The State of South Carolina
In The Court of Appeals

Appeal from Richland County
Administrative Law Judge
Ralph K. Anderson III
Administrative Law Judge
Case No: 13-ALJ-15-0004-AP

Robert F. Spigner, 065500
Appellant

v.

South Carolina Dept. of Pardon
Probation and Parole Services
Respondents.

Final Brief of The
Appellant
Appellant Case
No: 2013-01380

Dated: Sept. 27, 2013

Robert F. Spigner

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Statement Of Issues On Appeal

1. Did the S.C. Parole Board render Appellant ineligible for Parole when they failed to follow S.C. Statutory Requirements as set forth in S.C. Code Ann 24-21-10(F)(1) Supp. 2010 as well as S.C. Omnibus Crime Reduction and Sentencing Act of 2010?

2. Did the S.C. Parole Board Render Appellant ineligible for Parole by deciding his case prior to the time he was given his pre-parole interview?, thus denying Appellant his just and fair opportunity and right to be heard as set forth in the Parole Boards own Established Criteria and dictated by S.C. Code Ann 24-21-640 (2012)?

3. Did the S.C. Parole Board apply incorrect and improper Criteria (Law and Statutes), in deciding Appellant's parole?, thereby rendering Appellant ineligible for parole? One of many questions raised herein is: What determinative Method, And by what Authority did the S.C.D.P.P.S.

Utilize to change Appellants Original 1971 Common Law Felony into a 1986 Omnibus Crime Bill Violent Offense? And thereby using that after established Criteria as to Appellants Eligibility?

Statement of The Case

On September 8, 1971, Appellant was sentenced to Life Imprisonment for the Crime of Common Law Murder, S.C. Code Ann. 16-3-10__

On July 7, 1981 Appellant was paroled.

In September of 2000 Appellants parole was revoked for Compliance issues, Missing Report date, Changing Residence without permission and Drug use (misdemeaner) Since this sole revocation Appellant has unsuccessfully appeared before the Parole Board on six(6) occations, the last appearance occuring on October 10, 2012. Appellant was also denied reinstatement on Parole at that time.

On October 25, 2012, Appellant requested a rehearing and was denied on December 13, 2012.

A Timely notice of Appeal was properly filed with the Administrative Law Court on January 7, 2013.

On May 24, 2013, The Administrative Law Court Judge by order denied Appellants Appeals.

On June 20, 2013, Notice of Appeal was properly filed with the S.C. Court of Appeals.

This Appeals Follows.

Standard Of Review

In an appeal from an ALC decision the Administrative Procedures Act (APA) provides the appropriate standard of review. S.C. Code Ann. 1-23-610 (B)(Supp 2012).

This Court will only reverse 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) affected 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 Characterized by an abuse of discretion or unwarranted exercise of discretion.
id "The Court may not substitute its Judgement for the Judgement of the [ALC] as to the weight of the evidence on questions of fact". (Alterations added).

In determining whether the ALC's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached. Hill v. S.C. Dept. of Health and Envtl. Control, 389 S.C. 1, 9-10, 698 S.E.2d 612, 617 (2010).

ARGUMENTS

1. Did the S.C. Parole Board render Appellant ineligible for parole when they failed to follow S.C. Code Ann. 24-21-10 (F)(1). Supp 2010, as well as the S.C. Omnibus Crime Reduction and Sentencing Act of 2010?

The Parole Board did not give Appellant COMPAS as is required by S.C. Code Ann. 24-21-10(F)(1) and the S.C. Omnibus Crime Reduction and Sentencing Act of 2010.

The ALC in his Order dated May 24, 2013 States" that because Appellant used the wrong cite when presenting this issue that he Abandoned this issue". See Order Pg 4 of Record on Appeal, (this will be represented by R Pg in the remaining Arguments). Appellant who is pro-se and acts in good faith in all his efforts, Admits to A Scriveners Error in Mistakenly References S.C. Code Ann 1-23-380. However, Appellant didn't use the language of S.C. Code Ann. 1-23-380 but, did use the proper language and intent of,

the Correct Cite S.C. Code Ann. 24-21-10(F)(1) Supp. 2010. In any event take note that the Respondent did not argue this point.

The Respondent and the Court states that Appellant's issues should be dismissed because COMPAS is not Mandatory. However, in this Regard both the Court and the Respondent cite S.C. Code Ann. 24-21-10(F)(1) Supp 2010, as the Correct Cite of Statutory Law for this issue. See ALC Order R4. 3., and Respondent's brief R4. 26. which states "the Department MUST develope a plan that includes the following: 1, Establishment of a process for Adopting a validated Acturial Risk Needs Assessment tool Consistent with Evidence based practices and factors that Contribute to Criminal behavior, which the Parole Board Shall use in Making Parole decisions.

Both the Court and the Respondent ignore the Meaning of the words "MUST" used to say that Something is Required by Rule of Law, Merriam Webster English Dictionary. Pg. 1069 (2008) And "Shall" a command used in Rule of Law to say

that something is Required, Merriam Webster English Dictionary Pg. 1493 (2008).

Appellant Argues that the Respondent and Subsequently the ALC's interpretation of the words Must and Shall used in the Statute S.C. Code 24-21-10(F)(1) is Erroneous and Should be Rejected, See Barton v. South Carolina Dept. of Pardon, Probation and Parole Services ___ S.E.2d ___ 2013, WL 3366669 S.C. ___ 2013, Respondents Must Give Correct interpretation of the Statute.

The ALC on Pg. 4 of it's Order States "Appellant has cited no Legal Authority Showing the department was Required to use COMPAS." This Statement is Clearly Erroneous! But, perhaps most troubling About the ALC Statement is lack of Support in the Record. Appellant Cited the S.C. Omnibus Crime Reduction and Sentencing Act of 2010, See Appellant's Original Brief R Pg. 15. While both the ALC and the Respondents State that COMPAS is not Mandatory, they Offer No Authority or Proof.

S.C. Code Ann. 24-21-10 (D)(1) Supp 2010 Requires Training for Parole Board Members and it's Agents.

Would the State Legislature require time and money be spent to train staff for something that is NOT MANDATORY? If not required as Mandatory, then the S.C. State Legislature would not have used the word "Required" to call for as Obligatory or Appropriate; demand". The American Heritage College Dictionary Pg. 1160, 2008. Appellant was never given COMPAS as is Manditorily required by S.C. Code Ann. 24-21-10(F)(1), this Statute went into effect on January 1, 2011. COMPAS is Obligatory to be used as a Mandated requirement for Parole Consideration.

This Cited Statute Evidences the proof that COMPAS WAS and IS Mandatory.

S.C. Code Ann 24-21-10 (F)(2) Supp 2010 "Establishment of Procedure for the Department of Pardons, Probation and Parole Services on the use of the Validated Assessment Tool to guide the Departments Parole Board".

Appellant has a Substantial personal right to Statutorily Correct Parole Review. Appellant does have a right to Require the Parole Board to adhere to Statutory Requirement in Rendering A decision Supp Cooper. The Cardinal Rule

of Statutory Construction is to ACERTAIN and EFFECTUATE the INTENT of this State LEGISLATURE. Media General Comm'n Inc. v. S.C. Department of Revenue 388 S.C. 138, 694 S.E. 2d 525 (2010). "Where the Statute's Language is plain, unambiguous, and conveys a clear definite meaning, the Rule of Statutory interpretation are not needed and the Court has no right to impose another meaning." Gay v. Ariail 381 S.C. 341, 673 S.E.2d 418 (2009). "If the is ambiguous, the Court must construe the terms of the Statute." Town of Mt. Pleasant v. Roberts 393 S.C. 332, 713 S.E.2d 278 (2011).

When the Parole Board deviates from, or fails to render it's decision without consideration of the Appropriate Criteria, it ESSENTIALLY ABROGATES Appellants right to be parole eligible and thus infringes on a State Created Liberty Interest" Cooper v. S.C.D.P.P.S. 377 S.C. 489, 661 S.E.2d 106 (2008). By their own Admission, the S.C.D.P.P.S Parole Board of (they Claim COMPAS is not Mandatory) did not use the Correct Criteria in Making Appellants parole decision. This failure

is a crucial and critical element of Appellant's Appeal.

The S.C. Supreme Court has determined in Hinton v. S.C.D.P.P.S. 357 S.C. 327 ___ S.E.2d ___ (2004) "We find it unacceptable that the Parole Board should look to the so called facts of the case to make its determination for the facts are almost always disputed". Thus, the S.C. State Supreme Court having opined to the negative aspect of using "so called facts" it is antagonistic to fairness that the Parole Board continues to use and subscribe to its stated reasons/ policy.

Appellant now appropriately questions the Method and Authorities used by the Parole Board in making its decision since by their own admission they have not used the Mandatory Criteria (Respondent State that Appellant was not given COMPAS, because (COMPAS was not Mandatory.) SEE R. Brief, R Pg 26. Appellant posits that whatever it is that the Parole Board of, has used is outside of the Legal and proper Standards

And requirements of both the S.C. State Legislature and the S.C. State Supreme Court. See. S.C. Code Ann. 24-21-10(F)(1) COMPAS, and Hinton Supra. Appellant has cited Statute and Authority in this brief. This issue should be heard because the S.C. Parole Board interpretation effects other similarly situated individuals.

2. Did the S.C.D.P.P.S. (Parole Board OF) render Appellant ineligible for Parole by deciding Appellant's case prior to the time Appellant was interviewed for Pre-parole interview, thus, denying Appellant his Just and Fair Opportunity and Right to be heard as set forth in the Parole Boards Established Criteria and dictated by S.C. Code Ann. 24-21-640 (2012).

The Respondent's States on R. Pg 29, "the Parole Boards decision was not made prior to the Pre-Parole investigation". This Averment is Contrary to the official S.C.D.C. documentation Reported by the head of Classification at the Broad River Correctional Institution. The Board

And Legal Counsel does not dispute or explain away the response Appellant recieved from the head of Classification, see Rpg 24 S.C.O.C Inmate Request To Staff, dated September 9, 2012. Respondent offers no Evidence or Proof that the Appellant was not denied Parole on or before June 23, 2012

"MERE SCRIVENOUS ERROR" SEE ALC Order Rpg 6 and 7, The ALC opines that this was a "MERE SCRIVENOUS ERROR" The ALC also states "An Adequate de novo review renders harmless a procedural Due Process violation based on the insufficeney Of the Lower Administrative body".

Appellant posits how is it appropriate or proper for the ALC to provide a defense for the respondents?

The respondent did not provide a core defense or principle rebuttle for themselves. See Rpg. 28 and 29. Respondent never said alleged or offered that it was any kind of an error. When the respondent concedes to the facts given in the presentation in the Appellant's brief, those facts carry the

weight of the preponderance of the evidence which fulfills the fundamental element of the law; and further creates proof in the favor of the Appellant.

The ALC is remiss in arguing for the respondents and dismissing this issue, when the respondent fails to address the principle issue themselves. The respondent made a mere conclusory statement see Rg. 29, made without offering any cognitive reasoning or citing any authority whatsoever.

Is it appropriate and/or legally permissable to allow the respondent to deliberately ignore a valid critical appeal issue within their formal brief, put forth in response? When the respondent failed to assert affirmatively any objection to this claim by the Appellant, the Respondent in effect, in law and equity waived the right to further judicial review. See U.S. v. Schrone 727 F2d 91 (4th cir 1984). The honorable ALC in it's Order Rg. 5, citing Rule 208(B)(1)(D), SLACR, Divine v. Robbins 385 S.C. 23, 683 SE2d 286 (ct App 2009)

(noting that when a party fails to cite Authority or when the Argument is simply a conclusory statement, the party is deemed to have Abandoned the issue on Appeal) (short Conclusory Statements made without Supporting Authority are deemed Abandoned on Appeal, and therefore not Reserved for Our review).

Unlike Application to the Appellant why did not the ALC likewise Apply these Court Rules, Authorities and Opinions to the Respondent? Appellant Contends the Straight forward answer issues a clarion call that Equal and Balanced Justice is Absent.

Abandonment of a Claim is not a principle that works only to the detriment of the Appellant. It is a Sword that Cuts both ways. Justice Must not only be Just, Justice Must give the Appearance of Justice, and Avoid EVEN the Suggestion of favoritism.

This Honorable Court will please take note that in all of the Appellant's briefs, the Appellant Cites Authorities and Undertakes to Explain the issues.

The honorable found that the de novo review was given on October 10, 2012, and thus cured any procedural Due Process violations. See Order R.S. 7. The Court cites Unisys Corporation v. S.C. Budget and Control Board Division of General Services Information Management Office. 346 S.C. 158, 551 S.E.2d 263 (2001) "An adequate de novo review renders harmless a procedural Due Process violation based on the insufficiency of the lower administrative body". There are two points that attest that this Authority does not apply here. First, the Court omitted a very important term when quoting this case law "Impartial Panel" See 551 S.E.2d 272 key 17. It is axiomatic that the same Parole Board members sitting there after cannot be "Impartial" as is required, and presumably will infect the judgement of the remainder of the process, to include, but not limited to the Parole Boards later meeting. Second, the adequate de novo review rendering harmless a procedural Due Process violation based on the insufficiency of the lower administrative body, means that the de novo

Review is done by a higher body. Such is not the case in the instant process under scrutiny.

It is inappropriate and foreign to Justice and fairness in Law and Equity for the Court to attempt to Justify the Respondent Actions, especially in consideration that the Respondent failed to raise this issue for Proper adjudication. The U.S. Const. Amends V., XIV., the Due Process Protection mandates that the trial and Appeals be heard by disinterested and impartial Judicial Officers. See Caperton v. V.A.T. Massey Coal Company Inc. ___ U.S. ___ (2009)(WL1576573). Ward v. Village of Monroeville, Ohio, 409 U.S. 57, 59-62 (1972). And, Tomey v. Ohio 273 U.S. 510, 532 (1927). This issue Should be remanded for Proper Consideration

3. Did the S.C. Parole Board apply improper and incorrect Criteria (Law and Statutes) in deciding Appellant's parole, thereby rendering Appellant ineligible for parole?

A Significant and Controling question Raised herein is what determinative Method And by what Authority did the S.C. Parole Board of Use to Change Appellant's Original 1971 Common Law Felony into A 1986 Omnibus Crime Bill Violent Offense? Thereby using this later Criteria as to Appellant's Eligibility is A Significant and incorrect Causal Effect in the Parole Boards denial of Appellants Eligibility for Parole!

The Respondents' in their Reply State "the Parole Board used the Criteria that existed when the Appellant Committed the offense". See RPg 29.

The honorable ALC States" he thus argues That the Department violated his Due Process Right by using the wrong Criteria and Retroactively Applying S.C. Code Ann. 16-1-60 (2012)". See RPg. 7. "Appellant has Provided No Support to his Assertion that the Parole Board used the "Violent Offense Classification" from S.C. Code Ann 16-1-60, in Reaching it's decision as to Appellant's Parole".

SEE R. Pg. 8.

The Appellant now ask that this Appeals Court take Judicial Notice and Correct Accordingly. The Former Director of the S.C.D.P.P.S. has admitted in court proceedings that to use the 16-1-60 Classification for Prisoners whose offense was committed prior to 1986 was in Error See R. Pg. 39 and 40, Smith V. S.C.D.P.P.S Case No. 08-ALC-15-00042-AP.

The honorable ALC States " however, for the same reason given above this Argument is considered Abandoned on Appeal, for failure to Explain how the Authority Appellant cites Supports his Argument ". This is an Erroneous statement by the ALC. In the Appellant's Original Brief R Pg. 19, 20, 21. Appellant explains very clearly this issue. Both the honorable ALC and the Respondents are ignoring the Core Principle in this issue as stated by the Appellant. Appellant is a Technical Parole Violator! There is a Criteria that Applys to technical Parole

violators that the Parole Board of, is choosing not to use! The Parole Board of, and the honorable ALC offer no challenge to this issue, choosing to ignore the valid issue set forth within the Appellants Original and Final Briefs. The Respondents alter the wording and context of the meaning of the Appellants originally presented issue. The Respondent then goes on to use case law and subjects that do not address the issue. Not only is this tactic misleading, this effort is in error. Appellant clearly states that he is a Technical Parole violator and it is this criteria that is the criteria that should be used. See Rg. 19.

In the South Carolina Sentencing Reform Commission Report to the General Assembly 2010 Pg. 17, See R Pg. 36, 37 and 38. it state in part "P.P.P. maintains a policy which clearly defines violations in two (2) categories - (1) Compliance and (2) Community Safety, and a process for violation proceeding" By not using this Criteria that was created for Parole violators

The Parole Board of is violating Appellant's Due Process Rights, and Equal Protection of the Law: thus Making the Appellant ineligible for Parole Consideration. This is clearly a Policy that Applys to Parole Violators. "When the Parole Board deviates from or fails to render it's decision without the Consideration of the Appropriate Criteria, it essentially abrogates Appellants right to be paroled eligible and thus infringes on a state Created Liberty Interest" See Cooper v. S.C.D.P.P.S. 377 S.C. 489, 661 S.E.2d 106 (2008).

The Respondents dont even mention this issue of Parole violation. Is it not the Responsibility and obligation for the Respondent to Address and Affirmatively Respond in Formal, the issues properly brought before the ALC. However, the Respondent is deliberately Avoiding the issue. The ALC has Chosen to Argue for the Respondent and dismiss Appellant upon the Court's own initiative. When the Respondents themselves Refuse to Address the principle issue!

Appellant raises a question to this Court, is it appropriate and/or legally permissible, either in law or equity to allow the respondent to deliberately ignore and avoid Appellants valid and substantively important issue raised on appeal within the Respondents formal brief in response?

The distinction between a parole violator and the Criteria used for someone who has never been paroled, is at the heart of this particular issue. The Respondent has failed to address Appellants pleadings and averment, thus evidencing the Respondents default as to this issue and in effect acquiesence in favor of the Appellant.

There is a Criteria that exist that is for those who violate parole. This is evidenced by the South Carolina Sentencing Reform Commission Report to the General Assembly, 2010 See Rfg 36, 37 and 38. This Criteria Should be Applied to Appellant.

IMPARTIAL

The honorable ALC on Rg 8 of the Court Order states "this argument is considered abandoned on appeal for failure to explain how the authority the appellant cites supports his argument". Citing Rule 31 (B)(3) S.C.A.L.C.R. and Rule 208 (B)(1)(v) S.C.A.C.R. This is clearly erroneous. See Rg. 19, 20, and 21, which explains the cited authority. However when the respondent avoids the issue and refuses to address the issues, the honorable ALC ignores these same rules it clearly applied. When the respondent effectively concede to the facts advanced in the presentation and affirmative pleading in the Appellant's brief, those facts carry the weight of the preponderance of evidence, which creates the fundamental element and persuasion of the law in favor of the Appellant.

A proper question upon this appeal is, Why has the honorable ALC chosen to overlook, or ignore the profound evidence and arguments put forth and established within this

Appellants brief? By Avoiding the facts, Citations and Arguments presented by the Appellant Clearly Confirms that this issue was not fairly or substatively represented by the Respondent. With all due respect to the honorable ALC, the Appellants position is that he believes this issue was not decided as impartially as is called for in the U.S. Const Amends V, XIV. The Due Process Protection Mandates that trial and Appeals be heard by disinterested and impartial Judicial officers. In re Murchison 349 U.S. 133, 136 (1955) Tomey v. Ohio 273 U.S. 510, 532 (1927). In re. Murchison; "not to hold the balance nice, clean and true between the State and the accused denies the latter due process of law". A fair trial in a fair tribunal is a basic requirement of Due Process and is requiring the Absence of Actual or implied bias.

INCORRECT CRITERIA

THE HONORABLE ALC IN his ORDER Pg. 8, STATES "the PAROLE BOARD IS FREE to take into CONSIDERATION AS ONE OF the FIFTEEN (15) FACTORS ON FORM 1212, the NATURE AND SERIOUSNESS of the INMATES OFFENSE". This IS AND has been AN IN-CORRECT INTERPRETATION AND FINDING ON two (2) different LEVELS.

FIRST, IN RESPECT of the LEGISLATIVE IN-INTENT. "A victims right under the VICTIMS Bill of Rights terminates when the CRIMINAL proceeding AND the post CONVICTION ENDS. SEE. S.C. CONST AMEND 1-24 ALSO, EX PARTE Littlefield 540 S.E.2d 81 (S.C. 2000). ACTION AGAINST the ALLEGED PERPETRATOR ARE RESOLVED. S.C. CONST AMEND 1-24. This IS A VIOLATION AND CONSTRICTS the S.C. GENERAL ASSEMBLY'S RULE MAKING AUTHORITY. JUST AS the TRIAL COURT CAN NOT USE the VICTIMS Bill of Rights to RE-OPEN A COMPLETED CRIMINAL PROCEEDING (CONST. AMEND. 1-24).

The Parole Board Can not Over and Over Again Utilize the Above to deny the Appellant his Due Process Rights.

Second, Such Findings seemingly borders on Embracing the tenants of the Doctrine of Res Judicata("the Effect of foreclosing re-litigation of Matters that have been Litigated and decided"). Just to reference the Appellant's offense at each parole hearing is a re-litigation of the facts which this Court held in Hinton v. S.C.D.P.P.S. 357 S.C. 327, ___ S.E.2d ___ (2004) that "We find it unacceptable that the Parole Board should look to the so-called facts of the case to make this determination. For the 'facts' are almost always disputed and neither this Court, nor the Parole Board has any way of extricating which particular 'facts' the Jury decided were true and which were not! The Parole Board should not undertake such a determination in what amount to a

de facto second trial and an egregi-ous due process violation."

Once this Appellant was granted Parole in 1981, Appellant overcame all of the reasons that the Parole Board used, the (Victims Bill of Rights; Nature and Seriousness of the Offense; Violence and Weapon) To utilize those same reason again and again is Double Jeopardy! This does violate Res Judicata. This does violate case law of the S.C. Supreme Court in Hinton (2004) infra, . This Mandate is clearly and fully the law in South Carolina.

The Parole Boards failure to use Statutorily Required Criteria for Parole Violators affects other similarly situated individuals. This issue should be remanded back to the Board because this interpretation is wrong! Rq 38, Barton infra, Hinton infra.

This Appeal should be heard because

the S.C. Parole Boards interpretation of the Statutes and Law is erroneous and this interpretation effects many Others, Similarily situated individuals. The S.C. Sentencing Reform Commission Report the General Assembly dated Feb. 1, 2010 States "In Fy 2009 the S.C. Dept. of Probation, Pardon And Parole Services (PPP) Revoked 3, 205 Offenders to prison, Accounting for 24% of All prison Admissions, 66% of whom, or More than 2,100 Offenders were Sent back to prison for Non Criminal (Technical) violations, Such As A failure to Show up at the probation Office, Alcohol or drug usage" See Rfg 37.

Conclusion

This Appeal Should be Remanded for A decision Consistent with the Criteria; Statute And the Law

The State of South Carolina
In The Court of Appeals

ROBERT F. SPIGNER, 065300
Appellant

v

South Carolina Dept. of Pardon
Probation and Parole Services
Respondent

Certificate of
Service

Appellant Case
NO: 2013-001380

ROBERT F. SPIGNER declares under the penalty of perjury that he did MAIL (5) COPIES EACH of his Record on Appeal and Final Brief to the Clerk of the Court of Appeals. And ONE (1) copy to the Respondents Addressed as below, by placing in the U.S. Mail.

Ms. Jenny A. Kitching, Clerk
S.C. Court of Appeals
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Respectfully
ROBERT F. SPIGNER

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