

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JUN 25 2019

SC Court of Appeals

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2019-000607

ANTHONY ENRIQUEZ, #215961.....APPELLANT

v.

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

INITIAL BRIEF OF RESPONDENT

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Assistant General Counsel

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ATTORNEY FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- 1. Whether the ALC violated due process and its own procedural rules when it dismissed Enriquez's appeal for want of jurisdiction solely on the basis of the issues he identified in his notice of appeal, without giving him an opportunity to file an initial brief with a statement of issues?**
- 2. Whether the only appropriate remedy for the ALC's summary dismissal, without first assessing its own jurisdiction is a remand to give the Appellant an opportunity to file a brief and a record?**

STATEMENT OF THE CASE

On January 22, 1994, the Appellant pointed a shotgun at the victim with the intent to rob him. He proceeded to shoot the victim in the chest immediately causing his death. An eyewitness who knew the Appellant by name and sight informed the authorities that the Appellant shot and killed the victim. Due to this statement the authorities were able to obtain a search warrant. The murder weapon was later recovered during a lawful search of the Appellant's vehicle. He was then arrested and charged with the offenses of murder and armed robbery.

On December 1, 1994, the Appellant appeared before the Honorable Casey L. Manning for the offenses of murder and armed robbery. Upon the conclusion of this appearance the Court sentenced the Appellant to a period of incarceration for the remainder of his natural life for the offense of murder; and twenty-five years for armed robbery.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.

The Appellant made his initial appearance before the Parole Board on April 16, 2014. Upon the conclusion of this appearance the Parole Board decided to deny the Appellant an opportunity to be released on parole. Since this initial appearance the Appellant has appeared before the Parole Board two additional two times both resulting in a denial of parole. His most recent appearance occurred on January 23, 2019, parole was denied due to: 1) 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 the commission of this offense. After receiving his order of denial the Appellant filed a notice of appeal before the Administrative Law Court (ALC). Within this notice the Appellant alleged that his highly favorable institutional record should have afforded him parole. The

¹ The Appellant maxed out his sentence for armed robbery on April 23, 2009.

Appellant also argued that since he is continuously being denied parole the Parole Board has essentially given him a sentence of life without parole.

On March 12, 2019, the Honorable Deborah Brooks Durden dismissed this appeal due to the fact the notice of rejection revealed that the mandatory criteria and risk assessment was followed. This reveals a routine denial of parole which the ALC does not have the ability to remand. Upon receiving the ALC's dismissal the Appellant filled a notice of appeal before this Court. Within this appeal the Appellant alleges that the ALC prematurely dismissed his appeal before a record was filed or he was able to file a brief supporting his position.

The Respondent argues that pursuant to the rules, the ALC can dismiss an appeal if the Appellant fails to present a case where no Constitutional rights were violated. In his notice of appeal the Appellant was only concerned about not being granted parole after revealing a favorable institutional record. Since the Appellant failed to reveal to the ALC that he was being denied a constitutional right or that the Board failed to follow the mandatory criteria and risk assessment, this dismissal is lawful. The decision of the ALC should be affirmed. The initial brief of the Respondent supporting the above referenced defenses follows.

ARGUMENTS

1. Pursuant to the rules of the Administrative Law Court and the Cooper decision the ALC lawfully dismissed this appeal.

The Appellant argues that the ALC unlawfully dismissed this appeal prematurely. The Appellant believes that he was not allowed an opportunity to present his position, nor was the Respondent given the opportunity to file a record on appeal.

The only matter raised in the notice of appeal is that the Appellant believes that he should have been granted parole due to an exemplary institutional record. It is his opinion that since he continues to be denied parole, he has essentially been given a life without parole sentence. Within

his brief the Appellant cites the United States Supreme Court opinion of *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). In *Miller*, the Court decided that a person who committed an offense as a juvenile cannot be given a life sentence without possibility of parole. He also cites the United States Supreme Court case of *Montgomery v. Louisiana*, 136 S.Ct. 718, 193 L.Ed. 599 (2016) in which the Court allowed the *Miller* decision to be applied retroactively. The Appellant also relies on the South Carolina Supreme Court case of *Aiken v. Byers*, 410 S.C. 534, 765 S.E.2d 572 (2014) in which the South Carolina Supreme Court applied *Miller* to South Carolina juvenile life without parole sentences.

In *Aiken*, the Court ruled that a juvenile cannot be sentenced to a life without parole sentence unless the Defendant receives an individualized hearing where the mitigating hallmark features of youth are fully explored. *Aiken*, at 578. A parole hearing is an individualized hearing where the age of the Appellant at the time the crime was committed is considered. The General Assembly created mandatory criteria that must be considered prior to each final decision. The South Carolina Code of Laws specifically state:

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 (2018).

Within South Carolina law the Department is also responsible for creating their own criteria.² This criteria must reflect all of the aspects of the statutory criteria and include a review of the prisoner's

² The board must establish written specific criteria for the granting of parole and provisional parole. S.C. Code Ann. §24-21-640 (2018).

disciplinary and other records. S.C. Code Ann. §24-21-640 (2018) The Department criteria that is always considered 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 record and his/her adjustment under any previous programs of 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 past criminal conduct;
9. The inmate's efforts to solve his/her 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 had made available to inmates to help with their problems;
10. The adequacy of the inmate's overall parole plan. This includes living arrangements where he/she will live and who he will live with; the character of those 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. The actuarial risk and needs assessment outlined in section 24-21-10(F)(1) of the S.C. Code of laws; which evaluates based on criminal involvement, relationships/lifestyle, personality/attitudes, family, social exclusion and mental health;

16. Other factors considered relevant in a particular case by the Board.

The above referenced cases does not allow a life sentence **without the possibility of parole.**

However, the Appellant is eligible for parole, and the parole hearing is considered the separate hearing as described in *Aiken*. As the Court can notice, the above referenced criteria reveals many aspects that must be considered prior to the offense, during the offense, and after the offense has occurred. This is exactly what was described in *Aiken* as a separate hearing to allow the consideration of the youth of the Appellant at the time he committed this offense. Therefore, the Appellant is not entitled to a separate hearing as part of his parole hearing to consider his age at the time committed the offense. The parole hearing itself is that hearing. In *Montgomery v. Louisiana* the United States Supreme Court determined:

A state may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity – and who have since matured – will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

Montgomery, at 736

In *Miller*, the United States Supreme Court decided that a state is not required to guarantee eventual freedom but must provide, “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Miller*, at 2469. The Appellant argues that he was not given sufficient time to file a brief before the case was dismissed. The Respondent believes that since the Appellant failed to raise an argument within his notice of appeal that would allow the ALC jurisdiction, the lower court had no choice but to dismiss.

The ability of the ALC to narrowly review a decision of the Parole Board was given in 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 Supreme Court decided that a finding of fact was not included; however, the Court determined that the Parole Board neither, “offered an explanation nor indicated that it considered the statutory criteria of section 24-21-640, and the fifteen criteria listed on the parole form.” *Id.*, at 500. Due to this error the Court ruled that if the Board failed 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 Parole Board order should consist of, *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 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.

Within her order the ALC recognized that the proper criteria was considered as listed in the final order of denial. When this occurs the ALC has limited jurisdiction over a denial of parole because it is considered a routine denial of parole. Once this is established the ALC need not to even go any further in the appeal process.³ Since this was shown to have been done the ALC was limited in any decision she could have lawfully made regarding the denial of parole.

³ The Parole Board clearly 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, 684 S.E.2d 175 (2009).

Pursuant to South Carolina law and *Cooper*, all that must be revealed is a finding of fact and conclusion of law that is separately stated.⁴ There exists no law that obligates the Board to state the underlying facts as to why the decision was made. There exists no particular format in which the order must be made. As long as it states a reason(s) for denial and that the criteria and risk assessment was considered the order is valid. Under section 1-23-350, a findings of fact and conclusion of law need not be presented in any particular format but need only be sufficiently detailed to enable the reviewing court to determine whether the fact findings are supported by evidence and whether the law has been correctly applied. *Cloyd v. Mabry*, 295 S.C. 86, 367 S.E.2d 171 (S.C. App. 1988). The order of denial clearly stated that the mandatory criteria and risk assessment was considered which would be a conclusion of law. The reasons for denial was lawful and reasonable, which is considered a finding of fact. These two items are clearly placed in the final order, so the ALC had no other decision but to rule in favor of the Respondent.

The ALC is allowed to review whether or not the Board followed the mandatory criteria. So the ALC rules for special appeals are only applied to this appeal.⁵ Within the Appellant's notice of appeal his reasoning for the ALC to review the final decision of the Board was not due to any failing of law or procedure. Instead he argued since he had a favorable institutional record he should not have been denied parole. The Appellant was of the belief that he is essentially being subjected to a life without parole sentence due to him continuously being denied parole. It was noticed by the ALC that this is untrue. The order of denial followed South Carolina law and the Appellant failed to raise any mistake in law or procedure. Within his notice of appeal the Appellant

⁴ A final decision shall include findings of fact and conclusions of law separately stated. S.C. Code Ann. §1-23-350 (2018).

⁵ The Rules in this section apply exclusively in matters heard on appeal from final decisions pursuant *Al-Shabbaz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). *Al-Shabbaz* allowed the ALC to review a decision made by the Department of Corrections. This later included parole eligibility denials *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2003), and Parole Board decisions were later included in *Cooper*.

is obligated to include a brief factual basis for each expressly and specifically asserted constitutional violation. Rule 59(B) SCRALC. The Appellant only raised as a reason for appeal a matter regarding a factual basis as to why the Respondent erred in not granting him parole. A question of fact can only be determined by the Board, it is out of the reach of the ALC. 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 (2018). The ALC also cannot reverse the decision of the Parole Board as it pertains to a denial of parole. An administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections 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)(2018). These laws and the *Cooper* decision give the ALC the extremely limited ability to review a final decision of the Parole Board. Since the Appellant within his notice of appeal failed to list any constitutional violation the ALC had a duty to dismiss pursuant to the rules. Upon motion of any party or on its own motion, 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 appeals, including failure to comply with any of the time limits provided by this section (V) or **for the failure to provide a factual basis for each expressly and specifically asserted constitutional basis violation as prescribed by Rule 59(B).** Rule 62 SCALC (emphasis added)

2. The Appellant was never denied due process.

The Appellant argues that he was denied because he was not allowed to file a brief supporting his argument. The Appellant believes that he has a right to a meaningful review. The Appellant had an opportunity to be heard, he was allowed to appear before the Parole Board. During this appearance he was given an opportunity to present mitigating evidence. The Board

considered the fact that he was a juvenile at the time he committed the offense; and, his favorable institutional record. A mandatory risk assessment was also considered. The Appellant has a due process right to a hearing but not to be released on parole. There is no constitutional or inherent right of a convicted person to be conditionally release before the expiration of a valid sentence. *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100 (1979). The Appellant argued that he should have been released due to his favorable institutional record, however, no person is guaranteed parole. His notice of appeal never raised a denial of due process, nor a violation of any other Constitutional right.

The Supreme Court nor the rules ever gave the ALC the ability to freely examine the decision of the Parole Board. In order to be allowed to present a case to the ALC the Appellant must reveal in his notice of appeal that he was denied some constitutional right, or the Board failed to follow the mandatory criteria. Neither was ever raised by the Appellant in his notice of appeal. The Appellant's only reason for appeal is in his opinion the decision was unfair and he should have been granted parole.

The Appellant argues that the only remedy is that this case be remanded back to the ALC. Due to *Cooper*, the ALC has the very narrow ability to remand a decision of the Parole Board. If it is revealed that the Board followed procedures and have not violated any law the ALC has no choice but to allow the decision to remain. The Appellant raised no argument regarding the mandatory criteria. The Appellant just objected to the final outcome, which the ALC has no authority over.

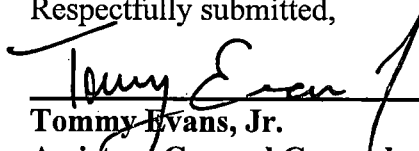
The Appellant argues that the ALC made its determination only by what was placed within the notice of appeal. The notice of appeal reveals the grounds in which the Appellant believes was the act(s) made by the Board that violated the law. Pursuant to the rules if the Appellant fails to

reveal any Constitutional violation within the notice of appeal, the ALC can dismiss per her own motion. The Appellant only raised factual arguments, which goes beyond the jurisdiction of the ALC. If the Appellant has no complaint regarding a possible failure of the Board to apply the mandatory criteria or a violation of any constitutional right the only decision available to the ALC is affirmation. The decision of the ALC was correct pursuant to the rules, so this dismissal should be affirmed.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests the final decision of the ALC be affirmed.

Respectfully submitted,



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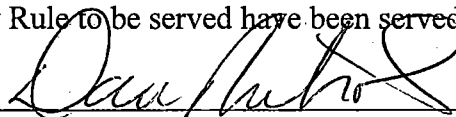
CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within
Initial Brief, on Appellant this 24th day of June, 2019, by depositing a copy of the same in the
United States mail, postage prepaid, addressed to:

John Blume, Esquire
Cornell Law School
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Hannah Freedman, Esquire
Justice 360
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Columbia, S.C. 29201

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



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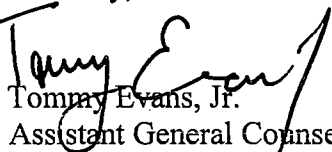
The Honorable Jenny Kitchings
Clerk of the S.C. Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

Re: **Anthony Enriquez v. SCDPPPS**

Dear Ms. Kitchings:

Please find enclosed the Initial Brief of Respondent and Designation of Matter dated June 24, 2019, along with proof of service in the above referenced case.

Sincerely,


Tommy Evans, Jr.
Assistant General Counsel

TE:dn

Enclosures

cc: John Blume, Esquire
Hannah Freedman, Esquire

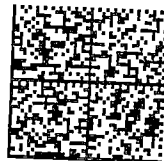
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