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 S. Phillip Lenski, Administrative Law Judge
Docket Number 2021-ALJ-15-0007

Appellate Case No.: 2021-001145

CHARLES WILLIAMS, #086721.....APPELLANT

v.

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

INITIAL BRIEF OF RESPONDENT

Jessica E. Kinard
Legal Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 207
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(803) 734-9220

ATTORNEY FOR RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

1. Does the Administrative Law Court err when it failed to find an ex post facto violation when Williams was denied parole through the retroactive application of Form 1212's nature and seriousness of the offense parole rule?

2. Did the Administrative Law Court err when it failed to find that the Parole Board's procedure was unlawful when it utilized an inappropriate criterion to render its decision?

STATEMENT OF THE CASE

On September 26, 1975, Appellant left a night spot with three females ranging in age from 15-17 years old. About a month later, on October 26, 1975, the bodies of all three females were found floating in the Reedy River about fourteen miles outside of Greenville County. The investigation revealed Appellant took all three victims and gave them some pills, which they consumed leading to their death a short time later. Appellant then drove to a wooded area by the Reedy River and rolled each body into the water. Due to the age of the case, information regarding his indictment and conviction are limited. On April 16, 1976, Appellant was sentenced to death by electrocution, however, on April 14, 1977, the South Carolina Supreme Court vacated Appellant's death sentence and remanded his case to the lower court for resentencing. On April 20, 1977, Appellant was sentenced to three life sentences which were set by the court to run consecutive to each other.

Appellant became parole eligible in August 1984. Since that time, Appellant has had twenty parole hearings with the most recent review taking place on March 24, 2021. Following Appellant's appearance, the Board unanimously rejected his request for parole citing the nature and seriousness of Appellant's offense as the reasons for their rejection.

Upon being informed of his denial of parole, Appellant filed a notice of appeal before the Administrative Law Court (ALC). In his appeal, Appellant alleges the application of Form 1212 to Appellant's parole hearing violates the ex post facto clause of the U.S. Constitution, and the Board determined their findings of fact upon unlawful procedure because of the change of a single word in the relevant parole statute outlining the Board's consideration of parole. The Honorable S. Phillip Lenski of the ALC determined that the court did not have jurisdiction to hear this matter as it was a routine denial of parole, thus affirming the Board's decision.

Appellant raises the same issues in this appeal. Respondent argues that the ALC was correct in its determination this was a routine denial of parole and cannot be reviewed. Beyond that and in the alternative, Respondent argues the changes in the criteria are minimal and not penal in nature so there exists no violation of ex post facto. Respondent will further argue that the change to the statute did not appreciably change the Board's required procedure and was therefore not unlawful.

Respondent's brief follows.

ARGUMENT

1. **The Board's use of its current parole consideration criteria does not result in an ex post facto violation.**

As a threshold matter, Respondent asserts that, because this was a routine denial of parole, the ALC's affirmation of the Parole Board's decision should stand as there is no legal basis to overturn it. The ALC reviewed the procedures, as it is limited to in this capacity, and found them to be in compliance with all relevant law. *See* Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs., 377 S.C. 489, 661 S.E.2d 106 (2008).

Regardless, Appellant argues that the use of the parole consideration criteria found in S.C. Code §24-21-640 and the criteria listed in the Board's current Form 1212 constitutes an ex post facto violation. Because he committed his crime in 1975, he argues that the criteria the Board uses should solely be that which was used at the time of his offense.[1]

Respondent submits that the changes to the parole criteria do not retroactively alter the definition of the crime or increase the punishment for a crime. As discussed in Jernigan v. State, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000), ex post facto violations occur when "the legislative amendment 'produces a sufficient risk of increasing the measure of punishment attached to the covered crimes.'" Id., quoting California Dep't of Corrections v. Morales, 514 U.S. 499 (1995).

In Jernigan, the legislative change at issue was a change from yearly parole hearings to biannual hearings for violent offenders. The Supreme Court determined that the change violated ex post facto because increasing the time between parole hearings "effectively increases the

[1] Appellant has unsuccessfully submitted this identical argument to this Court and the Honorable Deborah Brooks Durden under Docket No. 19-ALJ-15-0002 (Order filed July 22, 2019). He also unsuccessfully argued denial of due process after a routine denial of parole to the Honorable Carolyn C. Mathews and Court of Appeals, ending in Opinion No. 2012-UP-216.

'quantum of punishment.'" Jernigan at 340 S.C. at 265, 531 S.E.2d at 512, quoting Lynce v. Mathis, 519 U.S. 433, 444-45 (1997).

At the time Appellant committed the offense, S.C. Code Ann. § 55-612 (Supp. 1962) defined the mandatory criteria the Parole Board was obligated to apply to an inmate seeking parole. Section 55-612 of the South Carolina Code of Laws specifically stated:

> The Probation, Parole and Pardon Board shall carefully consider the record of the prisoner, before during and after imprisonment, and no such prisoner shall be paroled until it appear 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 interests of society will not be impaired thereby; and that suitable employment has been secured for him.

S.C. Code Ann. §55-612 (Supp. 1962)

In comparing this to the current statute, which was amended in 1981 and is now §24-21-640, the only difference is the word "shall" is replaced by the word "may" – "...no prisoner may be paroled...." This change does not affect the Board members nor the criteria used in the determination of parole. This minor difference must be considered procedural, and not a violation of ex post facto. A procedural change is not ex post facto even though it may work to an inmate's disadvantage. State v. Bryant, 382 S.C. 505, 675 S.E.2d 816 (Ct. App. 2009). It certainly does not represent the "significant risk," whether on its face or through implementation, of "a longer period of incarceration than under the earlier rule," as Appellant argues. Garner v. Jones, 529 U.S. 244, 251 (2000); Jernigan, 340 S.C. at 261, 531 S.E.2d at 509.

Appellant alleges that the consideration of the Department's fifteen criteria found in Form 1212 violates ex post facto, specifically as it includes consideration of the nature and seriousness

of the offense.[2] He argues that since this criteria did not exist at the time of his conviction, and that he has not received parole since he started receiving hearings in 1984, then it must be to his detriment. This argument is flawed, as correlation does not necessarily imply causation.

Furthermore, neither the statutory nor Department criteria are penal in nature so it does not violate ex post facto. In order for ex post facto clause to be applicable, the statute or the provision in question must be criminal or penal in purpose and nature. State v. Huiett, 302 S.C. 169, 394 S.E.2d 486 (1990). The Department criteria do not increase punishment; nor does it change the parole board or add to the amount of votes necessary to be awarded parole. The use of the current criteria is merely a procedural change; therefore, it does not violate ex post facto.

Lastly, there is no conceivable application of Form 1212 or the current wording of the statute that could increase Appellant's potential time in prison. Appellant looks to Garner v. Jones, 529 U.S. 244, 120 S.Ct. 1362 (2000), California Dept. of Corrections v. Morales, 514 U.S. 499, 115 S.Ct. 1597 (1995), and Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000) to support his claims that the "quantum of punishment" may be increased. All three of the cases consider the possibility of ex post facto violations due to a change in frequency of parole hearings and found that, in most instances, retroactive application would be an ex post facto violation. That fact pattern is clear application of a new rule that could lengthen incarceration. In the case *sub judice*, though, there is no new rule, merely a reframing of the existing standards. Therefore, the decision of the Board and the Administrative Law Court should be upheld.

2. The Parole Board's procedure was not unlawful.

Again, before considering Appellant's assertions, Respondent argues that, because this was a routine denial of parole, the ALC's affirmation of the Parole Board's decision should stand as

[2] The Board must establish written, specific criteria for the granting of parole and provisional parole. S.C. Code Ann. §24-21-640 (1990).

there is no legal basis to overturn it. The ALC reviewed the procedures, as it is limited to in this capacity, and found them to be in compliance with all relevant law. *See* Cooper, *supra.*

Appellant argues the Board did not utilize the procedure outlined by the South Carolina Code as it existed at the time of the commission of his offense.

This argument, Respondent submits, is a re-worded ex post facto argument that Appellant already stated above. Despite his assertions that the changes to the law since the commission of his offense are penal in nature, the differences in the law are procedural and do not increase the punishment.

The sole change of the §55-162 to §24-21-640 changes the word "shall" to "may." This is not a "substantive amendment" as asserted by Appellant. As discussed above, this is a procedural change that could not be an ex post facto violation. In no way, based on the plain language of the statute, does the earlier inclusion of the word "shall" imply that the Board must parole Appellant. The statute still confers absolute discretion to the Board over the matter of granting or denying parole. The only time an inmate *shall* be paroled (or *may* be paroled) is upon the satisfaction of the Board. This was verified by the Administrative Law Court, as was the fact that the Board followed proper procedure, making this a routine denial of parole. Final Order, p.3. As such, the Court followed the correct analysis and came to the appropriate conclusion, which must be upheld.

CONCLUSION

Based on the foregoing arguments, the Department respectfully requests Appellant's arguments be dismissed and the final decision of the Administrative Law Court be affirmed.

Respectfully submitted,

Jessida E. Kinard
Legal Counsel

South Carolina Department of Probation,
Parole and Pardon Services
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Columbia, South Carolina
February 14, 2022

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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within *Initial Brief and Designation of Matter* on Appellant this 14th day of February, 2022, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Charles Williams, #086721
Broad River Correctional Institution-GRN 2104
4460 Broad River Road
Columbia, S.C. 29210

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

Dawn K. Nichols
Executive Assistant
South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 207
Columbia, South Carolina 29202

State of South Carolina

Department of Probation, Parole and Pardon Services

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February 14, 2022

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

Re: **Charles Williams, #86721 v. SCDPPPS**
21-**001145**

Dear Ms. Kitchings:

Please find enclosed the Initial Brief of Respondent and Designation of Matter dated February 14, 2022, along with proof of service in the above referenced case.

Sincerely,

Jessica E. Kinard
Legal Counsel

JEK:dn

Enclosures

cc: Charles Williams, #86721

State of South Carolina
Department of Probation, Parole and Pardon Services

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February 14, 2022

Charles Williams, #086721
Broad River Correctional Institution-GRN 2104
4460 Broad River Road
Columbia, S.C. 29210

Dear Mr. Williams:

Please find enclosed copies of the matter we designated for inclusion in the Record on Appeal.

Sincerely,

Jessica E. Kinard
Legal Counsel

JEK:dn

cc: The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals

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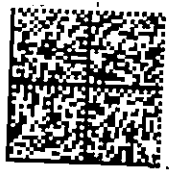

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