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S.C. SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable Harold W. Funderburk, Jr., Administrative Law Judge
Docket Number 18-ALJ-15-0039-AP

Op. No. 6020 (S.C. Ct. App. filed Aug. 30, 2023)
Appellate Case No. 2023-001932

JOSEPH KELSEY, #217218 .....RESPONDENT,

V.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S RESTATEMENT OF THE QUESTIONS PRESENTED

1. May PPP and the Parole Board continue to deny inmates access to their parole files despite PPP's own policy requirement that inmates "notify the Board" of any "specific error or inaccuracy" in those files?

2. Does the Administrative Law Court's (ALC) subject-matter jurisdiction confer on it the authority to reverse a parole denial when, as the Supreme Court of South Carolina has held, doing so would effectively require the Parole Board to grant parole to a specific person?

3. May the ALC reverse a parole denial where the ALC found that the Parole Board's decision was the result of unconstitutional, arbitrary, capricious, and procedurally defective process and produced a substantively arbitrary and capricious outcome?

4. Do PPP and the Parole Board exceed their statutory authority and intrude on the judicial function by including and relying on extrajudicial information in inmates' parole files and substituting their own opinion of the codefendants' relative culpability in connection with the nature and seriousness of the offense for the specific findings of this Court?

INTRODUCTION

Nearly thirty years ago, sixteen-year-old Joe Kelsey was convicted of murder and sentenced to life imprisonment with the possibility of parole. His codefendants, Geoffrey Payne and Jamie Lee, were sentenced to life imprisonment with the possibility of parole and ten years, respectively. As the Administrative Law Court ("ALC") confirmed below, this Court has twice determined that Payne, the oldest of the three and the ringleader, was responsible for the victim's death, and that Joe was less culpable. *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). Nonetheless, Respondent has taken the position that this "Court's findings are not relevant" to parole decisions. Record on Appeal, *Kelsey v. SCDPPPS*, No. 2020-001473, at 151 (S.C. Ct. App. Feb. 11, 2021) ("ROA").[1] Of the three codefendants, Joe—the least culpable and who has a remarkable and uncontroverted record of rehabilitation—is the only one still incarcerated and it is evident he will never be released on parole without judicial intervention.

The ALC determined that Joe's continued incarceration is the product of a decision-making process that was infected with "untrue assertions of fact and improper argument" and that produced a "decision that is arbitrary and capricious," and that Joe has been effectively permanently denied parole. ROA 170, 174. The ALC further found that PPP's policy of requiring inmates to notify the Board of errors in a file that they have no right to see is "logically and legally absurd." Nevertheless, despite finding serious error in both the process employed by the Parole Board and outcome of that process, the ALC concluded, "reluctantly," that it could not grant any relief because "the Board has the sole authority to grant or deny parole and does so in [sic] a case by

[1] Petitioner's Appendix was filed as separate documents without updated page numbers. Therefore, materials that appear in the Appendix are cited independently.

case basis." ROA 174. The ALC's order, as the final agency decision, therefore "prejudiced" Joe's "substantial rights" and was made "in violation of constitutional . . . provisions"; was "in excess of [the agency's] authority"; was made "upon unlawful procedure"; was "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record"; and was "arbitrary and capricious." *See* S.C. Code Ann. § 1-23-610(B).

The Court of Appeals agreed with the ALC's conclusion on the file access issue, held that inmates are entitled to access their parole files, and remanded the case to the ALC without reaching any of the remaining issues. The Court of Appeals was correct in ruling that inmates are entitled to have access to their parole files, and certiorari should be denied on that basis alone. However, this Court can and should address the remaining issues in Joe's case that the Court of Appeals declined to reach, and if the Court is inclined to consider those issues, Respondent consents to a grant of certiorari to do so. The ALC order identifies structural defects in the Board's procedures producing arbitrary and capricious outcomes, and PPP needs to receive a clear message from this Court that it is not wholly free from oversight. This is not hyperbole. A review of the agency's petition reveals a number of statements indicating its belief that both it and the Board are not accountable to anyone, including this Court.[2] According to PPP, the agency that oversees the Board, the Board 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, *see* ROA 150. Without judicial

[2] *See., e.g.*, Petition at 5 (arguing that as long as "each co-defendant was found guilty of the crime," courts may not review any information PPP provides to the Parole Board); *id.* 6 (asking this Court to "definitively uphold the fully discretionary powers vested in the Parole Board by South Carolina law" and arguing that the courts are powerless to remedy flaws in the parole process); *id.* at 7 (urging the Court to issue "a firm opinion emphasizing the Board's ultimate authority over parole decisions").

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. 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 because, in the words of PPP, "[t]he Supreme Court's findings are not relevant" to parole decisions, ROA 151, and PPP and the Board will continue to permanently deny inmates parole with no judicial accountability, as it has done in Joe's case.

STATEMENT OF THE CASE

Joe was sentenced to life imprisonment with the possibility of parole for his participation in a 1994 murder that took place when he was sixteen. The facts of the crime and the relative culpability of the three codefendants—Lee, Payne, and Joe—are well established in this case. This Court 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).[3] Despite Joe being the youngest and least culpable co-defendant, he is the only one who remains incarcerated. Lee, Payne's best friend, testified for the prosecution in exchange for a reduced sentence of ten years. He has been free for well over a decade. Payne was paroled in March 2019. When Joe went up for parole in November 2019, the Board denied

[3] As the ALC found, Joe and a group of other boys were making pipe bombs earlier in the day and using them to blow holes in the backyard. ROA 163. When Joe got in a car with Payne, Lee, and the victim later that night, he was under the impression that they were going to—at worst—blow up a mailbox, and by Lee's own account, when Joe realized that Payne had killed the victim, he was so paralyzed by fear that he "curled up into a ball[] in the front seat of the car." ROA 125.

him by a vote of 3-2 *in favor* of parole.[4] The two "no votes" were based on one and one reason only: the nature and seriousness of the offense. ROA 168.

I. Parole Proceedings

Joe and Payne applied for parole for the first time in 2015 and 2014, respectively; both were denied. Both applied for parole a second time and again were rejected. In March 2019, Payne went up for parole for a third time. At that hearing, Payne's attorney falsely told the Board that Joe was the primary perpetrator and urged the Board to consider the victim's family by "express[ing] their ire against parole with respect to the man who actually took their daughter's life." ROA 91. The Board voted unanimously to release Payne. After Joe's second denial, he twice requested that he be provided with the "[PPP] reports concerning me, my suitability for parole, likelihood of reoffending, etc., and any assessment tools applied to me and their results." ROA 87-88. The Board failed to respond to his letters.

Before Joe's parole hearing in November 2019, he submitted written materials to the Board. ROA 11-74. Joe presented the Board with his impeccable record in the Department of Corrections, including a pristine disciplinary record,[5] associate's and bachelor's degrees,[6] and

[4] 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. Board of Paroles & Pardons, Parole Board 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.

[5] Despite entering SCDC as a teenager, Joe has never received a single violent disciplinary conviction, and has not received a disciplinary of any kind since 2003. ROA 63.

[6] While incarcerated, Joe has earned both associate's and bachelor's degrees from Columbia International University, graduating from both programs with a 4.0 GPA. ROA 40–41. He is now pursuing an MBA from Adams State University, where he again holds a 4.0 GPA.

years of employment experience,[7] including with hospice and in the Crisis Stabilization Unit,[8] where he counsels inmates suffering mental health crises.[9] In addition, Joe presented the Board with a viable release plan based on the full support of his family, including four outstanding offers of employment and multiple reliable housing plans. ROA 64-66. Dr. Susan Knight, a board-certified forensic psychologist, performed a full psychological evaluation of Joe and concluded that Joe "exhibits the requisite clinical stability for successful community reintegration, with a low risk of future violence, and a secure transition plan." ROA 73. Joe was denied parole based solely on the "nature and seriousness of the offense" by a vote of 3-2 in favor of parole. ROA 5.

Throughout the pendency of this appeal, Joe has appeared twice more before the Board. On both occasions, he presented an improved record, including new certifications, new degree programs, new letters of commendation from SCDC employees, and of course, no disciplinary incidents. However, although his record has only improved, his votes in favor of parole have steadily decreased. In 2021, the Board voted 6-1 against parole (in contrast to the three votes he received in 2019), with one Board member who had previously voted for parole now voting to deny. In 2023, the Board voted unanimously to deny Joe parole, this time with two members who

[7] Joe has been continuously employed throughout his incarceration, including as an administrative clerk, a chaplain's assistant, a clerk for the education office, and a teacher's assistant in the GED program. ROA 31.

[8] Joe has now been working and living in the CSU for seven years. In this role, Joe 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." ROA 46. Joe has received multiple commendations, including one from Director of SCDC Bryan Stirling, "for his devoted and enthusiastic service to the program." *E.g.*, ROA 46, 50-51, 53-55.

[9] In addition to his education and employment, Joe has also completed extensive trainings and programs throughout his incarceration, all at the highest levels, and serves as a spiritual and service leader in the SCDC community. ROA 31-33, 37-38, 43-44, 52-53, 57-58, 62.

had previously voted for parole now voting to deny in the face of Joe's improved record.[10] At both hearings, Joe was denied solely on the basis of the nature and circumstances of his offense—the one and only thing he can never change.

II. Appellate Proceedings

Joe appealed the 2019 parole denial, the denial at issue in this case, to the ALC. He presented the court with all the information that was before the Board in his parole packet as well as transcripts from Payne's final parole hearing and his November 2019 hearing. ROA 11-74, 89-108. The ALC concluded that Joe's rehabilitation combined with the Board's decision to deny him parole "based exclusively on facts that cannot change" constituted "a denial of [Joe's] eligibility for parole," which in turn triggered procedural due process protections, and further acknowledged that "[t]o treat one [co-defendant] differently from the other can be based on nothing but arbitrary caprice". ROA 169, 173. Although this finding should have conferred jurisdiction on the ALC to remedy substantive legal violations, the court "reluctantly" held that it lacked the power to take any corrective action because, according to the ALC and PPP, "the Board has the sole authority to grant or deny parole and does so in a case by case basis," meaning a parole denial is never subject to review or reversal. *Compare* ROA 174 *and* ROA 151 ("[Joe's] repeated and protracted arguments that the Board acted arbitrarily and capriciously . . . cannot stand against this axiomatic rule: The ALC may not substitute its judgment for that of the Board.") *with Cooper v. S.C. Dept. of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 498-500, 502, 661 S.E.2d 106, 111-13 (2008)

[10] Joe has appealed both parole denials raising the same errors he identified in his November 2019. Additionally, Joe has credible claims of vindictiveness by the Board and the Agency for pursuing his right to appeal. Several board members who participated in his November 2019 hearing and voted in favor of parole have participated in his subsequent hearings and have changed their votes to vote against parole despite the only changed information before the Board being even more evidence of rehabilitation, maturity, and readiness for release.

(reversing a decision by the ALC affirming a parole denial and remanding "for disposition in accordance with this opinion").

Nevertheless, in the course of reaching this conclusion, the ALC concluded that the Board did three improper things. First, the Board based its decision on random, non-statutory factors, rendering the decision "arbitrary and capricious." Second, the Board considered "potentially inaccurate information" in Joe's parole file, which the Board unlawfully refused to produce to Joe based on a reading of PPP rules that, according to the ALC, is "logically and legally absurd."[11] Third, the Board substituted "untrue assertions of fact and improper argument" for the binding rulings of the Supreme Court. ROA 170, 174.

Joe appealed the ALC's decision to the South Carolina Court of Appeals, arguing (1) the ALC had the power to remedy the Board's unlawful action; (2) the ALC wrongfully affirmed an arbitrary and capricious parole denial; (3) PPP intruded on the judicial function by substituting its own factual findings for those of this Court; and (4) PPP must give potential parolees access to their parole files. The Court of Appeals ruled solely on the last issue, holding that "an inmate is entitled to review his or her file" and noting, as the ALC did, that requiring an inmate to notify the

[11] ALC rules require the Agency to file a copy of the Record with the ALC. SCALC Rule 36(A). The Record "shall consist of" any legal pleadings filed; "[a]ll evidence received or considered"; and "[t]he transcript of the testimony taken during the proceeding," among other things. SCALC Rule 36(B). PPP's Record before the ALC, however, "consist[ed] of two pages, a certificate of counsel, and a certificate of service (and a title page)." ROA 162. Because this information was insufficient to provide a basis for the ALC's review, and because it excluded all of the evidence Joe submitted to the Board and the transcripts of the relevant agency proceedings as required by the ALC rules, Joe filed an unopposed motion to supplement the record with consent from PPP's counsel. ROA 163. After Joe filed the supplemental record, however, opposing counsel objected, arguing the supplemental information "was immaterial to the matter at issue and was outside the scope of the limited authority of the ALC." ROA 163 (cleaned up). The ALC granted Joe's motion to supplement the record, and in its subsequent order, the court noted that "[t]he Record provided by [PPP] contained no evidence from which [relevant] 'facts' could be found," and it was therefore only able to rule on the factual disputes between the parties because "the Supplemental Record on Appeal provided to the Court provides ample material for review." ROA 168, 171.

Board of errors in a file he has no right to see is "logically and legally absurd." *Kelsey v. S.C. Dep't of Probation, Parole & Pardon Servs.*, 893 S.E.2d 588, 591 (S.C. Ct. App. 2023). The court declined to address Joe's remaining claims and remanded the case to the ALC for PPP to turn over Joe's file and give Joe a new parole hearing, but did not authorize further relief. *Id.* at 6. Both Petitioner and Respondent sought rehearing, Petitioner on the file access issue and Respondent on the remaining issues that the Court of Appeals declined to reach. Rehearing was denied on November 17, 2023. Order, *Kelsey v. SCDPPPS*, No. 2020-001473 (S.C. Ct. App. Nov. 17, 2023).

ARGUMENT

I. The Court of Appeals was correct in ruling that all parole-eligible inmates are entitled to review their files.

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 Al-Shabazz v. State*, 338 S.C. 354, 375, 527 S.E.2d 742, 753 (2000). Accordingly, the U.S. Supreme Court has acknowledged the "serious risks of error" when an inmate is denied access to his parole files and the ability to challenge them: The inmate may be denied parole on the basis of "adverse factual information in the inmate's file [that] is wholly inaccurate." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 15, n.7 (1979).

Joe has a substantial liberty interest in an accurate parole determination, and if he cannot see "wholly inaccurate" information in his file about his and Payne's relative culpability, Joe has no way of challenging the Board's conclusion that he is less deserving of parole than Payne. *See id.*; *see also, e.g.*, *Gardner v. Florida*, 430 U.S. 349, 354 (1977) (vacating a capital sentence for a due process violation where the defendant was not given access to portions of a confidential presentence investigation report because the information contained in the report was "absolutely

unknown to and therefore unrebuttable by [the defendant]" (citation omitted)). This fact, presumably, is why PPP's "Criteria for Parole Consideration" form includes the following language: "If the inmate thinks his/her file is somehow incomplete or contains some errors or other inaccuracy, he/she must notify the Board of *the specific error or inaccuracy*." ROA 170 (citation omitted) (italics added). "That the inmate must notify the Board of an error in a file he has no right to see is logically and legally absurd." ROA 170. This is especially true given that the inmate must not only advise the Board that he thinks there might be erroneous information in the file, but rather must identify the "specific error or inaccuracy," which is impossible in an informational vacuum.

Moreover, PPP has no countervailing interest in denying Joe access to the factual information, especially because, as the ALC emphasized, "ALC rules require that documents be redacted" such that any private information in Joe's parole file must either be redacted or submitted to the ALC for review, under seal. ROA 171 (citing SCALC Rule 6). PPP never responded to Joe's requests to see his file or explained why it would not give him the information he requested, meaning he has never had an opportunity to challenge PPP's refusal. Additionally, the South Carolina Freedom of Information Act (FOIA) does not exempt this kind of information from disclosure, and where FOIA does not expressly exempt a record from disclosure, the Supreme Court of South Carolina has construed the statute broadly to require disclosure. *See* S.C. Code Ann. § 30-4-40 (listing exemptions); *see also Evening Post Publ'g Co. v. Berkeley Cnty. Sch. Dist.*, 392 S.C. 76, 708 S.E.2d 749 (2011); *Soc'y of Pro. Journalists v. Sexton*, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984).

Finally, PPP's position—that the Board has no obligation to turn over the parole file based on S.C. Code section 24-21-40, which both the ALC and the Court of Appeals described as "a document retention rule" that the agency, apparently, "can choose to ignore," ROA 170—is

inconsistent with the concept of judicial review.[12] 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 review.[13] 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." Thus, if the Board "received or considered" internal documents related to Joe, those documents must be made a part of the administrative record. SCALC Rule 58. 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.* And 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 this Court recently reiterated, appellate review requires agencies, including PPP, to create a record based on "substantial evidence." *See Rose v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 429 S.C. 136, 142-43, 838

[12] S.C. Code Section 24-21-290 provides: "All information and data obtained in discharge of his official duties by a probation agent is privileged information, is not receivable as evidence in a court and may not be disclosed directly or indirectly to anyone other than the judge or others entitled under this chapter to receive reports unless ordered by the court or the director." This statute applies specifically to the probation supervision and revocation process and is meant to ensure that probationers and others feel free to disclose sensitive and personal information to agents concerning the health, welfare, behavior, and risk of probationers. Notwithstanding that plain language, PPP contends the following: (1) this statute applies to the gathering and compilation of records for the Parole Board, despite not mentioning parole, the Board, or even agents working parole supervision; (2) this statute further allows the agency to gather extra-judicial records such as "indictments, incident reports and investigative summaries, news media accounts," witness statements, and victim statements and allegations that may or may not reflect the actual facts of the crime, *e.g.*, Petition at 5, into a statement of the case that the Board is instructed to rely upon exclusively for the facts of the crime; and (3) this statute then transforms public documents and other extra-judicial information concerning a completed criminal case into secret information that is unreviewable either by potential parolees or any court.

[13] 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* Rule 212(a), SCACR.

S.E.2d 505, 509 (2020). Where the record is bare (as would have been the case had Joe not filed a supplemental record), 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. On remand, and in all future parole cases, PPP should be required to turn over an inmate's parole file upon request.

The Court of Appeals correctly held that all inmates must have access to their parole files as a matter of procedural due process. PPP contends that inmates are required to demonstrate a "credible, likely, or reasonable belief" that an error exists in their files before they are allowed to see them. *See* Petition at 4. This interpretation is unsupported by PPP's own Form 1212, which provides only that inmates must notify the Board of any suspected error in their files "if the inmate thinks his/her file is somehow incomplete or contains some errors or other inaccuracy," and stops short of imposing any standard by which to evaluate an inmate's concern that his or her file contains inaccurate information. However, even if PPP's interpretation were correct, the ALC recognized that Joe has shown a "credible, likely, or reasonable belief" that his file contains errors. As the ALC noted, the only way the Board could, without acting arbitrarily and capriciously, conclude that Payne should be released while Joe remains incarcerated is if its decision was based on "untrue assertions of fact." ROA 174.

Finally, if PPP has been working to ensure that the contents of its parole files comport with the judicially determined facts of an inmate's offense and contain no extrajudicial, inaccurate, or false information, it has no reason to worry that inmates will dispute the facts contained in their files—such appeals, if indeed frivolous, will be easily disposed of. The only reason PPP should

fear such appeals is if it routinely violates due process by allowing extrajudicial, untested, and/or false information in its files to bear on the Board's decisions.

II. There are additional grounds on which to sustain the Court of Appeals' judgment and that should be resolved by this Court.

The Court of Appeals' ruling on the file access issue was correct and there is no reason to grant certiorari on that issue. However, if the Court chooses to do so, there are other equally important issues involving the Board and the Agency that this Court needs to address and which are squarely presented in this case. Pursuant to Rule 208(b), Respondent may present "argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)," which provides that "[t]he appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." *See also I'On, LLC v. Town of Mount Pleasant*, 338 S.C. 406, 420, 421, 526 S.E.2d 716, 723 (2000) ("The basis for respondent's additional sustaining grounds must appear in the record on appeal," but "an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal."). These additional grounds were raised in the Court of Appeals both in Respondent's briefing and argument and in a Petition for Rehearing, and reveal additional flaws in the Board's and the ALC's decisions relevant to this Court's decision of whether to grant certiorari. Pet. for Reh'g, *Kelsey v. SCDPPPS*, No. 2020-001473 (Sept. 13, 2023).

The ALC found that Joe's parole denial was the product of arbitrary and capricious decision-making, based on inaccurate factual determinations that are inconsistent with the judicial record, and that the Board's most recent decision constituted a denial of parole eligibility. However, even after reaching these conclusions, the ALC held it was unable to grant Joe the relief it clearly found he deserved. ROA 174. *But see* ROA 170, 172 ("Respondent represents that the Board considers parole applications on a 'case by case' basis. The argument allowed in Payne's

parole hearing runs directly counter to Respondent's assertion." (internal citation omitted)). This final agency decision leaves Joe in a unique and unenviable position: A quasi-judicial body, after reviewing the relevant evidence, agreed with Joe that the Board acted unlawfully in denying him parole. But because the only way the agency can remedy its unlawful conduct is by granting Joe parole, the ALC held—"reluctantly"—that it lacked the power to give Joe any relief. ROA 174.

The ALC's ultimate holding, that it lacks the power to remedy constitutional violations when they come in the form of parole denials, misreads *Cooper*, invites the Board and PPP to violate the Constitution, abdicates the error-correcting function assigned to the ALC by the South Carolina Administrative Procedures Act (APA), thereby threatening confidence in the administrative process, and, practically speaking, undermines the goal of judicial economy by forcing all constitutional and statutory violations by the Board to be litigated in the Court of Appeals. *See Cooper*, 377 S.C. at 500, 661 S.E.2d at 112 (quoting S.C. Code Ann. § 1-23-350); *Rose*, 429 S.C. at 144 n.5, 838 S.E.2d at 510 n.5 (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 Board to immediately hold a new parole hearing free from arbitrary and capricious decision making and other unlawful error—a process that can produce one result and one result only: release on parole.

a. The ALC has authority to remedy unlawful agency action that resulted in a parole denial even when the relief sought would require the Board to grant parole.

PPP, an executive agency, and the Board, a division of an executive agency, only have authority to the extent the Legislature has delegated power to them. *See Major v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 384 S.C. 457, 465, 682 S.E.2d 795, 799 (2009). As this Court has

explained, "the Legislature created th[e] Board to operate within certain parameters," not to "render decisions without any means of accountability." *Cooper*, 377 S.C. at 499, 661 S.E.2d at 111. The source of the Board's powers, the statutory scheme that created it, also defines the scope of those powers. *See* S.C. Code Ann. § 24-21-640 (outlining the statutory parole requirements and requiring the Board to "establish written, specific criteria for the granting of parole"). When the Board exceeds its powers—by violating the constitution, failing to comply with its statutory obligations, or intruding on the powers of another branch—the APA contemplates that the ALC will serve as a final backstop before the agency decision is subjected to judicial review. *See* S.C. Const. art. I § 22; S.C. Code Ann. §§ 1-23-600, 1-23-380; *see also Al-Shabazz*, 338 S.C. at 369, 527 S.E.2d at 750.

Thus, when the Board (or any other division of an executive agency) acts outside its statutory delegation, the role of the ALC is twofold: (1) "provid[e] a 'neutral forum for fair, prompt, and objective administrative hearings' for members of the public affected by the actions of governmental agencies," and (2) protect "the general separation of powers principle" by ensuring "consistency and objectivity" in agency decision-making to guard against the executive branch intrusion on core legislative or judicial powers. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envt'l Control*, 411 S.C. 16, 53-54, 766 S.E.2d 707, 728 (2014) (Toal, C.J., joined by Kittredge, J., dissenting) (quoting James B. Richardson, *Judicial Review of Agency Decisions*, in South Carolina Administrative Practice & Procedure 459 (Randolph R. Lowell ed. 2008)). In South Carolina, it is notable that the General Assembly "granted ALCs the significant right to render final decisions based on de novo review," unlike in the federal system or in other states—an indication that in this state, the legislature intentionally gave ALCs more power than they might have in other jurisdictions. *Id.* at 55, 766 S.E.2d at 729.

So long as the ALC has subject-matter jurisdiction over the matter at hand, it has the power, on de novo review, to remedy agency violations, even where the remedy guarantees that an inmate will be granted parole. *See Rose*, 429 S.C. at 144 n.5, 838 S.E.2d at 510 n.5 (2020). In *Rose*, for example, PPP made the same argument about the scope of the ALC's powers as it has made in this case: "[T]he ALC did not have the authority to grant the relief requested by Rose in that the ALC, by ruling in Rose's favor, effectively granted Rose parole." *Compare id.* with ROA 151 ("The ALC may not substitute its judgment for that of the Board. Whatever the Board saw in the co-defendant that was deserving of parole and not for the Appellant is left in the sole discretion of the Board. Respectfully, this Court may not overturn that decision for any reason."). There, however, the ALC and the Supreme Court "rejected this argument," holding instead that where the agency has violated a putative parolee's substantive rights, and where the remedy the putative parolee seeks requires the agency to grant him parole, the ALC is not granting or denying parole but is acting within its delegated authority to correct unlawful agency action. *Rose*, 429 S.C. at 144, n.5, 838 S.E.2d at 510, n.5. Joe has not asked for anything more. He has merely requested a holding that the Board acted unlawfully, and the fact that the only remedy is a new parole hearing at which the Board must grant him parole does not alter the ALC's remedial powers. Thus, if the ALC had subject-matter jurisdiction over Joe's claims, it had the power to remedy the agency's substantive violations.

Moreover, this Court, contrary to Petitioner's argument, is appropriately suited to remedy agency violations of state and constitutional law. S.C. Code §§ 1-23-380, 390 (establishing procedures for judicial review of agency action). PPP is an executive agency. *See* S.C. Code Ann. § 24-21-10(A); *see also id.* § 1-23-10(1) (defining "Agency" and "State agency"). As such, parole determinations constitute agency action subject to judicial review, and PPP is not subject to a

special set of rules simply because its expertise lies in parole decisions. This Court has previously remedied the Board's and PPP's abuses of power, and given that both bodies continue to flout the Court's clear directives, specifically those from *Cooper*, it can do so again.[14]

i. The ALC had subject-matter jurisdiction in this case.

The ALC has subject-matter jurisdiction over a parole determination if the Board's decision implicates a state-created liberty interest, either by rendering a person ineligible for parole or by failing to abide by the statutory and constitutional framework that governs PPP. *See Cooper*, 377 S.C. at 497, 661 S.E.2d at 111; *Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2003); *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003).

Here, the ALC correctly found that it had subject-matter jurisdiction for two independent reasons. First, it held that the Board's decision "is effectively a denial of [Joe's] eligibility for parole." ROA 173. Specifically, the notice of parole denial the Board sent to Joe after his November 2019 hearing indicated that it had declined to parole him based solely on the "Nature and Seriousness Of [sic] the Current Offense." ROA 168 (quoting ROA 5). Thus, the Board "based

[14] *See, e.g.*, *Rose*, 429 S.C. at 143, 838 S.E.2d at 509 (rejecting PPP's claim that it properly denied parole to an inmate who had received the requisite number of votes and had presented affidavits to that effect, rejecting PPP's unsupported assertion that it properly denied the inmate parole simply because it had no evidence of the vote count in its own records, and remanding to PPP "to determine Rose's parole conditions"); *Barton v. S.C. Dep't of Probation Parole & Pardon Servs.*, 404 S.C. 395, 745 S.E.2d 110 (2013) (correcting PPP's erroneous retroactive application of S.C. Code § 24-21-645 as an *ex post facto* violation in order to safeguard "an inmate's substantial personal right to statutorily correct parole review," rejecting PPP's interpretation of § 24-21-645 because it would "invite[] absurd results," and remanding for the appellant to be granted parole); *Cooper*, 377 S.C. 489, 661 S.E.2d 106 (2008) (rejecting PPP's interpretation of § 24-21-640, establishing that inmates have a right to procedural due process at parole hearings and the Board must adhere to constitutional standards, and explaining that the Board is subject to reversal if its final decision does not "include findings of fact and conclusions of law, separately stated," or if the findings of fact are not "accompanied by a concise and explicit statement of the underlying facts supporting the findings" (quoting S.C. Code Ann. § 1-23-350)).

its decision on the original crime, consequently solely on facts that can never change," and there is no way for Joe to ever receive parole so long as this factor is the only factor that stands in his way. ROA 168. Thus, the Board has "abrogate[d] [Joe's] right to parole eligibility and, thus, infringe[d] on a state-created liberty interest." 377 S.C. at 499, 661 S.E.2d at 111.

Second, the ALC found that the Board's decision involved various forms of unlawful "method and procedure," in violation of the APA, the parole statute, internal PPP guidelines, and the constitution. ROA 168-71, 173-74. These findings, too, granted the ALC subject-matter jurisdiction over Joe's claims because Joe "ha[s] a right to require the Board to adhere to statutory requirements in rendering a decision." *Cooper*, 377 S.C. at 49, 661 S.E.2d at 112. Thus, because the ALC had subject-matter jurisdiction over Joe's claims, the court also had the power to remedy any violations it identified—even if the remedy would have required the Board to grant Joe parole.

ii. The ALC's denial of relief must be reversed because the ALC affirmed a demonstrably arbitrary and capricious parole decision.

The APA defines the "arbitrary and capricious" standard as requiring judicial reversal of an agency decision that is "characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(5)(f). "The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence." *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996). Substantial evidence exists where, "considering the record as a whole," "reasonable minds [could] reach the conclusion that the administrative agency reached." *Id.*; *see also Rose*, 429 S.C. at 143, 838 S.E.2d at 509. If, however, the agency has "offered an explanation for its decision that runs counter to the evidence before the agency," the agency's decision is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Rodney*, 320 S.C. at 519, 466 S.E.2d at 359.

After the ALC was presented with the legally relevant information that was before the Board, it came to the unavoidable and unremarkable conclusion that denying parole to Joe while granting parole to Payne was arbitrary and capricious. ROA 169; *see also* ROA 172 ("[T]he account of the crime leading to the convictions of both [Joe] and his codefendant (Payne) suggests that both or neither should be paroled."). As the ALC found, "[b]oth inmates have compiled extraordinary records as model prisoners," as evidenced by Joe's "devotion to education and self-improvement and his volunteering to assist other inmates experiencing emotional crises." ROA 168-69. "The only significant differences between Payne and [Joe]," according to the ALC, "derive from their respective roles in the crime." ROA 169. Thus, as the ALC explained:

> Although the Board has the sole authority to grant or deny parole, its decision to parole the individual who beat the victim with a wrench, choked the victim, raped her, and set off the pipe bomb in her mouth appears to be arbitrary and capricious in light of its decision to deny parole to another participant in the crime who did not beat, choke, or rape the victim.

ROA 173. Payne, in other words, was indisputably more culpable than Joe, and the Board's decision to parole him but not Joe "can be nothing but arbitrary and capricious." ROA 169.[15]

This Court may not revisit these factual findings of the ALJ (which mirror those of this Court) unless it determines that they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Barton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 404 S.C. 395, 401, 745 S.E.2d 110, 113 (2013) (quoting S.C. Code Ann. § 1-23-610(B)); *see also Nucor Steel v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 544-45, 426 S.E.2d 319, 322 (1992). "In

[15] Additionally, the Board's decision betrays the fact that its members ascribe more weight to one single non-predictive criterion for assessing parole readiness (the nature and seriousness of the offense) out of the sixteen criteria that PPP has promulgated. Neither the legislature, nor the courts, nor the Board's own published standards allow such an arbitrary approach—in no small part because, as Joe's case illustrates, the Board is poorly positioned to make assessments about the facts of any given offense.

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 the ALC reached." *Barton*, 404 S.C. at 401, 745 S.E.2d at 113. The record evidence relevant to this appeal, discussed in the Statement of the Case, is "reliable, probative, and substantial" because, as the ALC explained, it is based largely on facts conclusively established by the South Carolina Supreme Court. ROA 170. Thus, given that the ALC found that the Board's decision was arbitrary and capricious, and given that the record evidence does not support a conclusion that the ALC's decision was based on clearly erroneous findings of fact, the Court should reverse and remand with instructions for the ALC to grant Joe the requested relief.

The refusal of the ALC in this case to overturn a parole denial that it determined was arbitrary and capricious—and therefore unconstitutional—belies a larger systemic problem within the parole system. The current legal framework allows PPP and the Board to skirt the requirements of procedural due process in parole hearings that both this Court and the United States Supreme Court have recognized. *See Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 15 (1979) (noting that inmates are entitled to procedural due process in parole proceedings to the extent necessary to "safeguard[] against serious risks of error"); *Cooper*, 377 S.C. 489, 661 S.E.2d 106 (2008) (inmates have a state-created liberty interest, protected by procedural due process, in meaningful parole proceedings at which the Board follows proper procedure).

In *Cooper*, this Court established that parole-eligible inmates have a state-created liberty interest in a meaningful opportunity for parole. 377 S.C. 489, 661 S.E.2d 106. Thus, as a matter of law, if the Board renders a decision that permanently denies parole to an otherwise parole-eligible inmate, the denial is not a "routine denial of parole" and triggers due process requirements of judicial review. *Id.* at 497-98, 661 S.E.2d at 110-11; *Furtick*, 352 S.C. at 598, 576 S.E.2d at 149;

Sullivan, 355 S.C. at 443 n.4, 586 S.E.2d at 124 n.4. Further, the Board's actions may violate an inmate's right to parole eligibility even in the absence of an explicit statement by the Board that it is permanently denying parole to an inmate. *Cooper*, 377 S.C. at 498, 661 S.E.2d at 111 ("[A] sufficient liberty interest may be implicated to trigger due process requirements even though the Parole Board's decision did not constitute a permanent denial of parole eligibility."). The *Cooper* Court noted that the risk of a violation is especially high where, as here, the Board denies parole based solely on immutable factors relating to the nature and circumstances of the offense. *See id.* at 500, 661 S.E.2d at 112.

Cooper was followed one year later by *Compton v. S.C. Dep't Prob., Parole & Pardon Servs.*, 385 S.C. 476, 685 S.E.2d 175 (2009). In *Compton*, this Court held that a decision by the Board will be considered a routine denial of parole 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." 385 S.C. at 479, 685 S.E.2d at 177.

PPP and the Board have carved a procedural loophole out of these cases that they have used to sidestep *Cooper*'s requirements entirely, interpreting *Compton*'s holding to mean that the Board would be immune from judicial review and could violate *Cooper*'s due process guarantees with impunity as long as it made a vague assertion that it had considered the requisite factors in its decision to deny parole. Thus, the Board adopted its now-standard practice of uniformly denying parole to 93%[16] of the inmates who come before it, often citing no other reason than the nature

[16] Facts and Figures, South Carolina Department of Probation, Parole, & Pardon Services (as of Sept. 30, 2023), https://www.dppps.sc.gov/About-PPP/Facts-Figures. The Board's claimed overall grant rate for 2023 was 7%, or 172 of the 2,452 inmates who came before it. *Id.* The grant rate for violent offenders is even lower, at 4%. *Id.* This rate is among the lowest, if not the lowest, in the country among states with discretionary parole schemes—the vast majority of other states grant parole at rates between 25% and 70%. Prison Policy Initiative, "Discretionary Parole Grant Rates by State, 2019–2022" (Oct. 16, 2023),

and circumstances of the inmate's offense, and copying and pasting the same sentence into the denial letters that PPP sends after each parole hearing. *See* ROA 5. However, if this interpretation were correct, *Cooper* would be rendered meaningless. This clearly contravenes the *Compton* Court's intent, as evidenced by the fact that it could easily have overruled *Cooper* in *Compton* and chose not to. Thus, even after *Compton*, *Cooper*'s due process requirements still stand, and where the facts of the case clearly demonstrate that the Board has failed to "consider" or "give credence" to the requisite factors, regardless of whether it has provided a rote citation to one of the factors, the Board's decision cannot constitute a routine denial of parole and thus be immune from judicial review. *See Cooper*, 377 S.C. at 499, 661 S.E.2d at 111-12. Otherwise, potential parolees would have no administrative avenue through which to remedy violations of their due process rights, even where, as here, it appears that the Board has not considered or applied the criteria.

PPP's and the Board's interpretation and application of *Compton* also contravenes state law, which clearly contemplates that an inmate who shows "a disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interest of society will not be impaired thereby; and that suitable employment has been secured for him" should receive parole. S.C. Code § 24-21-640; *see also generally* S.C. Code Ch. 24, Art. 7. Joe's case is one of many that illustrate that this does not happen in South Carolina. In 2023, the Board granted parole to just 30 of the 774

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https://www.prisonpolicy.org/data/parolerates_2019_2022.html. PPP's published parole results indicate that the majority of these parolees had one year or less left to serve on their sentences, which means that the Board's effective parole rate—the percentage of inmates who are actually released on parole before their sentence expires—is much lower than PPP's official figure. This information is available through PPP's Parole and Pardon Hearings Search function at https://www.dppps.sc.gov/Parole-Pardon-Hearings.

violent offenders who came before it—an astounding four percent.[17] This practice directly contradicts sound correctional policy, which supports a robust parole program because parole incentivizes good conduct in correctional facilities, encourages participation in prison programming, and reduces unnecessary spending and the burden on correctional departments by releasing deserving individuals. *See* Brief of Former Correctional Agency Heads, Correctional Administrators, and Prison Wardens as Amici Curiae in Support of Petitioner, *Kelsey v. SCDPPPS*, No. 2020-001473 (Mar. 15, 2023).

b. The Parole Board intruded on the judicial function by making factual findings that are inconsistent with facts determined by this Court.

The second substantial error the ALC identified in the Board's decision-making involves its unjustifiable revisiting of facts "based on misinformation and improper argument." ROA 174. As the ALC explained, "Payne's attorneys argued that the Board could satisfy the victim's family by paroling Payne and denying parole to [Joe]" and "characterized [Joe] as the perpetrator and stated that the victim's family could 'still express their ire against parole with respect to the man who actually took their daughter's life.'" ROA 169-70 (quoting ROA 91). These arguments are "contrary to the facts, recognized by the South Carolina Supreme Court, that Payne choked the victim, struck her in the head with a wrench, and ignited the pipe bomb's fuse." ROA 170. Nevertheless, PPP argued before the ALC that "[t]he Supreme Court's findings are not relevant to the Board's decision-making process" and that the Board is free to disregard judicial findings of fact because "[i]t is solely the Board's authority to grant or deny parole." ROA 151-52.

"In South Carolina, to preserve some semblance of the separation of powers we once held sacred, an administrative agency may not make law without legislative oversight and approval."

[17] Facts and Figures, S.C. Dep't Prob., Parole & Pardon Servs. (Sept. 30, 2023), https://www.dppps.sc.gov/About-PPP/Facts-Figures.

See Joseph v. S.C. Dep't of Labor, Licensing & Reg., 417 S.C. 436, 461, 790 S.E.2d 763, 776 (2016) (Kittridge, J., concurring). Accordingly, the Board derives all of its authority from a legislative grant of power that is limited to "consider[ing] cases for parole, pardon, and any other form of clemency provided for under law" based on "written, specific criteria." 16 S.C. Code Ann. §§ 24-21-13(B), 24-21-640. This is the full extent of the Board's authority, and members of the Board lack the power to revisit judicial findings about the facts of an offense. Simply put, although the Board has the power to assess the "nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it," it does not have the power to set aside or ignore what a judicial body has found about the offense.

As explained above, this Court made specific determinations about the murder for which Joe and Payne were sentenced to life in prison, and the ALC confirmed that those facts are binding on the agency's assessment of relative culpability. *See* ROA 169-70. The Board is not free to completely ignore, as it did in this case, what the judiciary has already found about an inmate's crime. *See* S.C. Const. art. V § 1 (vesting in the courts of South Carolina the full "judicial power"). Moreover, the Board in Joe's case was not in a position to make accurate findings of fact because it had before it argument from Payne's attorneys "suggest[ing] that [the Board] could parole Payne and satisfy the victim's family by keeping [Joe] in custody." *See* ROA 174. Unlike the Board, this Court had the full record of what Joe and Payne did before it, which included evidence that had been tested by "procedures [that are] essential in criminal trials," including cross examination and confrontation. *See Wolff v. McDonnell*, 418 U.S. 539, 567 (1974). For these reasons the findings of the court system take supremacy over the Board's reading of the law, and it was prejudicial error for the Board to substitute its views for those of the Supreme Court. *See Marbury v. Madison*,

5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803) ("The province of the court is, solely, to decide on the rights of individuals.").

CONCLUSION

The Court of Appeals was correct in ruling that inmates are entitled to access their parole files, and this Court should deny certiorari on that basis. However, the Court should grant certiorari to consider the issues of whether the ALC's subject-matter jurisdiction confers the authority to reverse an arbitrary and capricious parole denial even when the remedy for such a denial would require granting parole, whether the ALC must reverse unconstitutional and arbitrary and capricious denials, and whether PPP and the Board may ignore the factual findings of this Court and substitute their own judgment for Supreme Court decisions. Absent judicial intervention, PPP and the Board will continue to violate due process and the Administrative Procedures Act by permanently denying inmates parole, and will continue to escape judicial accountability.

Respectfully submitted,

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