THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From The Administrative Law Court
Honorable H.W. Funderburk, Jr., III, Administrative Law Judge

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Appellate Case No. 2021-001162

Larry Blackwell, # 176790.....Appellant,

v.

South Carolina Department Probation, Parole & Pardon Services .....Respondent.

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether the ALC has jurisdiction to consider challenges to the manner in which an agency, including the South Carolina Department of Probation, Parole and Pardon Services (SCDPPPS), conducts hearings?
2. Whether SCALC Rule 61, as interpreted by SCDPPPS as prohibiting courts from considering any evidence other than the agency's form denial letter and list of parole criteria, conflicts with the South Carolina Administrative Procedures Act (APA), which requires full review of the record that was before the administrative agency and informed its decision?
3. Whether the SCDPPPS violates due process when it allows the Parole Board to consider objectively false information and prohibits or discredits efforts to correct that false information?
4. Whether due process requires the Parole Board to provide putative parolees with access to the relevant parts of their parole file, so that they have an opportunity to correct inaccurate information therein?

STATEMENT OF THE CASE

Larry Steve Blackwell, now sixty-eight years old, has served more than three decades in prison for a murder he committed while he was in the throes of a severe drug addiction. R. pp. 30-31. Since he got sober more than twenty years ago, Mr. Blackwell has not incurred a single prison disciplinary infraction. R. p. 30. During his time in prison, Mr. Blackwell has found Christ; restored damaged relationships with his family; rehabilitated himself through education and vocational training; and, most importantly, has spent years reflecting on his past and learning to live a life that gives back as much as possible, in recognition of the harm his past behavior caused. Simply put, Mr. Blackwell has been a model inmate and is prepared, as he approaches his eighth

decade of life, to live what years he has left outside the prison walls as a productive member of society.

Nevertheless, since 2014, the Parole Board has denied Mr. Blackwell parole based, at least in part, on objectively incorrect allegations of criminal conduct in his parole file—allegations SCDPPPS knows to be incorrect but refuses to correct, remove, or even provide to Mr. Blackwell or his counsel. The allegations date to early 2014, when Mr. Blackwell crossed paths with Alan Wayne Yates, an inmate with a checkered past, a history of convictions for crimes of dishonesty, and no reasonable prospect for release. R. pp. 100-01, 107. Mr. Blackwell was briefly housed with Yates at Perry Correctional Institution, and during that time, Yates fabricated an outlandish series of lies about Mr. Blackwell in an (ultimately successful) attempt to curry favorable treatment, transfer to a prison closer to his son, from the South Carolina Department of Corrections (SCDC). Using a false name and inmate number, Yates sent a letter to Seventh Circuit Solicitor Barry Barnette begging Barnette to oppose Mr. Blackwell's parole and accusing Mr. Blackwell of, among other incredible things, threatening to "get you [sic] wife drunk, have sex, and video it and sent [sic] it to you." R. p. 89.

Because this "threat" was allegedly levied against a solicitor, responsibility for investigating and processing any possible criminal charges against Mr. Blackwell was transferred to the South Carolina Law Enforcement Division (SLED) and the Attorney General (AG), respectively. Following a seven-month investigation, SLED produced a detailed, thirty-plus-page report, which it turned over to the AG's office, and the AG declined to prosecute. *See* R. pp. 75-108; R. p. 109. Nevertheless, starting in October 2014 (while the SLED investigation was underway), Barnette began sending letters to the Parole Board "to formally oppose parole for inmate Larry Blackwell" because, in Barnette's words, "Mr. Blackwell has recently threatened to

kill me and my wife. Fellow inmates in the Department of Corrections reported the threats and the State Law Enforcement Division (SLED) is presently investigating the matter." R. p. 110. Even after the AG declined to prosecute in January 2015, Barnette continued to send letters to the Board opposing parole based on Barnette's invented "fact that Mr. Blackwell threatened to kill me and my wife after he was sentenced." R. pp. 111-19

After reviewing Mr. Blackwell's prior parole hearings, his attorney, undersigned counsel Jon Ozmint, inferred that Barnette was sending inaccurate letters to the Board and sought to do what SCDPPPS form 1212 requires: "notify the Board" of an "error or inaccuracy" in his parole file. *See* Final Order, *Kelsey v. S.C. Dep't of Probation, Pardon & Parole Servs.*, No. 19-ALJ-15-0061-AP, at 9 (S.C. Admin. L. Ct. Oct. 7, 2020) (quoting Form 1212), *appeal filed*, No. 2020-001473. SCDPPPS, adopting the same position it routinely takes in parole litigation, refused to turn over any information about Mr. Blackwell's file. Mr. Blackwell's attorney, convinced that the Board's decision-making process was being tainted by Barnette's letters, tried another approach: he sent SCDPPPS's general counsel a copy of the SLED report and asked the agency to correct its file. R. pp. 67-68. SCDPPPS's general counsel responded that after speaking with Barnette, he was of the view that the contents of Barnette's letter were not inaccurate and therefore "at this time the Department will not be changing its own report to the Board." R. p. 69.

At Mr. Blackwell's parole hearing the next month, his attorney informed the Board of the SLED investigation and resulting report—the first time they had been made aware of its existence—and a member of the Board asked to review it. PPP agreed to give the Board the report, but only after informing them that it contains "no recanting of the allegations" and that Barnette "stands by his statements to the Board." R. p. 23. A SCDPPPS official told the Board, on the record, that she needed to be "clear on reviewing the SLED report, this is not part of the inmate's

record, it is not part of the investigation that was provided to the board. This is simply something that his attorney supplied to us." R. p. 24. The Board denied Mr. Blackwell parole.

When Mr. Blackwell appealed to the Administrative Law Court (ALC), SCDPPPS produced the only document it considers to be part of the record on appeal: a copy of the one-page form letter parole applicants receive after they are denied parole, listing the specific parole criteria that form the basis for the denial. R. pp. 11-17. Mr. Blackwell moved to supplement the record, indicating his intention to challenge the constitutionality of the Board's process and his corresponding need to put before the ALC information beyond the denial letters. One month later, before briefing on the merits of the claims, the ALC denied Mr. Blackwell's motion to supplement the record and *sua sponte* dismissed his appeal on the ground that because Mr. Blackwell "remains potentially eligible for parole . . . the ALC has no jurisdiction." R. p. 5.

I. False Accusations Against Mr. Blackwell and the SLED Report

In the spring of 2014, Mr. Blackwell was housed at Perry Correctional Institution in Pelzer, South Carolina. He had been disciplinary-free for fifteen years, had completed various addiction and other rehabilitative courses, was living in a Character-Based Unit (CBU), and had recently started the Jumpstart Program, from which he successfully graduated later that year. R. p. 31. Mr. Blackwell was then 61 years old and more than twenty years into his sentence.

At the same time, Alan Wayne Yates was 57 and less than a decade into a thirty-year, parole-ineligible sentence for kidnapping; armed robbery; first- and second-degree burglary; failure to stop for a blue light; and, significantly, blackmail and extortion. *E.g.*, R. p. 67, 100-01. Yates had a lengthy prison record dating back to the 1980s, but during his decades in prison, he had completed no programming and, in 2014, he had no certificates on his record. R. pp. 100-01, 107. Compared to Mr. Blackwell, Yates had nothing to lose.

Yates, however, has a son on the outside. Given that he stands almost no chance of outliving his sentence, the one thing that mattered to Yates in 2014 was his ability to see his son. Yates had learned from his prior prison stints that he could curry favorable treatment from SCDC officials—including moves to better prisons or prisons closer to his family—by sending false letters implicating other inmates in misconduct. R. pp. 76, 85. Such were the circumstances when Yates and Mr. Blackwell met.

On March 25, 2014, Yates sent a hand-written letter to Solicitor Barnette using the false name "Terry Buchanan" and a false inmate identification number. The letter read, in relevant part:

> Mr. Barnette, Solicitor,
> As a Christian i believe now in doing what is right. there is a Larry Blackwell 176790 here at Perry in dorm one. He has a very nice sister that is on first name basis with Chuck Wright-sheriff and Shane Martin-senator. Larry moved to dorm one, character base unit for one purpose. He is going to try and get his sister to put her neck on the line for him to make parole Larry is popping pills! Wanting alcohol when he gets out ← (Hoping). He has a few robberies in mind, and some clever scams to do. He got his sister thinking he done straighten his life out. Larry is fooling the heck out of her. That is ugly sir!
>
> . . .
>
> Larry has spoke so nasty of you. That you put him away with no real evidence. that you do that a lot to others. Said he wish he could get you wife drunk, have sex, and video it and sent it to you. Nasty-pathetic guy! That's a heart full of hate. Would you inform the sheriff and senator of this. And perhaps yourself can oppose Larry's parole attempt to Spartanburg, S.C. or in S.C. period.
>
> . . .
>
> Larry also said of doing this to his sister, a man got to do what a man go to do to get out of prison. That is ugly! Larry trying to con ministry folks to help on he parole also. Such as some Jumpstart program on S. pine street, i think is where it is at. A serial rapist just went there, Leroy Bernstein. He was raping young scared guys in here for years also. But Larry Blackwell is (physically dangerous)!

R. pp. 89-90.

Upon receiving this letter, Barnette contacted SLED, which assigned a senior investigator to the case. While SLED was initiating its investigation but before Mr. Blackwell had any notice of the letter, Mr. Blackwell went up for parole, unrepresented by counsel. Four days before the hearing, Barnette sent a letter to the Board "to formally oppose parole for inmate Larry Blackwell." R. p. 110. Barnette told the Board that he "prosecuted the murder case while working as an assistant solicitor" and that "[a] key to keeping our community safe is keeping Larry Blackwell and others like him in prison." R. p. 110. He continued: "Mr. Blackwell has recently threatened to kill me and my wife. Fellow inmates in the Department of Corrections reported the threats and [SLED] is presently investigating the matter." R. p. 110. Of course, the letter in question contained no such allegation; even taken at face value, the letter at worst accused Mr. Blackwell of "wish[ing] he could get [Barnette's] wife drunk, have sex, and video it and sent [sic] to you." R. p. 89. The Board denied Mr. Blackwell parole.

Meanwhile, the SLED investigation got underway. Because Yates had used a false name and a false inmate identification number when he sent the letter, the agency began its investigation by interviewing Mr. Blackwell. R. pp. 83-84. In the interview, Mr. Blackwell denied the allegations in the letter and informed the investigators that he bore no ill will toward Barnette, who was not even the primary prosecutor on his case. R. pp. 84-85. After the investigators informed Mr. Blackwell of the allegations against him, he told them "that he strongly suspected that an inmate named Yates had sent the letter" because "Yates had sent out letters in the past attempting to get other inmates in trouble." R. p. 85. Mr. Blackwell indicated in a written statement that he was "willing to take any kind of test pollygraph [sic], etc. and prove I knew nothing about any of this." R. p. 98.

The investigators spoke to Yates the same day and confronted him about sending the letter. At first, he was "reluctant to admit sending the letter to Barnett[e] but subsequently did confess to doing so." R. p. 85. After confessing, Yates "asked that [SLED] try to get him transferred to Tyger River Correctional Facility so that he could be closer to his son." R. p. 85. He maintained that Mr. Blackwell had "bragged that he would get Barnett[e]'s wife drunk, have sex with her and video it." R. p. 85. SCDC charged Yates for sending the letter under a false name and with a false SCDC number. R. p. 85. The AG's office reviewed the SLED report and within a matter of weeks, declined to prosecute. R. p. 109.

II. Mr. Blackwell's Most Recent Parole Hearing

Mr. Blackwell went up for parole again in 2016; 2019; and 2021. Before each hearing, Barnette again sent the Board letters accusing Mr. Blackwell of "threaten[ing] to kill me and my wife" and alleging that "[f]ellow inmates in the Department of Corrections reported the threats and [SLED] investigated the matter." R. pp. 110-112, 119. As in 2014, Barnette urged the Board to deny parole because "[a] key to community safety is keeping Larry Blackwell and others like him in prison." R. pp. 110-112, 119. In none of the letters did Barnette acknowledge that Yates's letter contained a series of wide-ranging and incredible allegations; that Yates had never alleged Mr. Blackwell threatened to kill Barnette or his wife; that the AG's office declined to prosecute; that the only charges that stemmed from the investigation were brought by SCDC against Yates; or that Yates used the letter as a means of getting himself moved to a prison closer to his son. Nevertheless, the Board considered and credited Barnette's allegations at both the 2016 and 2019 parole hearings.

Following the 2016 hearing, Mr. Blackwell became suspicious that the Board was receiving inaccurate information and sent a request to SLED for their report, pursuant to the Freedom of Information Act (FOIA), S.C. Code Section 30-4-10. After reviewing the report, Mr.

Blackwell retained counsel, and a month before Mr. Blackwell's 2021 hearing, his attorney contacted SCDPPPS's general counsel and asked for "assistance in correcting the unfair inclusion of blatantly and objectively false information and false allegations concerning uncharged misconduct in the parole file of Mr. Blackwell." R. p. 67. Specifically, counsel asked SCDPPPS to "inform the board of the SLED findings and the AG's decision [not to prosecute]." R. pp. 67-68.

General counsel for SCDPPPS refused. He told Mr. Blackwell's attorney that he had reviewed the SLED report and spoken with Barnette "in an attempt to be fair to all sides." R. p. 69. Based on his investigation, SCDPPPS's attorney concluded that there is "nothing in the SLED report that supports the claim [that Mr. Blackwell never made a threat] except for Mr. Blackwell's own statement. . . . Furthermore, Mr. Barnette is aware of the SLED report, so this does not appear to be some oversight from his office that would need correcting." R. p. 69. At no point did the attorney for SCDPPPS acknowledge that Barnette's letter contained objectively false information: nobody ever accused Mr. Blackwell of threatening to kill Barnette or anybody else.

Again, Mr. Blackwell's counsel asked SCDPPPS to produce "any document in the parole file that references ANY uncharged misconduct against Mr. Blackwell, including but not limited to Mr. Barnette's letters"; asked SCDPPPS to present the SLED report and the AG's letter declining to prosecute to the Board; and asked for "written confirmation as to whether or not you intend to present the subject SLED report and AG's declination letter to the board." R. pp. 70-71. SCDPPPS did not respond. On the eve of the parole hearing, Mr. Blackwell's attorney reached out to SCDPPPS a final time. R. pp. 72-73. Their general counsel responded, reiterating that "the Department feels it has no responsibility to second-guess the statements of the solicitor" because

to do so "would inappropriately place PPP in the position of being Mr. Blackwell's advocate, especially where, in this case, the inmate did not recant or withdraw his allegations." R. p. 74.

The parole hearing took place on April 14, 2021. Mr. Blackwell's attorney introduced the case and described how Mr. Blackwell fell into addiction as a young teenager, following the death of his mother when he was only two years old and his father a decade later. The attorney noted that Mr. Blackwell had undergone a "conversion" in SCDC after engaging for the first time in his life with education and rehabilitation programs. R. p. 18. By the late 1990s, Mr. Blackwell had recovered from his addiction and his prison record reflects that; his only disciplinaries came in the first several years of his sentence. R. p. 105. Mr. Blackwell gave a statement to the Board detailing his addiction history, the circumstances of the offense, and his eventual religious conversion and the realization that "I went and wasted my life . . . [a]nd I knew I had to make a change." R. p. 19.

Before he finished the presentation, Mr. Blackwell's attorney told the Board about the contents of Yates's letter and the fact that Barnette had submitted a letter (the precise contents of which he was unaware) that, Mr. Blackwell's attorney believed, contained false information. He described the SLED report and told the Board that he was "down about this" because, he noted, SCDPPPS "knew about that SLED report, they did not give that to you for six years. I don't know if they've given it to you now." R. p. 21.

At the close of the hearing, the Chairman asked for voice votes. Only the Chairman voted to grant Mr. Blackwell parole. Another Board member, Mollie DuPriest Taylor, voted as follows: "Deny, and I would like a follow up from the agency regarding um Mr. Ozmint's allegations about that SLED report." R. p. 22. In response, Valerie Suber, who introduced herself to the Board as "Director of Paroles, Pardons or Release Services," asked the agency's general counsel to speak to the Board. R. p. 22. The agency's lawyer told the Board the following:

> Mr. Ozmint contacted me and provided me with information about that SLED report, provided me that SLED report. The allegation that he says we're burying this, we were not aware of this SLED report until Mr. Ozmint provided this to me. *It pertains essentially to the allegations that are listed in Solicitor Barnette's letters in opposition.* After reviewing the SLED report I saw that there, uh, there was no recanting of the allegations, *I spoke with Solicitor Barnette about this, he stands by his statements to the board.* And in that case because this did not appear in the packet that Triple P prepared, and it was only within Mr. Barnette's letters, we felt that the, that, going in and what, what, *Mr. Ozmint wanted was to actually, for us to essentially refute or counter Solicitor Barnette's statements, and we are not in the position to do that.*

R. pp. 23-24.

The same Board member who had asked to see the SLED report then requested a copy of Yates's letter. The agency attorney agreed, but Ms. Suber again chimed in and informed the Board that "in order to [give the Board the SLED report], I need to make sure we're clear . . . [that] *this is simply something that his attorney supplied to us in order to refute a statement of [opposition] and we don't investigate or legitimize statements of opposition.*" R. p. 24. Ms. Suber reiterated that before she would send the Board the report, she needed them to know that "the SLED report was provided by the inmate's attorney, not official from SLED, and it needs to be reviewed as such." R. p. 25. The Board members adjourned while Ms. Taylor reviewed the SLED report, and when they returned later that day, they finalized Mr. Blackwell's parole denial by a vote of three against and one in favor. R. p. 26.

III. Appeal to the ALC

Mr. Blackwell timely appealed to the ALC and sent a FOIA request to Barnette's office for correspondence between the office and SCDPPPS. In response, Barnette sent his letters in opposition; for the first time, Mr. Blackwell had evidence of what he had suspected: Barnette was sending letters to the Board that contain objectively incorrect information. With this new evidence in hand, Mr. Blackwell moved to supplement the Record on Appeal (ROA), arguing that if he could not provide the ALC with more information than what was in the agency's ROA, there

would be no basis from which the ALC could evaluate his legal arguments. R. pp. 7-8. The agency opposed Mr. Blackwell's motion. Just over a month after Mr. Blackwell filed the motion to supplement—and before either party had filed a brief on the merits of the case—the ALC issued an order denying the motion to supplement and *sua sponte* dismissing Mr. Blackwell's appeal. R. pp. 1-5. According to the ALC, because Mr. Blackwell "remains potentially eligible for parole," his was a "routine parole denial[]" and the ALC therefore concluded it lacked jurisdiction and had no choice but to dismiss it immediately. R. p. 5. This appeal followed.

STANDARD OF REVIEW

This Court has jurisdiction to review decisions by the ALC. S.C. Code Ann. § 1-23-610(A)(l). Although routine parole denials are not subject to review at the ALC and are therefore beyond this Court's purview, a parole denial that is the result of improper or unlawful process falls within the ALC's jurisdiction. *See Cooper v. S.C. Dep't of Probation, Parole & Pardon Servs.*, 377 S.C. 489, 493-94, 661 S.E.2d 106, 108-09 (2008). This Court's review is confined to the record that was before the ALC and the Court may not substitute its judgment for that of the administrative law judge as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-610(B); *see also Cooper*, 377 S.C. at 500, 661 S.E.2d at 112 (applying the APA standard for judicial review of a contested case to an appeal from a parole denial and explaining that the Board and ALC are subject to reversal if their final decision does not "include findings of fact and conclusions of law, separately stated," or if the findings of fact are not "accompanied by a concise and explicit statement of the underlying facts supporting the findings" (quoting S.C. Code Ann. § 1-23-350)). After giving the ALC's factual findings the weight to which they are entitled, this Court's review of the controlling legal principles is *de novo*, and the Court has the power to reverse the ALC if its decision is affected by an error of law. S.C. Code Ann. § 1-23-610(B); *Gatewood v. S.C. Dep't of Corr.*, 416 S.C. 304, 313, 785 S.E.2d 600, 605 (Ct. App. 2016). Specifically, this Court may

"remand the case for further proceedings" or it may reverse or modify the ALC's decision if the appellant's "substantive rights have been prejudiced" as a result of: a "violation of constitutional or statutory provisions"; an agency's exercise of undelegated authority; "unlawful procedure"; any "other error of law"; "clearly erroneous" factual findings, in view of the whole record; or decision making that is "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-610(B).

ARGUMENT

I. The ALC Has Jurisdiction to Consider Challenges to the Manner in Which an Agency, Including SCDPPPS, Conducts Hearings.

The South Carolina Department of Probation, Pardon and Parole Services (SCDPPPS) is an executive agency. *See* S.C. Code Ann. § 24-21-10(A); *see also id.* § 1-23-10(1) (defining "Agency" and "State agency"). Because SCDPPPS is an agency, and because parole determinations constitute agency action, "an inmate may seek review of [SCDPPPS's] final decision in an administrative matter under the APA." *Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2ds 742, 750 (2000). This is reinforced by the fact that in all of the Supreme Court's decisions on the scope of the ALC's power to review SCDPPPS's actions, the Court has relied on opinions interpreting the scope of the ALC's power to review actions of *other* agencies— SCDPPPS, in other words, is not subject to a special set of rules simply because its expertise lies in parole decisions. *E.g.*, *Rose v. S.C. Dep't of Probation, Parole & Pardon Servs.*, 429 S.C. 136,143, 838 S.E.2d 505, 509 (2020) (citing *Sanders v. S.C. Dep't of Corr.*, 379 S.C. 411, 665 S.E.2d 231 (2008), a case involving a prisoner's non-wage deposits, and *Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 530 S.E.2d 653 (Ct. App. 2000), a case involving conditions imposed by hazardous waste permits); *Barton v. S.C. Dep't of Probation Parole & Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013) (citing *Hill v. S.C. Dep't of Health & Envt'l Control*, 389 S.C. 1, 698

S.E.2d 612 (2010), a case involving coast zone management permit violations by a property owner).

And because SCDPPPS is subject to the APA, the ALC has the power to review and correct decisions from PPP that violate the APA. *See* S.C. Code Ann. § 1-23-610(B); *see also Al-Shabaaz*, 338 S.C. at 369, 527 S.E.2d at 750 (holding that the APA applies to parole appeals and inmate disciplinary proceedings, so long as the person seeking administrative relief can show that the interest they have asserted is "encompassed by the Fourteenth Amendment's protection of liberty [or] property" (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569 (1972))). This is true even when a person seeking review at the ALC is "a potentially eligible inmate" who has been denied parole, so long as the parole applicant is not appealing the fact of the Board's decision to deny parole. *Compare* S.C. Code Ann. § 1-23-600(D) (restricting the ALC's subject-matter jurisdiction with respect to parole-eligible inmates) *with Rose*, 429 S.C. 136, 838 S.E.2d 505 (in the case of a parole-eligible inmate, confirming that the ALC had jurisdiction to hear an appeal from a parole denial where the parole denial stemmed from a statutory violation by SCDPPPS) *and Cooper*, 377 S.C. 489, 661 S.E.2d 106 (in an appeal from an ALC decision affirming a parole denial, confirming that inmates have a right to procedural due process at parole hearings and holding that, when the Board deviates from constitutional standards, the ALC, the Court of Appeals, and the Supreme Court all have jurisdiction over an appeal brought on that basis).

Notably, the statute that governs appeals to the ALC specifically provides that those appeals "must be in the same manner as prescribed in Section 1-23-380 for judicial review of agency decisions with the presiding administrative law judge exercising the same authority as the court of appeals." S.C. Code Ann. § 1-23-600(E). Section 1-23-380 requires review based on the record and, "[i]n cases of alleged irregularities in procedure before the agency," permits the ALC

to remand "for action as the court considers appropriate." *Id.* § 1-23-380(4); *see also id.* § 1-23-380(5) (detailing when the ALC may "reverse or modify" the decision of an agency).

Here, the ALC dismissed Mr. Blackwell's appeal for want of jurisdiction without even considering the nature of his claims. R. p. 5. Specifically, the ALC held that because Mr. Blackwell "remains potentially eligible for parole," the courthouse doors are closed to him forever, regardless of whether and how SCDPPPS violates his constitutional rights or entirely ignores the constraints of the APA. R. p. 5. *Cf. Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country."). This line of reasoning represents a significant misapprehension of the nature and purpose of ALC review, and especially so in South Carolina, where the ALC is empowered to take broad corrective action and to engage in searching fact-finding. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envt'l Control*, 411 S.C. 16, 55, 766 S.E.2d 707, 729 (Toal, C.J., joined by Kittredge, J., dissenting) (explaining that the General Assembly "granted ALCs the significant right to render final decisions based on de novo review," unlike in the federal system or in other states); *see also* S.C. Code Ann. §§ 1-23-600(D), 1-23-380(4), (5).

Mr. Blackwell raised claims under the Due Process Clauses of the State and Federal Constitutions, based on the agency's presentation to the Board of objectively inaccurate information and the agency's denigration of contrary evidence. The APA provides for judicial review from agency decisions that are "in violation of constitutional or statutory provisions," that are "made upon unlawful procedure," that are "affected by other error of law," that are "clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record," or that are "arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-610(B). These provisions apply to appeals from an

agency to the ALC. *Id.* § 1-23-600. Mr. Blackwell's claims involve those issues, and his case is therefore entitled to judicial review. Or, in the words of the Supreme Court, "the fact that the Parole Board did not permanently deny [Mr. Blackwell] parole is not dispositive and the ALC erred in summarily dismissing the appeal on this basis." *Cooper*, 377 S.C. at 498, 661 S.E.2d at 111.

II. SCALC Rule 61, as Interpreted by SCDPPPS, Conflicts with the Administrative Procedures Act.

In October 2020, the ALC issued an opinion in a case where a parole applicant sought to supplement the SCDPPPS record on appeal. At the time, the ALC rules provided that the Record on Appeal "shall consist of the transcript of the proceedings before the agency, if any, and the record of the contested case as described by Rule 58." SCALC Rule 61 (May 2, 2019). Rule 58, in turn, included as elements of the record on appeal "[a]ll documents filed" and "[a]ll evidence received or considered . . . and copies of specific policies relied upon by the agency." SCALC Rule 58 (May 2, 2019); *see also* Notes to 2014 Amendments, SCALC Rule 58 ("In every case, copies of all specific policies relied upon by the agency must likewise be included in the record."). Counsel for SCDPPPS consented to the request to supplement (though they later sought to revoke their consent), and based on the contents of the supplemental record, the ALC held that SCDPPPS had engaged in an "arbitrary and capricious" process and had made its parole decision "based on untrue assertions of fact and improper argument." Final Order, *Kelsey v. S.C. Dep't of Probation, Parole & Pardon Servs.*, No. 19-ALJ-15-0061-AP (S.C. Admin. L. Ct. Oct. 7, 2020), *appeal filed*, No. 2020-001473.

Following that order, which remains pending on appeal before this Court, the ALC amended its rules in an apparent attempt to prevent putative parolees from putting before the ALC any evidence other than SCDPPPS's form denial letters. Specifically, the 2021 amendments changed Rule 61 to provide as follows: "In appeals from decisions of the Probation, Pardon and

Parole Board, the Department need only provide a copy of the agency decision, and where applicable, the decision following a motion for reconsideration." SCALC Rule 61 (Apr. 26, 2021). The 2021 Note indicates that "[t]he 2021 amendment clarified that the record on appeal from decisions of the Probation, Pardon and Parole Board would be limited to the agency decision and any decision on a motion for reconsideration." 2021 Note to SCALC Rule 61.

In the present case, the agency's record on appeal consisted of the only thing Rule 61, as amended, requires—a form denial letter. R. pp. 15-16. Mr. Blackwell sought to supplement the record to include information necessary to support his claims, all of which, as described above, challenged the agency's process, not its ultimate decision. R. p. 7. Specifically, Mr. Blackwell sought to the following items in the record: (1) "documents received" by SCDPPS prior to Mr. Blackwell's parole hearing, including the parole package his attorney sent the Board; (2) a transcript of Mr. Blackwell's most recent parole hearing; (3) a copy of the SLED report; and (4) a series of written communications between Mr. Blackwell's parole attorney and SCDPPPS. R. p. 7.

Reading Rule 61 as narrowly as SCDPPPS does—to prevent the ALC from considering any of this information—conflicts with what the APA requires and renders ALC review a practical nullity. No other agency or division of an agency is governed by a similar rule; in all other appeals before the ALC, the record continues to consist of what the APA demands: "all pleadings, evidence received or considered, and the final order," as well as "the tape recording of the hearing or a properly transcribed record of the hearing." *Al-Shabazz*, 338 S.C. at 377, 527 S.E.2d at 754; *see also* S.C. Code Ann. § 1-23-600(C) ("A full and complete record must be kept of all contested cases and regulation hearings before an administrative law judge."); *id.* § 1-23-600(E) ("Review by an administrative law judge of a final decision in a contested case, heard in the appellate

jurisdiction of the Administrative Law Court, must be in the same manner as prescribed in Section 1-23-380 for judicial review of final agency decisions."). If the agency's reading of Rule 61 is correct, the ALC is, in practice, merely a stepping stone for review in this Court, and litigants should not be required to exhaust administrative relief before seeking relief from the judicial branch. *See Engaging & Guarding Laurens Cty.'s Envt. (EAGLE) v. S.C. Dep't of Health & Envt'l Control*, 407 S.C. 334, 345, 755 S.E.2d 444, 450 (2014) (in an appeal to the ALC, holding that the ALC was not bound by the agency's decision and that the ALC properly exercised its authority and did not consider extra-record evidence when its analysis hinged on a factor that the agency itself did not consider). Moreover, under the agency's reading of Rule 61, a parole applicant has no means of vindicating constitutional rights at the ALC because Rule 61 would prevent the ALC from ever considering evidence outside the denial letter—even if, for example, the parole applicant had evidence that the Board had denied him parole based on his race, gender, religion, or sexual orientation. *Cf. Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (long-standing evidentiary rules may not bar the admission of evidence that race played a role in juror deliberations). Although Rule 61, by its plain language, appears to relieve the agency of its obligation to produce the "full and complete record," S.C. Code Ann. § 1-23-600(C), the rule cannot be read to bar a parole applicant from supplementing the agency's record.

III. SCDPPPS's Decision to Permit the Board to Consider Inaccurate Allegations of Criminal Conduct; Its Decision to Undermine Evidence to the Contrary; and Its Refusal to Give Mr. Blackwell a Means to Correct the Inaccurate Information Violated Due Process.

Putative parolees have a right to due process in parole hearings. *Al-Shabazz*, 338 S.C. at 377, 527 S.E.2d at 754. Inherent in due process is the requirement that agency decisions not be arbitrary or capricious, meaning parole decisions must be based on "substantial evidence." S.C. Code Ann. § 1-23-380(5)(f); *Rose*, 429 S.C. at 142-43, 838 S.E.2d at 509 (upholding an ALC

decision against PPP because, "looking at the entire record on appeal," the ALC decision was based on "evidence from which reasonable minds could reach the same conclusion that the ALC reached" (internal quotation marks omitted)). The "substantial evidence" standard means that an agency may not "offer an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996).

From these principles flows the basic point that although a state need not set up a system of parole, once it has done so, the parole agency owes putative parolees a duty to "actually and accurately pertain to the prisoner whose parole is being considered." *State ex rel. Keith v. Oh. Adult Parole Auth.*, 24 N.E.3d 1132, 1137 (Oh. 2014); *see also Cooper*, 377 S.C. at 496-97, 661 S.E.2d at 110 (emphasizing that putative parolees have a right to due process in parole hearings). Thus, "where there are credible allegations, supported by evidence, that the materials relied on at a parole hearing were substantively inaccurate, the [agency] has an obligation to investigate and correct any significant errors in the record . . . the agency uses to consider [the prisoner] for parole." *Keith*, 24 N.E.3d at 1137-38.

Although South Carolina courts have not yet held that parole applicants have a right to parole decisions based on accurate information, the basic principles underpinning that rule are well established and are reinforced by at least three sources of law.

A. SCDPPP's own regulations indicate that parole applicants have a right to parole decisions based on accurate information.

According to the Board's criteria for parole, an inmate who applies for parole and who believes their file "is somehow incomplete or contains some errors or other inaccuracy . . . must notify the Board of the specific error or inaccuracy." Parole Form 1212, S.C. Dep't of Probation, Parole & Pardon Servs. However, because the Board will not give parole applicants access to their

files, this guideline exists on paper alone, and that gives rise to a due process violation. Specifically, as a matter of basic agency law, "government agencies are bound to follow their own rules, even self-imposed procedural rules that limit otherwise discretionary decisions," and an agency's failure to follow its own rules and regulations violates due process. *E.g.*, *Jefferson v. Harrison*, 285 F. Supp.3d 173, 184 (D.D.C. 2018) (quoting *Wilkinson v. Legal Servs. Corp.*, 27 F. Supp.2d 32, 34 n.3 (D.D.C. 1998), for the source of the so-called *Accardi* doctrine first identified by the Supreme Court of the United States in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267-68 (1954)); *see also Triska v. Dep't of Health & Envtl. Control*, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987) ("[An agency] must also follow its own regulations and the provisions of the Administrative Procedures Act in carrying out the legitimate purposes of the agency.").

Here, SCDPPPS gave Mr. Blackwell a copy of Parole Form 1212 before his most recent hearing, R. p. 15, and he cited the form in his efforts to get access to any information in the agency's possession that the Board was going to consider, R. p. 72. Nevertheless, the agency refused to give Mr. Blackwell anything. R. p. 73. Because he had (and still has) no way of knowing what is in the agency's file on him; what information the Board is in fact considering; and what the agency has told the Board about the inaccurate allegations in his file, Mr. Blackwell has no way of vindicating the right referenced in Parole Form 1212. When, as here, an agency establishes procedural rules but declines to follow them, that constitutes a due process violation. *See Jefferson*, 285 F. Supp.3d at 184; *Triska*, 292 S.C. at 194, 355 S.E.2d at 533.

B. Due process prohibits the Board from considering objectively false information.

Procedural due process guarantees in both the United States and South Carolina Constitutions shield an inmate from improper influences or incorrect information being brought to bear on a parole board's decision-making process. *See Simmons v. South Carolina*, 512 U.S. 154,

161-62 (1994) (due process prohibits states from misleading a decision-maker by "concealing" information from the decision-maker or the affected party); *Skipper v. South Carolina*, 476 U.S. 1, 10-11 (1986) (Powell, J., concurring in the judgment) (excluding rebuttal testimony that would undermine the state's case in aggravation violates due process); *Gardner v. Florida*, 430 U.S. 349, 361-62 (1977) (where a liberty interest is at stake, due process requires an opportunity to "deny or explain" false or misleading information); *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972); *see also Al-Shabazz*, 338 S.C. at 375, 527 S.E.2d at 753 (discussing the importance of "a reviewable record" for proceedings in front of an agency in order to permit error correction). Accordingly, the U.S. Supreme Court has acknowledged the constitutionally relevant "serious risks of error" when an inmate is denied access to his parole files and the ability to challenge them: the inmate may be denied parole on the basis of "adverse factual information in the inmate's file [that] is wholly inaccurate." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 15, n.7 (1979).

These basic precepts give rise to the rule in South Carolina that incarcerated individuals who seek parole have a "state-created liberty interest" in a parole process that does not "deviate[] from" a "consideration of the appropriate criteria." *Cooper*, 377 S.C. at 499, 661 S.E.2d at 111. Once a parole applicant has made out a claim that the government has infringed on a state-created liberty interest, procedural due process protections apply. *See id.* In determining what process is due, courts consider "the private interest affected by the proceeding, the risk of error created by the chosen procedure, and the countervailing government interest supporting [the] challenged procedure." *Kurschner v. City of Camden Planning Comm'n*, 375 S.C. 165, 172-73, 656 S.E.2d 346, 350 (2008) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Here, the private interest at issue is Mr. Blackwell's right to an accurate parole decision based on objective factors. This right is substantial; if the Board continues to deny Mr. Blackwell

parole based even in part on inaccurate information in his file, his parole-eligible life sentence is converted to a parole-ineligible life sentence, and that distinction carries constitutional weight. *See Aiken v. Byars*, 410 S.C. 534, 545-46, 765 S.E.2d 572, 578 (2014) (Pleicones, J., concurring) (in the controlling opinion for the Court, holding that under the South Carolina Constitution, juveniles sentenced to life without the possibility of parole must be given new sentencing hearings because there is a categorical difference between a sentence of life without parole and all other prison sentences). Every time Mr. Blackwell is denied parole based in whole or in part on inaccurate information, he moves two years closer to a death-in-prison sentence.

The risk of error inherent in allowing the Board to consider inaccurate information—and, as here, denigrating evidence that proves the inaccuracy of the information before the Board—is difficult to overstate. Members of the Board have before them secret information prepared by the agency; letters from members of the public who oppose parole, including any individual who self-identifies as a victim; and whatever information the parole applicant submits to the Board, including a maximum of five letters in support. *See* SCDPPPS, Parole Hearing Explanation, https://www.dppps.sc.gov/Victim-Services/Parole-Hearing-Explanation (last visited Dec. 20, 2021). But because the parole applicant has no way to know what information is before the Board other than what he has himself submitted, he cannot counter any inaccurate information.

Given that SCDPPPS refuses to review or filter any evidence that goes before the Board, there is a distinct possibility that a substantial amount of false information reaches the Board in, for example, letters submitted by local law enforcement, victims, or victim advocates, or in the factual summary SCDPPPS gives the Board in every case. After all, the agency that prepares the factual summary is the same agency that openly acknowledges it makes no effort to ensure that only accurate information goes before the decision-maker. It is also the same agency that, as in

Mr. Blackwell's case, intervenes when a parole applicant, knowing there is false information in his file, attempts to rebut that false information with objective evidence—by denigrating that evidence and ensuring that the Board does not give full weight to the parole applicant's materials. Under such circumstances, it is impossible for the Board not to take into account any inaccuracies in the parole applicant's file. *See Keith*, 24 N.E.3d at 1137-38.

The government has not identified a countervailing interest in permitting the Board to consider false information. To date, SCDPPPS has simply maintained that an inmate's parole file is "privileged and confidential," R. p. 15[1]; that the inaccuracies in Mr. Blackwell's file are not, in fact, incorrect because Yates did not recant his allegation that Mr. Blackwell wanted to get Barnette's wife drunk and have sex with her, R. p. 69; and that SCDPPPS has no authority to correct the inaccuracies because the inaccurate allegations are contained in a letter from the prosecutor as opposed to coming from "the packet that [the agency] prepared," R. p. 72.

Weighing those three considerations makes clear that the Board's process violated procedural due process. Mr. Blackwell is in a unique position because he has objective evidence that: (1) the Board considered patently false information; (2) SCDPPPS did not correct the patently false information; (3) SCDPPPS denigrated objective evidence that undermined the false information when his attorney attempted to put that evidence before the Board; and (4) he was

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[1] In related litigation, SCDPPPS has asserted alternatively that a statutory document retention rule prohibits it from disclosing a parole applicant's file and that the South Carolina FOIA exempts this information from disclosure. Neither statutory provision says anything close to what the agency claims. The document retention statute simply states that "[t]he Board shall keep a complete record of all its proceedings and hold it subject to the order of the Governor or the General Assembly." S.C. Code Ann. § 24-21-40. The FOIA likewise does not expressly exempt a parole file from disclosure. *See* S.C. Code Ann. § 30-4-40 (listing exemptions). Where FOIA does not expressly exempt a record from disclosure, the Supreme Court of South Carolina has construed the statute broadly to require disclosure. *See Evening Post Pub. Co. v. Berkeley Cty. School Dist.*, 392 S.C. 76, 84, 708 S.E.2d 749 (2011); *see also Soc'y of Professional Journalists v. Sexton*, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984).

denied parole based on factors related to the patently false information. Specifically, Barnette's letters reminded the Board that he "prosecuted the murder case while working as an assistant solicitor"; asserted that "[a] key to keeping our community safe is keeping Larry Blackwell and others like him in prison"; and alleged that "Mr. Blackwell has recently threatened to kill me and my wife" and that "[f]ellow inmates in the Department of Corrections reported the threats and [SLED] is presently investigating the matter." R. pp. 110-13, 119. Mr. Blackwell's attorney asked the agency not to let the Board consider the letters and to provide the Board with the SLED report; SCDPPPS refused. R. p. 69. When Mr. Blackwell's attorney put the SLED report before the Board at the parole hearing, an agency lawyer told the Board—incorrectly—that the SLED report "pertains essentially to the allegations that are listed in Solicitor Barnette's letters in opposition" and that the agency is "not in the position" to "refute or counter Solicitor Barnette's statements." R. pp. 23-24. Another agency official also informed the Board that "in order to [give the Board the SLED report], I need to make sure we're clear . . . [that] *this is simply something that his attorney supplied to us in order to refute a statement of [opposition] and we don't investigate or legitimize statements of opposition.*" R. p. 24. She continued: "the SLED report was provided by the inmate's attorney, not official from SLED, and it needs to be reviewed as such." R. p. 25. At the close of the hearing, the Board denied Mr. Blackwell parole and cited the following factors: "Nature And Seriousness Of Current Offense"; "Indication of Violence In This Or Previous Offense"; "Use Of Deadly Weapon In This Or Previous Offense"; "Criminal Record Indicates Poor Community Adjustment"; and "Failure to Successfully Complete A Community Supervision Program." R. pp. 16, 25.

Under these circumstances, Mr. Blackwell is entitled to a new parole hearing at which the Board does not consider inaccurate information. In order to effectuate that right, it is necessary

that Mr. Blackwell be given access to his parole file and that SCDPPPS remove all "substantively inaccurate" information from his file, including victim opposition letters. *See Keith*, 24 N.E.3d at 1137-38 (requiring the state's parole agency to "conduct an investigation into [the parole applicant's] allegations" that the parole board considered "substantively inaccurate" information and ordering the agency to "correct any significant errors in the record of the prisoner").

C. The APA prohibits agencies from rendering decisions that are arbitrary or capricious or that are otherwise unsupported by the record.

As described above, the APA prohibits agency action that is "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion" and agency action that is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(5)(e), (f). An agency's decision is "arbitrary or capricious" when it is not based on the evidence before the agency; when it appears random or the product of unreasoned decision-making; or where it is based on animus or other undue influence. *See Kiawah Dev. Partners*, 411 S.C. at 34-37, 766 S.E.2d at 719-20 (describing the fact-intensive standard and reversing the ALC's decision where the agency's decision was "reasonable and consistent with its statutory authority"); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913-1915 (2020) (holding that an agency's decision was arbitrary and capricious where, despite protestations to the contrary, the evidence demonstrated that the agency had not given reasoned consideration to the evidence before it); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 518-21 (2009) (holding that an agency's decision was not arbitrary and capricious where the agency's judgment "ma[de] entire sense"). Here, the Board's decision was arbitrary and capricious because it was based, at least in part, on objectively untrue assertions of fact that were unsupported by the substantial record before the agency. The fact that the information at issue came from a prosecutor rather than the agency itself does not cure the problem because the

substantial evidence before the agency proved the allegations incorrect and the agency is fully aware that a letter from the prosecuting agent (who, the Board members may assume, has more information about the parole applicant than the members themselves do) carries significant weight before the Board. It does not matter that Yates never recanted his allegations; even taking his letter at face value, the only evidence in the record that Mr. Blackwell threatened to kill anybody came from Barnette. Moreover, the agency's decision to bolster Barnette's allegations by denigrating the SLED report and by implying that the SLED report addressed death threats constituted an "abuse of discretion" or a "clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(5)(f). The Board's decision was infected by false accusations from an unduly persuasive source, and the agency—knowing that the accusations were false—did not correct the record but instead threw its weight behind the false allegations, intentionally tipping the scales against Mr. Blackwell. This violated the APA and Mr. Blackwell is therefore entitled to a new parole hearing that is untainted by false information.

CONCLUSION

For the foregoing reasons, the agency's process is unlawful and Mr. Blackwell is therefore entitled to a new parole hearing that does not violate his rights.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From The Administrative Law Court
Honorable H.W. Funderburk, Jr., III, Administrative Law Judge

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Appellate Case No. 2021-001162

Larry Blackwell, # 176790 ..... Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant's Final Brief and Final Reply Brief comply with Rule 211(b), SCACR.

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