STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge
Case No. 15-ALJ—15-0003-AP

Appellate Case No. 2015-000478

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

v.

SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES,.....RESPONDENT

FINAL BRIEF OF RESPONDENT

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2. **The ALC Judge erred in failing to find the Parole Board was required to consider the criminal risk factors according to §24-21-5(2), of the South Carolina Code of Laws.**

3. **The ALC Judge erred in failing to find the Board's defective notice of rejection dated 1/15/15, did not provide a detailed conclusion and finding regarding the law of the criminal risk factors as outlined in §24-21-5(2), and the evidence act exception according to §19-5-510 of the South Carolina Code of Laws.**

4. **The ALC Judge erred in failing to find that the Appellant appeared at the hearing under influence of a physical and emotional health impairment.**

5. **The ALC Judge erred in failing to find that the Board failed to find Appellant eligible for consideration of parole under the provisions of article 24-21-700.**

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7. **The ALC Judge erred in failing to find the Board investigated Appellant's inquiry regarding his parole file being incomplete s to what's not in the file, and containing errors, and other inaccuracies.**

8. **The ALC Judge erred in failing to find the Board demonstrated a rational nexus between Appellant's current behavior observations and his behavior problem related to the commitment offense immutable fixed factors 1, 2, 3, and 7 as outlined in Form 1212.**

9. **The ALC Judge erred in failing to find the Board protected Appellant's equal protection right when the Appellant was discriminated against in violation of the Americans with Disabilities Act (AD); and did not have the ability to present evidence or a witnesses in mitigation whose testimony relates to the law and capacity, and treatment as outlined in §16-25-90.**

10. **The ALC Judge decision is made upon unlawful procedure.**

STATEMENT OF THE CASE

On August 23, 1990, upon getting into an argument with his wife the day before, the Appellant discovered she resigned from her job; withdrew all of the money from their bank account; and, took their daughter to her mother's house in Eastover. After discovering his wife committed these actions, the Appellant traveled from Raleigh to Eastover to confront her. Upon arrival, the Appellant kicked in the door of his mother-in-law home, and inquired to his wife about a possible affair. During the ensuing argument he shot her twice causing her death.

The Appellant was later arrested and indicted by the Richland County Grand Jury for the offense of murder. He appeared before the Honorable Dan Laney to answer to this offense. Upon conviction, he received a sentence of incarceration for the remainder of his natural life. (R.p.1-p.2). At the time the Appellant committed this offense, South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of twenty years.

The Appellant made his initial appearance before the Parole Board on September 8, 2010. Upon conclusion of this appearance, the Parole Board decided to deny parole. Since this initial denial, the Appellant has appeared an additional two times both resulting in a denial of parole. On October 10, 2012, the Appellant was denied parole, and sought a reversal from the Administrative Law Court (ALC). The ALC decided to affirm the decision of the Parole Board. Upon receiving this decision, the Appellant decided to file a notice of appeal before the South Carolina Court of Appeals. The Court of Appeals decided that the Board did fail to reveal they considered a risk assessment tool pursuant to §24-21-10(F)(1) of the South Carolina Code of Laws.[1] The Court of Appeals ordered that upon the conclusion of the Appellant next hearing the Department must show

[1] 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 evidence-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)(2012).

they considered a risk assessment tool. *Bagley v. S.C. Dept. of Probation, Parole and Pardon Services,* 2014 WL 4217379 (S.C. App.). R.p.4-p.7). On January 14, 2015, the Appellant appeared before the Parole Board. Upon the conclusion of this hearing the Board decided to deny parole due to: 1) nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; and, 3) the use of a deadly weapon in this or a previous offense. (R.p.16). In error, the notice delivered to the Appellant failed to reveal a risk assessment tool was considered, another order was delivered on January 30. In this order it was revealed that the risk assessment was completed and considered prior to the denial of parole.

Upon receiving this order of denial, the Appellant filed a notice of appeal before the ALC. On February 12, 2015, the Honorable Deborah Brooks Durden, Administrative Law Court Judge, issued an order dismissing the Appellant's appeal. Within her order, Judge Durden decided the proper criteria was considered which reveals a routine denial of parole. She decided the order of denial conformed with the Supreme Court decision of *Cooper v. S.C. Department of Probation, Parole, and Pardon Services,* 377 S.C. 489, 66 S.E.2d 106 (2008), so it was dismissed.

Upon receiving the decision of the ALC, the Appellant decided to file a notice of appeal before the South Carolina Court of Appeals. Within this appeal the Appellant alleges that he was wrongfully denied parole, and request this Court to reverse the decision. The Respondent argues that this denial of parole was lawful, and conformed to the laws of the State of South Carolina. The ALC made the correct decision in denying the Appellant an opportunity to appeal this decision. The Respondent's brief supporting the above reference arguments follows.

ARGUMENTS

1. **The Appellant failed to reveal that the Board failed to follow the mandatory criteria or failed to abide to South Carolina law prior to denial.**

A final decision shall include a findings of fact and conclusions of law separately stated. S.C. Code Ann. §1-23-350(2013). It is Appellant's position that the ALC erred in deciding to dismiss this appeal. The Respondent argued and the ALC agreed, that the Board considered the mandatory criteria prior to denial. This makes this a denial as routine as any other inmate, and beyond of the jurisdiction of the ALC.

In *Cooper*, the Supreme Court decided that the finding of fact was included; however, the Court determined that the Parole Board neither, "offered an explanation nor indicated that it considered the statutory criteria of section 24-21-640, and the fifteen criteria listed on the parole form." *Id.*, at 500. The Supreme Court decided that if the Parole Board fails to consider and apply the statutory-related parole criteria, it has the effect of rendering an inmate parole ineligible, which warrants review by the ALC. *Id.,* at 502. In *Cooper*, the Supreme Court established what future Parole Board orders should consist of, *Cooper* specifically states:

> We emphasize that in future parole review hearings the Parole Board may avoid the result in the instant case if it clearly states in its order denying parole that it considered the factors outlined in section 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.**

Id. (emphasis added)

In the case at bar, the order of denial conformed with the *Cooper* decision. It revealed a finding of fact and conclusion of law separately stated. With this order it should be considered a

routine denial, which limits the ALC authority to review this decision. The ALC's decision to dismiss this appeal was proper.

The Appellant argues that the January 15, 2015, denial was not proper due to the fact it failed to reveal that a risk assessment was considered. That error was corrected in a subsequent order delivered on January 30. This order revealed that a risk assessment was considered. As the first order, this subsequent order also revealed a findings of fact and conclusion of law separately stated. The findings of fact were the reasons provided as to why parole was denied; and, the conclusion of law were the statute, factors, criteria, and assessments considered prior to a final determination. The order is clear, the criteria within the statute, mandatory policy, and risk assessment were considered prior to the denial of parole. The reasons given for denial were reasonable and followed the mandatory criteria. The Board is the sole authority in Parole decisions, which are not appealable; therefore, the ALC was correct in dismissing this appeal. Parole eligibility is not a matter within the jurisdiction of the trial court, but falls within the province of the Board of Probation, Parole and Pardon. *Brown v. State*, 306 S.C. 381, 412 S.E.2d 399 (1991).

In *Cooper*, the court determined that the order denying parole was unlawful due to it not presenting any conclusions of law. It was the opinion of the Supreme Court, that in order for the Board to prove proper procedures were followed it must not only state the findings of fact, but the statute and policy considered in reaching this conclusion. The order delivered to the Appellant is clear, the criteria within the statute, the mandatory policy, and risk assessment were considered

prior to the denial of parole. According to the Supreme Court, if this is shown no further review by the ALC is necessary.[2]

The Appellant also argues that the Board considered the prior 2012 denial in violation of the Court of Appeals decision. Pursuant to mandatory policy, prior denials are never considered. The reasons given for denial did not mention his prior denial of parole. The Appellant has offered no proof that the Board considered his prior denial. In administrative hearings the general rule is that an Appellant for relief, or a privilege has the burden of proof and the burden of proof test rest upon the one who files a claim with an administrative agency to establish that required conditions of eligibility have been met. *Leventis v. South Carolina Department of Health and Environmental Control,* 340 S.C. 118, 530 S.E.2d 643 (2000). This allegation should not be considered, if not proven by the Appellant.

The Appellant also argues that the results of the risk assessment was never revealed to him. A parole hearing is not identical to a jury trial, discovery rules that apply to trials do not apply to parole hearings. *See, State v. Hill,* 368 S.C. 649, 630 S.E.2d 274 (2006). The Appellant is never entitled access to his parole files. Since Brady nor Rule 5 applies to parole hearings, the Board is justified in not revealing the risk assessment results to the Appellant.

The Appellant also argues that the Board failed to follow the criteria listed in Section 24-21-5(2) of the South Carolina Code of Laws. This statute is not criteria but a definition of "criminal risk factors."[3] These factors are listed in the fifteen department criteria that is always considered

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[2] The Parole Board clearly stated in its notice of 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).

[3] "Criminal risk factors" mean characteristics and behaviors that, when addressed or changed, affect a person's risk for committing crimes. The characteristics may include, but not limited to, the following risk and criminogenic need factors: antisocial behavior patterns; criminal personality; antisocial attitudes; values, and beliefs; poor impulse control; criminal thinking; substance abuse; criminal associates; dysfunctional family or marital relationships; or low levels of employment or education. S.C. Code Ann. §24-21-5(2)(2011).

by the Board prior to denial. The ALC was correct in dismissing this appeal because all of the criteria was considered, which was revealed in the order of denial pursuant to *Cooper*.

2. There was never any violation of the American's with Disabilities Act in the denial of Parole.

The Appellant argues that the ALC erred in failing to find that during his hearing he was under the influence of failing physical and emotional health. The ALC was not present at his hearing and cannot make a determination as to the physical health of the Appellant. Any determination regarding a factual question must be determine by the Board, and cannot be reversed by the ALC. The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380(2008).

Within his brief the Appellant claims that he is a disabled veteran and the denial of parole was in violation of the American's with Disabilities Act (ADA). At the time of his hearing, the Appellant did not reveal to the Board any records confirming a disability, illness, or physical impairment. These claims must be first proven in order to determine if the ADA even applies.

It is the position of the Respondent that the Appellant had access to the Board, and the identical criteria was considered regarding his parole hearing as any other inmate. There exist no discrimination as to his denial of parole, so no violation of the ADA. According to the ADA, the purpose of the Act is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C.A. §1210(b)(1). The Board never discriminated against the Appellant due to any possible disability. Pursuant to South Carolina law all Parole hearings are held through close circuit television.[4] The Board is present in a central

[4] The Department of Corrections may install, maintain, and operate a two-way close circuit television system in one or more correctional institutions of the department that confines person eligible for parole. The Board of Probation, Parole, and Pardon Services shall install, maintain and operate close circuit television systems at locations determined by the board and conduct parole hearings by means of two-way close circuit television system provided in this section. S.C. Code Ann. §24-21-710(E)(1995).

location, while the inmate is brought into a room where the camera equipment is located. These rooms are handicapped accessible pursuant to the ADA; therefore, there exist no discrimination regarding access the Appellant has to the Parole Board. There exist no impairment of the Appellant to be able to appear before the Board.

The Appellant also argues that the ALC erred in not determining he was eligible for parole pursuant to Section 24-21-700 of the South Carolina Code of Laws. The ability to review decisions of the Parole Board is very limited, the ALC only has the ability to review and determine if the mandatory conditions have been considered. The Respondent has shown that it has considered the mandatory criteria so the ALC's decision to dismiss was lawful.

Pursuant to Section 24-21-700 it remains the decision of the Parole Board to release an individual on parole. The South Carolina Code of Laws specifically state:

> Any prisoner who is otherwise eligible for parole under the provisions of this article, except that his mental condition is deemed by the Probation, Pardon and Parole Board to be such that he should not be released from confinement may, subject to approval by the Veterans Administration, be released to the custody of the Veterans Administration or to a committee appointed to commit such prisoner to a Veterans Administration Hospital. **Such a special parole shall be granted in the sole discretion of the Board** and when so paroled, a prisoner shall be transferred directly from his place of confinement to the Veterans Administration Hospital which provides psychiatric care.

S.C. Code Ann. §24-21-700(2014)(emphasis added).

The ultimate decision to be released under this statute still remains with the Parole Board, a decision that cannot be reversed by the ALC. 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 potentially eligible inmate by the Department of Probation, Parole and Pardon Services. S.C.

Code Ann. §1-23-600(D)(2014). Any ALC decision in this matter would be beyond their jurisdiction, so the dismissal of this appeal is justified.

3. The Appellant is currently being allowed to appear before the Board bi-annually so there was no violation of the law.

The Appellant argues that he was not allowed to appear before the Board bi-annually pursuant to South Carolina law. The Appellant appeared before the Board on September 8, 2010, November 10, 2012, and January 14, 2015. The Appellant was allowed to present his case for parole before Board primarily every two years.

The Appellant is currently serving a life sentence for a conviction of murder, which is an offense classified as violent.[5] According to the South Carolina Code of Laws, "upon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole." S.C. Code Ann. §24-21-645(1986). The Appellant committed his offense on August 23, 1990. At the time he committed this offense, South Carolina law had classified violent and non-violent offenses, which only allowed those who have committed non-violent offenses to appear annually. At the time he committed this offense he was only allowed to appear on a bi-annual basis, the Appellant is lawfully being allowed to appear before the Board every two years.

The Appellant argues that he appeared on September 8, 2010, then again on January 15, 2015, in his opinion the 2012 remanded hearing did not count. That is not so, the Appellant had a hearing two years after his initial hearing. The Court of Appeals ruled that the Board must meet the requirements of this decision at his next hearing. *Bagley*, at 2, n.2 Since it was never ordered he receive another hearing there exist no violation of the Court's decision to apply their decision to

[5] For purposes of definition under South Carolina law, a violent crime includes the offenses of murder (Section 16-3-10). S.C. Code Ann. §16-1-60(1985).

his 2015 hearing. The Appellant was allowed to appear bi-annually so there exist no violation of the law for ALC review.

4. The Appellant never presented any substantial evidence proving his allegations regarding the denial of parole, so the decision of the ALC was correct.

The Appellant alleges his file was incomplete and that he was never allowed to review the information provided to the Parole Board. The Appellant also alleges that the pre-parole investigation did not include any mitigating information.

The ALC was correct in affirming the decision of the Parole Board. The Respondent has shown that they considered all the mandatory criteria. The South Carolina Code of Laws specifically state:

> The board must carefully consider the record of the prisoner before during and after imprisonment, and no such prisoner may be paroled until it appears to the satisfaction of the board; that the prisoner has shown a disposition to reform; that, in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interest of society will not be impaired thereby; and, that suitable employment has been secured for him.

S.C. Code Ann. §24-21-640(1986)

The Appellant's parole was denied due to the nature and seriousness of the offense of murder; the indication of violence that occurred while committing this offense; and the use of a deadly weapon in the commission of this offense. The Appellant accuses the pre-parole investigator of providing the Board incomplete or false evidence. He argues the ALC erred in not ordering that he be allowed to see the evidence presented. It is the Appellant's position that the pre-parole investigator failed to provide any mitigating evidence to the Board. Pursuant to department policy, the responsibility of the pre-parole investigator is to meet with the inmate initially, to complete a risk assessment, and provide the inmate with department criteria.[6] At the

[6] The board must establish written, specific criteria for the granting of parole and provisional parole. This criteria must reflect all of the aspects of this section and include a review of a prisoner's disciplinary and other records.

conclusion of this meeting, the pre-parole investigator is responsible for obtaining a social history from the inmate's family; speak with the victims and law enforcement; obtain Department of Corrections records; and, verify residence and place of employment. The Board was provided letters of support for the Appellant, they were aware of the Appellant honorable military discharge, and other mitigating evidence.

The Appellant also alleges that the ALC should have ordered that he would be able to review the records provided to the Parole Board. The pre-parole investigator is a probation agent, any information obtained in the discharge of his official duty is privileged, and cannot be released unless ordered by the Court or Director.[7] The Appellant has not provided any evidence that the information is false, or should be subject to release. There exist sensitive private information in parole investigative files, information that should not be released to the Appellant unless a valid reason is given to the Court.

No substantial evidence was ever provided to the ALC that would reveal the Appellant's parole was denied unlawfully, or that the Board failed to consider all of the mandatory criteria. The findings of the Appellant panel are presumed correct and will only be set aside if unsupported by substantial evidence. *Lark v. Bi-Lo,* 276 S.C. 130, 276 S.E.2d 304 (1981). The ALC was correct dismissing the Appellant's appeal. The Appellant did not provide the ALC any evidence proving his allegations. No sufficient substantial evidence was presented to lead the ALC to conclude that parole was denied unlawfully. The Appellant failed to provide any substantial evidence revealing it was unreasonable for the Board to deny parole. Substantial evidence is not a mere scintilla of

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The criteria must be made available to all prisoners at the time of their incarceration and the general public. S.C. Code Ann. §24-21-640(1986).

[7] All information and data obtained in the discharge of his official duty by a probation agent is privileged information, is not receivable as evidence in a court, and may not be disclosed directly or indirectly to anyone other than the Judge or others entitled under this chapter to receive reports unless ordered by the court or the director. S.C. Code Ann. §24-21-290 (1993).

evidence nor evidence viewed blindly from one side, but is evidence which when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached. *Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm'n,* 282 S.C. 430, 319 S.E.2d 695 (1984). This reveals that the ALC made the proper decision in dismissing this appeal.

5. The Appellant was never denied equal protection nor due process.

The Appellant argues that he was not allowed to present evidence. He alleges that the ALC's failure to determine that he was denied to present evidence violates due process and equal protection. The identical criteria was considered for the Appellant as all other inmates appearing before the Parole Board, so there was never a violation of equal protection. The Appellant was allowed to appear before the Board, and present evidence in mitigation, there also exist no violation of due process. The ALC was correct in dismissing this appeal.

In the United States Supreme Court case of *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972), the Court acknowledged that a person facing a parole revocation has minimal due process rights. A distinction between a person currently on parole, and a person seeking parole was made in the case of *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,* 442 U.S. 1, 99 S.Ct. 2100 (1979)[8] In *Greenholtz,* the Supreme Court determined that there exist no conditional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. *Greenholtz,* at 2104. The Appellant was allowed to present evidence in mitigation and make a presentation to the Board. He was never denied the right to due process as it pertains to an individual requesting a release on parole.

[8] There is a crucial distinction between being denied a conditional liberty one has, as in parole and being denied a conditional liberty that one desires. The parolees in *Morrissey* (and probationers in *Gagnon*) were at liberty and has such could "be gainfully employed and [were] free to be with family and friends and to form other enduring attachments of normal life." 408 U.S. at 482, 92 S.Ct. at 2600. The inmates here, on the other hand, are confined and thus subject to all of the necessary restraints that inhere in a prison. *Greenholtz,* at 2105.

The Appellant also alleges he was denied equal protection due to a violation of the ADA. There exist no discrimination, the Appellant was treated as all other inmates appearing before the Board. To establish an equal protection violation, a party must show that similarly situated person received disparate treatment. *TNS Mills, Inc. v. South Carolina Dept. of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (S.C. App. 1998). The identical criteria was followed in this case as in all other cases brought before the Parole Board. The Appellant presented no evidence to the ALC that his case was considered differently, or that he was denied any criteria considered for other inmates. Since no evidence of unfairness was shown, there exist no denial of equal protection, the ALC dismissal should be upheld.

6. The ALC decision was made upon lawful procedure

The Appellant argues that the decision of the ALC was defective and done under unlawful procedure. The Appellant argues that the ALC failed to follow ALC rules 58, 60, and 61. The ALC was correct in dismissing the appeal of the Appellant.

As stated earlier, due to the Board revealing in their order of denial a question of fact and conclusion of law separately stated, the ALC found the Board was correct in their decision of the denial of parole. This is what is required pursuant to South Carolina law. If that is shown, the ALC's review is very limited. All the ALC can do is make a determination that the Board considered the criteria. The Appellant is of the opinion that there are many factual questions the Board failed to answer. Many of the Appellant allegations are beyond the reach of the ALC. The ALC cannot reverse the decision of the Parole Board. If the ALC found the proper procedures have not been met they can remand for a new hearing. In the present case, the ALC's decision was clear, the Board revealed they considered the mandatory criteria. The denial of parole was routine and followed the law, so this appeal was properly dismissed.

The Appellant argues that the ALC's decision failed to address the Board not using a risk assessment as required in South Carolina law. The Board revealed in a subsequent order revealing a risk assessment was applied and considered by the Board. Since this was proven, the Court had no further obligation in addressing this allegation. Appellate court need not address remaining issues when disposition of prior issue is dispositive. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999). The ALC made her decision based on all of the evidence provided in the record. The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal. Rule 220 (c)(SCRAP). The record revealed the Board followed the mandatory criteria, and applied and considered a risk assessment. No further analysis alleged by the Appellant is necessary. Due to the proper application of the criteria, the ALC properly did not further question any issues raised by the Appellant. The decision to dismiss the Appellant's appeal was lawful and should be upheld by this Court.

CONCLUSION

Based on the foregoing reasons the ALC correctly dismissed the appeal; therefore the Respondent respectfully requests the final decision of the Administrative Law Court be affirmed.

Respectfully submitted,

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July 20, 2015

STATE OF SOUTH CAROLINA
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and with the South Carolina Supreme Court's order dated August 13, 2007.

Tommy Evans, Jr.
Assistant General Counsel

July 20, 2015

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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated July 20, 2015, on Appellant this 24th day of July, 2015, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Bernard Bagley, #175851
Kershaw Correctional Institution-HD133
4848 Goldmine Highway
Kershaw, S.C. 29067

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

Dawn K. Nichols
Executive Administrative Assistant

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