PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Nov 27 2023
S.C. SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable Ralph K. Anderson, III, Chief Administrative Law Judge

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Op. No. 6021 (S.C. Ct. App. filed Nov. 18, 2023)
Case No. 2023-001750

STEWART BUCHANAN, ... PETITIONER,

v.

S.C. DEP'T PROB., PAROLE & PARDON SERVS., ... RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Stewart Buchanan, a 67-year-old inmate serving a life-with-parole sentence for an offense he committed at age 17, is the longest continuously-incarcerated juvenile in the state of South Carolina. For forty years, Stewart has appeared before the Parole Board every two years and has been denied parole each time, despite clear proof of rehabilitation. His last 18 parole denials have been based exclusively on the only criteria Stewart cannot change: the nature and circumstances of his offense.

The law governing juvenile sentencing has undergone a sea change in both the United States and South Carolina Supreme Courts over the past twenty years. Most importantly, in *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), this Court established a set of five mitigating factors of youth that decision-makers must consider when sentencing juveniles. No decision-maker has ever considered those factors in Stewart's case. At Stewart's parole hearings, there is no indication on the record that the Board has considered either the § 24-21-640 factors, the Form 1212 factors, or any of the mitigating factors of youth. At issue here is whether the Board, as the sole remaining decision-maker concerning whether Stewart spends the rest of his life in prison, is required by *Aiken*'s due process principles to consider the *Aiken* factors when determining whether Stewart should receive parole.

QUESTION 1

Whether the current procedures of the Parole Board are sufficient to safeguard juvenile offenders' due process rights as guaranteed by *Aiken v. Byars* and *Cooper v. S.C. Dep't Prob., Parole & Pardon Servs.*?

QUESTION 2

Whether the Supreme Court and this Court's Eighth Amendment mandate that decision-makers consider the mitigating factors of youth in determining whether a juvenile offender is entitled to a "meaningful opportunity for release" requires that the Parole Board take these same factors into account in deciding whether to grant parole to juvenile offenders who were sentenced prior to *Aiken v. Byars*?

STATEMENT OF THE CASE & RELEVANT FACTS

Stewart Buchanan has been an inmate in the South Carolina Department of Corrections (SCDC) for fifty years—since he was seventeen years old—which gives him the distinction of being the longest-serving continuously incarcerated juvenile in this state. App. 148, 159. He has now been denied parole eighteen times since first becoming parole-eligible in 1983. App. 307–24. As will be discussed in more detail below, the denials cannot be justified by Stewart's institutional record. The last sixteen parole denials were not a reflection of poor prison behavior or a defect in his re-entry plan, but rather were based exclusively on the one thing Stewart cannot change: the facts and circumstances of his offense. *See* App. 307–24.[1]

In support of his release on parole, Stewart sent a packet of information to the Parole Board members, linking his offense to the transient qualities of youth and detailing his exemplary correctional record along with his plans for release. Stewart's childhood was marked by physical and emotional abuse and neglect by both of his parents. App. 30. Stewart turned to his older sister, Janet, as a parental figure until she, too, abandoned Stewart when he was in his early teens. App. 30–31. Left without the one person to whom he felt emotionally connected, Stewart fell in with an older crowd and began to drink and use drugs in an attempt to cope with his home life and emotional trauma. App. 32–33. As Dr. Susan Knight, PhD., a licensed forensic clinical

[1] In 1973, when Stewart was seventeen years old, he was charged with, and shortly thereafter pled guilty to, the murder of his neighbor, forty-three-year-old Ariene Boone. App. 139–42, 148. The basic facts are not in dispute. Stewart, disoriented from a mix of alcohol, drugs, and lack of sleep, climbed through his neighbor's window in the early morning hours of May 18, 1973. *See* App. 33–34, 44, 148. Ms. Boone saw him, called Stewart's name, and climbed out of another window onto her porch. App. 148–49. Stewart followed her out the window and when she ran into the yard and began yelling his mother's name, he stabbed her to death. App. 149. Stewart's father called the police. App. 149. Stewart was taken into custody later the same day and, when questioned by law enforcement, gave a full confession (which included the location of the murder weapon). App. 153.

psychologist who evaluated Stewart, explained, it is against this backdrop of "social and neurobiological immaturity," "severe[] intoxicat[ion]" and compromised "reasoning, judgment and impulse control"[2] that nearly fifty years ago Stewart committed the crime for which he is still incarcerated.[3] *See* App. 58.

Only four months after his arrest, Stewart entered a guilty plea, expressed his deep, sincere remorse, and accepted the (then) mandatory minimum sentence for murder: life imprisonment with the possibility of parole after ten years. App. 158–59. At the sentencing hearing, the trial judge acknowledged that Stewart's crime was the product of a "tragic situation" and expressed his hope that Stewart could "salvage some phase of his life." App. 159. His attorney advised him, based on the then-existing practice of the Parole Board, that if he maintained a good institutional record, he would likely be granted parole when, or not long after, he first became parole-eligible. App. 34–35. When he entered his guilty plea at age 17, Stewart reasonably believed, based on then-established parole board practice, that he would be granted parole after serving 10 years (or soon thereafter). App. 34–35. Fifty years later, however, Stewart remains in prison, where he has been a model inmate and has become a role model for younger inmates. Since January 2018, he has

[2] Dr. Knight also conducted an empirically validated risk assessment, the HCR-20^{v3}, and concluded that Stewart posed a low risk for reoffending, especially with continued substance-abuse treatment. App. 53, 59. According to Dr. Knight, Stewart "demonstrate[s] good insight into the adverse developmental factors facilitating his substance abuse as a teenager, which in turn, was heavily implicated in the offense." App. 58. Stewart has "taken full responsibility [for his crime], with expressions of remorse throughout his records and interviews," and ministers who have worked with Stewart in recent years told Dr. Knight that he is "[g]enuine, looking for change," "a shining example of what a man can do," and deserving of an opportunity outside of prison. App. 42, 49, 58, 59.

[3] The circumstances leading up to and surrounding Stewart's offense specifically involved the factors that a sentencing court must consider before sentencing a juvenile to life in prison without parole. *See infra* Section I; *Aiken v. Byars*, 410 S.C. 534, 544, 765 S.E.2d 572, 577 (2014) (quoting *Miller v. Alabama*, 567 U.S. 460, 477–78 (2012)). Stewart was a young man who did not feel at home with his family and this yearning to belong made him extremely susceptible to the pressures of his peers and the escapism provided to him by drugs and alcohol. *See* App. 44.

been confined at Perry Correctional Institution in the "Lifers Rehabilitation Program," a character-based housing unit which is only available to inmates who have been, and remain, disciplinary-free. App. 37.

Prior to the hearing, Stewart's attorney sent a letter to the Department of Probation, Parole and Pardon Services (PPP) describing the sea change in constitutional law applicable to juvenile life sentences. *See*, *e.g.*, *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577. Those opinions, counsel explained, constitutionalized the principle that "children are different" from adults for sentencing and parole purposes. App. 219–23. These differences mean that the decision of whether to incarcerate a juvenile for life (and thus whether to grant a juvenile parole) must consider the class characteristics of youth identified by the courts as well as any individual mitigating circumstances associated with the case. Counsel explained that because the judge who sentenced Stewart did not have the benefit of those decisions, and because South Carolina has not granted resentencing hearings to juveniles sentenced to life with parole, the Board, as the sole decision-maker with respect to Stewart's case, must now take those same factors into account in deciding whether to grant him parole. App. 221. Specifically, counsel requested that the Board consider Stewart's age, immaturity, intellectual capacity, and home environment at the time of the offense; the circumstances of the offense and how they were affected by the hallmark features of youth; the culpability of juveniles compared to that of adults; and how Stewart's youth affected his interactions with law enforcement, counsel and the criminal justice system. App. 221.

In response, attorneys for PPP assured Stewart that the Board would consider "factors that he was a juvenile at the time he committed the offense," as well as "any other mitigating evidence." App. 225. But they did not. Following Stewart's parole hearing, one of many heard that day,[4] the

[4] *See* South Carolina Department of Probation, Parole and Pardon Services, *Parole & Pardon*

Board "deliberated" for less than a minute (forty-three seconds). No member of the Board indicated that Stewart's status as a juvenile offender played any role in their consideration of his application for parole, and the Board denied Stewart parole for the eighteenth time based solely on the circumstances of the impulsive crime that Stewart committed as a teenager almost five decades ago. App. 329–30.

Stewart challenged the Board's ruling in the Administrative Law Court (ALC), but the ALC dismissed his appeal, leaning heavily on *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 499, 661 S.E.2d 111 (2008), which held that when the 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." App. 331–39. This interest, the ALC reasoned, does not exist in the context of a "routine denial or granting of parole" and such a denial is therefore "not appealable unless the inmate can show that he was 'rendered ineligible for parole due to the procedure employed by the Parole Board.'" App. 334 (quoting *Cooper*, 377 S.C. at 495–96, 661 S.E.2d at 106, 110). Thus, the ALC concluded, its hands were tied. Although no decision maker has ever fully considered Stewart's youth, vulnerability, and later rehabilitation, and although the Board has no formal procedure for doing so, the ALC deemed the Board's actions comported with "the minimum constitutional due process requirements outlined in *Cooper*" because its denial letter included an assurance that it had considered the factors outlined in S.C. Code Ann. § 24-21-640. App. 334, 345.

Stewart subsequently appealed the ALC's ruling to the Court of Appeals. The Court of Appeals "reluctantly" affirmed the ALC on the grounds that "the Board has complied with the

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Hearings, https://www.dppps.sc.gov/FAQ#parole_pardon_hearings (last accessed January 2, 2020) ("The Parole Board hears up to 70 cases per day so their time is limited.").

minimal requirements necessary for this to satisfy the standard our supreme court articulated in Cooper" and the Court was constrained to "operat[e] within the framework set by statutory law and by our supreme court's precedents." App. 472, Op. No. 6021, *Buchanan v. S.C. Dep't Prob., Parole & Pardon Servs.* (S.C. Ct. App. filed Oct. 18, 2023). However, the Court of Appeals noted that the Parole Board's procedures raise the question of whether Stewart and other similarly situated offenders are in fact afforded meaningful opportunities for release before the Board:

> We recognize there is tension between the principle that inmates are entitled to a meaningful parole review and what appears to be serial denials of parole based solely on factors that do not change and that have no relation to an inmate's rehabilitation. Even so, we read the authorities to instruct that the court system's role does not include looking behind the Board's statement that it has considered all of the factors and made its decision. . . . However, we are concerned regarding the perfunctory manner in which Buchanan's request for parole was denied. Although Buchanan and other juveniles similarly situated are technically eligible for parole, the continuing denial of parole based on the same factors, all unchangeable and related to their offenses, gives no guidance to these inmates about what can be done to improve their chances of parole and is very nearly equivalent to being ineligible for parole. Under the current system, it appears no passage of time served (here, forty-seven years) or showing of rehabilitation (here, eighteen parole reviews now indicating Buchanan "has more than demonstrated his rehabilitation") can change his fate before this Board.

App. 471. Consequently, the court asked both this Court and the Legislature to look deeper into the Board's procedures in recognition that "inmates who offended while juveniles are not given meaningful review regarding parole."

> Although the Board has complied with the minimal requirements necessary for this to satisfy the standard our supreme court articulated in Cooper, we are sympathetic to Buchanan's argument that it appears inmates who offended while juveniles are not given meaningful review regarding parole. Our role is one that is limited to operating within the framework set by statutory law and by our supreme court's precedents. It may well be good policy for the Legislature to review and/or revise the parole system to assure the factors of youth are a part of considering parole in these cases rather than permitting the seemingly perfunctory review now standardly given, but that is the Legislature's decision, not ours.

App. 472.

Specifically, the Court of Appeals found that its hands were tied by *Cooper v. S.C. Dep't Prob., Parole & Pardon Servs.*, 377 S.C. 489, 661 S.E.2d 106 (2008). In *Cooper*, this Court established that parole-eligible inmates have a state-created liberty interest in a meaningful opportunity for parole. 377 S.C. 489, 661 S.E.2d 106. Thus, as a matter of law, if the Board renders a decision that permanently denies parole to an otherwise parole-eligible inmate, the denial is not a "routine denial of parole" and triggers due process requirements of judicial review. *Id.* 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). Further, the Board's actions may violate an inmate's right to parole eligibility even in the absence of an explicit statement by the Board that it is permanently denying parole to an inmate. *Cooper*, 377 S.C. at 498, 661 S.E.2d at 111 ("[A] sufficient liberty interest may be implicated to trigger due process requirements even though the Parole Board's decision did not constitute a permanent denial of parole eligibility.") (citing *Steele v. Benjamin*, 362 S.C. 66, 72–73, 606 S.E.2d 502, 503 (Ct. App. 2004)). "If a Parole Board deviates from or renders its decision without consideration of the appropriate criteria, we believe it essentially abrogates an inmate's right to parole eligibility and, thus, infringes on a state-created liberty interest." *Id.* at 499, 661 S.E.2d at 111. The *Cooper* Court noted that the risk of infringement is especially high where, as here, the Board denies parole based solely on factors relating to the nature and circumstances of the offense. *See id.* at 500, 661 S.E.2d at 112.

Cooper was followed one year later by *Compton v. S.C. Dep't Prob., Parole & Pardon Servs.*, 385 S.C. 476, 685 S.E.2d 175 (2009). In *Compton*, this Court held that a decision by the Board will be considered a routine denial of parole if "the Parole Board clearly states in its order

denying parole that it considered the factors outlined in section 24-21-640 and the fifteen factors published in Form 1212." 385 S.C. at 479, 685 S.E.2d at 177.

PPP and the Board have carved a procedural loophole out of these cases that they have used to sidestep *Cooper*'s requirements entirely, interpreting *Compton*'s holding to mean that the Board would be immune from judicial review and could violate *Cooper*'s due process guarantees with impunity as long as it made a vague assertion that it had considered the requisite factors in its decision to deny parole. Subsequently, the Board adopted its now-standard practice of uniformly denying parole to 93%[5] of the inmates who come before it, often citing no other reasons than the nature and circumstances of the inmate's offense, and copying and pasting the same sentence into the denial letters that PPP sends after each parole hearing:

> After careful consideration of: (1) the characteristics of your current offense(s), prior offense(s), prior supervision history, prison disciplinary record, and/or prior criminal record, as described in the findings of fact below; (2) the factors published in Department Form 1212 (Criteria for Parole Consideration); (3) the factors outlined in Section 24-21-640 of the South Carolina Code of Laws, and (4) actuarial risk and needs assessment factors pursuant to Section 2421-10(F)(1) of the South Carolina Code of Laws. The Parole Board had determined that your parole must be denied.

This recitation has become standard practice for the Board in accordance with its interpretation that *Compton* safeguards it from judicial scrutiny (or even oversight) as long as the requisite factors are referenced. The Court of Appeals correctly recognized that this regular procedure of denying parole to inmate after inmate based solely on the nature and circumstances of their offenses violate inmates' liberty interest in a meaningful opportunity for parole, but also

[5] Facts and Figures, South Carolina Department of Probation, Parole, & Pardon Services (as of Sept. 30, 2023), https://www.dppps.sc.gov/About-PPP/Facts-Figures. The grant rate for violent offenders is even lower, at 4%. *Id.* In contrast, the vast majority of other states grant parole at rates between 25% and 70%. Prison Policy Initiative, "Discretionary Parole Grant Rates by State, 2019–2022" (Oct. 16, 2023), https://www.prisonpolicy.org/data/parolerates_2019_2022.html.

found that this Court's prior jurisprudence "constrained" the Court of Appeals from granting relief.[6] App. 461. Stewart now appeals the Court of Appeals' decision to this Court.

REASONS THE WRIT SHOULD BE GRANTED

The constitutional sea change in juvenile sentencing law implicates a liberty interest in a meaningful opportunity for parole that requires juvenile-specific parole procedures. The Court of Appeals "reluctantly" found "that the Board followed the proper procedure when it denied Stewart parole because the Board's order of denial stated the Board had considered "the factors outlined in [s]ection 24-21-640" and "the factors published in Department Form 1212." App. 472. In doing so, the Court of Appeals raised real concerns about the Board's current process as it relates to juveniles, noting that, "[t]he public policy behind *Roper*, *Graham*, and *Miller*, to restore hope to juvenile offenders for some life outside of prison, is thwarted by the Board's continued reliance on factors existing at the time of the conviction with little or no apparent consideration of subsequent rehabilitation efforts." App. 471. This Court should grant certiorari and require the Board to adopt procedures that comport with the due process requirements of *Cooper*, *Miller*, and *Aiken*.

[6] Petitioner submits that the current legal framework governing parole cases allows the Parole Board to skirt the due process requirements of *Cooper* by permanently denying inmates parole with no opportunity for judicial review. While this issue was not specifically raised in the lower courts, the Court of Appeals noted multiple times that it was only constrained from granting relief on Stewart's potentially meritorious claims by the current caselaw governing parole denials, and further, encouraged the Legislature to resolve the inconsistencies. App. 472. Petitioner further submits that this Court may also remedy the discrepancies between *Cooper*'s requirements and the Board's current practices. Given the Court of Appeals' finding that it could not solve the problem that "inmates who offended while juveniles are not given meaningful review regarding parole" because "[o]ur role is one that is limited to operating within the framework set by statutory law and by our supreme court's precedents," *id.*, the issue of whether the currently-existing caselaw permits the Board to violate due process is ripe for review should this Court choose to take it up in this case.

I. There has been a foundational shift in the substantive sentencing law applicable to juvenile sentencing proceedings.

Since 2005, the United States Supreme Court has fundamentally altered the relationship between juvenile offenders and the criminal justice system, steadily recognizing juvenile offenders as a distinct category from adult offenders and affording them unique protections and considerations as to punishment. The new legal regime shift is grounded in the principle first articulated by the United States Supreme Court in *Roper v. Simmons* that, for sentencing purposes, juveniles are constitutionally different from adults, and therefore must be treated differently. 543 U.S. 551 (2005). In *Roper*, the Court held that juveniles, as a class, have categorically reduced moral culpability to such an extent that to execute a person for a crime committed as a juvenile would violate the Eighth Amendment. 543 U.S. at 574. The *Roper* Court reviewed then-available scientific research on juvenile development,[7] from which it distilled three characteristics that differentiate juveniles from adult offenders:

1) Children "lack maturity and responsibility and are more reckless than adults," which leads to "impetuous and ill-considered actions," *id.* at 569;

2) Children are "more vulnerable or susceptible to negative influences and outside pressures," "have less control . . . over their environment," and "lack the freedom that adults have to extricate themselves from a criminogenic setting," *id*.; and

3) Children's characters are "not as well formed as th[ose] of an adult," and their personalities are "more transitory" and "less fixed." Therefore, "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character," *id.* at 570.

[7] *E.g.*, Erik Erikson, IDENTITY: YOUTH AND CRISIS (1968); Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003).

In light of these class-wide traits that reduce all juveniles' moral culpability, the Court held that the penalty of death was a disproportionate punishment for juvenile offenders. *Id.* at 572–73.

The Court extended the protections for juveniles in multiple cases in quick succession. In *Graham v. Florida*, the Court established that the Eighth Amendment forbids a punishment of life without parole for a juvenile convicted of non-homicide offenses, reiterating that juveniles are "less deserving of the most severe punishments," and thus, under most circumstances, must be given a "realistic" and "meaningful opportunity for release based on demonstrated maturity and rehabilitation." 560 U.S. 48, 55, 74–75. The Court continued to extend this reasoning in *Miller v. Alabama*, holding that mandatory life without parole sentences for juveniles convicted of murder also violate the Eighth Amendment. 567 U.S. 460, 489 (2012). In cases where a juvenile faces life without parole, the Eighth Amendment requires an individualized sentencing hearing, similar to the penalty phase of a capital trial. *Id.*[8] Four years later, in *Montgomery v. Louisiana*, the Court held that *Miller* announced a new substantive rule of constitutional law that applies retroactively. 577 U.S. 190, 212–13 (2016). The *Montgomery* Court noted that "all but the rarest of children whose crimes reflect irreparable corruption" are entitled to an opportunity to live "some years of life outside prison walls." *Id.* at 195, 212–13.

The Supreme Court of South Carolina embraced these same principles in *Aiken v. Byars*, holding that the then-existing state sentencing procedures were deficient because they treated adult and juvenile offenders the same. 410 S.C. 534, 536–37, 765 S.E.2d 572, 573. The Court clarified that *Miller* "does more than ban mandatory life sentencing schemes for juveniles; it establishes an

[8] Justice Kagan, who authored *Miller*, emphasized that the opinion can be summarized in two words—"youth matters"—and that the lesson of the case is that "whoever the sentencer is, has to take youth into account." Transcript of Oral Argument at 10–11, *Mathena v. Malvo*, 139 S. Ct. 1317 (2019) (No. 18-217).

affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." *Id.* at 543, 765 S.E.2d at 577. Instead, *Aiken* requires that a sentencing authority "carefully and thoughtfully consider[]" the factors which uniquely impede children: (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 offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the "incompetencies associated with youth—for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys;" and (5) the "possibility of rehabilitation." *Id.* at 544, 765 S.E.2d at 577 (quoting *Miller*, 567 U.S. at 477–78).[9]

Since *Aiken*, South Carolina courts have continued to recognize that "juveniles are entitled to careful sentencing under the Eighth Amendment," clarifying that *Aiken*'s protections extend to juveniles sentenced in the Court of General Sessions regardless of the charge. *Jones v. State*, 440 S.C. 14, 25, 889 S.E.2d 590, 596 (2023). Moreover, this consideration of youth must be "careful and thorough," which is requires "more than repeating the words; it requires applying the substantive content of those [*Aiken*] factors." *State v. Mack*, Op. No. 6031 (S.C. Ct. App. Nov. 1, 2023), at *15–16.

Looking at these cases as a whole, the following constitutional principles emerge:

1) Children are fundamentally different from adults in critical ways that significantly diminish their moral culpability.

[9] In light of these recent decisions, many states have recognized the constitutional deficiencies in their substantive and procedural criminal law and have modified it accordingly through both judicial and legislative means. *See infra* Section IIc.

2) Due to these differences, all proceedings which determine whether they should be confined or released must be different, both procedurally and substantively.

3) The state authority with the power to confine or release a juvenile offender must fully consider all of the class characteristics attendant to youth as well as individual mitigating circumstances emerging from the person's social history and mental and emotional development.

4) A juvenile offender is presumptively entitled to release on a demonstration of maturity and rehabilitation, and only in the rare, exceptional case where the state establishes that the juvenile is irreparably corrupt, may a juvenile be confined for the remainder of his life.

Each of these principles has emerged since Stewart was sentenced to life in prison and each applies retroactively. They have also shifted the balance of the proportionality component of the Eighth Amendment to a standard that is now much more forgiving to juvenile offenders than the legal regime in effect at the time of Stewart's offense and initial sentencing hearing.

No state official with the power to confine or release Stewart has ever taken these principles and the *Aiken* factors into account in assessing whether and when Stewart should be released from confinement. Because the Board is now the only decision maker with the ability to do so, this Court should hold that it is required by the Eighth and Fourteenth Amendments, and the corresponding provisions of the South Carolina Constitution, to expressly consider the impact of Stewart's youth and its attendant circumstances in a manner consistent with *Miller* and *Aiken*. Likewise, the ALC and Court of Appeals should have considered these changes in the law and held that the Board's procedures for juvenile offenders were insufficient. The failures of the Board, ALC, and Court of Appeals to do so violated the Eighth Amendment, Article I, Section 15 of the South Carolina Constitution, and due process under the Fourteenth Amendment and Article I, Section 3 of the South Carolina Constitution.

II. The change in juvenile sentencing law establishes new requirements for the protection of inmates' liberty interest in a meaningful opportunity for release.

Whereas non-juvenile offenders have at most an interest in the possibility of parole, all but the most irredeemable juvenile offenders have been promised their eventual freedom. The case law on juvenile sentencing clearly recognizes that offenders serving parole-eligible life sentences must be provided a right to parole, which includes a "meaningful opportunity" to be released and spend "some years of life outside prison walls," provided they do not fall into the very small group of incorrigible, irredeemable persons. *See Graham*, 560 U.S. at 75; *Montgomery*, 577 U.S. at 213. The changes in constitutional law applicable to juvenile sentencing detailed above implicate constitutionally protected liberty interests in two ways: (1) they brought about substantive changes to the law that affects juvenile lifers' "substantial personal right" to have a decision-maker consider youth; and (2) they identified a new range of legally mandatory information that decision-makers must consider before condemning juveniles to die in prison, *see Cooper*, 377 S.C. at 499, 661 S.E.2d at 111; *see also Barton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 404 S.C. 395, 413–14, 745 S.E.2d 110, 120 (2013). Consequently, juvenile offenders who appear at their parole hearing rightfully expect that they will be released, and therefore, their liberty interest is weighty.

a. Stewart has a state-created liberty interest, protected by due process, in both a meaningful opportunity for release and an accurate parole determination.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The Due Process Clause protects an individual's right to both procedural and substantive due process. *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997). The government violates an individual's procedural due process rights when it deprives them of a protected liberty or property interest, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999), and an inmate has a right to due process protections

if the interest they assert falls within the implicit meaning of liberty or if it flows from an expectation created by state law or policies, *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). This interest must also be greater than a "mere hope," *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 11 (1979), meaning that parole procedures that eliminate all hope of release violate due process, *see Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (per curiam). As a matter of state constitutional law, inmates have a state-created liberty interest in both a "realistic opportunity" for release on parole and an accurate parole determination. *Cooper*, 377 S.C. at 493, 661 S.E.2d at 108; *Barton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 404 S.C. 395, 413, 745 S.E.2d 110, 120 (2013).

b. The change in juvenile sentencing law establishes that, for juveniles, a "meaningful opportunity for release" and "correct parole review" includes consideration of the *Miller*/*Aiken* factors by the relevant decision-maker.

For a parole hearing to be a meaningful opportunity for an inmate to be heard, the Board must necessarily take into account all legally mandated information, and when it fails to do so, those procedures infringe on inmates' liberty interests. *Cooper*, 377 S.C. 489, 499, 661 S.E.2d 106, 111 (2008). In a similar vein, when the courts or the legislature announce substantive changes to the law that "affect[] an inmate's substantial personal right to . . . correct parole review," those changes implicate due process. *See Barton*, 404 S.C. at 413, 745 S.E.2d at 120.

Both the United States and South Carolina Supreme Courts have established that the mitigating factors of youth are information that a decision-maker is legally mandated to consider when making a determination about the length of a juvenile's incarceration. *See supra* Section I. As the only remaining decision-maker with respect to whether Stewart will ultimately serve a life-without-parole sentence—and particularly given that no other decision-maker has ever applied the *Aiken* factors to Stewart's case—it is incumbent on the Board to consider this legally mandated

information in determining whether Stewart and similarly situated juveniles should be granted parole. Because the failure to do so deprives juvenile offenders of their right to an accurate parole determination and a meaningful opportunity for release, this Court should grant certiorari.

c. PPP's current parole procedures do not satisfy the due process requirements of *Cooper*, *Miller*, or *Aiken*.

Stewart's case illustrates the Board's procedural shortcomings in light of *Roper*, *Graham*, *Miller*, *Aiken*, and *Montgomery*. Respondent contended below that the Board need only do three things to comply with procedural due process, regardless of the juvenile status of the person appearing before it: (1) notify the putative parolee of its findings of fact and conclusions of law, separate from one another, S.C. Code Ann. § 1-23-350; *Cooper*, 377 S.C. at 500, 661 S.E. at 112; (2) consider the statutory guidelines, a requirement that may be fulfilled by simply putting in writing the words "we considered the guidelines," *Cooper*, 377 S.C. at 500, 661 S.E. at 112 (referring to S.C. Code Ann. § 24-21-640); and (3) consider any factors written in its parole form (there are currently sixteen), which may also be fulfilled with a similarly formulaic written acknowledgement, *id.* This process leaves no room for any consideration of youth, much less meaningful consideration.

In practice, the process is formulaic. The Board holds a brief hearing where the juvenile offender may or may not have counsel or other representatives and supporters present. *See* App. 325–30. Some hearings last five to ten minutes, but in most cases the putative parolee gets far less time[10] The deliberations following the hearing are almost always exceptionally short, even where

[10] For each inmate, PPP provides the Board with a file containing information compiled by PPP agents. According to PPP, this "synopsis" of an inmate's offense and prison record includes "information gathered from indictments, incident reports and investigative summaries, [and] news media accounts"—all documents that may or may not comport with the actual facts of an inmate's case. Resp't Pet. for Reh'g, *Kelsey v. S.C. Dep't Prob., Parole & Pardon Servs.*, No. 2020-001473, at 3 (S.C. Ct. App. Sept. 12, 2023) (reh'g denied Nov. 17, 2023). PPP's Form 1212 requires that

the person seeking release has given a robust presentation. At the conclusion of a hearing, the members of the Board vote and announce their decision to grant or deny parole. The "deliberations" such as they were at Stewart's most recent hearing, for example, lasted forty-three seconds, which involved no discussion of the merits of his application and took only the length of time for the members to vote. Parole Hearing of Stewart Buchanan (November 18, 2018); *see also* App. 329–30. Individual Board members do not announce the reason or reasons for their vote, and there is no discussion or pronouncement of the § 24-21-640 or Form 1212 factors until several days later, when PPP sends a form letter to the juvenile offender with a list of reasons for the denial and its stock statement that the factors have been considered. In other words, there is no on-the-record acknowledgement from the Board itself that it has actually considered either the factors it is required to consider under *Cooper* or any information relating to the mitigating factors of youth. The only indication that the Board has complied with *Cooper* comes from PPP, as opposed to the Board, after the hearing is already over. In Stewart's most recent denial, for example, PPP listed three findings as the Board's reasons for denial—all immutable characteristics concerning the

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"[i]f the inmate thinks his/her file is somehow incomplete or contains some errors or other inaccuracy, he/she must notify the Board of the specific error or inaccuracy." However, PPP does not allow a person seeking parole to review his or her file, despite this affirmative requirement to find and correct any errors being presented to the Board. The Court of Appeals recently recognized that requiring an inmate to correct any errors in a file he has no right to see is "logically and legally absurd" and held that PPP must give inmates access to their parole files. Op. No. 6020, *Kelsey v. S.C. Dep't Prob., Parole & Pardon Servs.*, No. 2020-001473, at *4, *8 (S.C. Ct. App. Aug. 30, 2023) (reh'g denied Nov. 17, 2023). To undersigned counsel's knowledge, PPP has yet to adjust its practices to comply with the ruling in *Kelsey* and has not released any inmate's parole file.

While PPP prevents inmates from ensuring that no inaccurate information is brought to bear on the Board's decision in PPP's file, inmates are permitted to submit their own packet of information for the Board's consideration. However, in July 2023, PPP announced that inmate submissions—the inmate's only opportunity to present his case and counter any misinformation PPP provides to the Board—would be limited to twenty pages, including all relevant attachments. Board of Paroles and Pardons Administrative Meeting Minutes, July 12, 2023, https://www.dppps.sc.gov/var/plain_site/storage/original/application/8b02eda1a357444f68ce60e5e70d4cd9.pdf.

offense that Stewart committed as a *juvenile*. App. 324. All eighteen of Stewart's parole denials have been based on the same reason: "the nature and seriousness of the offense."[11] This "process" is insufficient because it does not guarantee that the Board will give Stewart's youth and rehabilitation their constitutionally correct weight.[12]

Moreover, a decision from the Board that purports to have considered youth but that is silent on the question is arbitrary and capricious. *See Cooper,* 377 S.C. at 500, 661 S.E.2d at 112 (holding that where there was no evidence that the Board considered the legislatively-mandated parole factors, the parole denial was arbitrary and capricious). The Board's position—that it may rely solely on the immutable characteristics of the original offense and pay no attention to the "critical" developments in Stewart's behavior post-sentencing—effectively disclaims any need to give juvenile offenders guidance about what they can and should do to improve their chances for parole. *See Greenholtz*, 442 U.S. at 15. This myopic focus in practice undermines one of the

[11] Fifteen out of eighteen of Stewart's parole denial letters cited the same three reasons using virtually the same form language: (1) "nature and seriousness of current offense," (2) "indication of violence in this or previous offense," and (3) "use of deadly weapon in this or previous offense." *See* App. 307–24. Reason (1) was cited by the Board every time it has denied Stewart parole and reasons (2) and (3) were each cited in the last fifteen of Stewart's parole denials. *Id.*

[12] In fact, there is reason to believe that the Parole Board's current practice actually makes it harder for juveniles, as compared to adults, to receive parole. The Board uses the COMPAS risk assessment in making their decisions. COMPAS's General Recidivism Risk and Violent Recidivism Risk scales both consider age at the first offense as a factor *increasing* the risk that they will reoffend. Tim Brennan & William Dieterich, *Correctional Offender Management Profiles for Alternative Sanctions,* in HANDBOOK OF RECIDIVISM RISK/NEEDS ASSESSMENT TOOLS 55–56 (Jay Singh *et al.* eds. 2017). Consequentially, the risk assessment systematically over-predicts recidivism among people seeking parole who are currently over age 44. Sharon Lansing, *New York State COMPAS- Probation Risk and Need Assessment Study,* CRIM. JUST. RES. REP. 14 (Sept. 2012) (finding that COMPAS over-estimated risk "for cases involving offenders age 44 or older with differences generally spanning up to 12 percentage points" and explaining that the over-estimation "of the likelihood of rearrest for older-offender cases may be due in part to the fact that the importance of criminal history as a predictor diminishes as an offender's age increases—as he or she 'ages out' of offending").

primary objectives of parole: to incentivize incarcerated people to invest in rehabilitation and refrain from poor behavior while imprisoned.

This Court should either require that the Legislature prescribe a remedy for the Board's constitutionally inadequate procedures or articulate a remedy itself. In the context of a juvenile serving parole-eligible life with a weighty interest living some time outside prison walls, the cost of maintaining a process that does not give full consideration to legally relevant, "reliable, probative evidence [is] particularly high." *See Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 365 (1998).

In other jurisdictions, courts have held that adult parole procedures are insufficient to adequately protect juvenile offenders' liberty interests. For example, in Missouri, a federal district court, looking to *Miller* and *Montgomery*, held that the state's practice of denying juvenile offenders parole based on the "circumstances of the offense" violated *Miller*'s central tenet regarding rehabilitation and maturity. *See Brown v. Precythe*, No. 2:17-CV-04082-NKL, 2018 WL 4956519, at *9 (W.D. Mo. Oct. 12, 2018). Similarly, a federal district court in North Carolina held that the state's prison release procedures were inadequate for juvenile offenders because the officials making release determinations did not consider the diminished culpability of juvenile offenders by distinguishing the review process of juveniles from that of adults. *Hayden v. Keller*, 134 F. Supp. 3d 1000, 1009 (E.D.N.C. 2015). In general, a parole board's cursory explanations have been found to be insufficient and lacking, especially when the board only directly addresses immutable characteristics such as the nature and circumstances of the offense. *See Brown*, 2:17-CV-04082-NKL, 2018 WL 4956519, at *9.

State legislatures have also amended their parole statutes in the wake of the *Graham* trilogy.[13] Many of these states have borrowed extensively from the Supreme Court's language and legal framework. In fact, the West Virginia and California statutes and the Rhode Island guidelines directly address the importance of being compliant with the case law immediately following either the importance of considering a juvenile offender's diminished culpability, meaningful opportunity to obtain release, hallmark features of youth, or subsequent growth and maturation.[14] Moreover, the West Virginia legislature specifically noted that the purpose of its juvenile offender amendments was to "establish parole review mechanisms for juveniles sentenced in adult court . . . in line with the meaning and spirit of" *Roper*, *Graham*, and *Miller*. H.B. 4210, 81st Leg., Reg. Sess. (W. Va. 2014). In California and Arkansas, the legislatures cited *Miller* when expressing the

[13] For example, Arkansas, California, the District of Columbia, and West Virginia now require their parole boards to specifically consider juvenile offenders' "hallmark features of youth," "diminished culpability," and subsequent growth and maturity since being incarcerated.[13] Ark. Code Ann. § 16-93-621; Cal. Penal Code § 4801; D.C. Code Ann. § 24-403.03; W. Va. Code § 62-12-13b; *see also* Conn. Gen. Stat. § 54-125a (providing similar guidance); S.B. 1008, 80th Leg. Assemb., Reg. Sess. (Or. 2019) (as passed by the Oregon Senate and House) (adopting similar guidance). Illinois passed a similar statute in 2019, and the guidelines for Rhode Island's parole board require it to consider youth. H.B. 0531, 100th Gen. Assemb., Reg. Sess. (Ill. 2019); R.I. Parole Board, 2018 Guidelines § l.5(F)(2), http://www.paroleboard.ri.gov/guidelines/UPDATED%20PB%20Guidelines%202018v2.pdf. All of these legislative enactments reflect the foundational principles upon which the Court's ruling in *Miller* was based. *See Miller*, 567 U.S. at 477.

[14] *E.g.*, Cal. Penal Code Ann. § 4801 ("[T]he board, in reviewing a [juvenile offender's] suitability for parole pursuant . . . shall give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."); W. Va. Code Ann. § 62-12-13b(a) ("the parole board shall ensure that the procedures governing its consideration of the person's application for parole ensure that he or she is provided a meaningful opportunity to obtain release and shall adopt rules and guidelines to do so that are consistent with existing case law"); R.I. Parole Board, 2018 Guidelines § l.5(F)(2) ("When a [juvenile offender] becomes eligible for parole . . . the Parole Board shall ensure that the procedures governing its consideration of the person's application for parole make certain that he or she is provided a meaningful opportunity to obtain release and shall adopt rules and guidelines . . . that are consistent with existing case law.").

intent and need respectively for their legislation. S.B. 294, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); S.B. 260, 2013–2014 Leg., Reg. Sess. (Cal. 2013).

Some states have also guaranteed a right to counsel for juvenile offenders who become eligible for release on parole. In Oregon and Connecticut, for example, a juvenile offender has the right to appear with counsel at his or her hearing and indigent juvenile offenders are guaranteed court-appointed counsel. Conn. Gen. Stat. Ann. § 54-125a(f)(3); Or. Rev. Stat. § 420A.203(3)(b). In the District of Columbia and Arkansas, counsel is permitted to speak on the offender's behalf, while Connecticut allows counsel to submit evidence at the hearing. Ark. Code Ann. § 16-93-621(b)(3); Conn. Gen. Stat. Ann. § 54-125a(f)(3)(B); D.C. Code Ann. § 24-403.03(b)(2).

In light of the legal developments that have occurred over the past two decades, PPP can reform its parole determination procedures and become compliant with the Court's directives by changing its procedures. Most importantly, to ensure that juveniles are being afforded a meaningful opportunity for release, this Court can require that if the Board denies parole to a juvenile offender, the Board must provide a written explanation for its denial, which includes findings of whether the juvenile offender demonstrated maturity and rehabilitation and reasoning for why any such demonstration was not sufficient for the offender's release. This written explanation should include findings for all legally mandated factors that the Board must consider, including the *Aiken* factors, the § 24-21-640 factors, and the Form 1212 factors.[15] Such a requirement would ensure that the

[15] Alongside this minimum requirement, this Court could also require the Board to adopt a number of the protections that other states have put in place to protect juvenile offenders' interests in parole proceedings, including providing a designated time at parole hearings for juvenile offenders to present evidence of maturity and rehabilitation; providing counsel to juvenile offenders before their scheduled parole hearing to assist the offender in reviewing and preparing their case; allowing designated counsel to present the case to the Board should the juvenile desire; and, if the Board denies parole to a juvenile offender, granting him or her the right to appeal the merits of the Board's decision to the ALC, which in turn should be authorized to review the Board's negative determination de novo.

Board adequately considers—on the record—a juvenile offender's maturity and rehabilitation in line with decisions from the United States Supreme Court and Supreme Court of South Carolina. Furthermore, in the event of a parole denial, the juvenile offender has some assurance that the Board's determination was based on incomplete maturation, giving the incarcerated person a reason to continue to reform, and in the case of an erroneous determination, the juvenile offender has a written record from which an appellate body can more readily correct the error.

CONCLUSION

For the reasons stated above, this Court should grant certiorari to remedy the constitutional defects in the Parole Board's procedures, which allow the Board to skirt due process requirements for juvenile offenders and effectively permanently deny parole without in fact considering the requisite criteria of S.C. Code § 24-21-640, Form 1212, and *Aiken v. Byars*.

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November 27, 2023.