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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
APPEAL FROM CHARLESTON COUNTY
Carmen T. Mullen, Circuit Court Judge

Unpublished Opinion No. 2019-UP-295

THE STATE,.....RESPODENT

v.

ANTHONY M. ENRIQUEZ,.....PETITIONER

RETURN TO PETITION FOR A WRIT OF CERTIORARI
Appellate Case No. 2019-001895

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TABLE OF CONTENTS

PETITIONER'S QUESTION PRESENTED

Did the Court of Appeals err by holding the circuit court properly found Petitioner did not qualify for resentencing pursuant to *Aiken v. Byers*, 410 S.C. 534, 765 S.E.2d 572 (2014), because he was eligible for parole after the service of twenty years, where the mandatory nature of Petitioner's life with parole sentence treated all adults and juveniles the same, and where the parole process in South Carolina does not provide a meaningful opportunity for release such that it is not an adequate substitute for individualized resentencing?

RESPONDENT'S COUNTER STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals properly affirmed the trial court's ruling that the Petitioner was not entitled to a resentencing due to the fact he received a *life with parole* sentence; therefore, is eligible for release every other year, thereby not related to the *Aiken v. Byers* decision?

STATEMENT OF THE CASE

Upon a guilty plea to murder, the Petitioner, Anthony M. Enriquez was sentenced to life *with* the possibility of parole on December 1, 1994. (R. p. 31 lines 10-14) He received a twenty-five year concurrent sentence for the offense of armed robbery upon a plea pursuant to *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed2d 162 (1970). The Petitioner became eligible for parole on January 23, 2014. He has appeared before the parole board on three occasions, each resulting in a denial of parole.

The State alleged that the Petitioner, then seventeen years of age and his two co-defendants robbed the victim. During the course of this robbery the Petitioner shot the victim in the chest with a sawed off shotgun immediately causing his death. (R. p. 10 lines 16-23, p. 11 lines 10-17). The Petitioner was later arrested for the offense of murder and armed robbery. He agreed to plea to murder without any aggravating circumstances so he could avoid the thirty-year minimum before becoming eligible for parole. In exchange of this guilty plea the state agreed not to seek the death penalty. (R. p. 14 line 19 – p. 15 line 13)[1]

On December 1, 1994, the Petitioner appeared before the Honorable Casey L. Manning for the offenses of murder and armed robbery. The Petitioner was represented by attorney William L. Runyon, Jr., and the State represented by assistant solicitor R. Spencer Roddey, Jr. (R. p. 1) -At the conclusion of this appearance the trial court sentenced the Petitioner to a period of incarceration for the remainder of his natural life for the offense of murder and twenty-five years for armed

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[1] A person who is convicted of or pleads guilty to murder must be punished by death or by imprisonment for life and is not eligible for parole until the service of twenty years; provided, however, that when the State seeks the death penalty and an aggravating circumstance is specifically found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the court must impose a sentence of life imprisonment without eligibility for parole until the service of thirty years. S.C. Code Ann. §16-1-20 (Supp. 1990).

robbery. The trial court ordered that these sentences were to be served concurrently. At the time of this guilty plea South Carolina law allowed an inmate serving a life sentence for murder parole eligibility upon the service of twenty years.

During his incarceration the Petitioner filed five post-conviction relief (PCR) applications in state court. As well as a state habeas corpus action and a civil action against his plea counsel. (1995-CP-04475; 1998-CP-10-00944; 2000-CP-10-01347; 2003-CP-10-03186; 2004- CP-10-04859; 2008-CP-10-03580; 2009-CP-10-05985). The actions raised by the Petitioner in these causes of action vary. They include, an allegation of an involuntary guilty plea, and multiple allegations of ineffective assistance of counsel. Following the denial of the Petitioner's fifth application for PCR this Court dismissed the appeal and prohibited the Petitioner, "from filing any further collateral actions challenging his 1994 conviction in the circuit court (including PCR or habeas corpus) without first obtaining permission to do so from the Court." (Order in 2009-CP-10-05985).

Pursuant to this Court's decision of *Aiken v. Byars,* 410 S.C. 534, 765 S.E.2d 572 (2014) the Petitioner decided to file a *pro se* motion for re-sentencing. (R. pp. 33-36) The Petitioner was represented by attorney Bentley Price who filed a memorandum in support of their motion for resentencing. (R. pp. 38-45). The State was represented by assistant solicitor Charles M. Condon, Jr., who filed a response to the Petitioner's motion. (R. pp. 61-63) This Court assigned the Honorable Carmen T. Mullen, Circuit Court Judge with exclusive jurisdiction to preside over this cause of action. (R. p. 37).

On July 20, 2016, a hearing was held was held in Charleston County on Petitioner's motion. Present before Judge Mullen was the Petitioner along with his counsel Bentley D. Price, and representing the State was assistant solicitor Charles Condon, Jr. At the conclusion of this hearing

the trial court decided to take each argument under advisement and to make a decision in the future. (R. pp. 68-77) On October 13, 2016, the trial court issued her decision. The trial court decided to deny the Petitioner's motion. She ruled that *Aiken v. Byers* does not extend to juveniles who are serving a sentence of life with parole eligibility; therefore, he is not entitled to a resentencing. (R. pp. 79-81)

Upon receiving this decision the Petitioner decided to file a notice of appeal before the Court of Appeals. Within this appeal the Petitioner argued that the trial court erred in deciding that he failed to qualify for resentencing. The Petitioner was of the position that the mandatory nature of the Appellant's life with parole sentence treated all adults and juveniles the same, and the parole process in South Carolina does not provide a meaningful opportunity for release such that it is not an adequate substitute for individualized resentencing. The Respondent argued that the trial court did not err in ruling that the Petitioner is not entitled resentencing pursuant to *Aiken v. Byers*, as the Petitioner is currently serving a life sentence *with* parole eligibility. The Respondent also argued that the trial court properly found the law only applies to juvenile homicide offenders previously sentenced to life *without* parole and has not been extended to any other sentence.

On August 21, 2019, the Court of Appeals issued a decision affirming the decision of the trial court. *State v. Enriquez,* 2019-UP-295 (2019). (R. app. Pp. 1-4) The Court of Appeals found that the Petitioner is not a member of the class of offenders contemplated by our precedent as he did not receive a life without parole sentence. (R. app. p. 4) After receiving this decision the Petitioner filed a petition for rehearing on September 13, 2019. (R. app. pp. 5-9) The Respondent filed their return on September 13, 2019. (R. app. pp. 11-18) The Court of Appeals denied this petition on October 15, 2019. (R. app. pp. 19-20)

The Petitioner now request a writ of certiorari seeking review from this Court. The Respondent will argue that the decision of the Court of Appeals does not fall within any of the parameters found in South Carolina Appellate Court rule 242, so this petition should be subject to dismissal. The return of the Respondent follows.

WHY CERTIORARI SHOULD BE DENIED

Pursuant to rule 242 of the South Carolina rules of the Appellate Court, a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicates the character of reasons which will be considered.

(1) Where there are novel questions of law;

(2) Where there is a dissent in the decision of the Court of Appeals;

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;

(4) Where substantial constitutional issues are directly involved;

(5) Where a federal question included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242 SCACR

In reviewing each of these criteria the present case does not apply. The Court of Appeals properly affirmed the decision of the trial court, which should not be subject to review.

Pursuant to *Aiken v. Byers*, it is unconstitutional for a juvenile to receive a sentence of life *without* the possibility of parole. The Petitioner does not fall within this class due to the fact he is receiving biannual parole hearings. This Court has recently determined in *State v. Slocumb,* 466 S.C. 297, 827 S.E.2d 148 (2019), that *Graham* nor the Eighth Amendment prohibits the imposition

of an aggregate sentence for multiple offenses amounting to a *de facto* life sentence. *Slocumb,* S.C. at 315-316, S.E.2d at 158. So this court decided to issue a declaratory judgment on behalf of the State.

The present case should not be considered a *de facto* life sentence due to the fact unlike the Appellant in *Slocumb,* the Petitioner is currently eligible for parole. This court was not inclined to go against the United States Supreme Court in *Slocumb*; so, the identical result should apply to the instant case. This petition should be subject to dismissal.

STATEMENT OF FACTS

On January 23, 1994, the Petitioner who was seventeen years old at the time along with his co-defendants, his brother Jessie Enriquez and Dan Murphy, decided to rob the victim. On the night in question, the victim went to a house party, he was then approached by the defendants. The defendants asked if he "had any papers on him." At that time the Petitioner went back to his vehicle and retrieved a sawed-off shotgun. He returned with the gun and when he arrived his co-defendants was going through the victim's pockets. At that time the Petitioner pointed the gun at the victim's chest, and fired off a shot killing him. Each of the defendants then ran back to their vehicle got in and drove away. While in the car the Petitioner was heard saying, "Who loaded the gun?"

The authorities were called to the scene, they spoke to several witnesses who identified the Petitioner as the shooter. They later took statements from Derrick Brown and Wendy Porter both of whom witnessed the robbery, and both identified the Petitioner as the shooter. (R. pp. 46-53) The Petitioner and his co-defendant's was later arrested and charged with the offenses of murder and armed robbery.

While the case was pending, the solicitor's office informed the Petitioner that they intend to seek the death penalty. A plea agreement was later made between the Petitioner and the

solicitor's office. The Petitioner agreed to plead guilty to murder without any aggravating circumstances so he can become eligible for parole upon the service of twenty years, and *Alford* for the offense of armed robbery. In return of his guilty plea the solicitor agreed not to seek the death penalty.

On December 1, 1994, the Petitioner appeared before the Honorable Casey L. Manning to plead guilty to murder and *Alford* for armed robbery. Present was the Petitioner along with his counsel Mr. William L. Runyon, Jr., representing the State was assistant solicitor R. Spencer Roddy. At the conclusion of this guilty plea the Petitioner was sentenced to a period of incarceration for the remainder of his natural life, with parole eligibility upon the service of twenty years for the offense of murder; and, twenty-five years for armed robbery. The sentencing court ordered that these sentences were to be served concurrently.

ARGUMENT

> The Court of Appeals correctly affirmed the trial court's order denying the Petitioner's motion for resentencing. The Petitioner is currently serving a sentence allowing biannual parole hearings; therefore, he does not fall under the class of inmates proscribed in the decision of *Aiken v. Byers.* This petition for writ of certiorari should be subject to dismissal.

Petitioner argues that the Court of Appeals erred in affirming the decision of the trial court denying the Petitioner's motion for resentencing. The Petitioner was seeking this resentencing pursuant to the South Carolina Supreme Court case of *Aiken v. Byers,* 410 S.C. 534, 765 S.E.2d 572 (2014) in which this court adopted the United States Supreme Court decision of *Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455 (2012). In the *Miller* and *Aiken* decisions it was determined that sentencing a juvenile to a period of life incarceration without the possibility of parole shall be considered cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. The Petitioner argues that he is eligible for a resentencing due to the fact the

mandatory sentence given to all murder convictions at the time of the Petitioner's conviction treated both adults and juveniles identical. The Petitioner also argues that the parole process does not provide a meaningful opportunity for release, so it is not an adequate substitute for individualized resentencing.

The Respondent argues that the Court of Appeals did not err in affirming the decision of the trial court in dismissing the Petitioner's motion. This is due to the fact the Petitioner does not fall under the class of inmates the *Miller* and *Aiken* decision applies to. The Petitioner is being considered for parole bi-annually; therefore, every two years he has an opportunity to be granted parole. The Respondent will also argue that the Circuit Court does not have the ability to resentence the Petitioner. The sentence Petitioner is currently serving is not unconstitutional, the court does not have the authority to give the Appellant another sentence. The sentence that existed at time of his conviction is the sentence that must be applied. The Respondent's final argument though not raised by the Court of Appeals relates to subject matter jurisdiction. The Respondent argues that the Petitioner originally brought this case before the wrong tribunal. The Petitioner argues that the parole process does not provide him a meaningful opportunity for release. This is an argument against the procedure of the parole board, so this is an administrative matter. This should be raised before the Administrative Law Court not the Circuit Court pursuant to the *Al-Shabbaz, Furtick,* and *Cooper* decisions. So the Circuit Court fails to have subject matter jurisdiction over this cause of action.

The trial court was correct in determining that the Petitioner is not entitled to a resentencing pursuant to *Aiken v. Byers*, as this decision does not extend to juveniles serving life sentences who are eligible for parole. The Court of Appeals properly affirmed the trial court's decision. This petition for writ for certiorari should be subject to dismissal.

Standard of Review

In criminal cases, appellate courts only review errors of law. *State v. Baccus,* 367 S.C. 41, 48, 625 S.E2d 216, 220 (2006). When considering whether a sentence violates the Eighth Amendment's prohibition on cruel and unusual punishment, the appellate court's standard of review extends only to the correction of errors of law. *State v. Finley,* 427 S.C. 419, 424, 831 S.E.2d 158, 160 (Ct. App. 2019). The Supreme Court reviews Court of Appeals by writ of certiorari only where special reasons justify exercise of that power. *Douglas v.State,* 369 S.C. 213, 216, 631 S.E.2d 542, 544 (2006) Issues related to subject matter jurisdiction may be raised at any time. *Carter v. State,* 329 S.C. 355, 364, 495 S.E.2d 773, 777 (1998).

Analysis

1. **The Court of Appeals did not err in affirming the decision of the trial court. The Petitioner is currently eligible for parole so the *Miller* nor *Aiken* decisions apply.**

The Petitioner claims that the trial court and the Court of Appeals erred in determining that due to him being eligible for parole he should not be allowed a resentencing. The Petitioner argues that the statute that exist at the time he was sentenced applied to all the defendants identically, and since there was no consideration for his youth at the time he committed the offense he is entitled to resentencing pursuant to *Miller v. Alabama,* and *Aiken v. Byers.*

In *Miller,* the United States Supreme Court decided that the eighth amendment forbids a sentencing scheme that mandates life imprison *without* the possibility of parole for juvenile offenders. *Miller,* 567 U.S. at 480, 132 S.Ct. at 2470 (emphasis added). This Court in *Aiken* made the identical determination and applied it to South Carolina juveniles serving sentences of life without the possibility of parole. Since the Petitioner in the present case is eligible for parole, the trial court was correct in the denial of resentencing. This decision was properly affirmed by the Court of Appeals. In their plain language both the *Miller* and *Aiken* decisions, only apply to cases

where an inmate as a juvenile received a sentence of life *without* the possibility of parole. That is not the type of sentence the Petitioner is currently serving.

In *Aiken,* this Court quoted *Miller* stating, "before sentencing, the court must consider the lack of maturity and the underdeveloped sense of responsibility, to negative influences and outside pressures, including family and peers." *Aiken*, 410 S.C. at 542, 765 S.E.2d at 576, *quoting, Miller,* at 2464. In *Aiken,* this Court also stated the following:

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

Id. (emphasis added.)

It is clear that both the *Miller* and *Aiken* decisions were only related to juveniles serving life sentences *without* the possibility of parole. That is not the sentence the Petitioner is currently serving.

The Petitioner argues that the South Carolina parole process does not provide a meaningful opportunity for release and that it is not an adequate substitute for an individualize resentencing. He also argues that the parole process does not give him a meaningful opportunity for release. However, the parole board is obligated to consider the lack of maturity and negative influences existing at the time the Petitioner committed these crimes. In his brief the Petitioner lists the fifteen criteria created by the board that must be considered at every hearing before a final determination is made.[2] One of those criteria states that the board must consider the "nature and seriousness of

[2] 1) The risk the inmate poses to the community; 2) The nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it; 3) The inmate's prior criminal records and his/her adjustment under any previous programs or supervision; 4) The inmate's attitude toward his/her family, the victim and authority in general;

the offender's offense, *the circumstances surrounding that offense* and the prisoner's attitude toward it." This guarantees that the age and maturity of the Petitioner during the crime is considered during each hearing before the Parole Board. Pursuant to *Miller,* the United States Supreme Court established what the Court must consider prior to a juvenile being sentenced to life without parole. However, within this criteria the current maturity and rehabilitation is not considered, but it is a part of mandatory criteria of the parole board. The board must also consider "the offender's adjustment while in confinement, including his progress in counseling, therapy, and other similar programs designed to encourage the prisoner to improve himself," and also, "The inmate efforts the solve his/her problems, such as seeking treatment for substance abuse, enrolling in academic and vocational educational courses, and in general using whatever resources the Department of Corrections has available to inmates to help with their problems." During a parole hearing the Petitioner has the opportunity to present not only evidence of his immaturity at the time the offense occurred, but any change of maturity or rehabilitation occurring since his

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5)The inmate's adjustment while in confinement, including his/her progress in counseling, therapy, and other similar programs designed to encourage the inmate to improve himself/herself; 6) The inmate's employment history, including his/her job training and skills and his/her stability in the work place; 7) The inmate's physical, mental, and emotional health; 8)The inmate's understanding of the cause of his/her criminal conduct; 9)The inmate efforts the solve his/her problems, such as seeking treatment for substance abuse, enrolling in academic and vocational educational courses, and in general using whatever resources the Department of Corrections has available to inmates to help with their problems; 10)The adequacy of the inmate's overall parole plan. This includes inmates living arrangements where he/she will live and who he will live with; the character of those with whom the inmate plans to associate in both his/her working hours and his/her off-work hours; the inmates plans for gainful employment; 11)The willingness of the community into which the inmate will be released to receive the inmate; 12)The willingness of the inmate's family to allow him/her to return to the family circle; 13)The attitudes of the sentencing judge, the solicitor, and local law enforcement officers respecting the inmate's parole; 14)The feeling of the victim's family, and any witnesses to the crime about the release of the inmate; 15)Other factors considered relevant in a particular case by the Board. *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services,* 377 S.C. 489, 661 S.E.2d 106(2008)fn. 2

incarceration. So there are criteria not considered pursuant to the *Miller* and *Aiken* standards that the board must consider which can be to the Petitioner's benefit.

Within her final order the trial court mentioned the United State Supreme Court case *Montgomery v. Louisiana*, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016). In *Montgomery* the Supreme Court decided:

> A state may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity and who have since matured will not be forced to serve a disproportionate sentence in violation of the eighth amendment.

Montgomery, 136 S.Ct at 737

The Petitioner argues that parole is harder to obtain in South Carolina than in other states. No proof is provided in the record revealing that it is more difficult to obtain parole in South Carolina than any other state in the nation. This argument should not be considered by this Court. The Petitioner also argues that no person in a similar situation has ever been granted parole. This accusation has also not been proven, and if this is the case that is not relevant due to the fact the Petitioner is receiving biannual parole hearings, he is eligible to be released on parole every two years. Both *Miller* and *Aiken* only relates to individuals who were sentenced as a juvenile to a term of imprisonment for the remainder of their life without the possibility of parole.

The Petitioner seeks a resentencing hearing due to the fact he is of the belief that the parole board does not give him a meaningful opportunity for release. In the seventy-six year history of the Department of Probation, Parole, and Pardon Services there have been numerous individuals serving a sentence for murder who have been granted parole. Unlike other cases cited within his brief the Petitioner became eligible for parole in a twenty year period, by the time he was thirty-seven years old. Other Appellant's had much longer periods to became eligible for parole which

courts have ruled violated *Miller*, *State v. Null*, 836 N.W.2d 41 (2013)(Supreme Court of Iowa determined that the service of fifty-two years prior to parole eligibility violates *Miller* since the Appellant would be sixty-nine years old before he can appear before a parole board); *Bear Cloud v. State,* 334 P.3d 132 (2014)(the Appellant would have to serve forty-five years prior to becoming eligible for parole, which would have made him sixty-one years old when he made his first appearance); *State v. Ramos,* 387 P.3d 650 (2017)(the Appellant received an eighty-five year sentence without the possibility of early release, he would be ninety-nine by time he's released from incarceration); *State v. Zuber,* 152 A.3d 197(2017)(two Appellant's one serving a sentence of one hundred and ten years and would not be eligible for parole until the service of fifty-five years; another serving a seventy-five year sentence who would not be eligible until the service of sixty-eight years); *Hayden v. Keller,* 134 F.Supp.3d 1000 (2015)(Appellant received a sentence of one hundred and sixty years at the age of fifteen). The situation the Petitioner is currently in does not equate to these matters. The Petitioner is currently eligible for parole and could possibly be released in the near future.

There exist another criteria that must be considered that takes into consideration the youth of the Petitioner at the time he committed the crime, and his increased maturity while incarcerated; this is the mandatory risk assessment. The South Carolina Code of Laws makes it mandatory that the Department develop a process for adopting a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contribute to criminal behavior, which the parole board shall use in making parole decisions, including additional objective criteria that may be used in parole decision. S.C. Code Ann. §24-21-10(F)(1)(2018).

The Petitioner argues that a parole hearing is not an adequate substitute for an individualized hearing. The parole board is mandated to consider fifteen criteria and a risk

assessment prior to making any decision. Each of these criteria must be applied to every parole hearing of the Petitioner and all other inmates appearing before parole board. Some of these criteria relates to circumstances surrounding the crime when it occurred including the Petitioner's mental state while committing the crime. Other criteria relate to the level to maturity the inmate has achieve during his period of incarceration. As long as the Petitioner is allowed to appear before the parole board his case does not fall under either the *Miller* nor *Aiken* decisions.

2. Neither the *Miller* nor *Aiken* decisions applies, so the Circuit Court did not have the authority to resentence the Petitioner.

This Court determined that the principles enunciated in *Miller* retroactively applied to prisoners that were similarly situated and prospectively to all juvenile offenders who may be subject to a sentence of life imprisonment *without* this possibility of parole. *Aiken,* 410 S.C. at 578, 765 S.E.2d at 545 (emphasis added). The lower Courts were correct in determining that *Aiken* does not apply to this case since the Petitioner is currently eligible for parole. The Petitioner is not entitled to resentencing due to the fact he is currently serving the sentence that existed at the time he committed the offense.

As stated above, at the time the Petitioner committed this crime the crime of murder only carried a sentence of life with a twenty year parole eligibility. In the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced. *State v. Varner,* 310 S.C. 264, 265, 423 S.E.2d 133, 134 (1992). This is the punishment existing at the time the Petitioner was sentenced. As part of the omnibus crime act of 1996, the punishment for murder changed to thirty years to life.[3] This was not the punishment at

[3] A person who is convicted of or pleads guilty of murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment of thirty years. S.C. Code Ann. §16-3-20 (Supp. 1996).

the time of sentencing so it does not apply. A criminal defendant receives the benefit of punishment mitigated by legislative amendment only when the amendment becomes effective before sentence is pronounced. *Id.*

The Appellant is currently eligible for parole. It was clear pursuant to the *Miller* and *Aiken* decisions that it is only a violation of the eighth amendment in sentencing a juvenile to life *without* the possibility of parole. That is not the current sentence of the Petitioner, so neither of these decisions apply. The trial court was not allowed to resentence the Petitioner to the current punishment existing under South Carolina law.

Within their opinion the Court of Appeals stated, "our supreme court recently noted in *State v. Slocumb,* this court's ability to provide relief in cases such as this is limited by the parameters set forth by the United States Supreme Court. *Enriquez,* OP. No. 2019-UP-295 (2019), *quoting, Slocumb,* 426 S.C. at 306, 314-315, 827 S.E.2d at 152-53, 157. In *Slocumb*, this Court declined to extend the United States Supreme Court decision of *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011 (2010)[4] This Court specifically determined:

> Respect for separation of powers compels us to recognize that the General Assembly is the author of our state's public policy for the sentencing of criminal offenders, juveniles, and adults. Pending further pronouncement from the Supreme Court, we take no position in the matter, nor should our holding be construed to limit or define the parameters of the legislative discussions and response to this challenge. The judicial role is limited to answering the narrow question raised: whether the aggregate term-of-years sentence imposed on Slocumb categorically violates the Eighth Amendment pursuant to the reach of *Graham.* Because we find it does not, our judicial prerogative is at its end, and the process must continue in the legislature.

[4] The Constitution prohibits the imposition of life without parole sentence on a juvenile offender who did not commit a homicide. A state need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term. *Graham,* U.S. at 82, S.Ct. at 2034.

Slocumb, S.C. at 314, S.E.2d at 157.

Conrad Lamont Slocumb is currently serving a one hundred and thirty years sentence for escape, kidnapping, strong armed robbery, criminal sexual conduct in the first degree, and burglary in the first degree. He committed all of these offenses as a juvenile. The offenses for kidnapping, criminal sexual conduct and burglary in the first degree are classified as A-Felonies; therefore, pursuant to South Carolina law he is currently not eligible for parole.[5] Mr. Slocumb is currently serving one hundred and ten years with no parole eligibility, which he is required to serve a minimum of eighty-five percent.[6] This Court has ruled not to extend *Graham* due to it not ever addressing a de facto life sentence.[7] The Petitioner is eligible for parole, he has an opportunity for release so if this court is reluctant to extend *Graham* on behalf of Mr. Slocumb, this court should not extend *Miller* nor *Aiken* on behalf of the Petitioner.

The Petitioner is currently receiving biannual hearings, this allows him an opportunity to be released on parole, neither the *Miller* nor *Aiken* decision applies. The Respondent would respectfully request this court to deny this petition for writ for certiorari.

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[5] For purposes of definition under South Carolina law a "no parole offense" means a class A, B, or C felony or an offense exempt from classification as enumerated in Section 1-16-10(d), which is punishable by a maximum of imprisonment for twenty years or more. S.C. Code Ann. §24-13-100(2018)

[6] Notwithstanding any other provision of law, except in a case which the death penalty or a term of life imprisonment is imposed, an inmate convicted of a "no parole offense" as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections, including an inmate serving time in a local facility pursuant to a designed facility agreement authorized by Section 24-3-20 or Section 24-3-30 is not eligible for early release, discharge or community supervision as provided in Section 24-21-560, until the inmate has served at lease eighty-five percent of the actual term of imprisonment imposed. S.C. Code Ann. §24-13-150 (2018).

[7] We agree *Graham's* explicit holding applies to *de jure* life sentences alone, and its rationale *may* implicate *de facto* life sentences....Nonetheless several factors caution us against extending the reach of *Graham* to provide Slocumb with relief without further input from the Supreme Court. *Slocumb,* 426 S.C. at 306, 827 S.E.2d at 153.(emphasis in original)

3. The issue raised by the Petitioner is an administrative matter; therefore, the Circuit Court lacked jurisdiction.

The Petitioner raises arguments regarding his parole hearing and the procedures set forth in the determination of parole. The Petitioner believes that since the Parole Board did not address his youth and impulsiveness at the time he committed the crime as designated in *Miller* and *Aiken,* his parole hearings violate the 8th amendment and he is entitled a resentencing. The Petitioner raises objections to the procedure used by the parole board in reviewing his case. He argues that the South Carolina parole process does not give him a meaningful opportunity to be released. Any arguments regarding the procedures applied or the lack of considerations made by the parole board upon the denial of parole must be considered administrative and are not under the jurisdiction of the Circuit Court. Pursuant to previous decisions made by this Court any allegations regarding the parole board not considering the mandatory criteria or the procedure used must be initially addressed by the Administrative Law Court (ALC), then by the Court of Appeals and possibly this Court pursuant to the Administrative Procedures Act. It has been determined that the Circuit Court no longer has jurisdiction to determine the violation of administrative procedures regarding a prison sentence, the denial of parole eligibility or parole.

The fact that this case has already been appealed and this matter has not been previously raised has no bearing on the lack of subject matter jurisdiction. It is well settled that issues related to subject matter jurisdiction may be raised at any time, including for the first time before the Supreme Court. *Brown v. State,* 343 S.C. 342, 346, 540 S.E.2d 846, 848 (2001).

Though not addressed by the Court of Appeals, there are three decisions made by this Court that addresses the ALC being sole tribunal that can initially review any decision made by the board relating to the denial of parole or the denial of parole eligibility, *Al-Shabbaz v. State,* 338 S.C. 354, 527 S.E.2d 742 (2000); *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services,* 352 S.C.

594, 576 S.E.2d 146 (2003); and *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services,* 377 S.C. 489, 661 S.E.2d 106 (2008). In *Al-Shabbaz,* this Court made the decision that an inmate held by the Department of Corrections may only seek a review for a decision in an administrative matter before the ALC and not through post-conviction relief. This Court made the determination that administrative matters can only arise in two ways: 1) when an inmate is disciplined and punishment is imposed; or 2) when an inmate believes prison officials have erroneously calculated his sentence; sentence-related credits or custody status. 338 *Al-Shabbaz,* S.C. at 369, 529 S.E.2d at 750.

In *Furtick,* this court decided that the latter applies to the denial of parole eligibility. This Court decided that *Al-Shabbaz* outlined the nature of review available to inmates raising non-collateral issues that implicate liberty interests; those procedures apply equally to inmates affected by final decisions of the Department of Probation, Parole and Pardons that affect a liberty interest. *Furtick,* 352 S.C. at 599, 576 S.E.2d at 146. This Court decided that the permanent denial of parole eligibility implicates a liberty interest sufficient to require at least minimal due process. *Id.,* S.C. at 598, S.E.2d at 149.

In *Cooper,* this Court decided that if the parole board deviates from or renders its decision without consideration of the appropriate criteria, it essentially abrogates an inmate's right to parole eligibility and thus, infringes on a state-created liberty interest. *Cooper,* 377 S.C. at 499, 661S.E. at 112. In *Cooper,* if it is revealed that the parole board failed to apply the mandatory criteria established under South Carolina law and the parole board the decision may be remanded.

The Petitioner argues that the current South Carolina parole system is inadequate for a fair determination of whether or not he should be released on parole, and that it is not an adequate substitute for an individualized resentencing. The Petitioner argues that current criteria does not

consider the immaturity, impetuosity and a failure to appreciate the risk and consequence as would a youth have at the time he committed this crime. The Petitioner argues against the policy and procedures of the parole board and how parole hearings are conducted and what is considered. Those are not matters relating to his sentence but non-collateral administrative matters that should be addressed by the ALC, not the Circuit Court. The Circuit Court should have not been allowed to preside over a determination of whether or not the parole board properly considered the hallmarks of youth as proscribed in both the *Miller* and *Aiken* decisions.

The circuit court lacked subject matter jurisdiction relating to parole board decisions, so this matter should have been presented before the ALC upon the denial of the Petitioner's parole. Due to the Circuit Court's lack of ability to preside over decisions regarding the parole board, this case was heard before an improper tribunal and should have been dismissed on those grounds. This court should deny certiorari due to the Circuit Court's lack of jurisdiction to preside over this cause of action. The issue is not a sentencing issue but a parole decision; therefore, this is an administrative matter that should have been initially presented before the ALC and not the Circuit Court.

CONCLUSION

Based on the foregoing reasons, Respondent submits Petitioner has failed to show that the question presented warrants certiorari review. The Court should deny the petition for writ of certiorari and let stand the decision of the Court of Appeals affirming the trial court.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Charleston County
The Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

Respondent,

v.

ANTHONY M. ENRIQUEZ,

Petitioner.

Appellate Case No. 2019-001895

CERTIFICATE OF SERVICE

I, **Tommy Evans, Jr.,** counsel for the Respondent, certify that I have served the within *Return to Petition for Writ of Certiorari* by depositing two (2) copies of the same in the United States mail, postage pre-paid, and addressed to his attorney of record: Lara M. Caudy, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, South Carolina 29201.

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

This 27th day of January, 2020.

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ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

January 27, 2020

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *The State v. Anthony M. Enriquez*
Appeal from Charleston County
Appellate Case No. 2016-002237

Dear Mr. Shearouse:

Enclosed for filing in your office is the original and six (6) copies of the Return to Petition for Writ of Certiorari, together with Certificate of Service in the above-captioned matter.

Thank you for your assistance in this matter.

Sincerely,

Tommy Evans, Jr.
Assistant Attorney General

TE:dmd
Enclosures
cc: Lara Mary Caudy, Esq. (w/two copies of encls.)
The Honorable Scarlett Wilson, Solicitor, Ninth Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)