

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
Court of Common Pleas

S. Phillip Lenski, Administrative Law Judge

Case No. 15-ALJ-15-0015-AP

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JUL 25 2016

SC Court of Appeals

Tony Moore, Jr., #188313

Appellant,

v.

South Carolina Department of Probation,
Parole and pardon Services,

Respondents.

INITIAL REPLY BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

Greenholz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1 (1979).5

Hinton v. S.C. Dep't of Probation, Parole and Pardon Servs.,
357 S.C. 327, 332 (Ct.App. 2004).5

Kimbree v. Jolog Sportswear, Inc., 239 S.C. 415 (1962). 6

Sherbert v. Verner, 374 U.S. 398, 406-07 (1963). 6

S.C. Code Ann., §24-21-950(A)(4).7

STATEMENT OF ISSUES ON APPEAL

- I. THE DENIAL OF APPELLANT TONY MOORE'S PAROLE ELIGIBILITY VIOLATED DUE PROCESS.
- II. THE DENIAL OF APPELLANT TONY MOORE'S PAROLE ELIGIBILITY IS CONTRARY TO THE OPINIONS OF *MILLER v. ALABAMA* AND *AIKEN v. BYARS*.

REPLY ARGUMENT

The Respondent South Carolina Department of Probation, Parole and Pardon Services (referred to as Respondent or “the Department”) has presented four primary arguments in support of its position on appeal.

1. Because this case raises a constitutional concern, as opposed to statutory interpretation, the Respondent’s statutory interpretation argument does not affect this appeal.

The Department argues Moore cannot be granted relief because there is no ex post facto violation stemming from the recidivist statute at issue in this appeal. The argument relies heavily on a number of cases regarding statutory interpretation of penal codes.

The Respondent’s cited cases would apply to insure the code at issue in this appeal is construed strictly against the State. *Hinton v. S.C. Dep’t of Probation, Parole and Pardon Servs.*, 357 S.C. 327, 332 (Ct.App. 2004). But Respondent argues this matter is a constitutional issue after the opinions discussed at length in the opening brief. Based on recent United States Supreme Court case law, adopted by the South Carolina Supreme Court, there is a different analysis at play in this case.

2. The Respondent is incorrect in claiming Moore has been afforded any due process in this case.

The Department relies heavily on the United States Supreme Court opinion in *Greenholz v. Inmates of Neb. Penal & Correctional Complex*. 442 U.S. 1 (1979). *Greenholz* is far different from the case at bar. In fact, if that case applied this would be an altogether different situation.

The Nebraska parole process at issues in *Greenholz* involved a number of opportunities to be heard that are not present in the instant case. *Id.* at 14-15. It was not just the gravity of the offense that dictated parole decisions; the inmate was also entitled to a review of his behavior record while in prison and allowed to make a presentation to the parole board. *Id.* at 15. The offense was just one consideration in the parole equation.

In Moore's case, the offense is the only consideration. Regardless of what other factors might be present, there is no opportunity to present them. There is no process involved in the denial of parole in Moore's case, much less due process.

In arguing no constitutional duty requires review of the parole statute holding Moore in jail, the Respondent makes much of the fact that "individuals who have conducted heinous crimes or have long criminal histories" must not be released from jail. This is not a special concern warranting a particular type of sentencing statute; it arguably applies to any criminal case. It is also heavily opinion-based, warranting a closer review.

Cases decided prior to the decisions raising juvenile offenses to a constitutional concern are of little value to this Court. Based on the opinions in *Miller* and *Aiken*, a different question now exists. While a law may have complied with due process in the past, it must be reviewed as the law evolves.

The idea that there is a compelling state interest based on the holding of *Kimbree v. Jolog Sportswear, Inc.*, is misplaced. 239 S.C. 415 (1962). *Kimbree* involved a very different question. The Court was considering whether a state law conflicted with federal jurisdiction. *Id.* at 421. The instant case is very different.

The constitutional issue in this case is far more important than mere federal agency jurisdiction. A compelling state interest must be very strong to infringe upon a right guaranteed by the United States Constitution. *Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963). This case involves the Eighth Amendment, and the simple police power cited by the Respondent is not enough to override the Constitution's guarantees under these circumstances.

3. Based on new precedent regarding juvenile offenders, a constitutional issue does exist regarding Moore's sentence.

Moore has extensively argued the constitutional issue regarding his youth at the time of his prior offenses in the opening brief. In response, the Respondent concentrates on his age at the time of the offense that led to the current sentence, as opposed to the enhancing offenses.

This argument is a difference without a distinction. To argue that juvenile status matters at the time of the current offense, but not the enhancing offense, is quite simply an insult to the theoretical underpinnings of the Court's new jurisprudence regarding juveniles and mandatory life without parole sentences.

4. If there is a remedy as described by the Respondent, it has no effect on this case.

The Respondent claims the existence of a remedy for Moore should defeat his claim regarding his current life without parole sentence. The statute cited by the Respondent references parole eligibility prior to a parole eligibility date. *S.C. Code Ann.*, §24-21-950(A)(4). Because there is no parole eligibility date in this case, it is not clear if this is truly a remedy.

To the extent the Department has conceded this statute would apply to Moore's case, that does not change Moore's argument regarding due process.

CONCLUSION

As argued in his opening brief, Appellant Tony Moore should be deemed eligible for parole. Any other result is arbitrary and contrary to the constitutional grounds discussed in this appeal.

Respectfully submitted,



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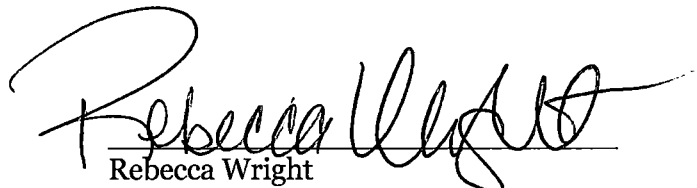
South Carolina Department of Probation,
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Respondents.

CERTIFICATE OF SERVICE

The undersigned counsel certifies that the attached *Initial Reply Brief and Motion for Leave to File Out of Time* has been served on the opposing counsel, via United States Postal Service at the following address, this 25th day of July, 2016:

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Rebecca Wright
Paralegal

July 25, 2016