STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Calvin Smith, #090424,

Appellant,

vs.

South Carolina Department of Probation Parole and Pardon Services,

Respondent.

Docket No. 19-ALJ-15-0005-AP

ORDER

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or Court) pursuant to the appeal of Calvin Smith (Appellant), an inmate incarcerated with the South Carolina Department of Corrections. On January 24, 2019, the South Carolina Department of Probation, Parole, and Pardon Services (Department) issued its most recent determination denying Appellant parole. The Parole Board cited the nature and seriousness of Appellant's offense, an indication of violence in his offense, and the use of a deadly weapon in his offense as the reasons for his denial. The Department requires Appellant to wait two years until his next appearance before the Parole Board. Appellant challenges the Department's determination on two grounds: 1) that the imposition of biannual appearances before the Parole Board violates his ex post facto rights; and 2) the Department improperly denied his parole by considering impermissible factors. For the following reasons, the Department's decision is affirmed.

DISCUSSION

Ex Post Facto Claim

Appellant argues the imposition of biannual appearances before the Parole Board violates his Constitutional right to not be subject to an ex post facto increase in his punishment for a crime. "An ex post facto violation occurs when a change in the law retroactively alters the definition of a crime or increases the punishment for a crime." Jernigan v. State, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000). "The law existing at the time of the offense determines whether an increase of punishment constitutes an ex post facto violation." Id. at 260, 531 S.E.2d at 509 n.3 (citing Elmore v. State, 305 S.C. 456, 459, 409 S.E.2d 397, 399 (1991)). Appellant is serving sentences of life in prison for murder, twenty-five years for armed robbery, and five years for conspiracy to commit murder for crimes committed on December 15, 1977. At the time

of Appellant's crimes, no statute regarding the amount of time an inmate must wait to reappear before the Parole Board existed. June 15, 1981 was the effective date of the statute first establishing a time for parole reconsideration. See, "History" annotation to S.C. Code Ann. § 24-21-260 (2007). Appellant claims he appeared annually before the Parole Board from 1993 until 1999 when the Department limited Appellant to biannual appearances pursuant to S.C. Code Ann. § 24-21-645(D). That statement is not denied by the Department. However, the frequency of parole review hearings between 1993 and 1999 is not relevant to the question of whether the current law represents an increase in punishment from the law that existed at the time the offenses were committed, 1977.

The Department avers that its policy at the relevant time called for a two-year wait between parole hearings for inmates serving sentences of thirty or more years. However, the Department has provided no citation to a published policy or regulation, and the record in this case fails to establish that fact despite this Court's September 3, 2019 Order to Supplement the Record. The document submitted by the Department purporting to be such a policy is a copy of a single printed page from what is apparently a longer document. There is no indication where the page came from or when the procedures described on the page may have been in effect.

The current statute governing the timing of parole reconsideration is S.C. Code Ann. Section 24-21-645(D) (Supp. 2019), which states:

> Upon satisfactory completion of the provisional period, the director or one lawfully acting for him must issue an order which, if accepted by the prisoner, shall provide for his release from custody. However, upon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole . . . .

"Only those offenses specifically enumerated in this section are considered violent offenses." S.C. Code Ann. § 16-1-60 (Supp. 2019). Murder and armed robbery are specifically enumerated in the statute as violent offenses. Id. Thus, under the current statute Appellant should appear before the parole board biannually.

In Jernigan, the South Carolina Supreme Court held that retroactive application of the statutory amendment that reduced the frequency of parole consideration hearings for violent offenders from once every year to once every two years violated the ex post facto clause of the South Carolina Constitution. Jernigan, 340 S.C. at 264. Subsequent to that ruling, the Department began making an exception to § 24-21-645 and conducting annual parole review of

inmates whose crimes were committed during the period between June 15, 1981 and June 3, 1986.[1] The instant case presents the question of whether it is also an ex post facto violation to implement the biannual parole reviews for an inmate whose crime was committed prior to the enactment of any statute controlling the timing of those hearings. This question has been previously considered by the South Carolina Court of Appeals in James v. S.C. Dep't of Prob., Parole, and Pardon Services, 376 S.C. 392, 398, 656 S.E.2d 399, 402-03 (Ct. App. 2008). In James, the Court held that no ex post facto violation had occurred. The Court's reasoning was based solely upon the underlying Circuit Court Judge's finding that the Department policy in effect at the time the crime was committed was to conduct reviews biannually. As discussed above, the record in the instant case does not support a finding of fact that the Department had a policy of biannual parole reviews for inmates such as Appellant on the date his crime was committed. However, even without a finding that biannual parole reviews were conducted at that time as a matter of policy, I conclude that no ex post facto violation has occurred in this case.

Prior to 1981 no statute controlled the frequency of parole reconsideration hearings. Inmates who committed offenses at that time were not entitled to anything other than a single parole consideration hearing under the statutes. The reconsideration hearings, upon whatever schedule conducted, were a matter of grace; the timing upon which they were held was a matter of Departmental discretion. Therefore, there has been no change in the law retroactively altering the definition of a crime or increasing the punishment for a crime. See, Jernigan, 340 S.C. at 261. Where a change in the law produces only a speculative and attenuated possibility of increasing an inmate's punishment, there is no ex post facto violation. Jernigan, 340 S.C. 261 (quoting, California Dep't of Corrections v. Morales, 514 U.S. 499, 115 S. Ct. 1597 (1995).) The biannual parole review hearings here fall within what was permitted under the law as it existed on the date Appellant's crimes were committed. Therefore, any possibility that applying the biannual reviews required under the current statute would increase an inmate's punishment are too speculative and attenuated to constitute an ex post facto violation. Here, the change was from a situation where the timing of review hearings was not controlled by law and hearings were conducted at the discretion of the agency, to a law requiring biannual reviews. That difference

[1]During the period from June 15, 1981 and June 3, 1986, a statutory requirement existed for annual parole review. The inmate in Jernigan had committed his crime during this period. The law existing at the time of the offense determines whether an increase of punishment constitutes an ex post facto violation. Elmore v. State, 305 S.C. 456, 459, 409 S.E.2d 397, 399 (1991).

simply does not produce a significant risk of increasing the measure of punishment attached to the covered crimes. See, Jernigan, 340 S.C. at 264. Therefore, Appellant did not suffer an ex post facto rights violation.

Consideration of Impermissible Factors

Appellant argues the Parole Board considered impermissible factors in denying his parole. Namely, Appellant argues the Parole Board should not have considered whether he utilized any counseling or therapeutic programs while incarcerated because the Department of Corrections did not offer such programs. The statutes controlling the parole process grant broad discretion to the Parole Board while setting out certain factors that must be considered:

> 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 (Supp. 2019). Additionally, "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 a prisoner's disciplinary and other records." Id. Where the Parole Board clearly states "in its order denying parole that it considered the factors outlined in section 24-21-640 and the . . . factors published in its parole form" 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." Cooper v. S.C. Dep't of Prob., Parole, and Pardon Services, 377 S.C. 489, 497-500, 661 S.E.2d 106, 110-12 (2008). The ALC can summarily dismiss the inmate's appeal in the case of such a routine denial of parole. Id. at 500, 661 S.E.2d at 112. Here, 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. With such a showing, no further review by this Court is appropriate.

ORDER

For the foregoing reasons, the Department's determination denying Appellant parole is **AFFIRMED.**

AND IT IS SO ORDERED.

Deborah Brooks Durden

Deborah Brooks Durden, Judge
S.C. Administrative Law Court

December 2, 2019
Columbia, South Carolina