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Jul 18 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable S. Phillip Lenski, Administrative Law Judge
Appellant Case No. 2019-002102

BERNARD BAGLEY, #175851.....APPELLANT

v.

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

**PETITION FOR REHEARING
and
MOTION FOR CLARIFICATION**

Comes now General Counsel for Respondent, Matthew Buchanan, respectfully moving pursuant to Rule 240, SCACR before this Court for rehearing of the order in the above-captioned action dated July 13, 2022. In particular, Respondent requests reconsideration of issue 2 regarding the timeliness of review by the Parole Board.

Respondent does not contest this Court's ruling on the mootness issue. Similarly, Respondent agrees that S.C. Code § 24-21-650 requires parole review every two years for violent

offenders. However, the Court's order seems to require that no more than 730 days (or precisely two years) may pass between hearings for violent offenders. Maintaining a review schedule with this amount of precision is all but impossible.

Initially, there is the fact that parole review is not done in a vacuum; rather, it requires notification of solicitors, law enforcement and, most importantly, victims. Scheduling also requires consideration of attorneys' schedules if they are involved. Pre-parole interviews must be conducted, reports must be produced and circulated amongst the Board Members, and they then must have time to review that information. This is required for every inmate's review hearing. Further, hearings of this type are held on Wednesdays, which is a finite window in which to work. Hearings cannot be expanded due to the massive task of preparing for and scheduling them.

While these processes are factored into scheduling, there are other issues that cannot always be avoided. For example, the availability of the Parole Board members cannot always be guaranteed. Reviews require a quorum of Board members who are human and have emergencies, illnesses, and vacations. Continuances are often requested for various reasons, often for unavailability of an inmate or their attorney. Importantly, if a scheduled hearing must be moved, it must be rescheduled out at least a month because S.C. Code § 24-21-221 requires thirty days' notice to these solicitors, law enforcement, and victims. It cannot be tacked onto the next week's schedule, thus automatically adding a month onto the two year review period. This delay can further be exacerbated by S.C. Code § 24-21-615, which prohibits capital cases from being considered in December. Thus, a hearing in late October or November that is delayed because of weather, for example, cannot be rescheduled until the following January.

What concerns Respondent most are acts of God that interfere with scheduling. As may be obvious, the COVID-19 pandemic caused major issues in scheduling and required cancelling two

months' worth of hearings while the capabilities to hold parole consideration hearings remotely were implemented. Thankfully, the new systems implemented in response to the pandemic have allowed the Board to catch up with and even exceed the number of cases needed to get back on track. Consider, also, a hurricane or other natural disaster that could cancel hearings for one or more weeks, depending on its severity. Similarly, other natural disasters or inclement weather could require a full day of hearings to be canceled.. On the simplest level, an inmate's review date may fall on a weekend or holiday, and the most logical hearing date may be the following week.

While Respondent endeavors to hold hearings as close to the exact two years mandated by statute as possible, it is simply untenable to abide by a mandate stricter than that. Respondent's internal policy is to schedule hearings as close as possible to the date when the inmate becomes eligible for a hearing. Sometimes, as with Appellant's most recent parole hearing, scheduling works to an inmate's advantage and they receive an early hearing – his June 2021 hearing was held three days before it was “due.”¹ This shows that, though a delay in hearings is capable of repetition, it is not guaranteed and is, in fact, less likely to happen.

Respondent's ultimate concern is the long-term reach of this court's order. If a hearing is not held exactly on the first eligible day, will Respondent be in violation of this order? For example, two years exactly from Appellant's most recent parole hearing will be June 16, 2023, which is a Friday. Assuming that there will be hearings scheduled that week, the Appellant's hearing will most likely be held on Wednesday, June 14, 2023. But if there are no other hearings scheduled that week, is the Respondent in violation of the order if it holds the hearing the following week on June 21?

¹ Appellant's 2019 hearing was held on June 19, while his 2021 hearing was held on June 16.

Furthermore, as discussed earlier, Respondent must provide at least thirty days' notice by statute to victims, solicitors, and law enforcement agencies. If a previously scheduled hearing is canceled due to weather, disasters, or lack of a quorum, Respondent will be in a position of being unable to comply with this order without violating the statute, and cannot follow the statute without violating the order. If the statute requires review to happen not before two years (the traditional interpretation), but this order requires that it happen not after two years, there is no time in which it can feasibly occur except for an extremely narrow and unworkable window. Though the opinion is unpublished and, therefore, applies only to Appellant, Respondent is certain other inmates will use it to find fault with their parole review dates. Respondent respectfully requests reconsideration and clarification as to what this court feels would cause Respondent to violate this order.

Further, this Court's order, in the last sentence of numbered paragraph 2, ordered South Carolina Department of Corrections (SCDC) to conduct parole reviews every two years. Respondent believes this is a scrivener's error and, even if no relief is granted above, requests clarification on this matter.

Respectfully submitted,



Matthew C. Buchanan
General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 207
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Columbia, South Carolina
July 18, 2022

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BERNARD BAGLEY, #175851.....APPELLANT

v.

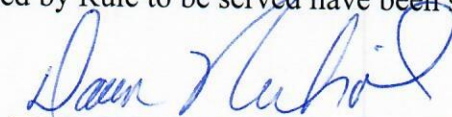
S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, certify that I have served the within Petition for Rehearing and Motion for Clarification, dated July 18, 2022, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, this 18th day of July, 2022, addressed to:

Bernard Bagley, #175851
Kershaw Correctional Institution
4848 Goldmine Highway
Kershaw, S.C. 29067

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



Dawn K. Nichols
Executive Assistant

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

HENRY McMASTER
Governor



JERRY B. ADGER
Director

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July 18, 2022

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Bernard Bagley v. SCDPPPS
Case No.: 19-002102

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Petition for Rehearing and Motion for Clarification, dated July 18, 2022, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,


Matthew C. Buchanan
General Counsel

Enclosures

cc: The Honorable S. Phillip Lenski
Bernard Bagley