THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SPARTANBURG COUNTY
Court of General Sessions

Honorable Edward W. Miller, Circuit Court Judge

Appellate Case Number: 2018-001465

THE STATE .....RESPONDENT.

v.

ERIC DALE MORGAN .....APPELLANT.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

(1) Did the trial court err when it denied Appellant—a juvenile offender serving a life without parole sentence imposed in 2006—a resentencing hearing pursuant to the South Carolina Supreme Court's decision in *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), which granted new sentencing hearings to all juveniles offenders serving previously imposed life without parole sentences?

(2) Did the trial court err in admitting Judge J. Derham Cole's testimony regarding his 2006 decision to sentence Appellant to life without parole, where the testimony was not relevant to the question of Appellant's entitlement to a resentencing hearing and where the State cannot satisfy its burden under *In re Whetstone*, 354 S.C. 213, 580 S.E.2d 447 (2003), to establish the testimony was "critical" to address the question of Appellant's entitlement to a resentencing hearing?

STATEMENT OF THE CASE

When Appellant Eric Dale Morgan was seventeen (17) years old, the State charged him and a teenaged co-defendant with murder and armed robbery. *See* R. p. 2 . Judge J. Derham Cole presided over Morgan's trial. Despite the fact that at the time of Morgan's trial, the United States Supreme Court had already granted certiorari in *Roper v. Simmons* to decide whether the death penalty was categorically disproportionate punishment for juvenile offenders, the State sought the death penalty. *See Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003), *cert. granted, Roper v. Simmons*, 540 U.S. 1160 (Jan. 26, 2004). Judge Cole summarily denied Morgan's request to stay the case pending the outcome in *Roper*, and the case proceeded to trial. In March 2004, a Spartanburg County jury sentenced Morgan to death. R. p. 17.

Less than a year later, *Roper* announced a categorical ban on the execution of juveniles who were under eighteen (18) at the time of their crime. *Roper v. Simmons*, 543 U.S. 551 (2005). Morgan—because he was under eighteen (18) at the time of his crime—timely requested a new sentencing hearing. The State opposed Morgan's request, arguing a hearing was not necessary because there was only one punishment now available for Morgan: life imprisonment without the possibility of parole. *See State v. Morgan*, 367 S.C. 615, 618, 626 S.E.2d 888, 889 (2006). The South Carolina Supreme Court disagreed, explaining that Morgan was categorically shielded from a death sentence (the only instance in which aggravating factors are relevant pursuant to the statute) and was, therefore, allowed to argue he was entitled to a sentence of less than life without parole. *Id.* Following the ruling, Judge Cole held a resentencing hearing and, relying on the "trial record as well as his independent memory of Morgan," imposed a sentence of life without the possibility of parole. *See* R. pp. 2–3. The transcript and record from that sentencing hearing has since been destroyed.[1] R. p. 2.

Beginning in 2012, the legal landscape changed for a second time in a way that impacted Morgan's sentence. First, the United States Supreme Court held that juveniles are protected from mandatory life without parole sentences and, except for "the rare juvenile offender whose crime reflects irreparable corruption," must be given a meaningful opportunity for release. *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012) (quoting *Roper*, 543 U.S. at 573). This is because, the

[1] The March 2018 Order states that the transcript "was destroyed because Morgan did not appeal or make a motion to preserve the transcript." *Id.* South Carolina Appellate Court Rule 607(i) provides that a court reporter "shall retain the primary and backup tapes of a proceeding for a period of at least five (5) years after the date of the proceeding." Rule 607(i), SCACR. The "proceeding" at issue here ended on March 17, 2006, meaning the court reporter likely destroyed the transcript some time after March 17, 2011. Morgan filed a post-conviction petition challenging issues related to his guilt or innocence; the court denied his petition in 2008. March 2018 Order at 2.

Court explained, "children are different": their "immaturity, impetuosity, and failure to appreciate risks and consequences" make them less culpable and more open to rehabilitation, as a class, than adults. *Id.* at 478, 481. Two years later, the South Carolina Supreme Court held that *Miller* applies retroactively in South Carolina, not only to juveniles serving mandatory sentences of life without parole, but to *all* juveniles serving sentences of life without parole. *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).

Aiken flowed from the well-established principle that a new rule of criminal procedure must apply retroactively if it "prohibits 'a certain category of punishment for a class of defendants because of their status or offense.'" *Id.* at 540, 765 S.E.2d at 575 (quoting *Saffle v. Parks*, 494 U.S. 484, 494 (1990)). *Miller* "create[d] a new, substantive rule" because it "plainly excludes a certain class of defendants—juveniles—from specific punishment—life without parole absent individualized considerations of youth." *Id.* at 540–41, 765 S.E.2d at 575. And that new rule applied in South Carolina to all juveniles serving sentences of life without parole because *Miller* "establish[ed] an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." *Id.* at 543, 765 S.E.2d at 577.

Although our Supreme Court did not categorically bar the imposition of life without parole for juveniles, it held that all juveniles sentenced to life without parole prior to *Miller* were entitled to new, individualized sentencing hearings "where the mitigating hallmark features of youth are fully explored." *Id.* at 545, 765 S.E.2d at 578. Specifically, a sentencing court "must" consider:

> (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."

Id. at 544, 765 S.E.2d at 577 (quoting *Miller*, 567 U.S. at 477–78) (alterations in original). The Court held new sentencing hearing were required for consideration of these factors even if their prior sentencing hearing addresses the issue of youth because "although some of the [prior sentencing] hearings touch[ed] on the issue of youth, none of them approach[ed] the sort of hearing envisioned by *Miller*." *Id.* at 543, 765 S.E.2d at 577.

As he did in the wake of *Roper*, Morgan filed a motion for resentencing, this time pursuant to *Aiken*, and the Supreme Court vested jurisdiction with Judge Edward W. Miller. *Morgan v. State*, 417 S.C. 69, 789 S.E.2d 41 (mem.) (2016). Again, the Solicitor's Office opposed Morgan's motion. R. p. 15 (State's Mot. to Dismiss Def.'s Mot. for Resentencing (April 12, 2017) ("Motion to Dismiss")). The Motion to Dismiss argued that, though Morgan's resentencing occurred six years prior to *Miller*, Morgan was not entitled to resentencing because he "already had a resentencing hearing [in 2006] that has met the requirements set out in [*Aiken*]." R. p. 16 ¶ 5.

Judge Miller held a hearing on the State's Motion to Dismiss. Over Morgan's objections, Judge Miller permitted the State to call Judge Cole as a witness.[2] *See* R. pp. 47–49. In support of calling the judge, Solicitor Barnette explained that he intended to ask Judge Cole "obviously what factors he considered" when he sentenced Morgan to life without parole in 2006. R, p. 46, lines 11–12. According to the State, eight years before *Aiken* was decided, without the benefit of a full presentation from Morgan's counsel and without guidance from *Aiken*, *Miller*, or any of their

[2] Morgan's counsel objected to Judge Cole's testimony on two independent bases. First, counsel argued that calling a judge as a witness regarding a case in which the judge previously presided is impermissible absent extenuating circumstances not present here. R. p. 47, lines 21–24. Second, counsel argued that Judge Cole's testimony was not relevant to the question before Judge Miller in 2017 because *Aiken* mandated *de novo* sentencing hearings for all affected juveniles. R. p. 47, lines 24–25, p. 48 lines 1–5.

progeny, "Judge Cole considered [the *Aiken*] factors, looked at them and so forth," and Morgan should therefore be barred from resentencing. R. p. 46, lines 19–20.

Consistent with that line of reasoning, Solicitor Barnette asked Judge Cole to recall his decision-making process in 2006 when he sentenced Morgan to life without parole. R. pp. 49–56. The Solicitor asked Judge Cole about his experience with children and asked him if he had "been a youth before" or "had children that's been youth." R. p. 56, lines 21–24. Judge Cole then testified as follows:

> I considered everything that was presented, and I certainly considered the circumstances relating to the crime and the circumstances relating to the defendant that was presented and considered his culpability and his participation. And, of course, I didn't ignore the fact that 12 randomly chosen citizens thought that he should be sentenced to death based upon the nature of the crime and his particular circumstances. That, of course, is not constitutionally permitted now, but it's not something that should be ignored upon the fact that those selected to hear the facts and apply the law thought he should be put to death. And had he been 16, if the crime had happened 16 days later we wouldn't be sitting here today. . . . So I thought the sentence of life in prison that I imposed was completely proportional to the crime that was committed.

R. p. 60, lines 17–25, p. 61 lines 1–5, 7–9. On cross examination, Judge Cole acknowledged that he did not "have a court's instructions on [the *Aiken*] factors" and did not make any specific findings relevant to the factors because, he explained, "I'm not required to." R. p. 63, lines 1–6.

The court granted the State's Motion to Dismiss, adopting the State's reasoning: Morgan has already been given enough process and "[i]n all litigation, at some point, for the benefit of interested persons there needs to be finality as to the judicial decisions made." R. p. 6. Judge Cole's testimony that he had anticipated and considered the *Aiken* factors in 2006, eight years before *Aiken* was decided, was central to the court's decision: because "Judge Cole properly analyzed and considered the necessary youth characteristics when resentencing Morgan to life without parole,"

"it would be improper to have another resentencing hearing with the objective to either affirm or set aside Judge Cole's 2006 ruling." R. p. 4. Morgan filed a motion pursuant to South Carolina Rule of Civil Procedure 59(e), which the court denied.[3] R. p. 7. This appeal followed.

ARGUMENT

I. MORGAN IS ENTITLED TO A *DE NOVO* SENTENCING HEARING TO CONSIDER THE *AIKEN* FACTORS FOR THE FIRST TIME.

Like all the other juveniles sentenced to life without parole before *Aiken*, Morgan is entitled to a new sentencing hearing to present evidence and have a judge formally consider the factors set forth by the Supreme Court. *Aiken* mandated that all juvenile offenders serving life without parole sentences in South Carolina receive new sentencing hearings. Morgan is a juvenile offender serving a life without parole sentence and is entitled to a new sentencing hearing.

In holding to the contrary, the trial court misconstrued *Aiken*'s mandate. *Aiken* did not hold that juvenile offenders are entitled to a review of their prior sentencing hearing to determine if the prior hearings considered youth (the review conducted in the court below). Rather, *Aiken* unambiguously held that, as a matter of law, all juveniles sentenced to life without parole prior to the Court's decision were entitled to new sentencing hearings. 410 S.C. at 545, 765 S.E.2d at 578 ("We hold the principles enunciated in *Miller v. Alabama* apply retroactively to these petitioners, to those similarly situated, and prospectively to all juvenile offenders who may be subject to a sentence of life imprisonment without the possibility of parole. Accordingly, any individual affected by our holding may file a motion for resentencing."). The remedy *Aiken* announced is

[3] The Rule 59(e) motion raised the same arguments that Morgan now raises on appeal: (1) *Aiken* "requires the resentencing court to conduct a sentencing hearing *de novo* and consider the factors enumerated by the Court based on its interpretation of *Miller*," R. p. 30; and (2) Judge Miller improperly allowed Judge Cole to testify, when his testimony was irrelevant and prejudicial, R. p. 31 n.4.

categorical, meaning that all juveniles who were serving life without parole in South Carolina at the time *Aiken* issued are entitled to new, *Aiken*-compliant sentencing hearings, regardless of what kind of hearing they previously received. *See id.* at 543–44, 765 S.E.2d at 577. Simply put, if Morgan fits within the category of people covered by *Aiken*, he is entitled to the form of procedural relief described by *Aiken*.

A. Morgan Is a "Similarly Situated" Individual under *Aiken*.

Aiken defined the class of people to whom it applied as being composed of individuals who shared two common criteria: (1) they were "convicted for homicide offenses while they were juveniles"; and (2) they "were sentenced to life without parole according to existing sentencing procedures, which made no distinction between defendants whose crimes were committed as an adult and those whose crimes were committed as a juvenile." *Aiken*, 410 S.C. at 537, 765 S.E.2d at 573. The State does not appear to dispute that Morgan satisfies both of those criteria: (1) he was convicted of the offense of murder committed at age seventeen (17); and (2) he was sentenced to life without parole under the sentencing procedures in place in 2006 (eight years prior to *Aiken*). *See* R. pp. 3, 15. *See also Morgan*, 367 S.C. at 618 n.2, 626 S.E.2d at 889 n.2 ("Both the state and appellant agree that appellant was seventeen years old at the time of the murder.").

In addition, the State itself recognized in its filings to the U.S. Supreme Court in *Aiken* that *Aiken* defined its class members as "shar[ing] two important characteristics":

> First, each Respondent was given the opportunity to present evidence in mitigation without any apparent restrictions. Second, the life without parole sentences imposed were not mandatory. Instead, the sentencing judge in each case had discretion to impose something less than life without parole for the relevant convictions.

Petition for Writ of Certiorari, *Byars v. Aiken*, 135 S. Ct. 2379 (2015), 2015 WL 738556, at *5 (Feb. 9, 2015). The fact that at Morgan's 2006 sentencing he had an opportunity to present evidence in mitigation and the life without parole sentence he received was not mandatory

therefore is irrelevant; by the State's own account of *Aiken*, Morgan fits within the class of people affected by the decision. As the State explained, *Aiken* held that juvenile homicide offenders sentenced to life without parole in South Carolina are serving "sentences [that] violate the Eighth Amendment under *Miller*" and therefore "Respondents and those similarly situated are entitled to resentencing pursuant to the United States Constitution." *Id.* at *7.

This is enough to resolve the present appeal: Morgan is "similarly situated" to *Aiken*'s named petitioners. He—like every other juvenile in South Carolina who was sentenced to life without parole before *Aiken*—is entitled to a resentencing hearing.

B. Morgan's 2006 Sentencing Hearing Could Not Have Complied with *Aiken* and Denying Him a Resentencing Would Circumvent the South Carolina Supreme Court's Mandate.

Judge Cole could not have complied with *Aiken* in 2006 because *Aiken* was not decided for another eight years and *Miller* for another six. Moreover, *Aiken*'s relief is categorical; it does not distinguish between pre-*Aiken* hearings that considered youth and those that did not. Thus, the fact that Morgan had a sentencing hearing in 2006 cannot supplant the constitutional necessity for a new sentencing hearing now.

As the United States Supreme Court explained in *Montgomery v. Louisiana*, "*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge must take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" 136 S. Ct. 718, 733 (2016) (quoting *Miller*, 567 U.S. at 480). Based on the same reasoning from *Miller*, *Aiken* mandated that when a juvenile faces a sentence of life without parole, "he must receive an individualized hearing where the mitigating hallmark features of youth are fully explored." *Aiken*, 410 S.C. at 545, 765 S.E.2d at 578 (citing *Miller*, 567 U.S. at 469). Because Morgan was sentenced prior to the decisions in *Miller* and *Aiken*, no judge has ever "fully explored" the "hallmark features of youth" as required under the Eighth

Amendment and Morgan is entitled to resentencing under *Aiken*. That Judge Cole may have considered Morgan's youth when he gave him life without parole in 2006 is of no significance because he could not have "fully explored" Morgan's youth to ensure that he was giving it the constitutionally appropriate weight required by *Miller* and *Aiken*, which had not yet been decided. *Id.* Those cases lay out the required procedure for a sentencing hearing when the person being sentenced was a juvenile at the time of the offense and is facing life without parole. *See id.* at 544, 765 S.E.2d at 577 (detailing the five *Aiken* factors). Neither Judge Cole nor Judge Miller gave Morgan that process.

The record below makes this clear. Judge Cole explained at the hearing on the State's Motion to Dismiss that he did not make any findings on the *Aiken* factors. R. p. 63, lines 4–6. Moreover, given that *Aiken* was not part of the legal framework in 2006, Morgan's attorneys did not present evidence related to the *Aiken* factors and the hallmarks of youth at Morgan's 2006 sentencing.[4] As the Public Defender Association of South Carolina explained to our Supreme Court in an amicus brief in *Aiken*, "because the sentencing judge [prior to *Miller*] wasn't required to consider the mitigating evidence of youth, defense attorneys were not presenting that evidence."[5] Br. for The S.C. Pub. Def. Ass'n as *Amicus Curiae* in Support of Pets., *Aiken*, 410 S.C.

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[4] Even if Judge Cole had clairvoyantly anticipated and applied *Aiken*, Morgan would still be entitled to a remand for a new hearing because an appellate court cannot review a record that is silent with respect to the *Aiken* factors. *See State v. Spears*, 403 S.C. 247, 256–57, 742 S.E.2d 878, 883 (Ct. App. 2013) ("[R]emand is appropriate when the appellate court is unable to determine from the record [how the trial court applied the facts]."); *State v. Tillman*, 320 S.C. 61, 64, 463 S.E.2d 94, 96 (Ct. App. 1995) (remanding for fact-finding "[i]n view of the shared responsibility of the court, the solicitor, and defendant to make an adequate record for appellate review").

[5] Specifically, pre-*Miller* and *Aiken*, "there were no mitigation training programs designed for the development of mitigation evidence in juvenile LWOP cases"; "mitigation investigations did not substantially meet the standard of a capital mitigation investigation"; and the mitigation presentations that did happen in cases involving juveniles facing the possibility of a life without parole sentence "correspondingly, were *not* substantially at the same level of a capital mitigation

534, 765 S.E.2d 572, No. 2012-213286, at *18–19 (July 30, 2013). This is because "[u]ntil *Miller*, the standard of practice for defense attorneys was conducted under the legal assumption that LWOP sentences for juveniles were constitutionally permissible." *Id.* at *18. Thus, before *Miller* and *Aiken*, defense attorneys representing individuals like Morgan did not investigate, prepare, or present juvenile mitigation cases that are constitutionally sound under the standard in place today. Even if Judge Cole had predicted *Miller* and *Aiken* as a matter of law, he could not have interpreted them in the context of salient facts in Morgan's case because Morgan's attorneys (by no fault of their own) did not present that information to the court. In short, when Judge Cole sentenced Morgan to life without parole, he did so without the benefit of the legal framework or constitutionally relevant facts. Such a hearing cannot be considered consistent with *Aiken*.

The *Aiken* Court took exactly this situation into account when making its remedy categorical. The Court was aware that some of the individuals who would be affected by the opinion had been sentenced to life without parole after hearings that took youth into account. *Aiken*, 410 S.C at 543, 765 S.E.2d at 577 ("some of the hearings [for the named petitioners] touch[ed] on the issues of youth"); *see also id.* at 549–51, 765 S.E.2d at 580–81 (Toal, C.J., dissenting) (detailing all of Angelo Ham's sentencing hearing, including evidence that a doctor recommended that he remain in juvenile court; that he was "easily influenced by others" and succumbed to peer pressure; that he had a broken family structure; and that he was the victim of various forms of abuse). Indeed, the categorical nature of the majority's rule was the dissent's primary target: "[I]t strikes me as absurd that the majority orders resentencing for *all* petitioners

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presentation, because the pre-sentence investigation was itself not at that same (or at least substantially the same) level." *Id.* at *19. *See also Aiken*, 410 S.C. at 544-54, 765 S.E.2d at 577 (recognizing "the type of mitigation evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings, in addition to the factors illustrated above").

without considering the adequacy of the original hearings." *Id.* at 552, 765 S.E.2d at 581–82 (Toal, C.J., dissenting). Nevertheless, the majority found that "although some of the hearings touch[ed] on the issue of youth, none of them approach[ed] the sort of hearing envisioned by *Miller*." *Id.* at 543, 765 S.E.2d at 577. Regardless of the evidence related to youth presented at pre-*Aiken* sentencing hearings, "the sentencing hearings . . . suffer[ed] from a constitutional defect—the failure to examine the youth of the offender thought the lens mandated by *Miller*." *Id.* at 552, n.8, 765 S.E.2d at 577, n.8. Because Judge Cole did not have the benefit of the "lens mandated by *Miller*," any hearing held in 2006 was constitutionally deficient.[6]

II. THE TRIAL COURT ERRED WHEN IT PERMITTED JUDGE COLE TO TESTIFY.

A. Judge Cole's Testimony Is Not Relevant and Unduly Prejudicial.

The court below erred in permitting Judge Cole to testify because his testimony is not relevant to the sole legal question at issue in this case: whether Morgan is entitled to a new sentencing hearing. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." *State v. Lyles*, 379 S.C. 328, 337, 665 S.E.2d 201, 206 (Ct. App. 2008) (internal quotation marks omitted). As explained above, whether Morgan is entitled to resentencing is a pure question of law whose answer depends only on the mandate from *Aiken* and Morgan's status as a juvenile offender serving a life without parole sentence. What Judge Cole thought about Morgan's sentence, how he arrived at his decision to issue that sentence, and what evidence he may or may not have considered in reaching that decision are not "fact[s] of consequence to the determination of the action." Rule 401, SCRE. Those

[6] This fact refutes Judge Miller's reasoning that Morgan is not entitled to a new hearing because "[u]nlike the hearings at issue in *Aiken v. Byars*, where age was only mentioned as a 'vague plea for mercy,' Judge Cole carefully and thoughtfully considered Morgan's youth at the time of the murder." R. p. 5. Even if Judge Cole had given Morgan a full death penalty-like sentencing hearing where he put on the record the substantial weight he was affording Morgan's youth, Morgan would *still* be entitled to a new hearing post-*Aiken*.

considerations do not "tend[] to establish or make more or less probable" Morgan's legal entitlement to a new sentencing hearing. *See Lyles*, 379 S.C. at 337, 665 S.E.2d at 206.

Moreover, "[w]hen evidence's prejudicial effect outweighs its probative value, it should be excluded, even if otherwise relevant." *Id.* at 338, 665 S.E.2d at 206 (citing Rule 403, SCRE). "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *Id.* (internal quotation marks omitted). Judge Cole's testimony is precisely the kind of unduly prejudicial evidence contemplated by Rule 403 because the determination of whether *Aiken* requires that Morgan be resentenced is Judge Miller's to make, not Judge Cole's. That is a pure question of law, and Judge Cole's opinion should have played no role in Judge Miller's legal analysis. Nevertheless, Judge Miller deferred to Judge Cole's determination. *See* R. p. 4 (declining to revisit Morgan's 2006 sentence because it was not "improperly conducted" and "the rule of comity stands for the proposition that, absent a significant and substantial change in circumstances, judge at the same jurisdictional level cannot overrule each other"). It is clear, then, that Judge Cole's testimony "suggest[ed] a decision on an improper basis," namely, Judge Cole's prior determination about what sentence was proper for Morgan (as opposed to whether Morgan is entitled to resentencing). On either evidentiary ground—relevance or prejudice—Judge Miller erred in admitting Judge Cole's testimony.

B. The State Has Not Met Its Burden under *Whetstone*.

Judge Cole's testimony was inadmissible for second, independent reason because, as a general rule, a judge should not testify "as a witness concerning actions taken in his official capacity."[7] *See In re Whetstone*, 354 S.C. 213, 215–16, 580 S.E.2d 447, 448 (2003); *see also*

[7] This rule stems from two common-sense intuitions about the role of judges. First, as Judge Miller's decision demonstrates, a judge's testimony is likely to be prejudicial and thereby undermine the appearance of impartiality. Second, a judge's belief about the propriety of actions he or she has taken his or her official capacity is almost never relevant to a later in time legal issue;

Terrell v. United States, 6 F.2d 498, 499 (4th Cir. 1925) ("The danger to the dignity of the bench, of subjecting its impartiality to doubt and of placing the defendant at an unfair disadvantage by admitting the presiding judge as a witness is very obvious."). *Whetstone*'s rule—applicable only to the testimony of a judge—is the common-law counterpart to Rule 606(b), which prohibits jurors from "testify[ing] as to any matter or statement occurring during the course of the jury's deliberations" except where the juror has been influenced by "extraneous prejudicial information." Rule 606(b), SCRE. There is an exception where a judge's testimony is "critical" and "can be obtained by no other means." *Whetstone*, 354 S.C. at 216, 580 S.E.2d at 448. However, no published case from South Carolina has ever recognized a situation in which a judge's testimony satisfies that exception. This is at least in part because under *Whetstone*, the party proffering a judge's testimony must meet an extremely high evidentiary standard. *See id.* at 217, 580 S.E.2d at 449 (quashing a post-conviction petitioner's subpoena directed at his trial judge because "[n]o relevant need for [the judge's] testimony [could] overcome[] the presumption judges should not be called to testify regarding matters from a case over which they previously presided"). The State cannot meet that standard here.

Judge Cole's testimony is not "critical" to the issue of whether Morgan is entitled to a resentencing hearing. Judge Cole's testimony regarding the 2006 resentencing hearing is not relevant to the purely legal question of Morgan's entitlement to a new sentencing hearing under *Aiken*. Additionally, the State, as the party proffering testimony of a judge regarding a case over which the judge presided, bears the burden of establishing that there is no alternate means of obtaining the information they seek to put before the court now. *Id.*; *see also Harris v. State*, 377

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whether or not the judge believes that he or she applied the law correctly is not the same as whether he or she in fact applied the law correctly. *See generally* 86 A.L.R.3d 633, § 2(a) (1978).

S.C. 66, 77, 659 S.E.2d 140, 146 (2008) (concluding that the party who carried the burden of proving up a claim could not satisfy that burden where he failed to move to preserve the transcript under Rule 607(i)), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). A transcript of the record existed as recently as 2011 but the State did not move to preserve it. A party cannot assert that a piece of evidence is critical, allow that piece of evidence to be destroyed, and then argue that the evidence is unavailable and the trial judge must therefore testify about it. *See Harris*, 377 S.C. at 77, 659 S.E.2d at 146. After all, it is the State and not Morgan—an indigent criminal defendant who has been incarcerated since he was a minor—who seeks to introduce Judge Cole's testimony in lieu of a transcript. The State here has offered "[n]o relevant need" for Judge Cole's testimony that could "overcome[] the presumption judges should not be called to testify regarding matters from a case over which they previously presided." *Whetstone*, 217, 580 S.E.2d at 449.

CONCLUSION

Aiken mandates that juveniles who received life without parole sentences pre-*Aiken* are entitled to a new sentencing hearing where their youth can be considered within the *Miller* and *Aiken* framework. Its relief is categorical, such that any juvenile offender serving a life without parole sentence in South Carolina is entitled to a new hearing. Morgan satisfies those two criteria and he is therefore entitled to an *Aiken*-compliant sentencing hearing. This Court should remand to the trial court with instructions to conduct such a hearing.

Respectfully submitted,

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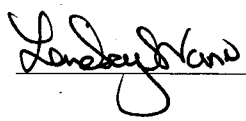

November 21, 2019.