STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable S. Phillip Lenski, Administrative Law Judge
Docket Number 24-ALJ-15-0002-AP

Appellate Case No.: 2024-001471

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SC Court of Appeals

JOSEPH KELSEY, #217218, ...APPELLANT

v.

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. **Whether the ALC properly dismissed the appeal when it determined the Parole Board followed the procedure outlined in *Cooper* and *Compton*?**

2. **Whether the "law of the case" doctrine should be applied when a previous ALC opinion erred when it determined that the Parole Board acted arbitrarily and capriciously because the Supreme Court has limited the ALC's authority to solely considering whether the Board followed proper procedure?**

3. **Whether the Parole Board "retaliated" against Appellant when it denied him parole because he appealed previous denials?**

4. **Whether the Parole Board intrudes on judicial functions and the separation of powers when it denies parole?**

5. **Whether Appellant's subsequent parole hearing pursuant to this Court's remand in the *Kelsey* opinion satisfied his ability to review his parole file before his hearing, and whether being provided access to the file and the opportunity to report perceived errors thus satisfied *Kelsey*?**

STATEMENT OF THE CASE[1]

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

Later that evening, Defendants and four others gathered at the house for a party. At around midnight, Lee and Payne left the party where they met the victim at a gas station. She had snuck out of her house to meet with a friend and had severely cut her foot. Lee and Payne offered to take her to the house in order to clean and bandage her injuries. The victim accepted.

Lee and Payne helped the victim bandage her foot, then all three went back to the house where the party was going on. Payne repeatedly tried to coax the victim into having sexual intercourse with him, but she refused his advances.

Payne and Lee crushed up a tablet of Ecstasy into the victim's drink without her knowing. Kelsey testified that while this was going on, he was resting on the floor by the stereo. At around 3:30 a.m., the three defendants offered to take the victim home. Defendants and the victim then got into Lee's car. Lee was driving, Appellant was in the passenger seat, and Payne and the victim were in the backseat. However, in previous statements to law enforcement Lee and Payne both said that Appellant was in the back seat with the victim, and that it was Appellant who assaulted the victim.

Lee drove across the Georgia border and into South Carolina. Lee testified that he turned around and saw that Payne had the victim in a strangle hold and heard the sounds of struggle. Lee

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

further testified that Payne had a wrench in his hand. Appellant testified that he had also turned around and saw that the victim's body was limp, her face was pale, and her lips were blue.

Lee drove to a bridge between Edgefield and McCormick counties where he parked the car. Defendants got out of the car, leaving the victim in the backseat. Lee testified that the victim was unconscious the entire time, and "she was definitely alive." Appellant, on the other hand, testified that he had checked her pulse, and he believed she was dead.

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

All three defendants were eventually arrested and charged with murder,[2] but Appellant was also charged for manufacturing the pipe bomb. Appellant was arrested in Maryland and brought back to South Carolina to stand trial. Appellant's case was transferred from Family Court to the Court of General Sessions where Appellant and Payne were tried together as adults. Payne was

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

found guilty of murder and criminal conspiracy. Appellant was found guilty of murder, possession of a pipe bomb, and criminal conspiracy. Appellant was sentenced to life imprisonment for murder and consecutive sentences of five years for possession of a pipe bomb and criminal conspiracy.

Appellant first appeared before the Board on November 18, 2015 and was denied. He was denied again on November 15, 2017. The Appellant's third hearing occurred on November 13, 2019, where parole was again denied. After this denial, Appellant's appeal resulted in this Court's decision in *Kelsey v. South Carolina Dep't of Probation, Parole and Pardon Services*, 441 S.C. 373, 893 S.E.2d 588 (Ct. App. 2023) (cert. denied March 5, 2024).

Appellant subsequently appeared before the Board in 2021,[3] and then on November 29, 2023, the result of which is the subject of this Appeal.[4] In unanimously denying parole in the instant case, the Board cited reasons for denial being the nature and seriousness of the current offense, the use of a deadly weapon in this or a previous offense, and criminal record indicates poor community adjustment. At the time of his trial, Appellant had been on probation for possession of a stolen vehicle on Indictment 94-GS-40-2231, failure to stop on 94-GS-40-2232, and attempted burglary on 94-GS-40-2233.

Appellant filed notice of appeal with the ALC on January 11, 2024. The Honorable S. Phillip Lenski affirmed the Board's decision on August 19, 2024, determining that the Board followed the requirements of *Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 377 S.C. 489, 661 S.E.2d 106 (2008), and therefore dismissed the appeal as it was from a routine denial of parole. (R.p.2-p.7).

[3] The denial of parole from this hearing was upheld in Unpublished Opinion 2024-UP-206.
[4] Appellant's most recent hearing was pursuant to the remand of *Kelsey* and held on April 24, 2024. He was denied, and has appealed that denial to the Administrative Law Court in case 24-ALJ-15-0027.

Appellant now brings this appeal, arguing that the ALC erred by holding it had limited authority to hear the appeal, that the Board did not apply the requisite factors of parole consideration when it denied parole, that the Board retaliated because of his previous appeals, and that inmates require "meaningful" access to parole files. In response, Respondent submits that the ALC was correct in its dismissal of the appeal. The brief of Respondent follows.

STANDARD OF REVIEW

In criminal cases the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. When reviewing a parole case, the ALC sits in an appellate capacity. *Furtick v. S.C. Dept. of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2004). Under the appellate standard of the Administrative Procedures Act, the ALC's review is limited to the record, absent irregularities in the procedure of the agency. S.C. Code Ann. § 1-23-380(4). Additionally, the court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, but may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5). However, "an administrative law judge shall not hear… an appeal involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services." S.C. Code Ann. § 1-23-600(D).

In an appeal from an ALC decision, the Administrative Procedures Act provides the standard of review. S.C. Code Ann. §1-23-610(B). This Court may only reverse the decision of the ALC if that decision is:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

"The [C]ourt may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Id.* In determining whether the ALC's decision was supported by substantial evidence,, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached. *Hill v. S.C. Dep't of Health and Envtl. Control*, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010).

ARGUMENTS

I. The ALC properly determined that it does not have jurisdiction over the discretionary decision-making authority of the Parole Board.

a. The previous ALC order was in error and should not be considered the law of the case.

Appellant argues that the Oct. 7, 2020 order by the Honorable Administrative Law Judge H.W. Funderburk, Jr., denying the appeal from Appellant's 2019 parole hearing in which he opined that the Board's decision to deny parole to Appellant was arbitrary and capricious is "the law of the case."

As an initial matter, the order was the subject of this Court's recent decision in *Kelsey v. South Carolina Dep't of Probation, Parole and Pardon Services*, 441 S.C. 373, 893 S.E.2d 588.

In that opinion, this Court remanded the case to allow Appellant review his parole file before the hearing, and did not address the remainder of the issues on appeal. Importantly, Respondent SCDPPPS had argued that the ALC committed error by examining the Board's decision-making in violation of S. C. Code § 1-23-600(D), which prohibits an administrative law judge from hearing an appeal from the Board involving the denial of parole of an otherwise parole-eligible inmate. Respondent renews that argument here; quite simply, the ALC does not have the authority to rule upon the Board's decisions as they relate to the denial or granting of parole. "Undoubtedly, the Parole Board is the sole authority with respect to decisions regarding the grant or denial of parole." *Cooper v. S.C. Dep't of Probation, Parole and Pardon Services*, 377 S.C. 489, 499, 661 S.E.2d 106, 111 (2008).

As Appellant concedes, the law-of-the-case doctrine is discretionary. "Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (citations omitted). In this case, the issue of Judge Funderburk's erroneous opinion on the Board's decision-making was not ruled upon in *Kelsey*. Therefore, the law-of-the-case doctrine is not appropriate where the issue was not ruled upon in a prior appeal.

Respondent further submits that were this Court to accept Appellant's argument and adopt the October 7, 2020, law-of-the-case, the ALC's error in not dismissing the appeal of the routine denial of parole will be perpetuated. The ALC erred by considering Appellant to be deserving of parole (or his co-defendant to be unworthy) when it was simply not its place to do so. To carry that opinion forward would substitute the ALC's judgment for that of the Board's, when South Carolina law unequivocally places the Parole Board as the sole authority over parole decisions.

Respectfully, this Court should not apply the doctrine as argued by Appellant in this case.

b. The Board's 2023 decision denying parole was routine.

Appellant argues that he is permanently denied parole eligibility, even though Appellant appeared again before the Parole Board for parole consideration in 2024, and will again be considered for parole two years after that, per S.C. Code 24-21-650. "Upon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole."

Appellant therefore has not been permanently denied parole. It follows, then, that the Board's denial of parole was routine. Consequently, the ALC had no other choice but to dismiss the appeal as, pursuant to § 1-23-600(D), the ALC shall not hear an appeal from a parole-eligible inmate.

Appellant grossly distorts the holding of *Cooper* in his argument that parole denials based on factors set at the time of the offense in the past that cannot be changed are arbitrary and capricious and therefore not a routine denial of parole. Appellant's Brief, p. 10. The Supreme Court was simply acknowledging Cooper's position, but the Court did not adopt that argument. In fact, the Court stated that the stated reasons for rejection being the nature and seriousness of the offense, indication of violence, and use of a deadly weapon were "sufficient to deny parole in the Board's discretion, if the Board's decision evinced consideration of section 24-21-640 and its own criteria." *Cooper*, 377 S.C. at 499 n. 5, 661 S.E.2d at 111 n. 5.

The true holding of *Cooper* is that if the Board fails to consider the criteria for parole consideration required by statute, it adversely affects an inmate's right to parole consideration. The opinion then provided a remedy for such a due process violation. "We emphasize that … if [the

Parole Board] clearly states in its order denying parole that it considered the factors outlined in section 24-21-640 and the fifteen factors published in its parole form… the decision will constitute a routine denial of parole and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure." *Cooper*, 377 S.C. at 500, 661 S.E.2d at 112.[5]

Appellant also mischaracterizes the role the Administrative Procedures Act (APA) plays in appeals arising from routine denials of parole. He cites to S.C. Code S.C. Code Ann. § 1-23-380(5)(f) and *Cooper's* mention of the APA in his argument that the Administrative Law Court has the authority to reverse the decision of an agency after a contested case hearing if it determines it to be arbitrary or capricious. However, the General Assembly *expressly removed this authority* as it relates to parole denials after the *Cooper* opinion when it amended Section 1-23-600(D) to include the language that an administrative law judge may not hear an appeal of a routine denial of parole.

Importantly, the ALC has only the authority conferred upon it by statute. The General Assembly created the ALC as both an agency and a court of record within the executive branch. S.C. Code S.C. Code Ann. § 1-23-500 (Supp. 2022). "The General Assembly has the authority to limit the subject matter jurisdiction of a court it has created; therefore, it can prescribe the parameters of the ALC's powers." *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 585, 743 S.E. 2d 786, 791 (2013). The General Assembly did just that when it added the language to Section 1-23-600(D) specifically removing jurisdiction over routine denials of parole from administrative law court judges.

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[5] Respondent will address Appellant's additional arguments regarding *Cooper* in Part II.

Consequently, Appellant's assertions that the Board's routine denials of parole are contested case hearings that fall under the APA and reversible if the administrative law judge disagrees with the Board's decision is, essentially, wishful thinking. His argument is based on an incorrect belief that he is deserving of parole and that due process requires his release to parole, when the law of South Carolina definitively states that no inmate has a right to parole. "Parole is a privilege, not a right," *Cooper,* 377 S.C. at 496, 661 S.E.2d at 110 (Citing *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 443 n. 4, 586 S.E.2d 124 127 n.4 (2003)).

Respondent therefore respectfully requests this Court uphold the ALC's dismissal of the appeal, finding that it arose from a routine denial of parole and therefore it lacked jurisdiction to hear anything further than whether the Board followed proper procedure.

II. The Board properly followed the requirement of *Cooper* when it clearly stated it had carefully considered the requisite factors of parole consideration.

Appellant argues that the Board's statement that it carefully considered the requisite factors of parole consideration[6] in its letter of denial was not sufficient under the requirements of *Cooper*. He self-servingly asserts that he should have been granted parole, and therefore because the Parole Board denied him it must mean that it did not carefully consider the requisite factors.

Respondent urges this Court to reject Appellant's attempt to undercut the clear instructions of the Supreme Court in *Cooper*. By stating that he doesn't believe the Board when it says that it carefully considered the requisite factors before rendering its decision, Appellant seeks to turn parole into a presumptive right. He argues that the only way the Board could have denied parole

[6] Outlined in S.C. Code Ann. § 24–21–640 and the fifteen criteria for parole consideration published in Form 1212, as well as the criminogenic risk-needs assessment mandated in S.C. Code Section 24-21-10(b). Respondent will hereinafter refer to these elements of parole consideration criteria as the "requisite factors."

is that they didn't consider the factors at all, and that the burden is on the Board to somehow *show* that they did consider the requisite factors because saying they did is insufficient – despite that is exactly what the holding of *Cooper* and subsequently in *Compton v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 385 S.C. 476, 684 S.E.2d 175 (2009). "We emphasized that ... if the Parole Board clearly states in its order denying parole that it considered the factors outlined in section 24–21–640 and the fifteen factors published in Form 1212, (R.p.11) and that if the Parole Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC will have limited authority to review the decision." *Id.*, 385 S.C. at 479, 684 S.E.2d at 177.

Yet, to Appellant, this still is not enough. He demands more, offering up paranoia and rhetoric that the Board is not to be trusted. Respondent submits that Appellant is arguing against precedent, demanding that this Court overturn the holdings of *Cooper* and *Compton.* The Supreme Court explicitly stated in *Cooper* (and reiterated in *Compton*) that when the Board states in its letter of denial that it carefully considered the requisite factors of parole consideration, its denial of parole was routine.

Appellant decries these holdings, arguing essentially that he is such a good and model inmate and so deserving of parole that the only possible explanation of his parole denial is that each Board member refused to consider those good qualities at all when they denied him parole. Therefore, he essentially accuses, the Board members lied when they stated that they did carefully consider the requisite factors (R.p.81-p.82), and also *violated their oaths of office*. (R.p.83-p.88). In the alternative, Appellant argues that the burden on showing whether the Board considered the requisite criteria can shift and become higher if the inmate simply argues that the statement by the Board that abides by *Cooper* and *Compton* is not enough.

Under no circumstances should these arguments be given serious weight. Any remand based on these positions with instructions to grant parole would supplant the Board with the appellate courts as the final authority over parole decisions, overruling well-established South Carolina law and precedent. Furthermore, a remand requiring the Board to essentially meet a higher burden of proving that its members read and carefully considered the requisite factors of parole consideration would not be in line with the clear holdings of *Cooper* and *Compton*. To that end, this Court had recently, albeit reluctantly, affirmed a similar argument in *Buchanan v. S.C. Dept. of Probation, Parole and Pardon Services*, 442 S.C. 393, 899 S.E.2d 600 (Ct. App. 2023) (cert. denied, April 16, 2024). In that opinion, this Court called upon the Legislature to "review and/or revise the parole system to assure the factors of youth are a part of considering parole in these cases rather than permitting the seemingly perfunctory[7] review now standardly given," noting that it is the "Legislature's decision, not ours." *Id.* at 407, 899 S.E.2d at 608. More than just the factors of youth, Appellant argues all the requisite factors of parole consideration were not considered, despite the Board's statement that they were which is sufficient under *Cooper* and *Compton*. Respondent agrees with this Court's opinion in *Buchanan* that the Legislature is the appropriate body to examine the Department's internal procedures and make any changes to the parole system it may deem necessary.

Respondent urges this Court to follow the holdings of *Cooper* and *Compton* and leave any changes to the process in the capable hands of the Legislature. The ALC properly determined that

[7] Respondent would submit that the limited Record in routine denials of parole may make the review of each inmate's record *appear* perfunctory, but that is not the case. Board members are provided the parole materials on each inmate two weeks before the parole hearing so that they may have ample time to review each candidate for parole and so that the actual hearings are run efficiently. The private reading and internal deliberations conducted by each Board member are something that cannot be shown or reflected in the Record.

the Board followed Cooper and dismissed the appeal. This is correct, even though Appellant decries the Board's statement as "boilerplate," as if the term "boilerplate" meant, "false." The term "boilerplate," according to Black's Law Dictionary 7th Ed., means, "1. Ready-made or all-purpose language that will fit in a variety of documents. 2. Fixed or standardized contractual language that the proposing party views as relatively non-negotiable." Clearly, "boilerplate" does not mean false or fraudulent. Instead, the language of the letter of denial is simply repeated because it applies to all inmates who were considered for parole, and is supported by the processes in place by the Department – stating that the inmate received the required careful consideration for parole yet was still denied. The ALC's dismissal of the appeal should be affirmed.

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

Appellant claims the Board denied him parole as retaliation for his prior appeals, arguing that in doing so he was denied due process and his First Amendment rights were violated.

Initially, Respondent would submit that this argument is rife with paranoia and entitlement, reading actual malice into a body that is by its very nature vested with the authority of making parole release decisions. The "proof" of such malice that Appellant has is essentially that the Board members changed their votes along with his own opinion of his entitlement to parole.[8]

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

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[8] It should be noted that during Appellant's subsequent hearing on April 24, 2024, two members of the Board voted in favor of parole and three voted against. One member was absent.

parole despite all his good qualities and his purported rehabilitation, then the only conclusion he makes is that the Board must be actively malicious and retributive.

This claim is absurd and, Respondent would submit, grossly inappropriate. It belies a frequent misconception among inmates and their ardent supporters regarding the very nature of parole. Because the Board has the power to grant parole and thus end one's ongoing imprisonment, many view each denial as the Board adding another year or two to their sentence. This twisting of perspectives can lead to the perception that the Board is vindictively extending incarceration with each denial of parole. Appellant's own Brief seems to show this belief when he talks of the respective length of terms of incarceration of him and his co-defendant. Appellant's Brief, p. 17.

Of course, this is not the case. "Parole is a privilege, not a right." *Sullivan*, 355 S.C. at 443 n. 4, 586 S.E.2d at 127 n.4. "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979). South Carolina's Code of Laws speaks of parole as a "lessening of the rigors of [an inmate's] imprisonment." Section 24-21-640, but it does not guarantee eventual release. Only if the Board is satisfied may the inmate be paroled, meaning that the Board has an inherent right to decline to grant parole. In other words, the Board has the absolute power to say no.

Appellant's goal in this appeal, therefore, is to find a way to take that power away from the Board. And with this argument, he is claiming that Board is saying "no" as an act of retaliation and therefore they should not be allowed to deny parole at all.

The claim of retaliation places an especially troubling scenario before this Court: if this Court were to provide any sort of relief to Appellant on the ground of retaliation, it opens an avenue for every inmate to appeal a denial once and then cry retaliation if the Board denies parole at a

subsequent hearing. There is no other Parole Board, and no means for its entire membership to recuse itself. South Carolina law places parole decisions solely with the Board.

Appellant is not the only inmate who has appealed his or her denial of parole, and the current climate is that numerous inmates challenge their parole denials in the appellate courts. Respondent respectfully submits that this argument be considered without merit.

IV. The Board did not intrude on the judicial function by denying Appellant parole.

Appellant makes the claim that the South Carolina Supreme Court determined the facts of the offense in two prior appellate decisions unrelated to parole eligibility and the Board's denials of parole, and argues that by denying parole, the Board is somehow intruding on the judicial function of the courts.

The basis of Appellant's argument lies with the fact that his co-defendant Payne had been released to parole in 2019. Appellant then argues that South Carolina Supreme Court determined in a pair of cases[9] that the Appellant's co-defendant was the primary actor, and therefore the Parole Board intrudes on the judicial branch when it denies parole for Appellant.

Appellant overreaches. As an initial point, Appellant and Payne are not identical individuals. Appellant has prior criminal convictions, whereas Payne did not. Appellant was convicted of constructing and detonating pipe bombs while Payne was not. The Board is entirely within its discretion to deny parole while granting parole to a co-defendant, and certainly not beholden to a rendition of facts outlined in an unrelated appeal.

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[9] *Payne v. State*, 355 S.C. 642, 586 S.E.2d 857 (2003) and *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998).

Consider, Appellant relies on direct appeals requiring a *Strickland* analysis[10] in a PCR appeal.[11] Appellant points to trial testimony, except that *it was his own testimony*, in which he claimed that he did not participate in the murder at all. The final say over the facts of the trial was the jury, which rendered a verdict of guilty. If the Supreme Court's rulings were, as Appellant alleges, dispositive statements of the facts, then Appellant would have been exonerated by the Supreme Court.

Obviously, Appellant remains convicted of his crimes. At trial, the State's theory of the case was that the victim was still alive when Appellant placed the pipe bomb in her mouth and thus he was an active participant in the murder. Because the jury found Appellant not only guilty of both murder and conspiracy, but also for the pipe bomb, the *true* determiners of fact decided that Appellant was not a mere bystander.

Lastly, appellate courts are not finders of fact, and do not disturb the factual findings of the lower courts. *Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct.App. 2006). Appellant's argument is therefore without merit. The Board does not weigh in on the Supreme Court's ruling on the effectiveness of counsel in *Payne* any more than the Supreme Court weighed in on the Board's decision to deny parole.

V. Inmates are granted sufficient access to their parole files in accordance with *Kelsey* and provided with the opportunity to report any errors or inaccuracies to the Board.

As an initial matter, Respondent submits that Appellant's argument that he did not receive his parole file prior to this hearing should be considered moot, as he received another hearing

[10] *Strickland v. Washington*, 466 U.S. 668 (1984).
[11] *Payne v. State*, 355 S.C. at 645, 586 S.E.2d at 859.

subsequent to his November 29, 2023, hearing on April 24, 2024 pursuant to the remand in *Kelsey*. Therefore, his argument that he did not receive his parole file has been remedied. Appellant further argues against Respondent's practice of allowing inmates to view their files the same day as their hearing, which Respondent submits is inappropriate here because that practice was not in place at the time of the hearing at issue.

If this Court wishes to take up Appellant's argument regarding his access to parole files, Respondent submits that it followed the requirements as outlined in the *Kelsey* remand, and appropriately provided Appellant with the opportunity to view his file and report any perceived inaccuracies at the April 24, 2024 hearing.

Appellant also demands that inmates or their attorneys should be given access to their file thirty days or more before the parole hearing, which is found nowhere in the *Kelsey* opinion. This Court's holding only allowed for inmates to view their files and report inaccuracies. The Department's Form 1212, the basis from which the *Kelsey* ruling is derived, states that the inmates may inform the Board of inaccuracies. The Department's process post-*Kelsey* fully allows for inmates to do so. Respondent would emphasize that this procedure is similar to Nebraska's parole process, which the U.S. Supreme Court determined satisfied due process. "At the Board's initial interview hearing, the inmate is permitted to appear before the Board and present letters and statements on his own behalf. He is thereby provided with an effective opportunity, first, to insure that the records before the Board are in fact the records relating to his case; and, second, to present any special considerations demonstrating why he is an appropriate candidate for parole. Since the decision is one that must be made largely on the basis of the inmate's files, this procedure adequately safeguards against serious risks of error and *thus satisfies due process*." *Greenholtz*,

442 U.S. at 15 (emphasis added). Quite simply, due process does not require review of the parole files weeks or months in advance of the actual hearing as if it were a trial requiring discovery.

It is also notable that Appellant filed a Motion for a Rule to Show Cause or a Writ of Mandamus with this Court after the *Kelsey* remittitur, raising the same issue[12] found in his argument. This Court summarily dismissed the Motion on April 11, 2024.

Lastly, the Fourth Circuit held that inmates do not have a constitutionally protected right of access to their prison files. *Franklin v. Shields*, 569 F.2d 800 (4th Cir. 1978) Cert. denied, 435 U.S. 1003 (1978). It is clear from the holding in Kelsey that this Court ruled based on the language of the Department's Form 1212 which refers to the obligation of inmates to notify the Board if they believe there are any errors or inaccuracies within their file. The current process, which was availed to Appellant on his April 24, 2024, hearing, satisfies that requirement.

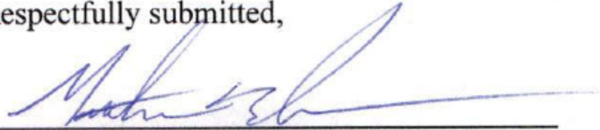
CONCLUSION

Appellant was routinely denied parole. The Board followed the requirements of *Cooper*; therefore, the ALC had limited authority to review the matter and properly dismissed the appeal. Appellant's attempts to sidestep established precedent should not be entertained by this Court. The ALC's decision to dismiss the case should be affirmed.

(Signature appears on following page)

[12] Appellant raised the issues of receiving the file on the day of the hearing and the right to have corrections made in the file as opposed to reporting perceived inaccuracies. He also raised an issue of the redaction of victim information, which is not part of Appellant's current argument.

Respectfully submitted,



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Columbia, South Carolina
February 21, 2025

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable S. Phillip Lenski, Administrative Law Judge
Docket Number 24-ALJ-15-0002-AP

Appellate Case No.: 2024-001471

JOSEPH KELSEY, #217218, ...APPELLANT

v.

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

CERTIFICATE OF COMPLIANCE

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

This 21st day of February, 2025.

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