THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

Appeal form the Administrative Law Court
The Honorable S. Phillip Lenski, Administrative Law Court Judge
Appellant Case No. 2015-000196

S.C. Court of Appeals Opinion No. 2016-UP-163
Submitted December 1, 2015 – Filed April 6, 2016

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

v.

James Tinsley, APPELLANT

PETITION FOR REHEARING

The Respondent, the South Carolina Department of Probation, Parole and Pardon Services respectfully petitions this Court for rehearing pursuant to Rule 221(a), SCACR. The Respondent hereby seeks a rehearing on the grounds that the Court may have misapprehended or overlooked several crucial points by concluding that the Administrative Law Court (ALC) erred in determining that they did have jurisdiction to determine if the Appellant parole was denied unlawfully.

Specifically, the Respondent submits this Court may have misapprehended that the Board erred in considering the Appellant's prior probation revocations in the denial of parole. This Court determined that since these offenses were expunged the Board, "deviated from the statutory criteria for parole by using allegedly expunged records." The Respondent will put before the Board that

considering historical events that is a direct result of the offense that the Appellant has committed is not in violation of the mandatory criteria, regardless if the conviction has been expunged.

The Appellant presented his case before the Parole Board on April 9, 2014. Upon the conclusion of this hearing the Board decided to deny parole due to the Appellant's failure to successfully complete a previous community supervision program. Upon being denied parole the Appellant requested the Board reconsider their position; this request for reconsideration was subsequently denied. After this denial the Appellant filed a notice of appeal before the ALC. Within this appeal the Appellant argued that the Board erred in considering factors stemming from an offense that has been expunged. On January 14, 2015, the Honorable S. Phillip Lenski, Administrative Law Judge issued an order affirming the decision of the Parole Board. The lower Court determined that, "since the Board revealed to the ALC that all the mandatory criteria was considered, the decision is not tantamount to a permanent denial of parole so the Court does not have jurisdiction to review the factual basis of the Board's decision."

After this decision, the Appellant filed a notice of appeal before the South Carolina Court of Appeals. Upon review of all the submitted briefs this Court determined that the ALC erred in their decision. This Court determined that the ALC has jurisdiction to review whether the Board deviated from the statutory criteria by using allegedly expunged records. The Respondent argues that the consideration of factors stemming from offenses that were expunged are not in violation of the mandatory criteria, so there exists no error, the ALC does not have jurisdiction; therefore, the decision of the ALC should be affirmed.

The Respondent respectfully request this Court to grant this petition for rehearing and issue an opinion affirming the decision of the lower court. The Respondent also requests this court to

determine that the consideration of his record prior to his incarceration regardless of the offense being expunged was not unlawful, and followed the mandatory criteria.

The Respondent did not err in using the prior violation of parole in the denial of the Appellant's parole regardless of the prior offense being expunged.

Pursuant to South Carolina law the Parole Board is the only entity that has the ability to determine if an inmate should be allowed release on parole. The Parole Board is the sole authority with respect to decisions regarding the grant or denial of parole. *Cooper v. S.C. Dept. of Probation, Parole, and Pardon Services,* 377 S.C. 489, 661 S.E.2d 106 (2008). Prior to making the decision regarding the denial of parole, mandatory criteria established by the General Assembly must be considered. 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 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. 2015).

In *Cooper,* the South Carolina Supreme Court determined that if the Parole Board fails to consider and apply the statutorily-created parole criteria, it has the effect of rendering an inmate parole ineligible, which under *Furtick* warrants review by the ALC.[1] *Cooper,* at 113. The ALC rightfully determined that the Parole Board revealed within their order of denial that all of the criteria has been considered prior to denial, and the reason for denial relates to factual issues beyond the Court's jurisdiction. The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380(5)(Supp. 2015). This

[1] *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services,* 352 S.C. 594, 576 S.E.2d 146 (2003).

Court made the determination that this case does fall within the jurisdiction of the ALC, because the Board deviated from the criteria by considering facts stemming from expunged records. The Respondent argues that it is totally within the rights of the Board to consider the prior supervision record of the Appellant regardless if the underlying offense was expunged. Since the Board followed the above referenced criteria the determination of the ALC was lawful.

According to the South Carolina Code of Law:

> If a person's record is expunged pursuant to Article 9, Title 17, Chapter 22 because the person was charged with a criminal offense, or was issued a courtesy summons pursuant to Section 22-3-330 or another provision of law, and the charge was discharged, proceedings against the person were dismissed, or the person was found not guilty of the charge, then the arrest and booking record, associated bench warrants, mug shots, and fingerprints of the person must be destroyed and no evidence of the record pertaining to the charge or associated bench warrants may be retained by any municipal, county, or state agency. S.C. Code Ann. §17-1-40(B)(Supp. 2015).

This expungement law also pertains to those who have been convicted and sentenced under the Youthful Offender Act.[2] Under this law the Appellant's convictions pursuant to the Youth Offender Act was expunged. Expungement only applies to the records pertaining to the "charge" including arrest and booking records. It does not apply to any recordation of historical events beyond the charge itself. *Compton v. South Carolina Department of Corrections,* 392 S.C. 361, 369, 709 S.E.2d 639, 643 (2011).[3] The fact the Appellant failed to abide by the conditions of parole is a criteria that must be considered. How can the Board rely on the Appellant completing parole if he has failed in the past? The Board was fully within their right under the law to consider the

[2]Following a first offense conviction as a youthful offender, the defendant after five years from the date of completion of his sentence, including probation and parole, may apply, or cause someone acting on his behalf to apply to the circuit court for an order expunging the records of the arrest and conviction. S.C. Code Ann. §22-5-920 (Supp. 2015).

[3] The distinction drawn under section 17-1-40(A) is the distinction between "capital –e Escape" – a criminal charge – and "lower case-e escape" – a mere fact that a person was AWOL. Section 17-1-40(A) prohibits the retention, and by extension the dissemination, of the former; it contains no restrictions with respect to the latter. *Id.*

fact the Appellant failed to abide to supervision in a prior offense, an expungement does not remove this responsibility. The Act specifically protects only the arrest, and makes no mention of the underlying conduct. *State v. Joseph,* 328 S.C. 352, 360, 491 S.E.2d 275, 279 (1998). The expungement statute only allows that any identifying traits of the arrest (ex. warrant, indictment, mug shots) be destroyed; however, any underlying facts stemming from the actual arrest does not have to be destroyed. Even though the Appellant had these offenses expunged, it does not negate the fact these acts were committed, and while on parole he violated numerous times. A fact that cannot and should not be ignored by the Parole Board.

The basic responsibility of the Parole Board is to release individuals who have shown through prior conduct that they can be successful while being supervised. The fact an individual has been previously revoked, must be considered. The above referenced criteria specifically state, "The Board must carefully consider the record of the prisoner **before, during and after imprisonment**." S.C. Code Ann. §24-21-640(Supp. 2015)(emphasis added). The fact the Board considered the prior record of the Appellant regardless of an expungement was not done in error.

Pursuant to *Cooper,* in order for the ALC to consider the decision of the Parole Board there must be some sign that the mandatory criteria established by the General Assembly and Board policy was not followed. In *Cooper* the Supreme Court established what an order of denial should entail. 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.*

It is clear in the order of denial that all of the mandatory criteria was considered. When this occurs the ALC no longer has the ability to make a decision regarding the denial of parole. The Parole Board clearly stated 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).

This Court made the decision that the consideration of a prior failure to abide by supervision should not be considered due to the fact the Appellant had this charge expunged. Expungement only relates to the destruction of records of an actual arrest and conviction, not any material stemming from the conviction. Within his brief the Appellant constantly argues that the Board used false information to deny his parole. That is untrue, the Appellant was convicted of these offenses, and he violated parole. The underlying fact of the case is truthful, it is just through expungement, the records of the arrest are destroyed so the Appellant does not have to admit to the arrest to the public[4]; however, the records of his failure to abide to parole is not subject to destruction, and is allowed to be considered pursuant to statute and policy. An expungement order pursuant to the statutes quoted above would not require DPPPS to destroy records in the "offender file" representing information related to a particular charge complied for purposes other than recording an arrest and the ensuing criminal charges but are instead used as entries made in the usual course of business pursuant to duties imposed on DPPPS under valid statutes. S.C. Op. Atty. Gen. (August 8, 2011) 2011 WL 3918182 If the General Assembly did not wish the Board to have the ability to consider expunged offenses it would have been placed within the statute, commensurate to other statues specifically stating that expunged records cannot be considered.

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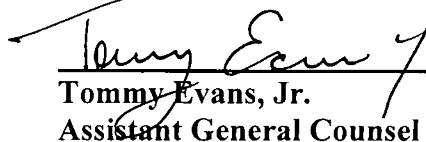
[4] The Act however, does not extend the same protection to conduct giving rise to the arrest. That is, while the Act provides that the offender may deny that he was arrested, it does not provide that he may deny the conduct leading up to the arrest. *Joseph,* at 359.

(ex. S.C. Code Ann. §63-7-1950, §17-22-330, §44-53-450). It is clear by the statute the Board must consider the record of the prisoner before incarceration. If the Appellant failed to abide by a supervision program, the Board must have the ability to consider this prior to releasing him back into society. This interpretation is not in violation of the law, and follows the mandatory criteria. Since the Board has followed the criteria the ALC was correct in determining they do not have jurisdiction over this denial, the ALC decision should be affirmed.

CONCLUSION

In conclusion the Respondent respectfully request this Court to grant this Petition for Rehearing and issue an opinion affirming the decision of the lower court.

Respectfully submitted,



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Attorney for the Respondent

Columbia, South Carolina
April 15, 2016

State of South Carolina

Department of Probation, Parole and Pardon Services

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Governor

JERRY B. ADGER
Director

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April 15, 2016

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: <u>James Tinsley v. SCDPPPS</u>

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the *Petition for Rehearing*, dated April 15, 2016, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Tommy Evans, Jr.
Assistant General Counsel

Enclosures

cc: James Tinsley

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from the Administrative Law Court
The Honorable S. Phillip Lenski, Administrative Law Court Judge
Case No. 14-ALJ-15-0028-AP

Appellate Case No. 2015-000196

JAMES TINSLEY, #171943,..APPELLANT

v.

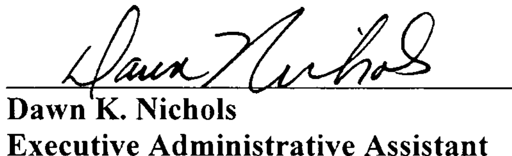
SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES,..RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, certify that I have served the within Petition for Rehearing, dated April 15, 2016, by depositing a copy of the same in the United States mail, postage prepaid, this 15th day of April, 2016, addressed to:

James Tinsley, #171943
Allendale Correctional Institution-F2B6
PO Box 1151
Fairfax, S.C. 29827

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



Dawn K. Nichols
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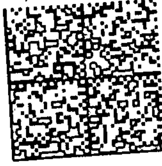

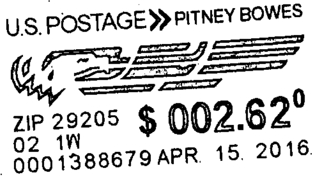

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