

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from the Administrative Law Court
The Honorable Ralph King Anderson, III, Administrative Law Judge
Case No. 15-ALJ-15-0046-AP

Appellate case No.: 2016-000296

KENNETH GREEN, #116020.....RESPONDENT

v.

SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES,.....APPELLANT

RECORD ON APPEAL

Tommy Thomas, Esquire
Post Office Box 88
Irmo, S.C. 29063
(803) 732-5507

ATTORNEY FOR RESPONDENT

Tommy Evans, Jr.
Assistant General Counsel

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

ATTORNEY FOR APPELLANT

INDEX

	Page
Record on Appeal in the Administrative Law Court	1
Judge Anderson's Order Dated February 11, 2016	13

STATE OF SOUTH CAROLINA
In The Administrative Law Court
Docket Number 15-ALJ-15-0046

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

KENNETH GREEN, #116020 APPELLANT

v.

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

RECORD ON APPEAL

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ATTORNEY FOR RESPONDENT

INDEX

	Page
Appellant's Information presented to the Board on July 22, 2015	1
Respondent's Letter Dated July 22, 2015	11

**BARTON HEARING FOR
KENNETH GREEN #116020
July 22, 2015**

Affidavits: Bishop Sanco Rembert
Marlene T. McClain
June Shissias
James M. Green, Sr. – father of Kenneth Green
James M. Green, Sr. – brother of Kenneth Green

Transcript: November 29, 2000 Parole Hearing

Residence: With father – James M. Green, Sr.
120 Owens Circle
Summerville, SC
843-871-0429

Employment: Jim Thorpe Painting Co. Inc. 843-871-0837
562 Hill Branch Rd.
Ridgeville, SC 29472

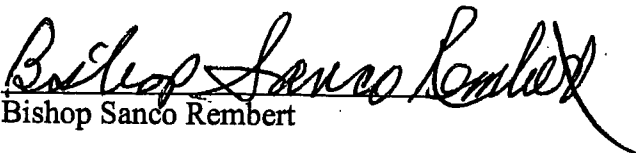
STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT OF Bishop Sanco Rembert

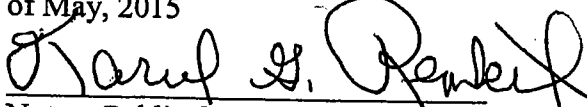
PERSONALLY APPEARED BEFORE ME, Bishop Sanco Rembert, being duly sworn,
deposes and states as follows:

1. My name is Bishop Sanco Rembert and I have personal knowledge of the facts set forth in my affidavit.
2. I served on the South Carolina Parole Board and was present at Kenneth Green's parole hearing on November 29, 2000.
3. I have had the opportunity to listen to the recording of Mr. Green's November 29, 2000 hearing and it is my recollection that I voted in favor of Mr. Green being granted parole at that hearing.
4. According to the recording, the vote count was 4 to 2. According to tradition at that time, the Board took the yes votes first. I believe that at Mr. Green's hearing, four votes were cast in favor of granting parole and two votes were cast against parole.

FURTHER AFFIANT SAYETH NOT.


Bishop Sanco Rembert

Sworn to before me this 5 day
of May, 2015


Notary Public for South Carolina

My commission expires 3-April 2017

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

AFFIDAVIT OF MARLENE T. MCCLAIN

PERSONALLY APPEARED BEFORE ME, Marlene T. McClain, being
duly sworn, deposes and states as follows:

1. My name is Marlene T. McClain and I have personal knowledge of the facts set forth in my affidavit.
2. From August, 1999 until May, 2006, I served on the South Carolina Parole Board.
3. I was present at Kenneth Green's parole hearing on November 29, 2000.
4. I have had the opportunity to listen to the recording of Mr. Green's November 29, 2000 hearing and it is my recollection that I voted in favor of Mr. Green being granted parole at that hearing. I also recalled that J.P. Hodges voted in favor of Mr. Green being granted parole.
5. At the time of this hearing, there were only 6 of the 7 Parole Board members present. The Department of Probation, Parole and Pardon had previously instructed the Board that the statute required an affirmative vote of 5 members (2/3) regardless of whether there were 6 or 7 members present. In this case, the Parole of Kenneth Green was rejected because he failed to get 5 or the 6 votes.

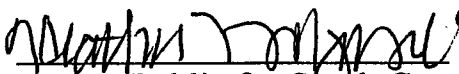
6. It is my understanding that there is some confusion regarding the announcement that can be heard on the recording that "parole is rejected 1, 2, 3 and 4". This announcement is not a tally of the votes for or against parole, but is instead a numerical listing of the reasons parole was denied, which would have appeared in the notice to Mr. Green.

FURTHER AFFIANT SAYETH NOT.


Marlene T. McClain

April 27, 2015

Sworn to me this 27 day
of April, 2015


Notary Public for South Carolina
My commission expires: 10/21/19


STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT OF JUNE SHISSIAS

PERSONALLY APPEARED BEFORE ME, June Shissias, being duly sworn, deposes and states as follows:

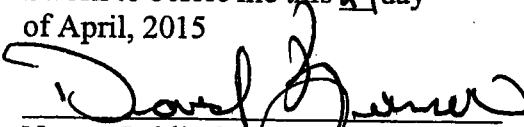
1. My name is June Shissias and I have personal knowledge of the facts set forth in my affidavit.
2. I served on the South Carolina Parole Board and was present at Kenneth Green's parole hearing on November 29, 2000.
3. I have had the opportunity to listen to the recording of Mr. Green's November 29, 2000 hearing and it is my recollection that I voted in favor of Mr. Green being granted parole at that hearing.
4. According to the recording, the vote count was 4 to 2. According to tradition at that time, the Board took the yes votes first. I believe that at Mr. Green's hearing, four votes were cast in favor of granting parole and two votes were cast against parole.

FURTHER AFFIANT SAYETH NOT.


June Shissias

April 24 2015

Sworn to before me this 24 day
of April, 2015


Notary Public for South Carolina
My commission expires 11/8/2022
DAVID L. BERNIER
Notary Public, State of South Carolina
My Commission Expires 11/8/2022

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

AFFIDAVIT OF JAMES M. GREEN, SR.

Personally appeared before me James M. Green, Sr., who deposes and says:

- 1) I am the father of Kenneth W. Green (SCDC# 116020).
- 2) That Kenneth Green appeared before the South Carolina Board of Paroles, via teleconference, from Lieber Correctional Institution on November 29, 2000.
- 3) That present in support of Kenneth Green that day were myself, James M. Green, Jr. (my eldest son), Attorney Tommy Thomas (Kenneth's attorney) and Tina Green (Kenneth's sister-in-law).
- 4) That following the hearing before the Parole Board, Cindy Smith, Parole Examiner for the South Carolina Department of Probation, Parole, and Pardon Services, approached Kenneth and the individuals named in # 3, above, seated together. Ms. Smith stated, "Rejected, you got four (4) votes, you missed it by one (1)."
- 5) That upon my return home, Senator William Branton called me on the phone and said "I'm sorry Jim, he only got four votes, he missed it by one."

The Affiant says the above is true and correct to the best of her knowledge.

James M. Green Sr.
James M. Green, Sr.

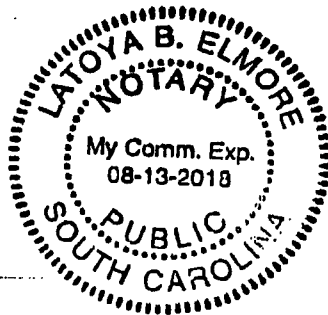
SWORN TO AND SUBSCRIBED before me

This *12th* day of *November*, 2013

Latoya B. Elmore

NOTARY PUBLIC OF SOUTH CAROLINA

MY COMMISSION EXPIRES: *8/13/18*



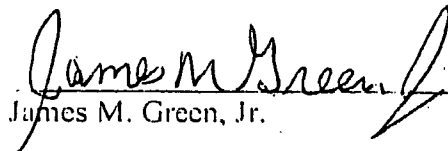
STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

AFFIDAVIT OF JAMES M. GREEN, JR.

Personally appeared before me James M. Green, Jr., who deposes and says:

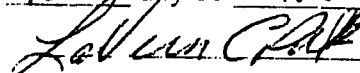
- 1) I am the brother of Kenneth W. Green (SCDC# 116020).
- 2) That Kenneth Green appeared before the South Carolina Board of Paroles, via teleconference, from Lieber Correctional Institution on November 29, 2000.
- 3) That present in support of Kenneth Green, that day were myself, James M. Green, Sr. (Kenneth's father), Attorney Tommy Thomas (Kenneth's attorney) and Tina Green (Kenneth's sister-in-law).
- 4) That following the hearing before the Parole Board, Cindy Smith, Parole Examiner for the South Carolina Department of Probation, Parole, and Pardon Services, approached Kenneth and the individuals named in # 3, above, seated together. Ms. Smith stated, "Rejected, you got four (4) votes, you missed it by one (1)."

The Affiant says the above is true and correct to the best of her knowledge.


James M. Green, Jr.

SWORN TO AND SUBSCRIBED before me

This 18th day of November, 2013



NOTARY PUBLIC OF SOUTH CAROLINA

MY COMMISSION EXPIRES: Nov. 27, 2017

LaVern C. Polk
Notary Public, South Carolina, State at Large
My Commission Expires November 27, 2017

November 29, 2000 Parole Hearing of Kenneth Green, #116020

Board Members Present: Chairman, David Baxter; JP Hodges; Orton Bellamy; Jay Elliott; Sanco Rembert; June Shissas; and Marlene McClain

Gwen Bright (Board Liaison) – Good morning Susan, Case Number 37, Kenneth Green, we have opposition in this case, the victim's son.

Chairman- Kenneth Green.

Mr. Green- Yes, sir.

Chairman- Other than your attorney, who came in with you please.

Mr. Green- My father, James M. Green, Sr., my brother, James M. Green, Jr., and his wife Tina Green.

Chairman- Would you like for Mr. Thomas to go ahead and present your case?

Mr. Green- Yes sir, if you don't mind.

Chairman- Go ahead

Attorney Tommy Thomas- All right, Mr. Baxter, members of the Board, good morning. This is Kenneth Green. Kenneth is 40 and he is serving for a murder charge. He has a life sentence received at trial. This is the first time that he has ever been in prison that I am aware of. He has served eighteen years and one month. He had a minor prior record, I think he had a forgery charge and a driving under suspension. He's had 2 disciplinaries that I know of since he's been in the system. One in 87 and one in 88. He is in minimum custody. He has worked outside of the fence from 1987 to 1999 for ten years and the only reason they moved him, of course, was when Mr. Moore came in and changed the policy it was not for disciplinary reasons. He got his GED in the system and was a ninth grade graduate prior to that. He has worked on an associate arts degree. He has a job with a lumber company and would be living with his dad in Summerville. It is my understanding that the co- defendant that he had in this case was released on parole in 1994. He has a tremendous amount of support in the community. Numerous petitions from folks. Also letters from a lot of different people in the area. Kenneth was not the individual in this case..... um the victim in the case was shot and killed. Kenneth had some knowledge that the co- defendant was going to rob this gentleman and what he thought was that he was going to get some money out of this and he was 21 years old at the time. The police couldn't really determine who was the shooter. They cut a deal with the co- defendant. The co- defendant for preferential treatment testified against Kenneth and that's why they had the trial with Kenneth saying he was the person who killed this gentleman. He was involved because he knew there was going to be a robbery but he was not the person who was the one who actually pulled the trigger. Um ... Kenneth's family is here. I knew they wanted to speak on his behalf and then Kenneth would like to address the Board.

Chairman- Ok, go ahead please.

James M. Green, Sr. - I'm Kenneth Green's dad. Since Ken's been incarcerated, he's told me many a times that he feels great remorse for this. He's taken a lot of the courses and everything that you people have had to offer him. He graduated out of Clemson through the Horticulture Class that he had and all these other courses. If he should make parole, which I hope he does, I've talked with Sheriff Nash and he said he has no problem what so ever with him coming back to the county. Also his Sunday school teacher which is William, US Senator. He used to teach him in Sunday school and he said he would more than welcome him back in the community. I thank you.

Chairman- Anybody else?

James M. Green Jr., - Yes sir. I'm James M. Green, Jr., Kenneth's brother. Uh.. the years my brother's been incarcerated, he had showed remorse. That was a very grave and saddening thing happen. He has.... the way I feel honestly in my heart He's taken all the courses everything the institutes have gave to offer him. He would be a tremendous support back to the community and my father and myself as well. Uh... the victims... the victim's son I've talked with. They've showed me that they at the time wouldn't have any problem with Ken coming back into the community. They might have changed a little bit over that You have a petition in front of you that we filled out. At the time, they said they weren't going to do it but I believe they've put one out now. I just hope Ken makes parole this time and is able to come home sir.

Chairman- OK. All right one more person.

Tina Green- Hi, I'm Tina Green. I'm Mike's wife. I just want to say I've only known Ken for a short time. I didn't know him prior. I met him the last three years being married to Mike and I have seen remorse he... um.... is respectful to his father, his brother, he loves them very much. I have lived in the Charleston surrounding area all my life. My family is in Charleston and we would welcome him back into the community with open arms.

Chairman-OK. All right. Kenneth, what do you want to tell us today, sir:

Kenneth Green- Ladies and Gentleman, first and for most, I would like to apologize sincerely to the family and friends of the victim and also to the family .. my family and friends for all the hardship and pain and sorrow this crime has caused but since my incarceration, I've tried to do everything. Tried to stay out of trouble. I've kept numerous jobs. The classes they've offered, I've taken every one of them some of them I've taken twice and three times to try to improve the quality of my life to try understand or have a better understanding of how the world works. I have plenty of community support if I were am released which I'm hoping for. I've had numerous jobs with Clemson University. I got a degree their the Horticulture Program Master Gardner Program where I served 40 hours community service hours on the street. They had A custody for numerous years until like my lawyer said, they took that away from us. But I've hardly been in any trouble since I've been in. I would really like to make parole. I just appreciate all the concern consideration y'all would give me to go home.

Chairman- All right. Thank you so much for your comments.

Board member- you actually have a degree in Horticulture?

Kenneth Green- Yes sir. I have a degree in Master Gardening from Clemson Extension University.

Chairman- OK. Step outside sir we'll let you know something.

Tommy Thomas- Thank you very much.

Chairman-Let's see your votes. I don't see any we might want to hear from the victims.

Gwen Bright- We do have a petition. Several hundred names opposing parole.

Chairman- You all are here to oppose the parole of Kenneth Green?

(Victims) Yes sir.

Chairman- Ok, can you state your names for the record.

(Victims)- John Cattles, Shirley Cattles Ward.

Chairman- We haven't made a final decision on this case yet so we're wondering if anyone would like to make a statement please.

John Cattles- Yes, I would. My name is John Cattles. I'm the oldest son and I'm here to just

Board Member- Speak a little louder please.

John Cattles- I'm here to deny parole of Kenneth Green I speak for my several brothers and sisters. At the sentence, I was there and the Judge said he wouldn't be eligible for 20 years there's some kind of litigation that allows him to come up before then. Kenneth Green shot my father in cold blood through the windshield of the car with a double buck shot gun...that's cold blood for just a few dollars. My father was a good man just as I am. He would have given the man whatever assistance he needed. Then he left him there on the side of the road and Kenneth Green and no time has contacted anybody in the family to express any remorse. I also fear for my family if he's released cause we live on the same proximity and my brother has talked to Kenneth's father and his brother and they don't want him up cause he's always been a bad boy, a trouble maker so what I ask is to keep him in prison where he belongs cause I see a volatile situation if he's released.

Chairman- All right, mam, would you like to say something?

Shirley Cattles Ward- Yes, we just recently lost our mother in January and you know how your life goes before you well she was still calling for daddy when she died and I agree with my brother, I don't think he should be out.

Chairman- OK, we thank you so much for your comments. If you will step outside, we will let you know something.

Board member- Have you voted yet?

Chairman- OK, let's see our votes please. OK. Kenneth William Green is rejected by a vote of four to two. Number 1, 2, 3 and 4.

Hearing Concluded.

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

NIKKI R. HALEY
Governor



JERRY B. ADGER
Director

2221 DEVINE STREET, SUITE 600
POST OFFICE BOX 50666
COLUMBIA, SOUTH CAROLINA 29250
Telephone: (803) 734-9220
Facsimile: (803) 734-9440
www.state.sc.us/ppp

July 22, 2015

Kenneth Green, #116020
Lieber Correctional Institution
PO Box 205
Ridgeville, South Carolina

Dear Mr. Green:

The purpose of the Barton hearing held today was to allow you, through your attorney, an opportunity to present the evidence that you feel shows that you did receive four favorable votes for parole at your hearing on Nov. 29, 2000.

After careful consideration, the Parole Board has decided not to ratify the vote count from your November 29, 2000, hearing. Your next parole consideration hearing will be on or about March 11, 2016.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry Patton, Jr.", written in a cursive style.

Larry Patton, Jr.
Director of Board Support Services

STATE OF SOUTH CAROLINA
In The Administrative Law Court
Docket Number 15-ALJ-15-0046

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


KENNETH GREEN, #116020 APPELLANT

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Record on Appeal complies with Rule 61 of the Rules of Procedure for the Administrative Law Court and contains all material proposed to be included in the Record on Appeal by all of the parties and not any other material.



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

September 30, 2015

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Kenneth Green, #116020,)	Docket No. 15-ALJ-15-0046-AP
)	
Appellant,)	
)	
vs.)	ORDER
)	
South Carolina Department of Probation, Parole and Pardon Services,)	
)	
Respondent.)	
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This matter comes before the South Carolina Administrative Law Court (Court or ALC) pursuant to the appeal of Kenneth Green (Appellant) from a decision of the South Carolina Department of Probation, Parole and Pardon Services (Department) denying him parole. Appellant filed this appeal with the Court on August 21, 2015.

FACTUAL/PROCEDURAL HISTORY

Appellant is in the custody of the South Carolina Department of Corrections after being sentenced to life imprisonment on March 9, 1983 for the offense of murder. At the time of Appellant's offenses, October 24, 1982, South Carolina law allowed a person serving a life sentence for murder parole eligibility upon the service of twenty years. Thus, Appellant had an initial parole hearing on November 18, 1998. The Parole Board (Board) denied Appellant parole, then and after each of his subsequent appearances, based on the following reasons: (1) nature and seriousness of current offense; (2) indication of violence in this or previous offense; and (3) use of deadly weapon in this or previous offense. However, it was the Board's rejection of Appellant's parole on November 29, 2000 that is it at issue in this case.

The law at the time of Appellant's offenses required only a simple majority of the Board members present to be granted parole. Based on the South Carolina Supreme Court's decision in *Barton v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013), if a quorum of the Parole Board is present at the hearing, then only a simple majority of the Board members present is required for Appellant to be granted parole. At Appellant's parole hearing on

FILED

February 11, 2016

SC ADMIN. LAW COURT

November 29, 2000, he received a vote of four to two. The pertinent part of the transcript reads as follows: “Kenneth William Green is rejected by a vote of four to two. Number 1, 2, 3 and 4.”

A “*Barton* hearing” was held on July 22, 2015 to allow Appellant to present evidence that he received four favorable votes at the November 29, 2000 parole hearing. The Board also allowed victims to speak at this hearing.¹ Following the hearing, the Board “decided not to ratify the vote count from [Appellant’s] hearing on November 29, 2000.” Appellant filed a Notice of Appeal with the ALC on August 21, 2015.

ISSUES

- I. Whether the Board erred by not ratifying the vote count from Appellant’s November 29, 2000 parole hearing; and
- II. Whether the Board erred in allowing a victims to make statements at the July 22, 2015 *Barton* hearing.

STANDARD OF REVIEW

The Court’s jurisdiction to hear this matter is derived from the decisions of the South Carolina Supreme Court in *Furtick v. S.C. Dep’t of Probation, Parole and Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2003) and *Cooper v. S.C. Dep’t of Prob., Parole and Pardon Servs.*, 377 S.C. 489, 499, 661 S.E.2d 106, 111 (2008).² 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. 2015) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). 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.* 1-23-380(5) (Supp. 2015). 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 arbitrary or affected by an error of law. *see 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,

¹ Appellant and his father were also present at the hearing, via teleconference.

² Though neither *Furtick* nor *Cooper* conferred jurisdiction to this Court to review determinations from *Barton* hearings, conference of that jurisdiction would seem to be a logical extension of the Supreme Court’s determination in both *Furtick* and *Cooper*. In both cases, the Supreme Court ordered the extension of this Court’s jurisdiction where, as at issue here, the Department failed to follow its own procedures. Moreover, it would be rather quizzical for this Court to have jurisdiction in *Barton* but not have jurisdiction to review hearings established based upon that very case.

166, 503 S.E.2d 490, 492 (Ct. App. 1998). Finally, “when appealing an agency's decision, the burden rests squarely on the appellant to prove that substantive rights were prejudiced” *S.C. Dep’t of Corr. v. Mitchell*, 377 S.C. 256, 260, 659 S.E.2d 233, 235 (Ct. App. 2008).

DISCUSSION

I. Whether the Board erred by not ratifying the vote count from Appellant’s November 29, 2000 parole hearing.

Appellant argues that the only evidence before the Board at the *Barton* hearing was that Appellant received four (4) votes in favor of parole out of the six members present and voting at the November 29, 2000 hearing. Therefore, Appellant argues that he was entitled to parole.

Prior to *Barton*, the Board’s policy had been to require five (five) affirmative votes in order to authorize parole, reflecting the two-thirds requirement of the current version of S.C. Code Ann. § 24-21-645 and applying it to the full seven-member Board. In *Barton, supra*, the South Carolina Supreme Court held that the version of Section 24-21-645 existing at the time of an inmate’s offenses is what is applicable at an inmate’s parole hearings, and that “members of the Board” under the statute means those members participating in the hearing where there is a quorum, not the full Board. Following *Barton*, the Department began holding *Barton* hearings.³ The purpose of these hearings, according to Section 10 of the Department’s January 2014 Operations Manual and its July 22, 2015 rejection letter to Appellant, is to determine whether an inmate received the proper number of votes pursuant to *Barton*. The Department even notes in its brief that the Board, upon conclusion of the *Barton* hearing, will “make a determination whether or not sufficient evidence was revealed to support the allegations [that the inmate received the required number of votes].” The Department adds that “[i]f the Appellant has successfully revealed he received the required number of votes, the Board will ratify the previous Board’s decision. If the Board decides insufficient evidence was provided[,] they will deny the Appellant’s motion and he will not be granted parole. . . .”

³ It is noteworthy that this Court has previously held that *Barton* does not apply retroactively to past parole decisions. 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). Nevertheless, the Department, following what it believed the Supreme Court required in *Barton*, established a Departmental policy requiring these *Barton* hearings, and therefore it must comply with the standards of process due these hearings.

Here, the 1982 version of Section 24-21-645 was the law at the time of Appellant's offenses and predates the Omnibus Criminal Justice Improvement Act of 1986, thus requiring only a simple majority of Board (i.e., a majority of those members participating in the hearing where there is a quorum), even for violent offenses.⁴ At Appellant's November 29, 2000 hearing, there were six Board members present and voting, and therefore only four (4) of them was required to authorize parole. The question then becomes whether the Board's decision not to ratify the prior Board's decision was contrary to its own procedure. In this case, Appellant provided affidavits from Bishop Sanco Rembert, Marlene T. McClain, and June Shissias, all of whom were Board members at the November 29, 2000 hearing and who attest that they voted in favor of Appellant's parole. Ms. McClain also attested to the fact that J.P. Hodges, who has since died, also voted in favor of Appellant being granted parole.⁵

The Department argues that "it is clearly reasonable for the Appellant to be denied parole" because the present Board could have decided that because the hearing occurred over fifteen years ago, the affiant Board members could have been mistaken in their recollection of that hearing. However, Rembert and Shissias attested to the fact that they listened to the recording of the November 29, 2000 hearing, which refreshed their "recollection that [they] voted in favor of [Appellant] being granted parole at that hearing." Rembert and Shissias also specifically explained that the Board had a "tradition at that time" that "the Board took the yes votes first." Thus, the vote count of four to two meant that there were four affirmative votes in favor of parole. McClain adds in her affidavit that "[t]he Department of Probation, Parole and Pardon [Services] had previously instructed the Board that the statute required an affirmative vote of 5 members (2/3) regardless of whether there were 6 or 7 members present. In this case, the Parole of Kenneth Green was rejected because he failed to get 5 or [sic] the 6 votes." McClain further addresses the ambiguity in the transcript of the hearings, which concludes with "Kenneth Green is rejected by a vote of four to two. Number 1, 2, 3 and 4." According to McClain, "[t]his announcement is not a

⁴ The Omnibus Criminal Justice Improvement Act of 1986 changed the requirement of a majority to a two-thirds requirement of the members of the Board to authorize parole for persons convicted of violent crimes as defined in Section 16-1-60.

⁵ Appellant also provided an affidavit from his father, James M. Green, Sr., and from his brother, James M. Green, Jr., both of whom were present at the hearing and who attest that Appellant received a vote of 4-2 in favor of parole was rejected for parole because he did not get the fifth vote required at the time. However, their statements concerning the vote count are based on hearsay and, therefore, could not be considered by the Board.

tally of the votes for or against parole, but is instead a numerical listing of the reasons parole was denied, which would have appeared in the notice to Mr. Green.”

The Court cannot not hear “an appeal 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 (D) (Supp. 2015). Nevertheless, as expressed in *Furtick* and *Cooper*, the Board cannot abuse its discretion by rendering an arbitrary or capricious decision disregarding whether a previous Board cast a sufficient number of favorable votes (subsections 1-23-380(A)(5)(e), (f)). The transcript of the November 29, 2000 hearing was ambiguous as to the number of affirmative votes that Appellant received, which required further evidence in order for the Board to be able to determine how many votes Appellant received. Appellant provided affidavits from voting board members as well as other attendees, the contents of which are described above, and this was evidence upon which a reasonable person could conclude that Appellant received four affirmative votes in favor of parole. Furthermore, there is nothing in the record that suggests that these affidavits are not credible.

The Department argues that it “should be reasonable to determine that affidavits from former Board members regarding one hearing out of the hundreds is insufficient to release someone on parole.” However, under that theory, the Board could reject parole in all of the Department’s *Barton* hearings, since each case would involve a parole hearing that predates *Barton* and thus would have occurred more than two years ago and among the many other hearings that occurred during that time. Thus, if the Board can reject all affidavits concerning past parole hearings based merely on the fact that the parole hearings happened years ago, then the *Barton* hearings would have no meaning, instead being subject to the whim and caprice of the Board.

According to the Department’s Policy Manual, and as the Department even states in its brief, if the Board finds that an inmate has successfully demonstrated that he received the required number of votes, the Board will ratify the previous Board’s decision, subject to any conditions that the Board feels necessary. Because I find that there was uncontradicted evidence in the record to support the prior Board’s finding of four favorable votes, and that number was the required number of favorable votes for parole, I find that the current Board’s decision not to ratify the previous Board’s four-to-two decision contradicted its own policy and was therefore arbitrary.

However, as the Department correctly argues, this Court has not authority to enter judgments granting or denying parole (*see State v. Dingle*, 376 S.C. 643, 659 S.E.2d 101 (2008))

(finding that under S.C. Code Ann. § 24-21-640, only the Parole Board, and not the courts, may determine parole eligibility), nor can the Court review appeals involving the denial of parole. *See* S.C. Code Ann. § 1-23-600(D) (Supp. 2015). According to Section 10 of the Department's Operations Manual, when the current Parole Board ratifies the votes of the previous Board that would have granted conditional parole, it does so by signing and issuing a "special Barton Order of Parole." After the Board issues a special *Barton* Order of Parole, "[t]he offender is then treated as any other offender granted conditional parole, and will have to comply with the conditions in order to receive parole." This order would thus seem to constitute the provisional parole order referred to in S.C. Code Ann. 24-21-645(A) (Supp. 2015), which requires the inclusion of terms and conditions that must be met for parole. Therefore, notwithstanding ratification of the previous Board's four votes in favor of parole, the Board still must set conditions of parole, which are required in provisional parole orders pursuant to subsections 24-21-645(A), (B) and by Section 10 of the Department's Operations Manual.⁶ Moreover, as the Department also correctly argues, the granting of parole further 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." Section 24-21-650.

II. Whether the Board erred in allowing a victims to make statements at the July 22, 2015 Barton hearing.

Because the prior issue was dispositive of this appeal, the Court declines to address this remaining issue. *See Young v. Charleston Cty. Sch. Dist.*, 397 S.C. 303, 311, 725 S.E.3d 107, 111 (2012) (declining to address additional remaining issue when the disposition of a prior issue was dispositive of the appeal).

Conclusion

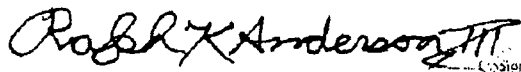
The Board erred in failing to ratify the previous Board's four-to-two vote in favor of granting Appellant parole, following Appellant's *Barton* hearing. Therefore, the Court

⁶ The Department seems to suggest in its brief that the current Board would issue another order – presumably the one under subsection 24-21-645(A) – in addition to the special *Barton* order. However, because the members of the Board would sign the *Barton* order ratifying the requisite number of votes from the previous Board, it would seem illogical to require another signed order to impose the same conditions that are already required after the *Barton* order is issued. Indeed, it would make no sense for the Department to state in Section 10 of its Manual that "[t]he offender is then treated as any other offender granted conditional parole" following the issuance of the signed *Barton* Order, if the Board is supposed to sign another Order imposing the same conditions.

must remand the case to the Board for it to proceed as if a provisional parole order had been issued pursuant to Section 24-21-645(A).

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **REVERSED AND REMANDED** for further proceedings consistent with this Order.

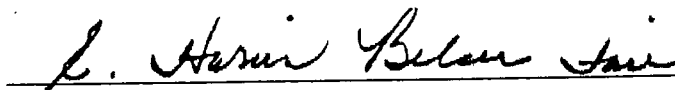
Handwritten signature of Ralph King Anderson, III in cursive script.

Ralph King Anderson, III
Chief Administrative Law Judge

February 11, 2016
Columbia, South Carolina

CERTIFICATE OF SERVICE

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



E. Harvin Belser Fair
Judicial Law Clerk

February 11, 2016
Columbia, South Carolina

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MAY 26 2016

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Ralph King Anderson, III, Administrative Law Judge
Case No. 15-ALJ-15-0046-AP

Appellate case No.: 2016-000296

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MAY 26 2016

SC Court of Appeals


KENNETH GREEN, #116020.....RESPONDENT

v.

SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON
SERVICES.....APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that this Record on Appeal complies with Rule 210(c), SCACR and with the South Carolina Supreme Court's order dated August 13, 2007, and contains all material proposed to be included by any of the parties and not any other material.



Tommy Evans, Jr.
Assistant General Counsel

South Carolina Department of
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May 26, 2016

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v.

SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICESAPPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant to counsel for Appellant, certify that I have served a copy of the *RECORD ON APPEAL*, dated May 26, 2016, on Respondent by depositing the same in the United States mail, postage prepaid, this 26th day of May, 2016, addressed to:

Tommy Thomas, Esquire
PO Box 88
Irmo, S.C. 29063

I further certify that all parties required by Rule to be served have been served.

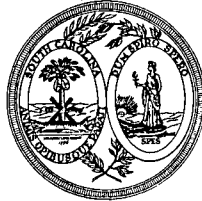


Dawn K. Nichols,
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JERRY B. ADGER
Director
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May 26, 2016

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street- 5th Floor
Columbia, South Carolina 29201

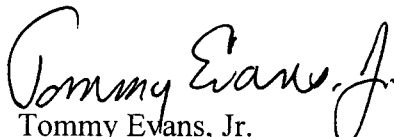
RE: Kenneth Green v. SCDPPPS

Dear Ms. Kitchings:

Please find enclosed for filing the original and fourteen (14) copies of the *Record on Appeal* dated May 26, 2016, along with proof of service in the above referenced case.

Thank you for your cooperation in this matter.

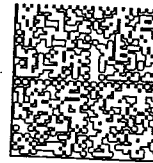
Sincerely,


Tommy Evans, Jr.
Assistant General Counsel

TE:dn

Enclosures

cc: Tommy Thomas, Esquire



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State of South Carolina

Department of Probation, Parole, and Pardon Services

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