STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2021-001162

LARRY BLACKWELL, #176790..... APPELLANT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....RESPONDENT

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On December 8, 1991, a witness told Spartanburg County Sheriff's deputies that he and Victim had been driving in Victim's vehicle when they were chased by two men in another vehicle on Dobson Road in Spartanburg. Victim and witness tried to turn their vehicle around on Gilliam Road. When the men chasing them blocked the vehicle, the witness jumped out of the car and ran. When the witness returned later, he found the victim lying face down partially inside the vehicle. A nearby resident heard a vehicle strike a tree and called 911. State troopers found the victim's vehicle with the left driver's door window broken and victim's body as the witness described. EMS workers located a fatal stab wound below the rib cage of the victim. The subsequent investigation resulted in the arrest of Appellant and co-defendant James Hazle who were both charged with murder. According to the local newspaper account, Appellant and Hazle were coming from a crack house and mistakenly thought the victim had taken money from them. Appellant was on supervised furlough with the Greenville probation and parole office at the time.

A jury found Appellant guilty of murder after a trial on May 22, 1992. Judge Thomas W. Cooper, Jr., sentenced Appellant to life imprisonment. At the time of the commission of the offense, South Carolina law provided for parole eligibility on a murder sentence after service of twenty years.

Appellant first appeared before the Parole Board ("The Board") for parole consideration on September 12, 2012, and was denied. Appellant's fifth and most recent hearing occurred on April 14, 2021, where parole was again denied by a vote of three opposed to parole and one vote in favor of parole. The Board gave its five reasons for denial as the nature and seriousness of the current offense, indication of violence in this or previous offense, use of a deadly weapon in this

or previous offense, criminal record indicates poor community adjustment, and a failure to successfully complete a community supervision program. (R.p.16).

After this denial, Appellant filed a notice of appeal before the Administrative Law Court (ALC). Appellant subsequently moved to supplement the record by including the information provided to the Board by his attorney, a transcript of the parole hearing, a copy of a State Law Enforcement Division (SLED) report, email correspondence, and a letter of opposition to parole from Solicitor Barry J. Barnette of the Seventh Judicial Circuit. (R.p.18-p.110). Respondent objected to the motion to supplement the record, citing SCALC Rule 61 and S.C. Code Ann. § 1-23-600(D) (Supp. 2019). The Honorable H.W. Funderburk, Jr. issued a ruling denying the motion to supplement the record and summarily dismissing the appeal, citing a lack of authority of the ALC to hear appeals of routine denials of parole.[1] (R.p.1-p.6).

Appellant filed his notice of appeal on October 7, 2021. Appellant argues that the ALC has the authority to hear appeals of routine denials of parole when the inmate alleges that the information presented to the Parole Board contained "inaccuracies." Appellant also argues that this court should rule that, despite the clear language in SCALC Rule 61, the ALC must allow the record to be supplemented whenever requested by the inmate. Furthermore, Appellant argues that information presented to the Board by a non-SCDPPPS employee that he disagrees with or believes is not accurate gives him a due process right to force SCDPPPS to either correct the information or allow him to challenge the routine denial of parole on appeal.

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[1] On December 29, 2021, Respondent filed an objection to the designation of matter submitted by Appellant and motion to strike in the instant case because the designation of matter included information not included in the underlying record on appeal as the ALC did not allow the record to be expanded. This motion was denied on April 15, 2022 and this brief follows. Although it must refer to the record on appeal to respond to Appellant's arguments, Respondent renews its objections to the supplemental record.

Respondent will argue that the ALC was correct in determining it lacked the authority to hear an appeal of a routine denial of parole and, therefore, correctly denied the motion to supplement the record and correctly dismissed the appeal. Respondent will also show that SCALC Rule 61 is entirely appropriate considering the ALC's narrow scope of review in what it may consider regarding a routine denial of parole. Further, Respondent will argue that the SCDPPPS's responsibility is not to police or vet the information provided to the Parole Board by non-employees. Doing so would create a currently non-existent due process right to inmates to allow them to turn parole consideration hearings into *de novo* trials over the facts, which is untenable and counter to the limited right of inmates to parole consideration, but not to parole release.

The brief of Respondent supporting the above-referenced defenses follows.

STANDARD OF REVIEW

When reviewing a parole case, the ALC sits in an appellate capacity. *Furtick v. S.C. Dept. of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2004). However, an administrative law judge may not consider an appeal from an inmate involving the denial of parole if the inmate is otherwise parole eligible. S.C. Code Ann. §1-23-600(D) (Supp. 2019). Under the appellate standard of the Administrative Procedures Act, the ALC's review is limited to the record, absent irregularities in the procedure of the agency. S.C. Code Ann. § 1-23-380(4) (Supp. 2008). Additionally, the court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, but may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5) (Supp. 2008).

In an appeal from an ALC decision, the Administrative Procedures Act provides the standard of review. S.C. Code Ann. § 1-23-610(B) (Supp. 2008). This Court may only reverse the decision of the ALC if that decision is:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
> *Id.*

"The court may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-610(B). In determining whether the ALC's decision was supported by substantial evidence, this court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached. *Hill v. S.C. Dep't of Health and Envtl. Control*, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010).

ARGUMENTS

I. Whether the Administrative Law Court (ALC) acts properly in accordance with well-established precedent when it dismisses appeals of routine denials of parole, even when the inmate challenges the information presented to the Board?

Appellant is appealing the ALC's order denying his motion to supplement the record and dismissing his appeal from a routine denial of parole. The ALC judge dismissed the appeal based on S.C. Code Ann. § 1-23-600(D), holding that because Appellant is still a "potentially [parole] eligible inmate," the ALC has no jurisdiction to consider his appeal. Despite the clear limitation on the ALC's authority to review parole denials, Appellant cites to the rest of the Administrative

Procedures Act as grounds that the ALC can review the matter, must consider the full record, and may reverse if the ALC finds one or more reasons listed in § 1-23-610(B). Respondent respectfully submits, however, that Appellant is mistaken, the ALC is correct and, when a parole eligible inmate is denied parole, the inmate simply may not appeal the Board's decision.

Appellant apparently hopes to convince this Court to ignore the blackletter law of §1-23-600(D) or create an enormous exception that would inevitably consume the rule – that if an inmate disputes or challenges any information presented to the Board, the ALC must then conduct a full appellate review. Appellant begins his argument by stating categorically that the ALC has jurisdiction to consider challenges to the manner in which the Board conducts its hearings. In support, Appellant cites to *Al-Shabazz*[2] and a number of cases involving the Parole Board's decisions.[3] However, none of the cases Appellant cites provide precedent that would support the radical change of allowing the ALC to review appeals of routine denials of parole and supplant the Parole Board as the ultimate decision-maker. More critically, *Cooper v. S.C. Dep't of Probation, Parole and Pardon Servs.*, 377 S.C. 489, 661 S.E.2d 106 (2008), and *Compton v. S.C. Dep't of Probation, Parole and Pardon Servs.*, 385 S.C. 476, 685 S.E.2d 175 (2009) provide precedent to the contrary.[4]

Respondent concedes the ALC has authority – albeit extremely limited – to review matters involving parole. Its clearest authority is to review the permanent denial of parole eligibility. The Parole Board has the specific authority to consider parole eligibility, which is separate and distinct

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[2] *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000).

[3] *Rose v. S.C. Dep't of Probation, Parole and Pardon Servs.*, 429 S.C. 136, 838 S.E.2d 505 (2020); *Barton v. S.C. Dep't. of Probation, Parole and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013); and *Cooper v. S.C. Dep't of Probation, Parole and Pardon Servs.*, 377 S.C. 489, 661 S.E.2d 106 (2008).

[4] Additionally, the limitations imposed by the legislature in § 1-23-600(D) of the code are discussed in more detail in Argument II below.

from the court's authority to sentence a defendant. *State v. McKay*, 300 S.C. 113, 114, 386 S.E.2d 623 (1989). Therefore, if the inmate is *permanently* denied parole as a result of an interpretation of state statutes, the inmate may appeal to the ALC pursuant to *Furtick*, 352 S.C. at 600, 576 S.E.2d at 150.

Beyond the permanent denial of parole eligibility, the ALC has jurisdiction to hear matters of the Board's statutorily established process that implicate permanent parole eligibility – but only in the most limited capacity. To rule otherwise, as Appellant argues this Court should, would create a right of inmates to appeal routine denials of parole and flood the ALC and appellate courts with filings.

Appellant relies heavily on dicta found within *Cooper* in an attempt to support his argument. In *Cooper*, the court heard the inmate's challenge alleging that the Board was not using the statutorily-required criteria for parole consideration found in S.C. Code Ann. § 24-21-640 (Supp. 2010). The court noted that even though the Board did not permanently deny Cooper parole eligibility, it would hear the matter only on the limited question regarding the Board's adherence to § 24-21-640. While ruling in favor of Cooper, the Court emphasized that the Board could avoid a similar result in the future by clearly stating that it considered the statutory factors in its order denying parole. Notably, the Court did *not* give the ALC the authority to supplement the record and review the Board's deliberations to determine if the Board was actively applying the factors in § 24-21-640 – which would be an untenable burden to place on both the ALC and the Parole Board. Instead, the Court simply required proof that the Board stated it considered those factors.

The Court was forced to revisit this issue in *Compton*, in which it reiterated *Cooper's* holding. "[I]f the Parole Board clearly states in its order denying parole that it considered the factors outlined in section 24–21–640 and the fifteen factors published in Form 1212, and that if

the Parole Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC will have limited authority to review the decision." *Id.*, 385 S.C. at 479, 685 S.E.2d at 177.

Nonetheless, using the Court's justification as to why it considered the matter in *Cooper*, Appellant argues he has a due process claim to appeal the Board's decision-making by couching it in terms of challenging the Board's manner in which it conducts its hearings. By claiming the Board received inaccurate information, Appellant wants the ALC to review an expanded record to include the challenged information, the information he supplied in an attempt to refute it, his attorney's entire presentation of material in favor of parole, and correspondence between his attorney and the attorney for the Department. With this plethora of information, Appellant then expected the ALC to conduct an exhaustive analysis of the Board's decision making – likely in the hopes that the ALC would either reverse the Board's denial of parole (which the ALC has no authority to do), or remand the case back to the Board for another hearing.[5] Here, the ALC properly rejected these expectations.

[5] This latter option begs the question of what sort of instructions the ALC should give the Board along with the remand Appellant seeks. If the ALC orders the Board to grant parole, it oversteps its bounds by supplanting the Board as the sole authority over the granting of parole. § 24-21-640. If it declines to order the Board to grant parole, then there is no point in a remand. This is similar to the dilemma before the ALC in the case of *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. The ALC judge disagreed with the decision of the Board, but appropriately concluded it lacked any authority to change the Board's decision. Alternatively, if the remand includes instructions solely on correcting the record as Appellant putatively requests, a subsequent denial of parole by the Board would invite further appeals by Appellant – to say nothing of the flood of other inmates emboldened to appeal parole denials based on their perceived flaws in the record subsequent to such a holding. This Court should be aware that no result short of release to parole would satisfy Appellant – and that is something only the Board can grant.

Appellant argues that the ALC does have the authority to reverse and remand, as seen in the cases of *Barton* and *Rose*. However, these two cases are distinguishable from the matter at hand.

Barton was concerned with the Board's interpretation of "members of the board" as it pertains to a two-thirds count, and the ex post facto application of a two-thirds supermajority requirement for parole for violent offenses. In that case, the ALC's review was proper because it did not go to the Board's sole authority to determine parole, but to the counting of votes and ex post facto considerations and how a miscount impacted due process. The record before the ALC was limited to the vote count (rather than statements of support or opposition), the risk-needs assessment, and the record of the inmate. There was never a dispute regarding the Board's decision – only how the votes of the individual board members were tallied. Questions before the ALC about the recorded votes can be considered so long as it does not intrude upon the board members' sole authority to grant or deny parole.

Rose follows this same logic – and again fails to support Appellant's argument that the ALC can hear an appeal about the Board's discretionary decision-making. However, the determining factor in *Rose* was a disputed vote count and the Department's record-keeping from nearly twenty years ago being insufficient to refute the inmate's assertion that he received an adequate number of votes for parole.

In this case, there is no dispute over the number of votes Appellant received, nor that they resulted in the denial of parole under the parameters recognized in *Barton*. The Board denied parole in a routine manner, and the Appellant asked the ALC to hear his appeal of the Board's decision even though he was still eligible for parole at a future hearing. The present case was properly

dismissed because the ALC lacks the authority to hear an appeal, much less reverse, a routine denial of parole.

II. Whether SCALC Rule 61 properly establishes the parameters of the record on appeal because it allows the ALC to decline supplementation of a record in an appeal from a routine denial of parole when the ALC is statutorily not permitted to hear the appeal?

Appellant argues that SCALC Rule 61 effectively eliminates judicial review of Board decisions. Respondent disagrees, because Rule 61 simply follows Chapter 23 of Article I of the S.C. Code and that effectively eliminates judicial review of discretionary Board decisions except in the limited circumstances already identified by our Supreme Court.

In 2021, the ALC amended its rules to include the language, "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).[6]

This change is appropriate because, per S.C. Code Ann. § 1-23-600(D), the ALC has no authority to consider appeals from parole-eligible inmates regarding a routine denial of parole. As the ALC judge in this matter correctly explained, the ALC was created as an executive branch court. Therefore, it has jurisdiction limited solely to that which is granted to it by statute. (R.p.5), citing *S.C. Dep't of Consumer Affairs v. Foreclosure Specialists, Inc.*, 390 S.C. 182, 186-87, 700 S.E.2d 468, 470 (Ct. App. 2010).

[6] Appellant's reference to *Kelsey* is misleading as the portion cited is dicta that is contrary to the ultimate holding that the ALC has no jurisdiction to hear the matter. Any assertion that Mr. Kelsey prevailed at the ALC level in that case is incorrect.

The statute explicitly limits the jurisdiction of the ALC in parole matters using mandatory language. Section 1-23-600(D) states that [a]n administrative law judge shall not hear … an appeal involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services."

Appellant asserts that SCALC Rule 61 is incompatible with S.C. Code Ann. § 1-23-600(C) (Supp. 2019), which requires a "full and complete record" in contested cases. This ignores the fact that the *ALC cannot hear the matter.* While SCALC Rule 61 does not necessarily preclude an administrative law judge from allowing the appellant to supplement the record, the ALC judge certainly does not commit an error when he declines to do so – especially in light of the fact that the judge may not hear the appeal anyway.

In arguing that an appeal to the ALC is "merely a stepping stone" to further appellate review, Appellant defeats his own point. Both this Court and the Supreme Court have held that the routine denial of parole is not appealable. Not only that but, through *Cooper* and *Compton*, the specific process and requirements for parole have been identified, streamlined, and approved. It is irrational to think that a different result could be achieved at an appellate court level if the Board has followed all appropriate procedures, as it has here.

Appellant's argument that a putative parolee may be denied parole based on race, gender, religion, or sexual orientation is merely alarmist fearmongering in an attempt to garner support for his proposition. Denials of parole based on these protected reasons would be patently unconstitutional; however, reality holds that even the most expanded record would not contain evidence of it. The odds that a Board member would state on the record that they have denied an inmate solely based on gender, for example, are extremely slim. Furthermore, the Board is made up of seven members each with a single vote – so claiming that the Board rejected someone for

such a reprehensible reason must therefore imply that a majority of the individuals all agreed to do so. Simply put, the only evidence any Board hearing record contains of *what* the Board considered and *why* the Board made its decision is stated in the notice of rejection and Form 1212 as required by *Cooper* and *Compton*. (R.15-p.16).

III. Whether the SCDPPPS is required to screen every statement presented to the Parole Board by outside entities not under its authority for allegations the inmate may disagree with and attempt to determine their accuracy before allowing them to be presented to the Board?

Appellant argues that inmates have a right to due process at parole hearings that allows them to challenge information presented to the Board and appeal if unsatisfied. Respondent submits that if inmates have due process rights at parole hearings, it is of a minimal nature that does not allow inmates to turn the proceeding into a new trial.

a. The due process rights at a parole hearing are minimal.

Inmates, even those who are parole eligible, do not have a right to receive parole. Parole eligible inmates are not guaranteed release to parole. *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 443 n. 4, 586 S.E.2d 124, 127 n. 4 (2003). Indeed, South Carolina law regarding parole is clear. Parole is a privilege, not a right, and an inmate may not be paroled "until it appears *to the satisfaction of the board*" that the inmate is deserving of parole. S.C. Code Ann. § 24-21-640 (Supp. 2010) (emphasis added).

"There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100 (1979).

"Due process" is derived from the Fifth and Fourteenth Amendments of the U.S. Constitution. No state shall "deprived any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "Due process" is necessary when a state actor is taking something away – be it life, liberty or property – from a person. "[A] prisoner must identify a cognizable liberty interest before he can demonstrate a denial of due process." *Bowling v. Dir, Virginia Dep't of Corr.*, 920 F.3d 192, 199 (4th Cir. 2019). If an inmate does not have a right to be released to parole, his liberty is not being deprived when the Board denies release to parole. The inmate may have a hope of release, but he does not have a right to be released. When the Board denies parole, the inmate can place his hope for parole in his next hearing. The inmate has lost nothing. The Board did not deprive liberty from the inmate when it denied parole – the inmate's own conviction did that. In fact, an inmate should understand that, as a starting point, he or she should expect to serve the entire incarcerative sentence that was duly and lawfully imposed by the sentencing court. Any earlier release to parole is a privilege, not an expectation, and certainly not a right.

In his brief, Appellant misses this point, or chooses to ignore it, when he claims he has due process rights in parole that may not be denied unless there is "substantial evidence."[7] While Appellant relies upon dicta in *Cooper* to argue for expansion of an inmate's due process rights in routine parole hearings, the actual holding of *Cooper* is far different – the Board is obligated to follow the statute when it considers inmates for parole, and it does so when it informs the inmate in its order rejecting parole that it considered the statutory requirements and published parole consideration criteria. *Id.*, 377 S.C. at 500, 661 S.E.2d at 112.

[7] Appellant cites to S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2008), again ignoring the prohibition of jurisdiction found in § 1-23-600(D).

Appellant's reliance on an Ohio case for the ideals of how a parole system should operate is clearly inappropriate as this carries no weight on the courts of this state. In fact, the points it cites are entirely opposite to procedures established in South Carolina law. There is no agency duty to investigate and correct alleged errors in the record, nor is there a case that emphasizes putative parolees have a right to due process in parole hearings. *Contra State ex rel. Keith v. Oh. Adult Parole Auth.*, 24 N.E.3d 1132 (Oh. 2014). Similarly, neither does *Al-Shabazz* hold that putative parolees have a right to due process in parole hearings. This is, again, not to say that inmates have zero due process rights, only that their rights are far diminished due to their status as convicted persons.

Anything further than that, including Appellant's demands discussed supra, is an improper expansion of due process rights far beyond the minimal requirements for parole board hearings, as established by our legislature and our courts.

b. SCDPPPS is a neutral body merely providing support to the Parole Board.

Appellant's arguments confuse the relationship between the Department and the Parole Board. Throughout Appellant's brief, the Department and the Parole Board are used interchangeably. But there are key distinctions between the two entities that should be clarified and which inform the analysis.

The Department is a state agency overseen by its director. S.C. Code Ann. § 24-21-13(A) (Supp. 2011). Its responsibilities include the employment of agents to supervise offenders on various forms of supervision within the community such as parole, probation, and community supervision. It also provides support for the Parole Board in the form of training, developing risk-needs assessment tools, conducting investigations on behalf of the board, as well as providing technical support and a physical location for the Board to meet.

The Parole Board is a seven-member body whose members are appointed by the governor with approval by the Senate. S.C. Code Ann. § 24-21-10(B) (Supp. 2012). Its sole duty is to consider cases for parole, pardon, and other forms of clemency provided for by law. S.C. Code Ann. § 24-21-10(B)

Appellant in his brief alleges that the *Department* violated his due process rights by allowing the *Board* to consider allegedly false or inaccurate information. He cites to Parole Form 1212 in his claim that the Department is violating its own policies by not providing the parole file so that the inmate may check it for inaccuracies. However, the Department is under no such obligation to provide the inmate's parole file.[8] Requesting that potential parolees make the Board aware of errors does not equate to requiring the Board to provide any information to these inmates.

Furthermore, Form 1212 is not so inconsistent as what Appellant claims. If an inmate believes the file is incomplete or contains errors, the inmate "must notify the *Board* of the specific error or inaccuracy." Parole Form 1212, S.C. Dep't of Probation, Parole and Pardon Services. The Board – as a separate body from the Department and the decision-making authority – can therefore consider the information provided by the inmate at the hearing.

The Board conducts public meetings, and therefore has the obligation to conduct them openly. S.C. Code Ann. § 30-4-60 (Supp. 1978). The Board must also "permit arguments and

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[8] The information and data received by probation agents in the course of their duties (in this context, creating the parole consideration file) is privileged and confidential *See* S.C. Code Ann. § 24-21-290 (Supp. 1993). This privilege does not belong to the offender or the inmate, as only the director or the court may order the release of those documents. Furthermore, the Board's records of its proceedings are held "subject to the order of the Governor or the General Assembly." S.C. Code Ann. § 24-21-40 (1976). Appellant's reliance on the Freedom of Information Act is also misplaced. The FOIA explicitly creates an exception for "[m]atters specifically exempted from disclosure by statute or law." S.C. Code Ann. § 30-4-40(4) (Supp. 2017). Furthermore, inmates are not extended FOIA rights. S.C. Code Ann. § 30-4-30(A)(1) (Supp. 2017).

appearances by counsel or any individual before it at any such hearing while considering a case for parole…" S.C. Code Ann. § 24-21-50 (Supp. 1995). Victims, especially, have the right to notice of the hearings, to appear, and to make a presentation to the Board. S.C. Const. amend. I, 24(A)(10).

The Department's role in parole hearings is to provide the Board with its investigation into the facts and circumstances of the underlying conviction.[9] The Department also has several administrative duties as it relates to parole hearings, including providing notice to solicitors, victims, and law enforcement agencies involved in the underlying offense. S.C. Code Ann. § 24-21-221 (Supp. 1993). Upon receiving such notice, many solicitors, victims, and law enforcement officers choose to provide a statement regarding whether they are in favor or opposed to parole for the inmate. Nowhere in the statutes does it require the Department to vet or review such statements for factual accuracy.

To Appellant, this is a grievous violation of due process – that any victim, solicitor or law enforcement officer could make a statement that contains what he believes to be factual inaccuracies.

Respondent submits that Appellant is again overly exaggerating the due process rights he actually has at parole consideration hearings. The Department is not obligated to review and police statements to the Board and minimal due process does not demand such a massive undertaking.

Essentially, Appellant is asking for the ALC to be given the authority to review the facts provided to the Board for accuracy and, presumably, the power to remand the case back for another

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[9] S.C. Code Ann. § 24-21-280(A) (Supp. 2017) "A probation agent must investigate all cases referred to him for investigation by the judges or director and report in writing." Agents of the Department are tasked with obtaining information to provide the Board. *See also* S.C. Code Ann. § 24-21-60 (Supp. 1995).

hearing if it determines something was said or written that was false. In this case, the allegedly inaccurate statement was from a solicitor but, if this precedent were set, nothing would prevent an inmate from appealing based on perceived inaccuracies given by victims.[10] It then would stand to reason that, similar to an inmate appealing the denial of parole, those opposed to parole would be able to appeal the grant of parole if it could be shown that the inmate or his supporters provided false information to the Board.

Parole consideration hearings are not trials. Specifically, inmates are not given the right of confrontation at the hearing. S.C. Code § 24-21-50 (Supp. 1995). The language in Form 1212 letting the inmate offer information correcting perceived inaccuracies in his file to the Board is not an invitation to endlessly litigate the facts of the offense or an offer by the Department to police the statements of those who may be opposed to parole. Similarly, there is no requirement for the Board to modify its files in any way after receiving notification from the inmate. Though the Board and its support staff keep thorough records, there is nothing mandating action of any type by the Board after hearing of alleged inconsistencies.

The Parole Board sits in a quasi-judicial capacity. They are the sole determiners of whether a parole-eligible inmate may be released early from his confinement to parole. They have a statutory duty to carefully consider the inmate's record "before, during, and after imprisonment, and no such prisoner may be paroled until it appears to the satisfaction of the board" that the inmate is deserving of parole. S.C. Code Ann. § 24-21-640 (Supp. 2010). Inherent in this authority is the power to weigh and consider the competing interests of the inmate and his supporters who are in

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[10] This especially is problematic, as victims often speak to the Board about their personal experiences or recollection of events that do not match up with trial testimony or other court records. Therefore, statements that may be easily demonstrated as "objectively false" could become the grounds for endless litigation over what a victim may or may not relate to the Board.

favor of parole against the opinions and feelings of the victims, solicitors and officers who would oppose it. Just as a sentencing judge considers the usually diametrically opposed viewpoints of victims and supporters of the defendant, so do the members of the Parole Board. This balancing can also be equated to how juries consider and weigh the believability of the evidence when considering if the State has met its burden of proof. However, before juries, a criminal defendant has not yet been divested of all of his constitutionally-guaranteed rights. Once he has been convicted, though, his rights are significantly diminished. It is in this state that an inmate faces the Parole Board.

c. The Appellant's own actions at the hearing satisfied any due process concerns related to his underlying complaint.

Respondent submits that even if this Court determines there are some due process rights against patently false information being presented to the Board during a parole consideration hearing – which it cautions could have serious ramifications discussed *infra* – there was absolutely no due process violation in the instant case.

As an initial matter, Respondent disputes the allegation that the information in Solicitor Barnette's statement was "objectively false." Specifically, Solicitor Barnette told officials with the Department that he stood by his statement, even after being provided a copy of the SLED report for review.[11] (R.p.119). The Department was not the investigating agency and, therefore, could not be expected to know the issues in detail – certainly not more than what a solicitor (and putative victim) would know. Hence, the Department's stance was not to weigh in on the veracity of

[11] Again, this was not provided to the ALC and, as such, Respondent objects to its inclusion in the record before this court. (See footnote 1)

Solicitor Barnette's statement and instead allow Appellant's attorney to advocate for his client – exactly what Form 1212 allows.

Furthermore, as a review of the transcript shows,[12] the Board did in fact receive the SLED report, heard the arguments by Appellant's attorney, and still elected to deny him parole.

Despite his attorney raising these same issues to the Board and providing information that could purportedly refute Solicitor Barnette's statement, Appellant still claims that a due process violation occurred. He points to a Department employee "denigrating" the information provided, but the employee said nothing that was not correct – simply that the SLED report was received from Appellant's attorney, not from SLED itself.

Part of the Department's training to the Board (see S.C. Code Ann. § 24-21-10(D) and (E)) is about what goes into the Department's efforts to investigate the facts of the underlying offense – which is derived from incident reports, supplemental reports, and court documents. The Board is informed that the Department only endorses the file it prepares, and does not endorse statements from the inmate, victims, and others. The statement by the official that, "the SLED report was provided by the inmate's attorney, not official from SLED, and it needs to be reviewed as such," that Appellant decries as denigrating, was merely reiterating that position that the Department itself did not prepare the document.

Consequently, there cannot be a due process violation if the Board was informed of Appellant's position about the perceived inaccuracy in Solicitor Barnette's statement of opposition and the SLED report was provided to the Board at their request. The Board's autonomy and sole

[12] Although referencing the transcript in this reply, Respondent does not concede that the ALC should have supplemented the record. Furthermore, the transcript is not an official recreation of the recording of the parole hearing in question. The Department records via audio recording, but does not transcribe, the Board's hearings. See footnote 1.

authority over parole decisions would be upended if this Court were to allow the ALC to consider this appeal, presumably with the authority to substitute its own judgment of the facts, as Appellant argues. Such a result would open all parole hearings into needless re-trials over the facts and evidence, which is often disputed, and invite endless appeals over the Board's decision-making.

d. The Parole Board's grounds for denial of parole show that they did not rely on a single factor when denying parole.

Respondent contends that the ALC lacks jurisdiction to consider all appeals from routine denials of parole, and this Court should dismiss this entire appeal on that ground and that ground alone. The minimal due process rights conferred to a parole-eligible inmate are satisfied if the Board follows the requirements of *Cooper* and the ALC has no jurisdiction to hear appeals from the routine denial of parole. *Supra.*

However, Appellant contends that his due process rights were violated by the inclusion of a statement of opposition by Solicitor Barnette that contained alleged inaccuracies, which should entitle him to a remand with instructions to correct the perceived inaccuracies before again being presented to the Board. Appellant has not shown, however, that it was solely the alleged inaccuracies that caused the Board to deny him parole. In fact, the Board's letter of rejection included *numerous* grounds for rejection – none of them related to Solicitor Barnette's letter of opposition. *See I'On L.L.C., v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (an appellate court can affirm for any reason appearing in the record).

The Board's reasons for denial were: the nature and seriousness of the current offense, indication of violence in this or previous offense, use of a deadly weapon in this or previous offense, criminal record indicates poor community adjustment, and a failure to successfully complete a community supervision program. A remand for a new hearing would not change the grounds for denial as stated by the Board.

Appellate courts considering criminal appeals are required to conduct a harmless error analysis. "Most trial errors, even those which violate a defendant's constitutional rights, are subject to harmless-error analysis." *State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013) (citing *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246 (1991)). The harmless error doctrine instructs an appellate court to uphold convictions despite an error – even if clearly demonstrated – was determined to be immaterial.

Respondent is not advocating for this Court to create a "harmless error" rule in the context of parole board hearings, given the fact that – quite simply – there is no right to appeal a routine denial of parole. However, the point stands to illustrate how extreme Appellant's position is. If a criminal defendant's conviction can be upheld despite the existence of an error in his trial, then an inmate who does not have the same constitutional protections as a defendant should not be able to force a remand just because he alleges an inaccuracy in the information before the Board, information that appears to have played no role in the Board's ultimate decision.

CONCLUSION

The ALC correctly denied Appellant's motion to supplement the record and did not err when it dismissed the appeal.

Appellant's arguments, if upheld, would inevitably open parole consideration hearings into mini-trials, where inmates would re-litigate their own version of the facts of the offense, challenge statements by those opposed to parole, and insist that the Department turn over parole files like discovery before trial. Appeals from parole hearings would be fully-involved examinations of the transcripts and the Board's discretionary decision-making. Granting Appellant relief in this case would overhaul the parole system and effectively create a right to parole rather than the right to a

chance at parole. Providing inmates a right to parole should require legislative action, not hopes for a judicial opinion that overturns decades of state and national precedent.

Therefore, the decisions of the ALC should be affirmed and this appeal should be dismissed.

Respectfully submitted,

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Columbia, South Carolina
July 18, 2022

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

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

Appellate Case No. 2021-001162

LARRY BLACKWELL, #176790..... APPELLANT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....RESPONDENT

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and with the South Carolina Supreme Court's order dated August 13, 2007.

Matthew C. Buchanan, # 73740
General Counsel

July 18, 2022