STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Omar Brown, Appellant, v. South Carolina Criminal Justice Academy, Respondent.	Docket No. 24-ALJ-30-0425-AP **ORDER DENYING MOTION FOR REHEARING**

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court ("ALC" or "Court") upon the appeal of Omar Brown ("Appellant") from a final agency decision issued by the Law Enforcement Training Council ("LETC or Council") of the South Carolina Criminal Justice Academy ("SCCJA" or "Respondent") to permanently deny Appellant a law enforcement certification. This Court has jurisdiction pursuant to S.C. Code Ann. Section 1-23-600(D) (Supp. 2024); *see also* S.C. Code Ann. § 1-23-505(2) (Supp. 2024). After careful consideration, the Court entered an order affirming the Council's decision on May 5, 2025. Appellant filed a Petition for Rehearing on May 14, 2025. Respondent filed a response to the motion on May 23, 2025.

HISTORY

The factual background and procedural history are set forth in detail in the Court's prior order and are incorporated herein by reference.

STANDARD OF DECISION

A motion for rehearing is authorized by SCALC Rule 40(B). This rule is based on its counterpart in the South Carolina Appellate Court Rules. The appellate court rules in turn provide that a motion or petition for rehearing "shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221(a), SCACR. Accordingly, to prevail on a petition for rehearing, an appellant must demonstrate the Court overlooked or misapprehended their argument. *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Jean H. Toal, Shahin Vafai & Robert Muckenfuss,

Appellate Practice in South Carolina 309 (1999) (citing *Arnold v. Carolina Power & Light Co.,* 168 S.C. 163, 167 S.E. 234 (1933)). The Court should therefore not consider new evidence or arguments when deciding whether to grant the petition for rehearing. *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322.

DISCUSSION

The Petition for Rehearing submitted by Appellant's counsel contains no headings or summary of the arguments it contains. After reviewing the Petition, it appears that counsel for Appellant raises the following arguments:

1. The Court misunderstands practice in criminal cases in South Carolina and is incorrect to suggest that production of witness statements occurs following the testimony of a witness;
2. Witness statements and discovery are contemplated by *Brady v. Maryland*[1] and *United States v. Bagley*[2] in criminal cases, and should have been permitted in the administrative proceeding under review;
3. The Court mistakenly relied upon Rule 5, SCRCrimP to narrowly construe *Brown v. State Board of Education*[3];
4. The Court's conclusion that Appellant cannot maintain a due process claim because he failed to properly request the documents is incorrect because Appellant did ask for the materials;
5. Even if the Court's conclusion regarding the failure to request materials is correct, the Court should not have drawn this conclusion because it was not argued by the Respondent below;
6. The Court incorrectly concluded that Appellant failed to make the evidentiary basis for admissibility of the materials sought because it was clear Appellant sought to introduce them as a prior inconsistent statement; and
7. The Court's conclusion that Appellant was not prejudiced is incorrect because credibility was critically important.

The Court will address each of these arguments below.

[1] 373 U.S. 83 (1963).
[2] 473 U.S. 667 (1985).
[3] 301 S.C. 326, 391 S.E.2d 866 (1990).

I. Practice in Criminal Courts

Appellant's counsel takes issue with the Court's characterization of practice in criminal court in South Carolina. Upon review, it does appear that the Court's language was too loose, and the Court should not have used language which suggests a general practice among solicitors in South Carolina with respect to production of witness statements. This error, however, does not alter the outcome of the case. As discussed more fully below and in the Court's prior order, the Court's conclusion that Appellant seeks to impose criminal procedural requirements in a civil administrative proceeding remains valid.

II. Witness Statements under *Brady v. Maryland* and *United States v. Bagley*

Appellant next argues that because the Court made a comparison between the hearing below and criminal cases, the Court should consider that *Brady* and *Bagley* hold that a due process violation occurs when evidence, including impeachment evidence, is suppressed by a prosecutor irrespective of the good faith or bad faith of the prosecution. Appellant notes that, in this case, the witness statements were never produced, even after the witnesses had testified, which would violate Rule 5 of the South Carolina Rules of Criminal Procedure. This rule provides that the State is required to produce specified information such as a statement made by the defendant, the defendant's prior record, and reports of examinations and tests only "[u]pon request of the defendant." Rule 5(a), SCRCrimP. Prior statements made by prosecution witnesses are not required to be produced under this rule until *after* the witness has testified on direct examination and even then only when a defendant moves the court for production. Rule 5(a)(2), SCRCrimP.

In the Court's view, this argument rests upon a misunderstanding of the comparison made by the Court in its prior Order. The Court did not mean to suggest that Appellant was in any way entitled to the due process protections which are constitutionally required in a criminal proceeding. The Court specifically noted that while some states treat license revocation proceedings as quasi-criminal in nature, *e.g., Wills v. Composite State Board of Medical Examiners*, 384 S.E.2d 636, 639 at n. 3 (Ga. 1989) ("[i]n Georgia, medical license revocations are in the nature of criminal proceedings") (internal quotations and citations omitted), South Carolina does not do so. *See Anonymous (M-156-90) v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 375-78, 496 S.E.2d 17, 19-20 (1998) (approving use of preponderance of evidence standard in administrative license revocation proceedings rather than the stricter clear and convincing standard required when fraud or quasi-criminal conduct is involved). As a result, participants in administrative license

proceedings are not entitled to the full panoply of procedural rights which a criminal defendant might enjoy in South Carolina.

What the Court did intend to convey is that: (1) Appellant seeks to impose procedural requirements which are required in criminal proceedings upon the Respondent in a civil administrative proceeding; and (2) the Court rejects this proposition. The Constitutions of the United States and of South Carolina require certain due process protections in criminal proceedings which are not required in civil proceedings. To accept Appellant's argument would be to ignore the distinction between criminal cases and the civil administrative proceeding underlying this appeal.

III. *Brown v. State Board of Education*

In *Brown*, the South Carolina Supreme Court held that due process requires disclosure of the evidence used to prove the State's case so that an individual has an opportunity to show it is untrue. *Id.,* 301 S.C. at 329, 391 S.E.2d at 867. Appellant construes this holding to require Respondent *produce* to Appellant all evidence which it intended to use to prove its case. The Court concluded that Appellant's construction of *Brown* was too broad and that what is required by *Brown* is not physical production of all evidence but rather the provision of notice of what evidence it intends to use.

The Court's conclusion was once again based in part upon a comparison with requirements in criminal proceedings in which greater procedural requirements are imposed than in administrative proceedings. In criminal proceedings, whether under Rule 5, SCRCrimP, or *Brady*, the State is not required to produce *all* of the evidence upon which it intends to rely but rather is required to produce only exculpatory evidence and impeachment evidence. If the Court were to read *Brown* to require that *all* evidence be disclosed, as Appellant suggests, participants in administrative license revocation proceedings would receive greater production than do criminal defendants.

The Court is not persuaded that its construction of *Brown* was erroneous.

IV. Request for Materials

In its prior Order, the Court alternatively held that Appellant's failure to use the discovery tools provided by statute and regulation are fatal to his due process claims. Appellant argues that this holding was in error for two reasons. First, Appellant contends that the Court failed to consider that Appellant did ask for the materials he sought. Second, he argues that the Court should not

have considered this argument because it was raised for the first time by the Respondent upon appeal. The Court will address both arguments below.

While the Court acknowledges that the record indicates Appellant requested certain documents from the police department in the course of collateral proceedings other than the license revocation proceeding currently on review,[4] these requests are insufficient. Our state supreme court held in *Zaman v. S.C. State Board of Medical Examiners*, that "[o]ne cannot complain of a due process violation if he has recourse to a constitutionally sufficient administrative procedure but merely declines or fails to take advantage of it." 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991). Here, Appellant had access to the discovery tools provided by regulation in proceedings for revocation of a law enforcement certificate. S.C. Code Regs. § 37-104. Appellant did not take advantage of these discovery tools.[5]

Appellant next argues that the Court should not have considered this argument because the Respondent did not make it below but was instead raised for the first time on appeal. Appellant relies upon SCALC Rule 38 which provides that the ALC will not ordinarily consider any fact which does not appear in the record and *Kiawah Resort Associates v. S.C. Tax Commission*, 318 S.C. 502, 458 S.E.2d 542 (1995), which holds that appellate courts have limited review and cannot ordinarily consider issues not raised to and ruled on by the administrative agency." However, Appellant ignores SCALC Rule 40(A). This rule states that: "[t]he administrative law judge may affirm, reverse, or remand any ruling, order, or judgment upon any ground(s) appearing in the Record." As a result, the Court's affirmance of the decision based upon an argument not made below is not improper. *See also* Rule 220(c), SCACR (**"Affirmance on Any Ground Appearing in Record.** The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal") (emphasis in original).

V. Admissibility of Sanchez Lawsuit Evidence

The Court affirmed the exclusion of the Sanchez lawsuit evidence for two reasons: (1) Appellant, who was acting *pro se* at the time, failed to make an offer of proof as required by Rule 103, SCRE, and, (2) if an error was made, the error was harmless because the evidence in question

[4] Appellant indicates requests for potential evidence were made in a proceeding with the South Carolina Department of Employment and Workforce and also under the Freedom of Information Act. [R.p. 113].

[5] Appellant's argument also ignores the fact that the requests submitted in alternate forums and the responses thereto are not in the record. As a result, the Court is unable to evaluate whether Appellant did in fact make the requests at issue and, if so, whether the request was validly denied.

was cumulative to other evidence already in the record. Appellant takes issue with both of these conclusions.

He first contends that an appropriate offer of proof was made. A satisfactory offer of proof requires that: (1) the substance of the evidence; and (2) "the specific evidentiary basis supporting admission" be made known to the court or were apparent from the context. Rule 103, SCRE. According to Appellant, Officer Sanchez's responses to the questions he asked indicate that Officer Sanchez knew precisely the statements to which Appellant referred, and, accordingly, the substance of the proffer was apparent from the context.

This reasoning is flawed. Appellant confuses the requirement of Rule 613, SCRE, that a witness be advised of the substance of the statement, including the time and place it was made, with the requirement of Rule 103, SCRE that, for an offer of proof to be valid, the substance of the evidence be made known "to the court." Whether Officer Sanchez could identify the statement at issue from Appellant's questions is irrelevant for purposes of an offer of proof. The question is whether the substance of the allegedly inconsistent statement was made known to the court, or, in this case, the hearing officer. The record does not reflect that it was.[6]

Appellant also argues that the record indicates that Appellant was attempting to introduce the statements as a prior inconsistent statement, and, therefore, the evidentiary basis for admission of the statement was known. The Court has once again reviewed the record and simply disagrees with Appellant's view. The Court believes that the record indicates that Appellant was attempting to impeach Officer Sanchez by use of a prior bad act.

Finally, Appellant challenges the Court's conclusion that it could not find Appellant was prejudiced by exclusion of the federal court document.[7] Appellant stresses that Officer Sanchez's credibility was the most important aspect of the case and argues that Appellant could not adequately attack the officer's credibility without the admission of the statement.

This argument ignores the Court's actual ruling on the question of prejudice. The Court concluded that the failure to make a valid offer of proof precluded it from making a determination that Appellant was prejudiced by the exclusion of the evidence in question.[8]

---

[6] Appellant's briefs did not identify allegedly inconsistent the statement to the Court. Appellant's Petition for rehearing also fails to identify the statement. The absence of the statement itself from the record precludes informed appellate review.

[7] Again, it is unclear whether the document sought to be admitted was a complaint, a deposition, or an affidavit.

[8] The Court did conclude that it was unlikely the evidence was prejudicial in a footnote but that was not the basis of its ruling.

In summary, the Court concludes that Appellant has failed to demonstrate that the Court overlooked or misapprehended points which require a different outcome in this matter.

ORDER

IT IS HEREBY ORDERED that the Petition for Rehearing is **DENIED.**

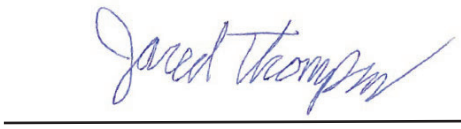
AND IT IS SO ORDERED.

The Honorable Robert L. Reibold
Administrative Law Judge

June 5, 2025
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Jared Thompson, hereby certify that I have on this date served this order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



Jared Thompson
Judicial Law Clerk

June 5, 2025
Columbia, South Carolina