STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Court Judge
Case No. 2014-001772

ALBARR-ALI ABDULLAH, #191449.....APPELLANT

v.

THE SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES,.....RESPONDENT

INITIAL BRIEF OF RESPONDENT

Tommy Evans, Jr.
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ATTORNEY FOR THE RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. **Did the Respondent unlawfully extend the Appellant's amount of time between parole hearings in violation of ex post facto?**

2. **Is the Appellant entitled any remedy due to the delay between hearings not causing him any prejudice?**

3. **Since the Appellant received the only remedy available, can this case now be considered moot?**

STATEMENT OF THE CASE

On September 9, 1991, in response to a robbery in progress, the victim, an officer of the Charleston police department entered a Bi-Lo grocery store. Upon entrance he was shot by Albarr Abdullah (hereinafter Appellant). The Appellant along with his co-defendant Alpharetta Walker, attempted to open the store safe and was unsuccessful. The Appellant removed the victim's service revolver, police radio, and fled the scene. The Appellant was later caught, arrested, and charged with the offenses of attempted armed robbery, and assault and battery with the intent to kill (ABIK).

On November 11, 1992, the Appellant appeared before the Honorable Jackson V. Gregory. Upon the conclusion of this appearance, Judge Gregory sentenced the Appellant to a ten (10) year period of incarceration for attempted armed robbery; and twenty (20) years for ABIK. The Court ordered these sentences are to be served consecutively.

At the time the Appellant committed these offenses, South Carolina law allowed an individual serving a sentence for a violent offense parole eligibility upon the service of one-third (⅓) of their sentence. The Appellant initially appeared before the Parole Board on February 16, 2000. Upon the conclusion of this hearing, the Board decided to deny the Appellant's an opportunity to be released on parole. Since this initial denial, the Appellant has appeared before the Board an additional six (6) times each resulting in a denial of parole. His most recent appearance occurred on January 30 , 2013, at the conclusion of this hearing parole was denied due to: 1) the nature and seriousness of the current offense; 2) the indication of violence in this or a previous offense; and, 3) the use of a deadly weapon in this or a previous offense.

Upon receipt of the order of denial the Appellant filed a notice of appeal before the Administrative Law Court (ALC). Within this appeal the Appellant argues that the Respondent failed to allow him to appear bi-annually in violation of South Carolina law.

On June 25, 2014, the Honorable Deborah Brooks Durden, Administrative Law Judge (ALJ) issued her order. She decided there does not exist a violation of ex post facto; that the Appellant was not prejudiced; and, since he was allowed to appear before the Board there exist no remedy. The request for relief was denied, and the ALJ decided to affirm the denial of parole.

As a result of this decision, the Appellant filed a notice of appeal before the South Carolina Court of Appeals. Within this appeal the Appellant argues that the delay in his hearings was a violation of ex post facto. In response, the Respondent will argue that there exist no violation of ex post facto; that the Appellant suffered no prejudice so he is not entitled any relief; and, this appeal should be considered moot, due to him receiving the only remedy available. The brief of the Respondent supporting their argument follows.

ARGUMENTS

1. **The delay in parole hearings was not in violation of ex post facto.**

The Appellant argues that he was not allowed to appear before the Board bi-annually in violation of ex post facto. Pursuant to South Carolina Code of Laws, "upon a negative determination of parole, prisoners in confinement for a violent crime as defined in 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole." S.C. Code Ann. §24-21-645(Supp. 1986) The Appellant was due to appear before the Board on October of 2012, he did not appear until January 30, 2013. He argues this delay is a violation of ex post facto. The Appellant is presently incarcerated for the offense of assault and battery with intent to kill, an

offense classified as violent pursuant to South Carolina law.[1] So the Appellant is due to appear before the Board every two years. The Appellant argues that he has not been allowed to appear every two years in violation of South Carolina law. Since the Appellant's initial hearing on February 16, 2000, he has been allowed to appear before the Board on August 20, 2002, August 24, 2004, August 23, 2006, October 8, 2008, October 20, 2010, and January 20, 2013, so he has essentially been appearing before the Board every two years.[2] Due to the large amount of hearings scheduled he did not appear before the Board. The Appellant's case was rescheduled for the next available time which, unfortunately, occurred was three months later. The Respondent argues that this delay does not constitute a violation of ex post facto.

An ex post facto violation occurs when there is a change in the law that retroactively alters the definition of a crime or increases the punishment for the crime. *Lynce v. Mathis*, 519 U.S. 433, 117 S.Ct. 891 (1997). In order for a law to be prohibited by the ex post facto clause, two elements must be present: (1) the law must be retrospective so as to apply to events occurring before its enactment; and, (2) the law must disadvantage the offender affective by it. *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446 (1987). However, before this two part analysis can even begin, the statute in question must be found to be punitive in nature such that it inflects punishment merely by requiring the conduct called for in the law. *State v. Walls*, 348 S.C. 26, 558 S.E.2d 524 (2002). Without such a finding the ex post facto clause is inapplicable. *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140 (2003), *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072 (1997), *Flemming v. Nestor,* 363 U.S. 603, 80 S.Ct. 1367 (1960), *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992).

[1] For purposes of definition under South Carolina law, a violent crime includes the offenses of assault and battery with intent to kill (Section 16-3-620) S.C. Code Ann. §16-1-60 (Supp. 1986).
[2] The Appellant's next hearing is scheduled to occur on January 30, 2015.

In the case at bar the law regarding the time line of a parole hearing is not criminal or penal in purpose or nature. 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). It does not increase the measure of punishment, it is merely procedural because it determines the amount of time an inmate must wait between hearings. This delay did not change the punishment, the makeup of the Parole Board, or the criteria the Board must consider. Procedural change in a parole system is not ex post facto even though it may work to inmate's disadvantage. *Roller v. Gunn*, 107 F.3d 227 (1997). The amount of time that the Appellant had to wait was not due to the change of the law, it was just an unfortunate circumstance resulting from the large amount of inmates becoming eligible at the same time. This made it difficult for the hearings to occur during the same time period, so some hearings had to be delayed for a short period of time. This delay had nothing to do with the law as it existed at the time the Appellant committed the offense. Since the law is identical at the time of his hearing as it was when he committed the offense, there exist no 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). The ALJ was correct in making her determination, which should not be reversed by this Court.

2. There exist no prejudice so this case should not be subject to reversal.

The ALC was correct in determining that since there exist no prejudice he is not entitled to a 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). The Appellant suffered no prejudice due to the delay. When the Appellant actually appeared before the Board parole was denied. If scheduled earlier it would have garnered the identical result, so a later hearing

had no detrimental effect. The Appellant was not denied any rights nor damages due to the delay. Since the Appellant did not suffer any damages, the ALJ was correct in not granting him any relief. The decision of the lower court should be upheld.

3. Since the Appellant was given the only remedy available, so no remedy currently exist so this case should be considered moot.

The ALC was correct in ruling that there exist no legal remedy available to the Appellant. This is due to the fact the Appellant was allowed to appear before the Parole Board; even though, it was beyond the two year period found in the statute. The only remedy available was that the Appellant be allowed to appear before the Board. That was accomplished prior to this case even being presented to the ALC. Ordering that the Appellant be granted parole is not a remedy available. 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 South Carolina Department of Probation, Parole and Pardon Services. S.C. Code Ann. §1-23-600(D)(Supp. 2013). The Appellant was given the only remedy existing under South Carolina law, there currently exist no remedy so, this cause of action should be considered moot.

A decision from the ALC or this Court demanding the Board allow the Appellant another hearing will not be to any assistance. This is due to the fact he has already been allowed to appear before the Board. A case becomes moot when judgment, if rendered will have no practical effect upon the existing controversy. *Mathis v. South Carolina State Highway Dept.,* 260 S.C. 344, 195 S.E.2d 713 (1973).

Even if this Court decides to grant the Appeal and award the Appellant another parole hearing, it will not provide any relief. Before any action can be maintained, there must exist a justiciable controversy. *Midland Guardian v. Thacker*, 280 S.C. 563, 314 S.E.2d 26 (Ct. App.) *cert. denied,* (1984). A justiciable controversy is a real and substantial controversy which is appropriate for

judicial determination as distinguished from a dispute or difference of a contingent hypothetical or abstract character. *Guimarin & Doan, Inc. v. Georgetown Textile & Mfg.Co.,* 249 S.C. 561, 155 S.E.2d 618 (1967). For a case not to become moot the Appellant must receive some type of remedy, this is not so regarding this matter because he received the hearing he was seeking.

The Appellant was seeking money damages; however, he never presented the purpose for these damages. The Appellant never presented any injury or loss due to the delay in this parole hearing. He was allowed to appear before the Board and never presented to the ALC, or this court, that the Board failed to follow the criteria existing in policy or South Carolina law.[3] Since the Appellant has never raised any deviation from policy during his hearing there exist no error in law; the decision of the ALC should be upheld.

[3] If a Parole Board deviates from or renders its decision without consideration of the appropriate criteria, we believe it essentially abrogates an inmate's right to parole eligibility and, thus infringes on a state-created liberty interest. *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services,* 377 S.C. 489, 661 S.E.2d 106 (2008)

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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Attorney for the Respondent

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November 10, 2014

STATE OF SOUTH CAROLINA
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THE SOUTH CAROLINA DEPARTMENT OF PROBATION,
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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* dated November 10, 2014, on Appellant this 10th day of November, 2014, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Abarr-Ali Abdullah, #191449
Kershaw Correctional Institution
4848 Gold Mine Highway
Kershaw, South Carolina 29067

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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November 10, 2014

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street- 5th Floor
Columbia, South Carolina 29201

RE: Albarr-Ali Abdullah v. SCDPPPS

Dear Ms. Kitchings:

Enclosed please find the *Initial Brief of Respondent and Designation of Matter*, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Tommy Evans, Jr.
Assistant General Counsel

TE:dn
Enclosures
cc: Albarr-Ali Abdullah

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outh Carolina 29201