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SC Court of Appeals

STATE OF SOUTH CAROLINA
COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge
Case No. 15-ALJ-15-0038

BOBBY RUFF, #185024.....APPELLANT

v.

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

INITIAL BRIEF OF RESPONDENT

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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STATEMENT OF ISSUE ON APPEAL

- 1. Did the ALC err in deciding to dismiss the Appellant's appeal due to the fact the ALC did not have jurisdiction to review the decision of the Court of Appeals?**

STATEMENT OF THE CASE

On November 9, 1991, the Appellant unlawfully entered the home of the eighty-six year old victim with the intent to commit a crime. When the police arrived they found the victim lying on the floor in her ransacked bedroom, a pillow over her face, unconscious, with very shallow breathing. She was immediately transported to the hospital where she later died. It was later determined through autopsy that she died of asphyxiation. Going through her home after her death, her family realized the person who committed this murder also took a television valued at two hundred dollars.

Upon completion of their investigation, the Greenville Police Department arrested the Appellant and charged him with the offenses of murder, burglary in the first degree (burglary 1st), and grand larceny. On July 29, 1993, the Appellant appeared before the Honorable Thomas Ervin to answer to all of these offenses. Upon conclusion of this appearance, the Appellant was sentenced to a period of incarceration for the remainder of his natural life for murder, and burglary 1st; and, thirty days for grand larceny. At the time he committed this offense South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of twenty years.

He initially appeared before the Board on September 4, 2013, and at the conclusion of this hearing parole was denied due to: 1) the nature and seriousness of the current offense; and 2) the indication of violence in this or a previous offense. Upon being notified of this denial, the Appellant filed a notice of appeal before the Administrative Law Court (ALC). Within this appeal the Appellant alleges that the Parole Board deprived him a stated created liberty interest; that the decision of denial was arbitrary and capricious; and the Board abuse its discretion by relying on immutable factors of the offense committed to deny parole. The ALC decided to deny this appeal, he immediately issued a notice of appeal before the Court of Appeals. On June 24, 2015, the Court

of Appeals issued an unpublished opinion reversing in part and remand. The Court of Appeals decided that the case should go back to the Parole Board for another hearing to be conducted where a risk assessment should be completed pursuant to Section 24-21-10 of the South Carolina Code of Laws.¹ The Appellant later appeared before the Board on October 24, 2015. The Court also determined that additional issues raised by the Appellant were not raised before the lower court so it was not preserved for appeal.

Upon receiving this decision, the Appellant decided to file another notice of appeal before the ALC. After being served this notice, the Respondent decided to file a motion to dismiss. The argument raised by the Respondent was that the ALC does not have subject matter jurisdiction regarding a decision made by the Court of Appeals. On September 1, 2015, the Honorable Deborah Brooks Durden issued an order of dismissal. Within this order Judge Durden determined that this is a remedy unavailable to the Appellant. That is due to the fact, “the Court of Appeals must review the decisions of the ALC, not the other way around.” Due to the lack of jurisdiction the ALC decided to dismiss the Appellant’s appeal.

The Appellant has now file a notice of appeal before the Court of Appeals. Within this appeal the Appellant argues that the Parole Board abused its discretion when it relied on immutable factors to deny the Appellant parole. He also argues that the ALC failed to rule on an issue raised before them, and they had jurisdiction to rule on this case. The Respondent argues that the ALC was correct in dismissing this appeal. Pursuant to South Carolina law the ALC does not have the authority to review the final decision of the Court of Appeals. If the Appellant had some objection

¹ The department must develop a plan that includes the following: (1) 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)(Supp. 2014).

with the final decisions of the Court of Appeals, he should have filed a motion for rehearing or petition for certiorari before the Supreme Court. He failed to do so; therefore, he should be denied any remedy due to his failure to follow the rules and South Carolina law. The brief of the Respondent supporting their argument follows.

ARGUMENTS

1. The ALC did not have the jurisdiction to review the final decision of the Court of Appeals, so the appeal was properly dismissed.

The Appellant issued a notice of appeal before the ALC for a decision made by the South Carolina Court of Appeals. The Appellant should have issued a petition for rehearing before the Court of Appeals, then request a writ of certiorari before the Supreme Court. The Appellant cannot request the ALC to review a decision made by the Court of Appeals, or attempt to raise issues not raised initially before the ALC. The ALC did not have subject matter jurisdiction to review this decision so the lower court properly dismissed this appeal.

The ALC's jurisdiction to review the final decision of the Department is derived from the decisions of the South Carolina Supreme Court in *Al-Shabbaz v. State*, 338 S.C. 334, 527 S.E.2d 724 (2000), and *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2002). In *Al-Shabbaz*, the South Carolina Supreme Court created a new avenue by which inmates could seek review of a final decision of a state agency in a "non-collateral" matter related to a conviction or sentence. The Court held that inmates could appeal those final agency decisions to the ALC, and ultimately to the Court of Appeals pursuant to the Administrative Procedures Act. *Al-Shabbaz*, at 376. In *Al-Shabbaz*, the Court recognized that "these administrative matters typically arise in two ways: (1) when an inmate is disciplined and

punishment is imposed; and, (2) when an inmate believes prison officials have erroneously calculated his sentence; sentence-related credits or custody status.” *Id.*, at 369.

The court noted that the appealable final decision in *Furtick* arises in the latter manner, where the inmate alleges the Department erroneously determined he was not eligible for parole. The Court held that in order to determine whether an inmate’s claim against the Department is entitled review by the ALC under the procedure set forth in *Al-Shabbaz*, it is first necessary to determine whether the inmate has a liberty interest in gaining access to the Parole Board. *Furtick*, at 149. The Court determine that the permanent denial of parole implicates a liberty interest sufficient to require at least minimal due process. *Id.* This is the only jurisdiction the ALC have over parole decisions. Once the case is decided by the ALC and reviewed by the Court of Appeals the case cannot be reviewed again by the ALC. The Appellant has relinquished issues he failed to raise in the original case.

The Appellant appealed to the ALC relating to a final order from the Court of Appeals, a remedy unavailable under South Carolina law. The remedy the Appellant should have sought is a petition for rehearing. The Appellant argues issues the Court says were not raised initially. This matter should have been raised in a petition for rehearing not another appeal before the lower court. A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the Court. Rule 221(a)SCACR. The Appellant accuses the Court of Appeals of wrongfully deciding that he failed to preserve two arguments before the lower Court. A petition for rehearing would particularity raise points supposed to have been overlooked by the Court. If the Court of Appeals failed to decide in the Appellant’s favor, his only remedy would be to file a petition for writ of certiorari before the South Carolina Supreme Court. The Supreme Court, or any two justices thereof, may in its discretion or

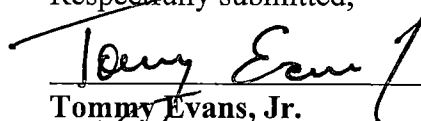
motion of any party to the case or on its own motion, issue a writ of certiorari to review a final decision of the Court of Appeals. Rule 242(a)SCACR.

The Appellant failed to seek any of those available remedies, instead the Appellant decided to file a notice of appeal before the ALC. Since the ALC does not have the authority to review the final decisions of the Court of Appeals the ALC rightfully decided to dismiss this appeal. The ALC was correct in determining that the Court of Appeals review their decisions not the other way around. The Court of Appeals have jurisdiction over any case which an appeal is taken from an order, judgment or decree of the circuit court, family court, a final decision of an agency, **a final decision of the administrative law judge**, or final decision of the Workers' Compensation Commission. S.C. Code Ann. §14-8-200(a)(Supp. 2009)(emphasis added). The ALC Court currently did not have jurisdiction over that cause of action, the only remedy available was through a petition for rehearing, or a writ of certiorari. Since there was a lack of jurisdiction the ALC was correct in their dismissal of this appeal.

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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Columbia, South Carolina
November 30, 2015

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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, certify that I have served the within Initial Brief and Designation of Matter, dated November 30, 2015, by depositing a copy of the same in the United States mail, postage prepaid, this 30th day of November, 2015, addressed to:

Bobby Ruff, #185024
Kershaw Correctional Institution-HA250
4848 Goldmine Highway
Kershaw, S.C. 29067

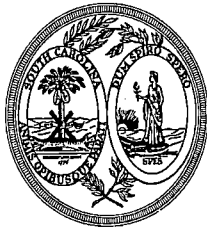
I further certify that all parties required by Rule to be served have been served.



Dawn K. Nichols
Executive Assistant

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

NIKKI R. HALEY
Governor



JERRY B. ADGER
Director

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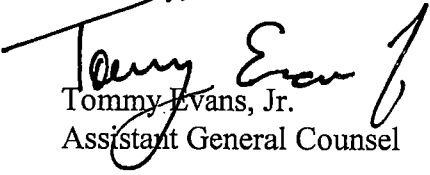
November 30, 2015

Bobby Ruff, #185024
Kershaw Correctional Institution
4848 Goldmine Highway
Kershaw, S.C. 29067

Dear Mr. Ruff:

Please find enclosed copies of the matter we designated for inclusion in the Record on Appeal.

Sincerely,

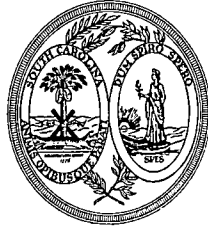

Tommy Evans, Jr.
Assistant General Counsel

TE:dn

cc: The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals

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

NIKKI R. HALEY
Governor



JERRY B. ADGER
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November 30, 2015

The Honorable Jenny Kitchings
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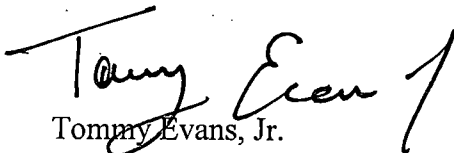
Re: Bobby Ruff v. SCDPPPS

Dear Ms. Kitchings:

Enclosed please find the original Initial Brief of Respondent and Designation of Matter, dated November 30, 2015, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,


Tommy Evans, Jr.
Assistant General Counsel

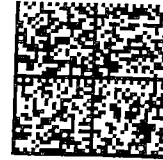
Enclosures

cc: Bobby Ruff

State of South Carolina

Department of Probation, Parole, and Pardon Services

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