THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge
Case No. 15-ALJ-15-0068-AP

Thomas Thompson #80681----------Appellant

vs

South Carolina Department of Probation,
Parole and Pardon Services----------Respondent

Appellate Case No. 2016-000781

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. The Parole Board based its decision on a record which is inaccurate and incomplete, therefore its decision is arbitrary and capricious.

2. The Parole Board continues to apply the 1986 Omnibus Criminal Justice Improvement Acts to Appellant's sentence in violation of the ex-post-facto clause.

3. The Parole Board has denied Appellant's right ot Equal Protection by denying him parole based on the offense he committed for an excessively longer period than other inmates sentenced for the same offense and to the same sentence.

4. The Parole Board's denial of parole based on Appellant's crime for a period of thirty years has essentially negated the sentencing authority of the Court which made a plea agreement which stated purpose was to give Appellant a chance based on his good behavior.

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THE CASE

On december 10th, 1975 Thomas Thompson, Appellant, stood before Judge Hayes and entered the mandatory not guilty plea to the crimes he was charged with. Then Judge Hayes instructed Sherriff Ernest Harrington to make a statement concerning the plea agreement which was taking place. Mr. Harrington gave a discription of the crime first and then told how the Judge, Solicitor, Law Enforement, the victim's family and the Attorneys and families of the defendants had come to an agreement on the sentence. He then stated how the life sentence was to serve a two-fold purpose by ensuring that the Appellant would serve the minimum ten years as punishment and also to allow him a chance to start a new life while he was still young based on his behavior while incarcerated.[1]

A little more than one year previous Appellant had appeared before a Family Court Judge and been given five years probation. After being sentenced Appellant was at John G. Richards awaiting his 17th birthday and transfer to the SCDC when he was told by Ms. Camille Graham, his caseworker, that a letter had been placed in his juvenile file which stated that he was released from probation for good behavior after 1 year. Actually he had been suspended from school half the year for truancy, wrecked a car while driving without a license and his parents had went to both his probation officer and the Family Court Judge three times over the course of that summer asking them to take some kind of action because he was out of their control.

After arriving at Manning CI Appellant acquired his GED in 1976. This information was eventually entered in the computer system in 1993, 8 years after his first parole hearing. Appellant then moved to Kirkland CI where he took vocational training in electricity receiving a certificate and then enrolled in the Midlands Tech College program receiving an Associate Degree in Business in Management. To the best of his knowledge neither of these appear on the computer record.[2]

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In 1982 he passed the required psychological exam and transfered to A custody status. In 1983 he passed another psychological and was put through Community Response screening prior to being approved for placement at a work release center. This screening would have included the Law Enforcement leaders, Solicitors Office and sentencing Court. Appellant was approved to work and receive passes to the rural community where he grew up and the crime was committed.

Appellant's initial appearance before the Parole Board was in February 1985. His parole was denied due to:

Nature and seriousness of offense
Use of a deadly weapon in offense
Indication of violence in offense

Appellant's next appeared before the Board in 1986 and was denied for the same reasons. At Appellant's next parole hearing the Board began applying the 1986 Omnibus Criminal Justice Improvement Acts to his sentence. Appellant was denied parole then and in all subsequent hearings before the Board for the same reasons. During this period the Board was requiring Appellant to receive 5 votes for parole to be granted regardless of the number of Board members present.

Appellant filed a timely appeal of his most recent parole hearing of October 21st, 2015 pursuant to Al-Shabazz v State, 338 SC 354, 527 SE 2d 742(2000) and Furtick v SCDPPPS, 352 SC 594, 576 SE 2d 146,149,150 (2003) and also requested a ruling on whether his Constitutional Rights have been violated pursuant to SC Code Ann 1-23-630, Powers of Administrative Law Judges, Dorman v Dept. of Health and Enviromental Control, (SC 2002) 350 SC 159, 565 SE 2d 119-"ALJ can still rule on whether a party's constitutional rights have been violated."

Appellant argues that the denial of parole was arbitrary and capricious; the Board is violating ex-post-facto by continuous application of the 1986 law to 1975 sentence; denying him equal protection; and the continual denial of parole based on his crime negates the sentencing authority of the Court and could violate his substantive due process rights.

On March 30th, 2016 Judge John D. McLeod of the Administrative Law Court affirmed the Board's decision and dismissed Appellant's appeal with prejudice.[1] On April 14th, 2016 Appellant filed a Notice of Appeal of this decision in the South Carolina Court of Appeals. Judge McLeod based his decision on the ruling in Cooper v SC Dept. of Prob., Parole and Pardon Servs., 377 SC 489, 500, 661 SE 2d 106,112(2008). Appellant contends that this ruling is inherently flawed in that while proper procedure requires the Board to state that it considered the factors outlined in section 21-24-640 and the 15 factors published in form 1212,[2] such notice does not offer substantive proof of that fact. Appellant will contend that an examination of the record will show that the Board is using inaccurate and incomplete information which renders it's decisions arbitrary and capricious. Appellant will contend that the Board has abused it's discretion by failing to give due consideration to the intentions of the sentencing Court and the feelings of the arresting authority, the Prosecutor and the community where the crime was committed. Judge McLeod cites SC Code Ann 1-23-600(D) (Supp. 2015) and does not respond to any of Appellant's issues which are listed in the Final Order[3] and therefore should be preserved for this Court. Appellant cites 24B CJS Criminal Law §1978- "where a legal sentence has been imposed, but there is an unlawful enforcement or execution of the penalty amounting to cruel and unusual punishment or to other violations of the rights of the person, the law affords appropriate relief and redress." State v Parker, 100 So. 260, 87 Fla 181. Appellant seeks review of the entire record before, during and after incarceration to determine whether his Constitutional Rights have been abridged. Appellant requests that the Court review all records of his parole hearings, to include Case Summary Reports[4], regardless of their availability to Appellant. Appellant begs the Court not to allow the disadvantages of being a prisoner with no outside assistance to deny him a fair and equitable hearing in this matter.

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ARGUMENTS

(1)-The Parole Board based it's decision on a record which is incomplete and inaccurate, therefore it's decision is arbitrary and capricious.

The Board uses the SCDC records of Appellant's activities while incarcerated in making it's decisions, These records are now computer based and very inaccurate and incomplete in Appellant's case. Appellant contends that the letter of denial does not offer any substantial proof of what the Board actually considered when making it's decision and is merely a modern computer generated form letter.[1] The Board states regarding his Associate Degree in Business Management from Midlands Tech that if the information was provided it was considered and that it is the responsibility of the Appellant to provide this information. It is the SCDC's responsibility to keep complete and accurate records for the Board to use in making it's decisions.. However, Appellant has on more than one occasion provided the Board with this information in writing and his late Father actually handed the Board a stack of Honor Roll certificates which Appellant received while earning his degree, in person at Broad River CI. The only fact in question is whether the Board actually considered this information. Appellant refers to his 2013 parole hearing in which the Board asked Appellant a series of questions regarding his job prospects and his employment history prior to incarceration, (this is information which has already been presented to the Board for consideration according to form 1212 and the Board of Parole and Pardon's Policy and Procedure Manual- see Case Summary Report).[2] The Board actually asked Appellant how long he had worked at the High School? Clearly the Board has not given due consideration to the factors as stated in the letter of denial which is identical to the 2015 letter except in date and a new clause pertaining to risk assessment.[1] The Board does not give due consideration to the intentions of the Judge, Prosecutor and Law Enforcement who were responsible for sentencing Appellant but gives consideration to a Prosecutor and Law Enforcement Agency who are a generation removed from

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the crime and prejudiced by modern no-parole laws and the actions of past Parole Boards that have caused Appellant to serve forty years on a sentence with ten year parole eligibility. Indeed this Parole Board was prejudiced by the actions of the previous Boards as will all future Boards be prejudiced against Appellant because of his many denials and long service so as to negate any chance of a fair and impartial hearing.
Appellant challenges the ruling in Cooper as being flawed and allowing the Board to base it's decision solely on the crime committed (which Appellant was judged and sentenced for by a Court of proper jurisdiction) and it's desire to enforce modern no-parole laws on Appellant's sentence. Proof of what the Board considered should come from the actual record (Case Summary Report)[1] and not from a post hearing form letter. The Board's policy and procedural changes and it's abuse of discretion have effected the de-facto abolition of parole for Appellant. Appellant asks the Court to examine the case as to whether the Board is using the proper statutes regarding his parole as Appellant was sentenced and committed his crime prior to the Legislatures passage of the current statutes. This would render the decisions of both the Board and the Administrative Law Judge errors of law.

(2)-The Parole Board continues to apply the 1986 Omnibus Criminal Justice Improvement Acts to Appellant's sentence in violation of the ex-post-facto clause.

At the time that Appellant was sentenced there were no violent or non-violent classifications and all inmates were eligible for parole on any sentence of one year or more. The SCDC Guidebook which all inmates received upon arrival at the R&E Center was very clear on parole guidelines and it stated that persons sentenced to life were eligible for parole after ten years and were subject to a two year wait after being denied at the first hearing and subject to annual review thenceforth. Respondent will claim that the two year period was continuously enforced yet will not submit any actual documentation or proof of this to the Court. The Courts have ruled in various cases

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such as Jernigan v State, 340 SC 256, 531 SE 2d 507 (2000) and Barton v SCDPPPS, Supreme Court of South Carolina July 2013, 404 SC 395, 745 SE 2d 110 that the application of these laws on persons sentenced prior to 1986 is a violation of the ex-post-facto clause. Since the question of whether the two year delay in hearings was one time or continuous has not been resolved by evidence (although an examination of the Board's records regarding parole hearings for persons with life sentences prior to 1981 would benefit Appellant's case)[1] precedent would favor the least harsh ruling and therefore the Board should in the future review Appellant's parole annually.

(3)-The Parole Board has denied Appellant's right to Equal Protection by denying him parole based on the offense he committed for an excessively longer period than other persons sentenced for the same offense and to the same sentence.

The 14th Amendment forbids the State to "deny any person within it's jurisdiction the equal protection of the laws." That means that "all persons similarly situated should be treated alike." Anyone sentenced to a life sentence with ten year parole minimum eligibility for the crime of murder would be considered similarly situated as Appellant. The reasons the Board has used to deny parole for Appellant would apply to all such persons and indeed if they were denied parole at any time those were undoubtedly the reasons used. The Greenville News published a front page article in their Sunday edition circa January 1991 which stated that 390+ inmates serving life sentences had been paroled after serving an average of twelve years.[1] Walter Gordon, the adult aged co-defendant of Appellant who guided and instructed Appellant in the commission of the crime they committed and is considered by the law to be equal in guilt for it was paroled in 1990 after serving 15 years. Clearly Appellant is being treated differently than those other similarly situated persons. This is especially evident when the intentions of the sentencing Court are taken into consideration. Appellant has exhibited no violent behavior patterns while incarcerated that would justify this treatment. Indeed a close examination of the sentences of many of these

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other persons would indicate that their sentencing Court's intent was much harsher and their crimes more serious than Appellant. Many of these persons were sentenced to multiple life sentences, large additional sentences running with the life sentence and some were originally sentenced to the death penalty. The sentencing Court in this instance could have done likewise had that been their intent. The Court in this instance was well ahead of it's time in that it considered the juvenility of the Appellant and the precept of justice that the punishment for crime should be graduated and proportional to both the offender and the crime (Roper v Simmons & Miller v Alabama, US Supreme Court). The Parole Board has refused to acknowledge and consider this. Appellant would also contend that the current Parole Board is not equivalent to the Board at the time of his sentencing which met once monthly and had a parole rate above 50%.

(4)-The Parole Board's denial of parole based on Appellant's crime for a period of thirty years has essentially negated the sentencing authority of the Court which made a plea agreement which stated purpose was to give Appellant a chance based on his good behavior.

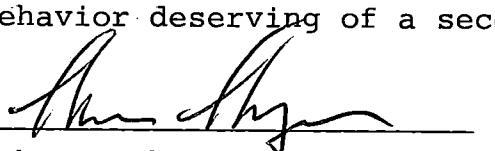
Should a person have a reasonable expectation of serving the sentence imposed? "The punishment inflicted must conform to that designated in the sentence and the sentence should be executed by the responsible officers in the manner provided by law." 24B CJS Criminal Law §1981. *"meaning of execute-with respect to a sentence, to execute means to carry out, to perform and does not connote to impose or to modify." Sweet v Taylor DC Kan., 178 F.Supp 456. "In determining terms of a sentence, intent of the sentencing Judge is controlling and that intent is ascertained by reference to the entire record." US v Meester 762 F.2d 867. "Where a valid sentence is imposed on a prisoner the government as well as the prisoner should be bound by it's terms and should be required to do what it can to see that the sentence is carried out as imposed." US v Baker DC Ark., 170 F.Supp 651, affirmed C.A. Baker v US

271 F,2d 190. "Fundamentally, it is the trial Court's perogative if not it's duty to access defendants character and crimes at sentencing, after defendant's guilt has been decided." Francolino v Kuhlman, 224 F.Supp 2d 615.

Appellant was sentenced under a plea agreement which proposed to allow him a chance for parole based on his behavior while incarcerated. Furthermore, the Community Response Screening which Appellant passed shortly before his first parole hearing validates this even more. The Board will argue that the Court had no authority with regard to parole so the question then is whether the Appellant is serving a valid sentence? It is most likely that the Court was aware of the operations of the Parole Board at the time of sentencing and relied on it to give Appellant the same consideration it was giving other sentences of life at that time. While certainly there were persons serving life at that time such as Donald "Pee Wee" Gaskins whom the sentencing Court, Prosecutors, Law Enforcement Agencies and general public had no desire to be paroled at any time. Appellant certainly does not fall into that category. As previously stated, persons serving life for murder at the time that Appellant was sentenced were paroled after an average of twelve years. The Board's continued denial of parole based solely on the crime rather that his behavior and the intentions of those who passed judgement on him for it could easily be construed as cruel and unusual punishment since the Board is effectively resentencing Appellant over and over again.

CONCLUSION

The Parole Board either hasn't properly investigated the facts regarding Appellant's sentencing with regard to the sentencing Court's intention and the feelings of the community about his sentence or it chooses to ignore them. The record of Appellant's activities supplied by the SCDC is inaccurate and incomplete. The Board has not only violated the ex-post-facto clause but has applied a wrongful interpretation of it in doing so. The Board has subjected Appellant to a harsher and more severe treatment than other persons serving the same sentence for the same crime as him. The Board's actions have resulted in the de-facto abolition of parole for Appellant. After thirty years and 17 hearings where Appellant was denied parole for a crime that will never cease to exist, there is no reasonable expectation that parole will ever be granted. The Board has clearly acted in an arbitrary and capricious manner; abused it's discretion; and denied Appellant of numerous Constitutional Rights. Does the case as a whole indicate a violation of his substantive due process rights as well? The ultimate irony of the whole case is that if Appellant were sentenced under the same plea agreement using the statutes now in effect, he would receive a mandatory minimum 30 year sentence which would have expired in October 2005. Appellant asks the Court to rule on these matters in such a way as to ensure justice is served. It is Appellant's firm belief that if the whole record and all pertinent facts are considered it will show that he has shown a disposition to reform; merited a lessening of the rigors of his confinement; that in the future he will obey the law and lead a correct life; and that the interests of society will not be impaired by his release on parole. Appellant has satisfied the requirements of the sentencing Court in regard to time served for punishment and behavior deserving of a second chance.

S 

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Appellant seeks to bring to the Court's attention certain errors in Respondents Brief regarding the facts in this case. Judge McLeod made his decision prior to the process for filing briefs being completed per section V, rule 60 A (Appellant had not filed a reply brief). Judge McLeod's decision was clearly based on the Departments notice of rejection letter and SC Code Ann §1-23-600(D) (Supp 2015). Appellant argues that the fact that this letter states that the Department abided by statute law and procedure is not substantial evidence of that fact. It is Appellant's argument that the ruling in Cooper is flawed in this respect because it allows the Department to merely change the wording in a computer generated form letter rather than produce the actual records and case summary reports it used to make it's decisions. Appellant is being legally denied access to these records and reports yet held accountable for their accuracy and completeness. Shouldn't the Department be ethically obligated to do it's utmost to insure the accuracy and completeness of its information when making a decision of this magnitude? The Department's statement regarding its policies at the time Apepellant committed his offense are completely false. The policy as published in the inmate guidebook stated there was a one-time two year waiting period and annual review thenceforth. In fact the Department's actual practice when Appellant entered the SCDC was to waive the two year wait and review every year as an examination of the records of parole hearings at the time will reveal.[1] Furthermore, Respondent states that it never changed the amount of votes necessary to obtain parole when in fact it did require Appellant to receive 5 votes for parole to be granted regardless of the number of Board members present from 1987 until the Barton ruling in 2013, a period of 26 years.

* Appellant has made no argument regarding persons sentenced to fifteen years or more.*

The Equal Protection Clause does not require people to be identically situated. Clearly anyone sentenced to a life sentence for murder with ten year parole eligibility is similarly

situated to Appellant. The reasons given for the constant denial of Appellants parole, (nature of offense, use of a deadly weapon, indication of violence) apply to each and every one. Appellant argues that the overwhelming majority (not just some other inmates) have been paroled after serving far less time than Appellant who has served over forty years (70% of his actual life). This is a great disparity in treatment without due cause. The sentencing Court gave Appellant this sentence based on the actions of the Parole Board at the time regarding the granting of parole. It certainly was not their only option as the sentencing Court could have allowed a plea to a lesser charge than murder. However it is clear and certain that the Court made a chance for parole based on Appellants conduct while incarcerated a part of this plea agreement. If the Court had no authority to issue such a sentence then the plea was not knowingly and willingly made and therefore invalid. Brown v State, 306 SC 381, 412 SE 2d 399 (1991).

CONCLUSION

The Department has violated the Constitutional Rights of Appellant in various and continual ways. This Court has the jurisdiction to address and remedy these violations. The Department is being allowed to operate behind a curtain of secrecy without being held to any type of accountability. In this particular case it has decided to substitute its personal judgment as to punishment over that of the sentencing Court. Appellant has a right to due process, both procedural and substantive, to the equal protection of the law, to protection from ex-post-facto laws, cruel and unusual punishment and what is essentially double jeopardy.

S 

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