

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
Deborah B. Durden, Administrative Law Judge
Case No. 15-ALC-15-0003-AP

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FEB 11 2016
SC Court of Appeals

Appellate Case No. 2015-000478

BERNARD BAGLEY, #175851,

Appellant

v.

South Carolina Department of Probation,
Parole and Pardon Services,

Respondent

AMICUS CURIAE BRIEF OF APPELLANT

Demetria D. Moore
4318 Park Road
Ridgeway, SC 29130

Layperson

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STATEMENT OF ISSUES ON APPEAL

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.
2. The Appellant never presented any substantial evidence proving his allegations regarding the denial of parole, so the decision of the ALC was correct.
3. The Appellant was never denied equal protection nor due process.
4. The ALC decision was made upon lawful procedure.

STATEMENT OF THE CASE

In 1991, a jury convicted Appellant Bernard Bagley of non-capital murder of his wife, Mary D. Bagley, on August 23, 1990. Appellant shot and killed Mary during a period of extraordinary or extreme prolonged stress caused by the death of his confidential informant during his position with Durham North Carolina Police Department, and when he was shot at twice in the line of duty while in Durham, along with continued marital difficulties and separation numerous times. The Appellant and his wife married in 1986. They live in Columbia, where Bernard worked as a city police officer. In 1987, the Bagleys' separated and Bernard moved to Sumter to become a deputy with the Sumter County Sheriff's Department. Mary discovered that Appellant was living in Sumter and she moved there, and they resumed their marriage. However, they continued to have marital difficulties and separated again and again, eventually, they reconciled where their daughter was born. In August 1989, Appellant accepted a position with Durham Police Department. About a week before his scheduled move, the two quarreled after Mary took his wallet with his credit cards, and moving finances, and a fight ensued. The police were called. When they arrived, they placed Mary under arrest for criminal domestic violence and for assaulting the arresting officer. Appellant retrieved his wallet and moving finances, thereafter, moved to Durham and joined the police force, and to enter the North Carolina Criminal Justice Academy. Mary and the baby remained in South Carolina. A few months later, Mary traveled from Eastover to Durham to talk to the Appellant, in which he rejected her entreaty that they resume their marriage. Nevertheless, they again reconciled, and Mary and the baby joined Bernard in Durham a few weeks after Hurricane Hugo.

On August 19, 1990, the Bagleys' again quarreled. The next morning, while Bernard was at the academy, Mary took the baby and returned to her mother's home in Eastover, South Carolina. When Appellant discovered that Mary and the baby were gone, he immediately drove to Eastover, took the baby, and returned to Durham. Mary telephoned on Tuesday to apologize for leaving and asked if he would come back to Eastover to pick her up. Bernard drove to Eastover on Wednesday, and the two returned to Durham late that night. The next morning, on August 23, 1990, when Bernard was at the academy, Mary again packed her belongings and took the baby to Eastover. The Appellant discovered that Mary resigned from her job; withdrew all the money from their bank account; took all the emergency household money; and all the baby belongings.

The Appellant left the academy and drove to Eastover to talk to Mary with no intentions to harm her or anyone, but after he heard Mary laughing and discussing on the phone about how she tricked him, and talking about an affair with Donald Dubose, the Appellant kicked in the door of mother-in-law home, and inquired to his wife about the affair, and after she rejected his entreaty that they resume their marriage, during the ensuing argument he shot her twice causing her death.

Appellant was sentenced to a term of a sentence of incarceration for the remainder of his natural life by Judge Dan Laney. At the time the Appellant committed this offense, South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon 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 (2) times both resulting in a denial of parole. On October 12, 2012, the Appellant was denied parole, and sought reversal from the Administrative Law Court (ALC). The ALC affirmed the decision of the Parole Board. Upon receiving this decision, the Appellant filed a notice of appeal before the S.C. Court of Appeals. The Court of Appeals decided that the Board did fail to reveal that they considered a risk assessment tool pursuant to §24-21-10(F)(1), of S.C. Code of Laws. The Court of Appeals ordered a new parole hearing within 90 days for the department must show they considered a risk assessment tool. *Bagley v. SCDPPPS*, 2014 WL 4217379 (S.C. App.).

On January 14, 2015, the Appellant, then 58 years old, appeared before the Parole Board, and denied 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, on three occasions. Upon the Appellant receiving the Notice of Rejection dated January 15, 2015, the Appellant file a notice of appeal before the ALC. On February 12, 2015, Judge Deborah B. Durden, ALC, issued an order dismissing the appeal. Within her order, Judge Durden stated the proper criteria was considered which reveals a routine denial of parole. She stated that the order of denial conformed with Supreme Court decision of *Cooper v. SCDPPPS*, 661 S.E.2d 106 (2008).

Upon receiving the decision of the ALC, the Appellant filed a notice of appeal before this Honorable Court. Within this appeal the Appellant attempted to articulate that the Board's decision to deny his request for parole does not reflect (in its order) due consideration of all relevant statutory factors and it is not supported by substantial evidence or a modicum of evidence, but by mere guesswork, that is rationally indicative of a threat to public safety, and he request this Court to vacate the decision, and that the Board immediately grant him provisional parole within the custody of the department of corrections under §24-21-645, S.C. Code Ann. (1990), which is not reflected in the order of denial. The Amicus Brief supports the foregoing matters, and the arguments that follows.

ARGUMENTS

1. THE APPELLANT DID NOT FAILED TO REVEAL THAT THE BOARD FAILED TO FOLLOW THE MANDATORY CRITERIA OR FAILED TO ABIDE TO SOUTH CAROLINA LAW PRIOR TO DENIAL.

First, the Appellant asserts that he does have a liberty interest in parole, and a reasonable probability that he will be granted parole unless the Board of Parole Hearings finds, in the exercise of its discretion that the Appellant has not shown a disposition, that, in the future he will again violate the law, in light of circumstances specified by §24-21-640, S.C. Code Ann. (1990), and by the criteria for parole consideration, and by mandates proscribed by the U.S. Constitution 14th Amendment, §1, and S.C. Constitution Article 1, §3, along with §24-21-645, S.C. Code Ann. (1990).

The general legal standard is that the state may not deprive any person of life, liberty, or property without due process of law. (U.S. Const., 14th Amend., §1, S.C. Const., art. 1, §3). The Board's parole authority is governed by a body of statutes and criteria as mandated by the Legislature, most notably S.C. Code Ann., §24-21-640, and §24-21-645. Section 24-21-645 mandates in some cases, the Board may decide that an inmate should be granted provisional parole if the inmate completes one or more stated conditions. Should the inmate disobey any rule or regulation of the department of corrections before satisfying the stated conditions to make parole effective, the Board may rescind inmate's parole and treat the case as though parole had been rejected. ..

The Board argues that if it ~~only~~ states in its order denying parole that it considered the ~~factors~~ outlined in §24-21-640 and 15 factors published in its parole form, that they have complied with this procedure, and 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. The foregoing procedure is arbitrary and capriciously seriously flawed because it does not support substantial evidence or a modicum of evidence that is rationally indicative of a threat to public safety. The ALC may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are: (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record as prescribed in §1-23-380(A)(6). The Board cannot be allowed to routinely deny parole for a certain class of inmates under a blanket policy that condemn and shield with a case-by-case invocation of 1) nature and seriousness of an offense that occurred over 25 years ago; 2) indication of violence in the offense 25 years ago; and 3) use of a deadly weapon that was used in the offense 25 years ago, without conducting an individualized inquiry into Bagley's best interest or disposition that the interest of society will not be impaired thereby when the Board have the entire record to draw answers from, and Appellant's progress during incarceration, along with his attitude or insight he has achieved into past behavior. As such, the Parole Board is not immune from judicial review for this Appellant to make an informed request for parole with what is rationally indicative of a ~~current threat to public safety~~, and without any supporting evidence from the Board it is arbitrary and capriciously abuse of discretion in violation of an additional requirement of due process. See: *Edwards v. Balisok*, 520 U.S. 641 (1997). The Respondent want this Court to believe that the order of denial conformed with the Cooper decision when it clearly falls short with support by atleast a substantial or modicum of evidence, not mere guesswork, but that is rationally indicative of current threat to public safety. The Respondent's order is a routine denial under a blanket policy that condemn and shield with immutable factors. The ALC authority to review this decision comes under the reliable, probative substantial evidence on the whole record standard as to whether there is a ~~rational nexus~~ between evidence and ultimate determination of current public safety.

The Respondent states that the findings of fact were the reasons provided as to why parole was denied, but it's clear before this Court that was not supported by evidence rationally indicative of current threat or risk to public safety. In addition, the respondent states the conclusion of law were the statute, factors, criteria, and assessments considered prior to a final determination, but it's clear before this Court that general constitution legal standards of due process under probative substantial or modicum evidence on the whole record as to whether there is a rational nexus between evidence and the ultimate determination of current threat or risk to public safety, as guaranteed by the U.S. Const., 14th Amend., §1, and S.C. Const., art.1, §3, that the state may not deprive any person of life, liberty, or property without due process of law. In other words, it's reasonable to believe that the Board must determine, consistent with due process, the essential question of whether the inmate currently poses a threat to public safety, and the Board should be required to answer this question by conducting an individualized inquiry into the inmate's disposition for parole by drawing answers from the entire record, along with the evidence of post-incarceration rehabilitation that indicates that the inmate no longer pose a threat to public safety, probative of the central issue. The ALC was incorrect in dismissing this appeal because all of the conclusions of law, nor findings of fact were considered nor mentioned in the order of denial pursuant to general legal standards.

2. THE APPELLANT NEVER PRESENTED ANY SUBSTANTIAL EVIDENCE PROVING HIS ALLEGATIONS REGARDING THE DENIAL OF PAROLE, SO THE DECISION OF THE ALC WAS CORRECT.

The Respondent failed to provide the Court upon judicial notice of Appellant's disciplinary and other records for the Court to review Board's decision to deny Bagley parole and to determine if it reflects individualized consideration of all the relevant facts and disposition factors for parole, and, if it does, is it supported by substantial evidence or modicum of evidence that Appellant currently poses a threat or risk to public safety. Section 24-21-640, and §24-21-645. Release on parole is the rule, rather than the exception, and the question whether any one can adequately articulate the complexity of atonement for it to the satisfaction of everyone on the Board is in the eye of the beholder, because there is no special formula for a prisoner to articulate in order to com-

communicate that he or she has gained an attitude or insight into, and formed a commitment to ending a previous pattern of violent behavior to the satisfaction of everyone on the Board, again, it's in the eye of the beholder. The Respondent argues that the Appellant's parole was denied due to the immutable facts of the offense with no reasoning establishing a rational nexus between those immutable factors and the necessary basis for the ultimate decision—the determination of current threat or risk to public safety. Bagley has not killed or injured anyone since the commitment offense; and assuming that this murder was heinous, however, even a heinous commitment offense does not alone justify a denial of parole. However horrible the crime, it is insufficient basis for the denial of parole unless there is an evidence-based, rational nexus between the offense and present behavior. There is nothing in Bagley's record that shows or indicate violence since the commitment offense, in fact, with the past 25 years he is considered non-violent without any need for specialized attention. Bagley understand to abstain from violence is based on his attitude or insights for anger-management programs and not to allow stress in relationships impact his behavior and impulsivity. Appellant can be put back into the community to interact with females because he understands his actions that led him into prison. Appellant's institutional activities indicate an enhanced ability to function within the law upon release. Appellant is not an abuser of vulnerable people, but instead a rescuer. The pre-parole investigator failed to obtain a social history from Bagley's family members, i.e. children, grandchildren, brothers, sister, and parents, because if they would have, the same would be before the Court to review, along with his department of corrections records, verification and place of employment records, or information. Appellant asserts that he does not have to review the records, but he do contend that the Parole Board should provide those records to the Court for review, as required by §24-21-290, S.C. Code Ann. (1990). Appellant asserts that he did not have to present any evidence because it's the Respondent duty to present all of the evidence to the Court that a modicum of evidence supports Board's determination that he currently poses an unreasonable risk to public safety. Furthermore, Appellant has not violated the provisions of a felon with a deadly weapon, and there's nothing in record to show that he has use a deadly weapon in the past 25 years. Also, he understand that he could never possess nor have a deadly weapon, nor own such

in the future. The ALC was unreasonable to reach the conclusion that the agency reached the proper decision in dismissing this appeal in favor of the Respondent.

3. THE APPELLANT WAS DENIED EQUAL PROTECTION AND DUE PROCESS.

The general legal standards is that the state may not deprive any person of life, liberty, or property without due process of law. U.S. Const., 14th Amend., §1, and S.C. Const., art. 1, §3. Section 24-21-645 mandates that the Board normally grant provisional parole date for an eligible inmate, and must issue an order which, if accepted by the prisoner, shall provide for his release. In addition, the Board's practice of deferring when an inmate may be parole, specifically, life inmates convicted before July 1996, until it appears to the satisfaction of the board is unconstitutional. Also, the practice of deferring calculation of the base term for life inmates sentenced prior to July 1996 is unconstitutional as well, because inmates serving life sentences after July 1996 are sentenced 1) 30 years day for day; 2) life without parole; or 3) capital murder death sentence. A life inmate serving 30 years will be allowed to walk out of prison upon the completion of 30 years regardless of their prison record, etc., i.e. nature and seriousness of offense; indication of violence; and use of a deadly weapon. The immutable factors does not matter because they will be release from prison without self-help programs, anger management, their insights or attitude, it does not make no difference, they will be release without any decision-making process.

Appellant will assert that he has a reasonable probability to be granted parole because he will not again violate the law which is in his best interest and the best interest of society as well. Appellant understand this. The foregoing issue should be consider for possible settlement to certain facts.

4. THE ALC DECISION WAS MADE UPON UNLAWFUL PROCEDURE.

The ALC has jurisdiction to review a Parole Board's decision under a deferential substantial evidence and probative standard, under §1-23-380(A)(6)(e), because the Board's decision is arbitrary and capriciously flawed. In this case, the ALC decision by an abuse of discretion to uphold a routine denial under a blanket policy that recitation of the immutable factors without recognition that

an inmate's right to due process cannot exist in any practical sense without a remedy against its abrogation. The denial of parole that is routine is violation of the law because the Board findings must be probative when the evidence reflecting Appellant's present risk to public safety leads to but one conclusion the ALC has jurisdiction to overturn a contrary decision by the Board.

CONCLUSION

Based on the foregoing reasons this Amicus Brief on behalf of my Father, the Appellant should be accepted, therefore, the said final decision of the ALC should be vacated, and order the Board immediately grant Appellant provisional parole within the department of corrections as required under §24-21-645, S.C. Code Ann.

Respectfully submitted,

s/ *Demetria D. Moore*

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February 10, 2016

Layperson

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CERTIFICATE OF COUNSEL
(Layperson)

The undersigned certifies that this Amicus Brief complies with SCARules
213, and 208(b).

s/ *Demetria D. Moore*

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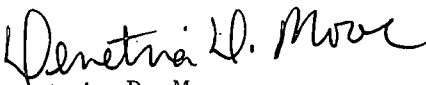
Respondent.

PROOF OF SERVICE

I, Demetria D. Moore, a layperson, hereby certify that I have served the within Amicus Curiae Brief of Appellant dated February 10, 2016, on Respondent this 10th day of February, 2016, by depositing a copy of the same in the U.S.

MAil, postage prepaid, addressed to: Tommy Evans, Jr.,
SCDPPPS Assistant General Counsel
Bernard Bagley
#175851/HD133/KER.CI
4848 Goldmine Hwy.
Kershaw, SC 29067
P.O. Box 50666
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I further certify that all parties required by Rule to be served have been served.

s/ 
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February 10, 2016

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SC Court of Appeals

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The Honorable Jenny Kitchings,
Clerk of Court S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Amicus Curiae Brief of Appellant, Bagley v. SCDPPPS(2), 2015-000478

Dear Mrs. Kitchings:

Enclosed is my Motion for Leave to File Brief Amicus Brief in the above-entitled case, and the brief to be conditionally filed as well.

Please note that I'm a layperson and in no way trying to practice law without a license. The brief is on behalf of my Daddy Bernard Bagley.

I'm respectfully requesting that you allow me or ~~authorize~~ that the rules be laxed regarding the number of copies to be file with the Court, along with the filing fee that maybe associated with submitting this Motion for Leave.

The brief does not contain no irrelevant arguments, but in an effort to articulate what my Father wanted to convey and perhaps provide an insight of what believe is required.

Thank you. If you need any further information contact me at the address listed above.

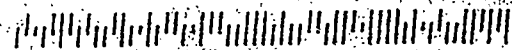
Sincerely,



Demetria D. Moore

cc: Bernard Bagley, #175851
Tommy Evans, Jr., SCDPPPS

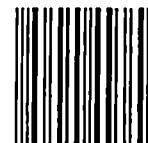
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