

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 2004

JOHN ROBERT NICOLAUS

VERSUS

THE STATE OF LOUISIANA AND LOUISIANA DEPARTMENT OF  
CORRECTIONS THROUGH THE ATTORNEY GENERAL  
OF THE STATE OF LOUISIANA, ET AL

Judgment Rendered: MAY 30 2014

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APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT  
IN AND FOR THE PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA  
DOCKET NUMBER C567576

HONORABLE WILSON FIELDS, JUDGE

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John Robert Nicolaus  
Angola, Louisiana

Plaintiff/Appellant  
Pro-Se

James D. "Buddy" Caldwell  
Attorney General  
And  
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Baton Rouge, Louisiana

Attorneys for Defendants/Appellees  
State of Louisiana, and Louisiana  
Department of Corrections

**BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.**

*McCleendon, J. dissents and assigns reasons.*

**McDONALD, J.**

This is an appeal of an Angola inmate, John Robert Nicolaus, (hereafter Petitioner), against the Louisiana Department of Corrections (DOC). For the following reasons, we affirm.

The procedural history of this matter has been reviewed several times. The appeal before us is of a judgment rendered July 15, 2013, adopting a Commissioner's<sup>1</sup> Recommendation.

The Commissioner's Recommendation stated:

The petitioner seeks parole eligibility on his sentence of life without benefit of parole, probation or suspension of sentence for twenty years. The petitioner was initially sentenced to death following a First Degree Murder conviction. He was resentenced to a term of life without benefit of parole, probation or suspension of sentence for a period of 20 years. *State vs. Nicolaus* 340 So.2d 296 (La. 1976). The petitioner seeks to be deemed parole eligible.

... [T]he Parole Board has informed the petitioner that his life sentence must be commuted to a fixed number of years before he is considered parole eligible. This Commissioner notes that parole eligibility may be a condition of a sentence imposed by a sentencing court, but eligibility for parole consideration by the Parole Board is determined by other statutory provisions which must be considered by this Court. R.S. 15:574.4(B) prohibits parole consideration for lifers until a commutation of sentence to a fixed term of years is granted by the executive branch. There is no conflict between the petitioner's sentence and R.S. 15:574.4(B). *Bosworth v Whitley* 627 So.2d 629 (La. 1993) see also *State v. Thomas* 972 So 2d 323 (La.2008). The petitioner's argument raising ex post facto issues, lenity and statutory intent do not entitle him to the relief he seeks. As noted above, prior case law has addressed the issues raised in this matter. While it does appear that the petitioner's sentence does allow for parole eligibility, his eligibility for parole consideration is restricted by other applicable statutory provisions.

It is the recommendation of this Commissioner that the petitioner's request for declaratory relief, injunctive relief and the plea of unconstitutionality must be denied and this matter be dismissed without prejudice, at the petitioner's cost.

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<sup>1</sup> The office of Commissioner of the 19<sup>th</sup> JDC was created by La. R.S. 13:711 to hear and recommend disposition of criminal and civil proceedings arising out of the incarceration of state prisoners. The commissioner's written findings and recommendations are submitted to a district court judge, who may accept, reject, or modify them. La. R.S. 13:713(C)(5).

The judgment appealed provided:

This matter came on for final adjudication by this Court. After a careful de novo consideration of the record herein, the law applicable, together with any transversal timely filed and the Court adopting as reasons, the Commissioner's Report filed herein,

**IT IS ORDERED, ADJUDGED AND DECREED**, that the matter of request for declaratory relief, injunctive relief and the plea of unconstitutionality is denied and be dismissed without prejudice and all costs in this matter are to be paid by the petitioner personally or on his behalf through the Department of Corrections by the authority of and in accordance with R.S. 15:874(3) & (4).

**READ, RENDERED AND SIGNED**, this 15 day of July, 2013 at Baton Rouge, Louisiana.

/S/WILSON FIELDS  
JUDGE, SECTION "25"  
NINETEENTH JUDICIAL DISTRICT COURT

DOC, through the Office of the Attorney General, argues that the sentence that is the subject of the petitioner's appeal was rendered in 1976, and further review is prescribed. Petitioner argues that the Commissioner's Recommendation is factually and legally incorrect, and a hearing should be convened for oral argument.

After careful review of the record, law, and evidence, we find no error in the judgment appealed. However, we amend it to provide that the matter is dismissed with prejudice. Accordingly, the judgment, as amended, is affirmed. This memorandum opinion is issued in compliance with Uniform Rules Courts of Appeal, Rule 2-16.1.B. Costs are assessed to John Robert Nicolaus.

**AMENDED, AND AS AMENDED, AFFIRMED.**

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**McCLENDON, J., dissenting in part.**

Because the trial court did not dismiss this matter with prejudice, nor was the issue raised by the parties on appeal, the majority errs in amending the judgment to order dismissal with prejudice. Due to the majority's action, the appellant has been disadvantaged because he exercised his right to appeal. Therefore, I respectfully dissent in part.