STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Ronald Tate, #114188, Appellant, vs. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	Docket No. 12-ALJ-15-0015-AP **ORDER**

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SC Court of Appeals

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to the Notice of Appeal filed by Ronald Tate (Appellant), an individual incarcerated with the South Carolina Department of Corrections. On May 9, 2012, the South Carolina Department of Probation, Parole and Pardon Services (Department) notified Appellant that the South Carolina Board of Parole and Pardon (Board) had rejected him for parole. Appellant filed a notice of appeal on May 25, 2012. Appellant challenges the Board's denial of parole as well as its procedures related to his parole eligibility hearing.

BACKGROUND

In 1982, Appellant, while armed with a handgun, entered the lobby of a motel in Greenville. Upon entry he demanded a sum of money from the hotel clerk. When the clerk refused to comply, the Appellant fatally shot her in the chest. Upon hearing the gunshot, another clerk ran into the lobby and was shot once in the leg by the Appellant. After fleeing the scene, Appellant then unlawfully entered the Hack Motor Company and stole a vehicle. Appellant was Later arrested and charged with the offenses of murder, attempted armed robbery, housebreaking, grand larceny, and assault and battery with intent to kill (ABWIK).

Appellant appeared before the Honorable Frank Epps for all of the offenses. Judge Epps sentenced the Appellant to a term of incarceration for the remainder of his natural life for the offense of murder; twenty (20) years for both attempted robbery and ABWIK; ten (10) years for grand larceny; and five (5) years for housebreaking. At the time of Appellant's sentencing, South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of twenty years.

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Appellant initially appeared before the Parole Board on April 1, 1998 and was rejected for parole.[1] Appellant has appeared before the Board twelve additional times, and each appearance resulted in the denial of parole. Appellant most recently appeared before the Board on May 9, 2012. Appellant was again denied parole due to: 1) the nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; and 3) the use of a deadly weapon in this or a previous offense.

Upon the receipt of the denial of parole, Appellant filed an appeal with this Court. Appellant argues that changes in policies and procedures related to parole constitute impermissible ex post facto violations; that he is unlawfully being denied an annual parole hearing; and that he is unlawfully being treated as a violent offender.

STANDARD OF REVIEW

The ALC reviews decisions of the Department in an appellate capacity and is "restricted to merely reviewing the decision[s] below." Al-Shabazz v. State, 338 S.C. 354, 377, 527 S.E.2d 742, 754 (2000). When acting in an appellate capacity, the ALC must apply the criteria of S.C. Code Ann. 1-23-380(5) (Supp. 2012), which states:

> (5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

[1] Due to the accumulation of good time credits, Appellant became eligible for parole upon the service of sixteen (16) years.

JURISDICTION

The Court has jurisdiction to hear appeals from final decisions of the Department and render opinions accordingly. Rules 51 and 65, SCALCR. This jurisdiction is derived from Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) and Furtick v. S.C. Dept. of Prob., Parole and Pardon Servs., 352 S.C. 594, 576 S.E.2d 146 (2003). Concerning parole, the ALC has jurisdiction to review decisions regarding parole eligibility, not a denial of parole. Steele v. Benjamin, 362 S.C. 66, 72, 606 S.E.2d 499, 502 (Ct. App. 2004). But where the decision is not a permanent denial of parole eligibility, such as here, the ALC's jurisdiction is limited to a review of whether the Board, in reaching its decision, failed to follow the proper procedure such that it implicated a "sufficient state-created liberty interest to trigger due process requirements." Cooper v. S.C. Dept. of Prob., Parole and Pardon Servs., 377 S.C. 489, 498-99, 661 S.E.2d 106, 111 (2008).

DISCUSSION

Appellant is alleging changes of the Board's policies and procedures have made it more difficult for him to be granted parole, in violation of the ex post facto clause of the South Carolina and United States Constitutions. Ex post facto situations are limited to those involving punishing as a crime a previous act committed that was innocent when done; depriving one charged with a crime of any defense available according to law at the time when the act was committed; or making more burdensome the punishment for a crime, after its commission. Collins v. Youngblood, 497 U.S. 37, 52 (1990). There is no ex post facto violation where a change in the law produces only a "speculative and attenuated possibility" of increased punishment. Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000) (quoting California Dept. of Corrections v. Morales, 514 U.S. 499, 115 S.Ct. 1597). A change in the law does not violate the ex post facto clause if it merely affects a mode of procedure and does not alter substantial personal rights. State v. Huiett, 302 S.C. 169, 172, 394 S.E.2d 486, 487 (1990). "Even though a procedural change may have a detrimental impact on a defendant, a mere procedural change which does not affect substantial rights is not ex post facto." Id. at 17-72, 394 S.E.2d at 487.

At the time Appellant was sentenced, S.C. Code Ann. § 55-612 (Supp. 1962) detailed the criteria the Board was obligated to follow prior to making a decision regarding the parole of an inmate. The criteria were amended by S.C. Code Ann. § 24-21-640 (Supp. 2010). When comparing the section that was in effect at the time of his incarceration to the current version, it

differs only by the word "shall" being replaced by the word "may." In both versions of the statute, the Parole Board has full discretion to decide whether or not a person should be granted parole. The current statute does not change the criteria, the decision makers, or the level of discretion related to the decision to grant or deny parole. The current version of § 24-21-640 does not alter any substantial right of the Appellant; therefore, the application of the current statute cannot be considered an ex post facto violation.

Appellant also challenges the requirement that he appear before the entire seven-member Board, with a two-thirds majority vote for the granting of parole as a violation of his Constitutional rights. At the time Appellant committed the crime, South Carolina law provided that a person needed a majority vote to be denied parole. In 1986, as part of Act No. 462, the Omnibus Criminal Justice Improvement Act, the legislature established that two-thirds of the Parole Board must sign orders authorizing parole for persons convicted of violent crimes as defined by statute S.C. Code Ann. § 24-21-645 (2007). Since this differs from the law that existed when he committed the offense, Appellant believes that applying the two-thirds law is an ex post facto violation.

In Roller v. Gunn, 107 F.3d 227 (4th Cir. 1997), cert. denied, 522 U.S. 874 (1997), an inmate challenged the retroactive application of S.C. Code Ann. § 24-21-645 as unconstitutional and a violation of the ex post facto clause. In that case, the United States Court of Appeals for the Fourth Circuit, relying on the holding in Dobbert v. Florida, 432 U.S. 282 (1977), held that the retroactive application of the change in the voting requirement to gain parole was not an ex post facto violation[2]. The United States District Court for the District of Maryland addressed this same issue in Alston v. Robinson, 791 F.Supp. 569 (D.Md. 1992). A new statute that retroactively applied had increased the number of favorable votes needed from a nine-member parole board to seven, up from a simple majority of five. The court found that "(a)lthough the seven member requirement does appear to make it more difficult for plaintiffs to achieve parole,

[2] In Roller, the Fourth Circuit also considered at whether South Carolina's change from an annual to a biannual review of parole applications for violent offenders after an initial denial of parole was a violation of the ex post facto clause. The court held that the retroactive application of the change in the length of time for parole review was not an ex post facto violation. In Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507, the South Carolina Supreme Court rejected the holding in Roller as to biannual parole review. The Jernigan case did not address the other issue in Roller, (presently before this Court), which is whether the retroactive application of the provision in S.C. Code Ann. § 24-21-645(A) (2012) increasing the number of votes required for a parole board to grant parole to violent offenders, violates the ex post facto clause.

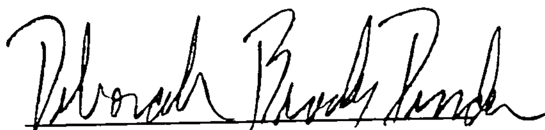
the change that that requirement encompasses does not alter the criteria which the Board applies to determine eligibility for parole, and is very much procedural in nature." Id. at 590. The court noted a case with a contrary holding, United States ex rel. Steigler v. Board of Parole, 501 F. Supp. 1077 (D.Del. 1980), but pointed out that this case relied on Thompson v. Utah, 170 U.S. 343 (1898), which the U.S. Supreme Court overruled as to its ex post facto clause analysis in Collins v. Youngblood, supra. The Alston court further supported its position against a finding of an ex post facto violation by analogizing the increase in number of favorable votes required to grant parole with the act of reducing the number of jurors in a trial, and pointed to a number of cases that held that a retroactive application of a law that reduced the number of jurors did not violate the ex post facto clause, including the following: United States v. Stratton, 779 F.2d 820, 833–34 (2d Cir.1985), cert. denied, 476 U.S. 1162, 106 S.Ct. 2285, 90 L.Ed.2d 726 (1986); Iseton v. State, 472 N.E.2d 643, 652–53 (Ind. App. 1984); State v. Maresca, 173 Conn. 450, 377 A.2d 1330, 1333 (1977); State v. McIntosh, 23 Ariz. App. 246, 532 P.2d 188, 190 (1975). Id. at 591; see also Duvall v. United States, 676 A.2d 448 (D.C. 1996). The Alston court did cite a case that took a contrary view, McSears v. State, 247 Ga. 48, 273 S.E.2d 847 (1981); That case, like Steigler, relied on Thompson, the ex post facto analysis of which was overruled by Collins. The Alston court thus concluded that "in the wake of Collins, the statutory change requiring more favorable votes for parole to be granted was "a procedural change which d[id] not substantially alter plaintiffs' 'quantum of punishment' and thus, does not violate the *ex post facto* clause." 791 F.Supp. at 591. Likewise, the retroactive application of Section 24-21-640 here does not constitute a violation of the ex post facto clause.

Appellant further argues that when he was sentenced for his offense, it was not classified as violent, so he should be allowed to appear before the three person panel which is only for non-violent offenders. Prior to the passage of Act No. 462, the Omnibus Criminal Justice Improvement Act, crimes were not classified as violent or non-violent. Appellant alleges that the application of this act in this case is an ex post facto violation. However, violent offender classification did not increase the risk of punishment for Appellant. Appellant was still required to serve a mandatory twenty (20) years before he could be considered for parole review. Therefore, the classification of crimes as violent or non-violent did nothing to make appellant's punishment for his crimes more burdensome after they were committed. There is no ex post facto violation in the classifications.

Appellant also asserts that Respondent's failure to allow him to appear before the Board exactly every twelve months is a violation of South Carolina law. However, Appellant must show that he was prejudiced in some way by the delay in not appearing exactly every twelve months to reverse judgment. Fields v. Regional Medical Center of Orangeburg, 354 S.C. 445, 581 S.E.2d 489 (S.C. App. 2003). There is no evidence that Appellant was prejudiced by the delay of three months. Moreover, the Board's decision clearly states that it considered "all of the criteria listed with Section 24-21-640 and the Department's policy" in reaching its decision.

For the foregoing reasons, the Department's decision denying Appellant parole is **AFFIRMED.**

AND IT IS SO ORDERED.



Deborah Brooks Durden, Judge
S.C. Administrative Law Court

May 3, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the interagency Mail Service addressed to the party(ies) or their attorney(s).

This 3rd day of May 2013

By: __________
Judicial Law Clerk