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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM ADMINISTRATIVE LAW COURT

S.C. SUPREME COURT

John D. McLeod, Administrative Law Judge

Opinion No: 2011-UP-400 (S.C. Ct. App. filed August 22, 2011)

William McKinnedy, III, # 256024,.....Petitioner,

v.

South Carolina Department of Corrections.....Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Did the Court of Appeals correctly uphold the Department of Corrections' calculation of petitioner's sentence?
- II. Were petitioner's motions to recuse properly denied?

STATEMENT OF THE CASE

On February 3, 1999, William McKinnedy (“petitioner”) pled guilty to distribution of crack cocaine, second offense. He was sentenced to eighteen years’ incarceration in the custody of the Department of Corrections (SCDC). (R.p.7).

Petitioner filed a Step One Inmate Grievance on December 15, 2008, claiming his sentence was not being calculated properly. Specifically, petitioner argued his sentence had originally been implemented by SCDC such that he earned additional work credits and was not subject to the requirement that he serve 85% of his sentence. However, according to a June 23, 2000 memorandum, an audit was conducted and SCDC’s implementation was corrected. (R.p.10). In his grievance, petitioner contended he should not be required to serve 85% of his sentence and argued that as a result, he should receive additional work credits. This grievance was investigated and denied. (R.p.37).

Petitioner filed a Step Two Inmate Grievance on January 6, 2009, which was also denied. (R.p.5).

Petitioner filed a Notice of Appeal in the Administrative Law Court (ALC), pursuant to Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). (R.p.40). Among the materials SCDC submitted to the ALC was a letter from Ernest Rowe of the Inmate Records Office explaining that because petitioner is serving an eighteen-year 85% non-parolable sentence for manufacturing or distribution of crack, second offense, petitioner must serve at least fifteen years, three months, and eighteen days before completing service of his sentence. (R.p.82).

After the parties filed briefs, the ALC affirmed SCDC's final decision, finding petitioner's sentence had been correctly calculated. Specifically, petitioner's sentence was subject to the requirement that petitioner serve at least 85% of his sentence and, because it was a "no parole" sentence, petitioner could earn no more than six earned credits per month or seventy-two work credits per year. The ALC also determined petitioner had previously litigated this issue in federal district court, and the federal district court had ruled adversely to petitioner. (R.pp.85-88).

On appeal, the Court of Appeals affirmed the ALC's decision in a per curiam opinion. The Court of Appeals held substantial evidence supported the ALC's decision petitioner was not deprived of a liberty interest and thus not deprived due process of law.

Petitioner has now filed this petition for a writ of certiorari. For the reasons discussed below, SCDC respectfully requests the petition be denied.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY UPELD THE DEPARTMENT OF CORRECTIONS' CALCULATION OF PETITIONER'S SENTENCE.

The Court of Appeals correctly affirmed SCDC's calculation of petitioner's sentence.

In an appeal of the final decision of an administrative agency, the standard of appellate review is whether the ALC's findings are supported by substantial evidence. See S.C. Code Ann. § 1-23-610(B). A reviewing Court shall not substitute its judgment for that of the ALC as to findings of fact, but it may reverse or modify decisions which are controlled by error of law or are clearly erroneous in view of the substantial evidence on the record as a whole. Id. In determining whether the ALC's decision was supported by substantial evidence, the Court need only find, considering the record as a whole, evidence from which reasonable minds could reach the same conclusion that the ALC reached. DuRant v. S.C. Dep't of Health & Environmental Control, 361 S.C. 416, 420, 604 S.E.2d 704, 706 (Ct. App. 2004). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. Id.

An inmate convicted of a "no parole offense," as defined by S.C. Code Ann. § 24-13-100, is not eligible for early release until he has served at least eighty-five percent of the actual term of imprisonment imposed. S.C. Code Ann. § 24-13-150(A). An inmate convicted of a "no parole" offense also earns good time and work credits at a reduced rate as compared with other offenders. See S.C. Code Ann. §§ 24-13-210(B); 24-13-230(B).

A “no parole” offense is defined as a class A, B, or C felony or an offense exempt from classification. S.C. Code Ann. § 24-13-100. Offenses are generally classified according to the maximum term of imprisonment. See S.C. Code Ann. § 16-1-30. At the time of petitioner’s offense, distribution of crack cocaine, second offense, was punishable by twenty-five years’ imprisonment. See S.C. Code Ann. § 44-53-375(B)(2) (1998). As a result, it was classified as a Class B felony, and therefore, it was a “no parole” offense. See S.C. Code Ann. § 16-1-20(A)(2).

On February 3, 1999, petitioner pled guilty to distribution of crack cocaine, second offense. (R.p.2, line 16-p.4, line 15). At the plea hearing, the sentencing judge specifically advised petitioner the charge carried a maximum penalty of twenty-five years, and petitioner’s attorney acknowledged it was a “no parole” offense. (R.p.3, line 7-p.4, line 11). Petitioner was sentenced to eighteen years’ incarceration. (R.p.7).

It appears SCDC initially did not implement petitioner’s sentence as a “no parole” offense. The error was corrected as a result of an audit, which revealed petitioner had received more work credits than allowed under S.C. Code Ann. § 24-13-230(B). Following the audit, petitioner’s sentence calculation was adjusted to comply with the statutory requirements for a “no parole” offense. (R.p.10).

On December 8, 2005 petitioner filed a petition for a writ of habeas corpus in United States District Court. In his petition, he argued some of his work credits were removed and his sentence changed to a no parole sentence without notice, hearing, or judicial review. The district court granted summary judgment against petitioner’s claims, concluding that because the statutory requirements petitioner complained of were in place

prior to petitioner's conviction, he was never entitled to earn work credits at a higher rate and he was sentenced to a no parole offense. The district court therefore found no due process or ex post facto violation when SCDC corrected petitioner's work credits to comply with the law under which petitioner was sentenced. (R.pp.26-30).

Petitioner subsequently challenged SCDC's corrected implementation of his sentence via the inmate grievance system, and SCDC issued a final agency decision denying petitioner's grievance. (R.p.39).

The ALC affirmed SCDC's final agency decision on two grounds. First, the ALC referred to the United States District Court's decision and found petitioner had litigated this issue previously and a ruling on the merits had been made. Second, the ALC ruled that SCDC's calculation of petitioner's sentence was correct and supported by substantial evidence. (R.pp.87-88).

The Court of Appeals affirmed, finding the ALC's decision was supported by substantial evidence. The Court of Appeals further held petitioner was not deprived of a liberty interest and thus not denied due process of law.

Petitioner's sentence has been correctly calculated. At the time of petitioner's offense, distribution of crack cocaine, second offense, was a no parole offense. Consequently, the proper implementation of petitioner's sentence would allow him to earn no more than 72 work credits per year and would require him to serve eighty-five percent of his sentence.

In addition, the ALC correctly found petitioner's claims have been previously litigated and a ruling has been made on the merits. Therefore, petitioner cannot now re-

litigate the same claims. See Foxworth v. State, 275 S.C. 615, 618, 274 S.E.2d 415, 416 (1981) (applying claim preclusion principles in the context of a prior federal habeas corpus petition).

Because the Court of Appeals properly upheld SCDC's final agency decision, SCDC respectfully asks that the petition for a writ of certiorari be denied.

II. PETITIONER'S MOTIONS TO RECUSE WERE PROPERLY DENIED.

In his petition, petitioner also argues several judges should have recused themselves in this case, including Chief Judge John Few and Administrative Law Judge John D. McLeod. Petitioner's requests to recuse both judges were correctly denied.

As to petitioner's motion regarding Chief Judge Few, petitioner did not timely raise the issue prior to the Court of Appeals' ruling. Therefore, his request for recusal was not properly preserved. See State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("Where bias and prejudice of a judge is claimed, the issue must be raised when the facts first become known and, in any event, before the matter is submitted for decision.").

Moreover, because there is no evidence of judicial prejudice, there is no basis for reversing the judges' ruling that they should not recuse themselves. See State v. Jackson, 353 S.C. 625, 628 n.7, 578 S.E.2d 744, 745 n.7 (Ct. App. 2003); Roche v. Young Bros., Inc., 332 S.C. 75, 85, 504 S.E.2d 311, 316 (1998) ("If there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal.").

Petitioner has failed to establish any basis for concluding there was judicial bias in the case at hand. See Roche, 332 S.C. at 85, 504 S.E.2d at 316 ("It is not enough for a party

seeking disqualification to simply allege bias; the party must show some evidence of that bias or prejudice.”).

Therefore, SCDC submits the petition for a writ of certiorari also be denied as to this issue.

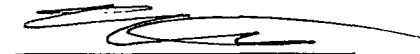
CONCLUSION

WHEREFORE, for all the reasons stated above, SCDC respectfully requests the petition for a writ of certiorari be denied.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF
CORRECTIONS

Attorney for Respondent



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Columbia, SC
January 4, 2013

THE STATE OF SOUTH CAROLINA
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APPEAL FROM ADMINISTRATIVE LAW COURT

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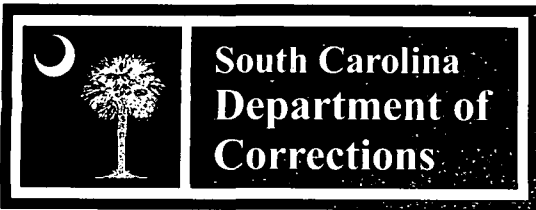
South Carolina Department of Corrections.....Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have served petitioner a copy of the Return to the Petition for a Writ of Certiorari by depositing a copy of same in the United States Mail, postage prepaid, on January 4, 2013, addressed to petitioner as follows:

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NIKKI R. HALEY, Governor
WILLIAM R. BYARS, JR., Director

January 4, 2012

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: William McKinnedy, III, # 256024 v. SCDC
Appellate Case No.: 2011-201846

Mr. Shearouse,

Please find enclosed an original and seven copies of the following:

- Return to Petition for a Writ of Certiorari

Please stamp the extra copy "filed" and return it in the enclosed self-addressed stamped envelope. Please do not hesitate to contact me with any questions. We greatly appreciate your assistance in this matter.

JAN 07 2013

S.C. SUPREME COURT

Sincerely,

Christopher D. Florian
Attorney for Respondent

cc: Mr. William McKinnedy, III, # 256024
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