

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT  
The Honorable Brooks Durden, Administrative Law Judge  
14-ALJ-15-0017  
Case No. 2014-001307

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BILLY LISEBY, Jr., #200273.....APPELLANT

v.

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

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**RESPONDENT INITIAL BRIEF**

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**SC Court of Appeals**

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**STATEMENT OF ISSUE ON APPEAL**

- 1. Did the Administrative Law Judge err in dismissing the Appellant's appeal sua sponte?**
  
- 2. Was the decision to deny parole arbitrary and capricious, in violation of due process and the Americans with disabilities act?**

## STATEMENT OF THE CASE

On March 8, 2008, after being found to be traveling seventy-one (71) miles per hour in a fifty-five (55) mile per hour zone, the Appellant became involved in a high speed car chase with officers of the Chesterfield County Sheriff Department. The chase covered sixty-eight (68) miles, and lasted fifty-two (52) minutes, going thru areas of North Carolina and South Carolina. On Highway 109, the Appellant pulled into the lane of Deputy Wayne Jordan. The Appellant failed to slow down causing Deputy Jordan to make a defensive move to avoid being struck. The Appellant was eventually forced to stop, arrested and charged with the offenses of failing to stop for a blue light, and assault with intent to kill (AWIK). On April 25, 2008, the Appellant appeared before the Honorable J. Mark Hayes, III to answer to these offenses. Upon the conclusion of this appearance, Judge Hayes sentenced the Appellant to a three (3) year period of incarceration for failure to stop for a blue light; and ten (10) years for AWIK. The sentencing Court ordered that these sentences were to be served consecutively.

The Appellant initially became eligible for parole on October 21, 1998. Upon the conclusion of his initial appearance, the Board decided to deny the Appellant an opportunity to be released on parole. Since this initial appearance, the Appellant has appeared an additional seven (7) times, each resulting in a denial of parole. His last denial occurred on March 12, 2014, parole was denied due to: 1) a failure to successfully complete a community supervision program; and, 2) an unfavorable institutional record. Upon being notified of this denial of parole, the Appellant requested the Board reconsider their decision. Upon reviewing the Appellant's file, the Board decided that the reasons stated in his request did not affect the decision of the Parole Board. The request for reconsideration was denied. Upon receiving the denial of reconsideration the Appellant filed a notice of appeal before the Administrative Law Court (ALC). Upon reviewing the record

on appeal and noticing the order of denial, the Honorable Deborah Brooks Durden, Administrative Law Judge determined that the Appellant failed to allege that this anything other than a routine denial of parole which the Department decision may not be disturbed. She decided to affirm the decision of the Parole Board and dismiss the appeal with prejudice.

Within this appeal the Appellant alleges that the sua sponte decision by the ALC dismissing this appeal was a violation of due process. The Appellant further argued that the decision of the Board was arbitrary and capricious and violated the Americans with disabilities act (ADA). The Respondent argues that the Appellant claims have no merit so the ALC was well within her right to dismiss this appeal; that the Appellant was not discriminated against due to his mental illness; and, the Appellant was allowed to appear before the Board and present mitigating evidence, so there exist no violation of due process. The brief of the Respondent supporting their argument follows.

### ARGUMENTS

- 1. The Board followed the mandates proscribed pursuant to the *Cooper* opinion; therefore, the sua sponte dismissal by the ALC was proper.**

The ALC's jurisdiction to review a final decision of the Department is derived from the decisions of the South Carolina Supreme Court in *Al-Shabbaz v. State*, 338 S.C. 334, 527 S.E.2d 724 (2000), and *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2002). In *Al-Shabbaz*, the South Carolina Supreme Court created a new avenue by which inmates could seek review of the final decision of a state agency in "non-collateral" matters related to a conviction or sentence. The Court held that an inmate could appeal those final agency decisions to the ALC, and ultimately the Court of Appeals pursuant to the Administrative Procedures Act. *Al-Shabbaz*, at 376. In *Al-Shabbaz*, the Court recognized that "these administrative matters typically arise in two ways: (1) when an inmate is disciplined and

punishment is imposed; and (2) when an inmate believes prison officials have erroneously calculated his sentence; sentence-related credits or custody status.” *Id.*, at 369.

The Court noted that the appealable final decision in *Furtick* arises in the latter manner, where the inmate alleges that the Department erroneously determined he was not eligible for parole. The Court held that, in order to determine whether an inmate’s claim against the Department is entitled review by the ALC under the procedures set forth in *Al-Shabbaz*, it is first necessary to determine whether the inmate has a liberty interest in gaining access to the Parole Board. *Furtick*, at 149. The Court determined that the permanent denial of parole implicates a liberty interest sufficient to require at least minimal due process. *Id.*

In *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008), the Supreme Court decided that a finding of fact was included; however, the Court determined that the Parole Board neither, “offered an explanation nor indicated that it considered the statutory criteria of section 24-21-640 and the fifteen criteria listed on the parole form.” *Id.*, at 500. The Supreme Court decided that if the Parole Board fails to consider and apply the statutory-related parole criteria, it has the effect of rendering an inmate parole ineligible, which warrants review by the ALC. *Id.*, at 502. In *Cooper*, the Supreme Court established what future Parole Board orders should consist of, in *Cooper* it specifically states:

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 procedure.

*Id.*

In the instant case the order of denial did conform with the *Cooper* decision. The findings of fact were the reasons provided as to why parole was denied; and, the conclusion of law are the statutes and factors used to determine the denial of parole. A final decision shall include findings of fact and conclusions of law separately stated. *S.C. Code Ann.* §1-23-350(Supp. 2013). The order is clear, the criteria within the statute and the mandatory policy were considered prior to the denial of parole. The reasons given for denial were reasonable and followed the mandatory criteria. The ALC was perfectly within their right to dismiss this appeal without the submissions of briefs if the claims of the Appellant are without merit.<sup>1</sup>

The claims of the Appellant are without merit, the order was clear, the criteria within the statute and the mandatory policy were considered prior to the denial of parole. The reasons given for denial were reasonable and followed the mandatory criteria. Since the Board is the sole authority to deny parole, which is not appealable; this denial of parole should be affirmed. Parole eligibility is not a matter within the jurisdiction of the trial court, but falls within the province of the Board of Probation, Parole and Pardon. *Brown v. State*, 306 S.C. 381, 412 S.E.2d 399 (1991).

In *Cooper*, the Court determined that the order denying parole was unlawful due to it not presenting any conclusions of law. It was the opinion of the Supreme Court that in order for the Board to prove that proper procedures were followed, it must not only state the findings of fact, but the statute and policy considered in reaching this conclusion. The order delivered to the Appellant is clear, the criteria within the statute and the mandatory policy were considered prior to the denial of parole. According to the Supreme Court if this is shown no further review by the ALC is necessary. The Parole Board clearly stated in its notice of rejection that it considered the

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<sup>1</sup> The administrative law judge shall render a decision in a written order which shall be served on all parties and filed with the clerk of the Court. The administrative law judge may affirm any ruling, order or judgment upon any ground(s) appearing in the Record and need not address a point which is manifestly without merit. Rule 40 SCRALC.

statutory criteria and the criteria set forth in Form 1212 which is sufficient under *Cooper. Compton v. S.C. Dept. of Probation, Parole and Pardon Services*, 385 S.C. 476, 685 S.E.2d 175 (2009). The sua sponte decision of the ALC was perfectly legal. The decision of Board followed the mandatory criteria, the claims of the Appellant had no merit so the ALC had no choice but to dismiss this appeal.

**2. The ALC could not make a ruling reversing a decision of the Board based on a question of fact.**

Within his brief the Appellant argues twelve (12) factors that are clearly questions of fact which can only be addressed by the Parole Board. The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record. *Williams v. David Strafford Drywall*, 402 S.C. 173, 739 S.E.2d 892 (Ct. App. 2013). The Appellant has not presented any evidence revealing that the decision to deny parole was erroneous; therefore, the decision must be upheld. The Court must affirm the Appellant's panel's findings of fact if they are supported by substantial evidence. *Id.*, at 181.

In order for the ALC to reverse a decision of an Administrative agency the decision of the Board must be unsupported by substantial evidence. Substantial evidence is evidence which considering the record as a whole would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981). The Appellant has failed to present any evidence revealing the Board failed to follow the mandatory criteria.

The Appellant request the Courts make a determination regarding matters that was presented to the Board regarding his mental health. This matter are question of fact, and can only be considered by the Parole Board.

The Appellant argues that he was wronged due to the fact the ALC made their decision sua sponte. The Appellant has the burden of proving that his parole was wrongfully denied. In administrative proceedings the general rule is that an Appellant for relief, or a privilege has the burden of proof and the burden of proof test upon one who files a claim with an administrative agency to establish that required conditions of eligibility have been met. *Leventis v. South Carolina Department of Health and Environmental Control*, 340 S.C. 118, 530 S.E.2d 643 (2000). The Appellant has failed to provide any evidence revealing the Board failed to follow the criteria listed in the statute; or, he was not given a meaningful hearing. It is his opinion that if the Board followed the criteria, due to his mental illness he would have been granted parole. The Appellant claims has no merit; therefore, in the interest of judicial economy the ALC was justified to dismiss this appeal without a hearing. It is his opinion that if the Board followed the criteria and considered his mental health situation he would have been granted parole. It remains the Parole Board's decision to release any inmate upon meeting all of the mandatory criteria. Once this decision has been made it cannot be reversed by the ALC. An Administrative Law Judge shall not hear an appeal from an inmate in the custody of the Department of Corrections involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services. *S.C. Code Ann. §1-23-600(D)(Supp. 2013)*.

The Appellant is requesting this court remand the decision back to the ALC or Parole Board, so he be given a mental health evaluation to ensure he was not denied parole due to his mental illness. There has been absolutely no evidence presented by the Appellant revealing he was denied parole due to his mental illness. The Appellant has also failed to reveal that he lacks competency to understand these proceedings. Since he has not presented any evidence revealing that he lacked the mental capacity to perform his parole hearing, he is not entitled a mental health evaluation.

The Appellant also argues that the use of identical reasons for denial in numerous parole decisions was declared unconstitutional by the Supreme Court in *Cooper*. In *Cooper*, the Court decided, “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*, at 112 n. 5. Nothing has been presented by the Appellant that reveals the Board failed to consider all of the mandatory criteria prior to using the listed reasons for denial. So the denial of parole should not be considered unconstitutional.

Since all of these allegations relates to facts determined by the Parole Board and not any legal error, the decision of the ALC is lawful. The only way the ALC can possibly remand the decision of the Parole Board is if the Board has committed an error of law. The Appellant Court sits to review errors in law only. *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001). The Appellant has not raised any error in law or any failure of the Board to follow the mandatory criteria, the decision of the ALC dismissing this appeal should be affirmed.

**3. The Board did not violate the Americans with Disability Act; nor due process with the denial of the Appellant’s parole.**

The Appellant states in his brief that he is currently suffering from bipolar disorder, narcolepsy, and intermittent explosive disorder. He informed the Board the he is suffering from these illnesses, as well as, currently taking fourteen (14) different medications. It is his opinion that his denial of parole was a violation of the American’s with Disabilities Act (ADA). He alleges that the Board failed to consider his mental health issues prior to denial, which he considers a violation of the ADA. The Appellant is mistaken about the purpose or practice of the ADA. This is a law to ensure that individuals with a disability are not discriminated against. According to the ADA the purpose of the law is: 1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; 2) to provide clear, strong, consistent,

enforceable standards addressing discrimination against individuals with disabilities; 3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and, 4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day to day by people with disabilities. 42 USCA §12101(b)(1-4). The Appellant argues that the denial of his parole is in violation of the ADA. This law was established to ensure that persons with disabilities are not discriminated. The Appellant has not submitted any evidence revealing that due to his mental illness he was denied parole. He was allowed a hearing, and given an opportunity to address the Board. All information regarding his mental illness was submitted by the Appellant and taken into consideration. The Appellant was denied parole due to his previous failure to complete two previous supervision programs,<sup>2</sup> and his institutional record being unfavorable.<sup>3</sup> The denial of parole had nothing to do with his mental health problems.

There exist criteria that the Board must consider prior to making a decision regarding the acceptance or denial of parole. The South Carolina Code of Laws specifically state:

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(Supp. 2013).*

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<sup>2</sup> He had a YOA parole revoked on January 16, 1996, and a probation revoked on June 22, 1993.

<sup>3</sup> The Appellant has had thirty-four (34) disciplinary infractions, twenty-seven (27) major, and seven (7) minor.

The Board has shown in their order that they considered all of the mandatory criteria. One of these criteria is the record of the inmate before, during, and after imprisonment. Part of his record include the mental health records submitted. There has been no discrimination against the Appellant do to his mental illness. He was allowed to appear before the Board and was placed under the identical criteria as all other inmates. There exist no discrimination, so no violation of the ADA.

The Appellant also alleges the Board violated his rights to due process by in his opinion, by not considering his mental health. The Appellant has not presented any evidence revealing that his right to due process was violated. The United States Supreme Court has acknowledged in the case of *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972), that a person facing a revocation of parole has minimal due process rights. A distinction between a person currently on parole and a person seeking parole was made in the case of *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100 (1979)<sup>4</sup> In *Greenholtz*, the United States Supreme Court determined that there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. *Id.*, at 2104. No person has a right to parole regardless of their mental condition at the time they appeared before the Board. They have a right to a fair and impartial hearing which the Appellant received. He has explained within his brief that he submitted evidence revealing his mental health illnesses, which the Board took into consideration. They still decided to deny parole due to the Appellant's prior failure to successfully complete a supervision program, and his unfavorable institutional record. The Board

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<sup>4</sup> There is a crucial distinction between being denied a 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, and confined and thus subject to all of the necessary restraints that inhere in a prison. *Id.*, at 2105.

was well within their rights to deny parole due to these reasons, which is not a violation of due process.


The Appellant also argues that he was denied due process due to the fact he was not evaluated by a licensed psychiatrist or psychologist. Pursuant to South Carolina law, any person who has served a total of ten consecutive years or more in prison, cannot be released on parole until the Board 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). Since the cost of these reports are made by the Department, these reports are not acquired unless the inmate has been conditionally paroled. If the inmate has been denied parole, the report is not necessary, so it is not sought. The failure of not acquiring this report does not deny the Appellant due process. This report is only necessary if the Appellant is going to be released on parole. If he is not going to being granted parole this report is not necessary.

The ALC has a very narrow ability to review the decision of the Parole Board. If it is determined that the Board considered all of the mandatory criteria no further review is allowed. The Appellant was not discriminated due to his mental illness, so there has been no violation of due process. Since the Appellant has failed to produce to the ALC that he did not receive a fair and impartial hearing, this decision should be affirmed.

**CONCLUSION**

Based on the foregoing reasons the Respondent respectfully requests that the final decision of the ALC dismissing this appeal be affirmed.

Respectfully submitted,

  
\_\_\_\_\_  
Tommy Evans, Jr.  
Legal Counsel

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August 28, 2014

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT  
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BILLY LISENBY, Jr., #200273 .....APPELLANT,

v.

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

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**CERTIFICATE OF SERVICE**

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I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within Initial Brief and Designation of Matter dated August 28, 2014, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, this 28<sup>th</sup> day of August, 2014, addressed to:

Billy Lisenby, #200273  
Lieber Correctional Institution-B-31  
PO Box 205  
Ridgeville, South Carolina 29472

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



**Dawn K. Nichols**  
**Executive Administrative Assistant**

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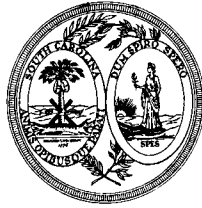
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AUG 29 2014

**SC Court of Appeals**

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August 28, 2014

The Honorable Jenny Kitchings  
Clerk of the South Carolina Court of Appeals  
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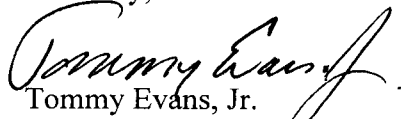
**RE: Billy Lisenby, #200273 v. SC Department of Probation, Parole and Pardon Services**

Dear Ms. Kitchings:

Enclosed please find the original of the Respondent's Initial Brief and Designation of Matter in the above referenced case.

Thank you.

Sincerely,

  
Tommy Evans, Jr.  
Assistant General Counsel

TE:dn

Enclosure

cc: Billy Lisenby

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AUG 29 2014

**SC Court of Appeals**