

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

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S.C. SUPREME COURT

**Certiorari to the Court of Appeals
Appeal from Williamsburg County
The Honorable Michael G. Nettles, Circuit Court Judge**

THE STATE,

Respondent,

v.

RONALD HAKEEM MACK,

Petitioner.

Appellate Case No. 2020-001101

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

- I. Did the Court of Appeals err by expanding the jurisdiction of appellate courts beyond the limitations specifically set by the South Carolina General Assembly in section 14-3-330 of the South Carolina Code, through its misinterpretation of this Court's precedent to allow the state to proceed with an interlocutory appeal of a circuit court's decision to grant a new sentencing proceeding?

- II. Did the Court of Appeals err by reversing the circuit court's finding that Petitioner was entitled to an individualized sentencing hearing where his fifty-year sentence for a murder committed as a juvenile constitutes a de facto life sentence in violation of the federal and state constitutions?

RESPONDENT'S QUESTIONS PRESENTED

- I. Was the Court of Appeals correct in finding the circuit court's Order was a final order addressing the merits of Petitioner's argument, and where the Order's grant of an entirely new sentencing proceeding to Petitioner gave rise to the State's right to appeal due to its erroneous application of both *Aiken v. Byars* and *Miller v. Alabama*?

- II. Was the Court of Appeals correct in finding legal error in the circuit court's application of *Aiken v. Byars* and *Miller v. Alabama* to a term-of-years sentence, when both cases are expressly limited to LWOP sentencing and where prior Supreme Court precedent already demonstrates that our State Supreme Court will not expand the protections of the Eighth Amendment beyond the limits set by the United States Supreme Court?

STATEMENT OF THE CASE

Petitioner, Ronald Hakeem Mack, was sentenced to fifty years imprisonment for murder and a concurrent thirty years for first-degree burglary following a guilty plea on August 24, 2010.¹ (App., p. 1; p. 32, lines 7-14). Petitioner admitted he and three co-defendants drove to a teenager's home and shot and killed him over a drug debt owed to the gang to which they belonged. (App., p. 7, lines 22-25; p. 8, lines 1-3; p.8, line 8 through p.12, line 20; p. 16, line 15 through p.17, line 13). Petitioner was seventeen-years-old at the time.² (App., p. 19, lines 4-5). Petitioner pled guilty before the Honorable Clifton Newman and was represented by attorney LeGrand Carraway. (App., p. 1). Petitioner did not appeal his guilty plea or sentences.

On August 5, 2011, Petitioner filed for post-conviction relief. (2011-CP-45-383). After an evidentiary hearing, the Honorable R. Ferrell Cothran, Jr. denied and dismissed with prejudice the application. Petitioner filed a petition for writ of certiorari which presented, among other issues, the claim that his case should be remanded for resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). The Supreme Court of South Carolina denied certiorari review on March 25, 2016. (Appellate Case No. 2014-001518).

On April 20, 2015, Petitioner filed a motion for resentencing pursuant to *Aiken*. (App., p. 39-41). The State submitted a response to the motion on April 28, 2015, and Petitioner replied on May 15, 2015. (App., p. 61-71). This Court vested the Honorable Michael G. Nettles with exclusive jurisdiction over the case on August 11, 2016. (App., p. 82).

The State moved to dismiss the motion for resentencing on October 5, 2016, arguing

¹ As part of the negotiations, the State dropped criminal conspiracy and weapons charges. (R.p.3, lines 15-19).

² Petitioner was four months away from his eighteenth birthday. (App., p. 34-36).

Petitioner was not entitled to relief because he was not sentenced to life without parole, but received a term of fifty years and the plea judge considered all relevant information prior to sentencing. (App., p. 85-87). Petitioner opposed the motion, asserting the term-of-years sentence he received was the functional equivalent of a life sentence such that he was part of the class entitled to resentencing. (App., p. 88-107).

On February 17, 2017, a hearing was held on the State's motion before Judge Nettles. (App., p. 117). Petitioner was represented by attorney Laura R. Baer, and the State was represented by Solicitor Ernest A. Finney, III. (App., p. 117). By order dated June 14, 2017, Judge Nettles denied the State's motion to dismiss, and made substantive findings that 1) *Aiken* applied to *de facto* life sentences, 2) fifty years constituted such a sentence, and 3) the original sentencing hearing was insufficient under the new precedent set forth by *Aiken* and *Miller*. (App., p. 392-400). Accordingly, the judge found Petitioner was entitled to a resentencing hearing pursuant to *Aiken*. (App., p. 401). Pursuant to the Supreme Court's grant of exclusive jurisdiction, Judge Nettles Order also dictated that he would preside over the new sentencing hearing and that a status conference would be convened within 15 days of the Order, so as to schedule such a proceeding. (App., p. 401).

The State filed a motion to reconsider and Petitioner opposed the motion. (App., p. 402-405). The State filed a lengthy memorandum waiving a reconsideration hearing and in support of its motion. (App., p. 406-434). Judge Nettles denied the motion for reconsideration by order dated November 15, 2017. (App., p. 435).

The State served a notice of appeal on November 22, 2017. Petitioner filed a motion to dismiss the appeal as interlocutory on December 19, 2017, which the State opposed. The Court of Appeals denied the motion to dismiss by order dated February 1, 2018. Petitioner submitted his

Final Brief of Respondent on October 29, 2018. The State submitted its Final Brief of Appellant and its Final Reply Brief on November 13, 2018. The South Carolina Court of Appeals filed its unpublished Opinion, 2020-UP-148, on May 20, 2020, and reversed the decision of the circuit court. Petitioner filed a Petition for Rehearing on June 4, 2020, which the Court of Appeals denied on July 14, 2020.

On August 12, 2020, Petitioner filed his Petition for Writ of Certiorari to the Court of Appeals. This Return to the Petition now follows.

STATEMENT OF FACTS

The Crime

Petitioner was involved in the Bloods gang along with victim, Kenyon Dorsey. The two individuals were involved in the sale of drugs together for the gang and developed a friendship. That friendship deteriorated as Victim became indebted to the gang for \$78,000. The gang's leadership gave Petitioner instruction to "take care of the problem." (App., p. 17-18). In response, Petitioner called his mother, Tawanda Allen, as well as her boyfriend, Kelvin Bowen, and asked that they assist him with murdering Victim. He instructed them to bring guns and drive down from Maryland. (App., p. 10, lines 7-14). Petitioner also asked for help from a fellow gang member, Antonio McClary.

On April 5, 2009, Allen and Bowen picked up Petitioner and McClary, and the group proceeded to drive to Victim's home. Petitioner was four months away from turning eighteen when he and his co-defendants broke into the home of seventeen-year-old Kenyon Dorsey. (App., p. 8, lines 18-23; p. 34-36). Petitioner found Victim sleeping in the recliner. He proceeded to walk behind the recliner and shoot Victim three times. Shortly after, co-defendant Bowen saw Victim move and stated, "He's not dead, we need to finish him off." He then shot Victim once with a

shotgun. The co-defendants then got in the car and drove away. Victim's mother was inside the home at the time. She heard what she thought were firecrackers. When she entered the room she saw blood on the wall and realized her son had been murdered. (App., p .8, line 23 through p. 11, line 15).

Petitioner, Allen, and Bowen were found in Maryland and ultimately all four participants were arrested. Petitioner, Allen, and McClary gave statements to police. Petitioner admitted that he and three co-defendants drove to Victim's home and killed him over a drug debt owed to the gang to which they belonged. (App., p. 7, lines 22-25; p. 8, lines 1-3; p. 8, line 8 through p.12, line 20; p. 16, line 15 through p.17, line 13). On August 24, 2010, Petitioner entered a guilty plea to the charge of murder, and after extensive argument in mitigation, the Honorable Clifton Newman sentenced Petitioner to imprisonment for 50 years for the charge of murder and a concurrent 30 years imprisonment for first degree burglary. (App., p. 1; p. 7-12; p. 16, line 15 through p.17, line 13; p. 30, line 16 through p. 32, line 14; p. 34-36).

ARGUMENTS

III. The Court of Appeals was correct in its conclusion that the circuit court's Order was a final order addressing the merits of Petitioner's argument, and where the Order's grant of an entirely new sentencing proceeding to Petitioner gave rise to the State's right to appeal due to its erroneous application of both *Aiken v. Byars* and *Miller v. Alabama*.

The Court of Appeals denied Petitioner's initial motion to dismiss the appeal as an improper interlocutory appeal. After briefing from both parties, the Court of Appeals followed with its unpublished opinion finding that the State had a right to seek an appeal of the circuit court order granting Petitioner a new sentencing proceeding pursuant to *Aiken v. Byars* and *Miller v. Alabama*. The Court of Appeals was correct in its ruling and certiorari is unwarranted in this matter.

The Court of Appeals cited the South Carolina Supreme Court decision of *State v. Johnson* for its ruling. In *State v. Johnson*, the State sought to appeal the grant of a motion for mistrial due to a witness referencing a polygraph test during the investigation of the crime. *State v. Johnson*, 376 S.C. 8, 10, 654 S.E.2d 835, 836 (2007). The Court of Appeals affirmed. *Id.*

This Court granted certiorari and relied upon the well-established rule that “[t]he State may only appeal a new trial order if, in granting it, the trial judge committed an error of law.” *Id.* This Court further explained that in determining whether an error of law exists, such that the right to appeal arises, it is necessary to consider the merits of the issue for which the new trial was granted. *Id.*, at S.C. 11, 654 S.E.2d at 836; *State v. Des Champs*, 126 S.C. 416, 120 S.E. 491, 492 (1923)(holding that “[f]rom the order granting the new trial the state has appealed upon the ground that it was based wholly upon an erroneous view of the law. The question of the state's right to appeal has not been raised, but where the grant of a new trial in a criminal case is predicated wholly upon error of law, we think an appeal by the state will lie.”). In the same vein of reasoning, our Supreme Court in *State v. Isaac* further explained that “[a]n order involving the merits “must finally determine some substantial matter forming the whole or a part of some cause of action or defense.” *State v. Isaac*, 405 S.C. 177, 183, 747 S.E.2d 677, 679 (2013)(citing *Mid-State Distrib., Inc. v. Century Imp., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)).

That is precisely what has occurred as a result of Judge Nettles’ Order. Judge Nettles reached a final ruling on the merits of the sole legal issue that has given rise to this action, and his ruling was based on a clear error of law. (*Infra*). Judge Nettles’ ruling carried with it the guarantee that Petitioner must be granted the opportunity for resentencing contemplated by *Aiken*, and nothing was left but to conduct the *Aiken v. Byars* proceeding. As such, Judge Nettles Order constituted a final order on the merits of the legal issue presented. As the Court of Appeals

concluded in its unpublished opinion, the State was entitled to appeal that Order pursuant to *State v. Johnson*.

IV. The Court of Appeals was correct in finding legal error in the circuit court's application of *Aiken v. Byars* and *Miller v. Alabama* to a term-of-years sentence, when both cases are expressly limited to LWOP sentencing and where prior Supreme Court precedent already demonstrates that our State Supreme Court will not expand the protections of the Eighth Amendment beyond the limits set by the United States Supreme Court.

The Court of Appeals correctly held that the circuit court committed an error of law in finding Petitioner was entitled to resentencing under *Aiken v. Byars*. Petitioner received a specific term-of-years sentence for a heinous execution style murder of an unarmed victim and will be released when he has completed his prescribed time of incarceration. As such, he is not a member of the specific class of inmates contemplated by *Miller* and *Aiken*, and therefore he is not entitled to resentencing. *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). Consequently, certiorari is not warranted in this matter.

The line of United State Supreme Court precedent set forth in *Roper*, *Graham*, and *Miller* demonstrate that specific sentences may exceed the “narrow proportionality principle” set forth by the Eighth Amendment of the United States Constitution as it pertains to juvenile offenders. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). In *Miller*, the United State Supreme Court found that *mandatory* LWOP sentences for juvenile homicide offenders violated the proportionality protections of Eighth Amendment. *Id.* 567 U.S. at 489, 132 S. Ct. at 2475. The effect of the *Miller* holding was to give courts the ability to impose some measure of judgment of the youthful circumstances of the offender so that formerly “mandatory” LWOP sentencing structures inherently provide an

opportunity for discretion from the court. *Id.* 567 U.S. at 474,132 S. Ct. at 2466.

While South Carolina’s statutory framework did not employ a mandatory LWOP scheme for juvenile offenders, this Court in *Aiken v. Byars* concluded that the hearing on the elements of youth contemplated by *Miller* should likewise be exercised for juveniles who have received or might receive permissible LWOP sentences. The rationale being that although LWOP already existed as a specific discretionary sentence for South Carolina judges, neither prohibited nor mandatory, *Miller* prescribed specific factors of youth which must be considered in order to sentence a juvenile to LWOP. *Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d 572, 577 (2014). This Court in *Aiken* found that this specific *Miller* framework should be utilized for LWOP sentencing in South Carolina.

Petitioner admits that he did not receive a LWOP sentence, but argues that he is entitled to resentencing on the assertion that his 50 year sentence constitutes a “de facto” life sentence. (Petition for Writ of Certiorari, p. 24). There is no controlling authority which dictates that the mitigation framework adopted by *Miller* and *Aiken* must be utilized before sentencing a juvenile offender to a term-of-years sentence. The Court of Appeals was correct in holding Petitioner is not entitled to resentencing and that the Order of the circuit court was based upon an error of law. Petitioner “received a ‘term-of-years’ sentence, rather than a LWOP sentence, he was not a member of the class of offenders contemplated by our precedent; therefore, the trial court abused its discretion in granting his motion for resentencing.” (App., *State v. Mack*, No. 2017-002441, 2020 WL 2554305, at *1 (S.C. Ct. App. May 20, 2020)). Moreover, this Court’s decision in *State v. Slocumb* is directly controlling authority for this matter. *State v. Slocumb*, 426 S.C. 297, 827 S.E.2d 148 (2019).

In *Slocumb*, the defendant received a combined 130 years sentence for his various crimes.

This Court’s analysis in *Slocumb* demonstrated that none of Mr. Slocumb’s individual sentences were constitutionally impermissible – *one of which included a 50 year sentence for burglary* – and that while it was clear Mr. Slocumb would die in prison, the decisions of the United States Supreme Court in *Graham* and *Miller* did not extend to “de facto” life sentences. *Id.*, 426 S.C. at 302, 309-10, 827 S.E.2d at 150, 154-55. Mr. Slocumb’s argument to the Supreme Court mirrors the arguments now asserted by Petitioner, that the “spirit” of the holdings in *Graham* and *Miller* should justify the stretching of their respective holdings to cover “de facto” life sentences. In addressing that argument, this Court found that existing precedent forbids an inferior court from enlarging or extending federal constitutional protections beyond the limits prescribed by the United States Supreme Court. *Id.* 426 S.C. at 306, 827 S.E.2d at 153. With that limitation in mind, this Court explicitly declined to extend the protections of the Eighth Amendment so as to forbid “de facto” life sentences that culminate from multiple term-of-years sentences. *Id.* 426 S.C. at 313, 827 S.E.2d at 156. Petitioner’s argument asks this Court to do precisely what it has already found to be improper in *Slocumb*: extend the protections of the Eighth Amendment beyond the limits that the United State Supreme Court has expressly delineated. Certiorari is not warranted.

To the extent that Petitioner has also set forth arguments that the Court of Appeals’ decision should be reversed on the basis of the South Carolina Constitution, those arguments are not properly before this Court. While the Court of Appeals has the authority to recognize an additional sustaining ground, it did not do so in this matter, and pursuant to South Carolina Appellate Court Rule 220, such arguments did not fairly arise within the record on appeal. Petitioner’s state constitutional arguments were not explored, nor were they ruled upon by Judge Nettles in his final Order granting resentencing. On appeal, Petitioner did not include such arguments in his Final

Brief of Respondent and only raised such arguments for the first time in his Petition for Rehearing.³ As such, any arguments concerning the application of the South Carolina Constitution are not preserved for certiorari review. However, if these arguments were preserved, Petitioner has failed to demonstrate any basis for which the South Carolina Constitution would forbid a term-of-years sentence for a juvenile offender who committed a particularly heinous murder.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

³ Judge Nettle's Order and Respondent's Final Brief contained only two nondescript references to the South Carolina Constitution, absent any discussion or argument. Such is insufficient to constitute preservation of the issue for appellate review. *State v. Smith*, 428 S.C. 417, 421, 836 S.E.2d 348, 350 (2019)(noting in footnote 5 that this Court expressed no opinion as to the applicability of the state constitution to similar *Aiken v. Byars* arguments, wherein Petitioner has only mentioned the state constitution in passing in his brief.).

Respectfully submitted,

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