THE DEPARTMENT OF SOUTH CAROLINA
In The Supreme Court

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Deborah Brooks Durden, Administrative Law Court Judge
Appellate Case No. 2016-000225
Case No. 15-ALC-0033-AP

S.C. Sup. Ct. Opinion No. 27940
Heard October 29, 2019 – Filed January 29, 2020

Appellate Case No. 2018-001641

David Rose,..... PETITIONER,

v.

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

PETITION FOR REHEARING

Respondent, the South Carolina Department of Probation, Parole and Pardon Services (the Department), respectfully petitions this Court for rehearing pursuant to Rule 221(a), SCACR, and submits there are important reasons for the Court to exercise its discretion to grant rehearing in this matter. The Department hereby seeks rehearing on the grounds that the Court may have misapprehended or overlooked several crucial points in reversing the opinion of the Court of Appeals, both in the manner in which it characterized the facts and procedural history of

the case, and more importantly in its application of the standard of review as applied to each level of this appeal from a final agency decision.

First, the Department respectfully submits that this Court's opinion may have inadvertently made a cascading series of mischaracterizations of the facts which accumulated to contribute to its decision to reverse the proper decision issued by the Court of Appeals in this matter. It respectfully asks the Court to reconsider and correct each of those mischaracterizations and to determine whether this would in turn warrant reconsideration of the resulting decision to reverse.

Second, the Department respectfully submits this Court failed to properly consider and apply the appropriate standard of review at each level of this appeal from a final agency decision. The Department submits the Court of Appeals correctly concluded that the Administrative Law Court's (ALC's) improper factual determination that David Rose (Rose) received four votes in favor of parole was not supported by substantial evidence. Therefore, it did not warrant reversal of the Department's final decision that he failed to carry his burden of proof in this regard. This is because the Department's determination—that the evidence submitted by Rose, which included the affidavit of Rose's cousin, was not credible—was a finding by the Department as to the weight of the evidence on a question of fact. The Court of Appeals properly concluded the ALC unlawfully substituted its judgment for the judgment of the Department as to the weight of the evidence. The Department's judgment on the weight of such evidence should not have been overturned by the reviewing court simply because that reviewing court, in this case the ALC, conducted an independent weighing of the evidence. Here, instead of recognizing this principle as required by the standard of review and as enforced by the Court of Appeals, this Court ignored the overreach of the ALC in substituting its judgment for the judgment of the agency, and instead

moved straight into the consideration of whether the ALC's decision was supported by substantial evidence.

The Department submits this gap in applying the proper standard of review stems from the Court misapprehending its determination that there was no evidence to support the Department's conclusion that Rose did not prove he received four votes in favor of parole. Instead, the Department's investigation found no credible evidence to *support* Rose's assertion that he received four votes. This lack of credible proof for Rose's claim that he received four votes in favor of parole is the precise reason the Department denied his claim, and why the Court of Appeals overturned the ALC when it substituted its judgment for that of the agency. 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."). The lack of any credible evidence, regardless of the reason for its existence or nonexistence, leads to a failure of proof. In this case, the burden of proof in regard to whether or not the Board exercised its entirely discretionary authority to grant parole, fell to Rose; therefore, the failure of proof required rejection of his claim. The ALC improperly reversed the Department and the Court of Appeals properly reversed the ALC. This Court should affirm.

For all of these reasons, the Department respectfully asks this Court to grant this petition for rehearing, vacate its published opinion filed January 29, 2020, and issue an opinion affirming the Court of Appeals decision to reverse the ALC's order reversing the Department's final determination that Rose did not carry his burden of proving he received sufficient votes to receive parole. Alternatively, the Department asks this Court to grant this petition for rehearing, vacate its published opinion filed January 29, 2020, and schedule additional oral arguments from the parties in this matter.

Particular Mischaracterizations

The Department respectfully submits that this Court's opinion may have inadvertently included some mischaracterizations which accumulated to contribute to its decision to reverse the proper decision issued by the Court of Appeals in this matter. First, the Court describes the Department as having a policy of "destroying records of parole hearings." While destruction or loss of the cassette tape recordings of parole hearings after a significant number of years pursuant to the Department's records retention policy was not ideal, it had no bearing on this case because Rose had a recording of the hearing and it failed to demonstrate he got the four votes he claimed. Nothing that was destroyed by the Department would have revealed the vote count where it wasn't revealed on the recording.

Second, the Court found "the evidence manifestly establishes that Rose received the requisite number of votes in favor of parole in 2001." However, as emphasized above, the only such "evidence" consisted of self-serving testimony and an affidavit from biased witnesses. If the evidence manifestly established four or more votes for Rose's parole, the Department would be the first to correct the error revealed by *Barton*, just as it has done in other cases. Here, even though the Department's practice in 2001 was to not record the vote count, this in no way means that Rose's claims must be accepted as inherently credible. In fact, by making this judgment, the ALC engaged in weighing the evidence itself, which was improper.

Third, the Court states: "Rose persistently sought relief through the years, often in circuit court, where DPPPS contended that Rose must pursue relief through the administrative process rather than through the judicial process." It later says: "Once again, Rose was told he was in the wrong forum." These sentences strongly imply the Department was the entity that repeatedly argued Rose was in the wrong forum, even though it was well-established that the Attorney

General's Office first responded to Rose's claims. The Department made its first argument regarding venue when Rose was before the circuit court in 2014, and the circuit court ultimately agreed.

Fourth, when discussing the Department's final decision prior to Rose's appeal to the ALC, the Court first quotes language from the Department's final decision that: "[w]ithout any other evidence of the vote count . . . the Department cannot release you to parole." It then states: "Ironically, in the most recent circuit court proceeding, DPPPS had not only admitted there was other evidence of the vote count via the Bell affidavit submitted by Rose, counsel for the agency informed Judge Addy that the affidavit was 'credible.'" These comments contain two mischaracterizations. Initially, they suggest the Department had ignored the affidavit in rendering its decision, yet the Department's final decision letter clearly references the affidavit ["Thank you for providing us with a copy of the affidavit from Mr. Carlos Bell . . . ."] before making the determination that Rose failed to carry his burden of proof. App. 270. Also, this Court's repeated reliance on the claim that counsel for the Department said the affidavit was "credible" is disingenuous. A careful review of the record reveals that Department's counsel apparently made a comment to Judge Addy, off the record, during or after the first part of the circuit court proceeding on May 19, 2014, that Mr. Bell "sounded pretty credible." It was judge Addy who then referenced the comment during the January 5, 2015, continuation of that hearing. Counsel merely confirmed he made the comment, but noted, "But it doesn't matter what I think." Judge Addy agreed, telling Rose: "Mr. Evans can't make that kind of determination," and going so far as to explain that even the court "can't say that one person is telling the truth and the other person is not" because, "that's not my call to make." App. 147. l. 14-149, l. 7. Notably, and as explained by counsel during oral arguments before this Court, the comment was offered only as

counsel's personal opinion, NOT as the Department's official position. Indeed, the Department's official position is and remains the letter from Larry Patton issued February 13, 2015, stating that there was insufficient evidence to support Rose's claim that he received four votes in favor of parole. If the Department's position was otherwise, the result would have been different.

Fifth, this Court misapprehended the underlying facts of Rose's misconduct following his initial release to parole. He did not simply fail to report. Instead, he absconded supervision for nine years, eventually being discovered in Florida.[1] He was extradited back to South Carolina where the Parole Board rightfully revoked his parole. One year later, the same Board denied his parole. It was during this very first hearing before the Board following his nine-year absconsion that Rose claims he received four votes in favor of being released back to parole – the very parole he refused to follow and instead absconded for multiple years in another state, and for which he instead had to be extradited once found. The Department submits that it strains credulity to believe that Rose would have had even one vote in favor of parole, much less four. Furthermore, Rose received no votes in favor of parole the next year, and the year after that. In fact, Rose received not *a single favorable vote* in every parole hearing he has had since 2002.

The evidence supporting the Department's decision that Rose did not carry his burden of proof does not stop there. Fortunately for all parties involved, Rose obtained a recording of the Board's vote before the Department destroyed the cassette tapes from his hearing. The transcript

[1] Mr. Rose was only discovered in Florida after nine years of absconsion due to a new arrest. The Department acknowledges this information is not currently in record before this Court; however, it is correct. The Department also acknowledges that Rose has not yet been prosecuted for, nor convicted of, this crime – likely because Florida knew his parole had been revoked. However, it contends this Court's language claiming that "Rose did not commit any additional crimes" is an unnecessary and inaccurate assertion meant to garner support for the Court's decision to order his release to parole. The Department respectfully requests that the Court substitute the phrase "was not convicted of" in place of "did not commit" in its published opinion so as not to make this factually incorrect assertion.

of the recording does not indicate a voice vote. The only indication of denial was the statement, "David Lee Rose, rejected 1 and 5." App. 111. As Roosevelt Hicks testified in his deposition—which was part of the Appendix before this Court—the South Carolina Board of Probation Parole and Pardon Services' (the Board's) practice at the time was to not announce the votes. App. 56, ll. 9-20. Also, as explained by Mr. Hicks, the inmate, his cousin, his attorney, and the unidentified Department employee who relayed the rejection of parole, and allegedly relayed the vote count to Rose and his attorney at the hearing site, would have only heard what was on the recording – which all parties agree did not include a voice vote at the time of the rejection. Therefore, there was no way for anyone at the institution where the inmates were located to get the number of votes. Mr. Hicks testified that the Department employees at the institutions did not have the time call and ask someone present in the hearing room to get the vote count because they had to get the next inmate ready. App. 62, ll. 10-23.

With the inmates, attorneys and supporters at the prison, while the Board was at the Department's central office in Columbia, the Department was reasonable to conclude that Rose's testimony at a prior proceeding and his cousin's affidavit were not credible because there was no possible way he would have heard about a vote count that day immediately after the hearing. As found by the Court of Appeals, the Administrative Law Court should have affirmed based on this conclusion and the standard of review.

The Department respectfully submits that the Court inadvertently shifted the burden from the inmate to the Department in determining what proof would constitute enough evidence requiring the release of an inmate on parole. The Department, while it supports and assists the

Board, does not have the authority to grant parole. Only the Board does. S.C. Code § 24-21-645.[2] Consequently, when an inmate makes a self-serving claim that he received enough votes to receive parole, there should be solid proof that there were the correct number of votes, not statements from a couple of clearly biased individuals who claim someone told them the number of votes. By requiring the Department to produce evidence sufficient to refute the inmate's assertion of a favorable vote count, this Court sets a dangerous precedent that could by extension require the release of any inmate who makes an opportunistic claim that he or she received enough votes for parole simply because the Department did not have the prescience to make or retain records of vote counts decades ago.

This is notable because while the Department did destroy its parole records, which consisted solely of the audio recording of hearings and a ledger of cases denied, it did so well in advance of *Barton v. South Carolina Dept. of Probation, Parole and Pardon Services*, 404 S.C. 395, 745 S.E.2d 110 (2013). The Department was operating under a good faith belief that Section 24-21-30 of the South Carolina Code meant exactly what it says,[3] and did not know that *Barton* would upend its parole practices.[4] Because there is no turning back the clock, the Department is faced with having no records of its parole hearings prior to 2001. Because the Court appears to hold that it was the Department's responsibility to refute Rose's cousin's

---

[2] Note, also, that the Code references signatures, not votes. S.C. Code Ann. § 24-21-645. Only an order signed by Board members can actually effect a release. The votes are simply a means of knowing that there will be enough signatures to grant parole, but until the order of parole is signed, the inmate cannot be released.

[3] "The board may grant parole to an offender who commits a violent crime as defined in Section 16-1-60 which is not included as a "no parole offense" as defined in Section 24-13-100 on or after the effective date of this section by a two-thirds majority vote of the **full board**." S.C. Code Ann. § 24-21-30(B) (emphasis added).

[4] It is also important to note that despite the Court's concern about the pre-*Barton* practice of requiring five votes for violent offenses when a quorum could be comprised of only four Board members, the Department again reminds this Court that the Board's own rules during this entire timeframe at issue set its quorum at five members. As a result, at NO point pre-*Barton* did the Board hold hearings with less than five members present; therefore, the "absurd results" concept, restated by this Court although wholly irrelevant to the issues at bar, is in fact an impossibility.

affidavit, this potentially opens the prison doors to all inmates who received parole hearings prior to 2001, if they are opportunistic enough to claim they received four votes in favor of parole decades ago.

The Department also respectfully submits that this Court seems to have deliberately mischaracterized the Department's actions in the twelve years between Rose's 2001 parole consideration hearing and today. Rose's first claim was made through a post-conviction relief action rather than by way of a timely request for reconsideration from the Board itself. The Attorney General's Office responds to PCR actions and did so in Rose's case, not the Department. The fact that Rose filed his claims in the wrong forum was not the fault of the Department.

For all of these reasons, the Department respectfully asks this Court to grant this petition for rehearing and issue an opinion which upholds the Court of Appeals' decision overturning the ALC's erroneous reversal of the Department's final determination that no credible evidence existed to support Rose's claim that he received four votes in favor of parole.

Misapplication of the Standard of Review

In its opinion, this Court correctly recites the standard of review for it to apply when reviewing a decision of an ALC, while ignoring the standard of review the ALC was supposed to apply when reviewing a final agency decision. This was the focus of the decision of the Court of Appeals, and one the Department submits should have been addressed by this Court.

In criminal cases the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. When reviewing a parole case, the ALC sits in an appellate capacity. Furtick v. S.C. Dept. of Prob., Parole & Pardon Servs., 352 S.C. 594, 576 S.E.2d 146 (2004). 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). 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) (emphasis added).

The Department respectfully submits this Court failed to properly consider and review the appropriate standard of review as applied at each level of this appeal from a final agency decision. The Court of Appeals correctly concluded that the Administrative Law Court's (ALC's) improper factual determination that Rose received four votes in favor of parole, was not supported by substantial evidence and therefore did not warrant reversal of the Department's final decision that he failed to carry his burden of proof in this regard. This is because the Department's determination—that the evidence submitted by Rose, which included the affidavit of Rose's cousin, was not credible—was a finding by the Department as to the weight of the evidence on a question of fact. The Court of Appeals properly concluded the ALC unlawfully substituted its judgment for the judgment of the Department as to the weight of the evidence. The Department's judgment on the weight of such evidence should not have been overturned by the reviewing court simply because that reviewing court, in this case the ALC, conducted an independent weighing of the evidence. Here, instead of recognizing this principle as required by the standard of review and as enforced by the Court of Appeals, this Court ignored the overreach of the ALC when it substituted its judgment for the judgment of the agency, and instead moved directly into a consideration of whether the ALC's decision was supported by substantial evidence. In determining the lack of support for Rose's claims, the Department's findings, inferences, and conclusions were not "clearly erroneous in view of the reliable, probative, and

substantial evidence in the whole record" – particularly where the only evidence to support Rose's claim was determined not to be credible due to obvious bias, self-interest and hearsay.

The Department submits this Court's overlooking of applying the proper standard of review stems from its misapprehending the determination that there was no evidence to support its conclusion that Rose did not prove he receive four votes in favor of parole. Instead, the Department's investigation found no credible evidence to *support* Mr. Rose's assertion that he received four votes. This lack of credible proof for Rose's claim that he received four votes in favor of parole is the precise reason the Department denied his claim, and why the Court of Appeals overturned the ALC when it substituted its judgment for that of the agency. 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."). The lack of credible evidence leads to a failure of proof, and the burden of proof in regard to whether the Board exercised its entirely discretionary authority regarding whether to grant parole, fell to Rose. The Department had no burden to prove the opposite; therefore, the ALC had a duty to affirm. The Court of Appeals properly recognized this duty, and reversed the ALC. This Court should do the same and affirm.

Conclusion

For all of the reasons set forth above, the Department respectfully asks this Court to grant this petition for rehearing, vacate its published opinion filed January 29, 2020, and issue an opinion affirming the Court of Appeals decision to reverse the ALC's order reversing the Department's final determination that Rose did not carry his burden of proving he received sufficient votes to receive parole. Alternatively, the Department asks this Court to grant this petition for rehearing, vacate its published opinion filed January 29, 2020, and schedule additional oral arguments from the parties in this matter.

Respectfully submitted,

Matthew C. Buchanan
General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 293
Columbia, South Carolina 29202
(803) 734-9220

Columbia, South Carolina
February 12, 2020

THE STATE OF SOUTH CAROLINA
In The Supreme Court

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Deborah Brooks Durden, Administrative Law Court Judge
Appellate Case No. 2016-000225
Case No. 15-ALC-0033-AP

S.C. Sup. Ct. Opinion No. 27940
Heard October 29, 2019 – Filed January 29, 2020

Appellate Case No. 2018-001641

David Rose,..... PETITIONER,

v.

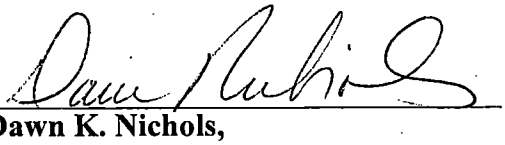
South Carolina Department of Probation, Parole and Pardon Services,.....RESPONDENT.

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that this 12th day of February, 2020, I served the Petition for Rehearing by first class mail, postage prepaid as follows:

Travis Dayhuff, Esquire
NELSON MULLINS RILEY & SCARBOROUGH, LLP
1320 Main Street, 17th Floor
PO Box 11070
Columbia, S.C. 29211

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 207
Columbia, South Carolina 29202
(803) 734-9220