STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Stewart Buchanan, #69848, Appellant, vs. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	)	Docket No.: 18-ALJ-15-0039-AP **ORDER**

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to an appeal filed by Stewart Buchanan (Appellant), an inmate incarcerated with the South Carolina Department of Corrections. On November 15, 2018, the South Carolina Department of Probation, Parole and Pardon Services (Department) notified Appellant that the South Carolina Parole Board (Board) denied him parole. On December 7, 2018, Appellant filed a Notice of Appeal with the Court seeking judicial review of the Board's denial of parole. Appellant alleges the Board's decision violated his right to due process under the Fourteenth Amendment and violated the prohibition against cruel and unusual punishment under the Eighth Amendment of the United States Constitution and the corresponding provisions of the South Carolina Constitution because the Board failed to give Appellant's juvenile status at the time of the offense its constitutionally appropriate weight. Appellant also asks this Court to order the Board to grant him parole because he is the longest-serving juvenile offender in South Carolina and he has demonstrated his rehabilitation and shown he is not the rare juvenile whose crimes reflect irreparable corruption.[1]

[1] Although it does not appear to be a significant consideration in this case, the portion of Appellant's argument asserting that parole should be granted because he is the longest-serving juvenile offender is unsound. If he is granted parole because he is the longest-serving juvenile offender, then the next longest-serving juvenile offender should also be granted parole for that reason, thereby creating a cascade effect of granting parole based only upon comparative service.

BACKGROUND

On May 18, 1973, when Appellant was seventeen years old, he entered his neighbor's home through a bedroom window. The neighbor recognized Appellant and then went out the window into the front yard. Appellant followed the neighbor into the front yard and stabbed the neighbor several times, killing her. Appellant was thereafter arrested and charged with murder. He gave a full confession and pled guilty to murder. Appellant was sentenced to the then-mandatory punishment for murder: life imprisonment with the possibility of parole after ten years.

On January 12, 1983, Appellant made his initial appearance before the Board. The Board denied Appellant parole. Appellant has been denied parole sixteen times since his initial appearance with his last appearance on November 14, 2018. At the November 14th hearing, Appellant presented mitigating evidence and evidence of his rehabilitation to the Board. However, following his appearance on November 14th, the Board issued an unanimous notice of rejection on November 15, 2018, in which it made the following conclusions of law and findings of fact:

> CONCLUSION OF LAW:
>
> 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 24-21-10(F)(1) of the South Carolina Code of Laws. The Parole Board has determined that your parole must be denied.
>
> You will be notified 30 days prior to your next scheduled parole consideration date.
>
> FINDINGS OF FACT:
>
> Nature And Seriousness Of Current Offense
>
> Indication Of Violence In This Or Previous Offense
>
> Use Of Deadly Weapon In This Or Previous Offense

ISSUES

1. Whether the Board violated Appellant's Fourteenth Amendment right to due process and violated the Eighth Amendment's prohibition of cruel and unusual punishment under the United States Constitution and the corresponding provisions of the South Carolina Constitution when it failed to give Appellant's juvenile status at the time of the offense its constitutionally appropriate weight?

2. Whether this Court can order the Board to grant Appellant parole when Appellant is the longest-serving juvenile offender in South Carolina and he has demonstrated his rehabilitation and shown he is not the rare juvenile whose crimes reflect irreparable corruption?

STANDARD OF REVIEW

When reviewing the Department's decisions in inmate parole matters, the ALC is constrained to review these cases in its appellate capacity. *Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 599, 576 S.E.2d 149 (2003); *see also* S.C. Code Ann. § 1-23-600(E) (Supp. 2018) (directing administrative law judges to conduct appellate review in the same manner prescribed in section 1-23-380 of the South Carolina Code). Consequently, an Administrative Law Judge may not substitute his judgment for that of an agency "as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5) (Supp. 2018). Furthermore, an Administrative Law Judge may not reverse or modify an agency's decision unless the record reflects that substantial rights of the appellant have been prejudiced because the decision is clearly arbitrary or affected by an error of law. *See Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 337 S.C. 133, 137, 522 S.E.2d 605, 607 (Ct. App. 1999); *S.C. Dep't of Labor, Licensing and Regulation v. Girgis*, 332 S.C. 162, 166, 503 S.E.2d 490, 492 (Ct. App. 1998). Finally, "when appealing an agency's decision, the burden rests squarely on the appellant to prove that substantive rights were prejudiced . . . ." *S.C. Dep't of Corr. v. Mitchell*, 377 S.C. 256, 260, 659 S.E.2d 233, 235 (Ct. App. 2008).

DISCUSSION

Jurisdiction

The Court's jurisdiction to hear this case is very narrow. Initially, the Court derived its jurisdiction to hear administrative appeals from inmates in *Al-Shabazz v. State*, which conferred jurisdiction on this Court to hear cases that arose in two ways: "(1) when an inmate is disciplined and punishment is imposed and (2) when an inmate believes prison officials have erroneously calculated his sentence, sentence-related credits, or custody status." *Id.* 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000). The Court was charged with ensuring that the minimal constitutional requirements of due process were met in these cases where a state-created liberty or property interest was at issue. *Id.* at 369-79, 527 S.E.2d at 750.

Thereafter, the South Carolina Supreme Court (Supreme Court) expanded this Court's jurisdiction to hear cases where an inmate is permanently denied parole eligibility. *Furtick*, 352 S.C. at 598, 576 S.E.2d at 149 (holding "the permanent denial of parole eligibility implicates a liberty interest sufficient to require at least minimal due process"). Notably, "[a]lthough the Court [in *Furtick*] found S.C. Code Ann. § 24–21–620 created a liberty interest in the one-time determination of parole eligibility, it was quick to note that the statute did not create a liberty interest in parole." *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003). Parole is a privilege, not a right, and the routine denial or granting of parole is generally not appealable unless the inmate can show that he was "rendered ineligible for parole due to the procedure employed by the Parole Board." *Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 377 S.C. 489, 495–96, 661 S.E.2d 106, 110 (2008); *see Sullivan*, 355 S.C. at 443 n. 4, 586 S.E.2d at 124 n. 4.

In *Cooper*, the Supreme Court held the Board's failure to permanently deny an inmate parole eligibility is not necessarily dispositive because it would oversimply the Board's decision. *Cooper*, 377 S.C. at 498, 661 S.E.2d at 111. The Supreme Court then held that if the 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.[2] In other words, "the apparent failure by the Parole Board to consider the requisite statutory criteria in rendering its decision constitutes an infringement of a state-created liberty interest and, thus, warrants minimal due process procedures." *Id.* at 499, 661 S.E.2d at 112.

The required statutory criteria referenced in *Cooper* include "the factors outlined in section 24–21–640 and the fifteen factors published in its parole form." *Id.* Additionally, the limited appeal of parole decisions is governed by the APA, which requires that "a final decision in an agency adjudication of a contested case . . . 'include findings of fact and conclusions of law, separately stated.'" *Id.* (quoting S.C. Code Ann. § 1–23–350 (2005)). In *Cooper*, the Supreme Court held the Board could avoid a violation of due process if it "clearly states in its order denying

---

[2] Following the *Cooper* decision, the General Assembly amended section 1-23-600(D) of the South Carolina Code to provide that "[a]n administrative law judge shall not hear an appeal . . . involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services." 2008 S.C. Acts No. 334, § 7 (effective June 16, 2008). Since *Cooper* remains good law, the ALC follows the Supreme Court's decision in that case.

parole that it considered the factors outlined in section 24-21-640 and the fifteen factors published in its parole form." *Id.* at 500, 661 S.E.2d at 112. "If the Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure." *Id.* If the Board's decision demonstrates it followed the applicable procedural criteria under *Cooper*, then this Court can summarily dismiss the appeal. *Id.*

> Section 24-21-640 discusses the following criteria for the Board, in relevant part:
>
> The board must carefully consider the record of the prisoner before, during, and after imprisonment, and no such prisoner may be paroled until it appears to the satisfaction of the board: that the prisoner has shown a disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interest of society will not be impaired thereby; and that suitable employment has been secured for him.
>
> * * *
>
> The board must establish written, specific criteria for the granting of parole and provisional parole. This criteria must reflect all of the aspects of this section and include a review of a prisoner's disciplinary and other records. The criteria must be made available to all prisoners at the time of their incarceration and the general public.

S.C. Code Ann. § 24-21-640. The Department's "written, specific criteria" include:

> 1. The risk the inmate poses to the community;
>
> 2. The nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it;
>
> 3. The inmate's prior criminal records and his/her adjustment under any previous programs or supervision;
>
> 4. The inmate's attitude toward his/her family, the victim, and authority in general;
>
> 5. The inmate's adjustment while in confinement, including his/her progress in counseling, therapy, and other similar programs designed to encourage the inmate to improve himself/herself;
>
> 6. The inmate's employment history, including his/her job training and skills and his/her stability in the work place;
>
> 7. The inmate's physical, mental and emotional health;
>
> 8. The inmate's understanding of the cause of his/her past criminal conduct;
>
> 9. The inmate's efforts to solve his/her problems such as seeking treatment for substance abuse, enrolling in academic and vocational education courses, and in general using whatever resources the Department of corrections has made available

to inmates to help with their problems;

10. The adequacy of the inmate's overall parole plan. This includes inmates living arrangements, where he/she will live and who he will live with; the character of those with whom the inmate plans to associate in both his/her working hours and his/her off-work hours; the inmate's plans for gainful employment;

11. The willingness of the Community into which the inmate will be released to receive the inmate;

12. The willingness of the inmate's family to allow his/her to return to the family circle;

13. The attitudes of the sentencing judge, the solicitor, and local law enforcement officers respecting the inmates' parole;

14. The feelings of the victim's family, and any witnesses to the crime about the release of the inmate

15. The actuarial risk and needs assessment outlined in section 24-21-10 (F)(1) of the S.C. Code of laws; which evaluates based on Criminal Involvement, Relationships/Lifestyle, Personality/Attitudes, Family, Social Exclusion and Mental Health.

16. Other factors considered relevant in a particular case by the Board.

South Carolina Department of Probation, Parole and Pardon Service, *Criteria for Parole Consideration*, https://www.dppps.sc.gov/content/download/200476/4681336/file/Criteria+for+Parole+Consideration.pdf.

Additionally, after *Cooper*, the legislature passed a law requiring the Department to establish and utilize a validated risk and needs assessment tool when evaluating parole. S.C. Code Ann. § 24-21-10(F) (Supp. 2018). This risk assessment tool is known as COMPAS and has been incorporated into the Board's written criteria and must be considered by the Board in addition to the other aforementioned statutory criteria. *See Cooper*, 377 S.C. at 499, 661 S.E.2d at 112 (holding "the apparent failure by the Parole Board to consider the requisite statutory criteria in rendering its decision constitutes an infringement of a state-created liberty interest and, thus, warrants minimal due process procedures."); *see also Ruff v. S.C. Dep't of Prob.*, No. 2015-UP-309 (S.C. Ct. App. dated June 24, 2015) (holding the actuarial risk and needs assessment is one of the statutory criteria to which the Board must adhere).

Constitutional Violations

Appellant contends the Board's parole review was constitutionally deficient because it did not meaningfully consider Appellant's juvenile status at the time he committed the offense.

Appellant argues the Board's failure to meaningfully consider his status violated his Fourteenth Amendment constitutional right to due process and violated the Eighth Amendment prohibition against cruel and unusual punishment under the United States Constitution and the corresponding provisions of the South Carolina Constitution. *See* U.S. Const. amend. XIV. § 1; U.S. Const. amend. VIII; S.C. Const. art. I, § 3, S.C. Const. art. I, § 15. Appellant supports his argument with citations to four United States Supreme Court (U.S. Supreme Court) cases: *Roper v. Simmons*, 543 U.S.551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012); and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Appellant also cites to this State's Supreme Court's decision in *Aiken v. Byers*, 410 S.C. 534, 765 S.E.2d 572 (2014). In his brief, Appellant contends the decisions in these cases reflect a "legal sea-change" and have resulted in the following newly-developed constitutional principles:

1. Children are fundamentally different from adults in critical ways that significantly diminish their moral culpability.
2. Due to these differences, the proceedings which determine whether they should be confined for life 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.

Appellant contends these newly developed constitutional principles have created new procedural and substantive requirements for youth sentencing that "demand meaningful consideration of the attendant class and individual characteristics of youth." Moreover, Appellant contends that if the characteristics of youth are given the appropriate weight, it is clear that the Board denied Appellant parole based solely on immutable facts related to his offense in violation of the Fourteenth and Eight Amendments and the corresponding provisions of the South Carolina Constitution.[3]

[3] This argument implies that if Appellant's youth had been considered, the Board would have granted him parole, thus further implying that because the Board denied Appellant parole, they did not consider his youth when making their decision.

In response, the Department essentially argues the Board complied with all statutory parole criteria and the Department's written criteria as required under *Cooper* and, therefore, minimal procedural due process was met, and no further analysis is necessary. The Department further argues that Appellant's juvenile status was, and always has been, considered as part of the parole criteria under § 24-21-640 and its accompanying written criteria.

Cooper Analysis

Appellant's argument in this case clearly goes beyond the boundaries of an analysis under *Cooper*. Nevertheless, Appellant raises one issue within the *Cooper* analysis. Specifically, he argues that the Board improperly based its denial of parole on immutable facts that Appellant cannot change. In this case, the Board denied Appellant's parole based upon the following findings of fact that are not subject to change after the offense: The Nature and Seriousness of the Current Offense, Indication of Violence In This Or Previous Offense, and Use of Deadly Weapon In this Or Previous Offense.

In *Cooper*, our Supreme Court determined the Board erred because it only considered non-changing, immutable facts without considering the other factors as required by section 24-21-640 and the Department's fifteen-factor form. *See Cooper*, 377 S.C. at 502, 661 S.E.2d at 113 ("In the instant case, the Parole Board apparently failed to consider the requisite factors and, instead, based its decision on certain fixed factors that are unaffected by any rehabilitation efforts on the part of Cooper."). To remedy this, the Supreme Court held the Board must show it considered section 24-21-640 and the Department's written criteria to comply with due process. *Id.* at 500, 661 S.E.2d at 112.

In this case, the Board's letter denying Appellant parole clearly states that it considered the factors outlined in § 24-21-640, the Department's Form 1212 (the written criteria), and the actuarial risk and needs assessment. See *Cooper*, 377 S.C. at 500, 661 S.E.2d at 112 (holding the Board can meet the requirement of due process if it "clearly states in its order denying parole that it considered the factors outline in section 24-21-640 and the fifteen factors published in its parole form"). Additionally, the Board's order contains separate findings of fact and conclusions of law consistent with the Supreme Court's edict in *Cooper*. *Cooper*, 377 S.C. at 500, 661 S.E.2d at 112; § 1-23-350. Therefore, the Board met the minimum constitutional due process requirements outlined in *Cooper*.

Notably, *Cooper* does not prohibit the Board from relying on immutable factors in its findings of fact, it merely requires the Board to consider all the statutory criteria in its decision making. *See Cooper*, 377 S.C. at 499 n.5, 661 S.E.2d at 112 n.5 (noting "[t]hese reasons [the nature and seriousness of the current offense; an indication of violence in this or a previous offense; and the use of a deadly weapon in this or a previous offense] would be sufficient to deny parole in the Board's discretion, if the Board's decision evinced consideration of section 24–21–640 and its own criteria"). Additionally, *Cooper* does not require the Board to explain its reasoning for its decision in detail, and this Court is not empowered to engage in a substantive review of the Board's decision beyond determining the Board followed proper procedure.[4] *Id.* at 500, 661 S.E.2d at 112 ("If the Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure."). All *Cooper* and § 1-23-350 require is that the findings of fact and conclusions of law be separately stated, as they were here. Therefore, based on the Record, the Court finds the Department's decision is consistent with *Cooper*. *See id.* ("If the Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure.").

However, Appellant's argument goes beyond the scope of *Cooper*. Specifically, Appellant is not attacking the Department's failure to consider the statutorily mandated criteria; rather, he is arguing the existing criteria are constitutionally deficient as applied to him.

Is the Existing Parole Criteria Constitutionally Deficient?

Appellant appears to argue current case law has established a substantive constitutional requirement that the Board *expressly* consider an inmate's juvenility at the time the offense during its parole review and give it the proper constitutional weight. Specifically, in his brief, Appellant makes the following statements indicating Appellant argues the Board must incorporate a new substantive constitutional requirement in its review:

[4] Even if the Court could engage in a more thorough review, it could not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact. *See* § 1-23-380(5).

- "Because the Board now holds the key to [Appellant's] release, it was required to take account of the newly recognized Eighth Amendment rules and to expressly consider the impact of youth in a manner consistent with *Aiken*."[5]
- "*Roper*, *Graham*, *Miller* and *Montgomery*[6] created a liberty interest for juveniles in meaningful parole review."
- "Although there is no right to parole, the Eighth Amendment provides juveniles with an entitlement to demonstrate maturity and rehabilitation."
- "[D]enying parole to a juvenile who has been rehabilitated would constitute an Eighth Amendment violation, and the state can have no legitimate interest in undermining the constitution."
- "In South Carolina, the legislature has chosen to leave the existing institutions to implement *Aiken's* mandates, but the Board does not distinguish between parole review for juvenile offenders and parole review for adult offenders."
- It is insufficient that the Board gives [Appellant] an opportunity to present information about his youth because that presentation does not guarantee that the Board will give [Appellant's] youth and rehabilitation their constitutionally correct weight."
- "[A] decision from the Board that purports to have considered youth but that is silent on the question is arbitrary and capricious."
- "Consistent with the Court's acknowledgment that the overwhelming majority of juvenile offenders are capable of reform, the Eighth Amendment requires the Board to employ a presumption of release for juvenile offenders."
- "Additionally, the Board must review and consider material and make informed assessments about the hallmarks of youth."

At first glance, this case presents as an as-applied attack on the constitutionality of the existing parole criteria in this State. *See Doe v. State*, 421 S.C. 490, 502, 808 S.E.2d 807, 813 (2017), *reh'g granted* (Nov. 17, 2017) ("The line between facial and as-applied relief is [a] fluid one, and many constitutional challenges may occupy an intermediate position on the spectrum between purely as-applied relief and complete facial invalidation." (citing 16 C.J.S. Constitutional Law § 153, at 147 (2015)); *State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016) (explaining a facial challenge requires showing that the law is "incapable of any valid application"); *Doe*, 421 S.C. at 503, 808 S.E.2d at 813 (noting in an "as-applied" challenge, "the party challenging the

---

[5] *Aiken v. Byars*, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014).

[6] *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 1200 (2005); *Graham v. Fla.*, 560 U.S. 48, 75, 130 S. Ct. 2011, 2030 (2010), *as modified* (July 6, 2010); *Miller v. Alabama*, 567 U.S. 460, 489, 132 S. Ct. 2455, 2475 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016).

constitutionality of the statute claims that the application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional" (internal quotation marks and citation omitted)). Appellant is not arguing the existing criteria are unconstitutional in every application; rather, Appellant is arguing the criteria are unconstitutional as applied to juvenile offenders like himself. *See Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 109, 705 S.E.2d 28, 39 (2011) (explaining that "finding a statute or regulation unconstitutional as applied to a specific party does not affect the facial validity of that provision").

Although this Court cannot determine the constitutionality of a law, the Supreme Court has ruled that this Court may address as-applied constitutional challenges to statutes and regulations. *Al-Shabazz*, 338 S.C. at 379 n.12, 527 S.E.2d at 755 n.12 ("When an inmate challenges the constitutionality of a statute, Department and the ALJ must follow the statute and leave the question of whether it is constitutional to the courts."); *Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000) ("ALJs are an agency of the executive branch of government and must follow the law as written until its constitutionally is judicially determined; ALJs have no authority to pass upon the constitutionality of a statute or regulation."); *Travelscape, LLC*, 391 S.C. at 109, 705 S.E.2d at 39 ("[O]ur decision today does not affect the ALC's inability to decide facial challenges to a statute or regulation; those are legal questions that are properly raised for the first time on appeal or in a declaratory judgment action before the circuit court."); *Id.* at 109, 705 S.E.2d at 38–39 ("We . . . hold that ALCs are empowered to hear as applied challenges to statutes and regulations."); *Howard v. S.C. Dep't of Corr.*, 399 S.C. 618, 630, 733 S.E.2d 211, 218 (2012) ("Because Appellant's claim constitutes an as-applied constitutional challenge to the policy, the ALC could have ruled on this claim.").

However, Appellant's as-applied challenge is premised on his assertion that case law has created a new substantive constitutional right to a "meaningful" parole review for inmates who were sentenced as juveniles, and this right requires the Board to expressly consider an inmate's youth and give it the proper constitutional weight. A review of the current case law does not convince this Court such a substantive constitutional right currently exists.

The U.S. Supreme Court precedent discussing juvenile offenders and sentencing has established that it is unconstitutional to sentence juvenile offenders to (1) death, (2) life without parole in non-homicide cases, or (3) mandatory life without parole in homicide cases. *See Roper*

v. Simmons, 543 U.S. 551, 578, 125 S. Ct. 1183, 1200 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."); *Graham v. Fla.*, 560 U.S. 48, 75, 130 S. Ct. 2011, 2030 (2010), *as modified* (July 6, 2010) (holding "while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life"); *Miller v. Alabama*, 567 U.S. 460, 489, 132 S. Ct. 2455, 2475 (2012) ("By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory-sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment."); *Montgomery v. Louisiana*, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016), *as revised* (Jan. 27, 2016) (holding *Miller* applied retroactively as a substantive change to constitutional law and holding "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them"). Our Supreme Court followed *Miller* in *Aiken v. Byars* recognizing that "*Miller* requires that before a life without parole sentence is imposed upon a juvenile offender, he must receive an individualized hearing where the mitigating hallmark features of youth are fully explored." 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014).

This line of cases, including our Supreme Court's decision in *Aiken v. Byers*, dealt with application of the Eighth Amendment's prohibition against cruel and unusual punishment in the context of sentencing a juvenile to death or to life *without* the possibility of parole. *Miller*, *Montgomery*, and *Aiken* specifically stand for the principle that a juvenile offender cannot be sentenced to life without parole without a meaningful review of "youth and its attendant characteristics" to determine whether the sentence is appropriate for "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility," thereby avoiding an "excessive sentence for children whose crimes reflect transient immaturity." *Montgomery*, 136 S. Ct. at 734-35.

Here, Appellant was not sentenced to life without parole. Rather, his sentence allowed him the opportunity for parole after serving ten years. Moreover, he was granted that opportunity after ten years and has been allowed to appear before the Board regularly ever since. Therefore, the line of cases cited by Appellant are distinguishable from this case because this case does not

concern a sentence of life without parole. *See Graham, Miller, Montgomery, supra.* The South Carolina Court of Appeals recently recognized this distinction in *State v. Finley*, when it refused to grant a juvenile offender's request for resentencing pursuant to *Aiken* because the juvenile had received a sentence granting him parole eligibility after thirty-years' imprisonment and not a sentence of life *without* parole like in *Graham*, *Miller* and *Aiken*. Op. No. 5665 (S.C. Ct. App. filed July 17, 2019) (Shearouse Adv. Sh. No. 29 at 27). Thus, although the cases cited by Appellant certainly recognize that juvenile offenders differ from non-juvenile offenders in their moral culpability and rehabilitation, current precedent does not specifically address whether a juvenile sentenced to life *with* parole is constitutionally entitled a more extensive parole review than he currently receives under South Carolina law.

In fact, although the U.S. Supreme Court held "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them," it did not prescribe any particular features for the parole review. *Montgomery*, 136 S. Ct. at 736. Rather, in *Miller* and *Montgomery*, the U.S. Supreme Court was more concerned with ensuring that juvenile offenders received the *opportunity* for parole at the sentencing stage. *Miller*, 567 U.S. at 471 (explaining "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing"); *id.* at 476 ("Of special pertinence here, we insisted in these rulings that a sentencer have the ability to consider the "mitigating qualities of youth."); *Montgomery*, 136 S. Ct. at 736 ("Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.").

Since there is no precedent holding that either the United States Constitution or the South Carolina Constitution requires specific parole criteria for juvenile offenders, this Court has no authority to impose such a constitutional requirement. As the South Carolina Supreme Court recently noted in *State v. Slocumb*, "while we are duty-bound to enforce the Eighth Amendment consistent with the Supreme Court's directives, our duty to follow binding precedent is fixed upon case-specific holding rather than general expressions in an opinion that exceed the scope of any particular holding." 426 S.C. 297, 307, 827 S.E.2d 148, 153 (2019). Indeed, in *Slocumb* our Supreme Court refused to extend the maxims expressed in *Graham* to juveniles sentenced to *de*

facto life sentences (term-of-years sentences longer than a natural life) because the U.S. Supreme Court had not expressly extended its ruling to such individuals. *Id.* at 315, 827 S.E.2d at 157. Specifically, our Supreme Court stated, "we decline to extend *Graham*'s explicit holding based solely on the general rationale underlying the opinion without further input from the Supreme Court as to how the Eighth Amendment applies to situations where a juvenile nonhomicide offender commits multiple crimes against multiple victims at multiple points in time." *Id.* at 312, 827 S.E.2d at 156.

Thus, the limited holdings in the U.S. Supreme Court cases cannot be used to formulate a new principle of substantive constitutional law before this Court. *See id.* Similarly, although this Court has the authority to enforce existing constitutional law or consider as-applied challenges to the constitutionality of statutes and regulations in keeping with its jurisdiction, this Court, being a creature of the executive branch, has no authority to establish a new substantive constitutional right. *See Slocumb, supra*; *Video Gaming Consultants, Inc.*, 342 S.C. at 38, 535 S.E.2d at 644 ("ALJs are an agency of the executive branch of government and must follow the law as written until its constitutionally is judicially determined; ALJs have no authority to pass upon the constitutionality of a statute or regulation.").

Order the Board to Grant Parole

Appellant articulates his second issue as whether this Court can order the Board to grant Appellant parole. The Court cannot order the Board to grant Appellant parole. Because the Board met the due process requirements of *Cooper*, this Court's limited review is complete. *Cooper*, 377 S.C. at 500, 661 S.E.2d at 112 ("If the Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure."). The Record shows Appellant presented mitigating evidence to the Board, including evidence of rehabilitation, and the Board has discretion to deny Appellant parole despite the presentation of mitigating evidence.

CONCLUSION

This Court's narrow jurisdiction in this case confines the Court to determine the Department's denial of parole was consistent with *Cooper* and afforded Appellant minimum due

process. Because the Department met the requirements of *Cooper*, this case amounts to a routine denial of parole and this Court has no authority to conduct any further review. *See id.*

Based upon the foregoing, the decision of the Department is **AFFIRMED.**

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

August 13, 2019
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair
Judicial Law Clerk

August 13, 2019
Columbia, South Carolina