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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Administrative Law Court
The Honorable Harold W. Funderburk, Jr., Administrative Law Judge
Case No. 19-ALJ-15-0061-AP

Appellate Case No. 2020-001473

Joseph Kelsey, #217218.....APPELLANT

v.

South Carolina Department of Probation, Parole and Pardon Services,.....RESPONDENT

PETITION FOR REHEARING

The Respondent, the South Carolina Department of Probation, Parole and Pardon Services respectfully petitions this Court for rehearing pursuant to Rule 221(a), SCACR. Respondent hereby seeks a rehearing on the grounds that this Court may have misapprehended or overlooked several crucial points in reversing and remanding the Administrative Law Court (ALC) decision affirming the Board of Paroles and Pardons' discretionary denial of parole.

Initially, and particularly notable given this Court's concern with the report of inaccuracies, Respondent submits the Court may have overlooked one important point in the "FACTS" portion of its opinion which merits correction and/or further explanation. In regard to the comment that: "the Board noted that some, but not all, of its members had received a copy of Kelsey's prehearing packet;" Respondent asks this Court to add amended language acknowledging that this situation

occurred because counsel for Kelsey failed to submit his prehearing packet to the Board via its well-established, published, and well-known process, and instead initiated ex parte contact with certain individual Board members by mailing the prehearing packet to their home addresses.

Specifically in regard to the Court's substantive ruling, Respondent submits this Court may have misapprehended the full consequences of its determination that, due to language appearing in the Department's Form 1212, inmates have an implicit "right" to review their parole files for perceived inaccuracies. Respondent respectfully cautions this Court that by granting this entitlement, the Administrative Law Court and appellate courts will likely become flooded with appeals over disagreements over perceived inaccuracies, effectively granting inmates the ability to relitigate the facts of their offenses as well as any statements provided by relevant solicitors, law enforcement officers, and judges, all of whom have the statutory right to notice of parole consideration hearings. S.C. Code Ann. §§ 24-21-221 & 24-21-610.[1]

This Court is no doubt well aware that trials and even pleas involve contested facts and competing points of view. Because the jury is merely the arbiter of guilt, and a defendant waives his right to contest certain facts at a plea, the resultant conviction does not necessarily resolve disputed details – such as the severity of injuries, pain, or suffering of the victim, relative culpability of co-defendants, or the precise dollar amount of a property crime. For example, the

[1] While this Court has acknowledged the need to redact victim information from the parole file, Respondent also submits that there is a real danger to the integrity of the Board's review if the results of the validated actuarial risk and needs assessment tool required by § 24-21-10(F)(1) are provided to inmates. Not only would it not make sense for inmates to be given the opportunity to object to their results as somehow "inaccurate," there is also a valid concern that over time inmates could manipulate their assessment scores by answering the questions in different ways and observing the results to artificially "improve" their level of risk at future hearings. This could effectively undermine the Legislature's intent in mandating the use of a validated assessment tool in the first place. See S.C. Code Section 24-21-10(F)(2).

well-established theory of accomplice liability in South Carolina—"the hand of one is the hand of all," will hold one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. State v. Harry, 420 S.C. 290, 299, 803 S.E.2d 272, 276-77 (2017). Yet jury verdicts in such cases only provide the determination of guilty or not guilty; this Court's ruling now potentially creates the question about whether an inmate may dispute his relative culpability and force the Board – or more likely, the appellate courts – to make such determinations decades after the original trial.

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, 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 inaccurate. What this Court's decision does not do is answer what the Respondent must do in such a case: is Respondent obligated to change the parole file to the inmate's liking even though the inmate may have nothing more to back up his version of the facts except his own recollection? If Respondent declines to make the requested changes, inevitably inmates will raise their disputed facts to the Administrative Law Court, resulting in innumerable appeals over Respondent's obligation to amend the file or whether the disputed facts would have substantively affected the Board's decision-making.[2]

[2] 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. Respondent submits that this Court's decision will only further embolden inmates to appeal their routine denials.

In reaching its decision, this Court relied upon the language of Respondent's Form 1212, which states that, "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," when it determined that inmates are entitled to review their files. However, Respondent submits that the language in Form 1212 should not be read to allow open-ended fishing expeditions inviting inmates to pick apart the information presented to the Board, nor that they have a right to pre-approve the information before the Board's review. Yet, Respondent submits that inmates will no doubt view this Court's ruling as such an invitation, risking an overwhelming number of appeals upon an already strained appellate system.

Respondent would encourage this Court to consider 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 should look to the guidance provided in Paine v. Baker, 595 F.2d 197 (4th Cir. 1979), noting that providing such access to all inmates would be "an overwhelming administrative burden,"[3] 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, Respondent would ask this Court to consider the analysis described by our United States Supreme Court in its seminal opinion addressing due process in parole consideration

[3] Id. at 200. Respondent also agrees that redacting victim information and supplying the thousands of parole eligible inmates with copies of their parole file would be unduly burdensome on not only the Department of Probation, Parole and Pardon Services, but also the Department of Corrections.

procedures where it said: "At the Board's initial interview hearing, the inmate is permitted to appear before the Board and present letters and statements on his own behalf. He is thereby provided with an effective opportunity, first, to insure that the records before the Board are in fact the records relating to his case; and, second, to present any special considerations demonstrating why he is an appropriate candidate for parole. Since the decision is one that must be made largely on the basis of the inmate's files, this procedure adequately safeguards against serious risks of error and thus satisfies due process." Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 15 (1979).

Respondent respectfully submits that this Court has overlooked the clear and expected ramifications of such a global proclamation in its holding, and asks that this Court reverse its holding that all inmates are entitled to review their parole files. In the alternative, Respondent believes this Court should rule similarly to the Fourth Circuit in Paine, so that instead of endless fishing expeditions inviting countless disputes over minutia, 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).

This process is already accomplished by the Board's current procedures. When it declines to grant parole, the Board lists as reasons for denial one or more of six standard findings of fact: 1) Nature and seriousness of the current offense; 2) indication of violence in this or previous offense; 3) use of a deadly weapon in this or previous offense; 4) criminal record indicates poor community adjustment; 5) failure to successfully complete a community supervision program; and 6) institutional record is unfavorable. There has occasionally been the situation when the Board has listed an inapplicable reason for rejection, such as stating the inmate had a criminal record

when he in fact lacked a prior record. Upon notice from the inmate or his attorney of the inappropriate reason for rejection, the Board has granted a rehearing following an investigation into the matter raised. Clearly, in those thankfully few instances, the inmate raised a particular fact that was false, in his file, and relied upon by the Board to a significant degree—not a mere fishing expedition.

Respondent respectfully submits that this Court misapprehended Appellant's requests for his parole file as significant, where in reality it was nothing more than a fishing expedition, which the Board rightfully declined to address. Because Appellant offered no particular information indicating that his file contained inaccuracies and was given ample opportunity to present whatever he considered to be "accurate" information to the Board, Respondent respectfully submits this Court should not have granted relief. Instead, because the Board fully complied with the procedures established in Cooper and Compton, the ALC's decision to affirm should likewise be affirmed.

Respondent also respectfully reminds the Court of the ALC's conclusion that the Supplemental Record on Appeal provided ample material for review, presenting Appellant's version of the offense, his purported rehabilitation, and efforts taken to prepare himself for parole was sufficient to affirm even beyond the requirements of Cooper and Compton. Consequently, there would be no reason for this Court to make such a sweeping ruling in this matter that, as Respondent has previously submitted, has the potential to inundate the Department, the ALC, and appellate courts with countless appeals over nit-picking details about the contents of an inmate's parole file.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court reconsider its ruling, amend its rendition of facts, and determine that a ruling allowing all inmates the right to review their parole files without any reasonable and articulated basis to believe there are constitutionally significant inaccuracies will only invite incessant appeals about disagreements over minutia within their files. This Court should recognize that inmates will take this opportunity to endlessly relitigate facts regarding their offenses and should decline to extend inmates such a "right."

Respectfully submitted,

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Subject: Joseph Kelsey v. SCDPPPS

Attachments: Kelsey, Joseph-Petition for Rehearing.pdf

Attached please find the Petition for Rehearing being filed with the Court today.