

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SEP 13 2023

Appeal From The Administrative Law Court
Honorable Ralph K. Anderson III, Chief Administrative Law Judge
Docket Number 18-ALJ-15-0039-AP

SC Court of Appeals

Appellate Case No. 2019-001554

STEWART BUCHANAN, # 69848APPELLANT,

V.

SOUTH CAROLINA DEPARTMENT OF
PROBATION, PAROLE AND PARDON SERVICESRESPONDENT.

PETITION FOR REHEARING

On August 30, 2023, this Court issued its published opinion in *Stewart Buchanan v. South Carolina Department of Probation, Parole, and Pardon Services*, Op. No. 6021 (Ct. App. filed August 30, 2023). Therein, this Court affirmed the Administrative Law Court’s decisions below and denied Appellant’s requests for relief. Pursuant to Rule 221(a), SCACR, Appellant petitions for rehearing. Appellant respectfully submits the following points and arguments in support of the petition for rehearing.

Buchanan is constitutionally entitled to a proceeding in some tribunal that has the authority to offer him a meaningful opportunity for release where the hallmark features of youth identified by the Supreme Courts of the United States and South Carolina are actually considered. He has never been afforded such a proceeding. As discussed more fully in the briefing for this appeal, there has been a sea change in the constitutional law applicable to juveniles in the last two decades.

See, e.g., *Roper v. Simmons*, 534 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48; *Miller v. Alabama*, 567 U.S. 460 (2012); *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014); *Montgomery v. Louisiana*, 577 U.S. 190 (2016). This change in law is grounded in understanding the ways in which children are categorically different from adults in ways that significantly diminish their moral culpability and thus must be taken into account in deciding whether he should remain in custody and for how long.¹

The shift in juvenile sentencing law clearly establishes that individuals who commit offenses while they were juveniles are entitled to a decision maker who “carefully and thoughtfully consider[s]” the ways in which children are constitutionally different than adults in proceedings determining whether the juvenile will be confined or released from prison. *Aiken*, 410 S.C. at 544, 765 S.E.2d 577. In South Carolina, this not only applies to juveniles facing the most serious sentencing options, namely life without parole, but also has been extended to all juveniles. The Supreme Court of South Carolina has recognized that all juvenile offenders are entitled to consideration of the mitigating factors of youth set forth in *Aiken*. *Jones v. State*, ___ S.C. ___, 889 S.E.2d 590, 596 (S.C. 2023) (“[W]e are mindful that juveniles are entitled to careful sentencing under the Eighth Amendment, and we direct circuit court judges to consider the mitigating factors of youth articulated in *Aiken v. Byars*.”). After over a decade of developed jurisprudence on

¹ The United States Supreme Court and the Supreme Court of South Carolina have both recognized at least five factors that need to be weighed in the balance in cases involving juvenile offenders: (1) the hallmark features of youth including “immaturity, impetuosity, and failure to appreciate the risks and consequences;” (2) the “family and home environment” that surrounded the child; (3) the circumstances of the offense, including the extent of the child’s participation in the conduct and how familial and peer pressures may have affected him; (4) the “incompetencies associated with youth,” including an “inability to deal with police officers or prosecutors (including on a plea agreement) or . . . incapacity to assist his own attorneys;” and (5) the “possibility of rehabilitation.” *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577 (quoting *Miller*, 567 U.S. at 477-78). These factors must be “carefully and thoughtfully considered” by state authorities with the power to confine a juvenile. *Id.*

juveniles, this is not a new substantive constitutional right, as the ALC determined, but rather is a fundamental principle that has to be procedurally implemented to ensure juvenile offenders are not receiving disproportionate punishments.²

In its opinion, this Court puts a central focus on how the state and federal decisions revolutionizing juvenile sentencing only provide due process protections to juveniles in a *sentencing* proceeding context. No such limiting principle is found in those cases. Rather, the emphasis is on providing juveniles sentenced to life imprisonment with an “opportunity for release,” with a recognition that the juvenile protections can be constitutionally afforded by providing consideration of the same factors associated with juvenility in parole proceedings so long as a juvenile’s ability to rehabilitate is actually considered in the parole proceedings. *E.g.*, *Montgomery*, 577 U.S. at 212. As a matter of state constitutional law, when the Parole Board fails to take account of all legally mandated information, it infringes on inmates’ liberty interests. *Cooper v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 499, 661 S.E.2d 106, 111 (2008). The changes in juvenile sentencing law created a new category of legally mandated information—the mitigating characteristics of youth—that decision-makers must consider before sentencing juveniles to die in prison. *Id.* Because the Board never took these factors into account, the Board violated Appellant’s “substantial personal right” to have a decision-maker consider the *Aiken* factors with respect to his case.

The “perfunctory” manner of parole denials that the Court noted, which consists of a minutes-long hearing followed by a form denial letter at which the same unchangeable factors are

² The United States Supreme Court has recognized that although this is a substantive constitutional guarantee, it is accompanied by explicit procedural requirements to give effect to it. *Montgomery*, 577 U.S. at 209–10. These procedural components are what give effect to the constitutional protections. *Id.* at 210.

routinely cited, does not provide a process that gives effect to the considerations of juvenility that the Supreme Court of South Carolina and the United States Supreme Court explicitly require. None of the articulated factors in S.C. Code § 24-21-640 or PPP's Form 1212, which the Board purports to consider in denying parole, recognize the factors set forth by *Miller* and *Aiken*. Stewart has not been afforded the constitutionally required consideration of juvenility under *Aiken* to make such a sentence permissible.

Finally, Appellant submits that the Court has made an error of law in its determination that the Board's decision rendered Appellant "equivalent to being ineligible for parole," *Buchanan* at *12, but simultaneously constituted a routine denial of parole. *Id.* at *11. As a matter of law, if the Board renders a decision that permanently denies parole to an otherwise parole-eligible inmate, the denial implicates a state-created liberty interest and is not a routine denial of parole. *Cooper*, 377 S.C. at 497-98, 661 S.E.2d at 110-11; *Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 598, 576 S.E.2d 146, 149 (2003); *Sullivan v. S.C. Dep't of Corrections*, 355 S.C. 437, 443 n.4, 586 S.E.2d 124, 124 n.4 (2003). Regardless of whether the Board has complied with *Compton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 385 S.C. 476, 685 S.E.2d 175 (2009), by including a cursory allegation that it has considered the required factors in its denial letter, courts must give effect to the due process guarantee of *Cooper* by remedying the Board's unlawful action where, as here, the Board violates due process by rendering parole-eligible inmates "equivalent to being ineligible for parole." In other words, this Court is not constrained by *Cooper* or *Compton* if it decides, as it did here, that Appellant has been rendered ineligible for parole. Instead, if the Court finds that the Board's decision has permanently denied Appellant parole, the Court is permitted—indeed, required—to also recognize as a matter of law that the decision was not a routine denial of parole. Moreover, given that this Court has found that Appellant has been

rendered parole ineligible, as a matter of law his current sentence constitutes cruel and unusual punishment under *Aiken* and *Miller* since no decision maker has ever considered the mitigating factors of youth as applicable to his case.

Based upon the above arguments, Appellant respectfully requests that this Court grant the petition for rehearing, reverse the judgment of the Administrative Law Court, and either (a) order the Board to conduct a new parole hearing that procedurally and substantively conforms to established constitutional principles governing when a juvenile offender can be incarcerated for life; or (b) order the Board to grant Appellant parole.

Respectfully submitted,

/s/Rosalind S.D. Major
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September 13, 2023.

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Honorable H.W. Funderburk, Jr., III, Administrative Law Judge

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V.

SOUTH CAROLINA DEPARTMENT OF
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Appellant's Petition for Rehearing was served by first class United States mail, postage prepaid, this 13th day of September, 2023, upon the following:

Matthew Buchanan
South Carolina Department of Probation, Parole and Pardon Services
P.O. Box 207
Columbia, SC 29202

Rosalind Major

Rosalind S.D. Major

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SC Court of Appeals

September 13, 2023

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *Stewart Buchanan v. South Carolina Department of Probation, Parole, and
Pardon Services*, No. 2019-001554

Dear Ms. Kitchings:

Please find enclosed for filing, along with a certificate of service, the original of Appellant's Petition for Rehearing.

Should you need anything further, please do not hesitate to contact me. Thank you for your attention to this matter.

Sincerely,

Rosalind Major

Rosalind Major
rosalind@justice360sc.org

Enclosure