STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
South Carolina 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.



# FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE DENIAL OF A OPPORTUNITY FOR PAROLE ELIGIBILITY FALL WITHIN THE JURISDICTION GIVEN BY THE SUPREME COURT?
2. WHETHER THE ALC MUST DENY APPELLANT THE OPPORTUNITY FOR PARDON ELIGIBILITY DUE TO THE FACT HE IS INELIGIBLE?
3. WHETHER THE PARDON ELIGIBILITY STATUTE IS PENAL IN NATURE SO THE APPELLANT IS ENTITLED TO THE ALC CONSTRUE THE LAW IN HIS FAVOR?
4. WHETHER INMATES THAT DO NOT HAVE A PAROLE ELIGIBILITY DATE ARE ENTITLED TO THE OPPORTUNITY FOR PARDON ELIGIBILITY STATUTE CONSTRUE THE LAW IN THEIR FAVOR?

## STATEMENT OF THE CASE

This case is before the Court of Appeals pursuant to the appeal of the Appellant, an individual who is incarcerated within SCDC. The Appellant was convicted of murder on April 12, 1991, and sentenced to a term of imprisonment for natural life. At the time of Appellant commitment offense of murder, South Carolina law allowed an individual serving a life sentence parole eligibility upon the service of 20 years. The Appellant made initial appearance before the Parole Board on September 10, 2010, and was denied parole. Since his initial denial, the Appellant has appeared before the Parole Board four (4) additional times, each resulting in a denial of parole.

After the third denial of parole, the Appellant contacted the Respondent (SCDPPPS) inquring information about clemency of a pardon. On November 7, 2018, the Respondent informed the Appellant that because he was parole eligible, he cannot be considered for a pardon and that statutorily the Parole Board can only offer a recommendation to the Governor to commute a sentence of death to life and because the Appellant is currently serving a sentence that will not result in the death penalty, his sentence cannot be commuted. On December 6, 2018, the Appellant filed a Notice of Appeal with the ALC alleging that SCDPPPS decision to permanently deny him consideration for pardon elilibility is arbitrary and capricious and deprives him of a protected liberty interest. The ALC refused to assert jurisdiction in this case and concluded with an order of dismissal, and noted that its dismissal is based upon a procedural deficiency in the appeal and that the court makes no finding on issue of its subject matter jurisdiction over this type of case, and that the notice of appeal did not contain a copy of any final decision from SCDPPPS which is the subject of the appeal as required by ALC Rule 59(c). By failing to obtain a final decision from the Respondent, the Appellant has not exhausted his administrative remedies and has thus, failed to meet the requirements of the APA for review by the ALC. In sum, the ALC stated that it has no jurisdiction to hear the underlying merits of the case.

FACTS

Appellant set out the following facts that are relevant to the statement of the case and arguments too. The Respondent's letter dated November 7, 2018, is clearly the final decision from which the Appellant's notice of appeal complies with ALC Rule 59(C). The Notice of Appeal before the ALC will show that Appellant complied the Rule 59(C). Appellant is not ignorant of that relevant process and procedure, and the letter was mailed with the notice of appeal as the final disposition. The ALC Order of Dismissal make references of the letter dated 11/7/2018. In addition, SCDPPPS do not have a grievance policy or procedure implemented for incarcerated individuals to redress matters pertaining to probation, parole, and pardon services. It's not Appellant's duty to implement or employ a procedure for inmates to redress probation, parole, and pardon services matters in formal grievance form, and it's not his duty to provide the ALC a proper final disposition regarding such matters whereas the Respondent does not provide him such or does not employ the proper procedure for the same. Also, the record on appeal should include the letter dated 11/7/18, along with a letter dated January 8, 2019, from the Respondent that reiterate the 11/7/18 disposition.

Respondent respectfully stated that; "I would no longer be answering any more correspondence regarding this matter." Additionally, "Unfortunately, due to the fact you are currently eligible for parole you are cannot be considered for a pardon." Appellant facts show that this matter should be certified for the State Supreme Court upon this court's review of this appeal.

ARGUMENTS

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

Appellant asserts that a pardon eligibility do fall within the jurisdiction given by the Supreme Court; however, the ALC Special Rules Note to 2003 Amendments in relevant part provide pardon eligibility applicable duty to all appeals arising under Al-Shabazz, 527 S.E.2d 742 (2000), as required under Furtick v. SCDPPPS, 576 S.E.2d 146 (2003). ALSO SEE any revised ALC Notes pertaining to adaptions of such matters. In Cooper v. SCDPPPS, 661 S.E.2d 106 (2008), the Supreme Court held that procedure employed by parole board deprived inmate of state-created liberty interest and triggered due process requirements, including entitlement to review by ALJ.
Here, Appellant contends that the Respondent's procedure and guidelines establishment for pardon consideration and eligibility is arbitrary or capricious because pursuant to South Carolina law, "An inmate must be considered for pardon before a parole eligibility date only when he can produce evidence comprising the most extraordinary circumstances." §24-21-950(A)(4). In interpreting statutes, the supreme court looks to the plain meaning of the statute and the intent of the legislature. Hinton v. SCDPPPS, 592 S.E.2d 335 (Ct.App.2004). Because the statute is penal in nature, the Court must construe it strictly in favor of the defendant and against the State. SEE: Hair v. State, 406 S.E.2d 332 (1991), construing in favor of the defendant the different times for parole eligibility found in the general parole statute and in a statute regarding parole eligibility for burglary. The Respondent is contesting that the timing of Appellant's parole hearings has nothing to do with parole eligibility date, in which Appellant dispute because parole hearing dates do become parole eligibility dates when consideration is taken. Appellant become eligible for parole every 2 years upon each rejection for parole. It's his contentions within that 2 year period prior to the eligible parole hearing date §24-21-950(A)(4) applies in his favor.

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

In terms of the ALC's jurisdiction to review parole decisions. the Appellant asserts in Furtick v. SCDPPPS, 576 S.E.2d (2003), the supreme court extended the Al-Shabazz holding by finding the permanent denial of parole eligibility implicates a liberty interest sufficient to require at least minimal due process, and thus, review by the ALC. Appellant further asserts that the concept applies in simple terms, that an inmate has a right of review by the ALC after a final decision that he is ineligible for a pardon consideration under §24-21-95(A)(4), S.C. Code Ann.

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

Appellant asserts that the pardon statute is penal in nature because of the language and plain meaning regarding eligibility for an inmate. §24-21-950(A)(4), or in its entirety is penal in nature regarding custody status for offenders. An inmate can produce evidence comprising the most extraordinary circumstances. The statute guarantees the ability for certain individuals to be eligible for a pardon. Those inmates that do not have a parole eligibility date and those as Respondent contends that have not passed their parole eligibility dates. Al-Shabazz v. State, applies here. See: 527 S.E.2d 724 (2000).

The Respondent would informed the court that it would be redundant to expect the board to release an inmate for a pardon where Appellant will have no supervision, who has not granted that same inmate parole where he will be supervised. Where an inmate can produce evidence comprising the most extraordinary circumstances, it's Appellant's contentions that expectation to be release for a pardon by the board is not irrational. Appellant states that he has a liberty interest under the Civil Rights Act of 1871, pursuant to the Supreme Court's ruling that the "use of a deadly weapon" implied and inferred malice instruction had no place in a murder presecution when evidence was presented that would reduce, mitigate, excuse or justify the killing represented a clear break from modern precedent, and thus, the court's ruling would be effective for all cases. however, Court's ruling would not apply to convictions challenged on post-conviction relief. Jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented of a lesser-included offense of murder. Appellant further asserts that voluntary manslaughter was charged to the jury, and the record is clear that the charge highlights a 'half-truth" nature of thje charge. SEE: Belcher v. State, 685 S.E.2d 802 (2009), and Glenn v. State, 68 Md.App. 379, 511 A.2d 1110 (1986). Appellant have no other remedy or recourse, because as the Respondent states that board will not grant Appellant parole where he will be supervised under an alternative custody.

Voluntary manslaughter under §16-3-50 (1990), states a person convicted of manslaughter, or the unlawful killing of another without malice, express or implied, must be imprisoned not more than 30 years or less than 2 years. If the law would have been in effect at the time of the Appellant's offense he would have more likely been convicted of manslaughter and sentenced to 30 years, in which he would have maxed out with his accumulated good time credits and earned work credits 13 years ago. Since 2009 when the new rule or law came in effect it's been a fundamental miscarriage of justice not to merit the lessening of the rigors of Appellant's imprisonment. Appellant asserts that he has the utmost respect for the law and the parole process, but it has been proven both in obtaining favorable parole decisions the board so often makes poor decisions, based on subjective factors, while ignoring objective and predictive crimnogenic factors. As such, a due process violation exist when Appellant is being deprived access to the pardon process procedures. Appellant asserts that he is innocent of infer malice from the use of a deadly weapon because the evidence in his murder prosecution presented a jury question on voluntary manslaughter, in which there exist evidence of a wrongful conviction based on the erroneous trial court charge to the jury that it could infer malice from the use of a deadly weapon. 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, a tenet in the Respondent's criteria that can effect any sentence or punishment as to construe it penal in nature and in violation of Appellant's religious beliefs because the Respondent has placed a substantial burden and hardship on him to modify his religious belief under the Judea-christian evangelical masonic precepts of forgiveness especially when the Respondent's tenets acts violates his beliefs. SEE RFRA/RLUIPA under 42 U.S.C. §2000, et seq.. The Respondent acts result pressure that tends to force him to forego the religious precept forgiveness. Appellant asserts that a legal definition of an extraordinary circumstance is required to clear any misunderstanding in public interest, and all parties involved.

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.

Appellant contends that §24-21-950(A)(4), S.C. Code Ann., "An inmate must be considered for pardon before a parole eligibility date only when he can produce evidence comprising the most extraordinary circumstances." The Respondent would lead this court to believe that a person can receive a pardon for any offense, i.e. non-parolable offenses; however, a pardon does not effect any sentence or punishment so it is not penal in nature. So, it's the board's position that a person may receive a pardon under §24-21-950(A)(4), with all rights restored but still serve his or her sentence when the General Assembly does establish that the Board can consider a person currently incarcerated for a pardon if that individual is not eligible for parole.? Respondent would lead this court to believe that there exist guidelines for individuals who are incarcerated to be granted a pardon, but it never occurs, and this is because the ability for an inmate to be considered for a pardon have very stringent guidelines that are difficult to achieve. The due process clause relates to the right of a person to not have life, liberty, or property taken without due process of law. The denial of a pardon application to be properly processed without bias and impartial proceeding and board and prejudice is arbitrary and capricious and affected by error of law under unlawful procedures employed by the Respondent. Al-Shabazz, Furtick, and Cooper decisions applies, along with a legal definition of extraordinary circumstance. Black Law Dictionary 5th Edition, difines extraordinary circumstances, as factors of time, place, etc., which are not usually associated with a particular thing or event; out of the ordinary factors. SEE ALSO extenuating circumstances, meaning such as a delict or crime less aggravated, heinous, or reprehensible than it would otherwise be, or tend to palliate or lessen its guilt, Such circumstances may ordinarily be shown in order to reduce punishment or damages. Black Law Dictionary 5th Ed..

## CONCLUSION

Based on the foregoing reasons the Appellant respectfully requests that his appeal be granted and that the ALC and Respondent's decisions be vacated.

Respectfully submitted,

s/

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September 4, 2019

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In The Court of Appeals

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S. Phillip Lenski, Administrative Law Judge
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Bernard Bagley, #175851, Appellant,

v.

South Carolina Department of Probation,
Parole and Pardon Services, Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(a), SCACR.

s/
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September 4, 2019

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Parole and Pardon Services, Respondent.

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant on Respondent, along with the Amended Designation of Matter to be included in the Record on Appeal, and the Certificate of counsel, each dated September 4, 2019, by depositing a copy(ies) of the same in the U.S. Mail, postage prepaid, on September 4, 2019, addressed to Assistant General Counsel of record, Tommy Evans, Jr., SCDPPPS, P.O. Box 50666, Columbia, SC 29250.

s/
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September 4, 2019

September 4, 2019

SC Court of Appeals
Jenny A. Kitchings, Clerk
P.O. Box 11629
Columbia, SC 29211



RE: Bagley v. SCDPPPS, 2019-000934

Dear Ms. Kitchings:

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

1. Amended Designation of Matter to be included in the record on appeal;
2. Certificate of Counsel; and
3. Proof of Service.

Please note that the Final Reply Brief will be mailed within the following week.

Sincerely,

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cc: Tommy Evans, Jr., SCDPPPS

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