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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

MAY 04 2023

SC Court of Appeals

Appeal from the Administrative Law Court
The Honorable H.W. Funderburk, Jr., Administrative Law Judge

Appellate Case No.: 2020-001473

JOSEPH KELSEY, #217218,APPELLANT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,RESPONDENT

BRIEF IN RESPONSE TO AMICUS

Matthew C. Buchanan
General Counsel

**South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 207
Columbia, South Carolina 20202
(803) 734-9220**

ATTORNEY FOR RESPONDENT

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ARGUMENT

I. The Amici Curiae are advocating for a change in the entire parole system that can only be addressed by the other branches of government – not the judicial branch.

The Amici have provided this Court an exhaustive overview of parole in the United States and in South Carolina, going over both the history of parole as well as the theories behind its purpose. They speak of the value of parole in how it “incentivizes good conduct,” “encourages participation in rehabilitative programming,” and “reduces the prison population.” Amicus Brief, p. 1. Furthermore, it “promotes smart fiscal policy.” *Id.*, p. 2.

The Amici then compare the policy behind parole to the Parole Board system as it exists in South Carolina while criticizing the Board’s sole authority over the decision to grant parole, which it is not bound or required to grant parole in any case. *Id.*, p. 9. At the end of their brief, they conclude that “the parole process in South Carolina is broken.” *Id.*, p. 17.

The Amici, however, underscore the fundamental problem Appellant faces in bringing this appeal when they state that “until the legislature takes action to fix it, we respectfully request that this Court intervene.” *Id.* Quite simply, the General Assembly has vested sole authority over parole to the Parole Board. S.C. Code § 24-21-640 (2010). Its members are appointed by the governor with the approval by the Senate. S.C. Code §24-21-10(B) (2012). Respondent respectfully submits that intervention by this Court for policy reasons would improperly abrogate the role of the legislative and the executive branches. S.C. Const. art. I, 8.

“[N]o such prisoner may be paroled until it appears to the satisfaction of the board: that the prisoner has shown a disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interest of society will not be impaired thereby; and that suitable employment has been

secured for him.” § 24-21-640. “Undoubtedly, the Parole Board is the sole authority with respect to decisions regarding the grant or denial of parole.” *Cooper v. South Carolina Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 499, 661 S.E.2d 106, 111 (2008). The Amici clearly disagree with the current parole system and are asking this Court to change it by having the appellate courts become the final authority over parole. Respondent respectfully requests that this Court decline to take part in this request for judicial overreach.

Furthermore, the Amici argue that granting parole to Appellant would “[c]orrect this injustice,” and send a message that the Board is accountable. Amicus Brief, p. 17. Respondent submits that the Board is accountable – to the governor, who may choose not to re-appoint the members, and to the Senate, which may not provide consent to the reappointment. Respondent respectfully submits that the judicial branch should not intervene to attempt to overhaul this system.

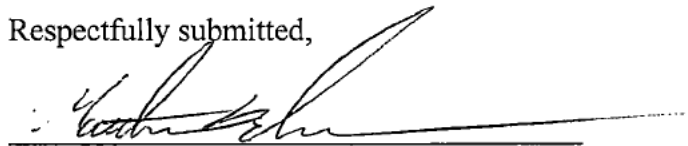
Lastly, the Amici also decry parole in South Carolina as “a system that fails to guarantee parole for people like Joe Kelsey.” Amicus Brief, p. 17. Yet, there is no guarantee of parole in South Carolina, and this is entirely constitutional. As the United States Supreme Court held in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7, 99 S.Ct. 2100, 2104 (1979), “There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.” South Carolina has repeatedly held that its parole-eligible inmates are only afforded the opportunity for parole consideration, but not guaranteed eventual release to parole. “Parole is a privilege, not a right. *Cooper*, 377 S.C. at 496, 661 S.E.2d at 110 (citing *Sullivan v. S.C. Dep’t of Corr.*, 355 S.C. 437, 443 n. 4, 586 S.E.2d 124, 127 n. 4 (2003)).

Quite simply, for this Court to grant parole, it must ignore such precedent by ruling that the facts of Appellant's case or the Amici's argued policy are so compelling that he has somehow earned a right to parole. Then, this Court must rule that it may usurp the authority of the Parole Board in being the final authority over decisions to grant parole. Respondent respectfully submits that this Court should strongly reject the Amici's argument.

CONCLUSION

The Amici are clearly of the opinion that the parole system in South Carolina requires changing. However, the granting of parole by this Court (or a remand to the Parole Board with the instructions to grant Appellant parole, which is effectively the same thing) would change the legislatively- created system to place the final say over parole in the hands of appellate courts rather than the Parole Board. This may be the Amici's ultimate goal but, in granting such a request, this Court would have to overturn long-standing precedent and statutory authority. Respectfully, this Court should decline to do so.

Respectfully submitted,



Matthew C. Buchanan
General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 293
Columbia, South Carolina 29202
(803) 734-9220

Columbia, South Carolina
May 2, 2023

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable H.W. Funderburk, Jr., Administrative Law Judge

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SC Court of Appeals

Appellant Case No.: 2020-001473

JOSEPH KELSEY, #217218.....APPELLANT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn Nichols, Executive Assistant to counsel for Respondent, certify that I have served the Brief in Response to Amicus dated May 2, 2023, on Appellant this 2nd day of May, 2023, by placing a copy in first class United States mail, postage prepaid, upon the following:

Allison Elder, Esquire
Root & Rebound
222 Rutherford Street
Greenville, S.C. 29609

Hannah Freedman, Esquire
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, S.C. 29201

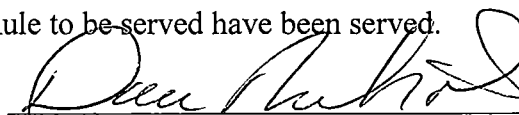
Whitney Harrison, Esq.
1517 Hampton Street
Columbia, S.C. 29201

John Blume, Esquire
Cornell Law School
159 Charles Evans Hughes Hall
Ithaca, NY 14853

Jon Ozmint, Esquire
The Ozmint Firm
PO Box 17554
Greenville, SC 29606

Hon. Gerald Malloy, Esq.
PO Box 1200
Hartsville, S.C. 29551

I further certify that all parties required by Rule to be served have been served.



Dawn K. Nichols
Executive Assistant
South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 207
Columbia, South Carolina 29202

State of South Carolina
Department of Probation, Parole and Pardon Services

HENRY McMASTER
Governor



JERRY B. ADGER
Director

293 GREYSTONE BLVD
POST OFFICE BOX 207
COLUMBIA, SOUTH CAROLINA 29202
Telephone: (803) 734-9220
Facsimile: (803) 734-9440
www.dppps.sc.gov/

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SC Court of Appeals

May 2, 2023

The Honorable Jenny Kitchings
Clerk of the S.C. Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

**Re: Joseph Kelsey v. SCDPPPS
20-001473**

Dear Ms. Kitchings:

Please find enclosed the original and copy of Respondent's Response to Amicus dated May 2, 2023, along with proof of service in the above referenced case.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew C. Buchanan", followed by a horizontal line.

Matthew C. Buchanan
General Counsel

Enclosures

cc: Allison Elder, Esquire
Hannah Freedman, Esquire
Whitney Harrison, Esquire
John Blume, Esquire
Jon Ozmint, Esquire
The Honorable Gerald Malloy, Esquire

State of South Carolina

Department of Probation, Parole, and Pardon Services

293 GREYSTONE BOULEVARD, POST OFFICE BOX 207
COLUMBIA, SOUTH CAROLINA 29202

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The Honorable Jenny Kitchings
Clerk of the S.C. Court of Appeals
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