STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Ralph K. Anderson III, Chief Administrative Law Judge
Docket Number 22-ALJ-15-0004-AP

Appellate Case No.: 2022-000965

JOSEPH KELSEY, #217218, ...APPELLANT

v.

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

FINAL BRIEF OF RESPONDENT

Matthew C. Buchanan, SC Bar #73740
General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 207
Columbia, South Carolina 20202
(803) 734-9220

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

STATEMENT OF ISSUES ON APPEAL

1. **Whether the Administrative Law Court (ALC) erred when it dismissed the matter because Appellant failed to submit a brief as required by rules of the ALC?**

2. **Whether the ALC's subject-matter jurisdiction confers the authority to reverse a routine denial of parole?**

3. **Although it was erroneously and unnecessarily addressed by the ALC and therefore is not a substantive issue that 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?**

4. **Although it was erroneously and unnecessarily addressed by the ALC and therefore is not a substantive issue that 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?**

5. **Although it was erroneously and unnecessarily addressed by the ALC and therefore is not a substantive issue that 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, 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 "Ecstasy," 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 Ecstasy. Kelsey testified

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[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,

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[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.

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[3] It 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).

Appellant first appeared before the Board for parole consideration on November 18, 2015 and was denied. (R.p.90). He was denied again at his second appearance before the Board on November 15, 2017. (R.p.91). The Appellant's third hearing occurred on November 13, 2019, where parole was denied by a vote of three in favor of parole to two opposed. (R.p.10). Because the offense was listed as violent under S.C. Code 16-1-60, a two-thirds majority 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, Appellant filed a notice of appeal before the Administrative Law Court (ALC). After review of the issues raised by Appellant which included the fact that the Board granted parole to Appellant's co-defendant Payne, the Honorable H.W. Funderburk, Jr., issued a ruling that found the Board had been "arbitrary and capricious" by granting parole to Payne and denying it to Appellant. He also ruled that the Board's denial of parole was based on "untrue assertions of fact and improper argument" based on the purported culpability disparity between Payne and Appellant; however, the judge ultimately concluded that the ALC lacked the authority to grant parole or rescind the Board's grant of parole to Payne and therefore denied the appeal of Appellant.(R.p.167-p.179).

Appellant filed a Notice of Appeal with this Court on October 29, 2020. Appellant argued, *inter alia*, that the ALC has 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. This case is currently pending before this court (Joseph Kelsey, #217218 v. SCDPPPS, 2020-001473) (Kelsey I).

Appellant's subsequent and most recent parole hearing was held November 10, 2021, at which time he was rejected by a vote of six against to one in favor of parole. (R.p. 201). Record on Appeal, *Kelsey v. S.C. Dep't of Prob., Parole & Pardon Servs.*, No. 22-ALJ-15-0004 at 1

(Admin. L. Ct. Apr. 13, 2022) (*Kelsey II*). This denial was also appealed to the ALC and given case number 22-ALJ-15-0004-AP. On May 16, 2022, Appellant moved to supplement the record and expand time for briefing. (R.p.214-p.219). Before this motion was ruled upon, Appellant filed a motion to compel, in which he cited an order from another inmate matter where a different ALC judge granted supplementation of the record. (R.p.225- p.228). On June 3, 2022, the Honorable Ralph K. Anderson, III denied Appellant's motion to supplement the record and suspend briefing. (R.p.229-p.235).Later, on June 22, 2022, Judge Anderson denied the motion to compel, which he described as a motion to supplement the prior motion. (R.p.251-p.256).Included in this order was analysis regarding the jurisdictional aspects of the case, noting that Appellant did not file or attempt to file a brief after being informed that briefing was not suspended. Respondent filed a motion to dismiss the action for failure to file a brief, which was granted by Judge Anderson via an order dated July 8, 2022. (R.p.244-p.246; R.p.258-p.262).

Appellant first attempted to file an appeal with this Court on June 6, 2022; however, because he sought to appeal from Judge Anderson's June 3, 2022 order denying his motion to supplement the record and suspend briefing, this appeal was dismissed as it was not an appeal from a final order. (R.p.237-p.241). See *Joseph Kelsey v. SCDPPPS*, Case No 2022-000797.[4]

Appellant filed a notice of appeal from the July 8, 2022 order ending the ALC action with this Court on July 12, 2022. Appellant filed a motion to consolidate the two appeals on September 23, 2022, which this Court denied on November 23, 2022.

Appellant's initial brief was filed October 12, 2022. The first ground for appeal is the claim that the ALC has subject matter jurisdiction over the underlying issue. This is based on an

[4] The parties have been referring to the instant action as "Kelsey II," as it is the second substantive appeal before this court. However, C-Track lists the June appeal attempt as "Kelsey (2)" and the instant action as "Kelsey (3)."

argument that the ALC's determination in an earlier matter that it had jurisdiction over Appellant's appeal became law of the case. Further, he argues that the Parole Board violated his due process and first amendment rights when it acted in a retaliatory manner and denied Appellant parole in 2021. Lastly, Appellant argues that parolees must be able to present a "complete record" of their case to the ALC. Respondent refutes and denies all of these grounds, and will address each in turn. The brief of 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). However, "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 Ann. § 1-23-600(D).

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 properly dismissed the appeal of *Kelsey II* because Appellant failed to follow the rules of the ALC by not filing a brief.

Appellant's appeal in the Administrative Law Court (ALC) was dismissed solely on the procedural basis that he failed to file a brief. As a result, any appeal from the dismissal is limited to challenging that procedural basis, and may not include an attempt to appeal or bootstrap substantive issues which were never raised to and ruled upon by the ALC. Furthermore, by failing to present or argue any challenge to the procedural dismissal by the ALC at this juncture, that ruling is now the law of the case. *ML-Lee Acquisition Fund, L.P., v. Deloitte & Touche*, 327 S.C.

238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case); *State v. Brewton*, 437 S.C. 44, 60, 876 S.E.2d 141, 150 (Ct. App. 2022).

It is undisputed that Appellant did not file a brief as part of his appeal before the Administrative Law Court. SCALC Rule 60(A) clearly states that "the party first noticing the appeal shall file an original brief within ninety (90) days after the date of assignment." Instead of filing a brief, Appellant made a motion to supplement the record and then filed a "motion to compel respondent to complete the record on appeal." Both motions were denied by the Honorable Ralph K. Anderson, III. (R.p. 229-p.235). Respondent then filed a motion to dismiss, pursuant to Rule 60(A), specifically because Appellant failed to file a brief and generally because the ALC lacked the authority to hear an appeal from an otherwise parole-eligible inmate, pursuant to S.C. Code § 1-23-600(D). (R.p.244-p.246).

In his reply to Respondent's motion to dismiss, Appellant stated that he had presumed the ALC's denial of his motion to supplement the record was tantamount to a dismissal and requested a final order from which he could appeal. *See* Appellant's Reply to Respondent's Motion to Dismiss. (R.p.248-p.249).Notably, there was no attempt by Appellant to comply with the rules of the ALC and file a brief, even belatedly, by requesting permission to file outside of time. *See* July 8, 2022 Order, P. 4, n. 3. (R.p.258-p.262).

Consequently, Judge Anderson dismissed the appeal pursuant to SCALC Rule 62, which states the judge may dismiss an appeal for failing to follow the rules of procedure. He specifically dismissed the matter finding Appellant violated SCALC Rule 60(A) by not timely filing a brief.

Quite simply, this Court should find Appellant's procedural shortcomings dispositive and no further analysis should be necessary. Failing to brief one's appeal is fatal to the case because it

leaves the court without an argument upon which to rule. No issues are preserved for review by this Court because no issues were raised below.

Notably, Appellant's brief in the instant appeal does not allege Judge Anderson dismissed the appeal in error or abused his discretion found within SCALC Rule 62. Appellant's reasons for failing to file a brief are couched entirely within Judge Anderson's denial of his motion to supplement the record. Appellant claims that it would be "frivolous (and pointless)" to file a brief. Appellant's Brief, p. 13. Yet, filing a brief is not an optional rule of the ALC. Rule 60 states that the parties **shall** file briefs which include a statement of the issues presented, a statement of the case, arguments, and conclusions. Following the rules of the court is fundamental, not frivolous.

Without setting forth issues, arguments, and conclusions at the lower court level, Appellant has preserved no issues for this Court to consider. "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011), citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). This rule applies to constitutional arguments, *State v. Langford*, 400 S.C. 421, 432, 735 S.E.2d 471, 477 (2012), as well as appeals from state agencies. *DuRant v. S.C. Dept. of Health and Environmental Control*, 361 S.C. 416, 424-25, 604 S.E.2d 704709 (Ct. App. 2004).

Consequently, all the points raised in Appellant's brief should be stricken and the appeal should be summarily dismissed. It is clear error for an appellate court to consider an issue not preserved for review. *See Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 464 S.E.2d 112 (1995) ("Since the issue…was not preserved for review, it should not have been addressed."). Appellant offered no argument that the ALC erred in dismissing the appeal for failure to file a brief; therefore, that ruling is the law of the case. Without a brief filed in the lower court, no issues

are preserved for this Court to review. Respondent respectfully submits that this Court should dismiss this Appeal.

II. The ALC does not have jurisdiction over the discretionary decision-making authority of the Parole Board, and properly declined to supplement the record on appeal.

Respondent submits that the only dispositive question on appeal before this Court is whether the ALC properly dismissed the appeal for failure to follow the rules of procedure by failing to file a brief. In the event this Court nevertheless wishes to address the dismissal of Appellant's motion to supplement the record, Respondent argues that the ALC also properly declined to order the record be supplemented.

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 does the ALC have full jurisdiction to review. *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.

In contrast to reviewing a determination that an inmate is ineligible for parole, the ALC does not have jurisdiction to hear an appeal of a routine denial of parole. "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).

The ALC may also review parole appeals in which the procedure employed by the Board is argued to 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

[5] *Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000).

Court reviewed an allegation that the Board was not following the procedure established by Section 24-21-640. The Court determined that if the Board failed to consider the criteria for parole consideration required by statute, that would adversely affect an inmate's right to parole consideration. It held that the issue would be remedied by the Board stating clearly that it had considered the required factors before rendering its decision regarding parole. The Court stated, "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*, 377 S.C. 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, (R.p.11) 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.*, 385 S.C. at 479, 684 S.E.2d at 177.

Consequently, the ALC may only review an appeal from the Board of a parole-eligible inmate when the Board's procedure has a negative impact on the inmate's right to parole eligibility. Because Appellant is parole eligible, however, the ALC could only legitimately hear an appeal if the Board's procedure materially affected his actual parole eligibility.

Appellant moved to supplement the record by including (1) documents submitted to the Board; (2) prior notices of Board denials; (3) letters from Appellant to the Department requesting parole materials; (4) the transcript of codefendant Payne's parole hearing; (5) the transcript of

Appellant's parole hearing and reconsideration requests; and (6) selections of the transcript from Appellant's trial. Appellant made that motion pursuant to SCALC Rule 58(A) and (F), arguing that the record for the appeal should include "all evidence received or considered" as well as the transcript of the proceeding.

However, this appeal was from a decision by the Parole Board denying him parole, not a denial of parole eligibility. Thus, SCALC Rule 61 controls, stating that, "In appeals from decisions of the Probation, Pardon and Parole Board, the Department need only provide a copy of the agency decision, and where applicable, the decision following a motion for reconsideration." The ALC properly held that Rule 58 did not apply to this special appeal, and that therefore Appellant needed to further justify the supplementation of the record.

Appellant argues that the materials were necessary to show that the Board acted arbitrarily and capriciously in its decision-making. No doubt, as seen in Appellant's reliance upon the October 7, 2020 order from the Honorable Judge H.W. Funderburk, Jr. in *Kelsey I*, Appellant sought to again compare the Board's decision in granting parole to codefendant Payne with its refusal to grant the same to Appellant. This, as Judge Anderson eloquently stated, goes to the decision-making capacity of the Board, which the ALC is statutorily prohibited from considering. "Because the Court's authority to review these cases is limited to ascertaining **if** the Board considered the requisite criteria, not how it **applied** the criteria, the Court does not have the jurisdictional authority to determine whether, after the Board reviewed the requisite criteria, the Board's decision was reasonable, arbitrary, or capricious." June 3, 2022 Order P. 5 (emphasis in the original). (R.p. 233).

The materials Appellant sought to include in the record all speak to the Board's decision and how he feels that it was incorrect. He clearly views the decision to deny him parole as wrong

– he understandably wants to be released from prison. So he sought to introduce evidence to try to convince the ALC that the Board was wrong to deny him parole. This sort of appeal is quite simply not allowed to be heard by the ALC. Thus, the court was correct in declining to supplement the record with information intended to support an appellate argument that cannot be made. Appellant should not receive any relief on this basis.

III. The previous ALC order has no precedential weight and cannot be considered the law of the case.

Appellant mystifyingly argues that the Oct. 7, 2020 order by Judge Funderburk denying the appeal from Appellant's 2019 parole hearing is "the law of the case."

As an initial matter, the order is currently on appeal with this Court.[6] Secondly, the ALC correctly ruled that it lacked the authority to grant parole, dismissing the appeal at the ALC level. Most importantly, the ALC committed an error in that case by considering the facts of a case in which it lacked jurisdiction – S. C. Code § 1-23-600(D) prohibits an administrative law judge from hearing an appeal from the Board involving the denial of parole of an otherwise parole-eligible inmate. As discussed *supra*, the ALC does not have the jurisdiction to hear an appeal of a routine denial of parole, which both this and the 2019 hearing were.

As Appellant concedes, the law-of-the-case doctrine is discretionary. But beyond that, the doctrine should never be applied while a matter is still under appeal. "Under the law-of-the-case doctrine, a party is precluded from relitigating, *after an appeal,* matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court."

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[6] *Kesley v. SCDPPPS*, Appellate Case No. 2020-0001473. Notably, Respondent SCDPPPS has responded to and argued against all of the ALC's findings except for the dismissal of the appeal.

Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (citations omitted) (emphasis added). By arguing for a law-of-the-case analysis, Appellant seeks to perpetuate the 2020 errors by Judge Funderburk in *Kelsey I* and to avoid Judge Anderson's sound reasoning based firmly in the law in *Kelsey II*. Respectfully, this Court should not apply the doctrine as argued by Appellant in this case.

IV. The Board did not violate Appellant's rights when it denied him parole release.

Appellant makes several inflammatory accusations in his argument, none of which were addressed by the ALC, nor preserved for review by this Court. As discussed in Part I, the sole reason the ALC dismissed his appeal was because he failed to follow the ALC rules by not filing a brief. He has, therefore, not preserved this argument for review by this Court. However, because Appellant accuses Respondent of retaliation because he appealed a previous parole denial and falsification of documents, Respondent addresses these execrable claims.[7]

Appellant makes the odious accusation that the Board denied parole because it sought to retaliate against him for a prior appeal. Respondent vehemently refutes this repugnant claim. Initially, no inmate has a right to parole or the expectation of parole; therefore, the Board does not violate the rights of an inmate when it denies an inmate parole.

Further, the Parole Board is an independent body separate and distinct from SCDPPPS. The Board is a seven-member body whose members are appointed by the governor with approval by the Senate. S.C. Code Ann. § 24-21-10(B) (Supp. 2012). Its sole duty is to consider cases for parole, pardon, and other forms of clemency provided for by law. S.C. Code Ann. § 24-21-10(B).

[7] Respondent submits that Appellant may be trying to inflame the passions of this Court in the hopes that it will overlook the fatal procedural defects in his appeal.

Importantly, the Board members do not respond to or defend against appeals from their decisions. SCDPPPS provides those services on behalf of the Board. "The [agency] director is responsible for scheduling board meetings, assuring that the proper cases and investigations are prepared for the board, maintaining the board's official records, and performing other administrative duties relating to the board's activities. The director must employ within his office such personnel as may be necessary to carry out his duties and responsibilities..." S.C. Code Ann. § 24-21-220 (Supp. 2011). Hence, the Department employs attorneys to respond to appeals of the Board's decisions.

The Board is not informed of which inmates appeal its decisions for the very reason that Appellant mentions. SCDPPPS only informs the Board of final decisions of cases that have an impact on its processes.[8] The Department does not share ongoing or pending appeals with the Board in order to ensure its decisions are solely based on the required parole consideration criteria.[9]

The claim of retaliation places an especially troubling scenario before this Court: if this Court were to provide any sort of relief to Appellant on the ground of retaliation, it opens an avenue for every inmate to appeal a denial once and then cry retaliation if the Board denies parole at a subsequent hearing. There is no other Parole Board, and no means for its entire membership to recuse itself. South Carolina law places parole decisions solely with the Board. This is precisely

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[8] For example, *Barton v. S.C. Dept. of Probation, Parole and Pardon Services*, 404 S.C. 395, 745 S.E.2d 110 (2013).

[9] Appellant is incorrect when he compares the criteria for parole consideration with the Board's grounds for rejection. The criteria for parole consideration contain sixteen different factors found on SCDPPPS Form 1212. The grounds for parole rejection is a list of six: 1. Nature and seriousness of the current offense; 2. Indication of violence in this or previous offense; 3. Use of a deadly weapon in this or a previous offense; 4. Criminal record indicates poor community adjustment; 5. Failure to successfully complete a community supervision program; and 6. Institutional record is unfavorable. The numbers that the Board chair listed at the conclusion of Appellant's hearing referred to the reasons for rejection, not, as suggested by Appellant, the criteria for parole consideration.

why SCDPPPS shields the Board members from knowing about pending appeals – even now, the Board members are unaware of the vitriol directed at them within Appellant's brief.

Appellant's accusation that SCDPPPS backdated its letter informing him of the Board's decision are similarly repugnant and reeks of paranoia. A SCDPPPS employee mailed the notice of rejection the day after Appellant's hearing. (R.p.211). On the day after the Board meets to consider inmates for parole, Department staff deliver the letters to the Department of Corrections for delivery to inmates. Because of the volume, these letters are generated automatically by computer and cannot be backdated. When Appellant's counsel requested another copy of the rejection letter in December, the letter still had the same date as when it was originally generated – November 10, 2021.[10]

This Court should not seriously entertain such baseless accusations.

V. The Board did not permanently deny Appellant's parole eligibility when it denied him parole.

Appellant makes the confounding argument that he is permanently denied parole eligibility, even though Appellant will be appearing again before the Parole Board for parole consideration in 2023.[11]

Citing the fact that one of the Board members *changed her vote* from a yes during an earlier hearing to a no at the later hearing, Appellant insists that he is now permanently denied parole. This is absurd. The Board members are not locked into their votes – either for or against. Board

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[10] Respondent could similarly have made an incendiary accusation that Appellant failed to timely file his Notice of Appeal past 30 days of the Board's decision and only made the claim that he did not receive the letter in an attempt to excuse himself for missing the deadline, but without direct evidence of this, Respondent's counsel accepts Appellant's counsel's claims as true.

[11] Appellant's next parole hearing is tentatively set for November of 2023.

members are appointed for six-year terms, and can be reappointed. S.C. Code Ann. § 24-21-10(B) and (C) (Supp. 2012). If they were not allowed to change a no to a yes (an occurrence Appellant would certainly wish to see), then perhaps Appellant's argument would hold merit. But similarly, there should be no reason why a Board member should be prohibited from changing a vote in favor of parole to one opposed on a subsequent hearing.[12]

Appellant's parole has not been permanently denied. He will have another parole hearing scheduled later in 2023, two years after his 2021 parole hearing.[13] At that hearing, the Board will again have the *authority* to grant Appellant parole – though it is important for him to understand that they are not *required* to grant him parole. Consequently, the ALC had no other choice but to dismiss the appeal as, pursuant to § 1-23-600(D), the ALC shall not hear an appeal from a parole-eligible inmate.

VI. Appellant's attacks on the Respondent should not be permitted to stand without comment.

Appellant has made several appalling accusations in his brief, including claims of backdating official documents, conducting "off-record fact-finding,"[14] and denial of parole as retaliation for his prior appeal. Respondent has addressed the substance of these accusations in earlier sections, but the tenor of these attacks should be addressed separately, and respectfully requests that this Court respond appropriately and forcefully.

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[12] Appellant's deeply insulting proposal that the Board retaliated against him for filing a prior appeal was addressed in Section IV, and Respondent again vehemently denies such an inflammatory accusation.

[13] *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."

[14] Appellant's Notice of Appeal, Feb. 17, 2022, p. 3. (R.p.199).

Respondent has done nothing to deserve such vitriol and accusations. The Board has done its duty, as has the Department, in conducting a parole hearing for Appellant. It afforded him the exact same hearing as other parole-eligible inmates are afforded – parole *consideration*, not a *guarantee* of parole. Yet because the Board denied Appellant parole, and Appellant apparently feels he achieved a modicum of validation in the flawed reasoning of an administrative law judge in a prior appeal, Appellant is now viciously attacking Respondent and making baseless accusations of fraud and wrongdoing by using rank conjecture and inflammatory rhetoric.

For example, in his Notice of Appeal to the ALC, he claimed that the Department had backdated his parole rejection letter. As a response, Respondent included an affidavit from the Department employee who mailed the letter to Appellant the day after the hearing in the record. Despite this affidavit being in the record and the very real probability that his letter was lost in the Department of Corrections' mail room, Appellant doubled-down and continued his baseless accusations that the letter had been backdated, which he maintained was proof that Respondent tried to subvert his right to appeal.

This level of paranoia might be understandable were Appellant proceeding *pro se*. However, he is represented by counsel – *several* experienced attorneys, notably – and still these appalling accusations are found throughout Appellant's brief. Respondent is not opposed to zealous representation, but this Court should draw the line when it devolves to unfounded accusations of dishonesty and fraud.

Respondent respectfully suggests that this Court consider Appellant's inherent bias: he wants to receive parole and firmly believes that he should receive it. He and his supporters have presented what they feel is a case that fully supports the decision to award him parole. He may even feel that he is entitled to parole and views his denial through that lens. Yet, the Board is in

no way required to grant parole. *Parole is not a right.*[15] Despite this inescapable fact, he presents wild accusations that the Board and the Department are involved in some elaborate conspiracy to keep him from parole. This Court should not be swayed by Appellant's efforts to distract attention from the basic fact of the case: The Board denied parole, which it may do in its absolute discretion.

CONCLUSION

Appellant's appeal in this matter is fundamentally flawed – he failed to preserve all of his arguments when he neglected to file a brief with the Administrative Law Court. Even if this Court wishes to look beyond the procedural shortcomings, Appellant's arguments fail. The ALC properly denied his request to supplement the record, because the information he wanted to produce went to the Board's decision-making authority – over which the ALC has no jurisdiction. The ALC's decision to dismiss the case should be affirmed.

Respectfully submitted,

Matthew C. Buchanan
General Counsel

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

Columbia, South Carolina
March 15, 2023

[15] *Sullivan v. South Carolina Dept. of Corrections*, 355 S.C. 437, 443, 596 S.E.2d 124, 127 (2003).

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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 Ralph K. Anderson III, Chief Administrative Law Judge
Docket Number 22-ALJ-15-0004-AP

Appellate Case No.: 2022-000965

JOSEPH KELSEY, #217218, ...APPELLANT

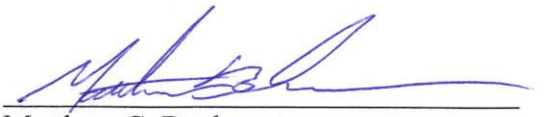
v.

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

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed March 15, 2023, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 607, 757 S.E.2d 421 (2014) (requiring redaction of social security numbers, names of minor children, financial account numbers, home addresses, and date of birth).

This 15th day of March, 2023.



Matthew C. Buchanan
General Counsel
S.C. Bar No. 73740