THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III, Chief Administrative Law Court Judge

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Administrative Law Court Docket Case No. 14-ALJ-15-0041-AP
Appellate Case No. 2015-001251

Phillip A. Brown, #118100 — Appellant.

v

South Carolina Department of Probation, Parole, and Pardon Services — Respondent

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INITIAL BRIEF OF APPELLANT

August 21, 2015

Phillip A. Brown
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3. Did the Parole Board fail in its duty to notify the proper partys and violate the Ex Post Facto clause when it applied S.C. Code Ann. §24-21-221 to Appellant after the grant of parole?

STATEMENT OF THE CASE

The Appellant, Phillip Ansel Brown, #118100, is currently serving a life sentence for Murder, from Kershaw County. Appellant has been incarcerated since June 15, 1982 due to pleading guilty before the Honorable Walter T. Cox on June 18, 1983.

The action before this Court is a Barton Petition For Release which was initiated on September 9, 2014 under the South Carolina Supreme Court ruling, Thalma Barton v. South Carolina Department of Probation, Parole, and Pardon Services, 404 S.C. 395, 745 S.E.2d 110 (2013).

On April 14, 2010 Appellant appeared before the South Carolina Department of Probation, Parole, and Pardon Services, (Board), for his annual parole hearing. Following the guidelines set forth by South Carolina statute and the South Carolina Board of Paroles and Pardons Operations Manual five (5) members of the Board voted to grant Appellant a conditional parole by majority. Appellant accepted the grant of parole and the six (6) conditions set by the Board.

On July 28, 2010 after he was enrolled in the Addiction Treatment program at Lee Correctional Institution Appellant was notified that his parole had been rescinded.

On September 8, 2010 a rehearing was held at the end of which Appellant was notified that he had been rejected for parole. After obtaining a transcript of the September 8, 2010 hearing Appellant discovered that the solicitor, law enforcement, and victim's family alleged they had not received proper notification of the hearing.

Appellant contends that the rescission of his April 14, 2010 grant of parole and subsequent September 8, 2010 rehearing and rejection for parole was in violation of South Carolina statutory law, the South Carolina Board of Paroles and Pardons Operations Manual guidelines, and is in contravention of constitutional provisions of substantive and procedural due process, and is in violation of the ex post facto clause, and does fall under Barton.

The nature of the Board's defence is that the denial of parole was not unlawful in that Appellant's due process and equal protection rights were not violated and that the circumstances in this instant case are not identical to the Barton decision.

Appellant applied for a Barton Petition For Release on September 9, 2014 which was denied on September 22, 2014.

On October 9, 2014 Appellant appealed to the South Carolina Administrative Law Court. The case was assigned to the Honorable Ralph King Anderson, III.

On May 18, 2015 the Honorable Judge Anderson issued an Order affirming the Board's decision to deny the Barton Petition For Release.

On June 4, 2015 Appellant tendered this appeal to the South Carolina Court of Appeals.

Judge Anderson was in err when he stated that Appellant failed to appeal Judge McLeod's Order of October 14, 2011. The S. C. Court of Appeals case tracking Number is: 2011203266.

Did the Administrative Law Court err when it stated that the Barton decision does not apply to Appellant?

The Administrative Law Court erred in stating that Barton v. South Carolina Department of Probation, Parole and Pardon Services, 404 S.C. 395, 745 S.E.2d 110 (2013) does not apply to this instant matter due to the fact that in both cases the Parole Board and Administrative Law Court has misinterpreted S.C. Code Ann. §24-21-645. It reads as follows:

> S.C. Code Ann. §24-21-645 Parole and provisional parole orders; review schedule following parole denial of prisoners confined for violent crimes.
>
> The Board may issue an order authorizing the parole which must be signed by a majority of its members or by all three members meeting as a parole panel on the case ninety days prior to the effective date of the parole; however, at least two-thirds of the members of the Board must authorize and sign orders authorizing parole for persons convicted of a violent crime as defined in §16-1-60. A provisional parole order shall include terms and conditions, if any, to be met upon parole. Upon satisfactory completion of the provisional period, the director or one lawfully acting for him must issue an order which, if accepted by the prisoner, shall provide for his release from custody. However, 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, except that prisoners who are eligible for parole pursuant to §16-25-90, and who are subsequently denied parole must have their cases reviewed every 12 months. This section applies retroactively to a prisoner who has had a parole hearing pursuant to

§16-25-90 prior to the effective date of this act.

Appellant contends that the grant of parole becomes effective when the prisoner receives a favorable psychological and/or the thirty day time limit for requesting a rehearing has passed.

In the Parole Board's Operations Manual (2014), page 47, section 3. Initiating The Process Of Rehearing Cases it states:

> "If the offender has been released on parole, the process will be pursuant to the applicable sections of Part III, above. If the offender has not been released on parole, the process is most often initiated by a report that the Board or panel receives from the parole examiner at the prison where the offender is incarcerated. However, a report could come from any source. The report itself would set forth the reasons why the Board or panel should conduct a rehearing in order to reconsider its original parole decision. A request for a rehearing may also be made by a petition or letter received from the requesting party within thirty (30) days of the parole rejection. This letter or petition must specify the exact reasons why the Board should reconsider its decision. The decision to grant or deny a rehearing shall be made in the sole discretion of the Board based upon the letter or petition filed by the requesting party and other documents which are made available to the Board from the parole file. Notice of the decision will be forwarded to the requesting party."

On April 14, 2010 Appellant appeared before the full Board and received five (5) votes in favor of a grant of parole. The Board assigned six (6) conditions to the parole.

The Parole Board and Administrative Law Court misconstrued S.C. Code Ann. §24-21-645. The grant of provisional parole became effective when, on

May 26, 2010 Appellant took the psychological evaluation. The thirty (30) day time limit for requesting a rehearing had passed under the Board's Operations Manual (2014) page 47, section 3. Initiating The Process Of Rehearing Cases, "... A request for a rehearing may also be made by a petition or letter from the requesting party within thirty (30) days of the parole rejection..." Even though this section states within thirty days of the parole rejection the equal protection clause compels this thirty day time limit to apply to all partys.

On June 14, 2010 Appellant was transferred to Lee Correctional Institution and enrolled in the Addiction Treatment program (ATU). This was the second condition of the provisional parole requirements that Appellant completed. Appellant graduated from the program December 17, 2010 with honors even though at the time his parole had been rescinded.

On July 28, 2010 Appellant was notified by the parole examiner, Robbie Weeks, at Lee Correctional Institution that his parole had been rescinded.

This instant matter is similar to Barton in that the Administrative Law Court and Parole Board considered only a part of S.C. Code Ann. §24-21-645 and not the statute as a whole.

In Barton the Parole Board misinterpreted section 24-21-645 as to require an inmate to receive a two-thirds majority vote of the Parole Board's seven members, thus meaning Appellant needed five votes, rather than four, to receive parole. In Barton's appeal to the Administrative Law Court claiming that the Parole Board erred by applying the current version of section 24-21-645 instead of applying the version of that statute in effect at the time Appellant committed her crime constituted an ex post facto violation. In the alternative, Appellant Barton also asserted that she should receive parole under the current version of section 24-21-645.

In Appellant's parole rescission the Parole Board and Administrative Law Court did not take into account that he had successfully completed the first of the six (6) assigned conditions of his provisional parole. The Parole Board and Administrative Law Court did not apply S.C. Code Ann. §24-21-645 as a whole according to proper statutory construction.

Appellant was granted a valid provisional parole which became effective upon completion of the thirty (30) daytime limit for requesting a rehearing and/or after the psychological evaluation and the transfer to Lee Correctional Institution. The Parole Board's claim of sufficient need for reconsideration of the original grant of parole due to information that was received after the time limit for requesting a rehearing had passed is not valid.

This instant matter is similar to Ellard v. Alabama Bd. of Pardons and Paroles, 824 F.2d 937, 945. "If a prisoner was granted valid parole in Alabama, substantive constraints of due process clause would permit parole to be rescinded only if prisoner violated parole conditions." "A state cannot declare a parole void simply on the basis of additional information that was not previously considered."

Also this instant matter is similar to Young v. Harper, 520 U.S. 143 (1997) in that the Court held,..." revocation of so-called "preparole" status conducted without due process protections which Morrissey v. Brewer, 92 S.Ct. 2593, 2604 (1972) assures individuals subject to parole revocation violated due process clause because "preparole" program... differed from parole in nome alone." "Although the Constitution does not prohibit state from declaring void previously granted parole, state's authority to do so is limited. Procedural and substantive requirements of due process clause attach so that before the state can declare parole void, parolee must be accorded procedural protections similar to those that apply when valid parole is to be revoked."

The Parole Board did not afford Appellant due process procedurally or substantively in its September 8, 2010 rescission of his parole.

The Parole Board is tasked with knowing the statutory laws from which their authority arises. It is acting as a quasi-judicial agency and is required to adhere to the totality of the statute and the legislative intent. When a state agency goes beyond legislative intent or does not consider the statute as a whole it is acting outside of statutory boundries and its actions are arbitrary and capricous.

This instant matter is similar to State v. Gordon, 356 S.C. 143, 152, 588 S.E.2d 105, 110 (2003) in that the Court held, "[T]he court should not consider the particular clause being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law."

The Parole Board and Administrative Law Court applied S.C. Code Ann. §24-21-645 so that it disadvantaged Appellant. In South Carolina there is a Constitutional restriction and requirement that penal statutes are to be construed strictly in favor of the defendant and against the state.

As in State v. Thomas, 372 S.C. 466, 642 S.E.2d 724, "Penal statutes are to be construed strictly against the State and in favor of the defendant."

Appellant is entitled to due process and adherance to statutory requirements which the Parole Board and Administrative Law Court failed to do. This Court held to the same requirements in Cooper v. South Carolina Department of Probation, Parole, and Pardon Services, 377 S.C. 489, 499, 661 S.E.2d 106, 111-112 (2008). "Parole is a privilege and Cooper has no right to be paroled; however, Cooper does have a right to require the Parole Board to adhere to statutory requirements in rendering a decision."

Did the ALC err and violate the Ex Post Facto clause in applying the amended statute S.C. Code Annotated §24-21-610 (2007) in its May 18, 2015 Order?

The ALC correctly stated that the 1982 version of S.C. Code Annotated §24-21-645 should be applied to Appellant in that Appellant needed a simple majority of four (4) votes out of seven (7) in order for parole to be granted. Then the Court applied an amended version of S.C. Code Annotated §24-21-610 to Appellant in stating that statutory requirements demanded victim or victim's family notification. The 1982 version of S.C. Code Annotated §24-21-610 did not include a requisite notification to victims or their families. This is a denial of equal protection of the law. See: Micken v Thomas v. Vaughn, 321 F.2d 374, the Court held that Ex Post Facto clause applies to statutory or policy change that alters the definition of criminal conduct or increases the penalty by which crime is punishable by law or policy violates clause when it: (1) is retrospective; i.e. applies to events occurring before its enactment; and (2) disadvantages offender affected by it. USCA Constitution Article 1 §9, cl.3, 10 cl.1.

This instant case is similar to Mickens-Thomas v. Vaughn in that changes to state's parole laws interpreted by parole board as requiring more emphasis on public safety fundamentally altered board's process for reviewing parole applications and thus potentially implicated Ex Post Facto clause when applied retroactively, statistics and parole board's substantive declarations indicated that after change public safety was sole or dominating factor, while prior to change board, under its guidelines, could deny parole only if public safety concerns together with other relevant factors outweighed, by perponderance, liberty interests of the inmate.

"For a law to fall within Ex Post Facto prohibitions, it must retroactively apply to events occuring before its enactment and it must also disadvantage

the offender affected by it." In re Treatment and care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002)

A law violates Ex Post Facto clause if it applies to events predating its enactment and disadvantages those it is applied to See Lynce v. Mathis, 519 U.S. 433, ___, 117 S.Ct. 891, 896, 137 L.Ed.2d 63 (1997) citing U.S. v. Neilssen, 136 F.3d 965, 969 (4th Circuit)

The Court's and Board's desire to accomadate the victim's family's emotions led to the ignoring the statutory construction and legislative intent behind the 1982 version of S.C. Code Annotated §24-21-610.

The 1984 version of S.C. Code Ann. §24-21-610. Eligibility For Parole. 1984 Act No. 482 §2 reads as follows:

> In all cases cognizable under this chapter the Board may, upon ten days' written notice to the solicitor and judge who participated in the trial of any prisoner, parole a prisoner convicted of a crime and imprisoned in the state penitentiary, in any jail, or upon the public works of any county who if:
>
> (1) sentenced for not more than thirty years has served at least one-third of the term;
>
> (2) sentenced to life imprisonment or imprisonment for any period in excess of thirty years, has served at least ten years.
>
> If after January 1, 1984, the Board finds that the state-wide case classification system provided for in Chapter 23 of this title has been implemented, that an intensive supervision program for parolees who require more than average supervision has been implemented, that a system for the periodic review of all parole cases in order to assess the adequacy of supervisory controls and of parolee participation in rehabilitative programs has been implemented, and that a system of contracted rehabilitative services for parolees is being furnished by public and private agencies, then in all

> cases cognizable under this chapter the Board may, upon ten days' written notice to the solicitor and judge who participated in the trial of any prisoner, to the victim or victims, if any, of the crime and to the sheriff of the county where the prisoner resides or will reside, parole a prisoner who, if sentenced for a violent crime as defined in §16-1-60, has served at least one-third of the term or the mandatory minimum portion of sentence, whichever is longer. For any other crime the prisoner shall have served at least one-fourth of the term of a sentence or if sentenced to life imprisonment or imprisonment for any period in excess of forty years has served at least ten years.

It is clear that before the enactment of the amended version of S.C. Code Ann. §24-21-610 that statutory construction and legislative intent did not require notification to any party other than the solicitor and judge. The Administrative Law Court's application of the amended version of S.C. Code Ann. §24-21-610 meets the prohibitions against ex post facto clause. The amended statute was applied to an event that occurred before its enactment and it severly disadvantaged Appellant.

Did the Parole Board fail in its duty to notify the proper partys and violate the ex post facto clause when it applied S.C. Code Ann. §24-21-221 to Appellant after the grant of parole?

The Board argues that due to the allegations put forth by the solicitor, law enforcement, and the victim's family that they had not been properly notified of the April 14, 2010 parole hearing the Board had no choice but to rescind Appellant's parole. In essence, the Board is holding Appellant responsible for their failure. Under S.C. Code Ann. §24-21-221 the responsibility of notifying any party falls on the Board.

The history of S.C. Code Ann. §24-21-221 began with the 1991 Act No. 134 §5. Any proposal for a new statute must be stated specifically if it is to be applied retrospectively. All other proposals that make it into the S.C. Code of Laws is to be applied prospectively. The determining factor of whether this particular statute can be applied to Appellant lies in the legislative intent behind the act.

The Board has applied S.C. Code Ann. §24-21-221 to Appellant in err of law. When the legislative intent is not clear the court adheres to the presumption that statutory enactments are to be given prospective rather than retroactive application. When a statute creates a new obligation or imposes a new duty, such as in Appellant's case, courts generally considers the statute prospective only. A statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt. The statute must contain express words evincing intent that it be retroactive or words necessarily implying such intent.

S.C. Code Ann. §24-21-221. Notice of Hearing to Consider Parole; To Whom Required.

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.

This instant matter is similar to Jernigan v. State, 340 S.C. 256, 260-61, 531 S.E.2d 507 (2000) in that a change in the law that is being applied retroactively to Appellant has caused an increase in the measure of punishment.

In Jernigan, "An ex post facto violation occurs when a change in the law retroactively alters the definition of a crime or increases the punishment for a crime." E.g. Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997); California Dep't of Correction v. Morales, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995); Farris v. State, 334 S.C. 21, 511 S.E.2d 688 (1999). "Regarding the issue of increase of punishment, the relevant inquiry is whether the legislative amendment "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." "Morales, 514 U.S. at 509, 115 S.Ct. at 1603, 131 L.Ed.2d at 597. "If the amendment produces only a "speculative and attenuated possibility" of increasing an inmate's punishment then there is no ex post facto violation. Id. A court should look at the effect of the statute on the "quantum of punishment" to determine whether an amendment offends the Ex Post Facto Clause."

In S.C. Code Ann. §24-21-221 there is no specific wording that directs a retroactive application to prisoners whose crimes occurred before its enactment in 1991.

Appellant puts forth that this instant matter relates to Griffin v. State, 315 S.C. 285, 433 S.E.2d 862, 864 (1993). In Griffin the South Carolina Supreme Court held that where procedural rule is so overly intrusive that it substantively affects review standard, it becomes ex post facto violation.

According to S.C. Code Ann. §24-21-221 the director must issue a written notice thirty days before any Board hearing. If the director did not notify the solicitor, law enforcement, and victim's family then the director failed in his/her duty.

The chairperson stated in the transcript of the September 8, 2010 hearing that "given letters were received from the sheriff of the county", that this case had been heard before and that the Board did grant parole. The next statement from the chairperson was that they now had a letter from county and state that they had not been notified, and that there was an attempt to contact the victims, but they did not have the addresses to contact the victims. The victims showed no interest in participating in the parole hearings until after Appellant was granted parole.

The chairperson further stated that a second vote was held. On the second vote the Board stood with their original vote to parole Appellant. He was sent to the Addiction Treatment program (ATU) as part of parole recommendations. In the meantime, Ms. Gardener, who is a family member of the victim who was murdered, came forth and stated that she has never been notified. The information in the record is that they have given their addresses. And they have been living at these addresses.

Appellant made the good faith effort to acquire a transcript of the panel meeting and the date when the Board made the decision to rescind his parole through the freedom of information act, S.C. Code of Law Title 30, but was denied access. The production of these documents now lies with the director of the Parole Board.

Appellant contends that the chairperson willfully violate S.C. Code of Laws and its own Operations Manual in order to not be held responsible for Appellant's release from incarceration.

CONCLUSION

For the reasons stated below Appellant prays for relief to be granted by this Court:

(1) This Court will reverse the decision of the Parole Board of October 8, 2010;

(2) Remand this case back to the Parole Board with instructions that the Appellant be released on Parole;

(3) Or, in the alternative, that this Court issue its own findings of fact and conclusions of law regarding Appellant's September 8, 2010 parole hearing and Order that he be released on Parole.

August 21, 2015

Respectfully Submitted,

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Appellant, pro se

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Chief Administrative Law Court Judge

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Appellate Case No. 2015-001251

Phillip A. Brown, #118100 Appellant

v

South Carolina Department of Probation, Parole, and Pardon Services Respondent

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CERTIFICATE OF SERVICE

I, Phillip A. Brown, Appellant pro se, certify that I have served one copy of Initial Brief Of Appellant and Designation Of Matter on the Honorable Jana Shealy, Clerk, Administrative Law Court, by depositing the same in the United States Mail, postage prepaid, the 21st day of August 2015, addressed as follows:

The Honorable Jana Shealy, Clerk
Administrative Law Court, Suite 224
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Columbia, S.C. 29201-3756

Phillip A. Brown

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THE STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

I, Phillip A. Brown, Appellant pro se, certify that I have served on counsel for the Respondents a copy of Initial Brief Of Appellant and Designation Of Matter on Respondents by depositing the same in the United States Mail, postage prepaid, the 21ST day of August 2015, addressed to:

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To: The Honorable Jenny Abbott Kitchings, Clerk
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RE: Phillip A. Brown, #118100 v. South Carolina Department of Probation, Parole, and Pardon Services (3)
Appellate Case No. 2015-001251

Date: August 21, 2015

Dear Ms. Kitchings,

Please find enclosed for filing one original and one copy of Initial Brief Of Appellant, and Designation Of Matter, and two copies of Certificate of Service.

Thank you for your help in this matter.

Respectfully Submitted,
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