STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge
Docket No. 13-ALJ-15-0027-AP

Appellant Case No.: 2014-001047

RONALD TATE, #00114188.....APPELLANT

v.

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

FINAL BRIEF OF RESPONDENT

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1. **Has the Board retroactively applied Section 16-1-60 of the South Carolina Code of Laws redefining his offense as violent in violation of ex post facto?**

2. **Has the application of the current criteria and not the criteria that existed at the time the offense was committed deprive the Appellant of a liberty interest, and violated ex post facto?**

3. **Has cumulative changes in parole laws since the Appellant's conviction violate the ex post facto clause?**

4. **Has the Respondent denied the Appellant annual parole review in violation of South Carolina law?**

STATEMENT OF THE CASE

On December 17, 1982, the Appellant while armed with a pistol entered the lobby of the Travel Lodge Motel in Greenville, South Carolina. Upon entry he demanded a sum of money from the hotel clerk. She refused to comply, so he fatally shot her in the chest. Upon hearing the gunshot another victim ran into the lobby, and was shot in the leg by the Appellant. Later that night the Appellant unlawfully broke into the Hack Motor Company, and stole a vehicle off the premises. The Appellant was later caught, arrested and charged with the offenses of murder, attempted armed robbery, assault and battery with intent to kill (ABIK), housebreaking and grand larceny.

On August 13, 1982, the Appellant appeared before the Honorable Frank Epps for all of the above referenced offenses. The lower court proceeded to sentence the Appellant to a term of incarceration for the remainder of his natural life for the offense of murder; twenty (20) years for armed robbery and ABIK; ten (10) years for grand larceny; and, five (5) years for housebreaking. 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 twenty years.

The Appellant initially appeared before the Board on April 1, 1998. At the conclusion of this appearance the Board decided to deny the Appellant an opportunity to be released on parole. Since this initial denial the Appellant has appeared before the Board an additional fourteen (14) times, each resulting in a denial of parole. The Appellant appeared before the Board on June 19, 2013. Parole was denied due to: 1) the nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; and, 3) a use of a deadly weapon in this or a previous offense.[1]

[1] Parole has since been denied on June 11, 2014 for the identical reasons.

Upon being denied parole the Appellant filed a notice of appeal before the Administrative Law Court (ALC). On April 9, 2014, the Honorable S. Phillip Lenski, Administrative Law Judge issued an order affirming the decision of the Board. Upon receiving this decision the Appellant decided to file a notice of appeal in the South Carolina Court of Appeals.

Within this appeal the Appellant alleges; the Board violated ex post facto by using current criteria instead of the criteria existing at the time he committed the offense; and retroactively applying Section 16-1-60 of the South Carolina Code of Laws. The Appellant further alleges that the Board violated ex post facto by applying cumulative changes in the law since his conviction; and has been denied annual parole review in violation of South Carolina law. The Respondent will argue that there did not exist any violation of ex post facto, and the Appellant is being allowed to appear before the Board annually. The brief of the Respondent supporting its arguments follows.

ARGUMENTS

1. **The use of the current criteria in the denial of the Appellant's parole is not a violation of ex post facto.**

The Appellant argues that the use of the current criteria in the denial of parole, instead of the criteria existing at the time of the offense, violates of ex post facto. It is the position of the Respondent, that the criteria has not changed to the point that it should be considered a change in punishment; therefore, it cannot be considered a violation of ex post facto. The current criteria found in South Carolina law specifically states:

> 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, suitable employment has been secured for him.

S.C. Code Ann. §24-21-640 (Supp. 2013).

At the time the offense was committed, Section 55-612 stated the criteria the Board must follow prior to making a decision of parole. Section 55-612 specifically state:

> The Probation, Parole and Pardon Board shall carefully consider the record of the prisoner, before during and after imprisonment, and no such prisoner shall 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 interests of society will not be impaired thereby; and that suitable employment has been secured for him.

S.C. Code Ann. §55-612 (Supp. 1962)

In comparing the two statutes, it only differs by the word "shall" being replaced by the word "may." All other criteria remains the same. This difference is merely procedural, and cannot be considered a violation of ex post facto. A mere procedural change which does not affect substantial rights is not ex post facto even when it has detrimental impact on the defendant. *State v. Huiett*, 302 S.C. 169, 394 S.E.2d 486 (1990).

The Appellant argues that the word "may" replacing the word "shall" creates a guarantee that if the criteria is followed that the Board must grant parole. In both statutes the Board is the sole entity making a parole determination, in which there is no guarantee. He also argues that that the old law creates a state created liberty interest in being released on parole. There has never existed a liberty interest in being released on parole. In South Carolina parole is considered a privilege, not a matter of right. *Major v. S.C. Dept. of Probation, Parole and Pardon Services*, 384 S.C. 457, 682 S.E.2d 795 (2009). Parole is a creature of statute, and is exclusively in the province of the legislative branch of government. *Id.* There is nothing written in statute or case law revealing a prisoner has a state created liberty interest in being released on parole. The original wording of this statute does not create a liberty interest in being released on parole. It is clear that it must be

upon "the satisfaction of the board," before a prisoner can be released on parole. The South Carolina Supreme Court has never concluded that there is a state created liberty interest in being released on parole. Quite the contrary, South Carolina courts have consistently held that parole is not a right but a privilege, and there exists no liberty interest in being granted parole. *Sullivan v. South Carolina Department of Corrections*, 355 S.C. 437, 586 S.E.2d 124 (2004)(parole is a privilege not a right); *Steele v. Benjamin,* 362 S.C. 66, 606 S.E.2d 499 (2004)(the distinction is that the review or consideration for parole is a right granted by statute whereas parole is only a privilege.); *James v. S.C. Dept. of Probation, Parole and Pardon Services*, 376 S.C. 392, 656 S.E.2d 399 (2008)(inmate did not have a protected liberty interest in parole, but only a hearing to determine parole eligibility). Although the Appellant has the right to an impartial hearing, he does not have a right to be released on parole.

The Appellant fails to realize he was given a life sentence; therefore, according to his sentence he could possibly be incarcerated for the remainder of his natural life. The opportunity to be eligible for parole only gives the Appellant the ability to appear before the Board, there is never a guarantee of release on parole. The Appellant was given the opportunity to appear before the Board numerous times; so there exists no denial of a liberty interest.

There also exist another difference between the old statute and the current statue. Within the current statute the Department is obligated to create its own criteria.[2] This criteria does not add to the statutory criteria, but encompasses the criteria found in the statute. These Department criteria covers matters that could be to the inmate's detriment (ex. The nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it); but they also cover matters within the inmates control that could to be to his advantage, (ex. The

[2] The board must establish written, specific criteria for the granting of parole and provisional parole. S.C. Code Ann. §24-21-640 (Supp. 2013)

inmate's efforts to solve his/her problems, such as seeking treatment for substance abuse, enrolling in academic and vocational educational courses, and in general using whatever resources the Department of Corrections has made available to inmates to help with their problems). In both versions only the Parole Board can decide whether or not a person should be granted parole. The current statute does not change the criteria or the decision makers, nor does it not increase punishment so it cannot be considered a violation of ex post facto. The relevant inquiry is whether the legislative amendment produces a sufficient risk of increasing the measure of punishment to the covered crimes. *Jernigan v. State,* 340 S.C. 256, 531 S.E.2d 507 (2000).

2. The Respondent did not retroactively apply Section 16-1-60 in violation of ex post facto.

The Appellant argues that the Board unlawfully retroactively applied section 16-1-60 of the South Carolina Code of laws to his parole case. This statute created the classification of violent offenses as part of the Omnibus Criminal Justice Improvement Act of 1986. This law was created after the Appellant committed his offense; therefore, the Board has never classified the Appellant as a violent offender.

The Appellant argues that since one of the reasons for denial is an "indication of violence in this or a previous offense," the board classified his offense as violent. The Appellant entered a business with a pistol with the intent to rob, shot a woman to death, and another in his leg. This act was clearly an act of violence. Even though it is not classified as a violent offense, it was a violent act. The violent nature of this act must be considered by the board prior to any decision regarding the release on parole.

The Appellant also alleges that during his parole hearing he was required to have a two-thirds vote in order to be release on parole. He argues this violated the South Carolina Supreme Court decision of *Barton v. South Carolina Dept. of Probation, Parole and Pardon Services,* 404 S.C.

395, 745 S.E.2d 110 (2013). The ALC determined the Appellant did not receive any prejudice in requiring him to receive a two-thirds vote, they are correct.

At the time the Appellant committed his offense South Carolina law stated:

> The Board may issue an order authorizing the parole which shall be signed either 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.

S.C. Code Ann. §24-21-645 (Supp. 1984).

As part of the Omnibus Criminal Justice Improvement Act of 1986 additional language was added to state that, "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 Section 16-1-60." S.C. Code Ann. §24-21-645 (Supp. 1986). In *Barton,* the South Carolina Supreme Court decided, that requiring an inmate convicted prior to 1986 a two-thirds vote to be granted parole violates ex post facto. The Appellant argues, that due to *Barton* the Board violated the law by requiring a two-thirds vote to be granted parole. The Appellant suffered no prejudice, the ALC was correct in not providing any relief.

In *Barton*, the Appellant Thalma Barton was serving a life sentence for the offense of murder. She appeared before the Parole Board on January 8, 2012, and with only six of the seven members present, four voted in the affirmative. *Barton*, at 399. Due to the law existing at the time of the hearing requiring a two-thirds vote, the Board determined Ms. Barton had not receive the votes required to be granted parole. Ms. Barton appealed, and the South Carolina Supreme Court decided that since the law existing at the time of the offense allowed a majority, so it was unlawful to deny her parole. Unlike *Barton*, the Appellant has never received an affirmative vote in any of his thirteen (13) parole hearings. In applying the old law, the Appellant would still have been

denied parole. There exist no prejudice, so the ALC rightfully decided to affirm the decision of the Board.

The Appellant could have been prejudiced if he was denied parole due to the subsequent violent offender law. Section 24-21-640 of the South Carolina Code of Laws, specifically state:

> The [parole] board must not grant, nor is parole authorized to any prisoner serving a sentence for 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.

S.C. Code Ann. §24-21-640 (Supp. 2013).

In determining whether an offender is a subsequent violent offender, the subsequent crime must have been committed after June 3, 1986, and classified as violent at the time of its commission. The prior crime can be committed at any time including after the offense date of the subsequent crime because the focus is on the date of sentencing not the date of commission.

There are exceptions however, if the subsequent crime was committed between January 1, 1994 and January 12, 1995, the prior crime must have been classified as violent at the time the subsequent crime was committed. With the exception of this window, there exist no ex post facto violation where an inmate is treated as a subsequent violent offender based in part on a prior conviction which was not defined as violent on the date that the prior crime was committed. *Sullivan v. State*, 331 S.C. 479, 504 S.E.2d 110 (1998); *see also, Phillips v. State*, 331 S.C. 482, 504 S.E.2d 111 (1998). This Court has also previously decided that a prior violent offense committed in another state will not preclude a prisoner from being eligible for parole. *See, State v. Hinton*, 357 S.C. 327, 592 S.E.2d 335 (2005).

Though the Appellant is serving the violent offense of murder, he committed the offense on August 13, 1982, prior to the above referenced effective date of the statute. Since the Appellant

committed this offense prior to the effective date he is eligible for parole. This portion of the statue does not apply.

The Appellant cannot be considered a subsequent violent offender, and he has not been prejudiced by the Board in requiring a two-thirds vote to be granted parole. Since he did not receive any prejudice the ALC was correct in affirming the decision of the Parole Board. 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).

3. The Appellant is appearing before the Board annually so there exist no violation of ex post facto.

The Appellant alleges that he is being denied an annual appearance before the Board in violation of ex post facto. The Appellant is currently being allowed to appear annually so there exist no violation of South Carolina law.

At the time the Appellant committed this offense South Carolina law allowed upon the denial of parole a case can be reviewed "every twelve months thereafter." S.C. Code Ann. §24-21-620 (Supp. 1981). The Appellant alleges that he has not been allowed to appear before the Board on an annual basis since his initial hearing in 1998. Due to unforeseen circumstances he was not heard in 1999 and 2010. The ALC was correct in not considering this matter since it was not brought before the Court.

Though the Appellant did not appear before the Board in 1999 or 2010 he appeared on April 1, 1998, May 24, 2000, May 22, 2001, July 17, 2002, July 16, 2003, July 28, 2004, July 13, 2005, July 26, 2006, August 29, 2007, October 8, 2008, November 17, 2009, February 9, 2011, May 9, 2012, and June 19, 2013, and, June 11, 2014.[3] The Appellant has appeared yearly except for two

[3] The Appellant's next hearing is scheduled to occur on June 11, 2015.

occasions when the hearing was postponed, but immediately rescheduled. The Appellant was denied upon his reappearance, so the failure to appear those two time did not cause any prejudice.

4. The Appellant does not mention what changes in parole laws that has cause him prejudice; therefore, this issue is not preserved for appeal.

Within his initial brief the Appellant argues that there has been significant changes in the law regarding parole that has caused him prejudice by increasing punishment attached to the covered crimes. He does not mention what these changes are, or how these changes affected his punishment. This argument has never been preserved for appeal, and should not be considered.

The Appellant argues that the parole laws changed significantly through the Omnibus Criminal Justice Improvement Act of 1986. Within this Act only two major changes was made regarding parole, none of which pertains to the Appellant. First, this act created the violent classification which causes individuals not to be eligible for parole upon the conviction of a second crime that is classified as violent; second, persons who have committed a violent offense must wait two years upon rejection to reappear before the Board. The Appellant is currently eligible for parole and is appearing on a yearly basis. Neither of these laws apply to the Appellant. The ALC was correct in affirming the decision of the Parole Board.

The Appellant argues that the change in the law as being applied to him violates of ex post facto. In order for a law to be prohibited by the ex post facto clause two elements must be present: (1) the law must be retrospective so as to apply to events occurring before its enactment; and, (2) the law must disadvantage the offender affected by it. *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446 (1987); *Huiett, supra.* However, before this two part analysis can even begin, the statute in question must be found to be punitive in nature such that it inflicts punishment merely by requiring the conduct called for in the law. *State v. Walls*, 348 S.C. 26, 558 S.E.2d 524 (2002). As the Appellant has attempted to prove, the only minor change in the law since his crime was committed

was a procedural change in the criteria. The change of the wording from "may" to "shall," is a minor change and does not change the overall criteria, or the decisions makers. It still remains solely up to the Board to grant or deny parole. Since this change does not constitute punishment, nor disadvantage the Appellant, it cannot be considered a violation of ex post facto.

The Appellant has made an attempt to prove that he was unlawfully denied parole, and that he is currently not being allowed to appear before the Board yearly. The Appellant has not provided proof that the ALC wrongfully decided to affirm the decision of the Parole Board. The burden is on the Appellant to prove his allegations. 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 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.2d 643 (2000). The Appellant failed to present substantial evidence revealing that his parole was denied unlawfully. Since there was no sufficient substantial evidence revealed to the ALC they made the correct decision by affirming the decision of the Parole Board. This decision should be affirmed by this Honorable Court. The findings of the Appellant panel are presumed correct and will only be set aside if unsupported by substantial evidence. *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981).

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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February 4, 2015

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v.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and with the South Carolina Supreme Court's order dated August 13, 2007.

Tommy Evans, Jr
Assistant General Counsel

February 6, 2015

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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated February 6, 2015, on Appellant this 6th day of February, 2015, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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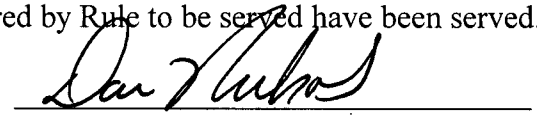
I further certify that all parties required by Rule to be served have been served.



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