STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III, Administrative Law Judge
Appellate Case Number 2015-000683

GEORGE LEE TOMLIN, ...APPELLANT

v.

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

RESPONDENT'S INITIAL BRIEF

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1. **Was the 2014 reasons of the Respondent in the denial of parole arbitrary and capricious and the Administrative Law Court erred in denying relief?**

2. **Did the Administrative Law Court err when it held South Carolina rule of evidence, Rule 609(b) should have no application to the Respondent's criteria?**

STATEMENT OF THE CASE

On June 28, 1988, the Appellant stabbed his wife eleven times in the head, neck, and chest, causing her death. After stabbing his wife to death, he took his fourteen year old step daughter into a wooded area and sexually assaulted her. The authorities received a detailed account of the events from the step daughter; and, later caught, arrested and charged the Appellant with the offenses of murder, and criminal sexual conduct in the second degree (CSC 2nd).

On February 8, 1990, the Appellant appeared before the Honorable James Morris, for the offenses of voluntary manslaughter, CSC 2nd, and possession of a weapon during the commission of a violent crime (weapons offense). Upon conclusion of this appearance, the Court sentenced the Appellant to a fifty-five year period of incarceration for voluntary manslaughter, twenty years for CSC 2nd, and five years for the weapons offense.[1]

Pursuant to the law existing at the time the offense was committed, a person convicted of committing a violent offense was eligible for parole upon the service of one-third of their sentence. The Appellant initially appeared before the Parole Board on March 17, 2010. 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 two times each resulting in a denial of parole. His most recent appearance occurred on August 6, 2014, parole was denied due to: 1) the nature and seriousness of the current offense; 2) indication of violence in this or a previous offense; and, 3) a use of a deadly weapon in this or a previous offense.

Upon being informed of his denial of parole the Appellant filed an appeal before the Administrative Law Court (ALC). Within this appeal the Appellant argued that using fixed reasons relating to his offense that occurred over ten years ago is unlawful. The Appellant also argued that

[1] The Appellant has since completed the CSC 2nd and weapons offense.

the Board failed to consider a risk assessment prior to denial in violation of South Carolina law. The Respondent argued that the Board followed the mandatory criteria which allows consideration of an offense occurring over ten years ago; and the risk assessment was considered prior to denial.

On March 3, 2015, the Honorable Ralph King Anderson, III, Chief Administrative Law Judge issued his decision. Within his decision, Judge Anderson determined that the Board met all of the mandatory criteria found in law and department policy. He further determined that Rule 609 of the Rules of Evidence does not apply. Judge Anderson ordered this appeal be subject to dismissal.

Upon receipt of this order the Appellant decided to file a notice of appeal before the South Carolina Court of Appeals. Within this appeal the Appellant argues that the lower court erred by not considering a violation of rule 609(b) of the Rules of Evidence, and the reasons for denial was arbitrary and capricious. The Respondent argues that the ALC was correct in dismissing this appeal. The brief of the Respondent supporting their arguments follows.

ARGUMENTS

1. **The ALC was correct in determining that the Board complied with the statutory criteria governing parole decisions.**

The ALC determined that 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) provided guidance on his issue. In *Cooper*, the Supreme Court decided 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 present case the ALJ correctly decided that the Board properly considered the criteria in statute and department policy.

In the present 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 conclusions of law were the statutes and factors used to determine the denial of parole. The order delivered to the Appellant was clear, the criteria within the statute and the mandatory policy was considered prior to the denial of parole. The reasons given for denial were reasonable and followed the mandatory criteria.

In *Cooper*, the court determined that the order of denial was unlawful due to it not presenting any conclusions of law. It was the opinion of the Court, that in order for the Board to prove proper procedures were followed, it must not only states 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 was considered prior to the denial of parole. According to the Supreme Court, if this is shown no further action by the ALC was necessary.[2]

[2] The Parole Board 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 argued that the Board failed to consider a risk assessment pursuant to South Carolina law. The South Carolina code of laws specifically state:

> The department must develop a plan that includes an establishment of a process for adopting a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contribute to criminal behavior, which the parole board shall use in making parole decisions, including additional objective criteria that may be used in parole decisions.

S.C. Code Ann. §24-21-10 (Supp. 2012).

The Parole Board used the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) risk assessment system of evaluation. A signed affidavit from Larry Ray Patton, Jr., the Department's Director of the Office of Board Support Services, was made a part of the record. Within this affidavit Mr. Patton stated that the COMPAS risk assessment was applied and considered by the Board prior to the Appellant denial.[3] As stated within the order of the ALC the first factor on the list of Department criteria states, "The risk the inmate poses to the community," this includes consideration of the COMPAS risk assessment. The ALC was correct in determining that the COMPAS risk assessment was considered prior to denial, so the Appellant's allegations have no merit.

2. The ALC was correct in determining that there was no violation of the rules of evidence in the denial of parole.

The Appellant argued that considering his prior offense in the denial of parole is a violation of rule 609(b) of the South Carolina Rules of Evidence. This rule was created "for the purpose of attacking the credibility of a witness." Rule 609 SCRE. The ALC correctly ruled that the rules of evidence was created to "govern proceedings in the courts of South Carolina." *See,* Rule 101

[3] Within his order the Judge Anderson advised the Department that instead of relying on an affidavit, the Department should either note on Form 1212 the Department listed criteria, or a separate document that the risk assessment was considered. Since this appeal the Department has changed its order of denial to reflect that the COMPASS risk assessment was considered prior to denial.

SCRE. A parole hearing is not a court proceeding but an informal proceeding in which an impartial Board will determine if a person would be released early from incarceration under supervision. Within his brief the Appellant argued that a parole hearing is a sentencing/resentencing proceeding. That is untrue, the Appellant has received his sentence, the parole hearing is just a determination if he should be released early on parole. It has nothing to do with the sentence he is currently serving.

The ALC correctly determined that if this rule is enforced it would conflict with the mandatory criteria the Board is obligated to consider. 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. 2014).

It is clear by the reading of the above referenced statute, the actions of the prisoner before incarceration must be taken into consideration. There exist no time limit within the statute, so any prior offense or the offense he is currently serving must be considered prior to the awarding of parole.

The Appellant attempts to inflict rule 609(b) into his argument alleging that his parole was unlawfully denied. He argues that considering his prior offense which is greater than ten years old is in violation of the rules of evidence. Rule 609 of the South Carolina rules of evidence states: "evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement

imposed for that conviction." Rule 609(b). This rule applies to a person providing testimony in a court proceeding, not parole hearings. The ALC was correct in not accepting the validity of this argument.

The Appellant position were that due to the reasons being fixed and not subject to change, the decision of the Parole Board was arbitrary and unlawful. The Courts have held that identical reasons given by the Board is reasonable, as long as the Board reveals that the mandatory criteria, and a risk assessment was considered prior to denial.[4] Nothing was ever raised by the Appellant alleging that his hearing was held improperly, or the Board failed to properly consider the criteria. The allegations raised by the Appellant was that the Board considered his prior offense which is a mandatory action, pursuant to South Carolina law and Department policy. The Appellant argues that the length of time that has elapsed between the time of the occurrence of the crime, and his hearing made this consideration illegal. That argument has no merit, and was properly denied by the ALC.

If the Board could not consider the prior offense after ten years has elapsed, almost no violent offender would ever have his prior offense considered. A majority of inmates incarcerated for violent offenses serve greater than ten years prior to parole eligibility. Which means the Appellant's argument goes totally against the intent of the legislature. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). On the face of the statute it is obvious the legislature wanted the Board be the lone entity deciding parole matters, and the prior record of the prisoner must be taken into consideration. The ALC made the correct decision not accepting this argument. The decision of

[4] 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 v. S.C. Dept. of Probation, Parole and Pardon Services,* 377 S.C. 489, 661 S.E.2d 106 (2008).

the ALC was lawful and does not contain any legal errors; therefore, the decision should be affirmed by this honorable court. The appellate court sits to review errors in law only. *State v. Baccus,* 367 S.C. 41, 625 S.E.2d 216 (2006).

CONCLUSION

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

Respectfully submitted,

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May 21, 2015

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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 May 21, 2015, on Appellant this 21st day of May, 2015, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

George Tomlin, #166361
Ridgeland Correctional Institution
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I further certify that all parties required by Rule to be served have been served.

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