IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2008-CP-01730

ARVIN DALE ROCHELL
APPELLANT

VS.

STATE OF MISSISSIPPI
APPELLEE

****

REPLY BRIEF OF APPELLANT

****

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Other Authority

SUMMARY OF REPLY

The overall premise of the Appellee Brief is that since Rochell has no liberty interest in parole he may not challenge parole procedures.

The fact that no liberty interest is involved does not preclude this Court from inquiring as to the construction of the parole statutes. The United States Supreme Court has held that contemporaneous administrative construction is a rule of interpretation, but it is not an absolute one and it does not preclude an inquiry by the courts as to the original correctness of such construction. Houghton v. Payne, 194 U.S. 88, 24 S.Ct. 590 (1904). This case is **not** precluded by the fact that Rochell has no protected liberty interest in parole in the State of Mississippi. Perry v. Sindermann, 408 U.S. 593, 599 (1972); Drennon v. Craven, 105 P.3d 694, 699 (Ida. App. 2004).

ISSUE I.

Rochell argued that Statutes 47-7-5 and 47-7-17 requires that all five (5) members of the Mississippi Parole Board must participate in parole hearings.

The Parole Board submits that Statute 47-7-13 allows three (3) members of the five-member Board to conduct parole hearings. That Rochells' argument is without merit.

At the outset it must be remembered that "[t]he State Parole Board can only do what the Legislature authorizes it to do." Shillingford v. Reed, 312 So.2d 717, 720 (Miss. 1970)."A public officer is not charged with the duty of determining whether a statute is constitutionally valid when acting thereon, that being a solemn judicial question for the courts to determine." Golden v. Thompson, 194 Miss. 241, 11 So.2d 906, 907 (Miss. 1943).

Rochell pleads thereupon that given the unambiguous meaning of "Board" in §47-7-5(1) and §47-7-17, which is five members as admitted by the defendants; that the quorum referred to in §47-7-13 relates only to voting, not the hearing authorized per §47-7-17.

Statute 47-7-17 entitled "Examination of Offender's Record; eligibility for parole" addresses the parole hearing, what factors are to be considered and the terms for parole consideration. Statute 47-7-13 entitled "Voting and recordkeeping requirements; offices, equipment, and supplies" states the number of votes needed to grant parole and other irrelevant matters. Statute

47-7-15 also addresses the voting of the board but it does not relate to parole hearings. Logically Statute 47-7-13 states only the number of "affirmative votes" needed to grant parole, it does not address the conducting of hearings as the Parole Board has alleged. The current practices of the Parole Board in conducting hearings with only three members is void as contrary to §47-7-17. "If an administrative agency exercises power that is not expressly granted or necessarily implied, then the agency's decision is void". Wilkerson v. MESC, 630 So.2d 1000, 1001-02 (Miss. 1994).

ISSUE II.

Rochell argued that the Legislature violated Sections 1, 2 and 33 of the Mississippi Constitution by granting unlimited discretion to the Parole Board as to the amount of time permitted between reconsideration hearings.

The Parole Board submits that since prisoners have no right to parole, they have no right to be reconsidered for parole at specific intervals.

That might be a correct argument concerning the unlimited discretion granted to the Parole Board, however it does not address the issue of whether the Legislature violated the State Constitution in granting such unlimited discretion to the board. "The power of judicial review includes the power to declare acts of the Mississippi Legislature to be unconstitutional." Estate of Smiley, 530 So.2d 18, 21 (Miss. 1988).

The Attorney Generals' argument misses the point, the Legislature is a party in this case and this Court has "the power to construe the constitution and thus define the powers of the three branches of government." State v. Wood, 187 So.2d 820, 831 (Miss. 1966). Without doubt, our Constitutional scheme contemplates the power of judicial review of legislative enactments.

It is completely irrelevant in this instance that Rochell has no liberty interest in parole, Rochell can still question the constitutionality of the parole statutes. The courts and not the parole board has competent jurisdiction over the constitutionality of Mississippi Statutes. Alexander v. State, 441 So.2d 1329, 1333 (Miss. 1983). "[N]o citation of authority is needed for the universally accepted principle that if there be a clash between the edicts of the Constitution and the legislative enactments, the latter must yield." Newwell v. State, 308 So.2d 71, 77 (Miss. 1975).

Therefore, this Court must determine whether the Legislature have acted contrary to Sections 1, 2 and 33 of the Mississippi Constitution by granting unlimitied discretion to the Parole Board without any guildlines on how the discretion is to be exercised. See M.R.A.P. 44(c).

ISSUE III.

Rochell argued that Statute 47-7-3(3) mandates the Parole Board to predetermine the date an offender will be "successfully paroled", not the date he/she will be eligible for parole

consideration.

The Parole Board submits that "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". Appellee Brief at page 5.

This argument offers a severe misrepresentation of the actual practices in the Mississippi parole system. First, the initial parole eligibility date is set according to the mandatory guildlines in Statute 47-7-3(1) and cannot be altered by the Parole Board. Second, if there is not a "second secret parole date", then why does the "Action of the Parole Board" form have two (2) different spaces for such dates. There is an "Eligibility Date" and a "Tentative Release Date". **SEE** Exhibit "D". Appellant's Record Excerpts at page 20. The two dates clearly are not the same date, so what is a "tentative release date"? Rochell asserts that §47-7-3(3) does not merely allow the Parole Board to consider additional factors when establishing the initial eligibilty date.

The Parole Board argues that since Rochell has no liberty interest in parole he may not challenge parole procedures under the due process clause. The Parole Board cites Hopson v. Miss. State Parole Bd., 976 So.2d 973, 976 (Miss. Ct. App. 2008) and Johnson v. Rodriguez, 110 F.3d 299, 309 (5th Cir. Tex. 1997) to support it's position.

Hopson does not address the statutory construction issue. Johnson on the other hand found that "such concerns are matters

for the responsible state agencies and it is to those bodies that grivances concerning parole procedures should be address. Id 110 F.3d at 309. Thus, the Johnson Court found that it was not a federal issue.

The United States Supreme Court in Wilkinson v. Dotson, 544 U.S. 74, 125 S.Ct. 1242 (2005) held that §1983 remains available for procedural parole challenges where success would not necessarily spell immediate or speedier release for prisoners. In the case at bar, Rochell claims are cognizable, he seeks relief that will render invalid the state procedures used to determine parole eligibility and parole suitability, plus clarification of parole statutes. The Parole Board is merely trying to circumvent the issues, as relief would not mean the release of Rochell.

This Court does not have the power to grant parole, but the Court has the authority to direct the parole board to reconsider eligibility for parole in a proper case. State v. Read, 544 So.2d 810, 815 (Miss. 1989)(citation omitted). Rochell can indeed challenge the constitutionality of parole procedures under substantive due process. "It is a familiar rule of administrative law that an agency must abide by its own regulations." Fort Stewart Schools v. FLRA, 495 U.S. 641, 654 (1990); Vitarelli v. Seaton, 359 U.S. 535, 547 (1959).

This Court in Cotton v. Miss. Parole Bd., 863 So.2d 917, 921 P12 (Miss. 2003) noted:

> We are not ... holding that the circuit court lacks jurisdiction in all matters which touch upon parole.
>
> The inmates in the present action are not asking the circuit court to review whether the parole board is

following their statutorily mandated duties and requirements regarding determining parole eligibility..

Our holding today does not preclude inmate appeals ... concerning a constitutional matter ... .

ISSUE IV.

Rochell argued that there is false criminal information contained in his parole file, that he has been questioned multiple times by the Parole Board concerning the false/incorrect information and the Board will not permit him to correct the erroneous infromation.

The Parole Board submits that the court lacks jurisdiction to hear offenders claim that his parole was improperly denied because of false information contained in his parole file. The Parole Board cites Hopson and Johnson to support it's position.

Hopson is distinguishable from the case at bar. Hopson did not offer any evidence to show that false information was indeed contained in his file, nor allege that the board had questioned him about such false information. Rochell has offered sworn testimony and documentation showing that false criminal information is contained in his parole file and that he has been questioned multiple times at previous parole hearings about the erroneous criminal information. Clerk's Papers at page 107.

The PSI shows the circumstances of Rochells' crimes totally contrary to the actual facts established in the Calhoun County Circuit Court. Since §47-7-17 mandates the Parole Board to consider the "circumstances of his offense", the false criminal information is extremely prejudicial to Rochell. Furthermore,

the Parole Board has admitted under oath that legislation does **not** intend for Rochell to be denied parole based in any part on false information. Clerk's Papers at page 125, 132, response to Interrogatory No. 7.

Johnson merely held that allegations that the board considers false information, without more, simply do not assert a federal constitutional violation. 110 F.3d at 308-09. The Johnson Court found that such matters should be addressed by the State, the court did not hold that such matters did not violate State Statutes or State Constitutional rights, only that it was not a federal due process violation.

The Attorney General implied that Rochell has been permitted to review his file and offer any evidence he considered false to the board. Appellee Brief at page 6. That is incorrect! Rochell has been trying to review his file for the past three (3) years to no avail. After Rochell was questioned by the Parole Board about the false criminal information, the PSI was disclosed to Rochell by the Calhoun County Circuit Clerk. In fact, Statute 47-7-21 does not permit the Parole Board to disclose the PSI, "all information obtained in the discharge of official duty by a field officer as an employee of the Department of Corrections shall be privieged". The PSI is the only information contained in an offenders parole file which is obtained by a field officer.

The Mississippi Code of Annotated is silent of offenders having access to their parole files before or during a parole hearing. Defendants Hamilton and Warnock both have admitted under oath that inmates may review their master files prior to parole hearings. Clerk's Papers at page 126-27, 132-34,

responses to Interrogatory No. 10 and 13. Apparently the Parole Board has adopted a new review policy pursuant to their authority in Statute 47-7-17, thereby superseding the opinions of Hopson, 976 So.2d at 975 P8; Edmond v. Miller, 942 So.2d 203, 206 P18 (Miss. Ct. App. 2006) and Way v. Miller, 919 So.2d 1036, 1042 P17 (Miss. Ct. App. 2005), each holding that inmates have no right to review their files.

Since the Parole Board has exercised their authority to adopt such review policy, the Parole Board should also adopt a rule to permit false information to be corrected when the erroneous information pertains to a criminal offense. "To the extent that the parole board establishes guildlines or procedures, the Board is as controlled by those rules and procedures as any statutory law." Brown v. Lundgren, 528 F.2d 1050, 1053 (5th Cir. 1976)(Citations omitted). Therefore, Rochell should be permitted to enforce the review policy adopted by the Parole Board and allowed to correct any information shown to be false or incorrect.

ISSUE V.

Rochell argued that the lower court erred in failing to entertain the Motion for Preliminary Injunction. The Motion alleged that the Parole Board had retaliated against him for the exercise of his First Amendment rights in bringing litigation against the Parole Board. Rochell therein claimed that the Parole Board acted contrary to the mandatory suitability guildlines set forth in §47-7-17, using unchangable factors as a pretext

to deny parole.

The Parole Board submits that Rochell sought a new parole hearing and the circuit court had no jurisdiction. That the issue is without merit citing Cotton, 863 So.2d at 921.

At the outset Rochell has been unable to locate a parole retaliation case in the Mississippi courts. Rochell moves this Court to recognize that the jurisprudence in other courts is established on this area of law. An inmate who was denied parole at least partly because of his or her legal actions against state officials may be entitled to relief. Rauser v. Horn, 241 F.3d 330 (3rd Cir. 2001); Drennon v. Craven, 105 P.3d 694 (Ida. App. 2004); In re Addleman, 991 P.2d 1123 (Wash. 2000)(holding that if an inmate is denied parole and that denial is caused by an attempt to access the courts, a prima facie case for retaliation is made); Serio v. Members of Louisiana State Bd. of Pardons, 821 F.2d 1112 (5th Cir. 1987); Clerk v. State of Ga. Pardons and Paroles Bd., 915 F.2d 636 (11th Cir. 1990); Johnson, 110 F.3d at 313 (retaliation claim can be established where protected litigation activities are considered by parole baord); and Irving v. Thigpen, 732 F.2d 1215, 1218 Fn 7 (5th Cir. Miss. 1984)(allegation that inmate was denied parole in retaliation for exercising constitutional rights is a claim that must be addressed first by the state courts). "Prison officials may not retaliate against or harass an inmate for exercising the right of access to the courts ..." Woods v. Smith, 60 F.3d 1161, 1164 (5th Cir. 1995).

The uncontroverted evidence is that there is no Board rule or policy to prohibit the unconstitutional consideration of

an inmates exercise of the right of access to the courts. The overwhelming weight of the evidence shows that inmates are questioned about such activities and that litigation material, as well as information about legal activities, appear in parole files. The evidence shows, as Parole Board Chairman Hamilton candidly stated under oath, that pending litigation against the board can be considered during a parole hearing. Clerk's Papers at page 127-28, response to Interrogatory No. 21. Board Member Warnock admitted the same. Id at page 135.

Statute 47-7-17 does **not** in any way authorize the Parole Board to consider the litigation activities of an inmate in the parole process. The Parole Board acting outside/contrary to the mandatory suitability guildlines set forth in §47-7-17, in and of itself, stated a claim upon which relief could be granted. See e.g. Mack v. State, 943 So.2d 73, 77 P11 (Miss. Ct. App. 2006)(there may be situations where the parole board exceeds its statutory authority). The State creates a protected liberty interest in parole consideration by placing substantive limitation per §47-7-17 on official discretion. Smith v. State, 580 So.2d 1221, 1226 (Miss. 1991). In order to prove that the interest has been created, the prisoner must show "particularized standards or criteria" which guide the State's decision maker. Id.

When one can show that the decisionmaker is required to base its decision on specific, defined criteria, a protectible interest is created that is entitled to some degree of due process protection. Connecticut Bd. Pardons v. Dumschat, 452

U.S. 458, 101 S.Ct. 2460, 2465 (Brennan, J., concurring).

The Board has no rule or policy prohibiting the consideration of an inmate's litigation activities in the parole decision process, although the consideration is contrary to the guildlines mandated in §47-7-17. The Court should determine that there must be a Board rule which prohibits the consideration of an inmate's legal activities when the Board determines that inmate's candidacy for parole. The Board must adopt by rule a policy that prohibits consideration of inmate's exercise of the constitutionally protected right of access to the courts.[FN1] The rule shall specify that such activity is wholly irrelevant to the parole decision making process in §47-7-17.

Thereby, the lower court erred in failing to entertain the merits of the retaliation claim, Rochell should be permitted to offer evidence and testimony to prove his claim, that his legal activities were considered in the parole process.

FN 1: The right of access to the courts is founded in the Due Process Clause and is fundamental. Bounds v. Smith, 430 U.S. 817, 821-22, 97 S.Ct. 1491, 1494-95 (1977); Crowder v. Sinyard, 884 F.2d 804, 811 (5th Cir. 1989); Roberson v. Hewes, 701 F.2d 418, 420 (5th Cir. 1983).

CONCLUSION

This Court has sole competent jurisdiction over the interpretation of Mississippi Parole Statutes. The lower court also had jurisdiction to entertain the retaliation claim and hence erred in failing to address the merits of that claim.

RESPECTFULLY SUBMITTED, the 22nd day of October, 2009.

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CERTIFICATE OF SERVICE

This is to certify that I, Arvin Dale Rochell, have this date mailed a true and correct copy of the foregoing, via the Inmate Legal Assistance Program, to:

Jane L. Mapp
SAAG
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Jackson, MS 39202

THIS, the 22nd day of October, 2009.

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