

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.

APPELLANT'S FINAL REPLY BRIEF

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SC COURT OF APPEALS

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RESPONDENT'S ARGUMENTS

1. THE ADMINISTRATIVE LAW COURT DID NOT ERR IN DETERMINING THAT THE ORDER OF DENIAL WAS PROPER PURSUANT TO SOUTH CAROLINA LAW.
 2. THE USE OF IDENTICAL REASONS FOR MULTIPLE DENIALS CANNOT BE CONSIDERED A VIOLATION OF RES JUDICATA.
 3. THE DENIAL OF PAROLE DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.
-

APPELLANT'S STATEMENT OF 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 §24-21-10(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 SCDPPPS 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 SCDPPPS 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 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?

FACTUAL/PROCEDURAL HISTORY

The Appellant and his wife married in 1986. They lived in Columbia, where Bernard worked as a city police officer. In 1987, the Bagleys' separated and Bernard moved to Sumter to become a deputy in the Sumter County Sheriff's Department. Mary discovered that the Appellant was living in Sumter and she moved there, eventually, they reconciled where their daughter was born. However, they continued to have marital difficulties and separated numerous times. In August 1989, Appellant accepted a position with Durham, North Carolina Police Department. About a week before his scheduled move, the two quarreled and a fight ensued. The police were called. When they arrived, they placed Mary under arrest for criminal domestic violence and assaulting the arresting police officer. Thereafter, Appellant moved to Durham to join the police force and to enter the North Carolina Criminal Justice Academy. Mary and the baby stayed in South Carolina. A few months later, Mary traveled from Eastover to Durham to talk to the Appellant, and they again reconciled, and Mary and the baby joined Bernard in Durham.

On Sunday, August 19, 1990, the Bagleys' again quarreled. The next morning, while Bernard was at the academy, Mary took the baby and returned to her mother's home in Eastover, South Carolina. When Appellant discovered that Mary and the baby were gone, he immediately drove to Eastover, took the baby, and returned to Durham. Mary telephoned on Tuesday to apologize for leaving and asked if he would come back to Eastover to pick her up. Bernard drove to Eastover on Wednesday, and the two returned to Durham late that evening. The next morning, on August 23, 1990, when Bernard was at the academy, Mary again packed her belongings and took the baby to Eastover. The Appellant discovered that Mary resigned from her job; withdrew all the money from their bank account; took all the emergency household money; and all the baby belongings.

Appellant left the academy and drove to Eastover to talk to Mary and not to intend to harm anyone. Upon arrival, Bernard could hear Mary talking on the phone inside the house, and he heard her laughing about how she had tricked him to get the baby back. He kicked in the door, and a heated argument occurred, she laughed, and Appellant inquired her about having a possible affair, and told her that he would not allow another man to raise his daughter, and then with no free

will, shot her twice causing her death. The Appellant was indicted and tried for murder in the Richland County Court of General Sessions. He appeared before Judge Dan Laney to answer to the offense. Judge Laney informed the jury that malice may be inferred from the use of a deadly weapon, and that they could consider a lesser included offense of murder where evidence was presented that would reduce, mitigate, excuse, or justify a killing caused by the use of a deadly weapon. The jury found Appellant guilty, and Judge Laney ~~sentenced him to incarceration for the remainder of his natural life.~~ At the time the Appellant committed the offense, South Carolina law allowed an individual serving a sentence of life with eligibility for parole upon the service of twenty (20) years.

The Appellant made his initial appearance before the Parole Board on September 8, 2010. Upon the conclusion of this hearing, the Board denied the Appellant an opportunity to participate in the provisional parole program on the basis of three (3) immutable fixed factors: (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. He later appeared before the Board on October 10, 2012. The Appellant was once again denied provisional parole due to two (2) immutable fixed factors: (1) the nature and seriousness of the current offense; and (2) the use of a deadly ~~weapon~~ in this or previous offense. Upon receiving the notice of rejection, the Appellant filed a notice of appeal before the Administrative Law Court (ALC). Within his appeal the Appellant raised five (5) grounds for appeal. While this case was pending before the ALC, the Appellant filed a motion for all evidence received and considered; all proffers of proof of excluded evidence; the transcript taken of the parole hearing; and for additional documents. On December 27, 2012, Judge Ralph King Anderson, III, issued an order dismissing the motion. He also ruled that the Respondent had shown that all of the procedures were followed prior to the denial of parole, so he dismissed the appeal. The Appellant filed a notice of appeal before this Court. The initial brief of the Appellant follows. On February 20, 2013, the initial brief of the Respondent was received by the Appellant. Now, the Reply Brief of the Appellant follows.

ARGUMENTS

1. THE ADMINISTRATIVE LAW COURT DID ERR IN DETERMINING THAT THE ORDER OF DENIAL WAS PROPER PURSUANT TO SOUTH CAROLINA LAW.

The Respondent argues that the Appellant came under the current process to determine his risk to the community, and that the Board applied a process and criteria currently established by the South Carolina General Assembly, and found in department policy in accordance of S.C. Code Ann. §24-21-10(f)(1) (Supp. 2011). In addition, that §24-21-10(f)(1) (Supp. 2011) is adopted process was listed within the notice of rejection pursuant to the South Carolina Supreme Court decision of Cooper v. SCDPPPS, 377 S.C. 489, 661 S.E.2d 106 (2008), related to the integrity of the parole hearing proceedings.

Section 24-21-10(f)(1), is an extraordinary circumstance, supervening change in §24-21-640 procedural law, and the department criteria and policy in applying its process. The South Carolina Code of Laws specifically state:

Establishment of a process for adopting 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.

S.C. Code Ann. §24-21-10(f)(1)(Supp. 2011).

The Appellant asserts that the Respondent did not use the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS). This program consists of questions used to determine overall risk potential and criminogenic needs, a mandatory standardized process pre-evaluation or pre-psychological report process in preparing a comprehensive risk assessment for the Board's use in making parole decisions, related to the integrity of the parole hearing proceedings. The Respondent abuse of discretion is on the basis of its inconsistency with the policy embodied in its own criteria, and statutory law §§24-21-10(f)(1), and 24-21-640. As such, the Appellant is challenging through his appeal the Parole Board's failure to utilize the procedure promulgated by COMPAS and the Legislature in §24-21-10(f)(1), of South Carolina law, and the established procedure by the department.

The Respondent also argues that in Cooper, the Supreme Court broaden the powers of the ALC, allowing them not only to review the decisions of parole

eligibility, but the procedures followed in the denial of parole. The Appellant contends that the department failed to reveal that they considered the mandatory standardized pre-evaluation or pre-psychological process that consists of questions and a report in preparing a comprehensive risk assessment for the Board's use in making its parole decision prior to denial, related to the integrity of COMPAS and parole hearing.

In addition, the ALC failed to review Appellant's parole eligibility based on §24-21-630, when he was granted eligibility of parole upon the service of twenty (20) years, 2 1/3 to 999 years or a life sentence. Permitted parole eligibility consideration at 20 years his life term of imprisonment. On September 8, 2010, and again on October 10, 2012, Appellant became eligible for parole consideration. In spite of numerous support letters, the Veterans Affairs Re-entry Program, and no new evidence of current dangerousness, not substantial evidence or the immutable fixed factors of the existence of the Board's regulatory factors, the Board denied him provisional parole for four (4) years. The Appellant asserts that the Board's decision is irrational bordering on impropriety, related to the integrity of the parole proceedings. One, there is no new evidence in the record to support the Board's decision. Section 24-21-630 imports a rebuttable presumption for parole upon the granting of eligibility of parole, although it does not preclude the Board from denying parole, nor does it eliminate the Board's discretion in making the release decision. The Board's action is deemed a judicial function and not reviewable if done in accordance with law to mean that intervention is not warranted unless there has been a showing of irrationality bordering on impropriety. The Board's exclusive reliance on the immutable fixed factors of the commitment offense to deny parole not only contravenes the discretionary scheme mandated by §24-21-630, but also effectively constitutes an unauthorized re-sentencing of the Appellant, noting that precedent requires new evidence of current dangerousness, or different evidence to support a determination that Appellant currently poses an unreasonable risk of danger to society if released on parole. Rather, there must be a logical nexus between the offense, and Appellant's earlier criminal record or in-prison record, and a determination of current dangerousness. The ALC judicial review was not based upon hard evidence of the nexus

found in the record, no probative evidence of current dangerousness and the commitment offense immutable fixed factors. The only evidence the Board used in Appellant's parole proceedings was a hunch or intuition, and that is not evidence. Parole is to be based on public safety and §24-21-630 presumes suitability upon being granted eligibility for parole consideration, related to the integrity of parole proceedings.

The Appellant argues that the Board never considered the COMPAS program ~~that consists of questions used to determine overall risk potential and criminogenic needs.~~ This determination is required which the parole board shall use in making parole decision of the Appellant's risk to the community, and his ability to function outside of prison. Section 24-21-640, in relevant part states: "The statute also mandates that the Board establish written, specific criteria for the granting of parole and provisional parole." And, the fifteen (15) factors the Board considers prior to the granting or denying of parole and provisional parole. It is the position of the Appellant, that the COMPAS procedure was not used within the criteria validating the risk consistent with evidence based practices; and that did not determine factors that has contributed to the Appellant's criminal behavior, related to his parole proceedings and §24-21-5(2)(Supp. 2011). South Carolina law defines "criminal risk factors" as:

Characteristics and behaviors that, when addressed or changed, affect a person's risk for committing crimes. The characteristics may include, but not limited to, the following risk and criminogenic need factors; anti-social behavior patterns; criminal personality, antisocial attitudes, values, and beliefs; poor impulse control; criminal thinking; substance abuse; criminal associates; dysfunctional family or marital relationships; or low levels of employment or education.

S.C. Code Ann. §24-21-5(2)(Supp. 2011).

The COMPAS mandatory standardized pre-psychological report process in preparing the validated risk assessment for the Board's use in making its parole decision was not determined within the mandatory criteria fifteen factors, and §24-21-640, related to the integrity of the parole proceedings.

The Appellant argues that his parole was denied by the Board considering fraudulent evidence-based practices, and factors that contribute to his criminal behavior without an actuarial validated COMPAS mandatory standardized pre-psychological report process, related to the integrity of the parole proceedings.

Respondent arguments the denial had to do with the violent nature of the offense of murder; and the use of a deadly weapon in the commission of this offense. Appellant asserts that the Respondent's argument infers he is in essence doomed to being forever found unsuitable for parole and that this process violate many legal protections, including double jeopardy, an inadequate legal burden of proof of any evidence. The Board does not have an iota of evidence linked to Appellant's 1990 offense to current propensity for dangerousness. To deny him parole based solely on the violent nature of the offense murder is arbitrary, in violation of equal protection and due process. In addition, the Respondent open the door that denial of the parole had to do with the use of a deadly weapon in the commission of this offense. Be that as it may, the Respondent failed to consider two (2) factors that 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, would have reduced, mitigated, excused or justified the homicide, in which this ruling should be applied to immutable fixed factors challenged in parole denials. SEE: State v. Belcher, 685 S.E.2d 802 (2009). Because the evidence prosecution presented a jury question on lesser included offense, it was error for trial court to charge the jury that it could infer malice from the use of a deadly weapon, related to the integrity of the court. S.C. Constitution Article 5, §21, Judges shall not charge juries in respect to matters of fact, but shall declare the law.

The Appellant also contends that the Cooper ruling by the Supreme Court regarding determination in what should be included in future orders did not have before it the supervening change in accordance to statutory law §24-21-10 (f)(1)(Supp. 2011), and the COMPAS mandatory standardized pre-psychological report process of a validated risk assessment for the Board's use in making its parole decision, an "extraordinary circumstance" that show the Board's notice of rejection is insufficiently detailed to meet the standard set forth in S.C. Code Ann. §1-23-350, or Cooper.

2. USE OF IDENTICAL REASONS FOR MULTIPLE DENIALS CAN BE CONSIDERED A VIOLATION OF RES JUDICATA.

The Appellant contends that the Respondent Board is the party that denied him parole in 2010 and again in 2012. Also, that the denial according to the

Respondent were based on the immutable fixed factors of the commitment offence. The Board adjudicated these factors in the 2010 parole proceedings, whereby the same became adjudicated upon parole eligibility that presumes suitability. In Biggs v. Terhune, 334 F.3d 910 (9th Cir. 2003), which held that reliance upon the immutable factors of the commitment offense may violate due process. Appellant argues that the Respondent determine him parole eligibility in 2012, in it imports a rebuttable presumption for parole upon its own determination, thus, adjudication of the immutable factors in the 2010 hearing. The Board has created an irrational bordering of impropriety when there is no new or different evidence to support whether the law was correctly applied, related to the integrity of the parole proceedings and the ALC. When new or different evidence is applied to support the immutable factors, at that time the res judicata doctrine has not been violated. Therefore, the third criteria found in Plum Creek Dev. Co. v. City of Conway, 512 S.E.2d 106 (1999), has been established regarding a violation of res judicata. SEE: §24-21-630, S.C. Code Ann. Appellant asserts double jeopardy and an unauthorized re-sentenicing on the basis of adjudicated factors of the commitment offense.

3. THE DENIAL OF PAROLE DID VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The Appellant argues that he is being held at a higher standard for being a former law enforcement officer, and a disabled military veteran, and thus being treated differently by the Respondent, and as a result, being denied equal protection of the laws. SEE: U.S. Constitution Amendment 14, §1, and Article IV, §2,[1].

The Board failed to provide him and consider the individualized mandatory standardized pre-psychological process that consists of questions and a report in preparing an individualized risk assessment. Appellant argues that Parole Examiner Sandra Ryan specifically told him that she would not administer the COMPAS questionnaire to him, and that she did not know how to do it, and for him to write the department director about it. Treating inmates differently does pose a form of favoritism or inappropriate relationship in violation of equal protection. Having a different set of facts is require to support a determination that Appellant currently poses an unreasonable risk of danger to society if released on parole, in which the Board does not have to linked Appellant's 1990 commitment offense immutable factors to current propensity for dangerousness, related to the integrity of the parole proceedings. The Appellant was not

allowed to contest the different set of facts against him, nor was he afforded access to his records in the parole hearing. The Respondent did not discuss the relevant guidelines or factors with him, i.e. his prison record, or prior criminal record, prior supervision, nor the characteristics of his current or prior offense during the hearing, nor did the Board allow him to present the the two factors that co-exist in Belcher as a different set of facts in mitigation. Neither accomplished during each of the Appellant hearings.

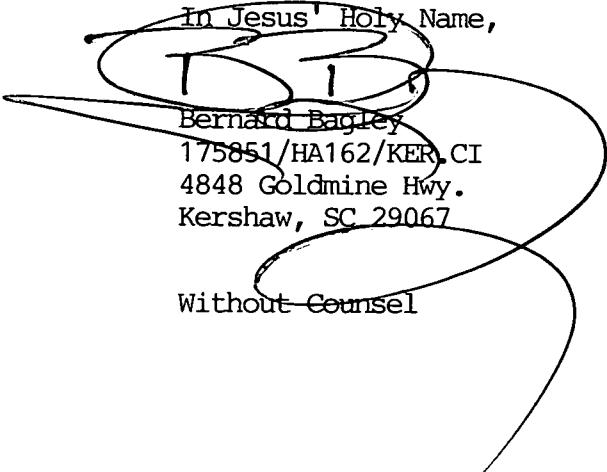
~~Whatever the Board was given prior to their decision is under fraudulent~~ intentions, excluding Appellant's submissions, or letters in support for him. Any other outside source has fraudulently given the Board a set of facts that the Appellant was not allowed to contest against him in his parole hearing or prior to the same., as related to the integrity of the parole proceedings. The two factors that co-exist in Belcher are a different set of facts that do relate to law in accordance to Rule 60(b)(5), of South Carolina Rules of Civil Procedure, on the basis that the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. Appellant argues that the lesser included commitment offense has been satisfied by law, and he would be on release and discharged on the commitment offense lesser included offense that was charged to the jury in a court of law, and the commitment offense is no longer equitable and that the judgment should have prospective application on the basis of the two factors that co-exist in Belcher in which the Appellant meet those criteria as mitigating set of facts by law, related to the integrity of this Court. The Appellant is an individual with a disability, he is otherwise qualified to participate in or receive the benefit of and some public entity's services, programs, or activities, and that he has been excluded from participation and denied the benefits of the public entity's services, programs, or activities is based on his disabilities, immutable fixed factors of commitment offense, in which discrimination was by reason of the same. The Respondent has provided all proof of this occurring. Respondent's arguments and position supports Appellants contentions, and the proof offered that he is treated differently than any other inmate in a similar situation because of their different set of facts.

CONCLUSION

Based on the foregoing reasons the Appellant prays that the final decision of the ALC be reversed and that this appeal be granted.

Kershaw, SC
June 26, 2013

In Jesus' Holy Name,


Bernard Bagley
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Without Counsel

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FOR THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge
Appellate Case Number 2013-000042

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v.

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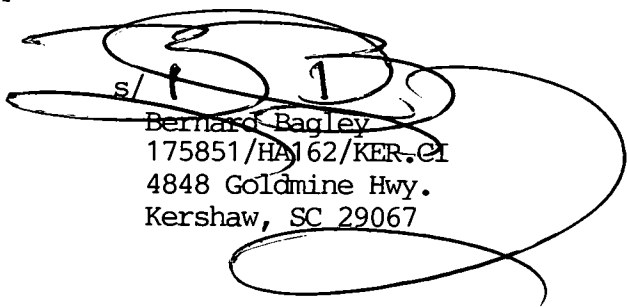
RECORD ON APPEAL
(Appendix)

In addition to the matter designated by the Respondent, the Appellant proposes the following to be included to Supplement the Record on Appeal:

1. State v. Bagley, April 10-12, 1991; Case No. 90-GS-40-5849 FOIA copies of pages 397-414 of the transcript, along with the cover letter furnished by the State Office of Attorney General;
2. Information of SCDPPPS Parole Assessment; and
3. State Statutes, §24-21-610; §24-21-620; §24-21-630; §24-21-640; and §24-21-645.
4. ALC Notice of Appeal dated October 16, 2012.

The undersigned hereby certifies this Record on Appeal (Appendix) contains no matter which is irrelevant to this appeal.

June 26, 2013


s/ Bernard Bagley
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STATE OF SOUTH CAROLINA
In the Court of Appeals

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Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Record on Appeal (APPENDIX) contains all material proposed to be included by the parties.

June 26. 2013

s/

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COURT OF APPEALS

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S.C. Department of Probation,
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PROOF OF SERVICE

I, Bernard Bagley, the Appellant certify that I have served the Appellant's Final Reply Brief, and Certificate of Counsel dated June 26, 2013, on Respondent this 27th day of June, 2013, by depositing a copy of the same in the U.S. Mail, postage prepaid, addressed to: Tommy Evans, Jr.
SCDPPPS Legal Counsel
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NOTE: Designated of Matter dated June 26, 2013
is enclosed with the foregoing. (Record
on Appeal, (Appendix))

June 27. 2013

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