

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )  
STATE OF SOUTH CAROLINA )  
v. )  
KENNETH ROBINSON, JR., )  
Defendant. )

IN THE COURT OF GENERAL SESSIONS  
NINTH JUDICIAL CIRCUIT  
Case No: 2017-GS-10-4878, 4879, 4880, 4881,  
4882

**RECEIVED ORDER**

JUL 26 2018

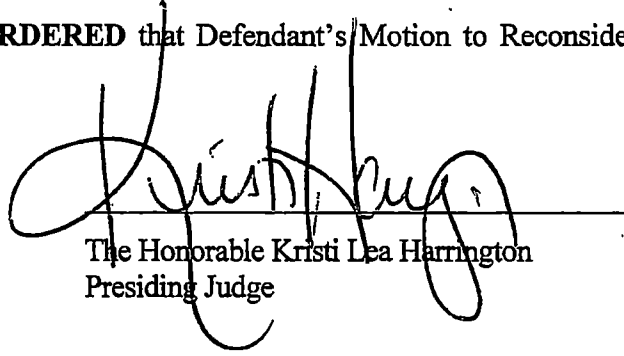
SC Court of Appeals

FILED  
2018 JUN 29 AM 9:31  
CLERK OF COURT  
ARMSTRONG  
BY [Signature]

**THIS MATTER IS BEFORE THE COURT** on Defendant Kenneth Lamont Robinson, Jr.'s Motion to Reconsider Sentence. The Defendant proceeded to a jury trial on February 12, 2018. Culver Kidd and Bruce DuRant from the Ninth Circuit Solicitors Office appeared on behalf of the State, and Megan Ehrlich and Michael Loignon from the Charleston County Public Defender's Office appeared on behalf of the Defendant. On February 22, 2018, the Defendant was convicted by the jury of the following charges: 2017-GS-10-4878, 2017-GS-10-4879, 2017-GS-10-4880, and 2017-GS-10-4881, four counts of Assault and Battery, First Degree; and 2017-GS-10-4882, Murder. The Defendant request a deferred sentencing to prepare mitigation and to hold an individualized hearing pursuant to *Aiken v. Byars*, 410 S.C. 534 (2014) and *Miller v. Alabama*, 567 U.S. 460 (2012). The Court conducted the sentencing hearing on June 6 and June 7, 2018, and Defense counsel called multiple witnesses to provide testimony as to the hallmark features of youth and characteristics of the Defendant. Following the hearing and consideration of all testimony presented from both parties, this Court sentenced the Defendant to fifty years on the charge of Murder and ten years on each charge of Assault and Battery, First Degree. All sentences were imposed to run concurrently, and credit was given for time served since May 14, 2015.

The Defendant's Motion to Reconsider was timely filed on June 15, 2018. The State filed a response on June 25, 2018. Upon review of the Defendant's Motion and the State's Response, the Court does not find grounds sufficient to warrant reconsideration.

**THEREFORE, IT IS HEREBY ORDERED** that Defendant's Motion to Reconsider Sentence is DENIED.



The Honorable Kristi Lea Harrington  
Presiding Judge

June 25, 2018  
Charleston, South Carolina

FILED  
2018 JUN 29 AM 9:31  
KENSINGTON  
CLERK OF COURT  
BY 29

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF GENERAL SESSIONS  
MOTION COVERSHEET

WARRANT/TICKET/  
INDICTMENT #'s

2017GS1004878

2017GS1004879

2017GS1004880

2017GS1004881

2017GS1004882

STATE OF SOUTH CAROLINA

-vs-

KENNETH LAMONT ROBINSON, JR.

DEFENDANT

Solicitor:  
Culver Kidd, Bar No. \_\_\_\_\_  
Address:  
101 Meeting St, Ste. 400, Charleston, 29401  
Phone: 843-958-1900  
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Defendant's Attorney:  
Megan Ehrlich, Bar No. 75164  
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- MOTION HEARING REQUESTED
- FORM MOTION, NO HEARING REQUESTED

SECTION I: Hearing Information

Nature of Motion: Motion for Reconsideration of Sentence


Estimated Time Needed: 30 minutes to 1 hour

Court Reporter Needed: YES  NO

SECTION II: Motion/Order Type

- Written motion attached
- Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

  
Signature of  Solicitor  Attorney for Defendant

6/15/18  
Date submitted

2018 JUN 15 PM 5:06  
CLERK OF COURT  
FILED

COPY

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

**IN THE COURT OF GENERAL SESSIONS  
FOR THE NINTH JUDICIAL CIRCUIT**

Indictment #s: 2017GS1004878;  
2017GS1004879; 2017GS1004880;  
2017GS1004881; 2017GS1004882

Charges: Assault and Battery 1<sup>st</sup> Degree (4  
counts); Murder

STATE OF SOUTH CAROLINA

vs.

**KENNETH LAMONT ROBINSON, JR.**

Defendant.

**DEFENSE MOTION FOR  
RECONSIDERATION OF SENTENCE**

FILED  
2018 JUN 15 PM 2:56  
J. HARRINGTON  
CLERK OF COURT

**TO: CULVER KIDD, ASSISTANT SOLICITOR, NINTH JUDICIAL CIRCUIT**

**PLEASE TAKE NOTICE** that the above-captioned Defendant, by and through the undersigned attorney, moves this Honorable Court for reconsideration of the sentence imposed on the Defendant on June 7, 2018, by the Honorable Kristi Harrington, pursuant to the above-captioned charges. The Defendant, Kenneth Lamont Robinson, Jr. appeared before the Honorable Kristi Harrington on June 6, 2018, and June 7, 2018, for an individualized sentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014) and *Miller v. Alabama*, 567 U.S. 460 (2012). Following two days of testimony and fifteen defense witnesses, the court sentenced the Defendant to fifty (50) years on the charge of Murder and ten (10) years each on the Assault and Battery 1<sup>st</sup> Degree charges. All sentences were ordered to run concurrently.

This motion is made on the following grounds and any such further grounds as may be offered.

## **I. A Fifty Year Sentence is the Functional Equivalent of LWOP**

The sentence imposed by the Court is the functional equivalent of a life without parole sentence and violates the Defendant's rights under the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution. The Defense previously submitted and marked Vera F. Dolan's actuary study for the record as Defense Exhibit 6. According to the actuary study, which is based on data provided by the South Carolina Department of Corrections, the Defendant's life expectancy in a South Carolina correctional facility is 56.3 years. Thus any sentence of forty (40) years or more is the functional equivalent of a life sentence in violation of the Supreme Court of the United States and South Carolina holdings in *Miller v. Alabama* and *Aiken v. Byars*. At the sentencing hearing, in response to the Defense objection to this being a sentence functionally equivalent to life without the possibility of parole, the Court responded that the Defense argued that a 30 year sentence was the same as life. This is incorrect. The Defense argued that even if given the minimum sentence of 30 years, he would be expected on average to only live ten additional years once released from prison (*see* Defense Exhibits 1 and 6 from Sentencing Hearing).

## **II. Defendant's Twice Diminished Culpability as an Adolescent and Non-shooter**

The Defendant was prosecuted for the Murder charge under accomplice liability.<sup>1</sup> The State argued that the action of Richard Simmons shooting into Kedena Brown's car was a foreseeable consequence of the earlier bad acts. The jury clearly struggled in its deliberations in considering whether or not the Defendant was guilty under accomplice liability or merely present

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<sup>1</sup> The Defense objected to the "Hand of One, Hand of All"/Accomplice Liability instruction as applied to a juvenile.

when Mr. Simmons acted alone in killing Ms. Brown. The jury requested to be instructed again on “hand of one” and “mere presence.” In one jury note (marked Court’s Exhibit 11 at trial), the jury asked “If there are 3 people in a vehicle and 1 commits murder, can the other two possibly be convicted of Assault and Battery if their attentions were different from the one that actually committed the murder?” While none of us were inside jury deliberations, it is clear that even the jury that convicted the Defendant recognized his diminished culpability.

The trial record established that prior to the shooting of Kedena Brown, a shooting had taken place in front of the Defendant’s house, with his mother and little sister outside. The State failed to prove that the Defendant was the intended target and not Richard Simmons, despite arguing at sentencing this was “all about Kenneth Robinson.” Additional people, all significantly older than the Defendant, arrived at his house, and when the second shooting occurred, people jumped into different vehicles. The Defendant at no point was driving any of the cars and certainly was not the leader of the events that night. His significantly older uncle and uncharged codefendant and father figure, Fred Lance, escalated the situation by firing at the original Chrysler. Once the Defendant was inside a car with Richard Simmons, there was no getting out of the vehicle. Mr. Simmons was speeding and determined to get revenge for his car being shot up. Once Kedena Brown’s vehicle was in his sight, both the Defendant and Keon Anderson warned him it was the wrong car and not to shoot. There was additional testimony that Mr. Simmons physically pushed the Defendant out of his way in order to kill Ms. Brown. As a fifteen year old, non-driver, non-shooter, and person who attempted to stop the killing, the Defendant’s culpability is very much diminished.

The sentence of fifty (50) years, which is a de facto life sentence, as applied to the Defendant who was both a juvenile at the time of the incident and was not the shooter and did not

kill or intend to kill Kedena Brown, violates the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution. The Defendant had twice diminished moral culpability in light of the fact that he was a juvenile (*see Roper v. Simmons*, 543 U.S. 551 (2005); *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Aiken v. Byars*, 410 S.C. 534 (2014)) and because he was not the shooter and did not kill or intend to kill the victim (*see Edmund v. Florida*, 458 U.S. 782 (1982); *State v. Peterson*, 287 S.C. 244 (1985)). He is not among the worst juvenile homicide offenders and should not be subject to the equivalent of a life sentence, the ultimate punishment.

### **III. Family Court Relinquished Jurisdiction Under the Pretense that Mitigating Evidence Would be Considered by this Court**

Upon deciding to transfer jurisdiction from Family Court to General Sessions Court, the Honorable Jocelyn Cate stated that the “Juvenile’s youth and attendant circumstances surrounding his youth will be taken into consideration by the general sessions court should he be found guilty by plea or trial in the sentencing phase, as well as all of the other possible mitigating circumstances revealed at this hearing.” She cited *Miller v. Alabama* and *Aiken v. Byars*, and relied on the fact that the General Sessions Court would fully consider mitigating evidence. The order further indicated that sufficient and adequate protection would be afforded to the Defendant in General Sessions Court to fashion an appropriate punitive and rehabilitative sentence. The Family Court relinquished jurisdiction in this case under the pretense of these protections being provided to him after transfer. The current sentence is completely punitive and void of rehabilitative intent.

The State’s theory of the case at the time of the transfer hearing was that the Defendant was the person who fired the fatal shot into Kedena Brown’s car. After years of lying and only

after failing a polygraph examination, Richard Simmons admitted to being the shooter. His admission came too late for the Defendant as he had already been transferred to General Sessions Court. This significant change in the State's theory of the case was never presented to the Family Court judge. Prior to the start of trial, the Defense argued that this Court should remand the case to Family Court given the admission by Mr. Simmons that the Defendant was not the shooter. The Motion to Remand was denied. As South Carolina law provides no right to interlocutory appeal to the Defense of the ruling to transfer jurisdiction, the remand motion was the only remedy available to the Defense to protect the Defendant from the potential imminent harm in General Sessions Court. Of note, the State, however, does have the right to interlocutory appeal a family court denial of the petition for waiver. This is patently unfair, as the harm that juvenile stands to suffer by way of the adult sentencing scheme and loss of substantial liberty rights far outweighs any harm the State may suffer by the Family Court maintaining jurisdiction. This is especially true in this case, where new information regarding the decreased culpability of the Defendant paired with additional information regarding his continued amenability to rehabilitative efforts were never considered by the Family Court.

The promises made by the Family Court in its order relinquishing jurisdiction were not kept by the General Sessions Court. The fifty (50) year sentence was issued without meaningful consideration of the possibility of rehabilitation and without consideration of overwhelming mitigation presented at the sentencing hearing. The Defendant should have been offered a right to interlocutory appeal of the Family Court's order relinquishing jurisdiction, especially in light of the fact that he now stands to remain in prison until what will be his death. The failure of the Court to meaningfully consider the mitigating evidence, as was the intent of the Family Court judge when jurisdiction was transferred, violates the Defendant's rights under the Eighth Amendment to the

United States Constitution and Article I, Section 15 of the South Carolina Constitution, and *Aiken v. Byars*.

#### IV. Failure to Meaningfully Consider Mitigation

It is clear that the intentions of the United States Supreme Court, South Carolina Supreme Court, and the Family Court judge who relinquished jurisdiction in this case to General Sessions Court, were that this Court fully consider the five factors outlined in *Byars* before sentencing the Defendant. The Court, however, failed to meaningfully consider any of the mitigating evidence presented and instead sentenced the Defendant to a fifty (50) year sentence. After briefly highlighting testimony by Dr. Knight with regard to the factors, the Court indicated “we’re here today because Mr. Robinson was in a car from which a shot was fired killing Kedena Brown.” The justification given for the sentence was that he “made a choice” to get in the car, that he had been “given services” (despite testimony that he in fact had not received services from January 2014 through August 2015, with the exception of one mental health assessment and a male mentor who met with him a handful of times), and that he “knew more the impact of losing a parent could be having witnessed shootings in [his] own neighborhood” and “own home.”

The Court failed to meaningfully consider mitigating evidence of the Defendant’s home and community environment, exposure to violence and family criminality, lack of prosocial home environment, poor parental supervision, exposure to negative peer groups, exposure to neighborhood violence, his adolescence and the hallmark features of youth. The Court further failed to meaningfully consider the mitigating scientific evidence, research, and studies that were cited by both Dr. Susan Knight and Dr. Elizabeth Cauffman, as well as the expert opinions offered by both psychologists. The Court additionally failed to meaningfully consider the Defendant’s decreased culpability in the incident, including that he was not the shooter and that there were both

familial and peer pressures affecting him throughout his life and leading up to the incident. Overwhelming evidence was presented by the Defense of the Defendant's rehabilitation at the Department of Juvenile Justice, including testimony that he was a "cut above the rest," a "role model," a "great person," "the type of person I wish I could take home and exemplified everything I want my son to be," and that he had a "heart of gold" and realized at DJJ there was "more that life had to offer."

A sentencing memorandum and packet was also submitted to the Court for review in advance of the hearing and admitted as Defense Exhibit 1 and incorporated into the Defense's presentation.<sup>2</sup> The failure of the Court to meaningfully consider the mitigating evidence violates the Defendant's rights under the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution, and *Aiken v. Byars*.

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<sup>2</sup> A forensic psychological evaluation report by Dr. Susan Knight was provided to the Court on May 29, 2018. On June 1, 2018, a copy of the Defense Sentencing Memorandum and Packet was provided to the Court via email and a hard copy was hand delivered to the Court's mailbox inside the courthouse. The Defense Sentencing Memorandum and Packet included: Defense Sentencing Memorandum, Forensic Psychological Report and C.V. of Dr. Susan Knight, Affidavit and C.V. of Dr. Elizabeth Cauffman, early childhood certificates and photographs, High School Equivalency Diploma, GED Transcript, Commencement Program and Photographs, High School Transcript and Grade Reports, 5 certificates and awards for the Blazer Program, Copy of Defendant's Speech "Too Many Years," Forklift Certificate of Completion, Certificate of Appreciation for Upholstery Program, 2 Certificates of Appreciation for "Willingness to Tell Your Story," Phase 3 Certificate of Achievement, Insiders Award, Birchwood Bulldogs Certificates, Best Welding Student Certificate, Baptism Certificate, Award for Best Kept Room, Honor Roll Certificates, 4 Acts of Pride Certificates, Best Science Student Certificate, 2 certificates for Good/Outstanding Behavior in English class, Award for Most Improved English Student, 11 JROTC Citations and Awards, Photographs of the Defendant including of his upholstery projects, Don't Quit Poem, Obituary of Kenneth Robinson, Sr., Keepsake Blanket photograph, Cards sent to Defendant by DJJ employees, Affidavit and Materials for Vera Dolan actuary study, Sentencing sheet for Montre Brown, DVD containing news story on upholstery program and basketball video, and Transfer of Jurisdiction Order.

## V. Vindictive Prosecution and Sentencing

The sentence imposed by this Court and requested by the State was vindictive and punishment for both exercising the right to go to trial and to appeal his convictions. Prior to trial, the State made a plea offer of 23 years in exchange for a plea to Voluntary Manslaughter. The Defendant declined to accept the plea offer and instead exercised his constitutional right to a jury trial. Following his conviction at trial for Murder, the State offered to negotiate a 30 year sentence but only if he waived his rights to appeal his conviction. When the Defendant further exercised his constitutional rights to an individualized sentencing hearing, the State retaliated by requesting a prison sentence twenty (20) years longer than if he had waived his right to appeal.

The Court at the start of the sentencing hearing had discussions with the parties about taking Life Without the Possibility of Parole off the table by negotiating a cap. The State at that time offered to negotiate a cap of 50 years. The Defense took the position that 50 years was still *de facto* life and the Court then warned the Defense to be "very clear that the punishment for murder is 30 to life" and the Defense took this as a warning that the Court was seriously considering a Life Without Parole sentence. As a result, the Defense felt there was no choice but to accept the cap, despite that the cap was unreasonable and failed to take into account his decreased culpability as a non-shooter and adolescent.

An in chambers meeting was also held during which the parties discussed their understanding of the impact of an agreement to a cap, during which time the Defense indicated an understanding that this would only impact arguing the Motion to Preclude Life Without Parole as a Punishment and that the hearing would still proceed in its entirety. The Court agreed that it would not impact holding a *Byars* hearing, but did comment about this possibly speeding up the process and that perhaps the Defense could streamline its presentation. The State also indicated a

desire to not spend the time it would take to conduct a full hearing on the matter. The Defense indicated that an intention to proceed with its full presentation.

Following the Defense's presentation, the State asked for a sentence more than twice what was originally offered prior to trial if the Defendant waived his right to trial and entered a guilty plea. The requested sentence was also 20 years more than had been offered if the Defendant would waive appellate rights after his conviction. Assistant Solicitor Kidd complained that the Defendant would not cooperate and had been afforded an opportunity after his conviction. His definition of "cooperation" is giving up all his rights. The State also ignored the fact that the Defendant provided cooperation to law enforcement by providing the name of the shooter at the time of his initial arrest. It is not his fault that the State chose not to believe him that Richard Simmons was the shooter.

The State in requesting 50 years was seeking the Court's assistance in punishing the Defendant for exercising his right to trial and not waiving his appeal. A criminal defendant has the right to trial by jury under the 6<sup>th</sup> Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution. In fact, this right as described as "inviolable" in South Carolina. Defendants must be able to exercise the right to trial without fear of injury or retaliation. Defendants also have the right to appeal their convictions and sentences without fear of vindictive sentencing. A trial court abuses its discretion in sentencing when it considers the fact that the defendant exercised his right to a jury trial. *State v. Hazel*, 317 S.C. 368, 370, 453 S.E.2d 879, 880 (1995).

It is a due process violation to punish a person for exercising a protected statutory or constitutional right. *United States v. Goodwin*, 457 U.S. 368, 372, (1982), citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363, (1978). *State v. Fletcher*, 322 S.C. 256, 260 (1996). The State's

positions on sentencing hinged solely on the Defendant waiving his constitutional right to trial and to appeal his conviction. There is no justification for the stark difference in the State's position on what an appropriate sentence was, but to punish the Defendant for going to trial and not waiving his right to appeal. This is evidence of actual prosecutorial vindictiveness, as the State clearly wanted to punish him for exercising his rights. The Court further adopted the State's position on sentencing by giving the Defendant a fifty (50) years sentence, punishing the Defendant for exercising his constitutional right to trial and appeal his conviction and sentencing, in violation his Due Process rights as guaranteed by the 14<sup>th</sup> Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution.

**VI. The Defendant's Prior Juvenile Record as Presented by the State was Inaccurate**

During the State's brief presentation, Assistant Solicitor Kidd indicated that the Defendant had two prior juvenile adjudications from separate incidents that would be considered "strike" offenses under S.C. Code Section 17-25-45, if he had been an adult at the time of those incidents. Specifically, Assistant Solicitor Kidd argued that he had a trafficking offense on his record. This was an inaccurate statement about the Defendant's record. He has never been adjudicated delinquent of any drug related offenses, and any petitions related to allegations of violations of the drug laws of this state, including Trafficking, were dismissed by the 9<sup>th</sup> Circuit Solicitor's Office on August 18, 2015. The Defendant has one set of prior adjudications that included a plea of "no contest" to Assault and Battery of a High and Aggravated Nature and Attempted Armed Robbery. A review of the transcript from the adjudication hearing indicates the decision to enter a no contest plea was made after the 9<sup>th</sup> Circuit Solicitor's Office filed a Petition for Transfer seeking to have

jurisdiction transferred from Family Court to General Sessions Court, despite the Family Court Solicitor's acknowledgment of self-defense issues in the case.

At the time of sentencing in the above-captioned case, the Assistant Solicitor represented to this Court an inaccurate prior record and likened the current convictions to his third strike. He furthered offered no actual proof of the Defendant's prior record. Clearly, the Defendant is not eligible for a mandatory life without parole sentence under the recidivist statute, and arguing that prior adjudications of delinquency for offenses that would be strikes if he was an adult, flies in the face of what the United States Supreme Court has said about juvenile offenders – "children are constitutionally different from adults for purposes of sentencing." *Miller v. Alabama*, 567 U.S. 460, 471 (2012). The Court, however, sentenced the Defendant to a *de facto* life sentence, despite his being ineligible for a life sentence under the recidivist statute and following an inaccurate report by the State of the Defendant's record.

## VII. Disproportionality of Sentence

This Court's sentence of fifty (50) years for the Defendant who was only fifteen years old at the time of the incident, African American, and was not the shooter is disproportionate compared to other sentences across this State. In the Defense sentencing memorandum, examples of other cases across the region were provided. However, the Defense has been able to obtain the following additional information about cases that should be considered by the Court and compared to this case.

### Adolescent Defendant Comparison

- **Jennifer McSharry** (*white female*, age 17 at time of incident, Anderson County, Resentencing Judge-Sprouse): Ms. McSharry was 17 years old at the time of the incident. She accompanied four people, including her

mother to get money from the victim. One of her codefendants shot the victim while Ms. McSharry was waiting in the car. Originally, she received a sentence of LWOP. At her resentencing hearing, Judge Sprouse sentenced her to 30 years.

- In comparison, Kenneth is African American, was age 15 at the time of the incident, and is similarly situated as the non-shooter.
  
- **Rodney Parker** (black male, age 16 at time of incident, Colleton County, Resentencing Judge-Buckner): Mr. Parker was 16 years old at the time of the incident. He shot and killed a grocery store clerk during a robbery attempt with his codefendant. His original sentence was LWOP. At his resentencing hearing, the Judge Buckner sentenced him to 35 years.
  - In comparison, Kenneth was 15 years old and not the shooter. He received a sentence that was 15 years longer than Mr. Parker.
  
- **James Smith** (*white male*, age 17 at time of incident, Union County, Resentencing Judge-Hayes): Mr. Smith and another codefendant shot and killed two men after a drug deal went bad. They further burned the house after killing the victims. He was originally sentenced to LWOP. At his resentencing hearing, Judge Hayes sentenced him to 38 years.
  - In comparison, Kenneth is African American, was age 15, a non-shooter, and did not have two victims. He received a sentence that is 12 years longer than Mr. Smith.
  
- **Anthony Willis** (black male, age 17 at time of incident, Dorchester County, Resentencing Judge-Nettles): Mr. Willis killed an 18 year old after getting into a fight. While out on bail for the murder charge, he was arrested for robbery and carjacking. His original sentence was LWOP. At resentencing, he received 38 years.
  - In comparison, Kenneth was younger and a non-shooter.

- **Terrell Smith** (black male, age 17 at time of incident, Charleston County, Sentencing Judge-Harrington): Mr. Smith was convicted at trial of Murder and Attempted Murder. He was accused of stabbing the victim to death and then attacking the victim's father who walked in on the attack. This Court sentenced him to 35 years.
  - In comparison, Kenneth was younger, not the killer, and had significantly more mitigation and evidence of rehabilitation.
  
- **Matthew Fischer** (*white male*, age 16 at time of incident, Charleston County, Sentencing Judge-Dennis): Mr. Fischer was 16 years old when he stabbed to death a peer and was charged with Murder. The 9<sup>th</sup> Circuit Solicitor's Office reduced the charge to Voluntary Manslaughter and allowed him to plead without negotiated a sentence. Judge Dennis sentenced him to 18 years.
  - In comparison, Kenneth is African American and was younger than Mr. Fischer. Kenneth is also not the actual killer. The State would not reduce the charge to Voluntary Manslaughter unless the plea was to a negotiated 23 year sentence.

#### **Adult Defendant Comparison**

- **Jalann Williams** (black male, age 20 at time of incident, Charleston County, Sentencing Judge-McIntosh): Mr. Williams was 20 years old when he arrested and charged with Murder. He was accused of working in concert with a codefendant to rob the victim and shooting him twice. Following a conviction at trial, he was sentenced to 30 years.
  - In comparison, Kenneth was 5 years younger and did not fire into the car of Kedena Brown.
  
- **Dennis Elvin Cervantes Pavon** (Hispanic male, 33 years old, Charleston County, Sentencing Judge-Harrington): Mr. Pavon was

convicted for stabbing the victim to death in Mount Pleasant. He was sentenced to 30 years after his conviction for Murder at trial.

- In comparison, Kenneth was 18 years younger and was not the actual killer.

- Deshawn Fordham (black male, 20 years old at time of incident, Sentencing Judge-Dickson): He was sentenced to thirty years in prison for Murder and Attempted Murder after a plea. He, along with codefendants, opened fire on a van after seeing its driver cash a check. The passenger was killed.

- In comparison, Kenneth was a non-shooter and 5 years younger.

In consideration of the sentences outlined above, 30 years was the only appropriate sentence in this case that was available to the Defendant while under the jurisdiction of General Sessions court. He was a juvenile at the time of the incident, with decreased culpability due to his age and the hallmarks of youth. Given that he was not the shooter and testimony supported that he tried to stop Richard Simmons from killing Ms. Brown, his level of culpability is decreased. His conduct is not as morally reprehensible as that of an adult, and the Courts have recognized that it is less supportable to conclude a heinous crime committed by a juvenile is evidence of irretrievably depraved character and that a greater possibility exists that a minor's character deficiencies will be reformed. *Roper v. Simmons*, 125 S. Ct. 1183, (2005).

### VIII. Racial Disparity Issues

There has been growing concern in this nation over the racial disparities that exist in our judicial system. The Sentencing Project found that African Americans are incarcerated in state prisons at a rate of 5.1 times the imprisonment of whites. In twelve states, including South

Carolina, more than half the prison population is African American. Ashley Nellis, Ph.D., *The Color of Justice*, <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/#1> (June 14, 2016). The United States Sentencing Commission issued a report on Racial Disparity in Sentencing in November 2017. It was found that black male offenders continue to receive longer sentences than white male offenders – on average 19.1 percent longer. United States Sentencing Commission, *Demographic Differences in Sentencing: An Update to the 2012 Booker Report*, November 2017.

Studies show that black children are perceived as more responsible for their actions than white children of a similar age. This is linked to perceiving these juveniles as older than they actually are. Law enforcement officers have been shown to overestimate the ages of black juveniles by up to 4.5 years. One result of this misperception is the increased likelihood that black children are sentenced as adults. Black children are 18 times more likely than white children to be sentenced as adults, and represent 58% of children sentenced to adult facilities, where they are exposed to a greater risk of assault, sexual abuse, and suicide. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY AND SOC. PSYCHOL. 526, 531 (2014). Assistant Solicitor Kidd attempted to argue with Dr. Knight during her testimony that perhaps because the Defendant appeared older and was tall for his age, perhaps his brain was more developed than others his age. This raises questions of whether or not the Assistant Solicitor himself viewed the Defendant as older and more mature than he truly was based on his physical appearance. This is very concerning. At the time of the trial, he was 18 years old and considerably older than his age at the time of the incident. Regardless, his physical appearance is irrelevant and should have no bearing on anything related to how the State prosecutes his case, the sentence requested by the State, nor the sentence imposed.

The Defense respectfully requests that this Court consider racial disparity issues and reconsider the Defendant's sentence. Of note, two of the defendants who have received re-sentencing hearings pursuant to *Byars* and have received sentences lower than the Defendant were white and older than him. In addition, the State allowed a 16 year old white defendant, Matthew Fischer, to plead to Voluntary Manslaughter (reduced from Murder) without negotiating the prison sentence and allowing the Defense to ask for any sentence within the sentencing range for Manslaughter. The Defendant could only receive a reduction to Voluntary Manslaughter if he agreed to a negotiated sentence of twenty-three years. Mr. Fischer received 18 years, while the Defendant was sentenced to *de facto* life in violation of the Equal Protection Clause and not offered a meaningful opportunity for release.

**IX. The Court Sentenced the Defendant to a *De Facto* Life Sentence without Making a Finding of Irreparable Corruption**

The Defense argued for the Court to sentence to the Defendant to the mandatory minimum sentence of thirty (30) years, or to find the mandatory minimum sentence unconstitutional and sentence him as if he had been convicted of voluntary manslaughter. The Court instead sentenced the Defendant to fifty (50) years. The Court failed to place the burden of proving the Defendant irreparably corrupt beyond a reasonable doubt on the State and the Court did not find the Defendant was irreparably corrupt. Such a finding is necessary to sentence a juvenile to a *de facto* life sentence.

The *Miller* court in its opinion recognized “that children are constitutionally different from adults for purposes of sentencing,” children “have diminished culpability and greater prospects for reform,” and therefore, “they are less deserving of the most severe punishments.” *Id.* at 471. “[T]he distinctive attributes of youth diminish penological justifications for imposing the harshest

sentences on juvenile offenders, even when they commit terrible crimes.” *Id.* at 473. The Court required that sentencing judges “take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime of prison.” *Id.* at 480. The South Carolina Supreme Court in *Byars* held that the youth “must be afforded weight in sentencing.” *Id.* at 543.

In *Montgomery v. Louisiana*, the Supreme Court of the United States recognized that “the starting premise” is the “principle” “that children are constitutionally different from adults for purposes of resentencing” that “result from children’s diminished culpability and greater prospects for reform.” 136 S.Ct. 718, 732 (2016). The Court further noted that “in light of children’s diminished culpability and heightened capacity for change, *Miller* made it clear that appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. *Id.* at 733-734 (internal quotations omitted). As a result, *Miller* “established that penological justifications for life without parole collapse in light of the distinctive attributes of youth.” *Id.* at 734 (internal quotations omitted).

“Because *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status – that is, juvenile offenders whose crimes reflect the transient immaturity of youth.” *Id.* (internal citations and quotations omitted). “Life without parole” is barred “for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” *Id.* Juvenile offenders must be afforded a meaningful opportunity for release unless there has been a finding of irreparable corruption. The Eighth Amendment bans not only Life Without the Possibility Parole sentences, but also those that are the functional equivalent of Life Without the Possibility of Parole. In order

for a judge to sentence a juvenile to the functional equivalent, the judge must make a finding of irreparable corruption proven by the State beyond a reasonable doubt.

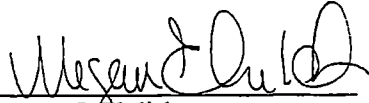
The Defense objects to this Court imposing a *de facto* life sentence without making adequate factual findings under the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution, and *Miller v. Alabama*. The Defense presented adequate evidence that the Defendant's crime "reflects unfortunate yet transient immaturity" as opposed to "irreparable corruption." This Court has not adequately addressed the evidence as demonstrating the Defendant as irreparably corrupt, and thus, the Court cannot sentence to him to a *de facto* life sentence under *Miller*. Furthermore, any finding of irreparable corruption based on the evidence presented at the sentencing hearing would not be supported by the evidence.

This Court allowed its disgust with the killing of a completely innocent victim to dominate its sentencing analysis, as the Assistant Solicitor requested it do. In determining the Eighth Amendment prohibits the death penalty for juveniles, the United States Supreme Court noted that while it could not "deny or overlook the brutal crimes too many juvenile offenders have committed," "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Roper*, 543 U.S. at 570-572. There was no proof beyond a reasonable doubt by the State or finding that exceptional circumstances demonstrated the Defendant was irreparably corrupt. Therefore, this Court should not have sentenced him to the functional equivalent of life, closing the door for any meaningful opportunity for release.

**X. Conclusion**

For the reasons outlined in this motion and any such further grounds as may be offered at a hearing in this matter, the Defendant respectfully requests that the Court reconsider his sentence and impose a thirty (30) year term of incarceration.

Respectfully Submitted,



Megan S. Ehrlich  
Attorney for Kenneth L. Robinson, Jr.

Charleston, South Carolina  
Dated: June 16, 2018

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2018 JUN 15 PM 2:56  
CLERK OF COURT  
BY \_\_\_\_\_

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July 20, 2018

The Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

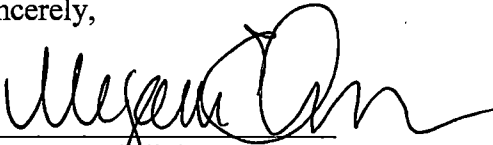
RE: The State v. Kenneth Lamont Robinson, Jr.  
Appellate Case No. 2018-001269

**RECEIVED**  
JUL 26 2018  
SC Court of Appeals

Dear Mrs. Kitchings:

Please find enclosed a copy of Judge Harrington's order denying the Defendant's Motion to Reconsider Sentence. There was no hearing on the matter, and she had the order filed on June 29, 2018. I received notice of her decision through the Clerk's CourtPlus program on June 29, 2018, by way of an alert that an order had been filed.

Sincerely,



Megan S. Ehrlich  
Attorney for Kenneth Lamont Robinson, Jr.  
Charleston County Public Defender's Office  
101 Meeting Street, 5<sup>th</sup> Floor  
Charleston, SC 29401

Enclosure(s): As stated above  
cc: South Carolina Commission of Appellate Defense

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TO:

The Honorable Jenny A.  
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Clerk, S.C. Court of Appeals  
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