THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Carolyn C. Matthews, Administrative Law Judge
Case No.: 11-ALJ-15-0010
Appellate Case No. 2013-000526

RONALD TATE, #114188, ... APPELLANT

v.

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

RESPONDENT'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF ISSUE ON APPEAL

1. **Whether the Parole Board committed Ex Post Facto and Due Process violation 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 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. The Appellant 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 his 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. The Parole Board once again decided to deny the Appellant an opportunity to be

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

released on parole. This denial was due to: 1) nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; 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.

After being denied parole at a prior hearing, the Appellant filed a notice of appeal before the ALC on February 25, 2011. 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 in this Honorable Court. On June 4, 2013, Appellant filed Appellant's Initial Brief, Designation of Matter, Certificate of Counsel and Proof of Service in this Honorable Court. The Respondent's brief supporting Appellant's arguments follows.

ARGUMENTS

There mandatory criteria is identical to the one existed 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 it was when the Appellant committed his crime. Use of these criteria in the denial of the Appellant's parole is not 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 that the Parole Board is obligated to follow prior to making a decision regarding the parole of the inmate. 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 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 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" is replaced by the word "may." This small difference must be considered procedural which not a violation of ex post facto is. 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 statue 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 legislature provisions which are disadvantageous to 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 addition, in order for the 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 ex post facto clause protects against retroactive legislature provisions which are disadvantageous to 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

The Appellant also argue that he is being denied due process by the Board applying the current criteria. 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 or the Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100 (1979) which relates to the changing of the criteria made by the Parole Board in Nebraska, and if it was a violation of due process. The United States Supreme Court made a distinction between a person

currently on parole and a person seeking parole. In Greenholtz the Supreme Court specifically stated:

> 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.

In Greenholtz 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. Greenholtz, at 2104. The Appellant was not denied due process he was given a right to a hearing in which he was allowed to present evidence in mitigation, and make a presentation to the Board as to why he should be granted parole.

The Appellant argues that he has a liberty interest and an expectation in being released on parole. There exist no liberty interest in being released on parole, just being given a parole hearing. In South 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 legislature 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 Court have consistently held that parole is not a right but a privilege, and there exists 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 the denial of the Appellant's parole.

The Appellant is essentially allowed yearly hearings; therefore, 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 individuals who have been denied parole the ability to re-appear before the Board one year after the denial. The Appellant became initially eligible for parole in 1998. His initial hearing was held on April 1, 1998. Since that initial hearing the Appellant was allowed to appear before the Parole 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, February 9, 2011, May 9, 2012, and June 19, 2013. So by the look of these dates he has been essentially allowed to appear yearly.

Due to circumstances that are out of the control of the Board there are times that a hearing might be delayed beyond the year; however, 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, so there exist no prejudice. The ALC determined that there was no prejudice for the Appellant not to be allowed to appear before the Board exactly every twelve (12) months. There has also been evidence revealed to the ALC showing that the Board considered all of the mandatory criteria established by the legislature and in Department policy. This was revealed in the order of denial of parole issued to the Appellant Pursuant to the decision of the South Carolina Supreme Court in Cooper v. S.C. Dept. of Probation, Parole and Pardon Services, 377 S.C. 489, 661 S.E.2d 106 (2008). Which has also been established by the Court that if this order been properly made pursuant to Cooper no other review by the ALC is necessary. Compton v. S.C. Dept. of Probation, Parole, and Pardon Services, 385 S.C. 476, 685 S.E.2d 175 (2009). The ALC has made no error in law, and the Appellant failed reveal any prejudice by not being allowed to appear before the board exactly every 12 months; therefore, the decision of the ALC should not be subject to reversal. 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).

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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August 5, 2013

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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 and Motion to Accept Respondent's Filing of Initial Brief and Designation of Matter Out of Time* dated August 5, 2013, on Appellant this 5th day of August, 2013, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Ronald Tate, #114188
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Pelzer, South Carolina 29669

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

Dawn Nichols

Dawn K. Nichols
Executive Administrative Assistant

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