

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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AUG 14 2019

Appeal from the Administrative Law Court  
The Honorable S. Phillip Lenski, Administrative Law Judge  
Appellant Case No. 2019-000934

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**SC Court of Appeals**

BERNARD BAGLEY, #175851.....APPELLANT

v.

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

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**RESPONDENT'S INITIAL BRIEF**

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## **STATEMENT OF ISSUES ON APPEAL**

- 1. Was the denial of an opportunity for pardon eligibility fall within the jurisdiction given by the Supreme Court?**
- 2. Did the ALC denied the Appellant an opportunity for pardon eligibility due to the fact he is ineligible?**
- 3. Was the pardon eligibility statute penal in nature so the Appellant is entitled to the ALC to construe the law in his favor?**
- 4. Do inmates who do not have a parole eligibility date are entitled an opportunity for pardon eligibility statute to be construed the law in their favor?**

## STATEMENT OF THE CASE

On August 23, 1990, upon getting into an argument with his wife the day before, the Appellant discovered that his wife resigned from her job, and withdrew money from their bank account. She left with their daughter to her mother's house in Eastover, South Carolina. Upon making this discovery the Appellant traveled from Raleigh to Eastover. He arrived at her mother's residence kicked in the front door and inquired to his wife regarding a possible affair. An argument ensued where the Appellant proceeded to shoot his wife twice causing her death.

The Appellant was subsequently indicted by the Richland County Grand Jury for the offense of murder. On April 12, 1991, he appeared before the Honorable Dan Laney to answer to this offense. At the conclusion of this appearance the Appellant received a term of incarceration for the remainder of his natural life for the offense of murder. At the time the Appellant committed this offense South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of twenty years.

The Appellant made his initial appearance before the Parole Board on September 8, 2010. Upon the conclusion of this appearance the Board decided to deny parole. Since this initial denial the Appellant has appeared before the Board an additional four times each resulting in a denial of parole. His most recent appearance occurred on June 19, 2019. At the conclusion of this appearance parole was unanimously denied due to: 1) the nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; and, 3) the use of a deadly weapon in this or a previous offense.

Upon being denied on October 5, 2018, the Appellant contacted the Respondent inquiring information regarding a clemency or a pardon. On November 7, 2018, the Appellant was notified that pursuant to South Carolina law any inmate that is eligible for parole cannot be considered for

a pardon. The Appellant was also informed that South Carolina law only allows clemency to individuals given a sentence of death. Since he was never sentenced to death he is not eligible for clemency. Upon receiving this letter the Appellant decided to file a notice of appeal before the Administrative Law Court (ALC). Within this appeal the Appellant alleged that the statute does not include language “currently” or “initially” and the statute is penal in nature so the decision of the court must construe in favor of the Appellant.

The Respondent argued that the ALC currently does not have jurisdiction over pardons. The Respondent also argued that the statute clearly does not allow an inmate who is eligible for parole to be allowed a pardon. The Respondent also argued that the pardon statute is not penal so the Court does not have an obligation to construe its decision in favor of the Appellant.

On April 30, 2019, the Honorable S. Phillip Lenski, Administrative Law Court Judge (ALJ) issued a decision. The ALJ decided that the notice of appeal failed to provide a final decision of the Department which is required pursuant to the rules of the Administrative Law Court. By failing to obtain a final decision the Appellant failed to exhaust all of the remedies available. The ALJ decided that this matter was not properly brought before the Court so he ordered it dismissed.

Upon being notified that his appeal before the ALC was dismissed the Appellant decided to file a notice of appeal before this Court. Within this appeal the Appellant alleges that the denial of a pardon does come within the jurisdiction of the ALC; that pardons are penal in nature so he is entitled to the law to be construed in his favor; and, inmates without a parole eligibility date are entitled an opportunity for pardon eligibility.

The Respondent argues that the dismissal of this appeal was proper due to the fact the ALC was never given jurisdiction by the Court in the *Al-Shabbaz* nor *Furtick* decisions. This is due to the fact an inmate has a liberty interest in parole; however, there exist no liberty interest in

obtaining a pardon. The Respondent will further argue that a pardon does not affect sentencing; so it is not penal in nature; and, the statute is clear no parole eligible inmate can receive a pardon. The Respondent's brief supporting these defenses follows.

### ARGUMENTS

**1. The denial of an opportunity for a pardon does not fall within the jurisdiction given to the ALC by the Supreme Court.**

The ALC's jurisdiction to review the final decision of the Parole Board is derived from the South Carolina Supreme Court decisions of *Al-Shabbaz v. State*, 338 S.C. 334, 527 S.E.2d 724 (2000); and *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2002). In *Al-Shabbaz*, the South Carolina Supreme Court created a new avenue by which an inmate could seek review of a final decision of a state agency in a "non-collateral" matter related to a conviction or sentence. The Court held that inmates could appeal those final agency decisions to the ALC, and ultimately to the Court of Appeals pursuant to the Administrative Procedures Act. *Al-Shabbaz*, at 376. In *Al-Shabbaz*, the Court recognized that, "these administrative matters typically arise in two ways: (1) when an inmate is disciplined and punishment imposed; and (2) when an inmate believes that prison officials have erroneously calculated his sentence; sentenced-related credits or custody status." *Id.*, at 369.

The Court noted that the appealable final decision in *Furtick* arises in the latter manner where an inmate alleges that the Department erroneously determined he was not eligible for parole. The review of the ALC under the procedures set forth in *Al-Shabbaz*, is necessary to determine whether an inmate has a liberty interest in gaining access to the Parole Board. *Furtick*, at 149. In *Furtick*, the Court determined that the permanent denial of parole implicates a liberty interest sufficient to require at least minimal due process. *Id.*

The Appellant now seeks review of a decision made by the ALC. This Court will not disturb the decision of the lower court absent a manifest abuse of discretion. See, State v. Perez, 423 S.C. 491, 496, 816 S.E.2d 550, 553 (2018). The Appellant argues that he is being unlawfully denied a pardon. Pursuant to the above named Supreme Court decisions the review by the ALC only relates to the denial of parole eligibility not pardons. This is due to the fact there exist no liberty interest in obtaining a pardon. Though with the revealing of “extraordinary circumstances” an person currently incarcerated that is not eligible for parole can receive a pardon, this is normally reserved for individuals who have been released. This is due to a pardon being an act of forgiveness given by the State for a person who have committed a crime within South Carolina. That is why the conviction remains on your South Carolina Law Enforcement Division report.

Pursuant to South Carolina law being eligible for parole denies an inmate the ability to receive a pardon. An inmate must be considered a pardon before a parole eligibility date only when he can produce evidence of comprising the most extraordinary circumstances. S.C. Code Ann. §24-21-950 (1981). The Appellant is currently eligible for parole so he is not entitled to a pardon pursuant to South Carolina law. This is due to the fact that the identical board would decide a pardon as well as parole. It would be redundant to expect the board to release an inmate for a pardon where he will have no supervision, who failed to grant parole where he would be subject to supervision.

The ALC was correct in the dismissal of this appeal. The Appellant is not entitled to review of the denial of a pardon eligibility by the ALC. This ability has never been given by the Courts. The Supreme Court in the above referenced cases only gave the ALC the ability to review the

denial of parole eligibility not the ability to request a pardon. Due to the ALC correctly deciding to dismiss this appeal the decision of the ALC should be upheld.

**2. The ALC must deny the Appellant the opportunity for a pardon due to the fact he is not eligible.**

The legislature intended an inmate not receive a pardon who is eligible for parole. If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no need to employ a rule or statutory interpretation and the court has no right to look for, or impose another meaning. *Pachel v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995). The Court should consider not merely the language of a particular clause being constructed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). A law must be interpreted reasonably and practically, consistent with the purpose and policy of the General Assembly. *Abell v. Bell*, 229 S.C. 1, 91 S.E.2d 548 (1956). It is clear that the General Assembly did not wish an inmate who has attained parole eligibility to be allowed to be granted a pardon. The ALC is obligated to follow the intent of the legislature and not allow the Appellant to prevail on this cause of action.

The Appellant argues that there exist an "extraordinary circumstance" that should allow him an opportunity to receive a pardon. The Appellant raise the argument that since the law has changed he could have been convicted of voluntary manslaughter which if he was given the maximum sentence he would have completed the sentence by now. The Appellant continues to have the ability to make his argument before the Parole Board, and the "extraordinary circumstance" is decided by the Board not the Courts. However, this cannot be considered because pursuant to South Carolina law the Appellant is currently not eligible for a pardon.

The Appellant also argues that he has been denied due process since he has not been allowed to apply for a pardon. The due process clause relates to the right of a person not to have

life, liberty, or property taken without the due process of law. In *Furtick*, the Supreme Court ruled that the denial of parole eligibility requires minimal due process, the Court has never made this ruling regarding a pardon. This is due to the fact a pardon is not a right afforded to an inmate. A pardon is a curtesy that could possibly be given to an inmate if they have shown to the Board that "extraordinary circumstances" exist, and that inmate is not currently eligible for parole. No person has a right to a pardon, nor do they have a right to appear before the Board to be considered for a pardon. Since it does not relate to a person's conviction and just a curtesy given by the South Carolina General Assembly there exist no violation of due process to deny pardon eligibility.

The statute is clear, only inmates not yet eligible for parole can apply and be considered for a pardon. The Appellant is currently eligible; therefore, pursuant to South Carolina law he cannot be considered for a pardon. So the Respondent was correct in denying the Appellant an opportunity to apply for a pardon.

**3. The Pardon statute is not penal in nature so the Appellant is not entitled for the law to be construed in this favor.**

The Appellant argues that since the pardon statute is penal in nature the law must be construed in his favor. A pardon is an act of forgiveness given by the state for a person that has committed a crime within the state of South Carolina. It has nothing to do with the amount of punishment an offense carries. A person can receive a pardon for any offense; however, a pardon does not affect any sentence or punishment so it is not penal in nature.

There exist no right to a pardon. Since there is no definition of an "extraordinary circumstance," the decision to allow a pardon exist only with the Pardon Board. The General Assembly gave the decision to allow a pardon totally up to the Board, however, the General Assembly does establish that the Board cannot consider a person currently incarcerated for a pardon if that individual is eligible for parole. This is the current circumstance of the Appellant. It

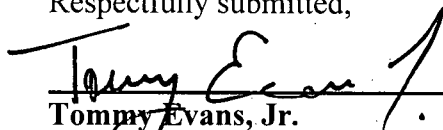
is clear that an inmate who is currently eligible for parole cannot be considered for a pardon. This does not effect the punishment that goes with the crime, nor does it causes an additional time to be served so it is not penal in nature.

The Appellant argues that since the pardon statute is penal in nature the law should be construed in his favor. That only occurs when there exist some ambiguity in the law. When a genuine ambiguity exists as a result of the proposed application of a penal statute to a given situation, the rule of lenity requires that the doubt must be resolved in the defendant's favor. *Bryant v. State*, 384 S.C. 525, 683 S.E.2d 280 (2009) The law is clear, an inmate who is currently eligible for parole cannot be considered for a pardon. Therefore, the Court must not construe this appeal in favor of the Appellant. It is clear South Carolina law does not allow an inmate to apply for a pardon who is currently eligible for parole. Since the Appellant is parole eligible his denial of a pardon application followed South Carolina law and should be upheld by this Court.

**CONCLUSION**

Based on the foregoing reasons the Respondent concludes that the decision for the ALC was lawful and he is not eligible for a pardon, so the Respondent would respectfully request this Court affirm the decision of the ALC.

Respectfully submitted,

  
\_\_\_\_\_  
Tommy Evans, Jr.  
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Columbia, South Carolina  
August 12, 2019

STATE OF SOUTH CAROLINA  
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Appeal from the Administrative Law Court  
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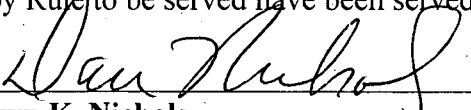
S.C. DEPARTMENT OF PROBATION, PAROLE AND  
PARDON SERVICES,.....RESPONDENT

**CERTIFICATE OF SERVICE**

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within  
*Initial Brief of Respondent*, on Appellant this 12<sup>th</sup> day of August, 2019, by depositing a copy of  
the same in the United States mail, postage prepaid, addressed to:

Bernard Bagley, #175851  
Kershaw Correctional Institution  
4848 Goldmine Highway  
Kershaw, S.C. 29067

I further certify that all parties required by Rule 9 to be served have been served.

  
**Dawn K. Nichols**  
**Executive Assistant**  
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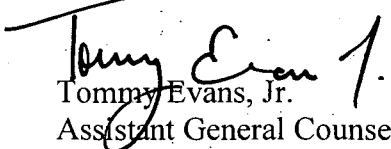
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Re: **Bernard Bagley v. SCDPPPS**

Dear Ms. Kitchings:

Please find enclosed the Initial Brief of Respondent and Designation of Matter dated August 12, 2019, along with proof of service in the above referenced case.

Sincerely,

  
Tommy Evans, Jr.  
Assistant General Counsel

TE:dn

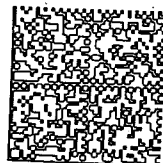
Enclosures

cc: Bernard Bagley

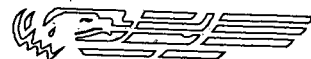
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