

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT
The Honorable H.W. Funderburk, Jr., Administrative Law Judge
Case No. 18-ALJ-15-0032-AP
Appellate Case No. 2019-000553

Gregory Mackey, #136609.....Appellant,

v.

S.C.Department of probation,
Parole and Pardon Services.....Respondent.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Table of authorities.....ii

Statement of issue on appeal.....iii

Statement of the case.....1

Arguments

1. The ALC erred in his decision that the Parole Board lawfully denied Appellant's parole application.

Conclusion.....4

TABLE OF AUTHORTIES

CASES

Barton, 745, S.E.2d 110.....3
Sullivan v. State, 331 S.C 479, 504 S.E.2d 110 (1998).....3
Phillips v. State, 331 S.C. 482, 504 S.E.2d 111 (1998).....3
Akins v. Snow, 992 F.2d 1558 (11th Cir. 1991).....4

STATUTES

S.C. Code Ann. 16-1-60 (Supp. 1986).....3
S.C. Code Ann. 16-1-60 (Supp. 2010).....2,3
S.C. Code Ann. 24-21-645 (Supp. 1984).....2,3
S.C. Code Ann. 24-21-645 (Supp. (1986).....3
S.C. Code Ann. 24-21-645 (Supp. 2010).....3
S.C. Code Ann. 24-21-645(A) (Supp. 2012).....2

OTHER

Parole Board Policy and Procedure Manual Page(s) 13, 14, 15,.....2,4
U.S.C.A. Const. Art. 1, § 10, c1. Const. Art. 1, § 4 Code 1976, §
24-21-645.....3

STATEMENT OF ISSUES ON APPEAL

Did The Parole Board Deny Appellant A Substantial Right To Statutorily Correct Parole Review And Violate The Ex Post Facto Clause In Use Of Current Version Of Parole Statute Instead Of Version Of Statute At The Time Of Offense?

STATEMENT OF THE CASE

On March 21, 1986, Appellant was arrested and charged with the offense(s) of murder, grand larceny, criminal sexual conduct, and a gun law violation. Through further investigation, Appellant was charged with murder and "exonerated from all other charges".

On August 28, 1986, the Appellant appeared before the Honorable William Howell for the offense of murder. Upon the conclusion of this appearance the court sentenced the Appellant to life imprisonment. At the time Appellant committed this offense, South Carolina law provided that an individual serving a life sentence for murder would become eligible for parole following the completion of twenty-years.

Appellant initially appeared before the Parole Board on August 23, 2006. At the conclusion of this appearance the Board decided to deny Appellant parole following that hearing, and on thirteen (13) subsequent annual parole hearings to date, not seven (7) as reported by the Parole Board.

Appellant's most recent appearance before the Parole Board occurred on September 19, 2018. The Parole Board once again decided to deny Appellant an opportunity to be released on parole. The denial was due to: 1) nature and seriousness of current offense; 2) an indication of violence in this or previous offense.

On September 29, 2018, Appellant requested a reconsideration hearing by the Parole Board and received a letter from the Parole Board on October 5, 2018 informing him that there is no rehearing or appeal process for the routine denial of parole; therefore no action will be taken on your request.

Upon being denied parole reconsideration Appellant filed an appeal in the Administrative Law Court (ALC) asserting that he was denied a substantial personal right to statutorily correct parole review.

On February 26, 2019, the Honorable H.W. Funderburk, Jr. Affirmed the decision of the Parole Board's denial of parole. Upon receiving this decision, Appellant filed a notice of appeal dated March 29, 2019 in the South Carolina Court of Appeals.

Within this appeal the Appellant avers that the Board did not use the version of the statute in effect at the time he committed his offense for which he is incarcerated.. Also, the ALC erred in it's conclusion that the Parole Board lawfully denied Appellant's parole application.

ARGUMENT

The ALC erred in his decision that the Parole Board lawfully denied Appellant's parole application.

The Parole Board is comprised of seven members. Six of those seven members participated in Appellant's hearing. Three members voted in favor of granting Appellant parole, while three members voted against granting parole.

According to section 24-21-645 of the S.C. Code, the Parole Board may issue an order authorizing parole signed by a majority of its members or by all three members meeting as a parole panel; however, at least two thirds of the members of the Parole Board must authorize and sign orders approving parole for persons convicted of a violent crime as defined in section 16-1-60 of the S.C. Code. Ann. § 24-21-645(A) (Supp.2012).

Prior to 1987, section 24-21-645 provided that the Parole Board may authorize parole when authorized by a majority of its members or by all three members meeting as a parole panel on the case ninety days prior to the effective date of parole. S.C. Code Ann. §24-21-645 (1984).

When scheduling meetings and hearings before the Board. **b. Violent versus non-violent.** Offenders convicted of a violent crime will be scheduled for parole hearings before the "full Board only". Offenders convicted for a non-violent crime may be scheduled for parole hearings before either the full Board or a three-member panel. See "Scheduling meetings and hearings of the Board, Policy and Procedure Manual page 14-15.

In all cases properly decided before a three member panel of the Board, a unanimous vote of a panel constitutes the final decision of the Board. (Any vote of a panel which is not unanimous "must" be referred to the full Board for a final decision). See, Parole Board Policy and Procedure Manual, page 13-2 Statutory Powers a. Vote.

Appellant filed a notice of appeal with the ALC, claiming that the Parole Board erred by applying the current version of section 24-21-645 instead of the version of that statute in effect at the time Appellant committed

his crime. Appellant argues that the version of section 24-21-645 in effect at the time of his conviction required only a majority of the Parole Board vote in favor of parole, and due to Barton application of the current version of section 24-21-645, and it's two-thirds requirement, constituted an ex post fact violation.

As part of the Omnibus Criminal Justice Improvement Act of 1986 additional language was added to state that, "at least two thirds of the members of the board must authorize and sign orders authorizing parole for persons convicted of a violent crime as defined in Section 16-1-60." S.C. Code Ann. §24-21-645 (Supp. 1986). In Barton, the South Carolina Supreme Court decided, that requiring an inmate convicted prior to 1986 a two-thirds vote to be granted parole violates ex post facto.

This law was created after the Appellant committed his offense; therefore, the statutory amendment requiring parole for persons convicted of a violent crime be approved by at least two-thirds of the members of Parole Board, in contrast to prior version of statute allowing Parole Board to authorize parole by a majority of its members, violated constitutional prohibition against "ex post facto laws" as applied retroactively. U.S.C.A. Const. Art. 1, § 10, cl. 1; Const. Art. 1, § 4 Code 1976, § 24-21-645.

The Board unlawfully retroactively applied section 16-1-60 of the S.C. Code Ann. §24-21-645 (Supp. 1986) to Appellant's parole case. This statute created the classification of violent offenses as part of the Omnibus Criminal Justice Improvement Act of 1986. This law was created well after the Appellant committed his offense which was not defined as violent at the commission of the crime. *Sullivan v. State*, 331 S.C. 479, 504 S.E.2d 110 (1998); see also, *Phillips v. State*, 331 S.C. 482, 504 S.E.2d 111 (1998).

Appellant has always been considered a violent offender by the Parole Board since the Omnibus Criminal Justice Improvement Act of 1986 and is currently considered a violent offender contrary to law. See, 16-1-60 (Supp. 1986 & Supp. 2010). This law was created after Appellant committed his offense.

Appellant argues that he appeared before a six (6) member panel of the Parole Board and received a split decision, 3 votes in favor of granting parole and 3 votes denying parole. Any vote of a panel which is not unanimous must be referred to the full board for a final decision. See, Parole Board Policy and Procedural Manual, page 13-2. Statutory Powers a. Vote. S.C. Code Ann. §24-21-220 (1993).

In *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991), a federal court stated that a key issue was whether a prisoner who committed an offense when a previous rule was in effect was "deprived of an opportunity for parole that existed prior to the alteration of the parole rules."

Appellant suffered prejudice by being denied a substantial personal right to statutorily correct parole review.

CONCLUSION

Based on the foregoing reasons the Appellant respectfully request that the final decision of the ALC dismissing this appeal be reversed.

Respectfully submitted,



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This 23 Day of August 2019
at Enoree, South Carolina.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Reply Brief complies with SCACR Rules. Appellant has no access to colored paper or bind/bounding material without approved hobby craft license and is limited to white typing paper only.

Respectfully Submitted,

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