

State of South Carolina  
In the Court of Appeals

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Appeal from the Administrative Law Court  
Shirley C. Robinson, Administrative Law Judge

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Docket No.: 12-AJ-15-0026  
Appellate Case No.: 2013-001722

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Stewart Buchanan, . . . . . Appellant,

v.

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

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Initial Brief of Appellant

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MAILED  
NOV 15 2013

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**SC Court of Appeals**

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## I. Statement of the Case

### A. The Facts

Brief of Respondent, ALC, dated December 11, 2012, page 8, lines 3-4, reads:

"The Parole Board determined this offense of murder was so egregious even if this is the only offense on his record it will still deny him parole consideration."

The above statement clearly evinces that the Parole Board did not, and will not ever, consider the statutory factors outlined in S.C. Code Ann. 24-21-640 and the fifteen factors published in its parole form.

This renders Appellant parole-ineligible.

Appellant challenges the method and procedure employed by the Parole Board when reaching its decision to deny him parole eligibility.

Appellant seeks remand of this case pursuant to the standard of review applied in Barton v. Dept. of Probation, Parole and Pardon Services, --S.E.2d --, 2013 WL 3366669, July 03, 2013.

### B. The Law

The South Carolina Supreme Court first announced a standard of review in parole cases challenging the method and procedure employed

by the Board in reaching its decision that, "a parole-eligible inmate does not have the same right of review after a decision denying parole, ..." Furtick v. S.C. Probation Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2003) cert. den. 539 U.S. 932, 123 S.Ct. 2584, 186 L.Ed. 612 (2003).

Later, the Court modified the Furtick standard of review to allow the Administrative Law Court (ALC) no more than to review the agency decision stated in the "Notice of Rejection" to inquire whether it clearly states the Board considered the factors outlined in S.C. Code Ann. § 24-21-640 and the fifteen factors published in its parole form.

"If the Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure. Under that scenario, the ALC can summarily dismiss the inmate's appeal." Cooper v. S.C. Dept. Probation Parole and Pardon Services, 377 S.C. 489, 661 S.E.2d 106 (2008).

Again, in Barton, supra, the Supreme Court modified the standard of review applied in parole cases, announcing the same standard found in S.C. Code Ann. § 1-23-380. On appeal, the Court is to use the APA's standard of review.

Barton should confer upon the ALC the obligation to finally apply the APA standard of review, seeing that the ALC's function is also appellate in

nature and it is the APA, specifically §1-23-500, which created the agency. However, the Barton Court failed to instruct the ALC to apply the broader, more inclusive APA standard of review to future parole cases rather than continuing to apply the severely limited, pre-Barton, Furtick/Cooper standard of review.

Under current law, the ALC is still prohibited from applying the section 1-23-380 standard of review to appeals of parole cases due to Furtick/Cooper instructions; yet, the appellate courts have abandoned the Furtick/Cooper standard and will apply, since July 03, 2013, the APA standard of review.

Under this scenario, the ALC cannot look beyond the agency's final decision as published in the "Notice of Rejection": the ALC must deliberately ignore other facts and circumstances which render the agency action to be in violation of the APA or State and Federal laws. Conversely, the APA standard of review confers upon an appellate court the capability to look beyond the "Notice of Rejection" and to reverse or modify decisions after taking judicial notice of facts which the ALC was compelled to ignore, as happened in the Barton case.

Current law renders review of parole cases by the ALC a complete nullity.

## C. The Case

On July 17, 2013, nine (9) days after the Barton decision, the ALC applied the Furtick/Cooper standard of review to Appellant's challenge to the method and procedure employed by the Parole Board which has rendered him parole-ineligible.

Like Barton, the Parole Board's "Notice of Rejection" clearly stated that it considered the factors outlined in section 24-21-640 and the fifteen factors published in its parole form.

Like Barton, the stated reasons for rejection are (1) Nature and Seriousness of Offense, (2) Use of a Deadly Weapon in this Offense, and (3) Indication of Violence in this Offense.

Unlike Barton, the Parole Board's action renders Appellant parole-ineligible.

Had the Barton Court applied the Furtick/Cooper standard of review, inquiry would have stopped at the statement of reasons published in the "Notice of Rejection" and the Court would have been required to affirm the ALC's decision.

Had the ALC applied the Barton/PA standard of review to Appellant's case, the ALC would have been freed to rule upon the evidence and facts which demonstrate Appellant has been rendered parole-ineligible. The ALC

would have been authorized to reverse or modify the Parole Board's decision in ways and for legal cause otherwise prohibited by the Furtick/Cooper standard. At very least, Appellant would not have been deprived his state-created liberty interest in procedural due process.

## II. Questions Presented

1. Whether the Parole Board's explanation in brief that, "[t]he Parole Board determined this offense of murder was so egregious even if this is the only offense on his record it will still deny him parole consideration", clearly evinces that the Board did not, and will not ever, consider the factors outlined in section 24-21-640 and the fifteen factors published in its parole form and this has rendered Appellant parole-ineligible?

2. Whether Respondent's use of boilerplate, pro forma language to comply with the Cooper procedure still constitutes a "routine denial of parole" when the Parole Board's statement in brief clearly evinces Appellant has been rendered parole ineligible due to their refusal to ever consider the factors outlined in section 24-21-640 and the fifteen factors published in its parole form?

3. Whether Respondent's published reasons for denying parole of (1) Nature and Seriousness of Offense, (2) Use of a Deadly Weapon in this Offense, and (3) Indication of Violence in this Offense, are legally sufficient when the Parole Board's statement in brief clearly evinces these three are the only factors possibly considered of the section 24-21-640 and fifteen parole factors in the parole form and this has rendered Appellant parole-ineligible?

4. Whether S.C. Code Ann. §1-23-380(A)(6)(a-f) was created for Appellant's benefit and imposes a duty upon the ALC to apply the APA standard of review toward his appellate challenge to the method and procedure employed by the Parole Board which has left him parole-ineligible?

5. Whether the ALC's failure to apply the APA standard of review contained in section 1-23-380(A)(6)(a-f) to Appellant's challenge to the method and procedure employed by the Parole Board which left him parole-ineligible has deprived Appellant of procedural due process of law by the ALC in violation of the 14th Amendment to the United States Constitution?

6. Whether the Barton decision modified the Furtick standard of review inasmuch as the APA, section 1-23-380(A)(6)(a-f) standard of review, as applied, grants parole eligible inmates the right of review after decisions to deny parole?

7. Whether the Barton decision modified the Cooper standard of review inasmuch as the APA, section 1-23-380(A)(6)(a-f) standard, as applied, grants parole-eligible inmates the right to review of challenges to Parole Board decisions which did not render the inmate parole ineligible?

8. Whether the Furtick standard of review, which has been imposed upon the ALC, deprived Appellant of his statutorily-created right to review as conferred upon him by S.C. Code Ann. §1-23-380(A)(6)(a-f), thereby depriving him of procedural due process of law in violation of the 14th Amendment to the United States Constitution?

9. Whether the Cooper standard of review, which has been imposed upon the ALC, deprived Appellant of his statutorily-created right to review as conferred upon him by S.C. Code Ann. §1-23-380(A)(6)(a-f), thereby depriving him of procedural due process of law in violation of the 14th Amendment to the United States Const.?

10. Whether it is error for the ALC to apply the Furtick/Cooper standard of review to Appellant's case nine (9) days after the Supreme Court abandoned that standard and applied the new, APA standard to appellate review of Respondent's decisions, and thereby Appellant was deprived due process of law in violation of the 14th Amendment to the United States Constitution?

11. Whether equitable and constitutional principles demand that this Court reverse the ALC's order affirming the Parole Board's decision to deny Appellant parole-eligibility and to remand the case to the ALC for further proceedings consistent with this Court's opinion in light of Barton?

### III. Argument

In support of his following answers to the questions previously propounded, Appellant reiterates the "Statement of the Case" as completely as if stated in its entirety herein. Otherwise, Appellant prays this Court to take judicial notice that these eleven questions have been asked and answered.

1. The Parole Board's explanation in brief that, "[t]he Parole Board determined this offense of murder was so egregious even if this is the only offense on his record it will still deny him parole consideration", clearly evinces that the Board did not, and will not ever, consider the factors outlined in section 24-21-640 and the fifteen factors published in its parole form and this has rendered Appellant parole-ineligible.

2. Respondent's use of boilerplate, pro forma language to comply with the Cooper procedure does not constitute a "routine denial of parole"

when the Parole Board's statement in brief clearly evinces Appellant has been rendered parole-ineligible due to their refusal to ever consider the factors outlined in section 24-21-640 and the fifteen factors published in its parole form.

3. Respondent's published reasons for denying parole of (1) Nature and Seriousness of Offense, (2) Use of a Deadly Weapon in this Offense, and (3) Indication of Violence in this Offense, are legally insufficient when the Parole Board's statement in brief clearly evinces these three are the only factors possibly considered of the section 24-21-640 and fifteen parole factors in the parole form and this has rendered Appellant parole-ineligible.

4. S.C. Code Ann §1-23-380(A)(6)(a-f) was created for Appellant's benefit and imposes a duty upon the ALC to apply this APA standard of review toward his appellate challenge to the method and procedure employed by the Parole Board which left him parole-ineligible.

5. The ALC's failure to apply the APA standard of review contained in section 1-23-380(A)(6)(a-f) to Appellant's challenge to the method and procedure employed by the Parole Board which left him parole-ineligible has deprived Appellant of procedural due process of law by the ALC in violation of the 14th Amendment to the United States Constitution.

6. The Barton decision modified the Furtick standard of review inasmuch as the APA, section 1-23-380(A)(6)(a-f) standard of review, as applied, grants parole-eligible inmates the right of review after decisions denying parole.

7. The Barton decision modified the Cooper standard of review inasmuch as the APA, section 1-23-380(A)(6)(a-f) standard, as applied, grants parole-eligible inmates the right to review of challenges to Parole Board decisions which did not render the inmate parole-ineligible.

8. The Furtick standard of review, which has been imposed upon the ALC, deprived Appellant of his statutorily-created right to review as conferred upon him by S.C. Code Ann. §1-23-380(A)(6)(a-f), thereby depriving him of procedural due process of law in violation of the 14th Amendment to the United States Constitution.

9. The Cooper standard of review, which has been imposed upon the ALC, deprived Appellant of his statutorily-created right to review as conferred upon him by S.C. Code Ann. §1-23-380(A)(6)(a-f), thereby depriving him of procedural due process of law in violation of the 14th Amendment to the United States Constitution.

10. It is error for the ALC to apply the ~~Furtick~~ ~~Cooper~~ standard of review to Appellant's case nine (9) days after the Supreme court abandoned that standard and applied the new, APA standard to appellate review of Respondent's decisions, and thereby Appellant was deprived due process of law in violation of the 14th Amendment to the United States Constitution.

11. Equitable and constitutional principles demand that this Court reverse the ALC's order affirming the Parole Board's decision to deny Appellant parole and to remand the case to the ALC for further proceedings consistent with this Court's opinion in light of Barton.

#### IV. Conclusion

The Parole Board explained it "will still" deny Appellant parole consideration -- that they will not ever consider the section 24-21-640 statutory factors or the fifteen factors on the parole form. This Court cannot force Respondent to give consideration -- only to act as though they have. That is all the Cooper decision has done.

The ALC's affirmation of the Respondent's decision should be reversed.

(Signature on next page)

Respectfully submitted:

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Dated: November 12, 2013