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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
Honorable S. Phillip Lenski, Administrative Law Judge

Case No. 2024-001471
ALC Docket No. 2024-ALJ-15-0002-AP

JOSEPH KELSEY, # 217218APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF
PROBATION, PAROLE, AND PARDON SERVICESRESPONDENT.

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether PPP and the Parole Board violated Joseph Kelsey's due process rights and acted in an arbitrary and capricious manner when the Board failed to consider the requisite statutory factors in its decision to deny Kelsey parole solely on the basis of the nature and circumstances of the offense, after paroling his judicially determined more culpable co-defendant.
2. Whether the Board's single-sentence, boilerplate statement that it considered the required factors of S.C. Code § 24-21-640 is sufficient to satisfy the due process guarantee of *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.* where the record demonstrates that the Board is not actually applying the factors to the facts of Kelsey's case.
3. Whether PPP and the Board violated Kelsey's due process and First Amendment rights and acted in an arbitrary and capricious manner by denying parole wholly or partly in retaliation for successful appeals of prior parole denials.
4. Whether PPP violated Kelsey's due process rights by refusing to disclose his parole file or allow him to correct false information in the file before it was sent to the Board.

INTRODUCTION

In 2019, the Administrative Law Court (ALC) determined that the Board’s decision to deny parole to Joseph Kelsey (on a vote of three to two in favor of parole) based solely on the nature of his offense after paroling his significantly more culpable co-defendant was “arbitrary and capricious decision-making . . . based on nothing but arbitrary caprice.” Order, *Kelsey v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, No. 19-ALJ-15-0061-AP (S.C. Admin. L. Ct. Oct. 7, 2020) (hereinafter “*Kelsey I*, ALC”). The ALC further noted that the Board’s decision “effectively denies [Joe’s] eligibility for parole” and therefore was not a routine parole denial. *Id.* On the merits, the ALC found that the Board’s decision-making was “logically and legally absurd,” infected with “untrue assertions of fact and improper argument,” and that it had produced a “decision that [was] arbitrary and capricious.” *Id.*

Since Joe filed that first appeal, he has continued to improve his already remarkable prison record and further demonstrate his suitability for parole. Nevertheless, when he went up for parole in 2021 and 2023, he was again denied both times—in 2021 by a vote of six-to-one against parole and in 2023 by a unanimous vote. Record on Appeal, *Kelsey v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, No. 24-ALJ-15-0002, at 11 (Feb. 9, 2024); Exhibit A to Request for Reconsideration. The only fact that the Board could possibly have held against Joe to produce a less favorable vote for parole was that between his hearings, he appealed both his 2019 and 2021 denials and secured a ruling requiring more transparency from the agency from this Court. *Kelsey v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, 441 S.C. 373, 379, 893 S.E.2d 588, 591–92 (Ct. App. 2023) (holding that PPP must give parole-eligible inmates access to their parole files and an opportunity to correct any inaccurate information in their files before their parole hearings) (*cert. denied*, *Kelsey v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, 2024 S.C. LEXIS 36 (S.C., Mar. 5,

2024)). Thus, this Court should reverse the Board's arbitrary, capricious, and retaliatory denial of parole and remand this case to the agency with an order that the Board grant Joe the only relief that will not produce an unconstitutional decision: a grant of parole.

STATEMENT OF THE CASE

Joe was sentenced to life in prison for a murder that he participated in at the age of 16 in 1994, along with an older, more culpable codefendant, Geoffrey Payne. The Supreme Court of South Carolina has twice considered the facts of the offense and has held that the evidence “overwhelmingly prove[d]” that the victim died at Payne’s hands, either “by Payne strangling her to death, or by Payne lighting the fuse of [a] pipe bomb that exploded in her mouth.”¹ *Payne v. State*, 355 S.C. 642, 586 S.E.2d 857 (2003); *see also State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998). *And see generally Kelsey I*, ALC (noting Payne’s greater culpability). Payne, in other

¹ The facts of the crime are set forth in greater detail in Joe’s Request for Reconsideration. Record on Appeal, *Kelsey v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, No. 24-ALJ-15-0002, at 1–9 (Feb. 9, 2024). However, a few crucial facts bear repeating. On July 10, 1994, a group of teenagers got together to hang out and drink beer at the house where Joe was temporarily staying, including Geoffrey Payne and Jamie Lee, neither of whom Joe knew well, and both of whom were older than Joe. Payne and Lee went to a nearby Texaco station where they found fifteen-year-old Melanie Richey, alone and limping. *State v. Kelsey*, 331 S.C. 50, 58–59, 502 S.E.2d 63, 67 (1998). They invited Melanie back to the house, where Payne “repeatedly tried to coax [Melanie] into having sexual intercourse with him. [She] refused Payne’s advances.” *Id.* Payne was frustrated—he told Lee “he was so mad he could kill [Melanie]”—so the two boys laced her drink with ecstasy. *Id.* During all this, Joe was listening to music by himself and was not involved with Payne, Lee, or Melanie until Payne and Lee invited him to come along to drive Melanie home around 3:30 AM. *Id.* Payne told Joe to bring some explosives the boys had made earlier in the day, which Joe “assumed Payne wanted to [use to] blow up mail boxes,” as the boys had been playing with them in the backyard earlier that day. *Kelsey*, 331 S.C. 50 at 59 n.1, 502 S.E.2d at 67. Unbeknownst to Joe, Payne also told Lee to bring “something to knock [Melanie] out with.” *Id.* at 59, 502 S.E.2d at 67.

As they were driving, Lee noticed Melanie’s foot had kicked the gear into neutral. *Id.* at 59-60, 502 S.E.2d at 67. He “turned around and saw that Payne had [Melanie] in a ‘strangle hold type position.’” *Id.* at 60, 502 S.E.2d at 68. He said nothing, but “[a] few minutes later, Lee heard ‘two quick, empty thud type sounds,’ *id.*, as Payne hit Melanie ‘twice on the head with a wrench,’ *Payne v. State*, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003). Payne announced that Melanie was “knocked out,” *Kelsey*, 331 S.C. at 60, 502 S.E.2d at 68. Payne told Lee to pull over. *Payne*, 355 S.C. at 645-46, 586 S.E.2d at 859; *Kelsey*, 331 S.C. at 59, 502 S.E.2d at 67. Joe, who had CPR training, checked her pulse as soon as they got out of the car and was confident she was dead. *Kelsey*, 331 S.C. at 60, 502 S.E.2d at 68. Payne “had sexual intercourse” with her body. *Payne*, 355 S.C. at 645-46, 586 S.E.2d at 859. Afterwards, the boys carried Melanie’s body into the woods and Payne “instructed [Joe] to place a pipe bomb into [her] mouth.” *Kelsey*, 331 S.C. at 60, 502 S.E.2d at 68. Joe, afraid of Payne after watching him rape and kill Melanie, complied with Payne’s demand. “Payne then lit the fuse, and the two ran.” *See id.*

words, was indisputably the primary perpetrator of the murder. Nevertheless, Payne was paroled unanimously at his third parole hearing in 2019, after serving 24 years.

Subsequently, in November 2019, the Board denied Joe parole by a vote of three for parole and two to deny based solely on a single criterion relating to the nature and circumstances of the offense. Joe appealed this parole denial to the ALC, where Judge Funderburk noted that “[t]he only significant differences between Payne and [Joe] derive from their respective roles in the crimes.” *Kelsey I*, ALC, at *8. The Board’s 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” while denying parole to Joe, “who did not beat, choke, or rape the victim,” was “arbitrary and capricious decision making . . . based on nothing but arbitrary caprice.” *Id.* at *8, 13. Nevertheless, despite having identified “one decision that is arbitrary and capricious and another that was based on untrue assertions of fact and improper argument,” the ALC affirmed because, it reasoned, it lacked jurisdiction to remedy the Board’s constitutional violations. *Id.* at 13. Joe appealed that decision to this Court.

While that appeal was pending, Joe went up for his fourth parole hearing in November 2021. In the two years that passed from his third hearing to his fourth, Joe maintained a spotless institutional record, obtained a new college degree, started on a master’s degree, continued to volunteer additional hours of service to suicidal inmates, and received additional commendations from the Department of Corrections and its staff. Joe presented these positive developments to the Board, both in a written parole packet submitted three weeks in advance of his hearing and at the hearing itself. Only one Board member asked Joe or his attorneys any questions. The other Board members’ silence suggested, at a minimum, that the materials that Joe submitted resolved any questions they might have had about his suitability for release.

At the close of the hearing, the Board again voted to deny Joe parole. Six Board members—including one who had voted *in favor of parole* in 2019—voted to deny. None of the Board members who voted against parole offered a basis on the record for their votes. In Joe’s denial letter, which he received nearly three months after his hearing, the Board again cited only factors relating to the nature and circumstances of his offense. Joe filed a second appeal based on this denial. *Kelsey v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, No. 2022-000965 (S.C. Ct. App. 2022) (*Kelsey II*).

Between Joe’s fourth hearing and his fifth, in August 2023, this Court decided Joe’s appeal of his 2019 parole denial in his favor. Specifically, the Court ruled that parole-eligible inmates must be granted access to their parole files. *Kelsey v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, 441 S.C. 373, 893 S.E.2d 588 (2023).² At the parole hearing that is the subject of the instant case, in November 2023—which proceeded again without PPP turning over Joe’s file, despite the Court of Appeals’ ruling—Joe presented the Board once more with his impeccable institutional record and release plan. Since his 2021 hearing, Joe’s record has only improved: He has continued to pursue his master’s degree and volunteer thousands of hours to serve suicidal inmates, and was in the first class of only a handful of SCDC inmates certified as a Peer Support Counselor. By any measure, Joe again presented an even better record in 2023 than he had in 2021. Nonetheless, in a disturbing pattern, the Board voted unanimously to deny Joe parole, now with two Board members who had previously voted for parole voting against it in the face of Joe’s improved record. Just as in 2021, none of the Board members offered a basis on the record for their votes. At the close of the hearing, the Chairperson announced that Joe would be denied parole based on factors one and three of the Board’s grounds for rejection—the nature and seriousness of the

² Rather than complying with the letter or spirit of the Court’s decision, PPP decided that it would provide parole files to inmates only minutes before their parole hearings, with all victim statements redacted.

offense and the use of a deadly weapon in the offense. In its boilerplate denial letter, which was received on November 30, 2023, PPP cited an additional reason for Joe’s parole denial: “nature and seriousness of current offense”; “use of deadly weapon in this or previous offense”; and “criminal record indicates poor community adjustment”—once again, all factors related to his offense, the only thing Joe can never change. Record on Appeal, *Kelsey v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, No. 24-ALJ-15-0002 at 11 (Feb. 9, 2024). Joe filed a request for reconsideration, which PPP denied. *Id.* at 10. This appeal follows.³

STANDARD OF REVIEW

This Court has jurisdiction to review decisions by the ALC. S.C. Code Ann. § 1-23-610(A)(1). A parole denial resulting from improper or unlawful process falls within the ALC’s jurisdiction. See *Cooper v. S.C. Dep’t of Probation, Parole & Pardon Services*, 377 S.C. 489, 493–94, 661 S.E.2d 106, 108–09. This Court’s review of the controlling legal principles is *de novo*, and the Court has the power to reverse the ALC if its decision is affected by an error of law. S.C. Code Ann. § 1-23-610(B); *Gatewood v. S.C. Dep’t of Corr.*, 416 S.C. 304, 313, 785 S.E.2d 600, 605 (Ct. App. 2016). Specifically, this Court may “remand the case for further proceedings” or it may reverse or modify the ALC’s decision if the appellant’s “substantive rights have been

³ After this appeal was filed in the ALC, Joe received another parole hearing on April 24, 2024, the remedy ordered by the Court of Appeals in *Kelsey v. SCDPPPS* for PPP’s failure to disclose Joe’s parole file ahead of his 2019 hearing. As has been its standard practice since *Kelsey* was remanded, PPP refused to disclose the file to counsel until two days before Joe’s hearing and refused to allow Joe himself to see his file until approximately one hour before the hearing. Simultaneously, PPP required Joe to sign a form stating that PPP would not change anything in his file without “official records” before he could attend his parole hearing. Upon reviewing his file, Joe learned that PPP has been providing the Board, as PPP’s official statement of the facts of Joe’s case, with a false version of the facts of the offense that is conclusively refuted by a comprehensive SLED investigation report, sworn trial testimony by Jamie Lee, and detailed findings in two opinions of the South Carolina Supreme Court. While the source of this flagrantly false version of the case is unknown (and unstated in the parole file), it falsely portrays Joe as the primary perpetrator and completely flips the roles of Joe and Payne.

Since the file had already been provided to the Board two weeks before Joe’s parole hearing and was not provided to Joe until well after the false information was sent to the Board, Joe had no opportunity to correct the false information with “official records” as required by PPP, and subsequently was denied parole. The April 24, 2024 denial is currently the subject of an appeal to the Administrative Law Court. *Kelsey v. SCDPPPS*, No. 24-ALJ-15-0027.

prejudiced” as a result of: a “violation of constitutional or statutory provisions”; an agency’s exercise of undelegated authority; “unlawful procedure”; any “other error of law”; “clearly erroneous” factual findings, in view of the whole record; or decision making that is “arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” S.C. Code Ann. § 1-23-610(B).

ARGUMENT

I. The ALC erred in holding that it had “limited” authority to review Joe’s parole denial.

a. The ALC erred in reviewing its 2020 determination that denying parole to Joe after paroling Payne was not a routine denial of parole.

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

law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.” *Id.* (emphasis in original).

In this case, the ALC erred when it ignored the law of the case established in 2019 and held in 2023 that it lacked jurisdiction over issues and parties that the court had already found to be subject to its jurisdiction. In 2023, as in 2019, Joe challenged the Board’s decision-making process after he was denied parole solely on the basis of circumstances that he cannot change and after his legally and morally more culpable co-defendant had already been released. In *Kelsey I*, the ALC held that denial of parole to Joe based solely on circumstances that can never change “effectively denies [Joe’s] eligibility for parole” and because of that, the ALC held, it has subject-matter jurisdiction. *Kelsey I*, ALC at 7. In other words, the ALC established the law of the case in 2019—it has jurisdiction to consider an appeal from Joe’s parole denial—and the ALC was prohibited from revisiting that decision in 2023 because PPP did not make the requisite “showing of good cause for failure timely to request reconsideration of the original appellate decision.” *Flexon*, 413 at 572 n.6, 776 S.E.2d at 403 n.6 (quoting 5 C.J.S., *Appeal and Error* § 991 (2007)).⁴

This is not a case where “the evidence [at the 2023 parole hearing] was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision [of the ALC in 2020] was clearly erroneous and would work a manifest injustice.” *Id.* at 573, 776 S.E.2d at 404 (cleaned up). Indeed, since 2019, nothing in Joe’s record has changed except that he has continued his education, he has continued to gain the respect and trust of employees of the Department of Corrections, and he is now older than Payne was at the time of Payne’s release. Thus, the ALC erred in 2023 when it revisited the law of the case and

⁴ Even if the law of the case doctrine does not apply in this case, the ALC’s relitigation of subject-matter jurisdiction is barred by *res judicata* because the present appeal involves the same parties; the same subject matter; and a previous adjudication of the same issue in *Kelsey I*. See *Judy v. Judy*, 393 S.C. 160, 168, 712 S.E.2d 408, 412 (2011).

held that it lacked subject-matter jurisdiction, creating a conflict within the ALC and undermining the twin goals of “finality and efficiency of the judicial process.” *Id.* at 573, 776 S.E.2d at 404.

b. The Board’s 2023 decision is not a routine denial of parole.

The ALC has jurisdiction over appeals from decisions by the Board that constitute a permanent denial of parole. *Furtick v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 598, 576 S.E.2d 146, 149 (2003); *Sullivan v. S.C. Dep’t of Corrections*, 355 S.C. 437, 443 n.4, 586 S.E.2d 124, 124 n.4 (2003). Even if this Court decides that Joe has not been permanently denied parole, the South Carolina Supreme Court has recognized that the Board’s decision need not rise to the level of a permanent parole denial to implicate a sufficient liberty interest to trigger the requirements of due process: “The use of the word *permanent* in *Sullivan* and *Furtick* does not mean that there must be a permanent denial of parole eligibility before a sufficient liberty interest is involved. It is merely one of the ways that a sufficient liberty interest may be involved.” *Cooper*, 377 S.C. at 498, 661 S.E.2d at 111 (quoting *Steele v. Benjamin*, 362 S.C. 66, 72, 606 S.E.2d 499, 502 (Ct. App. 2004)) (emphasis in original).

A parole denial implicates a sufficient liberty interest to trigger the requirements of due process when the Board fails to “adhere to statutory requirements in rendering a decision.” *Id.* at 499, 661 S.E.2d at 112. Specifically, the Board violates a putative parolee’s right to due process when it fails to “consider” and “giv[e] credence” to the statutory factors set forth in S.C. Code Ann. § 24-21-640. *Id.* at 499, 661 S.E.2d at 111. § 24-21-640 provides, in relevant part:

The board must carefully consider the record of the prisoner before, during, and after imprisonment, and no such prisoner may be paroled until it appears to the satisfaction of the board: that the prisoner has shown a disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interest of society will not be impaired thereby; and that suitable employment has been secured for him.

S.C. Code § 24-21-640.

Inherent in due process is the requirement that agency decisions not be arbitrary and capricious. S.C. Code Ann. § 1-23-380(5)(f); *see also Cooper*, 377 S.C. at 500, 661 S.E.2d at 112. The South Carolina Administrative Procedures Act (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). 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 v. S.C. Dep’t of Prob.*, 429 S.C. 136, 838 S.E.2d 505 (2020). 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 v. Michelin Tire Corp.*, 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996).

It is particularly important to protect an inmate’s due process right to require the Board to adhere to statutory procedures where the Board denies parole for “limited reasons” that “are fixed as of the date of the offense and can never be changed by the actions of [the inmate] while incarcerated.” *Cooper v. S.C. Dep’t of Probation, Parole & Pardon Servs.*, 377 S.C. 489, 499–500, 661 S.E.2d 106, 111–12 (2008) (cleaned up). In such an instance, the Board’s decision is considered arbitrary and capricious, and therefore is not a routine denial of parole. *See id.*; *see also Wyndham Enterprises v. City of North Augusta*, 401 S.C. 144, 149, 735 S.E.2d 659, 662 (2012) (finding an agency decision to be arbitrary and capricious where the decision “was based solely on opinion and conjecture”).

Here, the Board’s decision violates the APA and *Cooper*’s due process guarantee for three reasons. First, by denying Joe parole on the sole basis of factors involving the nature and circumstances of his offense, “the Parole Board apparently failed to consider the requisite factors and, instead, based its decision on certain fixed factors that are unaffected by any rehabilitation efforts on the part of [Joe],” thereby implicating the *Cooper* liberty interest. *Cooper*, 377 S.C. at 502, 661 S.E.2d at 113. The ALC has already determined that denying parole to Joe after granting it to Payne, based on the nature of the offense, is arbitrary and capricious:

The only significant differences between Payne and [Joe] derive from their respective roles in the crime. [Joe] made pipe bombs and placed one of them in the mouth of the victim, whom he thought to be deceased. Payne choked and struck the victim with a wrench, raped her or had sex with her corpse, and lit the fuse that detonated the pipe bomb. Distinguishing between these two for purposes of granting parole can be nothing but arbitrary and capricious decision making. . . . To treat one differently from the other can be based on nothing but arbitrary caprice.

Kelsey I, ALC at *8. Further, the ALC has also found that the Board’s decision to deny parole to Joe based only on the nature and circumstance of the offense constitutes the permanent denial of Joe’s “eligibility for parole.” *Kelsey I*, ALC at *7. As the ALC discussed at length in 2020, Joe’s role in the offense, the sole basis on which the Board continues to deny him parole, was objectively, morally, and judicially determined to be less egregious than Payne’s. As demonstrated by the police investigation, trial testimony, and findings in several judicial opinions, Joe did not kill Melanie Richey—Payne did. *Kelsey*, 331 S.C. at 60, 502 S.E.2d at 68; *Payne*, 355 S.C. at 646, 586 S.E.2d at 859. From actual consideration of the statutory factors, and without relying on false information and/or disregarding findings of the South Carolina Supreme Court, it is impossible for the Board to arrive at any other result than that if the factors weighed in favor of paroling Payne, they certainly weigh in favor of paroling Joe.

Second, the changed votes of two Board members between 2019, 2021, and 2023, with no explanation offered, illustrates the Board's failure to consider the requisite criteria. Since his last hearing, Joe's institutional record has only improved. If the Board is in fact considering the relevant criteria, it is impossible for any member to decide that *unchanged* offense facts that did not outweigh a stellar record to justify denying parole one year suddenly justified denial in the face of an even more impressive record the next year. *See* Section III, *infra*.

Finally, the Board's exclusive reliance on its "reasons for rejection" illustrates its and PPP's rejection of statutory requirements. The Board's grounds for rejection in its boilerplate denial letter come from neither § 24-21-640 nor the Board's published parole criteria in its Form 1212. Instead, the Board relies on a set of six factors that appear in Part II, Section E of the Board of Paroles and Pardons Policy and Procedure Manual (Nov. 2019), <https://www.dppps.sc.gov/content/download/209320/4885043/file/Board+of+Paroles+and+Pardons+11062019.pdf> ("Parole Manual"). *Id.* at 31. The Parole Manual instructs the Board that "a denial of parole continues the status quo" and directs them to rely on six backward-looking, immutable factors to deny parole rather than the forward-looking, improvement-focused factors of S.C. Code § 24-21-640. *Id.* Specifically, the Manual instructs the Board to consider the following: "(1) Nature and seriousness of the current offense; (2) Indication of violence in this or a previous offense; (3) Use of a deadly weapon in this or a previous offense; (4) Prior criminal record indicates poor community adjustment; (5) Failure to successfully complete a community supervision program; and (6) Institutional record is unfavorable." *Id.* In contrast to these factors, which all look to an inmate's past history, § 24-21-640 directs the Board to consider future-looking factors: "that the prisoner has shown a disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his

imprisonment; that the interest of society will not be impaired thereby; and that suitable employment has been secured for him.” *Id.* By instructing the Board that it can deny parole based exclusively on these backward-looking factors, PPP allows the Board to ignore § 24-21-640’s forward-looking considerations. That same manual incorrectly instructs the Board that its parole decisions “are not reviewable in the courts of South Carolina.” Parole Manual at 5.

As the ALC noted in *Kelsey I*, it is hard to imagine that the Board truly considers Joe “beyond rehabilitation.” *Kelsey I*, ALC at 7. It is equally difficult to imagine that it believes that the nature and circumstances of Joe’s offense outweighs the ample evidence of his rehabilitation and his outstanding contributions to SCDC, particularly given that the Board already released Joe’s significantly more culpable co-defendant. The only possible explanation for Joe’s last two parole denials is that something other than the Board’s stated factors is at play in the Board’s decision. *See* Section III, *infra*. At the very least, in order to satisfy the requirements of *Cooper*, the Board must be required to show that their decisions are the product of logical, reasonable, and unbiased decision-making. They cannot do so in Joe’s case.

II. The Board’s single-sentence, boilerplate statement that it considered the required factors is not sufficient to satisfy the due process guarantee of *Cooper* where the record demonstrates that the Board is not actually applying the factors to the facts of Joe’s case.

The ALC incorrectly decided that *Cooper* and *Compton v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, 385 S.C. 476, 685 S.E.2d 175 (2009), together foreclosed its jurisdiction to hear Joe’s appeal. Order of Dismissal, *Kelsey v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, No. 24-ALJ-15-0002, at 6 (S.C. Admin. L. Ct. Aug. 19, 2024). As discussed *supra*, the ALC has jurisdiction to review parole denials where the Board failed to follow “proper procedure.” *Cooper*, 337 S.C. at 500, 661 S.E.2d at 112. To give meaning to *Cooper*, the question of whether the Board writes a single boilerplate sentence in its denial letter (which it includes in the denial of parole to

every single inmate, with no distinction) cannot be the end of the procedural inquiry. In the face of repeated denials that belie record evidence, logic must come into play: If the facts of the case show that parole denial cannot result from any logical application of the factors to the record, it is clear that the Board has not in fact considered the factors and therefore has not followed “proper procedure,” regardless of whether the Board claims in its boilerplate denial letter (without evidence) to have considered the factors.

Compton does not mean that the Board must be immune from judicial scrutiny as long as it recites at least one of the statutory factors in its letter denying an inmate parole. If that were the case, *Cooper* would be rendered meaningless, which was clearly not the *Compton* Court’s intent, given that the Court 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 ALC has jurisdiction to review the case. *Cooper*, 377 S.C. at 500, 661 S.E.2d at 111. Otherwise, potential parolees would have no administrative avenue through which to remedy violations of their due process rights as long as the Board provides a rote citation to one of its factors, even where, as here, the evidence demonstrates that the Board has neither considered nor applied the criteria. When the Board overextends its authority in this way, both this Court and the ALC have the power to ensure that inmates’ due process rights are not violated by allowing for appellate review to determine whether PPP and the Board have infringed upon a state-created liberty interest. *Furtick v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 596, 576 S.E.2d 146, 147 (2003).

Cooper’s guarantee that the Board must “giv[e] credence to . . . its own criteria” is hollow if the Board is not required to do more than offer a single-sentence assertion that it is complying

with the law, particularly where the facts of the case clearly indicate that the Board is not actually considering the required factors. *Cooper*, 377 S.C. at 499, 661 S.E.2d at 111. Blind trust in an agency's good faith is not a sufficient safeguard of due process. *S.C. State Highway Dep't v. Harbin*, 226 S.C. 585, 596, 86 S.E.2d 466, 471 (1955)) ("The presumption that an officer will not act arbitrarily but will exercise sound judgment and good faith cannot sustain a delegation of unregulated discretion."). *Cooper* definitively assigns to the Board the burden of demonstrating that it has considered the relevant factors and thus not violated inmates' due process rights at their parole hearings. *Cooper*, 377 S.C. at 500, 661 S.E.2d at 112. The Board has not carried that burden in this case.

III. PPP and the Board violated Joe's due process and First Amendment rights by denying parole wholly or partly in retaliation for successful appeals of prior denials.

As discussed above, over Joe's hearings from 2019 to 2023, the number of Board members voting in Joe's favor has steadily decreased from three votes in favor in 2019 to one vote in 2021 to no votes in 2023, even though Joe's prison record has only improved and the Board continues to cite only factors that have remained unchanged since 1994. This steady decline culminated in a unanimous vote against parole at Joe's 2023 hearing, with Board members who voted in favor of parole in 2019 and 2021 now voting against. The only things that changed in the interim are that (1) Joe's record has improved, and (2) he has appealed the Board's denials and won a ruling in his favor. Given that the Board has no other reason to look adversely upon Joe's parole application—and certainly no other reason to change a vote for parole to a vote against it—it is clear that the Board denied Joe's parole wholly or at least partly in retaliation for Joe's decision to appeal his unconstitutional parole denials. Denial of parole even partly in retaliation for a potential parolee's decision to exercise his right to appeal the process behind the Board's rejection violates the parolee's right to due process and First Amendment right to file a lawsuit.

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

It is well-established that inmates are entitled to at least minimal due process protections in the parole process. *Cooper*, 377 S.C. at 497, 661 S.E.2d at 110. As a result, regardless of the outcome of a parole hearing, the Board's practices violate the Constitution if "administered maliciously or in bad faith." *Monroe v. Thigpen*, 932 F.2d 1437, 1441 (11th Cir. 1991). Inmates have a right to vindicate their liberty interest in fair parole procedures by challenging Board processes that render them ineligible for parole. *Cooper*, 377 S.C. at 497, 661 S.E.2d at 110; *see also Furtick*, 352 S.C. at 598, 576 S.E.2d at 149; *Kelsey I*, ALC at 7 (noting that denial on the basis of the circumstances of the offense "effectively denies [Joe's] eligibility for parole"). Moreover, due process protects appellants from retaliatory "vindictiveness" after a successful appeal. *North Carolina v. Pearce*, 395 U.S. 711, 725–26 (1969). In the judicial context, in order for a judge to impose a more severe sentence after a successful appeal, the judge's reasons for the sentence increase "must affirmatively appear" in the record. *Id.* If the judge's reasoning does not appear in the record, the increased sentence is presumed retaliatory and therefore unconstitutional (the "*Pearce* presumption"). *Id.*

PPP has unambiguously stated that "[t]he Parole Board sits in a quasi-judicial capacity." *See Br. Resp't, Blackwell v. S.C. Dep't of Prob., Parole & Pardon Servs.*, No. 2021-001162, at 16 (S.C. Ct. App. May 6, 2022). Given that admission, the Board should be held to the same standard as judges when it comes to assessing due process violations and arbitrary and capricious behavior when acting in a vindictive and retaliatory manner. The Board thought that a sentence of twenty-five years was appropriate for Payne, who was judicially found to have committed a worse crime than Joe. Now, Joe has served thirty years in prison for a crime for which he was judicially less culpable and presented a better prison record at each successive parole hearing. Thus, the fact that

the Board continues to deny him parole after he has served what is equivalent to an “increased sentence”—a sentence longer than what the Board thought was appropriate for his more culpable co-defendant—indicates retaliatory reasoning. Since no reason appears on the record for the Board’s decision that Joe should serve more time than Payne, contrary to the findings of the South Carolina Supreme Court, the *Pearce* presumption of vindictiveness applies. *See State v. Highbottom*, 344 S.C. 11, 542 S.E.2d 718 (2001) (where defendant moved for a reduced sentence and trial court instead increased the sentence without giving any reason on the record for the harsher sentence, the *Pearce* presumption that the harsher sentence was motivated by vindictiveness applies and the sentence violates due process).

b. The Board’s retaliatory parole denial violated Joe’s First Amendment rights.

The right to litigate is protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 429–30 (1963). An action for violation of an individual’s First Amendment rights based on a retaliatory denial of a privilege or benefit requires a showing that: (1) the individual’s speech is protected by the First Amendment, meaning that (a) “the speech involves a matter of public concern,” and (b) the individual’s interest in speaking outweighs the agency’s interest in efficiency; and (2) the individual’s speech was a “substantial motivating factor” in the agency action. *Town of Duncan v. State Budget & Control Bd.*, 326 S.C. 6, 14–15, 482 S.E.2d 768, 772 (1997); *see also Pickering v. Board of Educ.*, 391 U.S. 563 (1968). In the parole context, courts have required a potential parolee to allege that he “(1) engaged in First Amendment protected conduct and (2) suffered an adverse action that would deter a person of ordinary firmness from engaging in First Amendment protected conduct (3) as a result of having exercised his First Amendment rights.” *Nyberg v. Davidson*, 776 Fed. App’x 578, 581 (11th Cir. 2019).

A member of the Board may not lawfully vote to deny parole in retaliation for an inmate's exercise of his First Amendment rights. *Id.* at 582. “[A]n action, such as parole denial, that ordinarily would not violate the First Amendment may run afoul of the Constitution if done for a retaliatory purpose.” *Id.* at 581 (citing *Wright v. Newsome*, 795 F.2d 964, 968 (11th Cir. 1986) (per curiam)). *See also Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (“[U]nder the well-settled doctrine of ‘unconstitutional conditions,’ the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the right.”). “To state a retaliation claim, [a potential parolee] is not required to show that he had a right to the benefit denied. He must instead show he was denied a benefit because he exercised his rights.” *Id.* at 582. And regardless of whether the Board's decision was based partly on valid consideration of the required statutory factors—notwithstanding that the facts of the case, as set forth above, clearly demonstrate that it was not—the Board's denial is unconstitutional if it is even partially motivated by a retaliatory purpose. *See Drennon v. Craven*, 105 P.3d 694, 698 (Idaho Ct. App. 2004).

There was no “valid, non-retaliatory basis,” *Mackey v. Hilkey*, 2022 U.S. Dist. LEXIS 74149, *11 (D. Colo. 2022), for the decision of any Board member to change their vote from in favor of parole to against. Joe had done nothing but improve his institutional record in the years between his 2019, 2021, and 2023 parole hearings, and nothing else changed between 2019 and 2023 except the composition of the Board. One member of the Board who was on the Board at both of Joe's hearings voted in his favor in 2019, but changed her vote without explanation in 2021 and 2023. Another member voted for parole in both 2019 and 2021 and changed his vote to deny, also without explanation, in 2023. The only fact that either member could possibly have construed against Joe is that he appealed the Board's decisions and won rulings in his favor from both this

Court and the Administrative Law Court, including a ruling from the ALC that the Board engaged in “arbitrary and capricious decision making . . . based on nothing but arbitrary caprice.” *Kelsey I*, ALC at 8. Joe was denied the benefit of parole because he exercised his right to appeal the Board’s decision-making process.

IV. PPP and the Board intruded on the judicial function by making factual findings inconsistent with the facts as recognized by the South Carolina Supreme Court.

Even assuming the Board did not act arbitrarily and capriciously (which it clearly did), Joe is still entitled to relief because the legislature has not delegated to the Board the power to revisit judicial decisions. As the Administrative Law Court recognized in 2020, by releasing Payne and refusing to parole Joe, the Board substituted its own opinion of the facts of Joe’s case for the South Carolina Supreme Court’s findings that Payne was more culpable. Nonetheless, PPP has argued that “[t]he Supreme Court’s findings are not relevant to the Board’s decision-making process” and asserted 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.” Br. Resp’t, *Kelsey v. SCDPPPS*, No. 19-ALJ-15-0061, at 5 (S.C. Admin. L. Ct. Apr. 6, 2020).

“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.” *Joseph v. S.C. Dep’t of Labor, Licensing & Reg.*, 417 S.C. 436, 461, 790 S.E.2d 763, 776 (2016) (Kittredge, J., concurring). 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” promulgated by the Board. S.C. Code Ann. §§ 24-21-13(B), 24-21-640; *Nucor Steel v. S.C. Pub. Serv. Comm’n*, 310 S.C. 539, 426 S.E.2d 319 (1992).

While the Board may in some cases be permitted to make an assessment about the nature of a potential parolee's crime, it is not free to completely ignore, as it did in this case, what the judiciary has already found about that crime. *See* S.C. Const. art. V § 1 (vesting in the courts of South Carolina the full "judicial power"). Unlike the Board, the South Carolina Supreme Court had the complete record of Joe's and Payne's case 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 record (and any false information that PPP includes in its own record), and it was prejudicial error for the Board or PPP to substitute its view of the facts 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.").

V. PPP must give putative parolees meaningful access to their parole files, with enough time to review the files and provide necessary documentation for any corrections before the file is submitted to the Board.

In August 2023, this Court ruled that PPP must give potential parolees access to their parole files, documents prepared by PPP and provided to the Board in advance of each inmate's parole hearing, and allow them to correct any mistakes as required by PPP's Form 1212. *Kelsey v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 441 S.C. 373, 893 S.E.2d 588 (2023). The Court of Appeals recognized, as did this Court, that the Form 1212 requirement that inmates correct errors in files that they have no right to see was "logically and legally absurd." *Kelsey* at 376, 590. Despite this ruling, PPP failed to turn over Joe's file in advance of his 2023 hearing. *See* Letter from Matthew Buchanan to Allison Franz, Oct. 12, 2023. PPP justified its refusal to turn over parole files after *Kelsey* by arguing that it had sought a writ of certiorari in the South Carolina

Supreme Court, so the Court of Appeals' ruling was not final. To the contrary, all court of appeals decisions are binding precedent unless, and until, they are formally overruled. 20 Am. Jur. 2d Courts § 145. "Although the doctrine of stare decisis does not apply with full force the decision of an intermediate appellate court is the law of the jurisdiction until it is reversed or overruled by the court of last resort." 21 C.J.S. Courts § 202. Consequently, PPP violated Joe's due process rights by failing to turn over his file in advance of his November hearing.

PPP only began disclosing parole files after its petition for a writ of certiorari in *Kelsey* was denied on March 5, 2024. However, PPP's response to *Kelsey* has failed to vindicate the rights that the *Kelsey* court recognized. PPP has continued to refuse to turn over parole files for inmates to review and correct any inaccuracies before they are submitted to the Parole Board. Instead, PPP has made the files available only to inmates at the institution where they are incarcerated, immediately prior to the parole hearing, for cursory review under the supervision of a parole examiner. Inmates cannot take their files with them and PPP has refused to provide copies of the files directly to either inmates or their attorneys. To further complicate matters, the acknowledgement form that PPP requires inmates and their attorneys to sign after viewing the parole file on the day of the hearing explicitly states that PPP "is not obligated to alter facts or details which are unsubstantiated by official records."⁵ *Kelsey* clearly requires that inmates be given the opportunity to correct their files, but the system that PPP has instituted would require them to conjure any "official records" to correct their files in the approximately thirty minutes before their parole hearings, which they spend in a waiting area without access to any of their personal documents (even assuming that they were in immediate possession of any "records" PPP

⁵ Notably, while requiring inmates to provide "official records" to substantiate any necessary corrections to their files, PPP does not include any "official records," such as court transcripts, in its files to substantiate its own summarized account of an inmate's offense.

decided to require). Regardless, because the files are provided to the Board two weeks before an inmate's parole hearing, PPP has already eliminated any opportunity to correct false information before it infects the Board's decision.

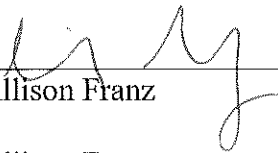
In order to fulfill the purpose of *Kelsey v. SCDPPPS*—to ensure that inmates are able to fulfill their obligations to correct any inaccuracies in their files pursuant to PPP's Form 1212—PPP should be required to finalize and disclose its parole file on each inmate not less than 30 days before the inmate's deadline to submit his packet of information to the Parole Board, which is three weeks before his hearing. Requiring PPP to provide the inmate's file 30 days in advance of this deadline is necessary to ensure that the inmate has the opportunity to review his file, identify any inaccuracies, and provide to PPP any "official records" necessary to correct those inaccuracies.

CONCLUSION

For the foregoing reasons, Appellant requests that this Court hold that the Board acted arbitrarily and capriciously and violated his procedural due process rights under the United States and South Carolina Constitutions and order PPP to remand this case to the Parole Board with an order to grant him a new parole hearing, with full access to his file 30 days in advance, at which the Board is required to make the only decision that is not arbitrary and capricious: to release Joe on parole.

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