

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT S.C. SUPREME COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 15-ALC-15-0033-AP
Appellate Case No. 2018-001641

David Rose, #91858, ... Petitioner,

v.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge

Appellate Case No.: 2016-000225

DAVID ROSE, #91858, ...RESPONDENT

v.

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

RECORD ON APPEAL

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1 STATE OF SOUTH CAROLINA
2 ADMINISTRATIVE LAW JUDGE DIVISION

3
4 DAVID LEE ROSE, #91858,

5 Petitioner(s),

6 vs. Case No: 15-ALJ-P-0033

7 SOUTH CAROLINA DEPARTMENT OF PROBATION,
8 PAROLE, AND PARDON SERVICES,

9 Respondent(s).

10

11 D E P O S I T I O N

12 WITNESS: ROOSEVELT HICKS

13 DATE: Monday, September 28th 2013

14 TIME: 2:06 p.m.

15 LOCATION: Nelson, Mullins, Riley & Scarborough
16 1320 Main Street, 17th Floor
Columbia, South Carolina

17 REPORTED BY: SHERI L. BYERS
18 Registered Professional Reporter

19 - - - - -

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37 (INDEX AT REAR OF TRANSCRIPT)

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The deponent waives the right to read and
sign the deposition transcript.

ROOSEVELT HICKS, being first duly
sworn, testified as follows:

EXAMINATION

BY MS. NELSON:

Q. So I'm Susan Nelson.

A. Okay.

Q. And have you ever been deposed before?

A. No.

Q. Okay. So I'm just going to go through some
preliminary things and then we'll get started.

If you could just state your name for the
record.

A. Roosevelt Hicks.

Q. And as you may know, we represent David Rose
in this matter.

A. Uh-huh.

Q. We're going to take your deposition pursuant
to the Rules of Civil Procedure. So if there are
objections to the question, then your attorney will be
able to say "objection to the form," and then after
that you can answer the question. The only time you

1 would not answer the question is if he had -- if your
2 attorney has an objection as to privilege in which case
3 he would instruct you not to answer.

4 A. Okay.

5 Q. I may take a break during the deposition and
6 you can ask to take one, too. If you want to take a
7 break, we would just ask that you not discuss anything
8 of substance regarding your testimony during the break.

9 A. Okay.

10 Q. That's also according to the rules.

11 A. Okay.

12 Q. If you could not respond by saying uh-huh or
13 huh-uh or nodding.

14 A. Okay.

15 Q. Try and make your responses verbal just
16 because of the court reporter. It will be easier for
17 her to type everything down.

18 A. Okay.

19 Q. And if you don't understand a question I ask,
20 which is very possible, you can please ask me for
21 clarification.

22 A. Okay.

23 Q. And let's say -- yeah, we can just get
24 started.

25 A. Okay.

1 Q. What, if anything, did you do to prepare for
2 this deposition today?

3 A. I just met the agency attorneys.

4 Q. Okay. Today?

5 A. No. Huh-uh.

6 Q. On one occasion prior to today?

7 A. Yes.

8 Q. Okay. Did you talk to anyone else --

9 A. No.

10 Q. -- about your deposition?

11 A. No.

12 Q. Okay. And did you look at any documents
13 before this deposition?

14 A. No. Just this case.

15 Q. Okay. Even when you were meeting with your
16 attorneys --

17 A. No documents.

18 Q. -- you didn't review any documents?

19 A. No.

20 Q. Okay. So basically we're going to go through
21 and just talk about you and what you do at the
22 department.

23 A. Okay.

24 Q. We learned earlier this morning that you call
25 it PPP.

1 A. Yes.

2 Q. So we'll call it PPP.

3 A. Okay.

4 Q. And then we're going to move on to questions
5 specifically about this case.

6 A. Okay.

7 Q. So first we'll get some background on you.

8 A. Okay.

9 Q. If you could tell me your date of birth.

10 A. June 10, '63.

11 Q. Okay. Where do you live?

12 A. I live off 120 Auburn Leaf Drive. That's
13 Hopkins, South Carolina.

14 Q. Okay. And your work address?

15 A. My work address is 2221 Devine Street, Suite
16 400.

17 Q. And have you ever served in the military?

18 A. No.

19 Q. No. Where did you get your education?

20 A. I graduated from Winthrop.

21 Q. Winthrop?

22 A. Winthrop College. At that time it was a
23 college. Now it's a university.

24 Q. Okay. So where are you from?

25 A. Columbia.

1 Q. Born and raised?

2 A. Uh-huh. Born and raised in Columbia,
3 South Carolina.

4 Q. Okay. And so you went to Winthrop, and then
5 when did you come to the department, DPPP?

6 A. I started at the department on September 18,
7 1988.

8 Q. And what was your first role?

9 A. My first role was Administrative Specialist
10 A.

11 Q. Okay.

12 A. My first position, I was -- I was the
13 administrative -- probably like the secretary to the
14 direct -- chief parole examiner. I kept -- I kept the
15 schedule of all the parole examiners --

16 Q. Okay.

17 A. -- who went out and interviewed the inmates.

18 MS. NELSON: Okay. So I want to show you a
19 chart that might help us.

20 Can you go ahead about mark that.

21 And you've seen this?

22 MR. EVANS: Yes.

23 (APPELLANT'S EXHIBIT 1, Organization Chart,
24 was marked for identification.)

25 BY MS. NELSON:

1 Q. And this may have changed since -- this was
2 on your Web site, by the way. We just pulled it off
3 your Web site. So when you started in 1988, were you
4 in this -- under the parole and pardon --

5 A. Yes.

6 Q. -- section of this chart?

7 A. Yes.

8 Q. Have you always been in that department?

9 A. Yes.

10 Q. Okay. So after your first position, when did
11 you change? What changed?

12 A. I didn't change. I was reclassified to a B
13 and then I reclassified to a C. Then I was
14 reclassified to administrative assistant. Then I was
15 reclassified to program assistant.

16 Q. Okay.

17 A. Then from program assistant, I was promoted
18 to program coordinator.

19 Q. Okay. And we heard that from Larry Patton
20 this morning about being a program assistant. So were
21 you supervising as a program assistant?

22 A. I never supervised until I became program
23 coordinator.

24 Q. Okay. Which is your current title?

25 A. Which is my current title.

1 Q. Okay. When did you become program
2 coordinator?

3 A. July 2010. No, not '10. I think '11. July
4 2011.

5 Q. Okay. And before July 2011, you were program
6 assistant?

7 A. Program assistant, yes.

8 Q. Okay. And who -- so just so I can kind of
9 get the timeline, were you a program assistant in 2001?

10 A. No.

11 Q. What was your role then?

12 A. My role then in 2001 was administrative
13 assistant.

14 Q. Administrative assistant. Okay.

15 But for this same -- under this same branch,
16 under administrative hearings?

17 A. Yes.

18 Q. You were an administrative assistant?

19 A. I wouldn't -- the section at that time went
20 through some changes.

21 Q. Okay.

22 A. It went through -- when I started was parole
23 examination and I stayed parole examination until it
24 changed to parole board support service. So whenever
25 that time changed, I can't remember.

1 Q. Okay. Okay. And I have that your current
2 title is supervisor in the office of board support
3 services?

4 A. Yes. That correct.

5 Q. Okay.

6 A. My title is program coordinator/parole board
7 support supervisor.

8 Q. Slash parole board support supervisor?

9 A. Uh-huh.

10 Q. So who did you replace?

11 A. I did not replace anybody. I was given --
12 promoted. I was -- the position was created for me.

13 Q. Okay. So who trained you?

14 A. Mainly I just got the title. I was currently
15 doing the position I was doing. I just became
16 supervisor.

17 Q. Okay.

18 A. They reclassified me. I was just
19 reclassified from program assistant to program
20 coordinator.

21 Q. Okay.

22 A. And just got to do the supervisor one.

23 Q. And who do you supervisor?

24 A. I supervisor a staff of four.

25 Q. What are their names?

1 A. Well, one position the person just left and
2 just got promoted. Her name was Beth Anderson. But I
3 don't supervise her anymore.

4 Q. Okay.

5 A. The other person is Mildred Cannon, Marti
6 Reardon, and Elizabeth Williams.

7 Q. And are they all program assistants?

8 A. No. Elizabeth Williams is data manager --
9 not data manager. Data Record Keeper II, I think.
10 Marty is a Data Entry Record Person I. Mildred Cannon
11 is a Program Coordinator I. And Beth Anderson was a
12 Program Coordinator I, but she just recently was
13 promoted in July.

14 Q. Okay.

15 A. So I no longer supervise her.

16 Q. She was promoted to a different department of
17 PPP?

18 A. She's in the same department. She's still in
19 the same section, but she's a Program Coordinator VI,
20 but she report to Larry Patton now.

21 Q. Okay.

22 A. It was a job promotion for her.

23 Q. And we heard from Larry Patton this morning
24 that you also report to Larry Patton.

25 A. Yes. Uh-huh.

1 Q. Okay. Okay. So if you'll see on this chart,
2 we basically talked about parole board support. So we
3 know that you're in parole board support.

4 A. Yes.

5 Q. And Larry Patton is.

6 A. Yes.

7 Q. And these four people are also in parole

8 board support.

9 A. Correct.

10 Q. Who else is in parole board support?

11 A. That's it. I mean, there's a tree up under
12 that. Release reentry program was up under parole
13 board support, but that's part of parole board support.

14 Q. Okay.

15 A. That's a tree that's up under parole board
16 support.

17 Q. Release reentry?

18 A. Uh-huh.

19 Q. And who works there?

20 A. That's one of the positions that Beth
21 Anderson got.

22 Q. Okay.

23 A. And the other person is Katherine Moore.

24 Q. So Beth Anderson went to handle release
25 reentry?

1 A. Correct.

2 Q. Okay. Who's the parole board administrator?

3 A. Molly Taylor.

4 Q. Okay. And then who's your deputy director?

5 A. Robert Mitchem.

6 Q. And who is in charge of records management?

7 A. It's in part of -- record management for the
8 department or records management to the section?

9 Q. For your section.

10 A. Okay. All that fall up under Larry Patton.

11 Q. Larry Patton?

12 A. There is no designated person that's over
13 recordkeeping.

14 Q. Okay. So when you want to review records
15 from a particular inmate from 2005, you ask Larry
16 Patton?

17 A. Actually, our records are kept in the records
18 department. Case file is.

19 Q. Okay. So who do you ask?

20 A. Records manage department. We send an email
21 to our records department for them to pull a case, if
22 that's what you're looking for. Like the case. But
23 our official records, like the case hard copy or case
24 file is kept in our records department. Which is run
25 by ...

1 MR. EVANS: Christie.

2 THE WITNESS: Christie. Christie Baird.

3 BY MS. NELSON:

4 Q. Christie Baird?

5 A. Yes.

6 Q. Okay. So I guess I'm -- so Larry Patton is
7 in charge of records management, but Christie Baird is
8 in the records department?

9 A. Well, he's not in charge of records
10 management. I mean, that's what I'm saying if you're
11 looking for something during our -- I don't understand
12 your question. You kind of have to clarify your
13 question for me.

14 Q. Okay. So when you are looking for a record
15 from a parole hearing, a tape of a parole hearing --

16 A. Okay.

17 Q. -- Larry Patton talked to us this morning and
18 said that you would be the one who would listen to it.

19 A. Yes.

20 Q. How do you get that tape?

21 A. We have it in a file room.

22 Q. In a file room where?

23 A. In a file drawer in our section.

24 Q. In your section?

25 A. Uh-huh.

1 Q. Okay.

2 A. Our records are twofold. The tapes and the
3 hard copy, like paper.

4 Q. Okay. So in your office you keep tapes?

5 A. In my section, yes, we keep tapes.

6 Q. Of parole hearings?

7 A. Correct.

8 Q. Going back to when?

9 A. 2008.

10 Q. Okay. And then if you wanted paper copies --

11 A. You would have to go to our records
12 department.

13 Q. Christie Baird?

14 A. Yes.

15 Q. You would ask Christie Baird?

16 A. Correct.

17 Q. And what type of paper records does she have?

18 A. She has the hard copy of the case file. Any
19 support letters that came in, the case summary. Any
20 type information that we retrieve or through the course
21 of the investigation, getting the case ready for
22 parole, all that is in the hard copy in the case file.

23 Q. Okay. Is there anyone else who might have
24 records dealing with parole hearings --

25 A. No.

1 Q. -- on this chart or other than what we've
2 talked about?

3 A. There could be because during the course of
4 getting the case ready for parole, there's quite a few
5 people that works with that case.

6 Q. Okay.

7 A. There are parole examiners who interview the
8 inmates. There are parole agents that do the fieldwork
9 of investigation getting the case summary ready. There
10 is a victims service, they do their part in it.
11 There's a number of people that could generate a file
12 on that case.

13 Q. And those people, if they created records,
14 would Christie Baird not have them or would Christie
15 Baird have them?

16 A. She may or she may not. I'm not sure because
17 I don't know how other people keep their records.

18 Q. Okay. So what contact, if any, does parole
19 board support have with records management?

20 A. None except for to pull the case file when
21 we're getting for a parole hearing.

22 Q. And who asks them to pull the case file?

23 A. I do. I send them a roster.

24 Q. Okay. So I just wanted to talk about what
25 your job entails. If you, you know -- if you were

1 going to train someone to do your job --

2 A. Uh-huh.

3 Q. -- what management things or what general
4 responsibilities do you have like on a daily basis, a
5 weekly basis, a monthly basis, what does your job look
6 like?

7 A. Okay. I am the case scheduler. I schedule
8 the inmates for their parole hearing. So from the
9 beginning, if I'm going to train someone to do my job,
10 I would teach them how to actually create a roster for
11 the hearing date.

12 Q. Okay.

13 A. First of all, you have to create the hearing
14 dates by calendar year.

15 Q. Okay.

16 A. So I would teach them how to create that
17 roster. We schedule cases five months out.

18 Q. And do you do that on your computer system?

19 A. Yes.

20 Q. Okay. And we heard about that this morning.

21 A. It's a database. It's directly related to
22 the Department of Corrections. It's download all the
23 eligible inmates from the Department of Correction file
24 to our file. And I generate the hearing roster from
25 that.

1 Q. Okay. And you would call that something.

2 You would call that P ...

3 A. PIC Parole Information System.

4 Q. P-I- --

5 A. P-I-C.

6 Q. P-I-C?

7 A. Uh-huh.

8 Q. Okay. So you create a roster. You get
9 information from SCDC about who was supposed to be
10 coming up for parole?

11 A. Right.

12 Q. For that month?

13 A. For the next five months because we schedule
14 five months ahead of time.

15 Q. Okay. And then -- so you create a roster for
16 the next five months?

17 A. Uh-huh.

18 Q. On a -- for each week?

19 A. Basically for each week, yes.

20 Q. Okay.

21 A. So like for this week, I was scheduling the
22 first week of March 1st.

23 Q. Okay. So anything else that you do?

24 A. If I'm training someone to do my job on a
25 daily basis, because we have hearings every week, so

1 you have to -- every week there is a roster that's due.
2 And that roster you have -- that the roster I was
3 sending to records for them to pull those records for
4 that hearing. I would send out a record -- that roster
5 to victim service so they would notify any victims and
6 all the victims and solicitor's and the sheriff's
7 office for that hearing.

8 I would send it to one of my people to do the
9 notification to the inmates. So they would get that
10 roster. That's on a weekly basis.

11 Now, if you go back to the beginning when I
12 first scheduled that roster, that roster is given to my
13 data entry people so they can start working on
14 gathering the information to get that case ready. It's
15 a like an assembly line. I'm the beginning of it and
16 each people on that line got a certain time frame to do
17 things. It's like my data entry people have a time
18 frame to do their part. And when they click off, the
19 agent sends out to the agent and the agent has his time
20 frame to do that part. When they do that part, the
21 parole examiners do their part. It's like an assembly
22 line. Each person do their part. And the system is
23 designed where a date populate.

24 And at the end when I get ready to finalize
25 that list 40 days out, all my dates need to be

1 complete. If all the dates are completed, I know this
2 case is ready to go to the board.

3 Q. So you try to get it ready 45 days out?

4 A. Yes.

5 Q. 45 days before the hearing?

6 A. Right. Any given time frame, I'm working
7 with five months of cases.

8 Q. Okay. And the people you supervise are now
9 the three names that you mentioned earlier?

10 A. Uh-huh.

11 Q. Okay. So one of them will contact victims
12 services?

13 A. No. None of them will contact victim
14 services. What they'll do is --

15 Q. Send the roster --

16 A. They'll run a rap sheet and enter the prior
17 record of inmates. They run a rap sheet, go through
18 the rap sheet and enter the prior records. They have
19 to do it on any new inmate that's coming for parole.
20 Because the way our system is designed, there's no way
21 that we know if a person has a prior record when they
22 first come to the Department of Correction. They have
23 to run the rap sheet and the information has got to be
24 entered into the database.

25 Q. So who contacts -- someone contacts victim

1 services with the roster?

2 A. I do.

3 Q. You do?

4 A. Uh-huh.

5 Q. Okay. What responsibility do you have with
6 inmates who are challenging their parole board
7 decision?

8 A. What to you mean "challenging"? You mean ...

9 Q. For example, someone who says that they got
10 the requisite number of votes pursuant to the Barton
11 decision.

12 A. Uh-huh. Well, that --

13 Q. What do you do in that situation?

14 A. Actually, that information don't come through
15 me. It comes through our legals department.

16 Q. Okay.

17 A. And they will ask me to go listen to the
18 tape, and I go listen to the tape.

19 Q. What asks you?

20 A. Our legals department, which is usually Dawn
21 Nichols.

22 Q. Dawn Nichols?

23 A. Un-huh.

24 Q. Will ask you to pull a tape?

25 A. Yes.

1 Q. And listen to it?

2 A. Yes.

3 Q. And then what happens?

4 A. I tell her what's on it and whatever she asks
5 me, what she wants me to listen to, I -- whatever she
6 asks me to listen for.

7 Q. Okay. What is Larry Patton's role in that?

8 A. He don't do anything.

9 Q. Nothing?

10 A. Nothing in that role. It's just between me
11 and Dawn Nichols at that time.

12 Q. Okay. And any other responsibilities that we
13 haven't discussed?

14 A. I do present the cases to the board on
15 hearing days.

16 Q. Okay. What does that involve?

17 A. That involves me making sure that the board
18 has their cases for the hearing. I provide support to
19 the board. Like if they got questions about the case,
20 I coordinate the hearings. I contact SCDC to tell them
21 what inmate to send to what site. And I basically
22 provide technical support system for the board on those
23 days.

24 Q. Okay. Technical support.

25 So we heard from Larry Patton this morning

1 about what actually happens during the parole board
2 hearings.

3 A. Uh-huh.

4 Q. And he explained that they have lights, 16
5 lights.

6 A. Seven.

7 MR. EVANS: It is 14?

8 MR. DAYHUFF: I'm sorry, 14 lights.

9 BY MS. NELSON:

10 Q. So seven green, seven red.

11 A. 14.

12 Q. 14 lights. And then there's two panels of 14
13 lights?

14 A. Two panels? What's do you mean?

15 Q. There's one right in front of the chairman of
16 the board?

17 A. Un-huh.

18 Q. And there's another panel for all of the
19 other board members to see?

20 A. Yes.

21 Q. So two panels of lights?

22 A. Uh-huh.

23 Q. And so you call the case?

24 A. Uh-huh.

25 Q. And what happens next?

1 A. Well, I call the case. I go to the site. I
2 call the case. The examiner bring the inmate into the
3 board. The board interview the inmate. And then they
4 ask the inmate to step out of the room. If there are
5 any victims in the case, they come in the room. And
6 the board interviews the victims.

7 Q. In the room where you are?

8 A. Right.

9 Q. Uh-huh.

10 A. And then they ask the victims to step out,
11 and then the board will vote on the case.

12 Q. Okay. And what is your role while the board
13 is deliberating, if any?

14 A. Nothing.

15 Q. Okay. Who -- okay.

16 A. I'm totally quiet. I do not interject on
17 anything unless they ask me a question.

18 Q. Do they ask you questions?

19 A. No. Sometimes they do and sometimes they
20 don't.

21 Q. What would be a question that they might ask
22 you?

23 A. "Did an inmate lose any time on that last
24 infraction?" Or "Can you give me more details on that
25 last infraction?"

1 Q. Disciplinary --

2 A. Yes.

3 Q. -- infractions --

4 A. Yes.

5 Q. -- in prison?

6 A. Yes.

7 Q. And then you would provide that information
8 to them?

9 A. Yes.

10 Q. Okay. And so when the board votes, who
11 records the vote? How does it get recorded?

12 A. Well, now we manually record it.

13 Q. Who manually records it?

14 A. I do.

15 Q. You write down -- what do you write down?

16 A. I have a sheet now with all the board
17 members' name on it in there and they go around and
18 they vote.

19 Q. For each inmate?

20 A. Yes.

21 Q. When did that process start?

22 A. We just start doing that September 2013.

23 Q. September 2013. And how long have you been
24 the person who manually records the parole board votes?

25 A. I only just took this position doing this

1 when Gwen left in May 2013.

2 Q. Who did it before you?

3 A. Gwen Bright.

4 Q. Gwen Bright.

5 And is Gwen Bright no longer with the
6 department?

7 A. No, she's not.

8 Q. Okay. How long was she in than role, do you
9 know?

10 A. I can't remember.

11 Q. So you present the case. You write down the
12 vote. Anything else that we haven't talked about?

13 A. That's it.

14 Q. You prepare the cases?

15 A. Uh-huh.

16 Q. Five months out?

17 A. Uh-huh.

18 Q. And then you do this role with Dawn Nichols
19 where you listen to hearings?

20 A. Right. If she asks me to, yes.

21 Q. And you tell her --

22 A. Uh-huh.

23 Q. -- what the vote was?

24 A. If that's what she's asking for, yes. But if
25 she asks for something different -- whatever she's

1 asking for at that time.

2 Q. And when the vote is not recorded, what do
3 you tell her?

4 A. There is no recording. There is no vote. I
5 have to say "There is no vote count."

6 Q. There is no vote count.

7 So even if you have a tape that doesn't have
8 a -- where the hearing is recorded, if there is no vote
9 down, you tell Dawn Nichols, "There was no vote count"?

10 A. I say, "There was no vote count," and I tell
11 her what the outcome was. Even if the board would say
12 "Conditional parole," or they'll say, "Joe Blow is
13 rejected, one, two, and three."

14 Q. How often is there no vote count?

15 A. Well, until 2013, they didn't -- they didn't.
16 There was no vote count recorded.

17 Q. Okay. Do you know David Rose?

18 A. No.

19 Q. You've never met him?

20 A. No.

21 Q. Have you ever heard about David Rose -- about
22 this case?

23 A. No.

24 Q. Did you know that David Rose was litigating
25 against PPP?

1 A. Only recently when I got this notice.

2 Q. So did anyone ever ask you to maintain
3 records for David Rose?

4 A. No.

5 Q. Do you know Thalma Barton?

6 A. No.

7 Q. You don't know anything about her case?

8 A. I know something about her case.

9 Q. What do you know about her case?

10 A. But I don't know her.

11 Q. Can you tell me what you know about her case.

12 A. She was --

13 MR. EVANS: I object to that relevance. Not
14 relevant. You can answer to that, but I'm going to
15 object to that. Go ahead and answer.

16 THE WITNESS: Okay. The only thing I know of
17 is that she filed a lawsuit and then won. Her vote --
18 she had the vote count.

19 MS. NELSON: Okay. Let's move to some
20 emails, if that's okay with you.

21 (Off the record.)

22 MS. NELSON: This is an email that was
23 produced to us in this case.

24 (APPELLANT'S EXHIBIT 2, Email Dated May 20,
25 2014, was marked for identification.)

1 BY MS. NELSON:

2 Q. Is that your email? Have you had a chance to
3 read it?

4 A. I'm reading it.

5 Q. Okay.

6 A. But this says from Dawn to me.

7 Q. Yes.

8 A. Yeah.

9 Q. Do you remember receiving that email?

10 A. Uh-huh.

11 Q. And I just wanted to ask you, was this the
12 first time that you were asked to look for information
13 regarding David Rose's 2001 hearing?

14 A. I can't remember because I got so many
15 requests for looking up vote count during that time
16 frame. I can't remember. Because it's just -- until
17 recently, it was just a name. People were just name
18 and numbers and hearing dates. That's all it was to
19 me. So I can't remember.

20 Q. About how many requests would you say you've
21 gotten from Dawn Nichols asking you to look up a
22 hearing and the vote count?

23 A. It was quite a few, because when Thalma
24 Barton case rolled in, it was quite a few. I can't put
25 -- I didn't keep count, but I know it was numerous

1 emails.

2 Q. Like 30?

3 A. I guess, if not more. But I just didn't keep
4 them because some of them was long and I don't
5 remember. I just cannot remember how many I did
6 because I was not counting.

7 Q. Okay. No, I understand.

8 And so this says, "If we do not have the
9 tape, provide me with info as to why not."

10 How common was it that you would not have the
11 tape?

12 A. It depends on how far back they were
13 requesting.

14 Q. Well, like in this time period, 2001.

15 A. I didn't have anything for 2001.

16 Q. And you were working at the agency in 2001?

17 A. Yes.

18 Q. Do you remember -- let's go back to -- you
19 were an administrative assistant in 2001?

20 A. In 2001, yes.

21 Q. What did that involve? Did you have any
22 responsibility with regard to parole hearings?

23 A. At that time in 2001, the only thing I did
24 was get the cases from records.

25 Q. Uh-huh.

1 A. Notify the inmates. Got the cases to the
2 board. At that time it was paper. And during the
3 hearing proceedings, I would go inside, in and out the
4 room getting the cases that may be used in parole and
5 fax the information out to the site. But at that time
6 I mainly was out at a desk that was outside the board
7 room.

8 Q. Okay. So in 2001, you didn't sit in and
9 listen to the deliberations?

10 A. No, I did not.

11 Q. Or the voting?

12 A. No, I did not.

13 Q. Okay.

14 A. It all depends if I was in the room at that
15 time when they was hearing the case or doing the
16 voting, I would hear it.

17 Q. Okay.

18 A. But the majority of the time, I was not in
19 the room.

20 Q. And when -- what do you -- do you know when
21 the tapes started being kept by PPP? When did they
22 start keeping tapes in your department?

23 A. I can't tell you when, but when I started in
24 1988, they was keeping tapes.

25 Q. Really? I'm going to show you another email.

1 This is from the same time period.

2 A. Okay.

3 (APPELLANT'S EXHIBIT 3, Emails Dated May 20,
4 2014, was marked for identification.)

5 BY MS. NELSON:

6 Q. Do you recognize that email?

7 A. Uh-huh.

8 Q. Is that your email?

9 A. Uh-huh.

10 Q. What does -- what did you mean by "Everything
11 was destroyed by the previous record keeper"?

12 A. Meaning the cassette and the hard copy.

13 Meaning the roster.

14 Q. What's the hard copy, the roster?

15 A. Uh-huh. At that time we kept -- at that time
16 the recording was kept and it was done on a
17 tape-recorder. And you had a roster where you write
18 the outcome on. And you had to write that tape count.
19 So when someone asks for a duplicate of the tape, you
20 will be able to find it -- the tape counter off the
21 tape-recorder. So that person that was doing the
22 recording of the parole hearing inside the room would
23 write that information on that sheet beside the name of
24 the inmate on the roster.

25 Q. And would they also write whether they were

1 granted or denied?

2 A. Yes.

3 Q. Would they write the votes?

4 A. No. We were not keeping votes count.

5 Q. And when did that process stop? The hard
6 copy roster.

7 A. When we got the audio equipment that actually
8 record the hearing for us that's on a computer. And
9 that stopped in the end of -- the end of 2007.

10 Q. 2007.

11 A. That's why we don't have any cassette tapes.

12 Q. Okay. So who was the previous record keeper?

13 A. The previous record -- there was not a record
14 keeper. I think I just answered that because she
15 maintained the records. But the person who maintained
16 those records at that time was Jennifer Hornsby.

17 Q. And where did she leave -- where did she go?

18 A. She retired.

19 Q. Jennifer Hornsby?

20 A. Uh-huh.

21 Q. How do you know that Jennifer Hornsby
22 destroyed the records?

23 A. I don't know. I just -- because they was not
24 there because there's no records from 2000 -- from 2001
25 and back. There's nothing. There's no tapes. There's

1 no hard copy. There's no file folders. There's
2 nothing. So I can't say she destroyed the records
3 because I didn't see her.

4 Q. Okay.

5 A. I wasn't doing that job at that time. She
6 was, so ...

7 Q. But you worked for PPP at the time?

8 A. Yes.

9 Q. And when you started working there, you said
10 they started keeping tapes in 1988?

11 A. I started working there in 1988. They was
12 keeping tapes before I even started.

13 Q. Okay. And as of 2001, they were still
14 keeping tapes?

15 A. Yes.

16 Q. And at some point between 2001 and 2014,
17 they're gone?

18 A. We didn't stop keeping tapes until November
19 2007. We started off 2008 making everything on CDs.
20 The tapes were still there. Those tapes that's from
21 2002 is still in -- is still there. The only tapes
22 that we have is from there to 2007.

23 Q. You still have tapes from 2002 to 2007?

24 A. Yes.

25 Q. Okay. When did you notice that there were no

1 tapes from 2001 prior?

2 A. When Dawn sent that email.

3 Q. Not until 2014?

4 A. Correct.

5 Q. And no one ever asked you to keep tapes?

6 A. No.

7 Q. Does anyone ever tell you when a person has a
8 pending lawsuit against PPP?

9 A. No.

10 Q. Has anyone ever asked you to keep tapes due
11 to a pending lawsuit?

12 A. No.

13 Q. Can you turn to the second page of this
14 email. You say, "I didn't take over keeping tapes
15 until 2009."

16 A. Uh-huh.

17 Q. Who was responsible for keeping tapes before
18 that?

19 A. Jennifer Hornsby.

20 Q. And she left in what year?

21 A. The end of 2008.

22 Q. Okay. Is there anything else that would have
23 been destroyed during those years from 2000 -- as far
24 as you know, 1988 to 2001 other than the cassette and
25 the hard copy roster?

1 A. That's as far as I know, that's it.

2 Q. Do you have any idea why they would have been
3 destroyed?

4 A. Because that's whatever their policy was for
5 how long they keep, I don't know.

6 Q. Do you know of any retention policy now?

7 A. Right now, no, I don't.

8 Q. Did you know of any destruction policies in
9 2001?

10 A. No.

11 MS. NELSON: I can show you one more email.

12 (APPELLANT'S EXHIBIT 4, Email Dated September
13 21, 2015, was marked for identification.)

14 BY MS. NELSON:

15 Q. Do you recognize this email?

16 A. Uh-huh.

17 Q. Do you remember sending that email?

18 A. Yes.

19 Q. So you say you don't know who or when the
20 recording was destroyed. "This was not my job at that
21 time."

22 A. Right.

23 Q. Whose job was it?

24 A. At that time Jennifer Hornsby was the --
25 we're doing the recording and responsible for making

1 copies of the CDs -- copy of the tapes.

2 Q. Did you ever see Jennifer Hornsby destroying
3 tapes?

4 A. No.

5 Q. Did you ever talk to her about a document
6 destruction policy?

7 A. No.

8 Q. Or retention policy?

9 A. No.

10 Q. And it's your job since 2009 and no one's --
11 do you know of any document retention or destruction
12 policy?

13 A. No. Any really it wasn't my job. It had
14 never been assigned to me. It's just that because I
15 was the -- it's just because there was nobody there so
16 I kind of like just started making the copies of the
17 tapes when people asked for it because that job was not
18 filled.

19 Q. I see.

20 A. So I have never been assigned that job. It's
21 not my job. It was just I was helping out.

22 Q. Have you ever been asked to destroy a tape?

23 A. No.

24 Q. For instance, due to the length of time that
25 has passed?

1 A. No.

2 Q. Okay. Who is -- what do you understand
3 Christie Baird's job description to be?

4 A. I don't. I can't give you -- I can't give
5 you an answer on that because I don't know what her job
6 is. I just never thought about it.

7 Q. Has -- have you ever seen the 1994
8 South Carolina Department of Archives and History
9 Retention Policy?

10 A. No.

11 Q. Have you ever heard that your department
12 keeps records until they're no longer needed for
13 reference?

14 A. Yes.

15 Q. What do you understand that phrase to mean?

16 A. I don't have no opinion on it. I just --
17 they keep it as long as they want. Until it was no
18 longer needed.

19 Q. Would a pending lawsuit mean that the records
20 were needed for reference?

21 A. I guess.

22 Q. Is there any procedure in place to implement
23 that policy no longer needed for records?

24 A. I don't know because I never destroyed any
25 records.

1 Q. Okay. Are there any paper files or documents
2 anywhere that might reflect who destroyed the 2001
3 hearing tapes?

4 A. No.

5 Q. Do you know how Mr. Eyans learned that David
6 Rose's parole board hearing tape was destroyed?

7 A. Mr. Evans here? I guess Dawn told him when
8 she asked -- when I told her.

9 Q. So Dawn asked you to listen to the tape?

10 A. Uh-huh.

11 Q. And you looked for it?

12 A. Uh-huh.

13 Q. And you told Dawn there are no tapes?

14 A. Correct.

15 Q. So what is your policy or procedure now for
16 maintaining records of the parole board hearings?

17 A. That's something that Christine Baird is
18 working on, but I still have -- I received set
19 guidelines.

20 Q. So as far as you know to date, there is no
21 set policy?

22 A. Huh-uh.

23 (APPELLANT'S EXHIBIT 5, Respondent's Answers
24 to Interrogatories, was marked for identification.)

25 BY MS. NELSON:

1 Q. Have you ever seen these interrogatory
2 responses?

3 A. No.

4 Q. Did anyone ask you to supply any responses
5 regarding these interrogatories?

6 A. No. You mean like -- can you clarify that
7 for me?

8 Q. Well, let's just walk through it.

9 A. Okay.

10 Q. Okay. So what else is kept as far as you
11 know besides an audio tape of the parole board
12 hearings?

13 A. The case file.

14 Q. The case file. So in my experience when I've
15 been to a parole board hearing, there is an employee at
16 the prison --

17 A. Uh-huh.

18 Q. -- who comes out and tells the inmate, "Yes,
19 you are granted parole," and "No, you weren't."

20 A. Uh-huh.

21 Q. If that person takes notes on whether they
22 were granted or whether they weren't, who keeps those
23 notes?

24 A. No one keeps those notes because what that
25 parole examiner is writing down, that's what we're

1 writing down on that roster sheet.

2 Q. So the only written record is your records?

3 A. Yes.

4 Q. And do you give your records to Christie
5 Baird?

6 A. No. We do the -- yes, it is. The case
7 summary do go back to the board, and it's written on
8 the case summary. Yes.

9 Q. Okay. And that's what happens now?

10 A. Uh-huh.

11 Q. But do you have any idea what happened in
12 2001? Like did anyone write down ...

13 A. I couldn't tell you because I would -- I
14 wasn't -- I wasn't part of their inside staff in the
15 room.

16 Q. Were you ever asked to look for any documents
17 regarding the votes received for David Rose's 2001
18 hearing?

19 A. Only according to this email from Dawn.
20 That's the only time that I could remember.

21 Q. Okay. Do you know anything else about his
22 2001 hearing?

23 A. No.

24 Q. Did you participate in the February 2015
25 investigation regarding David Rose's hearing?

1 A. What do you mean? For his hearing or ...

2 Q. An investigation at PPP regarding David
3 Rose's 2001 hearing.

4 A. No.

5 Q. It was in February of 2015.

6 A. Huh-uh. I wasn't aware of anything like
7 that.

8 Q. This response -- this is a response from PPP,
9 it says, "The audio tape was pulled out and the
10 cassette thrown away."

11 Do you know who would have pulled out a
12 cassette and thrown it away?

13 A. No.

14 Q. Do you believe that is an accurate statement
15 that hearings were not recorded until 2002?

16 A. No.

17 Q. As far as you know, they were recorded
18 starting in 1988?

19 A. I don't know when they was started. They was
20 kept when I started working there in 1988.

21 Q. Okay. Another response, response 7, this
22 response says -- I'm sorry, not 2002. It says the
23 tapes were kept from 1994 to present. Do you think
24 that's an accurate statement?

25 A. I don't know.

1 Q. But you remember tapes being kept ever since
2 you started?

3 A. Uh-huh.

4 Q. Which was 1988?

5 A. Yes.

6 Q. Okay. And does anyone inform you of inmates
7 who have pending cases concerning parole board
8 decisions?

9 A. No. The only time I get a response from Dawn
10 is when she want me to pull one, then she'll say
11 there's a pending case.

12 Q. Does anyone keep track of when a pending case
13 is closed?

14 A. I guess legals would.

15 Q. Legal. Have you ever had gotten an email
16 from legal asking you to keep a case or a cassette for
17 six years after a case is closed?

18 A. No.

19 Q. And when you say legal, do you mostly
20 interact with Dawn?

21 A. Or Matt Buchanan or Tommy Evans. I interact
22 with all of them.

23 Q. Are you aware of any other inmates besides
24 David Rose who would challenge the parole board
25 decision on the basis that he received enough votes to

1 be eligible for parole?

2 A. Yes.

3 Q. And do you remember any of those inmates'
4 names?

5 A. There was --

6 Q. We have the email.

7 A. Okay.

8 Q. But you remember -- I'd like to estimate.
9 About how many?

10 A. I think there were seven or eight.

11 Q. Seven or eight.

12 And did anyone ask you to maintain the
13 documents for those inmates for the next six years?

14 A. No. But we still have them. No one told me
15 to destroy them, so we still have them.

16 Can I say something?

17 Q. Yes.

18 A. Since I start -- just jump in and start
19 keeping the tapes in 2009, I have not destroyed any
20 cassette tapes. There's been no destruction of any
21 cassette tapes.

22 Q. Do you think that it's the department's
23 responsibility to keep track of an inmate's parole
24 hearing recording?

25 A. Repeat that.

1 Q. Do you think it's the department's
2 responsibility to keep an inmate's parole hearing
3 recording?

4 A. Yes, but you can't keep it indefinitely.

5 Q. As long as it's relevant.

6 A. (Nods head.)

7 (APPELLANT'S EXHIBIT 6, Emails Dated August
8 31, 2015, was marked for identification.)

9 BY MS. NELSON:

10 Q. Do you recognize this email?

11 A. Yes.

12 Q. Are these the cases that you know about where
13 an inmate has requested that they be released on the
14 basis of the Barton decision?

15 A. Yes. And I listened to all these tapes.

16 Q. And so you -- did you have tapes in all of
17 these cases?

18 A. Yes.

19 Q. Was the vote recorded on all of those tapes?

20 A. Yes. They were verbally stated by the board
21 members.

22 Q. Okay. Whether to grant or deny?

23 A. Yes.

24 Q. But was the individual vote count recorded on
25 all of those tapes?

1 A. They took that as an individual vote count.
2 At that time they count them as verbal votes. The vote
3 count was verbal. It wasn't written. It was said.

4 Q. Every single vote was verbally stated?

5 A. Yes. On those hearings by the board members.

6 Q. And you personally listened to them?

7 A. Yes. And I could hear each board member

8 state how they voted. You want me to give you an
9 example?

10 Q. Sure.

11 A. It would be like Mr. Williams would say --
12 Mr. Williams would say, "Williams rejected." Like my
13 name, I say, "Hicks parole." Then the chairman would
14 say whatever the number was, if it equals.

15 Q. So it's your understanding that that was the
16 process in 2001?

17 A. No. That was not the process in 2001.

18 Q. What is your understanding of the process in
19 2001?

20 A. My understanding, the process in 2001, the
21 board didn't -- they didn't vote. They didn't verbally
22 vote on it, they went by the lights.

23 Q. They went by the lights?

24 A. Uh-huh.

25 Q. And so in these cases --

1 A. Uh-huh. These cases was not heard in 2001.
2 These cases was someplace longer than 2004, '3,
3 someplace along up in there.

4 Q. Even Gene Richardson's case?

5 A. Gene Richardson case, I didn't have a
6 cassette on this one.

7 Q. What did you do with that one?

8 A. I didn't listen to that one because I didn't
9 have a cassette on that one.

10 Q. So you just told Dawn Nichols, "There's no
11 tape"?

12 A. I told her we didn't have one on that one.

13 Q. Okay. So is it your understanding that the
14 department made the decision that those inmates
15 received the correct number of votes?

16 A. Yes.

17 Q. For those seven inmates?

18 A. Yes. Well, they made the -- I'll confirm to
19 Dawn how many votes that they made, and then that -- it
20 was -- that information was given to the board.

21 Q. Who decided what conditions they would have?

22 A. Correct.

23 Q. Okay.

24 A. All that information -- we just confirmed
25 that they had the vote, and then we gave it to the

1 board and told the board -- this current sitting
2 board -- we told this current sitting board that they
3 had the vote count. And we showed them, the board
4 members at that time who voted for what and how they
5 voted. And we gave them a copy of the particular case
6 that the inmate said that had the vote count, we was
7 able to get them a copy of that original case summary
8 and give them the current case summary and give them
9 the board name and how the board voted, who was sitting
10 on that board at that time. We gave that to the
11 current sitting board, and they rendered decision to
12 grant or deny parole. And then they did the
13 conditions.

14 Q. Okay. And but in the case of Gene
15 Richardson, that was -- the process was a little
16 different?

17 A. Yes.

18 Q. Because there was no tape?

19 A. Yes.

20 MS. NELSON: Okay.

21 (APPELLANT'S EXHIBIT 7, Affidavit, was marked
22 for identification.)

23 BY MR. DAYHUFF:

24 Q. Do you recognize that document?

25 A. Uh-huh.

1 Q. Do you remember signing that document?

2 A. Uh-huh.

3 Q. Did you write that document?

4 A. I did not write that document.

5 Q. Who wrote it?

6 A. Dawn Nichols.

7 Q. Do you see the second statement there, "I
8 have personal knowledge of the procedures and laws that
9 apply to the scheduling in consideration of parole"?

10 A. Uh-huh.

11 Q. What do you think that statement means?

12 A. I don't know because I didn't read it.

13 Q. You were just asked to sign it?

14 A. Uh-huh.

15 Q. Do you have personal knowledge of the
16 procedures and laws that are applied to consideration
17 of parole?

18 A. No.

19 Q. Are you aware of any statutes regarding
20 retention of records by the parole board?

21 A. No.

22 Q. Are you aware of any A.G.'s opinions
23 regarding retention of records?

24 A. No.

25 Q. Does the department, to your knowledge, keep

1 a complete record of all parole board proceedings?

2 A. I think they do.

3 Q. When you say, "According to our records,
4 Mr. Rose had a parole consideration and was rejected
5 for parole," what records are you referring to there?

6 A. I'm not referring to anything. I just -- I
7 just signed it.

8 Q. Okay. And I know you were just asked to sign
9 this, but do you think it's an accurate statement that
10 according to your records he was rejected for parole?

11 A. Yes.

12 Q. Based on what records?

13 A. What's in our computer.

14 Q. On the computer record?

15 A. Yeah.

16 Q. Which says "reject"?

17 A. Correct.

18 Q. Okay. Doesn't say the number of votes?

19 A. No.

20 Q. What about the statement "Parole
21 considerations were not recorded prior to 2002"?

22 A. I don't know what that is.

23 Q. Do you think that's an accurate statement?

24 A. I don't think so.

25 Q. Did Dawn Nichols draft this affidavit?

1 A. Yes.

2 MS. NELSON: I'm going to take a brief break
3 if that's okay with you.

4 THE WITNESS: That's fine.

5 (A recess transpired.)

6 BY MS. NELSON:

7 Q. What is Dawn Nichols' title? Is she an
8 attorney?

9 A. She is -- you'll have to confer with
10 Mr. Evans. I know she's the our legal person. Not
11 legal person, but she works in legal. I think that she
12 was the secretary for legals.

13 Q. Secretary?

14 A. Uh-huh.

15 Q. Administrative assistant?

16 A. I think she's the executive assistant.
17 Whatever the title is on this sheet. She's the
18 executive administrative assistant for legals.

19 Q. Okay. So she sent you this email. Did she
20 give you an opportunity to revise the affidavit?

21 A. No.

22 Q. Did she ask you for input on the affidavit?

23 A. No.

24 Q. I just want to clarify the timeline. So
25 from -- as far as you know, from 1988 to 2001, PPP had

1 tapes and written rosters?

2 A. Uh-huh.

3 Q. And the written rosters had no vote count?

4 A. Written rosters had no vote count. It just
5 had that the person was rejected at parole. If there
6 was parole, it would have the conditions. What the
7 conditions were. If they was rejected, it would have
8 the reason for reject. Then we also attach to that a
9 roster if the board covered any administrative issues
10 at that time. And then also would have the hearing
11 date and the board members who was actually present and
12 any other administrative issues that happen on that
13 day.

14 Q. Okay. And that was all on one -- in one
15 document?

16 A. Well, the roster itself would be a roster of
17 all the names and then whoever was inside the room
18 would have written that information down and then just
19 typed it and put it -- and attached to the roster and
20 put it in a file.

21 Q. Do you know who would have been inside the
22 room in 2001?

23 A. I can't remember who was in that room at that
24 time.

25 Q. So from 2002 to 2006, you still have tapes?

1 A. Yes.

2 Q. And rosters?

3 A. Yes.

4 Q. With everything you just mentioned on it?

5 A. Yes. You have to have that roster because if
6 you don't have that roster, you couldn't find the
7 recording you're looking for.

8 Q. Is there a vote count from 2002 to 2006?

9 A. No. It's not a handwritten vote count, but
10 it might be a verbal vote count on the tapes. I just
11 don't know when the board started doing verbal. But in
12 2001, they was using the light system because the Chair
13 would look at the lights. If it didn't have the votes,
14 they would just say, "So and so is rejected, 1, 2 and
15 3."

16 Q. Okay.

17 A. Or if they had the votes, they'll say, "So
18 and so is conditionally paroled," and give out the
19 conditions. But I can't tell you from 2001 to 2006, I
20 can't tell you when they started doing verbal votes.

21 Q. Okay. And in 2007 you switched over to
22 electronic recording?

23 A. The end of 2007.

24 Q. Okay.

25 A. We didn't really -- we didn't really go live

1 with electronic recording until January of 2008.

2 Q. And do you still have the roster?

3 A. For those?

4 Q. Uh-huh.

5 A. For the roster for January? No. Because all
6 of it is on a computer.

7 Q. So no more roster as of end of 2007?

8 A. Yes.

9 Q. And then when did you start recording votes?

10 A. We started recording votes September 2013.

11 MS. NELSON: Okay. That's all the questions
12 I have right now. But I bet your attorney will have
13 some for you.

14 EXAMINATION

15 BY MR. EVANS:

16 Q. Okay. Mr. Hicks, you are aware of the
17 David Rose case, are you not?

18 A. Yes.

19 Q. You're aware he's currently serving a life
20 sentence for kidnapping?

21 A. Yes.

22 Q. And you're also aware that he was paroled in
23 the '80s, right?

24 A. Yes.

25 Q. And that parole was revoked in 2000?

1 A. Yes.

2 Q. And according to parole board policy, you are
3 allowed a hearing one year after you have been revoked?

4 A. Yes.

5 Q. Now, you was working for the department in
6 2000 and 2001, correct?

7 A. Yes.

8 Q. Even though you were not present at this
9 particular hearing?

10 A. Correct.

11 Q. But you do have knowledge of that board at
12 that particular time, correct?

13 A. Yes.

14 MS. NELSON: Object to the form.

15 BY MR. EVANS:

16 Q. Do you think that it was easier to obtain
17 parole now or then?

18 A. It's easier to obtain parole now but not
19 then.

20 Q. Why do you say that?

21 A. Because it was highly unusual for the board
22 to parole someone who they just revoked one year after
23 coming back up.

24 Q. You worked in the department for 27 years?

25 A. Yes.

1 Q. Have you ever seen anybody that was given
2 parole, especially a violent offense, after being
3 revoked -- one year after being revoked?

4 MS. NELSON: Object to the form.

5 THE WITNESS: No.

6 BY MR. EVANS:

7 Q. Okay. Now -- okay. Barton hearings, you are
8 aware of Barton hearings and how it's done?

9 A. Yes. Yes.

10 Q. Now, there are times when our paralegal,
11 Dawn, requests you to listen to tapes?

12 A. Yes.

13 Q. People request Barton hearings.

14 A. Uh-huh.

15 Q. When you listen to tapes, if there are four
16 votes, what do you do next?

17 A. I notify Dawn that there were four votes and
18 who the board members who voted for them.

19 Q. And then what happens after that, are you
20 aware?

21 A. Dawn let Tommy or Mr. Buchanan know that the
22 board had four votes and then we prepare the case. We
23 get the case -- prepare the case to present back to the
24 board -- for the current sitting board to review. We
25 gather the information. We get that particular summary

1 that they have to vote on, we get the current summary,
2 and we get the name of the board members who actually
3 vote on that case and all that information presented
4 back to the board on a full day.

5 Q. Okay.

6 A. And that information is given to each board
7 member two weeks prior.

8 Q. Okay. Are there any times when affidavits
9 are written by former board members saying, "I voted
10 for this person to receive parole," have you ever seen
11 that?

12 A. I have never seen any.

13 Q. Are you aware of any that have been done --

14 A. No.

15 Q. -- and presented to the board?

16 A. No.

17 Q. Okay. Now, you said earlier at that time the
18 board never announced the votes, correct?

19 A. Correct.

20 Q. In 2001?

21 A. Correct.

22 Q. Okay. So there would be no recording of the
23 actual vote count in 2001?

24 A. No, it wouldn't be.

25 Q. So even if the tape was found and you

1 listened to it, it wouldn't say what the vote would be?

2 A. Right. Even if the tape was found, it
3 wouldn't say -- it wouldn't say the vote count because
4 they didn't keep the vote count. It would probably
5 say, "David Rose rejected, 1, 2 and 3."

6 Q. And that would be the chairman that say that?

7 A. That would be the chairman.

8 Q. Okay. In your experience, have you ever seen
9 a person tell anyone what the final count was at a
10 hearing? Like the lawyer or a friend, anybody like
11 that?

12 A. No.

13 Q. Okay.

14 A. Because they're sitting at -- they're sitting
15 at the other end. They wouldn't see the vote count.
16 They wouldn't see the lights because the lights is only
17 seen by the Chair.

18 Q. At the time, the lights were only seen by the
19 Chair?

20 A. Yes.

21 Q. So --

22 A. At that time they only -- at that time the
23 board only used the lights.

24 Q. Okay. Are you aware of the affidavit signed
25 by Mr. Carlos Bell, who was a cousin of Mr. Rose --

1 A. No.

2 Q. -- in this hearing?

3 A. No.

4 Q. In this affidavit, Mr. Bell stated that
5 Mr. Neal informed him --

6 MS. NELSON: Object to the form.

7 BY MR. EVANS:

8 Q. In the affidavit, Mr. Bell stated that
9 Mr. Neal, his attorney, informed him that someone told
10 Mr. Neal that he received four votes. Are you aware of
11 that being possible for that to happen at a hearing?

12 A. No.

13 Q. Why not?

14 A. Because doing the sites, the employee who's
15 working on that has a list of inmates, that he doesn't
16 have time to do that because he got to coordinate the
17 next inmate into the room.

18 Q. Okay. All right.

19 A. And at that time the board would not have
20 even told -- on the site they would not have told them
21 the vote count because we didn't keep vote count. They
22 would have just said so and so is rejected, one, two
23 and three.

24 Q. In 2001 where were hearings held? Do you
25 remember?

1 A. We had at that time, we had, I think, five
2 sites or six sites. It start off we had, what,
3 Perry -- it was Perry, Broad River.

4 Q. So would the board go to these sites or
5 where?

6 A. We would go to the different sites, but the
7 board was in Columbia here in the central office.

8 Q. So the board was here, but all of you would
9 go to these different sites?

10 A. We would hear it by video conferencing like
11 we're doing now.

12 Q. Who was present with the board during these
13 hearings?

14 A. That would be Gwen Bright. She was in there.

15 Q. She was the only one present with the board?

16 A. And there would be a person who was doing the
17 written minutes. That was monitoring the recording.

18 Q. So the inmate would be at the prison?

19 A. The inmate would be at the prison.

20 Q. And all the support people would be at the
21 prison?

22 A. Just one support person would be at --

23 Q. I mean, lawyer, friends, all the people would
24 be at the prison?

25 A. Yeah. Yes.

1 Q. All right. Do you know when the video
2 conferencing started?

3 A. I want to say '97.

4 Q. Okay.

5 A. It was either '98, '97.

6 Q. Okay. Now, I remember a question being asked
7 who was responsible for keeping the recordings? That
8 the agency is responsible for that.

9 If Mr. Rose requested a recording of this
10 hearing, would he be given one if he paid the money?

11 A. Yes, he would.

12 Q. Are you aware if there is -- if Mr. Rose has
13 ever been given a copy of this hearing?

14 A. I have not no clue. I have no record that he
15 ever requested one.

16 Q. If he was requested a copy of this hearing,
17 who would be responsible for that copy?

18 MS. NELSON: Object to the form.

19 BY MR. EVANS:

20 Q. Would it be the agency or Mr. Rose?

21 A. Right. If at that time -- if he requested a
22 copy at that time, at that time it would have been sent
23 to him.

24 Q. I mean, but if he got a copy, who would be
25 responsible for that copy?

1 A. He would.

2 Q. Okay.

3 A. It would be sent -- it would be sent directly
4 to him. We would send it wherever he asked for it to
5 be sent. And at that time, I think the inmate asked
6 for it to be sent to them.

7 Q. Okay. And you have not destroyed any
8 recordings personally?

9 A. I have not.

10 Q. You never seen anybody destroy any
11 recordings?

12 A. I have not.

13 Q. Okay. Now, you said that there are
14 recordings that exist from 2002 to now?

15 A. Yes.

16 Q. And some of them are cassette tapes?

17 A. Yes. Recording from 2002 to 2007, that's the
18 cassette tape. Recording from January 2008 to present
19 is on the computer database.

20 Q. Have you ever had an opportunity to listen
21 some of the cassette tapes back in 2003, 2002?

22 A. I have.

23 Q. Some of them have distorted or not
24 including --

25 A. Some are distorted. Some cassette tapes are

1 popped.

2 Q. Okay. In all of the instances where the
3 legals asked you to provide a recording to them for a
4 particular case, has that happened in the past?

5 A. Uh-huh.

6 Q. And that was done in this case in which you
7 provided it to us?

8 A. Yes.

9 Q. Okay. All right. Now, I show you September
10 1, which is the actual flow chart of the agency. Could
11 you look at that chart and see where the parole board
12 is located?

13 A. Parole board?

14 Q. The board?

15 A. Itself. They're not on here.

16 Q. They're not on there. And could that be
17 because the board is separate from the agency?

18 A. Yes. The board is separate from the agency.

19 Q. So the director cannot order the board to
20 grant somebody parole?

21 A. No. He's mutual.

22 Q. Okay.

23 A. Only the board can order parole.

24 Q. Okay. In your 27 years with the agency, have
25 you ever seen an instance where a judge ordered the

1 board to grant somebody parole?

2 A. No. Because only -- from what I know, only
3 the statute -- only the board had the power to grant,
4 rescind, or to revoke parole.

5 Q. And actual preparole investigation file, the
6 paper records, they are kept with records. You do not
7 keep those?

8 A. No, I do not keep those. Those are kept with
9 records.

10 Q. Okay. Each time an inmate has a hearing, you
11 make a request to records and get that file and it's
12 brought back down to them?

13 A. Yes.

14 MR. EVANS: All right. Excuse for a second.

15 (Off the record.)

16 BY MR. EVANS:

17 Q. Do you remember being asked about the Gene
18 Richardson case? Do you remember that one?

19 A. Yes.

20 Q. Okay. Now, Mr. Richardson had a recording or
21 his attorney had a recording. Do you remember that?

22 A. Yes.

23 Q. We didn't have one, but his lawyer had one.

24 A. Yes.

25 Q. And he provided that copy to us.

1 A. Yes.

2 Q. Okay. And I think the big hangup on that one
3 was at the end of the hearing, the chairman said 4 to 2
4 but didn't say 4 yes or to 2 no?

5 MS. NELSON: Object to the form.

6 THE WITNESS: Correct. Yes.

7 BY MR. EVANS:

8 Q. And so but there were affidavits provided
9 from the board stating they had voted yes?

10 A. Yes.

11 Q. Was that provided to the current board?

12 A. Yes.

13 Q. Okay. And do you remember the actual audio
14 tape was provided also to the current board?

15 A. Yes.

16 Q. And upon this information, the board decided
17 to ...

18 A. Grant parole.

19 Q. Well, ratify the previous decision, correct?

20 A. Yes.

21 Q. But as far as you know, none of that was ever
22 provided to you regarding Mr. Rose?

23 A. No.

24 Q. There were no audio tapes provided to you?

25 A. No.

1 Q. There were no affidavits from the board
2 provided to you for Mr. Rose?

3 A. No.

4 Q. Okay. And you said earlier that you did no
5 investigation regarding Mr. Rose's case, right?

6 A. No.

7 Q. But you did look for the tape?

8 A. I did look for the tape, yes.

9 Q. So couldn't that be considered some type of
10 investigation?

11 A. Yes.

12 Q. Once you looked for the tape and couldn't
13 find it, you notified Ms. Nichols you couldn't find it?

14 A. Yes. Not only did I look for the tape, but I
15 looked for any handwritten copies. I looked for
16 everything I could.

17 Q. And you found nothing?

18 A. I found nothing.

19 Q. Okay. Did you see the affidavit from
20 Mr. Bell? It's not in there, but were you given a copy
21 of that showing that too? Do you remember seeing that?

22 A. An affidavit?

23 Q. Yes, from Mr. Bell. Carlos Bell.

24 A. I don't remember seeing Carlos Bell.

25 MR. EVANS: That's okay. If you don't

1 remember seeing it, sorry.

2 I think that's all I have at this time.

3 MS. NELSON: Just a couple of follow up.

4 REEXAMINATION

5 BY MS. NELSON:

6 Q. We heard you express opinions about what the
7 board might have done or might not have done in 2001.

8 Were you there for Mr. Rose's parole hearing?

9 A. I can't remember because I was in and out of
10 the room. I don't know how many cases we heard that
11 day, but there are some cases I was in there on and
12 some cases I wasn't. But I couldn't tell you I was --
13 I don't remember. I couldn't tell you I was physically
14 in the room at that time when that case was heard. But
15 I was in that room when other cases were heard, but I
16 can't tell you if his case was one of them.

17 Q. Was it your responsibility to record votes in
18 2001?

19 A. No.

20 Q. In your experience, are there times when an
21 inmate goes up for parole and you are very surprised
22 they are granted parole?

23 A. Yes.

24 Q. Are there times when an inmate goes up for
25 parole and you are very surprised they are not granted

1 parole?

2 A. Yes.

3 Q. So in your opinion, are the board's decisions
4 sometimes hard to predict?

5 A. They can't predict.

6 Q. They can't predict them?

7 A. Yes.

8 Q. So is there any way to predict what happened
9 at Mr. Rose's hearing in 2001 without a tape?

10 A. That is -- it's not hard to predict, but with
11 my experience working with the board, knowing them long
12 enough, it's very rare, if not ever, I've seen a case
13 make parole after being revoked one year coming up for
14 parole for the first -- excuse me. Coming up for
15 parole for the first time after being revoked for
16 misconduct, it's highly questionable that that person
17 would be granted parole.

18 Q. Were you there for Mr. Rose's parole hearing?

19 A. I can't remember if I was there in the room
20 or not.

21 Q. Whose burden is it to keep records of the
22 parole hearings?

23 A. All records, policies in the possession of
24 the director of Parole Board Support Services.

25 Q. Is it the board's responsibility to keep

1 records of parole board hearings?

2 A. No.

3 Q. It's the department's responsibility?

4 A. Yes.

5 MS. NELSON: No further questions. Thank
6 you.

7 MR. EVANS: Okay. I have a follow-up
8 question.

9 REEXAMINATION

10 BY MR. EVANS:

11 Q. Have you ever listened to any hearings of
12 Mr. Rose since this?

13 A. Yes, I have.

14 Q. How many -- do you remember how many votes he
15 had gotten?

16 A. None.

17 Q. None. And you said earlier that you never in
18 your 27 years with the agency seen a person granted
19 parole after being revoked one year later?

20 A. Correct.

21 Q. Okay. Do you think you would remember if
22 that happened since it's so rare?

23 A. I would.

24 Q. Okay.

25 A. Because that would be a -- I would remember

1 something like that.

2 MR. EVANS: Nothing further.

3 MS. NELSON: Okay. One final question.

4 REEXAMINATION

5 BY MS. NELSON:

6 Q. Were you there for Mr. Rose's 2001 parole
7 hearing?

8 MR. EVANS: That's asked and answered. She's
9 asked four times. But go ahead and answer.

10 THE WITNESS: I can't remember if I was in
11 the room for Mr. Rose's hearing because at that time
12 one inmate is just another inmate.

13 BY MS. NELSON:

14 Q. So do you know what happened in Mr. Rose's
15 parole hearing?

16 A. I couldn't answer that because I don't know
17 when his hearing occurred because at that time inmates
18 were just an inmate and a number. I did know about
19 Rose now -- until now.

20 Q. And there's no records?

21 A. None. I searched.

22 MS. NELSON: Thank you.

23 MR. DAYHUFF: Thank you, Roosevelt. We
24 appreciate your time.

25 (The deposition concluded at 3:42 p.m.)

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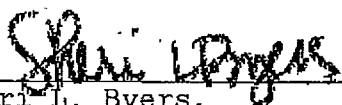
CERTIFICATE OF REPORTER

I, Sheri L. Byers, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify:

That the foregoing deposition was taken before me on the date and at the time and location stated on page 1 of this transcript; that the deponent was duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of the deponent and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing deposition as typed is a true, accurate and complete record of the testimony of the deponent and of all objections made at the time of the examination to the best of my ability.

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 9th day of October, 2015, at Columbia, Richland County, South Carolina.


Sheri L. Byers,
Registered Professional Reporter,
Notary Public
State of South Carolina at Large
My Commission expires:
October 30, 2023



1 STATE OF SOUTH CAROLINA
2 ADMINISTRATIVE LAW JUDGE DIVISION
3

4 DAVID LEE ROSE, #91858,
5 Petitioner(s),

6 vs. Case No: 15-ALJ-P-0033

7 SOUTH CAROLINA DEPARTMENT OF PROBATION,
8 PAROLE, AND PARDON SERVICES,
9 Respondent(s).

10

11 D E P O S I T I O N

12 WITNESS: LARRY J. PATTON

13 DATE: Monday, September 28, 2013

14 TIME: 9:13 a.m.

15 LOCATION: Nelson, Mullins, Riley & Scarborough
16 1320 Main Street, 17th Floor
Columbia, South Carolina

17 REPORTED BY: SHERI L. BYERS
18 Registered Professional Reporter

19 - - - - -

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The deponent reserves the right to read and
sign the deposition transcript.

- - - - -

LARRY J. PATTON, being first duly
sworn, testified as follows:

EXAMINATION

BY MR. DAYHUFF:

Q. All right. Mr. Patton, for the record, my
name is Travis Dayhuff. I represent David Rose.

We are here today to take your deposition in
a matter that is pending before the Administrative Law
Court. Do you understand that?

A. Yes.

Q. Good. This deposition is being taken
pursuant to the South Carolina Rules of Procedure, and
those rules require me to provide some instructions to
you before we begin.

But let me ask this, though, have you been
deposed before?

A. Not depositions.

Q. Okay. Well, good. These instructions,
sometimes I'll skip them if somebody says I've been
deposed ten times.

A. All right.

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4

1 Q. You may hear some objections to the form of
2 my questions today by Mr. Evans. If he wants to enter
3 an objection, you would pause your answer, allow him to
4 enter the objection and then you would answer after the
5 objection. Do you understand that?

6 A. All right.

7 Q. The only exception would be is if Mr. Evans
8 instructs you not to answer a question, then you
9 wouldn't answer. Do you understand that?

10 A. Yes.

11 Q. Good. If you don't understand my question,
12 the rules require that you ask me rather than your
13 attorney to clarify. And I will certainly ask
14 questions today that need clarification, so don't
15 hesitate to say, "I'm not sure I follow you. Could you
16 restate it," that type thing.

17 A. All right.

18 Q. Breaks. You're allowed to take breaks during
19 the deposition whenever you need one. You know, I
20 don't know that we're going to go really long today,
21 but if you want to take break, you can. The only rule
22 is you're not to discuss the substance of your
23 testimony with anyone during the breaks. Make sense?

24 A. Yes.

25 Q. Good. The only other thing is Sheri likes

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5

1 word answers rather than, like, nodding your head. So
2 it will get conversational, but we'll try to remind you
3 to say yes or no at times so she can record the
4 transcript.

5 A. Okay.

6 Q. All right. Outline of where we're going to
7 go today. I'm going to ask you some questions, just
8 background information about you, about what you do at
9 the agency. Ask you some about agency rules, process,
10 policies. Then I'm going to ask questions about the
11 David Rose matter.

12 A. Okay.

13 Q. That's the general flow.

14 A. Now, am I able to take notes and stuff like
15 that to keep my ...

16 Q. Sure, if you would like. You need a pen?

17 A. I have one.

18 Q. Okay.

19 A. I just want to be sure before I start writing
20 in the middle of things and told to stop.

21 Q. Sure. That's fine.

22 Preliminary question. What, if anything, did
23 you do to prepare for this deposition?

24 A. I looked a little bit over it. We discussed
25 it a little bit as far as with the legal counsel.

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6

1 Q. Okay. I don't want to know what you
2 discussed with legal counsel, but what documentation,
3 if any, did you review?

4 A. The summary, case summary.

5 Q. Okay. And the case summary, I guess, is the
6 summary that the board members see?

7 A. Board, yes. Yes.

8 Q. Anything else that you looked at other than
9 the case summary?

10 A. I glanced at the letter that he wrote,
11 but ...

12 Q. A letter that Mr. Rose wrote?

13 A. Yes, or his attorney or whomever it came
14 from.

15 Q. Okay. And I don't know which letter you're
16 talking about. Can you give me some more description
17 of that letter?

18 A. Just the whole idea that it hit his
19 background of why he feels like he -- basically his
20 appeal or --

21 Q. Okay.

22 A. -- whatever.

23 Q. Maybe his Notice of Appeal?

24 A. The Notice of Appeal that you wrote or
25 whomever.

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7

1 Q. So what is your understanding generally of
2 what his appeal is about, Mr. Rose?

3 A. Essentially he is -- he's appealing his vote
4 count based on the Thalma Barton ruling that I believe
5 his hearing was -- that he's actually appealing his 15
6 or so years ago, something of that sort. Around that
7 ballpark.

8 Q. He had a hearing in 2001, right?

9 A. Right.

10 Q. And he is claiming before the Administrative
11 Law Court that he received enough votes to be entitled
12 to parole from that hearing, right?

13 A. Right.

14 Q. Okay. And do you know how many votes he's
15 claiming he received?

16 A. Four.

17 Q. Four. All right.

18 Let's see, did you talk to anyone other than
19 your attorneys in preparation for this deposition?

20 A. Mr. Hicks.

21 Q. Roosevelt?

22 A. Yes.

23 Q. And what's Roosevelt's title?

24 A. He is a program manager or maybe program
25 coordinator. He's supervisor in the office. He's

1 right below me.

2 Q. All right.

3 A. Probably should know his technical title, but
4 I don't.

5 Q. We'll figure it out later today. Don't
6 worry.

7 What did you and Mr. Hicks discuss?

8 A. Just the same thing. Just kind of background
9 of what exactly was going on and things like that.

10 Q. All right. Background information about you.
11 What is your date of birth?

12 A. 9-22-84.

13 Q. And what formal education have you had after
14 high school?

15 A. Four-year bachelor's.

16 Q. What's your degree in?

17 A. Sociology and criminology.

18 Q. Where did you get that from?

19 A. Coker College.

20 Q. All right. And when did you get your B.A.?
21 What year did you graduate?

22 A. '06.

23 Q. All right. I understand you currently work
24 for the Department of Probation, Parole and Pardon
25 Services.

1 A. Yes.

2 Q. You guys have a shorthand version of your
3 agency name?

4 A. PPP.

5 Q. Yeah. We use PPP.

6 A. PPP, SDPPPS, Probation Parole.

7 Q. I like PPP. Do you mind if I use PPP?

8 A. Sounds good.

9 Q. We use DPPP at the office, but we'll change
10 that. It's not bad.

11 A. The abbreviation, sometimes you can get the
12 SCDPPP.

13 Q. PPP.

14 All right. What is your work address at PPP?

15 A. 2221 Devine Street.

16 Q. And your work phone number?

17 A. 803-734-9205.

18 Q. All right. And how long have you worked at
19 PPP?

20 A. About eight and a half years.

21 Q. Okay. Eight and a half years. Does that
22 mean you came out of college and went to ...

23 A. Graduated December, started January of '07.

24 Q. Okay. I know you're currently -- I think
25 you're currently the director of board support

1 services?

2 A. Correct.

3 Q. Is that right?

4 Did you begin after college as the director
5 of board support services?

6 A. No.

7 Q. Where did you start?

8 A. Rock Hill, York County. I was the sex
9 offender agent for five, five and a half years.

10 Q. Okay. So that's -- you're a probation agent
11 or --

12 A. Yes.

13 Q. Probation?

14 A. Probation, parole agent.

15 Q. So you're making sure people are following
16 their conditions of probation or parole? They report
17 to you?

18 A. At that time. Now, no, they don't report to
19 me.

20 Q. I understand, yeah.

21 A. Yes. Yes. Sorry.

22 Q. All right. And have you held any other
23 positions at the agency other than probation, parole
24 agent and director?

25 A. Program coordinator.

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1 Q. Okay. And what does a program coordinator
2 do?

3 A. For our department various things, but my
4 specific job, I was over conditional discharge,
5 administrative monitoring and compliance credits.
6 Certain field operation programs for the entire state.

7 Q. Okay. Program coordinator. All right. And
8 Mr. Hicks is currently a program coordinator?

9 A. Correct.

10 Q. Are there program coordinators -- I know
11 there are paroles, administration, field operations.
12 Are those the three main areas?

13 A. Yes.

14 Q. Okay. So were you the program coordinator
15 for field ops and pardons?

16 A. Field operations.

17 Q. Field ops.

18 A. Yes, sir.

19 Q. I got you. And Mr. Hicks is a program
20 coordinator for paroles and pardons?

21 A. Yes.

22 Q. Okay. And we found this on the Web site. I
23 don't know if this will be helpful to you, but I'm
24 going to keep it here if you need it.

25 A. That will work.

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12

1 Q. All right. So I may have asked this. How
2 long have you been the director of board support
3 services?

4 A. Two years or so, I think.

5 Q. Who preceded you in that role?

6 A. Cathy Cooper. Catherine Cooper.

7 Q. Is Catherine Cooper still with the agency?

8 A. She is.

9 Q. What's her role?

10 A. She is a team leader at the Richland County
11 office, so she's back in field ops now.

12 Q. Okay.

13 A. She's a supervisor in the field office.

14 Q. All right. I think you mentioned that
15 Mr. Hicks is, I guess, below you in the chain of
16 command?

17 A. Yes.

18 Q. Is that right?

19 A. Yes.

20 Q. So he reports to you?

21 A. Yes.

22 Q. Who do you report to?

23 A. The deputy director of legal services.
24 Sorry, paroles and pardons. Now changed to legal
25 services, the name.

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13

1 Q. I got you.
2 A. I'm sorry.
3 Q. That's all right.
4 A. The deputy director, Robert Mitchell.
5 Q. I see. Deputy director.
6 A. Yes.
7 Q. Robert Mitchell.
8 How long has Robert Mitchell been the deputy
9 director?
10 A. About three and a half, four years.
11 Something like that.
12 Q. And do you know who preceded him in that
13 position?
14 A. I cannot say exactly. There were a couple of
15 people in very short times that preceded him.
16 Q. Who were the couple people?
17 A. I think Pamela -- Pamela. Forgive me.
18 Q. That's all right.
19 A. I didn't deal with them often. I didn't deal
20 with them often, so ...
21 Q. Pamela somebody?
22 A. Magargle maybe.
23 Q. Magargle?
24 A. Magargle. She may not have been his exact --
25 the one right before him, but was --

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1 MR. EVANS: She was --

2 BY MR. DAYHUFF:

3 Q. She came over from LLR. I remember working
4 with her at LLR.

5 A. So she preceded him.

6 Q. Okay. All right. We mentioned Mr. Hicks.
7 Do you have any other staff that work for you as the
8 director?

9 A. Yes, sir.

10 Q. All right. Is that a lot of people, a few
11 people?

12 A. About 22 --

13 Q. Okay.

14 A. -- or so.

15 Q. Then I won't ask you to name those.

16 A. Okay.

17 Q. Tell me what are your duties as the director
18 of board support services. Outline those for me.

19 A. Essentially I just ensure that the -- my
20 staff compiles accurate and proper information to
21 compile the summaries that go to the parole board.
22 They -- from various sections -- or various areas, they
23 go in the prison and interview the inmates or they're
24 up here in Columbia and they're doing kind of the
25 behind-the-scene stuff.

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1 We also ensure that whatever information the
2 board feels that they need in order to make an informed
3 decision, that we do our best to get that. We run the
4 hearings as far as calling the cases and things of that
5 sort.

6 Q. All right.

7 A. That's the --

8 Q. Main thing?

9 A. Very broad strokes.

10 Q. Okay. All right. I noticed on the org
11 chart, and it's under deputy director of
12 administration, there's a records management person.

13 A. Right.

14 Q. Does that records management person who works
15 underneath the department or the director of
16 administration, does that person have any role with you
17 over in paroles and pardons or not?

18 A. Yeah. In the sense that that's where our
19 files are kept due to parole hearings coming up either
20 yearly or biyearly. We don't keep them down in our
21 offices so once the hearings are finished, we send them
22 to records. If they are not granted parole, and then
23 we retrieve them again. So as far as dabbling in the
24 files, no, but as far as keeping them, yes.

25 Q. Okay. And who is the record management --

1 records management person?

2 A. The supervisor is Christie Baird. I think
3 there's about three or four other people that works up
4 there.

5 Q. All right. Is there someone in charge of
6 documentation and records or that has a role with
7 documentation and records underneath the paroles and
8 pardons side of things?

9 A. A liaison between the records and us?

10 Q. Yeah.

11 A. No. Our staff pretty much does all the
12 documentation. We put it in -- to my knowledge. They
13 may have somebody up there. I don't know. But to my
14 knowledge, we do our documentation, put it in the file
15 and house the files up there.

16 Q. Okay. All right. Are you familiar with the
17 notion that agency -- state agencies are creatures of
18 statute? Have you ever heard that?

19 A. Uh-huh. Yes.

20 Q. What does that mean?

21 A. Pretty much we're dictated by what the law
22 says we can and can't do.

23 Q. All right. The agency's power and authority
24 comes from statutes, regulations, and other legal
25 authorities, right?

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17

1 A. Correct.

2 Q. What are the laws and regulations and
3 policies that provide the rules for PPP?

4 A. What are the laws?

5 Q. If you had, like, sets of rules that you
6 think about, okay, we're an agency, these are our rules
7 of the road.

8 A. All right.

9 Q. What kind of governs what you guys do? You
10 got a statute, right?

11 A. Right.

12 Q. You've got a statute that deals with
13 probation, parole, and pardon?

14 A. Right.

15 Q. You know, state statute. You guys have
16 regulations?

17 A. Policies, yes.

18 Q. Okay.

19 A. Policies and procedures.

20 Q. How about regulations that are promulgated by
21 the legislature?

22 A. I'm not aware of any --

23 Q. Okay. That's fine.

24 A. -- specific page that -- most of our policies
25 and procedures are pretty much our regulations as well.

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18

1 Q. Okay. All right. Let's talk about policies
2 and procedures. What are your policies and procedures
3 that provide the agency's rules?

4 A. A whole lot.

5 Q. I know there are a lot. Where are they? Are
6 they called something?

7 A. Policies.

8 Q. Okay. I've seen your State Operations
9 Manual.

10 A. Uh-huh.

11 Q. Is that where all the policies and procedures
12 reside?

13 A. To be honest, I believe so, but I know
14 they're online on your intranet. So that's where I go
15 to get them.

16 Q. Okay. And I'm just trying to figure out if
17 there's another -- I mean, it's a big set --

18 A. Right.

19 Q. -- of policies. And I've got it here.

20 A. I believe that's where --

21 Q. Where your policies come from? Sometimes
22 there are other sources of policies maybe, but you're
23 really not aware of anything outside of the state
24 operations manual.

25 A. Right. That should pretty well dictate what

1 takes place.

2 Q. Fair enough. And the agency does its best to
3 comply with the laws and regulations and the policies
4 that apply to it?

5 A. Correct.

6 Q. And the agency should not take actions or
7 make decisions that are contrary to the laws, the
8 regulations, or the policies that apply to the agency?

9 A. Right.

10 Q. I want to talk about parole hearings
11 generally and currently. We're going to talk about
12 what happens now and then I want to see if what happens
13 now used to happen back in 2001 to the extent you know.
14 Okay?

15 A. All right.

16 Q. Just some general questions, though. How
17 often does the parole board meet to hear cases?

18 A. Weekly.

19 Q. Weekly. Once a week?

20 A. On average.

21 Q. Okay.

22 A. Occasionally there will be two a week, but
23 that's far, few between.

24 Q. And the parole board today consists of seven
25 members?

1 A. Right.

2 Q. Do you meet the same time every week or does
3 it vary?

4 A. Yes, same time.

5 Q. And that is on what day?

6 A. Wednesdays 9:00 a.m. is the hearing start
7 time.

8 Q. All right. How long do the hearings go?

9 A. It's according -- it varies by the type of
10 hearings. The amount of attorneys, the number of
11 opposition. We've been there till 7:00. We've gotten
12 out as early as 12, 1:00. So it truly does vary.

13 Q. Okay. All right. Are you all meeting at all
14 with the panels or is it full board all the time?

15 A. It's every other week is panels.

16 Q. Okay. All right. What cases require full
17 board?

18 A. Statutorily mandated violent offenders.

19 Q. Okay. So nonviolent offenders can be heard
20 by a panel?

21 A. Both. They can be heard by either.
22 Nonviolent can be heard by either. Violent must be
23 heard by full board.

24 Q. All right. So if we've got a nonviolent
25 offender, you've got a panel week, they can be heard

1 by -- how many sit on the panel?

2 A. Three.

3 Q. Three. And if the panel, two out of three
4 votes to parole, is it over, or do they have to go to
5 the full?

6 A. If it's not unanimous one way or the other,
7 then it goes to the full board.

8 Q. And if a nonviolent offender gets two out of
9 three votes, it goes to the full board. Is that a
10 revote?

11 A. Yes. It's a completely new hearing. There
12 will be new notifications sent out. Everything is
13 started over from scratch. Start over from scratch as
14 far as your scheduling, not our investigative aspect.

15 Q. Okay. All right. Victims come back in?

16 A. Yeah. They get notified again.

17 Q. I got you. All right.

18 And the parole board meets at your Devine
19 Street office; is that right?

20 A. Yes.

21 Q. We talked about how long it goes. I guess
22 the number of cases vary?

23 A. We schedule roughly 65, but due to waivers
24 and things like that, it could vary lower but not
25 usually higher.

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1 Q. What's a waiver?

2 A. An inmate just says, "No, I don't want to
3 have my hearing. I don't care."

4 Q. Okay.

5 A. And so they basically reject their own parole
6 for all intents and purposes. And that can take place
7 at any stage.

8 Q. All right. Let's talk about I guess the
9 hearing itself. I've been to a lot of them so I kind
10 of know what's going on. What kind of staffing do you
11 have currently at a hearing from your agency? I know
12 there's at least one, maybe two people that I see.

13 A. From my agency or from my staff?

14 Q. Well, let's start with your staff, then we'll
15 go ...

16 A. There are typically going to be three people
17 in the hearing room, one security, and two actually
18 working the hearings.

19 Q. Okay. So you have a security officer --

20 A. Right.

21 Q. -- that's there?

22 A. Right.

23 Q. Maybe I just never noticed that. Are they in
24 uniform?

25 A. They are.

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1 Q. Okay.

2 A. It's a relatively newer practice.

3 Q. Okay. All right. Fair enough.

4 All right. So they're obviously there to
5 make sure things don't get out of hand. And they're
6 acting, I guess, in conjunction with the SCDC officers
7 that are there?

8 A. They are actually here at the Devine Street
9 site more so just for victims kind of getting very
10 emotional and things like that. So it's, I guess, less
11 security and more presence --

12 Q. Okay. I see.

13 A. -- than anything.

14 Q. No wonder I've never seen them. Matt's never
15 invited me to Devine. I always have to go into prison.

16 A. Yes, that's typically how it is.

17 Q. So the two people -- the two other people
18 that you mention, are they at the prison or are they at
19 Devine Street?

20 A. I have one person at every prison.

21 Q. Okay.

22 A. So I guess there would be four staff included
23 in one hearing taking place. There's going to be one
24 examiner at the prison site, at least one. Sometimes
25 there may be two or something, but at least one at the

1 hearing site. Then there's a -- including the security
2 staff, three people in the hearing room where the board
3 is.

4 Q. Okay. All right. So we have at the prison,
5 then, we have one examiner, maybe two?

6 A. Correct.

7 Q. All right. What are those folks doing? What
8 is their job?

9 A. They are coordinating the inmates with SCDC,
10 making sure that the right inmates are up there.
11 Letting us know here in Columbia when everyone's up,
12 everybody's with attorneys, family member, whomever is
13 going to be there. Basically when they are ready for
14 the hearing on their end to start, they are informing
15 us. And then we'll -- my staff in Columbia, we'll call
16 in case number 1. The examiner will go to the hall,
17 get case number 1. And then they will relay the
18 message. After the hearing, they remove them from the
19 room and they receive the decision from the board and
20 they will call the next case and relay the information
21 to the last case.

22 Q. Okay. And I think I noticed that the last
23 time. I don't know if this has always happened for me.
24 We had our hearing, we left. There was either
25 deliberation or victim opposition or both. And then it

1 sounded like they started a new hearing, and then we
2 got told the result. Is that the process that's going
3 on now?

4 A. Yes. Yes.

5 Q. Okay. And that hasn't been going on for a
6 long time, or has it?

7 A. To my knowledge, it's been done that way for
8 some time.

9 Q. Okay. All right. So focusing on the
10 examiner, who is at the prison, I've seen him with
11 clipboards, you know, taking down information of some
12 sort, maybe keeping a schedule. What kind of
13 documentation do those examiners have for a parole
14 hearing?

15 A. Sometimes inmates will give them information,
16 perhaps, so they'll keep that. Stuff like
17 certificates, things of that sort that may be completed
18 last week. So they do that. But it's typically the
19 hearing roster for their site. So they're keeping up
20 with who's going, the case number and all that good
21 stuff.

22 Q. All right. So they're keeping up with the
23 roster. Does the roster have any -- any columns for
24 information that they insert as they're processing
25 these people through?

1 A. Yes. They --

2 Q. What kind of things are on there?

3 A. The case number, the name. I believe maybe
4 DOB.

5 Q. That's date of birth, I assume?

6 A. I'm sorry, date of birth or case number.
7 Maybe their SCDC number. But the information for us to
8 know who the inmate is. And then the decision column,
9 I believe, parole, no parole. And then I think they
10 have a little spot they can write what the reasons are
11 and conditions. If they're granted parole, the
12 conditions. If they're rejected, then reasons.

13 Q. All right. Parole, no parole, the reasons if
14 they're granted; if they're not grant parole, there's
15 reasons; correct?

16 A. Correct.

17 Q. And then conditions if they've been granted
18 parole. And there are conditions, right?

19 A. Yes.

20 Q. Okay. And the parole board, if they decide
21 to grant somebody parole, do they do the conditions
22 right after that decision to grant parole?

23 A. Yes.

24 Q. Okay. All right. Any -- any documentation
25 regarding the number of votes for or against?

1 A. No.

2 Q. Okay. Why not?

3 A. Typically, unless there's a voice vote, the
4 examiner wouldn't know.

5 Q. Okay.

6 A. There's no information -- it's via
7 teleconference, so there's no information relayed from
8 the Columbia hearing through teleconference to the
9 examiner --

10 Q. Okay.

11 A. -- out at the prison.

12 Q. I assumed the examiner was kind of sitting
13 there observing deliberations. Maybe not?

14 A. They are, but due to the setup of the room
15 and for operational purposes, there's -- we don't
16 have -- they say this unless it's a voice vote, the
17 board members aren't going to stand up and say parole,
18 parole, they're not going to do that. It's just if
19 it's unanimous, it's unanimous one way or the other.
20 Or it's a voice vote and that's when ...

21 Q. Help me understand when you have a voice vote
22 and when you don't have a voice vote.

23 A. If it's not unanimous. If it's not unanimous
24 one way or the other, it's voice vote.

25 Q. And how does the parole board know whether

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1 it's unanimous or not to then call a voice vote?

2 A. The chairman has a -- it's a box, an
3 electronic box. The other board members have an
4 electronic switch. I don't know technical terms, but
5 there's a switch that they vote one way or the other,
6 and it lights up. And the chairman then knows, that
7 that's how he or she knows that it's either a grant or
8 not grant and if there needs to be voice votes.

9 Q. I got you. So there's this box in front of
10 the chairman, who at this time is Mr. Baxter, correct?

11 A. Correct.

12 Q. So he's got seven lights in front of him or
13 14 lights in front of him maybe?

14 A. 14 green and red.

15 Q. Green and red. So each member of the parole
16 board that's voting, I guess you could abstain. Does
17 anybody ever abstain?

18 A. You can abstain. You can recuse yourself.
19 For a full board, sometimes someone is sick, we just
20 have to have five board members, so there's at least
21 five board members for a full board hearing.

22 Q. So five is your quorum?

23 A. Yes.

24 Q. I got you. So they press their buttons. He
25 sees the lights. If it's unanimous, grant parole. I.

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“ “ “

- 1 guess then he announces that?
- 2 A. Right.
- 3 Q. Can the other guys see the lights or not?
- 4 A. There's a box at the end of the table as
- 5 well.
- 6 Q. Okay. So they see the lights, too?
- 7 A. Right.
- 8 Q. So if it's unanimous for parole, it's
- 9 conditions time, right?
- 10 A. Correct.
- 11 Q. If it's not unanimous, that's when there's a
- 12 voice vote?
- 13 A. That's when it's a voice vote.
- 14 Q. Even if it's 1 to 6?
- 15 A. 1 to 6, doesn't matter.
- 16 Q. So then the voice vote happens. The chairman
- 17 calls the voice vote?
- 18 A. Yes. Typically along the lines of "Voice
- 19 vote, please."
- 20 Q. "Voice vote, please."
- 21 Then they go around. Do they say their names
- 22 and then their vote?
- 23 A. Yes.
- 24 Q. So "Walto, parole."
- 25 A. Reject, yeah.

1 Q. Or reject. Accept or reject, is that what
2 they do?

3 A. Parole or deny and reject. Some say deny,
4 some say reject.

5 Q. Okay. All right. So then back to our
6 examiner. From that information, does the chair at the
7 end of the -- let's say there was a voice vote, does
8 the chair announce the result after the voice vote?

9 A. Yes.

10 Q. Okay. So the examiner who's at the prison
11 would then write "parole" or "no parole"?

12 A. Right.

13 Q. I got you. The people that are in the room,
14 not the security person, back at Devine Street.

15 A. Okay.

16 Q. Sorry. You got the seven board members in
17 the room assuming it's a full board day?

18 A. Right.

19 Q. You got the security person who's keeping
20 track of mostly victim witnesses.

21 A. Correct.

22 Q. The victim witnesses, are they in the hearing
23 room with the parole board?

24 A. Only for their testimony and then they're
25 removed again.

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1 Q. So there's some sort of waiting area for
2 them?

3 A. Right. Right.

4 Q. Okay. The two of your staff people that are
5 in the Devine Street office, what are they doing?

6 A. One of them is entering information into our
7 PIC system, our Parole Information System. Which is
8 the department's information system. And they are also
9 toggling with the SCDC system because they're needing
10 to enter. So SCDC can see the records if this person
11 has been granted parole or not. They are doing that.
12 They're also monitoring to make sure that recording is
13 working. That's what one of them is doing.

14 And the other one is keeping track of the
15 case that was just called, the decision for that case.
16 As well as getting the next case ready. And toggling
17 between sites with the TV.

18 Q. I got you. Okay. So one staff person is
19 entering in the system -- information into your system,
20 the PIC system?

21 A. Yes.

22 Q. What does the PIC stand for?

23 A. Parole Information Center.

24 Q. Parole Information Center.

25 They're also entering information into SCDC

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**Transcript of the June 20, 2001 Parole Hearing
of David Lee Rose #091858**

**Transcribed by Nelson Mullins
Document Services**

I am Juanita Epps. I'm employed with the South Carolina Department of Probation, Parole and Pardon Services. Original tape has been duplicated following my certification as in the custody of the Director of Parole Board Support Services. The hearing for David L. Rose, held on June 20th, 2001 is recorded on Tape 2B Section 51 through Section 108. This hearing was for the consideration of parole for David L. Rose, SCDC # 91858. This hearing was held before Board Members Orton Bellamy, Marlene McLain, J. P. Hodges, Sanco Rembert, June Shissias and John McCarroll. The duplication of the hearing on David L. Rose begins now.

Next case is no. 48 - David E. Rose. Represented by Attorney Alvin Neal.

Neal: Yes sir, this one on the far right and ma'am you can sit right beside. Sir if you'll sit in this chair. How about we let his cousin sit by him? Sure. Sure. Whatever you want. Because I want you to sit right here. That's fine. I want you to sit right there. Yeah, that will be good. Thank you.

Mr. Bellamy: Good morning, Mr. Rose.

Mr. Rose: Good morning.

Mr. Bellamy: Good morning, Mr. Rose. We know your attorney, Attorney Neal. Who else do you have with you Mr. Rose?

Mr. Rose: I have my sister and my cousin Carlos.

Male: I would like to hear from your attorney, Attorney Neal you may proceed, sir.

Mr. Neal: Thank you so much, and as we sat outside and, first of all David appreciates the opportunity to appear before you again. You all know why we are here--it's the fact that 23 years ago, as a matter of fact a little bit over 23 years ago, a whole

series of events that could have been much much more tragic than they actually ended up being. That was with the kidnapping charge, the 10 years that ensued where David spent 10 years in the Department of Corrections. Fortunately for David the Board at that time saw fit to parole him. He went to Florida, well after staying in South Carolina for a year, reporting and doing everything he was supposed to do. As a matter of fact living with good friends of mine, who we go to the same church, Rolling Hills Baptist Church, the Walters who could not be here with him today but sent word that they would support him in any way that they could, David left the Department, left South Carolina, went to Florida. Reported as he should have to his probation and parole officer down there. And I know I'm going quickly but I want to go through this because I think it's so important. David at that point in his life unfortunately made some decisions based on a terrible domestic situation with his then common law wife. He didn't report. He absconded. Which he and I talked about it. He didn't leave the state of Florida. What he did was not report. His father was in extremely ill health at that time. Some threats had been made by his common law wife as to what she was going to do to him and he did not report to his officer the way he should have. The next nine years ensued with David making no attempt to hide from anyone but actually getting out there, earning a living working all over the United States as well as in Florida. Finally due to a ticket that was issued to him on the East Coast he was re-arrested and of course is back in the Department of Corrections. What we come today before you asking if we could and David can do this certainly as well as I can to, we're asking for

mercy is what we're asking for. He did the first ten years. He was being punished. He should have been punished. He came back in the Department of Corrections after nine years of being out and not having any sort of violent offense or any offenses at all except the traffic offense.

Male: Mr. Neal, if he were paroled today, where's he planning on working and living?

Mr. Neal: Thank you so much. He has three opportunities. He can go to live with his sister back in Florida where not only would he have a home that he can live in but her next door neighbors in construction business which is his specialty. He could go and live there. His first cousin Carlos is here today. Carlos would be happy for him to come to live outside of Charlotte, North Carolina. He's already made calls to the state there. He would live with Carlos and his wife and work for Carlos's company. He's in the construction business also. I have spoken again with Mr. Cogdill in Columbia. His family would be willing once again (talking over)

Mr. Bellamy: Thank you very much. You've said he could get a job to with his cousin in Charlotte. We want to hear from his cousin, please.

Carlos Bell: Yes, sir. I came here today first of all because I am David's cousin and I'm pretty proud of David because when his father was dying of cancer. David was very supportive and I was quite pleased to see David step up to bat as he did for his dad. And I also watched him during those years with his nieces and nephews concerned for their well being, taking care of them. Second of all, I'm here because David worked for me before. He's a good worker. He's conscientious. He cares about what he does. He's proud of his work. And the

last time he worked for me, believe it or not, was because his father was getting close to his final, ducks in a row and he just couldn't stand being away from him. And so he came back to Orlando to be with his father during his final days. Third of all because of David and how he is and how I trust him around my family, with my home, with my personal _____ I would trust him. We have become very good friends and I think David deserves a chance. I think he's learned a lot from us. He's learned to do what he's supposed to do. And I think he'll fly right. I think he'll do what he's supposed to do and be a good person in society.

Mr. Bellamy: Thank you. I'd like to hear from his sister.

Sister: Yes, I'm here because of, on behalf of my brother. I'd like him to come back home and be with me and help me and be there to work there and so we could be together as a family.

Mr. Bellamy: Okay. I'd like to hear from David. Mr. Rose I'd like to hear from you.

Mr. Rose: Yes, sir. First off I'd like to apologize to members of the board for not keeping my priorities straight as to what the conditions were when I was granted parole before. I'm 51 years old now. The last 14 months has been a real reality for me. I just hope sure that you would grant me to reinstate my parole and I assure you nothing short of death will ever keep me from reporting. Thank you.

Mr. Bellamy: All right. Everyone please step outside. We'll notify your shortly. Thanks for coming and have a good morning.

Mr. Neal: Thank you so much.

Female: It's clear.

Male: David Lee Rose, rejected 1 and 5.

Female: This concludes the hearing on David L. Rose, SCDC # 91858.

STATE OF SOUTH CAROLINA
COUNTY OF LAURENS

IN THE COURT OF GENERAL SESSIONS

DAVID LEE ROSE,

PLAINTIFF,

-VS-

SC DEPARTMENT OF
PROBATION, PARDON AND
PAROLE,

DEFENDANT.

2014-CP-30-161

TRANSCRIPT OF RECORD

 ORIGINAL

MAY 19, 2014
LAURENS, SOUTH CAROLINA

BEFORE:

THE HONORABLE FRANK R. ADDY, JR., JUDGE

APPEARANCES:

FOR PLAINTIFF:

DAVID LEE ROSE, PRO SE

ATTORNEY FOR DEFENDANT:

TOMMY EVANS, ESQUIRE

TARA T. SCOTT, CVR
CIRCUIT COURT REPORTER

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EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>

(NO EXHIBITS PRESENTED DURING THIS HEARING)

1 THE COURT: I think we're now on the record, 14-CP-30-
2 161. This is David Lee Rose versus the Department of
3 Probation, Pardon and Parole. We do have Mr. Rose present.
4 The record should reflect that Mr. Rose is present. And
5 this is a motion for a declaratory judgment action that Mr.
6 Rose filed against the Department of Probation Pardon and
7 Parole. We have a competing Motion to Dismiss, I believe,
8 that's been filed on behalf of the State. So at this point
9 in time -- I think this is your motion, correct?

10 MR. EVANS: Yes, sir, Your Honor.

11 THE COURT: All right. Let me hear from you then --

12 MR. EVANS: Thank you, Your Honor.

13 THE COURT: -- on what the State's position is on this.

14 MR. EVANS: My name is Tommy Evans. I am assistant
15 general counsel at the Department of Probation, Parole and
16 Pardon Services, here on behalf of the Department. Mr. Rose
17 is currently serving a life sentence for the offense of
18 kidnaping. Back in 2001 he was denied parole. It was his
19 belief that even though he received four votes at the time,
20 the Department believed that you needed five votes for a
21 violent offense to be released on parole. He filed a motion
22 of appeal to the Administrative Law Court back in 2007. At
23 that time the Honorable Geathers, administrative law judge,
24 dismissed his appeal. After that he filed a declaratory
25 judgment action against the Department.

1 It is our position that this dismissal by the ALJ was
2 done before the *Barton* case. And *Barton* was decided, I
3 think, in 2013, or 2012, that if the law allowed for a
4 person to have a majority votes at the time he committed the
5 offense then all he needed was the majority regardless of
6 what type of crime it was when he was on parole. Since the
7 *Barton* case came after his appeal to the administrative law
8 judge, it is our position that under *Al-Shabazz* and under
9 *Cooper*, that this court does not have jurisdiction. That he
10 must raise his claim that he had raised in the declaratory
11 judgment action to the administrative law court.

12 I'd like to refer you to the *Al-Shabazz* case.
13 Basically, the Supreme Court described the ALC to have
14 subject matter jurisdiction when the case arrives in two
15 ways. First is when the inmate is disciplined and
16 punishment is imposed, or when an inmate believes prison
17 officials have erroneously calculated the sentence.
18 Sentence related to credits custom status. And under
19 verdict in *Cooper* those cases place our decisions regarding
20 parole in the jurisdiction of the Administrative Law Court
21 and not the Circuit Court, Your Honor. So it's our position
22 that this court doesn't have jurisdiction. And so, we would
23 ask this court to dismiss this case with prejudice in order
24 for Mr. Rose to file his claim to the proper venue which
25 would be the Administrative Law Court, Your Honor. Thank

1 you.

2 THE COURT: Mr. Rose, what's your position on the
3 State's motion? And just so that the record is clear, I was
4 aware that -- I think there was a post-conviction relief
5 action which had been filed where there were issues related
6 to this that was previously filed. I wanted to say -- I
7 checked the file before I ordered this hearing and I think
8 those issues were addressed by Judge Saunders. He basically
9 ruled that you had to pursue administrative remedies through
10 the ALJ on that issue. Because you've raised that same
11 issue in the PCR, didn't you at some point in time?

12 MR. ROSE: Yes, sir. At that hearing what the dispute
13 was as to what court did the issue belong into. And at the
14 time the State argued that it wasn't a PCR. It needed to be
15 an ALC. And Judge Saunders said -- well, I told Judge
16 Saunders that they lacked subject matter jurisdiction over
17 the issue. He said, well, in that case what we need to do
18 then is an amendment and render a dismissal. And then if I
19 was to go to ALC and it was like I said it was, that become
20 valid and have my issues fully explored. So I went to the
21 ALC with the same issue as being raised here today and the
22 Respondent argued that they lack subject matter
23 jurisdiction. They said I didn't have an issue that caused
24 for any relief over it. So I turned around and refiled the
25 PCR as Judge Saunders told me that I could, and then the

1 State come back and said it was second successor. It was
2 never adjudicated, Your Honor. So for 13 years I've been
3 ping ponging in court trying to get this issue heard. And
4 under this -- today they're arguing that I'm under the
5 statute of 24-21-645 1984 at the time of the offense. He's
6 correct that the statute at the time of the offense is the
7 one that I'm supposed to be answering to, and at the time of
8 the sentence. However, that's not the statute. The statute
9 that was at the time of the offense was 55-6-13 which had
10 entirely different language and gave me a liberty interest
11 in the granting of the parole because of the statutory
12 language that - the term "shall" upon receiving the majority
13 vote.

14 I demonstrated to the parole board that the four votes
15 were sufficient at the time. However, they never really
16 addressed that because if anyone was tried before 1986,
17 regardless of whether you went in front of a seven panel --
18 or a five panel. All that was required was four votes
19 regardless of whether it was classified as a violent crime
20 or not. However, for the board to classify me as a violent
21 offender is an actual fact of law in itself, because that
22 did not take place in the 1995.

23 So, you know, the Respondents are asking us to go back
24 to the Administrative Law Court and --

25 THE COURT: What did Judge Seathers do at that -- was

1 this issue brought it in front of Judge Geathers? I'm
2 trying to recall.

3 MR. ROSE: Judge Geathers just dismissed it as not
4 appealable.

5 MR. EVANS: May I address those matters, Your Honor?

6 THE COURT: Sure.

7 MR. EVANS: Judge Geathers did dismiss the case saying
8 it's not appealable back in 2007. But since then, because
9 of the Barton decision it is appealable. You can raise that
10 to the Administrative Law Court. Barton was decided in
11 2013, well after this order was made.

12 We have these all the time come up in the
13 Administrative Law Court. People who have been convicted
14 prior to even before he was that are stating that they
15 received majority votes and they should be released on
16 parole. So there's nothing that is unique regarding his
17 position in this case. Our position is just that this court
18 doesn't have jurisdiction. This is an administrative matter
19 regarding release and parole, therefore he has to go before
20 the Administrative Law Court.

21 And as for the ex post facto argument regarding a
22 violent offender. *Solomon vs. State* basically says that you
23 can be considered a violent offender even if your crime was
24 committed prior to 1986 in the violent classifications was
25 created. So you consider him a violent offender even though

1 this case was committed prior to the actual creation of that
2 classification.

3 THE COURT: Just give me one second. Let me -- I want
4 to read this order from '07, please.

5 (Whereupon, there was a brief pause in the
6 proceedings.)

7 THE COURT: When did Barton come out? Do you -- does
8 anyone recall?

9 MR. ROSE: 2013.

10 MR. EVANS: I think it's 2013, Your Honor.

11 THE COURT: I was trying to remember which month. I
12 was trying to find it. My clerk is getting sworn in today.
13 I'm sorry. Normally he would have this up in five seconds.
14 I've got it. It was in July.

15 (Whereupon, there was a brief pause in the
16 proceedings.)

17 THE COURT: I'm sorry. This is a long opinion.

18 (Whereupon, there was a brief pause in the
19 proceedings.)

20 THE COURT: Mr. Evans, I've read through the decision
21 in Barton. We have a decision from Judge Geathers with the
22 Administrative Law Court of May 14, 2007 basically saying
23 the ALJ does not have jurisdiction. You would agree now
24 that the ALJ has jurisdiction over this issue based upon
25 Barton, correct?

1 MR. EVANS: Yes, Your Honor. It's our position that
2 the ALJ has jurisdiction because of the Barton decision.
3 Because in Barton that court failed -- it says that decision
4 didn't have jurisdiction either, in which the Supreme Court
5 ruled that not only did they have jurisdiction, but that if
6 the person receives four votes -- which I don't know if he
7 did or not at his hearing. But if that person received four
8 votes and he was committing the crime prior to the 1986
9 statute then he should be released on parole.

10 THE COURT: Assuming he is correct, reading Barton,
11 assuming he had the votes, he would be eligible for release
12 on parole, correct?

13 MR. EVANS: Yes, sir. But I can't say he did or
14 didn't, to be honest with you. We would have to look at our
15 records and review the actual hearing. The recordings of
16 that hearing for determination.

17 THE COURT: If this court were to rule that the ALJ has
18 jurisdiction is it the Department's position, or would the
19 Department argue in that hearing that the order with Judge
20 Geathers is res judicata on this issue?

21 MR. EVANS: No. I don't think it would be fair to Mr.
22 Rose, and I don't think that that would be --

23 THE COURT: Clearly at the time that Judge Geathers
24 issued that opinion he didn't have the benefit of Barton.

25 MR. EVANS: Correct.

1 THE COURT: And it's the Futurio decision, or what --
2 f-u-t-u-r-i-o, I think is the one that dealt with a property
3 interest and parole itself as opposed to eligibility. They
4 made a distinction between those two, I think, in that case.

5 MR. EVANS: If you rule that you don't have
6 jurisdiction and it goes back to the Administrative Law
7 Court, we would treat that case as we've treated all other
8 cases we've had in that situation. That'll be whether or
9 not he did receive four votes or not, and we are going to
10 have to look at our records and do an investigation. If
11 it's our position he didn't receive the four votes then he
12 would -- that would be our argument, he didn't receive the
13 sufficient votes to be released on parole, and then it'll be
14 up to Mr. Rose to prove that he received the four votes. I
15 don't know how he would do that, but it would be up to him
16 to do so.

17 THE COURT: Out of curiosity, Mr. Rose, what proof do
18 you have that you did receive four votes?

19 MR. ROSE: Your Honor, I was represented by Alvin Neil
20 at that parole hearing.

21 THE COURT: Who? I'm sorry, sir.

22 MR. ROSE: Alvin Neil.

23 THE COURT: Alvin Neil?

24 MR. ROSE: Attorney Alvin Neil. He represented me at
25 the parole hearing. And when the parole examiner came out

1 from the deliberation after the parole review, she said,
2 "It's been rejected." And she said, "You've been rejected,"
3 and he said, "How many votes did he get?" She said, "He got
4 four votes." So at that time that's when I showed him that
5 the four votes was sufficient, and I sent him a letter from
6 Judy Boland of the parole board that says four votes was
7 sufficient for anybody trying to --

8 THE COURT: Right, because you attached that with some
9 of the paperwork, either with this or in the PCR that's
10 filed --

11 MR. ROSE: Exactly. So what I did, I turned around and
12 ordered the tape of the hearing and it's not on the tape.
13 And it says duplicate of the hearing. It doesn't even have
14 the recording of the votes on it. However, my cousin was
15 there and stood there and said he could not believe that
16 four votes was not sufficient out of six members, even at
17 two-thirds. So if they're going to say they don't have no
18 records and they've got to investigate the records, if they
19 even have the records, then that leaves me out there trying
20 to prove -- he wants me to prove that, but they should have
21 records. They're supposed to keep the records in case the
22 Attorney General or General Assembly wants them.

23 THE COURT: Well, you do have -- you do have the letter
24 from the lady at the parole board, right?

25 MR. ROSE: Yes, sir. That's -- all that letter does is

1 state how many votes I was required to have, not
2 specifically -- like I said, he says it doesn't -- doesn't
3 apply to this case, but it does because anybody tried before
4 1986. The four votes at the time was sufficient.

5 MR. EVANS: But only going by his word. I don't know
6 that we have anything showing that he received four votes.
7 And I think that ultimate determination would be the
8 Administrative Law Court, and not this court, of whether or
9 not he received a sufficient amount of votes to be granted
10 parole.

11 THE COURT: I think that letter that you referenced
12 must be in the PCR file that I reviewed before I ordered
13 this hearing set based on your motion.

14 MR. ROSE: I have a copy of it right here, Your Honor.

15 THE COURT: It simply references the two-thirds nature,
16 or what does it say?

17 MR. ROSE: It says, "Please be advised anyone convicted
18 of a violent offense prior to June 3rd, 1986 are identified
19 as unclassified. In these unclassified cases only four
20 votes are needed for a parole instead of a majority."

21 That's Judy Boland, case manager for parole. This is 1994.

22 THE COURT: Okay. Well, it seems to say that she's
23 saying that you didn't get the four votes.

24 MR. ROSE: No. She's just saying -- she's just saying
25 be aware of it.

1 THE COURT: Be aware that it's four votes.

2 MR. ROSE: That's why he reversed it, because he had
3 four votes.

4 But, Your Honor, if there's no record -- they're not
5 going to give me a record of the hearing when I ordered it
6 and paid \$18.50 for the transcript and it's not in the
7 transcript, how does he expect me to prove it when I heard
8 it from the parole examiner?

9 THE COURT: The issue, Mr. Rose, and I'm sure you're
10 aware, you're going to have the burden of proof regardless
11 of whether it's a declaratory judgment action in this court
12 or an action before the Administrative Law Court. Barton
13 seems to indicate that the Administrative Law Court would be
14 the appropriate venue for this. I'm just trying to make
15 sure that you have an opportunity, and I'm just trying to
16 make sure that the system is fair to you. Because clearly
17 in Judge Saunderson's order he touched on this and contemplated
18 that you would have another opportunity at PCR if the matter
19 is not addressed through the ALJ. Well, it was addressed
20 through the ALJ, but it was addressed erroneously in light
21 of Barton --

22 MR. ROSE: Exactly.

23 THE COURT: -- which, you know, six years later Judge
24 Geathers' decision is simply incorrect. He didn't actually
25 reach the merits. Is your attorney still alive?

1 MR. ROSE: I'm not sure, but I know when he came -- he
2 came to my hearing in 2003 also and I asked him how come
3 they're not addressing the two-third vote -- I mean, the
4 four votes.

5 THE COURT: You said your cousin -- you said your
6 cousin was there, too, right?

7 MR. ROSE: Yes, sir. He would be more than willing to
8 give an affidavit and state -- he showed up in order to give
9 the attorney the rest of the money, because my sister had
10 absconded with the money. But he showed up -- he showed up
11 at my revocation hearing, showed up in 2001, 2003, and
12 2005. He has an interest in the fact that I'm getting
13 paroled. That's why he couldn't understand how I haven't
14 made it. However, I asked Mr. Neil about why were they not
15 addressing the four votes, all he kept saying is about the
16 previous hearing, and he said that they said that if you're
17 not happy you're free to adjudicate it. And that's what
18 I've been doing for the last 13 years.

19 THE COURT: And that's why I'm not wanting to see you
20 continue in this procedural --

21 MR. ROSE: Your Honor, I can guarantee you that it
22 would be dismissed.

23 MR. EVANS: I don't know how he can even say that. As
24 a matter of law of dismissal he can appeal that in the Court
25 of Appeals, Your Honor. He does have other remedies after

1 that.

2 MR. ROSE: I appealed it before, Your Honor.

3 THE COURT: Here is my ruling. I've looked at Judge
4 Saunder's order dated March the 3rd of 2006, and this is in
5 case number 04-CP-30-666 titled *David Lee Rose vs State of*
6 *South Carolina*. It is in the post conviction relief matter.
7 Now, Judge Saunders, on page four of five of his order,
8 basically grants the State's motion to dismiss and the court
9 states, quote, "This court finds the allegation raised by
10 the applicant are not cognizable at PCR. South Carolina
11 case law clearly holds that allegations of this nature must
12 be brought pursuant to the APA, Administrative Procedures
13 Act. However, this court also notes that if the APA refuses
14 to hear the applicant's complaint, he can refile in Circuit
15 Court in order to have his allegations fully explored."
16 Judge Geathers did apparently hear the matter, but dismissed
17 it in light of *Barton* erroneously due to the holding in
18 *Furtick, F-u-r-t-I-c-k*, which said that there's liberty
19 interest in granting parole,

20 So the matter was heard by Judge Saunders. Judge
21 Saunders ruled that if the Administrative Law Court does not
22 hear the matter he can refile it in the Circuit Court.
23 That's the law of the PCR case, case 666.

24 So if the Administrative Law Court refuses to hear your
25 case, you can refile in this court. That's my ruling. But

1 clearly they have jurisdiction. So if they don't hear your
2 case you have the right to bring this case back, either in
3 case 666 or in the current case 151. But this matter has to
4 be resolved one way or another sooner or later. So bring it
5 in the Administrative Law Court, Mr. Rose. And certainly if
6 you want to appeal this, please feel free, because this
7 issue has got to be decided for you at some point in time.
8 I hear that you've been fighting this for a while.

9 MR. ROSE: Your Honor, the difficulty is going to be is
10 arguing it in Administrative Law Court and not being there,
11 or even have somebody to be there that would testify to the
12 four votes. That's going to be the difficulty.

13 THE COURT: I understand. That's a burden you would
14 bear probably in this court as well.

15 MR. ROSE: I could easily have a hearing here and have
16 the person subpoenaed to come in and testify to the fact.
17 That's if the attorney had advised both of us and upon
18 receiving, you know, --

19 MR. EVANS: -- sworn affidavits for the ALC to observe
20 in consideration. I mean, I don't see that being any
21 different than --

22 THE COURT: I've never done administrative work. They
23 only do affidavits? They don't have people actually come
24 in?

25 MR. ROSE: No, sir.

1 MR. EVANS: Very rarely do they have actual hearings. I
2 mean, but it would be up to the court whether or not they're
3 going to hear them.

4 THE COURT: That must be an easy job.

5 MR. EVANS: I'm not going to say one way or the other
6 regarding that. But, I mean, I've been to hearings in the
7 Administrative Law Court, but it's up to the court whether
8 or not they'll actually have a hearing on the merits. What
9 happens is usually -- I don't think -- like I said, this
10 case is not unique, since the Barton decision. And what
11 happens is they'll decide to present affidavits of
12 individuals who either were present or heard someone say
13 there were four votes, and then we do an investigation in
14 which we will listen to the hearing and make a determination
15 if the person got four votes or not. If the person received
16 four votes we release them on parole. We just go ahead and
17 do it. It's been done, I think, like seven times since the
18 Barton decision was made. But --

19 THE COURT: You're saying -- you're saying though that
20 they never provided you with a transcript. That there was
21 not transcript.

22 MR. ROSE: They gave me a -- they provided me with a
23 transcript but there's no voting on it. There's nothing on
24 it except for what I say and what my attorney says. There's
25 nothing on the tape. To me, that's not a transcript. How

1 would I know that I did not get the votes if you're not
2 going to tell me. Now we're going to have an investigation
3

4 MR. EVANS: I've never heard of a hearing tape with no
5 final order on it. I'm not saying he's lying. I'm just
6 saying it may have been -- the tape had been cut off at that
7 point or something. I don't know.

8 MR. ROSE: I have the tape.

9 THE COURT: Do you have a transcript of it or you just
10 have the audio?

11 MR. ROSE: In 2011 I challenged and went to the ALC
12 also and asked for the transcript for the hearing -- for the
13 2011 and I got a CD, and it was confiscated. They said it
14 was contraband.

15 THE COURT: All right. I'm not going to dismiss the
16 matter at this point in time. I'm not going to dismiss this
17 case at this point. I'll allow the parties to engage in
18 discovery. We'll see exactly where we need to go with this.
19 And at some point in time I may refer this over to the
20 Administrative Law Court, but I think it's appropriate to
21 allow discovery to go forward.

22 So you're familiar with the Rules of Civil Procedure, I
23 take it.

24 MR. ROSE: Yes, sir.

25 THE COURT: You can send them interrogatories and

1 things such as that and see what they have in the way of a
2 transcribed tape. I would suggest you go ahead and get your
3 affidavits prepared by your cousin. But at this point in
4 time I'm not going to dismiss this case. We'll revisit it
5 in 60 days or so from now.

6 MR. ROSE: Thank you, Your Honor,

7 MR. EVANS: All right. Thank you, Your Honor.

8 THE COURT: Thank you.

9 (Whereupon, the proceeding was concluded.)

10 - - - END OF TRANSCRIPT OF RECORD - - -

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Certificate of Reporter

I, the undersigned, Tara T. Scott, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Laurens County, South Carolina, on the 19th day of May, 2014.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Tara T. Scott

Tara T. Scott, CVR

Circuit Court Reporter

Abbeville, South Carolina

December 30, 2014

D OFFICIAL

COUNTY OF LAURENS

DAVID LEE ROSE,
PLAINTIFF
-VS-
SC DEPARTMENT OF
PROBATION PARDON, AND
PAROLE SERVICES,
DEFENDANT.

TRANSCRIPT OF RECORD

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EXHIBITS

(There were no exhibits made part of this hearing.)

1 THE COURT: We're going to go on the record, if we may,
2 on case 14-CP-30-161. This is David Lee Rose vs. The
3 Department of Probation, Pardon, and Parole. Mr. Rose is
4 present, pro se. Mr. Evans is here on behalf of Probation.
5 Essentially, just so that the record is clear, where we are
6 - I think back in October the court had initially set this
7 matter for a hearing on Mr. Rose's Rule 26 Motion. It was
8 held in Greenwood, and for whatever reason Mr. Rose wasn't
9 transported at that point in time. I believe that the
10 individual that was the subject of the Rule 26 Motion he did
11 show up. And I think he - is he here today?

12 MR. ROSE: Yes, sir.

13 THE COURT: An affidavit was subsequently forwarded to
14 Mr. Rose and the Court. I had explained to Mr. Rose that if
15 he felt the affidavit was insufficient for his purposes or
16 for his needs then certainly he would be inclined or allowed
17 to request a hearing, which Mr. Rose has done so asking that
18 the Court address his Rule 26 Motion. So at this point, Mr.
19 Rose, being the moving party, how is the affidavit
20 insufficient? What more information do you need from Mr.
21 Bell - I think is the person. Is that correct?

22 MR. ROSE: Yes, sir. The affidavit - one, I didn't take
23 it. The deposition I didn't take.

24 THE COURT: Right.

25 MR. ROSE: It's actually not permitted due to Rule 28A

1 because Mr. Evans has an interest in the case, so he's
2 disqualified to take a deposition from the witness. Some
3 things took place, Your Honor, during that - when he was
4 speaking with Mr. Bell that I would like to address again
5 and I would like to put Mr. Bell on the stand.

6 THE COURT: I don't have a problem with that. Do you
7 have any problem with that?

8 MR. EVANS: Well, first of all, I was doing that for his
9 assistance.

10 THE COURT: Right. As a courtesy to him.

11 MR. EVANS: As a courtesy to him I was doing that so Mr.
12 Bell wouldn't have to come back down here and get his
13 information. If he doesn't like it, fine. I won't help
14 anymore. Second of all, I don't know what he wants this
15 court to do. Because this court cannot grant him parole.
16 All this court can do is order the agency to give him
17 another hearing to make a determination of whether or not he
18 received the four votes. I have no problem with this court
19 making that order, but if he wants the court to grant his
20 parole, under the law, you cannot do that. You don't have
21 that authority.

22 THE COURT: Based on the posture of this case, the court
23 instead of referring this over to the Administrative Law
24 Court I thought it would be best to maybe afford Mr. Rose
25 the opportunity of discovery. That's what I recall the

1 basis for my ruling being. I agree that I cannot order Mr.
2 Rose to be paroled. That's outside of my power. For
3 purposes though of allowing Mr. Rose to elicit the
4 information that he wants under oath I'm going to go ahead
5 and allow you to call Mr. Bell as a witness and you can ask
6 him any questions regarding your previous parole hearing
7 that you might need to ask him. So -

8 MR. ROSE: I would like to say now that I did not ask
9 the Court to grant me parole. I have nothing in the
10 pleadings that says that. He keeps bringing that up, but
11 that's not what I asked.

12 THE COURT: Right.

13 MR. EVANS: Your Honor, basically we don't have the
14 information anymore. It was destroyed. This is a 2001
15 case. I don't know what else he wants us to give him. We
16 don't have it and this Court cannot grant parole, so that's
17 why I'm kind of puzzled. He can go before the Parole Board
18 and make these same allegations before the Parole Board, who
19 can give him parole and grant what he wishes to have. But I
20 have no objections to having his witness testify.

21 THE COURT: Mr. Bell, if you would come on up please,
22 sir.

23 CARLOS BELL, Jr., having first been
24 duly sworn, testified as follows:

25 DIRECT EXAMINATION BY MR. ROSE:

- 1 Q. Mr. Bell, please state your full name for the Court,
2 please.
- 3 A. Carlos Bell, Jr.
- 4 Q. On August 14 you appeared at the courthouse in
5 Greenwood; correct?
- 6 A. I did.
- 7 Q. With the intentions of testifying on the court record?
- 8 A. That's correct.
- 9 Q. About the events that took place on June 20, 2001, a
10 parole hearing.
- 11 A. Yes.
- 12 Q. And I wasn't at that hearing, so somehow inadvertently
13 you got with Mr. Evans and he asked you to sign an
14 affidavit. Is that correct?
- 15 A. Correct.
- 16 Q. Attached to your affidavit is a statement you gave him;
17 correct?
- 18 A. We talked more than what's in that statement. That is
19 a generalization of my statement on that affidavit.
20 MR. ROSE: Your Honor, I'd like to give it to him and
21 have him read it for the Court.
- 22 THE COURT: You can approach the witness. By all means.
23 Can someone - he's going to have trouble moving. Just take
24 whatever he has and show it to Mr. Bell, please.
- 25 Q. Can you read that out loud for the record?

1 A: The whole thing?

2 Q. Yes, sir.

3 A. "I attended the parole hearing for David Rose on June
4 2001 as a character witness. In attendance for that
5 hearing for David Rose were also Mr. Alvin Neal, his
6 attorney, Kathy Todd, his sister, and Carlos Bell,
7 cousin. We had been told before going into the hearing
8 that the board was one member short that day, but they
9 would be holding the hearing based on the number that
10 was in attendance. We all spoke on David's behalf. We
11 all felt after the hearing and when we were waiting to
12 hear the outcome that it had gone well with the parole
13 board. A woman came out into the common area where we
14 were waiting on the results. I believe she was a
15 secretary or recorder from the Parole Board. She said
16 I'm sorry, but parole has been denied. We were
17 dumbstruck. After a moment of figuring what had just
18 happened, we asked Mr. Neal if we could find out what
19 the vote was. Mr. Neal then asked the woman what was
20 the vote count. She gave this to him and he then, in
21 turn, turned back to us and repeated what she had told
22 him. The count was four "yes" and two "no" votes. I
23 immediately asked how can parole be denied when David
24 got four "yes" votes out of six. Is this not a
25 majority. He stated this did not sound right and that

1 he would be checking on this. I paid Mr. Neal his fee
2 out in the parking lot when we were leaving that day
3 and he reiterated that he would be checking on the
4 Parole Board's outcome. Nobody has heard from Mr. Neal
5 since. He took the money and has absconded. The fee
6 was supposed to be for him to represent David through
7 the parole process. My name,"

8 Q. Thank you. During the time that you were speaking with
9 him and he told you about the four out of six votes,
10 did he tell you that he found that there were only six
11 members and he found that to be kind of strange?

12 A. I'm sorry. Repeat that.

13 Q. Did Mr. Neal, while he was talking to you, did he tell
14 you that being only six members there --

15 MR. EVANS: Your Honor, I would object to that. That's
16 hearsay.

17 THE COURT: For the purposes of this - we're treating
18 this more as a Rule 26 type of a thing. I'm going to
19 overrule your objection.

20 Q. Did he state that that was unusual that there was six
21 members?

22 A. Yeah. I think he was - I can't remember if he said he
23 was shocked or anything like that, but I remember he
24 was kind of, you know, surprised that they were doing a
25 hearing minus a member.

1 Q. Okay. But basically there were only six members.

2 MR. ROSE: Your Honor, here I have the names of the six
3 members that participated, so we can verify that there were
4 six.

5 THE COURT: All right. Do you have any other questions
6 of this witness at this point in time before I receive that?
7 They may be willing to stipulate to - did you receive that
8 from the Parole Board?

9 MR. ROSE: No, sir. I got it off of the tape.

10 THE COURT: Off of the tape. Okay.

11 MR. ROSE: This is the actual tape of the hearing.

12 MR. EVANS: That is quite possible. That was 2001, so I
13 cannot tell you if it was six or not. A lot of times we'll
14 have hearings where not all members attend. I mean, it
15 happens sometimes. We go forward if it's greater than 5
16 members at the hearing. So it's quite possible that it was
17 six members. If the tape says that it was six members then
18 we'll stipulate that was the case, Your Honor.

19 THE COURT: Do you have any other questions?

20 MR. ROSE: No, Your Honor.

21 THE COURT: Is there anything you want to ask the
22 gentleman?

23 MR. EVANS: Yeah, a few questions, Your Honor.

24 CROSS EXAMINATION BY MR. EVANS:

25 Q. Mr. Bell, do you remember talking to me when you came
26 to the hearing?

- 1 A. Sure.
- 2 Q. Did I ever tell you what to say at any time?
- 3 A. No. You never told me what to say.
- 4 Q. As a matter of fact I asked you questions about his
5 hearing.
- 6 A. Yes, sir.
- 7 Q. Matter of fact, I told you that Alvin Neal was his
8 lawyer. You couldn't remember his name at the time.
9 Isn't that correct?
- 10 A. I knew his first name and couldn't remember his last
11 name. That is correct.
- 12 Q. And the affidavit that you just read, I sent you the
13 form; isn't that correct?
- 14 A. Yes, sir. I attached that to your form and sent it
15 back to you.
- 16 Q. And the form is blank that I sent to you?
- 17 A. Yes, sir.
- 18 Q. So all the information that you put on this form is
19 your words?
- 20 A. Right. Because I expected you to send one that had -
21 you had said I'll send you what you said and you sent
22 me a blank, so I filled it all out.
- 23 Q. So I never, at any time, tried to persuade you to make
24 any mention of any statements regarding what happened?
- 25 A. No, sir. I don't feel you did.
- 26 MR. EVANS: I have nothing further, Your Honor.

1 MR. ROSE: Your Honor, putting Mr. Bell on the stand was
2 not any intention to find him saying anything. It was just
3 to have it on the record, because the affidavit is not on
4 the record. Correct?

5 THE COURT: You have no other questions?

6 MR. EVANS: Well, from what I gathered he made the
7 assumptions that while I was talking to him I might have
8 tried to influence him in some way. I wanted the record to
9 be --

10 MR. ROSE: No.

11 MR. EVANS: -- clear that I never did that.

12 THE COURT: I believe you. No other questions?

13 MR. ROSE: No, sir.

14 THE COURT: Mr. Rose, in the relief that you're
15 requesting on page 4 of your request you're basically asking
16 this court to declare unconstitutional the -- basically
17 declare unconstitutional or declare that your due process
18 rights were violated in that two thirds vote of the panel
19 voted for your parole. And you are also requesting
20 conjunctive relief against the Probation, Pardon, and Parole
21 Services. Essentially requesting that the Court find that
22 you did make parole?

23 MR. ROSE: Well, what's taken place, Your Honor, is that
24 it's really been turned around so many different times and
25 so many different laws applied to it. In Mr. Evan's
26 pleadings, in his Motion to Dismiss, he states that at the

1 time of the offense that the statute in place was 24-21-645
2 and it specifically states that the board "may" issue an
3 order authorizing parole. May, may not. However, that was
4 not even codified into law until 1981. The statute in place
5 at the time of the offense, South Carolina specifically
6 stated the board "shall" issue an order upon the majority of
7 the votes. And that's what I'm asking the Court, to enjoin
8 in and apply the appropriate statute that they are supposed
9 to use in authorizing the parole.

10 THE COURT: Do you want to speak to that, Mr. Evans?

11 MR. EVANS: Well, I mean -

12 MR. ROSE: Your Honor, I've got the statute.

13 MR. EVANS: Your Honor, that's a procedural matter under
14 U.S. Supreme Court case - I'm trying to remember the case.
15 It's a procedural matter. It's not a violation of ex post
16 facto. That's one little procedural matter. It's still up
17 to the Parole Board to make that determination. Of course,
18 under Barton, it must be four votes. That's up to the
19 Parole Board to make the determination of whether or not he
20 got four votes at that hearing, not this court. So I don't
21 see how this court can make a ruling regarding the small
22 change in the statute when it's still, both statutes state
23 that it's essentially up to the Parole Board to make that
24 determination and no one else in the state, Your Honor. So I
25 don't see how it's a violation ex post facto whether the
26 board "may" or "shall" grant parole. It's still up to

1 parole - the actual guidelines and conditions in both
2 statutes are identical. Exactly the same. The board, back
3 in 1981, had to look at the same matters as they do now,
4 Your Honor. So I don't see how that can be a violation ex
5 post facto, when one word is changed within the statute at
6 this time, Your Honor.

7 MR. ROSE: Your Honor, would you like a copy of the
8 statute?

9 THE COURT: I'll take your word for it, Mr. Rose. I
10 imagine you've researched it more thoroughly than I could
11 have possibly hoped to.

12 MR. ROSE: Also, Your Honor, I have here an amendment to
13 the relief I'm asking the Court to specifically put in the
14 statute that they're supposed to be going by. Because
15 there's a big difference between "shall" and "may". There
16 discretion is limited.

17 THE COURT: I understand, Mr. Rose. Would you agree
18 that at this point procedurally you've made the record.
19 We've got the testimony. Do you agree that the Barton case
20 says that it now falls to the Parole Board to have another
21 hearing as to whether you got four out of six votes? What
22 is your position on procedurally where we stand and what
23 you're asking this court or the state to do?

24 MR. ROSE: I'm asking this court to make the
25 determination whether or not the four votes were received by
26 the testimony given and the facts, facts that they have no

1 record to counter the testimony and the testimony that has
2 already been stated that he found to be very credible.

3 THE COURT: All right, I think it's your position, Mr.
4 Evans, that essentially that's not an appropriate
5 determination for this court to make.

6 MR. EVANS: Yes, sir. Your Honor, that has to be made -
7 even in the Barton case the South Carolina Supreme Court
8 remanded the case back to the Parole Board. They didn't
9 even make that determination whether or not Barton received
10 four votes. So I don't see how this court can make that
11 same determination. That has to be done by the Parole
12 Board. He has a right to bring all this information before
13 the Parole Board and the Parole Board can make that
14 determination. I mean, there can be individuals who sit on
15 the board who sat in this hearing. I mean, that's happened
16 before. We've had seven cases where the Parole Board has
17 granted parole where individuals on the board has made the
18 determination that yes I sat for his hearing and I remember
19 he got four votes. The same thing can happen to this
20 individual right here, but that must be made by the Parole
21 Board and not this court, Your Honor.

22 THE COURT: Mr. Rose, anything further, sir?

23 MR. ROSE: That doesn't sound like it's too fair to me.
24 Because the Barton case did say how they should move
25 forward, and that was to grant the parole.

26 MR. EVANS: No. Your Honor, it didn't say that.

1 THE COURT: I recall that Barton basically said that the
2 way the Parole Board had been reading the law was incorrect.
3 That essentially a person being absent from a hearing - I
4 think in the situation of Barton was that somebody, one of
5 the Parole Board members, was absent. Basically the Supreme
6 Court said that well, because that's counted as a no vote,
7 it's possible for a whole bunch of people to agree that they
8 should be paroled, but an absentee -- am I right on the
9 holding on that or the facts surrounding Barton?

10 MR. EVANS: Yes. And also if the individual received
11 four votes prior to 1986 they should be granted parole.
12 However, they didn't say that Barton got four votes. They
13 just said that it was remanded back to them to make the
14 determination of whether or not she got four votes or not.

15 THE COURT: Mr. Evans, are you in agreement if he
16 requests a hearing before the Parole Board is it automatic?
17 Does he get automatically a hearing or are you agreeable in
18 allowing the Parole Board to visit this matter and to
19 address this matter?

20 MR. EVANS: I have no objection to the Parole Board
21 addressing this matter. I would feel more comfortable if
22 this court orders that. I can create an order, let him look
23 at it, and you can sign it ordering that this be addressed
24 by the Parole Board. Once that's done I can call downstairs
25 and get it scheduled.

1 THE COURT: I am more than happy to sign an order
2 directing that the Parole Board, because they have authority
3 under Barton, and I think under the statutory law of this
4 state, that they conduct a hearing to investigate this
5 matter and determine in 2001 whether he got the requisite
6 votes. Do you have another parole hearing scheduled anytime
7 soon, Mr. Rose?

8 MR. ROSE: Yes, sir. There's one in - it will be next
9 year.

10 THE COURT: I'm assuming that you can get to this sooner
11 than next year; correct?

12 MR. EVANS: Yes.

13 THE COURT: Very good.

14 MR. ROSE: Your Honor, can I also ask a question?

15 THE COURT: Yes, sir.

16 MR. ROSE: Is he willing to stipulate that he finds that
17 the four votes - or that he finds he's credible on the
18 statement there was four votes like he told you?

19 THE COURT: I think you've got the transcript of that
20 prior hearing. So hopefully - somebody behind you is
21 raising their hand. You may want to speak to them.

22 MR. ROSE: Your letter was in the - it wasn't in the
23 transcript, Your Honor.

24 THE COURT: My letter?

25 MR. ROSE: Yes, sir.

1 THE COURT: It's part of the file. I thought - my
2 letter to you?

3 MR. ROSE: Yes, sir. When you said that he remarked the
4 votes were sufficient, that he found them to be credible?

5 THE COURT: What I'm going to do - I know I've got a
6 copy of that letter somewhere. Here it is, October 17,
7 2014.

8 MR. ROSE: Yes, sir.

9 THE COURT: The letter speaks for itself. My
10 recollection is that when you came back to Greenwood after
11 speaking to Mr. Bell you basically spoke to me - and I don't
12 know if the court reporter got it or not. Maybe she didn't.
13 But you did remark to me that you said that you thought Mr.
14 Bell sounded pretty credible.

15 MR. EVANS: Yeah. And I'll say on the record I thought,
16 you know. But it doesn't matter what I think.

17 THE COURT: I do understand. I'll be happy to make this
18 a part of the Clerk of Court's file if you like.

19 MR. ROSE: What's confusing to me, Your Honor, is the
20 fact that they're going to make a determination whether or
21 not I got it. How are they going to do that? They don't
22 have no record and he's already spoke to where he finds that
23 the person is credible? Are they going to find him credible
24 too or are they going to say just go by the records?

25 THE COURT: For your sake I hope that they do find him

1 credible, but I cannot make that kind of determination. Mr.
2 Evans can't make that kind of determination. That's up to
3 the parole board. In the far-what-it's-worth category, Mr.
4 Bell seemed quite candid and straightforward to this court.
5 I hesitate saying that one witness - I really can't say that
6 one person is telling the truth and the other person is not.
7 That's not my call to make.

8 MR. ROSE: He was there and he's testified that that's
9 what he's heard.

10 THE COURT: The lady behind you wants to say something
11 to me. What's your name again, ma'am?

12 MS. WALTERS: Barbara Lynn Walters from Columbia, South
13 Carolina, Your Honor. We just received the paid for
14 transcript of the last hearing and it has what transpired.
15 Can I possibly hand this to him? I've got the rest of it,
16 but that's what I think you were asking about.

17 THE COURT: Yes, ma'am. Do you need a moment to review
18 that, Mr. Rose?

19 MR. ROSE: Yes, sir. Please.

20 THE COURT: By all means.

21 MR. ROSE: Okay. Now I understand. Sorry. Now I
22 understand what you were saying, but I didn't have this at
23 the time. But you're saying there would be a hearing for
24 them to determine whether or not the four votes were
25 granted.

1 MR. EVANS: Yes.

2 THE COURT: Right.

3 MR. ROSE: And they would listen at the hearing and make
4 a determination if the person got four votes or not. If the
5 person received four votes we would release them on parole.

6 THE COURT: That's right.

7 MR. ROSE: That's what I didn't have. I'm sorry. I
8 didn't recollect that from this hearing.

9 MR. EVANS: I said the Parole Board. Not me or the
10 Court. I can't tell you which way they'll vote. I have no
11 idea.

12 THE COURT: We're concluded on this. I'm making
13 everything that I've got, with the exception - I don't that
14 I have any personal notes, but I'm making it all part of the
15 Clerk's record. It looks like it already is, as well as the
16 correspondence that you sent to me. If that's okay I'll
17 just make all that a part of the record in the Clerk's file.

18 MR. ROSE: I appreciate that.

19 THE COURT: If you'll prepare me a brief order. You
20 know where we are.

21 MR. EVANS: Yes, sir, Your Honor.

22 THE COURT: Mr. Rose, good luck to you. Take care.

23 MR. ROSE: I appreciate the Court's time.

24 THE COURT: Glad to do it. Thank y'all for coming.

25

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Deborah Brooks Durden
Administrative Law Judge

Case No. 15-ALC-15-0033-AP

DAVID ROSE, #91858,

Respondent,

SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES,

Appellant.

NOTICE OF APPEAL

The South Carolina Department of Probation, Parole and Pardon Services, by its attorney,
Matthew C. Buchanan, appeals the order of the Honorable Deborah Brooks Durden,
Administrative Law Judge, dated and filed February 1, 2016, and received on February 3, 2016.



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THE STATE OF SOUTH CAROLINA
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DAVID ROSE, #91858,

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CERTIFICATE OF SERVICE

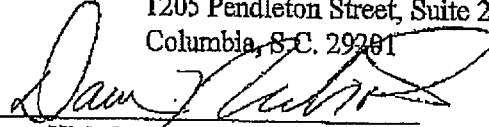
I, Dawn Nichols, Executive Assistant, hereby certify that this 3rd day of February, 2016, I served the following documents:

1. Notice of Appeal; and
2. Certificate of Service.

by first class mail, postage prepaid as follows:

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

David Lee Rose, #91858,

Docket No. 15-ALJ-15-0033-AP

Appellant,

vs,

ORDER

South Carolina Department of Probation
Parole and Pardon Services,

Respondent.

STATEMENT OF THE CASE

This case is before the Administrative Law Court (ALC or Court) pursuant to the appeal of David Lee Rose (Appellant), an individual re-incarcerated with the South Carolina Department of Corrections in 2000 after violating the terms of the parole he was granted in 1987. On June 20, 2001, the South Carolina Department of Probation, Parole and Pardon Services (Department) Parole Board (Board) held a hearing to determine whether Appellant should be released on parole again. The decision of the board was recorded as denied by the Department. Appellant challenged this denial before both the Circuit Court and the ALC arguing that, because he received four favorable votes to two unfavorable votes, the Board had actually granted him parole. Both cases were dismissed. At that time, the Appellant's challenge was dismissed by the ALC judge, who ruled it was not properly before this Court. See David L. Rose, #91858 v. S.C. Dept. of Prob., Parole & Pardon Servs., 06-ALJ-15-0016-AP (S.C. Admin. Law Ct., May 14, 2007).

However, in 2013, the South Carolina Supreme Court ruled on issues very similar to those raised by Appellant. See Barton v. S.C. Dept. of Prob., Parole & Pardon Servs., 404 S.C. 395, 745 S.E.2d 110 (2013). Subsequent to that case, the Department began holding "Barton Hearings" to apply the holding in Barton to inmates whose prior parole hearing vote count qualified as a release, rather than a denial, under the law as construed by the Supreme Court. Based upon the Barton case, Appellant again filed with the Circuit Court. Following an investigation conducted at the behest of the Circuit Court judge, the Department issued a decision concluding that Appellant is not eligible for release under the Barton holding, citing a lack of evidence of the vote count from the 2001 hearing. The Circuit Court dismissed the case, finding that jurisdiction of the case fell to the ALC. On June 1, 2015, Appellant's counsel filed a Notice of Appeal with the ALC, which the

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Department challenged as untimely. On July 30, 2015, this Court issued an Order ruling the Notice of Appeal timely.

ISSUE ON APPEAL

Whether the Department erred in determining that Appellant did not have enough votes to be eligible for release under the holding in Barton.

STANDARD OF REVIEW

The ALC's jurisdiction to hear this matter is derived from the South Carolina Supreme Court decisions in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), and Furtick v. S.C. Dept. of Prob., Parole & Pardon Servs., 352 S.C. 594, 576 S.E.2d 146 (2003). The Al-Shabazz decision explained that "procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property." Wicker v. S.C. Dept. of Corrs., 360 S.C. 421, 424, 602 S.E.2d 56, 58 (2004) (citation omitted). This Court does not review the routine denial of parole,¹ but does review decisions of the Department to ensure that an inmate's Constitutional rights are not infringed. See Cooper v. S.C. Dept. of Prob., Parole & Pardon Servs., 377 S.C. 489, 499, 661 S.E.2d 106, 112 (2008).

When reviewing a parole case, the ALC sits in an appellate capacity. Furtick, 352 S.C. at 597, 576 S.E.2d at 148; see also Al-Shabazz, 338 S.C. at 377, 527 S.E.2d at 754. Under the appellate standard of the Administrative Procedures Act, the Court's review is limited to the record, absent irregularities in the procedure of the agency. S.C. Code Ann. § 1-23-380(4) (Supp. 2015). Additionally, the Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, but may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5) (Supp. 2015). Substantial rights of the appellant are prejudiced when the agency's decision, including the agency's findings, inferences, and conclusions, are in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Id.

¹ South Carolina Code Section 1-23-600(D) provides, "An administrative law judge shall not hear . . . an appeal involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services."

DISCUSSION

Appellant argues that the Department decision is not supported by substantial evidence. The Court agrees. 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” Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (citation omitted). This deferential standard of review does not require the Court to accept the agency’s decision at face value where there is no evidence to support the agency’s reasoning. See Porter v. S.C. Pub. Serv. Comm’n, 333 S.C. 12, 21, 507 S.E.2d, 328, 332 (1998). Furthermore, “[a]n abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support.” Trident Med. Ctr. v. S.C. Dept. of Health & Envtl. Control, 412 S.C. 341, 348, 772 S.E.2d 177, 181 (Ct. App. 2015) (internal quotations and citation omitted).

Appellant asserts that he received four favorable votes out the six votes made at his parole hearing on June 20, 2001. In support, Appellant offered the affidavit of a relative who attended the parole hearing, which corroborated his own previous testimony. According to the affidavit, Appellant’s attorney was told the vote count by a member of the Department’s staff and conveyed the information to Appellant and his family member.

In addition, Appellant and the Department litigated the issue of the vote count in both the ALC and Circuit Court immediately following the 2001 hearing. At no time in that litigation did the Department take the position that the four-to-two vote count averred by Rose was factually incorrect. While not direct proof of the veracity of Rose’s position, the Department’s failure to dispute the facts as presented by Rose creates an inference that those facts were accurate. There is evidence that the vote count was four in favor, two against. Thus, there is *no* contradictory evidence of any kind. The transcript of a certified recording of the Board’s hearing kept by the Appellant does not contain a vote count. The only record that the Department has maintained of the hearing is a notation of rejection without any information regarding the vote count. At the time of the hearing the Board considered a four to two vote a denial. The South Carolina Supreme Court has since held this to be an incorrect application of the law. Therefore, evidence that the Department concluded that parole was denied, without evidence of the actual vote count, is not probative.

In the Barton decision, the Court held that the Board may not retroactively apply South Carolina Code Section 24-21-645 to inmates seeking parole. Barton, 404 S.C. at 419, 745 S.E.2d at 123. Section 24-21-645 was passed in 1981 and concerns, in part, the number of Board votes required to be granted parole. Section 24-21-645 originally called only for a parole order "signed either by a majority of its members or by all three members meeting as a parole panel on the case." Barton, 404 S.C. at 402, 745 S.E.2d at 114 (citing S.C. Code Ann. § 24-21-645 (Supp. 1984)). The section was amended in 1986 to require that "at least two-thirds of the members of the board must authorize and sign orders authorizing parole for persons convicted of a violent crime as defined in Section 16-1-60." S.C. Code Ann. § 24-21-645(A) (Supp. 2015). The Court reasoned that retroactively applying a rule requiring a higher number of Board votes for those convicted of violent crimes produced "a sufficient risk of increasing the measure of punishment," such that the offender was protected by the *ex post facto* clause of the Constitution. Barton, 404 S.C. at 412, 745 S.E.2d at 119 (citing Jernigan v. State, 340 S.C. 256, 264-65, 531 S.E.2d 507, 511-12 (2000)).

In this case, Appellant pleaded guilty to kidnapping in 1978. Thus, Section 24-21-645 was not yet enacted at the time of Appellant's conviction. Instead, Section 24-21-650, which contains almost identical language, applies to Appellant. The 1962 version of this section, labelled 55-613, required all prisoners to receive two-thirds of the vote. S.C. Code Ann. § 55-613 (1962). In 1977, the section was amended to require only a majority of the Board's members to issue a parole order. 1977 S.C. Act No. 110 § 1. This act took effect on May 24, 1977. Id. at § 2. The section was not amended again until the 1986 Omnibus Criminal Justice Improvement Act that also amended Section 24-21-645. S.C. Code Ann. § 24-21-650 (Supp. 2015); Barton, 404 S.C. at 401-02, 745 S.E.2d at 113-14. Thus, the language in effect at the time of Appellant's conviction required only a majority of the Board to grant parole.² The question raised for the Department's decision in this case is whether Appellant received enough votes to be conditionally released. The Department concluded that Appellant did not provide enough evidence in support of his position that the vote count was four in favor of parole to two against parole. However, the Appellant did provide evidence of the vote count. The Department offered nothing contradictory to that evidence. Thus, there is not even a scintilla of evidence supporting the Department's decision. Because the

² The court in Barton also concluded that the statutorily required number of votes to grant parole are only out of Board members participating in the hearing and not out of the full seven-member Board. Barton, 404 S.C. at 419, 745 S.E.2d at 123.

Department must provide at least some support for its factual findings, the Court concludes that the Department's decision must be reversed.

The Department argues that the ALC does not have the authority to reverse its decision in this case because the discretion to grant or deny parole falls solely to the Board.³ The Department misapprehends the posture of this case. By reviewing this case, the Court does not grant or deny Appellant parole, but rather requires the Department to carry out the result of a vote the Board already made. As stated above, it is the responsibility of the ALC to ensure that the Constitutional rights of Appellant are protected in decisions made by the Department. Where the Board fails to properly apply the law to its vote, the Court may conclude that parole has already been granted. See Barton, 404 S.C. at 419, 745 S.E.2d at 123 ("Appellant received the requisite number of votes from the Parole Board, and thus, should be granted parole. Thus, we remand for proceedings consistent with this opinion.").

The Department also argues that the holding in Barton may not be retroactively applied to Appellant on collateral review. However, "[e]x post facto claims are non-collateral matters." Steele v. Benjamin, 362 S.C. 66, 71, 606 S.E.2d 499, 502 (Ct. App. 2004) (citing Jernigan v. State, 340 S.C. 256, 260, 531 S.E.2d 507, 509 (2000)). Indeed, if Appellant's claim were cognizable under collateral review he would still be before the Circuit Court, instead of the ALC. See Jernigan, 340 S.C. at 508-09, 531 S.E.2d at 259. Moreover, the Court does not agree that the holding of Barton announced a new rule of Constitutional law. Rather, the Supreme Court found that the actions of the Board violated Barton's existing Constitutional rights and her "substantial personal right to statutorily correct parole review." See Barton, 404 S.C. at 413-14, 745 S.E.2d at 119-20 (citation omitted). Thus, the Department's argument that Appellant is seeking the retroactive application of a new rule on collateral review is erroneous.

Because the conclusion that the Department's decision lacked substantial evidence is dispositive, the Court declines to address Appellant's additional arguments.

ORDER

IT IS THEREFORE ORDERED that the Board's determination that Appellant should be denied parole in this instance is **REVERSED**.

³ The Department first argued that Appellant's brief should not be considered past the ten-page mark, pursuant to ALC Rules. However, the Court granted Appellant's motion to exceed the page limit on December 4, 2015.

IT IS FURTHER ORDERED that this matter is **REMANDED** for a hearing before the Board to determine the conditions upon which Appellant will be released.

AND IT IS SO ORDERED.


Deborah Brooks Durden, Judge
S.C. Administrative Law Court

February 1, 2016
Columbia, South Carolina

RETURN 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 1st day of February 2016
By: R. E. L.
Deputy Law Clerk

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

David Lee Rose, #91858,	)	Civil Action No. 15-ALJ-P-0033
	)	
Appellant,	)	
	)	
v.	)	<u>APPELLANT ROSE'S BRIEF</u>
	)	
South Carolina Department of Probation, Parole and Pardon Services,	)	
	)	
Respondent.	)	
	)	

ISSUE PRESENTED

Did DPPPS err when it determined that Rose did not receive enough votes at his 2001 parole hearing to obtain parole under the *Barton* case?

STATEMENT OF THE CASE

This is an appeal of a final agency decision made by the South Carolina Department of Probation, Parole, and Pardon Services ("DPPPS"). On or about February 13, 2015, DPPPS made the determination that Rose did not receive enough votes at his 2001 parole hearing to obtain parole under *Barton v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013), R. at 122.¹ On June 1, 2015, Rose filed a Notice of Appeal with the Administrative Law Court challenging this decision.

STATEMENT OF THE FACTS

When Rose pled guilty to kidnapping and was incarcerated in 1978, South Carolina's parole statute provided that an inmate would receive parole if a simple majority of the Parole

¹ In an August 17 order, the Court permitted Rose to conduct discovery and supplement the Record on Appeal that had been submitted by DPPPS. Pursuant to this order, Rose filed an Appendix to the Record on Appeal on October 15. Thereafter, DPPPS filed a "Supplement Record on Appeal." Rose's brief cites to the Appendix to the Record on Appeal, and Rose requests that the Court strike DPPPS's "Supplement Record on Appeal" to avoid confusion.

Board members voted in favor of parole. S.C. Code Ann. § 55-613 (1962). In 1986, the parole statute was amended to provide that an inmate who committed a violent crime² would not receive parole unless a two-thirds majority of the Parole Board members voted in favor of parole. Omnibus Criminal Justice Improvements Act of 1986, No. 462 § 31, 1986 S.C. Acts 2955, 2990. The current parole statute retains the two-thirds majority vote requirement for an inmate convicted of a violent crime, S.C. Code Ann. § 24-21-645(A).

In 1987, the Parole Board granted Rose parole. R. at 250. In 2000, Rose's parole was revoked because he failed to report his change of address to his parole agent. R. at 250.

On June 20, 2001, Rose appeared at a hearing before the Parole Board to request parole. Six members of the Parole Board were present at Rose's hearing. Rose was represented at the hearing by counsel and was accompanied by two persons supporting his request for parole. R. at 123, ¶ 1 & 42, ¶ 3. Immediately after the hearing, a female DPPPS employee informed Rose and those with him that Rose's request for parole had been denied. R. at 123, ¶ 2 & 42, ¶ 6. Then, in the presence of Rose and his supporters, Rose's counsel asked the DPPPS employee about the vote count, and she stated that four members voted for parole and two members voted against parole. R. at 123, ¶ 2 & 42, ¶¶ 8-9; *see also* R. at 60 & 4 ("He [Rose] testified that at his last parole hearing, he received four votes in favor of parole, but that parole was denied based on being short by one vote.").

Even though Rose received four favorable votes out of the six votes available at the 2001 hearing, DPPPS denied Rose parole by: (i) retroactively applying the two-thirds majority vote requirement in section 24-21-645(A) to Rose; and (ii) interpreting the two-thirds majority vote requirement in section 24-21-645(A) to require five affirmative votes to obtain parole,

² Kidnapping is defined as a violent crime. S.C. Code Ann. § 16-1-60.

regardless of how many Parole Board members are present and voting at the parole hearing. R. at 250 & 110, P. 81, L. 12 – P. 82, L. 12.

After the 2001 parole hearing, Rose filed actions in Circuit Court and the ALC claiming that DPPPS had unlawfully denied him parole. Rose asserted that retroactively applying the current parole statute's two-thirds majority vote requirement to him – rather than the old parole statute's simply majority vote requirement – was an *ex post facto* violation.

In response to Rose's actions, DPPPS did not challenge the fact that Rose had received four votes for parole in 2001. Instead, DPPPS asserted that retroactively applying the two-thirds majority vote requirement in the current parole statute to Rose was not an *ex post facto* violation and therefore Rose needed five votes, not four, to obtain parole in 2001. R. at 250. DPPPS coupled this erroneous legal argument with a strategy of denying Rose a hearing on the merits of his constitutional claim. In 2006, DPPPS obtained the dismissal of Rose's Circuit Court action by arguing that the Administration Law Court should adjudicate Rose's claim. R. at 4. Shortly thereafter, DPPPS obtained the summary dismissal of Rose's Administrative Law Court action. R. at 7.

On July 3, 2013, the South Carolina Supreme Court held that DPPPS's retroactive application of the two-thirds majority vote requirement in section 24-21-645(A) violates *ex post facto* and DPPPS requiring five affirmative votes to satisfy the two-thirds majority requirement, regardless of how many members are present and voting at the parole hearing, violates section 24-21-645(A). *Barton v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013).

The *Barton* case made clear that DPPPS had been unconstitutionally denying inmates parole by requiring a two-thirds majority vote in favor of parole when inmates needed only a

simple majority vote. The *Barton* case also made clear that DPPPS had been unlawfully denying inmates parole by counting absent parole board members as "no" votes.

Granting parole is a two-step process. First, the Parole Board determines whether the inmate should receive parole. Second, if the Parole Board votes in favor of parole, the Parole Board sets the conditions for parole and signs an order for parole. R. at 96, P. 26, L. 13-23. As DPPPS's Director of Parole Board Support Services, Larry Patton, ("Director Patton") explains below, inmates who were erroneously denied parole because of the violations of law recognized by *Barton* made it through the first step -- they received enough votes for parole -- but they did not make it to step two.

Q. . . . And why didn't we have part two in 2001?

A. Because this law ruling [*Barton*] didn't take place back then.

Q. They [Parole Board] didn't know they needed to move to part two?

A. They were going under the current law.

Q. Right. They thought the inmate was rejected so they never got to conditions --

A. Right. . . .

R. at 106, P. 66, L. 18 -- P. 67, L. 1.

DPPPS implemented the following policy to rectify the violations of law identified by *Barton*:

10. BARTON HEARINGS

The South Carolina Supreme Court decision in *Barton v. SCDPPPS* held that the Board is to consider a majority and two-thirds majority to be based on the number of Board members present, rather than based on the full Board membership. If an offender's old vote is brought to the Department's attention, the Office of Parole Support Services staff will investigate to verify that the offender did receive the proper number of votes, and the Department's Office of Legal Services will verify it qualifies under proper number of votes, and the

Department's Office of Legal Services will verify it qualifies under Barton. The Department's Office of Victim Services will contact the victim and explain the Barton decision and the Board's vote. During a full Board day, the Board will hold a Barton hearing on the offender. This hearing will not require the presence of the victim or the offender.

At the Barton Hearing, the Board may impose any conditions on the offender as it feels necessary, including all statutory conditions. The Board will then sign a special Barton Order of Parole, which ratifies the votes of the previous Board members which would have granted conditional parole. The offender is then treated as any other offender granted conditional parole, and will have to comply with the conditions in order to receive parole.

R. at 121. This policy creates a two-step process. First, DPPPS determines whether the inmate received enough votes at the prior parole hearing to receive parole pursuant to guidance provided by Barton. If DPPPS determines the inmate received the requisite number of votes, the current Parole Board convenes a "Barton Hearing" to set conditions for parole and sign the order for parole. Importantly, the current Parole Board does not reconsider the prior Parole Board's decision to grant parole.

Q. . . . So the - in the Barton hearing process, the current parole board is not hearing from the victim witnesses again?

A. Right.

Q. They're not hearing from the offender again?

A. No.

Q. They're not hearing from the offender's attorney again?

A. Right.

Q. Because they don't need to.

A. Right. The decision is made.

Q. The decision was made in 2001.

A. Yes, whenever.

R. at 106, P. 67, LL. 13-25.

Q. . . . So under this Barton hearing process, the agency has the power to determine, after the investigation, whether the inmate has got enough votes in the past, right?

A. Right.

Q. The parole board has the power to impose conditions?

A. Right.

R. at 107, P. 70, LL. 9-16.

On February 26, 2014, after learning about the *Barton* case, Rose filed an action *pro se* in Circuit Court asserting that the *Barton* case had confirmed what Rose had been claiming for 14 years; that is, that DPPPS had unlawfully denied him parole in 2001. DPPPS again moved to dismiss Rose's case arguing that the Circuit Court lacked jurisdiction over Rose's claim and that the Administrative Law Court was the appropriate forum for Rose's claim. The Circuit Court deferred ruling on DPPPS's motion to dismiss, and instead ordered DPPPS to conduct an investigation to determine whether Rose should be paroled under *Barton*.

Pursuant to the Circuit Court's order and pursuant to the policy for Barton hearings set forth above, DPPPS conducted an investigation to determine whether Rose should receive parole under *Barton*. Director Patton conducted the investigation. R. at 150, no. 1.

During this investigation, Director Patton reviewed an affidavit from Carlos Bell who had attended the 2001 parole hearing. R. at 150, no. 1. Bell's affidavit corroborated Rose's assertion, and his previous testimony before the Circuit Court, that four Parole Board members voted for Rose to be paroled in 2001.

A women came out to the common area were [sic] we were waiting the results (I believe she was the secretary or recorder for the Parole Board), she said "I'm sorry but parole has been denied", we were dumb struck. After a moment of figuring what had just happened we asked Mr. Neal [counsel for Rose] if we

could find out what the vote was. Mr. Neal then asked the women what was the vote count, she gave this to him, then he in turn turned back to us and repeating what she had told him, the count was 4 yes votes and 2 no votes. I immediately asked Mr. Neal how can parole be denied when David got 4 Yes votes out of 6, was this not a majority. He stated this did not sound right and he would be checking on this.

R. at 123, ¶ 2.

DPPPS reported that no evidence other than Bell's affidavit was considered during the investigation. R. at 150-151, nos. 1 & 2. However, when Director Patton was asked during his deposition whether he had reviewed anything during the investigation that he believed was evidence that Rose had not received four votes, Patton identified a "hearing ledger" in DPPPS's computer that noted Rose had been rejected for parole in 2001. R. at 109, P. 79, L. 23 - P. 80, L. 9. At his deposition, Director Patton conceded that this ledger did not, in fact, contradict Rose's claim that he received four votes as the ledger did not contain the vote tally from Rose's hearing, and the ledger was made when DPPPS "[w]asn't counting votes, right, for today's ruling [*Barton*] . . ." and was retroactively applying the two-thirds majority requirement. R. at 110, P. 81, L. 12 - P. 82, L. 17.

In a letter dated February 13, 2015, DPPPS provided notice to Rose and the Circuit Court that DPPPS had concluded its investigation and decided that Rose was not entitled to receive parole under the *Barton* case. R. at 122. DPPPS's February 13th letter reported that "without any other evidence of the vote count from your June 20, 2001, hearing, the Department, cannot release you to parole." R. at 122. Importantly, DPPPS had no other evidence to review regarding the vote total at Rose's 2001 hearing because DPPPS had, for years, failed to make and keep written records of the votes at parole hearings. R. at 151-52, nos. 4, 5 and 6 ("Prior to 2014 the final vote count was never recorded.") & 98, P. 35, L. 20

- P. 36, L. 9 (DPPPS has been making written records of voting for "maybe a year").³ This failure to make and keep written records violates the parole statute and the Freedom of Information Act. S.C. Code Ann. § 24-21-40; S.C. Code Ann. § 30-4-10 *et seq.*

After the issuance of the February 13th DPPPS decision, the Circuit Court granted DPPPS's motion to dismiss and denied Rose's motion to reconsider in an order filed on May 1, 2015. R. at 9. In the order dismissing Rose's claim, Judge Addy concluded, as DPPPS had argued, that the Circuit Court did not have jurisdiction over Rose's claim, but the Administrative Law Court did. The Circuit Court's order included the following:

In a report dated February 13, 2015, the parole Board informed the court that they had conducted an investigation. The court is genuinely troubled by the failure of the Parole Board to maintain any records relating to the parole hearing of June 20, 2001, and the absence of any record documenting the denial of parole, or otherwise signed by the members of the board present at that hearing, is of significant concern to the court. Put another way, if the only evidence in existence is the affidavit of Carlos Bell [affirming that Rose received four (4) out of six (6) votes], and the Parole Board lacks documentation to demonstrate that Plaintiff did not receive the required number of votes, the court is curious as to how a meaningful investigation could have been conducted as required under *Barton v. S.C. Dept. of Probation, Parole, and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013). By implication, the Parole Board appears to take the position that, since all records have been destroyed, the vote must have been adverse to Plaintiff's position - ergo, the lack of documentation indicating denial of parole is sufficient to demonstrate that parole was denied. Such circular and perfunctory reasoning is curious and does not take into account the alternative possibility - that the affidavit of Carlos Bell is correct and that the Plaintiff was mistakenly denied parole under the holding in *Barton*. The letter of February 13, 2015 fails to indicate who conducted the investigation, the extent of the investigation, the identities of any persons interviewed, any documents or transcripts reviewed, or a factual basis for concluding that Plaintiff did not receive the necessary votes.

³ Even though Rose's 2001 hearing has been the subject of litigation for the past fourteen years, DPPPS destroyed the audio tape of Rose's 2001 hearing. R. at 151, no. 3. Rose has a copy of the audio recording from his 2001 hearing, but it does not include a tally of the votes. R. at 44 & 60.

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Plaintiff is advised to appeal the Board's finding to the ALC. The court would also respectfully suggest that this case may represent one of those rare occasions where the ALC should conduct a full, formal hearing into this matter.

R. at 9-10 (emphasis added).

On or about May 5, 2015, Rose received the order dismissing his Circuit Court case. On June 1, 2015, after retaining *pro bono* legal representation, Rose filed the instant appeal with the Administrative Law Court asserting that DPPPS⁴ had unlawfully denied Rose parole.

STANDARD OF REVIEW

The Administrative Law Court may reverse, modify, or remand a decision of DPPPS if Rose's rights have been prejudiced because DPPPS's 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).

ARGUMENT

I. DPPPS ERRED WHEN IT DETERMINED THAT ROSE DID NOT RECEIVE ENOUGH VOTES AT HIS 2001 PAROLE HEARING TO OBTAIN PAROLE UNDER BARTON

A. DPPPS's decision is not supported by substantial evidence in the record

"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 the administrative agency reached in

⁴ On July 30th, the Administrative Law Court denied DPPPS's motion to dismiss this appeal finding that the prior representations DPPPS made to the Circuit Court estopped DPPPS from seeking the dismissal of this appeal.

order to justify its action." *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 289, 599 S.E.2d 604, 611 (Ct. App. 2004). If an agency decision is supported solely by opinions of agency staff and not by factual evidence, the agency decision is "wholly unsupported under the substantial evidence test." *Roper Hosp. v. Bd. of S.C. Dep't of Health & Envtl. Control*, 306 S.C. 138, 143, 410 S.E.2d 558, 561 (1991).

To determine whether Rose received enough votes in 2001 to obtain parole under *Barton*, DPPPS conducted an investigation that compiled all the evidence available on this question. Because of DPPPS's abject failure to make and keep even the most basic written records of parole hearings, there was admittedly not much evidence to compile. DPPPS did have the sworn testimony from Carlos Bell stating that Rose had received four votes at the 2001 hearing. Bell's affidavit corroborated testimony Rose had offered in the previous legal actions he filed against DPPPS over the past 14 years. DPPPS also knew that Rose had consistently asserted in his legal actions against DPPPS that he had received four votes, and DPPPS never disputed this factual assertion.

The only "evidence" DPPPS said it had that contradicted Rose's assertion was the hearing ledger on the DPPPS computer. This hearing ledger contained an entry stating that Rose had been rejected for parole in 2001. Of course, that DPPPS rejected Rose for parole in 2001 was never in dispute. The question before DPPPS in February was whether Rose received four votes. A ledger entry made when DPPPS did not appreciate that it was violating *ex post facto* and the parole statute and that did not contain a vote tally is simply not probative evidence on this question. DPPPS now correctly acknowledges that this ledger is evidence of nothing.

Judge Addy noted in his order that DPPPS's February 13th decision did not identify a factual basis for the decision that Rose did not receive four votes.

The letter of February 13, 2015 fails to indicate who conducted the investigation, the extent of the investigation, the identities of any persons interviewed, any documents or transcripts reviewed, or a factual basis for concluding that Plaintiff did not receive the necessary votes.

R. at 10, ¶ 3 (emphasis added). Discovery in this case confirmed that the February 13th letter did not include a factual basis for DPPPS's decision *because DPPPS had no factual basis for its decision.*

DPPPS's decision cannot survive application of the substantial evidence test when the only evidence in the record is contrary to DPPPS's decision. Said another way, reasonable minds considering this record cannot reach the decision DPPPS reached and, therefore, this decision should be reversed.

B. DPPPS's decision is arbitrary, capricious, and an abuse of discretion

An arbitrary and capricious agency decision "is without rational basis, is based only on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or principles." *Trimmier v. S.C. Dep't of Labor, Licensing & Regulation*, 405 S.C. 239, 246, 746 S.E.2d 491, 495 (Ct. App. 2013)(quoting *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985)). An agency decision is an abuse of discretion when the decision is based upon a factual conclusion that is without evidentiary support. *Trident Med. Ctr. v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 341, 348, 772 S.E.2d 177, 181 (Ct. App. 2015).

As set forth above, it is undisputed that Director Patton had no records, affidavits, or other evidence that supported the notion that Rose received three, two, one, or zero votes at the 2001 hearing. It is also undisputed that Director Patton had evidence that Rose received four votes. Simply put, when DPPPS reached the conclusion that Rose did not receive four votes when the only evidence in the record established otherwise, DPPPS abused its discretion.

DPPPS based its decision that Rose did not receive enough votes in 2001, in part, upon Rose's failure to present DPPPS with records showing the 2001 vote tally. R. at 122 ("Without any other evidence of the vote count from your June 20, 2001, hearing, the Department, cannot release you to parole."). It should go without saying that it is arbitrary, capricious - not to mention inequitable - to penalize Rose for not having written records showing the 2001 vote tally when it was DPPPS that failed to make and keep these records in contravention of the parole statute and FOIA. *See Infra* at § II.

DPPPS based its February 13th decision, in part, upon review of an entry on a DPPPS hearing ledger noting that Rose's 2001 request for parole was rejected. As DPPPS now correctly acknowledges, this entry provides no probative evidence regarding the question at issue, and DPPPS relying upon this entry for the February 13th decision is, therefore, arbitrary and capricious.

C. DPPPS's decision violates constitutional and statutory provisions

1. Parole statute violation

Rose should receive parole if a majority of the Parole Board members present at a hearing vote in favor of parole. S.C. Code Ann. § 55-613 (1962) (approval by a majority results in parole); *Barton*, 404 S.C. at 419, 745 S.E.2d at 123 (members not present and

voting at the hearing are not counted when determining whether an inmate receives the required quantum of votes).

DPPPS's February 13th decision that Rose did not receive four votes for parole is arbitrary and capricious (*see Supra* at § B) and it is not supported by, but instead is contrary to, the evidence in the record (*see Supra* at § A). Considered conversely, DPPPS's February 13 decision denies Rose parole when *the only evidence in the record* is that Rose received four of six votes, a majority, at the 2001 hearing. Denying Rose parole when he received a majority of votes in favor of parole violates section 55-613 of the parole statute. For this additional reason, DPPPS's February 13th decision should be reversed.

2. Substantive due process violation

An agency decision that arbitrarily denies a person life, liberty, or property violates the substantive due process clause. *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 300, 737 S.E.2d 601, 611 (2013). "It is axiomatic that any period of incarceration implicates a sufficient liberty interest to trigger due process requirements." *Steele v. Benjamin*, 362 S.C. 66, 72, 606 S.E.2d 499, 503 (Ct. App. 2004).

DPPPS's decision that Rose did not receive enough votes at his 2001 parole hearing to be granted parole under *Barton* infringes upon Rose's liberty interest. As this agency decision is arbitrary and capricious (*Supra* at § B) and is not supported by, but is instead contrary to, the evidence in the record (*Supra* at § A), this decision violates Rose's substantive due process rights. For this additional reason, DPPPS's February 13th decision should be reversed.

II. DPPPS'S FAILURE TO KEEP RECORDS OF PAROLE BOARD HEARINGS CANNOT BE HELD AGAINST ROSE

"The Board shall keep a complete record of all its proceedings and hold it subject to the order of the Governor or the General Assembly." S.C. Code Ann. § 24-21-40; *see also* S.C. Code Ann. § 24-21-220 (including "maintaining the board's official records, and performing other administrative duties relating to the board's activities" as a duty of the Director of DPPPS). DPPPS acknowledges that a complete record of a parole hearing would include, among other things, a tally of the votes cast and identification of the members who voted for and against the request for parole. R. at 98, L. 10-17 (the record should contain "[j]ust essentially the board member and what he or she voted").

Over the years DPPPS has been repeatedly advised by the Attorney General that its failure to keep written records of parole hearings violates the Freedom of Information Act ("FOIA"). *In the matter of the Honorable Glenn F. McConnell*, 2001 W.L. 790250, *4 (Op. Att'y Gen. 2001) ("In short, [FOIA] requires the votes of individual members of the Parole Board to be public information."); *In the matter of Frank B. Sanders*, 1985 W.L. 259229, *1-2 (Op. Att'y Gen. 1985) (holding that a Parole Board is a public body and that "[a]ll public bodies shall keep written minutes of all their public meetings" including "a record . . . of any votes taken"); *In the matter of John E. James, III*, 2012 WL 5266016, *1 (Op. Att'y Gen. 2012) (noting that FOIA should be narrowly construed to ensure public access, including a record of individual votes by the members of a public body).

At parole hearings that occurred before 2014 (including Rose's 2001 hearing), DPPPS failed to make and keep any, much less complete, written records. Consequently, DPPPS has

no written record of Rose's 2001 vote tally or the members who voted for and against Rose's request for parole.

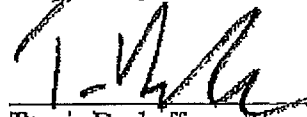
DPPPS's February 13th decision holds DPPPS's failure to make and keep a record of Rose's parole hearing against Rose. R. at 122 ("Without any other evidence of the vote count from your June 20, 2001, hearing, the Department, cannot release you to parole."). DPPPS's responses to discovery indicate that DPPPS will maintain this inequitable and unreasonable position in response to this appeal. R. 151, no. 4 ("There exist no records detailing the final vote of the Appellant's hearing, *and nothing was presented by the Appellant revealing the final vote at his 2001 hearing.*")(emphasis added).

To the extent that DPPPS claims that it needed more evidence to find that Rose received four votes, this claim should be rejected because DPPPS, not Rose, is responsible for DPPPS's abject failure to make and keep parole hearing records in violation of both the parole statute and FOIA.

CONCLUSION

For the reasons set forth above, Rose respectfully requests that the Court: (1) reverse the decision of DPPPS that Rose did not receive enough votes to receive parole under *Barton*; (2) remand this matter back to DPPPS and the Parole Board with instructions to convene a Barton Hearing for Rose for the sole purpose of imposing appropriate conditions, if any, to the parole granted Rose by the 2001 Parole Board and signing an order of parole; and (3) for any other relief that is just and proper.

Respectfully submitted,



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November 16, 2015

Columbia, South Carolina

STATE OF SOUTH CAROLINA
In The Administrative Law Court
Docket Number 15-ALJ-033

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

DAVID LEE ROSE, #91858, ... APPELLANT

v.

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

BRIEF OF RESPONDENT

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ATTORNEY FOR THE RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. Did the Respondent err in determining that the Appellant failed to prove he received a sufficient number of votes to be granted parole pursuant to the *State v. Barton* decision?

STATEMENT OF THE CASE

On April 6, 1978, the Appellant along with his co-defendant Jack B. Oliphant approached a child near his home in Laurens County, South Carolina. Upon asking the child to show them directions to a nearby address, he was forced into a vehicle and driven to Greenville. They held him captive for eighteen hours demanding a ransom for his return. Upon hearing on the radio the authorities were actively searching for this child, the defendant's decided to release the child to a nearby rural area. Both defendants were later found, arrested and charged with the offenses of kidnapping.

On May 22, 1978, the Appellant appeared before the Honorable James Moore for the offense of kidnapping. Upon completion of this appearance the Appellant was sentenced to a term of incarceration for the remainder of his natural life.¹ At the time the Appellant committed this offense South Carolina law allowed an individual serving a life sentence for kidnapping parole eligibility upon the service of ten years.

The Appellant was granted parole in 1987, but failed to report for years. Finally in 1991, an arrest warrant was issued, he was then placed in absconded status. It was later discovered that he was residing in Florida. He was extradited to South Carolina and his parole was revoked on June 14, 2000. The Appellant then appeared before the Parole Board on June 20, 2001, and the Board decided to deny parole.

On August 30, 2004, the Appellant filed an application for post-conviction relief. R. p. 11 Within this application the Appellant argued that he received four votes in the affirmative in 2001, so he should have been released on parole. Since this was a post-conviction relief action against his Public Defender Michael Turner, and his parole attorney Alvin Neal they were the only ones

¹ Co-Defendant Jack Oliphant was also give a life sentence for the offense of kidnapping. He was paroled on February 21, 1986, he currently remains on parole and now residing in the state of Georgia.

named to this action. **R. p. 15** The Attorney General responded and argued that the Circuit Court does not have jurisdiction, but jurisdiction falls upon the Administrative Law Court. (ALC) On March 3, 2006, the Honorable Wyatt T. Saunders ordered this case be dismissed without prejudice so it can be presented before the ALC. **R. p. 6** Judge Saunders ordered that if the ALC decides not to hear this case, the Appellant has the right to re-file before the Circuit Court.

The Appellant delivered a request for parole on April 17, 2006. **R. p. 250** The Respondent informed that he cannot be assisted in that matter. The Appellant then filed a notice of appeal before the ALC, on May 12, 2006. **R. p. 30**. On May 14, 2007, the Honorable John D. Geathers, Administrative Law Court Judge, issued an order dismissing this appeal. **R. pp. 7-8** It was his opinion that the ALC did not have jurisdiction over this offense.

On February 26, 2014, the Appellant filed a summons and complaint against the Respondent. **R. p. 31** The Respondent filed a motion to dismiss arguing that due to the South Carolina Supreme Court decision of *State v. Furtick*, the Circuit Court does not have jurisdiction. A hearing regarding the Respondent's motion to dismiss was held before the Honorable Frank R. Addy, on May 19, 2014. Upon the conclusion of this hearing, Judge Addy denied the Respondent's motion and ordered the Respondent conduct an investigation to determine if he has received four votes at the conclusion of his 2001 hearing. **R. pp. 9-10**

During this investigation the Respondent discovered that the recording of the 2001 parole hearing was destroyed. Even though the Appellant had a copy of this recording, the only thing produced to the Respondent was an affidavit from his cousin Carlos Bell. **R. pp. 180-181** Within his affidavit Mr. Bell stated that the Appellant's lawyer spoke to a Department employee in the common area who informed him that the Appellant received four votes, who in turned informed

Mr. Bell. The Respondent determined that this was not sufficient evidence and denied. Upon being notified of this denial, the Appellant filed a notice of appeal before the ALC.

Within his appeal the Appellant alleges that he should be granted parole due to the destruction of the audio recording, and the Department not having any records revealing the final vote count. The Appellant argues the failure to maintain these records should be considered arbitrary and capricious. The Respondent argues that the decision to release anyone on parole is solely the responsibility of the Parole Board, and the burden of proof that he received the required amount of votes falls upon the Appellant. The Respondent will further argue that in *Barton* the Court never determine it's holding to be retroactive. The Respondent's brief supporting their arguments follows.

ARGUMENTS

- 1. The Appellant's brief exceeds the page limit allowed under the rules of the ALC; therefore, any pages beyond this limit should not be considered.**

The Appellant's brief is sixteen pages, well beyond the limit imposed by the rules. The principal briefs shall not exceed ten pages and the reply brief shall not exceed five pages. Rule 60 SCRALC. The Appellant argues that due to the complex factual and legal issues present his brief must exceed the limit imposed by the rules. This case is not any more complex than any issue that the Respondent has brought before the ALC. The issue of this case is simple: the ALC must determine whether the Respondent erred in deciding that the Appellant has failed to prove sufficient votes was given to him to be granted parole. The Appellant attempts to make this case seem difficult by presenting irrelevant matters. This matter is simple and can be argued within the ten page limit established under the rules. The Respondent has had prior cases regarding this exact issue in which both parties were able to present their case within the page limit allowed. The

Appellant should be required to do the same. The Court should hold him to the limits imposed under these rules.

The reason the Appellant has failed to present their brief within the page limit allowed by rule, is due to the fact they have included arguments within the statement of the case a rule violation. The Appellant's "Statement of Facts" is nine pages long which includes quotes from an order signed by Judge Addy, which is not relevant. He also includes arguments regarding a determination of parole pursuant to *Barton* which should not be included within a statement of the case. "The statement of the case should contain a concise history of the proceedings....should not contain contested matters and shall contain as a minimum, date of the commencement of the action; nature of the action; date and nature of the agency action appealed from; date of service of the notice of appeal." Rule 60(B)(2) SCRALC. This page limit has been placed within the rules so the ALC would not be burdened with voluminous pages of irrelevant information. The ALC should only be provided a concise brief that contains the information needed to make an informed decision relating to the matter on appeal. This brief is in violation of the rules of the Administrative Law Court, and the Appellant should be either forced to present a brief that excludes irrelevant information so it can fall within the established page limits, or all information past the ten page mark not be considered.

2. The determination of parole lies solely with the Board and the burden falls on the Appellant that he received the votes to be granted parole.

The Appellant argues that since the audio was destroyed prior to the *Barton* hearing he should be granted release on parole. The Appellant expects the Respondent to grant a criminal offender release from incarceration based solely on hearsay testimony submitted through an affidavit submitted by his cousin Carlos Bell. According to this affidavit the Appellant's attorney spoke to an unnamed employee of the Department who informed him that the Appellant received four

affirmative votes. His lawyer in turn informed all of them of the vote count, was paid by Mr. Bell, and they all left the premises. No further action was ever made by this attorney regarding this decision, no motion for reconsideration, or appeal was filed, even though he was paid for the entire process. R. p. 180 The Appellant could have been told this vote by his attorney only to assure payment. This was the only information presented, so the Board was well within their duty to deny parole. Any release on parole lies totally with the Parole Board, "no such prisoner may be paroled until it appears to the satisfaction of the board." S.C. Code Ann. §24-21-640 (Supp. 2014).

The Appellant seeks a release 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 South Carolina Supreme Court decided in *Barton* that requiring an inmate convicted prior to 1986 a two-thirds vote to be granted parole is in violation of ex post facto. The Appellant argues that due to him receiving four affirmative votes any denial of parole is in violation of ex post facto.

The Appellant has yet to prove he has received four votes. In administrative proceedings the general rule is that an Appellant for relief, or a privilege has the burden of proof and the burden of proof rest upon who files a claim with an administrative agency to establish that required conditions of eligibility have been met. *Leventis v. South Carolina Department of Health and Environmental Control*, 340 S.C. 118, 530 S.E.2d 643 (2000). The Appellant failed to present sufficient evidence proving he has received the required votes to be granted parole. The only evidence presented to the Respondent is an affidavit written by his cousin, which is full of hearsay testimony. He never presented affidavits from Board members who sat on that hearing. Other inmates have done so in order to prove they have received the requisite votes to be granted parole. The Appellant never presented or sought the Department employee his lawyer supposedly spoken

to, nor his sister Kathy Todd who was also supposedly present; nor has he presented an affidavit from his lawyer confirming this conversation. Inmates have included affidavits from their attorney confirming the vote count, the Appellant has failed to do so. **R. pp. 39-40.** The Appellant continues to argue that the audio recording was destroyed which violates his substantive due process rights. This argument is not relevant due to the fact the Appellant had a copy the entire process, and failed to submit this recording to the Board for review. **R. p. 40, R. p. 252**

Within this recording there was no final vote count, the chairman just states "David Lee Rose rejected 1 and 5."² **R. p. 49** There are other instances which the chairman had announced "the inmate was rejected 4 to 2." **R. p. 40** In the present case, there was also no deliberation, nor a final vote count mentioned. It is safe to assume that the Appellant was denied unanimously. **R. p. 113, p. 96 lines 4-6** There was no evidence presented to the contrary, and that assumption can be as easily made, especially since he has not received any votes since 2001. **R. p. 144, p. 69 lines 11-16.** The Appellant is under the assumption that since he provided only an hearsay affidavit he should be automatically release on Parole. The Appellant failed to give a full faith effort to gather sufficient substantial evidence that would convince the Respondent to release him on parole. It should be considered reasonable that the Board not release anyone on parole when the only evidence presented is a biased statement from the inmate's cousin. If the Board believed the Appellant failed to provide sufficient evidence to verify a ratification of a Board's previous vote that determination must be upheld. The findings of an administrative agency are presumed correct and will be set aside only if supported by substantial evidence. *Summersell v. South Carolina Department of Public Safety*, 334 S.C. 357, 513 S.E.2d 619 (1999). Substantial evidence is evidence which considering the record as a whole would allow reasonable minds to reach the

² The 1 and 5 mentioned are the reasons for denial and not the final vote.

conclusion that the administrative agency reached in order to justify its action. *Lark v. Bl-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981).

When looking at the case at a whole it is clearly reasonable that the Appellant would be denied parole. There was nothing present that conclusively reveals he received four affirmative votes at the conclusion of that 2001 hearing. If anything, all evidence reveals the Appellant failed to receive four affirmative votes. His parole was just revoked just a year earlier; he has not received any votes since being revoked; there was no mention of the vote count or any deliberation as in other hearings occurring at that time. He absconded supervision from 1991 till 2000 a total of nine years, and was not found in South Carolina but in the state of Florida. The Respondent are usually inclined to deny parole upon a recent revocation. **R. p. 140, pg. 55 line 16 to pg. 56 line 3**

The Appellant argues that he was in litigation against the Respondent so the Respondent should have preserved the audio recording of his hearing. The original litigation was a petition for post-conviction relief filed against the state of South Carolina on August 30, 2004. **R. pp. 11-17** The parties named to this litigation was his public defender, Michael Turner and his parole attorney Alvin Neal. **R. p. 15.** The Respondent was never a party to this action, so they were never served. Notification for this post-conviction relief was served on the solicitor's office, and the Attorney General who defended the state in this litigation.³ There was never a request for the audio tape to be delivered to the Attorney General, and a copy was in the possession of the Appellant. The Respondent was not made a party to any litigation against the Appellant until the ALC dismissal in 2007. The matter was not raised again until the Respondent was made a party of the Appellant's summons and complaint and resulting motion to dismiss in 2014.

³ The clerk shall docket the application upon its receipt and promptly bring it to the attention of the court and deliver a copy to the solicitor of the circuit in which the applicant was convicted and a copy to the Attorney General. S.C. Code Ann. §17-27-40(Supp. 2014).

The record keeping of the Respondent is irrelevant due to the fact the Appellant had a copy of the audio tape throughout the process. The Respondent had to destroy some of the hearing tapes due to the lack of storage space, and the cost of storage; however, any destruction of the Appellant's hearing recording should be considered moot, since he had a copy that was never delivered to the Board. A subject become moot when judgment, if rendered will have no practical effect upon the existing controversy. *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 195 S.E.2d 713 (1973).

3. The Appellant requests a remedy that cannot be provided by the Courts.

The Appellant requests this Court reverse the decision of the Board denying the Appellant an opportunity to be released on parole. The ALC does not have the ability to reverse a decision made by the Parole Board. 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). The Appellant also requests the ALC to order that the Board convene a hearing pursuant to *Barton* for the sole purpose to imposing conditions of parole. This would make this Court the determining body regarding parole. That responsibility was never given to the Courts. 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 Pardons. *Brown v. State*, 306 S.C. 381, 412 S.E.2d 399 (1991). Section 24-21-640 specifically provides for the Board to consider the complete record of a prisoner and delegates to the Board the responsibility of determining if and when a prisoner meets the prerequisites of parole eligibility. *State v. McKay*, 300 S.C. 113, 386 S.E.2d 623 (1989). The Appellant seems of the opinion that a *Barton* hearing is just a rubber stamp of the Parole Board. That is untrue. A decision of the Respondent pursuant to *Barton* is three fold. First, the

office of Board Support Services will conduct an investigation to verify if the prisoner has possibly received the proper number of votes; second, the Office of Legal Services will verify if it qualifies under *Barton*; and, third, the Board holds a hearing during a full board day. R. p. 234 The Appellant failed to get through the first stage due to his lack of a good faith effort to gather sufficient information proving he received the required number of votes to be granted parole. This denial of parole was proper and not subject to remand, and the ALC does not have the authority to reverse.

4. The two-thirds rule announced in *Barton* does not apply retroactively.

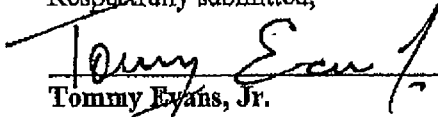
The Appellant seeks collateral review of the denial of his parole in 2001. However, the *Barton* court did not state that its interpretation of the two-thirds rule set forth in section 24-21-645(A) should apply retroactively to cases on collateral review. "The question of whether a decision announcing a new rule should be given prospective or retroactive effect should be addressed at the time of the decision." *Talley v. State*, 371 S.C. 535, 640 S.E.2d 878 (2007)(citing, *Teague v. Lane*, 489 U.S. 288, 300 (1989)). That the *Barton* court was silent to this issue implies that it did not intend for its ruling to apply retroactively, but only in future hearings. In fact, the law does not support *Barton's* retroactive effect. In *Talley*, the South Carolina Supreme Court adopted the United States Supreme Court's ruling in *Teague* that new procedural rules should not apply retroactively except criminal law-making power to penalize. *Talley*, at 543. This exception cannot apply to this case. The second exception occurs when a new rule amounts to a "watershed rule" of procedure. *Id.*, at 543. A "watershed rule" is a new rule requiring that procedures implicit in the concept of ordered liberty to be observed during a hearing – a rule that "implicate[s] the fundamental fairness and accuracy of the proceeding." *Id.* The *Barton* ruling did not announce such a rule. In the context of post-conviction administrative parole hearings, inmates only have a

protected right to the hearing, not to parole itself. *Furtick v. S.C. Department of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2003). Inmates are due minimum due process which is provided by notice and hearing.⁴ *Id.*, at 598. The *Barton* court plainly stated that section 24-21-645(A) was ambiguous and subject to more than one interpretation. *Barton*, at 416. The Court did not find that the minimum due process an inmate must receive also includes a protected right to a *particular interpretation* of section 24-21-645(A), only the Department (and the South Carolina Administrative Law Court) had wrongly interpreted the statute. Here the Appellant received sufficient due process because he was notified of the hearing were he appeared with counsel. The *Barton* ruling does not apply retroactively to his case.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests that the final decision of the South Carolina Department of Probation, Parole and Pardon Services be affirmed.

Respectfully submitted,


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Columbia, South Carolina
December 11, 2015

⁴ It may be that *Teague, Talley*, and their descendants, which had examined new rules of *criminal* procedure, cannot apply to a judicial interpretation of a statute establishing *civil* procedure in post-conviction administrative law hearings. See generally, *Hamm v. South Carolina*, 403 S.C. 461, 744 S.E.2d 503 (2013).

STATE OF SOUTH CAROLINA
In the Administrative Law Court
Docket Number 15-ALC-15-0033

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

DAVID LEE ROSE, SCDC# 91858,.....APPELLANT

v.

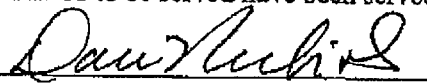
SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES.....RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant to counsel for Respondent, certify that I have served the within *Brief of Respondent*, dated December 11, 2015, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, the 14th day of December, 2015, addressed to:

Travis Dayhuff, Esquire
Nelson Mullins Riley & Scarborough LLP
1320 Main Street, 17th Floor
Columbia, South Carolina 29201

I further certify that all parties required by Rule 61 to be served have been served.


Dawn Nichols
Executive Assistant
South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 50666
Columbia, South Carolina 29250

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

David Lee Rose, #91858,	)	Civil Action No. 15-ALJ-P-0033
	)	
Appellant,	)	
	)	
v.	)	<u>APPELLANT ROSE'S</u>
	)	<u>REPLY BRIEF</u>
South Carolina Department of Probation, Parole and Pardon Services,	)	
	)	
Respondent.	)	
	)	

Appellant David Rose's arguments in reply to the arguments set forth in the December 11, 2015 brief of the South Carolina Department of Probation, Parole, and Pardon Services ("DPPPS") are set forth below.¹

ARGUMENT

I. ALL THE EVIDENCE DPPPS CONSIDERED BEFORE MAKING THE DECISION THAT IS THE SUBJECT OF THIS APPEAL SUPPORTED ROSE'S CLAIM THAT HE RECEIVED FOUR VOTES

DPPPS argues that Rose did not have enough evidence, and that the evidence Rose did have was not good enough. DPPPS Br. at 4-5. DPPPS's claim that Rose did not have enough evidence should be rejected as it is undisputed that DPPPS failed to make, much less to preserve, even the most rudimentary records of the vote counts at parole hearings, and this

¹ DPPPS's description of Rose's 1978 offense is inaccurate and incomplete. As Rose's offense is not relevant to any issues in this appeal, Rose will note only that the 1987 Parole Board and the 2001 Parole Board heard *all the facts* regarding his offense, and Rose *twice* received enough votes from these Boards to obtain parole.

failure occurred despite multiple admonitions from the Attorney General that such record keeping was required by law. Rose Br. at 14.²

DPPPS's claim that Rose's evidence is unreliable "hearsay" is incorrect. A statement made by a party opponent is "not hearsay." S.C. R. Evid. 801(d)(2). Rose testified in court and Carlos Bell testified in an affidavit that after the 2001 parole hearing a female DPPPS employee told Rose, Bell, and Rose's counsel that four members voted in favor of parole and two voted against parole. Rose Br. at 2. As the DPPPS employee's statement is an admission by a party opponent, it is not hearsay.

DPPPS's arguments regarding the amount and nature of Rose's evidence miss the fundamental point on appeal. It is axiomatic that an agency's decision on a contested issue must be supported by the evidence the agency considered. S.C. Code Ann. § 1-23-380(5). Said conversely, an agency decision that is not based upon the evidence the agency considered or that is contrary to the evidence considered is invalid. *Id.*

Director Patton on behalf of DPPPS compiled and considered the evidence on the question of whether Rose received four votes at his 2001 hearing. At his deposition Director Patton listed all the evidence that he considered. Patton had evidence that Rose received four votes in 2001 in the form of Rose's prior testimony and Bell's affidavit. Patton had no evidence that Rose had received three, two, one, or zero votes in 2001. Simply put, on this evidence, the only agency decision that DPPPS could have made - that would have been supported by substantial evidence - was a decision that Rose received four votes. Said

² DPPPS makes the related claim that Rose "failed to give a full faith effort to gather sufficient substantial evidence that would convince the Respondent to release him on parole." DPPPS Br. at 6. DPPPS's claim that Rose has not worked hard enough to establish that he is entitled to parole as a result of the 2001 hearing is particularly galling when one considers that Rose has been litigating this very issue with DPPPS, often *pro se*, for most of the last 15 years. Rose Br. at 3; 6-9.

conversely, on this evidence DPPPS's decision that Rose received less than four votes is not supported by substantial evidence and is, instead, arbitrary and capricious.

II. THE COURT MAY GRANT THE RELIEF ROSE SEEKS

DPPPS argues that Rose's appeal must fail because Rose asks the Court to "become the determining body regarding parole" and to "reverse" a Parole Board decision, thereby usurping the authority given the Parole Board by the General Assembly. DPPPS Br. at 8. DPPPS's argument should be rejected as it mischaracterizes the relief Rose seeks.

Rose does not ask the Court to review Rose's record while in prison and determine whether he should receive parole. That determination, most assuredly, is one for the Parole Board. S.C. Code Ann. § 24-21-640. Rose also does not ask the Court to reverse a routine denial of parole by the Parole Board, as such a request would be contrary to the well-established law that parole is a privilege, not a right. *Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 377 S.C. 489, 496, 661 S.E.2d 106, 110 (2008).

What Rose does seek is the reversal of the DPPPS determination, made by Director Patton pursuant to DPPPS's "Barton Hearing" policy, that Rose did not receive enough votes at his 2001 hearing to receive parole. Rose seeks the reversal of this DPPPS decision because the decision it is not supported by substantial evidence, it is arbitrary and capricious, and it violates the Parole Statute and substantive due process. Rose Br. at 9-13. If the Court finds that DPPPS's decision should be reversed pursuant to one or more of Rose's legal claims, Rose asks the Court to order DPPPS to allow Rose to proceed to step two in the parole process where Rose would receive parole conditions, if any, and would receive an order of parole pursuant to DPPPS's Barton Hearing policy. Rose Br. at 4-6 & 15.

DPPPS makes no claim that the Court cannot adjudicate Rose's *actual* claims or that the Court cannot order DPPPS to follow its own policies. The Court's authority in this regard cannot seriously be questioned. S.C. Code Ann. § 1-23-380(5); *Barton v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013); *Jernigan v. State*, 340 S.C. 256, 531 S.E.2d 507 (2000).

III. DPPPS'S ARGUMENT REGARDING THE "TWO-THIRDS RULE" SHOULD BE REJECTED

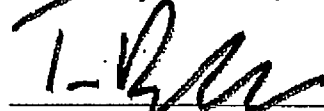
DPPPS claims that Rose's appeal fails because the *Barton* case's "two-thirds rule" does not apply retroactively to Rose. DPPPS Br. at 9-10. Though it is far from clear, DPPPS appears to be using "two-thirds rule" to refer to the Supreme Court's holding in *Barton* correcting the way DPPPS calculated whether an inmate had achieved a two-thirds majority (or a simple majority) vote for parole. The *Barton* case made clear that DPPPS violated the Parole Statute when it calculated these percentages without regard to the number of Parole Board members actually present and voting at the hearing. *Barton*, 404 S.C. at 414-19, 745 S.E.2d at 120-23.

The Supreme Court in *Barton* also held that DPPPS's retroactive application of the two-thirds majority vote requirement in section 24-21-645(A) violated *ex post facto*. *Id.* at 114-20 & 402-14. DPPPS does not contend that this holding does not apply to Rose. Pursuant to *Barton* then S.C. Code Ann. § 55-613 (1962) and its simple majority vote requirement applies to Rose -- not section 24-21-645(A)'s and its two-thirds majority vote requirement. Therefore, even if the *Barton* case's holding regarding the calculation of the required percentages does not apply to Rose, which is denied, not applying this holding to Rose would be of no moment as four votes is a majority of both six or seven.

DPPPS argues that the Supreme Court's silence regarding retroactivity in *Barton* "implies" that the "two-thirds rule" should apply prospectively only. DPPPS Br. at 9. DPPPS's argument ignores the inconvenient fact that the Supreme Court in *Barton* applied its holdings retroactively to Barton's previous hearing resulting in her parole. *Barton*, 404 S.C. at 419, 745 S.E.2d at 123 ("Appellant received the requisite number of votes from the Parole Board, and thus, should be granted parole. Thus, we remand for proceedings consistent with this opinion."). For this additional reason, DPPPS's argument regarding the retroactive application of the "two-thirds rule" should be rejected.

Finally, this argument should also be rejected because DPPPS's reliance on *Talley v. State*, 640 S.E.2d 878, 371 S.C. 535 (2007) is misplaced. The *Talley* case addresses the standards to determine whether a new rule of federal constitutional law should apply retroactively. Simply put, the *Barton* case did not announce a new rule of federal constitutional law.

Respectfully submitted,



Travis Dayhuff
 Susan H. Nelson
 Nelson Mullins Riley & Scarborough LLP
 1320 Main Street - 17th Floor (29201)
 Post Office Box 11070
 Columbia, SC 29211-1070
 (803) 799-2000
 Attorneys for Appellant

January 14, 2016

Columbia, South Carolina

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant David Lee Rose, #91858, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified to the following address(es):

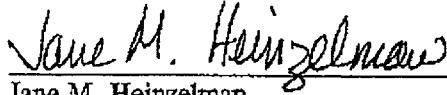
Pleadings:

APPELLANT ROSE'S REPLY BRIEF

Counsel Served:

Hand Delivery

Matthew C. Buchanan, Esq.
Tommy Evans, Jr., Esq.
South Carolina Department of Probation,
Parole, & Pardon Services
2221 Devine Street, Suite 600
Post Office Box 50666
Columbia, SC 29250



Jane M. Heinzelman
Administrative Assistant

January 14, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF MARLBORO)

AFFIDAVIT

PERSONALLY APPEARED BEFORE ME, Douglas Jennings, Jr., Attorney at Law, who, after first being duly sworn, deposes and says:

1. I represented Gene Ray Richardson (SCDC No.: 93614) before the South Carolina Parole Board seeking his parole during the hearing held on June 20, 2001;
2. On the date of the hearing, I appeared personally in the Board room at the Parole Board offices on Devine Street in Columbia;
3. I have had an opportunity recently to review my old file, including my notes, and I have had an opportunity to listen carefully to the audio tape of the entire hearing, including the deliberations of the Board members and the vote held on 6-20-01;
4. The Parole Board meeting on 6-20-01 consisted of six (6) Board members present and one (1) absent. The Board members who were present were Orton Bellamy (Chm.), Marlene McLain, J. P. Hodges, Sango Rember, June Shisslas and John McCarroll;
5. I give it as my sworn opinion that it is clear and unequivocal that Gene Ray Richardson received four "yes" votes in favor of parole and two votes against.
6. Specifically, it is absolutely clear in listening to the Board deliberations that both Board members Rember and Hodges spoke up specifically and made it clear that they were voting in favor of parole. Furthermore, after the victim testimony, Board member Marlene McLain also spoke favorably and made it clear that she was voting in favor of parole and you can clearly hear her state on the audio tape that we should "give him a chance now".

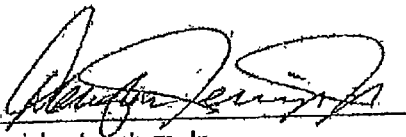
7. When the vote was announced, Chairman Bellamy did not specify which other Board member voted in favor of parole along with McLain, Hodges and Rembert. However, he did announce that parole "is rejected 4 to 2". Not only would it be impossible for the 4 votes to have been against parole, given the fact that 3 Board members clearly stated their vote in favor of parole, but also my notes indicate that the fourth favorable vote was in fact Chairman Bellamy. After the hearing, I was told by a staff member of SCDPPPS who was in the Board room during the vote that we had come very close and had gotten four (4) votes in favor, but he was rejected by a 4-2 vote under the then-existing Board policy which required five (5) favorable votes even when a Board member was absent.

8. In addition to the unambiguous statements on the tape by three (3) Board members who clearly stated they were voting "yes", which makes it utterly and completely impossible for the final 4-2 vote to have consisted of four (4) votes against parole, my notes indicate that during the week after the parole hearing, I had a conversation with former Board member J. P. Hodges (now deceased) during which he complimented us on an excellent presentation and told me that we had fallen just shy of the necessary five (5) votes by getting four (4) votes in favor. He reiterated that the four favorable votes were Bellamy, McLain, Rembert and himself.

9. I submit this sworn Affidavit under the penalties of perjury, and avowing that it is true and correct. I would be happy to testify before any tribunal to this effect, and would

submit my testimony to direct and cross examination.

Further deponent sayeth not.


Douglas Jennings, Jr.
Douglas Jennings Law Firm, LLC
P. O. Box 995, 151 Broad Street
Bennettsville, SC 29512

SWORN to before me this
27th day of January, 2014

Carol B. Dudley (L.S.)
Notary Public for South Carolina
My Commission Expires: 11-27-16

AFFIDAVIT OF DAVID LEE ROSE

PERSONALLY APPEARED BEFORE ME, David Lee Rose, being duly sworn, deposes and states as follows:

1. My name is David Lee Rose, and I have personal knowledge of the facts set forth in this affidavit.

2. I am presently an inmate in the South Carolina Department of Corrections. My inmate number is 91858.

3. On June 20, 2001, I had a parole hearing. Present for the hearing were myself, Mr. Alvin Neal (my attorney), Kathy Todd (my sister), and Carlos Bell (my cousin).

4. Prior to the hearing, we learned that the Parole Board was one member short but that the hearings would proceed with six Board Members.

5. After the hearing, a young woman came out of the parole hearing room into the common area. The young woman ("Parole Examiner") approached us and told us that my request for parole had been denied.

6. I immediately asked Mr. Neal if we could find out how many votes I received in favor of parole.

7. Mr. Neal, standing just three feet away from myself and Carlos Bell, turned to the Parole Examiner, who was also standing just three feet away from myself and Carlos Bell, and asked her how many votes I got in favor of parole.

8. I heard the Parole Examiner respond to Mr. Neal, "Mr. Rose received four votes."

9. I then heard Carlos Bell ask Mr. Neal how I could be denied parole when I received four out of six votes because that was a majority. Mr. Neal said that he would look into it and get back to us.

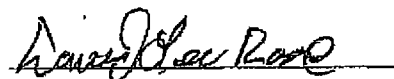
FURTHER, THE AFFIANT SAYETH NOT.

[SIGNATURE PAGE TO FOLLOW]

FILED

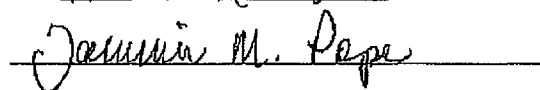
OCT 20 2015

SC ADMIN. LAW COURT



David Lee Rose

SWORN to and subscribed before me

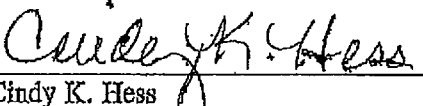
this 11th day of October, 2015.

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant David Lee Rose, #91858, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified to the following address(es):

Pleadings: **AFFIDAVIT OF DAVID LEE ROSE** (executed; replacing unsigned copy at pages 42 and 43 of Appendix to the Record on Appeal)

Counsel Served: **U.S. Mail**
Matthew C. Buchanan, Esq.
Tommy Evans, Jr., Esq.
South Carolina Department of Probation,
Parole, & Pardon Services
2221 Devine Street, Suite 600
Post Office Box 50666
Columbia, SC 29250


Cindy K. Hess
Sr. Administrative Assistant

October 20, 2015

FILED

OCT 20 2015

SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

AFFIDAVIT

PERSONALLY appeared before me, Roosevelt Hicks, who, after being duly sworn, deposes as follows:

1. I am an employee of the South Carolina Department of Probation, Parole & Pardon Services where I hold the position of Supervisor in the Office of Board Support Services.
2. I have personal knowledge of the procedures and laws that apply to the scheduling and consideration of parole;
3. According to our records, Mr. David Lee Rose, #91858, had a parole consideration hearing on June 20, 2001, and was rejected for parole. Due to the length of time since this hearing, all records have been destroyed and parole consideration hearings were not recorded prior to 2002. Therefore, the only information that can be provided is that Mr. Rose was rejected.

FURTHER AFFIANT SAYETH NOT.

Roosevelt Hicks
Roosevelt Hicks
Supervisor, Office of Board Support Services
South Carolina Department of Probation,
Parole & Pardon Services

SWORN to before me this 20th
day of May, 2014

Margaret L. Brown
Notary Public for South Carolina
My Commission Expires: 2/26/2021

Tommy Evans

From: Roosevelt Hicks
Sent: Monday, September 21, 2015 3:43 PM
To: Tommy Evans
Subject: RE: David Rose #91858

Sorry, I do not know who or when the recording was destroyed. This was not my job at that time.

From: Tommy Evans
Sent: Monday, September 21, 2015 3:39 PM
To: Roosevelt Hicks <Roosevelt.Hicks@ppp.sc.gov>
Subject: David Rose #91858

The recording of his hearing was destroyed. Do you have any record of when the tape was destroyed and by whom? If you can let me know by tomorrow I will appreciate it.

Tommy

Tommy Evans

From: Roosevelt Hicks
Sent: Monday, August 31, 2015 10:39 AM
To: Tommy Evans
Subject: RE: Barton Hearings

There isn't any. The only one that applied, heard, and rejected was Kenneth Green #116020.

From: Tommy Evans
Sent: Monday, August 31, 2015 10:28 AM
To: Roosevelt Hicks <Roosevelt.Hicks@ppp.sc.gov>
Subject: RE: Barton Hearings

No I'm talking about Barton hearings period those before this board and during. I also need those names of individual who have applied and were rejected and never appeared before the Board.

From: Roosevelt Hicks
Sent: Monday, August 31, 2015 10:06 AM
To: Tommy Evans <Tommy.Evans@ppp.sc.gov>; Larry R. Patton, Jr. <Larry.Patton@ppp.sc.gov>
Subject: RE: Barton Hearings

Tommy,

If you are talking about Barton cases that was actually heard by the current sitting Board, it's only been one; Kenneth Green #116020 and it was presented by Matt on 07/22/2015.

The number of Barton cases that have been released without a parole hearing by the current Board are seven (7) and they are as following:

Thalma Barton #110881, Gene Richardson #93614, James Plyler #120900, Francis Campbell #111197, Charles Sink #174003, Robert Miller #137506, and Shariah Muhammad #87258.

From: Tommy Evans
Sent: Monday, August 31, 2015 9:23 AM
To: Larry R. Patton, Jr. <Larry.Patton@ppp.sc.gov>; Roosevelt Hicks <Roosevelt.Hicks@ppp.sc.gov>
Subject: Barton Hearings

Do either of you have a list of inmates who has either had a Barton hearing, or has asked the Board for a hearing but was refused. Is so please deliver this list to me as soon as you can. Thanks.

Tommy

Tommy Evans

From: Roosevelt Hicks
Sent: Monday, August 31, 2015 10:06 AM
To: Tommy Evans; Larry R. Patton, Jr.
Subject: RE: Barton Hearings

Tommy,

If you are talking about Barton cases that was actually heard by the current sitting Board, it's only been one; Kenneth Green #116020 and it was presented by Matt on 07/22/2015.

The number of Barton cases that have been released without a parole hearing by the current Board are seven (7) and they are as following:

Thalma Barton #110881, Gene Richardson #93614, James Plyler #120900, Francis Campbell #111197, Charles Sink #174003, Robert Miller #137506, and Sharlah Muhammad #87258.

From: Tommy Evans
Sent: Monday, August 31, 2015 9:23 AM
To: Larry R. Patton, Jr. <Larry.Patton@ppp.sc.gov>; Roosevelt Hicks <Roosevelt.Hicks@ppp.sc.gov>
Subject: Barton Hearings

Do either of you have a list of inmates who has either had a Barton hearing, or has asked the Board for a hearing but was refused. Is so please deliver this list to me as soon as you can. Thanks.

Tommy

Tommy Evans

From: Christie Baird
Sent: Wednesday, August 26, 2015 10:13 AM
To: Tommy Evans
Subject: RE: David Rose #91858
Attachments: Records_2 to.pdf

Tommy, see answers below and the attachment. I hope that helps!

*Christie Baird, MLIS, IGP, CIPP/US
Records Management Services Director
SC Dept. of Probation, Parole & Pardon Services
P O Box 50666
Columbia, SC 29250*

Office: 803-734-8031

From: Tommy Evans
Sent: Wednesday, August 26, 2015 9:56 AM
To: Christie Baird <Christie.Baird@ppp.sc.gov>
Subject: David Rose #91858

This is an ongoing litigation in which the above referenced inmate claims that he received 4 yes votes at his 2001 parole hearing. The Judge has ordered discovery to be conducted on this case and there questions that was asked by opposing counsel that you might be able to answer.

1. Are you aware of any records retention policy in 2001? And if so can I get a copy of it. Yes, see attached— approved by SCDAH in 1994.
2. Was there any destruction policies in 2001? See attached. (Until no longer needed for reference, destroy.)
3. Is there any records showing when or how his hearing recording was destroyed? That would need to come from Parole Board Support.
4. Do you know who destroyed the recording of his 2001 hearing? RMS does not have the tapes; they are on the fourth floor. We only have paper files/documents. My recommendation was for PB Support to document any issues with tapes being destroyed inadvertently, but not certain as to whether that was implemented.

Any assistance you can give will be very helpful. Thanks.

Tommy

Tommy Evans

From: Myriam Brown <myriam.brown@nelsonmullins.com>
Sent: Monday, August 24, 2015 2:29 PM
To: mbuchanan@ppp.state.sc.us; tevens@ppp.state.sc.us
Cc: Susan Nelson; Travis Dayhuff; Tammie Pope
Subject: David Lee Rose vs. SC Dept of Probation, Parole & Pardon Svcs.
Attachments: 201508241419.pdf

Mr. Buchanan and Mr. Evans:
Attached are Petitioner's Requests to Produce and Interrogatories which we are hereby serving upon you. We are also hand delivering a copy to your office this afternoon.

Thank you,

Myriam Brown
Administrative Assistant to Susan H. Nelson

Nelson Mullins

Myriam Brown, PLS, AIS
Administrative Assistant to Daniel J. Westbrook, Susan H. Nelson
myriam.brown@nelsonmullins.com

Nelson Mullins Riley & Scarborough LLP
Meridian, 17th Floor
1320 Main Street, Columbia, SC 29201
Tel: 803.255.9481
www.nelsonmullins.com

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Tommy Evans

From: Travis Dayhuff <travis.dayhuff@nelsonmullins.com>
Sent: Wednesday, August 19, 2015 1:16 PM
To: Matthew Buchanan
Cc: Tammie Pope
Subject: Re: David Lee Rose v. S.C. PPS; Docket No. 15-AJ-15-0033-AP; Order Granting App.'s Motion for Discovery

Thanks for getting back to me.

TD

Sent from my iPhone

> On Aug 19, 2015, at 12:53 PM, Matthew Buchanan <Matthew.Buchanan@ppp.sc.gov> wrote:
>
> Travis,
>
> I've discussed the matter with our deputy director. He has also agreed that we do not have the authority to administratively release someone to parole without an official Order of Parole. If you can convince the courts that we can go outside the Board, best of luck to you.
>
> Matt
>
> -----Original Message-----
> From: Travis Dayhuff [mailto:travis.dayhuff@nelsonmullins.com]
> Sent: Tuesday, August 18, 2015 5:34 PM
> To: Matthew Buchanan <Matthew.Buchanan@ppp.sc.gov>
> Cc: Tammie Pope <tammie.pope@nelsonmullins.com>
> Subject: David Lee Rose v. S.C. PPS; Docket No. 15-AJ-15-0033-AP; Order Granting App.'s Motion for Discovery
>
> Matt,
>
> Recent order in Rose is attached for your review.
>
> Have you had a discussion with your Deputy Director? Please let me know if the agency wants to pursue a resolution along the lines we discussed Friday.
>
> Thanks, TD
>
> Travis Dayhuff
> Nelson Mullins Riley & Scarborough, LLP
> 1320 Main Street, 17th Floor
> Columbia, SC 29201
> DD: (803) 255-9525
> FAX: (803) 255-5506
> E-Mail: travis.dayhuff@nelsonmullins.com
>
>

Tommy Evans

From: Matthew.Buchanan@ppp.sc.gov
Sent: Tuesday, August 18, 2015 5:46 PM
To: Tommy.Evans@ppp.sc.gov
Subject: Fw: David Lee Rose v. S.C. PPPS; Docket No. 15-AJ-15-0033-AP; Order Granting App.'s Motion for Discovery
Attachments: Order Granting App.'s Motion for Discovery.PDF

FYI

Why didn't we file anything in response to his motion for discovery?

----- Original Message -----

From: Travis Dayhuff [mailto:travis.dayhuff@nelsonmullins.com]
Sent: Tuesday, August 18, 2015 05:33 PM
To: Matthew Buchanan
Cc: Tammie Pope <tammie.pope@nelsonmullins.com>
Subject: David Lee Rose v. S.C. PPPS; Docket No. 15-AJ-15-0033-AP; Order Granting App.'s Motion for Discovery

Matt,

Recent order in Rose is attached for your review.

Have you had a discussion with your Deputy Director? Please let me know if the agency wants to pursue a resolution along the lines we discussed Friday.

Thanks, TD

Travis Dayhuff
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, SC 29201
DD: (803) 255-9525
FAX: (803) 255-5506
E-Mail: travis.dayhuff@nelsonmullins.com

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Tommy Evans

From: Travis Dayhuff <travis.dayhuff@nelsonmullins.com>
Sent: Tuesday, August 18, 2015 5:34 PM
To: Matthew Buchanan
Cc: Tammie Pope
Subject: David Lee Rose v. S.C. PPPS; Docket No. 15-AJ-15-0033-AP; Order Granting App.'s Motion for Discovery
Attachments: Order Granting App.'s Motion for Discovery.PDF

Matt,

Recent order in Rose is attached for your review.

Have you had a discussion with your Deputy Director? Please let me know if the agency wants to pursue a resolution along the lines we discussed Friday.

Thanks, TD

Travis Dayhuff
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, SC 29201
DD: (803) 255-9525
FAX: (803) 255-5506
E-Mail: travis.dayhuff@nelsonmullins.com

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Tommy Evans

From: Addy, Frank R. Law Clerk (Elizabeth Able) <faddylic@sccourts.org>
Sent: Friday, January 02, 2015 10:01 AM
To: tevans@ppp.state.sc.us
Subject: Hearing Re: David Lee Rose

Mr. Evans,

I hope to find you well and enjoying the new year. I left a message on your office machine on Wednesday regarding the upcoming hearing with Mr. David Lee Rose on Monday, January 5. I wanted to ensure you all sent the transport order for Mr. Rose, as that was the issue we ran into last time. Our office was under the impression you all were going to send it and we just wanted to make sure. I look forward to hearing from you!

Best,

Elizabeth C. Able
Law Clerk to the Honorable Frank R. Addy, Jr.
8th Judicial Circuit
528 Monument Street
Suite 210
Greenwood, SC 29646
Office: (864) 943-8020
faddylic@sccourts.org

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**Tommy Evans**

---

**From:** Tommy.Evans@ppp.sc.gov  
**Sent:** Saturday, January 03, 2015 10:37 AM  
**To:** faddylc@sccourts.org  
**Subject:** RE: Hearing Re: David Lee Rose

The transport request was sent to the DOC hopefully that would not be an issue.

Sent from my Windows Phone

---

**From:** Addy, Frank R. Law Clerk (Elizabeth Able)  
**Sent:** 1/2/2015 10:01 AM  
**To:** Tommy Evans  
**Subject:** Hearing Re: David Lee Rose

Mr. Evans,

I hope to find you well and enjoying the new year. I left a message on your office machine on Wednesday regarding the upcoming hearing with Mr. David Lee Rose on Monday, January 5. I wanted to ensure you all sent the transport order for Mr. Rose, as that was the issue we ran into last time. Our office was under the impression you all were going to send it and we just wanted to make sure. I look forward to hearing from you!

Best,

**Elizabeth C. Able**  
Law Clerk to the Honorable Frank R. Addy, Jr.  
8<sup>th</sup> Judicial Circuit  
528 Monument Street  
Suite 210  
Greenwood, SC 29646  
Office: (864) 943-8020  
[faddylc@sccourts.org](mailto:faddylc@sccourts.org)

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Tommy Evans

From: Tommy.Evans@ppp.sc.gov
Sent: Thursday, December 04, 2014 11:35 AM
To: Dawn.Nichols@ppp.sc.gov
Subject: David Lee Rose SCDC#91858

Please do a transport request for this inmate to appear at the Greenwood County Courthouse, main Courtroom, on January 5, 2015 at 2:00pm. He was not transported for the last hearing and I want to make sure that he is transported this time.

Thanks.

Tommy Evans

From: Roosevelt.Hicks@ppp.sc.gov
Sent: Tuesday, May 20, 2014 9:32 AM
To: Dawn.Nichols@ppp.sc.gov
Subject: RE: David Lee Rose, #91858

Everything was destroyed by the previous record keeper.

From: Dawn K. Nichols
Sent: Tuesday, May 20, 2014 9:29 AM
To: Roosevelt Hicks
Subject: RE: David Lee Rose, #91858

Would we have any written notes regarding his votes from that hearing?

Dawn Nichols, Executive Administrative Assistant
S.C. Department of Probation, Parole and Pardon Services
Division of Paroles and Pardons
Office of General Counsel
P.O. Box 50666
Columbia, S.C. 29250
Office- (803) 734-9051
Fax- (803) 734-9324

From: Roosevelt Hicks
Sent: Tuesday, May 20, 2014 9:25 AM
To: Dawn K. Nichols
Subject: RE: David Lee Rose, #91858

No, we do not. Christie Baird is working on it.

From: Dawn K. Nichols
Sent: Tuesday, May 20, 2014 9:22 AM
To: Roosevelt Hicks
Subject: RE: David Lee Rose, #91858

So do we have a retention policy now for maintaining these records?

Dawn Nichols, Executive Administrative Assistant
S.C. Department of Probation, Parole and Pardon Services
Division of Paroles and Pardons
Office of General Counsel
P.O. Box 50666
Columbia, S.C. 29250
Office- (803) 734-9051
Fax- (803) 734-9324

From: Roosevelt Hicks
Sent: Tuesday, May 20, 2014 9:15 AM
To: Dawn K. Nichols
Subject: RE: David Lee Rose, #91858

Tommy Evans

From: Dawn.Nichols@ppp.sc.gov
Sent: Tuesday, May 20, 2014 9:23 AM
To: Roosevelt.Hicks@ppp.sc.gov
Subject: RE: David Lee Rose, #91858

So do we have a retention policy now for maintaining these records?

Dawn Nichols, Executive Administrative Assistant
S.C. Department of Probation, Parole and Pardon Services
Division of Paroles and Pardons
Office of General Counsel
P.O. Box 50666
Columbia, S.C. 29250
Office- (803) 734-9051
Fax- (803) 734-9324

From: Roosevelt Hicks
Sent: Tuesday, May 20, 2014 9:15 AM
To: Dawn K. Nichols
Subject: RE: David Lee Rose, #91858

Dwan, the records for June 20, 2001 were destroyed by the previous record keeper. I do not know what the policy was at that time. I didn't take over keeping tapes until 2009.

From: Dawn K. Nichols
Sent: Tuesday, May 20, 2014 9:08 AM
To: Roosevelt Hicks
Subject: David Lee Rose, #91858

The judge has issued an order in this case requesting us to provide information concerning his vote count from his June 20, 2001, hearing because he is claiming he received the correct number of votes per Barton. What if anything can you provide regarding his votes? And if we do not have the tape, can you please provide me with info as to why not so I can draft an affidavit for you to sign.

Dawn Nichols, Executive Administrative Assistant
S.C. Department of Probation, Parole and Pardon Services
Division of Paroles and Pardons
Office of General Counsel
P.O. Box 50666
Columbia, S.C. 29250
Office- (803) 734-9051
Fax- (803) 734-9324

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P.O. Box 50666
Columbia, S.C. 29250
Office- (803) 734-9051
Fax- (803) 734-9324

Tommy Evans

From: Dawn.Nichols@ppp.sc.gov
Sent: Tuesday, May 20, 2014 9:08 AM
To: Roosevelt.Hicks@ppp.sc.gov
Subject: David Lee Rose, #91858

The judge has issued an order in this case requesting us to provide information concerning his vote count from his June 20, 2001, hearing because he is claiming he received the correct number of votes per Barton. What if anything can you provide regarding his votes? And if we do not have the tape, can you please provide me with info as to why not so I can draft an affidavit for you to sign.

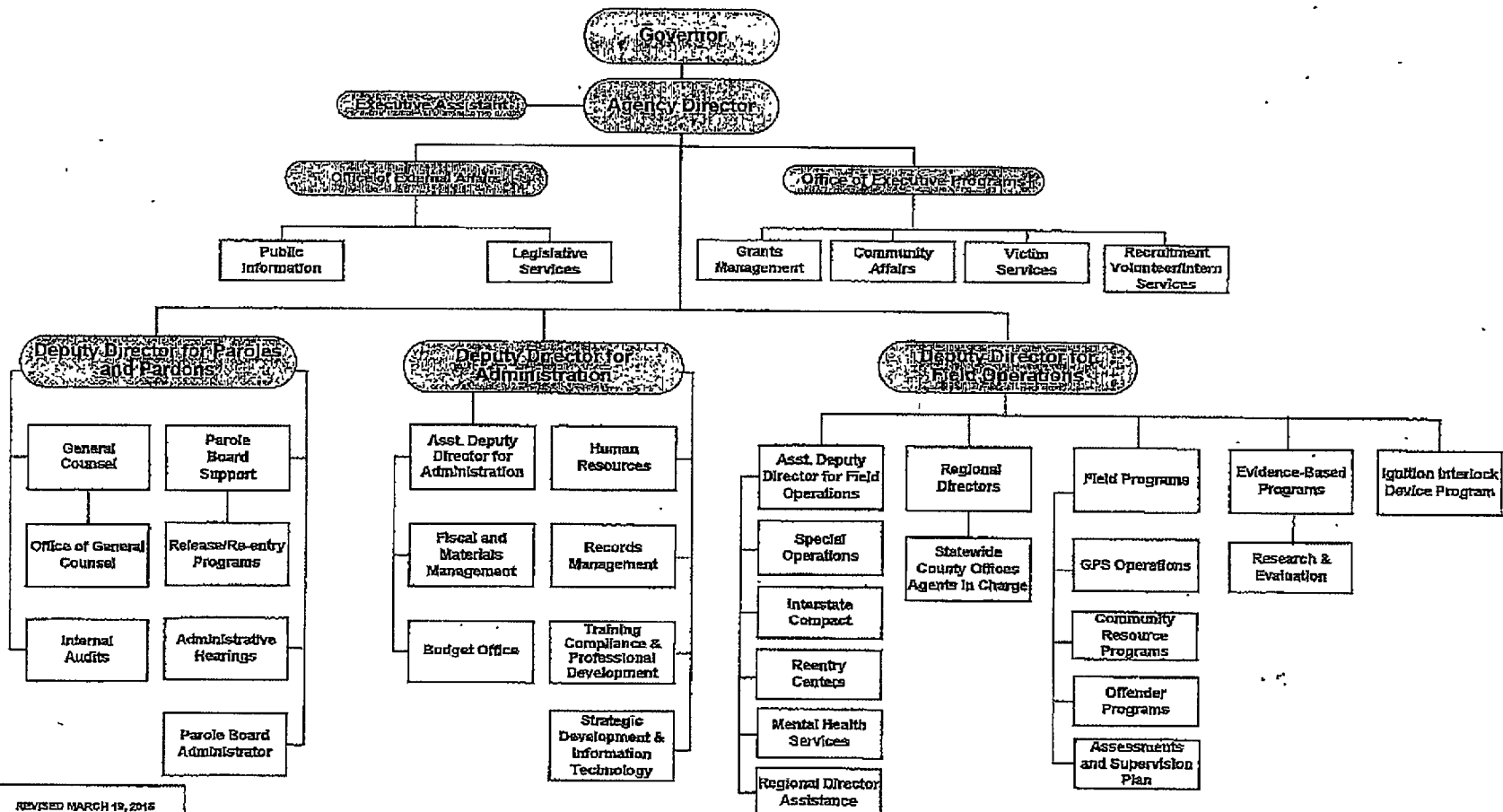
Dawn Nichols, Executive Administrative Assistant
S.C. Department of Probation, Parole and Pardon Services
Division of Paroles and Pardons
Office of General Counsel
P.O. Box 50666
Columbia, S.C. 29250
Office- (803) 734-9051
Fax- (803) 734-9324

Tommy Evans

From: Tommy.Evans@ppp.sc.gov
Sent: Friday, May 16, 2014 10:34 AM
To: Dawn.Nichols@ppp.sc.gov
Subject: David Lee Rose SCDC#9158

Dawn could you fax a transport request to the DOC for this Inmate to be transported to the Laurens County Courthouse for a hearing scheduled for May 19 at 2:00 pm. Thanks.

South Carolina Department of Probation, Parole and Pardon Services
MARCH 2015



REVISED MARCH 19, 2015

C. Notice of Rejection. The Board Support Services Director of is responsible for providing to offenders who are denied parole a written notice of rejection stating the reasons for that decision and giving the date of the offender's next parole hearing.

D. Notice of Release. In certain cases, the Department's Director of Victims' Services is required by law to provide notice to victims and witnesses of the release of an offender on parole.

3. PREPARATION OF CASES FOR THE BOARD'S REVIEW

The Department, through its Division of Field Operations and Office of Board Support Services, prepares cases for the Board's review. Before every hearing of the Board or a panel of the Board, all members receive a list of offenders who will be appearing for a parole hearing, together with the respective parole file on each prisoner. Members will receive these files no less than two weeks before the actual date of the hearing.

4. CONTENTS OF THE PAROLE CASE SUMMARY REPORT

Every file that the department prepares for the Board's review includes, though it is not limited to, the following information:

- The criminal offense and a description of it;
- The sentencing date, the "max-out" date, the parole eligibility date, the date of any previous parole hearings, the names of any co-defendants;
- The offender's criminal record;
- The offender's prison and disciplinary records;
- Risk classification reports;
- A medical history and psychological reports, if any;
- A history of the offender's supervision on probation or parole, if any;
- A proposed place of residence and employment;
- The parole examiner's recommendation;
- Any statements from law enforcement;
- Any statement from the prosecuting witness or the prosecuting witness's next of kin, if the witness is deceased;
- Any statement from the solicitor or his successor;
- Any statement from the sentencing judge;
- The offender's social history;
- The offender's employment experience.

5. STANDARD PROCEDURE FOR CONDUCTING HEARINGS

Parole hearings are informal proceedings, and the Board or its panels may properly conduct them with a fairly free hand. What follows here is a model plan for conducting hearings. In the experience of

both the Board and the Department, this model has worked well. It is only a model, and the Board or its panels are free to deviate from it.

- The Department, through its Office of Board Support Services schedules hearings. The names and case numbers of offenders who have been scheduled for a parole hearing are then published at the respective prisons where they are confined, so that they can begin preparing themselves for their hearing.
- The Department, through its parole examiners, then interviews these offenders, investigates their cases, and submits a recommendation for or against parole.
- At the hearing, the offender or offender's counsel, if the offender has counsel, appears first and presents case to the Board or panel. If the offender has family members or other persons appearing, they may be allowed to make a statement. The Board or the panel may limit the number of witnesses to three; more witnesses may be allowed if the circumstances warrant it.
- Members of the Board or the panel may ask questions of the offender and his witnesses. The Board's Chair or the member presiding over the panel leads the questioning.
- Once the case has been presented, the offender is excused from the hearing room, and those appearing in opposition to parole are then given their opportunity to be heard.
- After the witnesses in opposition are heard, they are excused from the hearing room, and the Board or the panel then deliberates over the case.
- After deliberations, a voice and electronic vote is cast and documented in writing.
- The offender and the other interested parties are then informed of the decision by Department staff. If the offender is rejected for parole, the Department gives a written notice of the reasons for rejection.
- The hearings proceed in this manner until all cases scheduled to be heard have been heard.

6. THE PRESENCE OF THE OFFENDER AND HIS/HER ATTORNEY

In general, offenders who are scheduled for a parole hearing must be allowed to appear via videoconferencing. If they are represented by counsel, their counsel must also be allowed to be present. Counsel must appear at the location of the offender. Any exceptions would have to be submitted to the Chair and approved by the Chair two weeks in advance of the hearing date.

A. Exceptions. Exceptions to this rule are given below:

- The offender is prevented because of illness from attending the hearing, or is confined at a state hospital.
- The offender has been placed in punitive segregation by the department of corrections.
- The offender has been transferred to prison outside South Carolina, or is otherwise serving a sentence in another state, in which case the Board may decide the case in the offender's absence. If the offender in this case wishes to be present at the hearing, he/she must make arrangements with South Carolina Department of Corrections.
- The offender has waived appearance at the hearing.

9. POSTPONED CASES

After hearing any parole case, the Board or panel may, where it seems appropriate under the circumstances to do so, postpone giving its final decision for up to one year in order to allow an offender to complete a treatment program, vocational training course, or other similar worthwhile endeavor.

10. BARTON HEARINGS

The South Carolina Supreme Court decision in Barton v. SCDPPPS held that the Board is to consider a majority and two-thirds majority to be based on the number of Board members present, rather than based on the full Board membership. If an offender's old vote is brought to the Department's attention, the Office of Parole Support Services staff will investigate to verify that the offender did receive the proper number of votes, and the Department's Office of Legal Services will verify it qualifies under Barton. The Department's Office of Victim Services will contact the victim and explain the Barton decision and the Board's vote. During a full Board day, the Board will hold a Barton hearing on the offender. This hearing will not require the presence of the victim or the offender.

At the Barton Hearing, the Board may impose any conditions on the offender as it feels necessary, including all statutory conditions. The Board will then sign a special Barton Order of Parole, which ratifies the votes of the previous Board members which would have granted conditional parole.

The offender is then treated as any other offender granted conditional parole, and will have to comply with the conditions in order to receive parole.



INSTITUTION: Division of Parole and Pardon
DIRECTOR: Office of Board Support Services

7680 PAROLE AND PARDON BOARD HEARING MINUTES (TAPES)

Description

Tapes used to record information on offenders whose cases have been heard by the Parole Board. Information includes name of the offender, tape number of hearing, where the case began and ended, names of individuals that attended the hearing (relatives, friends, opposition), outcome (whether or not parole/pardon was granted, or rejected and the reason), and any special cases that were discussed.

Retention

Until no longer needed for reference, destroy.

Schedule Approved APR 25 1994

The approval and implementation of this records retention schedule should comply with the Department of Archives and History's Guidelines for Information Management and Records Retention.

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

NIKKI R. HALEY
Governor



KELA E. THOMAS
Director

2221 DEVINE STREET, SUITE 600
POST OFFICE BOX 50666
COLUMBIA, SOUTH CAROLINA 29256
Telephone: (803) 734-9220 -
Facsimile: (803) 734-9440
www.state.sc.us/ppp

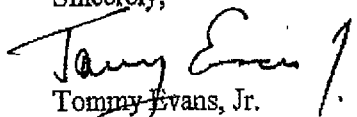
May 27, 2014

David Rose, #91858
Kershaw Correctional Institution -MAG-A-12
4848 Goldmine Highway
Kershaw, South Carolina 29067

Dear Mr. Rose:

In response to your Request for Production of Documents dated May 23, 2014, please find enclosed an affidavit of Mr. Roosevelt Hicks, Supervisor of the Office of Board Support Services. Also, in response to your request for the names of the Parole Board members at your hearing on June 20, 2001, this information is not available as these records have been destroyed.

Sincerely,


Tommy Evans, Jr.
Assistant General Counsel

TE:dn

cc: The Honorable Frank Addy, Jr.

STATE OF SOUTH CAROLINA)
 COUNTY OF LAURENS)
 IN THE COURT OF COMMON PLEAS
 EIGHTH JUDICIAL CIRCUIT

2014 FEB 26 A.D. CASE NO.:

2014 -CP30-1121

DAVID LEE ROSE, #91858.

PALINTIFF, LAURENS COUNTY

vs.

S.C. DEPT. OF PROBATION,

SUMMONS

PAROLE AND PARDON SERV.,

DEFENDANT.

TO: Kela E. Thomas, Director, S.C. Department of Probation,
 Parole and Pardon Services

YOU ARE HEREBY SUMMONS and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon the subscriber, at the address shown below within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint, judgment by default will be rendered against you for the relief demanded in the Complaint.

Dated:

Kershaw, South Carolina

David Lee Rose

David Lee Rose, #91858
 Kershaw CT, MAG-A-16
 4848 Goldmine Hwy.
 Kershaw, S.C. 29067

STATE OF SOUTH CAROLINA)
COUNTY OF LAURENS)
2014 FEB 26 A 10:10)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT
CASE NO.: 2014 -CP30-1161

DAVID LEE ROSE, #91858,)
PLAINTIFF)
vs.)
S.C. DEPT. OF PROBATION,)
PAROLE AND PARDON SERV.,)
DEFENDANT.)

AMENDED COMPLAINT

MOTION FOR
DECLARATORY JUDGMENT

This matter comes before this Court by way of the above name Plaintiff filing a Complaint pursuant to Rule 57, SCRPC, and in according to Codes §§15-53-10 et. Seq., seeking "prohibitory injunctive relief" for the following reasons:

Fact being that there are elements of justiciable controversy where a concrete issue is presented and there is a definite assertion of legal rights and a positive legal duty with respect thereto which are denied by the adverse party. There is a justiciable controversy calling for the invocation of declaratory judgment action by this Court. S.C. Code Ann. §15-53-20.

FACTUAL / PROCEDURAL BACKGROUND

The Plaintiff is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Laurens County Clerk of Court. The Plaintiff was indicted at the May term of the Laurens County Grand Jury for Kidnapping (1978-GS-30-0224). J. Michael Turner, Esq. and Thomas Babb, Esq. represented Plaintiff. On May 22, 1978, Plaintiff pled guilty as indicted, and was sentenced to an indeterminate sentence of ten (10) years to life by the Honorable James E. Moore. (See Attachment A.)

Plaintiff received parole on April 30, 1987. On June 14, 2000 parole was revoked for failure to report and for failure to notify Agent of change of address.

FACTS-IN-ISSUE

1. Plaintiff submitted application for reinstatement of parole and appeared before the Parole Board on June 20, 2001. Attending the hearing was Attorney Alvin Neal, and Plaintiff's cousin, Carlos Bell. After the Board had deliberated, Parole Examiner appeared and stated that my request for parole has been rejected. Mr. Neal ask her. "How many votes did he get?" Parole Examiner replied. "Mr. Rose received four votes."
2. Plaintiff challenged the procedure followed by the Board and on its rejection of parole. Presented letter written by Ms. Judy A. Boland, Director of Case Management, S.C. Dept. of Probation, Parole and Pardon Services. It states, "anyone convicted of a violent offense prior to June 3, 1986, are identified as 'unclassified,' but will appear before the Full Board." In these "unclassified" cases; only four votes are needed for parole instead of a majority vote (See Attachment B.)
3. In a letter dated April 12, 2006, Attorney Tommy Evans, Jr. responded for the Board, stating that parole was denied because I, Plaintiff, did not receive (2/3) votes of the Board Members. (See Attachment C.)
4. Subsequent to receiving Board's response, Notice of Appeal was filed by Plaintiff with the Administrative Law Court, on May 12, 2006. (See Attachment D.)
5. The Administrative Law Court issued Order of Dismissal on May 14, 2007. (Docket No. 06-ALJ-15-00016-AP. The order states: claims arising from the Board's decisions denying parole, including challenges to the procedures followed by the Board during a parole review, are not appealable to the ALC. (See Attachment E.)

Plaintiff Claims the Following:

Plaintiff's due process rights were violated when he received two-thirds (2/3) votes for parole of six (6) members participating in June 20, 2001 parole hearing, where parole statute created liberty interest, entitling Plaintiff to parole.

In re Barton v. S.C. Dept. of Probation, Parole and Pardon Serv.
2013WL3366669 (July 3, 2013),

The Supreme Court held: the retroactive application of Section §24-21-645 constituted an ex post facto law, an inmate convicted of a violent crime must only receive two-thirds (2/3) of parole board members participation in hearing.

The Court further stated: prior to Section §24-21-645's amendment of Act No. 462 the Omnibus Criminal Justice Improvement Act of 1986, the statute did not contain the two-thirds (2/3) provision and provided: authorization for parole upon receiving majority of votes.

DISCUSSION:

The common law requires that a convicted person receives the punishment which was in effect when the crime was committed. See State v. Varner, 423 S.E.2d 133 (1992). This rule applies to statutes that result in postponing parole or other release eligibility as well as to statutes that reduce the opportunity to obtain parole. See Wearver v. Gram, 450 U.S. at 35-36; Arnold v. Cody, 951 F.2d 280, 282-83 (10th Cir. 1991); and Perton v. Armontrout, 895 F.2d 1214, 1216 (8th Cir.).

RELIEF SOUGHT

- 1.) Declare unconstitutional Plaintiff's procedural due process rights after receiving two-thirds (2/3) votes of a panel of six (6) members participating in June 20, 2001 hearing;
- 2.) Issue prohibitory injunctive relief, enjoining Defendant from avoiding application of the correct 1978 Section §24-21-645 of S.C. Code of Law, entitling Plaintiff to his liberty in parole.

CONCLUSION

THEREFORE, for the foregoing reason Plaintiff moves for this Honorable Court for a hearing and render a ruling on the issues raised within.

Submitted by,

David Lee Rose

David Lee Rose, #91858

Kershaw CI, MAG-A-16

4848 Goldmine Hwy.

Kershaw, SC 29067

Acting Pro se

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LAURENS)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-30-161

DAVID LEE ROSE, #91858)
)
 PLAINTIFF,)
)
 VS.)
)
 S.C. DEPT. OF PROBATION,)
 PAROLE AND PARDON SERV.,)
)
 DEFENDANT.)

PLAINTIFF'S REQUEST FOR
 PRODUCTION OF DOCUMENTS
 RULE 34, SCRPC

TO: THE ABOVE-NAMED DEFENDANT:

The Plaintiff, pro se, pursuant to Rule 34, SCRPC, hereby submits upon the Defendant, Kela E. Thomas, Plaintiff's Request For Production Of Documents containing information stated below;

Defendant shall produce and permit the party making the request to inspect, any designated documents, which constitute or contain matters within the scope of Rule 26(b)(1) and which are in the possession or control of the party upon whom the request is served. Any documents requested containing information herein is conclusively established pursuant to Rule 34(a)(b), SCRPC.

Defendant shall, within 30 days after service of this request, serve upon the Plaintiff the documents requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the request.


 David Lee Rose, #91858
 Kershaw Corr. Inst.
 4848 Goldmine Hwy.
 Kershaw, SC 29067

1. Plaintiff request Defendant to produce document pursuant to Rule 34, SCRCF,
from which information can be obtain, to wit:

a.) Name of each Board member participating at June 20, 2001 hearing.

b.) The number of affirmative votes for the authorization of parole,
at June 20, 2001 hearing.

Respectfully submitted,



David Lee Rose, #91858
Plaintiff

Dated: May 23, 2014.

Kershaw Corr. Inst.
4848 Goldmine Hwy.
Kershaw, SC 29067

STATE OF SOUTH CAROLINA)
)
COUNTY OF LAURENS)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-30-161

DAVID LEE ROSE, #91858,)
)
PLAINTIFF,)
)
VS.)
)
S.C. DEPT. OF PROBATION,)
PAROLE AND PARDON SERV.,)
)
DEFENDANT.)

PLAINTIFF'S FIRST INTERROGATORIES
TO ROOSEVELT HICKS
RULE 33, SCRCP

TO: ROOSEVELT HICKS - SUPERVISOR, OFFICE OF BOARD SUPPORT SERVICES
SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES

Pursuant to RULE 33, INTERROGATORIES TO PARTIES and Rule 26, Plaintiff presents the following questions in response to your Sworn Affidavit, dated June 20, 2014, relating to subject matter in the above caption case.

1. Please describe in as much detail as possible every policy, procedure, and practice that governs the release and/or destruction of Parole Board hearing records maintained by your agency.
2. Please identify all SCDPPPS employees responsible for formulating, implementing, and monitoring compliance with the policies, procedures, and practices described in your response to Interrogatory #1.
3. Please describe in as much detail as possible the complete circumstances surrounding the destruction of Plaintiff's Parole Board hearing records of June 20, 2001 by your agency.
4. Please state the name, affiliation, title, last known address, and last known telephone number of each person who has knowledge of any of the facts stated in your response to Interrogatory #3.

5. Please identify each document, as the term is defined in Rule 34(a)(1), that evidences, mentions, or refers to any of the facts stated in your response to Interrogatory #3.
6. Please identify each person know to you and not otherwise identified in your answers to those interrogatories who has provided any information, or assistance of whatever nature or description, relating to any of your answers to these interrogatories.
7. Please identify each person who have made to you sworn or unsworn statements or provided information for affidavits or statements that relate to the allegations made in Plaintiff's Complaint and state the information.

Respectfully submitted,



David Lee Rose, #91858
Kershaw CI., MAG-A-12
4848 Golmine Hwy.
Kershaw, SC 29067

June 2, 2014.

cc: The Honorable Frank Addy, Jr.

STATE OF SOUTH CAROLINA)
COUNTY OF LAURENS)
IN THE COURT OF COMMON PLEAS
EIGHT JUDICIAL CIRCUIT
Case No.: 2014-CP-30-161

David Lee Rose, SCDC#91858,

Plaintiff,

v.

S.C. Department of Probation, Parole, and
Pardon Services,

Defendant.

**DEFENDANT'S ANSWERS TO
PLAINTIFF'S INTERROGATORIES**

TO: David Lee Rose

The Defendant the South Carolina Department of Probation, Parole and Pardon Services
(SCDPPPS) hereby answers the Plaintiff's interrogatories as follows:

1. Please describe in as much detail as possible every policy, procedure, and practice that governs the release and/or destruction of Parole Board hearing records maintained by your agency?

Answer: S.C. Code of Laws §§30-1-90 and 24-21-40, SCDPPPS retention schedule sections 12-323, 7702, 7680.

2. Please identify all SCDPPPS employees responsible for formulating, implementing, and monitoring compliance with the policies, procedures, and practices described in your response to Interrogatory #1.

Answer: Christe Baird, SCDPPPS, P.O. Box 50666, Columbia, S.C. 29250, (803) 734-9220.

3. Please describe in as much detail as possible the complete circumstances surrounding the destruction of Plaintiff's Parole Board hearing records of June 20, 2001 by your agency.

Answer: The hearing audio tape was pulled out of the cassette and thrown away. This is done pursuant to the SCDPPPS retention schedule approved by the South Carolina Director of Archives.

4. Please state the name, affiliation, title, last known address, and last known telephone number of each person who has knowledge of any of the facts state in your response to Interrogatory #3.

Answer: Mr. Larry Patton, Director of the office of board support services, SCDPPPS, P.O. Box 50666, Columbia, S.C. 29250, (803)734-9220.

5. Please identify each document, as the term is defined in Rule 34(a)(1), that evidences, mentions, or refers to any of the facts stated in your response to Interrogatory #3.

Answer: Not applicable, the recordings of the June 20, 2001, hearing was destroyed per the Department retention schedule.

6. Please identify each person known to you and not otherwise identified in your answers to those interrogatories who has provided any information, or assistance of whatever nature or description, relating to any of your answers to these interrogatories.

Answer: There are no people other than those already mentioned that assisted in the answers to these interrogatories.

7. Please identify each person who have made to your sworn or unsworn statements provided information for affidavits or statements that relate to the allegations made in Plaintiff's complaint and state the information provided.

Answer: There exist no affidavits or statements made relating to this cause of action.

The Defendant reserve the right to supplement any of the above answers while this case is currently pending.

Respectfully submitted,



Tommy Evans, Jr.
Assistant General Counsel

South Carolina Department of Probation,
Parole, and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250
(803) &34-9220

Columbia, South Carolina
June 27, 2014

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LAURENS)

IN THE COURT OF COMMON PLEAS
 EIGHTH JUDICIAL CIRCUIT
 Case No.: 2014-CP-30-161

David Lee Rose SCD# 91858,

Plaintiff,

v.

S.C. Department of Probation, Parole,
 and Pardon Services,

Defendants.

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, South Carolina Department of Probation, Parole and Pardon Services, hereby certify that this 30th day of June, 2014, I have served the following documents:

1. Defendant's Answers to Plaintiff's Interrogatories; and
2. Certificate of Service

by first class mail, postage prepaid as follows:

David Lee Rose, #91858
 Kershaw Correctional Institution
 4848 Goldmine Highway
 Kershaw, SC 29067


 Dawn Nichols
 Executive Administrative Assistant
 South Carolina Department of Probation,
 Parole and Pardon Services
 P.O. Box 50666

Columbia, South Carolina 29250
 (803) 734-9220

STATE OF SOUTH CAROLINA)
COUNTY OF LAURENS)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-30-161

DAVID LEE ROSE, #91858,)
PLAINTIFF,)

VS.)

PLAINTIFF'S SECOND INTERROGATORIES
TO TOMMY EVANS, JR.
RULE 33, SCRCP

S.C. DEPT. OF PROBATION,)
PAROLE AND PARDON SERV.,)
DEFENDANT.)

TO: TOMMY EVANS, JR., RESPONDENT FOR THE ABOVE-NAMED DEFENDANT

Pursuant to Rule 26, and Rule 33 of South Carolina Rules of Civil Procedure, Plaintiff presents the following questions. Defendant has 30 days in which to respond.

1. Please define in as much detail as possible the term "records" as stated in your May 27, 2014 response to Request For Production Of Documents.
2. Please describe in as much detail as possible, any statute, policies and/or procedures that SCDPPPS has implemented to retain and maintain the votes of individual members of the Parole Board to grant or deny parole since June 15, 2001.
3. Please state policies, and/or procedures of SCDPPPS that you or your agency relied on in not recording parole consideration hearings prior to the year of 2002.

Dated: June 24, 2014.
Kershaw County, South Carolina

Respectfully submitted,

David Lee Rose
David Lee Rose, #91858
Plaintiff

Kershaw Corr. Inst.
4848 Goldmine Hwy.
Kershaw, SC 29067

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LAURENS)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-30-161

DAVID LEE ROSE, #91858,)
)
 , PLAINTIFF,)

VS.)

CERTIFICATE OF SERVICE

S.C. DEPT. OF PROBATION,)
 PAROLE AND PARDON SERV.,)
)
 DEFENDANT.)

Under the penalty of perjury. I hereby certify that a copy of Plaintiff's Second Interrogatories in the above mention case was this date served upon the following individuals by placing a copy of the same in the United States Mail, prepaid, and sent to their address as follows:

TOMMY EVANS, JR., Legal Counsel
 South Carolina Department of Probation
 Parole and Pardon Services
 P.O. Box 50666
 Columbia, SC 29250

THE HONORABLE FRANK R. ADDY, JR.
 Greenwood County Courthouse
 528 Monument Street, Room 210
 Greenwood, SC 29646

DATED: June 24, 2014.

Kershaw County, South Carolina


 David Lee Rose, #91858
 Kershaw CI., MAG-A-12
 4848 Goldmine Hwy.
 Kershaw, SC 29067

STATE OF SOUTH CAROLINA)
COUNTY OF LAURENS)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-30-161

DAVID LEE ROSE, #91858)

PLAINTIFF,)

VS.)

S.C. DEPT. OF PROBATION,)
PAROLE AND PARDON SERV.,)

DEFENDANT.)

PLAINTIFF'S SECOND REQUEST
FOR PRODUCTION OF DOCUMENTS
RULE 34, SCRPC

TO: THE ABOVE-NAMED DEFENDANT:

In response to Respondent's letter of May 27, 2014, and pursuant to Rule 26, and 34, SCRPC, Plaintiff request that the Defendant produce the following documents. Please note that the term "document" is defined broadly in the South Carolina Rule of Civil Procedure, Rule 34(a)(1), SCRPC, and includes regulations, SOPs, memoranda, correspondence, and e-mails.

1. All documents that contain, evidence, mention, construe, or refer to the votes of individual members of the Parole Board for Plaintiff's parole hearings on June 25, 2003; June 15, 2005; August 11, 2011; and October 2, 2013.

Respectfully submitted,

David Lee Rose
David Lee Rose, #91858
Kershaw CI.; MAG-A-12
4848 Goldmine Hwt.
Kershaw, SC 29067

June 2, 2014

cc: The Honorable Frank Addy, Jr.

RECEIVED

JUN 04 2014

LEGAL SERVICES

STATE OF SOUTH CAROLINA)
COUNTY OF LAURENS)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-30-161

DAVID LEE ROSE, #91858)

PLAINTIFF,)

VS.)

S.C. DEPT. OF PROBATION,
PAROLE AND PARDON SERV.,)

DEFENDANT.)

PLAINTIFF'S FIRST INTERROGATORIES
TO TOMMY EVINS, JR.
RULE 33, SCRCP

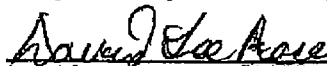
TO: TOMMY EVANS, JR., RESPONDENT FOR THE ABOVE-NAMED DEFENDANT:

Pursuant to Rule 33, INTERROGATORY TO PARTY and Rule 26, Plaintiff presents the following questions:

1. Please describe in as much detail as possible every policy, procedure, and practice that governs the release and/or destruction of Parole Board hearing records maintained by your agency.
2. Please identify all SCDPPPS employees responsible for formulating, implementing, and monitoring compliance with the policies, procedures, and practices described in your response to Interrogatory #1.
3. Please describe in as much detail as possible the complete circumstances surrounding the destruction of Plaintiff's Parole Board hearing records of ~~June 20, 2001~~ by your agency.
4. Please state the name, affiliation, title, last known address, and last known telephone number of each person who has knowledge of any of the facts state in your response to Interrogatory #3.
5. Please identify each document, as the term is defined in Rule 34(a)(1), that evidences, mentions, or refers to any of the facts stated in your response to Interrogatory #3.

6. Please identify each person known to you and not otherwise identified in your answers to those interrogatories who has provided any information, or assistance of whatever nature or description, relating to any of your answers to these interrogatories.
7. Please identify each person who have made to your sworn or unsworn statements provided information for affidavits or statements that relate to the
— allegations made in Plaintiff's Complaint and state the information provided.

Respectfully submitted,



David Lee Rose, #91858
Kershaw CI., MAG-A-12
4848 Goldmine Hwy.
Kershaw, SC 29067

June 2, 2014.

cc: The Honorable Frank Addy, Jr.

STATE OF SOUTH CAROLINA LYNN W. LAMASTER, JR. COURT OF COMMON PLEAS

Case No.: 2014-CP-30-161

COUNTY OF LAURENS

2014 JUL 30 P 4: 15

David Lee Rose, #91858,

Plaintiff, LAURENS COUNTY
v. DEFENDANT'S OBJECTION TO
OF PLAINTIFF'S REQUEST FOR THE
PRODUCTION OF DOCUMENTS

S.C. Department of Probation, Parole and
Pardon Services,

Defendant.

TO: David Lee Rose

The Defendant the South Carolina Department of Probation, Parole and Pardon Services (SCDPPPS) hereby answers the Plaintiff's request for the production of documents. Within this request, the Plaintiff wishes the Defendant produce documents that contain evidence, mention, construe or refer to the votes of individual members of Parole Board for his parole hearings on June 25, 2003, June 15, 2005, August 11, 2011, and October 2, 2013.

The only documents that mentions the vote of the parole board are the audio recordings of the individual hearings. The Defendant objects to this request due to the fact the Plaintiff is currently incarcerated and will not be able to be able to come into the Department to hear or reproduce any of these recordings, pursuant to Rule 34. According to Rule 34: "Any party may serve on any other party a request, to produce and permit the party making the request, or someone acting on his behalf to inspect and copy, any designated documents, or electronically stored information or to inspect and copy, test or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served. SCRCF Rule 34(a)(1). Rule 34 was created for a party to actually be present in the business of the opposing party to inspect, copy or test possible discovery.

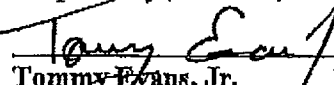
The Plaintiff cannot perform personally these actions due to his current incarceration. The Plaintiff will not be able to hear these recordings as an inmate serving a sentence within the Department of Corrections, unless they are copied by the Department, which requires the payment of a fee in the ordinary course of business.

The Defendant argues that the Plaintiff should be only entitled a copy of these recordings, if he makes the proper request, and pay the \$17.50 fee per recording. This is the only way that exist for anyone to receive a copy of these recordings. If a request does not specify the form of forms for producing electronically stored information a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. SCRCF Rule 34(b)(1).

Rule 34 was created to allow individuals to have access to personally inspect items that could be part of discovery. Since the Plaintiff is currently incarcerated he will not be able to appear at the Department to listen to the recordings, so this rule does not apply. The Defendant respectfully request that the Plaintiff be responsible for paying the fee allowed for the coping of the audio recordings of the requested hearings, as all other individuals wishing to receive recordings of parole hearings.

The Defendant also objects to the Plaintiff making any of these recordings a part of the record. The Plaintiff argues that he received the required number of votes upon the conclusion of his June 20, 2001, hearing pursuant to the Barton decision. The recording of all of his hearings since this denial are not relevant to the 2001 hearing. The court should not consider any of these recordings because they are not relevant to this cause of action. The records the Plaintiff request are from four separate hearings that did not have anything to do with this cause of action. So they should be excluded due to its lack of relevancy.

Respectfully submitted,


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.

Columbia, South Carolina
July 28, 2014

244

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LAURENS LYNN W. LANDASTER EIGHTH JUDICIAL CIRCUIT
Case No.: 2014-CP-30-161

2014 JUL 30 P 4 15

David Lee Rose SCDC# 91858,

Plaintiff
COUNTY OF LAURENS
CLERK OF COURT

v.

CERTIFICATE OF SERVICE

S.C. Department of Probation, Parole,
and Pardon Services,

Defendants.

I, Dawn K. Nichols, Executive Administrative Assistant, South Carolina Department of Probation, Parole and Pardon Services, hereby certify that this 28th day of July, 2014, I have served the following documents:

1. Defendant's Objections to Plaintiff's Request for the Production of Documents;
and
2. Certificate of Service

by first class mail, postage prepaid as follows:

David Lee Rose, #91858
Kershaw Correctional Institution
4848 Goldmine Highway
Kershaw, SC 29067



Dawn Nichols
Executive Administrative Assistant
South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666

Columbia, South Carolina 29250
(803) 734-9220

LYNN W. LANCASTER

STATE OF SOUTH CAROLINA

) THE COURT OF COMMON PLEAS

COUNTY OF LAURENS

) CASE NO. 14-CP-30-161

2015 MAY -1 A 11: 34

DAVID LEE ROSE, #91858
Plaintiff,

)
) LAURENS COUNTY
) CLERK OF COURT
)

vs.

)
) S.C. DEPARTMENT OF PROBATION,
) PAROLE AND PARDON SERVICES,
) Defendant.
)
)
)

ORDER DENYING MOTION FOR
RECONSIDERATION

HAVING CONSIDERED THE ARGUMENT OF PLAINTIFF in his motion for reconsideration pursuant to Rule 60, as well as the response by Defendant, the court finds that the previous order stands and this matter shall be dismissed. The court finds as follows:

1. Defendant is correct in that the Administrative Law Court [hereinafter "ALC"] has jurisdiction over this matter pursuant to *Al-Shabbaz v. State*, 338 S.C. 354, 527 S.E.2d 724 (2000). Simply stated, this court cannot order the relief requested, and any failure on the part of the Parole Board should be appealed to the ALC.

2. In a report dated February 13, 2015, the Parole Board informed the court that they had conducted an investigation. The court is genuinely troubled by the failure of the Parole Board to maintain any records relating to the parole hearing of June 20, 2001, and the absence of any record documenting the denial of parole, or otherwise signed by the members of the board present at that hearing, is of significant concern to the court. Put another way, if the only evidence in existence is the affidavit of Carlos Bell, and the Parole Board lacks documentation to demonstrate that Plaintiff did not receive the required number of votes; the court is curious as to how a meaningful investigation could have been conducted as required under *Barton v. S.C. Dept. of Probation, Parole and Pardon Services*, 404 S.C. 395, 745 S.E.2d 110 (2013). By implication, the Parole Board appears to take the position that, since all records have been destroyed, the vote must have been adverse to Plaintiff's position - ergo, the lack of documentation indicating denial of parole is sufficient to demonstrate that parole was denied.



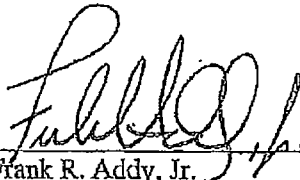
Exhibit F

Such circular and perfunctory reasoning is curious and does not take into account the alternative possibility – that the affidavit of Carlos Bell is correct and that the Plaintiff was mistakenly denied parole under the holding in *Barton*. The letter of February 13, 2015 fails to indicate who conducted the investigation, the extent of the investigation, the identities of any persons interviewed, any documents or transcripts reviewed, or a factual basis for concluding that Plaintiff did not receive the necessary votes. Clearly, *Barton* contemplates some semblance of a meaningful investigation as well as a sufficiently detailed report from that investigation so that a reviewing court may determine whether Plaintiff has been afforded minimal due process. That said, however, the Defendant is correct in that this is a question properly addressed to the ALC, and this court remains jurisdictionally prohibited from providing the relief requested by Plaintiff.

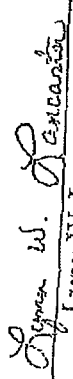
3. Accordingly, Plaintiff's motion under Rule 60 is denied, and Plaintiff is advised to appeal the Board's findings to the ALC. The court would also respectfully suggest that this case may represent one of those rare occasions where the ALC should conduct a full, formal hearing into this matter.

Accordingly, Plaintiff's motion for reconsideration is denied.

IT IS SO ORDERED.


Frank R. Addy, Jr.
Circuit Court Judge
Eighth Judicial Circuit

A TRUE COPY OF ORIGINAL


Lynn W. Lancaster
Lancaster County CCLCP & GS

April 30, 2015
Greenwood, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

David Lee Rose, #91858,	)	Civil Action No. 15-ALJ-P-0033
	)	
Appellant,	)	
	)	
v.	)	<u>INTERROGATORIES TO</u>
	)	<u>DEPARTMENT OF PROBATION,</u>
South Carolina Department of Probation,	)	<u>PAROLE, AND PARDON SERVICES</u>
Parole and Pardon Services,	)	
	)	
Respondent.	)	
	)	

Pursuant to the Administrative Law Court's Order of August 17, 2015, Appellant David Lee Rose ("Appellant"), by and through his undersigned counsel, submits these interrogatories to Respondent South Carolina Department of Probation, Parole and Pardon Services ("DPPPS"). In light of the schedule set forth in the Court's August 17 Order, Appellant respectfully requests that Respondent answer these interrogatories within fifteen (15) days from the date of service.

INTERROGATORIES

1. If an investigation was conducted by DPPPS and/or the Parole Board in 2015 regarding whether Appellant received four votes for parole at his 2001 parole hearing, please identify the names and positions of the persons involved in this investigation and identify all documents and other information considered in this investigation.

2. Please identify the names and positions of the persons who made the decision(s) set forth in the February 13, 2015 DPPPS letter to Appellant including, but not limited to, DPPPS's "position" that "Department cannot release you to parole" and identify all documents and other information considered by the decision maker(s) before making these decision(s).

3. With respect to the reference in the February 13, 2015 DPPPS letter to Appellant that the records of Appellant's 2001 parole hearing "have been destroyed," please identify: the records that were destroyed; the names and positions of the persons who destroyed the records or have knowledge of the destruction of the records; and the date(s) when the records were destroyed.

4. With respect to Appellant's 2001 parole hearing please identify: the names of the members of the Parole Board present at the hearing; the number of favorable and unfavorable votes Appellant received; and which members of the Parole Board voted for and against parole.

5. Please describe with specificity whether and how DPPPS and/or the Parole Board currently record and preserve the number of favorable and unfavorable votes an inmate receives at a parole hearing.

6. Please describe with specificity whether and how DPPPS and/or the Parole Board recorded and preserved the number of favorable and unfavorable votes Appellant received at his 2001 parole hearing.

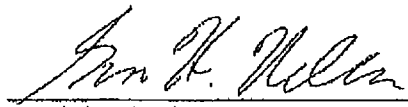
7. For the years 2001 to the present, please identify DPPPS's records retention, preservation, and/or destruction policies, procedures, and/or rules that applied/apply to the Parole Board, parole hearings, and/or votes for or against parole at parole hearings.

8. For the years 2001 to the present, please identify DPPPS's records retention, preservation, and/or destruction policies, procedures, and/or rules that applied/apply to matters wherein DPPPS is subject to, or engaged in, litigation.

9. Please identify the names and positions of the persons responsible for maintaining and preserving hearing transcripts, hearing recordings, records, and other documents of the Parole Board.

10. Please identify the inmates, by full name and inmate number, who have challenged the Parole Board's parole decision on the basis that he/she received enough favorable votes at a parole hearing to be eligible for parole pursuant to the Supreme Court's *Barton v. S.C. Dept. of Probation, Parole, and Pardon Servs*, 404 S.C. 395, 745 S.E.2d 110 (2013) opinion.

11. Please identify and describe the process or procedure, if any, DPPPS and/or the Parole Board provides to inmates who assert that they received enough favorable votes at a parole hearing to be eligible for parole pursuant to the Supreme Court's *Barton* case.



Travis Dayhuff
travis.dayhuff@nelsonmullins.com
Susan Nelson
susan.nelson@nelsonmullins.com
Nelson Mullins Riley & Scarborough LLP
1320 Main Street - 17th Floor (29201)
Post Office Box 11070
Columbia, SC 29211-1070
(803) 799-2000

Attorneys for Appellant David Lee Rose

August 24, 2015

Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

David Lee Rose, #91858,	)	Civil Action No. 15-ALJ-P-0033
	)	
Appellant,	)	
	)	
v.	)	<u>REQUESTS TO PRODUCE TO</u>
	)	<u>DEPARTMENT OF PROBATION,</u>
South Carolina Department of Probation,	)	<u>PAROLE, AND PARDON SERVICES</u>
Parole and Pardon Services,	)	
	)	
Respondent.	)	
	)	

Pursuant to the Administrative Law Court's Order of August 17, 2015, Appellant David Lee Rose ("Appellant"), by and through his undersigned counsel, submits these requests to produce to Respondent South Carolina Department of Probation, Parole and Pardon Services ("DPPPS"). In light of the schedule set forth in the Court's August 17 Order, Appellant respectfully requests that Respondent respond and produce documents responsive to these request within fifteen (15) days from the date of service.

REQUESTS

1. Please produce all records, recordings, and documents reviewed or considered during the investigation conducted by DPPPS and/or the Parole Board in 2015 regarding whether Appellant received four votes for parole at his 2001 parole hearing.
2. Please produce all records, recordings, emails, and documents related to the February 13, 2015 DPPPS letter to Appellant and the decision(s) therein.
3. Please produce all records, recordings, emails, and documents related to the destruction of the records of Appellant's 2001 parole hearing referenced in the February 13, 2015 DPPPS letter to Appellant.

4. Please produce all records, recordings, emails, and other documents related to the failure to preserve records of Appellant's 2001 parole hearing.

5. Please produce all records, recordings, emails, and documents related to Appellant's 2001 parole hearing, including, but not limited to, documents related to the votes for and against parole.

6. Please produce all policies, procedures, rules, and documents related to whether and how DPPPS and/or the Parole Board currently record and preserve the number of favorable and unfavorable votes an inmate receives at a parole hearing.

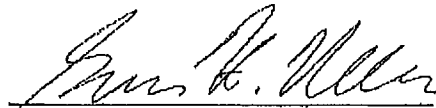
7. Please produce all policies, procedures, rules, and documents related to whether and how DPPPS and/or the Parole Board recorded and/or preserved the number of favorable and unfavorable votes Appellant received at his 2001 parole hearing.

8. For the years 2001 to the present, please produce DPPPS's records retention, preservation, and/or destruction policies, procedures, and/or rules that applied/apply to the Parole Board, parole hearings, and/or votes for or against parole at parole hearings.

9. For the years 2001 to the present, please produce DPPPS's record retention, preservation, and/or destruction policies, procedures, and/or rules that applied/apply to matters wherein DPPPS is subject to, or engaged in, litigation.

10. To the extent not produced pursuant to a previous request herein, please produce all documents identified in DPPPS's responses to Appellant's interrogatories.

11. To the extent not produced pursuant to a previous request herein, please produce all records, recordings, emails and other documents related to the above-captioned case.



Travis Dayhuff
travis.dayhuff@nelsonmullins.com
Susan Nelson
Susan.nelson@nelsonmullins.com
Nelson Mullins Riley & Scarborough LLP
1320 Main Street - 17th Floor (29201)
Post Office Box 11070
Columbia, SC 29211-1070
(803) 799-2000

Attorneys for Appellant David Lee Rose

August 24, 2015

Columbia, South Carolina

CERTIFICATE OF SERVICE

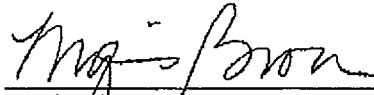
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant David Lee Rose, #91858, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified to the following address(es):

- Pleadings: 1. Requests to Produce to Department of Probation, Parole, and Pardon Services
 2. Interrogatories to Department of Probation, Parole, and Pardon Services

Counsel Served:

Hand Delivery

Matthew C. Buchanan, Esq.
Tommy Evans, Jr., Esq.
South Carolina Department of Probation,
Parole, & Pardon Services
2221 Devine Street, Suite 600
Post Office Box 50666
Columbia, SC 29250


Myrlan Brown
Administrative Assistant

August 24, 2015

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

David Lee Rose, #91858,	)	Civil Action No.: 15-ALJ-P-0033
	)	
Appellant,	)	
	)	
v.	)	RESPONDENT'S ANSWERS
	)	TO INTERROGATORIES
South Carolina Department of Probation,	)	
Parole and Pardon Services,	)	
	)	
Respondent.	)	

TO: David Lee Rose

The Respondent the South Carolina Department of Probation, Parole and Pardon Services (SCDPPPS) hereby answers the Appellant's interrogatories as follows:

1. If an investigation was conducted by SCDPPPS and/or the Parole Board in 2015 regarding whether the Appellant received four votes for parole at his 2001 parole hearing, please identify the names and positions of the persons involved in this investigation and identify all documents and other information considered in this investigation.

Answer: Larry Patton, Director of the Office of Board Support Services. The only information Mr. Patton had at his disposal was the affidavit of Mr. Carlos Bell. No other evidence that would reveal the final vote of the Parole Board was ever presented to Mr. Patton.

2. Please identify the names and positions of the persons who made the decision(s) set forth in February 13, 2015 SCDPPPS letter to Appellant including, but not limited to, SCDPPPS's "position" that "Department cannot release you to parole" and identify all documents and other information considered by the decision maker(s) before making these decision(s).

Answer: Larry Patton, Director of the Office of Board Support Services. Affidavit of Carlos Bell, the Appellant failed to present any further evidence that could reveal the final vote of the 2001 hearing.

3. With respect to the reference in the February 13, 2015, SCDPPPS letter to Appellant that the records of Appellant's 2001 parole hearing "have been destroyed," please identify: the records that were destroyed; the names and positions of the persons who destroyed the records or have knowledge of the destruction of the records; and the date(s) when the records were destroyed.

Answer: The hearing recording was destroyed. The audio tape was pulled out and the cassette thrown away. This was done pursuant to the SCDPPPS retention schedule approved by the South Carolina Director of Archives. There exist no record of who or when the tape was destroyed.

4. With respect to Appellant's 2001 parole hearing please identify: the names of the members of the Parole Board present at the hearing; the number of favorable and unfavorable votes Appellant received; and, which members of the Parole Board voted for and against parole.

Answer: The SCDPPPS does not have a record of the members present during the Appellant's 2001 hearing. The seven members of the board during the time of his hearing were: Marlene McClain, John McCarroll, Orton Bellamy, June Shissias, John Elliott, J.P. Hodges, and Sanco Rembert. There exist no records detailing the final vote of the Appellant's hearing, and nothing was presented by the Appellant revealing the final vote at his 2001 hearing.

5. Please describe with specificity whether and how SCDPPPS and/or the Parole Board currently record and preserve the number of favorable and unfavorable votes an inmate receives at a parole hearing.

Answer: As of 2014, results of parole hearings, a voice and electronic vote is cast and documented in writing.

6. Please describe with specificity whether and how SCDPPPS and/or the Parole Board recorded and preserved the number of favorable and unfavorable votes Appellant received at his 2001 parole hearing.

Answer: Prior to 2014 the final vote count was never recorded.

7. For the years 2001 to the present, please identify SCDPPPS's records retention, preservation, and/or destruction policies, procedures, and/or rules that applied/apply to the Parole Board, parole hearings, and/or votes for or against parole at parole hearings.

Answer: Since 1994, hearing recordings was only kept until no longer needed for reference, pursuant to the record retention schedule approved by the South Carolina Department of Archives.

8. For the years 2001 to the present, please identify SCDPPPS's records retention, preservation, and/or destruction policies, procedures, and/or rules that applied/apply to matters wherein SCDPPPS is subject to, or engaged in, litigation.

Answer: According to the SCDPPPS records retention schedule litigation case files are retained six years after case is closed.

9. Please identify the names and positions of the persons responsible for maintaining and preserving hearing transcripts, hearing recordings, records, and other documents of the Parole Board.

Answer: There is no court reporter present at parole hearings; therefore, there exist no transcripts at any parole hearing. Hearing recordings are preserved by Board Support Services, directed by Larry Patton. Records and documents considered by the Parole Board are preserved by Records Management Services directed by Christe Baird.

10. Please identify the inmates, by full name and inmate number, who have challenged the Parole Board's parole decision on the basis that he/she received enough favorable votes at a parole hearing to be eligible for parole pursuant to the Supreme Court's *Barton v. S.C. Dept. of Probation, Parole, and Pardon Services*, 404 S.C. 395, 745 S.E.2d 110 (2013) opinion.

Answer: Thalma Barton #110881, Gene Richardson #93614, James Plyer #120900, Francis Campbell #111197, Charles Sink #174003, Robert Miller #137506, Shariah Muhammad #87258, Kenneth Green #116020.

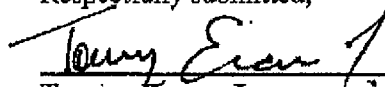
11. Please identify and describe the process or procedure, if any, SCDPPPS and/or the Parole Board provides to inmates who assert that they received enough favorable votes at a parole hearing to be eligible for parole pursuant to the Supreme Court's *Barton* case.

Answer: When an old vote is brought to the Department's attention an investigation is conducted by the office of Parole Support Services to verify if the inmate did receive the proper number of votes. If it is verified that is possible, the matter is forwarded to the Board for a *Barton* hearing. If not proven, the inmate will be notified that insufficient evidence was presented revealing the inmate received the proper amount of votes to be released on parole.

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The Respondent reserve the right to supplement any of the above answers while this case is currently pending.

Respectfully submitted,


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

Columbia, South Carolina
September 21, 2015

STATE OF SOUTH CAROLINA
In The Administrative Law Court
Docket Number 15-ALJ-15-0033

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

DAVID LEE ROSE, #91858 APPELLANT

v.

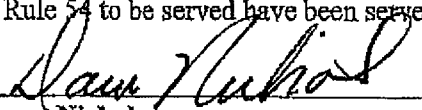
S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES, ... RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant to counsel for Respondent, certify that I have served the within *Respondent's Answers to Interrogatories*, dated September 21, 2015, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, the 23rd day of September, 2015, addressed to:

Travis Dayhuff, Esquire
Nelson Mullins Riley & Scarborough LLP
1320 Main Street, 17th Floor
Columbia, South Carolina 29201

I further certify that all parties required by Rule 54 to be served have been served.


Dawn Nichols
Executive Administrative Assistant
South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 50666
Columbia, South Carolina 29250

260

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

JIM RODGES
Governor



STEPHEN K. BENJAMIN
Director

2221 DEVINE STREET, SUITE 600
POST OFFICE BOX 50666
COLUMBIA, SOUTH CAROLINA 29250
Telephone: (803) 734-9220
Facsimile: (803) 734-9440

June 20, 2001

Mr. David Lee Rose #00091858
Lieber Correctional Institution
P.O. Box 205

Ridgeville, SC 29472

Re: NOTICE OF REJECTION

Dear Mr. Rose:

It is my responsibility to inform you of the action of the South Carolina Board of Parole and Pardon relative to your recent parole hearing. After careful consideration of your record before and after imprisonment, the Parole Board has rejected you for parole.

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

The reason(s) for rejection are:

Nature And Seriousness Of Current Offense

Failure To Successfully Complete A Community Supervision Program

Sincerely,

A handwritten signature in cursive script that reads "Gwendolyn A. Bright".

Gwendolyn A. Bright
Director of Parole Board Support Services

STATE OF SOUTH CAROLINA
COUNTY OF LAURENS

JUDGMENT IN A CIVIL CASE

IN THE COURT OF COMMON PLEAS

Case No. 2004 - CP-30- 4610

Dand Lee Rose, #9185B

State of SC

Plaintiff(s)

Defendant(s)

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Voluntary Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of judgment by the Court:

Dated at _____, South Carolina, this the _____ day of _____, 20____.

This judgment was entered on the 9 day of March, 2006, and a copy mailed first class this the 9 day of March, 2006 to the attorneys or parties (when appearing pro se) as follows:

John K. Ferguson, Esq Julie M. Thomas

_____ Esq

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Barbara T. Glass
CLERK OF COURT

Exhibit A

App 264

BARBARA T. WASSON

STATE OF SOUTH CAROLINA)

COUNTY OF LAURENS)

David Lee Rose, SCDC No. 91858,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

EIGHTH JUDICIAL CIRCUIT

2004-CP-30-666

2006 MAR -9 A 11:37

LAURENS COUNTY
CLERK OF COURT

AMENDED ORDER OF DISMISSAL
WITH PREJUDICE

John Ferguson, Esquire, appearing for the Applicant.

Julie M. Thames, Assistant Attorney General, appearing for the Respondent.

This is a post-conviction relief (PCR) matter. The Applicant filed an application for PCR on August 30, 2004. The Respondent filed a return and motion to dismiss on December 6, 2005. A motion hearing was convened on January 18, 2006, at the Moss Justice Center in York County.

I. PROCEDURAL BACKGROUND

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Laurens County Clerk of Court's orders of commitment. He was indicted at the May 1978 term of the Laurens County Grand Jury for kidnapping (1978-GS-30-224). On May 22, 1978, the Applicant pled guilty as indicted. He was represented by J. Michael Turner and Thomas A. Babb, Esquires. The Honorable James E. Moore sentenced the Applicant to life imprisonment. The Applicant did not appeal his conviction or sentence.

In his application for post-conviction relief the Applicant alleges he is being held in custody unlawfully for the following reasons:

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ATTACHMENT App 265

1. Retroactive application of current South Carolina Parole criteria violates *ex post facto*;
2. Retroactive application of increase in number of votes required to make parole violates *ex post facto*; and
3. Retroactive elimination of work release, extended work release, supervised furlough, and other classification-release opportunities triggering restrictions on release eligibility, violate the *ex post facto* clause.

II. APPLICABLE LAW

Ex post facto and parole eligibility

The South Carolina Supreme Court has held that: "PCR is a proper avenue of relief only when the application mounts a collateral attack challenging the validity of his conviction or sentence" Al-Shabazz v. State, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000). Claims that only affect the duration of the sentence or quality of the inmate's confinement do not affect the validity of the conviction or sentence and therefore are not considered collateral attacks on the conviction. Cooper v. State, 338 S.C. 202, 525 S.E.2d 886 (2000); Al Shabazz. An applicant may not seek review of a non-collateral or administrative matter through PCR. Al Shabazz; Tutt v. State, 277 S.C. 525, 290 S.E.2d 414 (1982). After Al Shabazz, only two non-collateral matters are cognizable in PCR: 1) a claim that the applicant's sentence expired, or 2) a claim that the applicant's probation, parole, or conditional release has been unlawfully revoked. Id. For credit related claims or claims concerning the conditions of confinement, the proper avenue of relief is through the Administrative Procedures Act (APA). Id., 338 S.C. at 369, 527 S.E.2d at 749-50. *Ex post facto* claims also must be brought through the APA rather than PCR. Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000).

III. SUMMARY OF TESTIMONY AND ARGUMENT PRESENTED AT THE PCR EVIDENTIARY HEARING

[Handwritten signature]

The Applicant argued at the PCR hearing that his application should not be barred by the statute of limitations because his allegation is a recurring issue.

The Applicant testified at the PCR hearing. He testified that the parole board should be applying the criteria that was in place when he was sentenced in 1978, but that it is using more current criteria. The Applicant testified that under the old guidelines, he needed four votes from the parole board to be granted parole, but under the new guidelines, five votes are required to grant parole. He testified that at his last parole hearing, he received four votes in favor of parole, but that parole was denied based on being short by one vote. The Applicant testified that other prisoners have told him that attempts to file his claim under the Administrative Procedures Act would fail because the APA would refuse to hear the matter. The Applicant testified that the only way for him to have due process was for his case to be heard in a PCR hearing. The Applicant testified that and a former attorney attempted to resolve the problem through the parole board but that the parole board would not help him. He also acknowledged that he had not attempted to file his own action under the APA, but that he filed his PCR application in circuit court based upon the information from other prisoners that the APA would not hear his case.

The Applicant also presented a Motion to Disclose, in which he requested a copy of the parole board's criteria in effect at the time of his commitment, 1978.

The Respondent argued the allegations in the application were not cognizable in PCR and are required to be brought before the Administrative Procedures Act. See Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000)(*Ex post facto* claims also must be brought through the APA

Pr 595

rather than PCR). Further, the Respondent argued the allegations raised by the Applicant were not collateral attacks on the conviction, and thus, could not be raised in a PCR application. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000)(PCR is a proper avenue of relief only when the application mounts a collateral attack challenging the validity of his conviction or sentence).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the motion hearing. Further, this Court reviewed the Clerk of Court records regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the PCR application, and legal arguments of counsel. Pursuant to S.C. Code Ann. § 17-27-80 (1985), this Court makes the following findings of fact and conclusions of law.

This Court finds that the Respondent's motion to dismiss must be granted. This Court finds the allegations raised by the Applicant are not cognizable in PCR. South Carolina case law clearly holds that allegations of this nature must be brought pursuant to the APA.

However, this Court also notes that if the APA refuses to hear the Applicant's complaint, he can re-file in circuit court in order to have his allegation fully explored.

IT IS THEREFORE ORDERED THAT:

1. The Respondent's Motion to Dismiss is hereby **GRANTED** and the post-conviction relief application is **DENIED AND DISMISSED WITH PREJUDICE, EXCEPT** that if the APA refuses to entertain the Applicant's allegation, he may then re-file in circuit court.
2. The Court advises the Applicant and his attorney of record that any Notice of Appeal must be filed within thirty (30) days of service of the signed copy. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures on appeal.

ps 9/9/5

3. The Applicant is remanded to the custody of the Respondent for the completion of his sentence.

AND IT IS SO ORDERED this 05th day of March, 2006.

Wyatt T. Saunders, Jr.
Wyatt T. Saunders, Jr.,
Presiding Judge
Eighth Judicial Circuit

Greenville, South Carolina.

A TRUE COPY OF ORIGINAL

Lynn W. Lancaster
Lynn W. Lancaster
Laurens County CCCP & GS

45595 ~~A~~

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

NIKKI R. HALEY
Governor



JERRY B. ADGER
Interim 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

February 13, 2015

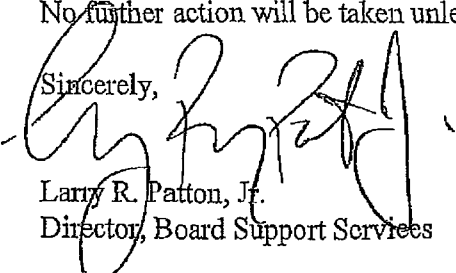
David Rose, #91858
Kershaw Correctional Institution -MAG-A-12
4848 Goldmine Highway
Kershaw, South Carolina 29067

Dear Mr. Rose:

Thank you for providing us a copy of the affidavit from Mr. Carlos Bell testifying what he remembered to have transpired at your parole hearing of June 20, 2001. Also, pursuant to Judge Addy's order dated January 28, 2015, the Department has completed its investigation into your claim that you did receive the required number of votes to be conditionally paroled pursuant to Barton. Unfortunately, we have been unable to locate any information from your parole hearing as records have been destroyed given that your hearing was almost fourteen years ago. Therefore, it is the Department's position that without any other evidence of the vote count from your June 20, 2001, hearing, the Department, cannot release you to parole.

No further action will be taken unless directed to do so by the Court.

Sincerely,


Larry R. Patton, Jr.
Director, Board Support Services

LRP:dn

cc: The Honorable Frank Addy, Jr.
Debbie Curtis, Office of Victim Services

Exhibit E

App 270

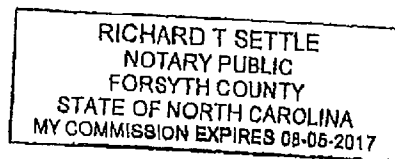
AFFIDAVIT

PLEASE SEE ATTACHED SHEET

I THANK YOU FOR YOUR TIME

Carlos Bell

My Commission Expires: 8-5-2017



Attachment Too Carlos L. Bell's Affidavit for; David Rose vs; South Carolina

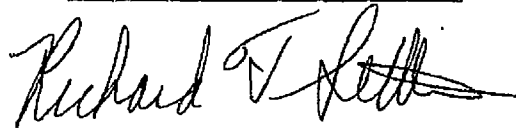
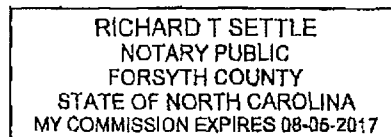
I attended the Parole Hearing for David Rose in June 2001 as a character witness. In attendance for that hearing for David Rose were Mr. Alvin Neal (Attorney), Kathy Todd (sister), and Carlos Bell (cousin). We had been told before going into the hearing that the Board was one member short that day but, they would be holding hearings based on the number that was in attendance. We all spoke on David's behalf, we all felt after the hearing and while waiting to hear the outcome that it had gone well with the Parole Board.

A woman came out to the common area where we were waiting the results (I believe she was the secretary or recorder for the Parole Board), she said "I'm sorry but parole has been denied", we were dumb struck. After a moment of figuring what had just happened we asked Mr. Neal if we could find out what the vote was. Mr. Neal then asked the woman what was the vote count, she gave this to him, then he in turn turned back to us and repeating what she had told him, the count was 4 yes votes and 2 no votes. I immediately asked Mr. Neal how can parole be denied when David got 4 Yes votes out of 6, was this not a majority. He stated this did not sound right and he would be checking on this.

I paid Mr. Neal his fee out in the parking lot when we were leaving that day and he reiterated that he would be checking into the Parole Board's outcome. Nobody has heard from Mr. Neal since (he took the money and absconded), the fee was supposed to be for him to represent David through the parole process.



Carlos L. Bell



10-25-26

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

NIKKI R. HALEY
Governor



KELA E. THOMAS
Director

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

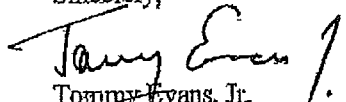
May 27, 2014

David Rose, #91858
Kershaw Correctional Institution -MAG-A-12
4848 Goldmine Highway
Kershaw, South Carolina 29067

Dear Mr. Rose:

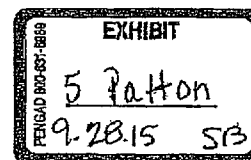
In response to your Request for Production of Documents dated May 23, 2014, please find enclosed an affidavit of Mr. Roosevelt Hicks, Supervisor of the Office of Board Support Services. Also, in response to your request for the names of the Parole Board members at your hearing on June 20, 2001, this information is not available as these records have been destroyed.

Sincerely,


Tommy Evans, Jr.
Assistant General Counsel

TB:dn

cc: The Honorable Frank Addy, Jr.



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

MARK SANFORD
Governor



SAMUEL B. GLOVER
Director

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

April 17, 2006

Mr. David Rose #918858
Kirkland R&E Center - B-2-9
4344 Broad River Rd.
Columbia, South Carolina 29210

RE: Parole Hearing

Dear Mr. Rose:

This is in response to your letter received on April 17, 2006. In your letter you are inquiring about your denial of parole on June 20, 2001. It is your opinion that you should have been granted parole because you received 4 votes in your favor, which at the time of your conviction a majority allowed an inmate to be released on parole. It is your position that this denial was a violation of ex post facto.

According to our records on May 22, 1978, you received a life sentence for kidnapping, at the time of your conviction a person became eligible for parole after the service of 10 years. You received parole on April 30, 1987, which was revoked on June 14, 2000. You were later denied parole because you failed to receive a two-thirds vote required by South Carolina law.

The 4th Circuit United States Court of Appeals case of Roller v. Gunn determined that, "Retrospective application of amendment to South Carolina's parole procedures did not violate ex post facto clause to the extent it required two-thirds vote of the parole board rather than a simple majority." Due to this decision the Board is allowed to follow current South Carolina law regarding the amount of votes needed in order to be awarded parole.

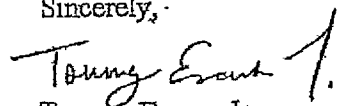
ATTACHMENT C

17

I hope that his has answered any inquiries regarding this matter. Unfortunately I cannot offer any further assistance regarding this matter. Good luck in all of your future endeavors.

With kind regards I remain,

Sincerely,



Tommy Evans, Jr.
Legal Counsel

TE/te

STATE OF SOUTH CAROLINA

County of Laurens

IN THE COURT OF COMMON PLEAS

2014 AUG 30 : A 10:52

David Lee Rose, 91858

Full name and prison number (if any) of Applicant

LAURENS COUNTY
CLERK OF COURT

v.

APPLICATION FOR

State of South Carolina

POST-CONVICTION RELIEF

2014-4-30-10:52INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten); signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Kirkland Corr Inst, 4349 Broad
River Road, Columbia, SC 29210
2. Name and location of Court which imposed sentence Laurens County
Court of General Sessions
3. Name(s) of co-defendant(s) (if any) Jack Elephant
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 78-65-30224

A TRUE COPY OF ORIGINAL

Barbara T. Wasson

BARBARA T. WASSON

Laurens County CCCC & GS

- (b) _____
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 5-22-78; Life sentence
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty Yes
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
- No
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Appeal was not available.

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Retroactive application of parole criteria violates ex post facto
(b) Retroactive application of increase in votes violates ex post facto
(c) (Please See Enclosed)

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) I was sentenced in 1978, yet the current criteria is applied
(b) I have obtained four votes, yet I remain incarcerated
(c) (Please See Enclosed)

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No
(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____
ii. _____
iii. _____
iv. _____

(b) the name and location of the Court in which each was filed:

i. _____
ii. _____
iii. _____

- iv. _____
- (c) the disposition thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (d) the date of each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

- (b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) This is my first PCR application
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes
- (b) your trial, if any? _____
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Michael Turner, Public Defender's Office
- ii. Parole Hearing Attorney: Alvin Neal
P.O. Box 301, Columbia, SC
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Custody Hearing
- ii. Parole Hearing
- iii. _____

19. State clearly the relief you seek in filing this application:

Release on Parole

20. Are you now under sentence from any other court that you have not challenged?

No

Revised 3/2003

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Laurens)

I, David Lee Rose, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

David L Rose

SWORN to and subscribed before me this 26th
day of August, 2009.

Ethan Ruston (L.S.)
Notary Public

My Commission Expires: My Commission Expires May 18, 2014

2004-CP-50-1224

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, David Lee Rose, hereby apply for leave to
proceed in this action without prepayment of fees or costs or security therefor. In support of my
application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give
security thereof.

David Lee Rose
Applicant

SWORN or affirmed to and subscribed before me this
26th day of August, 2004.

Gather Crutcher
Notary Public

My Commission Expires: My Commission Expires May 18, 2014

LAURENS COUNTY
CLERK OF COURT

2004 AUG 30 10 52

BARBARA T. WASSON

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

DAVID L. ROSE #91858

Appellant,

vs.

South Carolina Department of Probation,
Parole and Pardon Services,

Respondent.

NOTICE OF APPEAL

DOCKET NO. 06-ALI-15-00016-AP

Notice is hereby given that DAVID L. ROSE does hereby appeal the final decision of the South Carolina Department of Probation, Parole and Pardon Services dated APRIL 17, 2006 and received on APRIL 19, 2006, 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.) Retroactive application of current South Carolina Department of Probation, Parole and Pardon Services parole criteria violates ex post facto

2.) Retroactive application of increase in number of votes required to make parole violates ex post facto

David L. Rose

Appellant's Name

KREE B2-9

4344 Broad River Rd

Mailing Address

Columbia, SC 29210

City, State, Zip Code

Telephone Number

David L. Rose

Signed



Dated

May 12, 2006

ATTACHMENT D

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

David L. Rose, # 91858,

Appellant,

vs.

South Carolina Department of Probation,
Parole and Pardon Services,

Respondent.

ORDER OF DISMISSAL

DOCKET NO. 06-ALJ-15-00016-AP

This case is before the Administrative Law Court ("ALC") pursuant to the appeal of David L. Rose ("Appellant"), an inmate incarcerated with the South Carolina Department of Corrections. On April 17, 2006, the South Carolina Department of Probation, Parole and Pardon Services ("Department") sent to Appellant a letter responding to his inquiry concerning the denial of parole following his June 20, 2001 hearing and the number of votes of members of the South Carolina Board of Parole and Pardons ("Board") required for an order authorizing parole. Appellant challenges the Department's April 17, 2006 determination and requests this Court to review the record of all of his parole hearings.

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. South Carolina Department 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 decisions denying parole, including challenges to the procedures followed by the Board during a parole review, are not appealable to the ALC.

FILED

MAY 14 2007

SC ADMIN. LAW COURT

ATTORNEY GENERAL B.

ORDER

IT IS THEREFORE ORDERED that this appeal is dismissed.

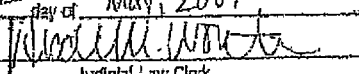
AND IT IS SO ORDERED.


JOHN D. GEATHERS
Administrative Law Judge

May 14, 2007
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 in 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 14th day of May, 2007
By: 
Judicial Law Clerk

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge

Appellate Case No.: 2016-000225

DAVID ROSE, #91858,.....RESPONDENT

v.

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

May 18, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge

Appellate Case No.: 2016-000225

DAVID ROSE, #91858, ...RESPONDENT

v.

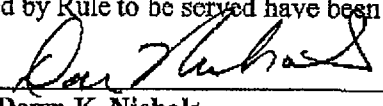
S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES, ...APPELLANT

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 18, 2016, on Respondent by depositing the same in the United States mail, postage prepaid, this 18th day of May, 2016, addressed to:

Travis Dayhuff, Esquire
1320 Main Street, 17th Floor
Columbia, S.C. 29201

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


Dawn K. Nichols,
Executive Assistant

S. C. Department of Probation,
Parole, and Pardon Services
P. O. Box 50666
Columbia, South Carolina 29250

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge
Case No.: 15-ALC-0033-AP
Appellate Case No.: 2016-000225

DAVID ROSE, #91858, ...RESPONDENT

v.

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

SUPPLEMENTAL RECORD ON APPEAL

Travis Dayhuff, Esquire
1320 Main Street, 17th Floor
Columbia, S.C. 29201
(803) 799-2000

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

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1 system?

2 A. Yes.

3 Q. And making sure the recording is working,
4 right?

5 A. Yes.

6 Q. And number two, the second person, they're
7 calling cases, making sure the decision's memorialized,
8 making sure the next case is ready and making sure the
9 video is on the right place to hear a case?

10 A. Right.

11 Q. All right. What is recorded in the PIC
12 system?

13 A. The decision.

14 Q. Okay. Parole? No parole?

15 A. If it's parole or no parole.

16 Q. Okay.

17 A. Conditions.

18 Q. Okay.

19 A. Or for parole -- if there's parole, they'll
20 record what conditions there are. And if they're not
21 granted parole, then the reasons for it.

22 Q. Okay. Any tabulation of the vote in the PIC
23 system?

24 A. Not currently.

25 Q. Has there ever been a tabulation of vote in

1 the PIC system?

2 A. There is not. Not to my knowledge.

3 Q. Is there a plan to include the vote?

4 A. There is.

5 Q. When will that happen?

6 A. That's outside my realm. You're talking IT
7 stuff so I could not tell you.

8 Q. Sure. So there's a plan to incorporate that
9 into the system when the IT folks can make it happen?

10 A. Not just them, but yes.

11 Q. Okay.

12 A. Yes. When everything is set up to be able to
13 move toward that, but, yes, there has been
14 conversation. Me, personally, it has taken place and
15 it's something that we are hoping to do sooner rather
16 than later.

17 Q. Why?

18 A. Just for better bookkeeping and just if the
19 capabilities are there, why not?

20 Q. If -- when you do that, do you expect to
21 record the vote totals and the identity of the people
22 making the vote, both?

23 A. Right now, it's a thought. So kind of hard
24 to say exactly according to any kind of issues or
25 hurdles or whatnot. I guess at that point maybe more

1 would be fine, so maybe having the names. But
2 that's -- like I say, that's still just a concept right
3 now.

4 Q. So that's still in the planning stage?

5 A. Yeah.

6 Q. Do you have an opinion about what it should
7 look like, the reporting? You may not be making the
8 final decision, right?

9 A. Right.

10 Q. What's your opinion as to what should be
11 reported in the PIC system with respect to votes?

12 A. Just essentially the board member and what he
13 or she voted.

14 Q. Okay.

15 A. Yes, no, or absent, not there. What, recused
16 or abstained, whatever, trying to give that other
17 column.

18 Q. All right. Currently, is there any -- we
19 talked about the kind of paper documentation going on
20 at the prison. There's a roster of stuff being written
21 down. Is anybody writing down anything in the Devine
22 Street office currently?

23 A. Yes.

24 Q. What's being written down?

25 A. Pretty much the same stuff as well as the

1 votes that the board members are making.

2 Q. All right. So currently we're writing
3 down -- and is this staff person number one we talked
4 about?

5 A. I don't know which is one or two, but the one
6 that's calling the cases and ensuring we're going to --

7 Q. I guess I have that as two, but it doesn't
8 matter.

9 A. Okay.

10 Q. You've got somebody doing that?

11 A. Yes.

12 Q. So they've got a sheet of paper?

13 A. Yes.

14 Q. With the names and the cases?

15 A. Yes.

16 Q. Date of birth? Does it look like the other
17 sheet?

18 A. It's the same thing. We use that same sheet
19 for every.

20 Q. Okay. And I understood the examiner doesn't
21 write down the votes, the one that's at the prison.
22 But this staff person at Devine Street will write
23 down --

24 A. Right.

25 Q. -- the number of votes for and against?

1 A. Uh-huh.

2 Q. And the identity of the people voting for or
3 against?

4 A. Yes.

5 Q. Okay. How long has that been going on?

6 A. I implemented it when I got there, so maybe a
7 year.

8 Q. Okay.

9 A. It's relatively new. Pretty recent.
10 Somewhere around the time that the whole Barton
11 situation took place for moving forward purposes
12 instead of us having to go pull recordings every day.

13 Q. All right. Any other documentation created
14 currently? You've told me about the PIC system and the
15 SCDC system. You've told me about staff person number
16 two recording stuff. Is there anybody else recording
17 anything? Writing anything? Recordkeeping? I'll give
18 you an example. Sometimes when boards meet, there's
19 formal minutes. This happened on this -- like a
20 secretary taking minutes. Does that happen?

21 A. That's our recording. The recording collects
22 everything.

23 Q. Got you. All right. So no paper minutes?

24 A. Right.

25 Q. You got your tape-recording and everything?

1 A. Right.

2 Q. All right. Good. So I guess the answer is,
3 then, no more documents are being created as part of
4 this?

5 A. I don't think. Victim services, they're not
6 under me --

7 Q. Sure.

8 A. -- but for opposition cases that are present,
9 they aren't keeping the details. But for that
10 particular case, they're letting the present opposition
11 know if they were granted parole or not. If granted
12 parole, then what the conditions are just so they'll
13 kind of have an idea. But that's really it.

14 Q. Okay. All right. I suppose if you're
15 granted parole, a document is generated, right? Is
16 that generated right then and there, or is it later?
17 Like the letter.

18 A. Are you referring to the certificate?

19 Q. No. I guess the -- I guess a document -- a
20 letter would be generated if you're denied and if
21 you're granted, too, right? A letter would come out
22 "Congratulations"?

23 A. I don't believe so.

24 Q. No?

25 A. No, sir. That essentially will be the

1 certificate when you have -- when you have essentially
2 completed all those conditions, either the one or two
3 conditions or the five conditions or whatever.

4 Q. You'll get a certificate?

5 A. You'll get a certificate and released.

6 Q. Well, let me focus then on if you're denied.

7 A. Right.

8 Q. I'm denied. I needed -- I had a full board.

9 I needed two-thirds because it's a violent crime. And
10 the vote -- I got two votes in favor and the rest
11 against. What does my letter look like that I'm
12 getting? My parole denial letter.

13 A. Assuming we're talking about all seven
14 members are there?

15 Q. Yeah, all seven members are there.

16 A. It's just basically Word -- a letterhead Word
17 document. "Your parole consideration was rejected.
18 You will be considered again in the future."

19 And we don't put specific day because so many
20 things can happen between now and a year, two years.

21 Q. So we don't say, "Hey, we'll see you again
22 September 28th"?

23 A. No. No. We tell you, you know,
24 approximately a year, approximately two years.
25 Because, you know, you just never know what may happen

1 in the system. In the system, I mean just an inmate
2 being in the system.

3 Q. Sure.

4 A. But it says, "You will be considered again."
5 And it gives you what the reasons for rejection were --

6 Q. Okay.

7 A. -- or are.

8 Q. All right. And the reasons, I've seen the
9 letters and I've heard the tapes. They talk about,
10 okay, rejected one and two or one and four or whatever.
11 What are those numbers? What are they referring to?

12 A. There are six different rejection reasons.
13 And instead of the board member having to read out that
14 brief sentence, they say the numbers. My staff member,
15 he writes the numbers down. When it's put into the
16 system, those numbers automatically coincide with
17 whatever that condition is.

18 So the letter doesn't say one, two, and
19 three. It says nature of crime, you know, whatever the
20 correlating sentence is.

21 Q. I got you. So those are criteria for
22 potential rejection, I guess?

23 A. Yes.

24 Q. Do those criteria appear in your State
25 Operations Manual?

1 A. I'm not sure if they're in our policy and
2 procedures. I don't know.

3 Q. Okay. Do you know whether they're in the
4 statute or not?

5 A. I don't know that.

6 Q. That's fine.

7 A. I don't know. I believe they're in the board
8 manual.

9 Q. Okay. All right. So there's a board manual,
10 and then there's policies and procedures?

11 A. Correct.

12 Q. Okay. All right. That letter of rejection.
13 Does it say, okay, you were rejected, nature and
14 seriousness of the crime, whatever the next one is, you
15 received two votes. That was my hypothetical, right?
16 I got two out of seven.

17 A. Right.

18 Q. Does it tell me that on the letter?

19 A. No. Not right now it does not.

20 Q. Okay. All right.

21 A. Once again, going back to a couple of
22 previous questions, we don't have the -- that
23 electronically right yet. So that's one thing we're
24 hoping to be able to get in to where it will be able to
25 tell you, you're rejected 7-0 or 0-7, however many.

1 Q. I gather by that answer there's a plan or
2 some discussion about incorporating the vote totals on
3 to the rejection letter?

4 A. Yes.

5 Q. Would you also incorporate the identity of
6 the people who voted no, or no?

7 A. Most likely not.

8 Q. Not. Okay.

9 And is there any time by which you think that
10 will occur, or is it still kind of up in the air as to
11 whether it will occur?

12 A. I feel like it's less in the air as to
13 whether it will occur, but as far as timeline, I don't
14 know of one right now.

15 Q. Okay. So it's going to happen, you just
16 don't know when?

17 A. I feel sure it will.

18 Q. All right. And you believe that to be a good
19 idea?

20 A. I do, yeah.

21 Q. Why?

22 A. I mean, pretty much majority of our inquiries
23 from inmates and/or attorneys would be cut in half if
24 not more --

25 Q. Right.

1 A. -- because majority of the information
2 they're asking is going to be on that letter.

3 Q. We wouldn't call Matt so much.

4 A. There you go. I'm sure he'll appreciate it.

5 MR. DAYHUFF: I thought you enjoyed our
6 calls. You don't have to answer that.

7 THE WITNESS: He's not under oath. He can
8 answer it.

9 BY MR. DAYHUFF:

10 Q. All right. Okay. Susan wants to know the
11 rejection reasons we were talking about, I guess the
12 criteria for rejection, are there a certain number that
13 you do, one, two, or three, or I don't mean -- do you
14 have three reasons or four reasons or two reasons or
15 does it vary?

16 A. Has at least one up to six.

17 Q. Okay. All right. All right.

18 A. The reason up to six is because that's all
19 there is is just six.

20 Q. I got you.

21 The documentation that we mentioned
22 currently, you know, you've got the roster at the
23 prison, they're taking down stuff. And then you've got
24 one of your staff members taking down the votes and
25 everything else on paper.

1 How long are those documents retained?

2 A. I guess currently until no longer needed.

3 Q. Okay.

4 A. Which as far as the individual votes go, it's
5 such a new practice, we have them still.

6 Q. Okay. The "until no longer needed," where is
7 that guidance? Is that a policy or a standard or a
8 law?

9 A. I'm not completely sure if it comes from
10 state archives or if it's in law. But it's mandated.
11 It's not just us throwing that out there.

12 Q. All right. And I had heard, I don't know if
13 it's true or not, that there was a policy, and maybe
14 it's on old policy, that said you would keep that type
15 of documentation until the inmate died or was paroled.
16 There was some other. Died or was paroled or maxed
17 out.

18 A. Or maxed out.

19 Q. Right.

20 A. Or no longer needed.

21 Q. Or no longer needed.

22 A. Which the three previous reasons would deem
23 them no longer needed. If you're out, we don't need to
24 know what your vote count was.

25 Q. Very true.

1 A. If you're dead or maxed out, don't need it
2 anymore either.

3 Q. It's not as useful as it used to be.

4 A. Right.

5 Q. So is that what you understand to be your
6 current policy with respect to retaining that type of
7 documentation?

8 A. Yes.

9 Q. All right. So you can get rid of it if it
10 maxed out, the inmate has died, if the inmate has been
11 paroled, or until no longer needed?

12 A. Right.

13 Q. And does "until no longer needed," does it
14 add anything that the three previous have said? I
15 mean, is there another reason you wouldn't need it?
16 That's a very inartful question, right?

17 A. Yes.

18 Q. I'm asking does this fourth criteria, "until
19 no longer needed," give you another opportunity to get
20 rid of the documents? Dispose of the documents?

21 A. I suppose so, yes.

22 Q. Okay. Under what circumstances would that
23 be?

24 A. Right now, I could not say for sure.

25 Q. Okay.

1 A. We do our best to try and hold on to what we
2 can as long as we can for purposes of, you know --

3 Q. I got you.

4 A. We try and be as open and honest.

5 Q. As you sit here today, you can't think of
6 another reason to dispose of that type of parole
7 documentation other than -- specific reason, other than
8 max out, death of the inmate, or granting parole?

9 A. Well, I mean, I guess due to so much being on
10 paper, so much, you know, kind of like law, kind of
11 like courts and things like that, they keep things for
12 space purposes and things of that sort for a certain
13 amount of time and then they dispose of them. So, I
14 mean, kind of the same -- along the same lines as what
15 courts and other hearing procedures would be.
16 Eventually space runs out.

17 Q. Right. Right. So that would be a no longer
18 needed --

19 A. I would --

20 Q. -- category?

21 A. I would think.

22 Q. Okay.

23 A. If you're in for life and you come up for 40
24 years' worth of parole hearings --

25 Q. Right.

1 A. -- probably the first ten may be no longer
2 needed.

3 Q. And is there any specific policy or rule that
4 applies to that? Like you mentioned a lifer. A lifer
5 has been up 20 times. Is there a time period that
6 you're keeping these or -- does that make sense?

7 A. Yeah.

8 Q. That you're deciding, okay, as of this date,
9 we're no longer keeping this, or this document has been
10 around 20 years, this vote tally? Is there a rule?

11 A. To my knowledge, right now there's not. Not
12 today there's not, but there is going to be very soon.

13 Q. A plan. Okay. Well, what's the plan?

14 A. We're in conversation with archives, state
15 archives right now. So according to what we can or
16 can't do, but the plan will be for a lot less than
17 until not needed.

18 Q. Okay. All right. All right. 2001. Let's
19 go back there and see what you know about 2001. I
20 guess that was before your time, wasn't it?

21 A. Yeah.

22 Q. But you do have, I assume, some kind of
23 institutional knowledge of the way things used to work.
24 You've had to deal with the Barton issue among other
25 things, right?

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1 A. Right.

2 Q. I guess you're currently dealing with people
3 coming to you today and saying, "Hey, I got the right
4 number of votes in 2001, 2002, 2005," whatever it was?

5 A. Right.

6 Q. I guess Barton -- do you remember what year
7 Barton was?

8 A. That the ruling --

9 Q. The ruling.

10 A. Wasn't it '14?

11 Q. It was '13.

12 A. Late '13. Okay.

13 Q. I think we started litigating in 2012, and I
14 think the Supreme Court spoke on it in 2013.

15 A. Okay.

16 Q. So I imagine, do you have a rough sense of
17 how many people come to you to say, "Hey, I got the
18 right number of votes" back in the day?

19 A. That have actually gained the right number or
20 inquired about?

21 Q. Come to you, right.

22 A. A lot.

23 Q. Really? Roughly over ten?

24 A. I would say upwards of 20.

25 Q. Okay.

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1 A. That may be lowballing. I don't know.

2 Q. Okay. And they're coming to you through
3 what, sending you a letter?

4 A. Either them and/or attorney.

5 Q. Okay. All right. Back in 2001, you've
6 explained to me what the current process is and I'm
7 particularly interested in how they were recording
8 things. What is different or the same about what was
9 going on? Do you know how they were voting, for
10 example?

11 A. How do you mean, how they were voting?

12 Q. Well, you told me about the box, right?

13 A. Right.

14 Q. They're clicking the box and they're doing
15 voice votes when it's not unanimous. Do you know how
16 they did it back then?

17 A. No.

18 Q. Okay. All right. Do you know whether they
19 had the red light, green light box?

20 A. No, sir.

21 Q. All right. Do you know -- they had tapes,
22 right? Minutes/tapes?

23 A. Yes. Yes.

24 Q. Because I've seen tapes.

25 A. Yes.

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1 Q. I've listened to tapes.

2 How far back do the tapes go, do you know? I
3 don't mean -- I know that some have been destroyed, but
4 do you know when that practice of taping began?

5 A. I cannot say for sure. I want to say late
6 '90s. I'm not sure exactly, though.

7 Q. I think I've seen that. Late '90s up until
8 the present day we're taping?

9 A. It's not cassette tapes anymore, but, yes,
10 they're recording stuff. Yes.

11 Q. It began with those little cassettes?

12 A. Correct.

13 Q. Okay. All right. And now we're doing some
14 sort of electronic recording?

15 A. Yes.

16 Q. On discs? I've seen the discs, I guess.

17 A. It's replicated on to discs.

18 Q. Okay.

19 A. But we keep it in our database storage.
20 Whatever -- whatever it is.

21 Q. All right. So do you know whether the staff
22 person who presumably would have been working for PPP
23 at the prison at a hearing in 2001 would have had a
24 roster with the names of the cases and parole yes or
25 no?

1 A. I couldn't say.

2 Q. Okay. Do you know whether there was even a
3 person there?

4 A. I couldn't say. I was -- according to what
5 month we're talking about, I was either a junior or
6 senior in high school.

7 Q. You hadn't looked ahead and you didn't know
8 what your future was going to be?

9 A. Not quite. Not quite. I was just trying to
10 get through 12 years of school at that point.

11 Q. I hear you. I was a junior, too. No, that's
12 not true, is it?

13 A. Okay. So we don't know.

14 A. The only thing I can tell you is our hearings
15 were conducted at Broad River. So instead of being in
16 Columbia, everything converged in Broad River.

17 Q. Okay. Do you mean that the parole went to
18 the prison?

19 A. Inmates, all my staff, everything. It was
20 the -- everything was obviously on paper. It was
21 packed up. Everybody went to Broad River Correctional.
22 Every institution around the state brought the
23 parole-eligible inmate to Broad River, victims, parole
24 boards, the parole board members. Any and everything
25 that had to do with that hearing on that particular day

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1 went to Columbia's Broad River.

2 Q. So more than likely you just didn't have one
3 person there. You had lots of staff and the whole
4 board. And wow. Okay.

5 A. All right. So they may have in 2001, they
6 may have written down parole, no parole?

7 A. May. I couldn't say.

8 Q. They may have written down the number of
9 votes?

10 A. May have written down all kinds of stuff.

11 Q. They may have written down the identity of
12 the people who voted yes or no?

13 A. They may have drawn pictures like they a lot
14 of times do in the famous court hearings.

15 Q. So we don't know, right?

16 A. I don't know.

17 Q. Well, does anybody at your agency know?

18 A. Yes. I'm sure they -- I'm sure they do.

19 Q. Who would know?

20 A. I know Roosevelt Hicks' letter will have a
21 better idea.

22 Q. Because he's been around a little longer?

23 A. He was actually working here at that point in
24 time.

25 Q. Excellent.

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1 A. Now, exactly how much working knowledge of
2 that particular information he has, I can't speak to.
3 But as far as actually being in the department at the
4 time.

5 Q. Okay. So his tenure goes back that far, so
6 he may know that answer.

7 What about your deputy director, would he
8 know? Or she? I can't remember.

9 A. He.

10 Q. He.

11 A. He was here with us. I don't -- he was -- I
12 don't know. I really don't know because his job
13 function at the time would have been different. So I
14 don't know.

15 Q. Okay. Back in 2001, do you have -- what was
16 he doing in 2001?

17 A. He was either a hearing officer or probably
18 an agent in charge.

19 Q. Okay. And I -- neither of those two would be
20 parole board support, right?

21 A. Right.

22 Q. So if that's the case, it's probably likely
23 that he wasn't there?

24 A. Right.

25 Q. I guess he may have heard what used to go on

1 back in the day.

2 A. Right.

3 Q. Okay. Was there anybody else; then, other
4 than Roosevelt?

5 Let me ask, is Roosevelt the best person that
6 we have left at the agency to answer these questions
7 about what was going on in 2001?

8 A. I don't want to say definitively because I
9 could be wrong, but right offhand, I would think so.

10 Q. Is there anybody else that's rolling around
11 in your mind, "This guy would really be better"?

12 A. Not with the department. Anybody still at
13 the department, I don't think so.

14 Q. Okay.

15 A. I don't think so.

16 MR. DAYHUFF: That's fine. I'm going to get
17 some more coffee. You want to take a two- or
18 three-minute break?

19 THE WITNESS: Sure.

20 (A recess transpired.)

21 MR. DAYHUFF: We were talking about document
22 retention. This was produced to me by your attorney.
23 Take a look at it; then we'll ask our court reporter to
24 mark it.

25 (APPELLANT'S EXHIBIT 1, Records Retention

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1 Schedule, was marked for identification.)

2 MR. DAYHUFF: Now, you can give that one to
3 Tommy. You should have the one with the sticker on it.

4 THE WITNESS: All right.

5 MR. DAYHUFF: Tommy will walk off with the
6 one with the sticker on it.

7 MR. EVANS: I have one of those.

8 BY MR. DAYHUFF:

9 Q. This was produced to me in this case. Take a
10 look at it and read it and then tell me if you can
11 identify it.

12 A. It looks familiar.

13 Q. All right. What is it?

14 A. This is our -- I guess our retention policy.
15 Our kind of -- yeah, retention policy for minutes.

16 Q. And you mentioned to me that the Department
17 of Archives and History worked with you guys to
18 determine retention policies, right? Or you worked
19 with them?

20 A. Currently. I don't know in the past. But,
21 yes, I do know now we're having conversations with
22 them.

23 Q. Okay. Obviously, it looks like this came
24 from them, right? South Carolina Department of
25 Archives and History at the top.

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1 A. Oh, yeah, there you go.

2 Q. So is this the policy that applied in -- I
3 think it was produced to me as applying in 2001. Do
4 you know whether that's the case? It's got a date on
5 the bottom of 1994.

6 A. To the best of my ability, I would say so.

7 Q. All right. So this applied in 2001. Does
8 this apply now, currently?

9 A. Yes.

10 Q. The "Retention, Until no longer needed for
11 reference, destroy." You kind of gave me a phrase that
12 sounded an awfully lot like that. Is that where you
13 think that comes from?

14 A. I think it may be amended to include the
15 max-out death. But, I mean, for all intents and
16 purposes, until no longer needed.

17 Q. Okay. All right. You can just set that
18 aside. That's her copy.

19 Have you had occasion to look at any of the
20 attorney general's opinions regarding your agency and
21 the retention of documents and the Freedom of
22 Information Act?

23 A. A little bit of Freedom of Information Act,
24 but not retention.

25 Q. What's your understanding of whether or not

1 the Freedom of Information Act applies to the votes an
2 inmate gets and the identity of the people voting?

3 A. For the most part being it's an open forum, a
4 public hearing, very little is -- if anything, is
5 privileged, I guess.

6 Q. Secret? Confidential?

7 A. Right.

8 Q. Okay. All right. So it's your understanding
9 under the Freedom of Information Act, whether an inmate
10 gets parole or not, public information?

11 A. Right.

12 Q. Whether an inmate gets two votes or three
13 votes, public information?

14 A. Right.

15 Q. Whether Karen Walto or somebody else votes
16 one of those three affirmative, public information?

17 A. Right.

18 Q. All right. Let's talk about 2013, the Barton
19 case comes out. We talked a little about this already.
20 You're generally familiar with that decision, right?

21 A. Uh-huh.

22 Q. What did that decision change at the agency
23 with respect to voting?

24 A. The number of votes how -- based on the
25 particular case as to what the ratio of votes needed to

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1 be.

2 Q. Okay. And the way I think about Barton's is
3 kind of two part. Right? There's the ex post facto
4 part. Which is legal mumbo jumbo. Do you know what
5 the ex post facto element of this was?

6 A. Pretty much goes back, right?

7 Q. Right. Right. We're retroactively applying
8 a new statute.

9 A. Retroactive.

10 Q. The new statute that was being retroactively
11 applied to some was the two-thirds majority
12 requirement, right?

13 A. Right.

14 Q. So the court said "Don't do that," right?

15 A. Right.

16 Q. So if I got convicted when there wasn't a
17 two-thirds majority requirement but there was a
18 majority, that's all I need to show to get out? So
19 that was part of it.

20 A. Right.

21 Q. The other part of it was how we count the
22 votes. Which I think is what you were explaining to
23 me, right?

24 A. Right.

25 Q. That the quantum of votes you need to get

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1 parole varies with how many people show up.

2 A. Present board members, right.

3 Q. Right. So if there's seven board members
4 that show up and you need a majority, it's four, right?

5 A. Right.

6 Q. If five members show up, you need three.

7 A. Uh-huh.

8 Q. Back in the day, that wasn't happening,
9 right? How were they doing it back in the day?

10 A. They were basing the majority on the number
11 of sitting board members.

12 Q. All right. Seven, right?

13 A. It's seven all the time on those panels.

14 Q. Right. So if you needed -- if you had
15 two-thirds, you always needed five, right?

16 A. Yes.

17 Q. Okay. So that --- we're not doing that
18 anymore?

19 A. Right.

20 Q. The agency is not, PPP?

21 A. Right.

22 Q. Now, we know that happened to Barton, but
23 there have been others that claim that's happened to
24 them --

25 A. Right.

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1 Q. -- in the past. And the agency took action
2 in response to that Supreme Court decision, right?

3 A. Right.

4 Q. And you guys have a policy about -- well, you
5 change the way you're voting?

6 A. Right.

7 Q. And you changed the retroactive application?

8 A. Uh-huh.

9 Q. And you have a policy in your State
10 Operations Manual on Barton, right?

11 A. Right.

12 Q. I'll show it to you. This was produced to me
13 by your attorney. I've got the entire manual, but this
14 is just one piece of it.

15 This came out of the current manual, right?

16 A. Yes.

17 MR. DAYHUFF: I haven't compared it word for
18 word.

19 MR. EVANS: Right.

20 MR. DAYHUFF: If you need to refer to the
21 full manual, I've got one here. I'll just put it in
22 the middle.

23 THE WITNESS: Thank you.

24 (APPELLANT'S EXHIBIT 2, Operations Manual
25 Page 35, was marked for identification.)

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1 BY MR. DAYHUFF:

2 Q. All right. Mr. Patton, have you had a chance
3 to review that?

4 A. Yes.

5 Q. I want to ask a few questions about it.

6 A. All right.

7 Q. So you don't have any question, do you, that
8 this is out of your State Operations Manual?

9 A. Right.

10 Q. Right. And your agency follows this policy?

11 A. Yes.

12 Q. Okay. So it looks to me -- I'm looking at
13 Number 10, Barton hearings, that there's essentially a
14 two-step process to deal with people who fall into that
15 or may fall into that Barton category. Okay. That
16 they may have received enough votes back when we
17 weren't counting votes right or when we were
18 retroactively applying the two-thirds, right?

19 A. Right.

20 Q. And the two steps are -- the first step is
21 the agency, your agency, undertakes an investigation.
22 The inmate comes to you and says, "I got the right
23 number of votes."

24 The agency undertakes an investigation to
25 determine whether that's so --

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1 A. Right.

2 Q. -- right?

3 "If an offender's old vote is brought to the
4 Department's attention, the office of Parole Support
5 Services --" that's your office, right?

6 A. Right.

7 Q. "-- staff will investigate to verify the
8 offender did receive the proper number of votes, and
9 the Department's Office of Legal Service will verify if
10 it qualifies under Barton."

11 All right. So how many of those
12 investigations has your department -- I don't know if
13 you know the exact number.

14 A. No.

15 Q. But roughly, how many investigations? Is
16 that the 20 you mentioned to me earlier?

17 A. I would say at least 20. I would maybe say
18 upward.

19 Q. All right. How do you determine -- how does
20 your staff determine whether the offender received the
21 proper number of votes?

22 A. We go back and relisten to the hearings
23 and -- because, like I said, if it's a voice vote, then
24 we know exactly who it was. At the beginning of the
25 hearings, the board members say who's present or

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1 whatnot, and so if it's unanimous voting, then we know
2 according to the decision. Obviously being reject or
3 we wouldn't be asked for the numbers, then we would
4 know that it would all be reject from all present board
5 members.

6 Q. So the agency staff members. Who is actually
7 making that decision? Is that you?

8 A. What decision?

9 Q. Inmate comes to you and says, "Hey, back in
10 2005, I got four votes out of the six that were there
11 and all I needed was two-thirds."

12 A. Right.

13 Q. Comes to you and tells you that. Who is
14 actually doing the investigation then making that
15 decision?

16 A. Roosevelt.

17 Q. Roosevelt makes the decision?

18 A. Yes.

19 Q. You have supervisory authority over
20 Roosevelt, right?

21 A. Correct.

22 Q. Does that decision ever come up to you, "Hey,
23 here's what I've decided"?

24 A. He does let me know what's going on and just
25 kind of let me know, "Hey, this Joe Blow has asked

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1 this," and then a day later, a week later, you know,
2 according to when he gets to it, he'll come and say,
3 "Hey, here's the --"

4 Q. Mr. Blow?

5 A. "-- the five hearings that we was asking
6 about and he was unanimous on all of them," or "This is
7 the only one that was even close" and that's ...

8 Q. Okay.

9 A. So he gives me a heads-up.

10 Q. Are you making the decision when he comes to
11 you? I mean, do you have the authority to say, "Yes,
12 Roosevelt." "No, Roosevelt"?

13 A. The board's made the decision. We are just
14 reiterating what the board said or didn't say.

15 Q. No. I got you.

16 So as in Rose's case, we're talking about a
17 2001 board, right?

18 A. Right.

19 Q. So Rose comes to you and says, "Okay, I got
20 the right number of votes."

21 You guys, the agency, Roosevelt and you, are
22 reiterating the board's wishes with respect to that
23 hearing?

24 A. Correct.

25 Q. Okay. After you investigate?

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1 A. Right.

2 Q. And if the inmate wants to submit stuff to
3 you, you would receive that, right?

4 A. Right.

5 Q. Okay. Is Roosevelt making a recommendation
6 to you that's then approved or not?

7 A. No, sir.

8 Q. Okay. He's coming to you and saying, "Here's
9 my decision"?

10 A. No. "Here are the facts."

11 Q. "Here are the facts," right?

12 A. "Here's what the board said."

13 Q. How about this, "Here's the result of my
14 investigation"?

15 A. Yes.

16 Q. Right? So that's what he's doing.

17 And the agency takes the results of that
18 investigation and decides whether the inmate received
19 enough votes to go get conditions for parole, right?
20 Because if they did, they could go get conditions.

21 A. In the sense of legals makes a decision as to
22 if this is legally a Barton case or not. That's the
23 only decision that the department's making at this
24 point.

25 At this point we're not deciding anything

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1 other than what hearing -- going off the basis that the
2 case is needed to be taken back to the board because
3 the proper number of votes were granted, then the only
4 decision the department is making, is, A, does this
5 legally fall under Barton; and, B, what's the next full
6 board hearing to take this to after we have notified
7 the victims and all of that.

8 Q. Right. And you told me you're essentially
9 trying to discern the vote that that original board
10 made back in 2001, right?

11 A. Uh-huh.

12 Q. We're not doing another parole hearing.

13 A. No.

14 Q. We're deciding what they decided. We're
15 investigating and determining what they decided in
16 2001?

17 A. Right.

18 Q. Then you go back to the parole board, the
19 current parole board, because the 2001 doesn't exist.

20 A. Right.

21 Q. And it says, "During a full board day, the
22 board will hold a Barton hearing on the offender."

23 Right?

24 A. Right.

25 Q. This hearing will not require the presence of

1 the victim or the offender?

2 A. Right.

3 Q. And then it tells you what happens at the
4 Barton hearing, right?

5 A. Right.

6 Q. "At the Barton hearing, the board may impose
7 any conditions on the offender as it feels necessary,
8 including all statutory conditions. The board will
9 then sign a special Barton order of parole which
10 ratifies the votes of the previous board members which
11 would have granted conditional parole."

12 Okay. So the board's role, it looks like to
13 me, is since we've already had the parole decision in
14 2001, what we didn't have in 2001, was part two, which
15 is the conditions, right?

16 A. And signatures.

17 Q. And signatures. Okay.

18 And why didn't we have part two in 2001?

19 A. Because this law ruling didn't take place
20 back then.

21 Q. They didn't know that they needed to move to
22 part two?

23 A. They were going under the current law.

24 Q. Right. They thought the inmate was rejected
25 so they never got to conditions --

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1 A. Right.

2 Q. -- and the signatures?

3 A. Correct.

4 Q. So that's what the new parole board, the
5 current parole board does in the Barton hearing?

6 A. Yes.

7 Q. They impose conditions, and then, I guess,
8 they sign the special Barton order of parole?

9 A. Yes. It's -- the order isn't a special
10 Barton order. It's an order parole, but that's for the
11 purpose of that hearing at the moment. It is a special
12 Barton hearing.

13 Q. All right. So the -- in the Barton hearing
14 process, the current parole board is not hearing from
15 the victim witnesses again?

16 A. Right.

17 Q. They're not hearing from the offender again?

18 A. No.

19 Q. They're not hearing from the offender's
20 attorney again?

21 A. Right.

22 Q. Because they don't need to.

23 A. Right. The decision is made.

24 Q. The decision was made in 2001.

25 A. Yes, whenever.

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1 Q. Right. And then the agency has decided
2 through the investigation that Roosevelt does, and then
3 you have some supervisory role on, that the appropriate
4 number of votes have been obtained to have a Barton
5 hearing?

6 A. Right.

7 Q. Okay. And legal helps you with that too?

8 A. Yes.

9 Q. Okay. Do you know how many people have gone
10 through that process? I know 20 have asked about it.

11 A. Yeah.

12 Q. I think Tommy provided it to me in an
13 interrogatory?

14 A. Probably about four or five.

15 MR. EVANS: A bit more than that.

16 MR. DAYHUFF: Let me read the interrogatory
17 answer and see if this is -- all right. I asked,
18 "Please identify the inmates who have challenged the
19 Parole Board's decision on the basis that he/she
20 received enough favorable votes at the parole hearing
21 to be eligible pursuant to Barton."

22 The answer was, "Thalma Barton, Gene
23 Richardson, James Plyer, Francis Campbell, Charles
24 Sink, Robert Miller, Shariah Muhammad, Kenneth Green."

25 That sound right?

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1 A. That sounds ...

2 Q. And I guess David Rose has made the claim
3 too.

4 A. Yes.

5 Q. All right. So Thalma Barton was given a
6 Barton hearing, right?

7 A. Right.

8 Q. The agency determined she had received enough
9 votes to move to the Barton hearing?

10 A. Right.

11 Q. Gene Richardson, are you familiar with his
12 case at all? He was one of our guys.

13 A. Yes. A little bit.

14 Q. Did the agency determine he had received
15 enough votes to move to the Barton hearing?

16 A. Yes.

17 Q. And that was Roosevelt and you?

18 A. Right.

19 Q. James Plyer, I don't know him.

20 Did the agency determine he had received
21 enough votes to move to a Barton hearing?

22 A. Once again, can't say a hundred percent.

23 But, I mean, presumably yes.

24 Q. Francis Campbell, same question.

25 A. Yes.

1 Q. Charles Sink?

2 A. Yes.

3 Q. Robert Miller?

4 A. Yes.

5 Q. Shariah Muhammad?

6 A. Yes.

7 Q. Kenneth Green?

8 A. Correct.

9 Q. Okay. All right. So under this Barton
10 hearing process, the agency has the power to determine,
11 after the investigation, whether the inmate has got
12 enough votes in the past, right?

13 A. Right.

14 Q. The parole board has the power to impose
15 conditions?

16 A. Right.

17 Q. All right. Before I forget, backing up, back
18 to the criteria, I'm not sure I understand that, you
19 know, you rejected one and two --

20 A. Right.

21 Q. -- or three. I understand the votes where
22 they're voting with the lights. How do they -- do they
23 deliberate about which of the criteria is the basis, or
24 does the chair decide that? How does that work?

25 A. They'll deliberate if needed. It's kind of

1 both. More times than not the chairman will, but there
2 will be some members if they feel, "I want number 2 in
3 there," then the chairman will say, "And number 2."

4 So it's just ...

5 Q. So is this fair, the chairman will announce
6 what he or she thinks are the criteria for rejection?

7 A. Right.

8 Q. If the parole board members want to change
9 that or discuss that, they can?

10 A. Correct.

11 Q. But generally it just rolls through with what
12 the chairman has announced?

13 A. Right.

14 Q. Okay. There's no quota, is there, of any
15 kind for numbers of people who should be released per
16 meeting, per year?

17 A. Is there --

18 Q. Any standards or guidelines?

19 A. There are averages -- there are averages but
20 no standards, guidelines, quotas, anything like that.

21 Q. So the legislature, like the penal committee
22 doesn't come to you and say, "Look, we need some action
23 here. We want X number of people paroled over the
24 course of the next couple of years."

25 A. I guess they could. I don't know of them

1 doing that.

2 Q. So you're aware of no quotas that would
3 apply?

4 A. Right.

5 Q. Okay. All right. Let's talk about
6 David Rose a little more. I think you're familiar with
7 David Rose's cases, I guess. David Rose has been
8 litigating with the agency --

9 A. For a little while.

10 Q. -- since you were in high school, right?
11 2001, I think.

12 A. Yeah. That was his first.

13 Q. Well, you know, he got his hearing in 2001.
14 Are you familiar with that he has been litigating with
15 the agency for about ten years?

16 A. By litigating, we mean ...

17 Q. Filing cases.

18 A. Like coming up for parole?

19 Q. No. I mean filing cases.

20 A. No.

21 Q. Okay.

22 A. Or if I was, it was mentioned in conversation
23 and I didn't take major note of it.

24 Q. So you don't know whether over the past ten
25 years Mr. Rose has filed, one, two, three, four actions

1 in court claiming that he received four votes in 2001.

2 A. Not offhand.

3 Q. Okay.

4 A. Perhaps.

5 Q. Okay. That's fine. That's fine. I'm sure
6 someone's --

7 A. I'm sure it was mentioned in conversation,
8 but you saying that, I hadn't. I can't say that I did.

9 Q. All right. Do you dispute that Mr. Rose has
10 been litigating with PPP for the greater part of ten
11 years claiming that he received four votes out of six
12 in 2001?

13 A. No.

14 Q. Okay. All right. Of course, we're here
15 about the latest case, right?

16 A. Right. He's done it at least once.

17 Q. At least once that you know of because you're
18 right here.

19 A. Absolutely.

20 Q. I hear you. Okay.

21 Now, the case before this case, there was a
22 case before a guy named Judge Addy, the Honorable
23 Judge Addy, and I don't remember which circuit, but it
24 was in circuit court in South Carolina. Are you
25 familiar with that matter?

1 A. Not offhand.

2 MR. DAYHUFF: Okay. Fair enough.

3 Let me see. I'll give you a letter.

4 Mr. Patton, I'll let you read that, and I'll ask you a
5 couple of questions about it.

6 (APPELLANT'S EXHIBIT 3, Letter Dated February
7 13, 2015, was marked for identification.)

8 BY MR. DAYHUFF:

9 Q. Have you had a moment to look at it?

10 A. Yes, sir.

11 Q. Can you identify that for the record, what's
12 been marked Exhibit 3?

13 A. 3. You want me to read it?

14 Q. Just tell me what it is.

15 A. It was a letter from our department on behalf
16 of me responding to Mr. Rose stating that we have
17 completed an investigation due to Judge Addy's order to
18 ensure that we went through all known files and
19 information to try and determine if he -- Mr. Rose did
20 or did not receive the correct number of parole votes
21 in the June 20, 2001, hearing.

22 Q. All right. So this letter, I believe, was
23 generated as a result of the action that preceded this
24 one in circuit court?

25 A. Right.

1 Q. Right? And Judge Addy was the judge?

2 A. Yes.

3 Q. All right. And you mentioned this,
4 Judge Addy apparently ordered the department to
5 investigate whether Rose received -- how many votes
6 Rose received.

7 A. Right.

8 Q. Right. So that investigation -- in the
9 interrogatories, I asked if an investigation was
10 conducted regarding whether Rose received four votes,
11 who did it? And the answer was Larry Patton, Director
12 of Office of Board Support Services.

13 So you did that investigation, right? Did
14 you have any role in that investigation?

15 A. I had a role, but it would have been
16 Roosevelt who actually did the listening to the --
17 hearing --

18 Q. Okay.

19 A. -- or digging through and trying to find.

20 Q. And then he reports to you and says what he
21 finds?

22 A. Right.

23 Q. And then you provide the results of that
24 investigation to the judge and to Mr. Rose, right?

25 A. Right.

1 Q. Okay. And you understood, right, that
2 David Rose -- at this time David Rose was claiming that
3 he got four out of six votes?

4 A. Yes.

5 Q. Okay. So Roosevelt participated in the
6 investigation with you, you were involved in the
7 investigation. Anybody else at the agency?

8 A. Not -- I mean, obviously coming down from
9 legals and stuff, but as far as the actual
10 investigation, no.

11 Q. Right. I imagine you're getting legal advice
12 about this case, which you don't need to tell me about,
13 right?

14 A. Right.

15 Q. Tommy is working this case with Judge Addy;
16 is that right?

17 A. Right.

18 Q. Okay. So you reference it looks like here,
19 "We've completed the investigation to see if you got
20 the number of votes to be conditionally paroled
21 pursuant to Barton," right?

22 So that's back to this Barton hearing
23 process, right?

24 A. Right.

25 Q. So this was step one that we talked about.

1 The agency needs to decide whether you got enough
2 votes, Mr. Rose, to go get a Barton conditions hearing,
3 right?

4 A. Right.

5 Q. And the answer was no, you did not?

6 A. Right.

7 MR. DAYHUFF: Right. Now, it mentions in
8 here that you reviewed an affidavit. Let me just show
9 it to you to make sure we're talking about the same
10 thing.

11 Mark that, please.

12 (APPELLANT'S EXHIBIT 4, Attachment to Carlos
13 L. Bell's Affidavit, was marked for identification.)

14 BY MR. DAYHUFF:

15 Q. Have you had time to look at it? It's pretty
16 long. I'll give you a second.

17 A. Yeah.

18 Q. Is that the -- your first sentence
19 references, "Thank you for providing us a copy of the
20 affidavit of Mr. Carlos Bell testifying to what he
21 remembered to have transpired at the parole hearing in
22 2001."

23 Is that what you reviewed?

24 A. Yes.

25 Q. Did Roosevelt also review that?

1 A. I'm not sure if Roosevelt actually reviewed
2 this. He may have.

3 Q. But you know you did?

4 A. Yeah.

5 Q. Okay. All right. And so I guess if we're
6 thinking about the evidence that you have before you,
7 you're making this decision of whether he got the right
8 number of votes. You have that piece of evidence that
9 says he did get the right number of votes?

10 A. Right.

11 Q. And you also had Mr. Rose's statement that he
12 received the right number of votes?

13 A. Right.

14 Q. Right. That's his claim. It's been his
15 claim for ten years. Did you have anything else, any
16 other evidence other than what Mr. Rose had said and
17 Mr. Bell had said that supported the claim that
18 Mr. Rose received four votes?

19 A. Not to my knowledge.

20 Q. Okay. Well, you were the guy who did the
21 investigation.

22 A. I don't recall seeing anything else.

23 Q. Okay. What was on the other side of the
24 ledger? What information, if any, did you have that
25 indicated he didn't get four of six votes?

1 A. His rejection of parole.

2 Q. Help me understand what that is. What is his
3 rejection? The fact that he's still in jail.

4 A. Yes. I mean, we keep records of each hearing
5 and things of that sort, so ...

6 Q. Okay. All right. So was there a document
7 you looked at that said, "David Rose was rejected,"
8 during the investigation?

9 A. In the computer it shows the historical
10 hearings.

11 Q. So is this the PIC system?

12 A. No.

13 Q. So you log into the PIC system, and it shows
14 David Rose. And it says what?

15 A. I'm assuming we're talking about that
16 particular screen where it shows the history of the
17 hearings?

18 Q. Okay. I don't know what the screens look
19 like. You tell me.

20 A. It shows all kind of stuff. It's a
21 snapshot -- it's a working document from SCDC's
22 information as well. But you go into the hearing
23 ledger and it shows his -- if he's been scheduled, when
24 his next hearing is and then what his past hearings are
25 or were and the reasons for rejection, things of that

1 sort.

2 Q. I got you. So you were able to look back and
3 see every prior hearing and you -- I assume you went
4 back to 2001. That was the key one, right?

5 A. Right.

6 Q. And it said what, rejected?

7 A. Yes.

8 Q. Denied? What were the actual words?

9 A. "Reject."

10 Q. Reject. Did it have the reasons, like one
11 and two or ...

12 A. I don't remember.

13 Q. That's all right.

14 A. Being -- I don't know.

15 Q. Did it have the number of votes he received
16 and didn't receive?

17 A. Huh-uh, no.

18 Q. Because that wouldn't even be recorded,
19 right?

20 A. Right.

21 Q. All right. So when you mentioned to me that
22 that's on the other side of the ledger, right? We
23 talked about the information that supported his claim.
24 The information that opposed his claim that he got four
25 was the PIC system and the 2001 hearing rejected?

1 A. Uh-huh.

2 Q. Anything else?

3 A. There had been information in the records,
4 files, and things of that sort, rejection letter he
5 received.

6 Q. Okay. So did you look at the rejection
7 letter, or did that pull up in PIC too?

8 A. No, I didn't look at it.

9 Q. Okay. But you assume that he would have a
10 letter from 2001 that says, "You're rejected"?

11 A. Yes.

12 Q. Okay. All right. Help me understand this.
13 In 2001, he may well have gotten the rejection letter
14 and the PIC may well have said "rejected." But at the
15 time, they didn't know that four of six votes would get
16 you out, right?

17 A. Right.

18 Q. So that seems to me to be a -- kind of a flaw
19 in that piece of the evidence. Do you agree?

20 A. I just know more so than hearsay from a
21 so-called friend or whatnot.

22 Q. I hear you.

23 A. So I mean ...

24 Q. Right. I guess I'm asking, you understand
25 the -- the concern that that PIC entry and the letter

1 back from 2001 really wouldn't get at the issue of
2 Barton, right?

3 A. Right.

4 Q. Because they weren't counting votes right
5 back then, right?

6 A. Wasn't counting votes, right, for today's
7 ruling, but back then --

8 Q. Hindsight's 20/20, sure.

9 A. Right.

10 Q. And they were applying the two-thirds statute
11 retroactively back then?

12 A. Right.

13 Q. All right. All right. So anything else that
14 you considered in this investigation of whether he got
15 the right votes or not that we haven't talked about
16 already?

17 A. I don't think so.

18 Q. Okay. The letter talks about, Hey, sorry, we
19 don't have any records. "Unfortunately, we've been
20 unable to locate any information from your parole
21 hearing as records have been destroyed given that your
22 hearing was 14 years ago."

23 So you guys looked?

24 A. Yes.

25 Q. What records did you think you would find?

1 You thought you would find a tape?

2 A. Tape, letters.

3 Q. The letter you talked about, the rejection
4 letter?

5 A. Right.

6 Q. Okay.

7 A. Something to that effect, or, I mean, even
8 just something that may for whatever reason show a vote
9 count.

10 Q. Just like notes?

11 A. Anything.

12 Q. Right.

13 A. Anything that would have been directly
14 related to him.

15 Q. And there was nothing?

16 A. Right.

17 Q. Okay. Who did the looking for the documents?

18 A. Roosevelt.

19 Q. Okay. All right. So after that
20 investigation, the agency, PPP, you, acting for the
21 agency, made the decision he didn't receive enough
22 votes?

23 A. Correct.

24 Q. And you had the authority to make that
25 decision?

1 A. Correct.

2 Q. Just like you had the authority -- the agency
3 has the authority to decide some people did get the
4 right number of votes to move on to a Barton hearing?

5 A. Right.

6 Q. Okay. Did you learn how the documents with
7 respect to records, whatever, the records, tapes,
8, whatever they would have made, did you learn how they
9 were destroyed?

10 A. No.

11 Q. Okay. Did you learn when they were
12 destroyed?

13 A. No.

14 Q. Did anybody ask? Was that a subject of
15 inquiry?

16 A. Not so much for me.

17 Q. You just dealt with what you had?

18 A. Right.

19 Q. So you don't know, for example, if the
20 records were destroyed in 2008 or '9 or '10 or the day
21 before? You don't know?

22 A. I don't know.

23 Q. Okay. Under the 1994 retention schedule,
24 should those records have been kept as they were
25 needed?

1 A. Hard to say what my predecessor or anybody
2 before her would have decided.

3 Q. Let me ask it this way. Were those records
4 needed in February of 2015? Hard to say they weren't
5 needed?

6 A. I will say I think they could have been
7 beneficial, but for the course of 14 years, I don't
8 think they were really needed prior to.

9 Q. If you could go back in time, and I know you
10 can't, and preserve those records, you would have liked
11 to have those records in front of you in February 2015
12 to help you make the decision, right?

13 A. Yeah. Like you said, if I could go back in
14 time.

15 Q. Right. Right. Why?

16 A. Because we probably wouldn't be here.

17 Q. Okay. And you would want to look at all the
18 information that was available to make your decision,
19 right?

20 A. Right.

21 Q. That just makes sense, right? You want to do
22 a good job, be thorough, and to reach the right
23 decision. And to reach the right decision, it's best
24 to have all the information and records, fair?

25 A. Right.

1 Q. All right. Let me see if I have any other
2 questions about the interrogatories. You need a break
3 or are you okay?

4 A. I'm fine. Yes, sir.

5 Q. This interrogatory answer says, "There exist
6 --" it says "exist," but exists "-- no record of who or
7 when the tape was destroyed."

8 Is that your understanding?

9 A. Yes.

10 Q. This interrogatory response says, "There
11 exists no records detailing the final vote of Appellant
12 Rose's hearing."

13 Is that true?

14 A. To my knowledge.

15 Q. Let me ask you about -- so your
16 South Carolina Department of PPP State Operations
17 Manual is amended from time to time?

18 A. Right. Now, that -- if I'm -- this is the
19 board's manual. This isn't for the entire department
20 or anything. This isn't our policy and procedures..

21 Q. Okay.

22 A. This is right there, it's enacted by the
23 chair. So this is the -- this is the board's policy
24 procedure manual.

25 Q. All right. So you understand, when we were

1 looking at the Barton hearing, that comes out of this,
2 right?

3 A. Right.

4 Q. So you have a stand-alone set of policies and
5 procedures --

6 A. Right.

7 Q. -- for your agency?

8 A. Right.

9 Q. Okay. Do those policies and procedures for
10 the agency have, like, document retention policies that
11 are incorporated into them?

12 A. Yes.

13 Q. Okay.

14 A. The Exhibit 1, I suppose that would be ...

15 Q. Exhibit 1 came out of your agency policies
16 and procedures?

17 A. I would assume so, yeah.

18 Q. Okay. All right. Okay. Thank you for
19 clearing that up. I was thinking these were the agency
20 policy and procedures. This is the board?

21 A. That is due to them being autonomous, that is
22 the board's policies and procedures. And we, being my
23 staff, have separate policies, procedures may
24 intertwine, but they are separate.

25 Q. I got you. We went through with some care at

1 the Barton hearing a process from in here.

2 A. Right.

3 Q. Does that process differ in your agency
4 policies and procedure from what we discussed?

5 A. No. Because as far as our stance being the
6 department and my examiners, the process is no
7 different for a Barton hearing as opposed to a regular
8 hearing.

9 Q. Okay.

10 A. The information is compiled the same. It's
11 all there.

12 Q. So the discussion we had 30 minutes ago
13 applies to the agency as well as to the board --

14 A. Yes.

15 Q. -- with Barton hearings?

16 A. Yes.

17 Q. All right. Okay. Does Mr. Rose bear any
18 blame for the agency disposing of his records?

19 A. Does he --

20 Q. Did he play any role in the agency's
21 disposing of his records?

22 A. Other than being in the system and having
23 records, no.

24 Q. Okay. Have you seen Mr. Hicks' affidavit
25 that was submitted as part of the -- I think as --

1 well, I don't know. Yeah, it's copied to Judge Addy.
2 It's part of the Judge Addy case. Have you seen his
3 affidavit?

4 A. I don't know.

5 MR. DAYHUFF: I'll show it to you just in
6 case. If you haven't, that's fine.

7 (APPELLANT'S EXHIBIT 5, Letter Dated May 27;
8 2014, was marked for identification.)

9 BY MR. DAYHUFF:

10 Q. You're not copied on it, but it doesn't mean
11 you didn't see it.

12 Just looking at the dates, it looks like,
13 Mr. Patton, you got involved in February of 2015. This
14 is going back to May of 2014. So it's a little
15 earlier.

16 A. Right.

17 Q. It looks like it's related to discovery that
18 Mr. Rose had submitted as part of the case.

19 A. Right.

20 Q. So I guess the question is, were you involved
21 in the Judge Addy/Rose case back in May of 2014?

22 A. Not in the middle of it. Not to my
23 knowledge.

24 Q. So you don't recall reviewing this affidavit?

25 A. No.

1 Q. Do you know who drafted this affidavit?

2 Obviously Roosevelt signed it.

3 A. Most likely Roosevelt because he does
4 oftentimes because people are writing in asking for him
5 to investigate their hearings, he lot of times has to
6 sign affidavits saying that --

7 Q. I got you.

8 A. -- he's legally saying the person did or
9 didn't or whatever he heard.

10 Q. All right. So with respect to Mr. Rose,
11 after your February 13th, 2015, decision, which was you
12 didn't get enough votes --

13 A. Right.

14 Q. -- he didn't proceed forward to the current
15 board for a Barton hearing where he would receive
16 conditions that they wanted to impose?

17 A. Right.

18 Q. His case stopped there?

19 A. Correct.

20 MR. DAYHUFF: Okay. All right, sir. You
21 want to talk for a minute? I think we're about done.

22 (A recess transpired.)

23 BY MR. DAYHUFF:

24 Q. All right. Just a couple more.

25 Did your -- I think her name was Kristine,

1 your records person, records administration person, did
2 she participate in the 2015 investigation of whether
3 you had documents or not?

4 A. I don't know.

5 Q. Okay. But Roosevelt did?

6 A. Right.

7 Q. Okay. Anybody else participate other than
8 Roosevelt and I guess you?

9 A. I'm sure we did ask for, I don't know whom,
10 but I'm sure we did ask for some help from someone in
11 records to look through things, but that's about as
12 specific as I can be.

13 MR. DAYHUFF: I got you. That's it. That's
14 all I got.

15 You have any questions?

16 MR. EVANS: Yes.

17 EXAMINATION

18 BY MR. EVANS:

19 Q. Mr. Patton, of course you are aware Mr. Rose
20 is currently serving time in incarceration, right?

21 A. Correct.

22 Q. And of course you had an opportunity to look
23 at his case summary, things of that nature?

24 A. Right.

25 Q. He's eligible for parole now; is that

1 correct?

2 A. Right.

3 Q. He's having a hearing next month; isn't that
4 correct?

5 A. I believe so.

6 Q. And you are aware that he's currently serving
7 a sentence for kidnapping?

8 A. Right.

9 Q. And of course you're aware that's a violent
10 offense?

11 A. Right.

12 Q. Now, you have a chance in the case summary,
13 are you aware that Mr. Rose was granted parole in the
14 '80s sometime? I can't remember when, but in the '80s
15 he was granted parole.

16 A. I do believe so because I believe he was
17 revoked. Vaguely, I -- yes.

18 Q. He was revoked in 2000, right?

19 A. Right.

20 Q. And his -- and according to parole board
21 policy, when you're revoked, you get a hearing the next
22 year, correct?

23 A. You must wait one year, yes.

24 Q. Right. So he got revoked in 2000, correct?

25 A. Yes.

1 Q. And he got a hearing the next year; is that
2 correct?

3 A. Right.

4 Q. Okay. Now, under your experience, how many
5 individuals receive a granting of parole a year after,
6 especially in a violent offense, a year after they've
7 been revoked?

8 A. In my experience?

9 Q. Yes.

10 A. It doesn't happen.

11 Q. It doesn't happen.

12 A. Not that I've experienced.

13 Q. Okay. And how long have you been working in
14 your capacity?

15 A. Two, two and a half years.

16 Q. Okay. So I would assume you've seen a good
17 bit of, you know, persons coming back before the parole
18 board?

19 A. Right. Yes.

20 Q. And you've never seen a person being granted
21 parole a year after it being revoked?

22 A. No, not that quickly.

23 Q. Now, of course, you were in high school in
24 2001, right?

25 A. Right.

1 Q. But I'm sure you've been aware of our board
2 and their granting practices back in that time?

3 A. Yes.

4 Q. Okay. What have you learned about how the
5 board conducted their granting back in 2001?

6 A. They didn't. Very seldom did they grant
7 parole at all.

8 Q. Okay. Now, Mr. Dayhuff asked you about the
9 Freedom of Information Act, correct?

10 A. Right.

11 Q. And of course the board falls under that act?

12 A. Correct.

13 Q. And part of the information that we must
14 release or the board must release is the recordings of
15 the hearings.

16 A. Right.

17 Q. And if an individual pays 17.50, it might be
18 more now, we give them a recording of the hearings.

19 A. Right.

20 Q. Are you aware if Mr. Rose received his
21 recordings?

22 A. I do not know.

23 Q. Well, I'll refresh your memory. He did
24 receive those recordings.

25 A. Okay. Doesn't surprise me.

1 MR. DAYHUFF: Object to the form.

2 BY MR. EVANS:

3 Q. Now, Mr. Dayhuff talked to you about a
4 hearing held before Judge Addy in May of 2014.

5 A. Okay.

6 Q. Okay. I'm going to read part of the
7 transcript where Mr. Rose specifically stated -- and he
8 stated, "So what I did, I turned around and ordered the
9 tape of the hearing."

10 Well, first of all, before I get to this, you
11 said earlier that there was a voice vote if the vote is
12 not unanimous; correct?

13 A. Current standards. I don't know about 2001.

14 Q. You don't know about 2001. But it could have
15 occurred in 2001?

16 MR. DAYHUFF: Object to the form.

17 BY MR. EVANS:

18 Q. Under your opinion, it could have occurred in
19 2001?

20 MR. DAYHUFF: Objection.

21 BY MR. EVANS:

22 Q. You're not quite sure, but it could?

23 A. Yes. Yes, it could.

24 Q. Okay. And what you stated is a voice vote
25 that was not unanimous, so each member said yes or no,

1 if that happens?

2 A. They would specify either parole or reject or
3 deny.

4 Q. Okay. Now, if it's unanimous, nothing is
5 said, correct?

6 A. Correct.

7 Q. They move on?

8 A. Correct.

9 Q. Now, according to Mr. Rose, he stated in that
10 hearing in 2014 before Judge Addy -- yes, sir.

11 A. I'm sorry, there's nothing said as far as
12 voting, but they state the reasons if it's rejected or
13 they state the conditions if it's paroled.

14 Q. Okay. All right. Now, he stated, "What I
15 did, I turned around, ordered the tape of the hearing.
16 It's not on the tape. And it says a duplicate of the
17 hearing. It does not even have the recording of the
18 votes on it."

19 Okay. And you just earlier said that there's
20 no recording of the votes if it's unanimous, right?

21 A. Correct.

22 Q. And you earlier said that very rarely a
23 person -- well, you said it doesn't happen if the
24 person comes up for parole after being revoked and gets
25 granted, correct?

1 A. Correct.

2 Q. Okay. Now, let me see. And you didn't
3 receive a copy of the recording from Mr. Rose, did you?

4 A. I don't believe so.

5 Q. Okay. All right. Let's go to the Barton
6 hearings. There have been about seven or eight
7 individuals that have been released on parole under
8 Barton, correct?

9 A. Right.

10 Q. And sometimes under those hearings, actual
11 board members sign affidavits stating, "Yes, I did vote
12 for him," correct?

13 A. That has happened.

14 Q. You didn't receive any affidavits from any
15 board member that heard the 2001 hearing, did you?

16 A. I don't believe I have.

17 Q. Did you receive any information from anyone
18 present other than Mr. Bell saying he got four votes?

19 A. No.

20 Q. Okay. And the only information you received
21 is this affidavit from Carlos Bell, which is, I think,
22 Exhibit Number 4, correct?

23 A. Yes.

24 Q. Okay. Now, in looking at this affidavit,
25 Mr. Bell stated that he is the cousin of Mr. Rose,

1 correct?

2 A. Yes.

3 Q. Okay. Also in his affidavit Mr. Bell says
4 that he hired Alvin Neal to represent him?

5 A. Yes.

6 Q. And he actually paid Mr. Neal to represent
7 him, correct?

8 A. Yes.

9 Q. Now, during this affidavit, according to this
10 affidavit, Mr. Rose heard from Mr. Neal. I mean not
11 Mr. Rose, Mr. Bell heard from Mr. Neal that he received
12 four votes, correct?

13 A. Yes.

14 Q. Mr. Bell never stated in his affidavit that
15 he heard it specifically from anybody from the board
16 that he received four votes?

17 A. Correct.

18 Q. Okay. So what was your opinion of this
19 information when you received it?

20 A. Pure hearsay. I mean, it was today's
21 practices, which I can't imagine would be as far as in
22 this sense, I wouldn't imagine being very far off from
23 what was done back then, there's not going to be much
24 conversation as to the hearing numbers and things of
25 that sort on the spot. There's a lot going on. And

1 like I said, this is just someone who's saying that
2 they heard this.

3 Q. Well, actually, Mr. Bell is saying he heard
4 it from someone else who said he heard it from someone
5 else.

6 A. Right.

7 Q. So actually this is hearsay in front of
8 hearsay.

9 A. Third, fourth person, something like that.

10 Q. And you received no other information
11 regarding him and the amount of votes he received?

12 A. No.

13 Q. Even though Mr. Rose stated on the record
14 during the hearing to a circuit court judge that he had
15 the recordings of this hearing?

16 A. I haven't seen anything.

17 Q. Okay. All right. Now, according to the
18 policies and procedures of the parole board, they have
19 a separate policy and procedures than this; isn't that
20 correct?

21 A. Yes.

22 Q. And the reason being because the parole board
23 is a separate entity from the department, correct?

24 A. Right.

25 Q. The director cannot make the board do any

1 manner -- the director cannot say, "You're going to
2 grant somebody parole, you're going to deny somebody
3 parole"?

4 A. Correct.

5 Q. You cannot do that, correct?

6 A. Correct.

7 Q. And nobody else in the agency can do that?

8 A. No.

9 Q. As far as you know, the board is appointed by
10 the governor; isn't that correct?

11 A. Yes.

12 Q. So even the director cannot remove anybody
13 from the board, as far as you know?

14 A. Right.

15 Q. That's why they have separate policies and
16 procedures because they have separate duties that they
17 must adhere to?

18 A. Correct.

19 Q. And part of that is Barton --

20 A. Right.

21 Q. -- the Barton hearings?

22 Are you aware if there is even a mention in
23 the Barton hearings in the department's policies and
24 procedures?

25 A. I don't -- I don't believe currently there

1 is.

2 Q. Because our policies must be about a thousand
3 pages.

4 A. Absolutely. This policy and procedure manual
5 for the board pertains only to the board, their actions
6 and the hearings. Our agency part of policy and
7 procedure pertains to everything from HR information to
8 supervising offenders to leave. I mean, just
9 everything.

10 Q. Yes.

11 A. Every business practice.

12 Q. All right. And if you received sufficient
13 information showing he received four votes, what would
14 you have done from there?

15 A. At that point we would have gotten -- in this
16 case, most likely wouldn't have been able to, but in
17 typical cases, we would get the summary -- the parole
18 summary for the actual hearing in question, and then we
19 would get the most recent parole summary, put them on
20 the schedule for the -- for the fall -- the next
21 available eligible full board hearing, meaning we would
22 have to go through the 30-day notice and things of that
23 sort for victims. And then we would present the case
24 to the parole board. Let them make their decision. We
25 would present them with the number of votes, things of

1 that sort.

2 Q. Okay. Now, explain on the record exactly
3 what occurs on the Barton hearing.

4 A. We go on record. We tell the board this is a
5 Barton hearing and now that they are familiar with
6 Barton hearing, we don't have to go into much more
7 detail. But we inform them there's a Barton hearing
8 takes place, and we tell them what date the person was
9 granted with the new ruling parole. What the vote was.
10 They have requested that we inform them of who the
11 voters were. Because we do have a couple members that
12 are currently on the board back -- from back then and
13 they don't want to sign yes when they originally voted
14 no.

15 So we do that. And then we, like I said,
16 present them with the current summary, and they have
17 the opportunity to place any kind of conditions or
18 whatnot on them. Or even rescind the hearing at this
19 point.

20 Q. Okay.

21 A. Or rescind the decision.

22 Q. And when you say that the board don't want to
23 sign, you mean the certificate, correct?

24 A. The order of parole.

25 Q. The order of parole.

1 A. Not the certificate.

2 Q. The order of parole that's done in the Barton
3 hearing, they don't do a certificate?

4 A. All hearings have an order of parole.

5 Q. Okay.

6 A. And then the department conducts -- compiles
7 the certificate.

8 Q. Okay. Now, the order of parole, is that
9 signed by, like, four members, five members? How many
10 people actually sign?

11 A. However many vote, yes.

12 Q. Okay. All right.

13 A. Only in a granting of parole. If it is a
14 rejection, then the one or two people who vote yes
15 won't have to sign.

16 Q. Okay. Are you aware that the initial case
17 for Mr. Rose was a post-conviction relief action, are
18 you aware of that?

19 A. Am I aware of the --

20 Q. Initial hearing that Mr. Rose conducted was a
21 post-conviction relief action? It wasn't against the
22 department. Are you aware of that?

23 A. I think we -- I think it's been mentioned.

24 Q. Okay.

25 A. But I'm not familiar with the details of it.

1 Q. All right. And Mr. Dayhuff asked about the
2 state statute of policies that we follow at the
3 department. Are you aware that one of the policies is
4 that the parole board must sign the certificate
5 ordering somebody on parole?

6 A. Yes.

7 Q. Okay. And it doesn't mention within any --
8 as far as your knowledge, it doesn't mention any law
9 that a judge is allowed to grant someone parole?

10 MR. DAYHUFF: Object to the form.

11 THE WITNESS: Right.

12 BY MR. EVANS:

13 Q. Okay. Have you ever seen a judge grant
14 somebody parole in your eight and a half years working
15 for the department?

16 A. I have not.

17 Q. Have you ever seen anyone in your eight and a
18 half years working at the department, other than the
19 board, grant anyone parole?

20 A. I have not.

21 Q. And if you received more documentation
22 regarding any board members' affidavits or actual tapes
23 saying -- showing he received four votes, you would
24 have furthered that along for potential Barton hearing;
25 is that correct?

1 A. Correct.

2 Q. Okay. But you never received any other
3 information other than the affidavit from Mr. Bell?

4 A. Right. We have worked -- we have handled
5 this case as we would any case with this amount of
6 evidence -- amount of information.

7 Q. Do you have ever give any recommendations in
8 the Barton hearings to the board?

9 A. Do I? No. Not my stuff.

10 Q. No one gives recommendations?

11 A. We present -- the only recommendations for
12 the conditions, and that is on the most recent summary.

13 Q. Okay.

14 A. But that's -- that's it.

15 Q. But if you recommend conditions, the board
16 can do what it wants?

17 A. Absolutely.

18 MR. DAYHUFF: Okay. One minute.

19 (Off the record.)

20 BY MR. EVANS:

21 Q. Okay. I'm referring to Exhibit Number 3.

22 This is the letter, Mr. Patton, that you sent to
23 Mr. Rose informing him that you're not going forward
24 with the Barton hearing.

25 At the end of the letter you said that the

1 department cannot release you on parole. Did you mean
2 the entire department or the board or what did you mean
3 when you wrote that, that last sentence? Or was that
4 an error on your part stating that?

5 A. I mean, I guess it could be worded a little
6 better. Due to the fact it's the board that releases
7 someone. But the department -- I mean, the board is,
8 through the department in this sense, because the
9 department is the person -- the entity monitoring,
10 supervising a parolee and that's what the intent of
11 that particular wording is geared toward. So I said
12 perhaps maybe better worded, but that's the intent of
13 that.

14 Q. All right. Did you mean the department can
15 release anybody on parole?

16 A. No. We have no authority to do so.

17 Q. Okay. And from your experiences in parole
18 board hearings -- and you stated earlier that the
19 chairman had the lights and the votes are done pretty
20 much under the table during the hearings?

21 A. Yes.

22 Q. Okay.

23 A. That's where the switches are.

24 Q. The switches are, correct.

25 A. The switches are mounted to the bottom of the

1 table.

2 Q. Okay. And you wasn't aware of how the actual
3 hearings were conducted before you came into your
4 position?

5 A. Right. No.

6 MR. EVANS: Okay. That's something I can ask
7 later.

8 I have no further questions.

9 MR. DAYHUFF: Let me just ask a few
10 follow-ups, and I'll start with the last piece.

11 REEXAMINATION

12 BY MR. DAYHUFF:

13 Q. You weren't aware of how hearings were
14 conducted in 2001?

15 A. Correct.

16 Q. You were in high school in 2001, correct?

17 A. Right.

18 Q. When you were offering your thoughts on how
19 the board considered parole and how tough or not tough
20 they were, you have no personal knowledge of that, do
21 you?

22 A. Personal knowledge being that I was there?

23 Q. That you observed it.

24 A. Correct.

25 Q. Okay. Have you looked at any statistics that

1 tell you how often parole was granted in 2001 versus,
2 say, 2015?

3 A. Yes, I can offhand tell you our rate. But I
4 have seen those, so yes.

5 Q. All right. And you don't have any personal
6 knowledge of how they were announcing votes in 2001?

7 A. Right.

8 Q. Right? Don't know if they were lights?

9 A. Right.

10 Q. Don't know if they were hands? I don't know
11 if they were voices?

12 A. I couldn't tell you any of it.

13 Q. Buzzers? Don't know?

14 A. I have no clue.

15 Q. Gene Richardson is one of the guys who got a
16 Barton hearing.

17 A. Uh-huh.

18 Q. He had a hearing in 2001. Did you know that?

19 A. I believe so because I think on the list -- I
20 don't know. I don't remember. There have been some
21 that we've had to say we have the information on this,
22 this and this hearing, but not this hearing. He may
23 have been one of those. I'm not sure.

24 Q. Okay. All right. The notion -- you don't
25 know in 2001 how the parole board considered revocation

1 of parole? I mean, you have no personal knowledge of
2 that. Whether they were harsh on people that have been
3 revoked or not harsh or never grant them in the first
4 year, you just don't know?

5 A. I can assume.

6 Q. Well, the question is, do you know?

7 A. No.

8 Q. You're speculating about that, right?

9 A. Right.

10 Q. Based on current experience, right?

11 A. Right. Yeah.

12 Q. Okay. There was some discussion of policies
13 and procedures I don't have, right?

14 A. Right.

15 Q. That's what I have.

16 A. Right.

17 Q. I think I was clear with your earlier
18 testimony that when we talked about Barton hearings and
19 the policy for Barton hearings, at least for your board
20 is right here, and we went through that, right?

21 A. Right.

22 Q. From the agency perspective, you all follow
23 this policy with respect to Barton hearings?

24 A. Yes.

25 Q. Okay. You mentioned to me that with respect

1 to the Barton -- not to me but to Mr. Evans that when
2 you have a Barton situation, you all have decided, you
3 and Roosevelt have decided that the inmate has enough
4 votes to get a Barton hearing?

5 A. Yes.

6 Q. You present that to the parole board, the
7 current parole board?

8 A. Right.

9 Q. And I think you said you tell them the date
10 that that inmate was granted parole?

11 A. The date in question, yes.

12 Q. Right. So that if Rose got one, and I know
13 he didn't, right, you would go in there and say this
14 inmate received parole, received four votes in 2001
15 from this old parole board. You would tell them who it
16 was?

17 A. Yes.

18 Q. In case there were any current people sitting
19 there, right?

20 A. Right.

21 Q. And then that parole board would sit and
22 decide conditions --

23 A. Right.

24 Q. -- right?

25 You mentioned something to me that was

1 interesting, that they could rescind the decision. Are
2 you saying that the current parole board, in our
3 hypothetical if Rose went up before them, and you
4 determined that Rose got four votes in 2001, are you
5 telling me that the current parole board could rescind
6 what the 2001 parole board did with respect to votes?

7 A. The way it currently stands, yes.

8 Q. How could that happen?

9 A. Because, like I said, you're getting the most
10 updated information. And let's say last year you
11 shanked somebody, well, your disciplinary record is
12 going to speak for itself. So they may rescind now
13 because you just killed someone a year ago or something
14 of that sort.

15 Q. So it would be based on misconduct in the
16 interim, you would allow them to do that?

17 A. That's just one example. Once again, I'm
18 just saying that's a possibility. Whatever. Once
19 again, the board is a -- the board --

20 Q. The board is the board?

21 A. -- is their own entity. They're their own
22 entity. They work outside of us. We provide them the
23 information, they get to --

24 Q. Is there any statutory, regulatory, or policy
25 authority for the board to rescind a parole that was

1 granted in the past?

2 A. Other than I believe you're asking the
3 only --

4 Q. In the Barton setting, right?

5 A. In the Barton setting, I don't believe
6 there's been anything. That's why I say, as it stands
7 now, I don't believe there have been any kind of
8 clarification at that point.

9 Q. So you couldn't point me to a statute or a
10 regulation or a policy that says when an inmate comes
11 before the parole board for a Barton hearing, that in
12 addition to imposing conditions, the parole board could
13 rescind and overturn what had been done in 2001 or
14 2002?

15 A. It was essentially -- it essentially falls
16 under the same as being granted parole and failing to
17 complete a condition or coming up for violation or
18 something, having your parole rescinded.

19 Q. And so the question is, can you point me to a
20 statute or a regulation or a policy that affords the
21 board that authority?

22 A. Yes.

23 Q. Okay. What is that?

24 A. Offhand, I could not tell you the numbers,
25 but I do know that -- I mean, that's the whole premise

1 behind them being the authority for violations and
2 things of that sort.

3 Q. And it's okay that you can't name it.

4 A. Yeah.

5 Q. So generally, it's their power to do what?
6 And I can look at it, right? Their power to rescind
7 based on --

8 A. Various. Earlier we discussed a waiver. You
9 know, the parole board could rescind based on a waiver.
10 Maybe they put -- in your opinion, you're the inmate
11 and you feel as if they gave you too many conditions.
12 Well, forget that, I'm not going to do it. I asked --
13 I'm going to waive, and so they'll rescind.

14 Q. I got you.

15 A. They tell you to go to drug class, you go to
16 drug class, you fail out. You test positive and you
17 fail out of drug class. They rescind you. You go
18 through the whole process, and, you know --

19 Q. I got you. For example, I think the drug
20 class example would be we grant you parole, it's
21 conditioned upon your completion of the ATU.

22 A. That's why every parole is conditional
23 parole.

24 Q. So when an inmate doesn't do well at ATU or
25 decides he's not going to do ATU, the parole board has

1 the authority to say, "Okay, that was a conditional
2 parole"?

3 A. Right. Well, all of them are conditional
4 because they're at least -- every parole has at least
5 statutory mandates. So that has at least a couple.
6 Every one of them is conditional.

7 Q. Any other basis that -- you mentioned the, I
8 guess, the bad behavior, failure to comply with
9 conditions. Any other reason that you believe the
10 parole board in a Barton setting would be able to
11 rescind the decision of an earlier board?

12 A. I hadn't -- like I said, the way things stand
13 now, I mean, that hasn't been something that's really
14 been done.

15 Q. What do you mean by that? That's just not
16 come up?

17 A. Right. We've had eight cases.

18 Q. Right. In those eight cases, you came to the
19 board and said, "Okay, Gene Richardson got four votes
20 and they moved to conditions --"

21 A. Right.

22 Q. "--- and that's over."

23 A. Right.

24 Q. Same thing with the others?

25 A. Right.

1 Q. So it hasn't happened otherwise?

2 A. Right. We're talking about hypotheticals in
3 some senses, so I'm just throwing that out as
4 hypothetical.

5 Q. I got you.

6 A. I mean, the only thing I could I guess say is
7 if they chose to completely abstain and not give
8 signatures because the law states signatures, not
9 votes.

10 Q. No, I hear you. This is part of your
11 explaining to me the separation between the board and
12 the agency?

13 A. Yes.

14 Q. They're different entities?

15 A. Yes.

16 Q. And the board has its power?

17 A. Yes.

18 Q. And you have a very broad interpretation of
19 that board's power, right?

20 A. Yes.

21 MR. DAYHUFF: Okay. Fair enough.

22 REEXAMINATION

23 BY MR. EVANS:

24 Q. All right. Now, Mr. Dayhuff talked to you
25 about a person going for a Barton hearing and the board

1 rescinding parole. That person hasn't received parole
2 yet, has he?

3 A. Not in traditional sense, no.

4 Q. Okay. So -- and there are circumstances
5 where the board, even if the board grants somebody
6 parole, they can rescind it?

7 A. Right.

8 Q. And it's in the policy manual, correct?

9 A. Yes.

10 Q. Could be for misconduct by the inmate, like
11 you say, shanking somebody a year ago?

12 A. Yes.

13 Q. It could be new criminal charges. Could it
14 be for that reason?

15 A. It could be various reasons that --

16 Q. After acquiring information about that
17 inmate --

18 A. Right..

19 Q. -- could be for that reason?

20 A. Yes.

21 Q. And it could be situations where the board
22 denied somebody parole and then information comes
23 before the board and they make the decision to grant?

24 A. Correct.

25 Q. It has happened before, also?

1 A. Yes. It can go either way.

2 MR. EVANS: It can go either way.

3 And Mr. Kenneth Green, he's had a -- I don't
4 know if I can go into that. I don't believe you asked
5 about that.

6 Nothing. That's it. I'm done.

7 MR. DAYHUFF: Okay. Thank you for your time.

8 (The deposition concluded at 11:38 a.m.)

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge

Appellate Case No.: 2016-000225

DAVID ROSE, #91858,.....RESPONDENT

v.

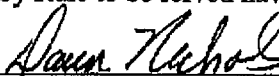
S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant to counsel for Appellant, certify that I have served a copy of the SUPPLEMENTAL *RECORD ON APPEAL*, dated May 23, 2016, on Respondent by depositing the same in the United States mail, postage prepaid, this 23rd day of May, 2016, addressed to:

Travis Dayhuff, Esquire
1320 Main Street, 17th Floor
Columbia, S.C. 29201

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



Dawn K. Nichols,
Executive Assistant

S. C. Department of Probation,
Parole, and Pardon Services
P. O. Box 50666
Columbia, South Carolina 29250

1 SIGNATURE OF DEPONENT

2

3 I, the undersigned, LARRY J. PATTON, do
4 hereby certify that I have read the foregoing
5 deposition and find it to be a true and accurate
6 transcription of my testimony, with the following
7 corrections, if any:

8 PAGE LINE CHANGE REASON

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LARRY J. PATTON DATE

1 CERTIFICATE OF REPORTER

2
3 I, Sheri L. Byers, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby
6 certify:

7 That the foregoing deposition was
8 taken before me on the date and at the time and
9 location stated on page 1 of this transcript; that
10 the deponent was duly sworn to testify to the
11 truth, the whole truth and nothing but the truth;
12 that the testimony of the deponent and all
13 objections made at the time of the examination were
14 recorded stenographically by me and were thereafter
15 transcribed; that the foregoing deposition as typed
16 is a true, accurate and complete record of the
17 testimony of the deponent and of all objections
18 made at the time of the examination to the best of
19 my ability.

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

23 Witness my hand, I have hereunto
24 affixed my official seal this 8th day of October,
25 2015, at Columbia, Richland County, South Carolina.

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Sheri L. Byers
Registered Professional Reporter,
Notary Public
State of South Carolina at Large
My Commission expires:
October 30, 2023



STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge

Appellate Case No.: 2016-000225

DAVID ROSE, #91858,.....RESPONDENT

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Supplemental 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.


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May 23, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2016-000225

DAVID ROSE, #91858

RESPONDENT

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

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Administrative Law Court err in reversing the Appellant's determination that Respondent failed to prove he received a sufficient number of votes to be granted parole pursuant to the *State v. Barton* decision?
2. Did the Administrative Law Court err when it issued a remedy that it may not grant?
3. Did the Administrative Law Court err in deciding that the *State v. Barton* decision should be applied retroactively?

STATEMENT OF THE CASE

On April 6, 1978, the Respondent along with his co-defendant Jack B. Oliphant approached a child near his home in Laurens County, South Carolina. Upon asking the child to show them directions to a nearby address, he was forced into a vehicle and driven to Greenville. They held him captive for eighteen hours demanding a ransom for his return. Upon hearing on the radio the authorities were actively searching for this child, the defendant's decided to release the child to a nearby rural area. Both defendants were later found, arrested and charged with the offenses of kidnapping.

On May 22, 1978, the Respondent appeared before the Honorable James Moore for the offense of kidnapping. Upon completion of this appearance the Respondent was sentenced to a term of incarceration for the remainder of his natural life.¹ At the time the Appellant committed this offense South Carolina law allowed an individual serving a life sentence for kidnapping parole eligibility upon the service of ten years.

The Respondent was granted parole in 1987, but failed to report for years. Finally in 1991, an arrest warrant was issued, he was then placed in absconded status. It was later discovered that he was residing in Florida. He was extradited to South Carolina and his parole was revoked on June 14, 2000. The Respondent's first appearance before the Parole Board after his revocation was on June 20, 2001, during which time the Board denied parole.

On August 30, 2004, the Respondent filed an application for post-conviction relief. (R.p.273-p.279). Within this application, the Appellant made the claim that he received four votes in favor of parole based on a statement by a cousin that he received four "yes" votes. The Respondent requested a recording of the hearing, which did not list the vote count. This was a

¹ Co-Defendant Jack Oliphant was also give a life sentence for the offense of kidnapping. He was paroled on February 21, 1986, he currently remains on parole and now residing in the state of Georgia.

post-conviction relief action against his Public Defender Michael Turner and his parole attorney Alvin Neal, and did not name the Appellant Department of Probation, Parole and Pardon Services. (R.p.277). The Attorney General responded and argued that the Circuit Court does not have jurisdiction, but jurisdiction falls upon the Administrative Law Court (ALC). On March 3, 2006, the Honorable Wyatt T. Saunders ordered the PCR be dismissed without prejudice so it can be presented before the ALC. (R.p.261-p.266). Judge Saunders ordered that if the ALC decides not to hear this case, the Respondent has the right to re-file before the Circuit Court.

The Respondent delivered a request for parole on April 17, 2006. The Appellant refused the request for parole. The Respondent then filed a notice of appeal before the ALC, on May 12, 2006. (R.p.280). On May 14, 2007, the Honorable John D. Geathers, Administrative Law Court Judge, issued an order dismissing the appeal. It was his opinion that the ALC did not have jurisdiction over this offense. (R.p.281-p.282).

On February 26, 2014, the Respondent filed a summons and complaint against the Appellant in Circuit Court. (R.p.222-p.227). The Appellant filed a motion to dismiss arguing that due to the South Carolina Supreme Court decision of *State v. Furtick*, the Circuit Court does not have jurisdiction. A hearing regarding the Appellant's motion to dismiss was held before the Honorable Frank R. Addy, on May 19, 2014. Upon the conclusion of this hearing, Judge Addy denied the Appellant's motion and ordered the Department to conduct an investigation to determine if he has received four votes at the conclusion of his 2001 hearing. (R.p.245-p.246).

During this investigation the Appellant discovered that the recording of the 2001 parole hearing had been destroyed. Even though the Respondent had a copy of this recording, the only thing produced to the Appellant was an affidavit from his cousin Carlos Bell. (R.p.268-269). Within his affidavit Mr. Bell stated that the Respondent's lawyer spoke to a Department employee in the

common area who informed him that the Respondent received four votes, who in turned informed Mr. Bell. The Appellant determined that this was not sufficient evidence and denied Respondent's request for parole. (R.p.267). Upon being notified of this denial, the Respondent filed a notice of appeal before the ALC.

Administrative Law Judge Deborah Brooks Durden reversed the Appellant's determination that the Respondent did not receive enough votes to be granted parole and ordered the matter be remanded to the Board to determine conditions for release on parole. (R.p.150-155). In her ruling, she determined that the matter of the vote count had already been litigated between the Appellant and the Respondent, that the Appellant failed to produce a scintilla of evidence refuting the Respondent's claim to have received votes, and that the decision in *Barton v. S.C. Dept. of Probation, Parole and Pardon Services* should be applied retroactively to this matter.

The Department appeals the ALC's ruling in this matter, and intends to show that the ALC was incorrect in determining the vote count had already been resolved, and that the Supreme Court's decision in *Barton* was never intended to be applied retroactively. The Appellant's arguments follows. (R.p.148-p.149).

STANDARD OF REVIEW

The Administrative Procedures Act (APA) provides the appropriate standard of Review. S.C. Code Ann. §1-23-610(B) (Supp. 2012). The Court may reverse the decision of an ALC if that decision is a) in violation of constitutional or statutory provisions; b) in excess of the statutory authority of the agency; c) made upon unlawful procedure; d) affected by other error of law; e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or f) arbitrary or capricious or characterized by an abuse of discretion or clearly

unwarranted exercise of discretion. *Barton v. S.C. Dept. of Probation, Parole and Pardon Services*, 404 S.C. 395, 745 S.E.2d 110 (2013).

ARGUMENTS

1. **The Administrative Law Court erred in its determination that the vote count had been litigated, and that the Appellant relied upon substantial evidence that the Respondent failed to receive votes sufficient to receive parole.**

In its ruling, the Administrative Law Court (ALC) placed great emphasis on the fact that the Department did not take a position against the Respondent's position that he received a favorable vote count in his Post-Conviction Relief action (PCR) following his denial of parole in 2001. However, the ALC fails to take into account that the PCR is an action taken against his attorneys and would not have been served on the Department.² Furthermore, the Attorney General's Office, which did respond to the action, made a motion to dismiss for improper jurisdiction and to remand the case to the Administrative Law Court because it involved the routine denial of parole – a preliminary motion that does not address the substantive matters within the claim. *See Kerr v. State*, 345 S.C. 183, 547 S.E.2d 494 (2001) (addressing the threshold issue of jurisdiction before addressing the matter of parole eligibility).

By taking up the initial matter of the proper venue, the Attorney General's Office never needed to respond to the allegation that the Respondent received four votes in favor of parole. In fact, by filing a PCR matter, the Respondent only challenged the effectiveness of his attorneys. The matter of the vote count was irrelevant for the PCR because the Respondent's attorneys had nothing to do with how the Parole Board voted. *See S.C. Code Ann. §17-27-20 (Supp. 1969)*.

² The clerk shall docket the application upon its receipt and promptly bring it to the attention of the court and deliver a copy to the solicitor of the circuit in which the applicant was convicted and a copy to the Attorney General. S.C. Code Ann. §17-27-40(Supp. 2014).

All subsequent hearings and rulings for the Respondent's case involved the proper jurisdiction of Respondent's case – whether it was properly before the circuit court or the ALC. At no point did the Department concede that the Respondent received four votes. In fact, it was not until Judge Addy ordered the Department to conduct an investigation on May 19, 2014, that the matter of the vote count became an issue.

The Respondent expects the Appellant to grant a criminal offender release from incarceration based solely on hearsay testimony submitted through an affidavit submitted by his cousin Carlos Bell. According to this affidavit the Respondent's attorney spoke to an unnamed employee of the Department who informed him that the Respondent received four affirmative votes. His lawyer in turn informed all of them of the vote count, was paid by Mr. Bell, and they all left the premises. No further action was ever made by this attorney regarding this decision, no motion for reconsideration, or appeal was filed, even though he was paid for the entire process. The Respondent could have been told this vote by his attorney only to assure payment. This was the only information presented, so the Department was well within its authority to determine that the Respondent's claim is not sufficient to submit the case to the Board.

Any release on parole lies totally with the Parole Board, "no such prisoner may be paroled until it appears to the satisfaction of the board." S.C. Code Ann. §24-21-640 (Supp. 2014). The only authority to sign an order of release to parole is the Parole Board. Importantly, the order authorizing parole must be *signed* by the majority of members of the Board. S.C. Code Ann. §24-21-640 (Supp. 2014). Without the signatures of the Board, the Department has no authority to order the release of an inmate to parole.

The ALC has ordered the Respondent 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 South Carolina Supreme Court decided in *Barton* that requiring an inmate convicted prior to 1986 a two-thirds vote to be granted parole is in violation of ex post facto.

The Respondent has yet to prove he has received four votes. In administrative proceedings the general rule is that an Appellant for relief, or a privilege has the burden of proof and the burden of proof rest upon who files a claim with an administrative agency to establish that required conditions of eligibility have been met. *Leventis v. South Carolina Department of Health and Environmental Control*, 340 S.C. 118, 530 S.E.2d 643 (2000). The Respondent failed to present sufficient evidence proving he has received the required votes to be granted parole. The only evidence presented to the Department is an affidavit written by his cousin, which is full of hearsay testimony. He never presented affidavits from Board members who sat on that hearing. Other inmates have done so in order to prove they have received the requisite votes to be granted parole. The Respondent never presented or sought the Department employee his lawyer supposedly spoken to, nor his sister Kathy Todd who was also supposedly present; nor has he presented an affidavit from his lawyer confirming this conversation. Inmates have included affidavits from their attorney confirming the vote count, the Respondent has failed to do so.

The recording of the hearing in question contained no final vote count. Instead, the chairman just states "David Lee Rose rejected 1 and 5."³ (R.p.108). There are other instances which the chairman had announced "the inmate was rejected 4 to 2." In the present case, there was also no deliberation, nor a final vote count mentioned. It is therefore safe to assume that the Respondent was denied unanimously. (Supp. R.p. 65, lines 4-6). There was no evidence presented to the contrary, and that assumption can be as easily made, especially since he has not received any votes

³ The 1 and 5 mentioned are the reasons for denial and not the final vote.

since 2001. (R. p. 69 lines 11-16). The Respondent is under the assumption that since he provided only a hearsay affidavit he should be automatically release on Parole. The Respondent failed to give a full faith effort to gather sufficient substantial evidence that would convince the Department to release him on parole.

As noted earlier, the Department cannot release an inmate on parole without a signed order authorizing parole from the Board. §24-21-640. It should be considered reasonable that the Department not release anyone on parole when the only evidence presented is a biased statement from the inmate's cousin. If the Board believed the Respondent failed to provide sufficient evidence to verify a ratification of a Board's previous vote that determination must be upheld. The findings of an administrative agency are presumed correct and will be set aside only if supported by substantial evidence. *Summersell v. South Carolina Department of Public Safety*, 334 S.C. 357, 513 S.E.2d 619 (1999). Substantial evidence is evidence which considering the record as a whole would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981).

The ALC chooses to ignore the evidence that the Respondent received no votes in favor of parole and makes the claim that the Department had no evidence to refute the Respondent's biased hearsay testimony. The ALC ignored the recording's lack of deliberation, which is customarily included in a split vote. (Supp. R.p. 65 lines 4-6). The Board has not awarded the Respondent a single vote in favor of parole in the following fourteen years of hearings. (R.p.69, lines 11-16). His parole was just revoked just a year earlier; he has not received any votes since being revoked; there was no mention of the vote count or any deliberation as in other hearings occurring at that time. He absconded supervision from 1991 till 2000 a total of nine years, and was not found in

South Carolina but in the state of Florida, The Parole Board is usually inclined to deny parole upon a recent revocation, (R.p. 55, line 16 to pg. 56, line 3).

2. The ALC issued a remedy that cannot be provided by the Courts.

The ALC does not have the ability to reverse a decision made by the Parole Board, nor can it require the Board to release someone on parole. 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). Because the ALC ordered that the Board convene a hearing pursuant to *Barton* for the sole purpose to imposing conditions of parole, the ALC made itself the determining body regarding parole. That responsibility was never given to the courts. 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 Pardons. *Brown v. State*, 306 S.C. 381, 412 S.E.2d 399 (1991). Section 24-21-640 specifically provides for the Board to consider the complete record of a prisoner and delegates to the Board the responsibility of determining if and when a prisoner meets the prerequisites of parole eligibility. *State v. McKay*, 300 S.C. 113, 386 S.E.2d 623 (1989).

The Respondent seems of the opinion that a *Barton* hearing is just a rubber stamp of the Parole Board. That is untrue. A decision of the Department pursuant to *Barton* is three fold. First, the office of Board Support Services will conduct an investigation to verify if the prisoner has possibly received the proper number of votes; second, the Office of Legal Services will verify if it qualifies under *Barton*; and, third, the Board holds a hearing during a full board day. The Respondent failed to get through the first stage due to his lack of reliable information proving he received the required number of votes to be granted parole. This denial of parole was proper and not subject to remand, and the ALC does not have the authority to reverse.

3. The two-thirds rule announced in *Barton* does not apply retroactively.

The ALC conducted a collateral review of the denial of the Respondent's parole in 2001. It erroneously ruled that *Barton* should be applied retroactively because it was an ex post facto analysis and that "ex post facto claims are non-collateral matters." (Citing *Steele v. Benjamin*, 362 S.C. 66, 71, 606 S.E.2d 499 (Ct. App. 2004). The ALC erroneously equates the ex-post facto analysis in *Barton*, which analyzed the two-thirds vote requirements for violent offenses, with the present question of whether *Barton* was intended to be applied retroactively.

Specifically, the *Barton* court did not state that its interpretation of the two-thirds rule set forth in section 24-21-645(A) should apply retroactively to cases on collateral review. "The question of whether a decision announcing a new rule should be given prospective or retroactive effect should be addressed at the time of the decision." *Talley v. State*, 371 S.C. 535, 640 S.E.2d 878 (2007)(citing, *Teague v. Lane*, 489 U.S. 288, 300 (1989). That the *Barton* court was silent to this issue implies that it did not intend for its ruling to apply retroactively, but only in future hearings. In fact, the law does not support *Barton's* retroactive effect. In *Talley*, the South Carolina Supreme Court adopted the United States Supreme Court's ruling in *Teague* that new procedural rules should not apply retroactively except criminal law-making power to penalize, *Talley*, at 543. This exception cannot apply to this case. The second exception occurs when a new rule amounts to a "watershed rule" of procedure. *Id.*, at 543. A "watershed rule" is a new rule requiring that procedures implicit in the concept of ordered liberty to be observed during a hearing – a rule that "implicate[s] the fundamental fairness and accuracy of the proceeding." *Id.* The *Barton* ruling did not announce such a rule. In the context of post-conviction administrative parole hearings, inmates only have a protected right to the hearing, not to parole itself. *Furtick v. S.C. Department of*

Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2003). Inmates are due minimum due process which is provided by notice and hearing.⁴ *Id.*, at 598. The *Barton* court plainly stated that §24-21-645(A) was ambiguous and subject to more than one interpretation. *Barton*, at 416. The Court did not find that the minimum due process an inmate must receive also includes a protected right to a *particular interpretation* of §24-21-645(A), only the Department (and the South Carolina Administrative Law Court) had wrongly interpreted the statute. Here the Respondent received sufficient due process because he was notified of the hearing where he appeared with counsel. The *Barton* ruling does not apply retroactively to his case.

A further policy argument must be made in favor of applying *Barton* prospectively only. The Parole Board and the Department historically did not record the vote counts of inmates who did not receive enough votes to be granted parole. The only time the votes were memorialized was in the actual order authorizing parole, which was required by statute. "The board shall issue an order authorizing the parole which must be signed by at least a majority of its members with terms and conditions, if any, but at least two-thirds of the members of the board must sign orders authorizing parole for persons convicted of a violent crime..." §24-21-640. Nowhere in the statute is it stated that the vote count must be recorded and preserved, and it cannot be expected that the Department should have had the prescience to predict the ruling of *Barton*.

Respondent's claim that he received four votes in favor of parole is baseless hearsay from a biased source. To hold that *Barton* is retroactive invites more claims from family members and friends who claim to recall hearing in the distant past that a particular inmate has received enough votes for parole. Without records to refute those claims, potentially every inmate who has had a

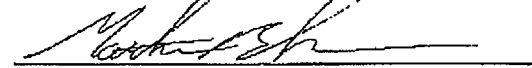
⁴ It may be that *Teague, Talley*, and their descendants, which had examined new rules of *criminal* procedure, cannot apply to a judicial interpretation of a statute establishing *civil* procedure in post-conviction administrative law hearings. See generally, *Hamm v. South Carolina*, 403 S.C. 461, 744 S.E.2d 503 (2013).

parole hearing prior to 2001 stands to be released on parole based on the retroactive application of *Barton*. This ruling would invite countless fraudulent claims for parole -- a result that can be avoided through the prospective application of *Barton* only.

CONCLUSION

Based on the foregoing reasons the Appellant respectfully requests that the ruling of the Administrative Law Court be reversed.

Respectfully submitted,



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Columbia, South Carolina
May 27 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge
Case No. 15-ALC-0033-AP

Appellate Case No. 2016-000225

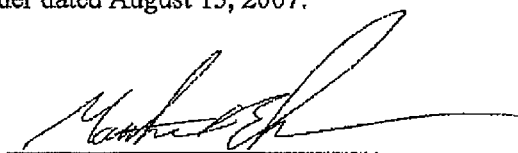
DAVID ROSE, #91858,.....RESPONDENT

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and
with the South Carolina Supreme Court's order dated August 13, 2007.



Matthew C. Buchanan
General Counsel

May 27, 2016

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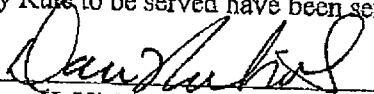
S.C. DEPARTMENT OF PROBATION, PAROLE
AND PARDON SERVICES, ...APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within
Final Brief of Appellant dated May 27, 2016, on Respondent this 27th day of May, 2016, by
depositing a copy of the same in the United States mail, postage prepaid, addressed to his
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I further certify that all parties required by Rule to be served have been served.


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RECEIVED

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

SC Court of Appeals

Deborah Brooks Darden, Administrative Law Judge

Case No. 15-310 15-0033-AP
Appellate Case No. 2016-000225

David Rose 799-255

Respondent,

South Carolina Department of Probation, Parole and
Pardon Services

Appellant

FINAL BRIEF OF
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STATEMENT OF THE ISSUES ON APPEAL

1. Should the ALC's determination that Rose received four votes for parole at his 2001 parole hearing be affirmed?
2. Did the ALC have the authority to review DPPPS's decision that Rose did not receive four votes for parole in 2001 and grant Rose relief?
3. Did the ALC correctly reject DPPPS's claim that the *Barton* case's "two-thirds rule" does not apply to Rose?

STATEMENT OF THE CASE

This is an appeal of an Administrative Law Court ("ALC") decision reversing an agency decision of the South Carolina Department of Probation, Parole, and Pardon Services ("DPPPS"). On February 13, 2015, DPPPS determined that David Rose did not receive enough votes at his 2001 parole hearing to obtain parole under *Barton v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013). On June 1, 2015, Rose filed a Notice of Appeal with the ALC challenging DPPPS's decision. On February 1, 2016, the ALC reversed DPPPS's decision and determined that Rose did receive enough votes at his 2001 parole hearing to obtain parole pursuant to the *Barton* case. On February 3, 2016, DPPPS appealed the ALC's decision to this Court.

FACTS

When Rose pled guilty to kidnapping¹ and was incarcerated in 1978, South Carolina's parole statute provided that an inmate would receive parole if a simple majority of the Parole Board members voted in favor of parole. S.C. Code Ann. § 55-613 (1962). In 1986, the

¹ DPPPS's description of Rose's 1978 offense is inaccurate, incomplete, and devoid of citations to the Record. As Rose's offense is not relevant to any issues in this appeal, Rose will note only that the 1987 Parole Board and the 2001 Parole Board heard *all the facts* regarding his offense, and Rose *twice* received enough votes from these Boards to obtain parole.

parole statute was amended to provide that an inmate who committed a violent crime² would not receive parole unless a two-thirds majority of the Parole Board members voted in favor of parole. Omnibus Criminal Justice Improvements Act of 1986, No. 462 § 31, 1986 S.C. Acts 2955, 2990. The current parole statute retains the two-thirds majority vote requirement for an inmate convicted of a violent crime. S.C. Code Ann. § 24-21-645(A).

In 1987, the Parole Board granted Rose parole. R. at 271. In 2000, Rose's parole was revoked because he failed to report his change of address to his parole agent. R. at 271.

On June 20, 2001, Rose appeared at a hearing before the Parole Board to request parole. Six members of the Parole Board were present at Rose's hearing. Rose was represented at the hearing by counsel and was accompanied by two persons supporting his request for parole. R. at 268, ¶ 1 & 196, ¶ 3. Immediately after the hearing, a female DPPPS employee informed Rose and those with him that Rose's request for parole had been denied. R. at 268, ¶ 2 & 196, ¶ 6. Then, in the presence of Rose and his supporters, Rose's counsel asked the DPPPS employee about the vote count, and she stated that four members voted for parole and two members voted against parole. R. at 268, ¶ 2 & 196, ¶¶ 8-9; *see also* R. at 119 & 264 ("He [Rose] testified that at his last parole hearing, he received four votes in favor of parole, but that parole was denied based on being short by one vote.").

Even though Rose received four favorable votes out of the six votes available at the 2001 hearing, DPPPS denied Rose parole by: (i) retroactively applying the two-thirds majority vote requirement in section 24-21-645(A) to Rose; and (ii) interpreting the two-thirds majority vote requirement in section 24-21-645(A) to require five affirmative votes to obtain parole,

² Kidnapping is defined as a violent crime. S.C. Code Ann. § 16-1-60.

regardless of how many Parole Board members are present and voting at the parole hearing. R. at 271 & Supp. R. at 50, L. 12 – 51, L. 12.

After the 2001 parole hearing, Rose filed actions in Circuit Court and the ALC claiming that DPPPS had unlawfully denied him parole. Rose asserted that he received four votes at his parole hearing and retroactively applying the current parole statute's two-thirds majority vote requirement to him -- rather than the old parole statute's simple majority vote requirement -- was an *ex post facto* violation.

In response to Rose's actions, DPPPS did not challenge the fact that Rose had received four votes for parole in 2001. Instead, DPPPS asserted that retroactively applying the two-thirds majority vote requirement in the current parole statute to Rose was not an *ex post facto* violation and therefore Rose needed five votes, not four, to obtain parole in 2001. R. at 271. DPPPS coupled this erroneous legal argument with a strategy of denying Rose a hearing on the merits of his constitutional claim. In 2006, DPPPS obtained the dismissal of Rose's Circuit Court action by arguing that the Administration Law Court should adjudicate Rose's claim. R. at 261-266. Shortly thereafter, DPPPS obtained the summary dismissal of Rose's ALC action. R. at 281-282.

On July 3, 2013, the South Carolina Supreme Court held that DPPPS's retroactive application of the two-thirds majority vote requirement in section 24-21-645(A) violates *ex post facto* and DPPPS requiring five affirmative votes to satisfy the two-thirds majority requirement, regardless of how many members are present and voting at the parole hearing, violates section 24-21-645(A). *Barton v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013).

The *Barton* case made clear that DPPPS had been unconstitutionally denying inmates parole by requiring a two-thirds majority vote in favor of parole when inmates needed only a simple majority vote. The *Barton* case also made clear that DPPPS had been unlawfully denying inmates parole by counting absent parole board members as "no" votes.

Granting parole is a two-step process. First, the Parole Board determines whether the inmate should receive parole. Second, if the Parole Board votes in favor of parole, the Parole Board sets the conditions for parole and signs an order for parole. R. at 97, L. 13-23. As DPPPS's Director of Parole Board Support Services, Larry Patton, ("Director Patton") explains below, inmates who were erroneously denied parole because of the violations of law recognized by *Barton* made it through the first step -- they received enough votes for parole -- but they did not make it to step two.

Q. . . . And why didn't we have part two in 2001?

A. Because this law ruling [*Barton*] didn't take place back then.

Q. They [Parole Board] didn't know they needed to move to part two?

A. They were going under the current law.

Q. Right. They thought the inmate was rejected so they never got to conditions --

A. Right.

Supp. R. at 35, L. 18 - 36, L. 1.

DPPPS implemented the following policy to rectify the violations of law identified by *Barton*:

10. BARTON HEARINGS

The South Carolina Supreme Court decision in *Barton v. SCDPPPS* held that the Board is to consider a majority and two-thirds majority to be based on the number of Board members present, rather than based on the full Board

membership. If an offender's old vote is brought to the Department's attention, the Office of Parole Support Services staff will investigate to verify that the offender did receive the proper number of votes, and the Department's Office of Legal Services will verify it qualifies under proper number of votes, and the Department's Office of Legal Services will verify it qualifies under Barton. The Department's Office of Victim Services will contact the victim and explain the Barton decision and the Board's vote. During a full Board day, the Board will hold a Barton hearing on the offender. This hearing will not require the presence of the victim or the offender.

At the Barton Hearing, the Board may impose any conditions on the offender as it feels necessary, including all statutory conditions. The Board will then sign a special Barton Order of Parole, which ratifies the votes of the previous Board members which would have granted conditional parole. The offender is then treated as any other offender granted conditional parole, and will have to comply with the conditions in order to receive parole.

R. at 219 § 10. This policy creates a two-step process. First, DPPPS determines whether the inmate received enough votes at the prior parole hearing to receive parole pursuant to guidance provided by *Barton*. If DPPPS determines the inmate received the requisite number of votes, the current Parole Board convenes a "Barton Hearing" to set conditions for parole and sign the order for parole. Importantly, the current Parole Board does not reconsider the prior Parole Board's decision to grant parole.

Q. . . . So the -- in the Barton hearing process, the current parole board is not hearing from the victim witnesses again?

A. Right.

Q. They're not hearing from the offender again?

A. No.

Q. They're not hearing from the offender's attorney again?

A. Right.

Q. Because they don't need to.

A. Right. The decision is made.

Q. The decision was made in 2001.

A. Yes, whenever.

Supp. R. at 36, LL. 13-25.

Q. . . . So under this Barton hearing process, the agency has the power to determine, after the investigation, whether the inmate has got enough votes in the past, right?

A. Right.

Q. The parole board has the power to impose conditions?

A. Right.

Supp. R. at 39, LL. 9-16.

On February 26, 2014, after learning about the *Barton* case, Rose filed an action *pro se* in Circuit Court asserting that the *Barton* case had confirmed what Rose had been claiming for 14 years; that is, that DPPPS had unlawfully denied him parole when he received four votes for parole at his 2001 hearing. DPPPS again moved to dismiss Rose's case arguing that the Circuit Court lacked jurisdiction over Rose's claim and that the ALC was the appropriate forum for Rose's claim. The Circuit Court deferred ruling on DPPPS's motion to dismiss, and instead ordered DPPPS to conduct an investigation to determine whether Rose should be paroled under *Barton*.

Pursuant to the Circuit Court's order and pursuant to the policy for Barton hearings set forth above, DPPPS conducted an investigation to determine whether Rose should receive parole under *Barton*. Director Patton conducted the investigation. R. at 254, no. 1.

During this investigation, Director Patton reviewed an affidavit from Carlos Bell who had attended the 2001 parole hearing. R. at 254, no. 1. Bell's affidavit corroborated Rose's

assertion, and his previous testimony before the Circuit Court, that four Parole Board members voted for Rose to be paroled in 2001.

A women came out to the common area were [sic] we were waiting the results (I believe she was the secretary or recorder for the Parole Board), she said "I'm sorry but parole has been denied", we were dumb struck. After a moment of figuring what had just happened we asked Mr. Neal [counsel for Rose] if we could find out what the vote was. Mr. Neal then asked the women what was the vote count, she gave this to him, then he in turn turned back to us and repeating what she had told him, the count was 4 yes votes and 2 no votes. I immediately asked Mr. Neal how can parole be denied when David got 4 Yes votes out of 6, was this not a majority. He stated this did not sound right and he would be checking on this.

R. at 269, ¶ 2.

DPPPS reported that no evidence other than Bell's affidavit was considered during the investigation. R. at 254-55, nos. 1 & 2. However, when Director Patton was asked during his deposition whether he had reviewed anything during the investigation that he believed was evidence that Rose had not received four votes, Patton identified a "hearing ledger" in DPPPS's computer that noted Rose had been rejected for parole in 2001. Supp. R. at 48, L. 23 - 49, L. 9. At his deposition, Director Patton conceded that this ledger did not, in fact, contradict Rose's claim that he received four votes as the ledger did not contain the vote tally from Rose's hearing, and the ledger was made when DPPPS "[w]asn't counting votes, right, for today's ruling [Barton] . . ." and was retroactively applying the two-thirds majority requirement. Supp. R. at 50, L. 12 - 51, L. 17.

In a letter dated February 13, 2015, DPPPS provided notice to Rose and the Circuit Court that DPPPS had concluded its investigation and decided that Rose was not entitled to receive parole under the *Barton* case. R. at 267. DPPPS's February 13th letter reported that "without any other evidence of the vote count from your June 20, 2001, hearing, the Department, cannot release you to parole." R. at 267. Importantly, DPPPS had no other

evidence to review regarding the vote total at Rose's 2001 hearing because DPPPS had, *for years*, failed to make and keep written records of the votes at parole hearings. R. at 255-56, nos. 4, 5 and 6 ("Prior to 2014 the final vote count was never recorded.") & Supp. R. at 4, L. 20 - P. 5, L. 9 (DPPPS has been making written records of voting for "maybe a year").³ This failure to make and keep written records violates the parole statute and the Freedom of Information Act. S.C. Code Ann. § 24-21-40; S.C. Code Ann. § 30-4-10 *et seq.*

After the issuance of the February 13th DPPPS decision, the Circuit Court granted DPPPS's motion to dismiss and denied Rose's motion to reconsider in an order filed on May 1, 2015. R. at 245. In the order dismissing Rose's claim, Judge Addy concluded, as DPPPS had argued, that the Circuit Court did not have jurisdiction over Rose's claim, but the ALC did. The Circuit Court's order included the following:

The court is genuinely troubled by the failure of the Parole Board to maintain any records relating to the parole hearing of June 20, 2001, and the absence of any record documenting the denial of parole, or otherwise signed by the members of the board present at that hearing, is of significant concern to the court. Put another way, if the only evidence in existence is the affidavit of Carlos Bell [affirming that Rose received four (4) out of six (6) votes], and the Parole Board lacks documentation to demonstrate that Plaintiff did not receive the required number of votes, the court is curious as to how a meaningful investigation could have been conducted as required under *Barton v. S.C. Dept. of Probation, Parole, and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013). By implication, the Parole Board appears to take the position that, since all records have been destroyed, the vote must have been adverse to Plaintiff's position - ergo, the lack of documentation indicating denial of parole is sufficient to demonstrate that parole was denied. Such circular and perfunctory reasoning is curious and does not take into account the alternative possibility - that the affidavit of Carlos Bell is correct and that the Plaintiff was mistakenly denied parole under the holding in *Barton*. . . .

³ Even though Rose's 2001 hearing has been the subject of litigation for the past fourteen years, DPPPS destroyed the audio tape of Rose's 2001 hearing. R. at 255, no. 3. Rose has a copy of the audio recording from his 2001 hearing, but it does not include a tally of the votes. R. at 103-108 & 119.

Plaintiff is advised to appeal the Board's finding to the ALC. The court would also respectfully suggest that this case may represent one of those rare occasions where the ALC should conduct a full, formal hearing into this matter.

R. at 245-246.

On June 1, 2015, after retaining *pro bono* legal representation, Rose filed an appeal with the ALC asserting that DPPPS had unlawfully denied Rose parole. On February 1, 2016, the ALC issued a decision reversing DPPPS's decision that Rose did not receive enough votes in 2001 to obtain parole. The ALC remanded this matter for a hearing before the Parole Board to determine what conditions, if any, should be imposed upon Rose's parole. In pertinent part, the ALC's decision stated:

The Department concluded that Appellant [Rose] did not provide enough evidence in support of his position that the vote count was four in favor of parole to two against parole. However, the Appellant did provide evidence of the vote count. The Department offered nothing contradictory to that evidence. Thus, there is not even a scintilla of evidence supporting the Department's decision. Because the Department must provide at least some support for its factual findings, the Court concludes that the Department's decision must be reversed.

R. at 153-154.

The ALC also considered, and rejected, DPPPS's argument that the relief requested by Rose was an impermissible usurpation of the Parole Board's authority to grant or deny parole:

By reviewing this case, the Court does not grant or deny Appellant parole, but rather requires the Department to carry out the result of a vote the Board already made. As stated above, it is the responsibility of the ALC to ensure that the Constitutional rights of Appellant are protected in decisions made by the Department.

R. at 154. The ALC further rejected DPPPS's claim that the *Barton* case cannot be applied retroactively to Rose. Specifically, the ALC held that Rose's claim was non-collateral, and that *Barton* protected existing constitutional and statutory rights rather than announcing a new rule. R. at 154.

STANDARD OF REVIEW

The Court will only reverse a decision of the ALC if the decision is: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-610(B); *Barton*, 404 S.C. at 401, 745 S.E.2d at 113.

ARGUMENT

I. THE ALC'S DETERMINATION THAT ROSE RECEIVED FOUR VOTES FOR PAROLE IN 2001 SHOULD BE AFFIRMED

A. The ALC's determination is supported by substantial evidence

When reviewing a decision of the ALC, the Court "may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Barton*, 404 S.C. at 401, 745 S.E.2d at 113 (citing S.C. Code Ann. § 1-23-610(B)). "In determining whether the ALC's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached." *Id.*; *Al-Shabazz v. State*, 338 S.C. 354, 380, 527 S.E.2d 742, 756 (2000); *ESA, Servs. v. S.C. Dep't of Revenue*, 392 S.C. 11, 24, 707 S.E.2d 431, 438 (Ct. App. 2011).

DPPPS makes the following arguments in support of reversing the ALC's determination that Rose received four votes at his 2001 hearing: (1) the ALC placed "great emphasis" on DPPPS's prior failure to dispute Rose's position that he received four votes; (2) Bell's sworn testimony is unreliable hearsay; (3) Rose did not make a "full faith effort" to provide evidence

that he received four votes; and (4) because the recording from the 2001 hearing does not contain a vote count and the parole board is "usually inclined" to deny after a parole revocation, it is "safe to assume" Rose did not get four votes. DPPPS Br. 4-8.

DPPPS's arguments are flawed for many reasons, but the most fundamental flaw is that all of these arguments fail to address the applicable standard of review. The ALC's determination that Rose received four votes should not be reversed if there is substantial evidence in the record that would allow "reasonable minds" to reach the ALC's conclusion that Rose received four votes.

DPPPS compiled the evidence we have in the record regarding Rose's 2001 vote total pursuant to an investigation ordered by the Circuit Court. Because of DPPPS's abject failure to make and keep even the most basic written records of parole hearings, there was admittedly not much evidence to compile.

The record contains sworn testimony from Carlos Bell who stated that Rose received four votes at the 2001 hearing. R. at 268. Bell's affidavit corroborated testimony Rose had offered in the previous legal actions he filed against DPPPS over the past 14 years. R. at 119 & 264. The record also reveals that Rose consistently asserted in his legal actions against DPPPS that he had received four votes, and DPPPS never disputed this factual assertion. R. at 271.

On the other hand, there is *no evidence in the record* that Rose received three, two, one, or zero votes in 2001. *Supra Stmt. of Facts* at 6-8. As the ALC correctly determined after reviewing the record, "there is not even a scintilla of evidence supporting the Department's decision." R. at 153.

On this record, it is abundantly clear that the ALC's determination that Rose received four votes is supported by substantial evidence. On this record, it is abundantly clear that a reasonable mind could reach the conclusion the ALC reached on Rose's vote count. Because DPPPS's arguments do not apply the substantial evidence rule, much less establish that the ALC's determination is not supported by substantial evidence, these arguments should be rejected, and the Court should affirm the ALC's factual determination that Rose received four votes for parole at his 2001 hearing.

B. DPPPS's arguments fail for additional reasons

1. The ALC's consideration of DPPPS's failure to contest Rose's position on the 2001 vote count was appropriate

DPPPS claims that the ALC's determination that Rose received four votes should be reversed because the ALC placed "great emphasis" on DPPPS's failure in previous litigation to dispute Rose's position that he received four votes in 2001. DPPPS Br. at 4-5. DPPPS does not fairly characterize the ALC's consideration of this evidence. As described above, the primary basis for the ALC's decision was the utter lack of any evidence in the record supporting DPPPS's decision. In addition, the ALC noted DPPPS's prior failure to challenge Rose's position that he had received four votes. Contrary to DPPPS's characterization, the ALC acknowledged that DPPPS's failure to challenge Rose's position is "not direct proof of the veracity of Rose's position," and appropriately found that the failure to challenge Rose's position "creates an inference that those facts were accurate." R. at 152.

DPPPS argues that it never expressly conceded that Rose received four votes; however, DPPPS does not - and cannot - dispute that DPPPS never contested Rose's assertion that he received four votes during the previous litigation. R. at 271 (DPPPS asserting that Rose needed

five, not four, votes to obtain parole in 2001, but not challenging Rose's assertion that he received four votes). The Court should reject DPPPS's argument that the ALC's decision should be overturned merely because it appropriately considered DPPPS's failure to contradict Rose's position that he had received four votes over the course of 15 years.

2. The ALC's consideration of the Bell affidavit was appropriate

DPPPS claims that Bell's sworn testimony is unreliable hearsay. DPPPS Br. at 5. A statement made by a party opponent is "not hearsay." S.C. R. Evid. 801(d)(2). Rose testified in Circuit Court and Bell testified in an affidavit that after the 2001 parole hearing a female DPPPS employee told Rose, Bell, and Rose's counsel that four members of the Parole Board voted in favor of parole and two voted against parole. *Supra* Stmt. of Facts at 2. As the DPPPS employee's statement is an admission by a party opponent, it is not hearsay. Even if this testimony were hearsay, which is denied, this evidence was still properly considered by the ALC because this evidence is in the record, and it was considered during DPPPS's investigation and decision making regarding Rose's vote count.

In a related argument, DPPPS offers that after the 2001 hearing Rose's counsel *may have* misrepresented the vote count to Rose and the others present "only to assure payment." DPPPS Br. at 5. Simply put, speculation unsupported by the record is not a basis for reversing the ALC.

3. DPPPS's claim that Rose did not work hard enough to provide DPPPS evidence of the vote count is absurd

DPPPS's claim that Rose did not "give a full faith effort" to gather evidence on the issue of the vote count is particularly galling as Rose has been litigating this issue with DPPPS, often *pro se*, for most of the last 15 years, and DPPPS's failure to make, much less to preserve, even the most rudimentary records of the vote counts at parole hearings violated the

parole statute, S.C. Code Ann. § 24-21-40 ("The Board shall keep a complete record⁴ of all its proceedings and hold it subject to the order of the Governor or the General Assembly."); *see also* S.C. Code Ann. § 24-21-220 (including "maintaining the board's official records, and performing other administrative duties relating to the board's activities" as a duty of the Director of DPPPS).

Moreover, over the years DPPPS has been repeatedly advised by the Attorney General that its failure to keep written records of parole hearings violates the Freedom of Information Act ("FOIA"). *In the matter of the Honorable Glenn F. McConnell*, 2001 W.L. 790250, *4 (Op. Att'y Gen. 2001) ("In short, [FOIA] requires the votes of individual members of the Parole Board to be public information."); *In the matter of Frank B. Sanders*, 1985 W.L. 259229, *1-2 (Op. Att'y Gen. 1985) (holding that a Parole Board is a public body and that "[a]ll public bodies shall keep written minutes of all their public meetings" including "a record . . . of any votes taken"); *In the matter of John E. James, III*, 2012 WL 5266016, *1 (Op. Att'y Gen. 2012) (noting that FOIA should be narrowly construed to ensure public access, including a record of individual votes by the members of a public body). DPPPS's attempt to place the burden of its unlawful failure to keep records on Rose should be rejected, and the ALC's decision upheld.

4. Assuming that Rose did not receive four votes is not appropriate

DPPPS claims that it is "safe to assume" Rose did not receive four votes because the vote count was not announced on the recording of the hearing and because the Parole Board is "usually inclined to deny parole upon a recent revocation." DPPPS Br. at 6-8. This claim

⁴ DPPPS acknowledged that a complete record of a parole hearing would include, among other things, a tally of the votes cast and identification of the members who voted for and against the request for parole. Supp. R. at 3, LL. 10-17] (the record should contain "[j]ust essentially the board member and what he or she voted").

should be rejected because illogical and unjustified "assumptions" are not appropriate grounds for reversal of the ALC's factual finding that Rose received four votes.

C. Alternative sustaining grounds support the ALC's decision

1. DPPPS's decision was arbitrary, capricious, and an abuse of discretion

An arbitrary and capricious agency decision "is without rational basis, is based only on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or principles." *Trimnier v. S.C. Dep't of Labor, Licensing & Regulation*, 405 S.C. 239, 246, 746 S.E.2d 491, 495 (Ct. App. 2013)(quoting *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985)). An agency decision is an abuse of discretion when the decision is based upon a factual conclusion that is without evidentiary support. *Trident Med. Ctr. v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 341, 348, 772 S.E.2d 177, 181 (Ct. App. 2015).

It is undisputed that Director Patton had no records, affidavits, or other evidence that supported the notion that Rose received three, two, one, or zero votes at the 2001 hearing. It is also undisputed that Director Patton had evidence that Rose received four votes. Simply put, when DPPPS reached the conclusion that Rose did not receive four votes when the only evidence in the record established otherwise, DPPPS abused its discretion.

DPPPS based its decision that Rose did not receive enough votes in 2001, in part, upon Rose's failure to present DPPPS with records showing the 2001 vote tally. R. at 267 ("Without any other evidence of the vote count from your June 20, 2001, hearing, the Department, cannot release you to parole."). It should go without saying that it is arbitrary, capricious - not to mention inequitable - to penalize Rose for not having written records showing the 2001

vote tally when it was DPPPS that failed to make and keep these records in contravention of the parole statute and FOIA.

The only evidence DPPPS claimed in support of its decision was an entry on a DPPPS hearing ledger noting that Rose's 2001 request for parole was rejected. As DPPPS now correctly acknowledges, this entry provides no probative evidence regarding the number of votes received, and DPPPS relying upon this entry for the February 13th decision is, therefore, arbitrary and capricious.

DPPPS's decision that Rose did not receive four votes was both arbitrary and capricious and an abuse of discretion. For these additional reasons, the ALC's decision should be affirmed.

2. DPPPS's decision violated constitutional and statutory provisions

Rose should receive parole if a majority of the Parole Board members present at a hearing vote in favor of parole. S.C. Code Ann. § 55-613 (1962) (approval by a majority results in parole); *Barton*, 404 S.C. at 419, 745 S.E.2d at 123 (members not present and voting at the hearing are not counted when determining whether an inmate receives the required quantum of votes).

DPPPS's decision denied Rose parole when *the only evidence in the record* is that Rose received four of six votes, a majority, at the 2001 hearing. Denying Rose parole when he received a majority of votes in favor of parole violates section 55-613 of the parole statute.

An agency decision that arbitrarily denies a person life, liberty, or property violates the substantive due process clause. *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 300, 737 S.E.2d 601, 611 (2013). "It is axiomatic that any period of incarceration

implicates a sufficient liberty interest to trigger due process requirements.” *Steele v. Benjamin*, 362 S.C. 66, 72, 606 S.E.2d 499, 503 (Ct. App. 2004).

DPPPS’s decision that Rose did not receive enough votes at his 2001 parole hearing to be granted parole under *Barton* infringes upon Rose’s liberty interest. As this agency decision is arbitrary and capricious and is contrary to the evidence in the record this decision violates Rose’s substantive due process rights.

DPPPS’s decision that Rose did not receive four votes for parole violated both the parole statute and substantive due process. For these additional reasons, the ALC’s decision should be affirmed.

II. THE ALC HAD THE AUTHORITY TO REVERSE THE DPPPS DECISION AND GRANT ROSE RELIEF

DPPPS argues that the ALC’s decision should be reversed because the ALC “made itself the determining body regarding parole” thereby usurping the authority given the Parole Board by the General Assembly. DPPPS Br. at 8. DPPPS’s argument should be rejected as it mischaracterizes the ALC’s decision.

The ALC did not review Rose’s record while in prison and determine whether he should receive parole. That determination, most assuredly, is one for the Parole Board. S.C. Code Ann. § 24-21-640. The ALC also did not review and reverse a routine denial of parole by the Parole Board, as such a ruling would be contrary to the well-established law that parole is a privilege, not a right. *Cooper v. S.C. Dep’t of Prob., Parole and Pardon Servs.*, 377 S.C. 489, 496, 661 S.E.2d 106, 110 (2008).

What the ALC did was to review the DPPPS determination – made by Director Patton pursuant to DPPPS’s “Barton Hearing” policy – that Rose did not receive enough votes at his

2001 hearing to receive parole. The ALC reversed DPPPS's decision because it is not supported by *any evidence*, much less substantial evidence. R. at 154-155 ("Because the Department must provide at least some support for its factual findings, the Court concludes that the Department's decision must be reversed.").

Next the Court remanded Rose's matter to DPPPS and the Parole Board so that Rose can proceed to step two in the parole process where Rose would receive parole conditions, if any, and would receive an order of parole pursuant to DPPPS's Barton Hearing policy. R. at 153-155 & Rose Br. at 15. In short, the ALC ordered DPPPS to follow its own policy. The ALC's authority in this regard cannot seriously be questioned. S.C. Code Ann. § 1-23-380(5); *Barton v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013); *Jernigan v. State*, 340 S.C. 256, 531 S.E.2d 507 (2000).

As the ALC noted, the ALC did not grant or deny parole, but instead required the Parole Board to "carry out the result of a vote the Board already made." R. at 154. This is exactly what the Supreme Court did in the *Barton* case. *Barton*, 404 S.C. at 419, 745 S.E.2d at 123 ("Appellant received the requisite number of votes from the Parole Board, and thus, should be granted parole. Thus, we remand for proceedings consistent with this opinion."). Just as the Supreme Court did not usurp the Board's authority to "grant" parole in *Barton*, the ALC has not done so here.

III. THE ALC PROPERLY APPLIED BARTON TO THE CASE

DPPPS claims that Rose's appeal fails because the *Barton* case's "two-thirds rule" does not apply "retroactively" to Rose. DPPPS Br. at 9-10. Though it is far from clear, DPPPS appears to be using "two-thirds rule" to refer to the Supreme Court's holding in *Barton* correcting the way DPPPS calculated whether an inmate had achieved a two-thirds majority (or

a simple majority) vote for parole. The *Barton* case made clear that DPPPS violated the Parole Statute when it calculated these percentages without regard to the number of Parole Board members actually present and voting at the hearing. *Barton*, 404 S.C. at 414-19, 745 S.E.2d at 120-23.

The Supreme Court in *Barton* also held that DPPPS's retroactive application of the two-thirds majority vote requirement in section 24-21-645(A) violated *ex post facto*. *Id.* at 114-20 & 402-14. DPPPS does not contend that portion of the *Barton* holding does not apply to Rose. Pursuant to *Barton* then, S.C. Code Ann. § 55-613 (1962) and its simple majority vote requirement applies to Rose -- not section 24-21-645(A) and its two-thirds majority vote requirement. Therefore, even if the *Barton* case's "two-thirds rule" does not apply to Rose, which is denied, not applying this rule to Rose would be of no moment as Rose obtained four out of six votes, a majority vote.

The Supreme Court in *Barton* also held that DPPPS's retroactive application of the two-thirds majority vote requirement in section 24-21-645(A) violated *ex post facto*. *Id.* at 114-20 & 402-14. DPPPS does not contend that this portion of the *Barton* holding does not apply to Rose. Thus, pursuant to *Barton*, S.C. Code Ann. § 55-613 (1962) and its simple majority vote requirement applies to Rose -- not section 24-21-645(A) and its two-thirds majority vote requirement. Therefore, even if the *Barton* case's "two-thirds rule" does not apply to Rose, which is denied, not applying this rule to Rose would be of no moment as Rose also obtained a majority vote.

DPPPS argues that the Supreme Court's silence regarding retroactivity in *Barton* "implies" that the "two-thirds rule" should apply prospectively only. DPPPS Br. at 9. DPPPS's argument ignores the inconvenient fact that the Supreme Court in *Barton* applied its

holdings “retroactively” to Barton’s previous hearing resulting in her parole. *Barton*, 404 S.C. at 419, 745 S.E.2d at 123 (“Appellant received the requisite number of votes from the Parole Board, and thus, should be granted parole. Thus, we remand for proceedings consistent with this opinion.”). DPPPS’s argument regarding the retroactive application of the “two-thirds rule” should be rejected, as it is contrary to the Supreme Court’s ruling in *Barton*.

DPPPS’s reliance on *Talley v. State*, 640 S.E.2d 878, 371 S.C. 535 (2007) is misplaced. The *Talley* case addresses the standards to determine whether a new rule of federal constitutional law should apply retroactively. As the ALC correctly noted, the *Barton* case did not announce a new rule of Constitutional law. R. at 154. Rather, it “found that the actions of the Board violated Barton’s existing Constitutional rights and her ‘substantial personal right to statutorily correct parole review.’” *Id.* (quoting *Barton*, 404 S.C. at 413-14, 745 S.E.2d at 119-20).

Finally, DPPPS argues that *Barton* should be applied “prospectively only” because allowing inmates to apply *Barton* to their previous parole hearings would “invite countless fraudulent claims for parole.” DPPPS Br. at 11. This argument is meritless. First, fraudulent vote count claims can easily be addressed by DPPPS decision making that is supported by thorough fact-gathering and investigation. Second, DPPPS’s speculation that it may experience some fraudulent vote count claims is not a legitimate reason to deny inmates redress for DPPPS’s statutory and constitutional violations.

CONCLUSION

For the reasons set forth above, Rose respectfully requests that the Court: (1) affirm the ALC’s decision; (2) remand this matter back to DPPPS and the Parole Board with instructions to convene a Barton Hearing for Rose for the purpose of imposing appropriate conditions, if

any, to the parole granted Rose by the 2001 Parole Board and for the signing of an order of parole; and (3) afford any other relief that is just and proper.

Respectfully submitted,



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June 2, 2016

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 15-ALC-15-0033-AP
Appellate Case No. 2016-000225

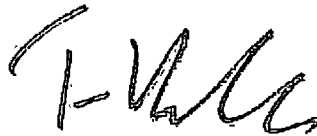
David Rose, #91858, ... Respondent,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certified that the Final Brief of Respondent David Rose complies with
Rule 211(b), SCACR.



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June 2, 2016

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM THE ADMINISTRATIVE LAW COURT

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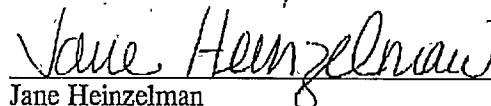
PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for David Rose, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by having them hand delivered to the following address(es):

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June 3, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge
Case No. 15-ALC-0033-AP

Appellate Case No. 2016-000225

DAVID ROSE, #91858, ...RESPONDENT

v.

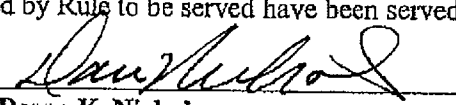
S.C. DEPARTMENT OF PROBATION, PAROLE
AND PARDON SERVICES, ...APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within
Final Reply Brief of Appellant dated May 27, 2016, on Respondent this 27th day of May, 2016,
by depositing a copy of the same in the United States mail, postage prepaid, addressed to his
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
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Appellate Case No. 2016-000225

DAVID ROSE, #91858 RESPONDENT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE
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STATEMENT OF ISSUES ON APPEAL

1. Can the ALC determine there was sufficient evidence revealing that Rose received four votes at his 2001 hearing; thereby allow him to be released on parole?
2. Can the ALC review the decision of the Appellant that there was insufficient evidence that he received four votes?

STATEMENT OF THE CASE

The Respondent is currently serving a sentence of incarceration for the remainder of his natural life for the offense of kidnapping. At the time the Respondent committed this offense South Carolina law allowed an individual serving a life sentence for kidnapping parole eligibility upon the service of ten years.

The Respondent was paroled in 1987, but after a lengthy period where he failed to report an arrest warrant was issued, and he was placed in absconder status. He was not discovered until 2000 residing in Florida. He was extradited to South Carolina to appear before the Parole Board. On June 14, 2000, the Parole Board decided to revoke parole. His first appearance after this revocation occurred on June 20, 2001, where the Board decided to deny the Respondent's parole. (R.p.260).

The Respondent filed a petition for post-conviction relief against his Public Defender Michael Turner and his parole hearing attorney Alvin Neal. (R.p.27-p.279). The Appellant Department of Probation, Parole and Pardon Services was never notified of this hearing to testify, or to present evidence for either side. The Attorney General defended the case, arguing that it should be brought before the Administrative Law Court, (ALC) due to the Circuit Court not having jurisdiction. On March 3, 2006, the Honorable Wyatt T. Saunders ordered this PCR dismissed without prejudice in order to be appealed to the ALC. (R.p.261-p.266). He also ordered that if the ALC decides not to hear the case the Respondent can refile before the Circuit Court. The case was presented by the Attorney General before the ALC. The Respondent again was never made aware of this appeal. There was never a request for information made to the Appellant nor was the Appellant requested to present evidence for either party. The Honorable John D. Geathers,

Administrative Law Court judge issued an order dismissing the appeal. It was his opinion that the ALC did not have jurisdiction over this cause of action. (R.p.281-p.282).

On February 26, 2014, the Respondent filed a summons and complaint against the Appellant in Circuit Court.(R.p.222-p.227). This was the first time the Appellant was ever made aware of this Respondent or his allegations. Upon receiving this complaint the Appellant filed a motion for summary judgment. The Appellant argued that since this case pertains to parole eligibility, jurisdiction was never given to the Circuit Court so pursuant to State v. Furtick this case should be heard by the ALC. The Appellant requested this case be dismissed so the Respondent can file an appeal in the proper forum. A hearing was conducted before the Honorable Frank R. Addy who ordered that the Appellant conduct an investigation to determine if the Respondent had received four votes at the conclusion of his 2001 hearing. (R.p.245-p.246).

The Respondent was made well aware of this investigation; however, the only evidence submitted to the Board was an affidavit signed by his cousin Mr. Carlos Bell. (R.p.268-269). Within this affidavit Mr. Bell stated that the Respondent's lawyer spoke to an unidentified Department employee in the common area who informed him that the Respondent received four votes. His lawyer then informed Mr. Bell and the Respondent of this vote count. There was nothing else submitted, and there was nothing within the Department's records revealing the Respondent received four affirmative votes. Since the Department cannot only rely on the word of the inmate and one family member without more corroborating evidence, the Department determined that insufficient evidence was provided proving he received the adequate amount of votes to be granted parole. (R.p.267). Upon being notified of this denial the Respondent filed a notice of appeal before the Administrative Law Court.

Administrative Law Court Judge Deborah Brooks Durden reversed the decision of the Appellant. (R.p.150-p.155). She decided that the Appellant failed to produce a scintilla of evidence proving that the Respondent failed to receive four votes.

The Appellant now responds to the argument of the Respondent that the ALC had the ability to reverse a decision of the Department based on the weight on a question of fact; that the ALC had the authority to reverse the decision of the Department regarding the denial of parole, thereby granting the Respondent parole. The Appellant alleges that the argument of the Respondent has no merit. The ALC erred in making a determination that reversed the burden of proof from the proper party and placed it on the Appellant. The ALC also erred in reversing a decision of the Department basing it on her interpretation of the weight of evidence based on a question of fact. The Appellant's response to the Respondent's initial brief follows.

ARGUMENTS

1. The ALC determination is not supported by substantial evidence.

The Respondent argued that the determination made by the ALC is supported by substantial evidence. The Appellant argues that the ALC must presume any decision made by the Department correct and any reversal must be supported by substantial evidence. The findings of an administrative agency are presumed correct and will be set aside only if supported by substantial evidence. Summersell v. South Carolina Department of Public Safety, 334 S.C. 357, 363, 513 S.E.2d 619, 622 (1999). The Appellant argues that there does not exist substantial evidence to allow reasonable minds to come to the ALC's conclusion that the Respondent received four affirmative votes. The ALC erred in her determination, due to the fact she decided that substantial evidence was provided that would reveal it reasonable that the Respondent received four votes. Pursuant to South Carolina law it is the responsibility of the ALC to determine if substantial

evidence was provided to support the decision of the Administrative agency, not the opinion of the requesting party. 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, 134, 276 S.E.2d 304, 306 (1981). The ALC made the interpretation that not one scintilla of evidence was provided by the Appellant proving that the Respondent failed to receive four affirmative votes. It is not the duty of the Department to present evidence supporting their conclusion, all the Department must show is that their decision was reasonable due to the lack of evidence produced by the Respondent, and that a reasonable mind would have made the identical conclusion.

Pursuant to the South Carolina Supreme Court decision of Cooper v. S.C. Dept. of Probation, Parole and Pardon Services, the South Carolina Supreme Court determined that if a Parole Board fails to consider and apply the statutorily-created parole criteria, it has the effect of rendering an inmate parole ineligible, which under Furtick warrants review by the ALC.¹ Cooper v. S.C. Dept. of Probation, Parole, and Pardon Services, 377 S.C. 489, 501, 661 S.E.2d 106, 113 (2008). In Cooper, the Supreme Court gave the responsibility of the ALC to make the determination that the Board followed procedures prior to a decision. The ability of the ALC does not go beyond a determination if the procedures were followed. After Barton a procedure was established by the Parole Board. This procedure is three fold, first, the office of Board Support Services would investigate to verify that the offender did receive the proper number of votes; second, the Department's Office of Legal Services will verify if it qualifies under Barton; and,

¹ Administrative Law Judge Division had jurisdiction to hear defendant's appeal from the Department of Probation, Parole and Pardon Services decision that as a violent offender, defendant was not parole eligible; defendant had a liberty interest in gaining access to the parole board. Furtick v. S.C. Dept. of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2003).

third, during a full board day the Board will hold a Barton hearing for the offender. There was never any argument raised by the Respondent that the Appellant failed to follow procedures. The Respondent accepts there was an investigation made by the Office of Board Support, they just dispute the findings. This makes this case decision not reviewable by the ALC.

The Respondent argues that there was substantial evidence revealing he received four votes in the affirmative. The Appellant disagrees, and this is not what the ALC must determine. The ALC should determine if substantial evidence exists revealing if the decision of the Department was reasonable. The Appellant submits that the decision of the Department was reasonable due to the lack of unbiased evidence presented by the Respondent.

In order to examine the determination of the ALC and to refute the argument of the Respondent the Appellant would ask this Court to fully examine the only evidence submitted by the Respondent supporting his allegations. The only evidence presented was the affidavit of Mr. Carlos Bell, cousin of the Respondent, (R.p.268-269). Within this affidavit Mr. Bell explained that he attended the 2001 hearing of the Respondent. Also present was the Respondent's attorney Mr. Alvin Neal, and the Respondent's sister Ms. Kathy Todd. They all spoke on the Respondent's behalf to the Board.² Mr. Bell alleges while awaiting the outcome a woman came out to the common area "believe[s] she was the secretary or recorder" but Mr. Bell was not even certain if she was employed by the agency. She expressed to all of them that "she was sorry but parole was denied." They then asked Mr. Neal what the vote was, he asked the woman then he turned back to them repeating what she said that the count was four yes and two no votes.

There were no other affidavits submitted, not one from Mr. Neal, nor Ms. Todd verifying this story. There was never a name nor description given of this woman who may or may not have

² Only six members were present not the usual seven.

been an employee of the Department. The ALC places the onus on the Department to present evidence supporting its decision; however, it is not the duty of the Department to prove he failed to receive parole, it is the duty of the inmate to prove he has received parole. In administrative proceedings the general rule is that an appellant for relief or a privilege has the burden of proof and the burden of proof rests upon who files a claim with an administrative agency to establish that required conditions of eligibility have been met. Leventis v. South Carolina Department of Health and Environmental Control, 340 S.C. 118, 133, 530 S.E.2d 651 (2000). The burden of proof is on the party challenging an order of the commission to show that it is unsupported by substantial evidence and that the decision is clearly erroneous in view of the substantial evidence on the whole record. Patton v. South Carolina Public Service Com'n, 280 S.C. 288, 291, 312 S.E.2d 257, 259. The Appellant presents to this Court that the ALC erred in their decision reversing the burden to the Department regarding their decision to go no further in the Barton process.

In reviewing the entire record there is, however, plenty of evidence that supports the Appellant's conclusion. First, the only evidence presented was an affidavit from the Respondent's cousin. There were three other people present yet none offered any evidence to verify this statement. Second, it was testified by Roosevelt Hicks, Program Coordinator for the Office of Board Support Services a twenty-seven year veteran of the Department, that he listened to all of the subsequent hearings of the Respondent, and he failed to receive one affirmative vote. Mr. Hicks deposition (R.p. 69 lines 11-16). The Department validly took that into consideration. How can an individual get four votes one year, and none all the remaining years without any change in circumstances? The Department also considered that the department employee was never named or described to the Department, so there was no evidence presented that this was an employee, or

that this statement was ever made. Mr. Hicks testified that it is unusual that any employee would know the final vote counts. His deposition specifically states,

Q: In the affidavit Mr. Bell stated that Mr. Neal, his attorney, informed him that someone told Mr. Neal that he received four votes. Are you aware of that being possible for that to happen at a hearing?

A: No

Q: Why not?

A: Because doing the sites, the employee who's working on that has a list of inmates, that he doesn't have time to do that because he got to coordinate the next inmate into the room.

Q: Okay. All right.

A: And at that time the board would not have even told -- on the site they would not have told them the vote count because we didn't keep vote count. They would have said so and so rejected, one, two, and three.

Mr. Hicks deposition (R.p.59 lines 8-23).

There was also the matter of any person at the parole hearing even seeing the final vote count to be aware what vote was even if it was not recorded by the Board Chairman. Mr. Hicks also testified at his deposition:

A: Right, Even if the tape was found it wouldn't say -- it wouldn't say the vote count because they didn't keep the vote count. It would probably say "David Rose rejected 1, 2, and 3."

Q: And that would be the chairman that say that?

A: That would be the chairman.

Q: Okay. In your experience have you ever seen a person tell anyone what the final count was at a hearing? Like a lawyer or a friend, anybody like that?

A: No

Q: Okay.

A: Because they're sitting at -- they're sitting at the other end. They wouldn't see the vote count. They wouldn't see the lights because the lights is only seen by the Chair.

Q: At the time, the lights were only seen by the Chair?

A: Yes.

Q: So—

A: At that time they only -- at that time the board only used lights.

Mr. Hicks deposition (R.p. 58 lines 2-23).

So the Department had knowledge that at the time there could not have been a person who told them the final vote count, because it was not recorded and no one told anyone. The final count was seen only by the Board Chairman and the Chairman would announce that this person was rejected. So according to the Department the statement of Mr. Bell is not possible and not believable. Furthermore, it is reasonable that a person would come up with a false story in order to release a family member from incarceration.

The Respondent argues that it was the fault of the Appellant for not preserving evidence so that he could not prove he received the four votes. The preservation of records for sixteen years, with the limited space and funding of the Department is not feasible. The Respondent apparently expects the Department maintain all of the records of every hearing for 16 years. There is an average of three thousand five hundred and ninety-eight (3,598) hearings held each year. So in a sixteen-year period there could be as many as fifty-seven thousand (57,000) hearings held. The Appellant just does not have the space or funding to keep records for each hearing for that amount of time. If the Appellant was ever notified that there was litigation regarding the count, it would have preserved these records, however, the Appellant was not notified until 2014, some 13 years after the hearing. By this time the records and recording were destroyed. The Appellant never destroyed records to conceal evidence, as Respondent implies. These recordings were destroyed

due to the numerous hearings and denials heard since the 2001 hearing. At the time this hearing was held the Board had the final decision; there existed no right to appeal. If the Appellant was ever notified there was litigation between the Respondent and the Attorney General's office, and a request for the preservation of these records was made the records would never been destroyed; however, no request was ever made.

Other inmates have been able to present sufficient substantial evidence to prove their vote count. As stated in the deposition of Mr. Larry J. Patton, Thalma Barton, Gene Richardson, James Plyer, Francis Campbell, Charles Sink, Robert Miller, and Shariah Muhammad have been released on parole pursuant to the Supreme Court decision of Barton v. S.C. Dept. of Probation, Parole and Pardon Services. Mr. Patton's disposition p. 60 lines 22-24. This is due to sufficient substantial evidence presented to the Appellant proving they received the required majority votes from the Board to be granted parole. The denial of the Respondent was not arbitrary nor capricious but due to his failure to provide sufficient substantial evidence revealing he received the required number of votes. The Court cannot expect the Department to release someone on parole just because he and his cousin said so. There must be more corroborative, independent, unbiased evidence revealing he received a majority of affirmative votes during this particular parole hearing. Other individuals had records removed due to the length of time between the request and the actual hearing; however, they decided to conduct a more thorough investigation in order to provide the Department with sufficient evidence to convince them that the required amount of votes were made to award the inmate parole. If Respondent could have provided similar information, including statements from his lawyer and sister that this Department employee made these statements, the Department's decision may have been different. A name or a description of this employee so she could have been found by the Department and interviewed, or board members who actually voted

during his hearing that could have remembered this particular hearing and could have informed the Department he did in fact receive the four affirmative votes. None of this was supplied by the Respondent. He just relied on his word and the word of his cousin. It should have been reasonable to the ALC that the Department made the proper decision. The Department cannot be expected to release someone from incarceration, especially a person being incarcerated for a violent offense such as kidnapping, based on only his word and the word of a relative.

The ALC placed a lot of weight on the fact the Respondent initially raised the fact he received four votes at his post-conviction relief hearing. She made her final decision based on the fact this was never challenged by the Appellant. The Appellant was unaware of this post-conviction relief application. This application had absolutely nothing to do with the Parole Board or the Department of Probation, Parole and Pardon Services. The Respondent only challenged the effectiveness of his attorneys. The matter of the vote count was irrelevant for post-conviction relief because the Respondent's attorneys had no involvement of the vote count of the Board. The fact the Respondent made this argument is not relevant.

There are many individuals currently incarcerated who maintain their innocence through their entire sentence. There exists a process to be able to receive a new trial based on after-discovered evidence. If a Circuit Court judge is not convinced that the inmate has provided sufficient evidence to achieve a positive result, the Court has the duty to deny. That decision is not subject to reversal due to the weight of the evidence based on a question of fact. Where in an action at law, the exceptions to an order granting a new trial for after-discovered evidence do not claim that there was an erroneous exercise of discretion or an abuse of discretion, the Supreme Court will not reverse unless there is a clear showing of abuse of discretion, or unless the discretion was based on an error of law, and not where there is a conflict of evidence and a question of fact. White

v. Charleston & W.C. Ry. Co., 121 S.C. 215, 114 S.E.2d 324 (1922). This also applies to the ALC. There *must* be a showing that the decision made by the Department was an abuse of discretion. This has not been shown since it was revealed on the record that there exists a Parole Board policy when allegations are raised by an inmate. This policy was followed and other inmates have been released under this policy. The Department has shown that if sufficient substantial evidence has been presented that inmate would be released; however, the evidence revealed by the Respondent was minimal at best, and it is not the duty of the Department to object to any allegations raised by the Respondent, or to prove he failed to receive to acquired votes. It is the duty of the person seeking relief to prove with the presentation of substantial evidence that he received a majority of votes. He has failed to meet this burden; therefore, the decision of the Department was legal and not subject to reversal by the ALC.

2. The Respondent has not revealed that the decision of the Appellant was arbitrary and capricious; therefore, the ALC decision was in error.

The Respondent argues that the Department abused its discretion and the decision to deny him parole was arbitrary and capricious, thereby, allowing the ALC to reverse the decision of the Board and allow him to be released on parole. The South Carolina Code of Laws specifically state:

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)(a-f)(Supp. 2015)

Within his brief the Respondent cites the case of Trimmier v. S.C. Dept. of Labor Licensing & Regulations which defines arbitrary and capricious. In Trimmier, the Supreme Court decided that an arbitrary and capricious decision is one without rational basis, is based only on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles. Trimmier v. S.C. Dept. of Labor Licensing & Regulations, 405 S.C. 239, 246, 746 S.E.2d 491, 495 (Ct. App. 2013). The Respondent comes to the conclusion that since the Department had no records that supported the notion that he did not receive the four votes; the decision was arbitrary. However, it is not the duty of the Department to prove he failed to receive the four votes -- it is the duty of the Respondent to prove he did receive these votes. Through his brief the Respondent continues to frame his argument as if it is a fact he received these votes, but has failed to produce any sufficient, unbiased, objective, concrete evidence to prove this fact. It was only his and his cousin's word that he received four votes. Although other persons were supposedly present, these individuals never testified or revealed any statements that supported his and his cousin's claims.

This decision was not based on the will of the Department, or made at pleasure of the Department, nor made without determining principles. It is rational for the Board not to release someone convicted of kidnapping to society just because he says so. Part of the mission statement of the Department is to protect the public trust and safety. That cannot be accomplished if the Department just releases an inmate because of what he says without any objective proof. There is also a fixed policy; there was never any allegation raised by the Respondent nor found by the ALC that this policy was not followed.

The Appellant also argues that the only evidence provided to the Department was full of hearsay testimony and should not be considered. Within his brief the Respondent argues that the statement is made by a party opponent so it cannot be considered hearsay. There was never any evidence provided to the Department nor the ALC that this statement was actually made, or that it was made by an employee of the Department. Within his affidavit Mr. Bell just stated that "a women [sic] came to the common area, (I believe she was the secretary or recorder for the Parole Board.)" There was never a name nor a description of this person; Mr. Bell was not even sure what she did. And within the disposition of a known department employee Mr. Roosevelt Hicks, this was not possible due to employees not being present at the location of the Board and not informed of the final vote. The Respondent only asked Mr. Hicks if he has any idea who was in the room on 2001, no further questions were asked regarding who this Department employee could possibly be.

In the rules of evidence hearsay is defined as a statement other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted. Rule 801(c) SCRE. The Respondent argues that this is a statement made by a party opponent so it falls under a statement which is not hearsay. However, there has not been any corroborating evidence made that reveals that this statement was ever made, or the person who made it worked for the Department. There was never a signed statement, affidavit, or deposition made by this "Department employee." The Respondent only expects the Department, and this Court, to believe his word. This should not be good enough without any evidence to prove this statement was made and made by a Department employee. The statement must be considered hearsay evidence and not admissible.

The Respondent admits the only evidence in the record is the statement from his cousin that this employee stated that there was four votes given. The ALC admits that during a hearing in this matter they sit in an appellate capacity. Furtick v. S.C. Dept. of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2003). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record. Williams v. David Strafford Drywall, 402 S.C. 173, 739 S.E.2d 892 (Ct. App. 2013). The ALC relies in error on a post-conviction relief hearing that was not between the Appellant and the Respondent but between the Respondent and the Attorney General's office. The Appellant was never a party to this proceeding, and never had any knowledge of these proceedings. To rely on this as proof that the Respondent received four votes is clearly an error of law made by the ALC. This is due to the fact this proceeding had nothing to do with the vote count. To place responsibility upon the Appellant to not take a position regarding the vote count when the Appellant was not a party, and never aware of the hearing is clearly an error of law.

The ALC also clearly erred in reversing the burden from the Respondent to the Appellant. The ALC stated that the Department offered nothing contradictory to the evidence presented by the Respondent. It is not the duty of the Department to prove he was not granted parole. The ALC makes the presumption that he was given the four votes totally ignoring the reasoning why the Appellant made its decision. 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. South Carolina Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995), *quoting*, Palmetto Alliance, Inc. v. South Carolina Public Services Com'n, 282 S.C. 430, 319 S.E.2d 695 (1984). The lack of objective, unbiased evidence provided by the Respondent is a very

viable reason for the denial of parole. It is not unreasonable to believe that the Respondent's cousin told a fabrication in order for the Respondent to be released from incarceration. That is why there is a procedure created by the Department, and it is up to the Department, not the courts, to make a determination as to whether sufficient evidence has been presented proving the vote count was established for the Respondent. If there was a failure to prove this by substantial evidence the Department is well within its rights to deny the Barton hearing, and this factual determination cannot be overruled by the courts.

The ALC has also ruled that they are not making a decision as to the parole determination but has ordered the Department carry out the previous order of the Parole Board. The Appellant argues that this determination goes beyond the authority of the ALC. This is due to the fact the Department has already decided that insufficient evidence has been presented. That determination cannot be reversed by the Court unless it was shown to be made arbitrarily and capriciously, or violated the Constitutional rights of the Respondent. The ALC determined that the Department failed to apply the law that is not true. The Department applied the procedures found in the Parole Board's procedure manual. Upon the conclusion of this procedure the lone decision to grant parole still remains with the Board, after an investigation of the facts by the Department. In order to grant the Respondent parole the evidence has to reliably show he received sufficient votes for parole at his 2001 hearing. The Appellant argues that it is not reasonable to just accept the word of the Respondent in making this determination. If that is the case any person currently incarcerated who has received a parole hearing prior to 2001 can simply say they received four votes and be automatically released on parole. That determination is not logical. The Parole Board did not award everyone parole during this period; there were obviously individuals who were denied parole, and unless the inmate can prove with substantial evidence he was awarded four or more votes the

Department has the right and the duty to deny him release on parole — a decision that is not subject to reversal by the ALC.

It is the position of the Appellant that substantial evidence was not presented to the Department showing the Board voted in favor of parole, and this decision is not subject to reversal. The substantial evidence test must not be only applied by the ALC but by the administrative agency. Substantial evidence is not a mere scintilla; rather it is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion of the agency. Lark, at 276 S.C. 135-36, 276 S.E.2d 306-07. In looking at the complete record it must be reasonable to conclude that the Respondent failed to receive the four votes he proclaims he received. There is only one bit of evidence submitted — the hearsay testimony of his cousin. Although other witnesses were present, no other testimony was ever submitted. No board member who heard the case was ever contacted to submit their recollection of the hearing. There was supposedly an unknown employee of the department who informed the Respondent of his vote count; however, this employee's name or description was never given. There was also testimony given by a twenty-seven year employee of the agency who testified agency employees did not disclose the vote counts at the time. The Respondent also never received a single affirmative vote since this 2001 hearing. If he received four votes as he claims, there should have been votes in his favor at subsequent hearings since there was no change in circumstances. That presents more substantial evidence that this vote never occurred than it has. However, the ALC erred in reversing and placing the burden of proof on the Department instead of placing the burden on the party that initiated the proceedings, which the burden falls upon pursuant to South Carolina case law.

Lastly, the present case is almost identical to the South Carolina Court of Appeals case of Green v. S.C. Dept. of Probation, Parole and Pardon Services, 2015 WL 2169555. In Green, the

Appellant Kenneth Green, like the Respondent in this case, submitted that he received four affirmative votes. The only proof submitted were two affidavits signed by his brother and father. Within these affidavits appellant Green also argued that they were told by a parole examiner that he received four votes. As in the present case the Department determined that there existed insufficient evidence to prove he received the required votes to be awarded parole.

At the conclusion of this case the Honorable Carolyn C. Matthews Administrative Law Court Judge decided to affirm the decision of the Parole Board. Appellant Green appealed this decision, which the Court of Appeals affirmed, deciding without oral argument that pursuant to Leventis the burden of proof lies upon the person who files the claim. The Court of Appeals decided to affirm the decision of the ALC who decided that insufficient evidence was presented to reverse the decision of the Parole Board.³

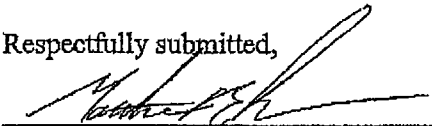
The Appellant argues that insufficient evidence was presented by the Respondent so the denial of parole was lawful. The ALC was in error in switching the burden to the Department regarding this case. Since there was insufficient substantial evidence presented by the Respondent that he has received four votes the denial of parole was rightfully made. For the ALC to reverse this decision it resulted in her injecting her opinion over a question of fact. The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380 (Supp. 2015). The final decision of the ALC was an error in law and should be subject to reversal.

CONCLUSION

³ The Appellant Kenneth Green has since filed for another Barton decision this time offering affidavits of actual board members who have voted in his hearing. The current Board decided to deny his release on parole. This decision was reversed by the ALC, it is currently being appealed by the Department.

For all of the foregoing reasons, the State respectfully requests that the decision of the ALC be reversed, and the decision of the Board denying parole be reinstated.

Respectfully submitted,



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Attorney for the Appellant

Columbia, South Carolina
May 27, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge
Case No. 15-ALC-0033-AP

Appellate Case No. 2016-000225

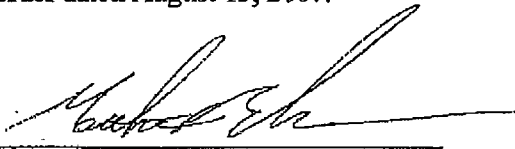
DAVID ROSE, #91858,.....RESPONDENT

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR
and with the South Carolina Supreme Court's order dated August 13, 2007.



Matthew C. Buchanan
General Counsel

May 27, 2016

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

David Rose, #91858, Respondent,

v.

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

Appellate Case No. 2016-000225

Appeal From The Administrative Law Court
Deborah Brooks Durden, Administrative Law Judge

Unpublished Opinion No. 2018-UP-087
Heard October 3, 2017 – Filed February 21, 2018

REVERSED

Matthew C. Buchanan and Tommy Evans, Jr., both of the
South Carolina Department of Probation, Parole and
Pardon Services, of Columbia, for Appellant.

Travis Dayhuff and Meredith Weinberg Sella, both of
Nelson Mullins Riley & Scarborough, LLP, of Columbia,
for Respondent.

PER CURIAM: The South Carolina Department of Probation, Parole and Pardon
Services (the Department) appeals the administrative law court's (ALC's) order

reversing the Department's denial of parole to David Rose, arguing the ALC (1) erred in finding Rose received sufficient votes in favor of granting parole, (2) lacked authority to reverse a decision by the parole board, and (3) erred by retroactively applying the supreme court's holding in *Barton v. South Carolina Department of Probation, Parole & Pardon Services*, 404 S.C. 395, 745 S.E.2d 110 (2013).¹ We reverse.

Rose pled guilty to kidnapping in 1978 and the circuit court sentenced him to life in prison.² After Rose had served just under ten years of his life sentence, the parole board granted him parole in 1987. Thereafter, Rose remained in South Carolina for one year before moving to Florida. Initially, Rose regularly reported to his Florida parole officer; however, he eventually stopped reporting. In 1991, Rose was placed on absconded status. On June 14, 2000, Rose was extradited to South Carolina and his parole was revoked.

On June 20, 2001, Rose again appeared before the parole board. In addition to his attorney, his sister, and his cousin, Carlos Bell, six board members were present at the hearing. After the hearing, the board denied Rose's parole. According to Rose and Bell, an unidentified person (whom they allege to have been a parole examiner) exited the hearing room to report the parole board's decision and informed them that Rose received four votes in favor of parole. The Department subsequently mailed Rose notice of his rejection, stating that due to the nature and seriousness of the offense and his failure to successfully complete a community supervision program, the parole board denied his application for parole.

On February 13, 2015, the Department notified Rose it had conducted an investigation pursuant to *Barton* regarding whether Rose had received enough

¹ In *Barton*, our supreme court found "retroactive application of section 24-21-645 constitutes an *ex post facto* violation, and inmates convicted of a violent crime must only convince two-thirds of the Parole Board members participating in their hearing" that they are entitled to parole. Thus, *Barton* should have been granted parole since four of the six board members participating in his hearing voted in favor of parole. 404 S.C. at 419, 745 S.E.2d at 123.

² Section 16-1-60 of the South Carolina Code (Supp. 2017) provides that, "for purposes of definition under South Carolina law, a violent crime" includes "kidnapping."

votes at his 2001 parole hearing to make him eligible for release.³ The Department stated it could not locate any records from the hearing, as they had been destroyed, and that it could not release Rose without evidence of the vote count, despite Bell's affidavit attesting that Rose received four votes.⁴

Subsequently, Rose appealed the Department's determination to the ALC. By order dated February 1, 2016, the ALC found the Department's determination that Rose lacked the necessary votes to be eligible for release was unsupported by substantial evidence. Because Rose offered Bell's affidavit in support of his contention that he received four votes at the 2001 hearing and because the ALC believed the Department failed to offer any contradictory evidence, the ALC found Rose received the necessary four votes in favor of parole and reversed the Department's decision.

The Bell affidavit, executed on October 25, 2014, attested that Rose received four votes in favor of parole at the 2001 hearing. According to Bell, only six board members were present during the hearing.⁵ Bell claimed a woman exited the hearing room and reported to Rose's attorney (who offered no affidavit or testimony) that Rose received four votes in favor of parole. Bell stated Rose's attorney informed Bell he would investigate whether the purported four votes were sufficient to grant Rose parole.

However, the Department presented evidence that called into question the credibility of Bell's affidavit. The evidence from the Department indicates it would have been highly unlikely for a parole examiner to know the vote count and be able to report it to an inmate's family member, such as Bell. Further, a long-time Department employee averred it also would have been highly unlikely for the parole board to release someone to parole just one year after parole had been

³ The Department does not have any records for parole hearings prior to 2001; however, Rose obtained a copy of the recording of his parole hearing shortly after the hearing. Rose's attorneys in the current action had the recording transcribed. The transcript did not reflect a vote count but reported someone (most likely the chairman) stating, "David Lee Rose, rejected 1 and 5."

⁴ The hearing occurred fourteen years prior to the investigation.

⁵ Section 24-21-10(B) of the South Carolina Code (Supp. 2017) explains that the board "is composed of seven members."

revoked. Additionally, Rose has failed to receive even one vote in favor of parole in any hearings subsequent to his 2001 parole hearing.

We find the ALC's determination that Rose received four votes in favor of parole is not supported by substantial evidence because, based on the record as a whole, reasonable minds would not find Bell's affidavit to be adequate evidence that Rose received four votes. *See* S.C. Code Ann. § 1-23-610(B)(e) (Supp. 2017) ("The court of appeals . . . may reverse [an ALC] decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is . . . clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record . . ."); *S.C. Dep't of Mental Retardation v. Glenn*, 291 S.C. 279, 281, 353 S.E.2d 284, 286 (1987) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."); S.C. Code Ann. § 1-23-330 (2005) ("Except in proceedings before the Industrial Commission the rules of evidence as applied in civil cases in the court of common pleas shall be followed."); Rule 801(c), SCRE ("Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules . . .").

In determining that Rose did not receive four votes, the Department essentially found Bell's affidavit not credible, and a reviewing court presumes this to be a correct finding unless unsupported by substantial evidence. *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 594, 654 S.E.2d 284, 287 (Ct. App. 2007) ("The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence."). Thus, the ALC erred in substituting its own judgment for that of the Department as to Bell's credibility and in assigning such significant weight to Bell's hearsay-laden affidavit. *See* S.C. Code Ann. § 1-23-380 (Supp. 2017) ("The [ALC] may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.").

Accordingly, the ALC's order reversing the Department's denial of parole is

REVERSED.⁶

⁶ Due to our reversal on other grounds, we need not address Rose's remaining issues. *See Berberich v. Jack*, 392 S.C. 278, 294, 709 S.E.2d 607, 616 (2011) (declining to address appellant's remaining issues when the court reversed and remanded on other grounds).

WILLIAMS, THOMAS, and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 15-ALC-15-0033-AP
Appellate Case No. 2016-000225

David Rose, #91858, ... Respondent,

v.

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

RECEIVED

MAR 07 2018

PETITION FOR REHEARING

SC Court of Appeals

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Petitioner David Rose respectfully petitions the Court to grant a rehearing in *Rose v. S.C. Dep't of Probation, Parole and Pardon Servs.*, Unpublished Op. No. 2018-UP-087 (S.C. Ct. App. filed Feb. 21, 2018) and/or issue a new opinion affirming the Administrative Law Court ("ALC").

Rehearing and issuance of an opinion affirming the ALC are proper for two reasons. First, the Court's opinion misapprehends or overlooks the standard of review that applies to the Court's review of the ALC's order. Second, the Court's opinion misapprehends or overlooks that the relevant record in this case is the evidence considered by the Department of Probation, Parole and Pardon Services ("DPPPS") when it made the agency decision that Rose is not entitled to parole.

I. The Court's opinion misapprehends or overlooks the standard of review.

Pursuant to a Circuit Court order and in accordance with DPPPS policy, DPPPS conducted an investigation and then made a determination regarding whether Rose should receive parole under *Barton v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013). R. at 267. Director Patton conducted the investigation and made the ultimate agency determination that Rose did not receive four votes at his 2001 hearing, and he was, therefore, not entitled to parole under *Barton*. R. at 254, no. 1.

Rose filed a case with the ALC to challenge this DPPPS decision, and the ALC afforded Rose the opportunity to conduct discovery to determine the factual basis for the agency's decision. Discovery revealed that before making this decision, DPPPS considered only two pieces of evidence: (1) an affidavit from Carlos Bell averring that a DPPPS agent announced after the hearing in 2001 that Rose received four votes for parole, which corroborated Rose's previous testimony before the Circuit Court; and (2) a "hearing ledger" in DPPPS's computer that noted Rose had been rejected for parole in 2001, which Director Patton conceded was not probative as the ledger did not contain the vote tally from Rose's hearing. R. at 254-255, nos. 1 & 2; Supp. R. at 48, L. 23-49, L. 9; 50, L. 12-51, L. 17.

The ALC sits in an appellate capacity when it reviews DPPPS agency decisions. S.C. Code Ann. § 1-23-380. Therefore, the ALC's review is limited to the agency record, and the ALC must affirm DPPPS's factual findings, if those findings are supported by substantial evidence. *Id.* The ALC concluded that the DPPPS decision that Rose was not entitled to parole had to be reversed because *all the evidence* the agency considered before making this parole decision supported Rose's assertion that he received four votes and was, therefore, entitled to parole. R. at 153-154.

This Court sits in an appellate capacity when it reviews ALC decisions. S.C. Code Ann. § 1-23-610(B). Therefore, the Court must affirm the ALC's factual findings if they are supported by substantial evidence in the record. *Id.* The record contains substantial evidence supporting the ALC's finding that Rose received four votes. The record contains sworn testimony from Carlos Bell who stated that Rose received four votes at the 2001 hearing. R. at 269, ¶ 2. Bell's affidavit corroborated testimony Rose had offered in the previous legal actions he filed against DPPPS over the past 14 years. R. at 118, L.25-119, L. 4. The record also reveals that Rose consistently asserted in his legal actions against DPPPS that he had received four votes, and DPPPS never disputed this factual assertion. R. at 152, ¶ 3. The Court's opinion, therefore, misapprehends or overlooks the standard of review when it finds that the ALC's decision was not supported by substantial evidence.

The corollary of the rule that factual findings are affirmed if supported by substantial evidence is the rule that the Court "may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Barton*, 404 S.C. at 401, 745 S.E.2d at 113. Said another way, the Court does not weigh evidence when reviewing an ALC factual finding.

The Court's opinion considers the Bell affidavit and finds it wanting. *Rose Op* at 3-4. The Court's opinion considers deposition testimony wherein a DPPPS agent offers his opinions that it would be "highly unlikely" that the DPPPS agent who reported the results to Rose in 2001 would have known the vote count, that it would have been "highly unlikely" Rose would have received parole one year after it had been revoked, and that Rose had not received any votes for parole since 2001. *Rose Op*. at 3-4. The Court's opinion weighs the deposition testimony against the Bell affidavit and the other evidence supporting the ALC's finding and

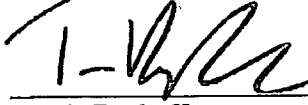
reaches the conclusion that the ALC's factual determination was wrong. *Id.* at 4. The Court's opinion, therefore, misapprehends or overlooks the standard of review when it weighs facts.

II. The Court's opinion misapprehends or overlooks the relevant record.

Even if it were permissible to weigh facts on appeal, which is denied, the opinion's evidence weighing is problematic for a second reason. The deposition information that the Court found more persuasive than the evidence supporting ALC's finding was not considered by DPPPS when it made the decision that Rose was not entitled to parole. It is undisputed that Director Patton considered only the Bell affidavit and the hearing ledger before making DPPPS's decision. As the ALC correctly noted after reviewing the record Director Patton had before him when he made the decision on Rose's parole, "there is not even a scintilla of evidence supporting the Department's decision." R. at 153.

The Court's opinion notes that the ALC mistakenly "believed the Department failed to offer any contradictory evidence" supporting the notion that Rose was not entitled to parole. *Rose Op.* at 3. Review of the record reveals, however, that the deposition information cited favorably by the Court's opinion was not considered by Director Patton and was, in fact, a *post hoc* justification for the Rose decision created well after the investigation and decision. The Court's opinion, therefore, misapprehends or overlooks that the relevant record in this case is the evidence DPPPS actually considered and relied upon to make the Rose decision.

Respectfully submitted,



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Attorneys for David Rose

March 7, 2018

Columbia, South Carolina

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant David Lee Rose, #91858, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified to the following address(es):

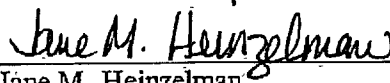
Pleadings: **PETITION FOR REHEARING**

Counsel Served:

Hand Delivery

Matthew C. Buchanan, Esq.
Tommy Evans, Jr., Esq.
South Carolina Department of Probation,
Parole, & Pardon Services
2221 Devine Street, Suite 600
Post Office Box 50666
Columbia, SC 29250

RECEIVED
MAR 07 2018
SC Court of Appeals



Jane M. Heinzelman
Senior Administrative Assistant

March 7, 2018

The South Carolina Court of Appeals

David Rose, #91858, Respondent,

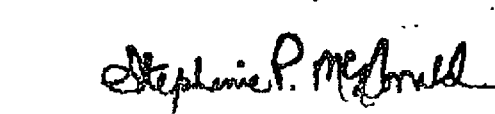
v.

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

Appellate Case No. 2016-000225

ORDER

The petition for rehearing is granted. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.

	J.
	J.
	J.

Columbia, South Carolina

cc:
Matthew C. Buchanan, Esquire
Travis Dayhuff, Esquire
Tommy Evans, Jr., Esquire
Meredith Weinberg Sella, Esquire

FILED

June 13, 2018

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

David Rose, #91858, Respondent,

v.

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

Appellate Case No. 2016-000225

Appeal From The Administrative Law Court
Deborah Brooks Durden, Administrative Law Judge

Unpublished Opinion No. 2018-UP-087
Heard October 3, 2017 – Filed February 21, 2018
Withdrawn, Substituted, and Refiled June 13, 2018

REVERSED

Matthew C. Buchanan and Tommy Evans, Jr., both of the
South Carolina Department of Probation, Parole and
Pardon Services, of Columbia, for Appellant.

Travis Dayhuff and Meredith Weinberg Sella, both of
Nelson Mullins Riley & Scarborough, LLP, of Columbia,
for Respondent.

PER CURIAM: The South Carolina Department of Probation, Parole and Pardon Services (the Department) appeals the administrative law court's (ALC's) order reversing the Department's denial of parole to David Rose, arguing the ALC (1) erred in finding Rose received sufficient votes in favor of granting parole, (2) lacked authority to reverse a decision by the parole board, and (3) erred by retroactively applying the supreme court's holding in *Barton v. South Carolina Department of Probation, Parole & Pardon Services*, 404 S.C. 395, 745 S.E.2d 110 (2013).¹ We reverse.

Rose pled guilty to kidnapping in 1978, and the circuit court sentenced him to life in prison.² After Rose had served just under ten years of his life sentence, the parole board granted him parole in 1987. Thereafter, Rose remained in South Carolina for one year before moving to Florida. Initially, Rose regularly reported to his Florida parole officer; however, he eventually stopped reporting. In 1991, Rose was placed on absconded status. On June 14, 2000, Rose was extradited to South Carolina and his parole was revoked.

On June 20, 2001, Rose again appeared before the parole board. In addition to his attorney, his sister, and his cousin, Carlos Bell, six board members were present at the hearing. After the hearing, the board denied Rose parole. According to Rose and Bell, an unidentified person (whom they allege to have been a parole examiner) exited the hearing room to report the parole board's decision and informed them that Rose received four votes in favor of parole. The Department subsequently mailed Rose notice of his rejection, stating that due to the nature and seriousness of the offense and his failure to successfully complete a community supervision program, the parole board denied his application for parole.

¹ In *Barton*, our supreme court found "retroactive application of section 24-21-645 constitutes an *ex post facto* violation, and inmates convicted of a violent crime must only convince two-thirds of the Parole Board members participating in their hearing" that they are entitled to parole. Thus, Barton should have been granted parole since four of the six board members participating in his hearing voted in favor of parole. 404 S.C. at 419, 745 S.E.2d at 123.

² Section 16-1-60 of the South Carolina Code (Supp. 2017) provides that, "for purposes of definition under South Carolina law, a violent crime" includes "kidnapping."

On February 13, 2015, the Department notified Rose it had conducted an investigation pursuant to *Barton* regarding whether Rose had received enough votes at his 2001 parole hearing to make him eligible for release.³ The Department stated it could not locate any records from the hearing, as they had been destroyed, and that it could not release Rose without evidence of the vote count, despite Bell's affidavit attesting that Rose received four votes.⁴

Subsequently, Rose appealed the Department's determination to the ALC. By order dated February 1, 2016, the ALC found the Department's determination that Rose lacked the necessary votes to be eligible for release was unsupported by substantial evidence. Because Rose offered Bell's affidavit in support of his contention that he received four votes at the 2001 hearing and because the ALC believed the Department failed to offer any contradictory evidence, the ALC found Rose received the necessary four votes in favor of parole and reversed the Department's decision.

The Bell affidavit, executed on October 25, 2014, attested that Rose received four votes in favor of parole at the 2001 hearing. According to Bell, only six board members were present during the hearing.⁵ Bell claimed a woman exited the hearing room and reported to Rose's attorney (who offered no affidavit or testimony) that Rose received four votes in favor of parole. Bell stated Rose's attorney informed Bell he would investigate whether the purported four votes were sufficient to grant Rose parole.

We find the ALC's determination that Rose received four votes in favor of parole is not supported by substantial evidence because, based on the record as a whole, reasonable minds would not find Bell's affidavit to be adequate evidence that Rose

³ The Department does not have any records for parole hearings prior to 2001; however, Rose obtained a copy of the recording of his parole hearing shortly after the hearing. Rose's attorneys in the current action had the recording transcribed. The transcript did not reflect a vote count but reported someone (most likely the chairman) stating, "David Lee Rose, rejected 1 and 5."

⁴ The hearing occurred fourteen years prior to the investigation.

⁵ Section 24-21-10(B) of the South Carolina Code (Supp. 2017) explains that the board "is composed of seven members."

received four votes. *See* S.C. Code Ann. § 1-23-610(B)(e) (Supp. 2017) ("The court of appeals . . . may reverse [an ALC] decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is . . . clearly erroneous in view of the *reliable*, probative, and substantial evidence on the whole record" (emphasis added)); *S.C. Dep't of Mental Retardation v. Glenn*, 291 S.C. 279, 281, 353 S.E.2d 284, 286 (1987) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."); S.C. Code Ann. § 1-23-330 (2005) ("Except in proceedings before the Industrial Commission the rules of evidence as applied in civil cases in the court of common pleas shall be followed."); Rule 801(c), SCRE ("Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules").

In determining that Rose did not receive four votes, the Department essentially found Bell's affidavit not credible, and a reviewing court presumes this to be a correct finding unless unsupported by substantial evidence. *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 594, 654 S.E.2d 284, 287 (Ct. App. 2007) ("The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence."). Thus, the ALC erred in substituting its own judgment for that of the Department as to Bell's credibility and in assigning such significant weight to Bell's hearsay-laden affidavit. *See* S.C. Code Ann. § 1-23-380 (Supp. 2017) ("The [ALC] may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.").

Accordingly, the ALC's order reversing the Department's denial of parole is

REVERSED.⁶

WILLIAMS, THOMAS, and MCDONALD, JJ., concur.

⁶ Due to our reversal on other grounds, we need not address Rose's remaining issues. *See Berberich v. Jack*, 392 S.C. 278, 294, 709 S.E.2d 607, 616 (2011) (declining to address appellant's remaining issues when the court reversed and remanded on other grounds).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 15-ALC-15-0033-AP

Appellate Case No. 2016-000225

RECEIVED

JUN 25 2018

SC Court of Appeals

David Rose, #91858, ... Respondent,

v.

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

PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Petitioner David Rose respectfully petitions the Court to grant a rehearing in *Rose v. S.C. Dep't of Probation, Parole and Pardon Servs.*, Unpublished Op. No. 2018-UP-087 (S.C. Ct. App. filed Feb. 21, 2018, withdrawn, substituted, and refiled June 13, 2018) and/or issue a new opinion affirming the Administrative Law Court ("ALC").

Rehearing and issuance of an opinion affirming the ALC are proper for two reasons. First, the Court's opinion misapprehends or overlooks the standard of review that applies to the Court's review of the ALC's order. Second, the Court's opinion misapprehends or overlooks that the agency record in this case contains no evidence that supports the decision made by the Department of Probation, Parole and Pardon Services ("DPPPS") that Rose is not entitled to parole.

I. The Court's opinion misapprehends or overlooks the standard of review.

Pursuant to a Circuit Court order and in accordance with DPPPS policy, DPPPS conducted an investigation and then made a determination regarding whether Rose should receive parole under *Barton v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013). R. at 267. Director Patton conducted the investigation and made the ultimate agency determination that Rose did not receive four votes at his 2001 hearing, and he was, therefore, not entitled to parole under *Barton*. R. at 254, no. 1.

Rose filed a case with the ALC to challenge this DPPPS decision, and the ALC afforded Rose the opportunity to conduct discovery to determine the factual basis for the agency's decision. Discovery revealed that before making this decision, DPPPS considered only two pieces of evidence: (1) an affidavit from Carlos Bell averring that a DPPPS agent announced after the hearing in 2001 that Rose received four votes for parole, which corroborated Rose's previous testimony before the Circuit Court; and (2) a "hearing ledger" in DPPPS's computer that noted Rose had been rejected for parole in 2001, which Director Patton conceded was not probative as the ledger did not contain the vote tally from Rose's hearing. R. at 254-55, nos. 1 & 2; Supp. R. at 48, L. 23-49, L. 9; 50, L. 12-51, L. 17.

The ALC sits in an appellate capacity when it reviews DPPPS agency decisions. S.C. Code Ann. § 1-23-380. Therefore, the ALC's review is limited to the agency record, and the ALC must affirm DPPPS's factual findings, if those findings are supported by substantial evidence. *Id.* The ALC concluded that the DPPPS decision that Rose was not entitled to parole had to be reversed because *all the evidence* the agency considered before making this parole decision supported Rose's assertion that he received four votes and was, therefore, entitled to parole. R. at 153-154.

This Court sits in an appellate capacity when it reviews ALC decisions. S.C. Code Ann. § 1-23-610(B). Therefore, the Court must affirm the ALC's factual findings if they are supported by substantial evidence in the record. *Id.* The record contains substantial evidence supporting the ALC's finding that Rose received four votes. The record contains sworn testimony from Carlos Bell who stated that Rose received four votes at the 2001 hearing. R. at 269, ¶ 2. Bell's affidavit corroborated testimony Rose had offered in the previous legal actions he filed against DPPPS over the past 14 years. R. at 118, L.25-119, L. 4. The record also reveals that Rose consistently asserted in his legal actions against DPPPS that he had received four votes, and DPPPS never disputed this factual assertion. R. at 152, ¶ 3. The Court's opinion, therefore, misapprehends or overlooks the standard of review when it finds that the ALC's decision was not supported by substantial evidence.

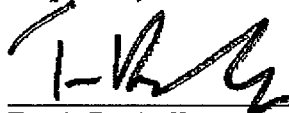
The corollary of the rule that factual findings are affirmed if supported by substantial evidence is the rule that the Court "may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Barton*, 404 S.C. at 401, 745 S.E.2d at 113. Said another way, the Court does not weigh evidence when reviewing an ALC factual finding.

The Court's opinion considers the evidence that supports the ALC's decision, including Rose's testimony and the Bell affidavit, and finds it wanting. After this consideration of the evidence, the Court's opinion concludes that the ALC's factual determination was wrong. *Id.* at 4. The Court's opinion, therefore, misapprehends or overlooks the standard of review when it weighs facts.

II. The Court's opinion misapprehends or overlooks that the agency record contains no evidence that supports DPPPS's decision.

Even if it were permissible to weigh facts on appeal, which is denied, the opinion's evidence weighing is problematic for a second reason. The Court's opinion notes that the ALC mistakenly "believed the Department failed to offer any contradictory evidence" supporting the notion that Rose was not entitled to parole. The Court's opinion finds that the ALC's decision must be reversed because it is not supported by substantial evidence "based on the record as a whole." It is undisputed that Director Patton considered only the Bell affidavit and the hearing ledger before making DPPPS's decision. As the ALC correctly noted after reviewing the agency record Director Patton had before him when he made the decision on Rose's parole, "there is not even a scintilla of evidence supporting the Department's decision." R. at 153. The Court's opinion, therefore, misapprehends or overlooks that the agency record in this case contains no evidence that supports DPPPS's decision.

Respectfully submitted,



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Attorneys for David Rose

June 25, 2018

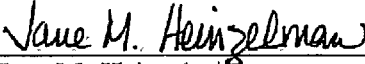
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant David Lee Rose, #91858, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified to the following address(es):

Pleadings: **PETITION FOR REHEARING**

Counsel Served: **Hand Delivery**
Matthew C. Buchanan, Esq.
Tommy Evans, Jr., Esq.
South Carolina Department of Probation,
Parole, & Pardon Services
2221 Devine Street, Suite 600
Post Office Box 50666
Columbia, SC. 29250



Jane M. Heinzelman
Senior Administrative Assistant

June 25, 2018

RECEIVED

JUN 25 2018

SC Court of Appeals

The South Carolina Court of Appeals

David Rose, #91858, Respondent,

v.

South Carolina Department of Probation, Parole and
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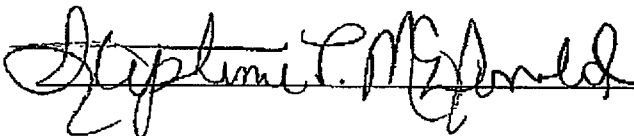
Appellate Case No. 2016-000225

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.

 J.

 J.

Columbia, South Carolina

cc:

Matthew C. Buchanan, Esquire

Travis Dayhuff, Esquire

Tommy Evans, Jr., Esquire

Meredith Weinberg Sella, Esquire

FILED

Aug. 16, 2018