

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Charleston County  
Honorable Carmen T. Mullen, Circuit Court Judge  
Appellate Case No. 2016-002237

RECEIVED  
SEP 13 2019  
SC Court of Appeals

The State,

Respondent,

v.

Anthony M. Enriquez,

Appellant.

RETURN TO PETITION FOR REHEARING

On August 21, 2019, this Court properly affirmed the trial court's decision denying Appellant's resentencing motion pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). The Court affirmed the ruling following a thorough analysis applying the facts of Appellant's case to both state and federal law. Contrary to Appellant's assertions in the petition for rehearing, the Court did not misapprehend or overlook any relevant law applicable in this case, particularly recent South Carolina Supreme Court precedent analyzing juvenile sentencing. Accordingly, this Court should deny the petition.<sup>1</sup>

Appellant contends the Court "incorrectly interpreted *Miller*<sup>2</sup> and *Byars* to limit the prohibition of life sentences imposed on juveniles to only de jure life without parole sentences," and maintains the Supreme Court's recent holding in *State v. Slocumb*, 426 S.C. 297, 827 S.E.2d

<sup>1</sup> The Court ordered a return to the petition for rehearing by letter dated September 4, 2019. See Rule 221(a), SCACR (providing that no return may be filed unless requested by the appellate court).

<sup>2</sup> *Miller v. Alabama*, 567 U.S. 460 (2012).

148 (2019), was in error. (Rehrg.Pet.p.3). The Court properly applied state and federal law to find Appellant’s sentence “differs significantly” from those at issue in *Miller* and its progeny in which the juvenile offenders received sentences of life *without* the possibility of parole because Appellant has the opportunity for release given his sentence of life *with* parole.<sup>3</sup> *State v. Enriquez*, Op. No. 2019-UP-295, at p.3 (S.C. Ct. App. filed Aug. 21, 2019). As properly analyzed by this Court, our Supreme Court chose not to extend protections to juveniles serving any sentence other than life without parole, explaining the “ability to provide relief in cases such as this is limited by the parameters set forth by the United States Supreme Court.” *See Slocumb*, 426 S.C. at 314-15, 827 S.E.2d at 157 (declining to extend relief for non-homicide juvenile offenders serving *de facto* life sentences, holding it does not violate the Eighth Amendment); *see also Enriquez*, Op. No. 2019-UP-295, at p.3. The *Slocumb* Court held it was unwilling to extend precedent related to juvenile sentencing beyond their “explicit holding[s].” *Slocumb*, 426 S.C. at 299, 306, 827 S.E.2d at 149, 152-53. The Court explained:

The *Roper* [*v. Simmons*, 543 U.S. 551 (2005)]-*Graham* [*v. Florida*, 560 U.S. 48 (2010)]-*Miller* trilogy has resulted in much confusion and conflicting opinions in ascertaining the reach of the Eighth Amendment in the sentencing of juveniles. . . . Courts have struggled in good faith in trying to determine the manner in which juveniles may be constitutionally sentenced. We are one of those courts. Rather than predict what the Supreme Court may or may not do, 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 313, 827 S.E.2d at 156.

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<sup>3</sup> Notably, this Court cannot overrule Supreme Court precedent and must apply the decisions as decided. *See Mathis v. United States*, 136 S.Ct. 2243, 2254 (2016) (“[A] good rule of thumb for reading our decisions is that what they say and what they mean are one and the same.”). Accordingly, this Court did not misapprehend any law where the opinion applied the relevant precedent as determined by the Supreme Court.

This Court carefully considered *Slocumb* and other relevant precedent to correctly determine the holdings do not extend protection to juvenile offenders such as Appellant serving a life *with* parole sentence for murder. As argued in Respondent's brief, Appellant received the sentence the Supreme Court deemed sufficient to remedy an unconstitutional sentence and is eligible for release. *See Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016) (offering parole eligibility as a solution to states tasked with re-litigating cases where a juvenile received mandatory life without parole, explaining states could permit juvenile homicide offenders to be considered for parole, rather than resentencing them). Further, our Supreme Court in *Slocumb* also signaled parole eligibility was a solution to remedy a *Miller* violation. *See Slocumb*, 426 S.C. at 313-14, 827 S.E.2d at 156-57 (discussing juvenile sentencing statutes enacted in states such as Iowa which provide juvenile offenders "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" and detailing the bill introduced in South Carolina which provides, among other things, parole eligibility for juvenile homicide offenders after twenty-five years). This Court found Appellant was "not a member of the class of offenders contemplated by our precedent" and correctly denied relief. *Enriquez*, Op. No. 2019-UP-295, at p.3.

Appellant also argues the Court ignored his argument regarding the constitutionality of the parole process. (Rehrg.Pet.p.3). Contrary to Appellant's assertion, this Court was not required to consider the argument because that was not the question before the lower court. The circuit court was tasked with considering only whether Appellant's sentence of life *with* parole afforded him the opportunity for release contemplated in *Miller* and *Aiken*. (R.pp.33-34; pp.38-45; pp.61-67; pp.73-74; p.76; pp.79-81). It was not until after the circuit court denied Appellant's motion for resentencing and following a subsequent denial of parole that Appellant

challenged the due process requirements of the parole system. (R.pp.82-86). As asserted in Respondent's brief, the argument Appellant is entitled to resentencing because he has been denied parole does not create a cognizable claim under *Miller* and its progeny. See *James v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 376 S.C. 392, 396, 656 S.E.2d 399, 401 (Ct. App. 2008) (“[A]n inmate has a liberty interest in gaining access to the parole board, although there is no protected right to parole.”). Appellant's sentence affords him the continuous attempt to obtain release by demonstrating to the proper authority rehabilitation, maturity, and growth. See S.C. Code Ann. § 24-21-640 (“The board must carefully consider the record of the prisoner before, during, and after imprisonment.”); see also *State v. Calhoun*, 222 So. 3d 903, 907 (La. Ct. App. 2017) (“He has a chance at parole, but he will have to earn it. This scheme is reasonable and satisfies *Miller*.”). As argued by Respondent, Appellant's lengthy disciplinary record while incarcerated belies his contention he is entitled to relief. Such evidence, which is considered by the parole board, is not indicative of rehabilitation in keeping with the “central intuition” of *Miller* that juveniles who commit even violent crimes are capable of change. *Montgomery*, 136 S.Ct. at 736.

Every two years, the parole board considers evidence presented by Appellant to determine whether he is eligible for release. Nothing guarantees anyone the right to parole. By statute, the parole board may only grant release if the inmate “has shown a disposition to reform,” he will probably obey the law and “lead a correct life,” his conduct led to “a lessening of the rigors of his imprisonment,” the “interest of society will not be impaired” by his release, and if he has obtained employment. S.C. Code Ann. § 24-21-640. Examining the board's manual shows it can also examine any other factors it “may consider relevant.” See DPPPS South Carolina Board of Paroles and Pardons Policy and Procedure Manual, (June 2017), p.27,

<https://www.dppps.sc.gov/content/download/120663/2749351/file/Parole+Board+Manual+June+7+2017.pdf> (providing other criteria the board can consider including criminal history and risk to the community, general attitude, health, adjustment while confined, employment history, and “[a]ny other factors that the Board may consider relevant”).

Critically, these are the exact types of criteria the Fourth Circuit recently considered and found provide a meaningful opportunity for release. *Bowling v. Director of Va. Dep’t of Corr.*, 920 F.3d 192, 198-99 (4th Cir. 2019). In *Bowling*, the appellant alleged the parole process was unconstitutional because the board was not specifically required to consider age-related characteristics unique to juvenile offenders. *Id.* at 194. The court declined “to find that juvenile-specific Eighth Amendment protections extend to juvenile homicide offenders sentenced to life with parole” or “to find that those protections extend beyond sentencing proceedings.” *Id.* at 197. Explaining its reasoning, the Fourth Circuit stated:

Significantly, the Supreme Court has placed no explicit constraints on a sentencing court’s ability to sentence a juvenile offender to life with parole. The Court has not yet gone so far as to require that juvenile offenders be released from prison during their lifetime. *See Graham*, 560 U.S. at 75, 130 S.Ct. 2011. (“A State is not required to guarantee eventual freedom to a juvenile offender . . .”). That is to say, the Court “[did] not foreclose” the possibility that “the rare juvenile offender whose crime reflects irreparable corruption” could be sentenced to life without parole. *Miller*, 567 U.S. at 479-80, 132 S.Ct. 2455. Rather, the Supreme Court required that, before sentencing a juvenile to life without parole, sentencing courts “take into account how children are different.” *Id.* at 480, 132 S.Ct. 2455.

*Id.*

While declining to extend *Miller*’s protections beyond a sentencing proceeding, the Fourth Circuit explained it was not persuaded appellant’s parole proceedings fell below the standard established in *Graham* and *Miller*. *Id.* at 198-99. The court found the parole board

considered whether appellant's release "would be compatible with public safety and the mutual interests of society" and appellant, whether his "character, conduct, vocational training, and other developmental activities during incarceration reflect the probability" he will lead a law-abiding life in the community and "live up to all the conditions of parole," appellant's "personal history," his institutional adjustment, change in attitude, appellant's release plans, his evaluations, "impressions gained . . . by the parole examiner," and any other information provided by appellant. *Id.* at 198. The Fourth Circuit found the factors allowed the parole board "to fully consider the inmate's age at the time of the offense, as well as any evidence submitted to demonstrate his maturation since then, and account for the concern at the heart of *Graham* and *Miller*: 'that children who commit even heinous crimes are capable of change.'" *Id.* (citing *Montgomery*, 136 S.Ct. at 736); *see also State v. Scott*, 416 P.3d 1182, 1187 (Wash. 2018) (finding the statutory grant of parole eligibility remedied any constitutional issues with Scott's "de facto" life sentence for offenses committed as a juvenile, rejecting the argument the parole process was inadequate because "it does not provide for consideration of a defendant's diminished capacity due to attributes of youth," and noting the Supreme Court in *Montgomery* expressly approved of a Wyoming parole-eligibility statute that also did *not* require consideration of factors related to youth as part of a parole determination).

Appellant's life sentence includes parole eligibility which is a meaningful way by which he can attempt to obtain release during his lifetime and is not cruel and unusual under the Eighth Amendment. Appellant has failed to demonstrate any fact or law which was either overlooked or misapprehended by the Court. Rehearing is not warranted in this case. Therefore, this Court should deny the petition and decline to modify the original decision finding Appellant was not entitled to resentencing.

**CONCLUSION**

For all of the foregoing reasons, Respondent requests the panel deny the petition for rehearing.

Respectfully submitted,

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September 13, 2019.

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CERTIFICATE OF SERVICE

I, Sherrie Butterbaugh, counsel for the Respondent, certify that I have served the within *Return to Petition for Rehearing* by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record: Lara Mary Caudy, Esq., P.O. Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.

This 13<sup>th</sup> day of September, 2019.

  
\_\_\_\_\_  
SHERRIE BUTTERBAUGH

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ATTORNEY FOR RESPONDENT



ALAN WILSON  
ATTORNEY GENERAL

September 13, 2019

The Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
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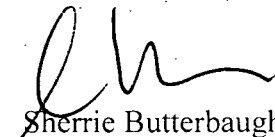
Re: *The State v. Anthony M. Enriquez*  
Appeal from Charleston County  
Appellate Case No. 2016-002237

Dear Ms. Kitchings:

Enclosed for filing in your office is the original and six (6) copies of the *Return to Petition for Rehearing* in the above-referenced case, together with the *Certificate of Service*.

Thank you for your assistance in this matter.

Sincerely,

  
Sherrie Butterbaugh,  
Assistant Attorney General

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SEP 13 2019

SC Court of Appeals

SB:brb  
Enclosures

cc: Lara Mary Caudy, Esq. (w/three copies of encls.)  
The Honorable Scarlett Wilson, Solicitor 9th Judicial Circuit (w/copy of encls.)  
Trisha Allen, Victim Advocacy Division (w/copy of encls.)