

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE FINAL AGENCY DECISION OF THE
SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES

Administrative Law Court

Honorable John D. McLeod, Administrative Law Judge

On Certiorari to the Supreme Court of South Carolina
Case Tracking No.: 2011-203266

Phillip Brown, #118100,

Petitioner,

v.

South Carolina Department of Probation,
Parole and Pardon Services

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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SC Court of Appeals

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- Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7, 92 S.Ct. 2701, 2709 (1972)
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OTHER AUTHORITIES

South Carolina Board of Pardons and Paroles, Operations Manual

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE FINAL AGENCY DECISION OF THE
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ADMINISTRATIVE LAW COURT
Honorable John D. McLeod, Administrative Law Judge

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Phillip Brown, #118100,

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v.

South Carolina Department of Probation,
Parole and Pardon Services,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Writ of Certiorari complies with Rule 242, SCACR. The Petition for Rehearing was made and finally rule on by the Court of Appeals on September 27, 2013.

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October 29, 2013

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SC Court of Appeals

ISSUES PRESENTED

- I. THE COURT OF APPEALS ERRED IN FAILING TO FIND THE ADMINISTRATIVE LAW COURT WAS BOUND BY THE SOUTH CAROLINA CONSTITUTION AND STATUTORY LAW TO RULE ON ISSUES PROPERLY RAISED ON APPEAL.
- II. THE ADMINISTRATIVE LAW COURT ERRED IN NOT FINDING APPELLANT WAS DENIED SUBSTANTIVE AND PROCEDURAL DUE PROCESS, UNDER THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE, BY FAILING TO CONVENE A PAROLE REVOCATION HEARING PRIOR TO RESCINDING [HIS] PAROLE.
- III. THE PAROLE BOARD CREATED A LIBERTY INTEREST RIGHT UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND APPELLANT'S INTEREST DID INVEST THEREIN WHEN THE PAROLE BOARD ADHERED TO THE CRITERIA IN §24-2J-645 AND §24-2J-650 AND GRANTED APPELLANT PAROLE.
- IV. THE ADMINISTRATIVE LAW COURT ERRED IN NOT FINDING THE DPPPS' RESCISSION OF APPELLANT'S PAROLE UNLAWFUL WHERE APPELLANT INCURRED NO VIOLATIONS OF THE CONDITIONS OF PAROLE AND MET ALL IMPOSED CONDITIONS.

HISTORY OF THE CASE

This matter is before the South Carolina Supreme Court pursuant to SCACR Rule 242(a).

This Certiorari to the South Carolina Supreme Court began on May 4, 2011 with an appeal of an agency "Final Decision" of a parole rescission, then an immediate revote for a granting or denying of parole for Phillip Brown, #118100, pro se Appellant, an inmate incarcerated in the South Carolina Department of Corrections, serving life, currently housed at Lieber Correctional Institution.

On April 14, 2010 Appellant was granted a conditional parole by a majority of five (5) members of the South Carolina Parole Board.

On July 28, 2010 Appellant was verbally informed that his conditional parole had been rescinded and that he was scheduled to appear before the Parole Board again on September 8, 2010.

Appellant was subsequently denied parole at the September 8, 2010 rehearing. On September 28, 2010 Appellant requested a reconsideration. The request for reconsideration was denied and an official agency "Final Decision" was issued on February 10, 2011.

On February 18, 2011 Appellant made a demand for a parole rescission hearing. On March 28, 2011 Appellant received notice from the Parole Board that no further response would be made.

Appellant appealed the matter to the Administrative Law Court, which was filed on May 4, 2011. The matter was assigned to the Honorable John D. McLeod, Administrative Law Judge. Judge McLeod heard and issued his decision on October 14, 2011.

On November 3, 2011 Appellant appealed the matter to the South Carolina Court of Appeals. The matter was submitted on April 1, 2013 and filed on June 5, 2013. (Unpublished Opinion No. 2013-UP-233)

On June 14, 2013 Appellant submitted a "Petition For Rehearing En Banc". This petition was denied on September 27, 2013. And now this matter is presented to the South Carolina Supreme Court.

STATEMENT OF FACTS

Appellant pled guilty on June 23, 1983 to murder, burglary and armed robbery and was sentenced to two life sentences and twenty-five (25) years before the Honorable Walter Cox in Richland county.

Appellant first became eligible for parole on February 7, 2001. [He] appeared annually before the South Carolina Parole Board and was denied at each hearing until being granted parole on April 14, 2010 by a majority of five (5) members of the Board, at his tenth (10th) appearance.

The parole had six (6) conditions. (ROA pgs. 5-6) Two of the conditions imposed were that Appellant was to take and pass a psychological questionnaire and attend and complete the Addiction Treatment program at Lee Correction Institution. Appellant completed the psychological questionnaire on May 26, 2010 and enrolled in the Addiction Treatment program on June 14, 2010.

Three and one-half (3½) months after Appellant was granted parole and was in the process of fulfilling the conditions [he] was verbally notified that the parole had been rescinded. This occurred on July 28, 2010, despite being in contravention of South Carolina Board of Pardons and Paroles Operations Manual, [Rehearing of Parole Cases, Part III pg. 44] which clearly allows only thirty (30) days, in writing, why a parole decision may be appealed or Part I, section c., After - Acquired Information About the Prisoner, pg. 43, clearly mandates that the information "to be so important as to require an immediate reconsideration of the case" places the same period of limitations upon those who would oppose a prisoner's parole. See, e.g., State v. Sampson, 317 S.C. 423, 454 S.E.2d 721 (decision becomes law of the case after time for appeal has lapsed).

Appellant was told that [he] would reappear before the Board on September 8, 2010. On this date the Board voted to rescind Appellant's parole and then held an immediate revote on whether to grant or deny parole. Parole was subsequently denied even though Appellant did not violate any of the conditions of the parole. (ROA pgs. 18-19, 27-29)

Appellant appealed the "Final" decision of the Parole Board to the Administrative Law Court. The matter was assigned to the Honorable John D. McLead on May 4, 2011. The Court did not address the limitation of time for requests for rehearings or the proper procedure for rescission of a parole under these instant circumstances. (ROA pg. 32, Part III, Initiating The Process Of Rehearing Cases) Judge McLead dismissed the matter October 14, 2011.

Appellant appealed to the South Carolina Court of Appeals November 3, 2011. This Court did not address the issue of time limitations for requesting a rehearing or the Parole Board's lack of procedure to rescind or revoke a parole in this instant matter as shown in the Record on Appeal. (ROA pg. 18, lns. 13-25, pg. 19, lns. 1-25, pg. 20, lns. 1-11, pg. 27 lns. 24-25, pg. 28 lns. 1-25, pg. 29 lns. 1-2) The Court of Appeals "Affirmed" the ruling made by the Honorable John D. McLead, Administrative Law Judge. Submitted April 1, 2013 - Filed June 5, 2013, Unpublished Opinion No. 2013-UP-233.

Appellant made "Petition For Rehearing En Banc" June 14, 2013. The petition was rejected by the judges. The Court did not address the Parole Board's lack of procedure to revoke or rescind a parole as in this instant matter or the issue of time limitations for requesting a rehearing. The petition was rejected on September 27, 2013.

I. THE COURT OF APPEALS ERRED IN FAILING TO FIND THE ADMINISTRATIVE LAW COURT WAS BOUND BY THE SOUTH CAROLINA CONSTITUTION AND STATUTORY LAW TO RULE ON ISSUES PROPERLY RAISED ON APPEAL.

Appellant timely and properly raised the issue before the Administrative Law Court (ALC) in his July 5, 2011 Original Brief. Appellant stated he was denied substantive due process where the Department of Probation, Parole and Pardon Services (DPPPS) did not have a substantive process in place for the procedure employed to bring Appellant back before the Parole Board outside of regulatory or statutory guidelines, rescind his parole without infraction, and then deny Appellant parole at a subsequent and immediate rehearing.

Appellant contends that the October 14, 2011 Order of Dismissal by the Honorable John D. McLead, Administrative Law Judge, failed to address the issue regarding the lack of substantive due process. (ROA pg. 18 Ins. 13-25, pg. 19 Ins. 1-25, pg. 20 Ins. 1-11, pg. 27 Ins. 24-25, pg. 28 Ins. 1-25, pg. 29 Ins. 1-15)

Appellant suggests that the ALC is bound by South Carolina law to address any issue of merit raised before an administrative agency and properly raised in the appeal before the ALC.

The South Carolina Constitution provides that no person "shall be finally bound by a decision of an administrative agency affecting private rights except on due notice and opportunity to be heard . . . and shall have in all instances the right to judicial review." S.C. Const. Art. I, § 22. (emphasis added). Thus, our Constitution guarantees a due process proceeding with administrative agencies and further guarantees that persons adversely affected by any agency action has a presumptive right to judicial review.

The South Carolina General Assembly created the ALC as a quasi-judicial agency within the executive branch of government.

The ALC decides contested cases and appellate cases pursuant to S.C. Code Ann. § 1-23-310 et. seq. (1989 and Supp. 2001).

This Court has explained that under the Administrative Procedures Act ("APA"), a "contested case" is one in which an agency is required by law to determine a party's rights after an opportunity for a hearing.

Garris v. Governing Bd. of South Carolina Reinsurance Facility, 333 S.C. 432, 511 S.E.2d 48 (1998).

Rule 2(E) ALJDRP also provides a definition of "contested case"; "It is a case for which a hearing is conducted pursuant to Article 3, Chapter 23 of Title 1, the South Carolina APA, and includes hearings required by due process under the South Carolina or United States Constitutions or otherwise provided by law".

Indeed, pursuant to S.C. Code Ann. § 1-23-600 (B) (Supp. 2001), the ALC "... shall preside over all hearings of contested cases ..."

The ALC had jurisdiction to properly determine the matter pursuant to S.C. Code Ann. § 1-23-380 (A)(6). The ALC failed to apply the "substantial evidence" rule in the judicial review of the DPPPS "Final" agency decision where the record supported the Parole Board had no process in place for the procedure employed to bring Appellant back before the Parole Board and rescind his parole.

Appellant suggests the exceptional circumstances involved in the novel question of the DPPPS' lack of substantive due process for the procedure employed in rescinding parole warrants granting the writ to serve the interests of judicial economy in eliminating numerous, inevitable DPPPS appeals based on lack of substantive and procedural due process in Parole Board parole eligibility procedures.

There is a thirty (30) day time limit to rehear a parole case. There is no procedure to rehear a parole case for the sole purpose of revocation or rescission absent a violation of the conditions of the parole beyond the thirty (30) day limit.

Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings

that stem from an independent source such as state law... " Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

The DPPPS's agency's policy/regulation/Operations Manual plainly creates such interests: Appellant submits (1) liberty and property interests in S.C. Board of Pardons and Paroles, Operations Manual, Part III, Initiating the Process of Rehearing Cases, pg. 45-46, which specifies a rehearing of any matter must be held within thirty (30) days; and (2) no agency policy/regulation/Operations Manual section exists for the procedure employed to rescind parole, without violation of agreed upon terms by parolee/Appellant, thus, no substantive process exists to protect Appellant's liberty which vested on April 14, 2010.

The property right or liberty interest is defined by, and conditioned on, the legislature's, or the agency's quasi-legislative choice of procedures for its deprivation. The DPPPS may argue grounds for revocation, but there exists no statute, regulation or procedure by which such a revocation may take place.

The Due Process Clause provides that certain substantive rights --- life, liberty, and property --- cannot be deprived except pursuant to constitutionally adequate procedures. In short, as here, once it is determined that the Due Process Clause applies, "the question remains what process is due". Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

The point is, where there is an entitlement, as here - liberty, a prior hearing facilitates the consideration of whether a permissible course of action is also an appropriate one. Such practice, lacking here, would have substantially reduced the risk of error. What steps were required? In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action, Matthews v. Eldridge, 424 U.S. 319, 343 (1976). However, where liberty is at stake, a full hearing before a circuit court judge, with the right to counsel, See S.C. Code Ann. §17-27-60 before a violation could be determined prior to DPPPS conducting a full administrative revocation hearing.

In Goldberg v. Kelly, 397 U.S. 254 (1970) the Court required a full

adversarial evidentiary hearing prior to adverse governmental action. Goldberg presented significantly different considerations, (welfare), than are present in the context of a vested parole (liberty). The predeterminative hearing need not have definitively resolved the propriety of the administrative review. It should have been an initial check against mistaken decisions - essentially, a determination of whether there are reasonable grounds to believe that the DPPPS could employ the procedures utilized without and outside of statutory or regulatory authority.

II. THE ADMINISTRATIVE LAW COURT ERRED IN NOT FINDING APPELLANT WAS DENIED SUBSTANTIVE AND PROCEDURAL DUE PROCESS, UNDER THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE, BY FAILING TO CONVENE A PAROLE REVOCATION HEARING PRIOR TO RESCINDING [HIS] PAROLE.

Appellant contends that the Parole Board violated Appellant's constitutional rights when they did not convene a parole revocation/rescission hearing before rescinding [his] parole. The thirty (30) day time limit for initiating a rehearing had elapsed by the time of notification on July 28, 2010. Once the Board issued an "Order of Parole", (ROA pg. 5), pursuant to S.C. Code Ann. §24-21-650, on April 14, 2010 and Appellant accepted the conditions of the parole, there was a binding contract between the Parole Board and Appellant. Both parties are required to fulfill the terms of the contract. The Board, without regard for the Due Process protections provided by the South Carolina Constitution Art. I § 3, the United States Constitution, Fifth and Fourteenth Amendments and South Carolina statute, arbitrarily and capriciously rescinded Appellant's parole.

The DPPPS decision, and subsequently the ALC, erred in the denial of substantive and procedural due process violation by conducting a revocation hearing without notice; based on any custom, practice, policy or precedented procedure; or conducted because of a violation by Appellant of any criteria agreed upon in being granted parole.

Appellant is guaranteed due process by virtue of Article I § 3 of the South Carolina Constitution. There are no statutory or regulatory provisions in South Carolina that provide for rescission or revocation of parole without notice, warrant or citation issued changing the parolee with a violation of conditions of parole once the thirty (30) day time limit has passed, S.C. Code Ann. §24-21-680. Appellant asserts Respondents can produce no such instrument.

The U.S. Supreme Court has held that due process protections apply to parole

revocations. Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756 (1972); Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593 (1972).

The Parole Board acknowledged that the substantive procedure employed was unprecedented and the members were uncertain on how to proceed, (ROA pg. 18 Ins. 13-25, pg. 19 Ins. 1-25, pg. 20 Ins. 1-11, pg. 27 Ins. 24-25, pg. 28 Ins. 1-25) and knew their actions violated Appellant's rights.

Although the DPPPS had the power to rescind the April 14, 2010 parole of Appellant before the thirty (30) day time limit, this Court must determine whether the Parole Board's exercise of that power violated Appellant's right to substantive due process after the thirty (30) day time limit had expired.

The ALC found no violation of Appellant's right to procedural due process. However, Appellant's argument is, at the moment the Board granted parole on April 14, 2010 and the thirty (30) day time limit passed, he obtained a vested, substantive due process right to be released in accordance with that parole, under §24-21-650, and regardless of the procedures the Parole Board afforded, that right could not be taken away. See Daniels v. Williams, 474 U.S. 327, 331, 106 S. Ct. 662, 665 (1986) cert. denied, 498 U.S. 938, 111 S. Ct. 341 (1990).

The ALC erred in applying Cooper v. DPPPS, 377 S.C. 489, 661 S.E.2d 101 (2008) (ROA pg. 2). Cooper is inapplicable here where our Supreme Court addressed the matter of Cooper's denial of parole on the method and procedure employed under different criteria than when he was sentenced. The case currently before this Court is based on Appellant's vested liberty interest in parole once granted and the procedure employed to revoke that parole.

The ALC also erred in applying Compton v. DPPPS, 385 S.C. 476, 685 S.E.2d 175 (2009) where the Court sought to correct the misapplication of the holding in Cooper.

In an appeal of the "Final" agency decision of an administrative agency an appellate court's review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by some error of law. Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007)

III. THE PAROLE BOARD CREATED A LIBERTY INTEREST RIGHT UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND APPELLANT'S INTEREST DID INVEST THEREIN WHEN THE PAROLE BOARD ADHERED TO THE CRITERIA IN § 24-21-645 AND § 24-21-650 AND GRANTED APPELLANT PAROLE.

Appellant contends that a liberty interest in parole is acquired once the "Order of Parole" has been accepted by Appellant and signed by both parties. From that point on only the parolee can violate the conditions of the parole and invalidate the contract agreements.

The Board's position is that because Appellant had not been released he had no liberty interest. A Fourteenth Amendment liberty interest is attached to the conditional parole once it has been signed and any time limitations have expired. On the face of it, the Board is attempting to circumvent Appellant's liberty interest rights by relying on vague, unspecified interdepartmental regulations. When the "Order of Parole" was signed, it became a binding contract. The Board cannot do away with any of Appellant's rights on a whim. U.S. v Marolf, 173 F.3d 1213 (9th Cir. 1999) relates to this instant case in that the U.S. Supreme Court held that, "Internal regulations can't legitimate violations of constitutional or statutory rights."

In determining whether Appellant obtained a liberty interest, one of the relevant questions is whether he suffered a "sufficiently 'grievous loss' to trigger the protection of due process", Olim v. Wakinekong, 461 U.S. 238, 252, 103 S. Ct. 1741, 1749 (1983). In Morrissey v. Brewer, Supra, the Supreme Court held that once a prisoner is granted parole, its termination inflicts a "grievous loss" on the parolee, 408 U.S. at 482, 92 S. Ct. at 2601.

In determining whether the due process clause affords Appellant the protection he seeks, we must look "to the nature of the interest at stake", Board of Regents v. Roth, 408 U.S. 564, 571, 92 S. Ct. 2701, 2706 (1972). Appellant here has a legitimate claim of entitlement to the interest vested in his parole. See, e.g., Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1,

7, 92 S. Ct. 2701, 2709 (1972).

Appellant obtained a liberty interest on April 14, 2010 when the Parole Board granted parole and the thirty (30) day time limit expired. This liberty interest entitled him to substantive due process. Substantive due process requires that government action depriving a person of life, liberty or property have a rational, non-arbitrary connection to a legitimate purpose. In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance "the liberty of the individual" and "the demands of an organized society." Youngberg v. Romero, 457 U.S. 307, 320, 102 S. Ct. 2452, 2460 (1982).

The Parole Board exhibited its disregard for its own policies in the South Carolina Parole and Pardons Operations Manual when it decided to ignore the time limits for any party to request a rehearing and revoke/rescind Appellant's parole by giving in to the politics and emotionalism of influential elected officials.

Appellant has a strong interest in his release from prison in conformance with the "Order of Parole". The State created this interest when it granted parole. A liberty interest is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2805 (1992). Deprivation of liberty, next to deprivation of life, is the greatest punishment a state can impose upon an individual, and the importance of regaining one's liberty should not be undervalued.

Appellant enjoyed a vested interest in the parole granted on April 14, 2010, which created a liberty interest under §§ 24-21-650 and 680 and South Carolina Paroles and Pardons Manual, Part III, pg. 45, that can not be reversed, revoked or rescinded absent procedure established by state law in S.C. Code Ann. § 24-21-680.

IV. THE ADMINISTRATIVE LAW COURT ERRED IN NOT FINDING THE DPPPS' RESCISSION OF APPELLANT'S PAROLE UNLAWFUL WHERE APPELLANT INCURRED NO VIOLATIONS OF THE CONDITIONS OF PAROLE AND MET ALL IMPOSED CONDITIONS.

The DPPPS revoked Appellant's parole on September 8, 2010 without statutory authority. The DPPPS did not comply with the procedures created by S.C. Code Ann. § 24-21-650. Once the interest in parole has vested it cannot be taken away absent some evidence of violations of the conditions or criteria of parole by the Appellant, See, e.g., Superintendent, Massachusetts Correctional Institution, Wapole v. Hill, 472 U.S. 445, 105 S. Ct. 2768. The Board rejected Appellant on nine (9) consecutive appearances, and on the tenth (10) appearance determined Appellant was suitable. The Board had no statutory reason to rescind that decision.

CONCLUSION

Appellant prays this Court will reverse the decision of the Administrative Law Court and the Court of Appeals and order the South Carolina Department of Probation, Parole and Pardon Services to reinstate Appellant's parole and immediate release. For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari.

October 29, 2013

Respectfully Submitted,
Phillip Brown
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE FINAL AGENCY DECISION OF THE
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Administrative Law Court
Honorable John D. McLeod, Administrative Law Judge

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Phillip Brown, #118100,

Petitioner,

v.

South Carolina Department of Probation,
Parole and Pardon Services,

Respondent.

PROOF OF SERVICE

I, Phillip Brown, do hereby certify that I have served a "Petition For a Writ of Certiorari" with Appendix on Counsel for the South Carolina Department of Probation, Parole and Pardon Services by depositing a copy of same in the United States Mail, postage prepaid, on October 29, 2013, addressed to:

Mr. Tommy Evans, Jr., Legal Counsel
2221 Devine Street, Suite 600
P.O. Box 50666
Columbia, S.C. 29250

I further certify that all parties required by Rule to be served have been served

cc: Honorable Daniel E. Shearouse
Honorable Jenny Abbott Kitchings
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SC Court of Appeals

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To: Jenny Abbott Kitchings, Clerk
S.C. Court of Appeals
P.O. Box 11629
Columbia, S.C. 29211

RE: Phillip Brown, #118100 v. South Carolina Department of Probation, Parole and Pardon
Services. Case Tracking No.: 2011-203266
Petition for Writ of Certiorari

Date: October 29, 2013

Dear Ms. Kitchings,

Please find enclosed a copy of a "Petition For a Writ of Certiorari" to the
South Carolina Supreme Court. This petition is required to be sent to your office
in compliance with Rule 242 (c) SZACR after the Court of Appeals issued their
ruling on "Petition For Rehearing En Banc" on September 27, 2013. Thank you for your
help in this matter previously.

Respectfully Yours,
Phillip Brown

cc: Daniel E. Shearouse, Clerk of Court
Tommy Evans, Jr., Legal Counsel
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SC Court of Appeals

Phillip Brown, #118100
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Ridgeville, S.C. 29472

To: The Honorable Daniel E. Shearouse, Clerk of Court
The South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

RE: Phillip Brown, #118100 v. South Carolina Department of Probation, Parole and Pardon
Services. Case Tracking No.: 2011-203266
Petition For Writ of Certiorari

Date: October 29, 2013

Dear Mr. Shearouse,

Please find enclosed for filing one original and six (6) copies of a
"Petition For Writ of Certiorari", two copies of the Appendix and "Proof
of Service" on opposing counsel. Thank you for your help in this matter.

Respectfully Yours,
Phillip Brown

cc: Jenny Abbott Kitchings, Clerk
Tommy Evans, Jr., Legal Counsel
files

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