THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINSTRATIVE LAW COURT
The Honorable Carolyn C. Matthews, Administrative Law Judge
Case No. 12-ALJ-15-0015
Appellate Case No. 2013-001132

RONALD TATE, #114188, ...APPELLANT

v.

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

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF ISSUE ON APPEAL

1. **Whether the Parole Board committed ex post facto and due process violations when applying current parole standards rather than the standard in effect at the time of the Appellant's offense?**

2. **Whether Appellant is being treated as a violent offender by the Parole Board?**

3. **Whether Respondent allows Appellant to appear before the Parole Board on an annual basis pursuant to South Carolina law in effect at time of his offense?**

4. **Additionally Appellant was denied sufficient discovery to make a complete showing that retroactive application created a significant risk of increased punishment.**

STATEMENT OF THE CASE

On December 17, 1982, the Appellant while armed with a handgun entered the lobby of the Travel Lodge Motel in Greenville. Upon entry he demanded a sum of money from the hotel clerk Ms. Margaret Debelli. Once she refused to comply, the Appellant fatally shot her in the chest. Upon hearing the gunshot Mr. Robert Bailey ran into the lobby, he was shot once in the leg by the Appellant who then fled the scene. Later that night the Appellant unlawfully entered the Hack Motor Company, and stole a vehicle off the premises. He was later caught, arrested and charged with the offenses of murder, attempted armed robbery, assault and battery with intent to kill (ABIK), housebreaking, and grand larceny.

On August 13, 1982, the Appellant appeared before the Honorable Frank Epps for all of these offenses. Judge Epps proceeded to sentence the Appellant to a term of incarceration for the remainder of this natural life for the offense of murder; twenty (20) years for both attempted armed robbery and ABIK; ten (10) years for grand larceny; and five (5) years for housebreaking. At the time the Appellant committed these offenses South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of twenty years.

The Appellant initially appeared before the Parole Board on April 1, 1998.[1] At the conclusion of this hearing the Appellant was denied an opportunity to be released on parole. Since this initial denial of parole the Appellant has appeared before the Board an additional thirteen (13) times each resulting in a denial of parole. The Appellant appeared before the Board on May 9, 2012.[2] The Parole Board decided to deny the Appellant an opportunity to be released

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

[2] He has since appeared before the Board on June 19, 2013, parole was denied.

on parole, due to: 1) 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 receiving his order of denial the Appellant filed an appeal in the Administrative Law Court (ALC). Within this appeal the Appellant argued that his parole was denied in violation of ex post facto; that he is unlawfully being denied an annual parole hearing; that he is unlawfully being treated as violent offender; and, the cumulative changes in the Parole Board is a violation of ex post facto. On February 12, 2013, the Honorable Carolyn Matthews issued an order affirming the Department's decision denying parole. On May 21, 2013, Appellant filed a notice of appeal before this Honorable Court. The Respondent's brief supporting their arguments follows.

ARGUMENTS

1. **The mandatory criteria are identical to the one existing at the time the Appellant committed his offense; therefore, there exist no violation of ex post facto.**

The Appellant argues that the changing of policies and procedures has made it more difficult for him to be granted parole, which is a violation of ex post facto. It is the Respondent's position that the law regarding the mandatory criteria is identical to what exist when the Appellant committed his crime. Use of these criteria in the denial his parole should not be considered a violation of ex post facto.

The law existing at the time of the offense and not at the time of sentencing determines whether an increase of punishment or reduction of benefits constitutes an ex post facto violation. Elmore v. State, 305 S.C. 456, 409 S.E.2d 397 (1991). At the time the Appellant committed this crime section 55-612 revealed the mandatory criteria the Parole Board is obligated to follow prior to a decision. Section 55-612 of the South Carolina Code of Laws specifically state:

> The Probation, Parole and Pardon Board shall carefully consider the record of the prisoner, before during and after imprisonment, and no such prisoner shall be paroled until it appear to the satisfaction of the Board, that the prisoner has shown a disposition to reform; that the future he will be probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of imprisonment; that the interests of society will not be impaired thereby; and that suitable employment has been secured for him.

S.C. Code Ann. §55-612 (Supp. 1962)

In comparing this section to Section 24-21-640, the current section regarding the criteria used in determining parole, the only difference is the word "shall" replaced by the word "may." This small difference must be considered procedural and not a violation of ex post facto. Even though it may work to the disadvantage of the defendant, a procedural change is not ex post facto. Roller v. Gunn, 107 F.3d 227 (1997).

The application of the current statute does not change the composition of the Board nor the criteria. These minor procedural changes does not make it more difficult to be granted parole. Since this does not add to the Appellant's punishment it cannot be considered a violation of ex post facto. The ex post facto clause protects against retroactive legislative provisions which disadvantages the offender; a mere procedural change in the law, not increasing punishment or changing the elements of the offense does not result in an ex post facto violation. Elmore, at 459. Regarding the issue of whether an increase of punishment constitutes an ex post facto violation, the relevant inquiry is whether the legislative amendment produces a sufficient risk of increasing the measure of punishment attached to the covered crimes. Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000).

In order for ex post facto clause to be applicable, the statute in question must be criminal or penal in purpose and nature. State v. Huiett, 302 S.C. 169, 394 S.E.2d 486 (1990). Here the

statue covering the mandatory criteria that is followed by the Parole Board is not criminal or penal in purpose or nature. It does not increase the measure of punishment, and is merely procedural because it determines what must be considered when a person is presented before the Parole Board. Since this does not add to the Appellant's punishment it cannot be considered a violation of ex post facto.

The Appellant also argues that the application of the current criteria is a violation of due process. In the United States Supreme Court case of Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972), the Court acknowledged that a person facing a revocation of parole has minimal due process rights. Within his initial brief the Appellant refers to the case of Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100 (1979) which relates to the changing of criteria by the Parole Board in Nebraska. In Greenholtz, the United States Supreme Court made a distinction between a person currently on parole and a person seeking parole.[3] The Supreme Court determined that there exist no conditional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. Id., at 2104. The Court in Greenholtz determined the changes in parole criteria did not constitute a violation of due process. The Appellant was not denied due process he was allowed to appear before an impartial board where he could present evidence in mitigation; answer any board questions; and make a presentation as to why parole should be granted.

The Appellant argues that he has a liberty interest and an expectation in being released on parole. There exists no liberty interest in being released on parole, just a parole hearing. In South

[3] There is a crucial distinction between being denied conditional liberty one has, as in parole and being denied a conditional liberty that one desires. The parolees in Morrissey (and probationers in Gagnon) were at liberty and as such could "be gainfully employed and [were] free to be with family and friends and to form other enduring attachments of normal life." 408 U.S. at 482, 92 S.Ct. at 2600. The inmates here, on the other hand, are confined and thus subject to all of the necessary restraints that inhere in a prison. Greenholtz, at 2105.

Carolina parole is a privilege, and not a matter of right. Major v. S.C. Dept. of Probation, Parole and Pardon Services, 384 S.C. 457, 682 S.E.2d 795 (2009). Parole is a creature of statute and is exclusively in the province of the legislative branch of government. Id. There is nothing written in statute or case law revealing that a prisoner has a liberty interest in being released on parole. Quite the contrary, the South Carolina Courts have consistently held that parole is not a right but a privilege, and there exist no liberty interest in being granted parole. Sullivan v. South Carolina Department of Corrections, 355 S.C. 437, 586 S.E.2d 124 (2004)(parole is a privilege not a right); Steele v. Benjamin, 362 S.C. 66, 606 S.E.2d 499 (2004)(the distinction is that the review or consideration for parole is a right granted by statute whereas parole is only a privilege.); James v. S.C. Dept. of Probation, Parole and Pardon Services, 376 S.C. 392, 656 S.E.2d 299 (2008)(inmate did not have protected liberty interest in parole, but only a hearing to determine parole eligibility.) Therefore, although Appellant does have a right to an impartial hearing, he does not have the right to be released on parole. He has been given an impartial hearing and allowed to present evidence in mitigation. There exist no violation of due process in denial of the Appellant's parole.

2. **The Appellant is being allowed yearly hearings; so there exist no violation of South Carolina law.**

The Appellant argues that the Respondent is violating South Carolina law by not allowing his appearance before the Parole Board yearly. At the time the Appellant committed his offense South Carolina law allowed for all inmates upon denial of parole the ability to be reviewed "every twelve months thereafter." S.C. Code Ann. §24-21-620(Supp. 1981). The Appellant became initially eligible for parole in 1998, and appeared before the board on April 1, 1998. Since that initial hearing the Appellant was allowed to appear before the Board on May 24, 2000,

May 22, 2001, July 17, 2002, July 16, 2003, July 28, 2004, July 13, 2005, July 26, 2006, August 29, 2007, October 8, 2008, November 17, 2009, May 9, 2012, and June 19, 2013.[4] By the look of these dates he has been essentially allowed to appear yearly.

Due to circumstances that are out of control of the Board there are times that a hearing might be delayed beyond the year, if that occurs the hearing is rescheduled as soon as another date becomes available. As revealed by the above dates, this has only occurred twice in a thirteen (13) year period. With these delays the Appellant was eventually allowed to appear before the Board which parole was later denied.

The ALC correctly determined that since he was denied parole at the conclusion of each hearing there exists no prejudice. Since the Appellant has not revealed no error or prejudice the ALC's decision was proper and should be upheld. To warrant reversal the Appellant must show both error of the ruling and resulting prejudice. Burroughs v. Worsham, 352 S.C. 382, 574 S.E.2d 215 (S.C. App. 2002).

The Appellant argued that sufficient discovery was not presented to the ALC. However, all that must be proven is that the mandatory criteria were followed by the Board prior to denial, so the record on appeal was sufficient for the ALC to make a proper decision.

The order released followed what is considered lawful pursuant to the South Carolina Supreme Court decision of Cooper v. S.C. Dept. of Probation, Parole and Pardon Services, 377 S.C. 489, 661 S.E.2d 106 (2008). Under Cooper, the Supreme Court decided that the findings of fact were included; however, the Parole Board neither "offered an explanation nor indicated that it had considered the statutory criteria of section 24-21-640 and the fifteen criteria listed on the

[4] The Appellant next hearing is scheduled for June 19, 2014.

parole form." Cooper, at 500. Within the Cooper decision the Supreme Court established what a Parole Board order should entail. It specifically states in Cooper:

> We emphasize that in future parole review hearings, the Parole Board may avoid the result in the instant case if it clearly states in its order denying parole that it considered the factors outlined in section 24-21-640 and fifteen factors published in its parole form. If the Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure.

Id.

The order given to the Appellant followed the Cooper decision. The criteria within the statue, and the mandatory policy were considered prior to the denial of parole. The final decision was in writing and included a findings of fact and conclusion of law separately stated. S.C. Code Ann. §1-23-350 (Supp. 2012). The findings of fact were the legitimate reasons for the denial of parole, and the conclusions of law were the statutory and Department criteria applied prior to the decision.

The record on appeal was created and filed by the Respondent pursuant to rules of the Administrative Law Court.[5] The record on appeal revealed the order of denial and the criteria form signed by the Appellant revealing that he was given the criteria pursuant to South Carolina law. The record on appeal was sufficient for the ALC to make an informed decision on the issues the ALC is allowed to make pursuant to South Carolina law.

According to the Supreme Court if this is shown no further review by the ALC is necessary. The Parole Board clearly stated in its notice of rejection that it considered the

[5] Within forty-five (45) days of the date of the notice of assignment to an administrative law judge, the agency with possession of the Record shall file an original and one (1) copy of the Record with the Court and serve one (1) copy on each party to the appeal, unless the time for filing the Record is extended by the Administrative Law Judge assigned to the appeal. Rule 36 SCRALC.

statutory criteria and the criteria set forth in Form 1212 which is sufficient under Cooper. Compton v. S.C. Dept. of Probation, Parole and Pardon Services, 385 S.C. 476, 685 S.E.2d 175 (2009).

The Appellant has failed to reveal any error of law committed by the ALC, or that the procedure was not properly followed by the Board. The Respondent argues that the ALC did not have the authority to reverse the decision of the Parole Board, so the lower court decision should be affirmed. An Administrative Law Judge shall not hear an appeal from an inmate in the custody of the Department of Corrections involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services. S.C. Code Ann. §1-23-600(D)(Supp. 2011).

CONCLUSION

The Appellant has not revealed an error of law in the final decision of the lower court, and the lower courts order was proper pursuant to South Carolina law. Due to these reasons the Respondent respectfully requests this Honorable Court to either dismiss this appeal or affirm the decision of the lower court.

Respectfully submitted,

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July 3, 2013

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DESIGNATION OF MATTER

Respondent proposes no additional material be designated to be included in the Record on Appeal.

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Assistant General Counsel

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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent and Designation of Matter* dated July 3, 2013, on Appellant this 3rd day of July, 2013, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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

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