STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge
Case No.: 16-ALJ-15-0002-AP

Appellate Case No.: 2016-000297

BILLY RICE, #0083744.....APPELLANT

v.

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

INITIAL BRIEF OF RESPONDENT

Tommy Evans, Jr.
Assistant General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250

ATTORNEY FOR THE RESPONDNET

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STATEMENT OF THE CASE

On June 21, 1975, the co-defendant Ms. Lavornia Bowens approached the victim armed with a deadly weapon. Upon approaching the victim she proceeded to shoot him three times causing his death. It was later discovered that the Appellant contacted Mr. Bowens, provided her money, and a .45 caliber weapon for the expressed purpose of murdering the victim. At the conclusion of their investigation the authorities arrested and charged the Appellant with the offense of accessory before the fact of the felony; co-defendant Levorinia Bowens was charged with murder; and, another co-defendant Anthony Crawford was charged with voluntary manslaughter.[1]

On October 14, 1976, the Appellant appeared before the Honorable Rodney Peeples for the offense of accessory before the fact of a felony. Upon conclusion of this appearance, the Court sentenced the Appellant to a term of incarceration for the remainder of his natural life.[2] On March 27, 1977, while serving his life sentence, the Appellant escaped, he was later found and charged with the offense of escape. On June 20, 1977, he appeared before the Honorable John Grimball for this offense, he received an additional one year period of incarceration.

At the time the Appellant committed this offense, South Carolina law allowed an individual serving a sentence for accessory before the fact of a felony parole eligibility upon the service of ten years. The Appellant initially appeared before the Parole Board on July 13, 1985. Upon the conclusion of this appearance the Board granted the Appellant parole. While serving parole the Appellant was served a warrant due to an alleged violation. It was alleged that the Appellant violated parole by being six hundred and forty dollars behind on his supervision fees; not reporting

[1] Mr. Crawford drove Ms. Bowens to the scene where the murder occurred.
[2] Lavornia Bowen received a life sentence for murder, she later died in prison due to natural causes. Andrew Crawford received a sentence of two years for the offense of voluntary manslaughter.

for eleven years; and receiving a sentence of one hundred and sixty-eight months for the offense of bank robbery. On May 8, 2002, the Board decided to revoke the Appellant's parole.

Since this revocation the Appellant has appeared before the Board an additional seven times each resulting in a denial of parole. The Appellant's most recent appearance occurred on October 21, 2015. Upon the conclusion of this hearing the Board decided to deny parole due to: 1) the nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; 3) use of a deadly weapon in this or a previous offense; 4) a prior criminal record indicating poor community adjustment; and, 5) a failure to successfully complete a community supervision program. The Appellant issued a request for reconsideration. On December 9, 2015, Mr. Matthew C. Buchanan the Department's General Counsel informed the Appellant that there is no appeal process for a routine denial of parole. So the Appellant request was denied.

After receiving the order of denial the Appellant filed a notice of appeal before the Administrative Law Court (ALC). The Appellant did not file this notice of appeal until January 27, 2016, some three months after the decision of the Parole Board. On February 8, 2016, the Honorable Deborah Brooks Durden, Administrative Law Court Judge decided that the Appellant failed to file his notice of appeal within the time allotted pursuant to the rules. Due to the Appellant's failure to abide by the rules Judge Durden decided to dismiss this appeal.

The Appellant now raises this appeal before the South Carolina Court of Appeals. Within his brief the Appellant argues that the ALC erred in dismissing his initial appeal. The Appellant further argues that the Parole Board never gave notice of the risk assessment requirement; that the Board arbitrary and capriciously denied him yearly appearances; and that he was wrongfully denied good time credits. The Respondent will argue that the ALC was correct in dismissing this appeal due to the Appellant's untimely filing of his notice of appeal; that he failed to properly served his initial

brief in violation of the rules of the appellant court; that no notice requirement exist regarding the risk assessment requirement; that pursuant to Department policy and South Carolina case law the Appellant is only entitled to bi-annual appearances; and, the Respondent is not responsible for the calculation of good time credits, so this argument is irrelevant. The brief of the Respondent supporting these defenses follows.

ARGUMENTS

1. **The ALC was correct in dismissing this appeal for the Appellant's failure to file a notice of appeal within the time allotted pursuant to the rules of the Administrative Law Court.**

The Appellant argues that the ALC erred in determining that he failed to submit his notice of appeal within the time allotted pursuant to the Administrative Law Court rules. According to the rules of the Administrative Law Court, "The notice of appeal from the final decision to be heard by the Administrative Law Court shall be filed with the Court and a copy served on each party, including the agency, within thirty (30) days of receipt of the decision from which the appeal is taken." Rule 59 SCRALC. The Board denied the Appellant's parole on October 22, 2015. He did not file his notice of appeal until January 27, 2016.

Within his brief the Appellant argues that he served a grievance upon the director so this should have tolled his time. The Director is a separate entity to the Board, they are both appointed by the governor; however, the Director has no influence to any Board decision's and is not a member of the Board.[3] The Department does not allow inmates to grieve a denial of parole to the director. Upon the denial of parole, Appellant's only remedy regarding any review of the procedures applied by the Parole Board, is the filing of a notice of appeal before the ALC. Pursuant to the rules of the

[3] The Department is governed by its director. The director must be appointed by the Governor with the advice and consent of the Senate... The Board of Probation Parole and Pardon Services is composed by seven members. The terms of office of members are for six years. Each of the seven members must be appointed from each of the congressional districts. S.C. Code Ann. §24-21-10(A)(B)(Supp. 2010).

ALC the Appellant was obligated to file this notice within thirty days of receipt of the denial of parole order. Within his brief the Appellant admitted that he received the order of denial on October 28, 2015. He requested a reconsideration which was denied on December 9, 2015, the clock started running on his notice of appeal at this time. Pursuant to the rules he was obligated to file his notice of appeal by January 9, 2016. The Appellant did not file his notice until January 27 some eighteen days after it was due to be filed according to the rules. The ALC was correct in dismissing this appeal due to the Appellant failure to abide to the rules of the Administrative Law Court. Upon motion of any party, or on its own, an Administrative Law Judge may dismiss an appeal or resolve the appeal adversely to the offending party for failure to comply with any of the rules of procedure for appeal, including the failure to comply with any of the time limits provided by this section. Rule 62 SCRALC.

2. **The Appellant failed to serve his initial brief upon the Respondent so this appeal should be subject to dismissal.**

The Respondent also argues that this appeal should be subject to dismissal due to the Appellant's failure to serve his initial brief on the Respondent. The initial brief of the Appellant was never served upon the Respondent but delivered to the Department of Corrections. The Respondent would have no knowledge that the brief was even filed if the Department of Corrections not notify the Respondent that they received this brief. Pursuant to the Appellant Court rules, within thirty days after the service of the notice of appeal the appellant shall serve one copy of his brief on all parties to the appeal. Rule 208(a)(1) SCACR. The Appellant filed this notice of appeal on March 7, 2016 the brief was not received by the Department of Corrections until May 19, 2016, and was not received by the Respondent until May 20th. This is some forty-three days after the notice of appeal was filed. This is a direct violation of the rules and this appeal should be dismiss due to this failure to abide to the time limits imposed by appellate court rules. Upon the

failure of the appellant to file and serve his brief within the time prescribed, the clerk of the appellate court shall sign an order dismissing the appeal and the appeal should not be reinstated. Rule 208(a)(4) SCACR.

3. There exist no notice requirement regarding the risk assessment administered to the Appellant.

The Appellant asserts that he was not notified that a risk assessment would be administered and considered by the Board pursuant to South Carolina law. The Respondent is puzzled as to the Appellant's allegations due to the fact he appeared before the Board in 2011 and 2013, a risk assessment was administered prior to both appearances. The Appellant should have realized that a risk assessment will be administered prior to each parole hearing.

Pursuant to South Carolina law a risk assessment must be completed and the results given to the Parole Board prior to a final decision. The South Carolina Code of Laws specifically state:

> The department must develop a plan that includes the establishment of a process for adopting a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contributed 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(F)(1)(Supp. 2015)

The risk assessment utilized by the Department is referred to as the Correctional Offender Management Profiling for Alternative Sanctions, or (COMPAS). The risk assessment tool is conducted for each prisoner prior to appearing before the Parole Board. The results of each assessment is provided to the Board and the Board considers these results prior to making a final decision. This portion of the statute was created by the General Assembly and became effective January 1, 2011.

There exist no notice requirement in the statute, so the failure to notify the Appellant as to the risk assessment requirement is not unlawful. A court must abide by the plain meaning of the words of a statute. When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation. *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 623 (2011) A COMPAS assessment has been done twice for the Appellant in 2011 and 2013 so he had previous experiences with this assessment. He should have been already aware that this assessment would be completed prior to all of his heairngs. His argument regarding not receiving notice has no merit.

The Appellant also argues that the Board used "boilerplate" reasons for the denial of parole. All of the reasons for denial fell into the mandatory criteria found in the statutory language regarding what the Board must consider prior to the denial of parole. Pursuant to the South Carolina Code of Laws:

> 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. 2015)

All of the reasons for denial falls within this criteria and are legitimate reasons for denial. These reasons can be used more than once as long as the Board has shown the criteria was considered prior to the decision. 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, 499, 661 S.E.2d 106, 112 n.5 (2008). As long as the Board has shown that the criteria was considered and the reasons followed

the mandatory criteria the reasons given is lawful and cannot reversed by the Court. This is due to the fact the reasons of denial are based on a questions of fact. 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).

The Appellant also argues that the Board failed to follow the department policy criteria that is mandatory pursuant to South Carolina law. The board must establish written, specific criteria for the granting of parole and provisional parole. S.C. Code Ann. §24-21-640 (Supp. 2015). This criteria was considered which is revealed in the language of the order of denial. The Appellant has also argued that the use of the facts of his case for denial as unlawful. The Board must consider the prior record of the inmate before, after and during imprisonment. The crime committed must be considered. This is due to the fact a person who has committed a violent crime is more of a possible threat to society. The Board must be sure that if released the prisoner will not reoffend. Until the Board has been assured that society would not be in jeopardy if that person is released from incarceration, the Board has a duty to deny parole. This ability to deny parole cannot be reversed by the Courts. Parole eligibility is not a matter within the jurisdiction of the trial court, but fall within the province of the Board of Probation, Parole and Pardon Services. *Brown v. State,* 306 S.C. 381, 383, 412 S.E.2d 399, 400 (1991). The question of parole eligibility is separate and independent from the court's authority to sentence an offender. *State v. McKay*, 300 S.C. 113, 115, 386 S.E.2d 623 (1989).

4. The Appellant is not entitled to annual review due to the policy that existed at the time he committed the offense.

The Appellant argues that the he is unlawfully allowed to appear before the Board biannually. It is the Appellant's position that the Board classified his offense as violent which did not exist at the time he committed the crime. He argues that to classify his offense as violent is a violation of

ex post facto. The Appellant is being heard biannually not due to any violent classification, but do to Department policy existing at the time he committed this offense.

Section 16-1-60 was not established by the South Carolina legislature until 1986. Section 16-1-60 list the offenses that are classified as violent, it has no relation to the biannual appearance of the Appellant. The Appellant was sentenced to a period of incarceration for the remainder of his natural life. At the time he committed this offense no law existed that determined the length of time an inmate must wait before he is allowed to re-appear before the Parole Board. Since there exist no law at the time, the Department created a policy to determine the wait after the denial of parole. This policy specifically stated, "The following computation is to be used in re-investigating all cases previously rejected unless otherwise specified by our board. . . 30 years sentence or more re-investigate after serving 24 months. Applying this policy to his existing case does not create a violation of ex post facto.

In *Jernigan v. State*, 340 S.C. 256, 531 S.E.2d 507 (2000) the South Carolina Supreme Court held, that retroactive application of a statutory amendment that reduced the frequency of parole reconsideration hearings for violent offenders from once every year to once every two years pursuant to §24-21-645, violated ex post facto. During this time the Department was applying the amended statute, only prospectively to person who had committed offenses on or after June 3, 1986.[4] In *Jernigan*, the Supreme Court determined applying annual parole hearings only prospectively is a violation of ex post facto. The *Jernigan* decision affects the frequency of parole reconsideration hearings only for those inmates subjected to the statutory amendment. Inmates

[4] Department acknowledges that in scheduling parole consideration hearings prior to the *Jernigan* decision, the Department alternated between applying current statutes retroactively to all inmates, and applying those statutes in effect at the time the crime was committed. However, those fluctuations were in reaction to the evolving case on this subject. See, *Gunter v. State*, 298 S.C. 113, 378 S.E.2d 443 (1989); *Roller v. Cavanaugh*, 984 F.2d 120 (4th Cir. 1993); *Griffin v. State,* 315 S.C. 285, 433 S.E.2d 862 (1993); *California Dep't of Corrections v. Morales*, 514 U.S. 499, 115 S.Ct. 1597 (1995); and, *Roller v. Gunn*, 107 F.3d 227 (4th Cir. 1997).

who committed offenses prior to June 15, 1981 were not entitled to anything other than a single parole consideration hearing under the statutes in effect at the time.

The Appellant's positions regarding biannual hearings is incorrect. When the Appellant committed these offenses Department policy held that after denial an inmate serving a sentence greater than thirty years will not be brought before the Board until the service of twenty-four months. The law existing at the time the crime of the offense, and not at the time of sentencing determines whether an increase of punishment or reduction of benefits constitutes an ex post facto violation. *Elmore v. State*, 305 S.C. 456, 409 S.E.2d 397 (1991). No law existed at the time of the offense so Department policy demanded that he be heard every two years. In 1981, the South Carolina legislature created a new law that allowed all inmates eligible for parole to be heard yearly. The 1986 omnibus crime bill created violent and non-violent classification of offenses, and bi-annual hearings for anyone serving an offense that is classified as violent. This statute placed the Appellant in the identical position he was at the time he committed the offense, so there exist no violation of ex post facto. In the case of *James v. S.C. Dept. of Probation, Parole, and Pardon Services,* this Court decided:

> Application of amended statute providing that consideration for parole eligibility for violent offenses would be biannually rather than annually did not violate prohibition against ex post facto laws. At time of inmate crimes, there was no statute governing frequency of parole hearings, but Department of Probation, Parole and Pardon Services had policy calling for biannual review for persons serving sentences of 30 years or more, statute allowing for annual reviews was enacted several years after inmate's crimes were committed, and amended statute provided no greater limitation on parole eligibility that inmate was originally entitled to.

James v. S.C. Dept. of Probation, Parole and Pardon Services, 376 S.C. 392, 656 S.E.2d 299 (2008).

For there to be an ex post facto violation there must be an increase of punishment. Regarding the issue of an increase in punishment the relevant inquiry is whether the legislative amendment "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Jernigan*, at 509. The policy regarding the Appellant being allowed to appear bi-annually has no effect on the substantive standards for scheduling his initial parole eligibility date, nor does it change the criteria for determining his suitability for parole or his release date; therefore, biannual hearings are not a violation of ex post facto.

Biannual appearances are not penal in nature so requiring him to appear biannually cannot be considered a violation of ex post facto. In order for the ex post facto clause to be applicable, the statute or the provision in question must be criminal or penal in nature. *State v. Huiett*, 302 S.C. 169, 394 S.E.2d 486 (1990). This addition did not increase punishment, nor added elements to the current offense; therefore, it cannot be considered a violation of ex post facto.

5. Good time and work credits are awarded by the Department of Corrections not the Respondent so this argument is not relevant.

The Appellant argues that he is not being properly being awarded good time credits. This goes beyond the Respondent's jurisdiction. Any credits awarded or removed is done though the Department of Corrections not the Respondent. The South Carolina Code of Laws specifically states:

> If an inmate sentenced to the custody of the Department of Corrections and confined in a facility of the department, confined in a local facility pursuant to a designated facility agreement authorized by Section 24-3-20 or Section 24-3-30, or temporary confined, held, detained, or placed in any facility which is not under the direct control of the department, to include an inmate on a labor crew or any other assigned detail or placement, or an inmate in transport status, commits an offense or violates one of the rules of the facility during his term of imprisonment, all or part of the good conduct he has earned may be forfeited in the discretion of the Director of the Department of Corrections.

S.C. Code Ann. §24-13-210(Supp. 2015)

Since the awarding or reduction of prison credits can only be accomplished by the Department of Corrections this argument has no relevancy and should not be considered.

CONCLUSION

The Appellant failed to file his original notice of appeal before the ALC within the time limit imposed under the rules. The ALC was proper in dismissing this appeal, a decision should be affirmed by this court. The Appellant has failed to serve his brief within the time limit imposed by the rules of the Appellant Court; this also affords that this case should be subject to dismissal.

There exist no notification requirement regarding the mandatory risk assessment imposed on the Appellant. The Board has also not violated ex post facto in requiring biannual appearances.

Based on the foregoing the Respondent respectfully requests this Honorable Court to either dismiss this appeal or affirm the decision of the ALC.

Respectfully submitted,

Tommy Evans, Jr.
Assistant General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250