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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Petition for Writ of Certiorari to the Court of Appeals
Appeal from the Administrative Law Court
The Honorable Ralph King Anderson, III., Chief Administrative Law Judge

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Op. No. 6021 (S.C. Ct. App. Filed Nov. 18, 2023)

Case No. 2023-001750

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STEWART BUCHANAN,

PETITIONER,

v.

S.C. DEPT. OF PROBATION, PAROLE & PARDON SERVS,

RESPONDENT.

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# RETURN TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS

## STATEMENT OF ISSUE ON CERTIORARI

Whether the Court of Appeals correctly decided that recent changes in the law regarding the sentencing of juvenile criminal defendants have not been extended to parole consideration hearings and therefore the Parole Board is not required to make additional findings of fact regarding the inmate's youth at the time of the commission of the crime before it can deny the inmate parole?

## STATEMENT OF THE CASE

On May 18, 1973, Petitioner, at age seventeen, broke into his neighbor's house in the early morning hours. His neighbor woke and fled the house, and Petitioner stabbed her to death in the front yard. After trial he received a life sentence, with parole eligibility after the service of ten years.

Since becoming parole eligible in 1983, Petitioner has appeared before the Parole Board for consideration of release to parole in the ensuing years on a bi-annual basis. Each time, the Board denied him parole. In November, 2018, Petitioner again appeared before the Board, which denied him parole with the following reasons for rejection: (1) nature and seriousness of the offense; (2) an indication of violence in this or a previous offense; and (3) the use of a deadly weapon in this or a previous offense.

Petitioner appealed this routine denial of parole to the Administrative Law Court (ALC), arguing that recent U.S. Supreme Court cases as well as recent South Carolina Supreme Court cases require the Parole Board to make additional factual inquiries based on the "hallmark characteristics of youth" before it may deny him parole. After the ALC dismissed the appeal, Petitioner appealed to the Court of Appeals, which upheld the ALC's dismissal. Petitioner now petitions this Court to grant certiorari, again arguing that recent case law now requires inmates who committed their crimes as juveniles to be considered with a different process than inmates who committed their crimes as adults, mirroring the holding of Aiken v. Byars. For the reasons set forth below, Respondent would request this Court to deny the petition.

## STANDARD OF REVIEW

In an appeal from an ALC decision, the Administrative Procedures Act (APA) provides the appropriate standard of review. S.C.Code Ann. § 1–23–610(B) (Supp.2012).

This Court will only reverse the decision of an ALC if that decision is:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) (a) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

*Id.* "The [C]ourt may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Id.* (alterations added). In determining whether the ALC's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached. Hill v. S.C. Dep't of Health and Envtl. Control, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010).

"An administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections involving the loss of the opportunity to earn sentence-related credits pursuant to Section 24-13-210(A) or Section 24-13-230(A) or an appeal involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services." S.C.Code Ann. § 1–23–600(D) (Supp.2024).

## ARGUMENT

**The Court of Appeals did not err when it determined legal precedent constrained it to uphold the Parole Board's denial of parole because due process and the Eighth Amendment do not require a change to the Board's procedures for consideration of parole for inmates who committed their offenses as juveniles, and that it would fall on the Legislature to enact changes to the parole system, not the appellate courts.**

### I. The case law regarding juvenile defendants refer to sentencing, not parole.

Respondent submits that the Court of Appeals did not err when it upheld the Administrative Law Court's determination that neither the United States Supreme Court nor this Court has required specific parole criteria regarding the defendants' youth be considered when granting or denying parole for inmates who committed their crimes when they were juveniles. Therefore, this Court does not need to further address the ruling by issuing a writ of certiorari.

Petitioner speaks of a "sea change" in the law regarding sentencing of juvenile criminal defendants, but fails to acknowledge that the tides have been steadily receding ever since Montgomery v. Louisiana, 577 U.S. 190, 136 S.Ct. 718 (2016).

Petitioner is correct that the United States Supreme Court in 2005 began issuing a series of decisions addressing juvenile sentencing, first with Roper v. Simmons, 543 U.S. 551 (2005) prohibiting the death penalty for juvenile defendants. The Court followed that with Graham v. Florida, 560 U.S. 48 (2010), holding that juvenile defendants may not be sentenced to life in prison without the possibility of parole for non-homicide offenses. Lastly, the Court in Miller v. Alabama, 567 U.S. 460 (2012), held that juvenile defendants may not be sentenced to life without the possibility of parole for homicide under a mandatory sentencing scheme, a holding later held to be a substantive rule of constitutional law and therefore to be applied retroactively. Montgomery, 577 U.S. at 212, 136 S.Ct. at 736.

The "sea change" firmly stopped, however, at Montgomery, because subsequent cases such as Jones v. Mississippi, 141 S.Ct. 1307 (2021) walked back the Miller ruling, holding that Miller does *not* require a finding of permanent incorrigibility before a sentencing judge may impose a life without parole sentence upon a juvenile defendant. Summing up the "series of Eighth Amendment cases applying the Cruel and Unusual Punishments Clause, [the U.S. Supreme Court] has stated that youth matters in sentencing." Jones at 1314. That being said, the Court rejected the assertion that specific findings of permanent incorrigibility or other justifications are necessary before a sentencing court may impose life without the possibility of parole. Id. at 1313.

This Court has duly followed this series of cases, beginning with Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). Finding that although Miller did not prohibit a life without parole sentence for a juvenile defendant, Aiken instructed sentencing courts consider five factors of juvenile defendants before imposing a life without parole sentence:

> (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."
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> Id. at 544, 765 S.E.2d at 577 (quoting Miller, 567 U.S. at 477–78, 132 S.Ct. 2468).

Importantly, these five factors must be considered by a sentencing court before ordering a juvenile defendant to a sentence of life *without* parole. In all other sentencing situations, this Court has declined to extend the *Aiken-Miller* factors.

For example, in State v. Slocumb, 426 S.C. 297, 827 S.E.2d 148 (2019), this Court determined that Graham's prohibition on life without parole sentences for nonhomicide offenses does not apply when a sentencing court imposes multiple consecutive sentences that amount to a de facto life sentence without parole. In Slocumb, the juvenile committed two series of heinous crimes, the first as a thirteen-year-old, and the second at age sixteen. He was eventually sentenced to an aggregate of 130 years, all of which were "no parole" sentences per S.C. Code 24-13-100, and eighty-five percent crimes. This Court recognized that Graham and the Eighth Amendment only expressly prohibit life without parole sentences for juveniles convicted of nonhomicide crimes and clearly did not extend the same prohibition to de facto life sentences. Id. at 309, 827 S.E.2d at 154. Consequently, this Court did not require the sentencing court to consider *Aiken-Miller* factors in Slocumb, stating, "we believe the proper course is to respect the Supreme Court's admonition that lower courts must refrain from extending federal constitutional protections beyond the line drawn by the Supreme Court." Id. at 314-15, 827 S.E.2d at 157.

Similarly, this Court declined "to ignore the confines of the holdings of the Supreme Court and instead extend the rationale underlying the holdings" in State v. Smith, 428 S.C. 417, 420, 836 S.E.2d 348, 350 (2019), when it found constitutional the mandatory minimum sentence of thirty years for the crime of murder for juvenile defendants.

This Court relied on Smith when it recently decided Jones v. State, 440 S.C. 14, 889 S.E.2d 590 (2023), upholding the constitutionality of S.C. Code 63-19-20(1). Again, even though emphasizing circuit courts must consider the *Aiken-Miller* factors of youth during sentencing pursuant to that section, this Court reiterated its refusal to extend "the rationale underlying the holdings" to new areas of the law. Id. at 27, 889 S.E.2d at 598.

Clearly, Petitioner is calling upon this Court to "ignore the confines of the holdings" in its argument that the Parole Board must specifically consider *Aiken-Miller* factors during parole hearings when there is no such determination from the United States Supreme Court. Without a mandate from the U.S. Supreme Court that the Eighth Amendment requires specialized parole consideration for inmates who committed their crimes as juveniles, Petitioner is reduced to arguing that the line of cases from *Roper* to *Graham* to *Miller* to *Montgomery* all point to some inevitability that the Supreme Court will someday change the rules for inmates being considered for parole. However, this hoped-for outcome is far from inevitable and is contrary to the restrained approach now employed by this Court.

Furthermore, Petitioner is already receiving the remedy – parole hearings – that the U.S. Supreme Court proscribed to address the issue. "A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." Montgomery, 577 U.S. at 212, 136 S.Ct. at 736. The U.S. Supreme Court did not say that those parole considerations must look any different from regular hearings though it could very well have done so.

Importantly, the United States Supreme Court has never established an inherent right for inmates to be released to parole. Indeed, there is no constitutional right of a convicted person to be conditionally released before the expiration of a valid sentence. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100 (1979).

Even more detrimental to Petitioner's arguments, the United States Supreme Court has *specifically* stated that even nonhomicide juvenile offenders are not entitled to eventually receive parole. "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime." Graham, 560 U.S. at 75.

If the Supreme Court specifically allowed for the possibility that a non-homicide juvenile offender would conceivably never be granted parole, then clearly a juvenile offender who committed homicide may also never be granted parole. This being the case, there is simply no support for Petitioner's request for this Court to mandate consideration of the *Aiken-Miller* factors by the Board.

Thus, Respondent urges this Court to deny this request for a grant of certiorari. Petitioner seeks to elicit sympathy for his years of incarceration and repeated denials of parole by the Parole Board. Despite the Board having the sole authority over parole release decisions[1] and Petitioner having no right to parole,[2] he is seeking certiorari hoping that this Court will override the Board's own decision-making process through mandated requirements that he and others will no doubt read as an expectation of parole. Everything about his Petition belies a belief in, and expectation of, parole as a right. His status as an inmate who committed his offense as a juvenile makes him no more entitled to release to parole than any other inmate. He already is eligible for parole, which satisfies any constitutional requirements. "A State may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." Montgomery, 136 S.Ct. at 736.

This Court should not entertain this Petition. Respondent respectfully submits that requiring *Aiken-Miller* factors be considered before the Board can deny Petitioner parole would be "ignor[ing] the confines of the holdings of the Supreme Court and instead extend[ing] the rationale

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[1] "Undoubtedly, the Parole Board is the sole authority with respect to decisions regarding the grant or denial of parole." Cooper v. S.C. Dep't of Probation, Parole and Pardon Services, 377 S.C. 489, 499, 661 S.E.2d 106, 111 (2008).

[2] "Parole is a privilege, not a right," Id. at 496, 661 S.E.2d at 110 (Citing Sullivan v. S.C. Dep't of Corr., 355 S.C. 437, 443 n. 4, 586 S.E.2d 124 127 n.4 (2003)).

underlying the holdings." Slocumb at 420, 836 S.E.2d at 349-50. This Court has previously declined to take this step, and Respondent respectfully requests this Court do so again.

## II. The procedures of the Parole Board are sufficient to safeguard all inmates' limited due process rights, including those of inmates who committed their offenses as juveniles.

Petitioner argues that due process requires he receive a "meaningful" opportunity for parole, ignoring the fact that he regularly appears before the one body in the state with the authority to grant parole, albeit in its own discretion. Clearly, his definition of a "meaningful" opportunity for parole is results-driven. Under Petitioner's logic, because he has not yet received parole, his opportunities to date must therefore not have been meaningful.

Respondent submits this argument should not be seriously considered by this Court. Granting certiorari to explore what a "meaningful" opportunity for parole is supposed to look like would only cloud the clear and established procedures previously laid out by this Court in the cases of Cooper[3] and Compton.[4] From Petitioner's perspective, the only "meaningful" opportunity for parole is the one in which he receives parole. Yet regardless of how understandable such a position may be coming from an inmate, South Carolina law only affords him the hope of release.

As this Court has stated repeatedly, parole is a privilege, not a right. Sullivan v. S.C. Dep't of Corr., 355 S.C. 437, 443 n. 4, 586 S.E.2d 124 127 n.4 (2003). The "*permanent* denial of parole *eligibility*" by the Department "implicates a liberty interest sufficient to require at least minimal due process." Furtick v. S.C. Dep't of Probation, Parole and Pardon Services, 352 S.C. 594, 598,

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[3] Cooper v. S.C. Dep't of Probation, Parole and Pardon Services, 377 S.C. 489, 661 S.E.2d 106 (2008).

[4] Compton v. S.C. Dep't of Probation, Parole and Pardon Services, 385 S.C. 476, 685 S.E.2d 175 (2009).

576 S.E.2d 146, 149 (2003) (emphasis in original). Petitioner, however, has not been permanently denied parole. He remains eligible for parole, and the Board at a subsequent hearing is certainly authorized to grant him parole should it choose to do so.

Since no liberty interest is implicated when an eligible inmate is denied parole by the Board, the inmate should have no expectation that his appeal from the routine denial of parole to the ALC (under *Furtick* or any other rationale) would be met with anything but dismissal. This is apparent in the statutory language governing the ALC's ability to hear cases found at S.C. Code Ann. § 1-23-600(D): "An administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections involving … the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services."

This Court has already held that an appeal to the ALC should only be considered if the inmate alleges a sufficient state-created liberty interest. Cooper, 377 S.C. at 502, 661 S.E.2d at 113. In that case, this Court reviewed an allegation that the Board was not following the procedure established by Section 24-21-640 or using its own criteria for parole consideration. The Court remanded the Board's denial of parole, only because there was no evidence that the Board weighed the factors in Section 24-21-640 or its own criteria.

This Court determined, however, that in the future the issue would be remedied by the Board stating clearly that it had considered the required factors before rendering its decision regarding parole. This Court stated, "We emphasize that … if [the Parole Board] clearly states in its order denying parole that it considered the factors outlined in section 24-21-640 and the fifteen factors published in its parole form… the decision will constitute a routine denial of parole and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure." Cooper at 500, 661 S.E.2d at 112.

This holding was further clarified by this Court in Compton. "We emphasized that … if the Parole Board clearly states in its order denying parole that it considered the factors outlined in section 24–21–640 and the fifteen factors published in Form 1212, and that if the Parole Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC will have limited authority to review the decision." Id. at 479, S.E.2d at 177.

Petitioner would have this Court grant his petition for certiorari and upend the clear rulings of Cooper and Compton for the obvious goal of stripping away the Board's autonomy and discretion in order to manufacture "meaningful" parole hearings in which the only legitimate result the Board may make is the granting of parole. Petitioner may color his language in platitudes of ensuring that the Board's decisions are "accurate," but his ultimate goal will always be entitlement to parole – regardless of the Board's discretion over parole release decisions.

Petitioner also argues that certiorari be granted so that this Court can ensure that his due process rights are not violated by the Board. Yet Petitioner refuses to acknowledge that this Court and the United States Supreme Court have repeatedly determined that due process is extremely limited for inmates hoping for parole.

Due process is derived from the Fifth and Fourteenth Amendments of the U.S. Constitution. No state shall "deprived any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "Due process" is necessary when a state actor is taking something away – be it life, liberty or property – from a person. "[A] prisoner must identify a cognizable liberty interest before he can demonstrate a denial of due process." Bowling v. Dir, Virginia Dep't of Corr., 920 F.3d 192, 199 (4th Cir. 2019).

When the Board denies parole, the inmate has lost nothing, nor has anything been taken away.

Petitioner wildly misses this point when he argues that he has an expectation of eventual release to parole. The United States Supreme Court has held that inmates eligible for parole are only afforded a hope of release, a far cry from the due process considerations when parole has already been granted and the State is seeking a revocation. Greenholtz, 442 U.S. at 10-11. "That the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained." Id. at 11, (emphasis in original), citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The Court in Roth does not mince words when it speaks of only expectations. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id. While no one can fault Petitioner's strong desire for parole, he does not have a legitimate right to receive parole.

The Court of Appeals clearly sympathized with Petitioner's strong desire for parole. The opinion devoted a great deal of attention to describing Petitioner's youth, his home life as a young person, the circumstances surrounding his crime, his efforts in the Department of Corrections to show rehabilitation, and even a psychological review of his mental state.[5] Petitioner similarly devotes multiple pages in his brief and hundreds of pages in his appendix to his support, achievements, and purported rehabilitation in an obvious bid to garner sympathy from this Court. He does not do this to make a legal argument, but an emotional one. He wants to be released to parole, but he can only show "an abstract need or desire for it." Roth at 577. Because the Board,

[5] Interestingly, the Court of Appeals did not look at Petitioner's recent disciplinary history at the Department of Corrections or chose not to recite his recent behavioral infractions, including fighting without a weapon (October 5, 2016), threatening an employee (July 16, 2019), unauthorized services (July 3, 2023), or abuse of privileges (July 7, 2023). Inmate Search Detail Report (as of December 7, 2023), https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000069848.

being the sole authority over parole decisions, has not yet granted him parole, Petitioner is looking to this Court in the hopes that it will overturn the decisions of the Board.

However, the clear holdings in Cooper and Compton stand in the way, so Petitioner criticizes this Court's holdings and, despite failing to obtain permission to argue against precedent, he argues for this Court to overturn these two cases. Respondent urges this Court to keep Cooper and Compton intact, both because they are sound decisions, and because they comport with South Carolina statutes.

As discussed above, this Court in Cooper reviewed an allegation that the Board was not following the procedure required by statute. In reversing, this Court determined that, so long as the Board states clearly that it had considered the required factors, "the decision will constitute a routine denial of parole and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure." Cooper at 500, 661 S.E.2d at 112.

Even after this clear holding, this Court was forced to revisit the matter in Compton. "In the instant case, the Parole Board clearly stated in its notice of rejection that it considered the statutory criteria and the criteria set forth in Form 1212, which is sufficient under Cooper." Id. at 479, 685 S.E.2d at 177.

Importantly, after this Court decided Cooper, the Legislature amended S.C. Code § 1-23-600(D): "An administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections involving … the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services." Thus, South Carolina precedent is clear that when the Board makes a routine denial of parole, the ALC acts properly when it dismisses the appeal. The inmate has not been deprived of a liberty interest; the inmate simply

continues to serve his valid sentence and may place his hope for parole in the next hearing. Our Legislature clearly agrees.

Respondent acknowledges that Cooper allows for certain issues to be raised regarding the Board's processes, such as how votes in favor of parole are calculated against the number of Board members present. See Barton v. S.C. Dep't of Probation, Parole and Pardon Services, 404 S.C. 395, 745 S.E.2d 110 (2013). However, this is not the issue underlying Petitioner's complaint. Petitioner was merely denied parole as a routine denial of parole, because the Board followed the procedure outlined in Cooper and Compton. This Court has also just recently clarified the ALC's authority in inmate appeals in Allen v. S.C. Dep't of Corrections, 439 S.C. 164, 171, 886 S.E.2d 671, 674 (2023). "[T]he ALC is not required to hold a hearing in every matter and may summarily dismiss an inmate's grievance if it does not implicate a state-created liberty or property interest sufficient to trigger procedural due process guarantees."

Here, Petitioner merely argues that the Board's decision was not "accurate," or that his parole hearing was not "meaningful." Regardless of how Petitioner phrases his complaint, the essence of his petition is that he wants parole and didn't get it. The ALC properly dismissed the appeal because a routine denial of parole "does not implicate a state-created liberty or property interest." Id. Thus, he is petitioning this Court in the hopes that it will intervene and change the rules so that the Board *has* to give him parole. Doing so, of course, would upend the entire parole system and make the appellate courts the final arbiters of parole release decisions – a role that Respondent respectfully submits the judicial branch does not have, nor should it wish to take upon. Therefore, this Court should decline to grant certiorari.

Respondent further reminds this Court that Cooper and Compton were correctly decided considering the minimal due process necessary for parole consideration as seen in Greenholtz.

Furthermore, Allen emphasizes the ALC's responsibility to dismiss appeals from routine denials of parole. Nothing is taken away when the Board denies parole to an otherwise parole-eligible inmate. This Court emphasized in Cooper, and reaffirmed in Compton, that when the Board clearly states in its rejection letter that it has considered the factors of S.C. Code § 24-21-640 and the criteria of parole consideration, "the decision will constitute a routine denial of parole and the ALC would have limited authority to review the decision." Compton at 479, 685 S.E.2d at 177. This clearly happened in this case, so there is no need for this Court to grant certiorari just because Petitioner doesn't believe the Board when its rejection letter clearly stated that it carefully considered the requisite factors.

Respondent takes issue with the Court of Appeals' characterization that the Board's decisions are being made in a "perfunctory manner." The Board hears fifty-five to sixty-five requests for parole each hearing day, so time allotted to each hearing is understandably limited. What the Court of Appeals overlooked, however, is the time each individual Board member takes in advance of each hearing, reading through the materials prepared by both the Department, the inmate, and his supporters. Although the Board is required to state the reasons for denial in its rejection letter, the sheer number of inmates heard on a given day necessitate the abbreviated summation of the reasons for denial – such as the nature and seriousness of the offense, indication of violence, and use of a deadly weapon. This Court in Cooper has held that such reasons are sufficient for denial of parole. Id. at 499 n. 5, 661 S.E.2d at 111 n. 5. Just because the Board denied parole for the seriousness of the crime committed does not mean that the Board failed to consider the positive information about the inmate found within the criteria of parole consideration. The Board clearly stated that it did so in its letter of rejection, which is sufficient under Cooper and Compton. Thus, a grant of certiorari is not warranted.

Lastly, the Court of Appeals called for the Legislature to "review and/or revise the parole system." Whether the Legislature decides to take up the task, as the Court of Appeals noted, is up to the members of the General Assembly. Respondent submits that the Legislature is indeed the best body suited to examine the Department's internal procedures and make any changes it deems necessary, because it has both the means to conduct a thorough review and the clear authority to enact changes, if any are truly warranted. Respondent respectfully would request that this Court decline to grant certiorari for this reason as well.

## CONCLUSION

Based on the foregoing arguments, this Court should deny certiorari and uphold the Court of Appeals' ruling.

Respectfully submitted,

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December 14, 2023

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