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THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Deborah Brooks Durden
Unpublished Opinion No. 2016-UP-210(S.C. Ct. App. Filed 5/11/16)
Appellant Case No. 2016-001997
Docket Number 15-ALJ-15-0003-AP

BERNARD BAGLEY,.....:Petitioner,

v.

S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....RESPONDENT

RETURN TO PETITION FOR WRIT OF CERTIORARI

Tommy Evans, Jr.
Assistant General Counsel

**South Carolina Department of Probation,
Parole and Pardon Services
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ATTORNEY FOR THE RESPONDENT

STATEMENT OF THE CASE

On August 23, 1990, upon getting into an argument with his wife, the Appellant traveled from Raleigh, North Carolina to Eastover, South Carolina to confront her. Upon arrival the Appellant kicked in the door of his mother-in-law home, and inquired about an alleged affair. During the ensuing argument he shot her twice causing her death.

The Appellant was later arrested and indicted for the offense of murder. On April 12, 1991, the Appellant appeared before the Honorable Dan Laney to answer to this offense. Upon the conclusion of this appearance the Appellant was given a sentence of incarceration for the remainder of his natural life. 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 the conclusion of this appearance the Parole Board decided to deny parole. Since this initial denial, the Appellant has appeared an additional two time each resulting in a denial of parole. On October 10, 2012, the Board decided to deny the Appellant an opportunity to be released on parole. Upon being informed of this denial he filed a notice of appeal before the Administrative Law Court (ALC). The Honorable Deborah Brooks Durden, Administrative Law Court Judge decided to affirm the decision of the Board. Upon receiving Judge Durden's decision, the Appellant decided to file a notice of appeal before the South Carolina Court of Appeals.

Before the Court of Appeals the Respondent argued that the ALC made the correct decision dismissing this appeal. It was the Respondent's position that the Board revealed they followed all of the mandatory statutory, and department criteria. The Court of Appeals agreed with the ALC and issued an opinion affirming her decision. The Appellant now has filed a petition for writ of

certiorari. He requests the Supreme Court to review the decision of the Court of Appeals for a possible reversal of their previous decision. The Respondent is of the position that the decision of the Court of Appeals was lawful, and the reasons provided by the Appellant does not fall into the criteria that the Court may consider.

ARGUMENT

1. The Court of Appeals was correct in affirming the decision of the ALC due to the Board revealing that all of the mandatory criteria was considered prior to denial.

According to the rules the reasons the Supreme Court can consider when deciding to accept a petition for writ of certiorari includes: 1) where there are novel questions of law; 2) where there is a dissent in the decision of the Court of Appeals; 3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; 4) where substantial constitutional issues are directly involved; and, 5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242 (b)(1-5) SCACR.

The Appellant argues that the ALC made a determination prior to him being able to make an argument regarding his position as to the denial of his parole. Once the ALC determined that the Appellant failed to raise an issue that can be supported she had the right to dismiss this appeal, and the determination by the Court of Appeals was proper.¹

The ALC made the determination and the Court of Appeals affirmed that the record reveals the Board followed all of the mandatory criteria listed in the South Carolina Code of Laws and Department policy. In *Cooper v. S.C. Dept. of Probation, Parole, and Pardon Services*, 377 S.C.

¹ Upon motion of any party, or on its own motion, an Administrative Law Judge may dismiss an appeal or resolve the appeal adversely to the offending party for failure to comply with any of the rules of procedure for appeals, including the failure to comply with any of the time limits provided by this section, or for the failure to provide a factual basis for each expressly and specifically asserted constitutional violation as prescribed by Rule 59(B). Rule 62 SCRALC.

489, 66 S.E.2d 106 (2008), 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.

In the case at bar, the order of denial conformed to 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.

In *Cooper*, the court determined that the order denying parole was unlawful due to it not presenting any conclusion 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 So the ALC was correct determining that the Board revealed they followed all of the mandatory criteria, the Court of Appeals was also correct in affirming this decision.

2. The Appellant seeks remedies that cannot be given by the ALC nor the Court of Appeals.

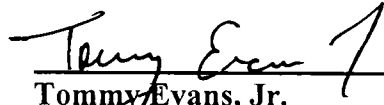
The Appellant argues that the Court of Appeals should have held that the ALC did have jurisdiction to consider a nexus between the notice of rejection and the possible future dangerousness was not considered; therefore, making this denial of parole unlawful. Any future dangerousness of an inmate appearing before the Board must be considered, however, this is a question of fact that can only be considered by the Board. The ALC nor the Court of Appeals has the ability to reverse a decision of the Board based on a question of fact. The Court shall not substitute its judgment for that of the agency as to weight of evidence on questions of fact. S.C. Code Ann. §1-23-380(5)(Supp. 2015). Matters brought before the Board including the crime committed, opinions of the victims, and the Appellant's prison record are all considered questions of fact. The ALC did not have the ability to review or reverse the decision of the Board, only if the Board failed to follow proper procedure can the ALC intervene and remand the case for a another hearing. The 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)(Supp. 2015). So the Court of Appeals was correct in not allowing the ALC to make a determination regarding the nexus between the criteria and the Appellant's future dangerous.

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).

CONCLUSION

For all the reasons set forth above, the Respondent submits this Court should deny the Petition for Writ of Certiorari and allow the case to remain as properly decided by the Court of Appeals. If the Court grants this petition the Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,



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October 18, 2016

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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that this 18th day of October, 2016, I served the following documents by first class mail, postage prepaid as follows:

1. Respondent's Return to Petition for Writ of Certiorari; and
2. Certificate of Service;

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

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