

**FILED**

MAR 25 2014

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

**SC ADMIN. LAW COURT**

Bobby Ruff, 185024,

Docket No. 13-ALJ-15-0047-AP

Appellant,

vs.

South Carolina Department of Probation,  
Parole and Pardon Services,

Respondent.

ORDER

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**SC Court of Appeals**

**STATEMENT OF THE CASE**

This matter is before the South Carolina Administrative Law Court (“ALC” or “Court”) pursuant to the appeal of Bobby Ruff (“Appellant”), an inmate incarcerated with the South Carolina Department of Corrections. On September 4, 2013, the South Carolina Department of Probation, Parole and Pardon Services (“Department”) notified Appellant that the South Carolina Parole Board (“Board”) rejected him for parole. On October 8, 2013, the Appellant filed a Notice of Appeal with the Court. The Appellant seeks judicial review of the procedure utilized by the Board in denying the Appellant parole.

**DISCUSSION**

An individual has a right to ALC review of a final decision of the Board only when that decision affects a liberty interest for which due process is required. See Furtick v. S.C. Dep’t of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146, 149, 150 (2003); see also Sullivan v. South Carolina Dep’t of Corrections, 355 S.C. 437, 586 S.E.2d 124, 127 (2003) (explaining the nature of the right to ALC review). In Furtick, the South Carolina Supreme Court held that although an inmate has a liberty interest in parole *eligibility* pursuant to S.C. Code Ann. § 24-21-620, the statute creates no such liberty interest in the granting of parole itself. Furtick, 352 S.C. at 598, 576 S.E.2d at 149 n.4. Therefore, claims arising from the Board’s decision denying parole are not appealable to the ALC, only claims that the Board failed to consider the appropriate criteria so as to be tantamount to an abrogation of parole eligibility. Cooper v. S.C. Dep’t. of Probation, 377 S.C. 489, 661 S.E.2d 106 (2008).

### Ex Post Facto Violation

The Appellant argues that the retroactive application of S.C. Code Ann. § 24-21-610 to the Appellant's case constitutes an ex post facto violation because it creates a presumption in favor of parole suitability only when certain designated findings are made. Specifically, the Appellant asserts that the requirement that the Board first receive a report attesting to the Appellant's mental health and ability to adjust to life outside prison before releasing the Appellant on parole is in violation of the law.

An Ex Post Facto violation occurs when "a change in the law retroactively alters the definition of a crime or increases the punishment for a crime. E.g., Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997); California Dep't of Corrections v. Morales, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995); Farris v. State, 334 S.C. 21, 511 S.E.2d 688 (1999). Regarding the issue of increase of punishment, the relevant inquiry is whether the legislative amendment 'produces a sufficient risk of increasing the measure of punishment attached to the covered crimes.' Morales, 514 U.S. at 509, 115 S.Ct. at 1603, 131 L.Ed.2d at 597. If the amendment produces only a 'speculative and attenuated possibility' of increasing an inmate's punishment, then there is no ex post facto violation. Id. A court should look at the effect of the statute on the 'quantum of punishment' to determine whether an amendment offends the Ex Post Facto Clause. Lynce, 519 U.S. at 444-45, 117 S.Ct. at 897, 137 L.Ed.2d at 73." See Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000).

Section 24-21-610 provides that:

Notwithstanding any other provision of this section or of law, no prisoner who has served a total of ten consecutive years or more in prison may be paroled until the Board has first received a report as to his mental condition and his ability to adjust to life outside the prison from a duly qualified psychiatrist or psychologist.

S.C. Code Ann. § 24-21-610 (Supp. 2013).

In this case, the Appellant committed the crimes of Murder, First Degree Burglary and Grand Larceny on November 9, 1991. On July 29, 1993, the Appellant was sentenced for the commission of these criminal offenses. In order for an ex post facto violation to be found, the retroactive application of a "change in the law" must be evident. Section 24-21-610 has been amended several times; however, the requirement that a qualified psychiatrist or psychologist

provide a report to the Board detailing an inmate's mental health before an inmate may be released on parole was the law when the Appellant committed his offenses.<sup>1</sup> Thus, the application of Section 24-21-610 to the Appellant's case is not retroactive and no ex post facto violation has occurred in this regard.

### **Reliance on Fixed Factors**

In Cooper the Supreme Court gave specific guidance as to what would constitute a sufficiently detailed order by the Board:

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 the 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 procedures. Cooper, 661 S.E.2d at 112.

In this appeal, the Appellant challenges the sufficiency of the Board's order based on the fact that the two reasons for rejection stated by the Board in its decision are all "fixed as of the date of the offense and can never be changed by the actions of [the Inmate] while incarcerated." See Cooper, 661 S.E.2d at 111-112. While the Cooper court used the above-quoted language which would seem to criticize a decision denying parole supported solely by the circumstances of the crime, the Court went on to state, "These reasons would be sufficient to deny parole in the Board's discretion, if the Board's decision evinced consideration of Section 24-21-640 and its own criteria." Cooper, 661 S.E.2d at footnote 5. Therefore, the Board has the discretion to deny parole based solely on the nature and seriousness of the Appellant's current offense and indication of violence in this or a previous offense so long as it considers all the factors required by statute.

### **Failure to Consider "Special Factors" and Post-Imprisonment Record**

The Appellant also argues that the Board failed to consider the "special factor" that the Appellant is a Vietnam Veteran suffering with Post Traumatic Stress Disorder ("PTSD") who would be eligible for conditional parole under Section 24-21-700.

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<sup>1</sup> "The law existing at the time of the offense, not 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) citing Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987).

Section 24-21-700 states that:

*Any prisoner who is otherwise eligible for parole under the provisions of this article, except that his mental condition is deemed by the Probation, Pardon and Parole Board to be such that he should not be released from confinement may, subject to approval by the Veterans Administration, be released to the custody of the Veterans Administration or to a committee appointed to commit such prisoner to a Veterans Administration Hospital. Such a special parole shall be granted in the sole discretion of the Board...*

S.C. Code Ann. § 24-21-700 (emphasis added). Despite the Appellant's assertion that he is eligible for conditional parole release under Section 24-21-700, the Board, in its discretion, has determined that the Appellant is not eligible for parole, and therefore, release to the custody of the Veterans Administration is not an option for the Appellant at this time.

Finally, the Appellant asserts that the Board failed to properly consider his "record after imprisonment" during his parole hearing. In his brief, the Appellant describes that he compiled a Provisional Parole Packet which included information concerning his accomplishments, substance abuse treatment, military service, and PTSD, as well as letters attesting to his good character from Nicholas C. Moore, of MANDate Ministries and Senior Chaplain Gerald Potoka, of Kershaw Correctional Institution. The Appellant contends that he has evidence that this information was never brought before the Board for consideration, and that there is nothing in the Record or the Board's denial letter which reflects that this information was ever considered.

Section 24-21-640 provides that:

The board must carefully consider the record of the prisoner *before, during, and after imprisonment*, and no such prisoner may be paroled until it appears to the satisfaction of the board: that the prisoner has shown a disposition to reform; that in 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 interest of society will not be impaired thereby; and that suitable employment has been secured for him.

S.C. Code Ann. § 24-21-640 (emphasis added).

The Court's review of this matter is limited to the Record presented, and therefore, the Court cannot consider any fact or evidence which does not appear in the Record.<sup>2</sup> The Record

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<sup>2</sup> See ALC Rule 65, "The Administrative Law Judge may affirm any ruling, order or judgment upon any


does include the Board's letter of decision which explicitly states that the Board considered all the factors published on the parole consideration form, as well as the factors outlined in Section 24-21-640 of the South Carolina Code of Laws. Therefore, the Court finds that the Board's review process of the Appellant's case sufficiently meets the standard set forth in Cooper.

**ORDER**

For the foregoing reasons,

**IT IS HEREBY ORDERED** that the Department's decision denying the Appellant parole is **AFFIRMED**.

**AND IT IS SO ORDERED.**

  
**SHIRLEY C. ROBINSON**  
Administrative Law Judge

March 25, 2014  
Columbia, South Carolina

CERTIFICATE OF SERVICE  
This is to certify that the undersigned has this date served this order, and above attached action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the emergency Mail Service addressed to the last address of their attorney(s).  
This 25 day of March 2014  
By: 