

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FOR THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT
Deborah B. Durden, Administrative Law Judge

Appellate Case Number 2015-000478

Bernard Bagley, #175851,

Appellant,

v.

South Carolina Department of Probation,
Parole and Pardon Services,

Respondent

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. THE ALC JUDGE ERRED IN FAILING TO FIND THE PAROLE BOARD WAS NOT REQUIRED TO CONSIDER AN INAPPROPRIATE FACTOR, THE 2012 DENIAL AS A PREJUDICIAL FACTOR IN REACHING ITS DECISION AT THE 2015 PAROLE PROCEEDING.
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 S.C. 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 S.C. 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.
6. THE ALC JUDGE ERRED IN FAILING TO FIND PAROLE BOARD FAILED TO REVIEW APPELLANT'S CASE EVERY TWO (2) YEARS FOR THE PURPOSE OF A DETERMINATION OF PAROLE AS OUTLINED IN §24-21-645, and §16-1-60, OF S.C. CODE OF LAWS.
7. THE ALC JUDGE ERRED IN FAILING TO FIND THE BOARD INVESTIGATED APPELLANT'S INQUIRY REGARDING HIS PAROLE FILE BEING INCOMPLETE AS 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 (ADA); 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.

FACTUAL/PROCEDURAL HISTORY

The Appellant incorporates and repeat verbatim the Statement of the Case and Factual/Procedural History in his Initial Brief of Appellant, and to include and supplement the following: The Appellant was arrested on August 23, 1990, and October 1990, indicted under statute §16-3-20 (punishment statute) of S.C. Code of Laws by the Richland County Grand Jury for the offense of murder. A jury trial was held in April 1991, in which a guilty verdict was rendered. Upon conclusion, Circuit Court Judge Dan Laney sentenced Appellant to "incarceration for the remainder of his natural life" (inferred life without parole). At the time the Appellant committed the offense, South Carolina Law as outlined in §16-3-20, in cases where the defendant is eligible for parole, "the judge must charge the applicable parole eligibility statute." An individual serving a life sentence for murder parole eligibility is upon the service of twenty (20) years (not inferred incarceration for the remainder of an individual natural life). The Appellant made his initial appearance before the Parole Board on September 8, 2010, in which the Parole Board denied his request for parole consideration. On October 10, 2012, the Parole Board once again denied Appellant's request for Parole consideration. The Appellant appealed the Board's denial, but the Administrative Law Court (ALC) dismissed the appeal. The Appellant appealed the ALC denial before the South Carolina Court of Appeals. The Court of Appeals reversed and remanded the the ALC denial that the Board did not fail to reveal they considered a risk assessment tool pursuant to §24-21-10(F)(1), of S.C. Code of Laws. The Court of Appeals ordered the Board to evaluate Bagley's risk using the department's assessment tool and consider the results of the evaluation in reaching its decision regarding Bagley's parole. In addition, the Court of Appeals ordered the Board "Because we are reversing Bagley's 2012 denial of parole, we direct the parole board not to consider the 2012 denial as a prejudicial factor in reaching its decision at the upcoming proceeding or in future decisions." Bagley v. S.C. Dept. of Probation, Parole and Pardon Services, (2013-000042) 2014 WL 4217379 (S.C. App. 20-14). Twenty seven (27) months after the October 2012 Board's denial, on January 14, 2015, the Appellant appeared once again before the Board, in which the Board again denied Appellant's request for parole consideration due to factor 2 of SC-DPPPS Criteria for Parole Consideration Form 1212, the nature and seriousness of

offense; factors 2 and 3; the circumstances surrounding the offense and prior criminal records; and factors 2,3, and 15; circumstances surrounding the offense, prior criminal record, and other factors considered relevant in a particular case by the Board, i.e. 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. The Appellant received the notice of rejection on January 22, 2015, in which the Appellant submitted his Notice of Appeal (15-ALC-15-0003-AP) to the ALC on the 26th of January, 2015.

NOTE: The Appellant has no ideal of the Respondent's other order delivered on January 30. He has no record of such. Appellant submitted his Notice of Appeal to the ALC and Respondent on January 26, 2015 (emphasis added).

On February 12, 2015, eighteen (18) days after Appellant submitted his Notice of Appeal to the ALC, Administrative Law Judge Deborah B. Durden, issued an order dismissing Appellant's appeal with prejudice, and there was no mentioning in her order pertaining to a "January 30" order, nor anything concerning that the risk assessment was completed prior to the denial of parole (emphasis added). Judge Durden stated within her order that the "proper criteria was considered which is a routine denial of parole, and that the order of denial conformed with the Cooper v. S.C. Dept. of Probation, Parole and Pardon Services, 661 S.E.2d 106 (2008)."

As such, the Appellant filed a Notice of Appeal before the Court. Within this appeal the appellant raises ten (10) issues, specifically, issue 10, "The ALC Judge decision is made upon unlawful procedure." The Appellant argues that the ALC decision was arbitrary and capricious, or abuse of discretion. The Appellant's Reply Brief supports the foregoing references arguments follows:

NOTE: Appellant submitted a Rule 59(e)(g) Motion, SCRCP, to the ALC, Respondent, Judge Durden on February 23, 2015, for her to take judicial notice and alter and amend her order in an effort to rule on all eleven (11) of Appellant's issues in his Principal Brief of Appellant mailed to the ALC and Respondent on February 13, 2015, in order to preserve for consideration and appellate review, but as of this date, there is no response to his motion. Also, Appellant received Judge Durden's order on February 23, 2015, that arrived here at the institution on February 17, 2015. Judge Durden's order was issued four (4) days after the ALC Clerk assigned it to her and provided a docket number.

ARGUMENTS 1-9 IN INITIAL BRIEF OF APPELLANT

The Appellant incorporates and repeat verbatim issues 1-9, and the arguments for the same (emphasis added).

ARGUMENT 10

The Appellant incorporates and repeat verbatim issue 10, and the argument for the same (emphasis added), and to include and supplement his argument, the Appellant asserts that ALC Judge Durden obligated to follow its own rules and regulations that are founded in principles of administrative law. ALC Rules, Rule 59 (C), "Within forty-five (45) days of the date the case is assigned to an Administrative Law Judge (date of assignment), the agency shall file the record with the Court, including a statement of the contents of the record, unless the time for filing the record is extended by the ALJ assigned to the appeal. " As of this date, the Respondent has not filed nor submitted a record to the Court and Appellant. (The Appellant has not received a Record on Appeal from either appeal). Nevertheless, Judge Durden must follow its own regulations in carrying out the legitimate purposes of the court.

Appellant Asserts ALC Rule 60, and ALC Rule 62 were violated by Judge Durden, because he complied with the rules of procedures for the appeal, and he complied with the time limits provided. Appellant asserts that he provided a factual basis for each expressly and specifically asserted constitutional violation as prescribed by Rule 59(B). In addition, he argues that the grounds or issues appealing on the record are meritorious. In essence, Judge Durden prematurely dismissed and denied Appellant's appeal process without allowing him to be heard on appeal from SCDPPPS final decision pursuant to ALC Special Appeal Rules, and as a result, she acted arbitrarily and capriciously. ALC Judge decision should be reversed and remanded.

SUPPLEMENT ARGUMENT

Since the Appeal it has come to the Appellant's attention that SCDPPPS has violated provisions of statute §17-1-40, of S.C. Code of Laws, prohibiting retention of evidence pertaining to a charge once it has been dismissed and expunged, in which Appellant asserts that he is irreparably harmed during the parole hearing on January 14, 2015, and during the pre-parole investigation. Appellant's previous burglary 1st degree charge is being retained in his parole file, a criminal charge that was not destroyed even though proceedings against him has been dismissed, and SCDPPPS, the Respondent continue to deny Appellant parole based on this burglary history in violation of §17-1-40. There is no adequate remedy at law, and Bagley is suffering irreparable harm, in which he believes he will be successful on the merits. SEE: Commitment Sentencing Sheet 90-GS-40-5849.

In addition, since this appeal, it has come to the Appellant's attention that the Respondent has parole records containing information and legal documents that are in error of law which are impeding any request for favorable parole consideration, and that the executive agency parole officials lack jurisdiction to grant him parole because he was indicted under the wrong statute §16-3-20, of S.C. Code of Laws, rather than the correct statute §16-3-10. As a result, of being indicted under the wrong statute §16-3-20, the trial court pronounced a natural life sentence, and failed to charge the applicable parole eligibility statute as outlined in §16-3-20. Section 16-3-20 does not contain an offense that is a lesser included offense of the correct statute §16-3-10 does; and Appellant did not waive presentment; and §16-3-20 indictment (90-GS-40-5849) is defective. As such, there is no doubt the length of his incarceration implicates a constitutional liberty interest, and this matter can be raised at such a time like this.

Section 16-3-20 is not just a clerical error, because Appellant was indicted under the statute, and the trial court allowed the State the burden not to prove every element of the crime charged as outlined in §16-3-10, definition and elements of murder. And, that error of law being indicted under §16-3-20, the State did not have the burden to prove malice aforethought. In essence, a determination to have the Appellant's length of incarceration must be resolved as outlined in S.C. Constitution Article 1, §3, and U.S. Constitution 14th Amendment §1, of the Due Process Clause.

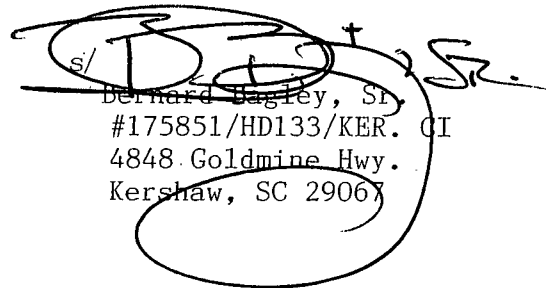
In the interest of the length of his incarceration, Appellant argues to this Court that asking the Parole Board who are also members of the executive branch by virtue of their role as parole officials to consider to grant or deny parole on the constitutionality of the Due Process Clause and a prejudicial factor of a defective indictment because Bagley was indicted under the wrong statute is a violation of the Separation of Powers. Not only requesting the Parole Board to grant or deny parole invade the judicial branch's sole authority to correct an error of law, but it also violates the Separation of Powers from a judicial angle.

The Parole Board lack jurisdiction to grant or deny Bagley parole in violation of the Due Process Clause, because then they would then be assuming a judicial function because in effect, what they does determine the length of incarceration in his case, and that function should lie with the Court Separation of Powers Doctrine. The Parole Board would be usurping power from the judicial branch regarding an error of law of Bagley being indicted under the wrong statute §16-3-20.

CONCLUSION

The Appellant incorporates and repeat verbatim the Conclusion in his Initial Brief of Appellant. In addition, he supplement that the Court grant him immediate relief for the foregoing Supplement arguments.

April 30, 2015


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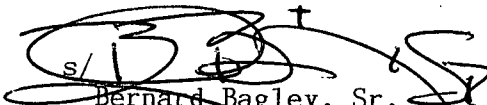
South Carolina Department of Probation,
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Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant Final Reply Brief and Designation of Matter contains all material proposed to be included by the parties.

April 30, 2015


s/ Bernard Bagley, Sr.
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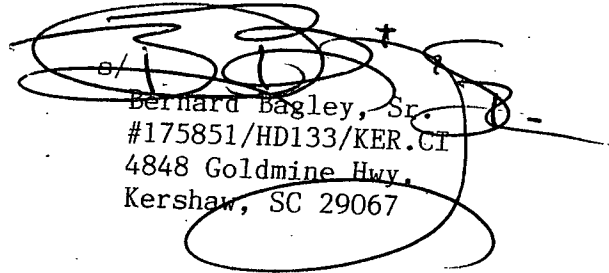
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PROOF OF SERVICE

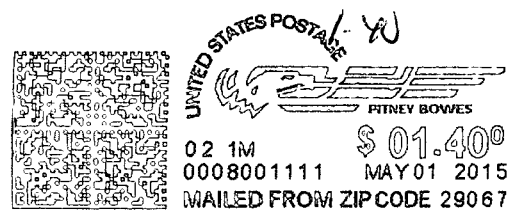
I, Bernard Bagley, the Appellant, certify that I have served the within Appellant's Final Reply Brief, Designation of Matters, Certificate of Counsels, and Record of Appeal (Appendix), dated April 30, 2015, on the Respondent this 30th day of April, 2015, by depositing a copy of the same in the U.S. Mail, postage prepaid, addressed to:

Tommy Evans, Jr.,
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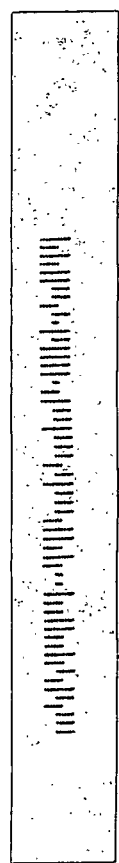

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