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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From The Administrative Law Court
Honorable H.W. Funderburk, Jr., Administrative Law Judge

Appellate Case No. 2020-001473

JOSEPH KELSEY, # 217218.....APPELLANT,

V.

SOUTH CAROLINA DEPARTMENT OF
PROBATION, PAROLE AND PARDON SERVICESRESPONDENT.

**BRIEF OF FORMER CORRECTIONAL AGENCY HEADS, CORRECTIONAL ADMINISTRATORS, AND
PRISON WARDENS
AMICI CURIAE IN SUPPORT OF THE PETITIONER**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
STATEMENT OF INTEREST	vii
DISCUSSION.....	1
I. PURPOSES OF PAROLE.....	1
II. HISTORY OF PAROLE	2
a. 1870–1970: Rise of Rehabilitation	2
b. 1970–2010: Tough on Crime	4
c. 2020–2021: Rising Rates and Reform	6
III. THE STRUCTURE AND PRACTICE OF PAROLE IN SOUTH CAROLINA	7
a. Policy and Procedure	7
b. Criteria for Parole	8
c. Structural Barriers.....	11
IV. THE COSTS AND CONSEQUENCES OF SYSTEMATIC DENIAL	11
a. Behavioral Costs.....	13
b. Participation in Programming.....	14
c. Operational Costs.....	15
CONCLUSION.....	17
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Brown v. Precythe</i> , No. 19-2910 (8th Cir. 2021).....	10
STATUTES AND RULES	
S.C. Code Ann. § 24-21-10 (2020).....	9
S.C. Code Ann. § 24-21-640 (2018).....	5
OTHER AUTHORITIES	
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Dep’t. Just., National Institute of Corrections, <i>Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates</i> (2004), https://s3.amazonaws.com/static.nicic.gov/Library/018735.pdf	15
Grant Duwe, <i>The Use and Impact of Correctional Programming for Inmates on Pre- and Post-Release Outcomes</i> , Nat’l Inst. Just. (2017).....	14
<i>Elmira Correctional Facility</i> , SNAC (last visited May 2, 2022), https://snaccooperative.org/ark:/99166/w6fv2kbr	2
<i>Elmira System</i> , Britannica, (May 15, 2020), https://www.britannica.com/topic/Elmira-system	2
Sheila French & Paul Gendreau, <i>Reducing Prison Misconducts: What Works!</i> , 33 CRIM. JUST. & BEHAV. 185 (2006).....	14
Patricia Garin, <i>Practice Tips: Helping Prisoners Get Paroled: A Vital Part of Public Safety</i> , 55 Boston Bar J. 27 (2011)	2

Shirene Hansotia, <i>Reevaluating Crime and Punishment in South Carolina</i> , ACLU S.C. (2021).....	passim
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Paul J. Larkin, Jr., <i>Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release</i> , 11 GEO. J.L. PUBLIC POL’Y 1 (2017).....	3
Jill Lepore, <i>The Rise of the Victims’-Rights Movement</i> , NEW YORKER (May 14, 2018), https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement	4
Matt McKillop & Alex Boucher, <i>Aging Prison Populations Drive Up Costs</i> (Feb. 20, 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs	2
Ashley Nellis, <i>A New Lease on Life</i> , Sentencing Project (June 30, 2021), https://www.sentencingproject.org/publications/a-new-lease-on-life/	16
Ashley Nellis, <i>S.C. Legislature Must Reform Life-Without-Parole Sentences</i> , THE POST AND COURIER, (updated Sept. 14, 2020), https://www.postandcourier.com/opinion/commentary/s-c-legislature-must-reform-life-without-parole-sentences/article_c9f64da8-9e44-11e7-ac9c-f7ecaf1d057d.html	7
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<i>Our History</i> , S.C. Dep’t Prob., Parole, & Pardon Servs., (last visited May 2, 2022) https://www.dppps.sc.gov/About-PPP/Our-History	3, 5
<i>Parole Board</i> , S.C. Dep’t Prob., Parole, & Pardon Servs. (last visited May 2, 2022), https://www.dppps.sc.gov/Parole-Pardon-Hearings/Parole-Board	7, 8
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Jorge Renaud, <i>Grading the Parole Release System of All 50 States</i> , Prison Policy Initiative (Feb. 26, 2019), https://www.prisonpolicy.org/reports/grading_parole.html	6
Mike Rosen-Molina, <i>US Prison Population Up Eight-Fold Since 1970: Report</i> , JURIST (Nov. 20, 2007, 7:06 PM), https://www.jurist.org/news/2007/11/us-prison-population-up-eight-fold/	4
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Beth Schwartzapfel, <i>Parole Boards Problems and Promise</i> , 28 Fed. Sent’g. Rep. 79 (2015).....	3
Richard P. Seiter & Karen R. Kadela, <i>Prisoner Reentry: What Works, What Does Not, and What Is Promising</i> , 49 Crime & Delinq. 360 (2003)	1
Faye S. Taxman, <i>Parole: “What Works” Is Still Under Construction</i> , in HANDBOOK OF EVIDENCE-BASED SUBSTANCE ABUSE TREATMENT IN CRIMINAL JUSTICE SETTINGS 205 (Carl Leukefeld, Thomas P. Gullotta & John Gregrich eds., 2011).....	1, 12
Jeremy Travis & Sarah Lawrence, The Urban Institute: Justice Policy Center, <i>Beyond the Prison Gates: The State of Parole in America</i> (2002)	4

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are twenty current or former correctional agency heads, senior correctional administrators, and prison wardens who have firsthand knowledge of the intricacies of the parole process and its impact on prison operations. As officers who have worked on the front lines of prison services and parole administration in various states including South Carolina, *amici* are particularly sensitive to the consequences and dangers of systematic parole denial, including the behavioral and operational costs that deteriorate the quality of the prison system for inmates, employees, and administrators alike.

Amici include current and former agency heads of the Departments of Corrections of Alabama, Arkansas, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kentucky, Michigan, Mississippi, New York, North Dakota, Ohio, Pennsylvania, South Dakota, Texas, Washington, and Wisconsin. Five *amici* served as agency heads of correctional departments in multiple states, and five have worked in corrections for fifty years or more. *Amici* represent more than six hundred years of combined correctional experience.

Accordingly, *amici* have a vested interest in promoting a parole system in South Carolina that creates a safer prison community for inmates and employees, encourages reasonable spending, and continues to serve the carceral interests of the State. The parole system as it stands is broken, and until people like Joe Kelsey are paroled, the systematic denial of parole will continue to exacerbate the costs and dangers of incarceration.

DISCUSSION

I. Purposes of Parole

Parole serves many important functions in the South Carolina Department of Corrections (SCDC). First, and most importantly, because parole offers the prospect of early release, it incentivizes good conduct inside the walls of corrections.² As such, the possibility of parole is essential in keeping both inmates and correctional staff safe.

Parole also encourages participation in rehabilitative programming.³ Prior to the shift toward no parole determinate sentencing, inmates participated in rehabilitative programming at high rates “to impress the parole board and improve their chances of a favorable parole decision.”⁴ Participation in rehabilitative programming in turn reduces recidivism rates.⁵

Parole further serves to reduce the prison population by releasing rehabilitated inmates. Not only does this reduce overcrowding and the burden on correctional departments, but it also helps prevent new prison admissions: Rehabilitated inmates will re-enter their communities and share their stories with others, deterring further crime. Inmates released on parole are also less

² See Faye S. Taxman, *Parole: “What Works” Is Still Under Construction*, in *HANDBOOK OF EVIDENCE-BASED SUBSTANCE ABUSE TREATMENT IN CRIMINAL JUSTICE SETTINGS* 205, 207 (Carl Leukefeld, Thomas P. Gullotta & John Gregrich eds., 2011).

³ See *id.*; see also Ryan King, *Balancing the Goals of Determinate and Indeterminate Sentencing Systems*, 28 Fed. Sent’g. Rep. 85, 85 (“While introducing more certainty and consistency to time served, [a determinate system] also greatly reduced opportunities and incentives for people in prison to take advantage of programming options or demonstrate personal transformation.”); *id.* (“[U]nder an indeterminate sentencing model with parole release, program participation and evidence of positive change while in prison can be incentivized with substantial reductions in length of stay.”).

⁴ Richard P. Seiter & Karen R. Kadela, *Prisoner Reentry: What Works, What Does Not, and What Is Promising*, 49 Crime & Delinq. 360, 362 (2003).

⁵ *Id.* at 365.

likely to return to prison on new charges than inmates who max out their sentence.⁶ A working parole system thus creates a safer community both inside and outside of correctional facilities.

Finally, parole promotes smart fiscal policy by eliminating unnecessary spending on the detention of people who no longer pose a threat to society. In the 2019 fiscal year, SCDC spent an average of \$24,510 per inmate.⁷ This cost is two to three times higher on average for inmates over the age of 55.⁸ By reducing the prison population through parole, SCDC may reallocate these funds to services that promote further rehabilitation, community, and safety.

II. History of Parole

a. 1870–1970: Rise of Rehabilitation

Parole has long been integral to the American criminal justice system. The first parole system in the United States was implemented in 1876, when Zebulon R. Brockway (the “father of American parole”) reformed the Elmira, New York prison system to focus on reforming inmates through tailored programming.⁹ Under Brockway’s system, inmates served indeterminate sentences and were released once they were found to be rehabilitated.¹⁰ At the turn of the twentieth century, Brockway’s approach began to catch on, and the primary goal of American criminal legal

⁶ See Patricia Garin, *Practice Tips: Helping Prisoners Get Paroled: A Vital Part of Public Safety*, 55 Boston Bar J. 27, 27–28 (2011); PEW Charitable Trs., *Max Out: The Rise in Prison Inmates Released Without Supervision*, 6–7 (2014).

⁷ SCDC Cost Per Inmate, Fiscal Years 1988–2020 (Oct. 1, 2020), https://www.doc.sc.gov/research/BudgetAndExpenditures/Per_Inmate_Cost_1988-2020.pdf.

⁸ Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs* (Feb. 20, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs>.

⁹ *Elmira System*, Britannica, (May 15, 2020), <https://www.britannica.com/topic/Elmira-system>.

¹⁰ *Elmira Correctional Facility*, SNAC (last visited May 2, 2022), <https://snaccooperative.org/ark:/99166/w6fv2kbr>. Brockway also convened the first Congress of Corrections, which through several iterations is currently known as the American Correctional Association.

policy shifted from retribution to rehabilitation.¹¹ By 1927, almost every U.S. state had adopted some version of parole.¹²

The general contours of the parole system remain largely the same today: A judge sentences a defendant to a range of years, with the ultimate time served depending on when (or whether) the parole board deems him fit to return to society. Inmates show fitness for release through their reformed behavior in prison, including their participation in prison programming aimed at rehabilitation. After being released on parole, the parolee is typically subject to certain restrictions to ensure that he has remained on the right side of the law.

South Carolina established parole relatively late, with the passage of Act 562 (amended by Act 563) in 1941.¹³ The Act created a six-member Parole Board tasked with monitoring individuals placed on probation and making recommendations on parole matters subject to approval by the Governor. Eight years later, the South Carolina Constitution was amended to restrict the clemency powers of the Governor, thereby granting the Board sole authority to grant pardons and to issue and revoke parole in South Carolina.¹⁴ In 1981, the Community Corrections Act (Act 100) tasked the agency with developing supervision strategies for people on parole release; in 1988, the Board was renamed the South Carolina Board of Paroles and Pardons and the agency was renamed the South Carolina Department of Probation, Parole and Pardon Services (SCDPPPS).¹⁵ In 1993, the Board's duties were amended to deal exclusively with the consideration of parole and pardons.¹⁶

¹¹ See Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. PUBLIC POL'Y 1, 7 (2017).

¹² See Beth Schwartzapfel, *Parole Boards Problems and Promise*, 28 Fed. Sent'g. Rep. 79, 80 (2015).

¹³ *Our History*, S.C. Dep't Prob., Parole, & Pardon Servs., (last visited May 2, 2022), <https://www.dppps.sc.gov/About-PPP/Our-History>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

b. 1970–2010: Tough on Crime

As public concern for issues of law and order began to rise in the aftermath of the social upheaval of the late 1960s and early 1970s, criminal justice reform began to shift away from the focus on rehabilitation that had characterized the movements in the first half of the century.¹⁷ Following the launch of the War on Crime in 1965 and the War on Drugs in 1971, support for discretionary sentencing, incentives for early release, and other rehabilitative measures waned on both sides of the political spectrum.¹⁸ Facing mounting pressure to get tough on crime, state and federal legislatures began to move away from indeterminate sentencing and rehabilitation, passing laws severely limiting the range of sentences judges could impose. As a result, sentences got longer, lists of people paroled got shorter, and prison populations soared nationally. In 1976, parole boards released 65% of the people released from prison in the U.S; by 1999, that number had dropped to just 24%.¹⁹ By 2007, the prison population in America was eight times larger than it was in 1970.²⁰

This time around, South Carolina was right on trend: Changes to state sentencing and parole policies in the 1980s and 1990s led to a dramatic increase in rates of incarceration.²¹ In 1985, for example, South Carolina implemented a new parole process requiring the Board to

¹⁷ See Jeremy Travis & Sarah Lawrence, *The Urban Institute: Justice Policy Center, Beyond the Prison Gates: The State of Parole in America* 2 (2002), <http://webarchive.urban.org/publications/310583.html>.

¹⁸ See, e.g., Jill Lepore, *The Rise of the Victims'-Rights Movement*, NEW YORKER (May 14, 2018), <https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement>.

¹⁹ Travis & Lawrence, *supra* note 17, at 4.

²⁰ Mike Rosen-Molina, *US Prison Population Up Eight-Fold Since 1970: Report*, JURIST (Nov. 20, 2007, 7:06 PM), <https://www.jurist.org/news/2007/11/us-prison-population-up-eight-fold/>.

²¹ Since 1983, the prison population has increased 113% in South Carolina. Vera Inst. Just., *Incarceration Trends in South Carolina*, (Dec. 2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-south-carolina.pdf>.

consider a so-called “risk assessment scale” for each eligible inmate considered for parole²² and to enumerate and release its criteria for release²³—but which nevertheless granted the Board absolute discretion in decision-making on a case-by-case basis.²⁴ In the following years, the Board substantially reduced the rate at which it released individuals eligible for parole.²⁵ The Board granted parole for 63 percent of all applications in 1980; by 2008, just 10 percent of parole applications were granted.²⁶ In the 1990s, South Carolina adopted mandatory-minimum sentences for certain felonies and abolished parole for many offenses altogether.²⁷ In conjunction with low parole rates, these changes in sentencing drove a dramatic increase in incarceration. The South Carolina prison population more than tripled from 1978 to 2009, rising from 7,526 inmates in 1978 to 24,460 at the end of the 2009 fiscal year.²⁸

All the while, in 1972, the federal government acknowledged widespread inequities and inconsistencies in its parole system, including inconsistent parole criteria, arbitrary decision-making, and lack of due process.²⁹ As a result, it began a pilot program that called for (1) explicit,

²² *Our History*, S.C. Dep’t Prob., Parole, & Pardon Servs. (last visited May 2, 2022), <https://www.dppps.sc.gov/About-PPP/Our-History>.

²³ S.C. Code Ann. § 24-21-640 (2018).

²⁴ S.C. Board of Paroles and Pardons, Policy and Procedural Manual 26 (Nov. 2019), <https://www.dppps.sc.gov/content/download/209320/4885043/file/Board+of+Paroles+and+Pardons+11062019.pdf>.

²⁵ The Pew Ctr. on the State of South Carolina’s Public Safety Reform 4 (2010), <https://www.pewtrusts.org/en/research-and-analysis/reports/2010/07/06/south-carolinas-public-safety-reform> [hereinafter PEW CTR., *SC Public Safety Reform*].

²⁶ *Id.*

²⁷ Vera Inst. Just., *supra* note 21.

²⁸ S.C. Sent’g Reform Comm’n, Report to the General Assembly (February 1, 2010), <https://www.scstatehouse.gov/Archives/CitizensInterestPage/SentencingReformCommission/CombinedFinalReport020110SigPage.pdf> [hereinafter *Commission Report*]; *see also* PEW CTR., *SC Public Safety Reform*, *supra* note 25, at 2 (citing a peak in 2009 with 24,612 inmates). *But see* Shirene Hansotia, *Reevaluating Crime and Punishment in South Carolina*, ACLU S.C. 10 (2021) (listing the 2009 state prison population as 23,486).

²⁹ Dep’t. of Just., U.S. Parole Comm’n, *History of the Federal Parole System* 18 (May 2003), <https://www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf>.

parole guidelines for “greater consistency and equity in parole decision-making”; (2) written and well-reasoned decisions; (3) timely decisions; (4) procedures for the appearance of representatives; (5) a two-level process for appeals; and (6) greater communication between the Board and relevant agencies.³⁰ Despite this slew of reforms, the federal government failed to ensure greater equity in the parole process: Where parole boards continued to exercise broad discretion, inequitable inconsistencies remained. Instead, the federal government abandoned its efforts and passed the Comprehensive Crime Control Act of 1984, abolishing parole for federal offenses.³¹ Recognizing the limitations of the parole process, other states followed suit.³² South Carolina, on the other hand, continued to press forward with its parole efforts despite these same difficulties.

c. 2010–2021: Rising Rates and Reform

In 2008, the South Carolina General Assembly established a Sentencing Reform Commission (“the Commission”) tasked with addressing the increasing prison population, rising recidivism rates, and mounting correctional costs.³³ The Commission’s recommendations were later adopted in the Omnibus Crime Reduction and Sentencing Reform Act of 2010 (S. 1154) (“SRA”).

The Commission identified a decrease in the rate of parole as a substantial driver of recent prison growth in South Carolina.³⁴ In 2009, for example, the Parole Board rejected 3,993 parole applications and approved 511, a total of only 3.5% of all South Carolina inmates released that

³⁰ *Id.*

³¹ *Id.* at 26.

³² As of 2019, sixteen states have eliminated or “severely curtailed” discretionary parole. Jorge Renaud, *Grading the Parole Release System of All 50 States*, Prison Policy Initiative (Feb. 26, 2019), https://www.prisonpolicy.org/reports/grading_parole.html.

³³ Sent’g Project, *Decarceration Strategies: How 5 States Achieved Substantial Prison Population Reductions* 41 (2018), <https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions/> [hereinafter *Decarceration Strategies*].

³⁴ Commission Report, *supra* note 28, at 2.

year.³⁵ As such, the SRA included measures to “give the parole board greater assurance that reaching parole eligibility actually means achievement of parole readiness,” including provisions that (1) shifted limited resources to supervise parolees at a high risk for recidivism; (2) implemented new supervision strategies for offenders least likely to reoffend; and (3) mandated the use of “evidence-based tools” in order to ensure more objectivity in parole decisions.³⁶

While South Carolina’s prison population did drop in the years following the passage of the SRA,³⁷ this decrease is primarily attributable not to the enactment of parole reforms but to changes in sentencing which resulted in shorter sentences and fewer new commitments for drug offenses and other non-violent crimes.³⁸ In fact, the overall annual rate of release in South Carolina has actually *decreased* in all but one year between 2009 and 2018, while the average length of incarceration has increased by nine percent in the same period.³⁹ Roughly thirty percent of inmates now in South Carolina prisons are serving a sentence of twenty years or more, with one in ten inmates serving a life sentence.⁴⁰

III. The Structure and Practice of Parole in South Carolina

a. Policy and Procedure

The South Carolina Parole Board is made up of seven members who are appointed by the governor and approved by the Senate to serve six-year terms.⁴¹ Parole panels constitute three

³⁵ *Id.* See also PEW CTR., *SC Public Safety Reform*, *supra* note 25, at 4 (describing substantial cuts to parole release rates since the 1980s).

³⁶ Hansotia, *supra* note at 28, at 11.

³⁷ *Decarceration Strategies*, *supra* note 33, at 43.

³⁸ *Id.* at 45.

³⁹ *Id.*

⁴⁰ Ashley Nellis, *S.C. Legislature Must Reform Life-Without-Parole Sentences*, THE POST AND COURIER, (updated Sept. 14, 2020), https://www.postandcourier.com/opinion/commentary/s-c-legislature-must-reform-life-without-parole-sentences/article_c9f64da8-9e44-11e7-ac9c-f7ecaf1d057d.html.

⁴¹ *Parole Board*, S.C. Dep’t Prob., Parole, & Pardon Servs. (last visited May 2, 2022), <https://www.dppps.sc.gov/Parole-Pardon-Hearings/Parole-Board>.

members of the Board and make decisions on non-violent parole cases. The panel must vote unanimously to grant parole or the case is put in front of the whole Board; if more than three members are present, a majority vote is required to grant parole. For violent offenders to receive parole, a quorum must be present and two-thirds of the Board must vote to grant parole. The Board meets around five times each month. With limited exception, nonviolent offenders have a hearing every year and violent offenders have a hearing every two years.

Inmates receive notice of a parole hearing thirty days before the hearing. Inmates must submit materials three weeks in advance of the hearing, and they may only do so via email; hard copies of parole materials are no longer accepted. The Board is typically assigned cases to review no later than two weeks prior to the hearing. If the Board denies parole, they send written notice of the rejection; over the years, this has devolved into today's one-page letter listing boilerplate reasons for denying parole.

b. Criteria for Parole

By statute, the Board must “carefully consider” the record of the prisoner “before, during, and after imprisonment.”⁴² The Board must also establish written, specific criteria for the granting of parole, which must reflect “all of the aspects” of the applicable statutory law and include a review of a prisoner's disciplinary and other records.⁴³ These currently include, *inter alia*: the risk the inmate poses to the community; the nature and seriousness of his offense; his participation in vocational and educational programming, including counseling or therapy; as well as the feelings of the sentencing judge and the victim's family.⁴⁴

⁴² S.C. Code Ann. § 24-21-640 (2018).

⁴³ *Id.*

⁴⁴ S.C. Board of Paroles and Pardons, Policy and Procedural Manual (Nov. 2019), <https://www.dppps.sc.gov/content/download/209320/4885043/file/Board+of+Paroles+and+Pardons+11062019.pdf>.

As the Board is careful to stress, however, these criteria “in no way bind[] the Board to grant parole in any given case.”⁴⁵ The arbitrariness of the Board’s decision-making is exacerbated by the Board’s lack of experience, oversight, and buy-in into the parole process. The Board in large part consists of political appointees with limited training, virtually no relevant experience, and no exposure to the prison system. The applicable statute only requires that “[a]t least one appointee shall have at least five years of work or volunteer experience in one or more of the following fields: parole, probation, corrections, criminal justice, law, law enforcement, psychology, psychiatry, sociology, or social work.” S.C. Code Ann. § 24-21-10 (2020). In addition to the Board’s lack of expertise, its members lack a vested interest in the outcome of the parole process. The Board members work part-time, receive no compensation, are removable by the governor at-will, and are not subject to any attendance requirements. As such, the members and their decisions are subject to little oversight and review.

Despite the provisions of the 2010 SRA, which mandated that parole board members consider factors such as an inmate’s risk of recidivism and level of participation in prison programs—with the goal of increasing the overall parole rate—the Board continues to cite reasons such as “the seriousness of the original crime” in its explanation for denying parole.⁴⁶ In a significant number of cases, the circumstances of the offense are the only reasons the Board cites for denial. Since the adoption of this backward-looking factor, the rate of parole has dropped significantly and inmates, with no power to change the past, are left to engage in futile efforts to demonstrate their rehabilitation. While the Board is required to utilize a risk assessment tool “consistent with evidence-based practices and factors that contribute to criminal behavior”⁴⁷ in its

⁴⁵ *Id.*

⁴⁶ Hansotia, *supra* note 28, at 55.

⁴⁷ S.C. Code Ann. § 24-21-10(F)(1)–(2) (2018).

decision-making, the Board's recent practice is to administer the COMPAS, its most frequently-used program that alleges to predict risk for violence, recidivism, and other factors relevant to parole.⁴⁸ COMPAS is a reliable tool for objectively measuring risk and is used in many states. Unfortunately, our board does not administer the test before every parole hearing and most often ignores the results, making decisions contrary thereto. To add insult to injury, and contrary to common sense and good correctional practice and public safety, the results of the COMPAS assessment are not provided to the applicants or SCDC so that applicants might identify weaknesses and address them before release or, if parole is denied, before their next parole hearing, leaving them no way to know what they should do to improve their chances of receiving parole. In any case, while governing statutes provide no such express authority, the Board most often chooses to weigh non-predictive criteria (such as the nature of the original crime or the feelings of the victims' family) just as or more heavily than those with proven predictive value (such as community support and participation in programming). In practice, the South Carolina Parole Board "routinely denies parole for the vast majority of people with violent convictions, even for individuals with stellar behavioral records and leadership qualities."⁴⁹ This decision-making process as it stands potentially runs afoul of constitutional safeguards.⁵⁰

⁴⁸ S.C. Dep't Prob., Parole, & Pardon Servs., Fiscal Year 2014-15 Accountability Report A-4. (Sept. 2015), <https://dc.statelibrary.sc.gov/handle/10827/15357> ("Increased compliance completion of Correctional Offender Management Profiling from 69% to 85% for Alternative Sanctions (COMPAS) risk/needs assessments").

⁴⁹ Hansotia, *supra* note 28, at 25.

⁵⁰ See *Brown v. Precythe*, 46 F.4th 879 (8th Cir. 2021) (finding that Missouri's remedial parole process for juveniles sentenced to life without parole violated the Eighth amendment by limiting parolee's access to information (including their parole files), failing to provide adequate details on the Board's reasons for denial, and repeatedly issuing denials based solely on the nature and circumstances of the offense instead of characteristics reflecting rehabilitation, growth, and maturity).

c. *Structural Barriers*

Most of us do not face such a disconnect between our parole authority and our correctional system. South Carolina is one of only eleven jurisdictions in which the Parole Board is located in an agency outside of the Department of Corrections.⁵¹ Where a Parole Board is housed within the Department of Corrections, the agencies necessarily share interests—e.g., reducing prison populations, lowering costs to the taxpayer, facilitating rehabilitation—and the burden of accountability. In South Carolina, however, where the Parole Board operates independently of SCDC (and, in recent years, without meaningful oversight from the political branches), the Board has no practical incentive to consider the responsibilities and goals of corrections in its decision making. Like other parole boards across the country, the South Carolina board has no incentive to operate fairly or to parole deserving inmates. All the costs of continued incarceration will be shouldered solely by a separate agency (SCDC) and the Board bears none of the risks created by destroying inmates' hopes of release.⁵²

IV. The Costs and Consequences of Systematic Denial

The Parole Board's failure to grant parole to deserving inmates hinders SCDC's ability to fulfill its duty of care and to achieve its rehabilitative mission. Parole standards that "reward people in prison for pursuing education and exhibiting good behavior. . . have been shown to improve prison climate and reduce recidivism."⁵³ In contrast, the Board's failure to adhere to a predictable standard for release has undermined the incentive structure that allows SCDC to function. The

⁵¹ Bureau Just. Stat., *Characteristics of State Parole Supervising Agencies*, 2006, <https://bjs.ojp.gov/content/pub/pdf/cspsa06.pdf>.

⁵² Frankly, we were shocked to learn that the SC Parole Board hides the entire parole record from applicants, including the statement of facts, while also placing the burden on the applicant to notify the Board of an error in the very parole file he is not allowed to review. While our systems were not perfect, none of the undersigned had such absurd unfairness in our parole systems.

⁵³ ACLU, *Blueprint for Smart Justice South Carolina* 17 (2019), <https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-SC.pdf>.

practice of systematically denying parole to even the most deserving applicants severs the relationship between parole and good behavior, rendering rehabilitative programming less effective and prisons less safe.⁵⁴

Joseph (“Joe”) Kelsey is a perfect example of such an applicant. Joe is now almost 46 years old and has been in prison since he was a teenager for his participation in a murder that was indisputably carried out by an older codefendant (who has since been released on parole). Joe has nevertheless taken full responsibility and expresses deep remorse for his role in the crime. By any measure, Joe’s record and performance in SCDC are better than his older and more culpable codefendant. Since his incarceration, Joe has made sure to take advantage of every rehabilitative opportunity presented to him. He has maintained employment since the moment he entered prison and earned two college degrees. He has successfully completed numerous faith-based and other programs designed to ready him for release. He was among the first inmates to earn admission into SCDC’s most selective and demanding program, the Columbia International University Prison Initiative, better known as the Seminary Program. Joe earned his associate’s degree and remains the only inmate to complete the program with a 4.0 GPA. He became a trained Hospice volunteer and devoted more than a thousand hours to end-of-life care for terminally ill prisoners. He was in the first group of inmates chosen to receive U.S. Department of Justice–sponsored, staff-level training in crisis intervention and he continues to provide crisis counseling for suicidal inmates in SCDC’s nationally acclaimed program that has all but eliminated suicides in the agency. He has never had a violent disciplinary infraction and has not had a single infraction in the last fifteen

⁵⁴ See Taxman, *supra* note 2, at 207–08; see also Ilyana Kuziemko, *How Should Inmates Be Released from Prison? An Assessment of Parole Versus Fixed-Sentence Regimes*, 128 Q. J. Econ. 371, 416 (2013) (finding that inmates in Georgia who essentially lost parole eligibility completed less programming than parole eligible inmates).

years. He has a well-developed plan for reentry, which includes strong family support, stable housing, and numerous suitable employment opportunities.

Joe Kelsey has come before the Parole Board on four separate occasions and been denied each time. When a person like Joe—who has maintained a spotless record, taken advantage of all of SCDC’s programming opportunities, and become a mentor and leader in his community—is repeatedly denied parole, it is not only demoralizing to him as an individual but to other inmates, who begin to see their own achievements and compliance with rules as pointless. If Joe Kelsey is unable to earn parole, then what reason do other inmates have to be on good behavior and work toward rehabilitation? As experienced correctional leaders with 100’s of years of experience, this “don’t bother to apply” message spreads like a virus across prison yards and prison systems. It is poison.

a. Behavioral Costs

Parole’s most important function from a correctional perspective is to motivate good behavior. Parole is the single most effective tool at impelling good behavior in prisons—which is why the current Parole Board’s actions (or lack thereof) have such dire consequences for SCDC. Without a meaningful incentive of early release, inmates are more likely to engage in misconduct.⁵⁵ Denying parole to rehabilitated individuals reduces *all* inmates’ incentives to be on good behavior. Without the possibility of parole, inmates are only motivated by the proverbial stick, and no carrot. Without the carrot of early release, inmates become less responsive to the repercussions for their

⁵⁵ See Kuziemko, *supra* note 54, at 413 (finding an increase in infractions among inmates in Georgia who essentially lost parole eligibility); William D. Bales & Courtenay H. Miller, *The Impact of Determinate Sentencing on Prisoner Misconduct*, 40 J. CRIM. JUST. 384, 402 (2012) (finding that inmates serving determinate sentences are more likely to commit infractions than inmates serving indeterminate sentences).

bad behavior because they have nothing to lose—and inmates with nothing to lose put everyone in danger.

b. Participation in Programming

The Board’s repeated denial of parole also reduces motivation for inmates to participate in programming, which also makes prisons more dangerous. Participation in programming reduces prison misconduct,⁵⁶ in part because “inmates occupied in productive activities are less likely to engage in institutional misconduct.”⁵⁷

Without parole as a motivating factor, it is difficult to recruit inmates to participate in programming. As such, denying parole to inmates heavily involved in programming makes it nearly impossible to convince inmates that programming is beneficial to them. Inmates that otherwise would have excelled in programming and taken on supervisor or worker roles—roles incredibly helpful to prison staff—no longer have the motivation to do so. When more inmates opt out of programming because they don’t see the benefit, prisons are less safe for everyone.

The Board’s refusal to reward participation in programming is especially egregious given SCDC’s efforts to provide a wide range of rehabilitative programs. By helping inmates develop the good habits and skills they need to succeed on the outside, these programs are not only vital to the secure day-to-day functioning of SCDC facilities but to the success of SCDC’s broader rehabilitative mission. All correctional systems work to provide meaningful educational,

⁵⁶ See generally Grant Duwe, *The Use and Impact of Correctional Programming for Inmates on Pre- and Post-Release Outcomes*, Nat’l Inst. Just. (2017) (reviewing the literature on the effectiveness of different types of prison programming); Sheila French & Paul Gendreau, *Reducing Prison Misconducts: What Works!*, 33 CRIM. JUST. & BEHAV. 185, 210 (2006) (“In summary, this meta-analysis, based on a large sample of incarcerates, indicated that, on average, prison-based behavioral programs produce large reductions in misconducts that may carry over into reductions in recidivism in the community.”)

⁵⁷ *Prison Reform: Reducing Recidivism by Strengthening the Federal Bureau of Prisons*, U.S. Dep’t Just. Archives (last updated Mar. 6, 2017), <https://www.justice.gov/archives/prison-reform>.

vocational, spiritual, therapeutic, programs and opportunities to work. Leveraging taxpayer dollars and private partners and volunteers, SCDC does so as well. Together, these opportunities contribute the safety and security of staff and inmates, and they all help the 94% of inmates who will leave prison to do so successfully. A dysfunctional, arbitrary parole process, as clearly evidenced in this case, is counter-productive to all those efforts.

c. Operational Costs

SCDC bears the monetary cost of the Board's refusal to grant parole. The cost of these denials is even greater given the graying of the prison population.⁵⁸ While South Carolina spends around \$25,000 a year per inmate,⁵⁹ the National Institute of Corrections estimates that the average cost of incarcerating elderly inmates with health conditions is nearly three times that—between \$60,000 to \$70,000 per year.⁶⁰ Accounting for taxpayer costs from public benefits once released, a state still saves an average of \$66,294 per year when it releases an elderly inmate.⁶¹

These numbers should encourage the Board to release more aging prisoners, especially in light of the low risk the elderly pose to public safety. Across the board, research shows that elderly inmates have lower recidivism rates than their younger counterparts; elderly inmates convicted of murder are the least likely to commit new crimes once released.⁶² In correctional settings,

⁵⁸ The Osborne Association, *The High Costs of Low Risk: The Crisis of America's Aging Prison Population* 27 (May 2018), https://www.osborneny.org/assets/files/Osborne_HighCostsofLowRisk.pdf (“Existing analyses calculate that, on average, it costs approximately twice as much to incarcerate someone aged 50 and over and in some cases, may actually cost up to five times more.”).

⁵⁹ See SCDC Cost Per Inmate, *supra* note 7.

⁶⁰ Dep't. Just., National Institute of Corrections, *Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates* 11 (2004), <https://s3.amazonaws.com/static.nicic.gov/Library/018735.pdf>.

⁶¹ See Joy Intriago, *Aging Behind Bars: How Elderly Convicts are Handled in the Prison System*, Seniors Matter (May 4, 2021), <https://www.seniorsmatter.com/aging-behind-bars-how-elderly-convicts-are-handled-in-the-prison-system/2492270/>.

⁶² Vera Inst., *Aging Out: Using Compassionate Release to Address the Growth of Aging and Infirm Prison Populations* (Dec. 2017), <https://www.vera.org/downloads/publications/Using->

murderers are often known as one-time “crime of passion” types. Like Joe, they are more likely than others to earn their way into positions and jobs of trust and confidence, because they are statistically less likely to abuse that trust or to reoffend. In California, for example, of 860 murderers paroled, only five returned to jail or prison and none returned for another life-sentence.⁶³ “Lifers,” people sentenced to life in prison, also have significantly lower recidivism rates than non-lifers.⁶⁴ Given these statistics, the Board should be eager to release elderly inmates, even those in prison for violent offenses.

The costs borne out by SCDC are more than just monetary. The Parole Board’s systemic denial of parole has a disastrous snowball effect for SCDC staffing. First, it increases the risk associated with the job because of increased misconduct. When the dangerousness of the job is elevated, the work becomes more stressful and it is more difficult to retain staff willing to work in these conditions. When fewer people are willing to serve as a correctional officer, the prisons become understaffed, further increasing the stress on remaining officers. This in turn has a cyclical effect: When prisons are understaffed, they cannot do their job of rehabilitating inmates as effectively.⁶⁵

Any parole board’s failure to parole deserving inmates is also demoralizing to the staff, making an already difficult job even more so. Staff in correctional settings work hard to prepare

Compassionate-Release-to-Address-the-Growth-of-Aging-and-Infirm-Prison-Populations%E2%80%94Fact-Sheet.pdf (explaining that “recidivism research demonstrates that arrest rates drop to just more than 2 percent in people ages 50 to 65 years old and to almost zero percent for those older than 65”).

⁶³ Christopher Zoukis, *California Lifers Paroled in Record Numbers*, Prison Legal News (Mar. 31, 2016), <https://www.prisonlegalnews.org/news/2016/mar/31/california-lifers-paroled-record-numbers/>.

⁶⁴ Ashley Nellis, *A New Lease on Life*, Sentencing Project (June 30, 2021), <https://www.sentencingproject.org/publications/a-new-lease-on-life/> (finding that “overall rates of violent offending of any type among people released from a life sentence are rare”).

⁶⁵ See, e.g., Hansotia, *supra* note 28, at 25, 31–33.

parole-eligible inmates for successful re-entry, becoming invested in the inmates they work with and work hard to help facilitate their rehabilitation; when an inmate has been successfully reformed and is arbitrarily denied parole, the meaning of that work is diminished and over time the work itself is discouraged.

CONCLUSION

As former correctional professionals and leaders, we spent careers being responsible for keeping our staff, inmates, and the public safe and rehabilitating prisoners to succeed in society. The Parole Board's continuous denial of rehabilitated inmates makes it nearly impossible to carry out these essential functions. This denial is especially arbitrary. It leads us to believe that the parole process in South Carolina is broken, and until the legislature takes action to fix it, we respectfully request that this Court intervene to limit the arbitrariness of a system that fails to guarantee parole for people like Joe Kelsey. Correcting this injustice will have a greater impact in South Carolina's prisons than this Court might realize—if it creates only the hope that the board is accountable to act with reason and fairness, hope is still a powerful thing. That axiom is most true in America's prisons.

Respectfully submitted,

/s/ Allison Elder

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March 15, 2023.

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SC Court of Appeals

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2023, I filed the foregoing Brief electronically with the Clerk of Court by emailing it to ctappfilings@sccourts.org, and served the Brief on all parties of record by copy on the same email.

/s/ Allison Elder
Allison Elder
Root & Rebound

ADDENDUM

AMICI CURIAE

Former Correctional Agency Heads, Correctional Administrators, and Prison Wardens

John R. Baldwin was the Director of the Illinois Department of Corrections from 2015 to 2019 and the Iowa Department of Corrections from 2007 to 2015. He co-founded the Iowa Department of Corrections in 1983 and served as Deputy Director until his appointment as Director. Mr. Baldwin currently owns a consulting firm and provides consulting services and testimony on corrections-related matters. He has forty years of corrections experience.

Jeffrey A. Beard was the Secretary of the California Department of Corrections and Rehabilitation from 2012 to 2015 and Secretary of the Pennsylvania Department of Corrections from 2001 to 2010. He is a licensed psychologist and currently works with various correctional jurisdictions as a correctional consultant and expert. Mr. Beard has over fifty years of corrections experience.

Leann K. Bertsch was the Director of the North Dakota Department of Corrections and Rehabilitation from 2005 to 2020. She served as a prosecutor in the Burleigh County State's Attorney Office in North Dakota for eight years. Ms. Bertsch currently serves as the senior vice president of the Corrections Division of the Management and Training Corporation, which is responsible for contracting with various correctional agencies. She has worked in corrections for eighteen years.

Rob Carter was the Commissioner of the Indiana Department of Corrections from 2017 to 2022. Prior to his term as Commissioner, Mr. Carter served as the executive director of risk management and security at Ivy Tech Community College. He was the Director of the Indiana Department of Natural Resources under Governors Mitch Daniels and Mike Pence. Early in his career, he was elected the youngest sheriff in Indiana, serving two terms for Clay County. Mr. Carter has worked in corrections for six years.

Patricia L. Caruso was the Director of the Michigan Department of Corrections from 2003 to 2011. She now runs a corrections consulting firm, advising multiple correctional jurisdictions as a corrections expert. Ms. Caruso has thirty-two years of corrections experience.

Matthew L. Cate was the Secretary of the California Department of Correction and Rehabilitation for more than four years. Prior to his appointment as Secretary, Mr. Cate served for four years as the California Inspector General, where he was responsible for public oversight of the Department. He also served as a state and local prosecutor and was the Deputy Attorney General at the California Department of Justice from 1996 to 2004. Mr. Cate has worked in corrections for fifteen years.

Colonel Jeff Dunn was the Commissioner of the Alabama Department of Corrections from 2015 to 2021. Prior to his term as Commissioner, Colonel Dunn served as a pilot in the U.S. Air Force, where he held numerous senior leadership and command roles. He has worked in corrections for eight years.

Glen S. Goord was the Commissioner of the New York State Department of Correctional Services from 1996 to 2006. Mr. Goord was awarded the Charles Evans Hughes Award and the Governor Alfred E. Smith Award from the American Society for Public Administration. He has worked in corrections for forty-seven years.

Solomon L. Graves is the Cabinet Secretary of the Arkansas Department of Corrections, a position he has held since 2020. Prior to joining the Department of Corrections, Mr. Graves served as the Administrator of the Arkansas Parole Board for over five years. Mr. Graves has twelve years of corrections experience.

Pelicia E. Hall was Mississippi's first female Commissioner of Corrections, a position she held from 2017 to 2020. She currently serves as the senior vice president of the correctional technology company ViaPath Technologies. Ms. Hall previously spent eleven years as lead counsel for the State of Mississippi and almost three years as a Special Assistant Attorney General in the Office of the Mississippi Attorney General. She has worked in corrections for eight years.

Kelly L. Harrington was the Director of the California Department of Corrections and Rehabilitation Division of Adult Institutions from 2014 to 2016. He subsequently served as the head of Custody Operations in the Los Angeles County Sheriff's Department. Mr. Harrington has worked in corrections for thirty-eight years.

Martin F. Horn was the Commissioner of the New York City Department of Correction and Department of Probation from 2002 to 2009. Prior to his term as commissioner, Mr. Horn served as Pennsylvania's Secretary of Corrections and the Executive Director of the New York State Division of Parole. Mr. Horn has worked in corrections for fifty-four years.

Denny Kaemingk was the Cabinet Secretary of the South Dakota Department of Corrections from 2011 to 2019. Prior to serving as Secretary, Mr. Kaemingk served on the South Dakota Board of Pardons and Paroles for almost ten years and worked as a law enforcement officer for almost twenty-five years. Mr. Kaemingk has worked in corrections for over twenty years.

Brad Livingston was the Executive Director of the Texas Department of Criminal Justice from 2004 to 2016. Prior to his term as Executive Director, Mr. Livingston served as the Department's Chief Financial Officer. Mr. Livingston worked in corrections for almost twenty years.

Kenneth McGinnis served as the Director of the Michigan Department of Corrections and the Illinois Department of Corrections. Since leaving government service, Mr. McGinnis has directed system-wide assessments and performance reviews for numerous state correctional and local detention systems. He has over fifty years of corrections experience.

Gary Mohr was the Director of the Ohio Department of Rehabilitation and Correction from 2010 to 2018. After his retirement, he served as president of the American Correctional Association and now works as a correctional consultant. Mr. Mohr has worked in corrections for nearly fifty years.

Rick F. Raemisch is the Executive Director of the Colorado Department of Corrections, a position he has held since 2013. Mr. Raemisch previously served as the Cabinet Secretary of the Wisconsin Department of Corrections from 2007 to 2011. He also served as an Assistant District Attorney and Assistant United States Attorney in Wisconsin, and was subsequently elected sheriff of Dane County, Wisconsin, for four terms. Mr. Raemisch has worked in corrections for eighteen years.

John Dewitt Rees was the Commissioner of the Kentucky Department of Corrections from 2004 to 2008. Prior to his term as Commissioner, Mr. Rees served as the vice president of business development at Corrections Corporation of America. He currently works as a correctional consultant. Mr. Rees has over fifty years of corrections experience.

Scott Semple was the Commissioner of the Connecticut Department of Correction from 2015 to 2019. After working in the Department since 1988, Mr. Semple now works as a correctional consultant. He has over thirty years of corrections experience.

Bernard Warner was the Secretary of the Washington State Department of Corrections from 2011 to 2015. He subsequently served as the senior vice president of corrections at the Management and Training Corporation. Prior to his term as Secretary, Mr. Warner served as the Chief Deputy Secretary of Juvenile Justice in the California Department of Corrections and Rehabilitation and the Assistant Secretary for Probation in the Florida Department of Juvenile Justice. He has thirty-seven years of corrections experience.