THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Hon. Crystal M. Rookard, Administrative Law Judge
25-ALJ-15-0027

Appellate Case No. 2025-002487

THERESA BARTON GUNTER.....APPELLANT

v.

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

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

CONSTITUTIONS

STATEMENT OF THE ISSUES ON APPEAL

1. Is a pardon hearing a "contested case" hearing within the meaning of the Administrative Procedures Act?
2. Does any statutory or case law confer jurisdiction on the Administrative Law Court or otherwise establish any mechanism for appealing the denial of a pardon, or are does the Board have absolute discretion as to granting or denying a pardon?
3. Has Appellant shown the Board's decision to deny Appellant a pardon was in retaliation for protected conduct?

STATEMENT OF THE CASE

On May 11, 1982, Appellant, Theresa Barton Gunter (née Thalma Theresa Barton) pled guilty to murder in Abbeville County, South Carolina.[1] The Honorable Francis B. Nicholson sentenced her to life on May 11, 1982. On July 6, 1997, Appellant made her first appearance before the Parole Board for consideration of parole. She was denied parole at that time, and on all successive appearances until January 18, 2012, in which she received at the time an unfavorable vote count. She successfully challenged on appeal the Board's method of counting votes that considered favorable votes against the entire Board membership instead of the Board members present.[2] As a consequence of the ruling, the 2012 vote was deemed favorable so in 2013 she was released to parole based on the 2012 hearing.

Appellant qualified to be considered for a pardon in 2018 pursuant to S.C. Code §24-21-950(A)(3). Appellant filed an application for a pardon on December 12, 2024. She appeared

[1] The indictment alleged that Appellant killed a two-year-old girl by means of "beating, choking, strangling, and drowning." *Barton v. S.C. Dept. of Probation, Parole and Pardon Servs.*, 404 S.C. 395, 398 n.1, 745 S.E.2d 110, 113 n.1 (2013).
[2] *Barton*, 404 S.C. 395, 745 S.E.2d 110.

before the Board of Paroles and Pardons ("the Board") on July 9, 2025. In a letter dated the next day, the Board informed her that her pardon application had been denied. (R.p.14). The Board denied Appellant's request for a rehearing on September 12, 2025. (R.p. 58).

Appellant filed a Notice of Appeal at the Administrative Law Court (ALC) on September 15, 2025. (R.p.15-p. 20). The Department filed a Motion to Dismiss, noting that the ALC lacks both subject matter jurisdiction and statutory authority to review a decision of the Board when its members vote against the granting of pardons. (R.p.31-p.36). The ALC agreed. In an Order filed November 14, 2025, the Honorable Crystal M. Rookard of that Court granted the Department's Motion and dismissed the appeal with prejudice. (R.p.1-p.3).

The Appellant filed a Notice of Appeal from the ALC's decision granting the motion to dismiss. Appellant filed her initial brief on or about February 5, 2026. Respondent's initial brief follows.

STANDARD OF REVIEW

The Board is vested with sole discretion to grant or deny a pardon. S.C. Code §§ 24-21-920, -930 (2018). Respondent can find no reported case in which an unsuccessful applicant for a pardon appealed the decision to any tribunal such as the Administrative Law Court. However, under the APA, 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 § 1-23-610 (2024). *Palmetto Alliance. Inc. v. Public Service Commission*, 282 S.C. 430, 319 S.E.2d 695 (1984) held proof of denial of due process in administrative proceeding requires showing of substantial prejudice. *Tall Tower, Inc. v. South Carolina Procurement Review Panel*, 294 S.C. 225, 233, 363 S.E.2d 683, 687 (1987).

ARGUMENT

1. **A pardon hearing is not a contested case hearing; applications for a pardon are not governed by the Administrative Procedures Act; therefore, the Administrative Law Court's dismissal should be affirmed.**

Appellant argues that the Administrative Procedures Act gives the Administrative Law Court jurisdiction over all appeals from final decisions of contested cases and, thus, in this case. This argument must fail for several reasons. The primary section of the South Carolina Code of Laws that defines "regulation" in the context of the Administrative Procedures Act ("the APA") is Section 1-23-10(4), which specifically excludes decisions of the Board. That subsection states in part, "'regulation'... does not include ... decisions, orders, or rules of the Board of Probation, Parole, and Pardon Services." *Id.*[3] Further, the APA defines "contested case" as "a proceeding ... in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for a hearing." S.C. Code § 1-23-310(3). Pardon hearings are not "contested cases." There is no requirement, statutory or otherwise, that the Board conduct pardon hearings at all. The specific exclusion, cited above, acts as a statutory "shield," perhaps

[3] While not governed by the general APA, the pardon process is governed by specific statutes found in Title 24, Chapter 21, Article 11 of the South Carolina Code of Laws, which governs the Board of Probation, Parole and Pardon Services.

meant to ensure that pardon decisions remain highly discretionary, executive "acts of grace," and not "administrative rights."

2. **No statutory or case law confers jurisdiction on an appellate court to hear an appeal from the denial of a pardon.**

As the ALC's Order dismissing this appeal stated, without "some statutory or court-recognized grant of jurisdiction...to review pardon determinations, this Court cannot assert jurisdiction over such matters." (R.p1-p.3). Accordingly, the ALC properly dismissed this appeal, noting it had no authority conferred by statute or a court. The dismissal should be affirmed.

The United States Supreme Court has held that there is "no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 7 (1979). In other words, "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." *Meachum v. Fano*, 427 U.S. 215, 224 (1976). Thus, parole is a privilege, not a right, and if Appellant has a liberty interest in parole, then it must emanate from state law. *See Ellis v. Dist. of Columbia*, 84 F.3d 1413, 1415 (D.C. Cir. 1996).

Accordingly, the ALC's jurisdiction to review a final decision of the Department is derived from case law, most notably from the decisions of the South Carolina Supreme Court in *Al-Shabbaz v. State*, 338 S.C. 334, 537 S.E.2d 724 (2000) and *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2002). In *Al-Shabbaz*, the South Carolina Supreme Court created an avenue through which an inmate could seek review of a final decision by a state agency in "non-collateral" matters related to a conviction or sentence. The Court held that inmates could appeal those final agency decisions to the ALC, and ultimately to the Court of Appeals pursuant to the Administrative Procedures Act. *Al-Shabbaz*, at 376. In *Al-*

Shabbaz, the Court recognized that "these administrative matters typically arise in two ways: (1) when an inmate is disciplined and punishment is imposed; and (2) when an inmate believes prison officials have erroneously calculated his sentence related credits or custody status. *Id.*, at 369.

The Court noted that the appealable final decision in *Furtick* arises in the latter manner, where the inmate alleges that the Department erroneously determined he was not eligible for parole. The review by the ALC under the procedures set forth in *Al-Shabbaz* is necessary to determine whether the inmate has a liberty interest in gaining access to the Parole Board. *Furtick,* at 149. In *Furtick*, the Supreme Court ultimately determined that, "the *permanent* denial of parole *eligibility* implicates a liberty interest sufficient to require at least minimal due process." *Id.*

Unlike parole, there is no constitutional right or liberty interest in receiving a pardon. It has been called "an act of grace" and of "mercy." *See, United States v. Wilson,* 32 U.S. 150 (1833). "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws,..." *Id* at 160. (Emphasis added.) At the federal level, the power to pardon rests with the President. U.S. Const. Article II, § 2, cl 1. The President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." *Id.* "The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law.... This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions." *Ex parte Garland,* 71 U.S. 333, 380 (1866). (Emphasis added.)

Likewise, in South Carolina, the power to pardon is vested in the Executive branch. The Governor can only grant reprieves and commute death sentences to life imprisonment. S.C. Const. art. IV, §14. All other clemency authority, including the power to grant pardons, is vested in the Board of Probation, Parole and Pardon Services. This transfer of power from the Governor to the Board occurred via a constitutional amendment in 1949.[4]

Presently, there are very few restrictions or limitations imposed by statute on the Board with respect to their exercise of discretion in granting or denying pardons. S.C. Code § 17-25-322 (E) provides, "[a]n offender may not be granted a pardon until the restitution and collection fees required by the restitution order have been paid in full." Other limitations may be found in Title 21 of Chapter 24. *See,* § 24-21-920 (granting the Board authority over pardons excluding death sentence commutations), § 24-21-940 (defining the effect of a pardon as absolving all legal consequences), § 24-21-950 & 960 (outlining eligibility, procedures, and setting application fee).

Appellant would turn all of this on its head, asking this Court to reverse the ALC's dismissal, remand the matter to the Board for a rehearing, order the Board's Vice Chairman to recuse himself, require the Department's General Counsel to follow what amounts to a script written by Appellant, and follow several other dictates of Appellant. These demands are at best unreasonable given the nature of a pardon as an act of grace. Appellant would have the Court treat the granting of pardons as an entitlement.

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[4] "[I]n 1949, Article 4, Section 11 of the Constitution was amended so as to restrict the clemency power of the Governor to granting reprieves and commuting death sentences to life imprisonment. All other clemency power was vested under this constitutional amendment in a Probation, Parole and Pardon Board, which was authorized to "grant pardons, issue paroles and admit to probation under such terms and conditions as it may determine". ...

...

"[I]t must be kept in mind that a pardon or parole is granted, not as a matter of right, but as a matter of grace bestowed by the government through its duly authorized officers or departments." *Bearden v. State*, 223 S.C. 211, 74 S.E. 912 (1953) (Emphasis added).

According to *Furtick*, the ALC has jurisdiction over parole cases only because the denial of parole eligibility implicates a liberty interest,[5] which does not apply to the current cause of action. Here, the ALC properly found it lacks jurisdiction to review the Board's pardon decisions. As Appellant acknowledges, the statutes and cases cited by Appellant only apply to parole, which—unlike a pardon—involves a liberty interest, albeit a limited one, in the denial of parole eligibility. There is no liberty right inherent in the grant or denial of a pardon. The General Assembly has not provided for appellate review of pardon denials. Instead, an applicant is allowed to apply again after one year. S.C. Code §24-21-960(B).

Neither this Court, nor any other court, has been given the ability to review a decision regarding a pardon. Indeed, Respondent is unable to find any reported case in the United States in which the denial of a pardon was reversed on appeal, or even a case in which it was the subject of an appeal. This is because no one has a right to a pardon, as the granting of a pardon is the act of forgiveness for a prior conviction. It restores a person's civil rights lost due to the conviction, which would include Appellant's obligations to the conditions of parole. *See,* S.C. Code §24-21-1000. Parole, on the other hand, is a lessening of a sentence by converting confinement in prison to supervised release in the community which triggers limited due process considerations. *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008).

The lack of a liberty interest in receiving a pardon is rooted in the plenary nature of the pardon power. Because this power is vested in the Executive Branch, there is no constitutional expectation of receiving one. Respondent has been unable to find any right to appeal the denial of a pardon within this State, and elsewhere. "Unlike probation, pardon and commutation

[5] Furtick v. S.C. Dept. of Probation, Parole and Pardon Services, 352 S.C. 594, 598, 576 S.E.2d 146, 149 (2003)(holding the permanent denial of parole eligibility implicates a liberty interest sufficient to require at least minimal due process).

decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Conn. Bd of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981).

3. Appellant has not shown the Board retaliated against her.

Respondent would first submit that the ALC's order dismissing the appeal for lack of subject matter jurisdiction is the sole issue of this Appeal, and any discussion of the underlying argument of Appellant's appeal is not before this Court. However, should this Court wish to take up Appellant's argument that the Board improperly denied her a pardon, Respondent would submit that she bases her argument on speculation without evidence, and it falls far short.

Appellant claims that when the Department or Board violates the law it is not a "routine denial," and appellate courts will remedy the violation. This argument improperly equates the limited, State-created liberty interest in receiving parole consideration with the granting or denial of a pardon. Appellant wrongly asserts that "violations of the law in [cases cited by Appellant] involve parole decisions and processes, courts have the same duty and power to remedy violations of the law involving the pardon process." (Brief of Appellant p. 8, n.6) Appellant states this without pointing to any source for it. There is none.

Neither does Appellant state the source for the invented premise and accusation that the Board violated the law. Again, there is none. The Appellant blithely states the Board considered "something more than just 'all the facts.'" (Initial Brief of Appellant, p. 2.) Appellant then states the Board's Vice Chairman notified other members of the Board: Appellant was paroled in 2013 "because of a prior vote;" "that whole thing went to the Supreme Court. If you hear us talking about the *Barton* case, this is the *Barton* case;" "we had to change the way we counted our votes

because of the *Barton* case . . . We had to pardon her based on her getting so many votes at a prior time;" and "Thought y'all should know that this is the *Barton* case."

The Department's General Counsel, who was present, said it would be better for him to answer questions about the *Barton* case after the vote, "so as not to 'color anything.'" Before the vote, one member the Board said this information, "kind of clouded things," and then that member voted against granting a pardon, as did the Vice Chairman and others. Appellant did receive one favorable vote.

Appellant characterizes the Vice Chairman's comments as "inappropriate, inaccurate, and irrelevant," then—despite noting Appellant received one favorable vote—alleges these comments "appeared to evince retaliatory bias." Respondent contends that the Vice Chairman's remarks were accurate. More important is they neither evince nor reveal any inappropriate motive to retaliate against Appellant, because there was none.

Respondent submits there is no externally imposed requirement that the Board even conduct a hearing to consider applicants for a pardon. Admittedly, having chosen to conduct (non-contested case) hearings to consider pardon applications, the decisions of the Board should never be arbitrary, or capricious, based upon impermissible factors such as race, gender, creed, the exercise of freedom of speech, or a coin toss. However, this is not such a case.

Consider the U.S. Supreme Court's determination that when there are no procedures or factors that must be considered set forth by law, the courts will not impose them.

> "Moreover, from the standpoint of a reasons requirement, there is a vast difference between a denial of parole—particularly on the facts of Greenholtz—and a state's refusal to commute a lawful sentence. When Nebraska statutes directed that inmates who are eligible for parole 'shall' be released 'unless' a certain finding has been made, the statutes created a right. By contrast, the mere existence of a power to commute a lawfully imposed sentence, and the granting of commutations to many petitioners, create no right

> or 'entitlement.' A state cannot be required to explain its reasons for a decision when it is not required to act on prescribed grounds."

Dumschat, 452 U.S. at 466-67. (Emphasis added.)

Similarly, the Board in this case did not, nor is it required to, explain its reasoning for denying Appellant a pardon. However, Appellant seized upon the statements by the vice chairman and argues that the only reason the Board denied her pardon was to retaliate against her. Lacking an explicit statement supporting that, Appellant relies entirely upon self-serving speculation—providing this Court an insufficient basis to support what would be a groundbreaking precedent that henceforth would open the floodgates to appeals of pardon denials based upon nothing more than unsupported claims of bias.

Finally, in administrative hearings, a claim of due process violation must be supported by a showing of substantial prejudice. *Tall Tower, Inc. v. South Carolina Procurement Review Panel*, 294 S.C. 225, 233, 363 S.E.2d 683, 687 (1987) (in an administrative proceeding, "[a] demonstration of substantial prejudice is required to establish a due process claim."); *Palmetto Alliance. Inc. v. Public Service Commission*, 282 S.C. 430, 319 S.E.2d 695 (1984) (proof of denial of due process in administrative proceeding requires showing of substantial prejudice). Appellant has shown no evidence of prejudice, and she certainly fails to produce any objective evidence of substantial prejudice.

CONCLUSION

The ALC lacks statutorily or judicially created jurisdiction to review a decision of the Board decision whether to grant or deny a pardon. Thus, the ALC properly dismissed the appeal. Respondent respectfully requests this Court affirm that decision.

(Signature page follows.)

Respectfully submitted,

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April 2, 2026

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 607, 757 S.E.2d 421 (2014) (requiring redaction of social security numbers, names of minor children, financial account numbers, home addresses, and date of birth).

This 2nd day of April, 2026.

Michael D. McMullen
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