THE STATE OF SOUTH CAROLINA
IN THE COURT of APPEALS

APPEAL FROM the ADMINISTRATIVE LAW COURT

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SC Court of Appeals

Robert L. Reibold, Administrative Law Judge
Appellate Case No. 2023-001203

Michael Moore, #219515 APPELLATE,

V.

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

Designation of Matter
To be included in the record of Appeal

Appellant proposes the following to be included in the record on Appeal:

1. Appellants parole denial letters dated April 9, 2014, May 19, 2016, August 29, 2018, and March 2, 2023.
2. Appellants reply brief dated June 9, 2023
3. Brief reply of Respondent before the ALC
4. Order of Judge Robert L. Reibold dated June 21, 2023
5. Order of Judge H.W Funderburk Jr. dated October 7, 2020

I certify that this designation contains no matter, which is irrelevant to this appeal, and is contained in the record from the Administrative Law Court.

/s/ Michael Moore #219515

Date: September , 2023

PCI/ Q2 B
430 Oaklawn Road
Pelzer, South Carolina 29669

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Michael Moore, #219515, Appellant, vs. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	Docket No. 23-ALJ-15-0002-AP **FINAL ORDER**

STATEMENT OF THE CASE

This matter is pending before the South Carolina Administrative Law Court (the ALC or the Court) pursuant to an appeal by Michael Moore (Appellant), an inmate incarcerated with the South Carolina Department of Corrections. A South Carolina court convicted Appellant of murder and sentenced him to life imprisonment with the possibility of parole on March 29, 1995. At that time, someone serving a life sentence for murder was required to serve at least twenty years' imprisonment before being parole eligible.

Appellant first appeared before the South Carolina Parole Board (the Parole Board) on April 9, 2014. The Parole Board denied Appellant parole based on the nature and seriousness of his offense. Appellant receives a hearing before the Parole Board every other year.

Appellant has now received parole hearings on four other occasions and was denied by letters dated: May 19, 2016; August 29, 2018; January 14, 2021; and most recently on March 2, 2023. On each of those occasions, the Parole Board voted to deny parole, citing the nature and seriousness of the current offense in its findings of fact.[1] The decision to deny parole on January 14, 2021, was a 3-3 vote, but the Parole Board's most recent decision to deny parole was unanimous. The Parole Board denied parole on the most recent occasion again due to: (1) the nature and seriousness of the current offense, (2) indication of violence in this or previous offense, and (3) use of a deadly weapon in this or previous offense.

[1] The 2014 and 2016 decisions also included the indication of violence in this or previous offense as one of the bases to deny parole.

On March 17, 2023, Appellant filed a notice of appeal with the Court. Appellant argues the Parole Board denied him a realistic opportunity to participate in parole because it denied his parole based on the same criteria on which the Parole Board previously based its denial—criteria that will never change. This matter was assigned to the undersigned on March 30, 2023. On April 11, 2023, the Department filed the record on appeal. On April 12, 2023, Appellant filed his brief and appendix, and on May 26, 2023, the Department filed its brief. Appellant filed his reply brief on June 13, 2023, and a prior order from the ALC involving another individual.

ISSUE

The single issue on appeal, as stated by Appellant, is as follows:

> When the [P]arole [B]oard denied Appellant for the fifth time using the exact same justification (FINDINGS OF FACT) in a rote fashion, which the [Prole [B]oard knows cannot and will never change, the [P]arole [B]oard engaged in a gross abuse of its discretion and denied Appellant parole, not as a routine denial of parole, but arbitrarily and capriciously in violation of the Legislative intent of chapter 21 of the South Carolina (S.C.) Penal code § 24 effectively subjecting Appellant to permanent denial of his parole eligibility.

(App. Br. 1). The Court construes this statement to mean that Appellant argues on appeal that the Parole Board abused its discretion in denying him parole.[2]

JURISDICTION

The Court generally has jurisdiction to hear inmate appeals from the South Carolina Department of Corrections. *See Allen v. S.C. Dep't of Corr.*, 439 S.C. 164, 170, 886 S.E.2d 671, 674 (2023); *see also Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000); S.C. Code Ann. § 1-23-600 (Supp. 2022). In *Al-Shabazz*, our supreme court held an inmate may seek review of a final agency decision in an administrative matter under the APA. *Al-Shabazz*, 338 S.C. at 369, 527 S.E.2d at 750. Our supreme court emphasized that its decision was not without limitation. *Id.* at 370, 527 S.E.2d at 750. Significantly, the court noted that the requirements of

[2] Appellant's statement of issues on appeal combines alleged error and jurisdictional argument. Appellant's statement that the Parole Board's actions amount to a permanent denial of parole eligibility relates not to the error ascribed to the Parole Board by the Appellant but to the existence of the Court's jurisdiction to entertain Appellant's argument.

procedural due process would be applicable when an inmate was deprived of a protected liberty interest under the Fourteenth Amendment to ensure that a "state-created right was not arbitrarily abrogated." *Id.*

The Court's jurisdiction to review parole decisions is, however, more limited. Section 1-23-600(D) of the South Carolina Code (Supp. 2022) specifically provides an administrative law judge shall not hear "an appeal involving the denial of parole to a potentially eligible inmate by the Department." However, our supreme court has explained that while a parole eligible inmate does not have a right of review after a decision denying parole, "an inmate has a right of review by the [ALC] after a *final* decision that he is *ineligible* for parole." *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 497-98, 661 S.E.2d 106, 111 (2008) (quoting *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 443 n.4, 586 S.E.2d 124, 124 n.4 (2003), *abrogated on other grounds by Allen v. S.C. Dep't of Corr.*, 439 S.C. 164, 886 S.E.2d 671 (2023)), *abrogated on other grounds by Allen*, 439 S.C. 164, 886 S.E.2d 671.

Moreover, even if the Parole Board's decision does not amount to a permanent denial of parole, the Court may still review whether the Parole Board followed the proper procedure in making its parole determination. *Id.* at 499-500, 661 S.E.2d at 112; *see also Compton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 385 S.C. 476, 479, 685 S.E.2d 175, 177 (2009) ("[I]f the Parole Board deviates from or renders its decision without consideration of the appropriate criteria, it essentially abrogates an inmate's right to parole eligibility and infringes on a state-created liberty interest, warranting minimal due process protection.").

STANDARD OF REVIEW

In situations when an appellant challenges the Parole Board's decision on the grounds that there is a permanent denial of parole eligibility, the Administrative Procedures Act, S.C. Code Ann. §§ 1-23-300 *et seq.* (2005 & Supp. 2022), establishes the standard of review the Court must apply when reviewing an agency's decision. Specifically, section 1-23-380(5) provides the following:

> The [C]ourt may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The [C]ourt may affirm the decision of the agency or remand the case for further proceedings. The [C]ourt may reverse or modify the decision if substantial rights of the appellant have been prejudiced

> because the administrative findings, inferences, conclusions, or decisions are:
>
> (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.

"When appealing an agency's decision, the burden rests squarely on the appellant to prove that substantive rights were prejudiced based on one of six statutory criteria listed above." *S.C. Dep't of Corr. v. Mitchell*, 377 S.C. 256, 259-60, 659 S.E.2d 233, 235 (Ct. App. 2008); *see also Pressley v. Lancaster County*, 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001) ("The party challenging a governmental body's decision bears the burden of proving the decision is arbitrary."); *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996) ("The burden is on appellants to prove convincingly that the agency's decision is unsupported by the evidence.").

DISCUSSION

Appellant argues the Parole Board abused its discretion when it denied him parole based upon the existence of three criteria: (1) the nature and seriousness of his offense, (2) the indication of violence for this or a previous offense, and (3) the use of a deadly weapon in the commission of this or pervious offense. According to Appellant, because these criteria will never change, he can never receive parole and is effectively ineligible for parole. Appellant additionally contends the Parole Board's purported failure to discuss the other criteria for which it stated it carefully considered means he "met all other criteria for release on parole, but the [P]arole [B]oard chose to ignore this fact."

The Department makes two primary arguments in response. First, it argues that the Parole Board's action amounts to a routine denial of parole rather than a determination that Appellant is

no longer eligible for parole. Second, it argues that the procedure the Parole Board followed in denying parole complied with our supreme court's decision in *Cooper* and *Compton* and Appellant is not entitled to any further findings or guidance from the Parole Board.

For the reasons set forth herein, the Court agrees with the Department.

I. Routine Denial of Parole

The Department argues the Parole Board's decision is a routine denial of parole. Appellant counters that he has permanently been denied eligibility for parole because he continues to be denied parole based upon immutable criteria. Appellant also notes that nowhere in the denial letter did the Parole Board indicate that Appellant had failed to satisfy or meet any of the other criteria for parole. According to Appellant, the Parole Board's failure to do so, or to explain its decision in detail, amounts to an abuse of discretion. After careful consideration of the arguments of the parties, the Court agrees with the Department.

Appellant's argument misses the point. The Court is tasked with determining whether the Parole Board's actions amount to a routine denial of parole or a permanent denial of parole eligibility. If the Court concludes that the Parole Board's action was a routine denial of parole, then the Parole Board's decision is *not* reviewable for an abuse of discretion. *See* § 1-23-600(D) (stating an administrative law judge shall not hear "an appeal involving the denial of parole to a potentially eligible inmate by the Department").

Here, the facts indicate that the Parole Board did not permanently deny Appellant eligibility for parole. Appellant has received all parole hearings to which he was entitled to date. Moreover, the notice of rejection sent to Appellant in this case does not contain any language indicating Appellant is no longer parole eligible, and the notice in fact states "[y]ou will be notified 30 days prior to your next scheduled parole consideration date." This statement alone indicates the Parole Board continues to view Appellant as parole eligible. Additionally, the record indicates votes on whether to grant Appellant parole have not always been unanimous. The vote to deny parole on January 13, 2021, was a 3-3 vote; furthermore, the reasons for denial of parole have varied over time. These facts indicate that the Parole Board, as constituted on various occasions, is undertaking review rather than ministerially denying parole. The Court therefore concludes the Parole Board's action in this case amounted to a routine denial of parole.[3]

[3] Because the Court concludes the Parole Board's decision was a routine denial of parole, the Court disagrees with Appellant that he has been permanently denied parole. Thus, Appellant's arguments

II. The Parole Board's Procedure

The Court's conclusion that the Parole Board's decision does not constitute a permanent denial of parole eligibility does not end the inquiry. The Court may still review whether Appellant received the *process* to which he was entitled from the Parole Board at his parole hearing. *See Cooper*, 377 S.C. at 497-99, 661 S.E.2d at 111. If the Parole Board deviates from or renders its decision without consideration of the appropriate criteria, it essentially abrogates an inmate's right to parole eligibility and infringes on a state-created liberty interest. *Compton*, 385 S.C. at 479, 685 S.E.2d at 177. This inquiry, however, is limited:

> [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. If, therefore, the Parole Board's denial letter itself states that the Parole Board considered all of the necessary factors, then the Court's review ends.

The March 2, 2023 notice of rejection letter in this case states the following:

> After careful consideration of: (1) the characteristics of your current offense(s), prior offense(s), prior supervision history, prison disciplinary record, and/or prior criminal record, as described in the findings of fact below; (2) the factors published in Department Form 1212 (Criteria for Parole Consideration); (3) the factors outlined in [s]ection 24-21-640 of the South Carolina Code of Laws, and (4) actuarial risk and needs assessment factors pursuant to [s]ection 24-21-10 (F) (1) of the South Carolina Code of Laws. The Parole Board concludes that parole must be denied.

This language indicates that the Parole Board considered the necessary factors, both those mentioned in Form 1212 and in section 24-21-640. Moreover, Appellant has not pointed to any specific procedural error in the Parole Board's review. *See Mitchell*, 377 S.C. at 259-60, 659 S.E.2d at 235. Accordingly, the Court is constrained to conclude Appellant received the process to which he was entitled and that the Parole Board's action constitutes a routine denial of parole.[4]

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pertaining to a purported due process violation based on the Parole Board's continued denials is meritless.

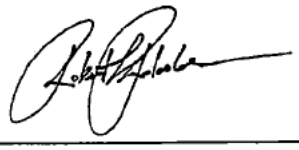
[4] The Court is cognizant that the denial letter's mere recitation that the Parole Board considered all appropriate factors is not conclusive evidence that all such factors were in fact considered.

Therefore, the Court dismisses this appeal.

ORDER

IT IS THEREFORE ORDERED that this appeal is **DISMISSED WITH PREJUDICE.**[5]

AND IT IS SO ORDERED.



Robert L. Reibold
Administrative Law Judge

June 21, 2023
Columbia, South Carolina

However, as discussed above, the votes of the members of the Parole Board have varied over time as have the specific reasons for why parole has been denied. This variance indicates that the Parole Board has in fact been considering the facts of Appellant's case. Moreover, and in any event, our supreme court's instructions in *Compton* are clear. The Court may not look beyond the wording of the denial letter. *See Compton*, 385 S.C. at 479, 685 S.E.2d at 177 ("[T]he Parole Board clearly stated in its notice of rejection that it considered the statutory criteria and the criteria set forth in Form 1212, which is sufficient . . . .").

[5] To the extent Appellant raises new arguments in his reply brief that could have been raised in his principal brief, those arguments are not properly before the Court. *See Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993) ("[A]n appellant cannot make new arguments for reversal in a reply brief."); 4 C.J.S. *Appeal and Error* § 735 (May 2023 Update) ("A point raised for the first time in the reply brief will not be considered by the appellate court.").

CERTIFICATE OF SERVICE

I, James Smith Harrison, III, hereby certify that I have this date served this order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

James Smith Harrison, III
Judicial Law Clerk

June 21, 2023
Columbia, South Carolina

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

NIKKI R. HALEY
Governor

KELA E. THOMAS
Director

2221 Devine Street, Suite 600
Post Office Box 50666
Columbia, South Carolina 29250
Telephone: (803) 734-9220
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www.dppps.sc.gov

April 9, 2014

Mr. Michael Moore #00219515
Perry Correctional Institution
430 Oaklawn Rd.
Pelzer, SC 29669

RE: NOTICE OF REJECTION

Dear Mr. Moore:

It is my responsibility to inform you, on behalf of the South Carolina Parole Board, that the Board has reached a decision regarding your parole hearing. The Board hereby makes the following CONCLUSION OF LAW:

After careful consideration of: (1) the characteristics of your current offense(s), prior offense(s), prior supervision history, prison disciplinary record, and/or prior criminal record, as described in the findings of fact below; (2) the factors published in Department Form 1212 (Criteria for Parole Consideration); and (3) the factors outlined in Section 24-21-640 of the South Carolina Code of Laws, the Parole Board concludes that parole must be denied.

You will be notified 30 days prior to your next scheduled parole consideration date.

FINDINGS OF FACT:

Nature And Seriousness Of Current Offense
Indication Of Violence In This Or Previous Offense

Sincerely,

Larry Ray Patton, Jr.
Director of Parole Board Support Services

State of South Carolina

Department of Probation, Parole and Pardon Services

NIKKI R. HALEY
Governor

JERRY B. ADGER
Director

2221 Devine Street, Suite 600
Post Office Box 50666
Columbia, South Carolina 29250
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May 19, 2016

Mr. Michael Moore #00219515
Perry Correctional Institution
430 Oaklawn Rd.
Pelzer, SC 29669

RE: NOTICE OF REJECTION

Dear Mr. Moore:

It is my responsibility to inform you, on behalf of the South Carolina Parole Board, that the Board has reached a decision regarding your parole hearing. The Board hereby makes the following CONCLUSION OF LAW:

After careful consideration of: (1) the characteristics of your current offense(s), prior offense(s), prior supervision history, prison disciplinary record, and/or prior criminal record, as described in the findings of fact below; (2) the factors published in Department Form 1212 (Criteria for Parole Consideration); (3) the factors outlined in Section 24-21-640 of the South Carolina Code of Laws, and (4) actuarial risk and needs assessment factors pursuant to Section 24-21-10 (F) (1) of the South Carolina Code of Laws. The Parole Board had determined that your parole must be denied.

You will be notified 30 days prior to your next scheduled parole consideration date.

FINDINGS OF FACT:

Nature And Seriousness Of Current Offense
Indication Of Violence In This Or Previous Offense

Sincerely,

Larry Ray Patton, Jr.
Director of Parole Board Support Services

State of South Carolina

Department of Probation, Parole and Pardon Services

HENRY McMASTER
Governor

JERRY B. ADGER
Director

2221 Devine Street, Suite 600
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Columbia, South Carolina 29250
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www.dppps.sc.gov

August 29, 2018

Mr. Michael Moore #00219515
Perry Correctional Institution
430 Oaklawn Rd.
Pelzer, SC 29669

RE: NOTICE OF REJECTION

Dear Mr. Moore:

It is my responsibility to inform you, on behalf of the South Carolina Parole Board, that the Board has reached a decision regarding your parole hearing. The Board hereby makes the following CONCLUSION OF LAW:

After careful consideration of: (1) the characteristics of your current offense(s), prior offense(s), prior supervision history, prison disciplinary record, and/or prior criminal record, as described in the findings of fact below; (2) the factors published in Department Form 1212 (Criteria for Parole Consideration); (3) the factors outlined in Section 24-21-640 of the South Carolina Code of Laws, and (4) actuarial risk and needs assessment factors pursuant to Section 24-21-10 (F) (1) of the South Carolina Code of Laws. The Parole Board had determined that your parole must be denied.

You will be notified 30 days prior to your next scheduled parole consideration date.

FINDINGS OF FACT:

Nature And Seriousness Of Current Offense
Vote Count: Unanimous To Reject

Sincerely,

Nettie C. Jacobs
Parole Board Support Services

State of South Carolina

Department of Probation, Parole and Pardon Services

HENRY McMASTER
Governor

JERRY B. ADGER
Director

293 Greystone Boulevard
Post Office Box 207
Columbia, South Carolina 29202
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January 14, 2021

Mr. Michael Moore #00219515
Perry Correctional Institution
430 Oaklawn Rd.
Pelzer, SC 29669

RE: NOTICE OF REJECTION

Dear Mr. Moore:

It is my responsibility to inform you, on behalf of the South Carolina Parole Board, that the Board has reached a decision regarding your parole hearing. The Board hereby makes the following CONCLUSION OF LAW:

After careful consideration of: (1) the characteristics of your current offense(s), prior offense(s), prior supervision history, prison disciplinary record, and/or prior criminal record, as described in the findings of fact below; (2) the factors published in Department Form 1212 (Criteria for Parole Consideration); (3) the factors outlined in Section 24-21-640 of the South Carolina Code of Laws, and (4) actuarial risk and needs assessment factors pursuant to Section 24-21-10 (F) (1) of the South Carolina Code of Laws. The Parole Board had determined that your parole must be denied.

You will be notified 30 days prior to your next scheduled parole consideration date.

FINDINGS OF FACT:

Nature And Seriousness Of Current Offense
Vote Count: 3 Rejected - 3 Parole

Sincerely,

Nettie C. Jacobs
Board Support Services

State of South Carolina

Department of Probation, Parole and Pardon Services

HENRY McMASTER
Governor

JERRY B. ADGER
Director

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March 2, 2023

Mr. Michael Moore #00219515
Perry Correctional Institution
430 Oaklawn Rd.
Pelzer, SC 29669

RE: NOTICE OF REJECTION

Dear Mr. Moore:

It is my responsibility to inform you, on behalf of the South Carolina Parole Board, that the Board has reached a decision regarding your parole hearing. The Board hereby makes the following CONCLUSION OF LAW:

After careful consideration of: (1) the characteristics of your current offense(s), prior offense(s), prior supervision history, prison disciplinary record, and/or prior criminal record, as described in the findings of fact below; (2) the factors published in Department Form 1212 (Criteria for Parole Consideration); (3) the factors outlined in Section 24-21-640 of the South Carolina Code of Laws, and (4) actuarial risk and needs assessment factors pursuant to Section 24-21-10 (F) (1) of the South Carolina Code of Laws. The Parole Board had determined that your parole must be denied.

You will be notified 30 days prior to your next scheduled parole consideration date.

FINDINGS OF FACT:

Nature And Seriousness Of Current Offense
Indication Of Violence In This Or Previous Offense
Use Of Deadly Weapon In This Or Previous Offense
Vote Count: Unanimous To Reject

Sincerely,

Valerie Suber
Associate Deputy Director for Paroles, Pardons and Release Services

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Joseph G. Kelsey, #217218,	)	Docket No. 19-ALJ-15-0061-AP
	)	
Appellant,	)	
	)	
vs.	)	FINAL ORDER
	)	
South Carolina Department of Probation, Parole and Pardon Services,	)	
	)	
Respondent.	)	
	)	

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to an Appeal by Joseph G. Kelsey (Appellant) seeking review of a decision of the South Carolina Board of Paroles and Pardons (Board) of the South Carolina Department of Probation, Parole and Pardon Services (Department or Respondent) which denied him parole on a three to two vote in favor of parole.[1]

STATEMENT OF THE CASE

Appellant was sentenced to life imprisonment for murder with the possibility of parole. Appellant was previously denied parole on November 18, 2015, and November 15, 2017. On November 13, 2019, Appellant appeared before five members of the Board. Three members voted in favor of parole. Two members voted against parole. The decision identified the only finding of fact as the "Nature and Seriousness of the Current Offense." (R. p. 1.)

Appellant filed a Notice of Appeal on December 10, 2019. The Record on Appeal, consisting of two pages, a certificate of counsel, and a certificate of service (and a title page) was filed on February 12, 2020. Also, on February 12, 2020, Appellant moved for permission to exceed the page limit on briefs imposed by SCALC Rule 60(A). The Court granted the motion by order issued February 24, 2020.

[1] S.C. Code Ann. § 24-21-645 (Supp. 2019) requires a two-thirds vote to authorize parole for a person "convicted of a violent crime as defined in section 16-1-60 of the South Carolina Code." *Barton v. S.C. Dep't of Probation, Parole and Pardon Services*, 404 S.C. 395 at 415, 745 S.E.2d 110 at 121 (2013).

On March 3, 2020, Appellant filed a Motion to Supplement the Record on Appeal so as to include documents received by the Department and the Board prior to the hearing, prior Board denials, letters from Appellant, the transcript of a codefendant's parole hearing (held November 4, 2020), the transcript of Appellant's parole hearing and reconsideration requests, and selections from Appellant's trial and waiver hearing. The Supplemental Record on Appeal (SROA) was filed on March 3, 2020. Department's counsel stated in an email that he did not object to Appellant's supplementing the record. Nevertheless, on March 5, 2020, Department's counsel filed a response to the motion arguing that the material offered was "immaterial to the matter at issue and [was] outside the scope of the limited authority of the ALC." Appellant responded to the Department's memorandum in opposition on March 10, 2020, to which the email referenced above was attached. On March 13, 2020, the Court granted the Motion to Supplement the Record on Appeal on the ground that counsel's consent, once given, must stand.

Appellant's brief was filed March 9, 2020. Respondent filed its brief on April 6, 2020, and also filed a motion seeking permission to exceed the page limit on briefs imposed by SCALC Rule 60(A). No reply to that motion was filed. The Court granted the motion to exceed the page limit.

BACKGROUND[2]

On July 11, 1994, Appellant (sixteen years old at the time) and two seventeen-year-old friends (Payne and Lee) were left by another seventeen-year-old friend (Kirchner) at his house when he went to work. The remaining three youths began experimenting, making three pipe bombs from galvanized pipe and shotgun shells. One was detonated in the back yard of Kirchner's house and made a foot-wide hole about four inches deep. Appellant put the other two pipe bombs into his travel bag in the house.

Appellant, Payne, Lee, and four others gathered at the house for a party. All were drinking beer. Around midnight, Payne and Lee went to a nearby Texaco gas station where they encountered Melanie Richey. Richey had cut her foot while sneaking out of her house to meet a friend. Payne and Lee offered to take Richey to Kirchner's house where they could bandage her foot.

[2] The account of the crime for which Appellant is incarcerated is taken from the Supreme Court's narratives in *Payne v. State*, 355, S.C. 642, 586 S.E.2d 857 (2003) and *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998).

Payne, Lee, and Richey returned to Kirchner's house around 1:30 a.m. when Payne and Lee helped Richey bandage her foot. The three joined the party. Payne attempted unsuccessfully to persuade Richey to have sex with him. Frustrated by her refusal, Payne expressed his anger to Richey and, allegedly, told Lee that he was so angry he could kill Richey.

Around 3:30 in the morning, Lee, Kelsey, and Payne decided to take Richey home. Payne asked Lee to get something with which he could knock Richey out. Lee found a wrench in Kirchner's garage. Payne also asked Kelsey to bring the unexploded pipe bombs.

Instead of taking Richey home, Lee drove in the opposite direction ultimately driving from Georgia into South Carolina. Payne and Richey were in the back seat where, as Lee observed, Payne had a strangle hold on Richey. Within minutes, Lee testified that he heard "two quick, empty thud type sounds." (*Kelsey*, 331 S.C. at 60, 502 S.E.2d at 68.) Lee again observed that Payne had a choke hold on Richey and was holding the wrench. Kelsey testified that Richey was limp and pale and her lips were blue.

Subsequently, Payne directed Lee to drive to a bridge on the boundary between Edgefield and McCormick counties where Payne told Lee and Kelsey "that he was going to have sex with Richey." (*Id.*) An approaching vehicle interrupted Payne, and Lee drove away but returned to the bridge when the other vehicle had passed. Lee testified that Richey was unconscious but alive. Kelsey testified that he checked her pulse and concluded that she was dead.[3]

Lee drove about 100 feet away from the bridge where the three removed Richey from the vehicle "and carried her into the woods and up an embankment." (*Id.*) Lee returned to the car, and Payne and Kelsey remained. Payne directed Kelsey to place one of the pipe bombs into Richey's mouth. "Payne then lit the fuse, and the two ran." (Id. 60-61.)[4] The bomb exploded some seconds later. The three then returned to Kirchner's home.

Eventually, Payne and Kelsey were tried as adults. Kelsey was convicted of murder, criminal conspiracy, and possessing a pipe bomb. Payne was convicted of murder and criminal conspiracy.[5]

[3] Appellant's attorney represented that Kelsey had CPR training, thus, augmenting Kelsey's reliability on this point. (Appellant's Brief, p. 4.)

[4] Kelsey testified that Payne used a lighter to ignite the fuse. "Lee testified that Payne threw the lighter on the dashboard of his car." *Payne*, 355 S.C. at 646, 586 S.E.2d at 859.

[5] Lee testified for the prosecution at Kelsey and Payne's trial in exchange for a reduced sentence of ten years.

By the time the body was found, it was impossible to tell whether Richey was choked to death, killed by a blow to the head, or killed by the pipe bomb. The Supreme Court concluded that in any event, "the testimony overwhelmingly proves that Payne murdered her." (*Payne*, 355 S.C. at 646, 586 S.E.2d at 859.)

AUTHORTITY AND SCOPE OF REVIEW

The jurisdiction and authority of the ALC to hear appeals from the Department is limited. The Court is governed by the South Carolina Constitution, the South Carolina Administrative Procedures Act (which created the Court), and decisions by the South Carolina Supreme Court (Supreme Court) delineating the ALC's jurisdiction to hear and decide issues arising from certain State agencies. The Constitution provides as follows:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

S.C. Const. art. I, 22.

However, S.C. Code Ann. § 1-23-600(D) (Supp. 2019) provides that an "administrative law judge shall not hear . . . an appeal involving the denial of parole to a potentially eligible inmate." In *Furtick v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2003), the Supreme Court identified exceptions to this restriction for issues that implicate a "liberty interest" requiring "at least minimal due process." *Id.* at 598, 576 S.E.2d at 149.

Therefore, the Supreme Court held that the ALC has jurisdiction to review the Department's final decisions. *See Furtick*, at 597, 576 S.E.2d at 148. This review is confined to errors in method and procedure. For example, if a Board decision, because of the procedures employed, effectively renders an individual ineligible for parole, then there has been a deprivation of a state-created liberty interest triggering the due process requirements of judicial review by the ALC. *Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 377 S.C. 489 at 495-96, 661 S.E.2d 106 at 110

(2008).[6] Further, the Supreme Court held that the Board's failure to follow statutory procedure was reviewable:

> If a Parole Board deviates from or renders its decision without consideration of the appropriate criteria, . . . it essentially abrogates an inmate's right to parole eligibility and, thus, infringes on a state-created liberty interest.
> Undoubtedly, the Parole Board is the sole authority with respect to decisions [granting or denying] parole. However, the Legislature created this Board to operate within certain parameters. We do not believe the Legislature established the Board and intended for it to render decisions without any means of accountability.

Id. at 499, 661 S.E.2d at 111.

The Supreme Court subsequently clarified *Cooper*, emphasizing that in a routine denial of parole, the Board need only to state clearly that it considered the appropriate factors. While not precisely defining "routine," the Supreme Court provided a contextual understanding of the term:

> . . . if 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 [emphasis added].[7]

Compton v. S.C. Dep't of Prob., Parole and Pardon Servs., 385 S.C. 476, 479, 685 S.E.2d 175, 177 (2009).

Thus, the ALC's jurisdiction, conferred by *Furtick*, is limited by *Cooper* and *Compton*.

Respondent contends that an appeal of a routine denial of parole should be dismissed because the ALC has limited authority to review a Board decision. The problem, of course, is determining of what the ALC's limited authority consists and how it is to be exercised. A further complication arises when the Board provides a minimal record from which the ALC cannot ascertain that the Board's action is supported by the evidence it considered and that its decision is, in fact, a routine denial of parole.

[6] It is not necessary that the Board use the term "permanent" in its denial to implicate a sufficient liberty interest. In *Cooper*, the Supreme Court went on to say, "a sufficient liberty interest may be implicated to trigger due process requirements even though the Parole Board's decision did not constitute a permanent denial of parole eligibility. *Id.* at 498, 661 S.E.2d at 111 (Citation omitted).

[7] Form 1212 has either 15 or 16 factors depending on when the crime occurred. *See* 2010 Act No. 273, § 66, providing that Part II of the act takes "effect on January 1, 2011, for offenses taking place on or after that date."

STATEMENT OF ISSUES ON APPEAL[8]

1. Was the Board's decision to deny parole to Appellant, based solely on the "nature of the offense," arbitrary and capricious in light of the Board's decision to grant parole to Payne for the same offense?

2. Did the Board err when it determined that Appellant's role in the underlying criminal act was more severe than Payne's role as characterized by the Supreme Court?[9]

3. Did the Board violate due process in determining that all aspects of parole memoranda prepared by an agency official are exempt from disclosure under the public records law thereby denying a parole applicant the opportunity to see or challenge potentially inaccurate information about the nature and circumstances of the offense upon which the parole decision is based?

4. Did the Board's decision in this case violate due process and the agency's rules by requiring Appellant to receive more than two-thirds of the votes when only five of the seven members voted?

5. Considering the evolution in the law applicable to juvenile sentencing, does due process require the Board to adopt specific procedures for those who committed crimes as juveniles to protect their right to live "some years of life outside prison walls" (*Montgomery v. Louisiana*, 136 S.Ct. 718, 737 (2016))?

6. Was the Board arbitrary and capricious when it denied the Appellant parole based upon the nature and seriousness of the offense? (This question is Respondent's version of the first issue above.)

DISCUSSION

1 & 6. Is the Nature and Seriousness of the Offense, alone, a sufficient ground on which to deny parole?

[8] In view of the disjunction of the issues identified by Appellant and Respondent, all issues are listed here although the Discussion will combine 1 and 6.

[9] No U.S. cite as yet. Respondent presents only two issues; its second issue presents this question without case law citation.

a. **Is the exclusive reliance on the nature and seriousness of the offense a factual finding that effectively makes the applicant ineligible for parole.** On November 15, 2019, the Board, over the stamped signature of a person providing Board Support Services, rejected Appellant's application for parole by a vote of three in favor of parole and two against parole. According to this Notice of Rejection, the Board reviewed (1) the characteristics of the current offense, prior offenses, prior supervision history and/or prior criminal record; (2) the factors in Department Form 1212; (3) the factors outlined in S.C. Code Ann. § 24-21-640, and (4) actuarial risk and needs assessment as required by S.C. Code Ann. § 24-21-10(F). However, the only fact found from this review was that the "Nature and Seriousness Of [sic] Current Offense" warranted denying Appellant's parole. (R. p. 1.)

The Board, therefore, based its decision on the original crime, consequently solely on facts that can never change.[10] Grounding its decision on this single event, without supplemental findings, effectively denies Appellant's eligibility for parole. As the Supreme Court observed, "a sufficient liberty interest may be implicated to trigger due process requirements even though the Parole Board's decision did not constitute a permanent denial of parole eligibility." *Cooper*, at 498, 661 S.E.2d at 111. Furthermore, as the Supreme Court held in *Cooper*, a challenge to "the method and procedure" employed in reaching a parole decision could raise

> a sufficient liberty interest to trigger due process requirements of judicial review. If a Parole Board fails to consider **and apply** the statutorily-created parole criteria, it has the effect of rendering an inmate parole ineligible . . . . In the instant case, the Parole Board apparently failed to consider the requisite factors and, instead, based its decision on certain fixed factors that are unaffected by any rehabilitation efforts on the part of [the inmate].

Cooper, at 502, 661 S.E.2d at 113 (emphasis added).

The Court acknowledges that a crime could be so egregious and so shocking to social norms that a perpetrator could and should be denied parole indefinitely. However, it is difficult to believe that a sixteen-year-old, whose sense of future consequences has not been fully developed, could be so hardened and morally corrupt as to be forever beyond rehabilitation. Appellant's devotion to education and self-improvement and his volunteering to assist other inmates experiencing emotional crises support the claimed success of his rehabilitation.

[10] The Record provided by Respondent contained no evidence from which those "facts" could be found.

b. **Given the claimed success of rehabilitation reported for both Appellant and his co-defendant Payne, do inconsistent Board decisions demonstrate arbitrary and capricious decision making?** The Supplement the Record on Appeal includes transcripts of Appellant's parole hearing (November 13, 2019) and the parole hearing of Appellant's co-defendant, Geoffrey Payne (March 20, 2019). Appellant was denied parole; Payne was unanimously (6–0) granted parole.

Appellant argues that the Board's denying his parole application and granting Payne's based on their participation in the same crime demonstrates an arbitrary and capricious decision.

Both inmates have compiled extraordinary records as model prisoners. Payne, who was 17 when the crime occurred, has been involved in character-based programs such as Operation Behind Bars, Turning Leaf, and Jumpstart. He obtained a GED, a journeyman certificate, and a gold work keys certificate. He is pursuing an associate degree via correspondence from Ohio University. He participated in programs to assist other inmates. Payne has plans for work and has arranged for a place to live.

Appellant, who was 16 at the time of the crime, earned his GED and an associate degree from CIU (Columbia International University). He worked with Operation Behind Bars and Jumpstart. He has also worked in crisis intervention to help other inmates. He plans to continue his education and has options for job offers and residential arrangements.

The only significant differences between Payne and Appellant derive from their respective roles in the crime. Appellant made pipe bombs and placed one of them in the mouth of the victim, whom he thought to be deceased. Payne choked and struck the victim with a wrench, raped her or had sex with her corpse, and lit the fuse that detonated the pipe bomb.

Distinguishing between these two for purposes of granting parole can be nothing but arbitrary and capricious decision making. It would be barely justifiable to parole both, but completely understandable to deny parole to both. To treat one differently from the other can be based on nothing but arbitrary caprice.

2. **Did the Board deny Appellant parole on an erroneous belief that he was the "trigger man" in the victim's murder?** Payne's attorneys argued that the Board could satisfy the victim's family by paroling Payne and denying parole to Appellant. In addition, Payne's attorneys

characterized Appellant as the perpetrator and stated that the victim's family could "still express their ire against parole with respect to the man who actually took their daughter's life." (SROA, p. 81.) This statement is contrary to the facts, recognized by the South Carolina Supreme Court, that Payne choked the victim, struck her in the head with a wrench, and ignited the pipe bomb's fuse. (*See* Background *supra* and *Payne*, 355 S.C. at 646, 586 S.E.2d at 859.)

The argument by Payne's attorneys and the subsequent Board decision was based on misinformation and an improper argument bargaining Payne's parole against keeping Appellant in custody.[11]

3. **Did the Board err in determining that information prepared by an agency official is exempt from disclosure thereby denying a parole applicant the opportunity to challenge potentially inaccurate information?** Respondent contends that there is no right of confrontation in parole hearings. That is true. S.C. Code Ann. § 42-31-50 (2007). The Board rightfully segregates the inmate from victim witnesses. Documents, subject to redaction, are a different matter.

Respondent also contends that S.C. Code Ann. 24-21-290 (2007) classifies information and data obtained by a probation agent as privileged and confidential. For this reason, the Board mistakenly believes that a parole applicant has no right to review his parole file.[12] Yet, the Department's "Criteria for Parole Consideration" (Form 1212) includes the following:

> The record itself is prepared through investigations conducted for the Parole Board, and it becomes a part of the inmate's parole file. The files . . . are, by the statute, privileged and confidential. The confidentiality of the parole file is far reaching: inmates themselves have no right to inspect the contents of their files. **If the inmate thinks his/her file is somehow incomplete or contains some errors or other inaccuracy, he/she must notify the Board of the specific error or inaccuracy.** (Emphasis added.)

That the inmate must notify the Board of an error in a file he has no right to see is logically and legally absurd.

[11] Respondent represents that the Board considers parole applications on a "case by case" basis. The argument allowed in Payne's parole hearing (SROA, p. 081) runs directly counter to Respondent's assertion.

[12] Respondent cites S.C. Code Ann. § 24-21-40 (2007), which requires the Board to keep a record of its proceeds and maintain those records subject to the order of the Governor or the General Assembly (a document retention rule), as a basis for denying access to the records of a public body. Apparently, the Department can choose when to ignore this rule. *See Rose v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 429 S.C. 136, 141, 838 S.E.2d 505, 508 (2020).

ALC rules require that documents be redacted. Information and data can and should be provided while the privacy and identifying information of sources must be redacted or the documents must be submitted under seal. SCALC Rule 6. Therefore, evidence that formed the basis for a finding of fact could be furnished to the ALC for its review.

In this case, the Supplemental Record on Appeal provided to the Court provides ample material for review. Accordingly, no error has been shown.

4. **Did the Board's decision in this case violate due process and the agency's rules by requiring Appellant to receive more than two-thirds of the votes when only five of the seven members voted?** In this case, an absent member and an unfilled vacancy left the Board with only five voting members present. The two-thirds vote required for parole could be met if Appellant received four votes in favor of parole. Even if all six sitting members had been present, that would have been the case. Here, Appellant received three votes but could have been paroled only if the absent member had been present and voted in his favor.

Appellant argues that the absent vote was effectively counted as a "no" vote contrary to *Barton v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 404 S.C. 395, 418, 745 S.E.2d 110, 123 (2013):

> [the Department's] "interpretation treats nonparticipating members of the Parole Board as 'no' votes. [The Department] fails to present any authority for what is the illogical position that the General Assembly intended for non-participating [sic] Parole Board members to arbitrarily count against inmates convicted of a violent crime . . . . Put another way, [the Department] fails to bring forward any rationale as to why absent Parole Board members could not be just as well treated as 'yes' votes.

Respondent agrees that the essential holding of *Barton* is that the two-thirds requirement must be applied to the Board members present and not to the full membership. *Id.* at 419, 745 S.E.2d at 123.

Appellant also argues that he should have been notified that a member would be absent so that he could have made an informed choice to proceed or not when only five members would be present. Appellant contends that this lack of notice deprived him of constitutionally adequate notice.

Constitutionally adequate notice "turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct." *Link v. Wabash R. Co.*, 370 U.S. 626 632, 82 S.Ct., 1386, 1390 (1962) (This case was dismissed

when an attorney failed to attend a scheduled pretrial conference.). According to Appellant, when "a party risks the forfeiture of an important right, he must be on notice of what will happen if he does or does not act." (App. Brief, p. 17.) Notice, in cases under the Administrative Procedures Act, includes (1) the time, place, and nature of the hearing, (2) the authority and jurisdiction applicable to the hearing, (3) reference to the statutory sections and rules which apply, and (4) a short and plain statement of the matters asserted or a statement of the issues involved. S.C. Code Ann. § 1-23-320(B) (Supp. 2019); *Ross v. Med. U. of S.C.*, 328 S.C. 51, 63, 492 S.E.2d 62,69 (1997).

In addition, S.C. Code Ann. § 24-21-645 does not require a specific number of Board members "that must review the parole suitability of an inmate convicted of a violent crime but also does not expressly exclude the common law quorum principle." *Barton*, at 417, 745 S.E.2d at 122. As long as a quorum is present, the unexpected absence of a Board member cannot justify rescheduling a hearing. Moreover, Appellant made no objection to the composition of the Board upon his discovery the day prior to the hearing that only five members would be present. An issue not raised at the hearing below cannot be raised now on appeal. *Herron v. Cent. BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citations omitted) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. It is 'axiomatic that an issue cannot be raised for the first time on appeal.'")

Appellant's argument that the composition of the Board at his hearing prejudiced him because he did not get adequate notice of that fact is without merit. For this reason, Respondent's position on this issue is upheld.

5. Does due process require the Board to adopt specific procedures for those who committed crimes as juveniles to protect their right to live "some years of life outside prison walls"? Appellant relies on *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) for the principle that the Board should adopt special procedures for those who committed crimes as juveniles. The United States Supreme Court announced that,

> children are constitutionally different from adults in their level of culpability . . . prisoners like Montgomery [who committed murder when he was 17 years old] must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored

Id. at 736-37.

Appellant availed himself of that opportunity in his parole hearing. The ALC has no authority to make policy for the Department or to modify its governing law. Therefore, the Court declines to rule on this issue. Ultimately, the General Assembly must determine whether and how to address this situation.

CONCLUSION

The Board denied Appellant's application for parole solely on the basis of the "nature and seriousness of the offense." Although that is a required factor to be considered in an appeal, S.C. Code Ann. § 24-21-640 provides clear instructions for the Board's evaluation process:

> The board must carefully consider the record of the prisoner before, during, and after imprisonment, and no such prisoner may be paroled until it appears to the satisfaction of the board: that the prisoner has shown a disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interest of society will not be impaired thereby; and that suitable employment has been secured for him.

By focusing on the crime alone, the Board fails to consider the inmate's record before and during his imprisonment and whether he has exhibited a "disposition to reform" and is likely to behave in accord with the law and social norms.

This section also requires the Board to "establish written, specific criteria for the granting of parole . . . . [which] reflect all of the aspects of this section and include a review of a prisoner's disciplinary and other records." The Board's consideration of these criteria is not reflected in its single factual finding. In actuality, a finding based exclusively on facts that cannot change is effectively a denial of the inmate's eligibility for parole.

In addition, the account of the crime leading to the convictions of both Appellant and his codefendant (Payne) suggests that both or neither should be paroled. Although the Board has the sole authority to grant or deny parole, its decision to parole the individual who beat the victim with a wrench, choked the victim, raped her, and set off the pipe bomb in her mouth appears to be arbitrary and capricious in light of its decision to deny parole to another participant in the crime who did not beat, choke, or rape the victim but did construct the pipe bomb and place it in the victim's mouth.

Finally, if the Board did indeed review the facts of the crime and both Payne's and Appellant's records while incarcerated, it could not have believed the statements made in Payne's parole hearing that Appellant, not Payne, had set off the pipe bomb. Likewise, it should not have allowed an argument that suggested that it could parole Payne and satisfy the victim's family by keeping Appellant in custody. An argument that appeals to that kind of bargaining taints the process, the members of the Board, and the attorneys who made it.

Appellant's remaining arguments are without merit or are beyond the authority of the ALC to address.

Although the Court has identified one decision that is arbitrary and capricious and another that was based on untrue assertions of fact and improper argument, the Board has the sole authority to grant or deny parole and does so in a case by case basis. This Court does not have the authority to grant parole or, unfortunately, the authority to rescind the Board's grant of parole.

It is, reluctantly, therefore,

ORDERED that that Appellant's Appeal is **DENIED.**

AND IT IS SO ORDERED.

Columbia, South Carolina
October 7, 2020

H.W. Funderburk, Jr.
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Elizabeth A. Perkins, hereby certify that I have this date served the enclosed **Final Order** upon all parties to this case by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the parties' attorneys.

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October 7, 2020
Columbia, South Carolina

Elizabeth A. Perkins
Judicial Law Clerk

FILED
OCT 07 2020
SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL from the Administrative Law Judge
Robert L. Reibold, Administrative Law Judge
Appellant Case No. 2023-001203

Michael Moore, #219515.....APPELLANT

V.

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

CERTIFICATE OF SERVICE

I, Michael Moore, certify that I have served the Initial *Brief* of Appellant and the Designation of Matter in the above captioned Appeal to the Respondent's by placing the same in the U.S Mail, postage pre-paid and addressed as follows.

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RE: Michael Moore, #215919 V. SCDPPPS
Appellate Case No. 2023-001203

Dear Honorable Clerk:
Enclosed, please find the **INITIAL BRIEF of APPELLATE** and the **DESIGNATION of MATTER** in the above referenced case, for filing in your office and with the Clerk.
By copy of this letter and **PROOF of SERVICE**, I have served a copy to the Respondents and the Administrative Law Court.

Sincerely,
/s/ Michael Moore

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