

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FOR THE ADMINISTRATIVE LAW JUDGE DIVISION  
The Honorable Ralph King Anderson III, Administrative Law Judge  
Appellate Case Number 2013-000042

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BERNARD BAGLEY, #175851,.....APPELLANT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE  
AND PARDON SERVICES,.....RESPONDENT

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**RESPONDENT'S SUPPLEMENTAL MEMORANDA**

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**Tommy Evans, Jr.**  
**Assistant General Counsel**

**South Carolina Department of Probation,  
Parole and Pardon Services  
P.O. Box 50666  
Columbia, South Carolina 29250**

**ATTORNEY FOR THE RESPONDENT**

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**SC Court of Appeals**

Comes now, the Respondent the South Carolina Department of Probation, Parole and Pardon Services, who submits this supplemental memoranda per order of this Honorable Court.

The Appellant originally filed a notice of appeal before the Administrative Law Court, due to his denial of parole occurring on October 10, 2012. Within this appeal the Appellant alleged that the COMPAS risk assessment program was not used prior to his denial, in violation of South Carolina law. Upon reviewing the briefs of both parties, the Appellant's motions for discovery for additional matters; and his motion in response to certificate of counsel, the Honorable Ralph King Anderson, III issued an order denying the Appellant's motions, and dismissed this appeal.

Upon being informed of the dismissal of his appeal, the Appellant filed a notice of appeal before the South Carolina Court of Appeals. Within his brief the Appellant alleges that the Board's decision of denial was arbitrary and capricious due to it not using the COMPAS program. He argues that the Board's failure to use this program was in violation of South Carolina law. Upon review of the brief of both parties, this Court decided to order that both sides file supplemental memorandum. Within this memorandum the Respondent must reveal, if the actual program was used by the Board prior to the denial of parole. The supplemental memorandum from the Respondent per order of this Court follows.

### **ARGUMENTS**

The Court asks if the Department adopted a risk assessment tool, and used it in the Appellant's case prior to denial. The answer to this question is no. The assessment tool does exist but, was not used during the Appellant's October 10, 2012, hearing. The Respondent argues that this tool does not determine parole, it is just another matter the board can consider. The Respondent

also argues that, this case should be considered moot, due to the fact the Appellant is scheduled for a hearing in October of this year.

**1. The failure to complete a risk assessment did not make the decision of the Board arbitrary and capricious.**

The Appellant argues that the failure of the Board to use a risk assessment, cause the decision of the Board to be arbitrary and capricious. The South Carolina Code of Laws specifically state:

The department must develop a plan that includes the establishment of a process for adopting a validated actuarial risk and needs assessment tool consistent with evidenced-based practices and factors that contribute to criminal behavior, which the parole board shall use in making parole decisions, including additional objective criteria that may be used in parole decisions.

S.C. Code Ann. §24-21-10(F)(1) (Supp. 2013).

Though this statute makes the Board obligated to use a risk assessment the ALC nor this Court should remand a decision of the Parole Board unless the decision has proven to be arbitrary and capricious. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are, arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. §1-23-380 (Supp. 2013).

The Appellant was on probation for the offense of murder. His denial was due to the nature and seriousness of his current offense; and, the use of a deadly weapon in this or a previous offense. These were two valid reasons for the denial of parole. There is no evidence presented that reveals the decision would have been different with an assessment. Everything presented regarding this assessment is speculative. Where the legislative adjustment creates only a “speculative and attenuated” risk of increasing punishment will withstand a constitutional attack. Roller v. Gunn, 107 F.3d 227, 235 (1997). As stated within my original brief, all of the mandatory criteria was

considered was prior to the denial of parole. The Appellant has raised no evidence that the criteria found in Section 24-21-640 of the South Carolina Code of laws and the fifteen department criteria was not followed prior to denial. As long as it has been shown that the Board used these criteria the case cannot be remanded by the Administrative Law Court.<sup>1</sup> So the decision of the ALC should not be subject to reversal.

The Appellant argues that the Board failed to use the COMPAS assessment tool to make a determination of future dangerous; however, it is the opinion of the Respondent that any error in not using COMPAS should be considered harmless. The denial of parole was reasonable, considering the facts of the underlying case. The Appellant has failed to reveal to the Court that there was any prejudice in not using the COMPAS assessment. There has been absolutely no evidence presented that reveals if the assessment was used, the Appellant was going to be granted parole. The reasons for denial fully shows that future dangerous was not a factor in the denial of parole. The Appellant was denied due to the nature and seriousness of the act; and, the fact a deadly weapon was used in the commission of this act. Two reasons that pursuant to South Carolina law can be used for the denial of an inmate's parole. Since the denial of parole did follow the statutory requirements for denial, we request this court affirm the decision of the Administrative Law Court.

**2. Since the Appellant is scheduled for a hearing in October, the Court should consider this appeal moot.**

The Administrative Law Court did not have the ability to reverse the denial of parole and order the Appellant be granted parole. An administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections involving the denial of parole to a

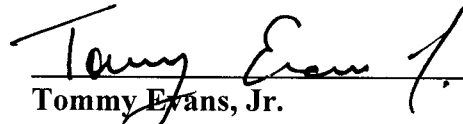
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<sup>1</sup> The Parole Board clearly stated in its rejection that it considered the statutory criteria and the criteria set forth in Form 1212 which is sufficient under Cooper. Compton v. S.C. Dept. of Probation, Parole and Pardon Services, 385 S.C. 476, 685 S.E.2d 175 (2009).

potentially eligible inmate by the Department of Probation, Parole and Pardon Services. S.C. Code Ann. §1-23-600(D)(Supp. 2013). So the only remedy available for the Appellant is a remanding of this case back to the Board for another hearing. That remedy is going to be accomplished for the Appellant by his scheduled hearing in October of this year. A decision of this court will not assist the Appellant in achieving what he is requesting, since he has been scheduled for another hearing in which the COMPAS assessment tool will be applied. Since Appellant is going to get what he is requesting this case should be considered moot. A case becomes moot when judgment, if rendered will have no practical effect upon the existing controversy. Mathis v. South Carolina State Highway Dept., 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

Even if the Court decides to grant the Appeal and award the Appellant another hearing it would be months before this case can be heard, which provides no relief to the Appellant. Before any action can be maintained, there must exist a justiciable controversy. Midland Guardian Co. v. Thacker, 280 S.C. 563, 567, 314 S.E.2d 26, 28 (Ct. App.), cert. denied, (1984). A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination as distinguished from a dispute or difference of a contingent hypothetical or abstract character. Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co., 249 S.C. 561, 155 S.E.2d 618 (1967). For this case not to become moot the Appellant must achieve some remedy at its conclusion, which is not the case. Regardless of how the court rules, the Appellant will appear before the Board in October where the COMPAS assessment will be applied; therefore, this case is moot and should be subject to dismissal.

Respectfully submitted,

  
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Tommy Evans, Jr.  
Assistant General Counsel

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Parole and Pardon Services  
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Attorney for the Respondent

Columbia, South Carolina  
June 30, 2014

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FOR THE ADMINISTRATIVE LAW JUDGE DIVISION  
The Honorable Ralph King Anderson, III, Administrative Law Judge  
Appellate Case Number 2013-000042

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BERNARD BAGLEY, #175851, ..... APPELLANT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE,  
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**CERTIFICATE OF SERVICE**

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I, Dawn K. Nichols, Executive Administrative Assistant to counsel for Respondent, certify that I have served the within Respondent's Supplemental Memoranda dated June 30, 2014, on Appellant this 30<sup>th</sup> day of June, 2014, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Bernard Bagley, #175851, Pro Se  
Kershaw Correctional Institution  
4848 Goldmine Highway  
Kershaw, S.C. 29067



**Dawn Nichols**  
**Executive Administrative Assistant**  
South Carolina Department of Probation,  
Parole, and Pardon Services  
P. O. Box 50666  
Columbia, South Carolina 29250

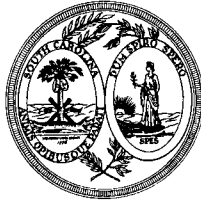
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**SC Court of Appeals**

State of South Carolina  
Department of Probation, Parole and Pardon Services

NIKKI R. HALEY  
Governor



KELA E. THOMAS  
Director

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June 30, 2014

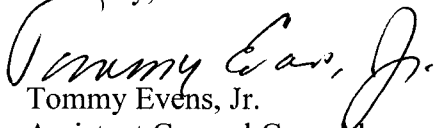
The Honorable Jenny Abbott Kitchings  
Clerk of the S.C. Court of Appeals  
Post Office Box 11629  
Columbia, S.C. 29211

RE: Bernard Bagley v. SCDPPPS  
Appellate Case No.: 2013-000042

Dear Ms. Kitchings:

Per the Court's order, please find the original and six (6) copies of Respondent's Memoranda in the above referenced case.

Sincerely,

  
Tommy Evens, Jr.  
Assistant General Counsel

TE:dn

cc: Bernard Bagley, Pro Se

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State of South Carolina  
Department of Probation, Parole, and Pardon Services  
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