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SC Court of Appeals

The STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge
Appellate Case No. 2023-001050

Charles Williams, #086721, ... Appellant,

v.

South Carolina Department of Probation, Parole, and Pardon Services, ... Respondent.

REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE ALC ERRED WHEN IT SUMMARILY DISMISSED APPELLANT'S APPEAL AS A "ROUTINE DENIAL" OF PAROLE?

STATEMENT OF THE CASE

For purposes of brevity, incorporated here are the statements made by Appellant in the Statement of the Case in the *Initial Brief of Appellant* (hereinafter "BOA"), as if fully stated herein. Respondent filed its *Initial Brief of Respondent* (hereinafter "BOR") and *Designation of Matter* on October 24, 2023; Appellant received the same through the Broad River Correctional Institution's mail room on October 30, 2023. Appellant's *Reply Brief of Appellant* now follows.

FACTS

For purposes of brevity, incorporated here are the statements made by Appellant in the Facts in the *Initial Brief of Appellant*, as if fully stated herein.

STANDARD OF REVIEW

For purposes of brevity, incorporated here are the statements made by Appellant in the Standard of Review in the *Initial Brief of Appellant*, as if fully stated herein.

ARGUMENTS

I. WHETHER THE ALC ERRED WHEN IT SUMMARILY DISMISSED APPELLANT'S APPEAL AS A "ROUTINE DENIAL" OF PAROLE?

Although Respondent attempts to mislead this Court into believing "Appellant's issues in this appeal could be considered to be contained in his bare-bones appeal, but they are most similar to his appeal in 2021, in which this Court affirmed the denial" (BOR, pg. 3), that interpretation is incorrect. Appellant presents only one question before this Court: Whether the ALC erred when it summarily dismissed Appellant's appeal as a "routine denial" of parole? The U.S. Supreme Court has held that a document filed *pro se* is to be liberally construed. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Therefore, Appellant's notice of appeal, however inartfully written, must be held to less stringent standards than those formally drafted by lawyers. *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007); also *Odom v. Ozmint*, 517 F.Supp.2d 764, 767 (D.S.C. 2007). Respondent's brief raises three arguments:

1. The ALC properly dismissed the appeal.
2. Appellant's arguments were not preserved for review at this stage.
3. The Board's use of its current parole consideration criteria does not result in an ex post facto violation.

For purposes of brevity, Appellant incorporates here the statements made by Appellant in the Arguments in the *Initial Brief of Appellant*, as if fully stated herein.

1. The ALC did not properly dismiss the appeal.

Respondent claims Appellant's appeal was "aimed at his belief that the ALC should have overturned the Board's decision and granted him parole due to its failure to follow what he believes are the appropriate procedures, including strictly abiding by the Parole Board statute that was in place when he was convicted" (BOR, pg. 5). Moreover, Respondent claims further that, "***Only*** when the

Department determines an inmate is permanently ineligible for parole does the ALC have ***full jurisdiction*** to review the decision" (BOR, pg. 5, emphasis added). The Respondent's arguments lacks merit.

Respondent mistakenly construes Appellant's novel issue of law as one that somehow attempts to challenge the Parole Board's decision to deny parole. To the contrary, Appellant filed the notice of appeal in an attempt to allege an "as-applied" constitutional challenge to the statutes considered by the Parole Board. As clearly alleged in Appellant's Brief, our "S.C. Supreme Court has declared that the ALC has the authority to review "as-applied" constitutional challenges to statutes. *Travelscape, LLC v. S.C. Dept. of Revenue*, 391 S.C. 89, 705 S.E.2d 28, 38-39 (2011) (BOA, pg. 7). Regardless of whether the Respondent determines Appellant is eligible or permanently ineligible for parole, or neither, the ALC retains full jurisdiction to review an "as-applied" constitutional challenge to statutes. The ALC is "empowered to hear as applied challenges to statutes and regulations ..., and [for] finding a statute or regulation unconstitutional as applied to a specific party..." *Travelscape*, 391 S.C. at 109, 705 S.E.2d at 39; also *Dorman v. Dep't of Health & Envtl. Control*, 350 S.C. 159, 171, 565 S.E.2d 119, 126 (Ct.App.2002); *Ward v. State*, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000).

Based on an inaccurate interpretation of our S.C. Supreme Court precedent, the Respondent seeks to mislead this Court into believing the ALC has absolutely no jurisdiction "to hear an appeal of a routine denial of parole" (BOR, pg. 5). Respondent bases its position on an inaccurate interpretation of S.C. Code Ann. § 1-23-600(D). Appellant would remind this Court that our S.C. Supreme Court stated unequivocally that "[t]o make a decision based ***solely on the outcome of the Parole Board's decision*** would be an oversimplification and merely involves a matter of semantics." *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 498, 661 S.E.2d 106, 111 (2008) (emphasis added). To put it in the way Respondent would have this Court believe, S.C. Code Ann. § 1-23-600(D) would make the ALC a rubber stamp for Respondent's parole decisions. Instead, as

recognized by this Court in *Steele v. Benjamin*, 362 S.C. 66, 606 S.E.2d 499 (2004), our S.C. Supreme Court stated further that, "a sufficient liberty interest may be implicated to trigger due process requirements even though the Parole Board's decision did not constitute a permanent denial of parole eligibility." *Cooper*, 377 S.C. at 498, 661 S.E.2d at 111. Such is the case when a parole-eligible inmate, like Appellant, attempts to allege an "as-applied" constitutional challenge to the statutes considered by the Parole Board.

2. Appellant's arguments were not preserved for review at this stage.

Respondent claims "Appellant's summary dismissal was based on the filing of his notice of appeal that contained six short words or phrases listing ***his issues***," and "Respondent cannot be expected to respond to ***issues that were not raised*** to either the Parole Board ***or the ALC***" (BOR, pg. 6, emphasis added). Appellant argues this recognition of the facts by Respondent essentially proves Appellant's issue before this Court; namely, that the ALC erred by summarily dismissing Appellant's appeal as a "routine denial" of parole.

The grounds for Appellant's appeal in the ALC, filed April 25, 2023, alleged: (1) abuse of discretion, (2) failure to follow substantive and procedural law, (3) unlawful procedure, (4) violation of due process, (5) deprivation of a state-created liberty interest in parole, and (6) the Board's parole decision is arbitrary and capricious. Appellant would point out the grounds for appeal are "the reason or point that something (as a legal claim or argument) relies on for validity," *Black's Law Dictionary* (8th Ed.2004) at 723, and simply refer to "the discrete reason or reasons that caused the party to appeal." cf. *Medcorp, Inc. v. Ohio Dept. of Job & Family Servs.*, 121 Ohio St.3d 622, 906 N.E2d 1125 (2009). Appellant was not required to fully express his claims of the Respondent's violations of our federal and state constitutions in the notice of appeal.

Pursuant to SCALC Rule 59(B), the notice of appeal filed in the ALC shall contain "a brief factual basis for each expressly and specifically asserted constitutional violation." Furthermore, SCALC Rule 59 states, "Any notice of appeal which is incomplete or not in compliance with this rule or Rule 71 will not be assigned to an administrative law judge until all required information is received ..." The fact this case was assigned to an administrative law judge necessarily implies Appellant's notice of appeal was not "incomplete or not in compliance with this rule." Again, our U.S. Supreme Court has held "a document filed *pro se* is to be liberally construed. *Estelle*, 429 U.S. at 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Therefore, Appellant's notice of appeal, however inartfully written, must be held to less stringent standards than formal statements drafted by lawyers. *Erickson*, 551 U.S. at 94, 127 S.Ct. at 2200, 167 L.Ed.2d 1081 (2007); also *Odom*, 517 F.Supp.2d at 767 (D.S.C. 2007).

Therefore, it is disingenuous for Respondent to argue "Appellant's arguments were not preserved" because Appellant made it perfectly clear that the Honorable Deborah Brooks Durden's apparent interpretation of "S.C. Code Ann. § 1-23-600(D) (Supp.2018) [did] not afford Appellant equal access to the courts to seek remedies for unconstitutional applications of state law by Respondent" (BOA, pg. 8). Unlike the appellants in *Stewart Buchanan v. S.C. Dep't of Probation, Parole and Pardon Services*, 2023 WL 5597908, *Joseph Kelsey v. S.C. Dep't of Probation, Parole and Pardon Services*, 2023 WL 5598698, *Rose v. S.C. Dep't of Probation, Parole and Pardon Services,* 429 S.C. 136, 144, 838 S.E.2d 505, 510 (2020), and *Barton v. S.C. Dep't of Probation, Parole and Pardon Services,* 404 S.C. 395, 419, 745 S.E.2d 110, 123 (2013), where the ALC and our S.C. Supreme Court have continued to review appeals where they implicated an alleged deprivation of due process, Appellant was not afforded the same opportunity to file a brief pursuant to SCALC Rule 60 in order to actually raise, argue, and ultimately preserve the "as-applied" constitutional challenge to the statutes considered by the Parole Board. Contrary to the controlling authorities of Cooper and Steele, the Honorable Judge Durden erroneously dismissed the appeal based solely on the Respondent's Notice

of Rejection—and not on any arguments actually briefed by Appellant. *Cooper*, 377 S.C. at 498, 661 S.E.2d at 111; *Steele*, 362 S.C. 66, 606 S.E.2d 499 (2004).

3. The Board's use of its current parole consideration criteria results in an ex post facto violation.

Respondent here makes three claims. First, Respondent claims, "The ALC reviewed the procedures, ***as it is limited to in this capacity***, and found them to comply with ***all relevant law***" (BOR, pg. 7, emphasis added). Second, Respondent claims that, "In comparing this [S.C. Code Ann. § 55-612 (Supp. 1962)] to the current statute, which was amended in 1981 and is now § 24-21-640, ***the only difference*** is the word "shall" is replaced by the word "may"—"... no prisoner may be paroled..." ***This change*** does not affect the Board members nor the criteria used in the determination of parole" (BOR, pg. 8, emphasis added). And finally, Respondent claims that, "In the case *sub judice*, though, there is ***no new rule***, merely a reframing of the existing standards" (BOR, pg. 9, emphasis added). Respondent's arguments lack merit.

In response to Respondent's first claim, Appellant would argue the ALC's jurisdictional capacity was not limited to simply reviewing the Respondent's Notice of Rejection. Again, the ALC is "empowered to hear as applied challenges to statutes and regulations ..., and [for] finding a statute or regulation unconstitutional as applied to a specific party..." *Travelscape*, 391 S.C. at 109, 705 S.E.2d at 39; *Dorman*, 350 S.C. at 171, 565 S.E.2d at 126 (Ct.App.2002); also *Ward*, 343 S.C. at 18, 538 S.E.2d at 247 (2000). Instead, Judge Durden was required by SCALC Rule 60 to allow Appellant to actually brief the issue filed by the notice of appeal, however inartfully written, in order to safeguard the constitutional guarantee "that prisoners, like all citizens, have 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'" *Lewis v. Casey*, 518 U.S. at 351, 116 S.Ct. at 2180, 135 L.Ed.2d 606 (1996). With regard to the Respondent's claim the ALC reviewed the procedures and "found them to comply with ***all relevant law***" (BOR, pg. 7, emphasis

added), it is disingenuous and grossly misleading to first argue Appellant's "***issues*** ... ***were not raised*** to either the Parole Board ***or the ALC***" (BOR, pg. 6, emphasis added), and then somehow claim the procedures were "***found***" to be in compliance "***with all relevant law***" (BOR, pg. 7, emphasis added). The ALC made no findings of fact or law related to the issue submitted in Appellant's notice of appeal because the ALC did not allow Appellant to file a brief.

In response to Respondent's second claim, Appellant would argue Respondent's statutory interpretation of S.C. Code Ann. §§ 55-612 (Supp. 1962) and 24-21-640 (Supp. 1981) is deliberately misleading and lacks merit. Appellant would argue the Legislature would have no need to repeal § 55-612, and then enact § 24-21-640 in 1981, if the legislative intent was merely to replace the word "shall" with the word "may". If the Legislature's intent was simply to change one word, then it would have done so by an amendment to § 55-612—not by repealing the statute altogether, and then creating a new one. Although Respondent was somehow comparing § 55-612 (Supp. 1962)] to the current statute, which was amended in 1981 and is now § 24-21-640, Respondent deceptively omits § 24-21-640 (Supp. 1981) altogether. Section 24-21-640 of the South Carolina Code of Laws was enacted by 1981 Act No. 100, § 12, and specifically reads:

> **SECTION 12.** Article 7 of Chapter 21 of Title 24 of the 1976 Code is amended by ***adding***:
>
> Section 24-21-640. The Board **shall** carefully consider the record of the prisoner before, during, and after imprisonment, and no such prisoner **shall** be paroled until it **shall** appear to the satisfaction of the Board that the prisoner has shown a disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interests of society will not be impaired thereby; and that suitable employment has been secured for him. **The Board shall establish written, specific criteria for the granting of parole and provisional parole. Such criteria shall reflect all of the aspects of this section. The criteria shall be made available to all prisoners at the time of their incarceration and the general public.** The paroled prisoner shall, as often as may be required, render a written report to the Board giving such information as may be required by the Board which shall be confirmed by the person in whose employment the prisoner may be at the time.
>
> (1981 Act No. 100, § 12, emphasis added)

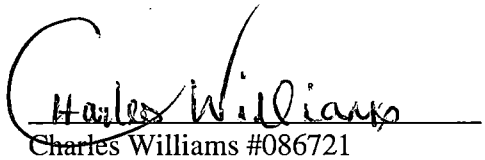
The bold-face type indicated above clearly demonstrates the change of the word "shall" to "may" did not occur by the enactment of 1981 Act No. 100, § 12 and, further, that the significant change to the statute was the Legislature's granting of general rule-making authority to the Parole Board to "establish written, specific criteria for the granting of parole and provisional parole." Prior to the repeal of § 55-612, and subsequent enactment of § 24-21-640, the Parole Board did not have this general rule-making authority.

In response to Respondent's third claim, Appellant would argue Appellant's novel issue of law is similar to the argument in *Cooper*, but is certainly not the same. Appellant is not challenging the Respondent's authority to "establish written, specific criteria for the granting of parole and provisional parole" pursuant to S.C. Code Ann. § 24-21-640. Instead, Appellant is challenging the authority of the Parole Board to consider and apply these post-1981 "written, specific criteria" while considering Appellant for parole. It's dishonest for Respondent to claim these "written, specific criteria" are merely a "***reframing*** of the ***existing standards***" because the Legislature did not grant any rule-making authority to the Parole Board to "reframe" the statutory standards created by the Legislature in § 55-612 until the enactment of 1981 Act No. 100, § 12. Although the Parole Board generally has authority to apply the "written, specific criteria" to offenders whose offenses occurred ***after*** the enactment of S.C. Code Ann. § 24-21-640 in 1981, the Parole Board exceeds and abuses its authority by retroactively applying them to Appellant's 1975 offenses. Moreover, the application of every new amended version of § 24-21-640 since 1981, in addition to the requirements and criteria in § 24-21-10(F)(1) and Form 1212, have a cumulative effect of changing the standard Appellant is required to meet in order to be granted parole. To put it another way, the Parole Board existing on September 26, 1975, would not consider Appellant for parole by the same overall standards in effect and considered by the Parole Board on March 29, 2023. Therefore, the Respondent's claim that "there is no new rule" is factually untrue.

CONCLUSION

Appellant prays this Court declares that the Respondent's decision constituted an unlawful procedure and was in excess of the statutory authority granted to the Respondent on September 26, 1975, pursuant to S.C. Code Ann. § 1-23-610(B)(b) and (c), or, in the alternative, remand this appeal to the ALC for further proceedings in order to make a factual determination of Appellant's claims of federal and state constitutional violations of Respondent.

Respectfully submitted,



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South Carolina Department of Probation, Parole, and Pardon Services, ... Respondent.

PROOF OF SERVICE

I did on this date serve this *Reply Brief of Appellant*, by placing a copy of the same in a United States Postal Service mail box, postage paid, and addressed as follows:

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Date: November 7. 23

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