00913437

IN THE COURT OF GENERAL SESSIONS  
INDICTMENT/CASE#:

00 -GS- 40 - 47718

A/W#: 6246915

Date of Offense: 12-14-99

S.C. Code §: 16-11-311

CDR Code #: 0101719

CASE RESTORED

SENTENCE

PLEA  TRIAL

CONVICTED OF or  PLEADS

In disposition of the said indictment comes now the Defendant who was Burglary 1st

TO: Burglary 1st  
in violation of § 16-11-311 of the S.C. Code of Laws, bearing CDR Code # 0101719

NON-VIOLENT  VIOLENT  SERIOUS  MOST SERIOUS  17-23-45

The charge is:  As Indicted,  Lesser Included Offense,  Defendant Waives Presentment to Grand Jury.

The plea is:  Without Negotiations or Recommendation,  Negotiated Sentence,  Recommendation by the State.

ARREST: Dana Pelluzzi  
Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center, for a determinate term of \_\_\_\_\_ days/months/years or  under the Juvenile Offender Act not to exceed \_\_\_\_\_ years and to pay a fine of \$ \_\_\_\_\_, provided that upon the service of \_\_\_\_\_ days/months/years and/or payment of \$ \_\_\_\_\_, plus costs and assessments as applicable, the balance is suspended with probation for \_\_\_\_\_ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference. WFO WITHOUT PAROLE

The Defendant is to be given credit for \_\_\_\_\_ days/months/jail time.  
 CONCURRENT or  CONSECUTIVE to sentence on: 2/7/01

SPECIAL CONDITIONS:

RESTITUTION:  Heard,  Waived,  Ordered  
Total: \$ \_\_\_\_\_ plus 20% fec: \$ \_\_\_\_\_

Payment Terms: \_\_\_\_\_  
 set by SCDPPPS

Recipient: \_\_\_\_\_  
\*Fine: ..... \$ \_\_\_\_\_  
§14-1-206 (Assessments 100%) ..... \$ \_\_\_\_\_  
§14-1-211(A)(1) (Surcharge) ..... \$ \_\_\_\_\_  
§14-1-211(A)(2) (Surcharge) ..... \$ \_\_\_\_\_  
§56-5-2995 (DUI Assessment) ..... \$ \_\_\_\_\_  
3% to County (if paid in installments) ... \$ \_\_\_\_\_  
TOTAL ..... \$ \_\_\_\_\_

[Signature]  
Clerk of Court/ Deputy Clerk

Court Reporter: \_\_\_\_\_

Watts - Clerk

Greene - Corrections

Conroy - Probation

Paul - Defendant

PRESIDING JUDGE [Signature]

Judge Code: 0101612

Sentence Date: 2/7/01

RECEIVED  
AUG 01 2001  
SC COURT OF APPEALS

STATE OF SOUTH CAROLINA ) IN THE COURT OF GENERAL SESSIONS  
COUNTY OF RICHLAND ) THE FIFTH JUDICIAL CIRCUIT  
) )  
DeMarco Johnson, #241438 )  
Applicant, ) MOTION FOR RE-SENTENCING  
) PURSUANT TO  
) AIKEN VS. BYARS  
-VS- ) 2012213286  
) )  
STATE OF SOUTH CAROLINA )  
2. Respondent. )

JEANETTE M. McBRIDE  
C.C.P. & G.S.  
16 JUL - 1 AM 8:43

Because of additional, recently decided binding constitutional decision; the applicant in the above caption moves this Honorable court for a re-sentencing pursuant to Aiken VS. Byars, 410, S.C. 534, 765 S.E. 2d 572 S.C. .

Movant is entitled to a re-sentencing based on the following:

Movant received a life without parole (LWOP) for Armed Robbery, Burglary, and Kidnapping. Pursuant to S.C. code ANN. 17-25-45 in 2001. The triggering offense was a conviction in 1997 stemming from crimes commented as a juvenile i.e. Attempted Armed Robbery and Assault and Battery with intent to kill. As mentioned earlier He was a juvenile.

Movant sentence violates the Fourth Amendment to the U.S. Constitution and the South Carolina Constitution insomuch as it prohibits him from receiving a meaningful opportunity to be released at a meaningful point in time, a realistic likelihood of release for the rehabilitated and meaningful opportunity to be heard. South Carolina Constitution Article 12 section 2.

RELIEF REQUESTED

Movant's sentence entitles him to have the court recognize his Juvenile status in light of aiken and that he is entitled to a re-sentencing that focuses on the fact that children are constitutionally different from adults for purpose of sentencing

RESPECTFULLY SUBMITTED BY,

s. DeMarco Johnson

DeMarco Johnson, #241438

BRCI Mur-128

4460 Broad River Rd.

Columbia, SC 29210

Sworn to and subscribed before me  
this 21st day of JUNE 2016

Janelle T. Spearman  
Notary Public for South Carolina

My commission Expires

JANELLE T. SPEARMAN  
Notary Public - State of South Carolina  
My Commission Expires  
August 26, 2025

JEANETTE W. BRIDGE  
C.C.P. & G.S.  
16 JUL -1 AM 8:43

# The Supreme Court of South Carolina

DeMarco Johnson,

Petitioner,

v.

State of South Carolina,

Respondent.

Richland County

Docket No.: 2000-GS-40-47714; and 47716-47718

ORDER

**RECEIVED**  
AUG 01 2018  
SC Court of Appeals

Petitioner filed a motion on July 1, 2016 for resentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (SC 2014). Now, therefore, pursuant to SC CONST. Art. V, § 4,

IT IS HEREBY ORDERED that the Honorable R. Knox McMahon be vested with exclusive jurisdiction over the Petitioner's Motion for Resentencing in the above-captioned matter.

Judge McMahon shall at all times be vested with concurrent jurisdiction in all circuits of the state to dispose of matters relating to this case, and shall decide all matters pertaining to the Petitioner's Motion, and shall retain jurisdiction over this matter regardless of where he may be assigned to hold court, and may schedule such hearings as may be necessary at any time without regard as to whether there is a term of court scheduled.

If necessary, to resolve issues related to the appointment of counsel, a hearing shall be conducted within thirty (30) days of this order.

Within sixty (60) days of the date of this order, Judge McMahon shall issue a scheduling order setting forth the schedule that shall be followed in this matter, including the date of the hearing on the merits. The scheduling order may be amended as necessary.



---

Costa M. Pleicones  
Chief Justice

July 28 2016  
Columbia, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF RICHLAND )  
 )  
 The State of South Carolina, )  
 )  
 vs. )  
 )  
 Demarco Johnson )  
 )  
Defendant. )

IN THE COURT OF GENERAL SESSIONS  
 Indictment Numbers: 2000GS4047714,  
 2000GS4047716, 2000GS4047717, 2000GS4047718

MEMORANDUM IN SUPPORT OF MOTION  
 FOR RE-SENTENCING PURSUANT TO  
 AIKEN V. BYARS, 410 S.C. 534 (2014)<sup>1</sup>

Demarco Johnson (D.O.B. 09/25/1979) was arrested and charged with 1 count of Murder, 2 counts of Assault with Intent to Kill, and 2 counts of Armed Robbery for an incident that occurred on or about June 18, 1995. At the time of the incident Demarco was a 15 year old juvenile. At some point in 1995 it appears that based on § 20-7-430(6) S.C. Code of Laws (repealed effective July 1, 1996), Demarco's cases were transferred to Richland County General Sessions court for criminal proceedings to continue against Demarco as an adult with nothing in Richland County Clerk of Court (General Sessions and Family Court) records indicating an adversarial hearing took place prior to transfer.

On March 20, 1996 Demarco was indicted for 1 count of Murder (96-GS-40-7698), 2 counts of Assault and Battery with Intent to Kill (96-GS-40-12218, 96-GS-40-12219), 2 counts of Armed Robbery (96-GS-40-12220, 96-GS-40-12224) all stemming from the same incident that occurred on June 18, 1995. On March 21, 1997 Demarco pled guilty to 1 count of Assault and Battery with Intent to Kill (96-GS-12219) and 2 counts of Attempted Armed Robbery 96-GS-40-12220, 96-GS-40-12224) in Richland County General Sessions court and was concurrently sentenced to 12 years; provided upon the service of 8 years, the balance suspended

<sup>1</sup> Memorandum in support of Demarco Johnson's motion for res-sentencing pursuant to *Aiken v. Byars* based on pro bono outline and research provided by Virginia Gulde, Esq., Amber Hendrick, Esq., Elizabeth Hinson, Esq., and Eric Smith, Esq.

RICHLAND COUNTY  
 FILED  
 JANE T. W. McBRIDE  
 C.P. & G.S.  
 3/17/18 25 AM 8828

with probation for 3 years. At the time of Demarco's guilty plea, the indictment for Murder (96-GS-40-7689) and 1 indictment for Assault and Battery with Intent to Kill (96-GS-40-12218) were nolle prosequere.

On December 14, 1999 Demarco was arrested and charged with 2 counts of Kidnapping (G-246913, G-246914), 1 count of Burglary 1<sup>st</sup> Degree (G-246915), and Armed Robbery (G-246916). At the time of the incident Demarco was 20 years old. On July 12, 2000 Demarco was indicted for Armed Robbery (2000-GS-40-47714), Kidnapping (2000-GS-40-47716), Kidnapping (2000-GS-40-47717), Burglary 1<sup>st</sup> Degree (2000-GS-40-47718). On January 5, 2001 Fifth Judicial Circuit Solicitor filed Notice of Life Without the Possibility of Parole with the Richland County Clerk of Court and Demarco was served such notice on January 19, 2001. At 9:53 a.m. on February 6, 2001 the jury was sworn in and the trial against Demarco began for Armed Robbery (2000-GS-40-47714), Kidnapping (2000-GS-40-47716), Kidnapping (2000-GS-40-47717), Burglary 1<sup>st</sup> Degree (2000-GS-40-47718). At 3:15 p.m. on February 7, 2001 the jury returned the verdict of guilty on all counts and Demarco was mandatorily sentenced to life in prison without the possibility of parole.

On February 12, 2001 Notice of Appeal was filed with the South Carolina Court of Appeals. On May 28, 2002 the South Carolina Court of Appeals affirmed Demarco's conviction and sentence. On February 24, 2003 the South Carolina Supreme Court denied Demarco's petition for writ of certiorari.

On July 1, 2016 Demarco filed a pro se Motion for Resentencing Pursuant to *Aiken v. Byars*, 410 S.C. 534 (2014). On July 28, 2016 the South Carolina Supreme Court issued an order vesting the Honorable R. Knox McMahon with exclusive jurisdiction over Demarco's Motion for Resentencing Pursuant to *Aiken v. Byars*.

**Demarco's mandatory sentence of life without the possibility of parole pursuant to South Carolina's Two-Strike Law (S.C. Code of Laws § 17-25-45) violates the Eighth Amendment's ban on cruel and unusual punishment.**

Demarco mandatory sentence of life without the possibility of parole pursuant to South Carolina's recidivist statute, S.C. Code of Laws § 17-25-45 (1995) as amended violates the Eighth Amendment's ban on cruel and unusual punishment because Demarco was a juvenile (15 years old) at the time of the triggering offense. Therefore, Demarco is entitled to a resentencing hearing that takes into account (1) Chronological age of Demarco and hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequences; (2) the family and home environment that surrounded Demarco; (3) the circumstances of the offense, including the extent of Demarco's participation in the conduct and how familial and peer pressures may have affected him; (4) the incompetencies associated with youth – for example, Demarco's inability to deal with police officers or prosecutors (including on a plea agreement) or incapacity to assist his own attorneys; and (5) the possibility of rehabilitation, as required by *Miller v. Alabama*, 567 U.S. 460 (2012) and *Aiken v. Byars*, 410 S.C. 534 (2014).

**Children are constitutionally different from adults and have special status and protections under the Eighth Amendment's ban on cruel and unusual punishment.**

Children are constitutionally different from adults. *See Miller*, 567 U.S. 460 (2012). During the past decade the Eighth Amendment's ban on cruel and unusual punishment jurisprudence relating to our youth has been a topic of great discussion and evolution by the United States Supreme Court resulting in greater protections from the imposition of overly harsh criminal sentences.

Beginning with its decision in 2005, the United States Supreme Court held that the Eighth Amendment's ban on cruel and unusual punishment prohibits capital punishment for

juveniles. *Roper v. Simmons*, 543 U.S. 551 (2005). Five years later, the United States Supreme Court decided *Graham v. Florida* holding that the Eighth Amendment's ban on cruel and unusual punishment prohibits a juvenile from being sentenced to life without the possibility of parole for a non-homicide offense. 560 U.S. 48 (2010). Then *Miller v. Alabama* was decided in 2012 and the United States Supreme Court held that mandatory life without the possibility of parole sentences for juveniles violates the Eighth Amendment's ban on cruel and unusual punishment. 567 U.S. 460 (2012).

Following the *Miller* decision, the South Carolina Supreme Court decided *Aiken v. Byars*, 410 S.C. 534 (2014). In *Aiken* the South Carolina Supreme Court took up the question of whether or not *Miller* applies to juveniles who received a nonmandatory sentence of life without the possibility of parole. In affirmatively answering this question the South Carolina Supreme Court explained that the United States Supreme Court's recent decisions on the Eighth Amendment's ban on cruel and unusual punishment relating to our youth are based on two lines of precedent: Categorical bans on certain sentences based on the inability to reconcile the class of offenders and the severity of the penalty; and cases that require sentencing authorities to give consideration to the individual characteristics of an offender and the details of his offense prior to imposing a sentence. *See Aiken*, 410 S.C. 534 (2014). The South Carolina Supreme Court went on to quote the United States Supreme Court from *Miller*,

A sentencer must be allowed to consider that youth is more than a chronological fact, and carries with it irresponsibility, impetuosity, and recklessness, factors as transient as youth itself. Although a court may still sentence a juvenile to life without parole after an individualized hearing the Court cautioned that given children's diminished culpability and heightened capacity for change that appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.

*Aiken*, 410 S.C. at 539. The South Carolina Supreme Court went on to acknowledge that while *Miller* was not expressly extended to sentencing schemes such as South Carolina where life without the possibility of parole is permitted but not mandated that it was required to give the effect to the proportionality rationale integral to the holding - youth has constitutional significance and failure of the sentencing court to take into account the hallmark features of your prior to sentencing is a violation of the Eighth Amendment's ban on cruel and unusual punishment. *See Aiken*, 410 S.C. at 543.

These recent decisions by the Supreme Court of the United States and the South Carolina Supreme Court make it clear that our youth have special status and protections under the Eighth Amendment's ban on cruel and unusual punishment, and make it clear these principles laying the foundation of its jurisprudence should be applied generally to our youth within the criminal justice system.

In making the recent decisions relating to our youth and the Eighth Amendment's ban on cruel and unusual punishment the Supreme Court of the United States has begun relying on findings from recent neuroscience studies of adolescents. These recent developments in neuroscience confirmed the "what parent knows" about difference between adults and adolescence. Prior to *Roper*, neuroscience played no role in decisions about developmental difference between our youth and adults. However, beginning with *Roper* during oral arguments and through *Amici*, and directly addressed in *Miller*, the court began considering and relying on adolescent neuroscience research. Elizabeth Scott, Thomas Grisso, Marsha Levick, & Laurence Steinberg, *The Supreme Court and the Transformation of Juvenile Sentencing* 6-7 Trustees of Columbia University in the City of New York (2015).

Adolescents' involvements in criminal activities are specific instances of a more general propensity of our youth for risk-taking and sensation-seeking, and are impulsive acts committed without full thought and consideration for the long-term consequences. *Id.*

Many studies have found that adolescents and individuals in their early 20s are more likely than either children or somewhat older adults to engage in risky behavior; most forms of risk-taking follow an inverted U-shaped curve with age, increasing between childhood and adolescence, peaking in either mid- or late adolescence and declining thereafter.

*Id.* at 7. Criminal activity follows this pattern and is referred to as the "age – crime curve." *Id.*

The United States Supreme Court was influenced by the scientific data supporting this in *Roper*, *Graham*, and *Miller*.

This data shows

[f]indings from developmental neuroscience align well with those from behavioral and psychological studies of age differences in traits like sensation-seeking and impulsivity. Neuroscientists have described a maturational imbalance during adolescence that is characterized by relative immaturity in brain systems that are involved in self-regulation during a time of relatively heightened neural responsiveness to appetitive, emotional and social stimuli. With respect to self-regulation, structural imaging studies using diffusion tensor imaging (DTI) indicate immaturity in neural connections within a fronto-parietal-striatal brain system (localized primarily in the lateral prefrontal cortex, inferior parietal lobe and anterior cingulate cortex) that supports various aspects of executive function. These connections become stronger over the course of adolescence as a result of both maturation and experience, and the strength of these connections is positively correlated with impulse control. Maturation of the structural connectivity (i.e., the physical connections between brain structures) in this brain system is paralleled by increases in functional connectivity (i.e., concurrent activation of multiple brain regions) and by changes with age in patterns of activation during tasks that measure aspects of "executive function," including working memory, planning, and response inhibition (all of which are important for impulse control and thinking ahead), as revealed by functional magnetic resonance imaging (fMRI).

By contrast, numerous fMRI studies show relatively greater neural activity during adolescence than in childhood or adulthood in the brain system that is located mainly in the ventral striatum and ventromedial prefrontal cortex. This system is known to have an important role in the processing for emotional and social information and in the valuation and prediction of reward and punishment. According to what has been referred to as a “dual systems model,” the heightened responsiveness of this socio-emotional, incentive-processing system is thought to overwhelm or, at the very least, tax the capacities of the self-regulatory system, compromising adolescents’ abilities to temper strong positive and negative emotions and inclining them towards sensation-seeking, risk-taking and impulsive antisocial acts.

*Id.* at 8; *see also* Amicus Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646, 10-9647).

***State v. Standard* and *State v. Green* are no longer good law.**

In light of these recent developments in the Eighth Amendment’s ban on cruel and unusual punishment and the special status of our youth under the Eighth Amendment, *State v. Standard* is no longer good law. In 2002 the South Carolina Supreme Court took up the question whether or not a sentence of life without the possibility of parole constituted cruel and unusual punishment under the Eighth Amendment if the triggering offense was committed at the time the defendant was a juvenile under South Carolina’s Two-Strike Law, SC Code § 17-25-45 in *State v. Standard* 351 S.C. 199 (2002). The South Carolina Supreme Court ruled that that an enhanced sentence based upon a prior most serious conviction for a crime which was committed as a juvenile does not offend evolving standards of decency so as to constitute cruel and unusual punishment violating the Eighth Amendment. *Id.* However, the decision in *State v. Standard* was premised on *Thompson v. Oklahoma*, 487 U.S. 815 (1988) which has since been overruled.

In *Thompson*, the United States Supreme Court held that the Eighth Amendment prohibits capital punishment of a person who is under 16 years of age of the time of the offense. *Id.* at 838. The *Thompson* opinion was based on the trend in a majority of jurisdictions and relied on the “evolving standards of decency that mark the progress of a maturing society.” *Id.* at 821. *Thompson* was overruled by *Roper* in 2005 and the United States Supreme Court held that it was unconstitutional to impose capital punishment for offenses committed by an individual under the age of 18. *Roper*, 543 U.S. at 578. The United States Supreme Court in *Roper* rejected the analytic framework used by the South Carolina Supreme Court in *State v. Standard* and instead adopted the analysis of the Eighth Amendment’s ban on cruel and unusual used in *Atkins v. Virginia*, 536 U.S. 304 (2002) in which United States Supreme Court exercised its own independent judgment as to whether punishment imposed was proportionate to the juvenile’s culpability. *Roper*, 543 U.S. at 564-73.

In *State v. Standard* the South Carolina Supreme Court did not apply a proportionality analysis as in *Roper*. See generally *State v. Standard*, 351 S.C. at 204-206. Additionally, cases cited in *State v. Standard* in support of contemporary standards of decency so as to constitute cruel and unusual punishment are no longer of any value as several have since been overruled by *Graham*, and the others do not meet the requirements of *Miller* and in South Carolina *Aiken*. These failures are fatal to the continued validity of *State v. Standard*.

The South Carolina Court of Appeals decision in *State v. Green* was incorrect. In 2015 the South Carolina Court of Appeals briefly considered whether a mandatory life without the possibility of parole sentence pursuant to the recidivist statute violates the Eighth Amendment’s ban on cruel and unusual punishment where the individual was a juvenile at the time of the triggering offense. *State v. Green*, 412 S.C. 65 (S.C. App. 2015). Relying on *State v. Standard*,

the South Carolina Court of Appeals stated the sentence in *State v. Green* “did not constitute cruel and unusual punishment because our appellate courts have rejected the argument that it is cruel and usual punishment to use prior convictions for offenses committed as juveniles for sentencing enhancement under section 17-25-45.” *Id.* at 86. The South Carolina Court of Appeals in *State v. Green* determined that it was bound to sentence the defendant to mandatory life without the possibility of parole because though he was a juvenile at the time of the prior conviction for purposes of the recidivist statute so long as the defendant was tried and sentenced as an adult for the triggering offense it is not cruel and usual punishment even where the defendant had not finished serving the sentence of his first offense prior to committing the second offense that led to the defendant’s life without the possibility of parole sentence – giving the juvenile defendant absolute no opportunity to reform or rehabilitate within the South Carolina criminal justice system. *See id.* at 85-86. Relying on *State v. Standard*, the South Carolina Court of Appeals gave sole weight to the fact that the defendant was not a juvenile when he was sentenced to life without the possibility of parole despite the undisputed fact that the defendant had not finished serving his sentence for the first offense and not taking into consideration the policy considerations and neuroscience studies regarding adolescents compared to fully developed individuals which was considered and relied upon by the United States Supreme Court in *Roper, Graham, and Miller*. *See generally State v. Green*, 412 S.C. at 85-87.

As previously noted, *State v. Standard* was decided a decade before *Miller* and a dozen years before *Aiken* and as such the South Carolina Supreme Court in *State v. Standard* did not consider *Miller* and *Aiken* in reaching its decision. Because *State v. Standard* did not consider *Miller* and *Aiken* in determining whether the Eight Amendment was violated in considering a juvenile conviction as a predicate conviction under South Carolina’s Two-Strike Law, *State v.*

*Green's* reliance on *State v. Standard* is inappropriate and violates the recent line of precedent regarding the consideration of juvenility at sentencing. Further, the South Carolina Supreme Court in *State v. Standard* reached its conclusion based upon precedent that has since been overruled, as such; the foundation upon which the South Carolina Court of Appeals relied on in reaching its conclusion was faulty.

**Evolving standards of decency that mark the progress of a maturing society counsel against the decisions in *State v. Standard* and *State v. Green*, and support a judgment that an individual cannot be penalized with the harshest penalty of life without the possibility of parole based on a juvenile offense, as doing so removes youth from the balance.**

Chief Justice of the United States Supreme Court Earl Warren used the phrase “evolving standards of decency that mark the progress of a maturing society” in *Trop v. Dulles*, 356 U.S. 86, 101 (1958) in deciding what limits are placed on the government by the Eighth Amendment’s ban on cruel and unusual punishment. While not always dispositive, but sometimes helpful in determining evolving standards the courts look to national consensus such as state legislation, and international laws for guidance. See *Roper*, 543 U.S. 551 (2005). State legislation and international laws reflect societal judgment that juvenile offenses do not have the same weight as adult offenses. See generally S.B. 9, 2011-2012 Reg. Sess. (Cal. 2013)(allows a person who was under 18 years old at the time of a crime and sentenced to life without the possibility of parole to submit a request to have a new sentencing hearing); S.B. 260, 2013-2014 Reg. Sess. (Cal. 2014)(establishes different criteria for juveniles parole process for juveniles tried/sentenced as adults); C.S./H.B. 7035, Ch. 2014-220 Leg. Sess. (Fla. 2014)(establishes new sentencing guidelines for juveniles in response to *Graham* and *Miller*); H.B. 4210, 2014 Reg. Sess. (W. Va. 2014)(eliminates life without the possibility for juveniles and eligibility for parole no later than 15 years after incarceration); H.B. 2116, 2014 Reg. Sess. (Haw. 2014)(abolishes life without the

possibility of parole for juveniles); U.N. Convention on the Rights of the Child, Fact Sheet: A Summary of the Rights Under the Convention on the Rights of the Child, [https://www.unicef.org/crc/files/Rights\\_overview.pdf](https://www.unicef.org/crc/files/Rights_overview.pdf) (Article 37 – “No one is allowed to punish children in a cruel or harmful way. Children who break the law should not be treated cruelly. They should not be put in prison with adults, should be able to keep in contact with their families, and should not be sentenced to death or life imprisonment without the possibility of release.”). Noteworthy to South Carolina specifically, in 1991 and 1992 the South Carolina House of Representatives adopted the concurrent resolution South Carolina S790 to support the United Nations “Convention on the Rights of the Child” and to request agencies providing services to children to aim to achieve the goals of the convention. This indicates a willingness of the state of South Carolina to follow in the footsteps of the United Nations when it comes to juvenile rights.

**Criminal offenses committed by juveniles, even when prosecuted in General Sessions criminal court, should not be qualifying conviction for the purposes of South Carolina’s Two-Strike Law.**

Precedent from both the United States Supreme Court and the South Carolina Supreme Court make it clear that juvenile crimes are not as severe as crimes committed by adults because their brains have not fully developed and they are not fully able to control their behavior. *See Graham*, 560 U.S. at 68 (noting that there are fundamental differences between juvenile and adult minds as the part of the brain involved in behavior control is not fully matured even in late adolescence); *Roper*, 543 U.S. at 569 (“The susceptibility of juveniles to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’”) (citing *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)); *Aiken*, 410 S.C. at 543 (“[I]t is the failure of a sentencing court to consider the hallmark features of youth prior to

sentencing that offends the Constitution.”). Because of this, courts have routinely held that when sentencing juveniles for their crimes whether adjudicated in family court or criminal court, courts must consider the specific impact of the defendant’s juvenility on their conduct and take into account the differences in children that counsel against extensive sentences. *See Aiken*, 410 S.C. at 544 (citing *Miller* factors requiring sentencing courts to take into account the age and life circumstances of juvenile offenders and the crime committed); *see also Graham*, 560 U.S. at 73 (“Even if the State’s judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence [life without the possibility of parole] was still disproportionate because the judgment was made at the outset.”). Further, the fact that many states permit juvenile crimes to be adjudicated in adult criminal court for certain crimes making juveniles eligible to receive the same sentences as adults does not mean that states intended to subject juvenile offenders to the same consequences. *See Graham*, 560 U.S. at 66-67.

Many jurisdictions find that sentencing a defendant under a recidivist statute is not sentencing them for prior crimes, but merely sentencing them for the current crime with a stiffer sentence based on their pattern of conduct. *See Vickers v. State*, 117 A.3d 516, 520 (Del. 2015) (“courts consider it an enhanced punishment for the current offense, not an additional punishment for the earlier offense.”); *United States v. Orona*, 724 F.3d 1297, 1307 (10th Cir. 2013) (noting that habitual offender statutes only penalize the latest criminal offense committed by the defendant); *United States v. Hunter*, 735 F.3d 172, 175 (4th Cir. 2013) (noting that an enhanced sentence under a recidivist statute is merely a stiffened penalty for the most recent crime which is considered an aggravated offense because it is repetitive).

While several jurisdictions permit adjudications of juvenile crimes to serve as “prior convictions” to increase subsequent sentences under recidivist or habitual offender statutes. *See*

*United States v. Wallace*, 663 F.3d 177 (3d Cir. 2011) (permitting juvenile offense adjudicated in adult court under youthful offender statutes to be considered in determining career offender status); *United States v. Orona*, 724 F.3d at 1304 (collecting cases). However, although such reasoning aligns with one aspect of the United States Supreme Court precedent, which finds that recidivism statutes only punish a defendant for last in time offense and not his status as a recidivist, *United States v. Rodriguez*, 533 U.S. 377, 385-86 (2008), it contradicts the line of precedent which finds that juvenile crime is less severe than adult crime because juveniles are less culpable *see Miller*, 567 U.S. 460 (2012).

As a threshold matter, such reasoning makes no sense. If a defendant being sentenced under a recidivist statute for a current criminal offense would not be subjected to a heightened sentence but for his prior criminal offense, then it stands to reason that he is being sentenced for those prior criminal offenses in conjunction with the current criminal offense. But, even if our courts consider increased punishment under a recidivist statute only a punishment for the latest offense that is aggravated because it is repetitive, such conduct cannot be rightfully deemed “aggravated” when the initial offense providing the aggravation is less culpable because committed by a juvenile. As such, when determining prior convictions under a recidivist statute, it is illogical and contrary to precedent to grant the same weight to offenses committed when the defendant was a juvenile as would be granted to any offenses committed once the defendant reached the age of majority.

Furthermore, it is illogical that a circuit solicitor or an assistant circuit solicitor can make a unilateral decision within 2 days (as was required by S.C. Code §20-7-4630 in 1995) to waive a criminal offense committed by a juvenile from Family Court to adult General Sessions Court for disposition without consideration of (1) Chronological age of the juvenile and hallmark features

of youth , including immaturity, impetuosity, and failure to appreciate the risks and consequences; (2) the family and home environment that surrounded the juvenile; (3) the circumstances of the offense, including the extent of the juvenile's participation in the conduct and how familial and peer pressures may have affected him; (4) the incompetencies associated with youth – for example, the juvenile's inability to deal with police officers or prosecutors (including on a plea agreement) or incapacity to assist his own attorneys; and (5) the possibility of rehabilitation, as required by *Miller* and *Aiken* which differ from the factors in *Kent v. United States*, 383 U.S. 541 (1966) and then makes the offense eligible for enhancement under South Carolina's Two-Strike Law.

In the instant case, Demarco entered a guilty plea to 1 count of Assault and Battery with Intent to Kill (96-GS-12219) and 2 counts of Attempted Armed Robbery 96-GS-40-12220, 96-GS-40-12224) in Richland County General Sessions court and was concurrently sentenced to 12 years; provided upon the service of 8 years, the balance suspended with probation for 3 years at the age of 15. It is unknown, because of lack of record keeping in Richland County Family Court or Richland County Circuit Court, whether a waiver hearing in fact took place, and if so what information was taken into account during this waiver hearing. As such, Demarco did not receive any benefit of the juvenile justice system and its focus on rehabilitation. Instead, Demarco was sentenced to a prison term at the age of 15 where he was exposed to harden criminals where rehabilitation for a juvenile would be nonexistent and survival would be the only thing that mattered to Demarco. This fact is important as many cases find that the reasons justifying an enhanced sentence as an adult which takes into account crimes committed as a juvenile is that the juvenile was obviously not rehabilitated by the juvenile justice system. See *People v. Nguyen*, 209 P.3d 946, 956 (Cal. 2009) (“If the *parens patriae* features of the juvenile

justice system have succeeded in rehabilitating a youthful offender, all well and good. But if the person was not deterred, and thus reoffends as an adult, this recidivism is a highly rational basis for enhancing the sentence for the adult offense.”); *see also United States v. Hunter*, 735 F.3d 172, 176 (4th Cir. 2013) (noting that the defendant had the opportunity to demonstrate rehabilitation but elected to continue his course of illegal conduct); *United States v. Hoffman*, 710 F.3d 1228, 1233 (11th Cir. 2013) (noting that courts should be able to consider prior youthful offenses “when sentencing criminal who continue their illegal activity into adulthood.”). However, Demarco did not receive any opportunity for rehabilitation because he was sentenced as an adult and sent to adult prison. A number of studies have determined that “the prosecution of juvenile offenders in adult criminal court significantly increases the likelihood that the youth will commit violent or other crimes in the future.” Emily M. Steiner, *When Psychology Answers Constitutional Questions: The Eighth Amendment and Juvenile Sentencing*, 46 U. Balt. L. Rev. 353, 371 (2017).

It follows that if juvenile crime is less culpable than adult crime, then juvenile crime cannot be and should not be qualifying conviction for the purposes of South Carolina’s Two-Strike Law and therefore Demarco’s mandatory sentence of life without the possibility of parole pursuant to S.C. Code of Laws § 17-25-45 violates the Eighth Amendment’s ban on cruel and unusual punishment.

**South Carolina’s Two-Strike Law unconstitutionally mandated a sentence of life without the possibility of parole based on Demarco’s juvenile convictions which deprived the court from exercising the discretion to consider Demarco’s unique circumstances as required pursuant to *Miller* and *Aiken*.**

South Carolina’s Two-Strike Law unconstitutionally mandated a sentence of life without the possibility of parole based on Demarco’s juvenile convictions which deprived the court from exercising the discretion to consider Demarco’s unique circumstances as required by *Miller* and

*Aiken*. *Miller* requires the sentencing court to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. See *Aiken*, 410 S.C. at 543. *Miller* rejected mandatory penalty schemes that prevent the sentence from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. 567 U.S. at \_ (slip op., at 18-22). Citing United States Supreme Court precedent (*Roper* and *Graham*), *Miller* makes clear that sentencers must be able to consider the mitigating qualities of youth. 567 U.S. at \_ (slip op., at 31).

When adopting *Miller's* holding, the South Carolina Supreme Court said,

The *Miller* Court unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole, and that the mandatory penalty schemes at issue prevented the sentencing authority from considering the differences between adults and juvenile offenders before imposing a sentence of life without parole.

*Aiken*, 410 S.C. at 542. In adopting *Miller's* holding, the *Aiken* court determined that sentencing hearings suffer from a constitutional defect when the sentencing court fails to examine the youth of the offender through the lens mandated by *Miller*. See *Aiken*, 410 S.C. at 543, n. 8. The *Aiken* court articulated 5 factors that a sentencing court must consider in order for the hearing to be constitutionally sound:

(1) the chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate the risks and consequences"; (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 (citing *Miller*).

In creating these factors, the *Aiken* court sent a clear message that youth is of significant constitutional significance when determining the imposition of a sentence. As such, it follows that youth maintains that same constitutional dimension even when determining the sentence of an adult based upon a crime committed as a juvenile. Where a mandatory penalty scheme uses a prior conviction to impose a sentence of life without the possibility of parole, to pass constitutional muster youth must be considered by the sentence prior to imposing life without the possibility of parole.

*Miller* made it clear that it was not holding that a judge may not impose life without the possibility of parole. 567 U.S. at \_ (slip op., at 21). *Aiken* echoed this, “Without question, the judge may still determine that life without parole is the appropriate sentence.” 410 S.C. at 545. However, the current statutory framework codified S.C. Code. § 17-25-45 shackles judges by mandating life without the possibility of parole based solely upon an individual circuit solicitor or assistant circuit solicitor’s decision to file notice they are seeking life without the possibility of parole on an individual. *Miller* requires those shackles to be removed under a narrow set of circumstances – where a juvenile faced mandatory life without the possibility of parole. Similarly, the situation where life without the possibility of parole is imposed solely because of a defendant’s prior conviction for a crime committed while a juvenile also presents the court with a narrow set of circumstances. To impose a mandatory sentence of life without the possibility of parole under those circumstances requires one to accept that youth is irrelevant, and poses a risk of disproportionate punishment. *Miller* rejected this, stating, “By making youth (and all that accompanies it) irrelevant to imposition of the harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.” 567 U.S. at \_ (slip op., at 21).

Although *Miller* and *Aiken* require that judges be permitted to exercise discretion with respect to sentencing, these cases do not hold that judge should have unfettered discretion. *Miller* stressed the importance of adhering to a process and following certain guidelines. This process and the guidelines are important because reliance on courts and prosecutors to “sufficiently consider a juvenile defendant’s age, as well as his background and the circumstances of his crime” when making prosecutorial decisions at earlier stages in the process is problematic to say the least. In support, the *Miller* court supplied reasons for using this process: (1) Many states use mandatory transfer systems; (2) Some leave the decision in the hands of the prosecutors, rather than courts; (3) Even where judges have transfer-stage discretion, it has limited utility, because the decision-maker typically will have only partial information about the child or circumstances of his offense; and (4) Limited sentencing options in some juvenile courts mean the transfer decision may present a choice between a light sentence as a juvenile and standard sentencing as an adult. *Miller* 567 U.S. at \_ (slip op., at 26-31). These reasons also support applying the factors and process articulated by *Miller* and *Aiken* to defendants facing life without the possibility of parole under South Carolina’s Two-Strike Law.

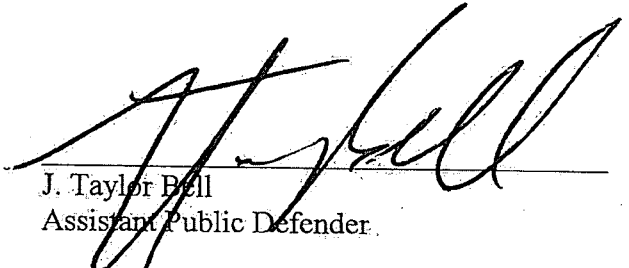
Post-*Miller*, it is possible, but not guaranteed that the *Miller* factors will be applied to juveniles charges as adults when life without the possibility of parole is off the table. See *State v. Zuber*, 152 A.3d 197 (N.J. 2017). Yet, convictions of the juveniles in those cases may be the primary reason that later – even just months or a few years later – to send them away to prison for life, without youth ever being given “sufficient consideration” required by *Miller* and *Aiken*. In other words, the possibility that the defendant’s youth may have been taken into account at some point in the past “cannot substitute for discretion at post-trial sentencing.” *Miller* 567 U.S. at \_ (slip op., at 30). Requiring judicial examination of the defendant’s youth in the context of

prior conviction used to send a person away for life is consistent with *Miller's* holding that juveniles be afforded this process, even if the consideration only comes after the defendant becomes an adult.

In the instant case, when Demarco was initially sentenced for his juvenile criminal offenses, the sentencing court did not take into account his juvenility as required by *Miller* and *Aiken*. Not only was Demarco deprived of his constitutional right to have his sentence reflect his juvenility, but he was also deprived of an opportunity to be rehabilitated and placed in a position contrary to the purposes for which he should have been sentenced. As such, instead of being rehabilitated, he was placed in a position that increased the likelihood that he would reoffend based on studies of juveniles sentenced as adults. Now, following offenses as an adult, he is serving a sentence of life without the possibility of parole based upon juvenile offenses under the assumption that he is somehow irreparable corrupt because he failed to rehabilitate, yet he was given no opportunity to do so – with the possibility of being released, though he has no disciplinary record since being incarcerated in the South Carolina Department of Corrections for nearly 17 years.

Further, at neither sentencing hearing was Demarco given the benefit of his juvenility. Not during the first sentencing hearing for the offenses committed at age 15, and certainly not at the sentencing hearing for offenses that resulted in his mandatory life without the possibility of parole at age 20. The United States Constitution requires that Demarco's juvenility at the time of the "aggravating" crime be given consideration, and it was not. Precedent has determined that such crime is less culpable than adult crimes. To the extent that such crime plays any role in enhancing an adult sentence, it should be accorded less weight than crimes committed as an adult. As such, Demarco is entitled to resentencing that takes into account the lessened

culpability of the crimes to which he entered a plea of guilty at age 15 pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012) and *Aiken v. Byars*, 410 S.C. 534 (2014).



J. Taylor Bell  
Assistant Public Defender  
Counsel of Record for Demarco Johnson

May 25, 2017  
Columbia, South Carolina

RICHLAND COUNTY  
FILED  
2017 MAY 25 AM 8:29  
JEANETTE W. McBRIDE  
C.C.P. & G.S.

cc: The Honorable R. Knox McMahon.

Daniel R. Goldberg, Deputy Solicitor Fifth Judicial Circuit

LOWLAND COUNTY  
FILED

STATE OF SOUTH CAROLINA ) IN THE COURT OF GENERAL SESSIONS

COUNTY OF RICHLAND )  
C.C.P. & G.S.)

DeMarco Johnson, ) MOTION TO DISMISS

Petitioner, )

-v- )

INDICTMENT NUMBER:  
2000-GS-40-47714, 47716, 47717, 47718

The State of South Carolina, )

Defendant. )

This matter is before the Court on Petitioner's Motion for Re-Sentencing (Ex. 1) pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). On February 7, 2001, after being found guilty of Burglary First Degree, Armed Robbery, and two counts of Kidnapping at a trial by jury, the Honorable Mark Westbrook sentenced the Petitioner to Life in Prison without Parole (LWOP) (see Ex 2). The petitioner filed his petition for re-sentencing on July 1, 2016 and the Supreme Court of South Carolina vested this Court with jurisdiction in the matter on July 28, 2016 (Ex. 3). The State moves this Court to dismiss the Petition because the Petitioner was not a juvenile when he received a sentence of LWOP and therefore does not fall within the purview of *Aiken*.

In *Aiken*, the South Carolina Supreme Court held that *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) applies to juveniles who received a sentence of life without parole under South Carolina's non-mandatory scheme. Thus, the Court in *Aiken* ordered resentencing hearings for fifteen inmates serving LWOP sentences they received as juveniles. The Court ordered this in light of *Miller*, which held that LWOP sentencing hearings for juveniles must take into consideration: (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. Thus, if a juvenile offender received an LWOP sentence and did not present mitigating evidence relating to the offender’s youth, the offender is entitled to resentencing.

In order for an offender to fall within the purview of *Aiken v. Byars*, the offender must have: 1) been a juvenile at the time of sentencing, 2) received a sentence of life without parole, and 3) received that sentence without the sentencing court considering the “hallmarks of youth” as described in *Miller v. Alabama*.

Petitioner does not fall within the purview of *Aiken v. Byars* because he was not a juvenile at the time his LWOP sentence was imposed. Petitioner was born on September 25, 1979. At the time of his arrest for these offenses on December 15, 1999, he was twenty (20) years old. Further, at the time of his conviction on February 7, 2001, he was twenty-one (21) years old.

Petitioner further claims he is entitled to a re-sentencing due to the fact that he received a LWOP sentence where “the triggering offense was a conviction in 1997 stemming from crimes committed as a juvenile” thus violating “the Fourth Amendment to the U.S. Constitution and the South Carolina Constitution” (Ex. 1). The State submits that Petitioner’s claim is without merit and unsupported by law.

In *State v. Green*, 412 S.C. 65, 770 S.E. 2d 424 (Ct. App. 2015), the South Carolina Court of Appeals addressed a nearly identical situation as the one at issue in the Petitioner’s Motion for Re-Sentencing. *Green* was found guilty at trial of Armed Robbery. Pursuant to the recidivist statute, section 17-25-45 of the South Carolina Code, he was sentenced to LWOP as he had been properly served before trial with the State’s notice of intent to seek LWOP upon conviction. *Green* argued that because he was a juvenile at the time of his prior conviction, a sentence of LWOP would violate his Eighth Amendment rights. He went on to assert that “although he was twenty years old at the time of sentencing, and nineteen years old at the time of the current offense, he was only seventeen years old when he committed the prior offense that served as the triggering offense under the recidivist statute.” *Id* at 75. The trial court rejected *Green*’s assertion and he was sentenced to LWOP.

On appeal, the South Carolina Court of Appeals took an in depth look at this issue and found that Green's LWOP sentence was not in violation of the Eighth Amendment. The initial analysis focused on the statutory sentencing enhancement prescribed by 17-25-45 which states, in part:

"[E]xcept in cases in which the death penalty is imposed, upon a conviction for a most serious offense[,] ... a person must be sentenced to a term of imprisonment for [LWOP] if that person has ... one or more prior convictions for ... a most serious offense." Armed robbery is defined as a "most serious offense." S.C.Code Ann. § 17-25-45(C)(1) (2014).

Having established that two or more most serious convictions makes an offender eligible for LWOP, the court examined the issue of *Green's* prior conviction and determined that because he was tried on the first case as an adult in general sessions court, there was no error in sentencing him to LWOP under the recidivist statute. *Green* at 84 citing *State v. Standard*, 351 S.C. 199, 203, 569 S.E.2d 325, 328 (2002).

The next issue addressed by the *Green* court was whether the sentence, though proper under the recidivist statute, ran afoul of the Eighth Amendment prohibition against cruel and unusual punishment. "In *Standard*, our supreme court held it is not cruel and unusual punishment to sentence a defendant to LWOP utilizing enhanced penalties for a burglary committed when the defendant was a juvenile so long as the defendant was tried and sentenced as an adult for the triggering offense." *Green* at 85 citing *State v. Standard*, 351 S.C. at 204, 569 S.E.2d at 328. As such, the court held that "the trial court did not err in finding Green's sentence did not constitute cruel and unusual punishment because our appellate courts have rejected the argument that it is cruel and unusual punishment to use prior convictions for offenses committed as juveniles for sentencing enhancement under section 17-25-45." *Green* at 86; See also *Standard*, 351 S.C. at 204, 569 S.E.2d at 328; *Williams*, 380 S.C. at 345-46, 669 S.E.2d at 645.

Finally, the *Green* court addressed the applicability of *Miller* and found it to be inappropriate:

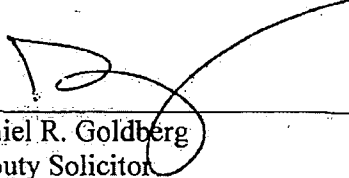
Although *Miller* held that mandatory LWOP sentences for juveniles violate the Eighth Amendment, *Green* was twenty years old at the time of sentencing; therefore, he was not a juvenile when he was sentenced to LWOP. *Miller's* holding was based, in part, on the "recklessness,

impulsivity, and heedless risk-taking” of children; however, because Green was not a juvenile at the time he committed the current armed robbery, the policy considerations from *Miller* are inapplicable. 132 S.Ct. at 2458; see also *Aiken*, 410 S.C. at 541-42, 765 S.E.2d at 576 (“[T]he Court in *Miller* noted that ... children were constitutionally different from adults for sentencing purposes, a conclusion that was based on common sense as well as science and social science.”). Therefore, Green’s LWOP sentence did not violate the Eighth Amendment. *Green* at 86-87.

Petitioner’s current claim is nearly identical to the scenario in *Green*. At the time of Petitioner’s first conviction for a most serious offense, he was a juvenile; however, the conviction occurred in General Sessions court thus exposing him to the consequences of future convictions under the Recidivist statute. Further, at the time of these convictions, and even the arrest for that matter, the Petitioner was no longer a juvenile as he was twenty (20) and twenty-one (21) years old, respectively.

Thus, in light of Petitioner being classified as an adult by virtue of his age at the time of both the incident and the conviction, he does not fall within the class of offenders described in *Aiken v. Byars* and *Miller v. Alabama*. As such, he is not entitled to a re-sentencing and this Court should dismiss his petition with prejudice.

I SO MOVE.



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Daniel R. Goldberg  
Deputy Solicitor  
Fifth Judicial Circuit

April \_\_\_\_, 2017  
Columbia, South Carolina

cc: The Honorable R. Knox McMahon, Chief Administrative Judge

J. Taylor Bell, Counsel of Record for the Defendant  
1701 Main Street  
Columbia, SC 29201

## Taylor Bell

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**From:** Dan Goldberg <Goldberg.Dan@richlandcountysc.gov>  
**Sent:** Monday, July 30, 2018 1:44 PM  
**To:** Taylor Bell  
**Subject:** Demarco Johnson  
**Attachments:** Demarco Johnson Order of Dismissal.pdf

Taylor,

FYI I found this on the Public Index. Just making sure you have seen it. Hope you are well.

Dan



### **Daniel R. Goldberg**

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**RECEIVED**  
AUG 01 2018  
SC Court of Appeals

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
DeMarco Johnson, )  
Petitioner, )  
-v- )  
The State of South Carolina, )  
Defendant. )

2018 JUN 26 PM 12:34  
THE COURT OF GENERAL SESSIONS  
C.C.P. & G.S.  
**ORDER OF DISMISSAL**

INDICTMENT NUMBER:  
2000-GS-40-47714, 47716, 47717, 47718  
G246916

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AUG 01 2018  
SC Court of Appeals

IT APPEARS THAT this matter came before the Court on Petitioner's Motion for Re-Sentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). On February 7, 2001, after being found guilty of Burglary First Degree, Armed Robbery, and two counts of Kidnapping at a trial by jury, the Honorable Mark Westbrook sentenced the Petitioner to Life in Prison without Parole (LWOP). The petitioner filed his petition for re-sentencing on July 1, 2016 and the Supreme Court of South Carolina vested this Court with jurisdiction in the matter on July 28, 2016. On June 1, 2017, the State moved before this Court to dismiss the Petition.

In *Aiken*, the South Carolina Supreme Court held that *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) applies to juveniles who received a sentence of life without parole under South Carolina's non-mandatory scheme. Thus, the Court in *Aiken* ordered resentencing hearings for fifteen inmates serving LWOP sentences they received as juveniles. The Court ordered this in light of *Miller*, which held that LWOP sentencing hearings for juveniles must take into consideration: (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

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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. Thus, if a juvenile offender received an LWOP sentence and did not present mitigating evidence relating to the offender's youth, the offender is entitled to resentencing.

In order for an offender to fall within the purview of *Aiken v. Byars*, the offender must have: 1) been a juvenile at the time of sentencing, 2) received a sentence of life without parole, and 3) received that sentence without the sentencing court considering the "hallmarks of youth" as described in *Miller v. Alabama*.

Based upon the arguments presented, I find that Petitioner does not fall within the purview of *Aiken v. Byars* because he was not a juvenile at the time his LWOP sentence was imposed. Petitioner was born on September 25, 1979. At the time of his arrest for these offenses on December 15, 1999, he was twenty (20) years old. Further, at the time of his conviction on February 7, 2001, he was twenty-one (21) years old.

Petitioner further claimed he was entitled to a re-sentencing due to the fact that he received a LWOP sentence where "the triggering offense was a conviction in 1997 stemming from crimes committed as a juvenile" thus violating "the Fourth Amendment to the U.S. Constitution and the South Carolina Constitution" (Ex. 1). The State submitted that Petitioner's claim was without merit and unsupported by law.

In *State v. Green*, 412 S.C. 65, 770 S.E. 2d 424 (Ct. App. 2015), the South Carolina Court of Appeals addressed a nearly identical situation as the one at issue in the Petitioner's Motion for Re-Sentencing. Green was found guilty at trial of Armed Robbery. Pursuant to the recidivist statute, section 17-25-45 of the South Carolina Code, he was sentenced to LWOP as he had been properly served before trial with the State's notice of intent to seek LWOP upon conviction. Green argued that because he was a juvenile at the time of his prior conviction, a sentence of LWOP would violate his Eighth Amendment rights. He went on to assert that "although he was twenty years old at the time of sentencing, and nineteen years old at the time of the current offense, he was only seventeen years old when he committed the prior offense that served as the triggering offense under the recidivist statute." *Id* at 75. The trial court rejected Green's assertion and he was sentenced to LWOP.

On appeal, the South Carolina Court of Appeals took an in depth look at this issue and found that Green's LWOP sentence was not in violation of the Eighth Amendment. The initial analysis focused on the statutory sentencing enhancement prescribed by 17-25-45 which states, in part:

"[E]xcept in cases in which the death penalty is imposed, upon a conviction for a most serious offense[,] ... a person must be sentenced to a term of imprisonment for [LWOP] if that person has ... one or more prior convictions for ... a most serious offense." Armed robbery is defined as a "most serious offense." S.C. Code Ann. § 17-25-45(C)(1) (2014).

Having established that two or more most serious convictions makes an offender eligible for LWOP, the court examined the issue of *Green's* prior conviction and determined that because he was tried on the first case as an adult in general sessions court, there was no error in sentencing him to LWOP under the recidivist statute. *Green* at 84 citing *State v. Standard*, 351 S.C. 199, 203, 569 S.E.2d 325, 328 (2002).

The next issue addressed by the *Green* court was whether the sentence, though proper under the recidivist statute, ran afoul of the Eighth Amendment prohibition against cruel and unusual punishment. "In *Standard*, our supreme court held it is not cruel and unusual punishment to sentence a defendant to LWOP utilizing enhanced penalties for a burglary committed when the defendant was a juvenile so long as the defendant was tried and sentenced as an adult for the triggering offense." *Green* at 85 citing *State v. Standard*, 351 S.C. at 204, 569 S.E.2d at 328. As such, the court held that "the trial court did not err in finding Green's sentence did not constitute cruel and unusual punishment because our appellate courts have rejected the argument that it is cruel and unusual punishment to use prior convictions for offenses committed as juveniles for sentencing enhancement under section 17-25-45." *Green* at 86; See also *Standard*, 351 S.C. at 204, 569 S.E.2d at 328; *Williams*, 380 S.C. at 345-46, 669 S.E.2d at 645.

Finally, the *Green* court addressed the applicability of *Miller* and found it to be inappropriate:

Although *Miller* held that mandatory LWOP sentences for juveniles violate the Eighth Amendment, *Green* was twenty years old at the time of sentencing; therefore, he was not a juvenile when he was sentenced to LWOP. *Miller's* holding was based, in part, on the "recklessness,

impulsivity, and heedless risk-taking” of children; however, because Green was not a juvenile at the time he committed the current armed robbery, the policy considerations from *Miller* are inapplicable. 132 S.Ct. at 2458; see also Aiken, 410 S.C. at 541–42, 765 S.E.2d at 576 (“[T]he Court in *Miller* noted that ... children were constitutionally different from adults for sentencing purposes, a conclusion that was based on common sense as well as science and social science.”). Therefore, Green’s LWOP sentence did not violate the Eighth Amendment. *Green* at 86-87.

I FIND THAT Petitioner’s current claim is nearly identical to the scenario in *Green*. At the time of Petitioner’s first conviction for a most serious offense, he was a juvenile; however, the conviction occurred in General Sessions court thus exposing him to the consequences of future convictions under the Recidivist statute. Further, at the time of these convictions, and even the arrest for that matter, the Petitioner was no longer a juvenile as he was twenty (20) and twenty-one (21) years old, respectively.

THEREFORE, I FURTHER FIND that in light of Petitioner being classified as an adult by virtue of his age at the time of both the incident and the conviction, he does not fall within the class of offenders described in *Aiken v. Byars*, nor the ones in *Miller v. Alabama*, and as such, he is not entitled to a re-sentencing.

IT IS THEREFORE ORDERED adjudged and decreed that the State’s Motion to Dismiss is hereby GRANTED.

IT IS SO ORDERED.



The Honorable R. Knox McMahon  
Presiding Judge  
Court of General Sessions

This 21<sup>st</sup> day of June, 2018.  
Columbia, South Carolina