

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Joseph Kelsey, #217218, Appellant,

v.

South Carolina Department of Probation, Parole, and
Pardon Services, Respondent.

Appellate Case No. 2024-001471

Appeal From The Administrative Law Court
S. Phillip Lenski, Administrative Law Judge

Unpublished Opinion No. 2026-UP-402
Heard February 4, 2026 – Filed August 5, 2026

AFFIRMED

Jonathan Edward Ozmint, of The Ozmint Firm, LLC, of
Greenville; and John H. Blume, III, of Law Office of
John Blume; Rosalind Sarah Duval Major, of Justice 360;
and Allison Franz, all of Columbia, for Appellant.

General Counsel Matthew C. Buchanan, of Columbia, for
Respondent.

PER CURIAM: Joseph Kelsey appeals the Administrative Law Court's (ALC's)
decision affirming the denial of his parole by the South Carolina Department of

Probation, Parole, and Pardon Services (SCDPPPS). Kelsey argues that (1) the ALC erred in holding that it had limited authority to review the Parole Board's decision; (2) the Parole Board's statement that it considered the required factors was insufficient; (3) the Parole Board violated Kelsey's due process and First Amendment rights by denying parole in retaliation for a successful appeal of a prior denial of parole; (4) the Parole Board intruded on judicial functions and the separation of powers when it denied parole; and (5) SCDPPPS violated this court's decision in *Kelsey v. South Carolina Department of Probation, Parole and Pardon Services (Kelsey II)*, 441 S.C. 373, 893 S.E.2d 588 (Ct. App. 2023), *cert. denied*, (S.C. Sup. Ct. Order dated Mar. 5, 2024), when it gave Kelsey his parole file immediately before his hearing. We affirm. See S.C. Code Ann. § 1-23-610(B)(f) (Supp. 2025) (providing the court of appeals may reverse the ALC's decision only if that decision is "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion").

1. We hold the ALC did not err in holding that it had limited authority to review Kelsey's parole denial. First, the law-of-the-case doctrine does not apply here because the issue of jurisdiction was not ruled upon in the prior appeal by the appellate court. See *Kelsey II*, 441 S.C. at 379 n.2, 893 S.E.2d at 592 n.2 (declining to address the remaining issues on appeal after reversing and remanding on the parole file disclosure issue); see also *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 573, 776 S.E.2d 397, 404 (Ct. App. 2015) ("[A] decision of a legal issue or issues by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court" (emphasis added)). Second, the Parole Board's denial of Kelsey's parole did not constitute a permanent denial of parole because this was a routine denial of parole, Kelsey is still eligible for parole, and he will have another parole hearing. See *Buchanan v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 442 S.C. 393, 405-06, 899 S.E.2d 600, 607 (Ct. App. 2023) (holding the Parole Board's denial of parole was routine even though it was based on the immutable facts and circumstances of the case because the appellant was still eligible for parole); but see *Steele v. Benjamin*, 362 S.C. 66, 72, 606 S.E.2d 499, 503 (Ct. App. 2004) (holding 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). Further, we hold that the Parole Board's denial of parole did not implicate a liberty interest sufficient to trigger the requirements of due process. Kelsey is still entitled to his regular parole review and is given the same procedures as any other inmate. Cf. *Steele*, 362 S.C. at 72, 606 S.E.2d at 503 (holding that by changing the appellant's parole review from annual to biannual, the Parole Board had implicated a sufficient liberty

interest even if it was not a permanent denial of parole). This court is constrained in our review of the Parole Board so long as it adheres to the statutory requirement of stating in its order denying parole that it considered the factors outlined in S.C. Code Ann. § 24-21-640 (2025) and the factors published in its parole form, which it did here.¹ See §1-23-610(B) (stating the appellate standard of review for an ALC decision); *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 496, 661 S.E.2d 106, 110 (2008) ("Parole is a privilege, not a right."), *abrogated on other grounds by Allen v. S.C. Dep't of Corr.*, 439 S.C. 164, 886 S.E.2d 671 (2023).

2. We hold the Parole Board's statement that it considered the required factors was sufficient under the due process requirements of *Cooper*, 377 S.C. at 499, 661 S.E.2d at 112 (holding the Parole Board's failure to consider the requisite statutory criteria in rendering its decision constituted an infringement of a state-created liberty interest and, thus, warranted minimal due process procedures). The Parole Board's procedure is proper "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." *Id.* at 500, 661 S.E.2d at 112; *see also Compton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 385 S.C. 476, 479, 685 S.E.2d 175, 177 (2009) (relying on the holding in *Cooper* to affirm a denial of parole because the Parole Board "clearly stated in its [order denying parole] that it considered the [section 24-21-640] criteria and the criteria set forth in Form 1212").

3. We hold the Parole Board did not violate Kelsey's due process and First Amendment rights by denying parole in retaliation for his successful appeal in *Kelsey II*. Kelsey's argument misapprehends *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969) (holding due process "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part *in the sentence he receives after a new trial*" (emphasis added)), overruled by *Alabama v. Smith*, 490 U.S. 794, 795 (1989) (holding the *Pearce* presumption of vindictiveness does not apply when a sentence imposed after trial is greater than that previously imposed after a guilty plea). The denial of parole is not a new sentence. Although Kelsey likely views his continued incarceration as an

¹ Much like the court in *Buchanan*, we are sympathetic to an inmate being denied parole based on immutable factors which occurred when he was a juvenile. 442 S.C. at 407, 899 S.E.2d at 608. However, just as the *Buchanan* court stated, "Our role is one that is limited to operating within the framework set by statutory law and by our supreme court's precedents." *Id.*

"increased sentence" in comparison with his co-defendant, Geoffrey Payne, Kelsey was properly convicted of his crimes and sentenced. Further, Kelsey offers no evidence of any retaliation beyond the change of votes in Kelsey's 2019, 2021, and 2023 parole hearings, respectively. The number of votes in favor of granting parole decreased gradually, from three in 2019, to one in 2021, and finally, to zero in 2023. This gradual decrease suggests the filing of the appeal in 2019 and eventual publication of this court's opinion in 2023 did not cause the change in votes. As we noted, "[p]arole is a privilege, not a right." *Cooper*, 377 S.C. at 496, 661 S.E.2d at 110.²

4. We hold the Parole Board did not intrude upon the judicial function or violate the separation of powers by making factual findings inconsistent with the facts recognized by our supreme court in *Payne v. State*, 355 S.C. 642, 586 S.E.2d 857 (2003) (affirming the post-conviction relief (PCR) court's denial of PCR) and *State v. Kelsey (Kelsey I)*, 331 S.C. 50, 502 S.E.2d 63 (1998) (affirming Kelsey's conviction).³ First, the court did not determine culpability between the co-defendants Payne and Kelsey by simply stating that the evidence showed that Payne murdered Richey. *See Payne*, 355 S.C. at 644-46, 586 S.E.2d at 858-59 (reviewing the denial of Payne's application for post-conviction relief and stating that "[w]hether the victim died by Payne strangling her to death, or by Payne lighting the fuse of the pipe bomb that exploded in her mouth, the testimony overwhelmingly proves that Payne murdered her"); *see also Kelsey I*, 331 S.C. at 58-61, 502 S.E.2d at 67-68 (reciting the facts of the case). Second, the power to grant or deny parole rests with the Parole Board. *See* S.C. Code Ann. § 24-21-610

² When an increased sentence is imposed on a defendant, the vindictiveness presumption places the burden on the court to justify its sentence. *See Pearce*, 395 U.S. at 726 ("In order to assure the absence of [vindictiveness], we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear."); *see also Alabama*, 490 U.S. at 799 (limiting the application of the *Pearce* presumption to "circumstances . . . in which there is a 'reasonable likelihood,' . . . that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness" (quoting *United States v. Goodwin*, 457 U.S. 368, 373 (1982))). However, as we stated, because the denial of parole is not a new sentence, *Pearce* does not apply in this case; therefore, the vindictiveness presumption does not apply, and Kelsey has the burden of proof.

³ Payne's conviction was affirmed in *State v. Payne*, Op. No. 98-MO-008 (S.C. Sup. Ct. filed Jan. 26, 1998).

(2025) (providing "the [Parole] Board may . . . parole a prisoner convicted of a crime and imprisoned in [this] state"). Any factual findings by our supreme court in Payne's post-conviction relief appeal do not alter Kelsey's conviction by the jury, and it is that conviction upon which the Parole Board must base its decisions. *See Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006) (holding appellate courts are not finders of fact, and do not disturb the trial court's factual findings).

5. We hold SCDPPPS did not violate Kelsey's due process rights by not complying with the court of appeals' remand in *Kelsey II*, when it gave him his parole file immediately before his hearing. First, the court of appeals in *Kelsey II* only held that an inmate is entitled to review his file; it did not hold the parole file must be provided within a certain amount of time before the hearing. 441 S.C. at 379, 893 S.E.2d at 591. Our decision in *Kelsey II* does not support Kelsey's argument and Kelsey cites to no other authority to support this position. Second, Kelsey is still eligible for parole and is scheduled to have a hearing before the Parole Board in November of 2027. The fact that he will have a hearing in 2027 would render the granting of a new parole hearing of no practical benefit.

Based on the foregoing, we affirm the ALC's decision affirming the Parole Board's denial of Kelsey's parole.

AFFIRMED.

WILLIAMS, C.J., and KONDUROS and VINSON, JJ., concur.