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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable H.W. Funderburk, Jr., Administrative Law Judge
Docket Number 18-ALJ-15-0039-AP

Appellant Case No.: 2020-001473

JOSEPH KELSEY, #217218…...………………………………………………APPELLANT

v.

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

BRIEF OF RESPONDENT

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2. **Although it was erroneously and unnecessarily addressed by the ALC and therefore is not a substantive issue which should be before this Court, whether this Court should rule that the ALC erred when it determined that the Parole Board acted arbitrarily and capriciously, when the Supreme Court has limited the ALC's authority to solely whether the Board followed proper procedure?**

3. **Although it was erroneously and unnecessarily addressed by the ALC and therefore is not a substantive issue which should be before this Court, whether the Parole Board's authority to grant or deny parole has anything to do with weighing or comparing purported relative culpability between co-defendants?**

4. **Although it was erroneously and unnecessarily addressed by the ALC and therefore is not a substantive issue which should be before this Court, whether the Parole Board must give parole applicants access to the Department's parole files when no inmate has a right to confrontation at his or her parole hearing?**

STATEMENT OF THE CASE[1]

In early July 1994, sixteen-year-old Joseph Kelsey was staying with his friend in Martinez, Georgia while his friend's father was away from home on business. On Monday, July 11, 1994, the friend left to go to work, leaving Kelsey, seventeen-year-old Geoffrey Payne, and seventeen-year-old Jamie Lynn Lee ("Defendants") alone in the house. Defendants decided to manufacture homemade pipe bombs. They constructed a number of bombs, two of which they detonated in the backyard.

Later that evening, Defendants and four others gathered at the house for a party. At around midnight, Lee and Payne left the party to go to a nearby Texaco station. When Lee and Payne arrived at the station, they spotted the victim standing near a telephone booth. She had snuck out of her house to meet with a friend and had severely cut her foot. Lee and Payne offered to take her to the house in order to clean and bandage her injuries.

The victim accepted. Lee, Payne, and the victim returned to the house at around 1:30 a.m. Lee and Payne helped the victim bandage her foot and then all three went back to the house where the party was going on. Payne repeatedly tried to coax the victim into having sexual intercourse with him, but she refused his advances. At several points during the night, Payne expressed to Lee his frustration.

Payne instructed Lee to crush up a tablet of "Ecstacy," a mild hallucinogen. Payne poured the powder into a mixture of tea and water in order to hide the taste of the drug. Payne gave the drink to the victim and told her it would help calm a stomach-ache she had been complaining about earlier in the evening. Payne did not tell her that the drink was laced with Ecstacy. Kelsey testified

[1] The facts in this summary are derived from court testimony and incident reports.

that while this was going on, he was resting on the floor by the stereo and occasionally changing the music selection. At around 3:30 a.m., the three Defendants offered to take the victim home.

Defendants and the victim then got into Lee's car, ostensibly to take her home. Lee was driving, Kelsey was in the passenger seat, and Payne and the victim were in the backseat.

Lee eventually drove across the Georgia border and into South Carolina. Lee[2] testified that the music was "obscenely" loud in the car, and he was going about 90 m.p.h. Soon after entering South Carolina, Lee noticed his tachometer go from 4200 to 6000 r.p.m. Lee looked down at the gear shift and discovered the victim’s foot had knocked the gear into neutral. Lee turned around and saw that Payne had the victim in a "strangle hold type position." Lee continued to drive. A few minutes later, Lee "heard two quick, empty thud type sounds." He again turned around and saw that Payne still had the victim in a strangle hold. Lee further testified that Payne had a wrench in his hand. Kelsey testified that he had also turned around and saw that the victim’s body was limp, her face was pale, and her lips were blue.

A few moments later, Payne leaned forward to tell Lee to turn the music down. According to Lee's testimony, Payne stated, "I'm pretty sure she's knocked out, guys." Payne then instructed Lee to go to a bridge between Edgefield and McCormick counties. Lee drove to the bridge where he parked the car. Defendants got out of the car, leaving the victim in the backseat. Payne informed Lee and Kelsey that he was going to have sex with her. Payne took off his clothes and the victim’s shorts. A few moments later, Lee warned Payne that a car was corning. Defendants quickly got back into Lee's car and began driving. After the approaching vehicle passed, Lee turned the car around and went back to the bridge. Lee testified that the victim was unconscious the entire time,

[2] Lee testified on behalf of the State during the joint trial of Kelsey and Payne. Kelsey testified in his own defense and Payne elected not to testify. In his initial statements to police, Lee had claimed Kelsey was the primary actor, but at trial he testified Payne was the primary actor.

and "she was definitely alive." Kelsey, on the other hand, testified that he had checked her pulse, and he believed she was dead.

Lee once again drove away from the bridge. He got approximately 100 feet down the road when Payne told him to stop the car. Defendants pulled the victim out of the car and carried her into the woods and up an embankment where they placed her on the ground. Lee returned to the car. Payne and Kelsey remained by the victim. Kelsey testified that while he was standing over the victim's body, Payne instructed him to place a pipe bomb into her mouth. Kelsey complied. Payne then lit the fuse, and the two ran. A few seconds later, the bomb exploded. At trial, forensic experts testified that it was impossible to determine the cause of death – whether it was from the physical assault or the use of the pipe bomb. Defendants returned to the house where they fell asleep.

All three Defendants were eventually arrested and charged with murder.[3] Kelsey was arrested in Maryland and brought back to South Carolina to stand trial. Kelsey's case was transferred from family court to the Court of General Sessions where Kelsey and Payne were tried together as adults. Payne was found guilty of murder and criminal conspiracy. Kelsey was found guilty of murder, possession of a pipe bomb, and criminal conspiracy. Kelsey was sentenced to life imprisonment for murder and consecutive sentences of five years for possession of a pipe bomb and criminal conspiracy.

The Appellant first appeared before the Board for parole consideration on November 18, 2015 and was denied. He was denied again at his second appearance before the Board on November 15, 2017. The Appellant's third and most recent hearing occurred on November 13,

[3] It again bears noting that although at trial Lee and the Appellant (Kelsey) both testified that Payne was the principal actor, Lee had initially made statements that the most responsible individual was Kelsey. As explained by Justice Pleicones: "Kelsey testified, and admitted his guilt of the charges other than conspiracy and murder: petitioner [Payne] did not testify. A third youth [Lee] involved in the crimes testified for the State; he had initially identified Kelsey as the perpetrator, but in later statements and in his trial testimony he identified [Payne] as the responsible individual." *Payne v. State*, 355 S.C. 642, 648, 586 S.E.2d 857, 860 (2003) (Pleicones, concurring).

2019, where parole was denied by a vote of three in favor of parole to two opposed. Because the offense was listed as violent under S.C. Code 16-1-60, a two-thirds vote was required for the grant of parole. The Board also gave its reason for denial being the nature and seriousness of the current offense.

After this denial, the Appellant filed a notice of appeal before the Administrative Law Court (ALC). After review of the issues raised by Appellant, the Honorable H.W. Funderburk, Jr., issued a ruling that found one decision of the Parole Board "arbitrary and capricious" and another decision based on "untrue assertions of fact and improper argument;" however, the judge ultimately concluded that the ALC lacked the authority to grant parole or rescind the Board's grant of parole and therefore denied the appeal of Appellant.

The Appellant filed its Notice of Appeal on October 29, 2020. Appellant argues that the ALC does have the authority to order the Board to grant parole, and that this Court should reverse the ALC's determination that it lacks the authority to do so. Appellant also argues that the Board's discretionary determination that he will not receive parole somehow exceeded of its authority because of the published opinion by the South Carolina Supreme Court that purportedly found Appellant's co-defendant was more culpable in the underlying criminal offense. Lastly, Appellant argues that the Board must give parole applicants access to the Department's parole files.

The Respondent will first and foremost argue that the ALC was correct in determining it lacked the authority to grant parole or require the Parole Board to grant parole, but Respondent also contends that the ALC exceeded its narrow scope of review in what was a routine denial of parole, thereby committing an error of law. Further, the Respondent will argue that the Supreme Court's recitation of the version of facts presented at trial and determination of culpability cannot restrict the Parole Board's decision-making because the Board remains the sole determiner of who receives parole. Finally, Respondent will argue that the South Carolina Code does not grant inmates the right to see the Department's parole files, and doing so would be counter-productive to the fair, efficient, and statutorily compliant parole consideration process given that no inmate has the right of confrontation at a parole hearing.

The brief of the Respondent supporting the above-referenced defenses follows.

STANDARD OF REVIEW

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 ALC'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).

In an appeal from an ALC decision, the Administrative Procedures Act provides the standard of review. S.C. Code Ann. §1-23-610(B). This Court may only reverse the decision of the 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 abuse of discretion or clearly unwarranted exercise of discretion.

Id.

"The [C]ourt may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Id*. 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. *Hill v. S.C. Dep't of Health and Envtl. Control*, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010).

ARGUMENTS

I. The ALC does not have the authority to grant parole, and did not err when it determined that it lacked the authority to grant parole.

Appellant argues that the ALC has broad powers to remedy unlawful agency action and may grant the relief sought – including releasing an inmate to parole. This is incorrect. The ALC can only consider parole eligibility cases involving the permanent denial of that eligibility or involving whether the procedure employed by the Board effectively abrogates the inmate's right to parole eligibility, and must summarily dismiss appeals from the routine denial of parole. Consequently, the ALC did not err when it dismissed the appeal, but the ALC did err when it ruled upon the Board's decision-making and conclusions.

a. The ALC cannot overturn the Board's denial of parole.

Appellant makes the claim that the ALC has the power to remedy an agency decision which includes the granting of parole. This is simply not correct.

Appellant relies heavily on *Rose v. S.C. Dept. of Probation, Parole and Pardon Services*, 429 S.C. 136, 838 S.E.2d 505 (2020) when making this assertion that the ALC may summarily grant parole to an inmate who has been routinely denied parole by the Board. But *Rose* is easily distinguishable from the matter at hand.

Inmate David Rose alleged that he received four votes in favor of parole at a 2000 hearing after the 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). Rose supplied an affidavit from his cousin who attended the hearing, which stated that an unnamed Department employee told him that Rose received four votes at the conclusion of the hearing. *Rose* at 140, 507. While the Department argued that this was not sufficient evidence to warrant the remedial granting of parole, the ALC disagreed. *Id*. at 141, 508. Because Department records could not refute Rose's cousin's claims, the ALC concluded, Rose should be considered to have received parole at that hearing in 2000. The Supreme Court ultimately agreed. *Id.*

In this case, there is no dispute over the number of votes Appellant received, nor that they result in the denial of parole under the parameters recognized in *Barton*. The Board denied parole, and the Appellant asked the ALC to overturn the Board's decision.

The ALC was correct when it concluded that it lacked the authority to reverse the Board's decision and grant parole. Appellant is equating the decision in *Rose*, which involved a disputed vote count and an alleged receipt of the proper number of votes, to the matter at hand wherein he simply disagrees with the Board's clear decision to deny parole. *Rose* resulted in a remedial grant of parole based on evidence of a favorable vote count in 2000, whereas the present case was properly dismissed because the ALC lacks the authority to reverse a routine denial of parole.

Appellant argues that the ALC has the statutory role of providing a neutral forum for administrative hearings and to protect the separation of powers principle in agency decision-making. (App. Brief, P. 19). He refers to Chief Justice Toal's dissent in *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envt'l Control*, 411 S.C. 16, 53-55, 766 S.E.2d 707, 728-729 (2014). However, Justice Toal notes that Kiawah "concerns a 'contested case,' one of several classes of proceedings the ALC is authorized to conduct." *Id.* at 54, 728. Appellant is not appealing a contested case, however. In fact, a decision to grant parole is not a ruling in favor of one party over another. Instead, it is a determination that, to the satisfaction of the Board, the inmate is entitled to parole. S.C. Code Ann. § 24-21-640. Furthermore, the Board did not act outside its statutory delegation – it denied Appellant parole. The Board is the sole determiner of what inmates may receive parole.[4]

The ALC's authority to review decisions by the Parole Board is extremely limited. Only when the Department makes a decision permanently denying parole eligibility or when the Board's procedure effectively abrogates the inmate's right to parole eligibility does the decision qualify for review by the ALC. *Furtick v. S.C. Dep't of Corr*., 374 S.C. 334, 339, 649 S.E.2d 35, 38 (2007). In *Furtick*, the Supreme Court extended *Al-Shabazz*[5] to parole eligibility decisions while emphasizing the difference between a final decision and a temporary granting or denial of parole by the Parole Board.

[4] "[N]o such prisoner may be paroled until it appears to the satisfaction of the board…" S.C. Code 24-21-640.
[5] *Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000).

Appellant's parole has not been permanently denied. He will have another parole hearing scheduled later in 2021, two years after his 2019 parole hearing.[6] Consequently, the ALC had no other choice but to dismiss the appeal without editorializing about purported levels of culpability or opining over which co-defendant should have received parole.

b. The ALC erred by not summarily dismissing the appeal.

Appellant argues that the ALC properly conducted a full review of the Board's decision and its conclusions. The Respondent disagrees and would argue that the ALC erred when it did not summarily dismiss the appeal and instead rendered unnecessary, irrelevant, and improper conclusions about the Board's decision.

The Respondent respectfully submits that the ALC has no authority to review parole denials. "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." S.C. Code § 1-23-600(D). See also *Furtick*, 374 S.C. at 339, 649 S.E.2d at 38.

The ALC may also review parole appeals in which the procedure employed by the Board may have an adverse impact on an inmate's rights to a parole hearing. In *Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 377 S.C. 489, 500, 661 S.E.2d 106, 112 (2008), the Court reviewed an allegation that the Board was not following the procedure established by Section 24-21-640 or the board-created criteria for parole consideration.

The Court determined the matter would be remedied by the Board stating clearly that it had considered the required factors before rendering its decision regarding parole. The Court stated,

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[6] *See* S.C. Code 24-21-645(D) "However, upon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole."

"We emphasize that … if [the Parole Board] clearly states in its order denying parole that it considered the factors outlined in section 24-21-640 and the fifteen factors published in its parole form… the decision will constitute a routine denial of parole and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure." *Cooper* at 500, 661 S.E.2d at 112.

This holding was further clarified by the Supreme Court in *Compton v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 385 S.C. 476, 684 S.E.2d 175 (2009). "We emphasized that … if the Parole Board clearly states in its order denying parole that it considered the factors outlined in section 24–21–640 and the fifteen factors published in Form 1212, and that if the Parole Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC will have limited authority to review the decision." *Id*. at 479, 177.

In this case, the order denying parole includes the statement that the Board considered the factors in *Cooper*. It stated that, "[a]fter careful consideration of: (1) the characteristics of your current offense(s), prior offense(s), prior supervision history, prison disciplinary record, and/or prior criminal record, as described in the findings of fact below; (2) the factors published in Department Form 1212 (Criteria for Parole Consideration); (3) the factors outlined in Section 24-21-640 of the South Carolina Code of Laws, and (4) actuarial risk and needs assessment factors pursuant to Section 24-21-10(F)(1) of the South Carolina Code of Laws." R.*

Clearly, the Board followed this instruction from *Cooper*, but the ALC refused to dismiss the matter without conducting a full analysis. Only after improperly reviewing an exhaustive record and coming to a different conclusion about the merits than the Board, did the ALC appropriately dismiss the appeal because it lacked the authority to reverse the Board's decision. While it was correct in the end, the ALC erred by conducting the analysis in the first place.

II. The ALC erred when it determined that the Parole Board acted arbitrarily and capriciously.

Appellant argues that the ALC's finding that the Board acted arbitrarily and capriciously requires this Court to reverse its dismissal and require the Board to grant him parole. The Respondent respectfully submits that this Court should uphold the ALC's ultimate decision that it lacks the authority to reverse the Board's decision, but this Court should also determine that the ALC erred by finding that the Board acted arbitrarily and capriciously.

By not dismissing the appeal because of *Cooper* and *Compton* (discussed in Part I.b.), the ALC conducted an inappropriate analysis of the Board's decision-making process. It erred when it reviewed the materials put forth by Appellant's counsel and supporters, and it erred when it reviewed the parole information of Appellant's co-defendant.

Most importantly, the ALC erred when it forgot the axiomatic rule that *no inmate has a right to parole*. *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 443 n. 4, 586 S.E.2d 124, 127 N. 4 (2003). By comparing Appellant and his record to the co-defendant and his record, and considering that the co-defendant had been granted parole, the ALC erred when it ruled that Appellant was similarly owed parole. It therefore concluded that the Board had acted arbitrarily and capriciously when it failed to grant parole to Appellant when it granted parole to the co-defendant.

South Carolina law regarding parole is clear. Parole is a privilege, not a right, and an inmate may not be paroled "until it appears *to the satisfaction of the board*" that the inmate is deserving of parole. S.C. Code §24-21-640 (emphasis added).

By trying to compare the circumstances of two different individuals presented at two different times to two different sets of Board members, and then weighing in on the worthiness of parole for Appellant and his co-defendant, the ALC invites constant scrutiny in endless appeals by inmates with co-defendants themselves, or even inmates with merely similar criminal offenses. The ALC erred by considering Appellant to be deserving of parole (or his co-defendant to be unworthy) when it is simply not its place to do so. The ALC may only intervene when the limited liberty interest to parole hearings is interrupted; it may not intervene when the Board elects to deny parole at a single parole hearing. S.C. Code § 1-23-600(D).

Consequently, this Court, while upholding the final decision by the ALC, should also remind the ALC that it cannot substitute its judgment for that of the Board, and its analysis should be reserved for considering the permanent denial of parole or the effective abrogation of the right to parole eligibility rather than a routine denial of parole.

III. The ALC erred when it determined that SCDPPPS made factual findings inconsistent with facts as recognized by the Supreme Court.

Appellant claims that the Board exceeded its authority by denying parole when it used the nature and seriousness of the offense as its grounds for denial. This is an incredible claim, both because the Parole Board is the *sole* body vested with the authority to grant or deny parole, and because the nature and seriousness of Appellant's offense is without question.

Appellant places great weight on the fact that the Supreme Court intimated in a pair of cases[7] that the Appellant's co-defendant was the primary actor. Appellant overreaches, however, when he tries to use the fact that the Supreme Court, when considering a *Strickland* analysis[8] in a PCR appeal[9], somehow restricts the Parole Board to only granting parole because his purportedly more culpable co-defendant was granted parole.

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[7] *Payne v. State*, 355 S.C. 642, 586 S.E.2d 857 (2003) and *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998).
[8] *Strickland v. Washington*, 466 U.S. 668 (1984).
[9] *Payne v. State*, 355 S.C. at 645, 586 S.E.2d at 859.

As set forth by our Legislature, "The board must carefully consider the record of the prisoner before, during, and after imprisonment, and no such prisoner may be paroled until it appears to the satisfaction of the board: that the prisoner has shown a disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interest of society will not be impaired thereby; and that suitable employment has been secured for him." S.C. Code §24-21-640. It is solely the Board's authority to grant or deny parole. At no point in the opinions in *Kelsey* and *Payne* did the Court speak on when and if Payne or Appellant should be awarded parole.

Furthermore, as pointed out in Justice Pleicones' concurrence in *Payne*, "In the present case petitioner and his codefendant (Kelsey) presented antagonistic defenses in which each blamed the other for killing the victim." *Id*. at 647, 860. Consequently, the facts are not as set in stone as the Appellant would like this Court to believe. The one fact that matters is the one found by the jury – that the victim was murdered by both Payne and Appellant.

The ALC further erred when it considered the transcript of Payne's parole hearing for the self-serving statement from Payne's attorney regarding who was the "trigger man." Payne's attorneys argued for parole for their client and suggested that the Board could deny Appellant parole in order to satisfy the victims' wishes. R. at *. Even though ultimately the Board denied Appellant at a later parole hearing, this does not mean the Board reached some sort of understanding with Payne's attorneys. Most notably, the Board also heard from Appellant's attorneys that *Payne* was the "trigger man," and because he received parole then Appellant should as well. R. at *. Three Board members voted in favor of parole; it's only because two voted against parole that Appellant did not receive the requisite number of votes for parole. Consequently, this was a routine denial based on valid votes cast by individual Board members.

As stated above, the Board's decision to deny parole is not reviewable by the ALC. The ALC's limited authority to review a Board's decision is only to determine if it followed proper procedure. *Cooper* at 500, 112. The Board is not required nor should it be expected to be aware of every PCR or appellate opinion relating to an inmate before it decides to grant or deny parole, unless that opinion directly relates to the inmate's parole eligibility.

The Supreme Court's determination in *Payne* was that, under a *Strickland* analysis, the evidence overwhelmingly proved guilt so as to outweigh prejudice over Payne's attorney not object to a comment about Payne not testifying made by his co-defendant's attorney. *Payne* at 645, 586 S.E.2d at 859. The Board's decision to not grant parole to Appellant was no more an infringement on the Supreme Court's role than the Supreme Court's ruling was an infringement upon the Board's authority over parole. Appellant's efforts to conflate the two should be considered meritless.

IV. The ALC erred when it determined that SCDPPPS should provide inmates access to their parole files.

Appellant asserts that inmates should be able to review the material that is gathered by the Department and provided to the Parole Board. The ALC agreed with this position, although the ALC determined that the supplemental record supplied by Appellant provided ample material for review. The Respondent submits that the ALC's limited role in reviewing routine denials of parole renders the need for a full review of the Department's parole file unnecessary. Inmates do not have a right to review their parole files because, as explained above, parole hearings are not truly contested hearings.

This is also supported by the fact that no inmate has the right to confrontation at parole hearings. S.C. Code §24-21-50 (1976). Parole hearings are not to be considered trials where inmates get to rehash facts of the offense they may dispute. Instead, the Board is simply making a discretionary decision regarding whether it is satisfied the inmate is deserving of parole.

Furthermore, the information and data received by probation agents in the course of their duties (in this context, creating the parole consideration file) is privileged and confidential. S.C. Code §24-21-290. This privilege does not belong to the offender or the inmate, as only the director or the court may order the release of those documents. *Id.* Lastly, the Board's records of its proceedings are held "subject to the order of the Governor or the General Assembly." S.C. Code § 24-21-40. Again, inmates are not entitled to review their parole file.

Appellant's reliance on the Freedom of Information Act is also misplaced. The FOIA explicitly creates an exception for "[m]atters specifically exempted from disclosure by statute or law." S.C. Code §30-4-40(4). Furthermore, inmates are not extended FOIA rights. S.C. Code § 30-4-30(A)(1) "This right does not extend to individuals serving a sentence of imprisonment in a state or county correctional facility in this State, in another state, or in a federal correctional facility; however, this may not be construed to prevent those individuals from exercising their constitutionally protected rights, including, but not limited to, their right to call for evidence in their favor in a criminal prosecution under the South Carolina Rules of Criminal Procedure." Considering that no inmate has a right to parole, the exception for constitutionally protected rights does not apply to inmates in advance of parole hearings.

Appellant argues that SCALC Rule 58 requires that anything that the Parole Board received and considered must be made part of the record and submitted. The Respondent submits that Rule 58 is inapplicable to a matter that the ALC cannot review. The ALC does not have the authority to review a routine denial of parole. S.C. Code § 1-23-600(D). Consequently, there is simply no need to submit the record of everything the Board reviewed or received before making its ruling. Documents sufficient to review whether procedures were followed are all that should be required, as clearly stated in *Cooper* and *Compton*.

Requiring the Respondent to release the full parole file only invites more scenarios like the instant case, wherein the ALC judge reviews the material presented to the Board and determines that he would have granted parole (or perhaps denied parole to an inmate who received parole), but ultimately concludes that regardless of his exhaustive review of the materials, he is without authority to make any ruling that would affect the outcome of the Board's decision.

CONCLUSION

The ALC correctly determined that it lacked the authority to change the Board's decision to deny Appellant parole. Because this was a correct conclusion, the ALC ultimately erred by conducting a full review of what had amounted to a routine denial of parole. In so doing, the ALC judge demonstrated why the ALC has limited authority to review parole denials in the first place. Appellant may bemoan the perceived lack of fairness in the instance where one co-defendant receives parole and another does not, or the lack of the right to dispute the facts of the case before the Board, but this all stems from a very important axiom: that parole is a grant of clemency to which no inmate has a right. Appellant is serving a life sentence for murder, and although he is entitled to parole hearings, he in no way is guaranteed eventual release to parole, even if a similarly situated inmate or co-defendant is granted parole. South Carolina law provides that only the Parole Board may grant parole; not the ALC, not the Supreme Court, nor this esteemed Court. The South Carolina Legislature, and the Legislature alone, has the authority to change our laws to mandate the early release of inmates or to create a presumption for parole. Consequently, the Respondent respectfully requests that this appeal be denied, with further clarification that the ALC should have dismissed the appeal pursuant to *Cooper* and *Compton* at the outset.

Respectfully submitted,

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