

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FOR THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Appellate Case Number 2013-000042

BERNARD BAGLEY, #175851

APPELLANT,

v.

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

RESPONDENT.

FINAL BRIEF OF APPELLANT

Bernard Bagley
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Without Counsel

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SC Court of Appeals

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STATEMENT OF THE ISSUES ON APPEAL

1. WHETHER THE ADMINISTRATIVE LAW COURT ORDER SUMMARILY DISMISSED APPELLANT'S APPEAL DETERMINED THAT THE BOARD CONSIDERED AN OMITTED STATUTORY VALIDATED INDIVIDUALIZED RISK ASSESSMENT PURSUANT TO §24-21-5(2), and §24-21-10(f)(1) IN MAKING ITS DETERMINATION?
2. WHETHER THE NOTICE OF REJECTION FOR PROVISIONAL PAROLE STATED CONSIDERATION IN CONCLUSION OF LAW, AND FINDINGS OF FACT STATUTORY VALIDATED INDIVIDUALIZED RISK ASSESSMENT PURSUANT TO §24-21-5(2), and §24-21-10(f)(1), SUFFICIENT TO SUPPORT DENIAL OF PAROLE?
3. WHETHER THE ADMINISTRATIVE LAW COURT ORDER SUMMARILY DISMISSED APPELLANT'S APPEAL DETERMINED THAT THE BOARD CONSIDERED APPROPRIATE FACTOR OF UNSUITABILITY FOR PROVISIONAL PAROLE PURSUANT TO §24-21-645(D), IN MAKING ITS DETERMINATION?
4. WHETHER THE NOTICE OF REJECTION DENYING PAROLE CONCLUSION OF LAW AND FINDINGS OF FACT VIOLATE THE DOCTRINE OF RES JUDICATA BARS ANY REASON TO DENY APPELLANT PROVISIONAL PAROLE THAT COULD HAVE BEEN RAISED IN HIS FORMER NOTICE OF REJECTION OR PAROLE HEARING PURSUANT TO §24-21-640, §24-21-645(D), and SCDPPS FORM 1212?
5. WHETHER THE ADMINISTRATIVE LAW COURT ORDER SUMMARILY DISMISSED APPELLANT'S APPEAL DETERMINED THAT THE BOARD CONSIDERED APPROPRIATE FACTORS PURSUANT TO THE DOCTRINE OF RES JUDICATA IN MAKING ITS DETERMINATION PURSUANT TO §24-21-640, §24-21-645(D), and SCDPPS FORM 1212?
6. WHETHER THE ADMINISTRATIVE LAW COURT ORDER SUMMARILY DISMISSED APPELLANT'S APPEAL DETERMINED THAT THE BOARD CONSIDERED APPROPRIATE FACTOR THAT CREATE A SIGNIFICANT RISK OF INCREASED PUNISHMENT UPON THE APPELLANT WHEN THE BOARD EXERCISED ITS LIFE-MEANS-LIFE POLICY FOR THE REMAINDER OF APPELLANT'S NATURAL LIFE UNDER §24-21-645(D), and §16-3-20(A)?
7. WHETHER THE ADMINISTRATIVE LAW COURT ORDER SUMMARILY DISMISSED APPELLANT'S APPEAL DETERMINED THAT THE BOARD CONSIDERED APPROPRIATE FACTOR OF A RATIONAL NEXUS BETWEEN THE SUBSTANTIAL EVIDENCE AND ULTIMATE DETERMINATION OF APPELLANT'S CURRENT DANGEROUSNESS AND THREAT TO PUBLIC SAFETY PURSUANT TO §24-21-10(f)(1)?
8. WHETHER THE ADMINISTRATIVE LAW COURT ORDER SUMMARILY DISMISSED APPELLANT'S APPEAL DETERMINED THAT THE BOARD CONSIDERED APPROPRIATE PROCEDURES PURSUANT TO THE DUE PROCESS CLAUSE IN MAKING ITS DECISION PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION, AND ARTICLE IV, §2[1], OF THE U.S. CONSTITUTION?

STATEMENT OF THE CASE

This matter comes before this Court pursuant to the appeal of Bernard Bagley (Appellant). On December 27, 2012, the Administrative Law Court (ALC) filed its Order summarily dismissing his appeal before its court, in which he received written notice of this order on December 31, 2012. Appellant filed his Notice of Appeal of the decision with this Court on January 10, 2013.

The Appellant is a prisoner confined within the South Carolina Department of Corrections (SCDC). On August 23, 1990, in Eastover, South Carolina, he shot and killed his wife, Mary Bagley. He was charged with the offenses of burglary 1st degree, and murder. On April 12, 1991, a jury found him guilty of both charges in the Richland County Court of General Sessions, and sentenced to two (2) consecutive life terms for the remainder of his natural life. Bagley appealed both convictions. The murder conviction was affirmed and the burglary 1st degree conviction remanded for a new trial on December 10, 1992, by the South Carolina Court of Appeals. The burglary 1st degree conviction was subsequently nol prossed and expunged on April 4, 2001, and consented by the Fifth Judicial Circuit Solicitor's Office on March 16, 2001. At the time the Appellant was convicted of these crimes, South Carolina law authorized an inmate serving a life sentence for murder parole eligibility upon the service of twenty (20) years.

The Appellant appeared before the Parole Board on October 10, 2012. The Parole Board denied to grant him the privilege into the provisional parole program, in which the Parole Board Notice of Rejection dated October 11, 2012, conclusion of law and findings of fact stated two (2) immutable or fixed reasons: (1) nature and seriousness of the current offense; and (2) use of deadly weapon in this or previous offense. Appellant filed his Notice of Appeal of that decision with the ALC on October 18, 2012. The South Carolina Department of Probation, Parole, and Pardon Services (SCDPPPS) filed a Record on Appeal on November 8, 2012.

Since the October 10, 2012, parole hearing, Appellant has appeared before the board once, on September 8, 2010, that appearance resulting in a denial of the privilege in participating in the provisional parole programs, in which the SCDPPPS Notice of Rejection conclusion of law and findings of fact stated three (3) immutable fixed reasons: (1) nature and seriousness of the current offense;

(2) use of deadly weapon in this or previous offense; and (3) indication of violence in this or previous offense. Upon being notified of his most recent Notice of Rejection, the Appellant petitioned the Parole Board requesting a reconsideration for provisional parole. The Parole Board's conclusion and findings of fact determined that the reasons for the request for reconsideration did not affect the original decision of the Parole Board. As a result, rehearing and request for reconsideration were denied by the Parole Board on November 14, 2012.

Wherefore, the Appellant's Brief follows.

ARGUMENTS

1. THE ADMINISTRATIVE LAW COURT ORDER SUMMARILY DISMISSED APPELLANT'S APPEAL DID NOT DETERMINE THAT THE BOARD CONSIDERED AN OMITTED STATUTORY VALIDATED INDIVIDUALIZED RISK ASSESSMENT PURSUANT TO §24-21-5(2), and §24-21-10(f)(1) IN MAKING ITS DETERMINATION.

Section 24-21-10(f)(1), states in relevant part:

A validated actuarial risk and needs assessment tool consistent with evidence based practices and factors that contribute to criminal behavior which the Parole Board **shall** use in making parole decisions, including additional objective criteria that may be used in parole decisions.

When it is clear by the language of the statute that the legislature intended the Parole Board "shall" use in making parole decisions a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contribute to criminal behavior, including additional objective criteria that may be used in parole decisions, that legislative intent should not be deviated by the Parole Board. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000). Because the statute is penal in nature, the Court must construe it strictly in favor of the defendant and against the state. Hair v. State, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991). The ALC order will be set aside upon determination that the Board did not consider appropriate factors in making its determination. The ALC order is unsupported by recent substantial evidence received or considered from the Respondent pursuant to § 24-21-10(f)(1).

2. THE NOTICE OF REJECTION FOR PROVISIONAL PAROLE DID NOT STATE CONSIDERATION IN CONCLUSION OF LAW, AND FINDINGS OF FACT STATUTORY VALIDATED INDIVIDUALIZED RISK ASSESSMENT PURSUANT TO §24-21-5(2), and §24-21-10(f)(1), INSUFFICIENT TO SUPPORT DENIAL OF PAROLE.

The Parole Board's release decisions are discretionary, and if such decision is made in accordance with the statutory requirements of §24-21-10(f)(1), and §24-21-645, for provisional parole, the board's determination is not subject to judicial review. The record does not reveal that the board took into account a validated individualized risk assessment in accordance with the statutory requirements of §24-21-10(f)(1), and that there was insufficient reason to deny Appellant provisional parole in accordance with statutory requirements of §24-21-645. On 6/21/12, Parole Examiner Sandra Ryan stated to the Appellant that the individualized offender risk and criminogenic needs assessment COMPAS by NorthPointe Institute for Public Management test will not help him, and that she did not know how the Parole Board would use it in decision making. Bagley respectfully asked Ms. Ryan to administer the test for individualized needs assessment, and she further stated, "write the director for it, because she did not know how to do it." The record of the contested test "shall" consist of all evidence received or considered; and all proffers of proof of excluded evidence. Rule 58(B), and Rule 58(D), SCALC Rules. The Respondent's order denying parole did not state consideration of "all" statutory and department criteria to support denial of Appellant's parole. The findings by an administrative agency will be set aside if unsupported by substantial evidence. [citation omitted].

3. THE ALC ORDER DID SUMMARILY DISMISSED APPELLANT'S APPEAL AND DID NOT DETERMINED THAT THE BOARD CONSIDERED INAPPROPRIATE FACTOR OF UNSUITABILITY FOR PROVISIONAL PAROLE PURSUANT TO §24-21-645, IN MAKING ITS DETERMINATION.

SCDPPPS order denying parole did not state consideration of "all" statutory and department criteria sufficiently to support denial of provisional parole. In considering application for parole, Parole Board must consider certain guidelines, including inmates' institutional record, participation in temporary release programs, and release plans; in addition, the board must also consider seriousness of offense, and inmate's prior criminal record. While Parole Board need not expressly discuss each of the applicable guidelines in its determination on application for parole, it must provide inmate with pro-

per hearing in which only relevant guidelines are considered. As the record before the Court indicates, that was not done in Bagley's case. Evidence in the proceedings show that Appellant was not afforded a proper suitability provisional parole hearing because the board considered factors outside the scope of the application statute, §24-21-645, including the consequences to society if that Appellant was a former police officer and did not have jurisdiction in South Carolina, and that his sentence must stay in place, and as a result, the board's decision was arbitrary and capricious. There is an irrationality bordering on impropriety to warrant intervention by the ALC, and it neglected to do so when the order denying parole and stating consideration not provide such of "all" statutory and department criteria pursuant to §24-21-10(f)(1), §24-21-640, §24-21-645, and SCDPPPS criteria 1212. The procedure employed by the parole board deprived Appellant of state-created liberty interest and he believes triggered due process requirements, including entitlement to review by this Court.

4. THE NOTICE OF REJECTION DENYING PAROLE CONCLUSION OF LAW AND FINDINGS OF FACT VIOLATE THE DOCTRINE OF RES JUDICATA FROM ANY REASON TO DENY APPELLANT PROVISIONAL PAROLE THAT COULD HAVE BEEN RAISED IN HIS FORMER NOTICE OF REJECTION OR PAROLE HEARING PURSUANT TO §24-21-640, §24-21-645, and SCDPPPS FORM 1212.

Where the Parole Board rejected inmate's application on basis of only two (2) enumerated factors in the Notice of Rejection, the Court must take into consideration each one is fixed as of date by Appellant's offense and could not be affected by Bagley's actions while incarcerated, without addressing any of the other enumerated factors, and without regard to statutory provisions accordance to §24-21-10(f)(1).

As such, the doctrine of res judicata bars the Respondent fixed immutable aspects or fixed criteria, (1) nature and seriousness of the current offense; and (2) use of deadly weapon in this or previous offense without any new evidence. Res judicata prohibits subsequent repetition action, or repeated repetition reasons to deny parole by the Parole Board with the same parties on the same fixed immutable aspects or fixed criteria without any new substantial evidence. SEE: Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct.App. 1993). Res judicata also bars any issues that could have been raised in the former action. The Respondent had a full opportunity to deny Appellant on the fixed

immutable aspects in his first parole hearing on September 8, 2010. The Respondent continues to raise the fixed immutable fixed criteria without any new substantial evidence to support its Notice of Rejection Conclusion of Law and Findings of Fact. SCDPPPS order is just repeated repetition reasons in a boilerplate statement denying parole without "all" statutory and its own criteria insufficient to support denial of provisional parole and parole in accordance to §24-21-640, and 24-21-645.

5. THE ALC ORDER SUMMARILY DISMISSED APPELLANT'S APPEAL WITHOUT DETERMINATION THAT THE BOARD CONSIDERED INAPPROPRIATE FACTORS PURSUANT TO THE DOCTRINE OF RES JUDICATA IN MAKING ITS DETERMINATION PURSUANT TO §24-21-640, §24-21-645, and SCDPPPS FORM 1212.

Res judicata prohibits subsequent repetition action, or repeated repetition reasons to deny parole by the board with the same parties on the same fixed immutable fixed criteria without any new substantial evidence. [citation omitted]. The ALC order is arbitrary and capricious since it neither offered an explanation nor indicated that the board had considered "all" the statutory criteria of §24-21-10(f)(1), §24-21-645, along with §24-21-640, and the fifteen (15) criteria listed on the parole form. SEE: Compton v. SCDPPPS, 385 S.C. 476, 479, 685 S.E.2d 175, 177 (2009), holding that an order denying parole and stating "all" statutory and department criteria is sufficient to support denial of parole. The ALC must proceed with an Appellant's appeal when inappropriate factors or omitted factors are used in the board's decision making.

6. THE ALC ORDER SUMMARILY DISMISSED APPELLANT'S APPEAL WITHOUT DETERMINATION THAT THE BOARD CONSIDERED INAPPROPRIATE FACTOR THAT CREATE A SIGNIFICANT RISK OF INCREASED PUNISHMENT UPON THE APPELLANT WHEN THE BOARD EXERCISED ITS LIFE-MEANS-LIFE POLICY FOR THE REMAINDER OF APPELLANT'S NATURAL LIFE UNDER §24-21-645(D), and §16-3-20(A).

The Appellant concede that there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. However, there is a constitutional or inherent right of the convicted person to "enjoy the same privilege" to be conditionally released before the expiration of a valid sentence when other convicted person(s) have been afforded that opportunity to do so. The Appellant's position that the ALC

order reduces Appellant's chances for the remainder of his natural life, based totally on the ALC arbitrary failure to determine that the board considered inappropriate factors in making its determination in his case, and the fixed immutable aspects of the underlying offense. In addition, the life-means-life policy SCDPPPS has implemented under §16-3-20(A), including penal philosophy, historical treatment of former law enforcement officers convicted of the murder of their wife, and consequences to society to parole or grant provisional parole to a former law enforcement officer if those sentences were not in place, created a significant risk of increased punishment by keeping the Appellant confined, because the Respondent's findings discredits anything from the Appellant on the basis of its penal philosophy, and the board is not bound by what the Appellant submits to the board regarding suitability and the fact that he will be gainfully employed through the Veterans Affairs Re-entry Program, and that his family and friends have formed enduring attachments for normal life with him. Bagley is a military veteran with disabilities that otherwise him qualified to participate in or receive the benefit of some public entity's services, programs, or activities, such as provisional parole in which he has been excluded from participation in or denied the benefits of the public entity's services was by additional reasons of his disabilities. Article IV, §2[1], of the United States Constitution states:

The citizens of each State shall be entitled to all privileges and immunities of citizens in several States.

The Privileges and Immunities Clause affords Appellant the same privileges that the parole lifers in South Carolina receive and enjoy, regardless that Bagley was a law enforcement officer in the State of North Carolina at the time of his offense, and because the board belief that he had no jurisdiction in being in South Carolina on August 23, 1990.

In order for the Appellant to be denied due process there must exist some constitutional right to being released on parole, or granted provisional parole, and there exist such liberty interest implicated for a potentially eligible inmate for consideration of parole in accordance with the Privileges and Immunities Clause of the United States Constitution. See: 14th Amendment, §1, and the 5th Amendment.

7. THE ALC ORDER SUMMARILY DISMISSED APPELLANT'S APPEAL WITHOUT DETERMINATION THAT THE BOARD DID NOT CONSIDERED THE APPROPRIATE FACTOR OF A RATIONAL NEXUS BETWEEN THE SUBSTANTIAL EVIDENCE AND ULTIMATE DETERMINATION OF APPELLANT'S CURRENT DANGEROUSNESS AND THREAT TO PUBLIC SAFETY PURSUANT TO §24-21-10(f)(1).

The ALC jurisdiction does not ask whether the prisoner is currently dangerous or poses a threat to public safety. That question is reserved for the Parole Board. Nor does the ALC have jurisdiction or empowered to reweigh the evidence. Rather, the ALC has jurisdiction to consider whether there is proof provided by Respondent whether an order denying parole and stating consideration of "all" statutory and department criteria is sufficient to support denial of parole [citation omitted]. Here, the record clearly does not reflect any proffers of proof of statutory §24-21-10(f)(1) was considered in the board making its determination. The excluded substantial evidence of Bagley's validated individualized risk assessment was applicable for provisional parole and parole, and when the parole board deviates from, or render its decision without consideration of the appropriate criteria, it essentially abrogates Bagley's right to parole eligibility, and thus infringes on a state-created liberty interest: SEE: U.S. Const. 14th Amendment, §24-21-640, and §24-21-10(f)(1), along with §24-21-645.

A rational nexus between recent substantial evidence any where in Bagley's record and the ultimate determination of his current dangerousness to society, and threat to public safety was not considered by "all" the statutory law.

8. THE ALC ORDER SUMMARILY DISMISSED APPELLANT'S APPEAL WITHOUT DETERMINATION THAT THE BOARD CONSIDERED INAPPROPRIATE PROCEDURES PURSUANT TO THE DUE PROCESS CLAUSE IN MAKING ITS DECISION IN ACCORDANCE TO THE 5th, and 14th AMENDMENTS OF THE U.S. CONSTITUTION, AND ARTICLE IV, §2[1], OF THE U.S. CONSTITUTION.

The Appellant was not allowed to contest the evidence against him, and he was not afforded access to his records prior to the hearing. In addition, the board did not provide Bagley a proper hearing in which only relevant guidelines are considered, instead of the board's penal philosophy, and the historical treatment of former law enforcement officers convicted of the murder of their wife, or that Appellant did not have any jurisdiction in being in South Carolina. The statutory law of §24-21-10(f)(1) was not considered in

its order denying Bagley provisional parole and parole. The issue is procedural and Appellant did not receive adequate due process of the law. The board categorically did not make an individualized assessment of the future dangerousness of the Appellant during the hearing when it neglected to take into account his disabilities, and to performed an individualized assessment of the threat he poses to the community by categorically in the hearing excluded him from consideration for provisional parole to the Veterans Affairs Re-entry Program. Bagley was not allowed to effectively speak relevant to the board regarding (1) his disposition to reform; that by his conduct he has merited a lessening of rigors of his imprisonment; (2) that, in the future he will obey the law and lead a correct life; (3) that the interest of society will not be impaired thereby; and (4) that he is a military veteran asking for leniency because suitable employment has been secured for him. The Board would not allow themselves to hear Bagley patiently for hope's sake of his request for provisional parole and parole.

CONCLUSION/RELIEF

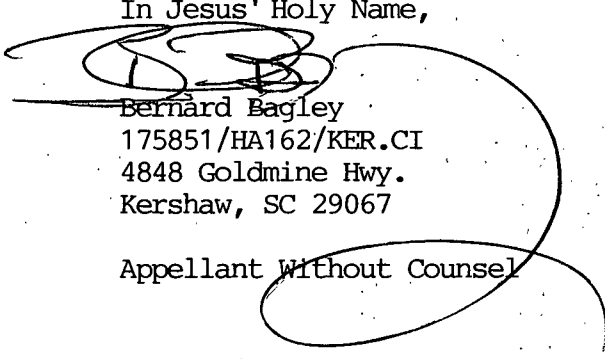
The Appellant ask that the Court consider whether he was afforded an adequate hearing prior to the denial of his request for provisional parole and parole supervision. His conviction, after a jury trial, stemmed from the shooting death of his wife on August 23, 1990. Where a jury is asked to consider a lesser included offense of murder, the use of a deadly weapon cannot be considered harmless. The State Supreme Court overruled "all" cases involving a homicide where two (2) factors co-exist: (1) approval of the jury instruction that malice may be inferred from the use of a deadly weapon; and (2) evidence was presented that, if believed, would have reduced, mitigated, excused or justified the homicide. The Court overruled "all" such cases only insofar as they meet these criteria. State v. Bagley, Unpublished Opinion 165 (Ct.App. December 10, 1992), represents in the catalogue of cases in State v. Belcher, cite as 685 S.E.2d 802, 810 (S.C. 2009). Accordingly, Appellant's sentence is constitutionally invalid because of the foregoing factors and criteria. SEE: Homicide Key 1392, and Criminal Law Key 778(6). In this proceeding, he challenges the Board's determination denying his recent request

for provisional parole after he has sought release to parole supervision in September 2010. The Appellant also asked that this case be reversed and remand the matter for a new parole hearing, or an order requiring provisional parole.

I declare, certify, verify, and state under penalty of perjury that the foregoing is true and correct to the best of my personal knowledge and belief.

March 6, 2013
Kershaw, SC

In Jesus' Holy Name,



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STATE OF SOUTH CAROLINA
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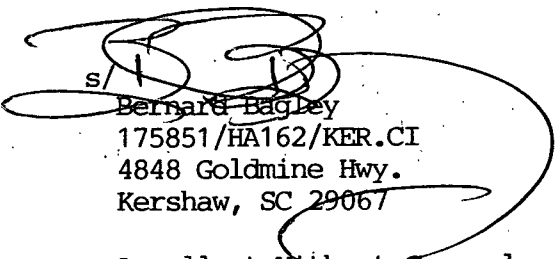
S.C. Department of Probation,
Parole, and Pardon Services,

Respondent.

PROOF OF SERVICE

I certify that I have served the original Final Brief of Appellant copy on Legal Counsel Tommy Evans, Jr., the attorney for the Respondent, by depositing the same of it in the U.S. mail, postage prepaid, on March 6, 2013, addressed as follow: Tommy Evans, Jr.
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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FOR THE ADMINISTRATIVE LAW COURT DIVISION
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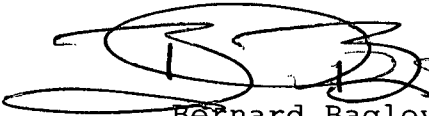
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S.C. Department of Probation, Parole,
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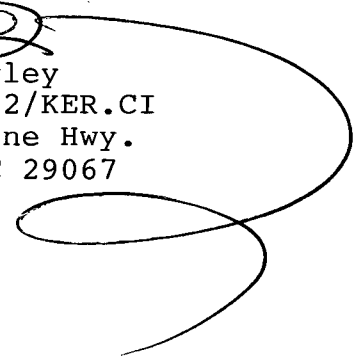
Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that his Final Brief complies
with South Carolina Appellate Court Rules and with the South
Carolina Supreme Court's order dated August 13, 2007.



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May 29. 2013

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