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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2020-001473

JOSEPH KELSEY, #217218 ..... Appellant,

v.

SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE, & PARDON SERVICES ..... Respondent.

REPLY TO RETURN TO MOTION FOR RULE TO SHOW CAUSE OR WRIT OF MANDAMUS

In reply to Respondent's Return to Appellant's Motion for Rule to Show Cause or Writ of Mandamus, Appellant, Joseph Kelsey, submits the following.

I. Respondent has a duty not to willfully promulgate false information, and to correct such information when it arises.

Respondent, S.C. Department of Probation, Parole, & Pardon Services ("PPP"), readily acknowledges that it does not prioritize ensuring that any information that it provides to the Board is accurate. Return at 9. While it may be true that "[t]he Board cannot be shielded from every embellishment, and every perceived inaccuracy," they can certainly be shielded from inaccuracies that are entirely within PPP's control. As an executive agency presenting facts to a quasi-judicial decision-maker, PPP and its representatives not only have a duty not to willfully present false information to the Board, but also to take at least minimal precautions to avoid presenting false information inadvertently and correct it when it appears—in the same way that attorneys for the

inmate are not allowed to present false information to the Board either. *See, e.g.*, ABA Model Rules of Professional Conduct 3.3(a)(1) ("a lawyer shall not knowingly make a false statement of fact or law to a tribunal"); ABA Model Rules of Professional Conduct 4.1(a) ("In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person"); *Giglio v. United States*, 405 U.S. 150 (1972); *State v. Peake* 353 S.C. 499, 508, 579 S.E.2d 297, 302 (2003) (Burnett, J., concurring) ("[A]gency responsibilities must be completed with openness, candor and integrity."). This Court's ruling in *Kelsey* makes clear that those minimal precautions include allowing the inmate to see the file and correct any inaccuracies.

This duty takes on new importance in light of PPP's acknowledgement that the Board is directed "to look to the facts as prepared for the parole file and presented by the Department," Return at 10, and to disregard any challenge that inmates might bring to PPP's depiction of those facts. Return at 9. "The failure to correct false evidence is as reprehensible as its presentation," particularly if the Board is relying exclusively on false evidence to decide between an individual's continued incarceration or freedom. *Riddle v. Ozmint*, 369 S.C. 39, 47–48, 631 S.E.2d 70, 75 (2006) (citing *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996)).

II. Victim statements do not fall within the protections of *Kelsey* or the Victims' Bill of Rights.

PPP contends that they must be allowed to fully redact all information pertaining to victims, including their full statements, to protect victim privacy. Return at 7. Neither the Victims' Bill of Rights nor *Kelsey*, which both provide for "reasonable" protections for victims, support PPP's position that it is required to redact statements in their entirety.[1] S.C. Const. art. I, § 24(A)(6);

[1] Appellant maintains that "reasonable protections" would require the redaction only of contact information and the names of victims who choose not to speak at parole hearings. However, in the interests of ease and uniformity, Appellant would not object to the redaction of both names and contact information from statements of victims who fall within the constitutional definition of article I, § 24(C)(2), provided that the substance of the statement is left unredacted.

Kelsey v. S.C. Dep't of Prob., Parole & Pardon Servs., 441 S.C. 373, 379, 893 S.E.2d 588, 591 (2023).

There is no requirement that the substance of statements submitted by victims to PPP be kept private in the same way that victims have no expectations of privacy in their statements (or their identities) if they choose to speak at parole hearings or testify in public court proceedings. Further, nothing would prevent PPP from informing victims that their statements (without identifying information) will be disclosed in an inmate's parole file if they choose to make one, the same way that they inform victims that their statements at parole hearings will be public. Return at 8. Even if the victims did have any reasonable expectation of privacy in the substance of their written statements to PPP, multiple states and courts have established that rights of victims must yield to the requirements of due process in criminal proceedings.[2] As long as contact information is redacted so that inmates have no way of contacting victims, disclosing their statements violates no constitutional or statutory protection and is required by *Kelsey*.

PPP argues that the contents of the statements themselves, if not redacted, would be sufficient for the inmate to determine who made the statement. Return at 8. This argument assumes that the inmate would otherwise have no idea who his victims are. Of course, every

[2] *See, e.g.*, Ala. Const. art. I § 6.01 (guaranteeing victims' rights "to the extent that these rights do not interfere with the constitutional rights of the person accused of committing the crime"); Ind. Const. art. I § 13(b) (recognizing victims' rights "to the extent that exercising these rights does not infringe upon the constitutional rights of the accused"); Kan. Const. art. 15 § 15 (recognizing victims' rights "to the extent that these rights do not interfere with the constitutional or statutory rights of the accused"); Neb. Const. art. I § 28 (providing that "[t]his enumeration of certain rights for crime victims shall not be construed to impair or deny others provided by law"); Okla Const. art. II § 34 ("The enumeration in the Constitution of certain rights for victims shall not be construed to deny or disparage other rights guaranteed by the Legislature"); Va. Const. art. I § 8-a (victims' rights provision "does not abridge any other right guaranteed by the Constitution of the United States or this Constitution"); Haw. Rev. Stat. § 801D-5 (recognizing victims' rights "to the extent that they will not conflict with the constitutional rights of the defendant"); N.H. Rev. Stat. 21-M:8-k(II) (guaranteeing victims' rights "to the extent that they . . . are not inconsistent with the constitutional or statutory rights of the accused"); *State v. Blackwell*, 420 S.C. 127, 150, 801 S.E.2d 713, 725 (2017) (noting that, in analyzing a question involving a victim witness, "a majority of jurisdictions in the United States have determined that a criminal defendant's right, provided certain requirements are met, may supersede a witness's rights or statutory privilege").

inmate has some idea of the identity of those who would oppose his parole in that he can narrow the field to direct victims or their "spouse, parent, child, or lawful representative of a crime victim who is deceased."[3] S.C. Const. art. I. § 24(C)(2). If identifying information is redacted, it is not reasonable to assume that an inmate will be able to contact a victim based solely on the contents of their statement any more than he could contact a victim who did not submit a statement, and thus, such a concern does not justify overriding the inmate's right and duty to see and correct inaccurate information in his parole file.

III. PPP's obligation to protect criminal justice information does not prevent it from turning over retainable files.

PPP argues that it cannot allow inmates or their attorneys to retain a copy of their parole files because it needs to protect Criminal Justice Investigation Services (CJIS) information. Return at 5. Contrary to PPP's position, nothing in Title 28, Part 20 of the Code of Federal Regulations or PPP's agreements with SLED prevents disclosure of such information to individual inmates for this purpose. Dissemination of such information is allowed in criminal and civil proceedings, quasi-judicial and fact-finding hearings, investigations, and quasi-criminal proceedings, and pursuant to court orders. *See* 28 C.F.R. §§ 20.21(b) and (c) (authorizing dissemination of both conviction and non-conviction data in accordance with a court decision or order); 20.33 (authorizing dissemination of criminal history record information for a variety of purposes, including professional licensing proceedings and investigations).

In fact, agencies that subscribe to the NCIC system are not only allowed but required to provide copies of NCIC Criminal Histories to the subjects thereof and to others as part of necessary due process. 28 C.F.R. § 20.21(g) ("Any individual shall, upon satisfactory verification of his

[3] If PPP includes as "victim statements" any statements from individuals who do not fall within South Carolina's constitutional definition of "victim," Appellant submits that neither the names nor the statements of those individuals are protected either by S.C. Const. art. I, § 24, or *Kelsey*.

identity, be entitled to review without undue burden to either the criminal justice agency or the individual, any criminal history record information maintained about the individual and obtain a copy thereof when necessary for the purpose of challenge or correction"). For a small fee, any private citizen can obtain a copy of their NCIC Rap Sheet, with certain redactions, which do not include convictions. 28 C.F.R. §§ 16.30–34. Moreover, the Code of Federal Regulations specifically provides that individuals must be allowed to correct any inaccurate information in their files and imposes a burden on the agency to make any necessary corrections and inform other agencies who have received the record of those corrections, and further provides for an appeal process when an agency refuses to do so. *Id.*

Appellant does not argue that parole files should be considered to be released to the public. *Contra* Return at 7. Rather, Appellant argues that files need to be provided in a retainable format that will allow inmates and their attorneys to conduct thorough review to satisfy inmates' obligations under Form 1212. The fact that these records are being used by the state in quasi-judicial hearings or this Court's order that PPP turn over inmates' parole files are both more than sufficient to satisfy the Code of Federal Regulations' dissemination requirements. *See* 28 C.F.R.§§ 20.21(b), (c).

IV. PPP must adapt its procedures to conform to potential parolees' due process rights.

PPP's current procedures require inmates to read their file immediately before their hearing, note any inaccuracies on the file itself (likely without the benefit of pen and paper that they can take back to their cells), report those inaccuracies to the Board in the middle of their hearing, and then also report the inaccuracies to PPP after their hearing if they are denied—all from memory and without a copy of their file. Such a practice is likely to produce the exact situation that PPP fears—inmates (particularly those appearing pro se), working from memory

after a quick glance at their files and with no way to double-check inaccuracies or provide the Board with documentation, will flood PPP with reconsideration requests or the Administrative Law Court with litigation over inaccuracies that may or may not be meritorious. Nonetheless, PPP raises a number of practicality arguments on the issue of why it is unable to turn over inmates' parole files with enough time for the inmate to correct any inaccuracies before the file is sent to the Parole Board.[4] First, PPP contends that the file cannot possibly be turned over sooner than immediately before the hearing because "the file is only complete approximately two weeks before the parole hearing" and "is subject to appropriate redaction—which takes time and effort." Return at 3–4. Second, PPP expresses concern that finalizing the files earlier would result in providing the Board with files that are not up-to-date. Return at 4. Finally, PPP contends that the Department cannot prepare parole files in time to meaningfully comply with *Kelsey* because the Department has limited staff. Return at 4.

As an initial matter, the majority of the redaction that PPP has undertaken—specifically, indiscriminately redacting complete victim statements—is unnecessary. *See supra* Section II. However, putting that issue aside, it is clear that *Kelsey* requires PPP to change its current practices in order to provide inmates with a meaningful opportunity to correct false information in their files. Given that files are already provided to the Board two weeks in advance, it is unlikely that completing them earlier and providing them a month in advance would cause significant harm. If additional necessary information arises, such as a new certificate or a new disciplinary infraction, it should be provided to the Board on an as-needed basis, with notice to the inmate. In addition, as noted in the Motion, the files are already stored electronically and could be easily transmitted

[4] Appellant recognizes that PPP has scheduled a new parole hearing for Mr. Kelsey for April 24, 2024. At the time of filing the Motion, Appellant had not received notice of that hearing. However, PPP still has yet to disclose either Appellant's file for his upcoming hearing or his 2019 file from the hearing giving rise to this appeal.

to attorneys and inmates for review. In short, there are any number of relatively simple policy changes that PPP could make to ensure that inmates' rights under *Kelsey* (and duties per Form 1212) are protected. However, ultimately, PPP's policies must conform to potential parolees' due process rights,[5] not the other way around.

CONCLUSION

For the foregoing reasons, Appellant requests that this Court grant the relief requested in his Motion for a Rule to Show Cause or a Writ of Mandamus.

Respectfully submitted,

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[5] PPP contends that *Kelsey* does not implicate due process considerations. Return at 2. To the contrary, the Supreme Court has established in *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 661 S.E.2d 106 (2008), that inmates have a due process right to fair parole proceedings, and this Court has now established in *Kelsey* that file access is part of those proceedings.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Appellant's Reply to Respondent's Return to Appellant's Motion for a Rule to Show Cause or a Writ of Mandamus was served on opposing counsel by first-class United States mail, postage prepaid, at the address provided in the Attorney Information System:

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Service was made on April 8, 2024.

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