THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From The Administrative Law Court

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

---

Appellate Case No. 2019-001554

STEWART BUCHANAN, #69848 ..... APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF
PROBATION, PAROLE AND PARDON SERVICES ..... RESPONDENT.

INITIAL BRIEF OF APPELLANT

JOHN H. BLUME #747
Cornell Law School
159 Charles Evans Hughes Hall
Ithaca, NY 14853
(607) 255-1030

HANNAH L. FREEDMAN #103373
LINDSEY VANN #101408
MEGAN BARNES #104368
Justice 360
900 Elmwood Ave, Suite 200
Columbia, SC 29201
(803) 765-1044

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes and Legislative Materials

Federal Cases

State Cases

Other

STATEMENT OF THE ISSUES ON APPEAL

1. In light of the legal sea change applicable to juvenile sentencing over the past decade, does due process require the Parole Board to adopt a set of procedures specific to juvenile offenders in order to protect their constitutional right to live "some years of life outside prison walls," *Montgomery v. Louisiana*, 136 S. Ct. 718, 736–37 (2016)?

2. Does Stewart Buchanan's continued incarceration of forty-seven years for a crime he committed as a juvenile, despite demonstrated maturity and rehabilitation, constitute disproportionate punishment in violation of the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution?

STATEMENT OF THE CASE

Stewart Buchanan has been an inmate in the South Carolina Department of Corrections (SCDC) for forty-seven years—since he was seventeen-years old—which gives him the distinction of being the longest continuously incarcerated juvenile in this state. *See Buchanan v. S.C. Dep't of Probation, Parole & Pardon Servs.*, Supplemental Record on Appeal at 122, 133 (S.C. Admin. Law Court March 12, 2019) (hereinafter S.R.). He has been denied parole eighteen times since first becoming parole eligible in 1983. S.R. 281–98. As will be discussed in more detail below, the denials cannot be justified by his institutional record, which overall has been quite satisfactory. The last fifteen 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 he cannot change: the facts and circumstances of his offense. *See* S.R. 281–98.[1]

[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. S.R. 113–16, 122. 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* S.R. 7–8, 18, 122. Ms. Boone saw him, called Stewart's name, and climbed out of another window onto her porch. S.R. 122–23. Stewart followed her out the window and when she ran into the yard and began yelling his mother's name, he stabbed her to

Stewart's most recent parole hearing was held on November 15, 2018. S.R. 299. The packet he sent to Board members contained ample information, detailed below, linking his offense to the transient qualities of youth and further demonstrating that he not only is suitable for release but that he is ready and able to be successful if granted parole.

Stewart's upbringing was marked by neglect and emotional and physical abuse. Stewart's father was an alcoholic who drifted from job to job and place to place and was absent from Stewart's life for long stretches of time. S.R. 4. When he was physically present, he either ignored Stewart or beat him, sometimes with his hand to Stewart's face, sometimes with a belt. S.R. 4. His mother also failed him. She was highly critical of Stewart and the rest of his siblings, offering little emotional support, kindness, or warmth. S.R. 4. His parents' behavior and detachment left Stewart's older sister Janet to serve as a stand-in parent, until she, too, abandoned Stewart. S.R. 4–5. When Stewart was still a young teenager, Janet met a boy, ran away from home, got married, got divorced, and remarried a man with whom she travelled the country in a stolen car, writing bad checks and running up debt under the Buchanan family address. S.R. 6. 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. S.R. 6–7. As Dr. Susan Knight, PhD., a licensed forensic clinical psychologist who evaluated Stewart, explained, it is against this backdrop of "social and neurobiological immaturity," "severe[] intoxicat[ion]" and

---

death. S.R. 123. Stewart's father called the police. *Id.* 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). S.R. 127.

compromised "reasoning, judgment and impulse control" that nearly fifty years ago Stewart committed the crime for which he is still incarcerated.[2] *See* S.R. 32.

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. S.R. 132–33. 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." S.R. 133. 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. S.R. 8–9. 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). S.R. 8–9. Nearly fifty years later, however, Stewart remains in prison.

During his incarceration, Stewart has become a role model in the prison community. He has had relatively few infractions, and those he has received came primarily in his teenage and young-adult years, before he matured.[3] S.R. 12, 20. He has taught other prisoners how to read and

---

[2] 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* S.R. 18.

[3] For example, Stewart's sole assault charge, which did not involve a weapon, happened in November 1988. S.R. 20. He also had two non-assaultive charges, also without a weapon, when he was attempting to help his long-term, mentally ill roommate through psychotic episodes on April 11, 2011 and October 5, 2016. S.R. 20, 27. He had one issue on a pass, a DUI in 1981, for which he was ordered to pay a fine by the magistrate's court, but he has not been charged for any substance use or contraband ownership in decades. S.R. 20. Although Stewart spent significant time in the community on work release, he has had no attempted escapes and no criminal charges or convictions except for the DUI. S.R. 20. In short, his record is excellent,

write, served as a teacher's aide, and taught his own courses on various subjects. S.R. 10. He participated in the community outside the prison walls as well, from speaking to schoolchildren about the dangers of drug use through the "Get Smart" program to raising $350 for citizens with intellectual disability. S.R. 19, 21. He taught himself how to sew, participated in a film used by criminal justice organizations, and volunteered for church community service when he was allowed to leave on passes. S.R. 11, 20. Stewart worked three civilian jobs in the community in a work-release program, has earned almost 1,500 hours in vocational training, and has held thirty-six work positions[4] within the prison. S.R. 19–20. Since January 2018, he has been confined at Perry Correctional Institute in the "Lifers Rehabilitation Program." S.R. 19. This is a character-based housing unit (CHU) which is only available to inmates who have been, and remain, disciplinary incident free. S.R. 11. He also was accepted into and completed JumpStart, a prison ministry and re-entry program. S.R. 13.

Stewart also presented the Board with evidence of a viable release plan. He had arranged housing and employment in Spartanburg as a result of receiving a "blue folder" recommendation from JumpStart (the highest level, given to less than 2% of graduates). S.R. 23. This guaranteed that if Stewart were released, he would receive two years of support from pastors and therapists as well as access to housing and vocational support. S.R. 23.

---

especially considering that he entered SCDC as a teenager and has spent his entire adult life behind bars.

[4] Stewart has been incarcerated for 47 years, and therefore, on average has held each job for approximately 1.3 years. Never one to be idle, Stewart has taken advantage of learning new jobs and gaining new skills moving up to different levels of jobs and to different types of jobs as he has moved around to different SCDC facilities during the length of his incarceration. The number of job opportunities he has been given speaks to his ability to learn new skills and adapt to whatever is asked of him. If he was not fulfilling the requirements of these jobs, he would not continually be given new and different job opportunities spanning last four decades.

In addition, Dr. Knight's psychological evaluation included the administration of an empirically-validated risk assessment,[5] from which Dr. Knight concluded that Stewart posed a low risk for re-offending, especially with continued substance abuse treatment. S.R. 27, 33. 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." S.R. 32. 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. S.R. 16, 23, 32, 33.

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. S.R. 193–97. These differences mean that the decision 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, it was now incumbent on the Board to take those same factors into account in deciding whether to grant him parole. S.R. 195. Specifically,

[5] The HCR-20^{v3} is an interview and assessment tool designed to assess an individual's risk of future violence. It includes twenty items that measure past, present and future risk. S.R. 27.

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. S.R. 195.

In response, attorneys for the 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." S.R. 199. But they did not. Following Stewart's parole hearing, one of many heard that day,[6] the 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. S.R. 303–04.

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." *Buchanan v. S.C. Dep't of Probation, Parole & Pardon Servs.*, 18-ALJ-15-0039-AP (S.C. Admin. Law Court Aug. 13, 2019). This interest, the ALC reasoned, does not exist in the context of a "routine denial

[6] *See* South Carolina Department of Probation, Parole and Pardon Services, *Parole & Pardon 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.").

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.'" *Id.* at 4 (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. *Id.* at 4, 15.

In sum, despite Stewart's suitability for parole on all matrixes, the Board, after no meaningful deliberation, denied parole for the eighteenth time based on a single parole factor: "nature and seriousness of current offense." S.R. 298. Stewart's most recent denial makes two things clear: (1) the Board's latest decision, affirmed by the ALC, violated Stewart's rights under the Eighth Amendment to the United States Constitution, Article I, Section 15 of the South Carolina Constitution, and due process because the Board failed to give constitutionally appropriate weight to the fact that children are constitutionally different; and, (2) because Stewart's last fifteen parole denials, spanning over thirty years, have been based on the unchangeable nature and circumstances of the offense, the Board is never going to grant him parole.

Thus, this case does not involve a routine denial of parole, and this Court has jurisdiction to remedy the constitutional violations in either of two ways. The Court could order another parole hearing at which the Board is mandated to give meaningful consideration to the "hallmark characteristics of youth," as defined by the United States and South Carolina Supreme Courts,

based on a complete presentation from Stewart's attorneys. Alternatively, and more appropriately, this Court could order the Board to grant Stewart parole because, as a juvenile "whose crime[] reflected only transient immaturity" and not "irreparable corruption[]," Stewart is entitled to live "some years of life outside prison walls." *See Montgomery v. Louisiana*, 136 S. Ct. 718, 736–37 (2016).

STANDARD OF REVIEW

This Court has jurisdiction to review an appeal from an ALC's decision. S.C. Code Ann. § 1-23-610(A)(1). This Court may reverse or modify an ALC's decision if the appellant's substantive rights have been prejudiced because the ALC's "finding, conclusion, or decision is . . . in violation of constitutional or statutory provisions . . . or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Id.* § 1-23-610(B).

ARGUMENT

I. THERE HAS BEEN A FOUNDATIONAL SHIFT IN THE SUBSTANTIVE CONSTITUTIONAL 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 shifting juvenile offenders into a distinct category from adult offenders, warranting them unique protections and considerations with respect to punishment. The new legal regime shift is grounded in the principle that emerged in *Roper v. Simmons*—juveniles are different, and therefore must be treated differently. 543 U.S. 551 (2005). Ultimately, this recategorization of juveniles has changed the standards of proportionality required by the Eighth Amendment when meting out punishments for this class of offenders, and in turn, has new due process implications

This paradigm shift in the juvenile sentencing landscape began with *Roper v. Simmons*, in which the Court reversed its prior decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989) and 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.

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 a juvenile offender. *Id.* at 572–73.

Next, in *Graham v. Florida*, the Court was confronted with a juvenile sentenced to life without parole who, while on parole for a separate burglary, broke into a house, held the occupants at gunpoint while ransacking the house searching for money, and then refused to surrender, leading police on a high-speed chase. 560 U.S. 48, 55 (2010). Notwithstanding the severity of Graham's offenses, the Court reiterated that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," and therefore, life without parole is a

---

[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).

disproportionate punishment for juveniles who commit non-homicide offenses. *Id.* at 68. Instead, the Court explained that due to their lesser culpability, juvenile offenders 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." *Id.* at 74–75.

In its third major juvenile sentencing decision, the Court held that juveniles found guilty of murder may not be subjected to mandatory life without parole sentences. *Miller*, 567 U.S. at 489. In cases where a juvenile is facing life without parole, the Court held that the Eighth Amendment requires an individualized sentencing hearing, similar to the penalty phase of a capital trial. *Id.* Again, like in *Roper* and *Graham*, the *Miller* Court reiterated that a juvenile's age and the "wealth of characteristics and circumstances attendant to it" are mitigating factors that the criminal justice system must, at some point, consider. *Id.* at 476.[8]

Four years later, the Court held that *Miller* announced a new substantive rule of constitutional law that applies retroactively. *Montgomery*, 136 S. Ct. at 736–37. In *Montgomery*, the Court was clear that "a lifetime in prison is a disproportionate sentence for all but the rarest of children whose crimes reflect 'irreparable corruption.'" *Id.* at 725. Thus, after *Montgomery*, states must give juvenile offenders the opportunity to live "some years of life outside prison walls" unless the state officials responsible for determining whether those individuals should be released make

[8] Justice Kagan, who authored *Miller*, recently 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).

a finding based on the totality of the evidence that the offenders have demonstrated "irreparable corruption." *See id.* at 736–37.

The South Carolina Supreme Court embraced these same principles in *Aiken v. Byars* and held 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 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. The gravity of the *Aiken* petitioners' crimes, all homicides, did not affect the need for juvenile-specific sentencing hearings. *Id.* at 537, 765 S.E.2d at 573. 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]

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 II.B.2.ii.

2) Due to these differences, all 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.

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 applied these principles to Stewart's case. Because the Board (and only the Parole Board) now holds the key to his release, it was 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 in a manner consistent with *Montgomery* and *Aiken*. Likewise, the ALC 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 and ALC 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 LAW IMPLICATED A LIBERTY INTEREST AND PPP'S INADEQUATE PROCEDURES VIOLATED DUE PROCESS.

A. Stewart Has a Liberty Interest in a Meaningful Opportunity for Release

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 trigger due process, *see Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (per curiam).

As a matter of state constitutional law, when the Parole Board relies on procedures that fail to take account of all legally mandated information, those procedures infringe 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). 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 v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 404 S.C. 395, 413, 745 S.E.2d 110, 120 (2013). In both scenarios, the South Carolina Supreme Court has recognized that a parole denial is not "routine" and this Court therefore has jurisdiction to evaluate the constitutionality of the Parole Board's procedures.

Juvenile offenders serving parole-eligible life sentences, unlike adults, have a right to parole—a "meaningful opportunity" to be released and spend "some years of life outside prison walls"—so long as they demonstrate that do not fall into the very small group of incorrigible, irredeemable persons. *See Graham*, 560 U.S. at 75; *Montgomery*, 136 S. Ct. at 737. The changes in constitutional law applicable to juvenile sentencing detailed above implicate constitutionally protected liberty interests in two ways: (1) 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; and, (2) they brought about substantive changes to the law that affects juvenile lifers' "substantial personal right" to have a decision-maker consider youth, *see Barton*, 404 S.C. at 413–14, 745 S.E.2d at 120.

Stewart was sentenced to life with the possibility of parole in a different legal era, when juveniles charged with murder were legally indistinguishable from adults. That is no longer the case, and as a matter of law, children are now "constitutionally different" for sentencing and release purposes.[10] It follows, then, that like juveniles who are charged with murder post-*Miller* and *Aiken*, who are entitled to hearings that are procedurally and substantively different from adult hearings, juveniles who were sentenced for the same crimes pre-*Miller* and *Aiken* are also entitled to hearings that are procedurally and substantively different from adult hearings. South Carolina has chosen to put the *exclusive* key to these juvenile offenders' release in the hands of the Parole Board, and thus it must modify both its procedures and criteria for release to comply with the

[10] Since the *Aiken* decision, 27 juvenile offenders have been convicted of murder in South Carolina. Of those, two have been sentenced to life without parole and the remaining 25 received an average sentence length of 39.46 years—more than seven years fewer than Stewart has already served.

Eighth Amendment principles described previously. The Board's failure to do so violates due process.

B. The Process that Stewart is Due

If a given state procedure implicates an inmate's liberty interests, procedural due process requires that the state provide sufficient process in order to fully protect the interests at stake. *See Mathews v. Eldridge*, 424 U.S. 319, 323 (1976). In weighing the adequacy of existing procedures, courts must balance three factors: (1) the individual liberty interest at stake; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and, (3) the government's interest in maintaining the existing procedures. *See id.* at 335.

1. Stewart's Interest in a Parole Process that Gives Him a Meaningful Opportunity for Release is Weighty

"Freedom from imprisonment—from restraint—lies at the heart [of due process]." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). A juvenile serving a parole-eligible life sentence suffers a "grievous loss" equivalent to the interest implicated by parole revocation when, despite evidence of rehabilitation, they are denied parole. *Cf. Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). This is because, as described above, a juvenile serving a life sentence has a right to parole—to freedom from continued government restraint—unless they are incorrigible. *See Montgomery*, 136 S. Ct. at 733–34; *Miller*, 567 U.S. at 479–80. 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 question is *when* and not *if*. Juvenile offenders who appear at their parole hearing rightfully expect that they will be released, and therefore, their liberty interest is weighty. The

decision to deny parole to a juvenile serving a life sentence, the decision "whether the [person] will be free or in prison, is a matter of obvious great moment" to the juvenile. *See Wolff v. McDonnell*, 418 U.S. 539, 560 (1974).

2. *PPP's Current Parole Review Process Produces an Unacceptably High Number of Incorrect Parole Denials for Juvenile Offenders and the Costs of Implementing a More Accurate Systems Are Minimal*

i. The Current Procedural Shortcomings

Stewart's case illustrates the Board's procedural shortcomings in light of *Roper*, *Graham*, *Miller*, and *Montgomery*. The Board's position before the ALC was that it 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.*

In practice, the process is mechanistic, with no room for meaningful consideration of youth, much less meaningful consideration. The Board holds a brief hearing where the juvenile offender may or may not have counsel or other representatives and supporters present. *See* S.R. 299–304. Most hearings last five to ten minutes, but in some cases the putative parolee gets far less time. The deliberations following the hearing can be exceptionally short, even where the person seeking release has given a robust presentation. The "deliberations" at Stewart's most recent hearing, for

example, lasted forty-three seconds which involved no discussion of the merits of his application and only the length of time for the members to vote. Parole Hearing of Stewart Buchanan (November 18, 2018); *see also* S.R. 303–04. At the conclusion of a hearing, the members of the Board vote and announce their decision to grant or deny parole. Several days after a denial, the Board sends a form letter to the juvenile offender with a list of reasons for the denial. In Stewart's most recent denial, for example, the Board listed three findings—all immutable characteristics concerning the offense that Stewart committed as a *juvenile*. S.R. at 298. All eighteen of Stewart's parole denials have been based on the same reason: "the nature and seriousness of the offense."[11] Nowhere in its decision did the Board address any of the factors that the Supreme Court has emphasized differentiate juvenile offenders from adult offenders. This "process" is insufficient because it does not guarantee that the Board will give Stewart's youth and rehabilitation their constitutionally correct weight.[12]

---

[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* S.R. at 281–98. 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. S.R. 281–98.

[12] In fact, there is reason to fear that the Parole Board's current practice makes it disproportionately harder for juveniles 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").

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 (where there was no evidence that the Board considered the legislatively-mandated parole factors, holding that 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 primary objectives of parole: to incentivize incarcerated people to invest in rehabilitation and refrain from poor behavior while imprisoned.

ii. How the Board's Procedures May Be Improved

The chief aim of due process with respect to factfinding is to "minimize the risk of erroneous decisions." *Id.* at 13. Accordingly, the quality of the process should be proportional to the importance of the need to reduce the relevant error. *Id.* Therefore, 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). Because the Board's current mechanistic process for reviewing juvenile offenders does not meet the above standards and thus violates the Due Process Clauses of both the Federal and State Constitutions, this Court could rule that it be immediately discontinued and allow the legislature to prescribe the remedy. Alternatively, this Court has the authority to delineate the remedy.

In other jurisdictions, courts have held that adult parole procedures are insufficient to accurately 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. 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

[13] Alternatively, other states have given these juvenile offenders resentencing hearings where a judge considers these same factors related to youth. Colo. Rev. Stat. Ann. § 18-1.3-401; N.D. Cent. Code Ann. § 12.1-32.

guidance). Illinois passed a similar statute last year, 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 § 1.5(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.

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 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).

---

[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 § 1.5(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.").

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 and looking to the example of states that have already acted, PPP can reform its parole determination procedures and become compliant with the Court's directives by doing the following:

1) Before a scheduled parole hearing, a juvenile offender should be provided with counsel to review his or her case to present before the Board. And, if the juvenile offender chooses, the designated counsel should be allowed to present the offender's case before the Board.
2) At the hearing, there should be a designated time at which the juvenile offender may present evidence of maturity and rehabilitation.
3) A presumption in favor of release should apply at the parole hearing. The vast majority of juvenile offenders will be able to demonstrate maturity and rehabilitation. *See Montgomery*, 136 S. Ct. at 733–34; *Miller*, 567 U.S. at 479–80. Thus, only when a juvenile's prison record establishes that they are one of "the rarest of children" whose behavior reflects "irreparable corruption" should the Board deny parole. *See Montgomery*, 136 S. Ct. at 725.
4) 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.
5) If the Board denies parole to a juvenile offender, he or she should have the right to appeal the merits of the Board's decision to the ALC, which in turn should have be authorized to review the Board's negative determination de novo.

These procedures would ensure that the Board adequately considers 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. Additionally, the right to counsel provides juvenile offenders with the requisite representation that they would have had at their original sentencing hearings. Juvenile offenders like Stewart had a sentencing hearing that failed to consider the "hallmark features of youth" and this subsequent parole hearing is meant to correct this prior wrong. Because these juvenile offenders would have had a right to counsel at their initial sentencing hearings, that same right should be provided now during this corrective process. Lastly, it is imperative that the risk of a wrong decision is minimized when the weighty interests in cases like these are at stake. Therefore, a juvenile offender who is denied parole should have the right to appeal the Board's decision to the ALC, which may review that decision using an "abuse of discretion" standard in order to ensure that the Board has not made an arbitrary determination.

3. There is Virtually No Governmental or Public Interest in Maintaining the Existing Procedures

PPP has no legitimate interest in preserving procedures that produce unconstitutional outcomes. *See infra* Section III. Moreover, the costs of implementing these additional parole review requirements for PPP are relatively minimal.

Stewart and similarly situated juvenile offenders have a weighty liberty interest in a meaningful opportunity for release where they can adequately demonstrate maturity and rehabilitation. The suggested guidelines in Section II.B.2.ii. would ensure that these individuals

are no longer subject to procedures that disproportionately produce erroneous parole denials for juvenile offenders.

III. THE BOARD'S FIFTEENTH PAROLE DENIAL BASED SOLELY ON AN OFFENSE THAT WAS THE PRODUCT OF THE TRANSIENT QUALITIES OF YOUTH, IN THE FACE OF OVERWHELMING EVIDENCE OF REHABILITATION, VIOLATES THE CONSTITUTIONAL PROHIBITIONS ON CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AMENDMENT AND THE SOUTH CAROLINA CONSTITUTION.

A. Article I, Section 15 of the South Carolina Constitution Requires a More Searching Proportionality Review than the Eighth Amendment

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. In interpreting the scope of this amendment, the United States Supreme Court has looked to the original meaning of the phrase "cruel and unusual" and concluded that at the time the amendment was ratified, the phrase was "directed against punishments . . . disproportionate to the offense involved." *Gregg v. Georgia*, 428 U.S. 153, 169 (1976). Because the concept of "disproportionate punishment" is not "static," the Court's analysis under the Eighth Amendment requires an assessment of moral culpability in light of "the evolving standards of decency that mark the progress of a maturing society." *Id.* at 172–73 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).[15] This standard and the United States Supreme Court opinions applying it

[15] The Court has repeatedly held that various forms of punishment that are disproportionate to the nature of the alleged offense violate the Eighth Amendment's evolving standards requirement. For example, in *Weems v. United States*, the Court looked to the history of the Eighth Amendment and the legislative debate that preceded its enactment and in light of that, held that a punishment of twelve years in irons at hard labor was unconstitutionally excessive for the crime of falsifying public records. 217 U.S. 349 (1910). In *Trop v. Dulles*, the Court held that the Army could not, consistent with the Eighth Amendment, expatriate a person convicted of desertion because to do so would subject the person to a punishment "decried by civilized people. 356 U.S. at 100–01. And in *Robinson v. California*, the Court invalidated a Los Angeles statute that criminalized narcotics addiction because "in the light of contemporary knowledge," the statute impermissibly punished innocent conduct in violation of evolving standards. 370 U.S. 660, 666 (1962); *see also Manning v. Caldwell*, 930 F.3d 264 (4th Cir. 2019) (en banc) (invalidating a municipal ordinance that

"set[] the floor for individual rights while the state constitution establishes the ceiling." *State v. Forrester*, 343 S.C. 637, 643–44, 541 S.E.2d 837, 840 (2001).

In interpreting the state constitution, the South Carolina Supreme Court has followed a similar mode of constitutional analysis. Where the language in the South Carolina Constitution differs from the language in the federal constitution, an appellate court's interpretative task is to determine whether the state constitution "provide[s] greater protection than the federal Constitution." *Id.* at 644, 541 S.E.2d at 840. This mode of analysis first looks to any textual differences between the two documents and clues from state legislative history. S*ee id.* at 644–47, 541 S.E.2d at 840–42. The next step is to survey parallel language in other states' constitutions and, where other states have language similar to that in the South Carolina Constitution, any judicial opinions interpreting that language. Finally, the appellate court should consider whether any newly proposed interpretation of the state constitution is consistent with past precedent. *Id.* at 645–48, 541 S.E.2d at 841–42. Applying that methodology here, it is clear that the language of Article I, Section 15 of the South Carolina Constitution sweeps more broadly than the language in the Eighth Amendment and that as a matter of state constitutional law, the Board's repeated parole denials have rendered Stewart's sentence unconstitutionally disproportionate.

1. The Text of the State Constitution is Broader Than That in the Federal Constitution

Article I, Section 15 provides, in relevant part: "Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained." S.C. Const. art. I § 15; *cf.* U.S. Const. amend. VIII

---

criminalized possession or consumption of alcohol by a person declared a "habitual drunkard").

("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). As a matter of plain language interpretation, the differences between the South Carolina and federal constitutions are significant. First and most obviously, the drafters of the South Carolina constitution elected to use a disjunctive framing, while the federal constitution is conjunctive. In standard English usage, a disjunctive indicates alternatives. This difference suggests that the South Carolina constitution provides more protection than its federal counterpart: a punishment need only be cruel *or* unusual, not both, to violate the state constitution. *See Jennings v. Jennings*, 401 S.C. 1, 11–12, 736 S.E.2d 242, 247 (2012) (Toal, C.J., concurring); *see also* Commentary to 1998 Amend., Fla. Const. art. 1 § 17 (explaining that the Florida legislature amended the state constitution by substituting the word "and" for "or" because the "change conforms the prohibition with the parallel statement in the federal constitution" and "also raises the bar on the part of a defendant by requiring proof of both prohibitions rather than one or the other"); *People v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992); *People v. Anderson*, 493 P.2d 880, 885 (Cal. 1972) (en banc), *superseded by* Cal. Const. art. I § 27. Grammatically, then, as a matter of state law "[t]he prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition." *Bullock*, 485 N.W.2d at 872; *see also Anderson*, 493 P.2d at 885 ("[T]he delegates modified the California provision before adoption to substitute the disjunctive 'or' for the conjunctive 'and' in order to establish their intent that both cruel punishments and unusual punishments be outlawed in this state." (footnotes omitted)).

The conclusion that Article I, Section 15 sweeps more broadly than the Eighth Amendment is reinforced by the fact that the South Carolina Constitution includes three distinct categories of

punishment that the drafters understood to be unconstitutional: cruel punishment; corporal punishment; and unusual punishment. This drafting form is unique among the constitutions in all American jurisdictions, including those that prohibit cruel or unusual punishments.[16] The choice to list punishments, one more specific and two more general, all separated by disjunctives, is a textual indication that the drafters contemplated the prohibition of three distinct categories and that the prohibitions should therefore be read broadly. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008) (rejecting the narrowing principles of *ejusdem generis* and *noscitur a sociis* as applied to a statutory phrase that "is disjunctive, with one specific and one general category" and concluding that, as a textual matter, the contested phrase had to be broadly construed).

The limited legislative history that is available confirms this reading of the constitution. The precursor to the cruel punishment provision first appeared in the South Carolina constitution in 1790, which provided that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." S.C. Const. art. IX § 4 (1790); *see also id.* (1861) (same); S.C.

---

[16] *Compare* S.C. Const. art. I § 15 ("nor shall cruel, nor corporal, nor unusual punishment be inflicted") *with, e.g.*, Ala. Const. art. I § 15 ("excessive fines shall not be imposed nor cruel or unusual punishment inflicted"); Ark. Const. art. II § 9 ("nor shall cruel or unusual punishments be inflicted"); Cal. Const. art. I § 6 ("nor shall cruel or unusual punishments be inflicted"); Haw. Const. art. I § 12 ("nor cruel or unusual punishment [shall be] inflicted"); Kan. Const. Bill of Rights § 9 ("nor cruel or unusual punishment [shall be] inflicted"); La. Const. art. 1 § 20 ("No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment."); Me. Const. art. I § 9 ("nor [shall] cruel nor unusual punishments [be] inflicted"); Md. Const. art. 9002 § 25 ("nor [shall] cruel nor unusual punishment [be] inflicted"); Mass. Const. Pt. 1, art. 26 ("No magistrate or court of law shall . . . inflict cruel or unusual punishments."); Mich. Const. art. I § 16 ("cruel or unusual punishment shall not be inflicted"); Minn. Const. art. I § 5 ("nor [shall] cruel or unusual punishments [be] inflicted"); Miss. Const. art. III § 28 ("Cruel or unusual punishment shall not be inflicted."); Nev. Const. art. I § 6 ("nor shall cruel or unusual punishments be inflicted"); N.H. Const. art. I § 33 ("No magistrate or court of law shall . . . inflict cruel or unusual punishments."); N.C. Const. art. I § 27 ("nor [shall] cruel or unusual punishments [be] inflicted"); N.D. Const. art. I § 11 ("nor shall cruel or unusual punishments be inflicted"); Okla. Const. art. II § 9 ("nor [shall] cruel or unusual punishments [be] inflicted"); Tex. Const. art. I § 13 ("nor [shall] cruel or unusual punishment [be] inflicted"); Wyo. Const. art. 1 § 14 ("nor shall cruel or unusual punishment be inflicted").

Const. art. IX § 5 (1865) (same). Then, in 1895 white Democrats called a constitutional convention to rewrite the reconstruction-era constitution in an effort to disenfranchise newly freed African Americans. *See* D. D. Wallace, *The South Carolina Constitutional Convention of 1895*, 4 SEWANEE REV. 348, 350–51 (1896) (explaining that the purpose of the 1895 convention was "to take time by the forelock, and disenfranchise the negro before the next election"); *see also* Journal of Proceedings, South Carolina Constitutional Convention, at 443–44 (1895) (statement of B.R. Tillman) (describing the 1895 convention as directed at rewriting a constitution that placed white men "under the rule of our ex-slaves"). When the members of the 1895 convention met, the newly admitted western states—most of which had adopted a disjunctive phrasing of the prohibition on cruel or unusual punishments—provided "constitutional models" that "reflected a concern on the part of their drafters not only that cruel punishments be prohibited, but that disproportionate and unusual punishments also be independently proscribed." *Anderson*, 493 P.2d at 884–85. Unsurprisingly, the drafters of the 1895 constitution did not follow those constitutional models and instead adopted the following language in Article I, Section 19: "Excessive fines shall not be imposed, nor cruel and unusual punishments inflicted, nor shall witnesses be unreasonably detained. Corporal punishment shall not be inflicted." Journal of Proceedings, South Carolina Constitutional Convention, at 136 (first reading); *id.* at 277 (final reading).

In the late 1960s, however, the General Assembly formed a Committee to Make a Study of the South Carolina Constitution of 1895. Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, at 10 (June 1969) [hereinafter Final Report]. The purpose of the Committee was to "strengthen the [constitution] and render it capable of meeting modern needs and future expectations." *Id.* at 8. On September 15, 1967, the members of the Committee assigned

to the Declaration of Rights met to discuss what became Article I, Section 15 (former Sections 19 and 20) and decided to substitute the disjunctive "nor" for the conjunctive "and." They compared the South Carolina Constitution to the Model Constitution[17] and although "[t]he committee fully agreed that the protections provided in these sections should remain," they settled on combining the sections and rewording the language. Book I, Proceedings of the Committee to Make a Study of the Constitution of South Carolina, 1895, at 11 (Aug. 25, 1966–Dec. 29, 1967); *see also* Final Report at 19 (noting the Committee's intent to "modernize the language "in Article I § 15). The drafters explicitly decided "to accept the recommendation of the Model, but to make two additions: retain the restriction on using corporal punishment and retain the protection for witnesses." Book I, Proceedings of the Committee to Make a Study of the Constitution of South Carolina, 1895, at 11.

The Committee's decisions to adopt the Model Constitution and to include a separate prohibition on corporal punishment are significant. The Model Constitution and the 1969 amendments were drafted against the backdrop of the Eighth Amendment and the United States Supreme Court cases interpreting it. *See* MODEL STATE CONSTITUTION at 35. From the early 1960s, when the Model Constitution was drafted, to the late 1960s, when the South Carolina amendments were drafted, there was a nationwide expansion of rights for criminal defendants, and especially criminal defendants and juveniles in state court proceedings. *See, e.g., In re Gault*, 387 U.S. 1

[17] The Model Constitution was an effort to offer states a plan of government premised on civic responsibility and based on a review of the language in state constitutions in effect at the time of its drafting. *See* Introduction *in* MODEL STATE CONSTITUTION (6th ed. 1963). The cruel and unusual prohibition in the Model provided: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." *Id.* at 33, section 1.06(b). At the time the Model Constitution was drafted in 1963, all states other than Illinois and Connecticut had prohibitions on cruel or unusual punishment in their constitutions. *Id.* at 34.

(1967) (extending due process to juvenile proceedings); *Ker v. California*, 374 U.S. 23 (1963) (incorporating the Fourth Amendment); *Robinson*, 370 U.S. 660 (incorporating the Eighth Amendment). The fact that the South Carolina drafters looked to the Model Constitution is an indication, then, that the drafters in 1969 and the voters in 1971 were intentionally adopting a constitution with more robust protections for criminal defendants. The drafters' decision to retain the specific prohibition against corporal punishment, which goes further than the Eighth Amendment and the Model Constitution, is another indication of the same legislative intent. Moreover, this inference is reinforced by other amendments the Committee undertook at the same time, which the Supreme Court of South Carolina has interpreted as "offering a higher level of . . . protection" than the federal constitution. *See Forrester*, 343 S.C. at 647, 541 S.E.2d at 842.

In sum, the amendments that gave rise to the current form of Article I, Section 15 were part of a sweeping set of reforms intended to liberalize the 1895 Constitution and expand protections for criminal defendants. Together, the text of Article I, Section 15 and the legislative history that gave rise to that text "favor[] an interpretation offering a higher level of . . . protection than the [Eighth] Amendment." *See id.* As the Michigan Supreme Court reasoned, "[w]hatever the legal terms 'cruel' and 'unusual' were understood to mean in 1791 when the Eighth Amendment was ratified—or in 1689 when its antecedent, the English Bill of Rights, was adopted," by the 1960s (when Michigan and South Carolina amended their constitutions), "those words had been interpreted and understood by the United States Supreme Court . . . for more than half a century to include a prohibition on grossly disproportionate sentences." *Bullock*, 485 N.W.2d at 873 (citing *Weems*, 217 U.S. at 366–67 and *Harmelin v. Michigan*, 501 U.S. 957, 1010–11 (1991) (White, J., dissenting)).

2. Other States Whose Constitutions Have Disjunctive Punishment Clauses Have Interpreted Their Constitutions as Requiring a More Robust Proportionality Review Than What the Eighth Amendment Demands

Eighteen states other than South Carolina use "or" or "nor" instead of "and" in their constitutional prohibitions on forms of punishment. Of those eighteen, courts in seven states have interpreted their constitutions as requiring a more searching proportionality review than the Eighth Amendment.[18] *See Anderson*, 493 P.2d at 884–87 (California); *State v. Baxley*, 656 So.2d 973, 977 (La. 1995); *State v. Dobbins*, 215 A.3d 769, 784 (Me. 2019); *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 1 N.E.3d 270, 283 (Mass. 2013); *Bullock*, 485 N.W.2d at 872 (Michigan); *State v. Vang*, 847 N.W. 2d 248, 263 (Minn. 2014); *Johnson v. State*, 61 P.3d 1234, 1249 (Wyo. 2003); *see also State v. Bassett*, 428 P.3d 343, 349 (Wash. 2018) (explaining that the Washington Constitution is more protective than the Eighth Amendment because the Washington Constitution "prohibits conduct that is merely cruel; it does not require that the conduct be both cruel and unusual" (internal quotation omitted)); *State v. Enderson*, 804 A.2d 448, 454–55 (N.H. 2002) (acknowledging that the state constitution is at least as protective as the Eighth Amendment). Only three of the eighteen states—Kansas, North Carolina, and Texas—have expressly held that the disjunctive phrasing does not extend further than the Eighth Amendment. *But see Medley v. N.C. Dep't of Corr.*, 412 S.E.2d 654, 659–60 (N.C. 1992) (Martin, J., concurring) ("The disjunctive term 'or' in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth

[18] Courts in the following states have not expressly ruled on the question of whether their constitutions are co-extensive with or more protective than the Eighth Amendment: Alabama; Arkansas; Hawai'i; Maryland; Mississippi; Nevada; North Dakota; and Oklahoma. Courts in the following states have held that their constitutions are coextensive with the Eighth Amendment: Kansas, *State v. Scott*, 961 P.2d 667, 670 (Kan. 1998); North Carolina, *State v. Green*, 502 S.E.2d 819, 828 (N.C. 1998); and Texas, *Reyes v. State*, 557 S.W.3d 624, 631 (Tex. Ct. App. March 29, 2017).

Amendment."). Moreover, even in states that use the conjunctive form, legislative history supports the idea that the disjunctive form sweeps more broadly. For example, when Florida amended its constitution in 1998 to expressly preserve capital punishment, legislators also changed the word "or" into the word "and" because, they explained, that amendment "raise[d] the bar on the part of a defendant by requiring proof of both prohibitions rather than one or the other." Commentary to 1998 Amend., Fla. Const. art. 1 § 17.

Nationwide, then, the consensus view is that when a state's constitution prohibits cruel *or* unusual punishment, the state constitution requires a more searching proportionality review. In practice, this has involved comparing the sentence at issue with sentences imposed on similarly situated individuals, and in a different context, the Supreme Court of South Carolina has implicitly endorsed this kind of proportionality review. *See State v. Dickerson*, 395 S.C. 101, 125 n.8, 716 S.E.2d 895, 908 n.8 (2011) (expressing concern with proportionality review in capital cases that is limited to a review of similar sentences, not similar defendants); *see also, e.g.*, *Baxley*, 656 So.2d at 977; *Bullock*, 485 N.W.2d at 873; *Vang*, 847 N.W.2d at 263. Moreover, when the South Carolina Supreme Court previously expanded the rights of juveniles beyond the federal Constitutional floor, the critical vote came from a member of the Court who explicitly relied on this language in the state constitution. *See Aiken*, 410 S.C. at 545–46, 765 S.E.2d at 578 (Pleicones, J., concurring) (noting that "the majority exceeds the scope of current Eighth Amendment jurisprudence in ordering relief under *Miller*" but that "I would reach the same result under S.C. Const. art. 1, § 15"); *see also Brown v. State*, 10 N.E.3d 1, 4, 8 (Ind. 2014) (downwardly revising a juvenile's aggregate sentence of 150 years because under the Indiana Constitution, the sentence was "inappropriate" and disproportionate); *State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016)

(categorically barring life without parole for juveniles under the Iowa Constitution); *State v. Lyle*, 854 N.W.2d 378, 400–01 (Iowa 2014) (holding that "all mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional" under the Iowa Constitution); *Diatchenko*, 1 N.E.3d at 283–84 (holding that under the Massachusetts Constitution, a sentence of life without parole for a juvenile "is disproportionate not with respect to the offense itself, but with regard to the particular offender"); *Bassett*, 428 P.3d at 351–52 (holding that juvenile life without parole is unconstitutional under the Washington Constitution, which uses "nor").

B. Stewart's Sentence Is Unconstitutionally Disproportionate

Stewart is the longest-serving juvenile offender with a parole-eligible life sentence in South Carolina. When he entered prison, Richard Nixon was president, the United States was entrenched in the Vietnam War, and a group of women were allowed to run in the Boston Marathon for the first time. Stewart has served nearly fifty years, outlasting his reasonable life expectancy and growing into a reformed man. Under both the Eighth Amendment, and even more so under the South Carolina Constitution, his continued punishment is cruel, unusual, and grossly disproportionate to the offense he committed and the person he has become.

Because maturity and rehabilitation can only occur post-offense, juvenile offenders, like Stewart, who are serving life sentences with the possibility of parole must be able to establish their progress in a formal setting, at a later date, and with meaningful consideration, *i.e.*, at a parole hearing. *See Md. Restorative Just. Initiative v. Hogan*, CV ELH-16-1021, 2017 WL 467731, at *21 (D. Md. Feb. 3, 2017); *see also Greiman v. Hodges*, 79 F.Supp.3d 933, 943 (S.D. Ia. 2015) ("It is axiomatic that a juvenile offender could only prove increased maturity and rehabilitation warranting release from custody at some time well after a sentence is imposed."). If the decision

to grant or deny parole hinges solely on the nature of Stewart's offense, he has no way of positively affecting the Parole Board's decision-making, and it follows that he has no meaningful opportunity for parole because characteristics like maturity can only be proved by examining the period after sentencing. Thus, denying juveniles like Stewart the opportunity to reenter society after they have demonstrated rehabilitation subjects them to continued punishment based on the crime. *See Hayden*, 134 F. Supp.3d at 1001 (finding that *Graham* mandates consideration of maturity after sentencing). A juvenile like Stewart who has matured and been rehabilitated but who is nevertheless denied parole has been denied their rights under the Eighth Amendment.

Despite the fact that Stewart has been incarcerated longer than any juvenile offender in this State, in its Order rejecting Stewart's appeal, the ALC concluded that the United States and South Carolina Supreme Court's juvenile sentencing decisions were irrelevant because Stewart was not sentenced to life without parole. *Buchanan*, 18-ALJ-15-0039-AP, at 12–13. That is technically true; he has been given the opportunity to appear before the Board. But, that "opportunity" has been rendered meaningless, not only due to the procedural failures described in Section II, *supra*, but also by the Board's myopic focus and reliance on the nature and circumstances of the offense. This now decades old pattern and practice makes it clear that the Board never intends to parole Stewart and thus he will die in prison unless this Court intervenes. Stewart is not asking for a new constitutional right. Instead, he is asking that an existing right be extended to him, as the ALC's Order acknowledged: "[a]llowing 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." *Id.* at 13 (citing *Montgomery*, 136 S. Ct. at 736). Because the Supreme Court has held that all juvenile offenders

who have previously been sentenced to life without parole are entitled to a meaningful opportunity for release where their subsequent maturation and growth should be considered (save for the rare incorrigible one), then a fortiori juvenile offenders with lesser sentences must at least have this same opportunity. *See Graham*, 560 U.S. at 75; *Montgomery*, 136 S. Ct. at 736. Thus, contrary to the ALC's determination, *Roper*, *Graham*, *Miller*, and *Montgomery* are all relevant to Stewart's case. *See Buchanan*, 18-ALJ-15-0039-AP, at 12–13.

Rather than demonstrating incorrigibility, the homicide for which Stewart remains incarcerated was the impulsive, impetuous act of an abused, neglected, drunk and high teenager. Today, Stewart is the success story the criminal justice system hopes will take place with all juvenile offenders: the easily influenced 17-year-old with a laundry list of issues stemming from his troubled childhood has transformed into a strong, educated man who has managed to have a positive influence in his community. *See* S.R. 18–24. He has taken responsibility for his actions, reflected on his past behavior, and made every effort to repent for his actions. He has sought opportunities to educate and better himself, and he has gone out of his way to assist fellow inmates, educate them, and assist them in their own rehabilitation efforts. Stewart's rehabilitative journey, borne out in his prison records and ongoing educational mission, is evidence in and of itself that a juvenile convicted of a serious offense can turn their life around during incarceration. Moreover, Stewart's current age and extensive release plan are strong predictors of long-term prospects for a successful reentry into society.

Firsthand accounts from those who interact with Stewart day-in and day-out corroborate his complete rehabilitation. For example, Sergeant Gloria Scales, who selected Stewart to work as her clerk during his stay at McCormick Correctional Institute from May 2009 until April 2015,

characterized Stewart as a "model" inmate who helped teach classes and assist other inmates with legal work, sewing, and maintenance. S.R. 22. According to Sergeant Scales, Stewart deserves a chance at parole and she remains hopeful that he will be released. S.R. 22. Similarly, Lieutenant Rodeshia Taylor, also from McCormick, is confident that Stewart would be able to "make it outside" of prison and is hopeful that he will be paroled. S.R. 22.

Juanita Moss, a food service worker who also got to know Stewart while he was at McCormick, also described him as a "model inmate," even going on to say that she was upset when he was moved to Perry Correctional Institute and subsequently asked the warden about Stewart's move because he "never caused trouble, made the staff feel safe, and was good with the younger 'rowdier' inmates." S.R. 22. Ms. Moss remains confident that Stewart would be successful out of prison and has offered to give him a recommendation for work. S.R. 22.

Albert Hall, who taught Stewart carpentry for two years at McCormick also stated that Stewart was well-liked and respected by the other inmates. S.R. 22. Mr. Hall even credited Stewart's efforts taking special time with a "slow" inmate to that inmate's success in earning his carpentry certificate. S.R. 22–23. Like all of Stewart's other prison supervisors, Mr. Hall believes that Stewart would be successful if released on parole if given a job opportunity. S.R. 23.

Chaplain Larry Epps, who first met Stewart in 2018, stated "if [Stewart] got out tomorrow, I would be happy to know he bought a home on my street." S.R. 23. SCDC Captain Adam Bradburn, who knows Stewart from his time at Perry, stated "if Mr. Buchanan made parole or got released, I wouldn't have no problem with him living right down the road from my house, I wouldn't have any concern about it." S.R. 23. And visiting Pastor Tammy Blom, who met with

Stewart multiple times, described Stewart as "deserving of opportunity outside of prison" and as a man who "expresses remorse." S.R. 24.[19]

All of these facts, however, were irrelevant to the Board, as they were in Stewart's numerous previous requests for parole. Thus, despite the overwhelming evidence of "demonstrated maturity and rehabilitation," *Graham*, 560 U.S. at 75, and Stewart's right to spend "some years of life outside prison walls," *Montgomery*, 136 S. Ct. at 737, he was denied parole based on the permanently unchangeable nature and circumstances of the offense. Given the Board's actions at his last parole hearing (i.e., the lack of deliberation and consideration of his juvenile status and characteristics), and the multi-decade pattern of denying him parole because of the underlying offense, two things are evident. First, a "lifetime in prison is a disproportionate sentence" for Stewart because the nature and circumstances of the offense and the evidence of rehabilitation do not permit anyone, including the Board, to determine that he is beyond redemption. *See id.* at 726. Second, the pattern of and reason for denying Stewart parole have established that the Board is never going to release him, and thus the Board has gone beyond its authority and transformed his parole-eligible life sentence into a *de facto* life without parole sentence. By ignoring Stewart's demonstrated rehabilitation and effectively converting his sentence to life without parole, the Parole Board, and the ALC by affirming the Board's decision, are disproportionally punishing Stewart in direct violation of the Eighth Amendment.

[19] These statements from those who have gotten to know Stewart over the last 40 years are not only significant due to their content but also because they are made by those who are very familiar with the realities of crime and the prison system—those who are not naïve enough to blindly see the best in people or easily manipulated by inmates acting in bad faith. If these individuals do not believe Stewart is a threat, then there would be very few people who could believe that he is.

If the bar the Board sets for release is so high that Stewart is not able to reach it despite almost five decades of development and growth, then it is unconstitutionally high, not only for Stewart but for all parole-eligible juvenile offenders serving life sentences. By repeatedly refusing to give adequate constitutional weight to Stewart's youth (and the class characteristics attendant thereto), the individual mitigating circumstances in his case, and his demonstrated maturity and rehabilitation the Board and the ALC have effectively condemned Stewart to die in prison. This is the exact sentence that the Supreme Court has said to be disproportionate in direct violation of the United States and South Carolina Constitutions. Thus, the ALC's decision to uphold the Board's arbitrary of parole based on the nature and circumstances of the offense, which is the one thing Stewart can never change, constitutes cruel and unusual punishment.

CONCLUSION

Stewart Buchanan went to prison when he was seventeen years old. S.R. 1. Now, forty-seven years later, he is sixty-three. He has been incarcerated longer continuously than any other juvenile offender in South Carolina, and he already outlived his reasonable life expectancy in SCDC. He has gone from a teenager to a senior citizen behind prison walls, despite demonstrable growth and rehabilitation. The Board's refusal to give constitutionally adequate consideration to the class and individual characteristics of youth and its repeated reliance on the unchangeable facts of the crime committed by an impulsive, intoxicated child violates the Eighth and Fourteenth Amendments and Article I, Sections 3 and 15 of the South Carolina Constitution.

Therefore, for the above stated reasons, this Court should reverse the judgment of the ALC 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 Stewart parole.

Respectfully submitted,

JOHN H. BLUME #747
Cornell Law School
159 Charles Evans Hughes Hall
Ithaca, NY 14853
(607) 255-1030

HANNAH L. FREEDMAN #103373
LINDSEY VANN #101408
MEGAN BARNES #104368
Justice 360
900 Elmwood Ave, Suite 200
Columbia, SC 29201
(803) 765-1044

January 9, 2020

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM
THE ADMINISTRATIVE LAW COURT
The Honorable Ralph K. Anderson, III, Chief Administrative Law Judge

---

Appellate Case No. 2019-001554

STEWART BUCHANAN,

Appellant,

v.

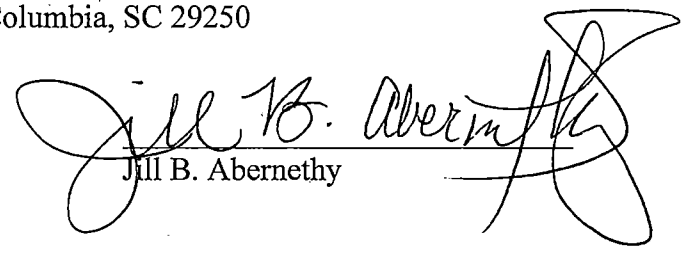
SOUTH CAROLINA DEPARTMENT OF
PROBATION, PAROLE AND PARDON SERVICES

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Appellant's Initial Brief and Designation of Matter was served by first class United States mail, postage prepaid, this 9th day of January 2020, upon the following:

Tommy Evans, Jr.
Department of Probation, Parole and Pardon Services
P.O. Box 50666
Columbia, SC 29250



Jill B. Abernethy

JUSTICE 360 ADVANCING EQUALITY IN THE CRIMINAL JUSTICE SYSTEM

900 ELMWOOD AVENUE
SUITE 200
COLUMBIA, SC 29201

OFFICE 803.765.1044
WWW JUSTICE360SC.ORG

January 9, 2020

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: *Stewart Buchanan, SCDC#69848 v. SC Department of Probation, Parole, & Pardon Services*
Appellate Case No. 2019-001554

Dear Ms. Kitchings:

Please find enclosed for filing, along with certificate of service, the original and two copies each of Appellant's Initial Brief and Designation of Matter in regards to the above captioned case. Please clock-in the extra copy and return it to me in the enclosed self-addressed stamped envelope.

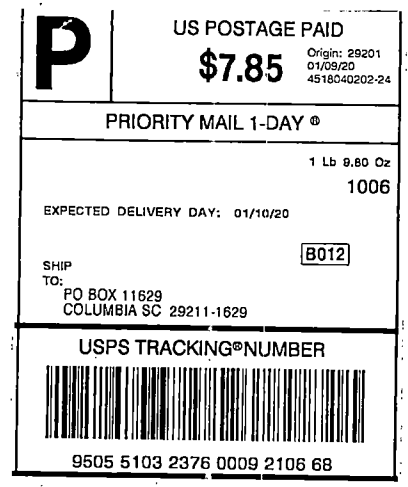
If you should have any questions, please feel free to contact our office.

Sincerely,

Jill B. Abernethy
Paralegal

Enclosure

cc: Tommy Evans, Esq.
Stewart Buchanan



JUSTICE 360 ADVANCING EQUALITY IN THE CRIMINAL JUSTICE SYSTEM

900 ELMWOOD AVENUE
SUITE 300
COLUMBIA, SC 29201

RECEIVED
JAN 10 2020
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211