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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Case No. 22-ALJ-15-0013-AP

Appellate Case No. 2023-000693

Charles J. Madden, #00182326, Appellant,

v.

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

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FINAL BRIEF OF APPELLANT

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2. **Whether the Administrative Law Court's finding is supported by substantial evidence contained in the Record on Appeal.**

3. **Whether the Administrative Law Court erred in considering, and basing its Final Order upon, facts which were not contained in the Record on Appeal.**

INTRODUCTION

In this appeal, an inmate challenges an Administrative Law Court Order finding the Parole Board's most recent decision denying parole was a "routine denial of parole." While this appeal raises multiple issues of both law and fact, at its core are two simple issues South Carolina's courts have already addressed: Where the General Assembly has provided a statutory definition for a term, the Administrative Law Court may not disregard the statute's unambiguous meaning and defer to an administrative agency's interpretation of that term, and the Administrative Law Court, sitting in its appellate capacity, may not render a decision based on facts which are not in the Record on Appeal.

STATEMENT OF THE CASE

Appellant Charles J. Madden appeared before the Parole Board (the "Board") for his most recent parole hearing on July 13, 2022. After his hearing, the Board voted 4-1 to deny parole. (Notice of Rejection, R. p. 3). The Board issued its Notice of Rejection on July 14, 2023, stating that it denied parole, in part, based on Appellant's "failure to successfully complete a community supervision program." (*Id.*).

Appellant appealed the Board's decision to the Administrative Law Court ("ALC"). Prior

to submitting briefs, the Appellant moved the ALC to supplement the record on appeal. (Motion to Supplement, R. pp. 30-103). Respondent, the South Carolina Department of Probation, Parole, and Pardon Services, opposed the motion, arguing that all information beyond its Notice of Rejection was irrelevant to the ALC's review. (Memo Opposing Motion to Supplement, R. pp. 104-08). The ALC agreed with the Department and found that material extrinsic to the Notice of Rejection was beyond its review and, per SCALC Rule 61, the Notice of Rejection and Respondent's Criteria for Parole Consideration were the only documents to be included in the Record on Appeal. (ALC Order Denying Motion to Supplement, R. pp. 4-10).

Appellant's arguments before the ALC centered on the fact that "community supervision program" is a statutorily defined term and, by the plain language of the statute, Appellant is neither permitted nor required to complete a community supervision program as a condition of his release. (Appellant's Brief to ALC, R. pp. 117-20, Appellant's Reply Brief to ALC, R. pp. 139-42). Because he is neither required nor eligible to participate in a community supervision program, the Appellant has never participated in, much less failed to successfully complete, such a program. (Appellant's Brief to ALC, R. pp. 117-20). Even assuming the provisions of the community supervision program were applicable to the Appellant, the statute is a prospective statute that was not enacted until after the Appellant was sentenced and, therefore, he cannot be required to complete such a program. (*Id.*). Consequently, the Board's finding of fact that the Appellant failed to successfully complete such a program is clearly erroneous, and its decision to deny him parole based on this finding is plain error and violative of several of Appellant's rights. The Department argued in response that the term "community supervision program" is a "broad phrase" encompassing any form of supervised release. (Respondent's Brief to ALC, R. pp. 130-31). The Department then pointed to a probation revocation

from 1982 (a fact which was not properly in the record before the court) as factual support for its finding that Appellant failed to successfully complete a community supervision program. (R. p. 131).

After reviewing the parties' briefs, the ALC issued an Order of Remand on February 14, 2023. In its Order, the ALC noted a statutory definition of community supervision program exists, South Carolina statutes and case law overwhelmingly supports Appellant's position, and that the use of "community supervision program" to refer to probation would be "curious under the facts of this case." (ALC Order of Remand, R. p. 14). The ALC further noted, in footnote text, that it was "unable to find any instance of "community supervision program" used synonymously with probation in South Carolina statutes or case law." (R. p. 14 n.2). Despite this, the ALC opined that the "phrase" community supervision program "is not well established" and remanded the case, requesting Respondent to elucidate its interpretation of the term "community supervision program." (R. pp. 14-15). Unsurprisingly, on March 2, 2023, the Respondent issued an Order stating it held a meeting on the issue and its use of "community supervision program" was intended to mean, in effect, what its attorneys' brief argued it meant. (Parole Board Order of March 2, 2023, R. p. 17).

The ALC issued its Final Order in this matter on March 23, 2023, finding Respondent's findings of fact were not clearly erroneous and its decision constituted a routine denial of parole. (ALC Final Order, R. p. 22). The ALC's decision was based on its acceptance of Respondent's interpretation of "community supervision program" and the Board's assertion that it was referring to Appellant's 1982 probation revocation (which was not part of the record properly before the court) when it found Appellant had failed to successfully complete a community supervision program. (R. pp. 21-22).

Appellant served his Notice of Appeal on the Department and the Administrative Law Court

on April 20, 2023, and now respectfully asks this Court to reverse the ALC's Final Order and require the ALC to issue an order remanding this matter to the Board for the Board to grant Appellant Parole. In the alternative, Appellant requests this Court reverse the ALC's decision below and require the ALC to issue an order remanding this matter to the Board for a new hearing to be conducted in compliance with the statutorily mandated process.

STANDARD OF REVIEW

The Administrative Procedures Act sets forth the standard of appellate review for cases decided by the ALC in S.C. Code Ann. § 1–23–610(B):

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or 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.

S.C. Code Ann. § 1–23–610(B). "Thus, [the Court of Appeals] can reverse the ALC if the findings are affected by error of law, are not supported by substantial evidence, or are characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Schwiers v. S.C. Dep't of Health & Env't Control*, 429 S.C. 43, 49, 837 S.E.2d 730, 733 (Ct. App. 2019) (quoting *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 64, 663 S.E.2d 497, 501 (Ct. App. 2008)).

This appeal, which challenges the facial validity of Respondent's Notice of Rejection,

presents a mixed question of law and fact: whether the ALC correctly interpreted the relevant statutes and whether the ALC correctly applied those statutes to the facts of this case. *See Boggero v. S.C. Dep't of Revenue*, 414 S.C. 277, 280, 777 S.E.2d 842, 843 (Ct. App. 2015). Consequently, two standards of review are applied. *Id.*

On questions of fact, an appellate court may not substitute its judgment for the judgment of the ALC as to the weight of evidence and may reverse or modify an administrative decision only where the ALC's findings of fact are not supported by substantial evidence. *See, e.g., Torrence v. S.C. Dep't of Corr.*, 433 S.C. 633, 642, 861 S.E.2d 36, 41 (Ct. App. 2021), *reh'g denied* (Aug. 4, 2021), *cert. denied* (Aug. 3, 2022) (internal citations omitted). South Carolina courts have defined "substantial evidence" as "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." *Risher v. S.C. Dep't of Health & Env't Control*, 393 S.C. 198, 210, 712 S.E.2d 428, 434 (2011) (citing *Southeast Res. Recovery, Inc. v. S.C. Dep't of Health & Envtl. Control,* 358 S.C. 402, 407, 595 S.E.2d 468, 470 (2004)) "Substantial evidence" is more than a mere scintilla of evidence, and the facts are not to be viewed "blindly from one side of the case." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 605, 670 S.E.2d 674, 676 (Ct. App. 2008); *A.O. Smith Corp. v. S.C. Dep't of Health & Env't Control*, 428 S.C. 189, 201, 833 S.E.2d 451, 458 (Ct. App. 2019).

The ALC's statutory interpretations, however, are "question[s] of law subject to de novo review." *Barton v. S.C. Dep't of Probation Parole & Pardon Servs.*, 404 S.C. 395, 414, 745 S.E.2d 110, 120 (2013) (reversing ALC's acceptance of statutory interpretation proffered by Department); *Geohaghan v. S.C. Dep't of Emp. & Workforce*, 439 S.C. 14, 28, 885 S.E.2d 422, 429 (Ct. App. 2023). Thus, when adjudicating a question of law, the "substantial evidence" test does not apply and

the court "may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law." *Id.*; *see also Barton* at 414, 745 S.E.2d at 120.

In cases involving a state agency's interpretation of a statute the agency is entrusted with administering, South Carolina's appellate courts generally give deference the agency's interpretation. *Jack's Custom Cycles, Inc. v. S.C. Dep't of Revenue*, 439 S.C. 35, 48, 885 S.E.2d 433, 440 (Ct. App. 2023), *reh'g denied* (Apr. 26, 2023). However, where the plain language of a statute or regulation is contrary to an agency's interpretation, the court will reject that interpretation. *Id.*; *A.O. Smith Corp.* at 202–03, 833 S.E.2d at 458–59. Where the terms of the statute are clear, the court must apply those terms according to their literal meaning; courts may not disregard a statute's plain language or resort to a forced interpretation to expand or limit the scope or meaning of a statute. *Brown v. S.C. Dep't of Health & Env't Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (internal citations omitted). "An administrative construction affords no basis for the perpetuation of a patently erroneous application of the statute." *Jack's Custom Cycles, Inc.* at 48, 885 S.E.2d at 440.

When interpreting and applying statutes and regulations administered by an agency, South Carolina's appellate courts apply a two-step process. *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 32–33, 766 S.E.2d 707, 717 (2014). The court must first determine whether the statutory or regulatory language speaks directly to the issue and, if so, the court must utilize the clear meaning of the statute or regulation. *Id.* (citing *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003)) (holding that where the plain language of a statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation). Second, and ***only if*** the statute or regulation is silent or ambiguous, the court must then give deference to the agency's interpretation, assuming the interpretation is worthy of deference. *Id.* (citing *Chevron,*

U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

ARGUMENT

I. THE ADMINISTRATIVE LAW COURT'S FINAL ORDER IS AFFECTED BY ERROR OF LAW AND SHOULD BE REVERSED

The ALC's Order remanding this matter for the Respondent's Board to "elucidate" its intended meaning of "community supervision program," and the ALC's subsequent reliance on Respondent's Board's interpretation of that term, constitutes reversible error. The ALC's order is in error because the ALC ignored the unambiguous statutory definition of "community supervision program" and improperly deferred to the Board's interpretation.

In appeals from denial of parole, the ALC sits in an appellate capacity. *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 497, 661 S.E.2d 106, 110 (2008), *abrogated on other grounds by Allen v. S.C. Dep't of Corr.*, No. 2021-001143, 2023 WL 2778609 (S.C. Apr. 5, 2023). When interpreting and applying statutes and regulations administered by an agency, South Carolina's appellate courts apply a two-step process. *Kiawah Dev. Partners, II* at 32–33, 766 S.E.2d at 717.

The first step of this process requires the ALC to determine whether the statutory or regulatory language speaks directly to the issue and, if so, the court must apply the clear meaning of the statute or regulation. *Id.* The second step, which should only be reached if the relevant statute is silent or ambiguous, requires courts to defer to the agency's interpretation, but only if the agency's interpretation is "worthy of deference." *Id.*

a. *The Administrative Law Court Erred by Failing to Find "Community Supervision Program" is a Statutorily Defined Term Applicable in This Case.*

The ALC erred by failing to apply the unambiguous statutory definition of "community supervision program" to the issues presented. Under the two-stage analysis set forth in *Kiawah*, courts interpreting and applying a statute administered by an agency must first determine whether the statute speaks directly to the issue and, if so, the court must apply the statute's clear meaning. *Id.* at 32–33, 766 S.E.2d at 717; *see also Brown* at 515, 560 S.E.2d at 414 ("While the Court typically defers to the Board's construction of its own regulation, where, as here, the plain language of the regulation is contrary to the Board's interpretation, the Court will reject its interpretation.") The court should defer to the agency's interpretation of a statute only if the statute is silent or ambiguous and may not resort to a forced interpretation to either expand or limit the statute's meaning. *Kiawah Dev. Partners, II* at 32-33, 766 S.E.2d at 717; *Brown* at 515, 560 S.E.2d at 414.

In the case at bar, the ALC completely failed to apply the first step of the analysis set forth in *Kiawah*. The ALC's order of remand notes that "[i]n South Carolina statues and case law, the phrase [community supervision program] appears to be overwhelmingly used in reference to the statutory community supervision program." (Order of Remand, R p. 14). The ALC further noted it was unable to find any instances of the term being used synonymously with "probation" in either statute or case law (R. p. 14 n.2). The ALC went on to state that "given that the phrase in this state is most typically used in relation to the statutory community supervision program, the use of the phrase to refer to probation would be curious under the facts of this case." (R. p. 14). Despite acknowledging that there *is* a statutory definition of community supervision program and noting the complete lack of support for the Board's position, the ALC did not attempt to apply the statutory definition to the facts before it. Instead, the ALC found the meaning of "community supervision program" was unclear, concluded it was unable to reach the merits of the case before it, and

remanded the matter to the Board for "further elucidation" as to the basis for its finding. (R. p. 15).

"Community supervision program" is, contrary to the ALC's holding below, a statutorily defined term that is applicable to the facts presented. S.C. Code Ann. §§ 24-21-560 *et. seq.* sets forth the parameters of the community supervision program and states the Respondent is the state agency responsible for developing, operating, and overseeing the community supervision program. S.C. Code Ann. §§ 24-21-560(A)-(B). The Respondent is the state agency responsible for determining the duration of an inmate's community supervision program and the individual terms and conditions of a prisoner's participation in the community supervision program. S.C. Code Ann. § 24-21-560(B). The Respondent is also statutorily responsible for supervising an inmate's participation in the community supervision program and determining whether an inmate has successfully completed a community supervision program, violated its terms, failed to participate satisfactorily, or whether the inmate should appear before a court for revocation of the community supervision program. *Id.*

Critically to the facts of this case, South Carolina law explicitly states that persons sentenced to life imprisonment, such as Appellant, are exempted from participation in a community supervision program:

> Notwithstanding any other provision of law, ***except in a case in which the death penalty or a term of life imprisonment is imposed***, any sentence for a "no parole offense" as defined in Section 24-13-100 must include any term of incarceration and completion of a community supervision program operated by the Department of Probation, Parole, and Pardon Services.

S.C. Code Ann. § 24-21-560(A). Moreover, the statutes establishing the community supervision program – which are prospective in nature – did not become operative until January 1, 1996, nearly five years after the Appellant's conviction and sentencing. *See* 1995 S.C. Laws Act 83 (H.B. 3096)

(amending various code sections to provide certain prisoners must complete a community supervision program as a condition of release).[1]

In this case, despite recognizing that a statutory definition of "community supervision program" exists, the ALC failed to correctly interpret the statutory definition of "community supervision program," failed to find the term was directly applicable to the Respondent and failed to apply the statutory definition to the case before it. Because the ALC failed to accurately interpret and apply the statutory definition of "community supervision program," its holding that the Respondent's decision was a routine denial of parole is affected by an error of law. This Court should, therefore, reverse the ALC's decision and require the ALC to issue an order remanding this matter to the Board for the Board to grant Appellant Parole. In the alternative, Appellant requests this Court reverse the ALC's decision below and require the ALC to issue an order remanding this matter to the Board for a new hearing to be conducted in compliance with the statutorily mandated process.

b. *The Administrative Law Court Erred by Remanding this Matter to Respondent's Board Rather Than Making its Own Finding of Law.*

After receiving and reviewing briefs from both parties, the ALC found it was unable to determine what Respondent meant by its use of the term "community supervision program." (Order of Remand, R. pp. 14–15). Because the ALC was unable to ascertain Respondent's subjective meaning of this term, it remanded the case for Respondent – a litigant in this matter – to state what it meant when it used the term "community supervision program" – the very term at issue in this

[1] The Department's own website unambiguously addresses the effective date and prospective nature of the community supervision program, noting that "[i]ndividuals who committed one of these ["no parole offenses"] on or after January 1, 1996, are not eligible for parole consideration at any time during their sentence." SCDPPP, *Supervision Strategies*, available at https://www.dppps.sc.gov/offender-supervision/supervision-strategies.

matter. (*Id.*) The ALC's Order of Remand is an improper abdication of the ALC's judicial role to one of the party litigants in the case. Because the ALC erred by issuing and relying on its Order of Remand, its holding below is based on upon unlawful procedure, affected by an error of law, and arbitrary and capricious and this Court should reverse.

When reviewing parole decisions rendered by the Respondent, the ALC sits in its appellate capacity. *Cooper* at 495-96, 661 S.E.2d at 109-10. In this appellate capacity, it was the ALC's role to determine the meaning of "community supervision program" from the parties' briefs, the Record on Appeal, and the relevant law. Rather than fulfil its judicial role by reaching a decision based on the Record, the parties' arguments, and the applicable law the ALC instead asked to the Respondent, a party litigant, to supply it with an answer to an outcome-determinative question before the court. In so doing the ALC improperly abdicated its judicial role to the Respondent. The ALC's decision below is, therefore, based on unlawful procedure, affected by an error of law, and arbitrary and capricious. This Court should, therefore, reverse the ALC's decision and require the ALC to issue an order remanding this matter to the Board for the Board to grant Appellant Parole. In the alternative, Appellant requests this Court reverse the ALC's decision below and require the ALC to issue an order remanding this matter to the Board for a new hearing to be conducted in compliance with the statutorily mandated process.

c. *The Administrative Law Court Erred in Deferring to the Parole Board's Interpretation of "Community Supervision Program."*

The ALC erred further by improperly deferring to Respondent's "intended meaning" of the term "community supervision program." While South Carolina's appellate courts afford substantial deference to an administrative agency's interpretations of statutes the agency administers, courts must reject agency interpretations that are contrary to the plain language of a statute. *Jack's Custom*

Cycles, Inc. at 49, 885 S.E.2d at 440; *A.O. Smith Corp.* at 202–03, 833 S.E.2d at 458–59. Where the terms of the statute are clear, they must be given their literal meaning; courts may not disregard a statute's plain meaning or resort to a forced interpretation to expand or limit the scope of a statute. *Brown* at 515, 560 S.E.2d at 414.

Under the second stage of analysis provided by *Kiawah* and similar holdings, South Carolina courts defer to an agency's statutory interpretation ***only if*** the relevant statute is silent or ambiguous and ***only if*** the agency's interpretation of the statute is "worthy of deference." *Kiawah Dev. Partners, II* at 32–33, 766 S.E.2d at 717 (2014) (citing *Chevron, U.S.A., Inc.* at 843). While "construction of a statute by the agency charged with its administration will be accorded the most respectful consideration," "an administrative construction affords no basis for the perpetuation of a patently erroneous application of the statute." *Jack's Custom Cycles, Inc.* at 49, 885 S.E.2d at 440.

Following the ALC's finding that the meaning of "community supervision program" was "not well established," it remanded the case to the Respondent, requesting clarification on what the board meant by its use of the term. In response, the Respondent issued an Order on March 2, 2023, stating:

> In this and all cases, the Board's position regarding reason for rejection #5 [FAILURE TO SUCCESSFULLY COMPLETE A COMMUNITY SUPERVISION PROGRAM] is that it includes any and all supervision programs, including but not limited to: probation, parole, community supervision, shock parole, supervised furlough, or any other program.

(Parole Board Order of March 2, 2023, R. p. 17). This interpretation of the meaning of "community supervision program" is contrary to the plain language of the applicable statutes, South Carolina case law, and the Department's own use of that term elsewhere. In its arguments before the ALC, the Respondent offered no support from any South Carolina case, statute, or regulation in support of

its assertion that the term "community supervision program" has any meaning other than that contained in the South Carolina Code. As a result, the ALC's deference to the Respondent's interpretation was improper and its decision affected by error of law.

As noted previously, "community supervision program" is a statutorily defined term with statutorily defined parameters. S.C. Code Ann. §§ 24-21-560 *et seq.* Contrary to Respondent's interpretation, the community supervision program does not encompass probation, parole, or other programs; it is its own distinct form of supervised release. The General Assembly's intent that "community supervision program" be a distinct program that is separate and apart from either probation or parole is manifestly evident from the plain language of the South Carolina Code.

The distinction between the community supervision program and other forms of supervised release is readily apparent first from the fact the General Assembly drafted and passed legislation enacting the community supervision program when both probation and parole were already in existence. The legislative intent that the community supervision program be a separate and distinct form of supervised release is also readily apparent from the General Assembly's repeated references throughout the South Carolina Code to "probation, parole, ***and*** community supervision" and "probation, parole ***or*** community supervision." S.C. Code Ann. §§ 24-21-5 (6); 24-21-13 (A)(1); 24-21-80; 24-21-220; 24-21-230(B); 24-21-280 (A)-(B); 24-21-300; 24-21-1300 (D) (emphasis added). Notably, Title 24, Chapter 21 of the South Carolina Code, which establishes and governs the Respondent as a state agency, contains the term "community supervision program" a total of thirty-two times: there is not a single instance where the General Assembly uses the term in this chapter either interchangeably or synonymously with "probation" or "parole." *See* S.C. Code Ann. §§ 24-21-5 *et. seq.*

Respondent's arguments below attempting to distinguish between "a" community supervision program as used in its Notice of Rejection and "the" statutory community supervision program are as meritless as its assertion that "community supervision program" means any form of supervised release. Respondent's claim that using the article "a" rather than the article "the" preceding "community supervision program" operates to supplant the statutory meaning of that term with a generic meaning strains credulity and is contradicted by the plain language of the statutory text, which uses both "a" and "the" preceding "community supervision program," as grammatically appropriate, to refer to the same statutorily defined term. *See, e.g.*, S.C. Code Ann §§ 24-21-13(A)(2); 24-21-560 *et. seq*. In some instances, the statute refers to both "a" and "the" community supervision program interchangeably in the same passage, paragraph, and even within the same sentence, as in the example below:

> ...The department must determine when a prisoner completes ***a*** community supervision program, violates a term of community supervision, fails to participate in a program satisfactorily, or whether a prisoner should appear before the court for revocation of ***the*** community supervision program.

S.C. Code Ann. § 24-21-560(B)(2) (emphasis added). Notably, when referring to an individual offender's participation, as Respondent does in its Notice of Rejection, the statute invariably refers to "**a**" community supervision program. S.C. Code Ann. § 24-21-30(A) ("A person who commits a "no parole offense. . . " must complete ***a*** community supervision program") (emphasis added); *see also* §§ 24-21-32(B); 24-21-560(A); 24-21-560(B).

South Carolina case law also notes the distinction between the community supervision program and other forms of supervised release. South Carolina case law discussing the community supervision program – much of which was litigated by the Respondent – discusses "community

supervision program" exclusively in reference to the statutorily defined term. *See, e.g.*, *State v. McGrier*, 378 S.C. 320, 663 S.E.2d 15 (2008); *State v. Picklesimer*, 388 S.C. 264, 695 S.E.2d 845 (2010); *Bennett v. State*, 380 S.C. 215, 669 S.E.2d 594 (2008); *State v. Dawkins*, 352 S.C. 162, 573 S.E.2d 783 (2002); *State v. Blakney*, 410 S.C. 244, 763 S.E.2d 622 (Ct. App. 2014).

Further, the Respondent's own public website utilizes the term "community supervision program" consistently with the statutory definition of the term rather than the interpretation it submitted to the ALC, stating:

> The Community Supervision Program is a release program for offenders who have been sentenced to a "No Parole" offense and have served 85% of their sentence at the SC Department of Corrections (SCDC). A "No Parole" offense is a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of 20 years or more. Individuals who committed one of these crimes on or after January 1, 1996, are not eligible for parole consideration at any time during their sentence. Offenders released to the Community Supervision Program have a two-year period of supervision. If at any time they violate the terms of supervision, a Circuit Court Judge may revoke any part of the remaining incarcerative portion of the sentence for up to one year at a time.

SCDPPP, *Supervision Strategies*, available at https://www.dppps.sc.gov/Offender-Supervision/Supervision-Strategies. Respondent's website also provides a listing of "Facts & Figures" including a table that categorizes the "Active Offender Population" by various forms of supervised release, including, among others, "Probation," "Parole," and "C-Supv." SCDPPP, Facts & Figures, available at https://www.dppps.sc.gov/About-PPP/Facts-Figures.

In sum, Respondent's interpretation of the meaning of "community supervision program" is patently erroneous. Respondent's interpretation is not only inconsistent with the statutory meaning of "community supervision program," but also with South Carolina courts' interpretation of that

term and the Department's own usage of that term elsewhere. Because Respondent's interpretation is inconsistent with the statutory definition and is wholly unsupported, it should have been rejected by the ALC. *Jack's Custom Cycles, Inc.* at 49, 885 S.E.2d at 440. Thus, the ALC's final order, which accepts and relies on Respondent's clearly erroneous interpretation of the meaning of "community supervision program," is affected by an error of law. This Court should, therefore, reverse the ALC's decision and require the ALC to issue an order remanding this matter to the Board for the Board to grant Appellant Parole. In the alternative, Appellant requests this Court reverse the ALC's decision below and require the ALC to issue an order remanding this matter to the Board for a new hearing to be conducted in compliance with the statutorily mandated process.

II. THE ADMINISTRATIVE LAW COURT'S FINAL ORDER IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD BE REVERSED

On questions of fact, an appellate court may not substitute its judgment for the judgment of the ALC as to the weight of evidence and may reverse or modify an administrative decision only where the ALC's findings of fact are not supported by substantial evidence. *Torrence* at 642, 861 S.E.2d at 41. "Substantial evidence" is "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." *Risher* at 210, 712 S.E.2d at 434. "Substantial evidence" is more than a mere scintilla of evidence, and the facts are not to be viewed "blindly from one side of the case." *Original Blue Ribbon Taxi Corp.* at 605, 670 S.E.2d at 676; *A.O. Smith Corp.* at 201, 833 S.E.2d at 458.

In the case at bar, there was no evidence in the Record on Appeal before the ALC that the Appellant "failed to successfully complete a community supervision program," either as that term is defined by South Carolina statute or as Respondent erroneously interprets that term. Simply stated, because the ALC limited the Record on Appeal to the Respondent's Notice of

Rejection, there are no facts in the record properly before the ALC which support its findings. Consequently, this court should reverse the ALC's holding below and require the ALC to issue an order remanding this matter to the Board for the Board to grant Appellant Parole. In the alternative, Appellant requests this Court reverse the ALC's decision below and require the ALC to issue an order remanding this matter to the Board for a new hearing to be conducted in compliance with the statutorily mandated process.

a. *There are no Facts in the Record on Appeal Supporting the Parole Board's Assertion that Appellant "Failed to Successfully Complete a Community Supervision Program" as that Term is Defined by Statute.*

Participation in a community supervision program, as the term is statutorily defined, is mandatory for persons convicted of "no parole offenses" ***except for*** persons sentenced to death or life imprisonment. S.C. Code Ann. § 24-21-560(A) (emphasis added). As the Department conceded in its arguments below, Appellant was sentenced to life imprisonment with the possibility of parole after twenty years. Thus, the community supervision program is, by law, inapplicable to the Appellant. The Appellant has never been assigned to or participated in a community supervision program, much less failed to successfully complete such a program, and the Record on Appeal before the ALC is completely devoid of ***any*** evidence to support the Board's finding. Because there is ***no*** evidence supporting the Board's finding of fact that the Appellant "failed to successfully complete a community supervision program," either in the Record on Appeal or elsewhere, the ALC's holding below is unsupported by substantial evidence and this Court should reverse.

d. ***There are no Facts in the Record on Appeal Supporting the Parole Board's Assertion that Appellant "Failed to Successfully Complete a Community Supervision Program" as the Board Interprets that Term.***

On September 28, 2022, the Department unilaterally filed the Record on Appeal with the Administrative law court. (Record on Appeal to ALC, R. pp. 24-29). The Department, in accordance with its interpretation of SCALC Rule 61, only included two documents in the Record on Appeal: its Notice of Rejection and its Criteria for Parole Consideration. (*Id.*). In response, Appellant moved the ALC on November 4, 2022, to supplement the record, requesting that the entirety of the record the Department claimed to have reviewed be included. (Appellant's Motion to Supplement, R. pp. 30-103). The Department responded in opposition (Respondents Motion in Opposition, R. pp. 104-08) and, on December 7, 2022, the ALC denied Appellant's motion. (ALC Order Denying Appellant's Motion to Supplement, R. pp. 4-10). Thus, the only facts properly before the ALC – at the Department's insistence – were those contained within the four corners of its Notice of Rejection.

Neither document in the Record on Appeal before the ALC provides any factual support for the Board's finding that Appellant "failed to successfully complete a community supervision program" regardless of how the Board interprets that term. Consequently, the ALC's holding below is in error and should be reversed.

It is well established that an appellate court's review is limited solely to the facts contained within the Record on Appeal. SCALC Rule 36(G); Rule 210(h), SCACR; *Fountain v. Fred's, Inc.*, 436 S.C. 40, 51, 871 S.E.2d 166, 172 (2022). Even assuming, for the sake of argument, the Department's interpretation of "community supervision program" is correct, there was no evidence in the Record on Appeal before ALC to indicate Appellant ever violated the terms of any form of

supervised release.[2]

The Respondent's Notice of Rejection lists five boilerplate[3] "findings of fact" without supporting facts or evidence from Appellant's record. (Record on Appeal to ALC, R. p. 27). The second document in the Record on Appeal, Respondent's Criteria for Parole Consideration, contains no facts at all and only sets forth the criteria Respondent examines when making parole decisions. (Record on Appeal to ALC at 1, R. p. 28).

Under the Supreme Court of South Carolina's holding in *Compton*, the Respondent is not required to provide "findings of fact and conclusions of law, separately stated" in its Notice of Rejection. *Compton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 385 S.C. 476, 479, 685 S.E.2d 175, 177 (2009). Respondent is merely required to "clearly state[] in its order denying parole that it considered the factors outlined in section 24-21-640 and the fifteen factors published in Form 1212." *Id.* If the Respondent makes this statement, presuming it complies with the statutorily mandated review, its decision constitutes a routine denial of parole which the ALC has limited power to review. *Id.*

In the case at bar, Respondent chose – as the *Compton* holding permits – to state its findings of fact as boilerplate recitations from the Parole Manual without supporting facts or evidence. Respondent's counsel then chose to rely solely on its Notice of Rejection to support its decision on appeal before the ALC, and actively opposed Appellant's attempt to supplement the record. As a

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[2] To be clear, the Appellant is not asserting that he has never violated the terms of a period of supervised release. Appellant makes no representations as to the factual veracity of the Department's claims and is merely asserting that such matters were, by the ALC's own Order and at the Department's own insistence, beyond the scope of the ALC's review because they were not included in the Record on Appeal.

[3] The Board's "findings of fact" are verbatim recitations pulled from the Board's Policy and Procedures Manual. S.C. Board of Paroles and Pardons, Policy and Procedures Manual, at 31 (November 2019) (available at https://www.dppps.sc.gov/content/download/209320/4885043/file/Board+of+Paroles+and+Pardons+11062019.pdf.)

result of the Department's choices, there were no facts or evidence in the Record on Appeal to support its findings of fact. The ALC's finding that Respondent was referring to a probation violation that occurred over forty years ago when it found Appellant had "failed to successfully complete a community supervision program" is, therefore, not supported by any evidence in the Record, much less substantial evidence. This Court should, therefore, reverse the ALC's Final Order and require the ALC to issue an order remanding this matter to the Board for the Board to grant Appellant Parole. In the alternative, Appellant requests this Court reverse the ALC's decision below and require the ALC to issue an order remanding this matter to the Board for a new hearing to be conducted in compliance with the statutorily mandated process.

III. THE ADMINISTRATIVE LAW COURT ERRED BY RELYING ON FACTS THAT WERE NOT IN THE RECORD ON APPEAL

The ALC's decision below is not only based on an erroneous interpretation of the meaning of "community supervision program," it is also based on applying that erroneous interpretation to facts which were not properly before it. When sitting in its appellate capacity, the ALC must limit its review to the Record on Appeal. S.C. Code Ann. §§ 1-23-600(E), 1-23-380(4); SCALC Rule 36(G); Rule 210(h), SCACR. Here, the ALC not only considered facts that were beyond the Record on Appeal asserted by Respondent in its brief, it also actively solicited facts beyond the Record on Appeal in its Order of Remand. Consequently, the ALC's holding below is erroneous and this Court should reverse.

After Respondent unilaterally filed its Record on Appeal below, Appellant moved the Administrative Law Court for an Order to supplement the record. (Motion to Supplement, R. pp. 30-103). In its Motion, Appellant requested the ALC include all materials supplied by the Appellant prior to his hearing, a transcript of Appellant's most recent hearing, and all documents the

Respondent asserts it reviewed in reaching its decision to deny Appellant parole (including materials which would have been both favorable and unfavorable to the Appellant). (R. p. 30).

Respondent opposed Appellant's motion, urging that the information Appellant requested to be added to the Record on Appeal would only "go toward the Board's decision-making process, which is beyond the [ALC's] authority to review." (Response in Opposition to Motion to Supplement, R. p. 105). Respondent went on to urge that "[a]dditional material is immaterial to the matter at issue" and that "the material Appellant wants to offer into the record are simply not relevant to the limited nature and scope of the [ACL's] appellate review." (R. p. 106).

The ALC agreed with Respondent and issued an order denying Appellant's Motion. (Order Denying Appellant's Motion to Supplement, R. pp. 4-10). Finding the proposed supplemental material did not "fall withing the very limited scope" of the ALC's appellate review, the ALC found Appellant had "not carried his burden of showing that including the supplemental evidence in the Record is appropriate." (R. p. 10). Consequently, the only materials in the Record on Appeal before the ALC – at Respondent's insistence and per the ALC's order – were two single-page documents: Respondent's Notice of Rejection and its "Criteria for Parole Consideration."

In its arguments to the ALC, Respondent asserted several facts that were not – again, at its own insistence – within the Record on Appeal. Respondent asserted, *inter alia*, that Appellant is "serving a life sentence for murder after satisfying sentences for assault and battery of a high and aggravated nature and burglary third degree," that Appellant "killed his father during the commission of an armed robbery that was committed while he was out on bond for other offenses,"[4] and that

[4] While this point is not directly related to the issues before the court, Appellant notes his disagreement with Respondent's assertion and requests the Court to take judicial notice of the public records relating to Appellant's current offense, a copy of which is attached herewith for the Court's convenience. (McCormick County Public Records, R. pp. 152-66). As Respondent raised this issue of fact below, and the ALC accepted it as fact and relied on it, Appellant believes these

Appellant received a sentence for one year suspended to 18 months' probation for a June 10, 1982, conviction for attempted housebreaking. (Respondent's Brief to ALC, R. pp. 130-31).

In his Reply Brief, Appellant argued that Respondent should be judicially estopped or otherwise precluded from raising these facts because they were not contained within the Record on Appeal and because Respondent had openly argued that these facts were irrelevant to the ALC's review. Appellant argued below that Respondent had the ability, and incentive, to include facts it deemed necessary and relevant to the ALC's review in the Record on Appeal it submitted to the court but made the conscious choice to exclude them from the record and argued, in opposition to Appellant's Motion to Supplement, that these facts and any arguments based upon them were irrelevant to the ALC's review.

Put plainly, whether through the doctrine of judicial estoppel or through some other form of relief, Respondent should not be permitted to have it both ways. As a matter of fundamental fairness Respondent cannot omit facts from a record it creates, oppose inclusion of those facts by claiming they are irrelevant, obtain a favorable ruling from the Court precluding introduction of those facts and then – when convenient for its own arguments – rely on those facts in its brief. The ALC's Order of Remand and Final Order implicitly rejected Appellant's argument, as both rely on facts asserted

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publicly available documents are both relevant and pertinent to this Court's review. While the record reflects that an individual named William D. Willis stated, in support of an arrest warrant, that probable cause existed to believe the Appellant committed murder during the commission of an armed robbery, Appellant was not charged, indicted, convicted, or sentenced for armed robbery. (*Id.*) Respondent's statement that Appellant "killed his father during the commission of an armed robbery" is a blatant attempt by Respondent to take a statement of probable cause – which was never proven to be factually accurate by a jury or confession – and represent it as an undisputed fact. This discrepancy between what Appellant was convicted and sentenced for and what Respondent claims occurred, based on a statement of probable cause in an arrest warrant, highlights Appellant's arguments here: because these records were excluded from the Record on Appeal and sprung on Appellant in Respondent's brief, Appellant was not given the opportunity to rebut Respondent's factual assertions in its arguments below. Moreover, because Respondent successfully argued that facts such as this were beyond the ALC's review of this matter, Appellant's arguments that Respondent based its decision on erroneous interpretation of the facts were foreclosed as Appellant could not factually support its arguments.

in Respondent's Brief and in Respondent's Order of March 2, 2023, which were not included in the Record on Appeal.

In reliance on these facts which were not in the Record on Appeal, the ALC found it could not determine whether the statutory definition of "community supervision program" or Respondent's interpretation of that term should apply to the facts presented. (*See* Order of Remand, R. pp. 11, 14). Based on this finding, the ALC then ***actively solicited*** information that was not within the Record on Appeal from a litigant in this matter by remanding with instructions for the Respondent to "issue a new order clarifying with sufficient particularity what it meant by 'community supervision program.'" (Order of Remand, R. p. 15).

Respondent's reply not only asserted Appellant had failed to successfully complete a term of probation in 1982, but also asserted that Respondent intended "failure to successfully complete a community supervision program" to refer to this probation revocation. (Parole Board Order of March 2, 2023, R. p. 17). The ALC's Final Order in this matter is based, in its entirety, on its acceptance of these assertions. (ALC Final Order, R. pp. 19, 21-22).

Critically, none of facts relied upon by the ALC in either its Order of Remand or its Final Order were properly before the ALC for its consideration because none of them were included in the Record on Appeal. S.C. Code Ann. §§ 1-23-600(E), 1-23-380(4); SCALC Rule 36(G); Rule 210(h), SCACR. Consequently, the ALC's Final Order, issued in reliance on these facts, is in error. This Court should, therefore, reverse the ALC's Final Order and require the ALC to issue an order remanding this matter to the Board for the Board to grant Appellant Parole. In the alternative, Appellant requests this Court reverse the ALC's decision below and require the ALC to issue an order remanding this matter to the Board for a new hearing to be conducted in compliance with the

statutorily mandated process.

CONCLUSION

The Administrative Law Court erred by failing to correctly interpret and apply the statutory meaning of the term "community supervision program" to the facts presented. The Administrative Law Court further erred by deferring to Respondent's interpretation of the meaning of "community supervision program" because Respondent's interpretation is contrary to the statutory meaning of that term and without support in South Carolina statute, regulation, or case law. The Administrative Law Court's finding below should also be reversed because it is not supported by substantial evidence in the record and is based entirely on facts which were not part of the Record on Appeal. For these reasons, Appellant respectfully requests this Court reverse the ALC's Final Order and require the ALC to issue an order remanding this matter to the Parole Board and directing the Board to grant Appellant Parole. In the alternative, Appellant requests this Court reverse the ALC's decision below and require the ALC to issue an order remanding this matter to the Board for a new hearing to be conducted in compliance with the statutorily mandated process, or for such other relieve the Court deems appropriate.

Signature page follows

Respectfully submitted,

August 1, 2023

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Case No. 22-ALJ-15-0013-AP

Appellate Case No. 2023-000693

Charles J. Madden, #00182326, Appellant,

v.

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

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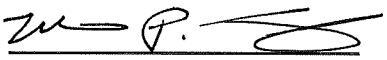
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b) SCACR and that no changes other than revisions to indicate where referenced materials appear in the Record on Appeal and corrections of typographical, grammatical, and spelling errors have been made.

August 1, 2023



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APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Court Judge

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Case No. 22-ALJ-15-0013-AP

Appellate Case No. 2023-000693

Charles J. Madden, #182326, Appellant,

v.

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

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Charles J. Madden, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by Electronic Mail, to the following address(es):

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Final Brief of Appellant

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August 1, 2023

Via Email and Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: Charles J. Madden #00182326 v. South Carolina Department of Probation, Parole, and Pardon Services
Docket No. 2023-000693
Our File No. 056334/01508

Dear Ms. Kitchings:

Attached, please find Appellant's Final Brief and Final Reply Brief in the above-captioned matter. In accordance with the Supreme Court of South Carolina's Order of August 25, 2021 and your letter dated June 20, 2023, an additional bound copy of Appellant's Final Brief and Final Reply Brief which comply with Rule 267, SCACR are being delivered to the Court via hand delivery.

Very truly yours,

Michael Stover

MS:krs
Enclosure
cc: Matthew C. Buchanan, S.C. Dept. of Probation, Parole & Pardon Services