

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable H.W. Funderburk, Administrative Law Judge
Case No.: 16-ALJ-15-0045-AP

RECEIVED
JUN 16 2017
SC Court of Appeals

Appellate Case No. 2017-000852

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

v.

WILLIE ASBURY.....PETITIONER

RETURN TO MOTION TO PETITION FOR RE-HEARING

Comes now, Tommy Evans, Jr., Assistant General Counsel for the Respondent the South Carolina Department of Probation, Parole and Pardon Services, who respectfully requests this Court deny this petition for re-hearing. The Petitioner originally filed a notice of appeal before the Administrative Law Court (ALC) regarding the denial of the Petitioner's parole. On March 13, 2017, the Honorable H.W. Funderburk, Jr., Administrative Law Judge affirmed the decision of the Respondent. Upon receiving this decision the Petitioner filed a notice of appeal before this Court on April 6, 2017. The Petitioner filed a petition to proceed *in forma pauperis*, which was denied on May 5, 2017. As a result of this denial this Court ordered the Petitioner pay the filing fee within

fifteen days of that order. On May 23, 2017, this Court decided to dismiss the Petitioner's appeal due to his failure to pay the mandatory filing fee. On May 23, 2017, the Appellant filed a petition for re-hearing. The Petitioner now requests this Court to reconsider their decision regarding the denial of his petition to proceed *in forma pauperis*. The Respondent submits this Court is correct in denying this petition. This petition for re-hearing should be subject to dismissal.

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 Within his petition for re-hearing the Petitioner failed to present any points that this Court overlooked or misapprehended pursuant to South Carolina law. This Court has the ability to deny any inmate attempting to proceed in an appellant case *in forma pauperis*.

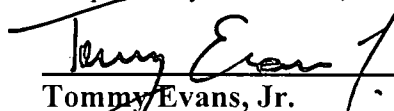
In the absence of a statutory provision allowing the general waiver of filing fees, motion to proceed *in forma pauperis* may only be granted, where specifically authorized by statute, or required by constitutional provisions. Martin v. State, 321 S.C. 533, 471 S.E.2d 134 (1995). The Petitioner has cited no statutory provision to support his motion, and the Respondent is not aware of any specific statutory authorization for the waiver of filing fees in appellant actions previously presented to the ALC. In support of his position, the Petitioner cites the decision of Lakes v. State, 333 S.C. 382, 510 S.E.2d 228 (1998). In Lakes, this Court determined that the Petitioner was entitled to proceed *in forma pauperis*. This was due to the nature of the case that the Petitioner was filed. In Lakes, the Petitioner filed a writ of habeas corpus which this Court determined should be treated as a post-conviction relief application, which is allowed to proceed without the payment of filing fees. This case is not on point with Lakes, so this Court should not grant this petition.

Constitutional provisions only require the granting of a motion to proceed *in forma pauperis* when a fundamental right is involved. Martin, *supra*. Compare Boddie v. Connecticut,

401 U.S. 371, 91 S.Ct. 780 (1971)(costs waived in divorce action); with United States v. Kras, 409 U.S. 434, 93 S.Ct. 631 (1971)(costs not waived in bankruptcy action). Here, the Petitioner is seeking relief regarding the Department's discretionary decision to deny parole. No constitutional right is implicated. Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979)(holding that there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence); Sullivan v. S.C. Dept. of Corrections, 355 S.C. 437, 586 S.E.2d 124 (2003)(finding there is neither a presumption of parole, nor a right to parole); Furtick v. S.C. Dept. of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2003)(noting there is no constitutionally protected Fourteenth Amendment liberty interest in parole).

There exist no statutory law that allows the waiver of fees or the guaranteed right to have the case presented before this Honorable Court. Thus, the Respondent submits this Court's original decision was correct pursuant to South Carolina law. Since this Court made the proper decision, the Petitioner failed to show any matter that was overlooked or misapprehended; therefore, this petition for re-hearing should be subject to dismissal.

Respectfully submitted,



Tommy Evans, Jr.
Assistant General Counsel
Attorney for the Respondent

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220

Columbia, South Carolina
June 12, 2017

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

HENRY McMASTER
Governor



JERRY B. ADGER
Director

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SC Court of Appeals

June 12, 2017

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Willie Asbury v. SCDPPPS

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Return to Petitioner's Motion for Rehearing, dated June 12, 2017, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Tommy Evans, Jr.".

Tommy Evans, Jr.
Legal Counsel

Enclosures

cc: Willie Asbury

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v.

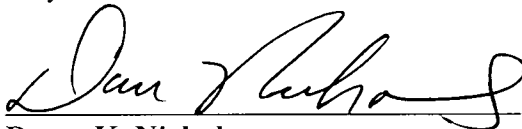
WILLIE ASBURY,PETITIONER.

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, certify that I have served the within Return to
Petitioner's Motion for Rehearing, dated June 12, 2017, on Petitioner by depositing a copy of the
same in the United States mail, postage prepaid, this 12th day of June, 2017, addressed to:

Willie Asbury, #200788
Kershaw Correctional Institution-MA-7B
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