

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
S.C. Department of Probation, Parole and Pardon Services
S. Phillip Lenski, Administrative Law Judge
Appellate Case No. 2019-000934

Bernard Bagley, #175851

Appellant

v.

South Carolina Department of Probation,
Parole and Pardon Services

Respondent

REPLY BRIEF OF APPELLANT

RECEIVED
AUG 21 2019
SC Court of Appeals

Bernard Bagley
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STATEMENT OF ISSUES ON APPEAL

The Appellant submit that he incorporate verbatim the Statement of Issues on Appeal stated in his Initial Brief of Appellant in this Reply Brief.

STATEMENT OF THE CASE

The Appellant submit and incorporate verbatim the Statement of the Case stated in Initial Brief of Appellant in this Reply Brief.

FACTS

The Appellant submit and incorporated verbatim the Facts stated in his Initial Brief of Appellant in this Reply Brief.

ARGUMENTS

1. THE DENIAL OF AN OPPORTUNITY FOR A PARDON ELIGIBILITY DO FALL WITHIN THE JURISDICTION GIVEN BY THE SUPREME COURT.

The Appellant submit and incorporate verbatim the Argument stated in his Initial Brief of Appellant in this Reply Brief.

2. THE ALC DID NOT HAVE TO DENY APPELLANT THE OPPORTUNITY FOR PARDON ELIGIBILITY DUE TO THE FACT HE IS INELIGIBLE.

The Appellant submit and incorporate verbatim the Argument stated in his Initial Brief of Appellant in this Reply Brief.

3. THE PARDON ELIGIBILITY STATUTE IS PENAL IN NATURE SO THE APPELLANT IS ENTITLED TO THE ALC CONSTRUE THE LAW IN HIS FAVOR.

The Appellant submit and incorporate verbatim the Argument stated in his Initial Brief of Appellant in this Reply Brief.

4. INMATES THAT DO NOT HAVE A PAROLE ELIGIBILITY DATE ARE ENTITLED TO THE OPPORTUNITY FOR PARDON ELIGIBILITY STATUTE CONSTRUE THE LAW IN THEIR FAVOR.

The Appellant submit and incorporate verbatim the Argument stated in his Initial Brief of Appellant in this Reply Brief.

ARGUMENT AND REPLY

Appellant objects to the Respondent's statement of the case [sic] because of the inaccurate information and contents stated therein. Paragraph 1, in Respondent's Statement of the Case is inaccurate and clearly shows the inaccuracy in Appellant's file currently before the parole officials. SEE: State v. Bagley, 92-UP-165, Unpublished Opinion (Ct.App. 1992). The Court's information is much more accurate than the Respondent's information before the Court.

Paragraph 2, in Respondent's Statement of the Case is inaccurate, the Appellant had a jury trial between April 10-12, 1991, in which the verdict came back guilty of murder and burglary 1st degree, in which this Court reversed and remand the burglary 1st degree offense, and affirmed the murder offense. State v. Bagley, 92-UP-165, Unpublished Opinion (Ct.App. December 10, 1992). Be that as it may, extraordinary and compelling circumstances exist that an improper fact is in evidence that contributed to the murder verdict regarding an impermissible factor of inferred malice based on use of a deadly weapon where evidence is presented at trial that tended to reduce or mitigate killing of the victim. Appellant asserts that it's clearly in the record before this Court that voluntary manslaughter a lesser included offense was charged and evidence of the same was presented in his case, but the trial court at that time instructed the jury that it may infer malice when use of a deadly weapon.

Appellant asserts that he has appeared before the parole board 5 times and each time the Board has denied him parole based on poor decisions on subjective factors, while ignoring objective and predictive criminogenic factors. The findings of fact: 1) nature and seriousness of the current offense; and 3) the use of a deadly weapon in this or a previous offense are arbitrary or capricious when extraordinary and compelling circumstances shows that inferred malice based on use of a deadly weapon is no longer good law in South Carolina which triggers a mechanism to correct a fundamental miscarriage of justice, and exception that merits the lessening of the rigors of Appellant's imprisonment.

The Respondent states that Appellant is not eligible for consideration of a pardon because of his parole eligibility, and that §24-21-950(A)(4), of S.C. Code Ann., does not apply to him nor create a liberty interest for him. Appellant objects, and he contends that the statute does not include the language "currently" or "initially" and that the statute is penal in nature that is construed in his favor and other similar inmates. Additionally, the Appellant asserts that the burglary offense qualifies for consideration for a pardon. The offense was officially expunged on April 4, 2001, upon consent of the Fifth Circuit Solicitor's Office. Respondent failed to elaborate consideration regarding the burglary offense under the Transparency Act in the State of South Carolina.

Appellant also asserts that the ALC's jurisdiction to review the final decision of the Respondent's notification dated November 7, 2018, is derived from the decisions on Al-Shabazz v. State, 527 S.E.2d 724 (2000), and Furtick v. SCDPPPS, 576 S.E.2d 146 (2002). Furthermore, Respondent does not have a grievance policy or procedure for inmates to redress a complaint for a final decision. Appellant was notified that any inmate that is eligible for parole cannot be considered for a pardon. Wherefore, Appellant filed a notice of appeal before the ALC which dismissed and denied the appeal based on its reasons and lack of jurisdiction.

The Appellant objection the Respondent's first argument in its entirety because the Respondent has determined that he is permanently denied consideration for a pardon, in which Appellant asserts that the permanent denial of consideration of a pardon implicates a liberty interest sufficient to require minimal due process. The Appellant contends that his civil rights are violated whereby he is not able to be treated for a medical condition at th Veterans Hospital; he is not able to vote or participate in elections to vote upon his conscious; nor is he able to obtain employment within the department of corrections to prevent further significant hardship or obtain funds for counsel to meaningfully represent him during a parole or pardon procedure; and he is being deprived freedom of expression regarding his christian religious belief based on Respondent's or Board's acting under color of state law to substantially burden and modify his behavior and violate his beliefs to lose his religious precepts of hope and forgiveness. Appellant asserts and incorporate verbatim the table of authorities cases, constitution, rules, statutes, and other authorities stated in his Initial Brief of Appellant in this objection, argument, and Reply Brief. SEE: RLUIPA, 42 U.S.C. §2000, et seq..

Appellant further asserts that he has the utmost respect for the parole and pardon process; however, parole hearings and pardon procedures require significant reform whereby extraordinary and compelling circumstances may exist of a person currently incarcerated eligible [on] ineligible for parole can show an actual innocence, and a changed in circumstances occurring after Appellant's initial parole eligibility date. SEE: State v. Burdette, 2019 WL3437783 (July 31, 2019), Regardless of the evidence presented at trial, a trial court "shall" not instruct the jury that it may infer the existence of malice when the killing is done with a deadly weapon. Appellant contends that inferred malice based on use of deadly weapon where there is evidence presented at his trial that tended to reduce or mitigate the killing of the victim contributed to the guilty murder verdict.

The Appellant objection the Respondent's second argument in its entirety because the Respondent has determined that the statute is in the state's favor. Appellant asserts and incorporate verbatim the table of authorities cases, constitution, rules, statutes, and other authorities stated and cited in his Initial Brief of Appellant in this objection, argument, and Reply Brief.

Appellant further contends that extraordinary and compelling circumstances exist that warrants his civil rights to be restored regarding the right to vote; to be treated for a medical condition at the Veterans Hospital; and his right to meaningful employment to prevent further financial hardship; along with the freedom of expression under his christian religious beliefs, because an impermissible fact or factor is in his record that contributed to the guilty verdict from inferred malice based on use of a deadly weapon where evidence is presented at trial that tended to reduce or mitigate killing of the victim. SEE: State v. Burdette, 2019 WL3437783.

The Appellant invokes the newly-enacted provisions of the rule of law pertaining to Burdette. The grandfather clause does not apply to the Appellant based on this exception of a fundamental miscarriage of justice in which judiciary authority to act on its own to define "extraordinary circumstances." Furthermore, Appellant has no other avenue for redress, relief, nor release based on extraordinary and compelling circumstances under the law.

Appellant contends that the permanent denial not allow him the ability to request a pardon implicates a liberty interest under §24-21-950(A)(4), of S.C. Code Ann.. The ALC decision was arbitrary or capricious employed upon unlawful procedure and error of law.

The Appellant objects the Respondent's third argument in its entirety because the Respondent has determined that the forgiveness nor grace is a privilege afforded to to him. Appellant asserts and incorporate verbatim the table of authorities stated and cited in his Initial Brief of Appellant, this include cases, constitution, rules, statutes, and other authorities in this objection, argument, and Reply Brief.

Appellant contends that his burglary 1st degree offense was considered a committed crime within the State of South Carolina. As such, an act of forgiveness is not being afforded to him to apply for a pardon, because the Board continues to use the circumstances as stated in Respondent's statement of the case paragraph one (1). Although, the offense is supposedly officially expunged it still violates his civil rights under the due process clause not to have life, liberty, or property without a mechanism to correct a fundamental-miscarriage of justice exception of the due process of law.

The Respondent's actions is causing Appellant to give up and lose the precept benefit forgiveness and grace based on his christian religious belief based on the substantial burden of denying and depriving him of the privilege of the same since his initial parole hearing where extraordinary compelling circumstances exist to warrant or merits a lessening of the rigors of his imprisonment. The Appellant invokes the RLUIPA under 42 U.S.C. §2000, et seq., along with the newly-enacted rule and law, mandated in State v. Burdette; 2019 WL3437783.

Appellant asserts that the parole hearings and pardon procedures require significant reform in the State of South Carolina whereby the Respondent states that: 1) the law is clear an inmate who is currently eligible for parole cannot be considered for a pardon or any other form of clemency; 2) when there exist some ambiguity in the law exists as a result of the proposed application of a penal statute to a given situation, such as §24-21-950(A)(4), the rule of lenity requires that the doubt must be resolved in the State's favor; and 3) that inmates not yet eligible for parole can apply and be considered for a pardon, but the South Carolina General Assembly intent does not intend for the Board to pardon an incarcerated person because there is no definition for "extraordinary circumstances." The Respondent's arguments are unreasonable and employed under unlawful procedures and affected by an error of law and should be vacated by this Court.

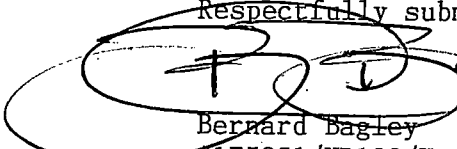
The Respondent's illogical constrction of §24-21-950(A)(4) is arbitrary, because Appellant will assert that the provisions of the statute must be interpreted in light of the language and whole statute. Also, he contends that the statute is applicable to conviction and sentence.

Appellant further asserts that Burdette words and change require prospective application and should be applied prospectively by this Court based on finding of error of law.

CONCLUSION

Based on the foregoing reasons, and the Initial Brief of Appellant, the Appellant concludes that the decision of the ALC was employed under an unlawful procedure and error of law that he is not eligible for consideration to apply for a pardon, as such, the Appellant would respectfully request this Court to vacate the ALC decision, and grant any other relief it deems just and fair.

Respectfully submitted,



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August 16, 2019

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Appellant,

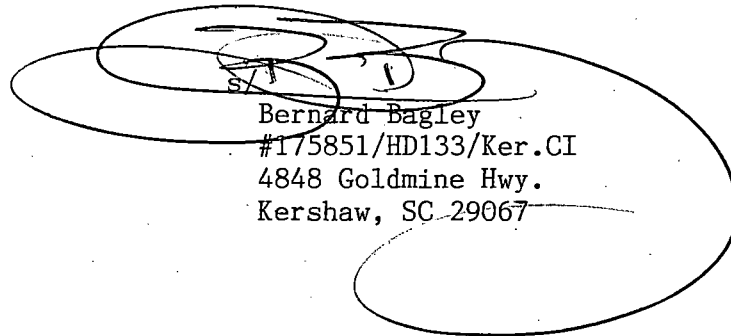
v.

South Carolina Department of Probation,
Parole and Pardon Services,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Reply Brief of Appellant complies with
Rule 208(3), SCACR.


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Respondent.

PROOF OF SERVICE

I certify that I have served Reply Brief of Appellant on Respondent by depositing a copy of the same in the U.S. Mail, postage prepaid, along with the Certificate of Counsel included, each dated August 16, 2019, addressed as follow to:

SCDPPPS

Tommy Evans, Jr., Asst. General Counsel
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August 16, 2019

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August 16, 2019

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SC Court of Appeals

RE: Bagley v. SCDPPPS, 2019-000934

Dear Ms. Kitchings:

Pursuant to Rule 208(7), SCACR, Supplemental Citations, please be advise that a pertinent and significant authority case has come to my attention after my initial brief was served and filed. The following citation, State v. Burdette, WL3437783 (SC July 31, 2019), which is novel or critical to the issues regarding extraordinary circumstances, S.C. Code Ann. §16-3-10, 2§16-3-20, and §16-3-50, of S.C. Code Ann., and error of law, along with an exception regarding a fundamental-misscarriage of justice, and it pertains to pages 1 through 6 of my initial brief. Additionally, the reason for the supplemental citation is to assist the Court to act on any error of law appearing in the record; findings of fact clearly erroneous; improper fact contributed to the jury verdict; preserved in the record of the case; and support on record on appeal transcript of proceedings 90-GS-40-5849, excerpts pp. 397-414.

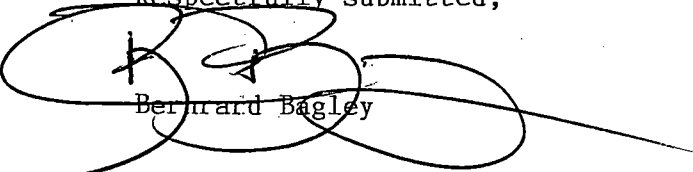
In addition, State v. Bagley, Unpublished Opinion 92-UP-165 (Ct.App. 1992), to assist the Court regarding my Statement of the Case in my initial brief.

Enclosed for filing is my Reply Brief of Appellant in the above case. Also enclosed are the following:

1. Proof of Service; and
2. Certificate of Counsel.

Thank you for your attention regarding this matter.

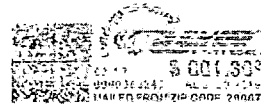
Respectfully submitted,


Bernard Bagley

cc: Tommy Evans, Jr., SCDPPPS

Enclosures

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