STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Administrative Law Court
Deborah Durden, Administrative Law Court Judge
15-ALC-15-0009
Appellate Case No.: 2015-000689

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SC Court of Appeals

THOMAS LOWERY, ...APPELLANT

v.

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

INITIAL BRIEF OF THE RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. **Whether Parole Board far reaching powers abrogates the fairness due to potential**

STATEMENT OF THE CASE

On May 28, 1976, the Appellant along with his co-defendant Marion Geddis entered Truluck's store in Lynchburg, South Carolina. Upon entering, the Appellant struck the victim in the head several times with a Coca-Cola bottle. After she fell she again was struck several times with a pecan branch by the co-defendant. As she lie on the floor dying, the Appellant opened the cash register and stole three hundred and sixty-nine dollars. The defendant's immediately fled the store, and ran through the woods where they left the murder weapons. The murder weapons were never recovered. The murder weapons were never recovered.

During the investigation Mr. Geddis became a suspect and upon the lawful search of his residence the stolen money was found. The Appellant's bloody fingerprints was found on this money. The Appellant was arrested, and blood matching the victim was found on his shirt. During a lawful interrogation, both defendants confessed to this crime. They were charged with the offenses of murder and grand larceny.

On September 8, 1976, the Appellant appeared before the Honorable Paul M. Moore for these offenses. Upon the conclusion of this appearance, Judge Moore sentenced the Appellant to a period of incarceration for the remainder of his natural life for murder, and ten years for grand larceny.[1] At the time the Appellant committed this offense, South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of ten years. The Appellant made his initial appearance before the Board on October 30, 1985.[2] Upon the conclusion of this hearing, the Board decided to deny the Appellant an opportunity to be released on parole. Since this initial hearing, the Appellant has appeared before the Board an additional fifteen times each resulting in a denial of parole. His last appearance occurred on January 14, 2015, parole was

[1] Marion Geddis received the identical sentence he currently remains incarcerated.

[2] The Appellant completed his sentence for grand larceny on February 23, 1982.

denied due to: 1) nature and seriousness of the current offense; and, 2) an indication of violence in this or a previous offense. Upon being notified of this denial of the parole the Appellant filed a notice of appeal before the Administrative Law Court. Within this appeal the Appellant argues that his parole was denied unlawfully and Department criteria considered by the Board is far reaching, therefore, the Department criteria is unlawful.

On March 3, 2015, the Honorable Deborah Brooks Durden, Administrative Law Judge, sua sponte issued an order dismissing the Appellant's appeal, and affirming the decision of the Parole Board. Upon receiving this order, the Appellant filed a notice of appeal before the South Carolina Court of Appeals. In response, the Respondent argues that the Board followed the mandates proscribed in the Cooper opinion; and, the Appellant wishes the Court determine questions of fact which can only be determined by the Parole Board. The initial brief of the Respondent 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 the notice of rejection revealed the board considered the fifteen factors and §24-21-640, which is considered a routine denial of parole. When the ALC made this determination no relief should be given to the Appellant. This determination was made pursuant to the South Carolina Supreme Court decision of *Cooper v. S.C. Dept. of 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 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.[3] 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.

2. **The criteria established by the General Assembly and the Department is sufficient to make a parole determination, and not in violation of the law.**

The Appellant argues that the criteria used by the Board is unlawfully broad. The Board must consider the mandatory criteria established by the General Assembly and criteria created by the Department. 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 this criteria is far reaching, thereby illegal. The Respondent argues that the Department criteria encompasses all of the above referenced criteria found in the statute. Department criteria specifically states:

1. The risk the inmate poses to the community;

[3] 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).

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 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 the Department criteria is unfair especially number fifteen. Each of this criteria encompasses all of the mandatory criteria created by the General Assembly. There exist no violation of the law when the Board considers these criteria.

The Appellant was denied parole due to the nature and seriousness of the offense of murder; and the indication and violence of this offense. These reasons follow the criteria allowed in South Carolina law and found in Department policy, there exist no decision made arbitrarily or capriciously. Within his brief the Appellant attempts to prove his position with factual examples as to why he should be granted parole. The Court shall not substitute its judgment for that of an agency as to weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380(A)(6)(Supp. 2014). The Appellant questions the reasons why he was denied parole. However, the reasons offered by the Court followed the criteria; therefore, it is was not subject to remand by the ALC. The ALC was correct in affirming the decision of the Board, and dismissing the Appellant's appeal. Pursuant to South Carolina law the ALC cannot reverse the decision of the Parole Board.[4] The decision of the ALC was lawful and followed South Carolina law.

Within his brief the Appellant also made claims of his being denied parole due to his race. The Board has never used race as a factor in the denial of a prisoners parole. There are individuals of all races, nationalities, and religions that have been denied or granted parole. The Board only considers the mandatory criteria found in statute, and a part of Department policy. The Appellant

[4] An administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections for an appeal 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(Supp. 2014).

has presented no proof to the ALC that race was used as a factor in the denial of his parole. 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 filed the 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 reasons for denial were valid and never mentioned the race of the Appellant. The Appellant has also offered no proof that his being denied parole was based on race. The ALC was correct in not even addressing this accusation.

The Appellant argues that number fifteen of the Department created criteria, reveals the far reaching abrogating powers of the Department. The Appellant was not denied parole due to this specific criteria. He was denied parole due to the violence and serious nature of the offense he committed. The nature and seriousness of his offense is relevant and must be considered not only for this Appellant, but any inmate appearing before the Parole Board. The above referenced statutory criteria specifically states that the Board must consider the record of the prisoner, "before, after and during imprisonment." S.C. Code Ann. §24-21-640 (Supp. 2014). The Board must not only consider the programs, employment, and disciplinaries occurring during imprisonment, but the prior record and offense committed by the Appellant.

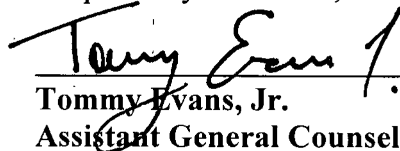
The criteria mentioned by the Appellant was not the reason for the denial of parole; therefore, the Appellant reveals no prejudice. To warrant reversal the Appellant must show both error of the ruling, and resulting prejudice. *Burroughs v. Worsham,* 352 S.C. 382, 574 S.E.2d 215 (S.C. App. 2002). The Appellant has not presented any error of law committed by the ALC; therefore, the decision of the ALC should be affirmed by this Court. In criminal cases the appellate court sits to review errors of law only. *State v. Baccus,* 367 S.C. 41, 625 S.E.2d 216 (2006).

The Appellant argues that the nature and seriousness of his current offense is unchangeable and used to arbitrarily to deny a potential chance for parole. The facts of the case must be considered, due to the fact the board must consider the potential of future dangerousness when deciding to release an individual out into the community. Using the same reasons for denial upon the conclusion of multiple denials is sufficient to deny parole, if the Board's decision evinced consideration of section 24-21-640 and its own criteria. *Cooper*, at 112 n. 5. The Board revealed that the mandatory criteria was considered prior to the denial of parole; therefore, the decision of the ALC was lawful and should be affirmed.

CONCLUSION

Based on the foregoing reasons the ALC correctly dismissed the appeal; therefore the Respondent respectfully requests the final decision of the Administrative Law Court be affirmed.

Respectfully submitted,



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May 1, 2015

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v.

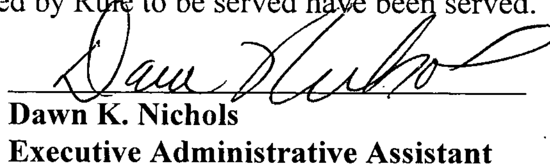
S.C. DEPARTMENT OF PROBATION, PAROLE
AND PARDON SERVICES;...RESPONDENT

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 May 1, 2015, on Appellant this 4th day of May, 2015, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Thomas Lowery, #83240
Kershaw Correctional Institution-HD235
4848 Goldmine Highway
Kershaw, S.C. 29067

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



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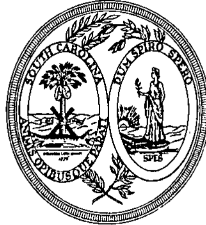
NIKKI R. HALEY
Governor



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May 4, 2015

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

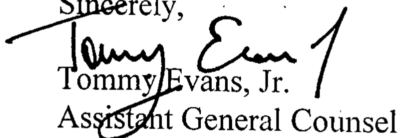
RE: <u>Thomas Lowery v. SCDPPPS</u>

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,



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TE:dn
Enclosures

cc: Thomas Lowery

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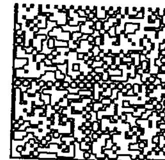

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