

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

RETURN PETITION OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Administrative Law Court  
S. Phillip Lenski, Administrative Law Judge

Unpublished Opinion No. 2022-UP-294  
(S.C. Ct. App. Refiled November 23, 2022)

Appellate Case No. 2022-001811

Bernard Bagley, #175851

Respondent

v.

South Carolina Department  
of Probation, Parole and  
Pardon Services,

Petitioner

RETURN PETITION FOR WRIT OF CERTIORARI

Bernard Bagley  
#175851/MB64b/KER.CI  
4848 Goldmine Hwy.  
Kershaw, SC 29067

Pro Respondent

Other Counsel of Record:

Matthew C. Buchanan  
SCDPPPS General Counsel  
P.O. Box 207  
Columbia, SC 29202

Attorney for Petitioner

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**JAN 19 2023**

**SC SUPREME COURT**

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## CERTIFICATE OF COUNSEL

Pro se Respondent certifies that both parties filed Petitions for Rehearing, and both petitions were denied by the Court of Appeals on November 23, 2022.

### QUESTION PRESENTED

Did the Court of Appeals findings of substantial evidence that the Parole Board has repeatedly failed to comply with the mandatory language of §24-21-650 S.C. Code Ann (Supp. 2022) by failing to review Respondent's case for a parole determination every two years?

### COUNTER-STATEMENT OF THE CASE

On August 23, 1990, the Respondent kicked in the back door of his mother in law's home after he discovered that his wife resigned from her job, withdrew all the money from their bank account, and money from their home, and left with their daughter from Durham, North Carolina. After entering the home of his mother in law, he and his wife argued about her having an affair. An altercation ensued that resulted in Respondent shooting his wife causing her death.

Respondent was indicted and tried for murder in the Richland County Court of General Sessions. The jury found him guilty, and Judge Laney sentenced him to two (2) consecutive remainder of his natural life sentences. Respondent appealed convictions and sentences. The S.C. Court of Appeals affirmed in part and reversed in part and remand for a new trial. State v. Bagley, Unpublished Opinion No. 92-UP-165 (SC Ct.App. 12/10/92).

At the time Respondent committed the offense, South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of (20) twenty years. Respondent made his initial appearance before the Parole Board in September 2010. The Board denied parole. Since the initial denial, Respondent has appeared before the Board an additional six (6) times, each resulting in a denial of parole. His most recent regular parole appearance occurred on June 16, 2022. At the conclusion of the appearance, the Board unanimously denied parole due to the three immutable boiler plate factors.

NOTE: Respondent had a medical parole hearing based on SCDC Director's request due to Respondent's medical diagnoses under S.C. Code Ann. §24-21-715(A)(3)(B)(E). In this appearance before the Board on November 23, 2022, the Board unanimously denied parole due to: "he being a threat to society and himself, and the three (3) boiler plate immutable factors.

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 Law Court (ALC). His appeal contained the issue that the Parole Board did not timely review his request for parole. ALC Judge S. Phillip Lenski issued his order on January 3, 2020, affirming the Board's decision. Respondent, appearing pro se, filed a notice of appeal with S.C. Court of Appeals on December 23, 2019. A decision was issued July 13, 2022, after which both sides filed petitions for rehearing. Both petitions were denied and a new dispositional decision was filed November 23, 2022. Petitioner petition for writ of certiorari. The Respondent's Return Petition for Writ of Certiorari follows.

## ARGUMENT

RESPONDENT IS NOT APPEARING BEFORE THE BOARD BI-ANNUALLY IN COMPLIANCE WITH S.C. CODE ANN. §24-21-650. A DETERMINATION OTHERWISE DOES NOT PRESENTS AN IMPOSSIBLE TIMELINE FOR PETITIONER.

Respondent challenges the method of scheduling his parole hearings. He avers that because his parole hearings were not held every two years, he is arbitrarily and capriciously nine (9) months behind on his parole hearing, which violates the statutory protections of S.C. Code Ann. §24-21-650, that states in relevant part:

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 purpose of a determination of parole.

The Petitioner states in its petition page 3, ¶2, that the Petitioner respects the court's ruling that this is capable of repetition and, therefore, not moot.

SEE: Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596, 596 (2001) ("[A]n appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review.").

The Court of Appeals determined it find the untimeliness of Bagley's parole review hearings is an issue capable of repetition, yet evading review because the parole board will have reviewed Bagley's case for a parole determination before the untimeliness issue can be reviewed.

In addition, S.C. Code Ann. §24-21-645 states in relevant part:

Upon a negative determination of parole, prisoners in confinement for a violent crime as defined in §16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole.

NOTE: For the purposes of definition under South Carolina law a violent crime includes the offense of murder §16-3-10, S.C. Code Ann. §16-1-60.

The Respondent avers that he appeared before the Parole Board September 8, 2010, October 10, 2012, and not in September through November 2014, but rather January 14, 2015, 3 months late, and then March 15, 2017, 5 months later from his initial appearance, and then June 19, 2019, a total of 9 months later than his initial parole date held in September 2010.

He further avers that 2010, 2012, 2014, (should have been the year), 2016 (should have been the year), 2020 (should have been the year) and 2022 should have been a year for regular appearance before the Board. The Petitioner's referenced dates in its petition reveal that the Respondent was arbitrarily and capriciously allowed to appear before the Board during its incorrect calculation from the initial September 2010 appearance before the Board.

Respondent asserts that the Petitioner's delayed calculation entries dates for appearances before the Board reduced his chances for parole in which he believes prejudiced him by 1) a proposed place of residence and employment; 2) Veterans Affairs medical and health care benefits and treatment; 3) Veterans Affairs compensation (monetary) benefits; 4) Veterans Affairs mental health benefits; 5) his overall parole plan; 6) the willingness of the community and his family members to receive him; and any other objective or subjective factors, including a favorable recommendation of the parole examiner, as well as the satisfaction of the board. In addition, the Respondent further asserts that if he would have appeared before the Parole Board 2020, he would not be suffering from an emergency ACDF surgery whereby he received in March 2021, in which the hardware has become loose in his neck, reasons, the Board possibly may have paroled him and the surgery could have been performed by the VA Hospital or a medical facility of his choice. Respondent is at a disadvantage based on Petitioner's delayed calculation entries dates for appearances before the Board.

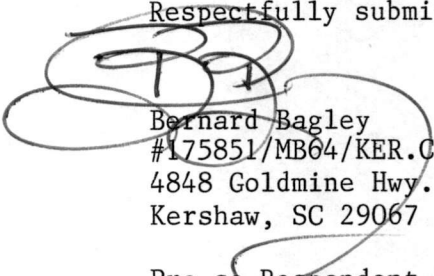
The Petitioner will have this Court not to eliminate the legal violation because it is an impossible task. The Respondent only asks that his hearings be held exactly in the same month every two years. Currently, in the instant case it was in June 2021, and he only asks that it be held in June 2023 and from then on in the future in the month of June on whatever Wednesdays the Petitioner chooses. All things are possible because there are several usual remedies: 1) All future hearings be held in June every two years on the Wednesday of the Petitioner's choice. Another more usual remedy available is under S.C. Code Ann. §24-21-920, Clemency in other cases, in all other cases than those referred to in §24-21-910, the right of granting clemency shall be vested in the Board; 2) in the form of release under §24-21-700, S.C. Code Ann., Special Parole, or recommendation to modify Respondent's sentences under §16-3-20, S.C. Code Ann. (1996) to a flat sentence-30 year mandatory minimum term reduction because Respondent's medical condition will worsen and even cause death. The Petitioner will have this Court to believe that Respondent's most recent parole hearing will be June 16, 2023, which is a Friday. The argument is without merit because June 7th, 14th, 21st, and 28th are all Wednesdays available if the Petitioner just choose to do it. The Petitioner can submit a bill to the legislators to amend §24-21-645 and §24-21-950, and §16-3-20, to cap sentences such as the Petitioner's or to set a mandatory parole dates for prisoners to resolve such matters. Also, the Petitioner have resources and the manpower such matters. A request to delay from a prisoner attorney should be based on its request for a delay.

CONCLUSION

Petitioner will have this Court to believe that it cannot revise its own policies and regulations to guide and navigate to adhere the the Court of Appeals ruling in this matter, or any other "routine denial of parole cases" but instead request that this Court participate in the legal violation of the plain language of the statutes as cited by the Court of Appeals and herein this Return Petition. Routine denials of parole is common practice of the Petitioner with those with such offenses similar to his as well as sentences. Recommendations for routines denials are decided prior to the next scheduled parole dates for the average prisoners. Be that as it may, the Respondent respectfully asks that the Petitioner's request for a writ of certiorari be dismissed and denied with prejudice. Or, in the alternative, grant Respondent a commutation of sentence or punishment which is simply a reduction to a thirty (30) year mandatory flat term under §16-3-20 S.C. Code Ann. (1996), or §24-21-920, in the form of parole. In addition, regardless of the Court's ruling, Respondent asks the Court to order the Petitioner or the Board not to consider this matter of the 2022 reverse in part ruling in this appeal as a prejudicial factor in reaching its decision at any upcoming pre-parole investigations, recommendations, proceedings or future decisions by the Petitioner and Board.

I declare, certify, and verify under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

  
Bernard Bagley  
#175851/MB04/KER.CI  
4848 Goldmine Hwy.  
Kershaw, SC 29067

Pro se Respondent

January 6, 2023

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**JAN 19 2023**

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