

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from the Administrative Law Court  
The Honorable Shirley C. Robinson, Administrative Law Court Judge  
Court Case No. 17-ALJ-15-0002-AP

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Appellate Case No. 2017-002079

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TIMOTHY L. MARSH, #145874..... APPELLANT

v.

**RECEIVED**  
FEB 21 2018  
SC Court of Appeals

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

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**RESPONDENT'S INITIAL BRIEF**

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**ATTORNEY FOR RESPONDENT**

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## STATEMENT OF ISSUE ON APPEAL

1. **Whether the Board's decision to deny the Appellant parole after service of twenty-five years of incarceration was based on erroneous information?**
2. **Whether the Board's decision to deny the Appellant parole was arbitrary and capricious due to the Board's deviation from appropriate criteria?**
3. **Whether the Board's failed to consider or did not give appropriate weight to favorable information factors supporting a decision to grant Appellant parole?**
4. **Whether the Board's enumerated factors denying parole are immutable and fixed as of date of offense and therefore depriving Appellant of a meaningful opportunity at parole?**
5. **Whether the Board abuses its authority and acted arbitrary and capricious when it refused to allow Appellant to postpone schedule parole hearing?**

## STATEMENT OF THE CASE

On October 31, 1987, the victim while standing at a pay phone was shot in the head by the Appellant. The victim was later transported to the hospital where he was pronounced dead. During their investigation the police received sworn statements from numerous individuals who identified the Appellant as the person who shot the victim. The Appellant was eventually arrested and charged with the offense of murder.

On March 22, 1988, the Appellant appeared before the Honorable Ralph King Anderson for the offense of murder. The Appellant was then sentenced to a term of incarceration for the remainder of his natural life. 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's initial appearance occurred on March 5, 2008. Upon the conclusion of this hearing the Board denied the Appellant an opportunity to be released on parole. Since that initial denial, the Appellant has appeared before the Board an additional four times each resulting in a denial of parole.

The Appellants most recent appearance occurred on January 11, 2017. 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) the use of a deadly weapon in this or a previous offense. Upon being notified as to his denial of parole the Appellant decided to file a notice of appeal before the Administrative Law Court (ALC). Within this appeal the Appellant argued that the final decision of the Board was arbitrary and capricious. It was his opinion that the Board deviated from the mandatory criteria. He also argued that using fixed factors as a reason for denial deprive him of a meaningful opportunity to be granted parole; and, the Board abused authority in not allowing him a continuance.

The Respondent argued that the denial of parole was not arbitrary nor capricious but made after a careful consideration of the mandatory criteria. The Respondent also argued that the Board is allowed to deny postponement of a hearing if sufficient reasons are not given.

On September 25, 2017, the Honorable Shirley C. Robinson, Administrative Law Court Judge issued an order relating to this appeal. The lower court decided that there existed no wrongdoing in the denial of parole nor the denial of a postponement. Due to no wrongdoing existing in the denial of parole the lower court decided to affirm the decision of the Parole Board.

The Respondent will now argue that the decision of the ALC was correct. The Board revealed in the order of denial that they considered all of the mandatory criteria prior to denial. This decision was not made arbitrary nor capriciously. The ALC was correct in deciding that the denial of a continuance was lawful. So this Court should affirm their decision. The Respondent's brief supporting these defenses follows.

### ARGUMENTS

**1. The ALC was correct in determining that the Board followed the mandates found in the *Cooper* decision.**

The ALC determined that since the Board revealed they considered the mandatory statutory and Board policy criteria. This routine denial of parole limits the ALC's ability to reverse and remand. The Board correctly determined that the denial of parole followed the mandates proscribed by the South Carolina Supreme Court decision of *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008).

In *Cooper*, the Court decided that a finding of fact was included; however, the Parole Board neither, "offered no explanation nor indicated that it considered the statutory criteria of section 24-21-640, and the fifteen criteria listed on the parole form." *Id.*, at 500. In their decision the Supreme Court determined 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.

In *Cooper*, the Court established what a future order of denial should consist of, 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 state in its order denying parole that it considered the 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.*

The ALC correctly interpreted *Cooper* as the decision which the Supreme Court gave the ALC the very narrow ability to review the process conducted by the Board. If it is shown that the Board followed the mandatory criteria the ALC does not have any further ability to review the final decision. In the present case the order of denial included language that revealed a findings of fact, which were the reasons for denial; and, conclusions of law, the criteria, and risk assessment considered prior to a final decision. The Court in *Cooper* decided if the order revealed all of these things then no further review by the ALC is necessary.<sup>1</sup>

In his appeal the Appellant argues that the Board used erroneous information to deny parole. It is his position that since he had no prison disciplinarys, nor criminal record, the Board's decision to deny parole was unlawful. The ALC was correct in determining that the Board followed the proper criteria. Before making a final determination the Board is required to consider statutory criteria established by the General Assembly. The South Carolina Code of Laws specifically state:

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<sup>1</sup> The Parole Board clearly stated in its notice of rejection that it considered the statutory criteria and the criteria set forth Form 1212 which is sufficient under *Cooper*. *Compton v. S.C. Dept. of Probation, Parole and Pardon Services*, 385 S.C. 476, 684 S.E.2d 175 (2009).

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(2015)

The final order specifically stated what the Board considered prior to denial. The order specifically stated that the Board considered the Appellant's "supervision history, prison disciplinary record, and/or criminal record," all are factors that must be considered. The Appellant argued that since he did not have a serious criminal record, and no disciplinaries, his denial of parole is arbitrary and capricious. However, the Respondent revealed that the proper criteria was considered. The ALC made the correct decision in affirming the decision of the Parole Board.

**2. The denial of parole was not based on erroneous information but followed the mandatory criteria.**

The Appellant argues that the Board relied on erroneous information to deny parole. It is his opinion that the use of any prior record or prison disciplinary in the denial of parole was unlawful due to the fact he does not have any. The Respondent never revealed that a prison record nor any prison disciplinaries were used as a reason for denial. The ALC decided that there was never a reason for denial that stated he was denied parole due to a prior record or prison disciplinary. The Appellant was denied parole due the nature and seriousness of the offense of murder; the violence used in the commission of this offense; and, the use of a gun in the commission of this offense. None of these reasons reveals that a prior record or prison disciplinary was considered in the denial of parole. The decision of the ALC was made correctly.

One of the criteria that must be considered is the record of the prisoner before, during and after imprisonment. The acts of the inmate in the commission of his crime must be considered. This is due to the fact this reveals the character of the person, and the potential of future dangerousness. The Board only considers a lack of a prior record and the existence of no prison disciplinaries to the advantage of the Appellant. However, the Board thought that these advantages did not override the overall violence that occurred in the commission of the crime. This is the duty which can only be decided by the Parole Board. 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, 386 S.E.2d 623 (1989). The ALC was correct in making the determination that the Board followed the proper criteria in the denial of the Appellant's parole.

**3. The use of a prior crime as a reason for denial does not permanently deny the Appellant an opportunity to be granted parole in the future.**

The Appellant argues that the use of the facts of his crime as a reason for denial denies him a meaningful opportunity to ever be released on parole. The Appellant is currently serving a life sentence for the offense of murder. He became eligible for parole upon the service of twenty years. This is just parole eligibility there is never a guarantee in a release on parole. It is more difficult to be granted parole for a violent offense than other crimes. However, numerous individuals have been granted parole for the offense of murder. This is due to the fact the Board not only considers the previous crime, but other criteria prior to making a final decision. The Appellant was given a meaningful opportunity to be granted parole.

It is clear that pursuant to South Carolina law the legislature intended the Parole Board to be the sole decision makers regarding parole. The ALC has no jurisdiction over the decision of the Parole Board. An Administrative Law Judge shall not hear an appeal involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services. S.C.

Code Ann. §1-23-600(D)(2006). It is clear by the reading of the statute the legislature wanted no other body except the Parole Board awarding or denying parole. If it is the intent of the legislature, it should be followed by the ALC. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 553 S.E.2d 578 (2000). There exist no error in law by the denial of this parole. The decision of the ALC was lawful and should be upheld.

The Appellant argues that the facts of his case would never change, thereby, depriving him a meaningful opportunity to be granted parole. The prior offense is only one of many factors considered. If the Board determines that the current offense outweighs all of the other criteria parole would be lawfully denied. The General Assembly gave the Parole Board the authority to award or deny parole. The offense must be taken into consideration. It does not lead to a permanent denial of parole, because other criteria must be considered. Each of the criteria is considered during each hearing so there always exist an opportunity to be awarded parole.

Pursuant to South Carolina law the Department is responsible for creating their own criteria which must be considered prior to a final decision. These criteria is more specific than the statutory criteria but must encompass all of the aspects found in statute. 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 prisoner's disciplinary and other records. S.C. Code Ann. §24-21-640(2016). Form 1212 lists the Department policy criteria. A copy of that form is given to the Appellant and all other inmates prior to appearing before the Parole Board. The criteria the Board considers other than the statutory criteria includes:

1. The risk the inmate poses to the community;
2. The nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it;

3. The inmate's prior criminal records and his/her adjustment under any previous programs or supervision;
4. The inmate's attitude toward his/her family, the victim, and authority in general;
5. The inmate's adjustment while in confinement including his/her progress in counseling, therapy, and other similar programs designed to encourage the inmate to improve himself/herself;
6. The inmate's employment history, including his/her job training and skills and his/her stability in the work place;
7. The inmate's physical, mental and emotional health;
8. The inmate's understanding of the cause of his/her criminal conduct;
9. The 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 recourses the Department of Corrections has made available to inmates to help with their problems;
10. The adequacy of the inmate's overall parole plan. This includes inmates living arrangements, where he/she will live and who he will live with; the character of this with whom the inmate plans to associate in both his/her working hours and his/her off-work hours; the inmate's plans for gainful employment;
11. The willingness of the community into which the inmate will be released to receive the inmate;
12. The willingness of the inmate's family to allow him/her to return to the family circle;
13. The attitudes of the sentencing judge, the solicitor, and local law enforcement officers respecting the inmate's parole;
14. The feelings of the victim's family, and any witnesses to the crime about the release of the inmate;
15. Other factors considered relevant in a particular case by the Board.

The Department created criteria has some aspects that could be detrimental to the Appellant, (ex. The nature and seriousness of the inmate's offense the circumstances surrounding the offense, and the inmate's attitude toward it.), or could possibly be to his advantage, (ex. The inmate's efforts to solve his problems such as seeking treatment for substance abuse, enrolling in academic and vocational education courses, and in general using whatever resources the Department of Corrections has made available to the inmate to help with their problems.) The overall job of the Parole Board is to review all information presented and then make a determination. If the mitigating evidence override the detrimental factors, a person would stand a better chance to be awarded parole.

Even though the facts of his crime would never change there still can be an opportunity for the Appellant to be awarded parole. The ALC was correct to deny this argument and affirming the decision of the Parole Board. The fact the Board denied parole due to the facts of the underlying offense was lawful. The decision of the ALC should be affirmed.

**4. The ALC was correct in deciding that the Board was lawful in not granting the Appellant a continuance.**

The Appellant argues that the Board abuse authority and acted arbitrary and capriciously when they refused to allow the Appellant a continuance for his scheduled hearing. The ALC ruled that the denial of a continuance are addressed in the sound discretion of the trial judge. The ALC ruled that they do not have the ability to upset this ruling unless there are clear evidence that the Board abused its authority over the Appellant.

The Board had the right to deny any continuance if they feel that the Appellant raised an insufficient reason. It has long been the rule in this State that motions for continuance are addressed to the sound discretion of the hearing body, and this ruling will not be upset unless it clearly

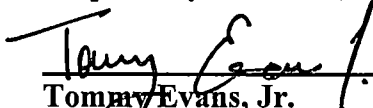
appears that there was an abuse of discretion to the prejudice of the Appellant. *Williams v. Bordon's, Inc.* 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980).

There was sufficient notice given to the Appellant as to the date and time of his hearing. The Appellant argues that he needed a continuance in order to complete his parole plan. The Appellant as all other individual appearing before the Parole Board are given a 30 day notice. This was also the fifth time the Appellant appeared before the Board. So he is aware of the process. The Appellant has not provided any proof that the Board's decision to deny a continuance prejudiced him in anyway. The Board was well within their right to move forward with his hearing. There exist no proof that the Board abused their discretion, or acted arbitrary and capriciously in the denial of this continuance. The ALC was correct in ruling that the Board did not abuse discretion in denying the Appellant request for a continuance of his hearing.

**CONCLUSION**

Based on the foregoing reasons the Respondent respectfully requests the final decision of the Administrative Law Court be affirmed.

Respectfully submitted,

  
\_\_\_\_\_  
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Columbia, South Carolina  
February 20, 2018

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appeal from the Administrative Law Court  
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TIMOTHY MARSH, #145874, .....APPELLANT  
v.

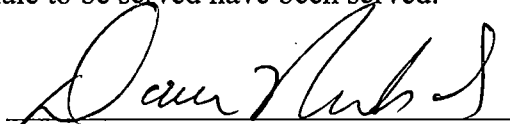
S.C. DEPARTMENT OF PROBATION, PAROLE  
AND PARDON SERVICES,.....RESPONDENT

**CERTIFICATE OF SERVICE**

I, Dawn K. Nichols, Executive Assistant to counsel for Respondent, certify that I have served the within Initial Brief and Designation of Matter dated February 20, 2018, on Appellant this 20<sup>th</sup> day of February, 2018, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Timothy Marsh, #145874  
Lee Correctional Institution  
990 Wisacky Highway  
Bishopville, S.C. 29010

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



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January 20, 2018

The Honorable Jenny Kitchings  
Clerk of the S.C. Court of Appeals  
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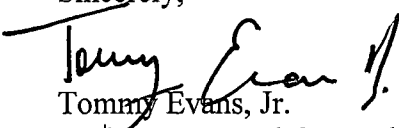
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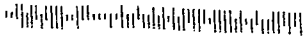
Please find enclosed the Initial Brief of Respondent and Designation of Matter dated February 20, 2018, along with proof of service in the above referenced case.

Sincerely,

  
Tommy Evans, Jr.  
Assistant General Counsel  
TE:dn

Enclosures

cc: Timothy Marsh



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