IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

NO. 2008-~~TS~~CP-01730

ARVIN DALE ROCHELL, PLAINTIFF-APPELLANT,

Versus

STATE OF MISSISSIPPI, SUB NOM., DEFENDANTS-APPELLEE(S).

STATE PAROLE BOARD MEMBERS,

GOV. HALEY BARBOUR, and

MISSISSIPPI LEGISLATURES,

APPELLANT BRIEF

On appeal from the Hinds County Circuit Court

The Honorable Winston L. Kidd, Judge

Oral arguments not requested

/s/

Arvin D. Rochell

Appellant pro se

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TABLE OF CONTENTS

TABLE OF CASES

AMENDMENTS

MISSISSIPPI STATUTES

INTRODUCTION

This appeal calls for the definitive first impression interpretation of several Mississippi Parole Statutes, i.e., §§47-7-3(3)(a), 47-7-5(1) and 47-7-17. No state or federal court in a citiable opinion has ever interpreted these statutes in the context of this case.

The interpretation of these statutes will revolve around some of the most important pivotal laws in the state parole scheme. Therefore, it is the duty of this Court "to give effect, if possible, to every clause and word" of each statute in question. United States v. Menasche, 348 U.S. 528, 538-39 (1955). "The courts have no right to add anything to or take anything from a statute, where the language in plain and unambiguous. To do so would be entrenching upon the power of the legislature. Neither have the courts authority to write into the statute something which the legislature did not itself write therein ..." Sheppard v. Miss. State Hwy. Patrol, 693 So.2d 1326, 1328 (Miss. 1997). "Where the language used by the legislature in a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion to resort to rules of statute interpretation." Lanier v. State, 635 So.2d 813, 832 (Miss. 1994)(citations omitted).

JURISDICTION

This Court has original jurisdiction over this action under Art. 6, Sec. 156 of the State Constitution and should interpret state statutes pursuant to §1-3-1, et seq. of the Miss. Code Ann of 1972.

STATEMENT OF CLAIMS

I.

BASED ON THE INTERPRETATION OF §47-7-5(1) HOW MANY MEMBERS IS 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 OFFEND 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 DECISIONMAKING 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 IN DENYING THE MOTION FOR PRELIMINARY INJUNCTION AFTER ROCHELL WAS DENIED PAROLE BECAUSE OF THIS LITIGATION BASED ON BOILERPLATE REASONS?

STATEMENT OF FACTS

Appellant Arvin Dale Rochell (hereinafter "Rochell") was convicted of murder and arson in the Calhoun County Circuit Court in January, 1994. Rochell was sentenced to life imprisonment for murder plus twenty (20) years for arson with the sentences run concurrently.

Rochell has been considered for release on parole five (5) times; on March 26, 2002, on January 27, 2004, on November 9, 2005, on March 27, 2007 and again on May 20, 2008. Following the March, 2002, the Mississippi Parole Board (hereinafter "Board") listed several reasons for denying release: serious nature of offense, number of offenses committed, disciplinary reports, community opposition, insufficient time served, and the Board believed the ability or willingness to fulfill the obligations of a law abiding citizen was lacking.

In January, 2004, the Board listed the following reasons for denying release: serious nature of offense, number of offenses committed, police record, prior misdemeanor convictions, community opposition, insufficient time served, and the Board believed the ability or willingness to fulfill the obligations of a law abiding citizen was lacking. In November, 2005, the Board listed five (5) reasons for denying release: serious nature of offense, number of offenses committed, community opposition, and insufficient time served.

On January 19, 2006, Rochell filed a civil suit under 42 U.S.C. §1983 styled Arvin Rochell v. State Parole Board Members, et al, No. 3:06cv39-HTW-TCS, in the United States

District Court for the Southern District of Mississippi against the Board, Gov. Haley Barbour and the Mississippi Legislatures alleging civil rights violations. After an Omnibus Hearing was held on November 29, 2006, both parties consented to moving the litigation to the State Court for the interpretation of several State Parole Statutes.

On January 5, 2007, Rochell filed the current Complaint in the Hinds County Circuit Court against the same defendants' named in the federal case. Rochell sought the exclusive interpretation of multiple parole statutes, the interpretation of the statutes were of first impression. On January 29, 2007, new Defense Counsel filed an answer to the Complaint denying that there was anything for the court to interpret.

At the Parole Hearing held on March 27, 2007, immediately after this litigation was filed, Parole Board Members Warnock, Thomas and Brown acted contrary to the mandatory standard set forth in §47-7-17, MCA. The Board jointly asked Rochell a total of four (4) questions concerning the information required by §47-7-17 to be considered in each parole decision in Mississippi. Board Member Warnock, an Attorney, asked Rochell multiple questions concerning the current litigation. Warnock even asked Rochell about other litigation against the Department of Corrections. The Parole Hearing was primarily about Rochells litigiousness, not the criteria set forth in §47-7-17. Following the illicit hearing the Board listed five (5) reasons for denying release: serious nature of offense, number of offenses committed, prior police record, community opposition and insufficient time served,

although none of those factors were addressed at the hearing.

Thereafter Rochell filed an official letter of request to the Board seeking for the Board to hold a new de novo hearing based solely on the factors mandated per §47-7-17. Rochell alleged that the Board considering his current litigation denied him a fair and lawful hearing and did at the very least create an atmosphere prejudicial to a fair consideration. The Board did not respond to Rochell.

So on May 3, 2007, Rochell filed a Motion for Preliminary Injunction moving the lower court to order the Board to hold a new hearing in accordance with §47-7-17 without considering his litigation activities. On May 7, 2007, the Defendants filed their response to the motion for preliminary injunction, wherein the defendants did not deny or refute that Rochell was questioned extensively concerning his litigation against the Board.

After all relevant discovery was completed, on July 12, 2007, Rochell filed a Motion for Summary Judgment. The Motion was based in part on the Interrogatory responses of Board Members Hamilton and Warnock, wherein all relevant facts were established for the lower court to interpret the parole statutes in question.

On May 20, 2008, after the latest Parole Hearing, the Board listed the same pretext reasons for denying release. However, after much run around, the defendants finally filed their response to the motion for summary judgment on August 22, 2008; still the defendants did not address the interpretation of the parole statutes.

Rochell having attempted multiple times to place the case on the active docket for a hearing to no avail, filed a Writ

of Mandamus to this Court. Rochell sought for the court to compel the lower court to entertain several pending motions. On October 21, 2008, this Honorable Court entered an Order requiring Circuit Judge Winston L. Kidd to file a response to the mandamus within thirty (30) days, being due on or before November 20, 2008. So on November 18, 2008, Honorable Kidd entered an Order finding this action to be without merit, dismissing the entire case with prejudice. Judge Kidd omitted to give any interpretation of the statutes in question although the statutes had never before been interpreted by any State or Federal Court. Judge Kidd also omitted to entertain the retaliation claim in the Motion for Preliminary Injunction.

Rochell timely filed his notice of appeal and a Motion for Leave to Appeal In Forma Pauperis. On December 19, 2008, Judge Kidd granted Rochell leave to appeal in forma pauperis so that this case can be reviewed with an advocate eye.

ARGUMENT OF CLAIMS

I.

Based on the interpretation of §47-7-5(1) how many members is required to constitute the Parole Board as the term "Board" is used throughout the statutory parole scheme?

At the outset Defendants/Appellees Hamilton and Warnock both have admitted in their Interrogatory response No. 2 that "five (5)" members are required to constitute the State Parole Board. The Interrogatory Responses of Hamilton and Warnock are being filed/attached hereto marked as **Exhibit "A"** and **"B"** respectively. See Appellant's Record Excerpts p. 1-14.

Statute 47-7-5(1) states in relevant part:

> "The State Parole Board, created under former Section 47-7-5, is hereby created, continued and reconstituted and **shall** be composed of five (5) members."

Mississippi Statute 47-7-5(1) mandates that the Parole Board be composed of five (5) members. Way v. Miller , 919 So.2d 1036, 1039 (Miss. Ct. App. 2005)("shall" is mandatory language in State Parole Statute). The mandatory language in §47-7-5(1) requires that when any Statute explicitly requires the "Board" to conduct the matter of business, that the Board must consist of five (5) Members. The legislative intent in using the term "Board" in each Parole Statute is obvious upon review of §§47-7-5(1), (2), (4) and §47-7-17, ¶3 as the term "Board" is **NOT** used interchangable with the term "member" or "members". Therefore the statutory parole scheme mandates that

the "Board" be composed of five (5) members and the scheme does not permit a "member" or "members" to act as the "Board".

Statute 47-7-17 states in relevant part:

"the 'Board'may have the offender appear before it".

Rochell is of the opinion that if the "Board" elects for the offender to appear before "it", that all five (5) Members are mandated at that hearing. According to the clear legislative scheme a committee of less than five (5) members does not constitute a complete "Board" to conduct a proper parole hearing.

During the previous parole hearings of Rochell there was never a complete five (5) member Board and Rochell submits based upon these facts that he has been denied a fair and lawful hearing. It is the practice of the Appelleesd to hold parole hearings with only three (3) members, Rochell offers that it is easier for an offender to get three (3) affirmative votes from five (5) members than from only three (3) members. Therefore, since the Appellees do admit the core facts in this interpretation, this Court should enter judgment requiring that all five (5) Board Members must conduct all future parole hearings, if the Board elects for the offender to appear before them.

The United States Court of Appeals for the Fifth Circuit has clearly held "a prisoner has no right to release on parole; he has only a statutory right to have the board comply with ... its own rules and guildlines." Brown v. Lundgren, 528 F.2d 1050, 1054-55 (5th Cir. 1976). Mr. Justice Marshall once observed in dissent:

> "The Due Process Clause itself, is the premise that regulations bind with equal force whether or not they

> are outcome determinative. As its very terms make manifest, the Due Process Clause is first and foremost a guarantor of process. It embodies a commitment to procedural regularity independent of result." United States v. Caceres, 440 U.S. 741, 764, 99 S.Ct. 1465, 1478 (1979)(dissent).

In the case sub judice it is completely irrelevant that the Parole Board had complete discretion to deny release to Rochell, under Brown the Board still had to comply with the statutory guildlines in conducting the parole hearing with the amount of "Board" Members mandated per §47-7-5(1) and §47-7-17. While this Court has no power to grant parole, this Court does have authority to direct the Mississippi Parole Board to reconsider eligibility for parole. Mississippi v. Read, 544 So.2d 810, 815 Hn. 5 (Miss. 1989)(citation omitted).

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 offend Sections 1, 2 and 33 of the Mississippi Constitution?

At the outset Mr. Hamilton and Mrs. Warnock both have admitted in their Response to Interrogatory No. 3 that there is not a limit placed on the amount of time by legislation. Exhibit "A" and "B". Record Excerpts (RE) at pp. 1-2 & 7-8.

Rochell submits that the entire Mississippi Parole scheme is unconstitutional in that the legislation grants unlimited discretion to the Parole Board, as to the amount of time permitted between reconsideration hearings; which effectively violates Sections 1, 2 and 33 of the Mississippi Constitutio of 1890.

The State Parole Board, as an executive agency, cannot be vested with an arbitrary and uncontrolled discretion, Howell v. State, 300 So.2d 774 (Miss. 1974), there must be reasonably clear standards by which the discretion granted to the agency is governed. State v. Allstate Insurance Co., 97 So.2d 372, 375-76 (Miss. 1957). "Agencies have only such powers as are expressly granted to them or necessarily implied, and any such power exercised must be found within the four corners of the statute under which the agency operates". Strong v. Bostick, 420 So.2d 1356, 1361 Hn.7 (Miss. 1982)(citation omitted).

The State Parole Board is the sole cretion of the Mississippi Legislature, the Board possesses only such powers, duties and discretion as are conferred by statutory amendments. However, no where in the Mississippi Code of Annotated does the legislation limit the Boards discretion as to the length of time permitted between parole reconsideration hearings. Thus the sky is the limit with entirely no maximum cap or guildlines. Thereby the Board can force an offender to serve an additional five, ten or even fifteen years before another reconsideration hearing! This practice in the Mississippi parole scheme is invalid as constituting an improper delegation of legislative authority, because this practice fails to provide adequate standards for the guidance to the delegatee of the power.

The Mississippi Supreme Court has addressed the improper delegation of legislative power in **Allstate** there the Court explicitly held:

> Legislative power or functions may be delegated to

> an administrative agency only in the limited sense that the statute must set forth the legislative decision and must prescribe adequate standards or rules for the agency's guidance. It cannot be vested with an arbitrary and uncontrolled discretion.
>
> [T]these functions in a resticted manner may be delegated to executive or administrative agencies by the acts of the legislature if the latter prescribe limits within which the administrative grantees are to operate. The principal doctrines involved are those respecting the separation and delegation of powers, both of these lead to the practical field of adequacy of legislative standards. That term is used to embrace statements of objective, policy or purpose, as well as definitions, specifications, requisites and **limitations.** In other words there should be a reasonable clear standard by which the discretion granted to the agency must be governed. Allstate, 97 So.2d at 375-76 (citations omitted).

In this instance, the Legislature must delegate to the Parole Board the maximum length of time permitted between each periodic parole hearing. According to the Mississippi Constitution and Allstate the Parole Board cannot have uncontrolled discretion in setting the number of years between periodic reviews; although the Board does have complete discretion to deny release at each periodic review. The Legislature have established criminal sentencing guildlines, parole eligibility guildlines, and there must be established parole reconsideration guildlines. The current reconsideration scheme is illicit due to the Legislatures have delegated unlimited discretion to the Parole Board, when such arbitrary delegation of legislative power in contrary to Sections 1, 2 and 33 of the State Constitution, thereby in violation of the State Due Process Clause.

If the legislative intent for parole eligibility in §47-7-3 is to have any logical effect, then the frequency of parole suitability hearings must be fixed by statute. "Parole

reconsideration hearings is both in law and in practice an important component of a prisoners parole eligibility". Akins v. Snow, 922 F.2d 1558, 1568 (11th Cir. 1981). This Court should enter judgment against the Mississippi Legislatures requiring them to adopt written guildlines on the maximum length of time permitted between parole reconsideration hearings.

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 decisionmaking process and run contrary to §§47-7-3(1) and 47-7-17?

At the outset Mr. Hamilton and Mrs. Warnock both stated in their Response to Interrogatory No. 4 that the legislative intent meant "what it says" in §47-7-7(3)(a). **Exhibit "A"** and **"B"**. RE at pp. 2 & 8.

Statute 47-7-3(3)(a) states in relevant part:

> 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 custody of the Department of Corrections. The tentative parole hearing date shall be determined within ninety (90) days after the department has assumed 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 and other criteria which in the opinion of the board tend tovalidly and reliably predict the length of incarceration necessary before the offender can be successfully paroled.

Rochell asserts that the entire Mississippi parole hearing and eligibility scheme set forth in §§47-7-3(1) and 47-7-17 is a sham due to the Parole Board is mandated by §47-7-3(3)(a) to predetermine within the first 90 days of confinement, with "validly and reliably", the length of incarceration necessary before the offender can be "successfully paroled". The unambiguous command in §47-7-3(3)(a) requires the Board to predetermine the successful release date, not the hearing date, years in advance to the initial parole eligibility date set forth in §47-7-3(1).

In this case, according to §47-7-3(3)(a), the Parole Board had prejudged the year that Rochell would be "successfully paroled" over fifteen years prior to Rochell's last parole hearing. This legislative scheme denys to Rochell a fair and lawful hearing by an impartial board in violation of the Federal Due Process Clause, completely making a mockery of the fairness in the State parole process.

The parole eligibility clause in §47-7-17 requires the Board to "secure and consider", inter alia, the offenders "conduct, employment and ATTITUDE WHILE IN THE CUSTODY OF THE DEPARTMENT". These factors in §47-7-17, nevertheless, cannot be considered in the predetermined decision required by §47-7-3(3)(a) because the predetermination occurs within the first 90 days of confinement and the factors have not yet occurred at that point of incarcerations. The criteria set forth in §47-7-17, in part, is worthless due to the offenders conduct, employment and attitude throughout his/her confinement has entirely no bearing

on the decision mandated per §47-7-3(3)(a).Therefore, the legislation requires the Parole Board to prejudge the release date of Rochell, notwithstanding any consideration of his good prison conduct, employment history while incarcerated, community support, rehabilitation and educational accomplishments while confined. See Greenholtz v. Inmates of the Nebraska Penal and Corrections Complex,442 U.S. 1, 15, 99 S.Ct. 2100, 2107-08 (1979)("The behavior record of an inmate during confinement is critical in the sense that it reflects the degree to which the inmate is prepared to adjust to parole release").

The mere fact that the Legislatures in §47-7-3(1) set forth the number of years that Rochell must serve to be eligible for parole release is a falsehood; according to §47-7-3(3)(a) Rochell is **not** truly eligible for release until the predetermined number of years have elapsed. For example, the legislation in Statute 47-7-3(1) states that an offender, like Rochell, sentenced to life prior to July 1, 1994, is eligible for parole release after serving ten (10) years. On the other hand, the Parole Board can determine within the first 90 days of confinement that Rochell needs to serve thirty (30) years to be "successfully paroled" pursuant to their authority in §47-7-3(3)(a). Therewith all parole hearings starting at the initial eligibility date of ten (10) years continuing throughout the next twenty (20) years is a sham.

Rochell calls into question the logic, integrity and fairness of the Parole system with the Board predetermining the successful parole date years in advance. Greenholtz, 442 U.S. at 34, 99 S.Ct. at 2117 ("[T]his court has stressed the

importance of adopting procedures that preserve the appearance of fairness and the confidence of inmates in the [parole] decisionmaking process"). The Parole Board should not be permitted to continue the illicit practice of predetermining the year that offenders will be "sucessfully paroled" years in advance to their first parole hearings. Each offender must receive due process in the parole decisionmaking process. This Court should enter judgment against the Parole Board and State Legislatures requiring them to immediately stop the practices required in §47-7-3(3)(a), as the parole eligibility date is set forth in §47-7-3(1) not §47-7-3(3)(a).

IV.

> Based on the interpretation of all State Parole Statutes does the Legislatures intend for an offender to be denied parole based on false or erroneous information in his/her parole file? If not, then why can offender not correct such information in their files after the Parole Board is notified that the file contains such information?

At the outset Mr. Hamilton and Mrs. Warnock both admitted in their Response to Interrogatory No. 7 that the legislation does not intend for Rochell to be denied parole based on false information in his file. **Exhibit "A"** and **"B"**. However, Hamilton and Warnock both also admit that Rochell has not been permitted to correct erroneous information in his parole file because "the Board has access to Rochell's explanation". **id** at Response to Interrogatory No. 16. Hamilton and Warnock are of the opinion that no danger is posed to Rochell by false information being contained in his file. **id** at Response to Interrogatory No. 17.

RE at pp. 2, 4, 9 & 11.

Rochell has informed the Parole Board multiple times that the "Pre/post Sentence Investigation" Report contained in the file contains false information concerning his crimes. Rochell offered this fact to the lower court in an Affidavit in support of the Motion for Summary Judgment filed on July 13, 2007.RE p. 24. Mr. Hamilton and Mrs. Warnock have admitted that they have reviewed Rochells' file in making parole decisions. **Exhibit "A" and "B"** at Response to Interrogatory No. 19. Therefore the Board has reviewed false information to deny parole to Rochell.

The danger posed to a parole canidate by the risk that his records contain incorrect information is clearly not insignificant. Walker v. Prison Review Bd., 694 F.2d 499, 503 (7th Cir. 1982)(citing Greenholtz, 442 U.S. at 15 n.7, 99 S.Ct. at 2108 n.7 (dictum)("Risk of error in that relevant adverse information in the inmate's file is wholly inaccurate"). Inaccurate information in the parole file that remains unverified or unrebutted inflates the risk of erroneous decisions and could flaw the decisionmaking process. Williams v. Missouri Bd. of Probation and Parole, 661 F.2d 697, 699-700 (8th Cir. 1981).

"Parole should not be denied on false, insufficient or capricious reasons." Andrus v. Lambert, 424 So.2d 5, 9 (Ala. Crim. App. 1982). Denial of parole based on false information denied due process. Monroe v. Thigpen, 932 F.2d 1437, 1441-42 (11th Cir. 1991). See also Black v. Glover, 2006 U.S. Dist. Lexis 7380 (M.D. Ala. 2006)(same); Williams v. Fed. Bureau of Prisons, 85 Fed. Appx. 299 (3rd Cir. 2004); Drennon v. Craven,

105 P.3d 694, 698 (Ida. Ct. App. 2004); Langton v. Gorgone, 1998 Mass. Super. Lexis 148 (Mass. Apr. 1, 1999); Perez v. McBribe, 1999 Del. Super. Lexis 39 (Del. Super. Ct. Dec. 9, 1996); Paine v. Baker, 595 F,2d 197 (4th), cert. denied, 444 U.S. 925 (1979).

Rochell during discovery in a Motion for the Production of Documents requested the defendants to produce any and all rules and regulations that the Board had implemented to ensure that erroneous information was not placed in a parole file. The Defendants according to their answer has not implemented any rules to ensure that erroneous information is not placed in the offenders file from the general public. **Exhibit "C"** at Response to Request No. 5. Rochell also requested the defendants to produce a copy of any and all rules and regulations that permitted Rochell to review his file and correct erroneous information in his file. Again the defendants does not have such rules. id at Response to Request No. 4. **Exhibit "E"**. RE 21.

Therefore, since the Parole Board has admitted that the legislation does not intend for Rochell to be denied parole based on false information in his file; this Court should enter judgment requiring the Parole Board to adopt rules and regulations that permit inmates to verify their files and correct any information that is false or erroneous that is contained in the files.

v.

Whether the lower court committed err in denying the Motion for Preliminary Injunction after Rochell was

denied parole because of this litigation based on boilerplate reasons?

Rochell asserts that the lower court committed err in denying the Motion for Preliminary Injunction after he was denied parole because of this litigation. The facts clearly shows that the Parole Board abused their statutory discretion, acting arbitrarily in denying Rochell a fair and lawful parole hearing in retaliation for the current litigation. Therein 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 because there was insufficient reasons to find Rochell unsuitable for release.

The Mississippi Parole Board performs a very significant function in determining the length of time which an inmate will spend in prison and it is entitled to exercise substantial discretion within its sphere under §47-7-5(3), Miss. Code Ann.. However, that discretion must be exercised under the guildlines laid down in Statute 47-7-17 entitled "Examination of Offender's Record; eligibility for Parole", which provides:

> "A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered to be a reduction of sentence or pardon. An offender **shall** be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care, and when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen".

The Statute specifically delineates the type of information which the Board must take into account in making a decision as to whether these general conditions have been met:

> "[T]he board **shall** secure and consider all pertinent information regarding each offender, ...including the circumstances of his offense, his previous social history, his previous criminal record, including any records of law enforcement agencies or of a youth court regarding that offender's juvenile criminal history, his conduct, employment and attitude while in the custody of the department, and the reports of such physical and mental examonations as have been made."

While the courts remain reluctant to second guess the decisions of the Parole Board, it is unquestionably the duty of the Board to give fair consideration to each of the applicable statutory factors as to every inmate who comes before it. Johnson v. Miller, 919 So.2d 273, 277 (Miss. Ct. App. 2005) (listing information that should be considered in each State parole decision). And where the record convincingly demonstrates that the board did in fact fail to consider the proper standards, the court should intervene. See e.g. King v, New York State Div. of Parole, 598 N.Y.S.2d 245, 250, 252-53 (A.D. 1 Dept. 1993)(Decision of parole board to deny parole was fatally tainted by board's abdication of responsibility to consider fairly all relevant statutory factors, and thus, denial of application for parole release had to be set aside). The court has held that consideration for parole eligibility is an aspect of liberty to which the protection of the Due Process Clause extends. Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), vacted as moot, 432 U.S. 147 (1976)(Supreme Court held that since the prisoner had obtained a full release from supervision the case was moot).

In the instant case, the March 2007 Parole Hearing record (minutes) will reveal that the denial of Rochell's application

was a result of the Board's failure to consider and weigh all of the relevant statutory factors and there is a strong indication that the denial was a foregone conclusion. At the hearing in question, Board Member Warnock, an Attorney prior to placement on the Board, very extensively questioned Rochell concerning the current litigation. Warnock asked multiple questions on each allegation alleged in Rochell's Complaint filed in the lower court. Warnock even inquired about other litigation concerning the Department of Corrections. The so-called hearing was focused on Rochell's litigiousness.

The litigations questions by Warnock demonstrates a reliance by the Board on matters not within its purview. Statute 47-7-17 does not in any way permit the board to consider the litigation activities of an inmate, as the inmate clearly has a First (1st) Amendment right to access of the courts, and he cannot be punished "in any manner" for exercising such right. Andrade v. Hauck, 452 F.2d 1971, 1972 (5th Cir. 1971); Bounds v. Smith, 430 U.S. 817, 821 (1977). The Board's decision to deny Rochell's parole application is at least in part based on his litigiousness and this fact is evidenced by Warnocks' questions in the hearing record (minutes). The exclusive inquiring into the litigation matters, in and of itself, would at the very least raise serious concerns as to whether an atmosphere prejudicial to a fair consideration of Rochells application was created. In this instance, the Board's practice of not fairly considering Rochell for release on parole because of his pending litigation, punished Rochell for seeking judicial relief from the court.

In Serio v. Members of Louisiana State Bd. of Pardons, 821 F.2d 1112 (5th Cir. 1987) the Fifth Circuit stated that a Plaintiff, in order to sustain his claim of intentional parole board retaliation, must point to "hearing record statements or other facts establishing that his allegations [is] founded on any thing more than his own assumption". In this case, the minutes from the March 2007 hearing will substantiate in toto Rochells allegations. See also Clark v. Georgia Pardons and Parole Bd., 915 F.2d 636, 639, 640 (11th Cir. 1990)(allegation that litigation was considered by the Board when it denied parole stated a claim upon which relief could be granted); Johnson v. Rodriguez, 110 F.3d 299 (5th Cir. 1997)(parole board retaliation because of litigation stated a claim); Hilliard v. Board of Pardons and Paroles, 759 F.2d 1190, 1192, 1193 (5th Cir. 1985)(claim of parole denial in retaliation for involvement in litigation against prison officials is an equal protection claim, if prisoner had alleged supporting facts).

Rochell further argues that there was not sufficient evidence or factors to find him unsuitable for release but for the retaliation. After the March 2007 hearing the Board did not indicate that Rochell lacked "the ability or willingness to fulfill the obligations of a law-abiding citizen" or that Rochell had "inadequate arrangements for employment and/or residence". See **Exhibit "D"**, the "Action of the Parole Board" from the March 2007 Parole Hearing. In fact, the Board did not find these two (2) factors unfavorable to Rochell at the hearings held on November 9, 2005 or March 27, 2007. Statute 47-7-17 states in

relevant part:

> "An offender shall be placed on parole only when arrangements have been made for his proper employment and for his maintenance and care, and when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen".

Recently the Mississippi Court of Appeals in Edmond v. Miller, 2006 Miss. App. LEXIS 182 HN.2 (March 21, 2006) stated that "a protected liberty interest exists where state law provides that upon the meeting of one or two objective conditions a prisoners becomes entitled to parole". The United States Supreme Court in Greenholtz, 442 U.S. at 7, 11-12 and Board of Pardons v. Allen, 482 U.S. 369, 373 (1987) established that:

> While ther is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence, a State's statutory scheme, if it uses mandatory language, creates a presumption that parole release will be granted when or unless certain designated findings are made, and therebygives rise to a constitutional liberty interest.

The Appellees will perhaps argue that Greenholtz and Allen analysis is inapplicable because Sandin v. Conner, 515 U.S. 472 (1995) eliminated the "mandatory language" approach. However, Sandin dealt with internal prison disciplinary regulations, and does not affect the cretion of liberty interest in parole under Greenholtz and Allen. See Sandin, 515 U.S. at 484 (citing Allen with approval. Also McQuillion v. Duncan, 306 F.3d 895, 903 (9th Cir. 2002)(Sandin did not overturn Greenholtz or Allen); Ellis v. District of Columbia, 84 F.3d 1413, 1417-18 (D.C. Cir. 1996).

Under the analysis of Edmond, Greenholtz and Allen, Rochell become entitled to release on parole when he satisfied the two

objective conditions set forth in §47-7-17. The State will argue perhaps that Rochell has not satified the two conditions, but the "Action of the Parole Board", **Exhibit "D"**, proves that these conditions were not used against Rochell to deny release and since the factors favorable to Rochell release was not marked it must be assumed that the two conditions were favorable. Thus if the factors were not marked as unfavorable to Rochell, then the factors were favorable for release! Based on the mandatory language in §47-7-17, the statute creates a presumption of entitlement to release once the objective conditions are satified. Thus an average person like Rochell does expect the granting of parole.

Rochell alleges that the parole scheme can create a liberty interest in extremely rare circumstances because §47-7-3 and §47-7-17 use the permissive "may" in conjunction with the mandatory "shall", thereby the statutes can confer a recognized liberty interest in a very limited situation.

Mississippi Statute 47-7-3(1) states in relevant part:

> "Every prisoner ... **may** be released on parole as hereinafter provided, ..."

The parole scheme thereafter provides in Statute 47-7-17 entitled "examination of offender's record; eligibility for parole", the two core objective conditions to be satified before the prisoner shall be released. Statute 47-7-17 states in mandatory language:

> "A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered to be a reduction of sentence or pardon. An offender **shall** be placed on parole **only**

when arrangements have been made for his proper employment or for his maintenance and care, and when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen."

The Appellees' will argue that there is no liberty interest in parole under §47-7-17 according to Harden v. State, 547 So.2d 1150 (Miss. 1989). Rochell submits, however, that Harden is distinguishable from the case at bar for one major reason. In Harden the parole board concluded that it was "not in the best interest of society" to parole. id. Thereby a main objective condition in §47-7-17 was not satified in Hardens' case. The case sub judice is unique in that in all prior Mississippi cases that have considered a liberty interest claim, the Parole Board had found one or both of the core objective conditions unfavorable to the inmates, so there was no legitimate expectation for release under §47-7-17.

In this instance, nevertheless, the Parole Board at the Hearings held on November 5, 2005 and March 27, 2007 did not find that Rochell lacked the ability or willingness to fulfill the obligation of a law-abiding citizen, nor that he had inadequate arrangements for his employment and/or residence. **Exhibit "D"**. RE 20.

A criteria in statutes can be substantive predicates even if they require the decisionmaker to exercise subjective judgment. Obviously, there is discretion on the part of the parole board in deciding whether these objective conditions exist. But as long as the decisionmaker is required to take some action, or forbidden to take some action, if he/she decides that the substantive predicates do not exist, a liberty interest is created. Allen, 482 U.S. at 375-76. There are really two

kinds of discretion involved in these type cases. The first kind - the official's discretion to do as he/she pleases without following any definite criteria - is inconsistent with the existence of a liberty interest. The second kind - which requires officials to exercise judgment in attempting to follow specified criteria, does not prevent a liberty interest from existing. id. In Mississippi the parole scheme confers a liberty interest under §47-7-17 upon the offender satifying two core objective conditions. In order for the two objective conditions to be satified, the offender must have already satified the mandatory criteria in §47-7-17 ¶1. Statute 47-7-17 states that the inmate "shall" be released "only when" the two objective conditions are favorable. In this very rare case Rochell become emtitled to release on parole when he meet the two main objective conditions in §47-7-17, so a liberty interest is created. The criteria in §47-7-17 does not outright create a liberty interest unless the two core objective conditions are satified, then the statute generates a reasonable expectation of parole release. But the extremely rare liberty interest created here will not apply to all State inmates, it will only apply to inmates whom the Parole Board has concluded does not lack the ability to be law abiding citizens and the inmates have adequate arrangements for his/her employment and residence. Both of which Rochell had in this case. Therefore, the Board acting in retaliation failed to comply with the mandatory statute since Rochell was not granted release after the two objective conditions were favorable.

The Parole Board acting in further retaliation denied release based solely on boilerplate reasons contrary to clear legislative

intent. In finding Rochell unsuitable for release at the March 2007 Hearing, the Board relied on some unchanging factors: serious nature of offense, number of offenses comitted, and police record.

In Biggs v. Terhune, 334 F.3d 910, 917 (9th Cir. 2003) the Ninth Circuit Court of Appeals found:

> The Parole Board's decision is one of equity and requires a careful balancing and assessment of the factors considered. As in the present instance, the parole board's sole supportable reliance on the gravity of the offense and conduct prior to imprisonment to justify denial of parole can be initially justified as fulfilling the requirements set forth by state law. Over time, however, should Biggs continue to demonstrate exemplary behavior and evidence of rehabilitation, denying him a parole date simply because of the nature of Biggs' offense and prior conduct would raise serious questions involving his liberty interest in parole.
>
> A continued reliance in the future on an unchanging factor, the circumstance of the offense and conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation. (citations omitted).

More important in assessing any violation in this case is the fact that continuous reliance on unchanging circumstances transforms an offense for which Mississippi law provides eligibility for parole into a de facto life imprisonment without the possibility for parole. Here asking rhetorically--what is it about the circumstances of Rochells' crimes or his past conduct which are going to change in the future? The answer is nothing! The circumstances of the crimes will always be what they were, and Rochells' motive for committing them will always be trivial. Based on the current actions of th Board, Rochell has no hope for ever obtaining parole except perhaps that a board in the

future will arbitrarily hold that the circumstances were not that serious. Given that no one seriously contends lack of seriousness or lack of triviality at the present time, the potential for parole in this case is remote to the point of non-existence.

To a point, it is true, the circumstances of the crimes may indicate a person instability, cruelty, impulsiveness, violent tendencies and the likes. However, after fifteen or so years in the caldron of prison life, not exactly an ideal therapeutic environment to say the least, and after repeated demonstrations that despite the recognized hardships of prison, Rochell does not possess those attributes, the predictive ability of the circumstances of the crimes is near zero. The Board has truly relied on the above unchangable factors at least five (5) times in finding Rochell unsuitable for parole, although the same Board did not find Rochell lacking the ability to be a law-abiding citizen. **Exhibit "D"**. RE at p. 20.

The next reason given by the Board for denial of parole at the March 2007 Hearing was "community opposition". **id.** But, Mr. Hamilton and Mrs. Warnock both admitted in their Response to Interrogatory No. 12 that community opposition has no impact that "only the parole board's decision has impact". **Exhibit "A" and "B"** at Response to Interrogatory No. 12. RE p. 3 & 10.

The alleged community opposition in Rochells' case did not come from the victims family, to the contrary Mr. Billy W. McMahan, Administrator for Victims, has sent two (2) letters to the board requesting that Rochell be granted parole due to, inter alia, the accidental circumstances of the murder. Then

time under §47-7-3(1) if he had served a mandatory ten (10) years and his "record of conduct shows that [he] has observed the rules of the penitentiary". In fact, Mr. Hamilton and Mrs. Watnock both admit that Rochell "is currently eligible". **Exhibit "A" and "B"** at Response to Interrogatory No. 5. If Rochell had not served sufficient time for release under §47-7-3(1), then he could not lawfully be considered for release under §47-7-17. Therefore, this factor was just another boilerplate reason used to justify denying parole to Rochell. RE at p. 2 & 8.

The establishment of penal policy is not the role of the Mississippi Parole Board and these circumstances reveal a fundamental misunderstanding of the limitations of the board. The torturous and difficuit decisions involved in determining the appropriate penalty to be imposed for the commission of a particular crime is fundamentally a function which belongs in the hands of elected officials to be preformed in open and considered debate. It is the province of the legislative process, except insofar as the legislature has entrusted, within certain parameters, the imposition of individual sentences to the judiciary. The due operation of those processes has seen fit to punish Rochell was a sentence of life with parole, requiring him to serve ten (10) years with an exemplary prison record to have served sufficient time for release under §47-7-3(1).

The role of the Parole Board is **not** to re-sentence Rochell according to the personal opinion of Board members as to the appropriate penalty for murder; but to determine whether, as of the moment, given all relevant statutory factors in §47-7-17, Rochell should be released. The same Parole Board has granted

release to other prisoners serving life like Rochell, when those prisoners had served less time than Rochell and had far worse prison records than Rochell. In that regard, the statute expressly mandated that the factors listed in §47-7-17 be taken into consideration in determining whether Rochell should be released notwithstanding his litigation against the Board.

The lower court should have held a hearing on therMotion for Preliminary Injunction to permit Rochell to offer evidence and testimony to prove that the Board acted in retaliation towards him because of his litigation. Therefore, the Court should remand this issue to the lower court for a hearing to determine whether the Board did indeed act with retaliation in denying parole to Rophell.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Rochell prays that this Honorable Court will interpret the State Parole Statutes that have been called into question in this case. Furthermore, Rochell moves this Court to remand this case to the lower court for a hearing on the retaliation claim, to allow Rochell to offer evidence and testimony to prove his claim. And, that the court will grant any such other relief that the court deems just.

RESPECTFULLY SUBMITTED, the 9th day of July, 2009.

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CERTIFICATE OF SERVICE

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

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This the 9th day of July, 2009.

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