

STATE OF SOUTH CAROLINA  
In the Court of Appeals

Appeal from the Administrative Law Court, Final Decision  
from the Honorable Judge Phillip Lenski

Appellate Case No. 2021-000447

RECEIVED

AUG 13 2021

SC Court of Appeals  
APPELLANT

CHUCK MCCULLOUGH, # 311608 . . . . .

v.

SOUTH CAROLINA DEPARTMENT OF  
PROBATION, PAROLE, PARDON SERVICES . . . . . RESPONDENT.

---

FINAL Brief to  
BRIEF IN REPLY TO THE BRIEF OF RESPONDENT

---

Chuck McCullough # 311608  
PRD SE Appellant

Livesay Correctional Inst.  
P.O. Box 560  
UNA, S.C. 29378

TABLE OF CONTENTS

Table of authorities . . . . . ii

Argument in Reply . . . . . 1-4.

1. The Respondent submits, and the ALC agreed, that the COVID-19 restrictions that prevented Appellants family members from attending his hearing were put into place by SCAC, not Respondent.  
(Respondents Brief page 3.) . . . . . 1.

2. The Board properly considered the criteria set forth in Cooper in reaching their decision to deny Appellant parole, thereby making this a routine denial of parole. (Respondents Brief page 5.) . . . . . 2.

3. This court should not consider an issue raised on appeal here for the first time and not raised and ruled upon by the lower court.  
(Respondents Brief page 7.) . . . . . 3.

Exhibit (page 7 of Appellants Initial Brief to ALC to support argument on page 3 of the reply brief.) attachment . . . . . 3.

Conclusion . . . . . 4.

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
1. <u>Cooper v. S.C. Dept. of Probation, Parole, Pardon Services</u> 377 S.C. 489, 661 S.E.2d 106 (2008) . . . . .	2, 3, 4
2. <u>Curtis v. State</u> 345 S.C. 557, 568 ; 549 S.E.2d 591, 596 (2001) . . . . .	3
3. <u>Gagnon v. Scarpelli</u> 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 . . . . .	1
4. <u>Morrissey v. Brewer</u> 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 . . . . .	1

Statutes

S.C. code

1. <u>1-23-380 (5)</u> . . . . .	1
2. <u>24-3-2030</u> . . . . .	2
3. <u>24-21-13</u> . . . . .	1
4. <u>24-21-640</u> . . . . .	4

ORDERS

1. Executive ORDER NO 2020-08 (Declaration of State of Emergency) . . . . .	2
---	---

## ARGUMENT IN REPLY

The only matters in the brief of respondent that require reply are the following potentially misleading statements of facts and law. Respondent's brief was received on July 1, 2021.

### I.

1. The Respondent submits, and the ALJ agreed, that the COVID-19 restrictions that prevented Appellant's family members from attending his hearing were put into place by SCDC, not Respondent... (Respondent's Brief) page 3.

This statement is misleading the issue. Appellant understands that Respondent has no control over SCDC or any other agencies, and that is not the issue. The issue is that the Respondent does have control over its own agency and failed to implement ways for family to participate in in-person hearings from March 13, 2020 to March 25, 2020. As a result Appellant's family showed up to be present at his hearing. Had Respondent given notice, Appellant could have had family to write letters or called Respondent to see what they should do. Instead when Appellant's family called days prior to Respondent, their calls were never returned.

("The Chair of the board is responsible to follow policies, procedures, and coordination of scheduling. The board members receive the respective parole file and will review these files no less than two weeks before the actual date of the hearing." (S.C. code § 24-21-13)

Morrissey v. Brewer 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484

Guyon v. Scarpell 411 U.S. 719, 93 S.Ct. 1756, 36 L.Ed. 2d 656

("It's the Duty of the Director to oversee, manage and control the department")  
South Carolina code section § 24-21-13 (A). This is why Appellant relies on S.C. code § 1-23-380 (5) to support his argument, that he was prejudiced by the Respondent and his due process rights were violated, therefore when Respondent failed to implement ways for family to participate amid the new COVID-19 restriction on visitors does not misplace this code section. That failure prevented Appellant

to present mitigating factors and testimony that may have been the deciding factor by the board that would have given votes to grant parole.

The Governor issued the state of emergency on March 13, 2020 for all agencies to suspend provisions of existing regulations in order to prevent the spread of Covid-19. At this point, Respondent's Director would have contacted Brian Sterling the Director of SDC to discuss upcoming parole hearings. Primarily they would discuss the transporting of inmates for the hearings and visitors appearances such as, attorneys, family, ect. There fore the Respondent knew visitors were not allowed in the institutions, but continued to hold hearings up til March 25, 2020, when remaining parole hearing were rescheduled to resume on June 2, 2020. Appellant gave an example of fellow inmate that had his parole hearing rescheduled. William Smith #256495 (Initial Brief p. 3) when new hearing protocol was Issued June 2, 2020.

Appellant is not saying that Respondent should reschedule hearing to accommodate visitors to be present at parole hearings. Appellant claim is that Respondent should have stopped all hearing on March 13, 2020 until they could properly notify inmates with new provisions for visitors, and that is how Respondent violated his rights to have family at his hearing.

For this reason, the denial of parole and judgment of AIC should be reversed.

## II.

1. The Board properly considered the criteria set forth in Cooper in reaching their decision to deny Appellant parole, thereby making this a routine denial of parole.  
(Respondent Brief) page 5.

When the Parole Board uses the Fifteen factors published on Form 1212 "Criteria for Parole" and the five factors listed for "Risk assessment Instrument." (S.C. code § 24-3-2030) and takes into account inaccurate information about Appellants performance under prior Community Supervision, and fails to comply with lines 4-6; 10-14 of form 1212 respectfully violates Cooper and the fair and meaningful investigation by the board members, and makes a denial of parole unconstitutional, and abuse of discretion.

The fact is that Appellant did have some hardship during his only probation supervision, but the fact is that he did complete his 3 year probation in 2009. The Respondent identified in its findings of fact that Appellant failed to successfully complete a community supervision program. That is inaccurate information. That information allowed the risk assessment to be substantially negative in its results. Also allowed for Lines 1, 3, 15 of form 1212 to be incorrect.

This fact alone proves that Appellant was not properly assessed for parole. There is no way possible the the Board properly considered the criteria set forth in Cooper. The Board did not contact Appellant's family, job, or correctly consider his past community supervision which invalidates form 1212 of being properly considered, and is misunderstanding the issue.

("The use of the allegedly inaccurate information in making parole determinations is capable of repetition but evading review. An appellate court can take jurisdiction despite mootness, if the issue is capable of repetition but evading review.")

Curtis v. State 345 S.C. 557, 568; 549 S.E.2d 591, 596 (2001)

The parole board used inaccurate information in regards to Appellant's prior supervision, and improper consideration of the criteria set forth in Cooper v. SC Dept. Probation, Parole and Pardon Services 377 S.C. 489, 661 S.E.2d 106 (2008) and this Court should reverse the judgement of the Respondent and the ALC.

### III.

3. This court should not consider an issue raised on appeal here for the first time and not raised and ruled upon by the lower court.  
(Respondent's Brief page 7.)

Appellant points out that the allegation of bias from the Respondent was raised in the Initial Brief before the ALC (Dated May 15, 2020) in the second issue page 5 and in the third issue page 7. second paragraph. The ALC nor Respondent argued against the allegation that Respondent was biased to Appellant's case.  
(See Attachment.)

("The purpose of Parole is universally recognized to be reformatory or rehabilitative. Parole is intended as a means of rehabilitating, then restoring the offender to society as a law abiding and productive member. As an early release mechanism, parole also serves to alleviate the high cost to the state, and ultimately to the tax payer, of keeping offenders in prison...")

It appears that DPPPS is biased as the Appellant's case on not the facts that he has shown he has rehabilitated, that he follows rules, that he is currently paying taxes, has shown respect for authority, that he has meaningful employment and will not reoffend if he was released. DPPPS has shown disregard to his record while he has been incarcerated. To use the same reason "Nature and Seriousness" every time to deny parole and increase the reasons to deny with no evidence to warrant an increase in sense is double jeopardy, because Appellant is put twice in jeopardy to be denied parole for the same thing and it increases his sentence another 12 months see language in Green v. U.S. 355 U.S. 184. It is constitutional for the Board to properly consider parole and be impartial. DPPPS fails to consider the accomplishments, facts that Appellant supports his Eleven year old with voluntary child support, and has remain disciplinary free for nine years, and obtain BED, and other character classes, which is an abuse of discretion and violates Due process.

Secondly, Appellant understands that DPPPS has the sole discretion to determine "Criminal Record Indicates Poor Community adjustment". The problem is that DPPPS didn't think so when it denied Parole in 2019 (EX-3), but did so in 2020. To be clear, Appellant has not been released from prison into the community and has not shown any poor attitudes, actions, or adjustments in his record since his last parole hearing. Appellant's SCDC is on their web site and is review by Internal programs linking SCDC and the Parole Board. Again DPPPS has failed to give credit and consider Appellant's Record. DPPPS has rendered its decision without consideration of the appropriate criteria under §24-21-640 and All 16 factors on form 1212 which violates Appellant's Due Process rights to have an impartial hearing.

Exhibit from original Brief  
Filed with ALC.

"The ALC will have limited authority to review the decision and can only determine whether the Board followed proper procedure" Boyer, 377 S.C. at 500, 661 S.E.2d at 112. Therefore, the ALC could not rule on the allegation of biased. Appellant continues to allege biased because it seems the only reason for the board to continue denial of parole and receive unanimous votes for denial in light of Appellant's SCDC record and all the criteria that he does satisfy. Moreover, Appellant's view is that the Respondent is biased in regards to his son's death, and because he appeals their decisions, it results in the Respondent being denied parole.

This violates S.C. code 5-24-21-640 because the Respondent is not considering the complete record of Appellant. He has only two other drug convictions and they are for possession of Meth 1<sup>st</sup> and 2<sup>nd</sup>. he poses no risk to the community, has a perfect SCDC record with no disciplinary, has work and is a tax paying citizen while in the DOC, has a job and place to live if he was released. There is no reason why he should not make parole other than the allegation Appellant is bring to this court, because if you took out the death of his son, then he would have made parole his first time up. This court not the ALC has jurisdiction of such issue and should hear the merits and decide the case. Respondent should not be granted leave to fully brief its response, because they have had since the original appeal to ALC to do so. Also Appellant filed his Record on Appeal before his 30 days to file brief expired.

### Conclusion

The judgement of the ALC affirming Appellant's denial of Parole should be reversed.

This 11 day of August 2021

S/ Chuck McCallagh  
Chuck McCallagh # 311605  
Appellant

Livesay, C.I.  
P.O. Box 580  
UNA, S.C. 29378