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## STANDARD OF REVIEW

In an appeal from a ALC decision the Administrative procedure Act (APA) provides the appropriate standard of review. S.C. code Ann. 1-23-610 (B) (supp. 2012).

This court will only review the decision of a ALC if that decision is:

- (A) In violation of constitutional or statutory provisions,
- (B) In excess of the statutory authority of the agency,
- (C) Made under unlawful procedure,
- (D) Affect by other error of Law,
- (E) Clearly erroneous in view of the reliable, probative, and evidence on the whole record, or
- (F) Arbitrary, capricious or characterize by an abuse of discretion or unwarranted exercise of discretion.

"The court may not substitute it's Judgement for the Judgement of the [ALC] as to the weight of the evidence on question of fact fact". In deternining whether the ALC decision was supported by substancial evidence, this court need omly find, looking at the entire record on appeal evidence from which reasonable minds could reach the same conclusion that the ALC reached. Hill vs. S.C. Dept. of Health and Environmental control 698 S.E. 2d 612.

**STATE OF ISSUES ON APPEAL**

- 1. Was petitioner denied eligibility to participate in the parole program, by the parole Board continuing to use factors that will never change to deny him parole?**
  
- 2. Was petitioner's constitutional Due process right violated when the petitioner who is classified as violent had his parole hearing before only 6 parole Board members, thereby making him ineligible to participate in the parole program?**
  
- 3. Was petitioner unconstitutionally denied a meaningful opportunity to participate in the parole program, when the parole Board failed to consider the fact that petitioner was a Juvenile at the time of the offense. When the criteria for parole requires the Board to consider the petitioner before his incarceration?**

**STATEMENT OF THE CASE**

**Petitioner was indicted by the Lexington county Grand Jury, during the March 1, 1993 term of General Sessions Court for murder, A.B.W.I.K., Armed Robbery, Possession of a Firearm during the commission of a violent crime. On March 21, 1994 petitioner plead guilty and was sentenced to life. At the time of the offenses, petitioner was 17 years old.**

## ARGUMENTS.

Was petitioner denied eligibility to participate in the parole program by the parole Board continuing to use factors that will never change to deny him parole?

The Respondents in addressing this issue avoid the main point. Petitioner is being denied eligibility to participate in the parole program. Respondent's in their brief pages ROA 27-29. Articulate a statement that is based on the South Carolina decision in Cooper v. S.C.D.P.P.P.S. 377 S.C. 489, 661 S.E.2d 106. While this decision does set-out the mandates for a final order of the parole Board it does not address the eligibility.

Petitioner has a constitutional right to be eligible to participate in the parole program. The parole Board effectively rendered the petitioner ineligible for parole when it makes it's decision based on immutable factors.

1. Nature and seriousness of the current offense
2. Indication of violence in this or previous offense
3. Use of deadly weapon in this or previous offense

The seriousness of the underlying crime may be considered only as an element in determining whether the offender's punishment has been adequate. The parole Board must not construct artificial factors to deny Petitioner's eligibility to participate in the South Carolina parole program. S.C. Code Ann. 2421-140" the Board Must establish written specific criteria for the Granting of Parole and provisional parole". By using immutable factors to deny Petitioner's parole, the Parole Board in fact is denying Petitioner's eligibility to participate in the parole program. When the Board uses factors that never change, Petitioner is already denied parole before he even gets to the parole hearing, so the issue here is one of eligibility. When the criteria that is used is one that creates an opportunity for the Board to deny parole, before the Petitioner goes before the Board, then this criteria is not a criteria for the granting of parole. And therefore, not in line with what the General Assembly ordered. The Respondent does not deny that immutable factors deny eligibility, they only state that they follow the mandates of Cooper v. S.C.D.P.P.P.S. 615 S.E. 2d 106. When addressing this issue the ALJ followed the reason of the Board and avoided the point of eligibility!

Was petitioner constitutional Due process right violated when the petitioner who is classified as violent had his parole hearing before only 6 parole Board members, thereby making him ineligible to participate in the parole program?

The Administrative Law Judge in his order states "the court can find no authority to support the proposition that all seven members of the Board to be present to conduct a parole hearing" R.O.A. page 5.

South Carolina Board of parole and pardons policy and procedure manual page 15. states "violent versus non - violent. Offenders convicted of a violent crime will be scheduled for parole hearing before the full Board only". R.O.A. page 45.

Vested with the power from the South Carolina Legislature. The South Carolina parole Board created a policy and procedure for conducting parole hearings for violent crimes, and that policy and procedure is clear. When the parole Board fails to follow the correct criteria it essentially abrogates petitioner's right to parole eligibility. *Cooper v. S.C.D.P.P.S.* 661 S.E. 2d 106 (2007). By failing to have the correct number of Board members at the parole hearing the parole Board is denying petitioner his right to be eligible for parole this determination by the ALJ is clearly erroneous in view of the reliable, probative, and evidence on the whole record. See R.O.A. page 44-45. See *Hill v. S.C. Dept. of Health and Environmental control* 389 S.C. 1. 9. 10., 698 S.E. 2d 612 (2010).

3. Was petitioner unconstitutionally denied a meaningful opportunity to participate in the parole program, when the parole Board failed to consider the fact that the petitioner was a Juvenile at the time of the offense. When the criteria for parole consideration requires the parole Board to consider the petitioner before his incarceration?

Petitioner was 17 years old at the time of his offense. Our state and the U.S. supreme court have held that Juvenile's under the age of 18 are different from adults. Juvenile minds are not fully developed Aiken v. Byars 410 S.C. 534, 765 S.E. 2d 572; Miller v. Alabama 132 S.Ct. 2455. Petitioner has a right to a meaningful opportunity for release.

Juvenile characteristics should be considered in deciding parole. Montgomery v. Alabama 136 S.Ct. 718 (2016). See also: Hawkins v. N.Y.D.O.C. 30 N.Y.S. 3d 397 (NY Div 2016). Hayden v. Keller 137 F. Supp. 100 (Ed IVC 2015). Atwell v. State 197 50 3d 1040 (Fla 2016). And Greiman v. Hodges 79 F. Supp. 3d 933 (SD 2015).

The ALC in it's order R.O.A. page 5. states "this court finds the reasoning of the New York court persuasive. The appellants argument that the maturity of a Juvenile who has taken step to rehabilitate himself in prison should be considered by the Board has merit, in the court's opinion. Currently, to the court's knowledge the factors considered by the Board do not include this issue." Because, the appellant's recieved a routine denial of parole consistent with the current statutory and procedural due process requirement under South Carolina Law. The court cannot impose new requirements upon the Department's decision criminal procedure Laws that fail to take defendants youthfulness into account at all would be flawed. See Miller v. Alabama 132 S.Ct. at 2466.

Quoting Montgomery v. Louisiana 136 S.Ct. 718 (2016) (holding, in accord with Aiken v. Byars, that Miller is retroactive) The court held, for those persons convicted of crimes committed as Juvenile who, but for a favorable parole determination will be punished by life in prison

The Board must consider youth and its attendant characteristics in relationship to the commission of the crime at issue.

The Respondents, when addressing this issue on page 31, R.O.A. states: "the circumstances surrounding the offense is always considered by the Board for each inmate appearing before them requesting to be released on parole". The Board in addressing this issue fail to express how, or when, they consider factors as transient as youth itself. But, instead, rely on factors that never change to deny Petitioner parole.

Reading the determination by the ALC, that this is an issue that must be a part of any parole decision involving a person who was a juvenile at the time the offense was committed. But, is not mandated by Law. While the Board states that the circumstances surround the crime is consider, they don't indicate that any consideration is given to his youthfulness.

No clearly established (State) Law exist with the respect to Petitioner's claim because no decision by the court applies to the specific facts of this case. There is a universal reason to use the determination on this issue by other jurisdictions.

Petitioner's Mitigating Juvenile characteristic should be considered in deciding parole. *Montgomery v. Alabama* 136, S.Ct. 718. *Hawkins v. N.Y.D.O.C.* 30 N.Y.S. 3d 397, (N.Y. App. Div. 2016), *Hayden v. Keller* 134 F. Supp. 100 (Ed NC 2015) *Atwell v. State* 197 50. 3d 1040 (Fla 2016), *Greiman v. Hodges* 79 F. Supp. 3d 933 (SD 2015). There are many different circuits that have addressed this issue for this Court to rely on. This Court acting under the power given to it by the General Assembly can go outside this Jurisdiction and rely on determination by other circuits to form a determination that addresses this very important issue.

#### CONCLUSIONS

Petitioner is requesting that this Court order the Petitioner be given a parole hearing with the correct number of Board members. And that his age at the time of the offense be considered in the parole Decision.