

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from the Administrative Law Court
The Honorable Deborah Broks Durden, Administrative Law Judge
Appellate Case No. 2019-002065

CALVIN SMITH, #090424.....APPELLANT

v.

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

RESPONDENT'S FINAL BRIEF

**Matthew C. Buchanan
General Counsel**

**South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 207
Columbia, South Carolina 29202**

ATTORNEY FOR THE RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Parole Board follow procedure giving consideration to the criminogenic factors outlined in §24-21-10(f)(1), §24-21-640, and the fifteen factors published in its parole form?
2. Did the Board properly deny the Appellant's parole when it stated its reasons for denial being the nature and seriousness of the offense, the indication of violence in his current or previous offense, and his use of a deadly weapon?
3. Whether the Board properly allowed the Appellant to appear bi-annually?
4. Whether the Administrative Law Court had jurisdiction to consider the Appellant's twenty-five issues in his appeal from his routine denial of parole?

STATEMENT OF THE CASE

On December 15, 1977, the Appellant and two co-defendants robbed a business and shot the owner. The victim was found lying behind a counter with a bullet wound to his face. He was immediately rushed to the hospital where he later died. Inside the business investigators discovered several doors and cabinets opened as well as a safe. One suspect Carman Richardson was questioned. After given her *Miranda* warnings, she gave a full confession implicating herself, the Appellant and another co-defendant Wayman Smith. She informed the authorities they went to the business with the intent to rob and kill the victim. The investigation also revealed that one to six thousand dollars was missing from the safe. When the Appellant and co-defendant were approached and searched, a large amount of cash was found on each of them. They were arrested and charged with the offenses of murder, armed robbery and conspiracy to commit murder.

On February 23, 1978, the Appellant appeared before the Honorable John Gentry for each offense. The judge sentenced the Appellant to a period of incarceration for the remainder of his natural life for the offense of murder; twenty-five years for armed robbery; and five years for conspiracy to commit murder. At the time of the offense, South Carolina law allowed a person serving a life sentence for murder parole eligibility upon the service of twenty years.

The Appellant initially appeared before the Parole Board on October 20, 1993. At that first hearing, the Board denied the Appellant an opportunity to be released on parole. Since this initial denial the Appellant has appeared before the Board an additional thirteen times, each resulting in a denial of parole.¹ His most recent denial 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 this or a previous offense. (R.p.1).

¹ The Appellant waived his hearing for August 8, 2012.

After being informed of this denial of parole the Appellant filed a notice of appeal before the Administrative Law Court (ALC). In his appeal, he argued that his biannual hearings before the Board violated ex post facto and that the Board considered impermissible factors when it denied his parole. The Honorable Deborah Brooks Durden issued her order on December 2, 2019, affirming the Board's decision to deny parole and denying his ex post facto argument. This appeal follows.

STANDARD OF REVIEW

In an appeal from an ALC decision, the Administrative Procedures Act provides the standard of review. S.C. Code Ann. §1-23-610(B). This Court may only reverse the decision of the ALC if that decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. "The [C]ourt may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Id.* In determining whether the ALC's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion

that the ALC reached. *Hill v. S.C. Dep't of Health and Env'tl. Control*, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010).

ARGUMENTS

1. Due to the law and the Board policy existing at the time he committed the offense, the Appellant must appear before the Board biannually.

The Appellant argues that only being allowed to appear before the Board every two years violates ex post facto. It is his position that due to *Jernigan v. State*, 340 S.C. 256, 531 S.E.2d 507 (1999) he should be allowed to appear before the Board on an annual basis. The Appellant received a life sentence for the offense of murder on February 23, 1978. He committed this offense on December 15, 1977. The law existing at the time of the offense, and not at the time of sentencing, determines whether an increase of punishment or reduction of benefits constitutes an ex post facto violation. *Elmore v. State*, 305 S.C. 456, 409 S.E.2d 397 (1991). At the time the Appellant committed this offense no law existed regarding the length of time an inmate must wait until he is allowed to reappear before the Parole Board. Since no law existed the Department created a policy that determined the waiting period of an inmate upon the denial of parole. This policy specifically stated, "The following computation is to be used in re-investigating all cases previously rejected unless otherwise specified by our board. . . . 30 years sentence or more reinvestigate after serving 24 months."

The Appellant asserts that scheduling his parole hearings biannually is unlawful pursuant to the *Jernigan* decision. The Department has set the frequency of the Appellant's hearings pursuant to Parole Board policy which was in effect at the time the Appellant committed the offense. In *Jernigan*, the South Carolina Supreme Court held, that retroactive application of a statutory amendment that reduced the frequency of parole consideration hearings for violent offenders from once every year to once every two years pursuant to Section 24-21-645, violated

ex post facto clause of the South Carolina Constitution. *Jernigan*, at 256 (emphasis added). Based on this opinion the Department began applying the amended statute, Section 24-21-645, only prospectively to persons who had committed offenses on or after June 3, 1986.² Additionally, the Department began immediately scheduling parole reconsideration hearings for inmates who had been subjected to the retroactive application of Section 24-21-645, and who committed offenses after June 15, 1981.³ The *Jernigan* decision affects the frequency of parole reconsideration hearings only for those inmates who committed their offense on or after June 15, 1981, but before June 3, 1986 because they are the only inmates who had been subjected to a statutory amendment. Inmates who committed offenses prior to June 15, 1981, were not entitled to anything other than a single parole consideration hearing under the statutes in effect at that time.

The position of the Appellant that hearings being held biannually is in violation of ex post facto is incorrect. No violation of ex post facto exists for applying biannually parole review on the Appellant because there was no law in place when he committed his offense. When he committed this offense Department policy held that after the denial of parole, an inmate serving a sentence of thirty years or more must wait two years before another hearing would be held. No law existed at the time the offense was committed so pursuant to Department policy the Appellant was to appear before the Board every two years.

In 1981, the South Carolina legislature created a law that allowed all inmates to have the ability to appear before the Board on a yearly basis. In 1986 the omnibus crime bill created violent

² The Department acknowledges that in scheduling parole consideration hearings prior to the *Jernigan* decision, the Department alternated between applying current statutes retroactively to all inmates, and applying those statutes in effect at the time the crime was committed. However, those fluctuations were in reaction to the evolving case law on this subject. *See, Gunter v. State*, 298, S.C. 113, 378 S.E.2d 443 (1989); *Roller v. Cavanaugh*, 984 F.2d 120 (4th Cir. 1993); *Griffin v. State*, 315 S.C. 285, 433 S.E.2d 862 (1993); *California v. Morales*, 514 U.S. 499, 115 S.Ct. 1597 (1995); and, *Roller v. Gunn*, 107 F.3d 227 (4th Cir. 1997).

³ This is the effective date of the statute which first established a time frame for parole reconsideration hearings following a parole rejection. S.C. Code Ann. §24-21-620 (2007).

and non-violent classification. This new law allowed only biannual hearings for anyone serving an offense that is classified as violent.⁴ This statute placed the Appellant in the identical position he was in at the time he committed the offense.

This issue was raised before the South Carolina Court of Appeals in the case of *James v. S.C. Department of Probation, Parole and Pardon Services*. In *James*, the South Carolina Court of Appeals decided:

Application of amended statute providing the consideration for parole eligibility for violent offenders would be biannually rather than annually did not violate prohibition against ex post facto laws; at time of inmate crimes, there was no statute governing frequency of parole hearings, but Department of Probation, Parole and Pardon Services had a policy calling for biannual review for persons serving sentences of 30 years or more, statute allowing for annual reviews was enacted several years after inmate's crimes were committed, and amended statute provided no greater limitation on parole eligibility than inmate was originally entitled to.

James v. S.C. Department of Probation, Parole and Pardon Services, 376 S.C. 392, 656 S.E.2d 299 (2008).

The Appellant was convicted of murder prior to the law that created biannual review. The Appellant is serving a life sentence occurring in 1977. At that time no law existed, so Department policy applied. Due to this policy he could only appear biannually. That policy is identical as the law as it exist today, so there exist no violation of ex post facto. Regarding the issue of whether an increase of punishment constitutes ex post facto violation, the relevant inquiry is whether the legislature amendment procedures a sufficient risk of increasing the measure of punishment attached to the covered crimes. *Jernigan*, at 261.

⁴ 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 determination of parole. S.C. Code Ann. §24-21-645 (1986).

2. The order of denial revealed that the Board considered all of the mandatory criteria; therefore the denial of parole was lawful.

The Appellant argues that the Board considered factors that were unchangeable because they were fixed in the past and therefore immutable. He then argues that considering those factors was improper.

At no point has a South Carolina court held that it is impermissible for the Parole Board to consider factors fixed in the past, so long as the Board considers all the required factors that are mandated by statute and its own rules.

After the Board's most recent denial of the Appellant's parole, the Department sent him written notice of his denial, the reasons for the denial, and a statement that it considered the mandatory criteria when considering the Appellant's request for parole. A final decision shall include findings of fact and conclusions of law separately stated. S.C. Code Ann. §1-23-350 (2018). (R.p.1).

This order followed South Carolina law and the mandates proscribed 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 established that the ALC has a very narrow ability to review the process conducted by the Parole 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.

The Court in *Cooper* found that though the Board's denial of parole included its findings of fact, the Board, "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. The Supreme Court ruled 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.

The Supreme Court then established what a future order of denial should consist of. “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 published in its parole form. If the Board complies with the 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.*

In the present case, the order of denial included its findings of fact which were the reasons for denial; and a statement that the mandatory criteria and risk assessment were considered prior to the final decision. The Appellant appears to be of the belief that the Board is not allowed to consider factors that are fixed in time and unchangeable. This, however, is not correct.

The South Carolina General Assembly as well as the Department has created mandatory criteria that must be considered. 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)

The General Assembly has also made the Board responsible for the establishment of 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.* This criteria includes, “the nature and seriousness of the inmate’s offense, the circumstances

surrounding the offense, and the inmate's attitude toward it." So the actual events that occurred must be considered as part of the mandatory criteria considered by the Parole Board.

At no point has the appellate courts of South Carolina prohibited the Board's consideration or use of the facts and circumstances of the offense – which are always unchangeable events in the past – in its denials of parole. Furthermore, the Department respectfully submits that the Courts would not be able to do so, in light of the statutory language mandating that the Board carefully consider the inmate's record. To rule otherwise – that the Board must carefully consider the inmate's record but somehow may not rely upon that record when it declines to award parole – would impose an impossible mental exercise upon the members of the Board.

The Department respectfully submits that the ALC properly followed *Cooper* and dismissed the appeal because it was from a routine denial of parole. This Court should therefore uphold the decision of the ALC.

3. The issue the Appellant raises regarding destroyed parole hearing records was not raised at the lower court and therefore should be dismissed.

The Appellant raises for the first time in this Appeal the issue of parole hearing records that had been destroyed. He makes a new claim that he may have been improperly denied parole and that the destroyed records makes it impossible for him to prove that fact.

This matter was not preserved for review, because it was not raised at the lower court. "It is 'axiomatic that an issue cannot be raised for the first time on appeal.'" *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011), quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

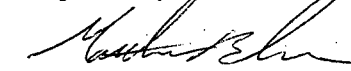
Because this issue was not raised or ruled upon by the Administrative Law Court, this issue cannot be introduced for the first time before this Court. The Department respectfully requests that this Court decline to consider this issue.

In any event, the case the Appellant cites, *Rose v. South Carolina Dept. of Probation, Parole and Pardon Services*, 2020 WL 465696 (2020), is not yet a final decision. As of the date of this Initial Reply Brief, a Motion for Reconsideration is pending and the Remitter has not yet been filed.⁵

CONCLUSION

Based on the foregoing reasons, the Department submits that the ALC correctly concluded that the Board followed its procedures under *Cooper* which resulted in a routine denial of parole. Therefore, it correctly declined to rule on anything outside its limited scope. The Department would respectfully request this Court affirm the decision of the ALC.

Respectfully submitted,



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⁵ In the event that the decision in *Rose* is upheld, the Department submits that the opinion be strictly confined to Rose's situation, who timely filed his first appeal in 2001 after the denial of parole.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and
with the South Carolina Supreme Court's order dated August 13, 2007.


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April 20, 2020