RECEIVED
MAR 01 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From The Administrative Law Court
Honorable Ralph K. Anderson III, Chief Administrative Law Judge

---

Appellate Case No. 2022-000965

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

V.

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

FINAL BRIEF OF APPELLANT

ALLISON FRANZ #105189
HANNAH FREEDMAN #103373
Justice 360
900 Elmwood Ave., Ste. 200
Columbia, SC 29201
(803) 765-1044
allison@justice360sc.org
hannah@justice360sc.org

JOHN H. BLUME #747
Cornell Law School
159 Charles Evans Hughes Hall
Ithaca, NY 14853
(607) 255-1030
jb94@cornell.edu

JON OZMINT #7107
The Ozmint Firm
P.O. Box 17554
Greenville, SC 29606
(803) 782-0042
jon@ozmint.com

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes and Rules

Federal Cases

State Cases

Other

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the Administrative Law Court's previous determination that it has jurisdiction over Joseph Kelsey's first parole appeal became the law of the case for subsequent appeals that raise identical questions of fact and law?
2. Whether a denial of parole is arbitrary and capricious in violation of the South Carolina Administrative Procedures Act, due process, and *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 661 S.E.2d 106 (2008), where the facts of the case clearly demonstrate that the Parole Board has not considered the requisite factors?
3. Whether the Parole Board violates due process or the First Amendment when it denies parole, in whole or in part, in retaliation for the parole applicant's decision to appeal a previous parole denial?
4. Whether the South Carolina Administrative Law Court must allow putative parolees appealing the Parole Board's decision-making process to supplement the record on appeal with the information considered by the Parole Board and required to create a basis for judicial review?

INTRODUCTION

The facts of this case were presented to this Court in a nearly identical appeal filed two years ago. *See* Final Br. of App., *Kelsey v. S.C. Dep't Prob., Parole & Pardon Servs.*, No. 2020-001473 (Feb. 9, 2021) (*Kelsey I*). That appeal challenged the Parole Board's decision (by a vote of three-to-two in favor of parole) to deny Appellant Joseph Kelsey (Joe) parole solely on the basis of circumstances that he cannot change, a decision that the Administrative Law Court (ALC) held had "effectively denie[d Joe]'s eligibility for parole" and that therefore was not a routine parole denial. *See* R. p. 173. On the merits, the ALC found that the Board's decision-making was "logically and legally absurd," infected with "untrue assertions of fact and improper argument," and that it had produced a "decision that [was] arbitrary and capricious." However, the ALC ultimately held that it lacked the authority to grant Joe any relief. R. p. 179.

Since Joe filed that first appeal, nothing has changed except that he has continued to improve his prison record and further demonstrate his suitability for parole. Nevertheless, when he went up for parole in November 2020, the Board again denied him parole (this time by a vote of six-to-one against parole). R. p. 209. Again, Joe appealed to the ALC and the South Carolina Department of Probation, Parole and Pardon Services (PPP) filed a record on appeal that consisted of just two documents—a backdated form letter with the purported bases for denying Joe parole and an affidavit from a PPP employee about why Joe had received the denial letter three months after his parole hearing. As he did two years prior, Joe moved to stay the briefing schedule and to supplement the record so the ALC could consider Joe's challenges in light of information that was before the agency. This time, the ALC denied both motions after Joe's brief was due and dismissed the case for lack of jurisdiction.

The law of this case was settled in 2020, when the ALC held that it had subject-matter jurisdiction over Joe's appeal because the Board's decision-making effectuated a permanent denial

of parole. The ALC lacked the authority to revisit that decision in this appeal. The lower court's legal conclusions were in error and this Court should either remand to the ALC for a new appeal with a complete record that includes all information that was presented to the Board or should order PPP to grant Joe the relief to which he is ultimately entitled: a grant of parole.

STATEMENT OF THE CASE

This appeal arises from the Board's arbitrary, capricious, and retaliatory denial of parole in 2021, followed by an erroneous decision by the ALC in unexplained contradiction of the ALC's own precedent. The basic facts of the crime and the relative culpabilities of Joe and his codefendants—Geoffrey Payne and Jamie Lee—are described in greater detail in *Kelsey I*, but one simple fact bears repeating: The Supreme Court of South Carolina has twice determined that the evidence "overwhelmingly prove[d]" that Payne, the oldest of the three and the ringleader, was responsible for the victim's death. *See Payne v. State*, 355 S.C. 642, 586 S.E.2d 857 (2003); *State v. Kelsey*, 331 S.C. 50, 59–60, 502 S.E.2d 63, 67 (1998) (describing the trial evidence); *see also* R. p. 174 (2020 order from the ALC describing Joe's and Payne's relative culpability). Joe, the youngest codefendant and the least culpable, remains the only codefendant still incarcerated.

When Joe went up for parole in November 2019, the Board denied him by a vote of three-to-two *in favor* of parole for one reason: the nature and seriousness of the offense.[1] R. p. 173. Joe appealed to the ALC, which held that it had jurisdiction because the Board's decision to deny Joe parole "based exclusively on facts that cannot change, is effectively a denial of the inmate's

[1] At Joe's hearing—but not at Payne's—only five of the six members of the Board were present. Because the Board's internal rules require that an offender in Joe's position receive "yes votes" from at least two-thirds of the members of the Board present in order to get parole, Joe would have needed "yes votes" from four members. *See* S.C. Dep't of Probation, Parole & Pardon Servs., Policy & Procedure Manual at 28 (Nov. 2019). Because he only had three yes votes (60%) instead of the required two-thirds (67%), Joe remains incarcerated while Payne and Lee are free.

eligibility for parole." R. p. 173. The ALC also found that the Board's decision was "arbitrary and capricious" and the product of a process that was "taint[ed]" by "untrue assertions of fact and improper argument." R. p. 178–79. Nevertheless, after holding that it had subject-matter jurisdiction, that the agency violated Joe's substantive rights, and that the agency had violated the South Carolina Administrative Procedures Act and precedent from the Supreme Court, the ALC denied Joe all relief because, it reasoned, it lacked the authority to grant Joe the relief he sought. Joe appealed and the parties filed their final briefs in February 2021.

With his appeal to this Court pending oral argument, Joe went up for parole a fourth time in November 2021. He was again denied, despite showing nothing but improvement in his institutional record since his 2019 hearing and despite the fact that by 2021, he was older than Payne was when he was released in 2019. Joe again appealed to the ALC and filed a motion to supplement PPP's cursory record on appeal along with a motion to stay the briefing schedule. The ALC ignored its previous ruling in *Kelsey I*, denied Joe's motion to supplement, denied his motion to stay the briefing schedule, determined that it did not have jurisdiction over Joe's case, and finally dismissed his appeal when Joe sought an order clarifying the ALC's finding of no jurisdiction.

The ALC orders in both the 2019 and 2021 appeals make three things clear: (1) according to PPP, the Board is not required to comply with constitutional or statutory standards governing state actions and has license to act arbitrarily and capriciously, without any oversight and without ever offering any "rationale as to [the Board's] reasons or reasoning for the denial," so long as a notice of parole denial recites one of the statutory parole factors, R. p. 155; (2) without judicial oversight, the Board will continue to violate the rights of putative parolees and the ALC will continue to rubberstamp the Board's decisions based on a misapprehension of the scope of the ALC's jurisdiction; and (3) absent judicial intervention, PPP and the ALC will further erode the

judicial branch by making findings directly contrary to those of the Supreme Court of South Carolina (and in other cases by this Court) because, in the words of PPP, "[t]he Supreme Court's findings are not relevant" to parole decisions, R. p. 156.

I. JOE'S FOURTH PAROLE DENIAL

While awaiting oral argument on appeal from his 2019 denial, Joe presented the following information to the Board at his 2021 parole hearing:

In the two years that passed from his third hearing to his fourth, Joe maintained his spotless institutional record, obtained a new college degree, started on a Master's Degree, continued to volunteer additional hours of service to suicidal inmates, and received additional commendations from the Department of Corrections and its staff. *See* R. p. 277 (updated risk assessment from clinical psychologist Dr. Susan C. Knight). Joe enrolled in the Master's Degree program at Adams State University in Denver, Colorado, becoming one of very few inmates to pursue a Master's Degree while incarcerated. R. p. 298. Joe continued his volunteer work as an Inmate Mental Health Companion in the Crisis Stabilization Unit (CSU) at Broad River, where he is "responsible for observing crisis inmates with the directive of providing emotional support, modeling positive behaviors, and alerting relevant staff if medical care is needed or behavioral concerns are noted." R. p. 51. When COVID-19 shut down the entire SCDC system a few months later, leaving the CSU understaffed, Joe was one of the first to volunteer his help, one of only three people who continued in-person counselling for inmates in crisis.[2] As of August 2021, Joe had provided

[2] With the onset of the COVID-19 pandemic and rapid spread of the disease at Broad River, institutional staff have relied on Joe more than ever. When the CSU went into quarantine in July 2020, Joe was one of only two inmates trusted to continue constant monitoring of inmates in the CSU under strict safety conditions that include bi-weekly nasal swab tests. Joe was also tasked with cleaning and sanitizing the entire CSU and with distributing meals. In November 2020, Joe was appointed by the Unit Manager to serve on the Inmate Representative Committee (IRC), a panel that serves as a liaison between prison administration, including the warden, and the inmate

emergency counsel to 294 inmates over the course of more than 2,200 hours. R. p. 289. Finally, in 2021, Joe became a Certified Peer Support Specialist, making him the only inmate in SCDC trained as both a Peer Support Specialist and a Para-Professional Counselor. R. p. 300. To attest to his work on the Crisis Unit, Joe added to his 2021 parole packet letters from Sophie Paquette and Shenelle Hanley, mental health professionals in the Crisis Unit, describing Joe's exemplary service on the Unit and continued self-improvement in SCDC. R. p. 304–05. Joe also included a letter from Joyce Spivey, another mental health professional on the Crisis Unit, also attesting to Joe's remarkable work with the Crisis Unit and his generosity in helping Ms. Spivey pass an important math exam. R. p. 306.

Joe presented the Board with a viable release plan based on the full support of his father, step-mother, mother, siblings, and fiancée. He had four outstanding offers of employment and multiple reliable housing plans.[3] R. p. 69. Moreover, the undisputed evidence before the Board established that Joe is a very low risk for reoffending. He has no violent disciplinary convictions during his entire twenty-eight-year incarceration, which is difficult to do when entering the system as a teenager, and he has not had a single infraction of any kind in over eighteen years.[4] He has maintained this nearly perfect institutional record by a deliberate process of educating himself, growing his Christian faith, and serving his community. Dr. Susan Knight, a board-certified forensic psychologist, performed a full psychological evaluation of Joe in advance of his 2019

---

population.

[3] Joe had employment and housing available through JumpStart. He also could have lived with his father in South Dakota, with his mother in Texas, or with his fiancée, Jennifer Montgomery. Jennifer is the Dean of Students at a public college in Augusta, Georgia, and she owns a three-bedroom home. Jennifer and her mother remain prepared to support Joe with unconditional love, transportation, and financial assistance. R. pp. 69–70.

[4] Joe's only major disciplinary violation in nearly twenty-eight years of incarceration was for using marijuana in 2003.

hearing to assess his "developmental and psychosocial functioning prior to his incarceration; functioning over his incarceration; risk for future violence; and transition needs." R. pp. 61–79 (Report of Dr. Susan Knight). In his 2021 parole packet, Joe added an updated risk assessment from Dr. Knight, reaffirming her 2019 findings that Joe continued to pose a "low risk" for future violent recidivism and concluding that Joe "exhibits the requisite clinical stability for successful community reintegration, with a low risk of future violence, and a secure transition plan." R. p. 277 (Updated Report of Dr. Susan Knight).

At Joe's hearing itself, four attorneys appeared before the Board, including State Senator Gerald Malloy. While Joe was joined in 2019 by Dr. Knight and four additional supporters from his family, PPP refused to allow either Dr. Knight or Joe's family to join him at his 2021 hearing, either in person or remotely. Senator Malloy, who also appeared on behalf of Payne at the 2019 parole hearing that resulted in Payne's release from prison, acknowledged that he had made a mistake in advocating for parole for Payne over Joe, but that the Board could remedy that error:

> [Payne] came through and . . . he was the main perpetrator of this horrific crime, back whenever Joe was just sixteen years of age. . . . And I think that sometimes we don't get it right, at particular times, even with this board, but I will tell you that the time is always ripe to do what is right. And if there's a parole system that we have in place in South Carolina, this is the case that should be entitled to it.

R. pp. 264–65.

Joe again informed the Board of his strong release plans, including multiple housing options and multiple job opportunities waiting for him if he was released. By an objective assessment, Joe presented an even better record in 2021 than in 2019; nonetheless, the Board voted six to one to deny Joe parole, with one Board member who had previously voted for parole now voting to deny it. At the close of the hearing, the Chairman announced that the Board was denying Joe parole on three grounds: (1) "The risk the inmate poses to the community"; (2) "The nature

and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it"; and (4) "The inmate's attitude toward his/her family, the victim, and authority in general." R. p. 271; *see also* R. p. 11 (listing the 16 criteria the Board considers for parole). PPP's letter to Joe confirming his denial of parole—which Joe did not receive until February 2022, although it was backdated to November 2021—stated that Joe was denied parole based solely on criteria involving the nature and circumstances of his offense, the only things that Joe can never change.

II. SECOND APPEAL TO THE ADMINISTRATIVE LAW COURT

With his 2019 appeal still pending before this Court, Joe appealed the 2021 denial to the Administrative Law Court. Before filing initial briefing in the ALC, Joe filed a motion to supplement the record on appeal, arguing, *inter alia*:

(1) The ALC, having already determined that it had jurisdiction to consider Joe's 2019 appeal, had jurisdiction over this appeal as well; and

(2) In light of the cursory and insufficient record on appeal filed by PPP, supplementation of the record with the materials Joe provided to the Board for its consideration was required for full briefing of Joe's case.

R. pp. 214–17. Joe also requested that the ALC stay the briefing schedule pending resolution of his Motion to Supplement because, as the motion explained, Joe could not reference information not contained in PPP's scant record without supplementing the record, and without that information, he would not be able to raise any arguments about the Board or agency's defective decision-making. R. pp. 214, 217.

Notwithstanding Judge Funderburk's finding that the ALC had jurisdiction over Joe's parole appeals in 2019, Chief Judge Anderson denied Joe's motion to supplement the record on the basis that Joe had not shown that "the Department's denial was tantamount to the permanent

denial of parole eligibility." R. pp. 232–33. Chief Judge Anderson also denied Joe's request to stay the briefing schedule that would have allowed Joe to file a belated initial brief—three days after that brief was due. R. p. 234. Consequently, Joe recognized that without jurisdiction and with no time left to file a brief, the ALC would consider no further filings in his case, and he appealed. This Court summarily dismissed Joe's appeal on the grounds that the ALC's decision denying Joe's Motion to Supplement the Record did not constitute a final order of dismissal. R. p. 241. Joe returned to the ALC to request that Chief Judge Anderson clarify his finding that the ALC lacked jurisdiction. R. pp. 248–49. The ALC, refusing to admit that it had erred in finding that it lacked jurisdiction and dismissing Joe's Motion to Supplement, denied Joe's appeal for failure to file a brief. R. pp. 258–63. In that order, Chief Judge Anderson insisted that Joe should have filed an untimely brief with the ALC, even after it had already decided, in a signed order, that it had no jurisdiction to consider Joe's case.

STANDARD OF REVIEW

This Court has jurisdiction to review decisions by the ALC. S.C. Code Ann. § 1-23-610(A)(l). Although routine parole denials are not subject to review at the ALC and are therefore beyond this Court's purview, a parole denial resulting from improper or unlawful process falls within the ALC's jurisdiction. *See Cooper v. S.C. Dep't of Probation, Parole & Pardon Services*, 377 S.C. 489, 493–94, 661 S.E.2d 106, 108–09. This Court's review of the controlling legal principles is *de novo*, and the Court has the power to reverse the ALC if its decision is affected by an error of law. S.C. Code Ann. § 1-23-610(B); *Gatewood v. S.C. Dep't of Corr.*, 416 S.C. 304, 313, 785 S.E.2d 600, 605 (Ct. App. 2016). Specifically, this Court may "remand the case for further proceedings" or it may reverse or modify the ALC's decision if the appellant's "substantive rights have been prejudiced" as a result of: a "violation of constitutional or statutory provisions"; an agency's exercise of undelegated authority; "unlawful procedure"; any "other error of law";

"clearly erroneous" factual findings, in view of the whole record; or decision making that is "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-610(B).

ARGUMENT

In 2020, the ALC found that Joe's parole denial was the product of arbitrary and capricious decision-making that was based on inaccurate factual determinations inconsistent with the judicial record, and that the Board's 2019 decision constituted a permanent denial of parole eligibility. However, when confronted with nearly identical facts in 2021, the ALC concluded the exact opposite: that the Board's 2021 denial of parole to Joe was "routine" and that the ALC therefore lacked jurisdiction over Joe's case. The ALC's holdings in *Kelsey I* and *Kelsey II*—that it lacks the power to remedy constitutional violations when they come in the form of parole denials—misread *Cooper*, invite the Board and PPP to violate the constitution, abdicate the error-correcting function assigned to the ALC by the South Carolina Administrative Procedures Act (APA), and undermine the goal of judicial economy by forcing all constitutional and statutory violations by the Board to be litigated in this Court. *See Cooper*, 377 S.C. at 500, 661 S.E.2d at 112 (quoting S.C. Code Ann. § 1-23-350); *Rose v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 429 S.C. 136, 144, n.5, 838 S.E.2d 505, 510, n.5 (2020) (rejecting PPP's argument that "the ALC did not have the authority to grant the relief requested," which would have required the Board to parole the appellant, because the ALC "did not grant or deny [the petitioner] parole itself, but rather required [PPP] to carry out the result" of a lawful parole hearing (cleaned up)). This Court should reverse the ALC's order, remand Joe's case, and require the ALC to allow Joe to supplement the record on appeal and to file a brief. Alternatively, the Court could moot the ALC's errors in *Kelsey II* and grant Joe the relief he continues to seek in *Kelsey I* and that he would receive in the absence of the Board's arbitrary, capricious, and retaliatory decision-making: release on parole.

I. THE ALC HAS SUBJECT MATTER JURISDICTION OVER JOE'S CASE.

A. The ALC's determination in 2019 that it has jurisdiction is the law of the case and the ALC erred when it revisited that issue in 2021.

The law-of-the-case doctrine "prohibits issues that have been decided in a prior appeal from being relitigated in the trial court in the same case." *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571–72, 776 S.E.2d 397, 403 (Ct. App. 2015); *see also Huggins v. Winn-Dixie Greenville, Inc.*, 252 S.C. 353, 357, 166 S.E.2d 297, 299 (1969) ("It is well settled in this jurisdiction that a decision of [a] court on a former appeal is the law of the case."). Although this doctrine has been described as discretionary, "it should be disregarded only upon a showing of good cause for failure timely to request reconsideration of the original appellate decision, and only as a matter of grace rather than right." *Flexon*, 413 S.C. at 572 n.6, 776 S.E.2d at 403 n.6 (quoting 5 C.J.S., *Appeal and Error* § 991 (2007)). "The policy behind the law of the case is to 'promote the finality and efficiency of the judicial process by protecting against the agitation of settled issues.'" *Id.* at 573, 776 S.E.2d at 404 (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (cleaned up)). Thus, a court's resolution of a legal issue establishes the law of that case and "must be followed in all subsequent proceedings in the same case," unless "*the evidence on a subsequent trial was substantially different,* controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *Id.* (emphasis in original).

In this case, the ALC erred when it ignored the law of the case established in 2019 and held in 2021 that it lacked jurisdiction over issues and parties that the court had already found to be subject to its jurisdiction. In 2021, as in 2019, Joe challenged the Board's decision-making process after he was denied parole solely on the basis of circumstances that he cannot change and after his legally and morally more culpable co-defendant had already been released. In *Kelsey I*, the ALC

held that denial of parole to Joe based solely on circumstances that can never change "effectively denies [Joe's] eligibility for parole" and because of that, the ALC held, it has subject-matter jurisdiction. R. p. 173. In other words, the ALC established the law of the case in 2019—it has jurisdiction to consider an appeal from Joe's parole denial—and the ALC was prohibited from revisiting that decision in 2021 because PPP did not make the requisite "showing of good cause for failure timely to request reconsideration of the original appellate decision." *Flexon*, 413 at 572 n.6, 776 S.E.2d at 403 n.6 (quoting 5 C.J.S., *Appeal and Error* § 991 (2007)).[5]

This is not a case where "the evidence [at the 2021 parole hearing] was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *Id.* at 573, 776 S.E.2d at 404 (cleaned up). Indeed, since 2019, nothing in Joe's record has changed except that he has continued his education, he has continued to gain the respect and trust of employees of the Department of Corrections, and he is now older than his codefendant, Payne, was at the time of Payne's release. The ALC erred in 2021 when it revisited the law of the case and held that it lacked subject-matter jurisdiction, creating a conflict within the ALC and undermining the twin goals of "finality and efficiency of the judicial process." *Id.* at 573, 776 S.E.2d at 404.

B. The ALC erred when it denied Joe's motion to stay the briefing schedule and supplement the record.

After denying Joe's Motion to Supplement the Record, in its second order dismissing Joe's appeal, the ALC insisted that it was prepared to consider the jurisdictional issue and would have if Joe had only filed another brief making the exact same arguments the ALC previously rejected.

---

[5] Even if the law of the case doctrine does not apply in this case, the ALC's relitigation of subject-matter jurisdiction is barred by *res judicata* because the present appeal involves the same parties; the same subject matter; and a previous adjudication of the same issue in *Kelsey I*. *See Judy v. Judy*, 393 S.C. 160, 168, 712 S.E.2d 408, 412 (2011).

R. pp. 261, 262. Such a motion would have been frivolous (and pointless) for three reasons. First, Joe was out of time to file his brief because the ALC denied his motion to supplement and his motion to stay the briefing schedule *after* the time to file his brief had already expired. R. p. 261. Filing a brief after the time to do so had run and after the ALC had already denied Joe's motion to stay the briefing schedule would have amounted to a request to reconsider, and the ALC Rules specifically preclude motions for reconsideration. Revised Notes to S.C. Admin. L. Ct. R. 63 (2015) ("[M]otions for reconsideration [of an ALC decision on a motion] are not permitted and will not be considered by the administrative law judge.").

Second, the ALC had already determined that it lacked jurisdiction in the order denying his request to supplement the record. As with the timeliness issue, Joe was barred by the ALC Rules from moving for reconsideration on the question of the ALC's jurisdiction. *See id.* Given that the Rules specifically precluded Joe from asking for reconsideration, it is unclear exactly what further briefing the ALC expected. Moreover, the ALC's determination that it lacked jurisdiction would have barred the court from granting Joe any relief, regardless of any additional information Joe might have attempted to put before it, because once a court determines that it lacks jurisdiction, the court is without authority to act in that case, other than to dismiss the matter. *See* S.C. R. Civ. P. (12)(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); *Chet Adams Co. v. James F. Pedersen Co.*, 307 S.C. 33, 36, 413 S.E.2d 827, 828 (1992) (noting that "once a lack of jurisdiction was determined, the court would have to dismiss the action").

Third, Joe had already set forth his argument that the ALC had jurisdiction over his case—namely, that the ALC had already decided that very issue in the affirmative—in his Motion to Supplement. The ALC considered and rejected that argument. Filing another motion, setting forth

the same argument that the judge had already rejected, would have accomplished nothing but wasting the ALC's (and Joe's) time. Thus, through its June 3 Order, the ALC tied Joe's hands.

C. The ALC has jurisdiction over Joe's case because it involves the permanent denial of parole.

While the law of the case doctrine applies here and decides the jurisdictional issue, the ALC also has jurisdiction over Joe's case for two reasons the ALC identified in 2019: (1) it does not involve a routine denial of parole but rather the Board's arbitrary and capricious decision-making and failure to consider the requisite criteria; and (2) the Board's faulty decision-making resulted in a permanent parole denial. It is axiomatic that the ALC has jurisdiction over appeals from decisions by the Board that constitute a permanent denial of parole. *Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 598, 576 S.E.2d 146, 149 (2003); *Sullivan v. S.C. Dep't of Corrections*, 355 S.C. 437, 443 n.4, 586 S.E.2d 124, 124 n.4 (2003). A decision constitutes a permanent denial of parole if the Board fails to "consider" and "giv[e] credence" to the statutory factors set forth in S.C. Code Ann. § 24-21-640 and its own criteria, particularly where the Board denies parole for "limited reasons" involving the nature of the inmate's crime, and triggers a liberty interest in due process. Such a liberty interest exists in this case, as in *Cooper*: By denying Joe parole on the sole basis of factors involving the nature and circumstances of his offense, "the Parole Board apparently failed to consider the requisite factors and, instead, based its decision on certain fixed factors that are unaffected by any rehabilitation efforts on the part of [Joe]." *Cooper*, 377 S.C. at 502, 661 S.E.2d at 113. Additionally, even when the Board or the agency has not reached a decision that "constitute[s] a permanent denial of parole eligibility," the ALC has jurisdiction over parole appeals in which "a sufficient liberty interest [is] implicated to trigger due process requirements." *Id.* at 498, 661 S.E.2d at 111; *Steele v. Benjamin*, 362 S.C. 66, 72–73, 606 S.E.2d 499, 503 (Ct. App. 2004).

In this case, the ALC correctly determined in 2020 that it had jurisdiction over Joe's case on both of those bases:

> The Board, therefore, based its decision on the original crime, consequently solely on facts that can never change. Grounding its decision on this single event, without supplemental findings, effectively denies Appellant's eligibility for parole. . . . If a Parole Board fails to consider **and apply** the statutorily-created parole criteria, it has the effect of rendering an inmate parole ineligible. . . . [I]t is difficult to believe that a sixteen-year-old, whose sense of future consequences has not been fully developed, could be so hardened and morally corrupt as to be forever beyond rehabilitation.

R. p. 173.

In the present appeal, as in the 2019 appeal, there is ample evidence that the Board has not actually considered the statutory factors. First, as discussed at length in *Kelsey I*, Joe's role in the offense, the sole basis on which the Board continues to deny him parole, was objectively, morally, and judicially determined to be less egregious than Payne's, whom the Board paroled in 2019. As demonstrated by the police investigation, trial testimony and findings in several judicial opinions, Joe did not kill Melanie Richey—Payne did. *Kelsey*, 331 S.C. at 60, 502 S.E.2d at 68; *Payne*, 355 S.C. at 646, 586 S.E.2d at 859. From a true consideration of the statutory factors, and without relying on false information and/or disregarding findings of the South Carolina Supreme Court, it is impossible for the Board to arrive at any other result than that if the factors weighed in favor of paroling Payne, they certainly weigh in favor of paroling Joe. *See* R. p. 174 ("Distinguishing between [Payne and Joe] for the purposes of granting parole can be nothing but arbitrary and capricious decision making. It would be barely justifiable to parole both, but completely understandable to deny parole to both. To treat one differently from the other can be based on nothing but arbitrary caprice.").

Second, the changed vote of one Board member between 2019 and 2021, with no explanation offered, illustrates the Board's failure to consider the requisite criteria. As previously

discussed, Joe's institutional record only improved between his 2019 and 2021 hearings. If the Board is in fact considering the relevant criteria, it is impossible for a Board member to decide that *unchanged* offense facts that did not outweigh a stellar record to justify denying parole in 2019 suddenly justified denial in the face of an even more impressive record in 2021. The nature and circumstances of Joe's offense—the Board's stated reason for denying him parole both years—did not change between his parole hearings. As will be further discussed in the next section, the only possible explanation for this Board member's inconsistent voting is that something other than the statutorily required factors and the facts of Joe's case unconstitutionally influenced the Board's decision-making.

Third, there was no discussion on the record of the Board's reasons for denying parole at Joe's 2021 hearing. Because the Chairperson, who voted *for parole*, declined to inquire into the reasons for the other members' votes for denial or even to invite deliberation before casting voice votes, he apparently knew the other members' reasons for denial before votes were even cast. R. p. 271. At the end of Joe's twenty-five-minute parole hearing, approximately three seconds of silence elapsed between a PPP employee's announcement that "the room is clear" (indicating that Board members are free to deliberate) and the Chairperson's call for voice votes. The oral vote count that followed lasted approximately thirty-two seconds. Over this thirty-second process, none of the Board members offered any explanation for their decisions or engaged in any discussion of Joe's case on the record, indicating that they had already discussed their decision and made up their minds before Joe's hearing even started.

Finally, the letter formally providing Joe written notice of his parole denial described different—but still unsupported—reasons for the parole denial than those given at the close of Joe's hearing. After the hearing, the Chairperson announced that Joe would be denied parole based

on factors one ("the risk the inmate poses to the community"), two ("the nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it"), and four ("the inmate's attitude towards his/her family, the victim, and authority in general"). R. p. 271; *see also* R. p. 210. None of these factors were supported by Joe's prison record and the information that he presented to the Parole Board at his hearing. But when Joe's denial letter arrived in February 2022, backdated to November 10, 2021, the letter listed the following different—but still unsupported—reasons for Joe's parole denial: (1) "Nature And Seriousness Of Current Offense"; (2) "Indication of Violence In This Or Previous Offense"; and (3) "Criminal Record Indicates Poor Community Adjustment." R. p. 209. By backdating Joe's denial letter by three months and changing the criteria by which it denied Joe parole (or allowing the Board to do so), PPP allowed the Board the opportunity to engage in additional fact-finding, impeded Joe's ability to file a Notice of Appeal to the ALC, and violated the APA and the Agency's internal regulations. *See* S.C. Dep't of Probation, Parole, & Pardon Servs., Policy & Procedure Manual, Parole Hearings Policies 1, 2, & 5 (requiring written notice to the inmate reflecting the reasons for denial at the parole hearing).

Cooper's guarantee that the Board must "giv[e] credence to . . . its own criteria" is hollow if the Board is not required to do more than offer a single-sentence assertion that it is complying with the law, particularly where the facts of the case clearly indicate that the Board is not actually considering the required factors. Blind trust in an agency's good faith is not a sufficient safeguard of due process. *S.C. State Highway Dep't v. Harbin*, 226 S.C. 585, 596, 86 S.E.2d 466, 471 (1955)) ("The presumption that an officer will not act arbitrarily but will exercise sound judgment and good faith cannot sustain a delegation of unregulated discretion.").

As the ALC noted in *Kelsey I*, it is hard to imagine that the Board truly considers Joe "beyond rehabilitation." R. p. 173. It is equally difficult to imagine that it believes that the nature and circumstances of Joe's offense outweighs the ample evidence of his rehabilitation and his outstanding contributions to SCDC, particularly given that the Board already released Joe's significantly more culpable co-defendant. The only possible explanation for Joe's last two parole denials is that something other than the Board's stated factors is at play in the Board's decision. At the very least, in order to satisfy the requirements of *Cooper* that still stand after *Compton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 385 S.C. 476, 685 S.E.2d 175 (2009), the Board must be required to show that their decisions are the product of logical, reasonable, and unbiased decision-making. They cannot do so in Joe's case.

II. THE BOARD VIOLATED JOE'S DUE PROCESS AND FIRST AMENDMENT RIGHTS WHEN IT DENIED JOE'S PAROLE IN RETALIATION FOR APPEALING HIS 2019 PAROLE DENIAL.

As illustrated above, there is no legally valid explanation for the Parole Board's decision to deny Joe parole in 2021 by fewer votes than he received in 2019 after he presented an even more stellar record, and even stronger evidence of parole readiness, than he presented in 2019. It is clear that the Board denied Joe's parole wholly or at least partly in retaliation for Joe's decision to appeal the process that resulted in his denial of parole in 2019. Denial of parole even partly in retaliation for a potential parolee's decision to exercise his right to appeal the process behind the Board's decision violates the parolee's First Amendment right to file a lawsuit and his right to due process.

A. The Board's retaliatory parole denial violated Joe's First Amendment rights.

The right to litigate is protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 429–30 (1963). An action for violation of an individual's First Amendment rights based on a retaliatory denial of a privilege or benefit requires a showing that: (1) the individual's speech is

protected by the First Amendment, meaning that (a) "the speech involves a matter of public concern," and (b) the individual's interest in speaking outweighs the agency's interest in efficiency; and (2) the individual's speech was a "substantial motivating factor" in the agency action. *Town of Duncan v. State Budget & Control Bd.*, 326 S.C. 6, 14–15, 482 S.E.2d 768, 772 (1997); *see also Pickering v. Board of Educ.*, 391 U.S. 563 (1968). In the parole context, courts have required a potential parolee to allege that he "(1) engaged in First Amendment protected conduct and (2) suffered an adverse action that would deter a person of ordinary firmness from engaging in First Amendment protected conduct (3) as a result of having exercised his First Amendment rights." *Nyberg v. Davidson*, 776 Fed. App'x 578, 581 (11th Cir. 2019).

A member of the Board may not lawfully vote to deny parole in retaliation for an inmate's exercise of his First Amendment rights. *Id.* at 582. The fact that Joe has no constitutional right to a parole determination in his favor is of no consequence because "an action, such as parole denial, that ordinarily would not violate the First Amendment may run afoul of the Constitution if done for a retaliatory purpose." *Id.* at 581 (citing *Wright v. Newsome*, 795 F.2d 964, 968 (11th Cir. 1986) (per curiam)). *See also Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("[U]nder the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the right."). "To state a retaliation claim, [a potential parolee] is not required to show that he had a right to the benefit denied. He must instead show he was denied a benefit because he exercised his rights." *Id.* at 582. And regardless of whether the Board's decision was based partly on valid consideration of the required statutory factors—notwithstanding that the facts of the case, as set forth above, clearly demonstrate that it

was not—the Board's denial is unconstitutional if it is even partially motivated by a retaliatory purpose. *See Drennon v. Craven*, 105 P.3d 694, 698 (Idaho Ct. App. 2004).

Joe was denied the benefit of parole because he exercised his right to appeal the Board's decision-making process. The only difference between Joe's 2019 and 2021 hearings was that in the interim, Joe appealed the Board's 2019 denial and won a ruling in his favor from the ALC—of which PPP was clearly aware. Several key facts support the claim that the Board denied Joe parole in retaliation for Joe's attempt to defend against the Board's violation of his constitutional rights.

First, as discussed above, the Chairperson announced at Joe's hearing that Joe was denied parole "one, two, and four"—referring to the factors listed in PPP's Criteria for Parole Consideration. R. p. 271. While all three reasons are unsupportable, the most noteworthy of those factors is factor four: "the inmate's attitude toward his/her family, the victim, and authority in general." R. p. 210. The only possible basis from which the Board could have decided that Joe had a poor "attitude" toward "the victim and authority in general" is the fact that Joe dared to challenge the Board's violation of his rights in court. Notably, when Joe received his parole denial letter in February (but backdated to November), PPP had removed factor four from its stated reasons for Joe's parole denial, instead claiming that Joe's parole was denied on the following bases: "nature and seriousness of current offense" (factor two); "indication of violence in this or previous offense" (also factor two); and "criminal record indicates poor community adjustment" (factor three). R. p. 209. By backdating Joe's denial letter, PPP allowed the Board to adjust the criteria by which it denied Joe parole in an attempt to cure the Chairperson's admission that Joe was denied at least partly in retaliation for his "attitude" toward "authority in general"—his decision to question the Board's actions.

Second, as discussed above, there was no "valid, non-retaliatory basis," *MacKey v. Hilkey*, 2022 U.S. Dist. LEXIS 74149, *11 (D. Colo. 2022), for the decision of one Board member to change their vote from in favor of parole to against. Joe had done nothing but improve his institutional record in the two years between his 2019 and 2021 parole hearings, and nothing else changed between 2019 and 2021 except the composition of the Board. While the Chairperson voted at both hearings to grant Joe parole, the only other member who was on the Board at both of Joe's hearings and who voted in his favor in 2019 changed her vote without explanation in 2021; the *only* fact that she could have construed against Joe was that he sued PPP following his 2019 parole denial and received an order from the ALC confirming that the agency engaged in "arbitrary and capricious decision making . . . based on nothing but arbitrary caprice." R. p. 174. To deny Joe parole on that basis constitutes retaliation for exercising his rights under the First Amendment.

Third, the very fact that the Board refused to deliberate on the record and rendered its decision in Joe's case in less than forty seconds indicates that something other than the required factors influenced the Board's decision. All but one of the Board members who denied Joe parole by a vote of three to two in favor of parole in 2019, including both members who voted to deny parole, were on the Board that denied Joe parole in 2021 by a vote of six to one against. The Board failed to put on the record any reasoning for its denial of Joe's parole, and the Chairperson—who voted for parole—declined to invite deliberation before or after voice votes were cast, indicating that he already knew the reasons for the other members' votes to deny. Denial on the sole basis of the circumstances of the offense had already been determined to be invalid for Joe's case in *Kelsey I*, and it was impossible for the Board to deny Joe parole without considering "inaccurate, fabricated and/or prejudicially prepared information." *Drennon*, 105 P.3d at 697.

B. The Board's retaliatory parole denial violated Joe's due process rights.

It is well-established that inmates are entitled to at least minimal due process protections in the parole process. *Cooper*, 377 S.C. at 497, 661 S.E.2d at 110. As a result, regardless of the outcome of a parole hearing, the Board's practices violate the Constitution if "administered maliciously or in bad faith." *Monroe v. Thigpen*, 932 F.2d 1437, 1441 (11th Cir. 1991). Procedural due process guarantees in both the United States and South Carolina Constitutions shield an inmate from improper influences or incorrect information being brought to bear on a parole board's decision-making process. *See Morrissey v. Brewer*, 408 U.S. 471, 484 (1972); *see also North Carolina v. Pearce*, 395 U.S. 711, 725–26 (1969) (noting that due process protects appellants from retaliatory "vindictiveness" after a successful appeal and that to ensure that protection, in the trial context, a judge's reason for imposing a more severe sentence after a successful appeal and retrial "must affirmatively appear"); *Al-Shabazz v. State*, 338 S.C. 354, 375, 527 S.E.2d 742, 753 (2000) (discussing the importance of "a reviewable record" before an administrative agency to permit error correction). Further, inmates have a right to vindicate that liberty interest by challenging Board processes that render them ineligible for parole. *Cooper*, 377 S.C. at 497, 661 S.E.2d at 110; *see also Furtick*, 352 S.C. at 598, 576 S.E.2d at 149. The Board's permanent denial of parole to Joe, as established by the ALC in *Kelsey I*, in retaliation for Joe's successful challenge to the Board's violation of his rights, is an unconstitutional violation of Joe's due process right to challenge the mechanisms by which the Board makes its decisions.

III. Parolees Must Be Able to Present to the ALC the Complete Record of Their Case.

The ALC must allow inmates appealing the Board's decision-making process to supplement the record. PPP's position—that the Board has no obligation to turn over the parole file, based on S.C. Code Ann. § 24-21-40, what the ALC described as "a document retention rule"

that the agency, apparently, "can choose to ignore," R. p. 175—is inconsistent with the concept of judicial review. At the ALC, the court's rules appear to require the Board to disclose parole memoranda in order to ensure that the agency has created a complete record for judicial review.[6] *See* R. p. 226 (citing Order Denying Mot. to Dismiss & Order to Supp. R. at *4, *Williams v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, No. 21-ALJ-15-0023-AP (May 16, 2022)). For example, SCALC Rule 58 lists the items that are part of a record after final decision, including "[a]ll evidence received or considered" by the agency and "copies of specific policies relied upon by the agency." S.C. Admin. L. Ct. R. 58. Thus, if the Board "received or considered" internal documents related to Joe, those documents must be made a part of the administrative record. *Id.* If PPP refuses to disclose the memorandum, it must put into the record "copies of specific policies" it relied on in declining to respond to Joe's requests. *Id.* If PPP does not make the parole memorandum part of the administrative record, it cannot cite it (or any other nondisclosed information) as the basis for the parole denial. As the Supreme Court of South Carolina recently reiterated, appellate review requires agencies, including PPP, to create a record based on "substantial evidence." *See Rose*, 429 S.C. at 142–43, 838 S.E.2d at 509. Where the record is bare, as here, there is no basis for judicial review, and to permit an agency to make secret decisions without affording an affected individual an opportunity to create a record undermines the fundamental separation of powers expressed in the South Carolina constitution. *See* S.C. Const. art. I § 22.

[6] As noted above, the ALC did not have access to the factual summary, the COMPAS assessment, or any other documents upon which the Board relied in reaching its parole decision. If this Court determines that the contents of Joe's parole file are relevant to the present appeal, the Court's rules permit it to order PPP to produce them as part of the record on appeal. *See* S.C. App. Ct. R. 212(a).

The "record" filed by PPP in Joe's case consisted solely of Joe's Notice of Rejection, PPP's Criteria for Parole Consideration, and an affidavit from Patricia Gunter, testifying to PPP's procedure for mailing parole rejection letters. R. pp. 209–12. As Joe explained in his Motion to Supplement, he was unable to adequately brief and argue his case on the basis of PPP's record—further factual development of Joe's claims than PPP provided was necessary. R. p. 216. The ALC's error in 2021 is even more salient in light of the fact that Joe made a similar motion to supplement the record in his 2019 appeal, which was granted even before the ALC explicitly determined that it had subject-matter jurisdiction over Joe's claim. Without the additional materials that Joe proposed to include in a supplemented Record on Appeal, the ALC would have no basis from which to evaluate his appellate claims, and the Court of Appeals will become the *de facto* reviewing court for appeals of decisions by the Parole Board. *See* Order, *Blackwell v. S.C. Dep't of Prob., Parole & Pardon Servs.*, No. 2021-001162 (Ct. App. Apr. 15, 2022) (denying PPP's motion to strike materials from the Record on Appeal from a parole denial because "the objected-to matters were presented to the Administrative Law Court in Appellant's 'Motion to Supplement the Record'"); S.C. Code Ann. § 1-23-610(B)(e) ("The review of the administrative law judge's order must be confined to the record. . . . The court of appeals . . . may reverse or modify the 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.").

CONCLUSION

For the foregoing reasons, Joe requests that this Court hold that the Board acted arbitrarily and capriciously and violated his procedural due process rights under the United States and South Carolina Constitutions. The Court should either remand this case to the ALC with an order that the ALC has jurisdiction and must allow a new appeal with a complete record, including all the

information considered by PPP and the Board in relation to Joe's case, or remand the case to PPP and the Parole Board with an order that the Board hold a new parole hearing, free from arbitrary, capricious, and retaliatory decision-making and free from the procedural defects the ALC identified, and because the only way the Board can remedy its arbitrary decision-making is by granting Joe parole, the Court should also order the Board to do so.

Respectfully submitted,

/s/ Allison Franz
ALLISON FRANZ #105189
HANNAH FREEDMAN #103373
Justice 360
900 Elmwood Ave., Ste. 200
Columbia, SC 29201
(803) 765-1044
allison@justice360sc.org
hannah@justice360sc.org

JOHN H. BLUME #747
Cornell Law School
159 Charles Evans Hughes Hall
Ithaca, NY 14853
(607) 255-1030
jb94@cornell.edu

JON OZMINT #7107
The Ozmint Firm
5205 Forest Drive, Suite 1
Columbia, SC 29206
(803) 782-0042
jon@ozmint.com

March 1, 2023.