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**SEP 26 2016**

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM ADMINISTRATIVE LAW COURT  
Deborah B. Durden, Administrative Law Judge

Appellate Case No. 2015-000478

Bernard Bagley, #175851,

Petitioner,

v.

South Carolina Department of Probation,  
Parole and Pardon Services,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Bernard Bagley  
#175851/HD133/KER.CI  
4848 Goldmine Hwy.  
Kershaw, SC 29067

pro se

**LEGAL**

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CERTIFICATE OF COUNSEL

Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 18, 2016.

QUESTIONS PRESENTED

- I. Did the Court of Appeals err in holding that the ALC decision was made upon lawful procedure?
- II. Did the Court of Appeals err in holding that the ALC does not have jurisdiction to consider whether there is a rational nexus between the evidence in the notice of rejection and the ultimate determination of current dangerousness?
- III. Did the Court of Appeals err in holding that the Parole Board did not abused its discretion by concluding that heinous nature of crime alone was such as to preclude release on parole?

STATEMENT OF THE CASE

In 1991, a jury convicted Petitioner Bernard Bagley of non-capital murder of his wife, Mary D. Bagley, on August 23, 1990. Petitioner 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 also, when he was shot at twice at close distance in the line of duty while in Durham, along with the death of five (5) children burned to death during a house fire in which he was the first responder and could not enter the home to save the children during his position with Sumter County Sheriff's Department. Another of his informants shot and killed in Sumter South Carolina, along with the miscarriage Mary had in 1988, as well as being shot at, and aggravated assaulted in Sumter County. During his position with Columbia Police Department Bagley was shot at and first responder on several shootings and murder victims that he found during such responses, along with continued marital difficulties and separations numerous times.

The Petitioner and his wife married in 1986. They lived in Columbia, where Bernard worked as a city law enforcement officer. In 1987, the Bagley's separated and Bernard moved to Sumter to become a deputy with the Sumter County Sheriff's Department. Mary discovered that Petitioner was living in Sumter and she moved there, and they resumed their marriage. However, they continued marital diffi-

culties and separated again and again, eventually, they reconciled where their daughter was born. In August 1989, the Petitioner 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 arrived, they placed Mary under arrest for criminal domestic violence and for assaulting the arresting officer. Petitioner 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 talk to the Petitioner, 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, S.C.. When Petitioner 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 Petitioner discovered that Mary resigned from her banking job in Durham; withdrew all the money from their banking accounts; took all the emergency household money; and all the baby belongings, along with Bernard's personal money (\$700.00, traveler checks, and money orders).

The Petitioner left the academy and drove home and made the foregoing findings, and then he drove to Eastover to talk to Mary with no intentions to harm her or anyone, but after he arrived and her Mary laughing and discussing on the phone about how she tricked him, and talking about an affair with Donald Dubose, the Petitioner kicked in the door of his 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. Petitioner 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 Petitioner com-

mitted this offense, South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon service of twenty (20) years. The Petitioner made his initial appearance before the Parole Board on September 8, 2010. Upon conclusion of this appearance, the Parole Board denied parole. Since this initial denial, the Petitioner has appeared an additional two (2) times both resulting in a denial of parole. On October 12, 2012, the Petitioner was denied parole, and sought reversal from the ALC. The ALC affirmed the decision of the Parole Board. Upon receiving this decision, the Petitioner 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, WL4217379 (S.C. Ct.App.). On January 14, 2015, the Petitioner, 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 Petitioner's receiving the notice of rejection dated January 15, 2015, the Petitioner failed 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 Petitioner filed a notice of appeal before the Court of Appeals. Within the appeal the Petitioner attempted to articulate that the Board's decision to deny his request for parole does not reflect in its order due consideration whether there is a rational nexus between the evidence and the ultimate determination of current dangerousness, and he requested that the Court of Appeals vacate the decision, and that the Board immediately grant him conditional or provisional parole based on an individualized risk assessment criteria, which is not reflected in the order of denial. The Court of Appeals affirmed the ALC Judge Durden's order 5/11/16. Petitioner filed a petition for rehearing that was denied 8/18/16, *Bagley v. SCDPPPS*, UP. Op. No. 2016-UP-210 (S.C.

Ct. App. 5/11/16). Petitioner seeks a writ of certiorari to review that decision.

ARGUMENTS

1. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE ALC DECISION WAS MADE UPON UNLAWFUL PROCEDURE.

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. Constitution 14th Amendment, and S.C. Constitution Article 1, §3. ALC established the Special Appeals Rules of procedure used in appeals from final decisions of the Department of Corrections and Department of Probation, Parole and Pardon Services. These rules are based upon the Court's existing general procedural and appellate rules, with adaptations for this specific type of appeal.

The ALC Rule 62, Dismissal of Appeal; Sanctions, allows an ALJ to dismiss an appeal or resolve it adversely to an offending party for failure to comply with the rules of procedure for appeals, or for the failure to provide a factual basis for each alleged constitutional violation.

Here, the ALC Judge issued its order of dismissal on 2/12/15, sixteen (16) days after Petitioner filed his appeal on 1/27/15, without considering that the Board failed to render its decision without consideration of whether there is a rational nexus between the appropriate criteria and evidence and the ultimate determination of current dangerousness. Petitioner asserts that the ALC has jurisdiction to consider whether the Board's decision must reflect due consideration of the specified factors and positive factors as applied to the individual prisoner in accordance with applicable legal standards.

Rather, the ALJ stated that this is a routine denial of parole, and that the ALC has no authority to consider Petitioner's appeal based on the procedure employed by the Board in reaching its decision. Petitioner was not allowed to file his brief as required by ALC Rule 60, in which the rule provides the time frames for filing, format, and content of appellate briefs. Statements of fact set forth in the briefs are binding upon the proponent of the statement. The brief must be accompanied by proof of service. The ALJ arbitrarily and capriciously deprived Petitioner the opportunity to do such when she (ALJ Durden) dismissed his appeal 16 days after filing date upon an unlawful procedure she employed outside the scope of ALC Special Appeal Rules.

The Court of Appeals should have held that the ALC decision was made upon unlawful procedure.

2. THE COURT APPEALS SHOULD HAVE HELD THAT THE ALC DOES HAVE JURISDICTION TO CONSIDER WHETHER THERE IS A RATIONAL NEXUS BETWEEN THE EVIDENCE IN THE NOTICE OF REJECTION AND THE ULTIMATE DETERMINATION OF CURRENT DANGEROUSNESS.

## ARGUMENTS

The Court of Appeals should have held that the ALC does have jurisdiction to consider whether there is a rational nexus between the evidence in the notice of rejection and the ultimate determination of current dangerousness.

The Board's decision is arbitrary and capricious procedurally flawed, and it review hearings just by stating in its order(s) denying parole that it considered the factors outlined in §24-21-640 and the 15 factors published in its parole form without considering whether there is a rational nexus between any evidence and the ultimate determination of current dangerousness as required by constitutional standards applicable in S.C. Constitution Article 1, §3, and the Federal Constitution 14th Amendment. Cooper v. SCDPPPS, 661 S.E.2d 106 (2008) does not address this matter, and not doing so, the Board still essentially abrogates an inmate's right to parole eligibility and infringe on a state created liberty interest, warranting due process protection. Because the Parole Board in Bagley neither offered an explanation nor indicated it had considered the specified factors as applied to him the individual prisoner in accordance with applicable standards under constitutional standards.

The Board does not ask the question whether Bagley is currently dangerous, nor do the Board have any evidence regarding Bagley is currently dangerous. There is no evidence in the record or notice of rejection to support a rationally indicative of current dangerousness, only mere guesswork.

Petitioner asserts that to affirm a denial of parole the Board decision must reflect due consideration of all relevant statutory and factors published by SCDPPPS, and supported by evidence in the record rationally indicative of current dangerousness, not mere guessing.

The Board has arbitrary and capriciously has denied Petitioner parole in an effort to serve a term disproportionate to his culpability. The question in issue is Bagley's individual culpability for the commitment offense, not by concluding that the crime is heinous alone. The Petitioner contends that the circumstances in which his offenses were committed were wanton and reckless but the record will show that he is reformed and prepare for parole.

Petitioner asserts that an essential question for the Board is whether the determinate sentence law, the policy of uniformity in sentencing transcended the interest in protecting public safety? Viewed as a whole, the statutory scheme clearly elevates a life prisoner's individual reform or rehabilitation for parole above the inmate's expectancy in early setting of a parole date. See §24-21-640, and the criteria cannot authorize retention of a life prisoner eligible for parole, even for reasons of public safety, beyond the constitutional equality maximum period of confinement. Bagley further asserts that he believes that gravity of the commitment offense should not be used as a basis upon which to "routine deny him parole."

The Court of Appeals should have held that the ALC does have jurisdiction, and err upon unlawful procedure.

## ARGUMENTS

3. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE PAROLE BOARD ABUSED ITS DISCRETION BY CONCLUDING THAT HEINOUS NATURE OF CRIME ALONE WAS SUCH AS TO PRECLUDE RELEASE ON PAROLE.

In hearing and determining Petitioner's request for parole, the Board has responded, "I realize that you have very strong family support." But in doing so, the Board failed to consider the required positive factors, and did not base its decision on a single positive factor. Surely actual consideration of factors means more than acknowledging that evidence of them was before the Board.

Nowhere does the Board's decision reflect an assessment whether Petitioner posed a danger to society or would repeat his criminal conduct. Certainly if the Board had evaluated Petitioner's total reform and rehabilitation, the Board would have determined that this 58 year old grandfather posed no threat, but realistically promised to contribute to society's welfare and is ready to rejoin the community outside of prison.

Bagley asserts without undertaking this required assessment, the Board's determination not to release him on parole is arbitrary. Yet, the Board consideration of impermissible factors shows. Instead on undertaking the assessment required, the Board impermissibly considered the "heinous crime" Petitioner was serving a sentence for, such that the offense did not, no matter what the circumstances since that offense, warrant a sentence of life or to the remainder of his natural life, the sentence the court imposed. The Board's unjustifiable exclusive reliance on the severity of petitioner's offense exceeds its administrative discretion authorized by statute and thus contravenes that statutory scheme.

In essence, Bagley contends that the Board must consider the significant factors that can change, not "heinous crime" and "he had no jurisdiction here." Nevertheless, nowhere has the Board even hinted in the notice of rejection of how granting parole within the full range of his sentence would undermine respect for the law. Nature, seriousness, and violence of the crime cannot change, but if the Board consider the significant factors that can change is a determination that itself undermines respect for the law.

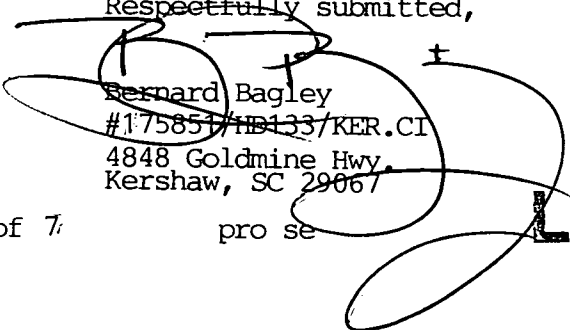
The Court of Appeals should have held that the Board considered impermissible factors upon unlawful procedure.

## CONCLUSION

For the reasons stated, Petitioner asks the Court to grant the petition for writ of certiorari.

September 15, 2016

Respectfully submitted,

  
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In The Supreme Court

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South Carolina Department of Probation,  
Parole and Pardon Services,

Respondent.

PROOF OF SERVICE

I, Bernard Bagley, the Petitioner, hereby certify that I have served the  
Petition for Writ of Certiorari dated September 15, 2016, on Respondent  
this 15th day of September, 2016, by depositing a copy of the same in the  
U.S. Mail, postage prepaid, addressed to: Tommy Evans, Jr.  
SCDPPPS Assistant General Counsel  
P.O. Box 50666  
Columbia, SC 29250

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

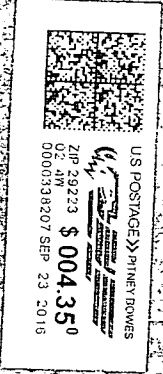
September 15, 2016

s/

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