**STATE OF SOUTH CAROLINA**
**ADMINISTRATIVE LAW COURT**

Tony Moore, Jr., #188313,

Appellant,

vs.

South Carolina Department of Probation, Parole and Pardon Services,

Respondent.

Docket No. 15-ALJ-15-0015-AP

**ORDER**



## STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or court) pursuant to the appeal of Tony Moore, Jr. (Appellant), an inmate incarcerated with the South Carolina Department of Corrections. On February 10, 2015, the South Carolina Department of Probation, Parole and Pardon Services (Department) issued a final decision letter stating that the Appellant is ineligible for parole, pursuant to South Carolina Code Section 24-21-640. On March 10, 2015, the Appellant filed a Notice of Appeal challenging the Department's determination on constitutional grounds. The Appellant's case was assigned to this court on March 11, 2015.[1] For the following reasons, the Department's decision is affirmed.

## BACKGROUND

On June 2, 1992, the Appellant pleaded guilty and was sentenced as a youthful offender for Second Degree Burglary, Accessory Before the Fact to Assault and Battery with Intent to Kill, and Assault and Battery with Intent to Kill. During the commission of these crimes, the Appellant was seventeen years old. On March 23, 1995, the Appellant was sentenced to life in prison after being found guilty of Murder. At the time of the murder, the Appellant was twenty years old. Second Degree Burglary, Assault and Battery with Intent to Kill, and Murder have been classified as violent crimes under South Carolina Code Section 16-1-60 since its enactment in 1986 as part of the Omnibus Criminal Justice Improvements Act. *See* S.C. Act No. 462, § 33 (1986).

## ISSUES ON APPEAL

1. Did the Appellant receive due process when he was deemed ineligible for parole?

[1] This court has considered the Appellant's Reply Brief, filed on June 22, 2015, and considers it timely filed.

2. Does the denial of parole eligibility for the Appellant violate the Eighth Amendment?

## STANDARD OF REVIEW

The court's jurisdiction to hear this matter is derived from the South Carolina Supreme Court decisions in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000), and *Furtick v. S.C. Dept. of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2003). The *Al-Shabazz* decision explained that "procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property." *Wicker v. S.C. Dept. of Corrs.*, 360 S.C. 421, 424, 602 S.E.2d 56, 58 (2004) (citation omitted). In *Furtick*, the court ruled that the permanent denial of parole eligibility implicates such a liberty interest, and is thus reviewable by the ALC. *Furtick*, 352 S.C. at 598–99, 576 S.E.2d at 149.

When reviewing the Department's permanent denial of parole eligibility, the ALC sits in an appellate capacity. *See id.; Al-Shabazz*, 338 S.C. at 377, 527 S.E.2d at 754. Under the appellate standard of the Administrative Procedures Act, the court's review is limited to the record, absent irregularities in the procedure of the agency. S.C. Code Ann. § 1-23-380(4) (Supp. 2014). The court may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5) (Supp. 2014). Substantial rights of the appellant are prejudiced when the agency's decision is in violation of constitutional provisions. S.C. Code Ann. § 1-23-380(5)(a) (Supp. 2014).

As part of the executive branch, the ALC cannot decide a facial constitutional challenge to a statute. *Travelscape, LLC v. S.C. Dept. of Revenue*, 391 S.C. 89, 108–09, 705 S.E.2d 28, 38–39 (2011) (citing *Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000)). Rather, the ALC can rule on whether a law violates the appellant's constitutional rights as applied. *Id.* (citing *Dorman v. Dept. of Health & Envtl. Control*, 350 S.C. 159, 171, 565 S.E.2d 119, 126 (Ct. App. 2002)).

## DISCUSSION

It is well established that parole is a privilege, not a right. *State v. Dingle*, 376 S.C. 643, 649, 659 S.E.2d 101, 104 (2008) (citing *Sullivan v. S.C. Dept. of Corrs.*, 355 S.C. 437, 443 n.4, 586 S.E.2d 124, 127 n.4 (2003)). This privilege is administered by the Parole Board and is a matter separate and apart from sentencing. *Id.*, 335 S.C. at 649, 659 S.E.2d at 104–05 (citing *State v. McKay*, 300 S.C. 113, 115, 386 S.E.2d 623, 623–24 (1989)). The Appellant first asks the court to find that the administration of parole implicates a fundamental right under the Due Process Clause.

As stated, this court does not have the jurisdiction to rule on a facial challenge to the constitutionality of the laws governing the parole process. Thus, the court will only determine whether the Appellant received the due process required by law in this case.

Contrary to the Appellant's position, the Supreme Court of South Carolina has found that where an inmate's liberty interest is at stake, he or she is only entitled to "'those minimum procedures appropriate under the circumstances and required by the Due Process clause to ensure that the state-created right is not arbitrarily abrogated.'" *Furtick*, 352 S.C. at 598, 576 S.E.2d at 148 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963 (1974)). As applied to his own case, the Appellant argues that he did not receive due process for two reasons: the determination that he is ineligible for parole is based solely on a review of his records and he was not informed prior to his jury conviction for murder that he would be ineligible for parole.

Section 24-21-640 specifically prohibits the Parole Board from providing the type of individualized assessment the Appellant is seeking in this case. *See* S.C. Code Ann. § 24-21-640 (Supp. 2014) ("The board must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60."). The court finds that the Department's review of the Appellant's record to determine if the Appellant fell within the confines of the violent crime exclusion, and the subsequent opportunity for judicial review, is sufficient to satisfy the demands of due process. Furthermore, the unambiguous language of the violent crime exclusion was contained in Section 24-21-640 at the time of all the Appellant's crimes and convictions. *See* S.C. Code Ann. § 24-21-640 (Westlaw through 1995) (showing no amendments between 1990 and 1995). Due process is satisfied where the law provides fair notice of the conduct forbidden by law and the penalty that applies, such that a person of ordinary intelligence could understand. *See Thomas v. Davis*, 192 F.3d 445, 455 (4th Cir. 1999) (citations omitted); *see also State v. McKnight*, 352 S.C. 635, 650, 576 S.E.2d 168, 176 (2003) (citations omitted). Thus, there is no question that the Appellant was on notice of the possibility that he would be ineligible for parole.

The Appellant also argues that the denial of parole eligibility violates the Eighth Amendment. Citing two recent Eighth Amendment opinions concerning juveniles sentenced to life without parole, the Appellant argues that he has effectively been sentenced to life without parole on the basis of crimes committed when he was seventeen. The Appellant argues that the

same principles at stake in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), and *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), apply to this case and compel the court to conclude that the denial of parole eligibility to the Appellant constitutes cruel and unusual punishment. The court disagrees.

First, the court notes that the two above-cited cases do not hold that sentencing a juvenile to life without parole is a cruel and unusual punishment in every case; instead, they conclude that such a sentence must not be mandatory and may not be imposed without an individualized hearing that considers the defendant's youth and its effect on culpability. *Aiken,* 410 S.C. at 538–39, 765 S.E.2d at 574–575 (citations omitted). Second, the court agrees with the Respondent that a number of factors distinguish this case from *Miller* and *Aiken.*

The *Miller* decision was based largely on some specific concerns: the immaturity, recklessness, and underdeveloped sense of responsibility characteristic of juveniles who may be more likely to bend to outside influences, and the lack of an opportunity to attempt reform when there is no release from prison. *See Miller*, 132 S.Ct. at 2464 (citations omitted). The Appellant argues that these concerns apply in his case because the convictions preventing his parole eligibility were committed when he was seventeen. However, the Appellant is not serving the sentence imposed for those crimes. Indeed, when the Appellant was sentenced for those offenses, his sentence took into consideration his youth and the possibility that he might change his behavior in the future. The Appellant received a concurrent Youthful Offender Act (YOA) sentence not to exceed six (6) years for his three 1992 convictions. Nonetheless, less than three (3) years after receiving that sentence, the Appellant committed murder, just a few days before his twenty-first birthday. At the time of this crime, the Appellant was fully an adult, capable of self-control and aware of the possible consequences of his actions. After being found guilty by a jury, the Appellant received a life sentence—the minimum sentence allowed by law at that time. S.C. Code Ann. § 16-3-20 (Westlaw through 1995). At that time, Section 16-3-20 provided that an inmate serving life was "not eligible for parole until the service of twenty years . . . ." *Id.*

The Appellant argues that he is serving a life sentence without parole "solely based on prior activity that occurred during youth." However, this is an inaccurate characterization. The violent crime exclusion in Section 24-21-640 is a sentence enhancement. *See Phillips v. State*, 331 S.C. 482, 504 S.E.2d 111 (1998); *see also State v. Williams*, 380 S.C. 336, 669 S.E.2d 640 (Ct. App. 2008). The Appellant is not serving a sentence for his 1992 convictions, rather he is serving a sentence for murder aggravated by his prior convictions. The Appellant argues that he deserves a

chance for reform, but it is precisely because he is a recidivist that he is denied parole eligibility. The South Carolina Supreme Court has previously held that a recidivism enhancement based on crimes committed as a juvenile does not offend the Eighth Amendment. *State v. Standard*, 351 S.C. 199, 206, 569 S.E.2d 325, 329 (2002). The Court of Appeals also reached this conclusion after considering the *Miller* and *Aiken* decisions. *State v. Green*, 412 S.C. 65, 86, 770 S.E.2d 424, 435 (Ct. App. 2015). Therefore, the court concludes that the application of South Carolina Code Section 24-21-640 to the Appellant does not violate his rights under the Eighth Amendment.

**ORDER**

For the foregoing reasons, the Department's determination that Appellant is ineligible for parole is **AFFIRMED.**

**AND IT IS SO ORDERED.**

S. Phillip Lenski, Judge
S.C. Administrative Law Court

January 15, 2016
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 15th day of Jan 2016

By: _____
Judicial Law Clerk