THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Deborah Brooks Durden, Administrative Law Court Judge
Appellate Case No. 2018-001641
Case No. 15-ALC-0033-AP

DAVID ROSE, #91858.....PETITIONER

v.

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

RESPONDENT'S BRIEF

Tommy Evans, Jr.
Assistant General Counsel

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ATTORNEY FOR RESPONDENT

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2. **Does the opinion of the Court of Appeals erroneously rely upon the notion that the Respondent had evidence supporting its final agency decision?**

3. **Does the opinion of the Court of Appeals erroneously fail to find that the Respondent's final agency decision is arbitrary, capricious and an abuse of discretion?**

STATEMENT OF THE CASE

On April 6, 1978, the Appellant Mr. David Rose along with his co-defendant Mr. Jack B. Oliphant approached their bosses' child near his home in Laurens County, South Carolina. Upon asking the child to show them directions to a nearby address, the pair forced him into a vehicle and drove him to Greenville. They held him captive for eighteen hours demanding a ransom for his return. Upon hearing on the radio that the authorities were actively searching for his whereabouts, they decided to release the child into a nearby rural area. Both defendants were later found, arrested, and charged with the offense of kidnapping.

On May 22, 1978, the Appellant appeared before the Honorable James Moore for the offense of kidnapping. Upon the completion of this appearance the Appellant was sentenced to a term of imprisonment for the remainder of his natural life.[1] At the time these defendants committed this offense, South Carolina law allowed an inmate convicted of kidnapping parole eligibility upon the service of ten years.

The Appellant was granted parole in 1987.[2] He failed to report for years, so finally in 1991 an arrest warrant was issued and he was placed on absconder status. He was later discovered residing in Florida, and extradited back to South Carolina. On June 14, 2000, he appeared before the Parole Board and his parole was revoked. The Appellant reappeared before the Board for a parole hearing on June 20, 2001. At the conclusion of this hearing the Board decided to deny parole.

On August 30, 2004, the Appellant filed an application for post-conviction relief (PCR). Within this application the Appellant made the claim that he received four votes in favor of parole.

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[1] Co-Defendant Jack Oliphant was given the identical life sentence for the offense of kidnapping.

[2] Mr. Oliphant was granted parole on February 21, 1986, he continues to remain on parole and now is residing in Georgia.

The Appellant requested a recording of his hearing; however, the recording did not include a final vote count. This PCR action was filed against his public defender Mr. Michael Turner, and his parole attorney Mr. Alvin Neal. The Respondent was never named a party to this action, so they never knew this post-conviction relief action existed. The Respondent was therefore unable to make any type of response to these allegations. The Attorney General's office responded and argued that the Circuit Court did not have jurisdiction, and instead 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. Judge Saunders also 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 filed a notice of appeal before the ALC on May 12, 2006. The Respondent was once again not named a party to this action; so, once again they did not know these allegations existed. The Respondent was not able to respond to this action either. On May 14, 2007, the Honorable John D. Geathers, Administrative Law Court Judge issued an order dismissing this appeal. It was his opinion the ALC did not have jurisdiction over this matter.

On February 26, 2014, the Appellant filed a summons and complaint in the Court of Common Pleas. The Respondent was made a party to this action. It was the first time the Department was made aware of the Appellant's allegations relating to the vote count of his 2001 hearing. A motion to dismiss was filed by the Respondent. The Respondent argued that due to the South Carolina Supreme Court case of *State v. Furtick,* 352 S.C. 594, 576 S.E.2d 146 (2003), the Circuit Court does not have jurisdiction over this cause of action, so it should be subject to dismissal. 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, the court denied the

Respondent's motion and ordered the Department to conduct an investigation to determine if the Appellant had in fact received four votes at the conclusion of this 2001 hearing.[3]

During this investigation the Respondent discovered that the recording of the 2001 parole hearing had been destroyed. The Appellant did receive a copy prior to its destruction but the voice recording did not reveal a final vote count. Other inmates in a similar situation have previously provided evidence through affidavits from Board members who were actually present at their hearing; this was not done by the Appellant. The only evidence provided was an affidavit from his cousin Carlos Bell. Within his affidavit Mr. Bell stated:

> "A women came out to the common area were 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 women what was the vote count, she gave it to him, then he turn turned back to us and repeating what she had told him, the count was 4 yes votes and 2 no votes."

Bell affidavit pg. 2

Since this was hearsay evidence and the only evidence presented by the Appellant, the Department determined that this was insufficient to prove he actually received four affirmative votes for parole. The Appellant's request for parole was therefore denied. Upon being notified of this denial, the Appellant filed a notice of appeal before the Administrative Law Court (ALC).

The appeal was assigned to the Honorable Deborah Brooks Durden of the ALC. After the filing of briefs by both sides supporting their arguments, Judge Durden issued her opinion. She determined the matter of the vote count had already been litigated between the Appellant and the Respondent, that the Respondent 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*

[3] Judge Addy later dismissed the Appellant summons and complaint on April 30, 2015.

and Pardon Services, 404 S.C. 395, 745 S.E.2d 110 (2013), should be applied retroactively to this matter. She ordered that this issue be remanded back to the Board to determine conditions for the release on parole.

The Respondent appealed the decision of the ALJ to the South Carolina Court of Appeals. The Respondent argued that there was insufficient substantial evidence presented revealing that the Appellant had in fact received four affirmative votes at the conclusion of his 2001 hearing. The Respondent further argued that the ALJ does not have the ability to determine parole; and, the Supreme Court decision in *Barton* was never intended to be applied retroactively.

The Court of Appeals later correctly determined that the ALC erred because their determination was unsupported by substantial evidence. They decided, based on the record as a whole, reasonable minds would not find Mr. Bell's affidavit to be adequate evidence that the Appellant received four votes. The Court of Appeals also ruled that the ALC erred in considering Mr. Bell's affidavit, since it was hearsay evidence and therefore inadmissible.

Upon the decision made by the Court of Appeals, the Appellant filed a petition for writ of certiorari before this Honorable Court. This petition was granted and now this case is before the Court to make a determination if the Court of Appeals did in fact err in reversing the decision of the ALC. The initial brief of the Respondent supporting their arguments follows.

ARGUMENTS

1. **The Court of Appeals did not err in their determination that the ALC made a decision based on a lack of substantial evidence.**

The Administrative Procedures Act (APA) provides the appropriate standard of review. S.C. Code Ann. §1-23-610(B)(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,* at 401. The Court of Appeals ruled that the ALC made a determination where there was insufficient substantial evidence on the whole record. The decision of the Court of Appeals was valid and should be upheld by this Court.

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 Court of Appeals determined that the Respondent questioning the credibility of Mr. Bell's affidavit is reasonable. The Respondent cannot release an inmate-especially one currently incarcerated on a violent offense on just the word of the inmate's cousin. More credible evidence must be presented to reasonably expect the Board to release such an offender. If the Board believed that the Appellant failed to provide sufficient evidence to verify a ratification of a 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).

The Court of Appeals was correct in deciding that the ALC erred in considering the Appellant's biased hearsay testimony. Hearsay is a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 802 SCRE. Hearsay testimony is not admissible except where there is an exception. The Appellant argues that hearsay exception exists. He argues that the statement by the Department employee was a statement against interest. However, no substantial evidence was ever provided to prove the statement was made in the first place. No name or even description of the individual

from the Department was ever placed in the record. No affidavit from this person exist, nor was there any statement from the Appellant's lawyer or his sister-both of whom were supposedly present when this alleged statement was made. The Court of Appeals was correct in determining that this evidence was an out of court statement made in court to prove the fact of the matter asserted, the definition of hearsay, and thereby not admissible.

Even if the information provided by Mr. Bell was admissible it does not mean the Board had to find it credible. The determination of the credibility of any statement regarding the vote count remains with the Parole Board, and that decision cannot be reversed without substantial evidence. The court may not substitute its judgement for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380 (2018). The Court of Appeals correctly decided that, "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)" *Rose v. S.C. Dept. of Probation, Parole and Pardon Services,* op. no. 2018-up-087 (S.C. Ct. App. 2018).

The ALC made the mistaken determination that the decision made by the Department was arbitrary, and no evidence was provided supporting the decision. The ALC decided to ignore all of the evidence contrary to his position regarding the result of that 2001 hearing. The recording revealed no deliberation, which is customary in a split vote. The Board has also not awarded the Appellant a single vote in any hearing since 2001. If he was awarded four yes votes, those identical board members would likely have voted yes upon subsequent hearings since there was no evidence of any changes in circumstances. His parole had been revoked a year earlier; and it was testified that individuals are never awarded parole on the first attempt after being revoked. The Appellant

absconded supervision from 1991 until 2000 a total of nine years, and was not discovered in the state of South Carolina but in Florida. This is evidence revealing that the Board was likely not to have granted parole. All of this information was known by the Department and included in the record but ignored by the ALC.

The Appellant expected the Department to grant a criminal offender release from incarceration based solely on hearsay testimony submitted through an affidavit from the Appellant's cousin. According to this affidavit the Appellant's attorney at the time of the hearing spoke to an unnamed employee of the Department who informed him that he received four affirmative votes. This information was then relayed to Mr. Bell and the Appellant's sister. There has been no corroborating evidence ever presented by the attorney nor the Appellant's sister that this conversation ever occurred. So it was not arbitrary that the Appellant was not granted parole. Insufficient evidence was revealed that the Appellant had ever received the necessary votes to be granted parole. The Department has a duty to the public to only release individuals on parole who have actually been granted parole. If that is not revealed, the Department cannot release someone on parole. The Court of Appeals was correct in their decision that the ALC failed to follow the substantial evidence rule in its determination that the Appellant should be granted parole. The reversal of their decision was lawful and should upheld by this court.

2. The ALC erred in reversing the burden of proof, and issuing a remedy that cannot be approved by the Courts.

The ALC determined that the Department failed to present evidence proving that the Appellant failed to receive the four votes necessary to be granted parole. However, burden of proof falls upon the Appellant. He must provide to the Department substantial evidence revealing that he received the four votes necessary to be awarded parole. It was the Appellant's responsibility to present substantial evidence to prove he actually received four votes. This could have been done either by

audio tape, or affidavits of Board members who were present at his actual hearing. Given the evidence presented, a reasonable person would have made the identical decision as the Department. The Department just cannot take the word of the Appellant's cousin with no other evidence presented in order to grant parole for a person convicted of a violent crime.

The Appellant initiated this cause of action before the ALC. Therefore, he carries the burden of proof. The ALC placing that responsibility on the Department improperly reversed that burden. 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, 530 S.E.2d 643 (2000). The Appellant failed to present substantial 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 was full of hearsay testimony. He never presented affidavits from Board members who were present at this hearing and have or witnessed the amount of votes he received. Other inmates have done so in order to prove they received the requisite number of votes to be granted parole. The Appellant never presented or sought the Department employee his lawyer supposedly had spoken to, nor has his sister, or his lawyer made a statement confirming this conversation. Other inmates have included affidavits from their attorney confirming the vote count; the Appellant has failed to do so.

The Appellant argues that they have provided sufficient evidence proving that he has been granted parole. However, as the Court of Appeals correctly determined, the ALC's determination that the Appellant received four votes is not supported by substantial evidence. Based on the record as a whole, reasonable minds would not find Bell's affidavit to be adequate evidence that the

Appellant received four votes. *Rose,* at 3. The burden lies solely on the Appellant to provide sufficient evidence revealing that he received the votes to be granted parole. His failure to do so allowed the Department to deny parole, a decision that can be considered reasonable; therefore, the ALC erred in reversing that decision.

The ALC also erred in reversing the decision of the Parole Board. The ALC was never given the ability 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 (2014). Because the ALC ordered 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 an when a prisoner meets the prerequisites of parole eligibility. *State v. McKay*, 300 S.C. 113, 386 S.E.2d 623 (1989).

The decision to deny parole to the Appellant was three fold. First, the office of Board Support Services conducted an investigation to verify if the prisoner did receive the proper number of votes. During this investigation the Appellant had the opportunity to submit substantial evidence revealing that he in fact received four affirmative votes. He could have provided affidavits from Board members present during his hearing to state that he had in fact received four votes in the affirmative. This is what many other inmates have provided who has in fact received four votes. This was not done, so the Department can only determine that this is due to the fact he did not

receive four votes. The Appellant could have at least provided the name of the Department employee or affidavits from his attorney or his sister who were also supposedly present during this conversation. But he failed to even present this evidence. All that was provided was an affidavit from his cousin filled with hearsay testimony. It was reasonable for the Department to deny parole due to the lack of evidence provided. Secondly, the Office of General Counsel will verify if the vote count qualifies under *Barton*; and third, the Board holds a hearing during a full Board day. The Appellant failed to get through the first phase due to the lack of reliable information provided revealing that he received the required number of votes. This denial was proper and not subject to remand, the Court of Appeals was correct in reversing the ALC decision.

The Appellant argues that the Department has no records, affidavits or other evidence that supported the notion that the he failed to receive the proper amount of votes to be granted parole. The Appellant also argues that the Board abused discretion since the decision was made without sufficient evidence provided to make that decision. The Court of Appeals properly decided that the Department is not responsible for providing the evidence proving the Appellant failed to receive the votes. It is the Appellant's responsibility to provide sufficient substantial evidence proving that he did receive the required amount of votes. The Appellant failed to meet this burden so the Respondent was correct in the denial of parole. The decision of the ALC was in error and the Court of Appeals reversing this decision was proper and should be upheld.

3. The two-thirds rule announced in *Barton* does not apply retroactively.

The ALC conducted a collateral review of the denial of the Appellant'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 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 "implicates[s] the fundamental fairness and accuracy of proceeding." *Id.* The *Barton* ruling did not announce such a rule. Although inmates are given a liberty interest in parole eligibility, there exists no liberty interest in being granted parole. *Furtick,* at 149 Fn. 4 Inmates are allowed 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 §24-21-640(A), only the Department (and the South Carolina

[4] It may be that *Teague* and *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).

Administrative Law Court) had wrongly interpreted the statute. 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 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..." S.C. Code Ann. §24-21-640 (2017). Nowhere in the statute is it stated that the vote count must be recorded or preserved, and it cannot be expected that the Department should have had the prescience to predict the ruling in *Barton.*

The Appellant'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 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 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.

The only evidence revealed by the Appellant is an affidavit from his cousin that was ruled to be hearsay and thereby inadmissible. Due to the lack of substantial evidence presented by the Appellant, the Court of Appeals lawfully ruled that a reasonable mind would determine that this affidavit was inadequate evidence proving that the Appellant received four votes. The Court of Appeals decided to reverse the decision of the ALC. This decision was lawful and should be upheld

by this Court. The Respondent argues this Court never meant the decision of *Barton* to apply retroactively. This decision was meant to be applied to inmates going forward regarding parole decisions.

CONCLUSION

Based upon the previous reasons the Respondent would respectfully request this honorable Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that this 9th day of January, 2019, I served the Respondent's Brief by first class mail, postage prepaid as follows:

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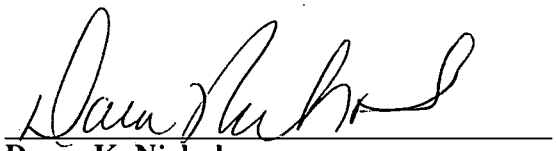
I further certify that all parties required by Rule to be served have been served



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