STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL OF FINAL DECISION
Shirley Robinson, (ALC) Judge

Appellate Case No. 2020-001121

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SC Court of Appeals

George Adams, #181283.......................................Appellant,

v.

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

FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the Lower Court Administrative Judge error on granting Respondent's motion to dismiss, where Department of Probation, Parole and Pardon Services legal counsel has abused it's discretion in a letter denying inmate his liberty interest to Bi-Annual parole hearings?

2. Did the Lower Court Administrative Law Judge error on granting Respondent's motion to dismiss, where Department of Probation, Parole and Pardon Services legal counsel's letter violate ex post Facto Law, by retroactively altering the definition under the parole statute to increase punishment?

3. Did the Lower Court Administrative Judge error in entering summary judgment, and refusing to file Appellant's motions for reconsideration, and recusal?

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STATEMENT OF CASE

After a Richland County jury returned indictment 392-GS-40-1131 for murder, a jury found Adams guilty as indicted under South Carolina Code of Laws §16-3-20(A)(1992): (R.P. 2).

Adams became eligible for a Bi-Annual parole hearing February 8, 2013, but SCDPPPS legal counsel in 2012 forwarded Adams a letter explaining his decision of the reason why the parole board members would not grant Adams parole, and denied him a parole hearing. February 25, 2020, Adams forwarded the parole board another letter inquiring about the status of being denied parole hearings for the years of 2013, 2015, 2017, and 2019. March 6, 2020, DPPPS responded back in a letter up holding the legal counsel's letter from 2012: (R.P. 3 thru 6).

A timely appeal was perfected with the ACL Judge. March 18, 2020 the honorable Shirley Robinson was assigned to the appeal, docketed at No. 20P0013.

April 9, 2020 Adams filed and served his Brief, and Record on appeal with the ALC judge. April 16, 2020, the ALC Judge returned Adams Record on appeal, informing Adams that Respondent's is required to file the Record on appeal. June 2, 2020 DPPPS legal counsel filed the only Record on appeal. Respondent did not file a response Motion To Dismiss until June 10, 2020. July 27, 2020, Adams served a Reply in reference to the Motion To Dismiss.

June 29, 2020, ALC Judge adopted the Motion To Dismiss. August 5, 2020, Adams served the ALC Judge a 29(d)(SCALC) Motion For Reconsideration. August 6, 2020, a timely appeal was perfected with the South Carolina Court of Appeals. August 10, 2020, Adams filed another Motion For Recusal with the ALC Judge. August 19, 2020 the ALC Judge Clerk forwarded Adams a letter informing him that the motion could not be filed, because no case was pending in the ALC.

This appeal is as follows: (R.P. 7 thru 20)

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ARGUMENTS

I.

DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES ABUSED IT'S DISCRETION IN VIOLATING APPELLANT'S LIBERTY INTEREST TO BI-ANNUAL PAROLE HEARINGS.

The Court is to evaluate the Department of Probation, Parole and Pardon Services (DPPPS), amended version of South Carolina statute directed at inmates who had been convicted of more than one offense for violent crimes. Under S.C. Code of Laws §24-21-620 (1992), the law in effect at the time of Appellant committing the second violent crime, entitled him to become eligible for a parole hearing conducted by a quorum of members before the parole board on a bi-annual basic starting February 8, 2013, and every two (2) years after. S.C. Code of Law §24-21-645 (2015), only to reduce frequency of parole reconsideration for violent offender from annual to bi-annual basic, and sudsection 24-21-640 (Supp.2015), establishes DPPPS sole authority to "prohibit the board from granting parole to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crime." The statutory definitions was not amended directing DPPPS legal counsel to forward Appellant a letter, in place of the parole board, the discretion to defer a parole hearing February 8, 2013, "permanently." Where in the letter, the legal counsel found that it was reasonable to expect that appellant would not be granted parole during the intervals. No records from the

parole board in accordance with the statute, has been established to state the basis for "it's" finding that parole review should be deferred permanently. The DPPPS legal counsel spectlative letter making a determination for the parole board, excludes the common-law quorum principle. Appellant has a liberty interest to obtain the votes from the parole board members actually present at the hearing. In absence of a controlling provision, DPPPS legal counsel has denied Appellant a liberty interest to four (4) hearings, starting February 8, 2013, and every two (2) years after, conducted by a majority of the whole board, which is necessary to constitute a quorum. DOE vs. MARION, 605 S.E.2d 556, 561 (Ct.App.2004). S.C. Code §24-21-620 (1992) amended by §24-21-645 (Sipp.2015) statutory languages is not to be construed to give DPPPS legal counsel intepretations to deny Appellant his initial parole bi-annual hearings thereafter. The current DPPPS legal counsel's letter dated March 6, 2020, treats nonparticipating members of the parole board as "NO" votes. DPPPS legal counsel letter fail to present any authority which would allow the agency to arbitrarily deny Appellant convicted of a violent crime a parole hearing, or that the General Assembly intended for a meeting of the parole board convened with only a quorum to result in a "life without parole." Put another way, Appellant after twenty years was no longer ineligible for parole under S.C. Code §16-3-20(A) (1992), and as a prisoner in confinement for a violent crime as defined in S.C. Code §16-1-60 (1976). Adams must have a case review every two (2) years for the purpose of determination of parole. In DPPPS letter no rational as to why absent

parole board members could not just as well be treated as "Yes." Hypothetical application of the parole board legal counsel letter interpretation to a wider context truly demonstrates abuse of discretion. South Carolina Constitution Art. III, § 11 provides that "a majority of each house shall constitute a quorum to do business." The parole board's legal counsel view of a "No" vote effectively violates the ability of the quorum to act. The parole board should have first conducted a complete hearing February 8, 2013 and, if the quorum chose to defer given Appellant a hearing as well as the next parole review permanently, the members had to state the basis of that findings on record. The statute only allows the parole board, not legal counsel letter to avoid the futility of going through the motions of permanently reannouncing it's denial of a parole hearing on a yearly basis. (R.P. 3,4,5,6).

WHEREFORE, Appellant's initial eligibility parole hearing date of February 8, 2013 should not have been removed. FURTICK vs. SCDPPPS, 576 S.E.2d at 149 (2003).

II.

DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES VIOLATED EX POST FACTO LAW BY RETROACTIVELY ALTERING THE DEFINITION OF MURDER TO INCREASE PUNISHMENT.

This was an indictment brought under South Carolina Code (1976) §16-3-20(A) (1992), in the circuit court for Murder, June 17, 1992 by Appellant's co-defendant. After twenty years of service upon

his conviction in 1994, Appellant forwarded DPPPS a letter on February 5, 2020 requesting the board to reconsider the retroactive application of legal counsel's review under S.C. Code § 24-21-640 (2015), and S.C. Code (1986) subsection 16-1-60. Appellant challenge the combination of his prior conviction with the current conviction used bt DPPPS legal counsel to change his sentence from with parole, to without parole as a second subsequent conviction, following a separate sentencing for a prior conviction, for a violent offense.

The Omnibus Crime Bill of June 3, 1986, enacted section 16-1-60 (1976) amended section 24-21-640 of the South Carolina Code and statutory codifies which crimes are considered "violent crimes" S.C. Code Ann. § 16-1-60 (2001), became effective January 1, 1994, where the General Assembly made sure each offense's name and statute was parenthetically followed by its South Carolina Code section. The statute was again amended on January 12, 1995, this time adding the statute's final sentence: "only those offenses specifically enumerated in this section are considered violent offenses". South Carolina has long recognized the principle that penal statutes are to be strictly construed. STATE vs. GERMANY, 57 S.E.2d 165, 168 (1949) ("[A] criminal statute must be strictly against the State and any doubt must be resolved in favor of the defendant..."); STATE vs. DUPREE, 583 S.E.2d 437, 446 (Ct.App 2003)("penal statutes are strictly construed against the State and in favor of defendant"). At the same time, the cardinal rule of statutory construction requires that courts endeavor to

"ascertain and effectuate the intent of the legislature." STATE v. MORGAN, 574 S.E.2d 203, 206 (Ct.App.2002). The law in this case must be interpreted reasonably and practically, consistent with the purpose and policy of the General Assembly when crimes were committed. ABELL v. BELL, 91 S.E.2d 548, 550 (1956). The statutory definition and sentence should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statutes.

The retroactive application by DPPPS legal counsel terms must be construed in context and their meaning determined by looking at the other terms used in the statute. Crimes and sentencing, probation and parole - general amendments in 1995 South Carolina Laws Act 83 (H.B. 3096), section 10 amended section 16-3-20 (A) (1992) code, as last by Act 488 of 1992, was further amended to read "sentencing" for Murder., section 62 of the Act took effect January 1, 1996, after Appellant's crimes were committed, and should have been applied prospectively. DPPPS legal counsel's review and application of the law existing at the time of sentencing for Murder under S.C. Code (1976) §16-3-20 (A) retro effect violated S.C. Constitution Art. I, § 10 cl. I; and S.C. Constitution Art. I § 4 where retroactive application alter the definition and sentencing under S.C. Statues section 16-1-10 and § 16-1-20 Code of Laws (1976). Even though Appellant's indictment does not list the statutory definition of Murder as required by section 16-3-10 (1976) code of laws, the categorization of felony Murder in 1992 was classified under S.C. Code of Laws (1976) section 16-1-20 (A) (1) applicable to section 16-1-90(A)(1976). To incorporate these

statutes into S.C. Code of Law §24-21-640 (2010), and § 16-1-60 (2015). Sentencing under § 16-3-20(A) (1992), could not be transferred to DPPPS to deny the mandatory minimum term eligibility for parole. S.C. Code Ann. §17-25-45 (1992) provided the definition to deny early release to certain prisoners, to provide conditions for parole as a recidivist without parole upon conviction of triggering offenses enumerated in section 16-1-10 and section 16-1-20 as applicable to section 16-1-90 violated Separation of Powers Doctrine, in light of prosecutor to choose not to pursue triggering offenses or to plea charge down to non-triggering offenses. S.C. Constitution Art I, § 8.

S.C. Code Ann. §16-1-60 (2001) effective date January 1, 1994 General Assembly amendment stated, "that each offense name was parenthetically followed by S.C. Code section". The statute was again amended on January 12, 1995, this time adding the statute's final sentence, "only those offense specifically enumerated in this section are violent offenses." The statutory definition and sentencing for Murder under §16-3-20(A)(1992) was listed in 1992. The rule that penal laws are to be construed strictly is founded on the plain principle that the power of punishment is vested in the legislative not the DPPPS legal counsel sole review. The legislature defined Murder and punishment for Murder. Looking at the clear and unambiguous terms of S.C. Code of Laws (1976) §16-3-20(A) "violent" is not covered by the language in the statute. The plain a ordinary definition of Murder simply is not encompassed with a term "importing wickedness and excluding a just cause or excuse." 23 S.C. Jur.

Homicide §14, definition of Murder, section 16-3-10 (1976) defines "Murder" as "the killing of any person with malice and aforethought either expressed or implied." This 1993 amendment by South Carolina Act 184 § 1, legislature rewrote section (B) in part, "for all offenders sentenced on or after July 1993, the minimum term of imprisonment required by law does not apply to offenders listed in section 16-1-90, unless, the offense refers to mandatory minimum sentence or the offense prohibits suspension of any part of the sentence". The lengthy list of statutory sections found in the"cross reference" to section 16-1-60 reveals the legislature could not have intended for criminals with a history of violent crimes from the use of a prior violent crime in 1991 and 1992, by DPPPS under §16-3-20(A), §16-1-60 and §24-21-640 retroactive application. S.C. DEPT OF SOCIAL SERVICES v. WHEATON, 474 S.E.2d 156 (1996). Where Adams conduct in committing Murder which triggered recidivist features of sentencing under section 16-3-20(A)(1992) occurred before the sentencing provision effective date in 1995. No law existed in 1992 for DPPPS to define section 16-3-20 (A)(1992) under section 16-1-60 (1976) as a violent crime to impose additional punishment to that prescribed at time the offense was committed. DPPPS legal counsel was prohibited under the Separation of Powers Doctrine and ex post facto clause of the United States and South Carolina Constitutions. U.S. Const.Art 1 § 10, cl.1; S.C. Const. Art. 1 § 4. In SMITH v. TIFFANY, 799 S.E.2d 479, 483 (2019), the court stated:

"We are mindful that statutory interpretation

begins (and often ends), with the text of the statute in question. Absent an ambiguity, there is nothing for a court to construe, that is a court should not look beyond the statutory text to discern it meaning."

In this case, it's the duty of the Court to determine legislative intent of the statute, and the best evidence of that intent. Yet the text must be construed in light of the intended purpose of sentencing for Murder, in a manner which harmonizes with it's subject matter and accords with it general purpose. Section 16-3-10, 20 (1992) can be read in it's ordinary sense in 1992, and DPPPS had no right retroactively to engineer such extraordinary one where the legislature titled the offense defind by sections, then it's proper to consider the titled or caption of above Act in 1995 to aid with DPPPS construction to show the intent of the legislature. This sense becomes inescapable when the court consider carefully not to construe common sense out. The Court can not leave this issue without discussing the important cannon of statutory construction that penal statutes are to be strictly construed. The rule of lenity applies when a criminal statute is ambiguous and requires any doubt about a statutes' scope be resolved in the Appellant's favor. BERRY v. STATE, 675 S.E.2d 425, 426 (2009). But the rule of lenity is not a device to create ambiguity, nor should a court invoke it before considering the words of the statute in context. The Court is not prevented from

calling to aid all the other rules of construction and giving each it's appropriate scope, and will not be violated by giving the words of the statute a reasonable meaning according to the sense in which they were intended and disregarding even the demands of exact grammatical properity. McBOYLE v. U.S., 51 S.Ct. 340 (1931), the court stated:

> "[I]t is reasonable that a fair warning should be given to the word in language that the common word will understand of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."

The court is requested to read into these statutes only that mens rea which is necessary to separate the wrongful conduct from otherwise innocent conduct of DPPPS legal counsel, because the issue of interpretation of a statute is a question of law. If Respondent "assumed" that the 1992 S.C. Laws Act 488 H.B. No: 3095, amendment of section 16-3-20(C)(b) of the (1976) code applied retroactively to when Adams crimes was committed, then their exist an ambiguity, because under the Act section 2 did not take effect until the first day of July, 1992, on Homicide - Mitigating circumstances - Mental Retardation. (R.P. 2, 4).

ARGUMENT III

Did the Lower Court Administrative Law Judge error in entering summary judgment, and refusing to file Appellant's Motion For Reconsideration and Motion For Recusal?

Home Medical System, Inc. v. South Carolina Dep't. of Revenue, 677 S.E.2d 582 (2009). The Administrative Law Court entered summary judgment in favor of Taxpayer's favor and denied the Department's motion to Amend or Alter judgment. Department appealed. The South Carolina Supreme Court ruled that Respondent's motion to Amend judgment was permitted under Administrative Law Court rules and operated to toll thirty (30) days period governing appeal. Rule of Civil Procedure Rule 59(e), Rule 68 (SCALC), and Rule 203(b)(6).

Adams filed several motions in the ALC Court as described above. The ALC Judge denied filing both Adams' motions for Reconsideration, and Recusal pursuant to Rule 65 (SCALC). The court informed Adams that his motion was improper because ALC was not permitted to filing such a motion where the ALC Judge ruling was final Decision. Therefore,, accordingly to the ALC Judge, the post-order motions did not toll the time period for filing the Notice of Intent to appeal. Stated differently, the ALC Judge stated that rule 29(d) do not apply to ALC contested cases action. In this case, the ALC rules contemplate a "Motion For Reconsideration", and "Motion for Recusal" any party may move for these motions of a final decision of an Administrative Law Judge in a contested case, subject to the grounds for relief set forth in the ALC rules.

The filing of Adams motion is not a prerequisite to filing a Notice of appeal from a final decision of an Administrative Law Judge. The ALC Judge maintained that because ALC rule 65 (SCALC) dictate that "the decision of the Administrative Law Judge is a final decision and motions will not be considered". Adams on the other hand, argues the ALC rules specifically allow the Rules of Civil Procedure to apply.

Adams points out there is no ALC rule akin to rule 29(d), and Cannon rules of Appellate procedure Moreover, Adams contends that because issue preservation rules apply to this appeal in this ALC action, there is a need for these type of motions. **Elam v. South Carolina Dep't of Transp., 602 S.E.2d 772 (2004). The court explained in Elam that "there is noting inherently unfair in** allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but to revisit a previously raised argument". **Id. at 602 S.E.2d at 779.** In deed, the ALC abused discretion where, "It is inherently unfair to disallow Adams such an opportunity".

The **Elam** court further stated that a "party must file such motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review". **Id. at 602** S.E.2d **at 780.** In I'on, LLC. v. Town of Mt. Pleasant, 526 S.E.2d 716, 724 (2000). The court discussed the policy underlying these rules:

> "If the losing party has raised an issue in the lower court, but fails to rule upon it, the party must file a motion to Alter or

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Amend the judgment in order to preserve the issue for appellate review. Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered "all" relevant facts, law and argument".

Put simply, the motion serve a vital purpose for proper issue preservation of claims raised before the ALC. This court of Appeals require issue preservation in Administrative Appeals. Brown v. South Carolina Dep't of Health and Envtl. Control, 506 S.E.2d 410, 417 (2002); Carson v. South Caolina Dep't of Natural Res., 638 S.E.2d 45, 48 (2002); Kiawah Resort Assoc. v. South Carolina Tax Commn., 458 S.E.2d 542 (1995). The Supreme Court therefore held that these motion are permitted in ALC proceedings. Accordingly, Adams motions tolled the time period for filing his appeal, and the Notice of appeal was timely served.

As Adams points out, the ALC granting the DPPPS motion to dismiss does not address whether Adams is entitled to Bi-Annual parole hearings or whether Adams can be held a a second subsequent violent offender under South Carolina Code of Laws §16-3-20(a)(1992), and the parole statute can be interpreted on allowing DPPPS legal counsel the authority to deny Adams parole hearings Bi-Annually. DPPPS is the agency charged with this regulation, this court is to defer to it's interpretation. See **South Carolina Code of Laws §24-21-640 (2010); §24-21-645 (2015); §16-3-20(a)(1992); § 16-1-60(1976); §17-25-45(1992): §24-21-620(1992): §16-1-90(1976): S.C. Law Act 488 sec. 62(1996): S.C. Law Act 488 (H. B. §2)(1992); S.C.Law Act. 83 (H.B.3096) sec. 10 (1995); S.C. Law Act 184 § 1, sec.(B)(1993).** If the statutes or regulations is silent or ambiguous with respect to the specific issues, this court then must give deference to the agency's interpretation of the statutes or regulations, assuming the interpretation is worth of deference. Adams state's that the DPPPS is not complying with the parole statutes and regulation acts, and Adams is seeking an enforcement action. Because Adams was simply restating the applicable regulations and because the regulations is silent, the conditions in the final approval did not render it an itial decision. SCDC V. Mitchell, 659 S.E.2d 233 (2008).

The propriety of a new magistrate judge, who was formerly employed by the DPPPS, hearing of this appeal in the ALC contested case , where Respondent's legal counsel works is to recuse herself from this appeal. See **2010 WL 7809019, (S.C. Adv. Comm. Std. Jud. Cond.).** South Carolina Appellate Court **Rule 501 Cannon 2.A.** of the rule of **Judicial Conduct** states that a **"Judge shall respect and comply with the law and shall act all times in manner that promotes the public confidence in the integrity and impartially of the judiciary".** Reason for the recuse should come from your honor has not made an inquiry upon the circumstances of the presence case. And furthermore, in this appeal that came before the court, your Honor is a former employer with the prosecution attorney for the Respondent and was involved with DPPPS during the year of 2012-

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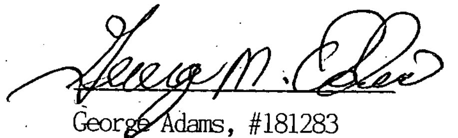
2016 and should disclose the circumstances of all connection on the record of this appeal. South Carolina Appellate Court Rule **Cannon 503(E) governs support of disqualification and states that** "Judge shall disqualify them self in a proceeding in which the judge's impartiality might reasonably be questioned", regardless of whether the specific **Rule of Section 3.E.1.** apply. **South Carolina Appellate Court Rule 503 . E. 1.** states that a **"Judge shall disqualify herself if the judge has a personal bias or prejudice concerning a party".** As a former employee for DPPPS it appears as the judge in this case has contingency fee interest as well (a percentage) in any recovery the DPPPS law firm may eventually obtain, before leaving the agency and ascending to the bench. Even though the committee has not previously addressed the situation presented in this case. However, a review of other states 'judicial advisory' opinions indicates that disqualification based on prior employment occurs when the matter initiated while the judge was still employed by prior employment and the case is still ongoing. See **W.V. Advisory Opinion,** **(June 26, 2007); Kentucky Judicial Ethic Opinion, J-E-32; Alabama Advisory Opinion, 89-959** thru 89-365. (R.P. 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20).

CONCLUSION

In considering this appeal based upon this court analysis from the statutes, and regulations along with the practice from logic opinions of other states, Remand the appeal to the ALC with instructions of appointment of another ALC judge, and file Adams motions.



George Adams, #181283

Date: February 16, 2021
Columbia, S.C. 29210

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APPEAL OF FINAL DECISION

Shirley Robinson, (ALC) Judge

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George Adams, #18182, ... Appellant,

v.

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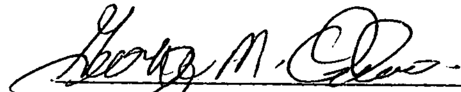
Certificate of Counsel

The undersigned certified that Final Brief complies with with Rule 211(b), SCACR.

Date: February 16, 2021



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