

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Deborah Brooks Durden, Administrative Law Court Judge
Appellate Case No. 2016-000225
Case No. 15-ALC-0033-AP

S.C. SUPREME COURT

DAVID ROSE, #91858,.....PETITIONER

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of authorities.....i

Statement of the case.....1

Arguments

 1. The decision of the ALC was not supported by substantial evidence so the reversal by the Court of Appeals was lawful.....3

 2. The ALC did not have the authority to release someone to parole, the Court of Appeals was correct in reversing this decision.....7

Conclusion.....9

TABLE OF AUTHORITIES

CASES

Barton v. S.C. Dept. of Probation, Parole and Pardon Services, 404 S.C. 395, 745 S.E.2d 110 (2013).....3

Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991).....7

Furtick v. S.C. Dept. of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2003).....2

Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981).....6

Leventis v. South Carolina Department of Health and Environmental Control, 340 S.C. 118, 530 S.E.2d 643 (2000).....4

State v. McKay, 300 S.C. 113, 386 S.E.2d 623 (1989).....7

Summersell v. South Carolina Department of Public Safety, 334 S.C. 357, 513 S.E.2d 619 (1999).6

RULES

Rule 242(b)(1-5)SCACR.....4

STATUTE

S.C. Code Ann. §24-21-640(2014).....7

S.C. Code Ann. §24-21-650(2014).....7

STATEMENT OF THE CASE

On April 6, 1978, the Petitioner along with his co-defendant Jack B. Oliphant approached a child near his home in Laurens County, South Carolina. Upon asking the child to show them directions to a nearby address, they forced the child into a vehicle and drove him to Greenville. They held him captive for eighteen hours demanding a ransom for his return. Upon hearing on the radio that the authorities were actively searching for his whereabouts, the defendants decided to release the child in a nearby rural area. Both defendants were later found, arrested and charged with the offenses of kidnapping.

On May 22, 1978, the Petitioner appeared before the Honorable James Moore for the offense of kidnapping. Upon the completion of this appearance the Petitioner was sentenced to a term of incarceration for the remainder of his natural life.¹ At the time the Petitioner committed this offense South Carolina law allowed an individual serving a life sentence for kidnapping parole eligibility upon the service of ten years.

The Petitioner was granted parole in 1987. The Petitioner failed to report, so in 1991 an arrest warrant was issued. He was then placed on absconder status. It was later discovered that he was residing in Florida. He was extradited back to South Carolina and his parole was revoked on June 14, 2000. After this revocation, the Petitioner's first reappearance before the Board occurred on June 20, 2001. At the conclusion of this hearing the Board denied the Petitioner's request for parole.

On February 26, 2014, the Petitioner filed a summons and complaint in Circuit Court against the Respondent. Within this complaint the Petitioner argued that he received four affirmative votes, so he should be released on parole. As a result of this complaint the Respondent

¹ Co-Defendant Jack Oliphant was also given a life sentence for the offense of kidnapping. He was paroled on February 21, 1986, he currently remains on parole and is now residing in the state of Georgia.

made a motion for dismissal arguing that due to the South Carolina Supreme Court decision of *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2003), the Circuit Court does not have jurisdiction over parole decisions. On May 19, 2014, a hearing regarding the Petitioner's motion to dismiss was held before the Honorable Frank R. Addy. Upon the conclusion of this hearing, Judge Addy held his decision in abeyance, and ordered the Respondent conduct an investigation to determine if he had received four votes at the conclusion of his 2001 hearing.

During this investigation, the Respondent discovered that the recording of the 2001 parole hearing had been destroyed. However, the Petitioner did receive a copy of this recording prior to it being destroyed.² The only evidence submitted by the Petitioner proving that he was given four votes was an affidavit from his cousin Mr. Carlos Bell. Within this affidavit, Mr. Bell stated that the Petitioner's lawyer spoke to an employee of the Respondent who informed him that the Petitioner received four votes for parole and two against. Mr. Bell stated that the Petitioner's lawyer then informed all of them of this vote count. At the conclusion of this investigation, the Respondent determined there was insufficient evidence to support Petitioner's claim that he received four votes in favor of parole. Therefore, the Respondent denied the Petitioner's request. Once Judge Addy was made aware of the results of this investigation he granted the motion to dismiss on May 1, 2015. Upon receiving Judge Addy's decision, the Petitioner filed a notice of appeal before the Administrative Law Court (ALC).

Administrative Law Judge Deborah Brooks Durden decided to overturn Department's determination. She ordered the matter be remanded to the Board to determine conditions for release on parole. In her decision she determined that the Respondent failed to produce a scintilla of

² The Petitioner had the recording transcribed, which did not reveal the vote of the Board. Instead, the recording revealed the Board denied the Petitioner's parole without deliberation.

evidence refuting the Petitioner's claim that he received the sufficient votes to be granted parole, and that the decision in *Barton v. S.C. Dept. of Probation, Parole and Pardon Services*, 4040 S.C. 395, 745 S.E.2d 110 (2013), should be applied retroactively to this matter.

Upon receiving this ALC decision, the Respondent filed a timely notice of appeal before the South Carolina Court of Appeals. At the conclusion of the appeal the Court of Appeals ruled that the determination of the ALC was not supported by substantial evidence, reversing the decision of the ALC.

The Petitioner now files this petition for writ of certiorari before the South Carolina Supreme Court. The Respondent will argue that the Petitioner failed to provide substantial evidence that he received four affirmative votes at the 2001 hearing. The ALC's decision was made in error. The Court of Appeals was correct in the reversal of the decision of the ALC; therefore, this petition for writ of certiorari should be denied.

ARGUMENTS

1. The decision of the ALC was not supported by substantial evidence so the reversal by the Court of Appeals was lawful.

The Petitioner now presents this petition for writ of certiorari requesting this Honorable Court to issue a writ of certiorari and reverse the final decision of the Court of Appeals. The Respondent argues that this case does not fall within the reasons proscribed under the South Carolina rules of Appellate Practice, establishing a writ of certiorari.

The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

- (1) Where there are a 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.
- (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 above-referenced rule is not a criteria that the Court strictly abides by in making a decision regarding the granting of a writ. However, within this listing there is only one that remotely applies to this cause of action. There are no novel questions of law which were not properly addressed and decided by the Court of Appeals. This is due to the fact clear substantial evidence was not revealed to the agency so the Petitioner should not have prevailed. The ALC was incorrect in shifting the burden to the Respondent. The Petitioner was the party who brought this cause of action so the burden lies with him to prove that this denial of parole was done unlawfully.

The Petitioner has never revealed substantial evidence that he received the four votes needed to be granted parole. The ALC unlawfully placed that burden on the Respondent, when the burden of proof belongs with the party presenting the cause of action. In administrative proceedings, the general rule is that an Appellant for relief or a privilege has the burden of proof, and the burden of proof rest upon whoever files a claim with an administrative agency to establish that required conditions of eligibility have been met. *Leventis v. South Carolina Department of Health and Environmental Control*, 340 S.C. 118, 530 S.E.2d 643 (2000). The Court of Appeals correctly decided that the submission of just an affidavit by the Petitioner's cousin could be determined as insufficient substantial evidence to be granted parole. This is due to the fact it is reasonable for the Respondent not to find the Petitioner's cousin's statement credible if it is not supported by other nonbiased substantial evidence.

The affidavit that was submitted was also hearsay evidence and therefore inadmissible. The Petitioner argues that this evidence is not hearsay due to the fact it should be considered a statement against interest. However, no proof has been presented to the Respondent, the ALC nor the Court of Appeals that this statement was ever made by an Department employee, or that this employee even existed. Since there was no formal statement made by an employee or even a description made of this employee, this cannot be determined as a statement against interest. Mr. Bell's statement says he received information from the Petitioner's lawyer, who claimed to have received this information from an unidentified employee. This is clearly hearsay which makes this statement inadmissible.

The Petitioner also failed to present statements from his attorney, nor his sister Kathy Todd who was present at his hearing. No affidavits from Board members who presided over his hearing who could attest if he received four affirmative votes, was not presented. This has been done in other instances to prove the vote count of the inmate when agency records are unclear. If any of these items were presented it could have provided corroboration of Mr. Bell's statement. Since this was not provided, all the Department had to rely on in making a decision is the statement of the Petitioner's cousin. The Court of Appeals found it reasonable for the Respondent to deny parole due to the lack of evidence provided by the Petitioner. Therefore, it properly determined the decision of the ALC was unlawful.

Within his petition the Petitioner request this Court reverse the decision of the Court of Appeals, thereby affirming the decision of the ALC. The Petitioner request this case go back to the ALC so these conditions can be applied, and he be released on parole. The Court of Appeals was correct in its decision that the ALC's decision was not supported by substantial evidence. The Respondent made a decision to deny the Petitioner's request for parole. This decision cannot be

reversed by the ALC without substantial evidence being placed in the record revealing that this decision was made in error. The findings of an administrative agency are presumed correct and will be set aside only if supported by substantial evidence. *Summersell v. South Carolina Department of Public Safety*, 334 S.C. 357, 513 S.E.2d 619 (1999). It should be considered reasonable that the Respondent will not want to grant a person convicted of a violent crime parole when the only evidence presented is an affidavit signed by his cousin. Substantial evidence is evidence which considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981). If the Department believed the Petitioner failed to provide sufficient evidence to verify a ratification of a Board's previous vote, that determination must be upheld.

The entire record must be considered prior to making a decision. The ALC ignored substantial evidence in the record that would make it reasonable to decide that the Petitioner did not receive four affirmative votes. The Petitioner received no votes in favor of parole in fourteen years of subsequent hearings. If he received four affirmative votes, in 2001, it is reasonable to expect he should have received at least one vote from the identical Board at his next hearing in 2003. But instead he received no votes at that hearing and every hearing thereafter. Furthermore, his parole was just revoked a year earlier; there was no mention of the vote count or any deliberation as in other hearings that are not unanimous. He also absconded supervision from 1991 until 2000, and eventually found in the state of Florida. The Board is usually inclined to deny parole upon a hearing held that close to a previous revocation. These are factors in the record that the ALC ignored even though this reveals the reasonableness of the Respondent's decision not to grant parole.

2. The ALC did not have the authority to release someone to parole, the Court of Appeals was correct in reversing this decision.

The Petitioner argues that the ALC's decision was correct, and request this Court to affirm a decision that is not permissible pursuant to South Carolina law. The ALC ordered that the decision of the Board be reversed and the case be remanded for the Board to determine conditions for parole. The ALC essentially ordered that the Petitioner be released on parole which is beyond the jurisdiction of the Court. A release on parole lies totally with the Parole Board, "no such prisoner may be paroled until it appears to the satisfaction of the board." S.C. Code Ann. §24-21-640(2014). The only authority to sign an order of release to parole is the Parole Board. Importantly, the order authorizing parole must be signed by the majority of members of the Board S.C. Code Ann. §24-21-650 (2014). Without the signatures of the Board, the Department has no authority to order the release of an inmate to parole. Because the ALC ordered the Board convene a hearing pursuant to *Barton* for the sole purpose to imposing conditions of parole, the ALC made itself the determining body regarding parole. That responsibility was never given to the courts. Parole eligibility is not a matter within the jurisdiction of the trial court, but falls within the province of the Board of Probation, Parole, and Pardons. *Brown v. State*, 306 S.C. 381, 412 S.E.2d 399 (1991). Section 24-21-640 specifically provides for the Board to consider the complete record of a prisoner and delegates to the Board the responsibility of determining if and when a prisoner meets the prerequisites of parole eligibility. *State v. McKay*, 300 S.C. 113, 386 S.E.2d 623 (1989).

Within his petition the Petitioner request that a *Barton* hearing be conducted on his behalf.³ The Petitioner seems to be of the opinion that *Barton* hearings were just a rubber stamp to allow individuals parole. This was never the case. A decision of the Department pursuant to *Barton* was

³ Due to an opinion made by the Honorable Ralph King Anderson III, that the *Barton* decision was meant not to be retroactive, the Department no longer conducts *Barton* hearings.

three fold. First, the office of Board Support Services will conduct an investigation to verify if the prisoner has possibly received the proper number of votes; second, the Office of Legal Services will verify if it qualifies under *Barton*; and third, the Board holds a hearing during a full board day. The Petitioner failed to persuade the office of Board Support Services that he received four votes, a decision that the Court of Appeals decided was reasonable. The ALC erred in their decision due to the fact there was no substantial evidence presented by the Petitioner revealing that he received the sufficient votes to be granted parole. The Court of Appeals made the correct decision in reversing the decision of the ALC.

The Petitioner has presented no evidence of wrongdoing made by the Court of Appeals. There exist no novel questions of law that were not considered and correctly decided by the Court of Appeals. The ALC erred in determining that it was the responsibility of the Respondents to present substantial evidence in order to deny the Petitioner's appeal. Pursuant to South Carolina law, that is the responsibility of the Petitioner-which he failed to accomplish. The ALC granted relief to the Petitioner which was not supported by substantial evidence, so this decision was in error. Since the Court of Appeals was correct in their decision, and the Petitioner failed to present any wrongdoing committed by the Court of Appeals, this petition should be denied.

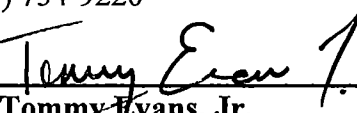
CONCLUSION

For all the reasons set forth above, the Respondent submits this Court should deny this 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 for Writ of Certiorari, the Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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September 25, 2018

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S.C. DEPARTMENT OF PROBATION, PAROLE
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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that this 25th day of September, 2018, I served the Respondent's Return to Petition for Writ of Certiorari and Certificate of Service by first class mail, postage prepaid as follows:

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



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