

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

PETITION OF CERTIORARI TO 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.....RESPONDENT

v.

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

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR THE PETITIONER

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QUESTIONS PRESENTED

Did the Court of Appeals err in finding Respondent was not receiving timely parole hearings, despite his being heard every two years as required by S.C. Code Ann. 24-21-650 and, if it did not, how can Petitioner realistically uphold such a precise schedule as contemplated by the Court of Appeals?

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STATEMENT OF THE CASE

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On August 23, 1990, the day after he was in an argument with his wife, Respondent discovered that his wife resigned from her job, withdrew money from their bank account, and left with their daughter to her mother's house in Eastover, South Carolina. Respondent traveled from Raleigh, North Carolina to Eastover. He arrived at the mother's residence, kicked in the front door, and demanded to know whether his wife was having an affair. An altercation ensued resulting in Respondent shooting his wife twice, causing her death.

Respondent was indicted by the Richland County Grand Jury for the offense of murder. On April 12, 1991, he appeared before the Honorable Dan Laney. Upon his conviction for murder, Respondent received a term of incarceration for the remainder of his natural life. At the time Respondent committed this offense, South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of twenty years.

Respondent made his initial appearance before the Parole Board on September 8, 2010. The Board denied parole. Since this initial denial, Respondent has appeared before the Board an additional six times, each resulting in a denial of parole. His most recent regular parole appearance occurred on June 16, 2022.¹ At the conclusion of this appearance, the Board unanimously denied parole due to: 1) the nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; and, 3) the use of a deadly weapon in this or a previous offense.

The instant appeal was filed after Respondent was denied parole pursuant to a hearing on June 19, 2019. After this notification, Respondent filed a notice of appeal with the Administrative

¹ Respondent had a medical parole hearing on November 30, 2022. Because this is a separate request process related to medical diagnoses, these hearings are kept separate and apart from inmates' regularly scheduled parole hearings. This will not affect his every two-year parole hearings as otherwise scheduled.

Law Court (ALC). His appeal contained twenty-seven points alleging, generally, that the Board acted arbitrarily and capriciously in denying him parole. The Honorable S. Phillip Lenski issued his order on January 3, 2020, affirming the Board's decision to deny parole. Respondent, appearing *pro se*, filed a notice of appeal with the South Carolina Court of Appeals on December 23, 2019. A decision was issued July 13, 2022, after which both sides filed petitions for rehearing. Both motions were denied and a new dispositional decision was filed November 23, 2022. This petition for writ of certiorari follows.

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ARGUMENT

Respondent is appearing before the Board bi-annually in compliance with S.C. Code Ann. 24-21-650. A determination otherwise presents an impossible timeline for Appellant.

Respondent challenges the method of scheduling his parole hearings. He alleges that because his parole hearings were not held precisely every two years, he is roughly nine months behind on his parole hearing, which violates the statutory protections of S.C. Code Ann. 24-24-650.

The ALC determined this argument to be moot, because it cannot rule on a case or controversy that has not happened yet – being his next parole hearing. The ALC cited *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). The Court of Appeals disagreed and held that this was capable of repetition yet evading review, so therefore not moot, and that Petitioner had repeatedly failed to comply with the mandatory language of 24-24-650. Petitioner respects the court's ruling that this is capable of repetition and, therefore, not moot. However, Petitioner requests this court review this ruling for the purpose of determining what is considered timely review.

The offense Respondent has been convicted of committing is classified as violent.² Upon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purposes of a determination of parole. S.C. Code Ann. §24-21-645 (1986). Respondent has appeared before the Parole Board on September 8, 2010, October 10, 2012, January 14, 2015, March 15, 2017, June 19, 2019, and November 30, 2022.

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² For purposes of definition under South Carolina law a violent crime includes the offense of murder (Section 16-3-10) S.C. Code Ann. §16-1-60 (1986).

The above referenced dates reveal that Respondent has been allowed to appear before the Board every two years. The only substantial delay was in 2014 when he was heard in January of 2015 after a prior hearing in October 2012 and parole was denied. He was heard and denied approximately every two years thereafter, so the delay has not caused any prejudice; consequently, this case should not be subject to reversal due to that reason. To warrant reversal, Respondent must show both error of the ruling and resulting prejudice. *Burroughs v. Worsham*, 352 S.C. 382, 574 S.E.2d 215 (S.C. App. 2002).

Respondent expects his hearings to be held exactly every two years and, it seems, so does the Court of Appeals. Petitioner endeavors to schedule each hearing as close to the same date every two years (or year, if a nonviolent offender) for all parole-eligible inmates. Yet holding each hearing on the exact date year after year is an impossible task due to the simple operation of the calendar – the days of the month fall on different days of the week from year to year.

There are also instances beyond the Board's control that could cause an individual's hearing to be postponed or rescheduled. Weather emergencies, illnesses of Board members causing lack of a quorum, institutional lockdowns, a request to delay from an attorney, and other unforeseen circumstances may move a hearing. Sometimes events can require rescheduling an entire day of hearings, thus causing further scheduling problems with future hearings. Importantly, if a scheduled hearing must be moved for any reason, it must be rescheduled at least a month later because S.C. Code Ann. 24-21-221 requires thirty days' notice be given to solicitors, law enforcement, and victims related to the case. A moved hearing cannot simply be tacked onto the next week's schedule because of these statutory requirements.

Petitioner'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 Petitioner be in violation of this order? For example, two

years exactly from Respondent's most recent parole hearing will be June 16, 2023, which is a Friday. Assuming that there will be hearings scheduled that week, Respondent's hearing will most likely be held on Wednesday, June 14, 2023. But if there are no other hearings scheduled that week, is Petitioner in violation of the order if it holds the hearing the following week on June 21? Similarly, many individuals would be aware of the exact parole date by virtue of the last one and potentially use this order (though it is unpublished) to find fault with new scheduling. This could include lead to challenges from not just inmates, but also family members and advocacy groups.

Despite Petitioner's best efforts to have hearings heard at the two-year mark, if not slightly earlier³, the requirement that a hearing be held exactly every two years is completely untenable. Some allowance must be given for the realities of life and the functioning of the parole system. Petitioner does not dispute the plain language of the statutes as cited by the Court of Appeals and endeavors to uphold both the spirit and the letter of those statutes throughout every step of the parole process. Unfortunately, the order as issued provides no consideration for events outside the control of Petitioner, nor guidance for how to navigate the same. As such, Petitioner respectfully requests a writ of certiorari and further briefing to resolve this issue.

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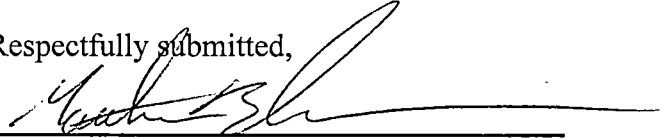
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³ Incidentally, Respondent's 2019 hearing was held on June 19, while his 2021 hearing was held on June 16, three days ahead of when it was "due."

CONCLUSION

Based on the foregoing reasons, the Department would respectfully request this Court grant a writ of certiorari to the Court of Appeals and reverse its finding regarding the exactitude of the two-year timeline.

Respectfully submitted,

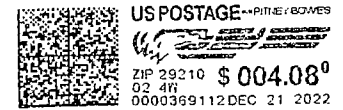
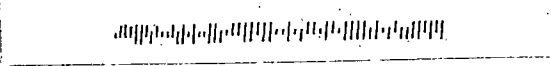


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