

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal:

1. Inmate Arvin Dale Rochell, Appellant
2. Hon. Winston Kidd, Circuit Court Judge
3. Jim Hood, Attorney General for the State of Mississippi

The undersigned counsel further certifies that the following attorneys have an interest in the outcome of this case:

For Appellee:

1. Jane Mapp, Special Assistant Attorney General, State of Mississippi
2. Jim Norris, Attorney Senior, Mississippi Department of Corrections

By: Jane Mapp

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
ISSUES	v
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	2
CONCLUSION	8
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Cotton v. Mississippi Parole Board</i> , 863 So.2d 917 (Miss. 2003)	3, 8
<i>Hopson v. Miss. State Parole Bd.</i> , 976 So.2d 973(Miss. Ct. App. 2008)	5, 7
<i>Johnson v. Rodriguez</i> , 110 F.3d 299(5 th Cir. 1997)	5, 6
<i>Mitchell v. State</i> , 561 So.2d 1037 (Miss. 1990)	3
<i>Monroe v. Thigpen</i> , 932 F.2d 1437 (11 th Cir. 1991)	7
<i>Paine v. Baker</i> , 595 F.2d 197 (4 th Cir. 1979)	7
<i>Scales v. Mississippi State Parole Board</i> , 831 F.2d 565 (5 th Cir. 1987)	3
<i>Shanks v. State</i> , 672 So.2d 1207 (Miss. 1996)	3
 <u>Other Authorities</u>	 <u>Page</u>
Miss. Code Ann. §47-7-3(3)	3
Miss. Code Ann. §47-7-5	2
Miss. Code Ann. §47-7-13(Rev. 2004)	2
Miss. Code Ann. §47-7-17	2, 3, 4
M.R.C.P. 65	8

ISSUES

I. Based on the Interpretation of § 47-7-5(1) How Many Members Is [Sic] Required to Constitute the Parole Board as the Term “Board” Is Used Throughout the Statutory Parole Scheme?

II. Based on the Interpretation of All State Parole Statutes Does the Legislation Place a Limit on the Maximum Amount of Time That a Violent Offender Can Be Denied Reconsideration of His/her Application after the Initial Application Is Rejected? If Not, Does Such Uncontrolled Discretion Offender Sections 1, 2, and 33 of the Mississippi Constitution?

III. Based on the Interpretation of § 47-7-3(3)(A) What Is the Legislative Intent in the Language That Requires the Parole Board Within the First 90 Days of Confinement to “Predict the Length of Incarceration Necessary Before the Offender Can Be Successfully Paroled”? Does Not Such Prediction Offend Due Process in the Decision Making Process and Run Contrary to §§ 47-7-3(1) and 47-7-17?

IV. Based on the Interpretation of All State Parole Statutes Does the Legislature Intend for an Offender to Be Denied Parole Based on False or Erroneous Information in His/her Parole File? If Not, Then Why Can Offenders Not Correct Such Information in Their Files after the Parole Board Is Notified That the File Contains Such Information?

V. Whether the Lower Court Committed Err [Sic] in Denying the Motion for Preliminary Injunction after Rochell Was Denied Parole Because of this Litigation Based on Boilerplate Reasons?

STATEMENT OF THE CASE

On or about January 5, 2007 Arvin Dale Rochell (Rochell), a state inmate legally incarcerated within the Mississippi Department of Corrections (MDOC), filed a complaint in the Circuit Court of Hinds County, Mississippi entitled “Complaint Seeking Interpretation of State Statutes” against Governor Haley Barbour, members of Mississippi State Parole and members of the Mississippi Legislature . (C.P.¹ at 6). Rochell his currently serving concurrent sentences of Life Imprisonment and 20 year for convictions of murder and arson. He became parole eligible in 2002 and at the time he filed his complaint he had been denied parole on at least four (4) occasions. (C.P. at 54). Rochell filed suit seeking interpretation of Mississippi’s parole statutes. He states no specific grounds for any cause of action, but instead merely a seeks the court’s interpretation of the state’s parole statutes.

On or about November 18, 2008 Circuit Court Judge Winston Kidd dismissed Rochell’s complaint as without merit. (C.P. at 199). Feeling aggrieved, Rochell filed his Notice of Appeal to the Mississippi Supreme Court. (C.P. at 200). Rochell also filed a request to proceed *in forma pauperis* which was subsequently was granted by the lower court. (R. at 203; 209).

SUMMARY OF THE ARGUMENT

Rochell filed a compliant seeking the court’s interpretation of Mississippi’s parole statutes. The Parole Board and not the trial court has jurisdiction over parole matters and

¹C.P. = Clerk’s Papers

Plaintiff's failure to state a viable claim against the Defendant left the Circuit Court without jurisdiction in this cause.

ARGUMENT

I. Based on the Interpretation of § 47-7-5(1) How Many Members Is [Sic] Required to Constitute the Parole Board as the Term "Board" Is Used Throughout the Statutory Parole Scheme?

Rochell argues that since Miss. Code Ann. § 47-7-5 states that the Parole Board "shall be composed of five (5) members" then anytime a statute requires an action to be taken by the "Board" all five (5) members must participate or there has been no action by the "Board" but rather only action by members of the Board which he argues is insufficient. Rochell states that during his previous parole hearings only three (3) members of the Board were present. He maintains that since Miss. Code Ann. § 47-7-17 states in part that "the board may have the offender appear before it an interview him" then all five (5) members must be present.

At the time Rochell filed his complaint, Miss. Code Ann. § 47-7-13 (Rev. 2004) read in pertinent part as follows:

A majority of the board shall constitute a quorum for the transaction of all business. A decision to parole an offender convicted of murder or a sex-related crime shall require the affirmative vote of three (3) members.²

This section clearly allows three members of the five-member Board to conduct parole hearings. Accordingly, Rochell's argument is without merit.

²§ 47-7-13 was amended in 2009 to require an affirmative vote of four (4) members before offender convicted or capital murder or a sex-related crime may be paroled.

II. Based on the Interpretation of All State Parole Statutes Does the Legislation Place a Limit on the Maximum Amount of Time That a Violent Offender Can Be Denied Reconsideration of His/her Application after the Initial Application Is Rejected? If Not, Does Such Uncontrolled Discretion Offender Sections 1, 2, and 33 of the Mississippi Constitution?

Rochell argues that Mississippi's parole scheme is unconstitutional since the legislation grants unlimited discretion to the Parole Board as to the amount of time permitted between reconsideration hearings. Rochell maintains that this unlimited discretion violates Section 1, 2 and 33 of the Mississippi Constitution of 1890.

It is well settled that Mississippi prisoners have "no constitutionally recognized liberty interest" in parole. *See, Cotton v. Mississippi Parole Board*, 863 So.2d 917 (Miss. 2003) (Held that the parole Board has "absolute discretion" to grant or deny parole within the boundaries established in Miss. Code Ann. § 47-7-3 and that absent a viable constitutional claim the circuit court has no jurisdiction over appeals concerning the denial or parole); *Shanks v. State*, 672 So.2d 1207, 1208 (Miss. 1996) (Held that the Parole Board and not the trial court has jurisdiction over parole matters.); *Mitchell v. State*, 561 So.2d 1037, 1039 (Miss. 1990) (Pursuant to Miss. Code Ann. § 47-7-3, parole matters are the exclusive responsibility of the parole board); *Scales v. Mississippi State Parole Board*, 831 F.2d 565, 566 (5th Cir. 1987) (Mississippi's parole statutes confers absolute discretion on the Parole Board.) Mississippi's parole statutes have been held by both the Mississippi Supreme Court and the Fifth Circuit Court of Appeals to be constitutional.

Since Mississippi prisoners have no right to parole, they have no right to be reconsidered for parole at specific intervals. The Legislature in Miss. Code Ann. § 47-7-17

gave the Parole Board the authority to adopt rules concerning the “conduct of parole hearings....” This includes a determination by the Board as to when an offender who has been denied parole will be reconsidered. Accordingly, this issue is without merit.

III. Based on the Interpretation of § 47-7-3(3)(A) What Is the Legislative Intent in the Language That Requires the Parole Board Within the First 90 Days of Confinement to “Predict the Length of Incarceration Necessary Before the Offender Can Be Successfully Paroled”? Does Not Such Prediction Offend Due Process in the Decision Making Process and Run Contrary to §§ 47-7-3(1) and 47-7-17?

Rochell argues that Miss. Code Ann. §47-7-3(3) requires the Parole Board to predetermine the date an offender may be successfully paroled, not just the date he would be eligible for a parole hearing. Rochell maintains that this language violates his due process rights and denies him the right to have other factors set out in Miss. Code Ann. § 47-7-17 considered during the parole process.

Miss. Code Ann. § 47-7-3(3) reads as follows:

The State Parole Board shall, by rules and regulations, establish a method of determining a tentative parole hearing date for each eligible offender taken into the custody of the Department of Corrections. The tentative parole hearing date shall be determined within ninety (90) days after the department has assumed the custody of the offender. Such tentative parole hearing date shall be calculated by a formula taking into account the offender’s age upon first commitment, number of prior incarcerations, prior probation or parole failures, the severity and the violence of the offense committed, employment history, whether the offender served in the United States Armed Forces and has an honorable discharge, and other criteria which in the opinion of the board tend to validly and reliably predict the length of incarceration necessary before the offender can be successfully paroled.

This subsection requires that within 90 days after the Department of Corrections has assumed custody of an offender that a tentative parole hearing date be determined for eligible

offenders. The section states that in addition to the minimum time required for parole eligibility, the Parole Board may establish a tentative parole hearing date by taking into consideration any factor that would “tend to validly and reliably predict the length of incarceration necessary before the offender can be successfully paroled.” The subsection does not create a second secret parole date that the offender does not know about. It merely allows the Board to consider addition factors when establishing the offender’s initial parole eligibility date. There is no evidence to suggest that Rochell’s initial parole eligibility date was beyond the ten years minimum he was required to serve by statute. Additionally, since Rochell has no liberty interest in parole he may not challenge parole procedures under the due process clause. *Hopson v. Miss. State Parole Bd.*, 976 So.2d 973, 976 (Miss. Ct. App. 2008); *Johnson v. Rodriguez*, 110 F.3d 299, 309 (5th Cir. 1997). Accordingly, this issue is without merit.

IV. Based on the Interpretation of All State Parole Statutes Does the Legislature Intend for an Offender to Be Denied Parole Based on False or Erroneous Information in His/her Parole File? If Not, Then Why Can Offenders Not Correct Such Information in Their Files after the Parole Board Is Notified That the File Contains Such Information?

Rochell argues that there is false or incorrect information contained in the pre/post sentence investigation (PSI) report which is included in his parole file, but that he has not been allowed to correct it. Rochell claims that the PSI contains false information regarding a prior arson conviction. In the lower court he pointed to an National Crime Information Center (NCIC) report and a “Motion to Suppress” filed by his attorney in his criminal case

to show he had not been previously convicted of arson. The PSI clearly states that the prior arson charge was dismissed. Additionally, the Parole Board has given Rochell an opportunity to provide any information regarding this entry on the PSI. Not all arrests are entered into the NCIC database and according to the PSI information used in the report was also obtained from the Calhoun County Sheriff's Office.

Rochell asks the Court to order the Parole Board to adopt rules and regulations to permit inmates to verify their files and correct any false or erroneous information. The Parole Board in their answers to Rochell's interrogatories informed him the he could review his file and present any evidence or explanations for what he considered false or inaccurate information. The fact that Rochell knows what is in his parole file suggests that he has had to opportunity to review it and he admits that he has provided the Board with information to suggest that the information regarding at least one prior crime inaccurate. Rochell's explanation would undoubtedly be considered in the Board's review of his file and in their decision as to how much weight to given the contested information.

Rochell cites to number cases from other jurisdictions in arguing that false information in his parole file violates his rights. None of these cited cases are from Mississippi or the Fifth Circuit Court of Appeals. In *Johnson v. Rodriguez*, 110 F.3d 299, 309 (5th Cir. 1997), the Fifth Circuit Court of Appeals stated that "[t]he protections of the Due Process Clause are only invoked when State procedures which may produce erroneous or unreliable results imperil a protected liberty or property interest." *Id.* at 308. (citations

omitted). The Court went on to state that “allegations that the Board considers unreliable or even false information in making parole determinations, without more, simply do not assert a federal constitutional violation.” The Fifth Circuit went on to state:

It is our view that the procedural Due Process protections created in *Monroe* and *Paine* [*v. Baker*, 595 F.2d 197 (4th Cir. 1979), cert. denied, 444 U.S. 925, 100 S.Ct. 263, 62 L.Ed.2d 181 (1979),] are in essence inconsistent with subsequent precedent in their respective circuits and that both cases have thus been effectively overruled. Whatever the viability of these anomalous cases today, our precedent is definite and precise on this point: in the absence of a cognizable liberty interest, a state prisoner cannot challenge parole procedures under the Due Process Clause.

Id. at 309, fn 13.

Since Rochell has no liberty interest in being granted parole the possibility that the Board may have considered on false information in making their decision does not give rise to a due process claim. *See Hopson v.* 976 So.2d at 975(held that the Court lack jurisdiction to hear offender’s claims that his parole was improperly denied because of false information contained in his parole file). This issue is without merit.

V. Whether the Lower Court Committed Err [Sic] in Denying the Motion for Preliminary Injunction after Rochell Was Denied Parole Because of this Litigation Based on Boilerplate Reasons?

Rochell argues that the lower court erred in denying his Motion for Preliminary Injunction seeking an order vacating the Board’s previous denial of parole and requiring the Board to conduct a new parole hearing. Rochell argues that he was entitled to a preliminary injunction because the Board allegedly considered the current litigation when making its decision to deny him parole.

Whether to grant a preliminary injunction is within the discretion of the trial court. (See comments to M.R.C.P. 65.) Rochell sought a new parole hearing at which the Board would be “directed to NOT consider, in any manner, the litigation activities of Rochell and instructed to not deny release on the unchangeable reasons used in the previous four hearings, nor any boilerplate reasons.” (C.P. at 66). Rochell was in essence seeking an order from the trial court giving him a new parole hearing and directing the Parole Board as to what it could and could not consider when determining whether or not to grant him parole.

The lower court did not abuse its discretion in failing to grant Rochell’s Motion for Preliminary Injunction. As stated previously, parole is within the complete discretion of the parole board and the circuit court had no jurisdiction to dictate or re-weigh the factors considered by the Board in making its parole decision. *See, Cotton*, 863 So.2d at 921. Accordingly, this issue is without merit.

CONCLUSION

Based on the arguments of fact and law herein above, it is clear that the trial court did not commit reversible error and its decision dismissing Plaintiff’s complaint should be affirmed.

Respectfully submitted,

STATE OF MISSISSIPPI
DEFENDANT-APPELLEE

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

JANE L. MAPP
SPECIAL ASSISTANT ATTORNEY GENERAL
MS BAR NO.: [REDACTED]

BY: Jane Mapp

CERTIFICATE OF SERVICE

I, Jane L. Mapp, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first class postage prepaid, a true and correct copy of the foregoing **Brief of Appellees** in the above-styled and numbered cause to the following:

Arvin Dale Rochell, #83848
Unit 26-B
Parchman, MS 38738

Honorable Winston Kidd
Circuit Court Judge
P.O. Box 327
Jackson, MS 39205

This, the 12th day of October 2009



Jane L. Mapp
Special Assistant Attorney General

510 George Street, Suite 212
Jackson, MS 39202
Telephone: (601) 359-5770