THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III, Chief Administrative Law Court Judge

Appellate Case No. 2015-001251

Phillip A. Brown, #118100 — Appellant

v.

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

RECORD ON APPEAL

October 15, 2015

Other Counsel of record

Mr. Tommy Evans, Esquire
2221 Devine Street, Suite 600
P.O. Box 50666
Columbia, S.C. 29250

Phillip A. Brown

Phillip A. Brown
#118100
5A-23
Lieber Correctional Institution
P.O. Box 205
Ridgeville, S.C. 29472

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THE STATE OF SOUTH CAROLINA
DEPARTMENT OF PROBATION, PAROLE AND PARDONS SERVICES

In the matter of

Phillip A. Brown, #118100,

Petitioner,

PETITION FOR RELEASE

NOW COMES, Phillip Ansel Brown, #118100, appearing pro se, petitioning the Parole Board of and for the State of South Carolina for release.

1. Phillip Ansel Brown appeared before this Board on April 14,2010. At that hearing, Petitioner received five (5) parole votes and zero (0) reject votes [see attached];
2. Petitioner was placed on safekeeping in the Columbia Central Correctional Institution on June 18, 1982 and sentenced to life on June 23, 1983.
3. That on July 3, 2013, the State of South Carolina decided the case of *Thalma Barton v. South Carolina Department of Probation, Parole and Pardon Services*, 404 S.C. 395, 795 S.E.2d 110 (2013);
4. That pursuant to the Supreme Court's recent ruling in Barton, the Petitioner would respectfully request that he be released on parole.

WHEREFORE, the Petitioner respectfully, requests that he be released.

September 9, 2014

PHILLIP ANSEL BROWN
#118100, Pro se
Lieber C.I., SA-23
P.O. Box 205
Ridgeville, S.C. 29472

PETITIONER, *pro se*

State of South Carolina

Department of Probation, Parole and Pardon Services

NIKKI HALEY
Governor

KELA THOMAS
Director

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September 22, 2014

Phillip A. Brown, #118100
Lieber Correctional Institution-SA-23
PO Box 205
Ridgeville, South Carolina 29472

Dear Mr. Brown:

I have been asked to respond to your Petition for Release addressed to Kela Thomas dated September 9, 2014, pursuant to the Barton ruling. According to our records, in April of 2010, the Parole Board granted you a conditional parole. However, on July 28, 2010, the Board decided to rescind your parole and scheduled another hearing. On September 8, 2010, the Board reviewed your case again and decided to reject you for parole. The Board was acting within its authority to rescind your conditional parole and rehear your case because you had not been released, and therefore, had not yet acquired a "liberty interest" under the U.S. Constitution. Therefore, you are not eligible for release pursuant to the Barton case.

Sincerely,

Tommy Evans, Jr.
Assistant General Counsel

TE:dn

cc: Larry Patton, Director, Board Support Services

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Phillips A. Brown, # 118100, Appellant, vs. South Carolina Department of Probation, Parole, and Pardon Services, Respondent.	)	**NOTICE OF APPEAL** **DOCKET NO. 14-ALC-15-0041-AP**

Notice is hereby given that Phillip A. Brown, #118100, does hereby appeal the final decision of the South Carolina Department of Probation, Parole, and Pardon Services dated September 22, 2014, and received by Appellant on September 27, 2014, a copy of which is attached. A general statement of the grounds for appeal is (See S.C. Code Ann. §1-23-380 (A)(6):

(1) Appellant has previously satisfied the requisite number of votes required to be granted parole in light of *Barton v. DPPPS*, yet has not been released on parole.

(2) Appellant was denied parole in an arbitrary and capricious manner where the parole board voting process failed to apply or follow agency regulatory guidelines regarding the April 14, 2010 hearing in which Appellant received the requisite number of votes and subsequently rescinded those votes.

(3) In determining Appellant's granting of parole on April 14, 2010, DPPPS employed a process contrary to constitutional protections of due process and equal protection.

Phillip Ansell Brown
Phillip Ansell Brown, #118100

October 8, 2014
Dated

Lieber Correctional Institution SA-23
Post Office Box 205
Ridgeville, South Carolina 29472-0205

CERTIFICATE OF MAILING

I certify that a copy of the Notice of Appeal and attachments is mailed to counsel for Respondents, Matthew C. Buchanan, Department of Probation, Parole and Pardon Services at 2221 Devine Street, Suite 600, P.O. Box 50666, Columbia, S.C. 29250, this 8th day of October 2014.

STATE OF SOUTH CAROLINA
In The Administrative Law Court
Docket Number 14-ALJ-15-0041

APPEAL OF FINAL DECISION
Department of Probation, Parole, and Pardon Services

PHILLIP BROWN, #118100 ..... APPELLANT

v.

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

RECORD ON APPEAL

Tommy Evans, Jr.,
Assistant General Counsel

South Carolina Department of Probation, Parole and Pardon Services
P. O. Box 50666
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ATTORNEY FOR RESPONDENT

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Phillip Brown, #118100, Appellant, vs. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	)	Docket No. 11-ALJ-15-0030-AP **ORDER OF DISMISSAL**

This case is before the Administrative Law Court (ALC) pursuant to the appeal of Phillip Brown (Appellant), an individual incarcerated with the South Carolina Department of Corrections. On September 9, 2010, the South Carolina Department of Probation, Parole and Pardon Services (Department) notified Appellant that the South Carolina Board of Paroles and Pardons (Board) had rejected him for parole. Appellant challenges the Board's denial of parole as well as its procedures related to his parole eligibility hearing.

BACKGROUND

On April 14, 2010, the Board made a decision to grant parole to Appellant upon the satisfaction of eight specific criteria. However, upon notification to the victim's family and the Kershaw County Sheriff's Department, both informed the Board that they received no prior notification of Appellant's parole hearing. Pursuant to state law, victims and/or their family, the solicitor, and law enforcement are required to be notified prior to an inmate's parole hearing.[1] Both the victim's family and the sheriff's department requested to be heard by the Board prior to it issuing a final decision regarding Appellant's parole. A second hearing was held by the Board on September 8, 2010, and the victim's family, the Kershaw County Sheriff, and the Fifth Circuit Solicitor were allowed to present opinions to the Board concerning the release of the Appellant on parole. Upon the conclusion of this rehearing, the Board denied parole to Appellant based upon the reasons set forth in its September 9, 2010 denial letter.

Subsequently, Appellant filed a motion with the Board requesting reconsideration of its earlier decision. The Board denied Appellant's motion. Appellant later notified the Board that

1 Cf. §24-21-610 S.C. Code Ann.

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his parole was "unlawfully revoked" and Appellant further requested the information contained within his file. The Board denied his request for information and informed Appellant that no response would be made to any additional inquiries regarding his latest parole hearing.

Based upon the Board's final decision, Appellant filed a notice of appeal with the ALC on May 4, 2011.

DISCUSSION

Board's Order

An individual has a right to ALC review of a final decision of the Department only when that decision affects a liberty interest for which due process is required. See Furtick v. S.C. Dep't of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146, 149, 150 (2003); see also Sullivan v. S.C. Dep't of Corrections, 355 S.C. 437, 586 S.E.2d 124, 127 (2003) (explaining the nature of the right to ALC review). In Furtick, the South Carolina Supreme Court held that although an inmate has a liberty interest in parole *eligibility* pursuant to S.C. Code Ann. § 24-21-620, the statute creates no such liberty interest in the granting of parole itself. Furtick, 352 S.C. at 598, 576 S.E.2d at 149 n.4. Therefore, claims arising from the Board's decision denying parole are not appealable to the ALC.

Appellant challenges the Board's procedures regarding his parole hearing by essentially arguing that the Board's order did not comply with Cooper and South Carolina law because it did not use any specific criteria or procedure with regard to his parole hearing. However, the Board's decision clearly states that it considered all of the criteria listed with Section 24-21-640 and the factors published in Department Form 1212 in reaching its decision. Thus, its decision to deny Appellant's parole sufficiently complied with the Court's decision in Cooper v. South Carolina Department of Probation, Parole and Pardon Services, 377 S.C. 489, 661 SD.E.2d 106 (2008) (stating that an inmate's state-created liberty interest is infringed upon if the Board does not render an inmate's parole determination after consideration of the appropriate criteria) and Compton v. South Carolina Department of Probation, Parole and Pardon Services, 385 S.C. 476, 685 S.E.2d 175 (2009) (stating that the result in Cooper "could be avoided in the future 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.").

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Parole Hearing

Appellant argues that the denial of parole was done without the benefit of a hearing, and thus, violated his due process rights. This argument must fail. Appellant was allowed to appear before the Board at the first hearing, but, because the requirements of § 24-21-610 relative to notice to the Solicitor, law enforcement and victims family had not been met, the hearing was not complete. There is no requirement that Appellant must appear at the same hearing at which the victim's family, solicitor's office, and law enforcement appear. Appellant appeared before the Board prior to it making a decision regarding his parole, and it considered all the evidence and arguments by the individuals appearing before the Board, on both dates. Because Appellant has no right to cross-examine at the parole hearing, there was no due process violation in Appellant's absence from the September 8, 2010 Board hearing. See Fleming v. Murray, 888 F.Supp.734 (D.C. Vir. 1994). Even if there were a due process violation, Appellant has not shown how he was prejudiced by such violation. Leventis v. S.C. Dep't of Health and Envtl. Control, 340 S.C. 118, 131-32, 530 S.E.2d 643, 650 (Ct. App. 2000) ("'To prove the denial of due process in an administrative proceeding, a party much show that it was substantially prejudiced by the administrative process.'").

Conditional Parole

Appellant next argues that he had a vested interest in the granting of his conditional parole, and the Board's decision violated his right to due process. I disagree. In Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972), the United States Supreme Court acknowledged that a person facing a revocation of parole has minimal due process rights. However, a distinction between a person currently on parole and a person seeking parole was made in the case of Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S.1, 99 S.Ct. 2100 (1979). In Greenholz, the Court determined that there is no constitutional or inherent right of the convicted person to be conditionally released before the expiration of a valid sentence. Thus, in the present case, Appellant's argument that he had a vested liberty interest in the granting of his conditional parole is simply without merit.[2] No individual has a right to be

[2] Appellant cites Tippins v. Luther, 869 F.Supp. 331 (W.D. Pa. 1994) to support his argument that he is entitled to some due process protections in a parole rescission hearing. However, this case is distinguishable from the instant case. First, Tippins does not provide any specific analysis of what due process protections are required to be provided in a parole rescission hearing. Furthermore, Appellant is given due process protections within the

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awarded parole; rather, the individual has right to a hearing. Because Appellant was never released on parole, the rights established under Morrissey do not apply in the instant case.

Assistance of Counsel

Appellant next argues that he was denied due process of law because he was not allowed to have counsel present at the September 8, 2010 Board hearing. I disagree. A parole hearing is not a formal trial. There is . . . [no] right to attend in person or to have counsel at a parole hearing." Fleming, 888 F.Supp. at 738. As noted above, there was no right of Appellant to appear at the September 8, 2010 Board hearing.

ORDER

IT IS THEREFORE ORDERED that this appeal is dismissed with prejudice.

AND IT IS SO ORDERED.

John D. McLeod, Judge
S.C. Administrative Law Court

October 14, 2011
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 14 day of October 2011

By: _____
Judicial Law Clerk

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administrative hearing and appeals process. Appellant provided no evidence that the due process protections discussed in Tippins drastically differ from those afforded to Appellant and how he was prejudiced by those differences, if any. Second, the inmate in Tippins had not been release from prison, but his date of parole had been approved. Here, Appellant was not given a date certain for his parole.

South Carolina Department of Probation, Parole and Pardon Services

Columbia, South Carolina

ORDER OF PAROLE

It having to be made appear to the satisfaction of the Board that Phillip Ansel Brown is eligible for parole and has shown a disposition to reform; that there is a reasonable probability that said prisoner will remain at liberty without violating the law; that release is not incompatible with the welfare of society; and that the prisoner will not become a public charge upon release; and that the prisoner will keep the conditions on the reverse side of this order inviolate, and understands that the violation of any of the conditions will constitute a breach of faith and be sufficient grounds for the revocation of the parole issued, and the execution of the original sentence imposed.

It is therefore ordered that Phillip Ansel Brown be released on Parole the _____ day of _____, 20_____ subject to said prisoner's agreement to abide by the conditions listed on the reverse side of this order, which parole is to expire _____. This parole is granted by [the full board or a panel of the full board].

Ordered this _____ day of _____, 20_____

Karen A. Walls
Chairman

Rescinded on September 8, 2010
Vice Chairman

James H. Williams

Lowayne M. Dorn

Orton Bellamy

D.G. Rodgers

Re-hearing on Sept. 8, 2010. Rescinded

(10)

State of South Carolina

Department of Probation, Parole and Pardon Services

MARK SANFORD
Governor

SAMUEL B. GLOVER
Director

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www.dppps.sc.gov

September 9, 2010

Mr. Phillip Brown #00118100
Lee Correctional Institution
990 Wisaky Hwy.
Bishopville, SC 29010

RE: NOTICE OF REJECTION

Dear Mr. Brown:

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
Use Of Deadly Weapon In This Or Previous Offense
Prior Criminal Record Indicates Poor Community Adjustment

Sincerely,

Heyward A. Hinton

Heyward A. Hinton
Director of Hearings & Parole Board Support

State of South Carolina

Department of Probation, Parole and Pardon Services

NIKKI HALEY
Governor

KELA THOMAS
Director

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February 24, 2011

Phillip A. Brown, #118100
Lieber Correctional Institution-CB-12
PO Box 205
Ridgeville, South Carolina 29472

Dear Mr. Brown:

I have been asked to respond to your letter addressed to Kela Thomas dated February 18, 2011, concerning your last parole hearing. According to your letter, you feel that the denial of parole was done in error and that proper procedures were not followed. In April of 2010, the Parole Board granted you a conditional parole. However, on July 28, 2010, the Board decided to rescind your parole and scheduled another hearing. On September 8, 2010, the Board reviewed your case again and decided to reject you for parole. The Board was acting within its authority to rescind your conditional parole and rehear your case because you had not been released, and therefore, had not yet acquired a "liberty interest" under the U.S. Constitution.

In response your request for all information and documents relating to your parole hearing, all of this information is contained in your offender file and it is exempt from disclosure. See S.C. Code Ann. § 30-4-40(a)(4) (1991) (allowing exemption of matters specifically exempted from disclosure by statute or law). Pursuant to statute, all information and data obtained in the discharge of his official duty by a South Carolina probation agent is privileged information and may not be disclosed directly or indirectly to anyone other than the judge or others entitled to receive reports, unless ordered by the court or the director. S.C. Code Ann. § 24-21-290 (Supp. 2008). See also State v. Hook, 356 S.C. 421, 590 S.E.2d 25 (2003). Investigating parole cases referred by the director, keeping detailed records of his or her work, making reports in writing, and performing other duties as the director may require are part of the official duties of a probation agent. S.C. Code Ann. § 24-21-280 (Supp. 2007). Therefore, the Department is under no obligation to disclose the information you requested.

Sincerely,

J. Benjamin Aplin
Assistant Chief Legal Counsel

JBA:dn

State of South Carolina

Department of Probation, Parole and Pardon Services

NIKKI HALEY
Governor

KELA THOMAS
Director

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May 20, 2014

Phillip A. Brown, #118100
Lieber Correctional Institution-SA-23
PO Box 205
Ridgeville, South Carolina 29472

Dear Mr. Brown:

I have been asked to respond to your letter addressed to Director Kela Thomas dated May 14, 2014, in which you are requesting information and documents relating to your parole hearing on April 14, 2010, and rehearing of September 8, 2010. Please be advised that this information is contained in your offender file and it is exempt from disclosure. See S.C. Code Ann. § 30-4-40(a)(4) (1991) (allowing exemption of matters specifically exempted from disclosure by statute or law). Pursuant to statute, all information and data obtained in the discharge of his official duty by a South Carolina probation agent is privileged information and may not be disclosed directly or indirectly to anyone other than the judge or others entitled to receive reports, unless ordered by the court or the director. S.C. Code Ann. § 24-21-290 (Supp. 2008). See also State v. Hook, 356 S.C. 421, 590 S.E.2d 25 (2003). Investigating parole cases referred by the director, keeping detailed records of his or her work, making reports in writing, and performing other duties as the director may require are part of the official duties of a probation agent. S.C. Code Ann. § 24-21-280 (Supp. 2007). Therefore, the Department is under no obligation to disclose the information you requested.

Sincerely,

Matthew C. Buchanan
General Counsel

MCB:dn

(13)

State of South Carolina

Department of Probation, Parole and Pardon Services

NIKKI HALEY
Governor

KELA THOMAS
Director

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September 22, 2014

Phillip A. Brown, #118100
Lieber Correctional Institution-SA-23
PO Box 205
Ridgeville, South Carolina 29472

Dear Mr. Brown:

I have been asked to respond to your Petition for Release addressed to Kela Thomas dated September 9, 2014, pursuant to the Barton ruling. According to our records, in April of 2010, the Parole Board granted you a conditional parole. However, on July 28, 2010, the Board decided to rescind your parole and scheduled another hearing. On September 8, 2010, the Board reviewed your case again and decided to reject you for parole. The Board was acting within its authority to rescind your conditional parole and rehear your case because you had not been released, and therefore, had not yet acquired a "liberty interest" under the U.S. Constitution. Therefore, you are not eligible for release pursuant to the Barton case.

Sincerely,

Tommy Evans, Jr.
Assistant General Counsel

TE:dn

cc: Larry Patton, Director, Board Support Services

THE STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Phillip Ansel Brown, # 118100, Applicant, vs. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	**Docket No. 14-ALJ-15-0041** Honorable Ralph King Anderson, III **APPELLANT'S ORIGINAL BRIEF**

This matter is before the Administrative Law Court ("ALC") by Appellant's Notice of Appeal of a final agency decision of the South Carolina Department of Probation, Parole and Pardon Services ("SCDPPPS"), filed October 9, 2014 and assigned October 16, 2014:

STATEMENT OF THE ISSUE(S) ON APPEAL

1. Whether the Department of Probation, Pardon, and Pardon Services incorrectly denied Appellant parole based on the number of votes received at Appellant's April 14, 2010 eligibility hearing, in contravention of South Carolina Constitutional and Statutory Law, and in light of the recent South Carolina Supreme Court ruling in *Thalma Barton v. South Carolina Department of Probation, Pardon, and Pardon Services,* 404 S.C. 395, 745 S.E.2d 110 (2013)?

2. Whether the Department of Probation, Pardon, and Pardon Services denied Appellant parole in an arbitrary and capricious manner where the Parole Board failed to apply statutory law and controlling precedent?

3. Whether the Department of Probation, Pardon, and Pardon Services denied Appellant parole by employing a process contrary to constitutional protections of due process and equal protection.

STATEMENT OF THE CASE

The Appellant, Phillip Ansel Brown, # 118100, is currently serving a life sentence for Murder, from Kershaw County. Appellant has been incarcerated since June 15, 1982.

On April 14, 2010 Appellant appeared in front of the South Carolina Parole Board ("Board") for consideration for parole. Following review protocols applied by the Board in regards to all parties, Appellant received five (5) votes in favor of parole. Regardless of Appellant being awarded more than the four (4) votes required, on September 8, 2010, outside the parameters of South Carolina statutory law and against constitutional provisions of substantive and procedural due process, the Board rescinded the five (5) votes.

ARGUMENT

I. The Department of Probation, Pardon, and Pardon Services incorrectly rescinded Appellant's parole based on the number of votes received at Appellant's April 14, 2010 eligibility hearing, in contravention of South Carolina Constitutional and Statutory Law, and in light of the recent South Carolina Supreme Court ruling in *Thalma Barton v. South Carolina Department of Probation, Pardon, and Pardon Services,* 404 S.C. 395, 745 S.E.2d 110 (2013).

As noted, Appellant was sentenced prior to 1986.[1] Prior to June 3, 1986, S. C. Code of Laws Annotated §24-21-645 provided that the Parole Board may authorize parole when authorized by a **majority** of its members. *See* S.C. Code §24-21-645 (Supp. 1984) (emphasis added).

The Parole Board is comprised of seven members.[2] At Appellant's eligibility hearing on April 14, 2010, at least five (5) members voted in favor of granting Appellant parole. According to §24-21-645 of the South Carolina Code, the Parole Board may issue an order authorizing parole signed either by a majority of its members or by any three members meeting as a parole panel.

The gravamen of Appellant's complaint is that without question, having received five (5) votes, Appellant should have been released under the decision by the South Carolina Supreme Court in *Thalma Barton v. South Carolina Department of Probation, Pardon, and Pardon Services.*[3]

[1] June 15, 1982
[2] See S.C. Code Ann. § 24-21-10 (2007)
[3] 404 S.C. 395, 745 S.E.2d 110 (2013)

Alternatively, Appellant asserts that he should have been granted parole even under the amended statute, as the Parole Board interpreted the statute erroneously and, the Respondent now seeks to assert an irregular voting procedure for the year Appellant received the five (5) votes.

Appellant made good faith efforts to obtain written documentation from Respondent for the manner in which parole votes are called, collected, counted and published. Respondents resisted every attempt to provide Appellant with a logical procedure to equitably provide due process in this administrative tribunal.

Appellant suggests that the burden shifts now to Respondents to show this Honorable Court and this Appellant why Appellant has not been released after clearly earning five (5) votes under the *Barton* decision. The reviewing standard of this Court requires Respondents to produce a procedure by which this Court can justify Respondent's decision in this matter on reliable and accurate evidence and the record as a whole where it is contrary to statutory and constitutional provisions.

The primary rule of statutory construction is the Court must ascertain the intention of the Legislature, *e.g., State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). When the terms of a statute are clear and unambiguous, the Court must apply them according to their literal meaning, without resort to subtle or forced construction to limit or expand the statute's operation. *Id.* Furthermore, when a statute is penal in nature, it must be construed strictly against the State and in favor or the defendant.

This rule of statutory construction was applied by our Supreme Court in *Kerr v. State*, 345 S.C. 183, 547 S.E.2d 494, 496-97 (2001) to determine the context of certain parole eligibility and revocation statutes.

Appellant here asserts this includes South Carolina Administrative Agencies empowered with quasi-legislative rule-making authority, which encompasses the Operations Manual or other procedures currently unknown to Appellant in the determination of suitability for parole.

The facts surrounding this issue raise a particular question. Should the Court grant relief as requested by the Appellant? Moreover, if granted, how can this relief be put into effect? The Appellant would submit that should the Court consider sending this case back to the Parole Board for further review, that the Board would be unable to make an objective decision at this point. A decision has been made and further review will only produce a second denial due to those factors listed by the Board in its letter of rejection. This inability at this point to make an objective decision denies the Appellant a realistic opportunity to participate in the parole process. The failure to apply the correct procedure as ascertained in the Supreme Court's recent *Barton* decision, arbitrarily and capriciously, in contravention of due process, denied Appellant the privilege of parole to which he earned and received the appropriate number of "yes" votes to be granted parole.

II. **The Department of Probation, Pardon, and Pardon Services denied Appellant parole in an arbitrary and capricious manner where the Parole Board failed to apply statutory law and controlling precedent.**

Where DPPPS failed to correctly apply the Supreme Court decision in *Barton* and S.C. Code §24-21-645 (1984 Supp.), the October 8, 2010 decision to deny Appellant parole was made in an arbitrary and capricious manner.

III. **The Department of Probation, Pardon, and Pardon Services denied Appellant parole by employing a process contrary to constitutional protections of due process and equal protection.**

Where DPPPS failed to correctly apply the Supreme Court decision in *Barton* and S.C. Code §24-21-645 (1984 Supp.), the October 8, 2010 decision to deny Appellant parole was a process contrary to constitutional due process and equal protection where Appellant earned the number of votes required for parole but was denied parole where others receiving the same number of votes have been released.

CONLCUSION

For the foregoing reasons and based upon the record, the Appellant would respectfully request that:

i. This Court reverse the decision of the Parole Board of October 8, 2010;

ii. Fully review the facts and circumstances regarding the Appellant's October 8, 2010 denial of parole;

iii. Remand this case back to the Parole Board with instructions that the Appellant be released on Parole;

iv. Or, in the alternative, that this Court issue its own findings of fact and conclusions of law regarding the Appellant's April 14, 2010 parole hearing efforts of rehabilitation and Order that he be released on parole.

Respectfully submitted,

December 12, 2014

Phillip Ansel Brown

Phillip Ansel Brown
#118100
Lieber Correctional Institution SA-23
P.O. Box 205
Ridgeville, SC 29472

APPELLANT, Pro se

STATE OF SOUTH CAROLINA
In the Administrative Law Court
Docket Number 14-ALJ-15-0041

APPEAL OF FINAL DECISION
Department of Probation, Parole and Pardon Services

PHILLIP BROWN, #118100,.....APPELLANT

v.

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

BRIEF OF RESPONDENT

Tommy Evans, Jr.
Assistant General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

MANUALS

STATUTES

STATEMENT OF ISSUES ON APPEAL

1. **Whether the Respondent incorrectly denied the Appellant parole based upon the number of votes received at the Appellant's April 14, 2010, hearing in violation of the *Barton* decision?**

2. **Whether the Respondent denied the Appellant in an arbitrary and capricious manner where the Parole Board failed to apply statutory law and controlling precedent?**

3. **Whether the Respondent denied the Appellant parole by employing a process contrary to constitutional protections of due process and equal protection.**

STATEMENT OF THE CASE

On June 12, 1982, the Appellant along with his co-defendants Dale Brown and Myra Jackson met at her residence in Elgin, South Carolina. They devise a plan to break into the home of the victim with the intent to steal money, and other various items. They entered the home through the front entrance using a key found under the floor mat. Once inside, they began to search the home looking for money and valuable items. The victim arrived home early surprising the defendants, he was attacked and shot three (3) times, causing his death. The Defendant's then immediately fled the scene, and later found and charged with the offenses of murder, burglary, and armed robbery. Upon arrest, the Appellant was subjected to a lawful interrogation in which he gave the authorities a full confession. On June 23, 1983, the Appellant appeared before the Honorable W. Cox for the offenses of murder, burglary, and armed robbery. The Appellant was sentenced to a period of incarceration for the remainder of his natural life for murder and burglary; and twenty-five (25) years for armed robbery.[1]

While serving his sentence, the Appellant escaped incarceration, and stole a motor vehicle. He also broke into a residence, and stole property valued at an excess of two hundred ($200.00) dollars. He was later found, and on February 9, 1984, appeared before the Honorable Frank Epps. Upon the conclusion of this appearance he received a sentence of ten (10) years for unauthorized use of a motor vehicle; ten (10) years for vehicle theft; and, two (2) years for escape. The Court ordered that these sentences are to be served consecutively with his incarcerated sentence.

At the time the Appellant committed these offenses, South Carolina law allowed a person serving a life sentence for murder parole eligibility upon the service of twenty (20) years. The

[1] Myra Jackson was sentenced to a one to six year sentence under the youthful offender act for accessory before the fact of grand larceny. Dale Brown received a sentence of one to six years under the youthful offender act for the offense of housebreaking and grand larceny.

Appellant initially appeared before the Parole Board on February 7, 2001. Upon the conclusion of this hearing, the Board decided to deny the Appellant's application for a release on parole. Since this initial denial the Appellant appeared before the Board an additional twelve (12) times each resulting in a denial of parole. His most recent appearance occurred on March 19, 2014, parole was denied due to: 1) the nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; and, 3) a use of a deadly weapon in this or a previous offense.

The Appellant is currently requesting an appeal of a hearing where a conditional parole was rescinded, due to the victim's family nor law enforcement receiving proper notification. The Appellant argues that he received a sufficient amount of affirmative votes to be granted parole; and he should be released on parole pursuant to the South Carolina Supreme Court decision of *Barton v. S.C. Dept. of Probation, Parole and Pardon Services,* 404 S.C. 395, 745 S.E.2d 110 (2013). The Appellant further argues that the denial of his parole is in violation of due process and equal protection. In response, the Respondent argues that the present case is not identical to the *Barton* decision, and was valid due to the failure to notify the victim and law enforcement pursuant to South Carolina law. The Respondent further argues that due process nor equal protection was violated due to his denial. The Respondent's brief supporting these arguments follows.

1. **The facts of the present case is not identical to the *Barton* decision; therefore the denial of parole was not unlawful.**

In April of 2010, the Appellant was granted a conditional parole; however, this parole was later rescinded and another hearing held. At the conclusion of the second hearing, parole was denied. The Appellant argues the he receive the sufficient number of votes according to *Barton,* so he should have been granted parole. He was initially granted provisional parole; however, an order for parole is not final until signed by a majority of the Parole Board, and issued by the Director. S.C. Code Ann. §24-21-645(Supp. 1997). The Board was later notified that the victims nor law

enforcement were notified of his parole hearing, and wanted to address the Board regarding the Appellant's parole. Per Department policy the Board decided to rescind their previous decision, and schedule another hearing.[2] The Appellant was never granted parole due to the certificate never being released by the director. The Board had no choice but to rescind the decision, due to the victims and law enforcement not being notified. Pursuant to South Carolina law these parties must be given notice prior to any parole hearing. The South Carolina Code of Laws specifically state:

> The director must give a thirty-day written notice of any board hearing during which the board will consider parole for a prisoner to the following persons;
> (1) any victim of the crime who suffered damage to his person as a result thereof or if such victim is deceased, to members of his immediate family to the extent practicable;
> (2) the solicitor who prosecuted the prisoner or his successor in the jurisdiction in which the crime was prosecuted; and
> (3) the law enforcement agency that was responsible for the arrest of the prisoner concerned.

S.C. Code Ann. §24-21-221 (Supp. 1993).

The Appellant argues that due to him receiving six affirmative votes in that 2010 hearing he should have been released on parole pursuant to *Barton*. The *Barton* decision has nothing to do with the present case, so the Appellant is not entitled to parole. His previous hearing was rescinded, so it was nullified due to the victims and law enforcement not receiving the required notification. It is like that previous hearing did not occur, and when his case was reheard with the victims and law enforcement present, he was properly denied parole.

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[2] In this situation, the Board or panel may have acquired some new material and information after it has made its final decision. The information about the prisoner's case appears, in the Board's or panel's judgment, to be so important as to require an immediate reconsideration of the case. In that event, the case will be presented to the Board or panel to review its decision in light of the new information. SOUTH CAROLINA BOARD OPERATIONS MANUEL p. 46.

The Respondent argues that *Barton* is not on point with the present case due to the fact in *Barton* the Board issued an order of denial drawing that case to a conclusion. In *Barton,* the South Carolina Supreme Court came to two conclusions:

> (1) statutory amendment requiring that parole for persons convicted of a violent crime approved by at least two-thirds of the members of the Parole Board, in contrast to prior version of statue allowing the Parole Board to authorize parole by a majority of its members, violated federal and state ex post facto clauses as applied retroactively; and.
> (2) authorization of parole for persons convicted of a violent crime does not require a vote of at least two-thirds of the seven member board without regard to how many members actually attend a parole hearing, but instead requires only a two-thirds vote of the members participating in a hearing.

Barton, at 395.

The *Barton* decision pertained to the Board denying parole by using the current law regarding the amount of votes needed for approval. This decision only applied if an inmate parole decision was finalize. This is not the case with the Appellant, the first decision was not final, it was rescinded, a new hearing held, and he was lawfully denied.

The Appellant in *Barton* was convicted of committing a violent offense; received the votes to be granted parole; but was denied due to the Respondent following the current law instead of the law existing at the time the offense occurred. Prior to Ms. Barton's hearing all necessary individuals were notified, and were allowed to be present to voice their opinions regarding parole. That was not done in the present case. The Appellant's case was not complete so the decision was not final; due to the fact the victim's family nor law enforcement were notified prior to the hearing. Pursuant to South Carolina law notification to the victim's family and law enforcement is mandatory. A failure not to notify the proper parties prior to the commencement of this hearing nullifies the decision, causing it to be rescinded.

The Respondent had the ability to rescind their previous decision due to the fact the decision was not final. A parole decision is final when the Board issues an order authorizing parole which must be signed by at least a majority of its members with terms and conditions. The director or one lawfully acting for him, then must issue a parole order which, if accepted by the prisoner, provides for his release from custody. S.C. Code Ann. §24-21-650(Supp. 2014). No certificate of parole was ever issued in the present case, so the decision was not final. It could be subject to rescission due to a failure to notify the proper parties. This case does not equate to the facts of the *Barton* decision, so that decision should not influence the court in deciding the present case.

The Respondent further argues that the initial decision of the Board was rescinded; therefore, it was as though the Appellant was never granted parole. Since he was not granted parole this Court has no authority to reinstate. The General Assembly gave the ability to grant or deny parole solely to the Parole Board. The Board must carefully consider the record of the prisoner before, during and after imprisonment, and no such prisoner maybe paroled until it **appears to the satisfaction of the board**. S.C. Code Ann. §24-21-640(Supp. 2014)(emphasis added) Parole eligibility is not a matter within the jurisdiction of the trial court, but falls within the province of the Board of Probation, Parole and Pardon. *Brown v. State*, 306 S.C. 381, 412 S.E.2d 399 (1991). During the second hearing the victims and law enforcement were allowed to attend. Upon the conclusion of that hearing parole was lawfully denied. That decision cannot be appealed to the ALC. An Administrative Law Judge shall not hear an appeal from an inmate in the custody of the Department of Corrections involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services. S.C. Code Ann. §1-23-600(Supp. 2014).

2. The denial of the Appellant's parole did not violate due process, nor equal protection.

The Appellant argues that the denial of parole denied him due process and equal protection. In the United States Supreme Court case of *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972), the Court acknowledged that a person facing a revocation of parole has minimal due process rights. A distinction between a person currently on parole, and a person seeking parole was made in the case of *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100 (1979)[3] In *Greenholtz*, the Supreme Court determined that there exist no conditional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. *Greenholtz*, at 2104. The Appellant was allowed to present evidence in mitigation, and make a presentation to the Board as to why he should be granted parole. He was never denied the right to due process as it pertains to an individual requesting a release on parole.

The Appellant also argues that his denial of parole was in violation of equal protection. To establish an equal protection violation, a party must show that similarly situated persons received disparate treatment. *TNS Mills, Inc. v. South Carolina Dept. of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (S.C. App. 1998). The identical criteria was followed in this case as in all other cases brought before the Parole Board. The Appellant has not presented any evidence that his case was considered differently, or that he was denied any criteria given to other inmates. Since no evidence of unfairness was shown there exist no denial of equal protection; therefore, the denial of parole should be upheld.

[3] There is a crucial distinction between being denied a conditional liberty one has, as in parole and being denied a conditional liberty that one desires. The parolees in *Morrissey* (and probationers in *Gagnon*) were at liberty and has such could "be gainfully employed and [were] free to be with family and friends and to form other enduring attachments of normal life." 408 U.S. at 482, 92 S.Ct. at 2600. The inmates here, on the other hand, are confined and thus subject to all of the necessary restraints that inhere in a prison. *Greenholtz,* at 2105.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests that this appeal be dismissed or the final decision of the South Carolina Department of Probation, Parole, and Pardon Services denying the Appellant's parole be affirmed.

Respectfully submitted,

Tommy Evans, Jr.
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Columbia, South Carolina
February 9, 2015

THE STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Phillip Ansel Brown, # 118100, Applicant, vs. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	**Docket No. 14-ALJ-15-0041** Honorable Ralph King Anderson, III **APPELLANT'S REPLY BRIEF**

This matter is before the Administrative Law Court ("ALC") by Appellant's Notice of Appeal of a final agency decision of the South Carolina Department of Probation, Parole and Pardon Services ("SCDPPPS"), filed October 9, 2014 and assigned October 16, 2014. Appellant filed an original Brief on December 12, 2014. Respondent's received an extension of time and filed their Brief on February 9, 2015. Appellant's Reply Brief follows:

Appellant submits that the facts Respondents assert for parole eligibility hearing denials since April 14, 2010 have been based on 1) nature of offense; 2) an indication of violence in this or previous offenses; and 3) use of a deadly weapon during the commission of the offense. Appellant further submits that on April 14, 2010 these same factors were weighed and Appellant was deemed suitable for parole and parole was granted. It is arbitrary and capricious to apply those criteria as a basis for denying parole where the Board has already granted Appellant six (6) votes considering those same facts. It violates the fundamental concepts of the Equal Protection and Due Process Clauses of the Fourteenth Amendment where Appellant was suitable for parole and was allotted six votes considering ***all*** the facts of the case, until an untimely objection by victims and law enforcement.

I. Appellant received six (6) votes in favor of parole and thus *Barton*[1] is applicable and the rescission of parole was unlawful in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Appellant submits that conditional parole is parole, or at the very least, a pre-parole status to which a liberty interest was vested therein, as demonstrated by the Order of Parole dated April 14, 2010. Respondent urges parole is not final until signed by a majority of the Board and issued by the Director. The Order present in the record is the same order issued for all paroles and Respondent's assertion is without foundation or evidence.

Appellant quite simply received the requisite number of votes for parole and Respondents circumvented due process by issuing a rescission, which, Appellant submits, is a revocation, upon the untimely objection by victims and law enforcement.

Appellant further submits that by the agency's own guidelines, Respondents [***or any interested party***] have only thirty (30) days in which to seek a review of the Board's decision.[2] Appellant suggests that equal protection and due process dictate that such a limitation period is designed for comity, finality and fairness and, absent some violation of the fifteen criteria acknowledged by Appellant on April 14, 2010, the Board has violated due process by acting when authority or jurisdiction to rescind outside the guidelines no longer attached.

Appellant sought from Respondents, via correspondence and attempted to use the South Carolina Freedom of Information Act, in order to determine the veracity of Respondent's *claims and the timing* that Notices were sent to victims and law enforcement and returned by same. Respondents, for reasons not divulged, have refused to provide the dates of the actions in question

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[1] *Thalma Barton v. South Carolina Department of Probation, Pardon, and Pardon Services,* 404 S.C. 395, 745 S.E.2d 110 (2013)

[2] *Operations Manual*, South Carolina Department of Probation, Paroles and Pardon Services, January 2014

which infer Respondents are cognizant they acted outside agency authority in "rescinding" Appellant's parole.

Appellant received six (6) votes on April 14, 2010 and despite all assertions, pursuant to *Barton*, Appellant must be granted parole and it may not be revoked based on whims of other party's outside agency guidelines.

Despite all Respondent's assertions to manipulate facts and rules, Appellant was granted six (6) votes and parole. When the Board reheard the matter, rescinded the parole, and immediately conducted another eligibility hearing, Appellant was no longer deemed suitable and the Board utilized "reasons" upon and after which Appellant was deemed suitable. This clearly violates due process and equal protection of the law.

The Fifth and Fourteenth Amendments prohibit the government from depriving persons of life, liberty or property without due process of law. The Due Process Clauses are designed to protect the individual against arbitrary government action, *see, Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889).

To demonstrate an equal protection violation, Appellant submits the recent cases granted parole pursuant to Barton, despite the obvious community opposition and the lack of discernible numbers of cases where Respondents have granted, rescinded and reheard the same case on a timeline identical to Appellant's here.

CONLCUSION

For the foregoing reasons, those presented in Appellant's Initial Brief, and based upon the record, the Appellant respectfully moves this Honorable Court for the relief sought in the Original Brief.

Respectfully submitted,

February 19, 2015

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APPELLANT, ***Pro se***

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Phillips A. Brown, #118100 Appellant, vs. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	)	Docket No. 14-ALJ-15-0041-AP **ORDER**

This matter is before the South Carolina Administrative Law Court (Court or ALC) upon Phillips A. Brown's (Appellant) appeal from the decision issued September 8, 2010 by the South Carolina Department of Probation, Parole and Pardon Services (Department). By letter dated September 22, 2014, the Department informed Appellant that he was not eligible for parole under the *Barton v. S.C. Depart. of Probation, Parole and Pardon Services*.[1]

FACTUAL/PROCEDURAL BACKGROUND

In 1983, Appellant was convicted of murder, burglary, and armed robbery committed in 1982. In 1984, Appellant received an additional sentence of ten years for unauthorized use of a motor vehicle; ten years for vehicle theft; and two years for escape, all relating to escape from his incarceration. Because of the law at the time Appellant committed these offenses, Appellant, though serving a life sentence for murder, became parole eligible upon service of twenty years.

Beginning with his first parole hearing, on February 7, 2001, the Department denied Appellant parole at each of the parole hearings leading up to his last hearing in April 2010. Following the April 2010 parole hearing, on April 14, 2010, five of the seven members of the Parole Board (Board) voted to grant Appellant a conditional parole.[2] However, it was thereafter discovered that the requisite notice had not been given to the victims of Appellant's crimes and/or their families,

[1] 404 S.C. 395, 745 S.E.2d 110 (2013).

[2] The Department states in its Respondent's Brief that Appellant received six votes. However, the Order of Parole, which was later rescinded on September 8, 2010, bears five signatures. Regardless, because the 1982 version of S.C. Code Ann. § 24-21-645 applies to Appellant, only a majority of the Parole Board members present is required for Appellant to be granted parole; thus either five or six votes would have been sufficient to constitute a majority of the seven-member Board.

the solicitor's office, and law enforcement as required under S.C. Code Ann. § 24-21-610 (2007). Because this required notice was not sent to proper parties for the April 2010 parole hearing, the Board held a second hearing during which the victims and/or their families, law enforcement, and the Fifth Circuit Solicitor were allowed to testify, though Appellant was not present at this hearing. Upon conclusion of the rehearing, the Board denied Appellant parole for the reasons set forth in the September 9, 2010 letter it sent him.

Appellant appealed the 2010 decision to the ALC. On October 14, 2011, Judge McLeod issued an order dismissing Appellant's appeal with prejudice. Appellant did not appeal Judge McLeod's order. Then, on October 9, 2014, Appellant filed a Notice of Appeal with the ALC, arguing that in light of a recent South Carolina Supreme Court decision, *Barton v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013), the Parole Board should have granted him parole based on receiving a majority of votes of the Parole Board present. He also argued that the Board's denial of parole following the April 14, 2010 grant of parole was arbitrary and capricious, and violated his due process and equal protection rights.

The Notice of Assignment was filed on October 16, 2014, and the Record on Appeal was filed on November 18, 2014. Appellant filed his Brief on December 10, 2014, The Department filed its Brief on February 9, 2015, and Appellant filed a Reply Brief on February 19, 2015.

ISSUE

Whether, in light of the *Barton* decision, the Parole Board violated Appellant's due process and equal protection rights by arbitrarily and capriciously rescinding its decision to grant Appellant parole and, following a second hearing, denying Appellant parole after a majority of the members of the Parole Board attending the April 14, 2010 had voted in favor of parole eligibility.[3]

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[3] Both Appellant and Respondent list essentially the same three Issues on Appeal. However, these issues can be summed up in the sole issue as set forth above. Indeed, Appellant incorporates the latter two issues at the end of his first issue discussion. Moreover, were this Court to consider the latter two issues as separate issues, as Appellant has separately stated them, the Court would have to dismiss them, because the arguments, though both citing *Barton* and S.C. Code Ann. § 24-21-645 (Supp. 1984) (he should have cited to the 1982 version, as that was the year of his crime, not the year of his sentencing), his arguments still amount to one-sentence conclusory statements. *See D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 549, 730 S.E.2d 340, 351 (Ct. App. 2012) (noting that while the appellants cited a case to support a claim, the argument was nevertheless considered "largely conclusory" and still considered abandoned on appeal); *State v. Hill*, 394 S.C. 280, 297, 715 S.E.2d 368, 377 (Ct. App. 2011) (considering a citation to a case "without any analysis whatsoever as to how or why [it] applies" insufficient to preserve an issue on appeal, and thus rendering that issue abandoned on appeal).

STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decisions of the South Carolina Supreme Court in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000) and *Furtick v. S.C. Dep't of Probation, Parole and Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2003). When reviewing the Department's decisions in inmate grievance matters, the ALC sits in an appellate capacity. *Id.* at 377; 527 S.E.2d at 754; *see also* S.C. Code Ann. § 1-23-600(E) (Supp. 2014) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). Section 1-23-380(A)(5) states:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court 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.

S.C. Code Ann. § 1-23-380(5) (Supp. 2014).

Consequently, an Administrative Law Judge may not substitute his judgment for that of an agency "as to the weight of the evidence on questions of fact." *Id.* Furthermore, an Administrative Law Judge may not reverse or modify an agency's decision unless the Record reflects that substantial rights of the appellant have been prejudiced because the decision is clearly erroneous in view of the substantial evidence, arbitrary or affected by an error of law. *Id.*; *see also Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 337 S.C. 133, 137, 522 S.E.2d 605, 607 (Ct. App. 1999); *S.C. Dep't of Labor, Licensing and Regulation v. Girgis*, 332 S.C. 162, 166, 503 S.E.2d 490, 492 (Ct. App. 1998). "'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the Record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." *Lark v. Bi-Lo*, 276 S.C. 130, 135, 276 S.E.2d

304, 306 (1981) (quoting *Law v. Richland County Sch. Dist. No. 1*, 270 S.C. 492, 495-96, 243 S.E.2d 192, 193 (1978)). Accordingly, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Grant v. S.C. Coastal Council*, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995).

DISCUSSION

Appellant argues that in light of the South Carolina Supreme Court's 2013 decision in *Barton* and pursuant to the requirement under the version of S.C. Code Ann. 24-21-645 applicable at the time of his crime (1982), only a majority of votes of the Parole Board's members was required to grant parole. Appellant thus argues that the five votes in favor of parole that he received at his April 14, 2010 parole eligibility hearing, which constituted a majority of the Parole Board, should have resulted in his parole. He argues that it was arbitrary and capricious, and violative of his due process rights for the Department to ignore the statutory requirements of Section 21-24-645 and *Barton*.

However, from the outset, the premise underlying Appellant's argument – that *Barton* retroactively applies to past parole decisions – is in error. In South Carolina, "[t]he general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively." *Lord v. D&J Enters., Inc.*, 407 S.C. 544 554, 757 S.E.2d 695, 699 (2014); *see also, e.g., Truesdale v. Aiken*, 289 S.C. 488, 347 S.E.2d 101 (1986) (limiting the retroactive effect of a recently decided case on a death sentence to **cases pending on direct appeal** and holding that the case did not apply on collateral attack) (emphasis added). Therefore, *Barton* does not apply to parole cases already finally decided and no longer on appeal.

Also, though Appellant's April 2010 hearing and his first subsequent appeal to the ALC occurred prior to the decision in *Barton*, Appellant could have raised the argument that approval from only a majority of the Parole Board was required to grant him parole pursuant to the version of Section 24-21-645 applicable at the time of his crimes. Because Appellant could have raised this argument in his appeal before Judge McLeod, he was procedurally barred by res judicata from doing so in his Petition for Release below. *See Catawba Indian Nation v. State*, 407 S.C. 526, 537, 756 S.E.2d 900, 906-07 (2014) ("Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action

between those parties. Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." (internal quotation marks, brackets, citations omitted)). Therefore, this Court cannot entertain this argument.

Moreover, even if *Barton* applied retroactively and even if the Court considered Appellant's Section 24-21-645 argument, it would not make a difference in the outcome of this case because this case is distinguishable from *Barton* in several respects. First, *Barton* involved a question of which version of the law would apply in determining whether the number of votes in favor of parole was sufficient to grant parole and whether that number was determined based upon the whole board or upon a quorum participating in the hearing. These questions were not at issue in the instant case. Indeed, unlike in *Barton*, the Board initially granted parole in this case; there was no dispute that Appellant received the number of favorable votes required for parole. But the number of votes that Appellant received had nothing to do with why his parole was rescinded and subsequently denied following the second hearing.

Also, the Parole Board, unlike in *Barton*, rescinded Appellant's parole, which it was able to do since that parole was conditional. Pursuant to Section 24-21-645 (1982) and *Barton*, a majority of the Board (i.e., a majority of those members participating in the hearing where there is a quorum) is all that is required to sign the parole order,[4] even for violent offenses. However, Section 24-21-650 (1982) requires "the director, or one lawfully acting for him, [to] issue a parole order, which, if accepted by the prisoner, provides for his release from custody." In this case, neither the director nor anyone acting on his behalf issued the parole order. Also, the Board received information after it made its initial decision that the victims and/or their families, the solicitor's office, and law enforcement had not been given the required notice. Because this notice is required by S.C. Code Ann. § 24-21-610 (2007), the Board reasonably considered this information to be so important that it decided that rescission and reconsideration of the case was necessary. The Board had the authority to make this decision pursuant to the South Carolina Board Operations Manual. Therefore, the Board's rehearing and subsequent denial of parole for Appellant was proper and not capricious or arbitrary.

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[4] Section 24-21-645 (1982) also allows, as an alternative requirement to signatures from a majority of the Board, the signatures of all three members of a parole panel.

Another distinction, as alluded to above, is that unlike *Barton*, this case involves a procedural error in the hearing process. Section 24-21-610 requires notice to be given to the solicitor (and judge) who participated in the trial, the victim(s) and/or their families, and the sheriff of the county where the prisoner resides or will reside. In this case, no notice had been given to the victims and/or their families or to law enforcement. Judge McLeod addressed this issue in his October 14, 2011 Order, finding that the first hearing was not complete because the requirements of Section 24-21-610 had not been met.[5] And because Appellant failed to appeal Judge McLeod's opinion, Judge McLeod's Order became the law of the case. Furthermore, this case involves the same parties and the issue has already been ruled on by McLeod and was necessary to his judgment, and thus Appellant was procedurally barred from relitigating it based on collateral estoppel. *See* Restatement (Second) of Judgments § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim."); *see also, e.g., S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991) (adopting the general rule for the offensive use of collateral estoppel as set forth in Restatement (Second) of Judgments § 27), *cited in Kunst v. Loree*, 404 S.C. 649, 657, 746 S.E.2d 360, 363 (Ct. App. 2013)).[6]

As to Appellant's due process and equal protection claims, Judge McLeod already decided that an inmate does not have a right to parole, based on *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1 (1979), and that Appellant had not been released on parole and therefore did not have the minimal due process rights afforded under *Morrissey v. Brewer*, 408 U.S. 471 (1972) to a person facing parole revocation. Appellant nevertheless contends that the Department failed to correctly apply *Barton* and Section 24-21-645, which "arbitrarily and capriciously" denied him parole in "contravention of due process." However, as discussed earlier, *Barton* does not apply retroactively. But even if *Barton* does so apply, though Appellant received after his first eligibility hearing the majority of votes required by 24-21-645 (1982), as "majority" is defined in *Barton*, the director (or someone on his behalf) never issued a final parole order

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[5] Even had the Board not rescinded its parole order, the order would still have been void *ab initio* had it been issued, because it denied procedural due process to the State by depriving it of statutorily required notice. Thus, the Board's April 14, 2010 decision would still have been invalid had it not been rescinded.

[6] In Restatement (Second) of Judgments § 28 (1982), there are five (5) exceptions to the general rule in § 27. However, Appellant's case meets none of these exceptions.

pursuant to Section 24-21-650. In addition, Judge McLeod already found that Appellant was never released on parole because the requirements of Section 24-21-610 had not been met, and thus due process rights did not attach. Furthermore, the conditional parole granted to Appellant was properly rescinded because of the aforementioned procedural defect, which made the conditional parole void *ab initio*.

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **AFFIRMED**. **AND IT IS SO ORDERED.**

Ralph King Anderson, III
Chief Administrative Law Judge

May 18, 2015
Columbia, South Carolina

PAROLE BOARD REVIEW

IN RE: PHILLIP A. BROWN

AUDIO RECORDING

DATE: September 8, 2010

TRANSCRIBED BY: LORA L. McDANIEL,
Registered Professional Reporter

(Audio recording begins.)

THE CHAIRPERSON: Our first case is number 13, Phillip Ansell Brown. (Inaudible).

Good morning, Mr. Brown.

MR. BROWN: Good morning, ma'am.

THE CHAIRPERSON: State your full name for the record.

MR. BROWN: Phillip Brown. Phillip Ansell Brown.

THE CHAIRPERSON: Introduce your guests to the board.

MR. BROWN: Yes, ma'am. This is my mother, Betty Dillard (inaudible). This is my attorney and sister Shirrese Brockington.

THE CHAIRPERSON: Thank you very much for attending. Mr. Brown, we're reviewing your parole summary. Is there anything that you want to say to the board this morning?

MR. BROWN: Yes, ma'am. I would like to thank you for sending me to the ATU program. I know that may seem kind of strange. I have found some tools there that I will carry with me to the rest of my life. It has been a good thing, and it still is a good thing. I will be completing it in December.

THE CHAIRPERSON: Thank you. Is there

anything that your guests would like to add at this time?

MS. DILLARD: I'm his mother, of course, and I represent the family. The father, who is an invalid almost, and family members and friends. And we want to thank you for giving him parole on the 14th of April. He will be living with me in Mount Pleasant. He has a job and home. The home is, will accommodate a wheelchair and so forth that he's in at this time. And we would appreciate anything you could do. Thank you very much.

THE COURT: Ma'am.

MS. BROCKINGTON: Yes, I'm Attorney Shirrese Brockington. I am Phil's sister as well. We'd like to thank the board for this opportunity. We're not quite clear why we're here for a review.

We would like to say that, while he's been in a program -- it's been almost 90 days that he's been in a treatment program here at Lee. He's done fantastically well in the program. His essay was used as an example by the program director just last week. His attitude is very cheerful and positive.

I have a job in my law firm for my brother whenever he's released. He's completed a paralegal legal assistant certificate. He does have gainful

employment upon his release. He has a home. He has tons of family support and love. He has for all these many years.

We appreciate the opportunity for the treatment program to be completed and for his release to be upheld here today.

THE CHAIRPERSON: Thank you very much. This concludes the hearing. Have you step outside, please.

MS. BROCKINGTON: Thank you very much.

(Guests exited the room.)

UNIDENTIFIED VOICE: Your room is clear.

THE CHAIRPERSON: We have discussed this. This is the case where we have given letters from the (inaudible), from the sheriff of the county as well. And this case was heard before, and we did grant parole.

We also have a letter from county and state in that they had not been notified, and we were told that they had been notified, and that there was an attempt to get ahold of the victims, but they didn't have addresses to get ahold of the victims.

We had a second vote. The second vote, we stood with our vote to parole this gentleman. He was sent to ATU as part of parole recommendations.

In the meantime, the (inaudible) Gardener, who is a family member of the victim who was murdered, came forth and has never been notified. And information in the record that they have given their address. And they have been living at this address. That there were members of the family addresses as well. And they have been living there as well.

We had a vote for reconsideration to rehear this trial. We did hear this case. Due to the fact that we did not have the correct information, the victims were not given the opportunity to speak at the hearing.

MR. STEPHENSON: When he was paroled?

THE CHAIRPERSON: April 14th.

MR. STEPHENSON: April 14th. That's before he got on board. He was paroled, like you said votes. That's over.

THE CHAIRPERSON: Mr. Stephenson, you weren't here. You probably were not aware of what we were speaking about.

MR. STEPHENSON: You were here when we voted?

THE CHAIRPERSON: No.

At this time, I did not address it to

Mr. Brown or his family because they understood, they were told by the system why they were coming back.

MR. STEPHENSON: I don't think they do based on what she said. (Inaudible)

THE CHAIRPERSON: I know for a fact they were told why they're back up here.

MR. STEPHENSON: I'm not arguing with you. She said she wasn't sure why she was here.

THE CHAIRPERSON: I did not want to open the fact that we are waiting for victims to come in. I made that professional decision.

MR. STEPHENSON: Okay.

UNIDENTIFIED VOICE: Madam Chair, proceed (inaudible).

THE CHAIRPERSON: At this point, we will hear from opposition.

(Inaudible).

THE CHAIRPERSON: Good morning, everyone. We are rehearing the parole case summary of Phillip Ansell Brown, who was paroled on April 14, 2010. And we're here this morning because of the fact that you, as victims, have not been informed of the information. And you have been granted a rehearing so that you can have your voice.

At this time before I hear statements, I

need everyone's name for the record. Start with you, sir.

MR. CLAY CAMPBELL: I am Clay Campbell, Sr.

MR. CLAUDE CAMPBELL: My name is Claude Campbell, I'm the oldest son.

MS. GARDENER: (Inaudible) Gardener, I'm the daughter of Mr. Campbell.

(Inaudible)

OFFICER TOMLIN: I'm Jim David Tomlin, Kershaw County Sheriff's Office, friend of the family.

SOLICITOR GIESE: I'm Barney Giese, Solicitor, Fifth District.

MRS. CAMPBELL: Lisa Campbell, wife.

UNIDENTIFIED VOICE: I'm Steve, pastor (inaudible) Kershaw.

UNIDENTIFIED VOICE: My name is Robert (inaudible). I was assisting the family in trying to have (inaudible).

THE CHAIRPERSON: Thank you.

MR. ADAMS: Charles Adams, friend of the family.

UNIDENTIFIED VOICE: Gary (inaudible).

THE CHAIRPERSON: I realize that this is

difficult for everyone to come, especially the family members. And we want you to know that we do have the facts of the offense and that we are mainly interested in this morning on whether or not you are for or against parole. Is there a spokesperson for the family that would like to speak at this time?

MS. GARDENER: I will.

THE CHAIRPERSON: Yes, ma'am.

MS. GARDENER: Gardener, I am Mr. Campbell's daughter. I am definitely -- the whole family is definitely opposed to his release.

THE CHAIRPERSON: Would you like to add another statement?

MS. GARDENER: Yes, I would.

THE CHAIRPERSON: Yes, ma'am.

MS. GARDENER: The impact that this has had on my family, this is something we were told that would never happen. He would never be paroled when he was sentenced. We never had any idea that this would ever come up.

Little bit of healing that we've had in the years our father has been dead, this has brought everything back to us. It's terrible. More than devastation. And I wouldn't want any of you to ever have to go through it.

THE CHAIRPERSON: Thank you. And the rest of the family is in agreement.

Yes, sir.

MR. CLAUDE CAMPBELL: Thank you. My name is Claude; Claude Campbell, oldest son. Of course, we were in business together. In 1953, I took over the business from my father, mill business. We worked the mill for 29 years. Of course, you know how it impact me, working with my father for 29 years. And then to be killed like a dog.

You know, I had to think about the man (inaudible). I'm definitely opposed him being released because he still has family members in the area. And he will be there. Knowing him, he had no respect for the law. Thank you very much.

THE CHAIRPERSON: Thank you, sir.

MR. CLAY CAMPBELL: Clay Campbell, second son. I don't live in the area now. I've been away for 55, 56 years. I grew up there and go back and visit with my father occasionally. Of course, you know, when I go back up there now, I can't find him. He's not there.

And (inaudible) part of it was a premeditated situation. The man planned it A to Z. And he carried it out just like he planned to do. A

fellow like that is dangerous anywhere. Anywhere you put him.

Are we opposed to him being released? Absolutely. And I can tell you this. The family at one time had somewhat peace because the judge and Solicitor Andrews at that time assured us that he would be sentenced and a condition where he would never be able to get on the streets again. He would never.

Because we were seeking capital punishment for him. It was all evidence that would warrant that, but we could not get a jury or enough prospective jurors to serve. That's why the judge told us, he said: You will never get enough people. He says he will accept his guilty plea, I will see he is put away for the rest of his life.

We never expected that basis. Appreciate you listening to us.

THE CHAIRPERSON: Thank you, sir. At this time, law enforcement.

SOLICITOR GIESE: Barney Giese, Solicitor, Fifth Circuit, clearly from Kershaw County. I was the assistant solicitor on this case 28 years ago, if you can believe that. But I remember the case vividly. We tried to pick a jury;

couldn't get one.

And I know y'all know the facts of the case, I'm not going to go into that. It really was, in my opinion, I don't know if this is because of my youth at the type, the case really stuck with me. It was a brutal case. The facts were not in dispute. It was a very difficult situation for the family.

And I do remember the judge, Judge Walter Cox, who went on to serve military board, (inaudible) specifically gave him consecutive life sentences; life on the murder and life on the burglary. And, you know, whether or not that was supposed to keep him in for life or not, I don't know. But I do know that his intent was, at that time, is the judge's intent was to try to keep him in, because it was such a brutal case, for the rest of his life.

Because of that, because of the situation that we see ourselves in today, as the Solicitor of the Fifth Circuit, I would strongly oppose.

THE CHAIRPERSON: Thank you.

UNIDENTIFIED VOICE: (Inaudible) Kershaw County. I was deputy at the time. Terrible tragedy took place in our community. We were violently (inaudible). We were greatly opposed to Phillip Brown getting out because we had worked, working on

the Phillip Brown cases where he broke into houses before all this occurred. This was probably as heinous a murder as I've ever seen.

Not only did he wait for Mr. Campbell to come into his house and shoot him twice, ladies and gentlemen, he left and came back when he remembered his glasses and the ski mask which Mr. Campbell stripped off his face when he attacked him (inaudible). He shot that man down again. I hate to say this in front of his family. This is what took place in that house and then robbed him. He had no remorse whatsoever.

Since he's been put in prison, we feel like that he is always going to be a danger and a threat to any community wherever he is located. This is the reason that we oppose ever any parole. I appreciate you listening to me.

UNIDENTIFIED VOICE: If I could just say one thing, I was 19 years old when this occurred and a neighbor to Mr. Campbell. To say he was a pillar of the community is a gross understatement.

This murder not only changed and affected the Campbell family, it affected all of us in the community. We changed the way we lived at the time because of what happened. This sort of thing just

didn't happen in our community.

I've been with the Sheriff's Office for 20 years now, investigating some 40 homicides. And we still -- this is one of the homicides that's still talked about in our small community. It was so heinous and so violent. So we absolutely oppose release.

THE CHAIRPERSON: Thank you very much. This concludes the hearing. We're going to ask all of you to step outside. We will let you know our decision shortly.

UNIDENTIFIED VOICE: Thank you. Can I say something personal note to the board. I am retiring at the end of January and never going to be able to look at the parole board again. I have to come up one more time; it's going to be smaller section. I just want to thank y'all for everything that y'all do. I know it's a thankless job.

I want to thank you for treating my victims well over the years with respect and treating me with respect also. Just want to thank y'all.

(Guests exited the room).

UNIDENTIFIED VOICE: (Inaudible)

THE CHAIRPERSON: I believe that what the first thing we have to do on the parole board, we

have to vote whether or not we're going to rescind the parole and then move on to whether grant parole or to deny.

We've already done it. This is what we voted. We didn't hear from the victims. We paroled him. We have to vote whether or not we want to rescind that and start a new vote. That is what we have to do.

UNIDENTIFIED VOICE: (Inaudible).

THE CHAIRPERSON: First vote that I'm calling for, I'm calling for whether or not we will rescind the vote that we voted on to parole him.

UNIDENTIFIED VOICE: Rescind would be a green vote?

THE CHAIRPERSON: Green vote would be, yes, that we are going to rescind.

UNIDENTIFIED VOICE: I think since you were here the first time --

THE CHAIRPERSON: You can abstain.

UNIDENTIFIED VOICE: Just abstain.

UNIDENTIFIED VOICE: We come to the main case, you have to vote (inaudible).

UNIDENTIFIED VOICE: Very unusual situation. You don't find this very often.

THE CHAIRPERSON: First vote.

UNIDENTIFIED VOICE: I know I'm not supposed to reject.

UNIDENTIFIED VOICE: Rescind.

UNIDENTIFIED VOICE: Rescind.

UNIDENTIFIED VOICE: Rescind.

THE CHAIRPERSON: Walter rescinds. The parole of Phillip Ansell Brown has been rescinded.

I now call for the vote for --

UNIDENTIFIED VOICE: Parole (inaudible.)

UNIDENTIFIED VOICE: Reject.

UNIDENTIFIED VOICE: Reject.

UNIDENTIFIED VOICE: Reject

THE CHAIRPERSON: Also reject.

Phillip Ansell Brown is rejected, one, two, three, four.

Next case is --

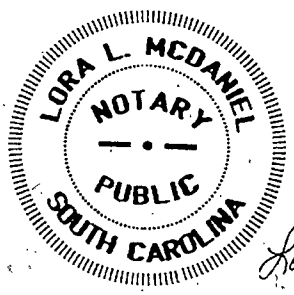
(End of audio recording.)

CERTIFICATE OF REPORTER

I, Lora McDaniel, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to, nor counsel for, any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 1st day of February, 2012 at Charleston, Charleston County, South Carolina.



Lora McDaniel

Lora L. McDaniel,
Registered Professional Reporter
My Commission expires:
September 18, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III Chief Administrative Law Court Judge

Appellate Case No. 2015-001251

Phillip A. Brown, #118100 — Appellant

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Record on Appeal complies with Rule 210 SCACR.

October 15, 2015

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