STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FOR THE ADMINISTRATIVE LAW JUDGE DIVISION
The Honorable Shirley C. Robinson, Administrative Law Judge
Appellate Case Number 2015-001028

JIMMY LONG, SCDC#197708, ...APPELLANT

v.

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

RESPONDENT'S FINAL BRIEF

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2. **Did the ALC erred in addressing ex post facto and not the number of the affirmative votes that the Appellant received prior to the denial of parole?**

STATEMENT OF THE CASE

On or about July 10, 1992, the Appellant attempted to sexually assault the victim. During this assault, he beat the victim and stabbed her with a stick. She later died from her injuries, and the Appellant was later charged with the offenses of murder, and assault with intent to commit criminal sexual conduct in the first degree.

On April 29, 1993, the Appellant appeared before the Honorable Ralph King Anderson, Jr. Upon the conclusion of this appearance, the Court sentenced the Appellant to a period of incarceration for the remainder of his natural life for murder; and, ten years for attempted criminal sexual conduct.[1] At the time the Appellant committed this offense, South Carolina law allowed a person serving a life sentence for murder parole eligibility upon the service of twenty years.

On November 14, 2012, the Appellant made his initial appearance before the Parole Board. Upon the conclusion of this hearing, the Board decided to deny the Appellant an opportunity to be released on parole. The Appellant once again appeared before the Board on November 5, 2014. The Board once again denied parole due to: 1) the nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; and, 3) the use of a deadly weapon in this or a previous offense. (R.p.3). Upon being informed of this denial, the Appellant filed a notice of appeal before the Administrative Law Court. (ALC). On April 30, 2015, the Honorable Shirley C. Robinson, Administrative Law Court Judge, issued an order affirming the decision of the Board. (R.p.4-p.7). Upon receiving this decision, the Appellant decided to file a notice of appeal before the South Carolina Court of Appeals.

Within his appeal the Appellant argues that the Court erred in deciding that the United States Fourth Circuit Court of Appeals case of *Bradford v. Weinstein,* 519 F.2d 728 (1975) does

[1] Appellant maxed out his sentence for attempted criminal sexual conduct in the first degree on June 11, 1998.

not apply; and, the ALC erred in failing to determine that it was illegal not to inform the Appellant of the final vote count prior to denial. The Respondent argues that the ALC was correct in determining the Board complied with the *Cooper* decision. The Board revealed they followed the mandatory criteria prior to denial, so the denial was valid. The Respondent would further argue that the Board properly applied the current law regarding the amount of affirmative votes necessary to be granted parole. The Appellant committed the crime after the change in the law, so the current law applies. The brief of the Respondent supporting these arguments follows.

1. **The ALC's decision to affirm the Board's decision due to their compliance with *Cooper* decision was valid and did not violate South Carolina law.**

The ALC ruled that the Board revealed in their order of denial that the mandatory criteria found in statute and Department policy was considered prior to denial. Pursuant to *Cooper v. S.C. Dept. of Probation, Parole, and Pardon Services,* 377 S.C. 489, 661 S.E.2d 106 (2008), the ALC has the very narrow ability to review the decision of the Parole Board. The ALC only has the ability to determine if the proper procedures were followed, if that is determined, the ALC must affirm the decision of the Parole Board.

In *Cooper*, the Supreme Court decided that a finding of fact was included; however, the Court determined that the Parole Board neither, "offered an explanation nor indicated that it considered the statutory criteria of section 24-21-290, and the fifteen factors listed on the parole form." *Id.*, at 500. The Supreme Court decided that if the Parole Board fails to consider and apply the statutory-related criteria, it has the effect of rendering an inmate parole ineligible, which warrants review by the ALC. *Id.,* at 502.

The ALC mentions in her order that the ability to review the decision of the Board is very narrow. If the Board reveals they have considered the proper criteria, the Court will then be denied

to make any further rulings on this decision. In *Cooper,* the Supreme Court established what future Parole Board orders should consist of, *Cooper* 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.

In the instant case the order of denial did conform with the *Cooper* decision. The findings of fact were the reasons provided as to why parole was denied; and, the conclusions of law were the statutes and factors used to determine the denial of parole. The order delivered to the Appellant was clear, the criteria within the statute and mandatory policy were considered prior to the denial of parole. This makes the order of denial valid, and, conforming to South Carolina law.[2] The ALC was correct in determining that the decision of the Board was valid.

In *Cooper,* the court determined that the order of denial was unlawful due to it not presenting any conclusions of law. It was the opinion of the Court that an order of the Board must prove proper procedures were followed. The order must not only state a findings of fact, but the statute and policy considered in reaching this conclusion. The order delivered to the Appellant is clear, the criteria within the statute and the mandatory policy were considered prior to denial of parole. According to the Supreme Court, if this is shown no further action by the ALC is

[2] A final decision shall include a findings of fact and conclusions of law separately stated. S.C. Code Ann. §1-23-350(Supp. 2014).

necessary.[3] So the ALC made the proper decision in affirming the Board's denial of the Appellant's parole. This decision should not be subject to reversal.

2. The ALC was correct in determining that the *Weinstein* decision, and revealing the final vote count is not relevant.

The Appellant argued that the United States Fourth Circuit Court of Appeals case of *Bradford v. Weinstein* applies to the present case. *Bradford,* is a class action suit raised by numerous North Carolina inmates alleging that parole was being denied in violation of due process. These inmates were being denied parole without a hearing, with no notice or opportunity to comment on adverse information, and was never advised of the reason for the denial of parole, or evidence which the denial was based. *Bradford,* at 729. That does not relate to the present case. Pursuant to South Carolina law, an inmate must be allowed to appear before the Board, and he or his attorney must be allowed to present evidence in mitigation.[4] The order of denial must be in writing, and reveal the reasons for denial, and the law and criteria considered prior to the decision. None of the allegations found in *Bradford* applies to the present case. The Appellant was allowed to appear before the Board, and the final decision was given in writing, revealing what was considered and why parole was denied.

Within his brief the Appellant also argued that the *Bradford* Court acknowledged that a person facing a revocation should be aware of what changes in attitude, habits, and requirements to be successful in obtaining parole. *Bradford,* at 732. The Appellant alleges this was never revealed to him so this denial of parole is unlawful, and the ALC erred in affirming the decision of the Board.

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[3] The Parole Board stated in 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).

[4] The board must grant hearings and permit arguments and appearances by counsel or any individual before it at any such hearing while considering a case for parole, or any other form of clemency provided for under law. S.C. Code Ann. §24-21-50 (Supp. 1995).

Each of the criteria found in *Bradford* is revealed in the fifteen Department criteria. Pursuant to South Carolina law, these criteria was given to the Appellant as well as all other inmates being considered for parole.[5] The *Bradford* case does not apply to the present case, the Appellant has offered no proof that this parole was denied unlawfully.

The Appellant is also of the opinion that the ALC erred in not considering the Board failed to release a final count. The Appellant argues that in the *Barton v. S.C. Dept. of Probation, Parole, and Pardon Services,* 404 S.C. 395, 745 S.E.2d 110 (2013) the Supreme Court ruled that a person convicted prior to 1986 receiving a majority of affirmative votes must be granted parole. The ALC properly ruled that the *Barton* case is irrelevant due to the fact the Appellant committed his offense after the 1986 change in the law. The Appellant is required to receive two-thirds affirmative votes to be released on parole. The ALC properly ruled *Barton* does not apply.

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. Of the six members present, four voted in the affirmative. *Barton,* at 399. The existing laws required a two-thirds vote of all seven members, so the Board determine that Ms. Barton failed to receive the required amount of affirmative votes. The Board decided to deny parole. Upon receiving the order of denial Ms. Barton decided to file a notice of appeal. The case ultimately appeared before the South Carolina Supreme Court who decided that since the law existing at the time of the offense allowed a majority, a two-thirds vote requirement for Ms. Barton is unlawful.

The Appellant argues that the ALC erred in only making a determination regarding a possible violation of ex post facto. However, due to the law changing prior to the Appellant committing

[5] The board must establish written, specific criteria for the granting of parole and provisional parole. This criteria must reflect all of the aspects of this section and include a review of the prisoners disciplinary and other records. The criteria must be made available to all prisoners at the time of their incarceration and the general public. S.C. Code Ann. §24-21-640(Supp. 1990).

this crime he is required to receive a two-thirds vote prior to release on parole. The law existing at the time of the offense, and not at the time of punishment 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). He obviously failed to receive the required votes or he would have been released. The Appellant suffered no prejudice so he is not entitled a reversal due to this matter. Any failure to inform the Appellant reversal of the Board's decision due to this matter. To warrant reversal the Appellant must show both error of the ruling and resulting prejudice. *Burroughs v. Worsham,* 382 S.C. 382, 574 S.E.2d 215 (S.C. App. 2002).

Unlike Ms. Barton, at the time the Appellant committed his offense, the law allowed a two-thirds affirmative vote in order to be released on parole, for all violent offenses. The Omnibus Criminal Justice Improvement Act went into effect on June 3, 1986, the Appellant committed his offense on July 10, 1992. A two-thirds vote requirement being applied to the Appellant does not constitute a violation of ex post facto. It should be obvious that he failed to receive the proper amounts of votes due to the fact he was denied parole.

The Appellant wishes to receive the vote count. Any release of a vote count is irrelevant. The Appellant committed his offense after the change of the law. There exist no violation of ex post facto, so *Barton* does not apply. The fact the Board followed the criteria and voiced this within the denial letter was sufficient. There was no need for the ALC to make another ruling in an irrelevant matter. The appellate court need not address remaining issues when disposition of prior issue is dispositive. *Whiteside v. Cherokee County School Dist. No. One,* 311 S.C. 335, 428 S.E.2d 886 (1993). The ALC was correct in not addressing this matter since he has no merit. The Court of Appeals need not address a point which is manifestly without merit. Rule 220(b)(2)SCACR.

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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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.

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November 10, 2016