STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from the Administrative Law Court
The Honorable Ralph King Anderson, III, Administrative Law Judge
Case No. 15-ALJ-15-0046-AP

Order Dismissing Appeal (S.C. Ct. App. filed February 15, 2017)
APPELLATE CASE No.: 2016-000296

APPELLATE CASE No.: 2017-001276

KENNETH GREEN, #116020

RESPONDENT.

v.

SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Trident Med. Ctr. v. S.C. Department of Health & Envtl. Control, 412 S.C. 341, 348, 772 S.E. 2d 177, 181 (Ct. App. 2015).

South Carolina Board of Paroles and Pardon, Operations Manual, January, 2014.(P. 35, No. 10)

Statute:

S.C. Code of Laws Ann. §24-21-645

Rule 242 S.C. SCACR

QUESTION PRESENTED

Does the question presented by the Petitioner rise to the level of a novel question of law?

STATEMENT OF THE CASE

On November 29, 2000, the Appellant appeared before the Parole Board and was denied parole with a vote of four (4) to two (2). Prior to the South Carolina Supreme Court's decision in 2013 in the case of Barton v. S.C. Department of Probation, Parole and Pardon Services, 404 SC 395, 745 S.E. 2d 110 (2013) the Parole Board required violent offenders to receive a vote of five (5) Board members to be granted parole.

After the Barton decision, the Department developed a procedure to review previous cases to determine if they qualified for release under Barton. (South Carolina Board of Paroles and Pardon, Operations manual, January, 2014)

Pursuant to that procedure, the Office of Parole Support Services would verify that the offender received the proper number of votes and the Office of Legal Services would verify that it qualified under Barton. The Board would then ratify the vote and impose any conditions that it felt necessary. A special order of Parole would be signed by the Board.

The Board met on July 22, 2015 and decided not to ratify the Appellant's vote and notified the Appellant that he would again be heard and considered for parole on or about March 11, 2016.

This matter was appealed to the Administrative Law court filed on August 21, 2015. The Administrative Law Court issued its opinion on February 11, 2016. The Appellant appealed that decision to the Court of Appeals. The Court of Appeals issued an Order Dismissing Appeal on February 15, 2017. Petitioner filed a Motion for Reconsideration which was denied on May 24, 2017.

STATEMENT OF THE FACTS

Respondent is serving a life sentence for murder. He received this sentence in 1983 in Dorchester County. He was sentenced to life imprisonment with a twenty (20) year parole eligibility. He has currently served thirty three (33) years on this sentence. He has received three (3) disciplinaries in the thirty three (33) years of incarceration.

On November 29, 2000, the Respondent went up for parole. There were six (6) member of the Parole Board present at the time of the vote. He received a vote of four (4) to two (2) and his parole was rejected. The vote count was not designated as four (4) in favor or four (4) against.

Pursuant to the South Carolina Supreme Court's decision in Barton, the Respondent had to receive a simple majority or a simple majority of the members present. Prior to Barton, Respondent would have needed to obtain five (5) votes to be granted parole.

The Respondent received and submitted sworn Affidavits of three prior members of the Parole Board (App. pp. 2-7). These prior members stated under oath that they voted in favor of release of the Respondent. One member, Mrs. Marlene McClain remembered that an additional member, Mr. Hodges (now deceased) voted in favor of release (App. pp 3-4). This makes four (4) votes in favor of release.

By letter dated July 22, 2015, the Board voted not to ratify the previous vote.

ARGUMENT

The Lower Court's decision provides a step by step analysis of the issues now before this Court.

First the Lower Court found that in Barton, the South Carolina Supreme Court held that the version of §24-21-645 existing at the time of an inmate's offense is what is applicable at an inmate's parole hearing.

Following the Barton decision, the Department began holding Barton hearings. The purpose of these hearings as set forth on page 35, Section 10 of the Department's January, 2014 Operations Manual is to determine whether an inmate received the proper number of votes pursuant to Barton.

In this case, the 1984 version of §24-21-645 was the law at the time of Respondent's offense and predates the Omnibus Criminal Justice Improvement Act of 1986. Thus the Respondent is only required to receive a simple majority of the Board.

In this case, the Respondent provided Affidavits from Bishop Sanco Rembert (App. p. 2), Marlene T. McClain (App. pp. 3-4) and June Shissias (App. p. 5) all of whom were Board members at the November 29, 2000 hearing. These members attest that they voted in favor of Respondent's parole. Ms. McClain also attests to the fact that J.P. Hodges, who has since died, also voted in favor of the Respondent being granted parole.

The Court noted that both Rembert and Shissias attested to the fact that they listened to the recording of the November 29, 2000 hearing which refreshed their recollection that they voted in favor of the Respondent being granted parole. Rembert

and Shissias also specifically explained that the Board had a tradition at that time of taking the yes votes first.

The Lower Court then found that there is nothing in the record that suggests that the Affidavits are not credible.

The Court concluded by stating that:

> "I find that there was uncontradicted evidence in the record to support the prior Board's finding of four favorable votes, and that number was the required number of favorable votes for parole, I find that the current Board's decision not to ratify the previous Board's four-to-two decision contradicted its own policy and was therefore arbitrary." (App. p. 17)
>
> "if the Board can reject all affidavits concerning past parole hearings based merely on the fact that the parole hearings happened years ago, then the Barton hearings would have no meaning, instead being subject to the whim and caprice of the Board." (App. p. 17)

In this Petition, the Petitioner's arguments are inconsistent with the Supreme Court's ruling in Barton and the Department's own established policy.

To quote the Lower Court "if the Board can reject all affidavits concerning past parole hearings based merely on the fact that the Parole hearings happened years ago, then the Barton hearing would have no meaning." (App. p. 17) The Respondent would go further to argue that this line of thought would render the Barton decision itself without meaning.

Pursuant to the Operations Manual of the South Carolina Board of Paroles and Pardons the Board may convene a Barton hearing. At that hearing the Board may impose any conditions on the offender as it feels necessary. The policy goes further to state that the Board **will** (emphasis added) then sign a special Barton order of parole which ratifies the votes of the previous Board members which would have granted conditional parole.

It is arguable that the operations manual does not provide for or allow the Board

to determine the validity of the votes. The Policy states that the office of Parole Support Services staff will investigate to verify that the offender received the proper number of votes and the Department's office of Legal Services will verify that it qualifies under Barton. At that point, the case is sent to the Board for ratification and any conditions of Parole may be imposed.

The Petitioner also argues that the Board may not go back to consider prior or subsequent hearings for guidance. This clearly defeats the holding in Barton and transforms the Barton hearing into an ordinary parole hearing, which is directly contrary to Barton and the Board's own procedural policy.

An arbitrary and capricious agency decision "is without rational basis, is based only on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules of principles." Timmier v. S.C. Dep't of Labor, Licensing & Regulation, 405 S.C. 239, 246, 746 S.E. 2d 491, 495 (Ct. App. 2013) (quoting Deese v. S.C. State Board of Dentistry, 286 S.C. 182, 184-85, 332 S.E. 2d 539, 541 (Ct. App. 1985)). An agency decision is an abuse of discretion when the decision is based upon a factual conclusion that is without evidentiary support. Trident Med. Ctr. v. S.C. Department of Health & Envtl. Control, 412 S.C. 341, 348, 772 S.E. 2d 177, 181 (Ct. App. 2015). Clearly the Board's decision was arbitrary and capricious.

The Petitioner filed their Petition for Writ of Certiorari due to what they claim is a novel question of law raised by the decision. (Rule 242 S.C. SCACR) The Respondent would argue that the Petition for Writ of Certiorari fails to adequately set out the standard as to why the issue presented would be a novel question of law. Respondent's argument

is that the Court of Appeals errored in affirming the decision of the Administrative Law Court.

The Petition for Writ of Certiorari continues to allege that there were factors that the Lower Courts overlooked prior to making their final decisions. However, it doesn't appear that any of the arguments presented in their Petition for Writ actually cites any type of factors that the Lower Courts overlooked.

The Petitioner seems to claim that the Parole Board is the only entity with the ability to determine if an inmate should be allowed to be release on parole. They go further to say that the Parole Board has the sole authority with respect to decisions regarding the granting or denial of parole, citing Cooper v. South Carolina Department of Probation, Parole and Pardon Services, 377 SC 489, 661 S.E. 2d 106 (2008).

The Petitioner argues that this authority gives the Board the ability to hold a Barton hearing to make the determination that the inmate has presented sufficient evidence revealing that they received 4 votes at a previous hearing. It is at this point in their Petition, that the Petitioner makes the argument that this is the "novel issue of law" in that; Can the ALC or the Court of Appeals, reverse a decision of the Parole Board, based upon a question of fact and not one of law.

The Respondent would argue that the Petitioner has completely missed the bases of the decision of both the Administrative Law Court and the Court of Appeals. The Petitioner argues correctly, that after Barton, they established a three pronged procedure that would give an inmate the ability to have a previous decision ratified by the current Board. The Petitioner, then states that the second prong is that, as a result of the investigation, this matter would be forwarded to the office of legal services to verify if it

qualifies under Barton, and thirdly, during a full board hearing, the Board would hold a Barton hearing and upon conclusion of this hearing, the Board makes a determination as to whether or not sufficient evidence was revealed to support the allegations made by the Respondent.

The Respondent would argue that the Petitioner's playing loosely with the facts as contained in their South Carolina Board of Parole and Pardon's Operational Manual, page 35, No. 10, addressing the Barton hearings. They state that the Supreme Court decision in Barton held that the Board is to consider a majority and 2/3 majority under different factual situations. They go further to say that if an offender's old vote is brought to the Department's attention, the Office of Parole Support Services staff will investigate to verify that the offender did receive the proper number of votes and then, the Department's Office of Legal Services would verify that it qualifies under Barton. It is at that point that the procedural manual states that the Department's Office of Victim Services will contact the victims and explain the Barton decision and the Board's vote and that during a full Board day, the Board will hold a Barton hearing on the offender. It states that at the Barton hearing, the Board may impose any condition on the offender as it feels necessary, including all statutory conditions. The Board will then sign a special Barton Order of Parole, which ratifies the vote of the previous Board Members which had granted conditional parole. The Petitioner's description of the procedure as contained in their Manual leads one to believe that it is only at the final full Board hearing that the Board makes a determination as to whether sufficient evidence was revealed. This is not according to their Procedural Manual. It clearly states that the Office of Parole Support Services verifies that the Offender did receive the proper number of votes and the

Department's Office of Legal Counsel verifies that it qualifies under Barton. Therefore, when this case actually appears before the Parole Board their only decision is whether or not to impose conditions on the offender and to ratify the votes of the previous Board Members.

Petitioner also argues that the Administrative Law Court is obligated to follow the rules of Administrative Procedures regarding substantial evidence. They go further to state that substantial evidence to support a finding of the Administrative Law Court is evidence which considering the record as a whole would allow rational minds to reach the conclusion that the Administrative Agency reached. In this situation, the only evidence that was present before the Parole Board was the fact that the Respondent received 4 votes for parole, which was all that was necessary for him to have been granted parole. There was no evidence that indicated that he did not receive four (4) votes. The recitation of the vote at the conclusion of the original hearing was 4 to 2. So it is clear, in this situation, that the Parole Board did not follow their procedures as set out in their Operational Manual for South Carolina Board of Parole and Pardons.

In addition, the Petitioner seems to make a fatal argument when the Board decided to hold a Barton decision that the final Parole Order must be signatures on the Parole Certificate and that the current Board Members cannot sign a Parole Order from a previous Board regarding a hearing that was not held before them. They go further to state that votes do not equal signatures and in order for parole to be granted, Board Member signatures must be placed on the Order of Parole.

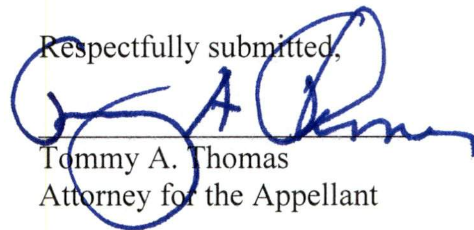
It appears that the Parole Board would like to believe that they have the ability to make the sole decision regarding the granting of parole, without out any oversight from

the Judiciary. While they concede that the Court of Appeals stated that they did not think the legislature established the Board to render decisions without any means of accountability, the argument of the Petitioner is just that.

CONCLUSION

That based upon the forgoing reasons, the Court should affirm the decision of the Administrative Law Court and the Court of Appeals. And deny the Petition for Writ of Certiorari.

Respectfully submitted,



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Attorney for the Appellant

July 3, 2017

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SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES,

PETITIONER.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Respondent hereby certify that I placed in the United States Mail, a copy of a Return to Petition for Writ of Certiorari, with postage prepaid and the return address clearly shown on said envelope to:

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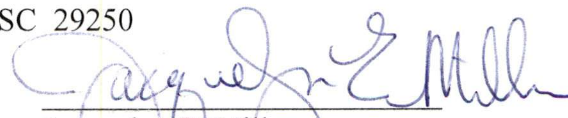

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July 3, 2017