THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Administrative Law Court

The Honorable Harold W. Funderburk, Jr., Administrative Judge
Appellate Case No. 2020-001473

STATE OF SOUTH CAROLINA.....PETITIONER
S.C. Department of Probation, Parole and Pardon Services

v.

JOSEPH KELSEY #217218.....RESPONDENT

PETITION FOR WRIT OF CERTIORARI

Matthew C. Buchanan
General Counsel

South Carolina Department of Probation, Parole and Pardon Services
P.O. Box 207
Columbia, South Carolina 29202
(803)734-9220

Other Counsel of Record:

John H. Blume
159 Charles Evans Hughes Hall
Ithaca, NY 14853

Jonathan Edward Ozmint
PO Box 17554
Greenville, SC 29606

Gerald Malloy
P.O. Box 1200
Hartsville, SC 29551

Whitney Boykin Harrison
McGowan Hood Felder & Phillips
1517 Hampton Street
Columbia, SC 29201

Allison Ann Franz
Rosalind Sarah Duval Major
Lindsey Sterling Vann
Justice360
900 Elmwood Ave. Suite 200
Columbia, SC 29201

Allison Krause Elder
Hannah Lyon Freedman

INDEX

CERTIFICATE OF COUNSEL

Counsel for the Petitioner hereby certifies that the Petition for Rehearing was timely made on September 12, 2023, and was ruled upon by the Court of Appeals on November 17, 2023.

QUESTIONS PRESENTED

1. Did the Court of Appeals err by ruling that parole-eligible inmates are entitled to review their parole files?

STATEMENT OF THE CASE

On or about July 11, 1994, Respondent, aged sixteen, and two co-defendants aged seventeen drove a fifteen-year old girl (victim) from a residence in Georgia to McCormick County, South Carolina. While in the car, the victim was sexually assaulted, beaten with a wrench and ultimately killed. In 1998, four years after these heinous crimes were committed by the three co-defendants and after they provided varying and often conflicting statements, first to law enforcement and later in testimony offered at trial, this Court issued a published opinion affirming Respondent's convictions for murder, possession of a pipe bomb, and criminal conspiracy. In that opinion, this Court laid out a "Factual/Procedural Background" of the crimes, opining in part that the assaults in the back seat were directly committed by co-defendant Geoffrey Payne (Payne), although Payne told police that Respondent had committed the assault and murder. According to the appellate opinion, the victim's body was taken to the woods in McCormick County where Respondent placed a pipe bomb in her mouth and Payne lit it, causing it to explode.

Respondent and Payne were tried together as adults, with the third co-defendant testifying for the State. Both Respondent and Payne were convicted of the murder and were sentenced to life in prison with parole eligibility after twenty years. They also received consecutive five-year sentences for possession of a pipe bomb and criminal conspiracy.

Respondent became eligible for parole in 2015. The Parole Board (Board) denied him parole on his first and second appearances. Before his third appearance before the Board in 2019, Respondent requested that the Department of Probation, Parole and Pardon Services (Department) allow him to view the parole file it prepared on behalf of the Board. The Department did not respond to his request.

Respondent's third appearance before the Parole Board for consideration of parole resulted in a denial of parole by a vote of three in favor and two against. An inmate with a violent offense requires a two-thirds majority to receive parole. S.C. Code Ann. § 24-21-645. After his request for reconsideration was denied by the Board, Respondent appealed to the Administrative Law Court (ALC) arguing, among other issues, that he had the right to review the Parole Board's files.

The ALC dismissed the appeal on October 7, 2020, stating that it had no authority to grant parole to Respondent. The ALC also found no error regarding Respondent's claim that he could not review the file, determining that the Record on Appeal provided ample material for review (ALC Final Order, p. 10). Respondent appealed the ALC's order on November 9, 2020.

The Court of Appeals issued its ruling on August 30, 2023, holding that the language of Form 1212 implies that inmates are entitled to review their parole files, reversing the ALC's ruling which had affirmed the Board's denial of parole, and ordering a new parole hearing for Respondent after he's had a chance to review his file and report any inaccuracies. Petitioner filed its petition for rehearing, which was denied by the Court of Appeals. This Petition for Writ of Certiorari follows.

ARGUMENT

1. **The Court of Appeals erred in ruling that parole-eligible inmates are entitled to review their parole files.**

The Petitioner submits that in accordance with rule 242(b), SCACR there are novel and important reasons for this court to exercise its discretion to grant review.

The Court of Appeals has based its ruling on the language of the Parole Board's Form 1212, which informs the inmate in advance of the hearing:

> In deciding whether or not to grant parole, the Parole Board considers, among other things, the inmate's record before incarceration as well as during incarceration. The record itself is prepared through investigations

> conducted for the Parole Board, and it becomes a part of the inmate's parole file. The files are maintained by the Department of Probation, Parole and Pardon Services and are, by the statute, privileged and confidential. The confidentiality of the parole file is far reaching; inmates themselves have no right to inspect the contents of their files. If the inmate thinks his/her file is somehow incomplete or contains some errors or other inaccuracy, he/she must notify the Board of the specific error or inaccuracy. The Board will investigate the inquiry and notify the inmate of the action taken.

The Court of Appeals relied heavily on the specific statement, "If the inmate thinks his/her file is somehow incomplete or contains some errors or other inaccuracy, he/she must notify the Board of the specific error or inaccuracy," saying it "necessarily implies the right to review the file."

Petitioner respectfully submits that this is an incorrect reading of the language of Form 1212. The form specifically states that inmates do *not* have the right to see the file, and that the inmate must notify the Board if he or she **thinks** the file is incomplete or contains an inaccuracy, and then must notify the Board of that specific error or inaccuracy. While this language explicitly places the burden on the inmate to notify the Board of errors or inaccuracies, the only implication, when taken in the context of the entire form, is that they must have a credible, likely, or reasonable belief that such an error or inaccuracy exists.

The form's language should not be read as an invitation for fishing expeditions or for the inmate to nitpick over the factual summary of the offense, the statements by judges, prosecutors and law enforcement officials, the results of the actuarial risk and needs assessment tool, or any other details within the file that the Department must, by law, provide to the Board for its consideration. See S.C. Code Ann. §§ 24-21-10(F)(1); 24-21-221; & 24-21-610. Petitioner respectfully cautions this Court that such an entitlement will see the ALC and appellate courts flooded with appeals over disagreements over perceived inaccuracies within the parole file –

effectively granting inmates the ability to repeatedly relitigate the facts of their offenses or dispute the findings of the Department's evidence-based assessment tools. S.C. Code § 24-21-10(F)(1).

When considering an inmate for parole, the Board necessarily looks at the nature and seriousness of the underlying offense, the details of which are provided to the Board in a brief synopsis prepared by Department investigators, typically comprised of information gathered from indictments, incident reports and investigative summaries, news media accounts, appellate opinions, and other information available in the Clerk of Court's record. This synopsis could include details the inmate may well dispute based on his own perceptions of the crime, but which also would be impossible to establish as truly inaccurate. Just as a jury is not called upon to resolve which facts from conflicting testimony are "true" at trial before it renders a verdict, a parole hearing is not a venue to resolve every contested detail from that trial. The parole files necessarily contain the factual synopsis prepared for the Board, and it need not require full agreement from the inmate. This is particularly true when the inmate is given a full and fair opportunity to address the Board during the parole consideration hearing. For example, as long as each co-defendant was found guilty of the crime, the synopsis prepared for the Board should not be scrutinized over potentially impossible to resolve disputes over exactly who did what and who was arguably more culpable of the crimes they were convicted of committing. Under the scheme newly created by the Court of Appeals, if inmates who submit a "correction" are still denied parole, inevitably those inmates will raise their disputed facts to the ALC, resulting in even more appeals over whether the disputed facts would have substantively affected the Board's decision-making.[1]

---

[1] Notably, the ALC has no authority to hear an appeal of a parole decision by an otherwise parole-eligible inmate. S.C. Code § 1-23-600(D). Yet, that has not stopped inmates from attempting to appeal their routine denials of parole. Petitioner respectfully urges that this Court take notice that the Court of Appeals' decision will only increase the number of inmates appealing their routine denials of parole.

Inmates are also apt to object to the results of the assessment tool, disagreeing with the actuarial risk and needs assessment on their likelihood to reoffend or comply with the rules of parole. Just as likely, inmates with favorable assessments may appeal, arguing that a low risk score mandates their release regardless of the Board's decision to deny parole. Petitioner would ask this Court to recognize that releasing the parole files will only invite more disputes over the Board's decisions, and grant certiorari to correct the Court of Appeals' holding.

Petitioner would also encourage this Court to consider that the Court of Appeals overlooked the holding in Franklin v. Shields, 569 F.2d 800 (4th Cir. 1978) Cert. denied, 435 U.S. 1003 (1978), which held that an inmate does *not* have a constitutionally protected right of access to his prison file. Furthermore, this Court could in the alternative grant certiorari to clearly establish that the language in Form 1212 follows the guidance provided in Paine v. Baker, 595 F.2d 197 (4th Cir. 1979). In Paine, the Fourth Circuit noted that providing such access to all inmates would be "an overwhelming administrative burden,"[2] and that "a requirement of particularity is necessary to discourage fishing expeditions through files." Id. at 201, citing Jones v. Superintendent, 460 F.2d 150, Reh. denied, 465 F.2d 1091 (4th Cir. 1972), Cert. denied, 410 U.S. 944 (1973).

Finally, Petitioner would ask this Court to grant certiorari in order to definitively uphold the fully discretionary powers vested in the Parole Board by South Carolina law, as well as to reiterate that no inmate has a right to parole. Petitioner submits that there has been an incessant effort by inmates in their appeals of routine denials and by parole advocates to seek changes to the parole system through the appellate process and not through the legislative process. Petitioner submits the legislative process should be the only process whereby such change would be

---

[2] Id. at 200. Petitioner also agrees that the efforts to redact victim information and supplying the thousands of parole eligible inmates with copies of parole files annually or bi-annually would be unduly burdensome on not only the Department, but also the Department of Corrections.

appropriate. Respectfully, the Legislature is the body most equipped to thoroughly investigate the Board's and Department's current processes and to make any changes if it deems necessary.

The United States Supreme Court in its seminal opinion addressing due process in parole consideration procedures stated, "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7 (1979). In South Carolina, "[p]arole is a privilege, not a right." Cooper v. S.C. Dept. of Probation, Parole and Pardon Services, 377 S.C. 489, 496, 661 S.E.2d 106, 110 (2008).

"Merely because a statutory expectation exists cannot mean that in addition to the full panoply of due process required to convict and confine there must also be repeated, adversary hearings in order to continue the confinement." Greenholtz, 442 U.S. at 14.

Yet, leaving the Court of Appeals' opinion in place threatens to turn parole consideration hearings into adversarial hearings that inevitably end up in the appellate courts with inmate-appellants seeking the grant of parole by the courts rather than the Board. Petitioner strongly cautions this Court and urges it to recognize that, through the granting of certiorari and issuance of a firm opinion emphasizing the Board's ultimate authority over parole decisions, this Court can forestall this growing trend. Petitioner submits that the appellate courts should in no uncertain terms reiterate the Board's statutorily-granted authority over parole, and a granting of certiorari would afford this Court the opportunity to emphasize this.

Petitioner respectfully submits that this Court should consider the ramifications of the Court of Appeals' holding, and asks that this Court grant certiorari to reverse its determination that all inmates are entitled to review their parole files prior to their parole consideration hearings, rather than simply being able, as they already are, to advise the Board of credible, likely, or

reasonably anticipated errors. In the alternative, Petitioner submits this Court should grant certiorari to impose the Fourth Circuit's rule in Paine. Instead of endless fishing expeditions inviting countless disputes over minutia at Board hearings and inevitable appeals, this Court should require that the "inmate must first allege that particular information is contained in his file… Second, the inmate must affirmatively plead that the information in his file is false… Third, the inmate must allege that the information is relied on to a constitutionally significant degree." Id. at 201 (internal citations omitted).

Note, too, that Respondent did not follow this process. Respondent only asked to see his file and made no allegations of specific inadequacies prior to his third parole consideration hearing. When he was denied parole, he concluded without any supporting evidence that it must have been an inaccuracy in his file that led to his routine denial. At no point did he have any legitimate basis to think that his file contained errors or inaccuracies, only wild speculation and a desire for an excuse as to why his parole was denied even though the Board was fully within its authority and acting entirely within its discretion when it denied him parole. The Court of Appeals clearly erred when it remanded the matter for a new parole hearing when Respondent offered only wild speculation that anything was inaccurate in the parole file. Granting certiorari is therefore appropriate.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant certiorari so that it may reverse the Court of Appeals' ruling and affirm that inmates do not have the right to review their parole files without any reasonable and articulated basis to believe there are constitutionally significant inaccuracies. This Court should acknowledge granting inmates the right to see the files will only invite incessant appeals about disagreements over minutia within those files. This Court should recognize that inmates will take the Court of Appeals' ruling as an opportunity to endlessly

relitigate facts regarding their offenses, and should decline to extend inmates such an entitlement.

For these reasons, Petitioner urges this Court to grant certiorari.

Respectfully submitted,

Matthew C. Buchanan #73740
General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 207
Columbia, South Carolina 29202
(803) 734-9220

Columbia, South Carolina
December 14, 2023