STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable S. Phillip Lenski, Administrative Law Court Judge
Case No. 2014-ALJ-15-0026

Appellate Case No. 2014-002592

ALFONSO WARE, #168464..APPELLANT

RECEIVED
JAN 29 2015
SC Court of Appeals

v.

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

INITIAL BRIEF OF RESPONDENT

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ATTONREY FOR THE RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. **Did the Respondent apply the proper criteria prior to denying the Appellant an opportunity to be released on parole?**

2. **Did the Respondent go outside the criteria when the Board inquired about the victim who they knew was deceased?**

STATEMENT OF THE CASE

On November 25, 1989, the Appellant shot the victim in the chest with a .22 caliber pistol. The victim later died as a result of his gunshot wounds, and the Appellant was arrested and charged, for the offense of murder.

On June 27, 1990, the Appellant appeared before the Honorable Hubert Long for this offense. Upon the conclusion of this appearance, Judge Long sentenced the Appellant to a period of incarceration for the remainder of his natural life. At the time the Appellant committed this offense, South Carolina law allowed an inmate serving a life sentence for murder parole eligibility upon the service of twenty (20) years.

The Appellant made his initial appearance before the Board on September 11, 2009. At the conclusion of this hearing, the Board decided to deny the Appellant an opportunity to be released on parole. Since this initial appearance, the Appellant has appeared before the Board an additional two times, each resulting in a denial of parole. His most recent appearance occurred on April 8, 2014, parole was denied due to: 1) the nature and seriousness of the current offense; 2) an indication of violence in his or a previous offense; 3) the use of a deadly weapon in this or a previous offense; and, 4) a prior criminal record that indicates poor community adjustment. After receiving his notice of denial the Appellant issued a request for reconsideration. Upon the receipt of this request the Board decided to reexamine the Appellant's file. After this examination, the Board determined that the reasons for this request did not affect the final decision of the Board, the request for reconsideration was denied. Once the Appellant received the denial of reconsideration he filed a notice of appeal before the Administrative Law Court. On October 9, 2014, the Honorable S. Phillip Lenski Administrative Law Court Judge issued an order affirming the decision of the Parole Board.

Once he received Judge Lenski's order the Appellant filed a notice of appeal before the South Carolina Court of Appeals. Within his appeal the Appellant argues that the Board erred by applying improper criteria prior to the denial of parole; that the Board created criteria is not identical to that found in South Carolina law; and, the Board went outside the criteria by inquiring about the deceased victim. In response, the Respondent will argue that the Board followed the mandates applied by the Supreme Court in the *Cooper* opinion; that the department criteria is identical to the statutory criteria; and, that it was not a violation of South Carolina law for the Board to consider the opinions of the victims, or inquiring about the deceased victim. The Respondent's initial brief supporting their arguments follows.

ARGUMENTS

1. The Respondent followed the mandates proscribed by the South Carolina Supreme Court revealed in the *Cooper* opinion.

The ALC correctly decided that as long as the Respondent can reveal all of the criteria was considered prior to the denial of parole, there cannot be any relief given to the Appellant. This determination was made pursuant to the South Carolina Supreme Court decision of *Cooper v. S.C. Dept. Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008).

Pursuant to South Carolina law, a final decision of an agency shall include a findings of fact and conclusions of law separately stated. S.C. Code Ann. §1-23-350 (Supp. 2013). In *Cooper*, 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 criteria, it has the effect of rendering an inmate parole ineligible, which warrants review by the ALC. *Id.*, at 502.

In *Cooper*, the 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 case at bar, the order of denial did conform with the *Cooper* opinion. 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. The order is clear, the criteria within the statute and the mandatory policy were considered prior to the denial of parole.

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 statue 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.[1] The ALC ruled that pursuant to *Cooper*, the Board revealed a findings of fact and conclusion of law separately stated. Since the Court have given the ALC a narrow ability to review the decisions of the Board, their decision to affirm the denial of parole was valid and should be upheld.

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[1] The Parole Board clearly stated in its notice of rejection that it considered the 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 Appellant argues that the criteria of the Department is not identical to what was established pursuant to South Carolina law and not what the General Assembly wanted considered in a parole determination. The criteria the Board must consider is found in the South Carolina Code of Laws, which 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 the lessening of the rigors of 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).

Pursuant to South Carolina law, "the board must establish written specific criteria for the granting of parole and provisional parole. This criteria must reflect all of the aspects of this section and include a review of a prisoner's disciplinary and other records." S.C. Code Ann. §24-21-640 (Supp. 2013). The Appellant argues that the Department criteria does not reflect the criteria placed in the statute, the Respondent disagrees.

The Department has developed criteria that must be considered by the Board prior to the awarding of parole. These criteria encompasses the above referenced criteria but more detailed. These criteria specifically state:

1. The risk the inmate poses to the community;
2. The nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it;
3. The inmate's prior criminal records and his/her adjustment under any previous programs or supervision;
4. The inmate's attitude toward his/her family, the victim, and authority in general;

5. The inmate's adjustment while in confinement, including his/her progress in counseling, therapy, and other similar programs designed to encourage the inmate to improve himself/herself;

6. The inmate's employment history, including his/her job training and skills and his/her stability in the work place;

7. The inmate's physical, mental and emotional health;

8. The inmate's understanding of the cause of his/her past criminal conduct;

9. The inmate's efforts to solve his/her problems, such as seeking treatment for substance abuse, enrolling in academic and vocational education courses, and in general using whatever resources the Department of Corrections has made available to inmates to help with their problems;

10. The adequacy of the inmate's overall parole plan. This includes inmates living arrangements, where he/she will live and who he will live with; the character of those with whom the inmate plans to associate in both his/her working hours and his/her off-work hours; the inmate's plans for gainful employment;

11. The willingness of the community into which the inmate will be released to receive the inmate;

12. The willingness of the inmate's family to allow him/her to return to the family circle;

13. The attitudes of the sentencing judge, the solicitor, and local law enforcement officers respecting the inmate's parole;

14. The feelings of the victim's family, and any witnesses to the crime about the release of the inmate;

15. Other factors considered relevant in a particular case by the Board.

The Appellant argues that this criteria does not match the criteria established in South Carolina law. Each of these criteria created by the Department encompasses all of the mandatory criteria found in South Carolina law. There exist no violation of the law for the Board to consider these criteria.

2. **The Department never deviated from the criteria, or go outside the criteria by inquiring about the victim, even though they knew of his death.**

The Appellant argues that the criteria does not allow the Board to raise issues regarding the underlying facts surrounding the offense of which he is currently incarcerated. To support this argument the Appellant cites the South Carolina Court of Appeals case of *Hinton v. S.C. Dept. of Probation, Parole and Pardon Services*, 357 S.C. 327, 592, S.E.2d 335 (Ct. App. 2004). In *Hinton*, the Court of Appeals ruled that pursuant to the subsequent violent offender statute, the Board cannot consider the facts of an out of state conviction to deny parole eligibility. That decision is not in any way similar to the present case. It must be considered reasonable for the Board to consider the facts of a case prior to deciding whether or not an inmate should be released back into the community. It is the Board's responsibility to make sure the community would not be in jeopardy if the Appellant is released on parole. One of the ways the Board makes the determination is by the crime committed. It should be less challenging for an inmate serving a sentence for shoplifting to be granted parole than one serving a sentence for murder.

The statute does refer to the record of the inmate before, during and after incarceration. The facts of the offense is part of the Appellant's record prior to incarceration. To request information concerning the victim is within the bounds of the Board's ability to inquire about the record before incarceration. When the General Assembly makes it mandatory that the Board carefully consider the record of the inmate before imprisonment, the violent nature of the actions of the Appellant must be considered.

The record of the prisoner prior to his imprisonment must be considered regardless of when it occurred; because this criteria informs the Board of the prisoners' possible conduct if released. The Board has the full authority to deny parole. Once the denial of parole is considered, the decision is final and cannot be reversed or reviewed by this Court. 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).

3. Victim, law enforcement, and Solicitor notification is mandatory, and a consideration of their opinions is not unlawful.

The Appellant argues that a victim's rights to provide their opinion ends after a post-conviction relief decision. Notification of a parole hearing must be given to the victim, law enforcement, and the solicitor, so their opinion can be taken into consideration. The South Carolina Code of Laws specifically state:

> The director must give a thirty-day written notice of any board hearing during which the board will consider parole for a prisoner to the following persons:
> (1) Any victim of the crime who suffered damage to his person as a result thereof or if such victim is deceased, to members of his immediate family to the extent practicable;
> (2) The solicitor who prosecuted the prisoner or his successor in the jurisdiction in which the crime was prosecuted; and,
> (3) The law enforcement agency that was responsible for the arrest of the prisoner concerned.

S.C. Code Ann. §24-21-221 (Supp. 2013).

It is also listed in the victim's bill of rights that a victim must, "be informed of any proceeding when any post-conviction action is being considered and be present at any post-conviction hearing involving a post-conviction release decision." S.C. Const. art. I §24. The Board did not commit any unlawful action by obtaining and considering the opinion of the victim's family prior parole determination. The Appellant cites the case of *Ex Parte Littlefield*, 343 S.C. 212, 540 S.E.2d 81 (2000). He argues that in this case the Supreme Court decided, "once a criminal case has been resolved and the defendant is sentenced, the alleged victim loses his victim status under the Victims' Bill of Rights." *Littlefield,* at 221. However, *Littlefield*, relates to a "victim" whose case was dismissed, and is requesting the Court to re-open litigation for an order of restitution. In

Littlefield, the Court also ruled that, "the trial court cannot use the victim's bill of rights to re-open a completed criminal proceeding." *Id.* According to *Littlefield*, "a victim rights under the Victims Bill of Rights terminate when the criminal proceedings and the **post-conviction actions** against the alleged perpetrator are resolved." *Id.*, at 219. (Emphasis added) It is clear that the victim has a right to voice their opinion at every post-conviction procedure, including a parole hearing. If the General Assembly did not wish the victim, law enforcement, or the solicitor to be heard, notice will not be mandatory.

A parole hearing is not a criminal trial. It is just a hearing to make a determination of whether or not an inmate should be released early from incarceration. Any person can voice their opinion regarding the release of the inmate from incarceration. The Board has to take any statement concerning an inmate under consideration. This includes anyone against parole, or speaking in the inmate's behalf. If this Court denies victims access to the Board, all parties should not be allowed to address the board, including those appearing on behalf of the Appellant. If that is done it will curtail the Board's ability to make an informative decision regarding an inmate's parole.

4. The doctrine of Res Judicata does not apply at parole hearings.

The Appellant argues that Res Judicata bars him from being forced to repeatedly defend the same action. *Garris v. Governing Board of S.C. Reinsurance Facility,* 333 S.C. 432, 511 S.E.2d 48 (1998). This issue was never raised before the ALC; therefore, it was not preserved for appeal and should not be considered by this Court. In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. *State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003).

Even though it should not be considered Res Judicata does not apply. If this is the case, once the Appellant was denied parole he should remain incarcerated for the remainder of his natural life; however, pursuant to South Carolina law he is allowed to re-appear before the Board bi-annually.[2]

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999); *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 417 S.E.2d 569 (1992). Under the doctrine of res judicata, "[a] litigant is barred from raising any issues which were adjudicated in a former suit and any issues which might have been raised in the former suit." *Plum Creek, supra,* (quoting *Hilton Head Center of South Carolina Inc. v. Public Service Comm'n of South Carolina,* 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and, (3) adjudication of the issue in a former suit. *Plum Creek, supra; Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 419 S.E.2d 217 (1992); *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986).

Since a parole hearing is not determined by a Court it cannot be considered an adjudication. A parole or probation proceeding is just an informal proceeding that stems from the criminal conviction of the Appellant. *See*, *State v. Franks,* 276 S.C. 636, 281 S.E.2d 227 (1981).For Res Judicata to apply there must be some type of adjudication which is defined as, "the entry of a decree by a court in respect to the parties in a case. BLACKS LAW DICTIONARY 39 (5th ed. 1979). During a parole hearing the determination of parole is made by the Board, the Court has no

[2] Upon a negative determination of parole prisoners in confinement for a violent crime as defined in Section 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).

jurisdiction. The Appellant argues that a parole hearing should be considered litigation; however, for Res Judicata to apply there must be not only litigation but an adjudication. An adjudication does not exist during a parole hearing; therefore, res judicata does not apply. Since this cannot be considered an adjudication the use of the prior record cannot be considered res judicata.

5. The ALC made the correct decision not ruling on a question of fact.

The Respondent contends that the ALC was correct in affirming the decision of the Parole Board. The arguments of the Appellant either have no merit, does not apply under the law, or relates to factual events given to the Parole Board which the Court has no jurisdiction. The Court shall not substitute its judgment for that of the agency as to 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 Respondent has never proven the Board failed to follow the criteria placed in statute or policy; therefore, the ALC did the correct thing in affirming the decision of the Parole Board. It remains the sole decision of the Parole Board to release an inmate upon meeting all of the mandatory criteria. The Parole Board has the sole authority to determine eligibility separate and apart from the court's authority to sentence a defendant. *State v. McKay,* 300 S.C. 113, 386 S.E.2d 623 (1989).

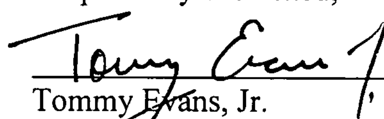
It remains the responsibility of the Board to consider the record of the inmate and make a determination whether or not that prisoner should be released on parole. Prior to any release, the Board must be absolutely convinced this release will not cause a determinant to society. Until the Board can be completely satisfied this release will not cause harm to any member of the community, he cannot be granted parole. This final decision of the Board is not reviewable. The

ALC shall only review the procedure, not the Board's final decision. 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). No credible evidence was revealed proving the procedure was not followed. The Appellant has the burden of proving that the prior procedure, or criteria was not followed prior to denial. The 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.643 (2000). The Appellant never revealed any evidence that the Board failed to follow the mandatory criteria. Since this was never shown the ALC was correct in affirming the decision of the Parole Board.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests that the final decision of the ALC affirming the decision of the Parole Board be affirmed.

Respectfully submitted,



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January 28, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
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Case No. 2014-ALJ-15-0026

Appellate Case No. 2014-002592

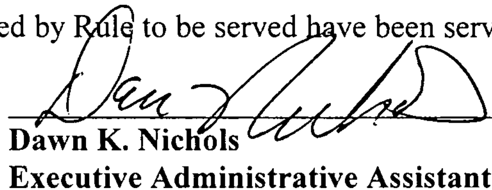
ALFONSO WARE, #168464..APPELLANT

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 January 28, 2015, on Appellant this 28th day of January, 2015, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Alfonso Ware, #168464
Broad River Correctional Institution-Monticello 286
4460 Broad River Road
Columbia, S.C. 29210

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



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5

State of South Carolina
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January 28, 2015

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SC Court of Appeals

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

RE: Alfonso Ware v. SCDPPPS

Dear Ms. Kitchings:

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

Thank you for your assistance in this matter.

Sincerely,

Tommy Evans, Jr.
Assistant General Counsel

TE:dn
Enclosures

cc: Alfonso Ware, #168464

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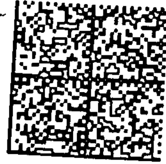

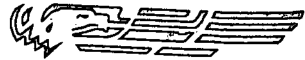

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