THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal From The Administrative Law Court
Honorable H.W. Funderburk, Jr., III, Administrative Law Judge

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Appellate Case No. 2020-001473

JOSEPH KELSEY, # 217218 ....APPELLANT,

V.

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

INITIAL BRIEF OF APPELLANT

HANNAH FREEDMAN #103373
MEGAN BARNES #104368
Justice 360
900 Elmwood Ave., Ste. 200
Columbia, SC 29201
(803) 765-1044
hannah@justice360sc.org
megan@justice360sc.org

JOHN H. BLUME #747
Cornell Law School
159 Charles Evans Hughes Hall
Ithaca, NY 14853
(607) 255-1030
jb94@cornell.edu

JON OZMINT #7107
The Ozmint Firm
5205 Forest Drive, Suite 1
Columbia, SC 29206
(803) 782-0042
jon@ozmint.com

COUNSEL FOR APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether the Administrative Law Court's (ALC) subject-matter jurisdiction confers on the ALC the authority to reverse a parole denial when, as the Supreme Court of South Carolina has held, doing so would require the Board to grant parole to a specific person?
2. Whether this Court must reverse a decision of the ALC affirming a parole denial where the Administrative Law Court found that the Parole Board's decision was the result of unconstitutional, arbitrary, capricious, and procedurally defective process?
3. Whether the Parole Board exceeded its statutory authority and intruded on the judicial function when it substituted its opinion, based on a factual summary that the Board refuses to disclose, about the co-defendants' relative culpability in connection with the nature and seriousness of the offense for the findings of the Supreme Court of South Carolina?
4. Must the Parole Board give putative parolees access to their parole files in order to ensure that they have an opportunity to "notify the Board" of "errors or other inaccuracy," as guaranteed by the Department's own policy?

INTRODUCTION

Twenty-five years ago, sixteen-year-old Joe Kelsey was convicted of murder and sentenced to life imprisonment with the possibility of parole. His co-defendants, Geoffrey Payne and Jamie Lee, were sentenced to life imprisonment with the possibility of parole and ten years, respectively. Of the three co-defendants, Joe—who has a remarkable and uncontroverted record of rehabilitation—is the only one still incarcerated. His continued incarceration is, as the Administrative Law Court (ALC) found below, the product of a decision-making process that was "logically and legally absurd" and infected with "untrue assertions of fact and improper argument" and that produced a "decision that is arbitrary and capricious." *Kelsey v. S.C. Dep't of Prob., Parole & Pardon Servs.*, No. 19-ALJ-15-0061-AP, slip op. at *9, 13 (Admin. L. Ct. Oct. 7, 2020). Nevertheless, despite finding serious error in both the *process* employed by the South Carolina Board of Paroles and Pardons (the Board) and *outcome* of that process, the ALC concluded, "reluctantly," that it could not reverse the Board's parole denial because "the Board has the sole authority to grant or deny parole and does so in [sic] a case by case basis." *Id.* at 13. Although the ALC's factual findings at this stage of review are entitled to great deference, its legal conclusion—that it lacks the power to remedy serious statutory and constitutional violations by the Board—requires reversal and this Court should now order the ALC or the Board to hold a new parole hearing at which the Board will have only one option that is not arbitrary and capricious: release Joe on parole. *See* S.C. Code Ann. § 1-23-610(B).

STATEMENT OF THE CASE

The facts of the crime and the relative culpabilities of the three co-defendants—Lee, Payne, and Joe—are at the crux of this appeal. Lee, Payne's best friend, testified for the prosecution in exchange for a reduced sentence of ten years; he has been free for well over a decade. As Joe explained in his briefing below, and as the ALC confirmed, the Supreme Court of South Carolina has twice determined that the evidence "overwhelmingly prove[d]" that Payne, the oldest of the three and the ringleader, was responsible for the victim's death. *See Payne v. State*, 355 S.C. 642, 586 S.E.2d 857 (2003); *State v. Kelsey*, 331 S.C. 50, 59-60, 502 S.E.2d 63, 67 (1998) (describing the trial evidence); *see also Kelsey*, No. 19-ALJ-15-0061-AP, at *8 ("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.").[1] In March 2019, the Board paroled Payne, leaving Joe the last codefendant incarcerated. Then, when Joe went up for parole in November 2019, the Board denied him by a vote of 3-2 *in favor* of parole.[2] The two "no votes" were based on

[1] As is described in greater detail below, and as the ALC found, Joe and a group of other boys were making pipe bombs earlier in the day and using them to blow holes in the backyard. *See Kelsey*, No. 19-ALJ-15-0061-AP, at *2. When Joe got in a car with Payne, Lee, and the victim, he was under the impression that they were going to—at worst—blow up a mailbox, and by Lee's own account, when Joe realized that Payne had killed the victim, he was so paralyzed by fear that he "curled up into a ball[] in the front seat of the car." Supp. R., *Kelsey*, No. 19-ALJ-15-0061-AP, at *115 (Admin. L. Ct. Mar. 3, 2020) (portion of a transcript from Joe's waiver hearing in family court).

[2] At Joe's hearing—but not at Payne's—only five of the six members of the Board were present. Because the Board's internal rules require that an offender in Joe's position receive "yes votes" from at least two-thirds of the members of the Board present in order to get parole, Joe would have needed "yes votes" from four members. See S.C. Board of Paroles & Pardons, Parole Board Manual

one and one reason only: the nature and seriousness of the offense. *Kelsey*, No. 19-ALJ-15-0061-AP, at *7.

Joe appealed to the ALC. The court, by written order, agreed with Joe's legal arguments and presentation of the facts. Nevertheless, after concluding that the Board's decision to deny Joe parole "based exclusively on facts that cannot change, is effectively a denial of the inmate's eligibility for parole," and despite finding that the Board's decision was "arbitrary and capricious," the product of a process that was "taint[ed]" by "untrue assertions of fact and improper argument," the ALC "reluctantly" denied Joe relief because it concluded it lacked the authority to grant relief. *Id.* at *12-13. The ALC's order, as the final agency decision, therefore "prejudiced" Joe's "substantial rights" and was made "in violation of constitutional . . . provisions"; was "in excess of [the agency's] authority"; was made "upon unlawful procedure"; was "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record"; and was "arbitrary and capricious." *See* S.C. Code Ann. § 1-23-610(B).

The ALC order makes three things clear: (1) according to the agency that oversees the Board, the South Carolina Department of Probation, Parole and Pardon Services (PPP), the Board has license to act arbitrarily and capriciously, without any oversight and without ever offering any "rationale as to [the Board's] reasons or reasoning for the denial," so long as a notice of parole denial recites one of the statutory parole factors, *see* Br. of Resp., *Kelsey*, No. 19-ALJ-15-0061-AP, at *4 (Admin. L. Ct. Apr. 6, 2020); (2) without judicial

at 28 (Nov. 2019). Because he only had three yes votes (60%) instead of the required two-thirds (67%), Joe remains incarcerated while Payne and Lee are free.

oversight, the Board will continue to violate the rights of putative parolees and the ALC will continue to rubberstamp the Board's decisions based on a misapprehension of the scope of the ALC's jurisdiction; and, (3) absent judicial intervention, PPP and the ALC will further erode the judicial branch by making findings directly contrary to those of the Supreme Court of South Carolina because, in the words of PPP, "[t]he Supreme Court's findings are not relevant" to parole decisions, *id.* at 5.

I. Evidence of the Offense as Presented at Trial and to the Parole Board

On July 10, 1994, a group of teenagers got together to hang out and drink beer at the house where Joe was temporarily staying. Among the teenagers gathered were Payne and Lee, neither of whom Joe knew well, and both of whom were older than Joe. Around midnight, Payne and Lee went to a nearby Texaco station where they found fifteen-year-old Melanie Richey, alone and limping. *Kelsey*, 331 S.C. at 58-59, 502 S.E.2d at 67. They struck up a conversation with her, learned that she had cut her foot sneaking out of her house, and offered to take her with them to clean up the wound. *Id.* at 59, 502 S.E.2d at 67. Melanie agreed. When they got to the party, 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, an illegal drug known to "encourage unsafe sexual behavior."[3] *Id.* During all this, Joe was listening to music by himself. *Id.*

[3] *See* Nat'l Inst. on Drug Abuse, *Drug Facts: MDMA (Ecstasy/Molly)*, https://www.drugabuse.gov/publications/drugfacts/mdma-ecstasymolly (rev. June 2018).

At around 3:30 AM, after the other teenagers had fallen asleep, Melanie asked for a ride home. *Id.* Payne and Lee invited Joe to go along for the drive. 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.

The four got into Lee's car, with Lee driving, Joe in the passenger's seat, and Payne and Melanie in the back. *Id.* "[T]he music was 'obscenely' loud," and Lee "was going about 90 m.p.h." when 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*, 355 S.C. at 645, 586 S.E.2d at 859. Payne had kept her in a strangle-hold throughout. *Id.* at 60, 502 S.E.2d at 67-68. Melanie "was limp, her face was pale, and her lips were blue." *Kelsey*, 331 S.C. at 60, 502 S.E.2d at 68. Payne announced that Melanie was "knocked out," *id.*, "she's not breathing. I think I've killed her," Supp. R., *Kelsey*, No. 19-ALJ-15-0061-AP, at *111. According to Lee, Joe "curled into a ball[] up in the front seat of the car." *Id.* at *115. 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.

Lee believed Melanie was unconscious but alive. *Kelsey*, 331 S.C. at 60, 502 S.E.2d at 68. 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; Supp. R., *Kelsey*, No. 19-ALJ-15-0061-AP, at *111. 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.* When police recovered Melanie's body, enough time had passed that it was impossible for the coroner to conclusively identify how Payne killed her.[4] Supp. R., *Kelsey*, No. 19-ALJ-15-0061-AP, at *108.

Joe was subsequently arrested, and because he was a juvenile, he appeared in Family Court. Due to the seriousness of the charges, his case was transferred from Family Court to the Court of General Sessions where he was tried jointly with Payne. *Kelsey*, 331 S.C. at 61, 502 S.E.2d at 68. Lee testified against Payne and Joe in exchange for a reduced sentence of ten years. His testimony confirmed that Payne murdered Melanie.[5] *Id.* at 60,

[4] Dr. Joel Sexton, the forensic pathologist who conducted the autopsy, testified that as between the three possible causes—strangulation, drug overdose, or explosive device—it was a "coin toss," "fifty/fifty" how Melanie died. Supp. R., *Kelsey*, No. 19-ALJ-15-0061-AP, at *132. Joe included in his parole packet an affidavit from Dr. Sexton reaffirming this aspect of his testimony. *Id.* at *19-20. When questioned by law enforcement, the three boys all initially lied about their involvement with Melanie's death. Joe acknowledges, and deeply regrets, that had he been truthful sooner, the Richeys would have been spared the additional pain of not knowing what happened to Melanie. *Id.* at *89.

[5] The only discrepancy between Joe's testimony and Lee's testimony was the precise timing of Melanie's death. Joe testified, consistent with his statements to law enforcement, that Melanie was dead when Payne took her out of the car, whereas Lee testified that although Melanie was unconscious he thought he still felt a pulse. *Compare Payne*, 355 S.C. at 646, 586 S.E.2d at 859 ("After Payne strangled the victim, . . . [Joe] testified that the victim was dead.") *with id.* ("After Payne strangled the victim, Lee testified that the victim was still alive.").

502 S.E.2d at 68; *Payne*, 355 S.C. at 646, 586 S.E.2d at 859. Thus, although Joe was present for Melanie's death and participated in the destruction of her body—facts he admitted at trial and for which he has accepted full responsibility—this was Payne's crime. Payne and Lee brought Melanie to the party. Payne attempted to rape her and when she resisted, Payne convinced Lee to put ecstasy in her drink. Payne strangled Melanie and hit her with a wrench. Payne had sex with Melanie's body. And Payne lit the fuse that ensured that even if Melanie had still been alive, she would not survive his attack. The words of the South Carolina Supreme Court bear repeating: the evidence "overwhelmingly proves that Payne murdered [Melanie]." *Payne*, 355 S.C. at 646, 586 S.E.2d at 859. Lee has been free for nearly twenty years, and on March 20, 2019, the Board paroled Payne, leaving Joe—the youngest of the three—the only codefendant still incarcerated.

II. The Contents of Joe's Most Recent Parole Packet

Before Joe's last parole hearing in November 2019, he submitted written materials to the Board. He also appeared before the Board with two attorneys, a clinical psychologist with expertise in risk assessments, and four supporters who were prepared to discuss his release plans. Joe presented the following information.

Joe was still a teenager when he entered the Department of Corrections. During his twenty-five-year incarceration, he has taken advantage of every opportunity to express his profound remorse for his role in Melanie's death and to demonstrate his maturity and readiness to resume his place in society. For example, Joe has a strong work ethic, with an employment history stretching back to when he first entered SCDC in 1994. Supp. R., *Kelsey*, No. 19-ALJ-15-0061-AP, at *21. He has also taken advantage of every available

educational opportunity, including earning his GED, *id.* at *25; graduating from the highly selective faith-based Columbia International University (CIU) Prison Initiative Program with 100% attendance, a 4.0 GPA, and an Associate's Degree in Biblical Studies, *id.* at *29-31; and graduating in December 2019 from CIU with a Bachelor's of Science Degree in General Studies and a concentration in Business Administration, *id.* at *11, 46, 52.[6] He is one of only five CIU graduates ever to have obtained a bachelor's degree while incarcerated.[7] *Id.* at *52. Joe is also a spiritual and service leader in the SCDC community, with too many certificates and awards to list. *Id.* After serving as a Chaplain's Assistant and finishing JumpStart's rehabilitation program with its highest level of certification, he is now part of JumpStart's Leadership Training Program.[8] *Id.* at *21-23, 33-34.

[6] Within a year of his incarceration, Joe earned his GED, scoring so high that (top five percent of test-takers that year) he received a letter of commendation from the State Superintendent of Education. Supp. R., *Kelsey*, No. 19-ALJ-15-0061-AP, at *25-26. He went on to earn his diploma from CIU. *Id.* at *29. In the words of Professor Stephen Baarendse, who taught Joe at CIU, Joe is "a fine example of rehabilitation in prison . . . who during his time in prison lived with integrity and served his fellow prisoners and supervisors well." *Id.* at *32. Grace Dye, the Assistant Director of the CIU program who has known Joe for six years, wrote a letter on her own behalf urging this Board to grant Joe parole: "[Joe] is by far one of the gentlest and most determined men I've ever met. . . . Mr. Joseph Kelsey would be an excellent candidate for parole based on the maturity and character I've seen consistently displayed in his life over the years that I have known him. Mr. Kelsey is the kind of man I would want for a neighbor and believe our community would be better for having him as part of it." *Id.* at *35.

[7] Even after Joe was denied parole in 2019, he did not stop seeking to better himself. In early 2020, he enrolled in a Master's Degree program at Adams State University in Denver, Colorado, and is currently pursuing his Master's in Business Administration. Since the abolition of post-secondary education funding for inmates, Joe is one of only a few inmates in South Carolina to ever seek an advanced degree while incarcerated.

[8] His mentor at Broad River, Mr. Gary R. Minion, explained that Joe is "passionate in his commitment to his God, seeking to improve himself since his incarceration, and demonstrates care for fellow residence [sic]." And his mentor in the JumpStart Leadership Training program, Mac Ogburn, describes Joe as having been "one of the outstanding leaders in the program from the very beginning," by "tak[ing] the initiative to embrace the program and its values and giv[ing] guidance to many in the program." Supp. R., *Kelsey*, No. 19-ALJ-15-0061-AP, at *22-23.

However, perhaps the best testament to Joe's rehabilitation is his work with hospice and the Crisis Stabilization Unit (CSU). At Lee and Kirkland Correctional Institutions, Joe volunteered with hospice service, providing terminally ill inmates with physical and emotional support at the ends of their lives. *Id.* at *11, 38, 52. When he was transferred to Broad River in 2016, he was eligible to serve as an Inmate Mental Health Companion in the CSU, where he is "responsible for observing crisis inmates with the directive of providing emotional support, modeling positive behaviors, and alerting relevant staff if medical care is needed or behavioral concerns are noted." *Id.* at *36. As of October 2019, Joe had provided emergency counsel to 243 inmates over the course of more than 1500 hours.[9]

[9] As a volunteer with the Crisis Stabilization Unit at Broad River Correctional Institute and Kirkland Correctional R&E Institute, Joe was selected as one of three spokespeople for the program during the filming of a television report on the CSU's successes, demonstrating the trust and confidence SCDC leadership places in Joe. The CSU's success has been widely praised in the local media. *See, e.g.*, Supp. R., *Kelsey*, No. 19-ALJ-15-0061-AP, at *37. Joe has received multiple commendations, including one from Director of SCDC Bryan Stirling, "for his devoted and enthusiastic service to the program." *Id.* at *41. The manager of the CSU, Paul Dennis, described Joe as displaying "exemplary patience, understanding, and compassion." *Id.* at *44. Another supervisor and mental health professional at the CSU, C. Austin Edmundson, has noted that Joe, if released, "would be successful" because he "has all of the characteristics to be a positive and impactful member of the community." *Id.* at *36. And Ann-Marie Elwood, RN, who also works with Joe at the CSU, wrote that she has "witnessed first-hand Mr. Kelsey give up his personal time to assist and pray with inmates in their time of great need." Ms. Elwood opined that "Mr. Kelsey should be given the chance to re-enter society and be a productive member of the community." *Id.* at *45.

Joe has continued his work with the CSU since his 2019 parole hearing. As of mid-December 2020, he has provided emergency counsel to 269 inmates spanning more 1900 hours. And with the onset of the COVID-19 pandemic and rapid spread of the disease at Broad River, institutional staff have relied on Joe more than ever. Since the CSU went into quarantine in July, Joe is one of only two inmates trusted to continue constant monitoring of inmates in the CSU under strict safety conditions that include bi-weekly nasal swab tests. Joe has also been tasked with cleaning and sanitizing the entire CSU and with distributing meals. In November 2020, Joe was appointed by the Unit Manager to serve on the Inmate Representative Committee (IRC), a panel that serves as a liason between prison administration, including the warden, and the inmate population.

Joe also presented the Board with a viable release plan based on the full support of his father, step-mother, mother, siblings, and fiancée. He had four outstanding offers of employment and multiple reliable housing plans.[10] *Id.* at *54. Moreover, the undisputed evidence before the Board established that Joe is a very low risk for reoffending. He has no violent disciplinary convictions during his entire twenty-five year incarceration, which is difficult to do when entering the system as a teenager, and he has not had a single infraction of any kind in over fifteen years.[11] He has maintained this nearly perfect institutional record by a deliberate process of educating himself, growing his Christian faith, and serving his community. Dr. Susan Knight, a board-certified forensic psychologist, performed a full psychological evaluation of Joe to assess his "developmental and psychosocial functioning prior to his incarceration; functioning over his incarceration; risk for future violence; and transition needs." *Id.* at *46-64. Dr. Knight's evaluation confirms what Joe's actions indicate: he is rehabilitated and extremely unlikely to reoffend.[12] In sum, Dr. Knight concluded, Joe "exhibits the requisite clinical stability for

[10] Joe had employment and housing available through JumpStart. He also could have lived with his father in South Dakota, with his mother in Texas, or with his fiancée, Jennifer Montgomery. Jennifer is the Dean of Students at a public college in Augusta, Georgia, and she owns a three-bedroom home. Jennifer and her mother remain prepared to support Joe with unconditional love, transportation, and financial assistance. Supp. R., *Kelsey*, No. 19-ALJ-15-0061-AP, at *54-55.

[11] Joe's only major disciplinary violation in more than twenty-five years of incarceration was for using marijuana in 2003.

[12] Dr. Knight's evaluation was more comprehensive than the standard psychological evaluation administered to individuals post-parole but pre-release. Specifically, Dr. Knight performed three clinical interviews with Joe totaling 10 hours plus telephone interviews with many members of his family. Supp. R., *Kelsey*, No. 19-ALJ-15-0061-AP, at *49-50. She gave Joe the Minnesota Multiphasic Personality Inventory, 2nd Edition (MMPI-2), a tool designed to assess personality and affective functioning, and the HCR-20V3, a tool designed to assess an individual's future risk of violence. *Id.* at *56-60. She also evaluated Joe for any mental conditions or diagnoses detailed in the Diagnostic and Statistical Manual for Mental Disorders, Fifth Edition (DSM-V). *Id.* at *57. With respect to the MMPI-2, Dr. Knight reported that Joe's results "were indicative of someone

successful community reintegration, with a low risk of future violence, and a secure transition plan." *Id.* at *63.

III. Parole Denials

Joe has been denied parole three times since becoming eligible in 2015.[13] These denials stand in stark contrast with the Board's treatment of Payne. Joe and Payne applied for parole for the first time in 2015 and 2014, respectively; both were denied. Both applied for parole a second time and again were rejected. After Joe's second denial, he twice requested that he be provided with the "[PPP] reports concerning me, my suitability for parole, likelihood of reoffending, etc., and any assessment tools applied to me and their results." Supp. R., *Kelsey*, No. 19-ALJ-15-0061-AP, at *77-78. The Board failed to respond to his letters.

In March 2019, Payne went up for parole for a third time and the Board voted unanimously to release him. At that hearing, Payne's attorney falsely told the Board that Joe was the primary perpetrator and urged the Board to consider the victim's family by "express[ing] their ire against parole with respect to the man who actually took their daughter's life." *Id.* at *81; *see also Kelsey*, No. 19-ALJ-15-0061-AP, at *9 ("The argument by Payne's attorneys and the subsequent Board decision was [sic] based on

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with high self-confidence, minimal emotional distress, regrets regarding life decisions, good sociality, and well-controlled anger and frustration tolerance." *Id.* at *56. With respect to the HCR-20^{V3}, Dr. Knight reported that Joe "represents a low risk for future violent acts." *Id.* at *60. And with respect to her clinical evaluation for DSM-V diagnoses or mental conditions, Dr. Knight found that Joe has no mental disorders or any other DSM-V diagnosis. *Id.* at *57.

[13] The Board rejected his first application in 2015 based on the nature and the seriousness of the offense and an indication of violence in the offense, Supp. R., *Kelsey*, No. 19-ALJ-15-0061-AP, at *75; it denied his second in 2017 based on those two facts, plus the determination that his criminal record indicates poor community adjustment, *id.* at *76.

misinformation and an improper argument bargaining Payne's parole against keeping Appellant in custody."). Eight months later, when Joe again appeared before the Board and presented the information described above, he was denied for a third time based solely on the "nature and seriousness of the offense" by a vote of 3-2 in favor of parole. R., *Kelsey*, No. 19-ALJ-15-0061-AP, at *1.

IV. Appeal to the Administrative Law Court

When Joe appealed to the ALC, he presented the court with all of the information that was before the Board in his parole packet as well as a transcript from Payne's final parole hearing. In response, the court found that Joe—"a sixteen-year-old, whose sense of future consequences ha[d] not been fully developed"—had proven his rehabilitation through evidence of his "devotion to education and self-improvement and his volunteering to assist other inmates experiencing emotional crises." *Kelsey*, No. 19-ALJ-15-0061-AP, at *12. Thus, the ALC concluded, Joe's rehabilitation combined with the Board's decision to deny him parole "based exclusively on facts that cannot change" constituted "a denial of [Joe's] eligibility for parole," which in turn triggered procedural due process protections. *Id.* Although this finding should have conferred jurisdiction on the ALC to remedy substantive legal violations, the court held that it lacked the power to take any corrective action because, according to the ALC and PPP, "the Board has the sole authority to grant or deny parole and does so in a case by case basis," meaning a parole denial is never subject to review or reversal. *Compare id.* at *13 *and* Br. of Resp., *Kelsey*, No. 19-ALJ-15-0061-AP, at *5 ("[Joe's] repeated and protracted arguments that the Board acted arbitrarily and capriciously . . . cannot stand against this axiomatic rule: The ALC may not substitute its

judgment for that of the Board.") *with Cooper v. S.C. Dept. of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 498-500, 502, 661 S.E.2d 106, 111-13 (2008) (reversing a decision by the ALC affirming a parole denial and remanding "for disposition in accordance with this opinion").

Nevertheless, in the course of reaching this conclusion, the ALC made a series of factual findings about how the Board decided Joe's case that are relevant to this appeal. Specifically, the ALC concluded that the Board did three improper things:

(1) it based its decision on random, non-statutory factors, rendering the decision "arbitrary and capricious";

(2) it considered "potentially inaccurate information" in Joe's parole file, which the Board unlawfully refused to produce to Joe based on a reading of PPP rules that, according to the ALC, is "logically and legally absurd"[14]; and,

(3) it substituted "untrue assertions of fact and improper argument" for the binding rulings of the Supreme Court.

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[14] ALC rules require the Agency to file a copy of the Record with the ALC. SCALC Rule 36(A). The Record "shall consist of" any legal pleadings filed; "[a]ll evidence received or considered"; and "[t]he transcript of the testimony taken during the proceeding," among other things. SCALC Rule 36(B). PPP's Record before the ALC, however, "consist[ed] of two pages, a certificate of counsel, and a certificate of service (and a title page)." *Kelsey*, No. 19-ALJ-15-0061-AP, at *1. Because this information was insufficient to provide a basis for the ALC's review, and because it excluded all of the evidence Joe submitted to the Board and the transcripts of the relevant agency proceedings as required by the ALC rules, Joe filed an unopposed motion to supplement the record with consent from PPP's counsel. *Id.* at *2. After Joe filed the supplemental record, however, opposing counsel objected, arguing the supplemental information "was immaterial to the matter at issue and was outside the scope of the limited authority of the ALC." *Id.* (cleaned up). The ALC granted Joe's motion to supplement the record, and in its subsequent order, the court noted that "[t]he Record provided by [PPP] contained no evidence from which [relevant] 'facts' could be found," and it was therefore only able to rule on the factual disputes between the parties because "the Supplemental Record on Appeal provided to the Court provides ample material for review." *Id.* at *7, 10.

Kelsey, No. 19-ALJ-15-0061-AP, at *9, 13. Those three findings are at the core of Joe's current appeal.

STANDARD OF REVIEW

This Court has jurisdiction to review decisions by the ALC. S.C. Code Ann. § 1-23-610(A)(l). Although routine parole denials are not subject to review at the ALC and are therefore beyond this Court's purview, a parole denial that is the result of improper or unlawful process falls within the ALC's jurisdiction. *See Cooper*, 377 S.C. at 493-94, 661 S.E.2d at 108-09. This Court's review is confined to the record that was before the ALC and the Court may not substitute its judgment for that of the administrative law judge as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-610(B); *see also Cooper*, 377 S.C. at 500, 661 S.E.2d at 112 (applying the APA standard for judicial review of a contested case to an appeal from a parole denial and explaining that the Board and ALC are subject to reversal if their final decision does not "include findings of fact and conclusions of law, separately stated," or if the findings of fact are not "accompanied by a concise and explicit statement of the underlying facts supporting the findings" (quoting S.C. Code Ann. § 1-23-350)).

After giving the ALC's factual findings the weight to which they are entitled, 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

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 this 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

The ALC found that Joe's parole denial was the product of arbitrary and capricious decision-making, based on inaccurate factual determinations that are inconsistent with the judicial record, and that the Board's most recent decision constituted a denial of parole eligibility. However, even after reaching these conclusions, the ALC held it was unable to grant Joe the relief it clearly found he deserved, stating that "the Board has the sole authority to grant or deny parole and does so on a case by case basis." *Kelsey*, No. 19-ALJ-15-0061-AP, at *13. *But see id.* at *9, n.11 ("Respondent represents that the Board considers parole applications on a 'case by case' basis. The argument allowed in Payne's parole hearing runs directly counter to Respondent's assertion." (internal citation omitted)). This final agency decision leaves Joe in a unique and unenviable position: a quasi-judicial body, after reviewing the relevant evidence, agreed with Joe that the Board acted unlawfully in denying him parole. But because the only way the agency can remedy its unlawful conduct is by granting Joe parole, the ALC held—"reluctantly"—that it lacked the power to give Joe any relief. *Id.* at *13. As a result, Joe remains incarcerated while Payne has been free for nearly two years, despite the undisputed fact that he is factually, legally and morally more culpable. *See id.* at *12-13; *see Payne*, 355 S.C. at 646, 586

S.E.2d at 859 ("Whether 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."); *Kelsey*, 331 S.C. at 60, 502 S.E.2d at 68 (describing the trial evidence, which included testimony that Payne hit the victim with a pipe wrench, strangled her, attempted to rape her, and lit the pipe bomb that destroyed her body).

The ALC's ultimate holding, that it lacks the power to remedy constitutional violations when they come in the form of parole denials, both misreads *Cooper* and invites the Board and PPP to violate the constitution; abdicates the error-correcting function assigned to the ALC by the South Carolina Administrative Procedures Act (APA), thereby threatening confidence in the administrative process; and, practically speaking, undermines the goal of judicial economy by forcing all constitutional and statutory violations by the Board to be litigated in the Court of Appeals. *See Cooper*, 377 S.C. at 500, 661 S.E.2d at 112 (quoting S.C. Code Ann. § 1-23-350); *Rose v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 429 S.C. 136, 144, n.5, 838 S.E.2d 505, 510, n.5 (2020) (rejecting PPP's argument that "the ALC did not have the authority to grant the relief requested," which would have required the Board to parole the appellant, because the ALC "did not grant or deny [the petitioner] parole itself, but rather required [PPP] to carry out the result" of a lawful parole hearing (cleaned up)). This Court should reverse the ALC's order, remand Joe's case, and require the Board to immediately hold a new parole hearing free from arbitrary and capricious decision making and other unlawful error—a process that can produce one result and one result only: release on parole.

I. **The ALC Has the Authority to Remedy Unlawful Agency Action, Even When the Relief Sought Would Require the Board to Immediately Release a Parole Applicant, So Long as the ALC Has Subject Matter Jurisdiction.**

A. The ALC has broad powers to remedy unlawful agency action.

PPP and the Board, divisions of an executive agency, only have authority to the extent the Legislature has delegated power to them. *See Major v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 384 S.C. 457, 465, 682 S.E.2d 795, 799 (2009). As the Supreme Court has explained, "the Legislature created th[e] Board to operate within certain parameters," not to "render decisions without any means of accountability." *Cooper*, 377 S.C. at 499, 661 S.E.2d at 111. The source of the Board's powers, the statutory scheme that created it, also defines the scope of those powers. *See* S.C. Code Ann. § 24-21-640 (outlining the statutory parole requirements and requiring the Board to "establish written, specific criteria for the granting of parole"). When the Board exceeds its powers—by violating the constitution, by failing to comply with its statutory obligations, or by intruding on the powers of another branch—the APA contemplates that the ALC will serve as a final backstop before the agency decision is subjected to judicial review. *See* S.C. Const. art. I § 22; S.C. Code Ann. §§ 1-23-600, 1-23-380; *see also Al-Shabaaz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000) (holding that the APA applies to parole appeals and inmate disciplinary proceedings, so long as the person seeking administrative relief can show that the interest they have asserted is "encompassed by the Fourteenth Amendment's protection of liberty [or] property" (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569 (1972)).

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

So long as the ALC has subject-matter jurisdiction over the matter at hand, it has the power, on *de novo* review, to remedy agency violations, even where the remedy guarantees that an inmate will be granted parole. *See Rose*, 429 S.C. at 144, n.5, 838 S.E.2d at 510, n.5. In *Rose*, for example, PPP made the same argument about the scope of the ALC's powers as it has made in this case: "the ALC did not have the authority to grant the relief requested by Rose in that the ALC, by ruling in Rose's favor, effectively granted Rose parole." *Compare id. with* Br. of Resp., *Kelsey*, No. 19-ALJ-15-0061-AP, at *5 ("The ALC may not substitute its judgment for that of the Board. Whatever the Board saw in the

co-defendant that was deserving of parole and not for the Appellant is left in the sole discretion of the Board. Respectfully, this Court may not overturn that decision for any reason."). There, however, the ALC and the Supreme Court "rejected this argument," holding instead that where the agency has violated a putative parolee's substantive rights, and where the remedy the putative parolee seeks requires the agency to grant him parole, the ALC is not granting or denying parole but is acting within its delegated authority to correct unlawful agency action. *Rose*, 429 S.C. at 144, n.5, 838 S.E.2d at 510, n.5. Joe has not asked for anything more. He has merely requested a holding that the Board acted unlawfully, and the fact that the only remedy is a new parole hearing at which the Board must grant him parole does not alter the ALC's remedial powers. Thus, if the ALC had subject-matter jurisdiction over Joe's claims, it had the power to remedy the agency's substantive violations.

B. The ALC had subject-matter jurisdiction.

This Court reviews the ALC's assessment of its own subject-matter jurisdiction *de novo*, but any factual findings underpinning that determination are reversible only for clear error and the Court may not substitute its judgment for that of the ALC as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-610(B). It is axiomatic that in South Carolina, the ALC has subject-matter jurisdiction over a parole determination if the Board's decision implicates a state-created liberty interest, either by rendering a person ineligible for parole or by failing to abide by the statutory and constitutional framework that governs PPP. *See Cooper*, 377 S.C. at 497, 661 S.E.2d at 111; *Furtick v. S.C. Dep't of*

Prob., Parole & Pardon Servs., 352 S.C. 594, 576 S.E.2d 146 (2003); *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003).

Here, the ALC correctly found that it had subject-matter jurisdiction for two independent reasons. First, it held that the Board's decision "is effectively a denial of [Joe's] eligibility for parole." *Kelsey*, No. 19-ALJ-15-0061-AP, at *12. Specifically, the notice of parole denial the Board sent to Joe after his November 2019 hearing indicated that it had declined to parole him based solely on the "Nature and Seriousness Of [sic] the Current Offense." *Id.* at *7 (quoting R., *Kelsey*, No. 19-ALJ-15-0061-AP, at *1). Thus, the Board "based its decision on the original crime, consequently solely on facts that can never change," and there is no way for Joe to ever receive parole so long as this factor is the only factor that stands in his way. *Id.* In the words of *Cooper*, the Board has therefore "abrogate[d] [Joe's] right to parole eligibility and, thus, infringe[d] on a state-created liberty interest." 377 S.C. at 499, 661 S.E.2d at 111.

Second, the ALC found that the Board's decision involved various forms of unlawful "method and procedure," in violation of the APA, the parole statute, internal PPP guidelines, and the constitution. *See Kelsey*, No. 19-ALJ-15-0061-AP, at *7-10, 12-13. These findings, too, granted the ALC subject-matter jurisdiction over Joe's claims because Joe "ha[s] a right to require the Board to adhere to statutory requirements in rendering a decision." *Cooper*, 377 S.C. at 49, 661 S.E.2d at 112. Thus, because the ALC had subject-matter jurisdiction over Joe's claims, the court also had the power to remedy any violations it identified—even if the remedy would have required the Board to grant Joe parole.

II. This Court Must Reverse the ALC's Denial of Relief Because the ALC Affirmed an Arbitrary and Capricious Parole Decision.

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

After the ALC was presented with the legally relevant information that was before the Board, it came to the unavoidable and unremarkable conclusion that denying parole to Joe while granting parole to Payne was arbitrary and capricious. *Kelsey*, No. 19-ALJ-15-0061-AP, at *8; *see also id.* at *12 ("[T]he account of the crime leading to the convictions of both [Joe] and his codefendant (Payne) suggests that both or neither should be paroled."). As the ALC found, "[b]oth inmates have compiled extraordinary records as model prisoners," as evidenced by Joe's "devotion to education and self-improvement and his volunteering to assist other inmates experiencing emotional crises." *Id.* at *7-8. "The only significant differences between Payne and [Joe]," according to the ALC, "derive from

their respective roles in the crime." *Id.* at *8. While Joe "made pipe bombs and placed on of them in the mouth of the victim, whom he thought to be deceased," Payne was solely responsible for "chok[ing] and str[iking] the victim with a wrench, rap[ing] her or ha[ving] sex with her corpse, and li[ghting] the fuse that detonated the pipe bomb." *Id.* Thus, as the ALC explained:

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

Id. at *12. Payne, in other words, was indisputably more culpable than Joe, and the Board's decision to parole him but not Joe "can be nothing but arbitrary and capricious decision making." *Id.* at *8.[15]

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

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

at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion the ALC reached." *Barton*, 404 S.C. at 401, 745 S.E.2d at 113. The record evidence relevant to this appeal, discussed in the Statement of the Case, is "reliable, probative, and substantial" because, as the ALC explained, it is based largely on facts conclusively established by the South Carolina Supreme Court. *Kelsey*, No. 19-ALJ-15-0061-AP, at *9. Thus, given that the ALC found that the Board's decision was arbitrary and capricious, and given that the record evidence does not support a conclusion that the ALC's decision was based on clearly erroneous findings of fact, the Court should reverse and remand with instructions for for the ALC to grant Joe the requested relief.

III. PPP Intruded on the Judicial Function by Making Factual Findings that Are Inconsistent with Facts as Recognized by the Supreme Court.

The second substantial error the ALC identified in the Board's decision-making involves its unjustifiable revisiting of facts "based on misinformation and improper argument." *Id.* As the ALC explained, "Payne's attorneys argued that the Board could satisfy the victim's family by paroling Payne and denying parole to [Joe]" and "characterized [Joe] as the perpetrator and stated that the victim's family could 'still express their ire against parole with respect to the man who actually took their daughter's life.'" *Id.* at *8-9 (quoting Supp. R., *id.*, at 81). These arguments are "contrary to the facts, recognized by the South Carolina Supreme Court, that Payne choked the victim, struck her in the head with a wrench, and ignited the pipe bomb's fuse." *Id.* at *9. Nevertheless, PPP argued before the ALC 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. of Resp., *Kelsey*, No. 19-ALJ-15-0061-AP, at *5-6.

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

As explained above, the Supreme Court of South Carolina made specific determinations about the murder for which Joe and Payne were sentenced to life in prison, and the ALC confirmed that those facts are binding on the agency's assessment of relative culpability. *See Kelsey*, No. 19-ALJ-15-0061-AP, at *8-9. The Board is permitted—indeed, required—to make an assessment about the nature of Joe's crime, but in doing so it is not

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[16] Specifically, the Board must consider each of the sixteen criteria for parole it promulgates pursuant to its legislative directive. *See* S.C. Dep't of Probation, Parole & Pardon Servs., *Criteria for Parole Consideration*, https://www.dppps.sc.gov/content/download/200476/4681336/file/Criteria+for+Parole+Consideration.pdf.

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"). Moreover, the Board in Joe's case was not in a position to make accurate findings of fact because it had before it argument from Payne's attorneys "suggest[ing] that [the Board] could parole Payne and satisfy the victim's family by keeping [Joe] in custody." *See Kelsey*, No. 19-ALJ-15-0061-AP, at *13. Such argument, which "appeals to that kind of bargaining[,] taints the process, the members of the Board, and the attorneys who make it." *Id.* On the other hand, unlike the Board, the South Carolina Supreme Court had the full record of what Joe and Payne did before it, which included evidence that had been tested by "procedures [that are] essential in criminal trials," including cross examination and confrontation. *See Wolff v. McDonnell*, 418 U.S. 539, 567 (1974). For these reasons the findings of the court system take supremacy over the Board's reading of the law, and it was prejudicial error for the Board to substitute its views for those of the Supreme Court. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803) ("The province of the court is, solely, to decide on the rights of individuals.").

IV. PPP Must Give Putative Parolees Access to Their Parole Files.

The third error the ALC identified in the Board's decision-making process also involves the Board's findings with respect to the facts of the offense. As the ALC noted, the only way the Board could, without acting arbitrarily and capriciously, conclude that Payne should be released while Joe remains incarcerated is if its decision was based on "untrue assertions of fact." *See Kelsey*, No. 19-ALJ-15-0061-AP, at *13.[17] If that is the

[17] Although the ALC ruled in Joe's favor on this point and held that PPP must give a putative

case, Joe has a right to review and challenge the inaccurate material upon which the Board relies. Joe twice requested access to his parole memorandum, all other reports and assessments in PPP's possession (including the results of the agency's own risk assessment[18]), and the "factual summary" of the case prepared by agency staff, but the agency never responded. Supp. R., *Kelsey*, No. 19-ALJ-15-0061-AP, at 77-78. PPP's refusal to disclose inmate parole files is another example of the agency's "hide the ball" approach to parole. In practice, it impedes implementation of PPP's own policy, which places the burden on the inmate to notify the Board if "the inmate thinks his/her file is somehow incomplete or contains some errors or other inaccuracy." *Kelsey*, No. 19-ALJ-15-0061-AP, at *9 (citation omitted). Moreover, hiding the information on which the Board reached its decision violates the express purpose and spirit of the entire parole process—without knowing why the Board has denied parole, an inmate has no way (or reason) to arrive at the next parole hearing better prepared.

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parolee access to the information in their parole file, it found that Joe's supplemental record—to which PPP objected after consenting in writing to Joe filing it—"provide[d] ample material for review." *Kelsey*, No. 19-ALJ-15-0061-AP, at *10. Thus, although the ALC did not consider this error prejudicial in Joe's case, if Joe is to receive a new parole hearing, PPP should nevertheless be required to turn over Joe's parole file to give him an opportunity to "notify the Board" of any errors or inaccuracies he identifies. *See id.*

[18] PPP is required, by statute, to administer "a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contribute to criminal behavior, which the parole board shall use in making parole decisions." S.C. Code Ann. § 24-21-10(F)(1). The agency uses COMPAS, a nationally recognized risk assesement tool intended in part to assist offenders in identifying and taking steps to reduce risk. The purchase of the tool and its administration are funded with taxpayer money. At the ALC, PPP took the position that *all* of the parole file, including the COMPAS assessment and the factual summary, are hidden, agency work product, protected by S.C. Code sections 24-21-290 and 24-21-40. However, section 24-21-290 only protects information received by probation agents and is intended to allow and encourage honest communication between probationers and their supervising agents, while section 24-21-40 is, as the ALC noted, merely a "document retention rule." *Kelsey*, No. 19-ALJ-15-0061-AP, at *9.

Procedural due process guarantees in both the United States and South Carolina Constitutions shield an inmate from improper influences or incorrect information being brought to bear on a parole board's decision-making process. *See Morrissey v. Brewer*, 408 U.S. 471, 484 (1972); *see also Al-Shabazz*, 338 S.C. at 375, 527 S.E.2d at 753 (discussing the importance "a reviewable record" before an administrative agency to permit error correction). Accordingly, the U.S. Supreme Court has acknowledged the constitutionally relevant "serious risks of error" when an inmate is denied access to his parole files and the ability to challenge them: the inmate may be denied parole on the basis of "adverse factual information in the inmate's file [that] is wholly inaccurate." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 15, n.7 (1979).

Joe has a substantial liberty interest in an accurate parole determination, and if he cannot see "wholly inaccurate" information in his file about his and Payne's relative culpability, Joe has no way of challenging the Board's conclusion that he is less deserving of parole than Payne. *See id.*; *see also, e.g.*, *Gardner v. Florida*, 430 U.S. 349, 354 (1977) (vacating a capital sentence for a due process violation where the defendant was not given access to portions of a confidential presentence investigation report because the information contained in the report was "absolutely unknown to and therefore unrebuttable by [the defendant]" (citation omitted)). This fact, presumably, is why PPP's "Criteria for Parole Consideration" form includes the following language: "If the inmate thinks his/her file is somehow incomplete or contains some errors or other inaccuracy, he/she must notify the Board of the specific error or inaccuracy." *Kelsey*, No. 19-ALJ-15-0061-AP, at *9

(citation omitted). "That the inmate must notify the Board of an error in a file he has no right to see is logically and legally absurd." *Id.*

Moreover, PPP has no countervailing interest in denying Joe access to the factual information, especially because, as the ALC emphasized, "ALC rules require that documents be redacted" such that any private information in Joe's parole file must either be redacted or submitted to the ALC for review, under seal. *Id.* at *10 (citing SCALC Rule 6). PPP never responded to Joe's requests for to see his file or explained why it would not give him the information he requested, meaning he has never had an opportunity to challenge PPP's refusal. Additionally, the South Carolina Freedom of Information Act (FOIA) does not exempt this kind of information from disclosure, and where FOIA does not expressly exempt a record from disclosure, the Supreme Court of South Carolina has construed the statute broadly to require disclosure. *See* S.C. Code Ann. § 30-4-40 (listing exemptions); *see also Evening Post Publ'g Co. v. Berkeley Cnty. Sch. Dist.*, 392 S.C. 76, 708 S.E.2d 749 (2011); *Soc'y of Pro. Journalists v. Sexton*, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984).

Finally, PPP's position—that the Board has no obligation to turn over the parole file, based on S.C. Code section 24-21-40, what the ALC described as "a document retention rule" that the agency, apparently, "can choose to ignore," *Kelsey*, No. 19-ALJ-15-0061-AP, at *9, n.12—is inconsistent with the concept of judicial review. At the ALC, the court's rules appear to require the Board to disclose parole memoranda in order to ensure that the agency has created a complete record for judicial review.[19] For example,

[19] As noted above, the ALC did not have access to the factual summary, the COMPAS assessment,

SCALC Rule 58 lists the items that are part of a record after final decision, including "[a]ll evidence received or considered" by the agency and "copies of specific policies relied upon by the agency." Thus, if the Board "received or considered" internal documents related to Joe, those documents must be made a part of the administrative record. SCALC Rule 58. If PPP refuses to disclose the memorandum, it must put into the record "copies of specific policies" it relied on in declining to respond to Joe's requests. *Id.* And if PPP does not make the parole memorandum part of the administrative record, it cannot cite it (or any other nondisclosed information) as the basis for the parole denial. As the Supreme Court of South Carolina recently reiterated, appellate review requires agencies, including PPP, to create a record based on "substantial evidence." *See Rose*, 429 S.C. at 142-43, 838 S.E.2d at 509. Where the record is bare (as would have been the case had Joe not filed a supplemental record), there is no basis for judicial review, and to permit an agency to make secret decisions without affording an affected individual an opportunity to create a record undermines the fundamental separation of powers expressed in the South Carolina constitution. *See* S.C. Const. art. I § 22. On remand, and in all future parole cases, PPP should be required to turn over an inmate's parole file upon request, subject to review under seal by the ALC if necessary.

CONCLUSION

For the foregoing reasons, Joe requests that this Court hold that the Board acted arbitrarily and capriciously and violated his procedural due process rights under the United

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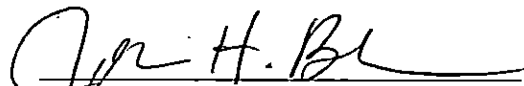
or any other documents upon which the Board relied in reaching its parole decision. If this Court determines that the contents of Joe's parole file are relevant to the present appeal, the Court's rules permit it to order PPP to produce them as part of the record on appeal. *See* Rule 212(a), SCACR.

States and South Carolina Constitutions. The Court should remand the case to the agency with an order that the Board hold a new parole hearing, free from arbitrary and capricious decision-making and free from the procedural defects the ALC identified, and because the only way the Board can remedy its arbitrary decision-making is by granting Joe parole, the Court should also order the Board to do so.

Respectfully submitted,



HANNAH FREEDMAN #103373
MEGAN BARNES #104368
Justice 360
900 Elmwood Ave., Ste. 200
Columbia, SC 29201
(803) 765-1044
hannah@justice360sc.org
megan@justice360sc.org

JOHN H. BLUME #747
Cornell Law School
159 Charles Evans Hughes Hall
Ithaca, NY 14853
(607) 255-1030
jb94@cornell.edu

JON OZMINT #7107
The Ozmint Firm
5205 Forest Drive, Suite 1
Columbia, SC 29206
(803) 782-0042
jon@ozmint.com

December 17, 2020

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal From The Administrative Law Court
Honorable H.W. Funderburk, Jr., III, Administrative Law Judge

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Appellate Case No. 2020-001473

JOSEPH KELSEY, # 217218 ....APPELLANT,

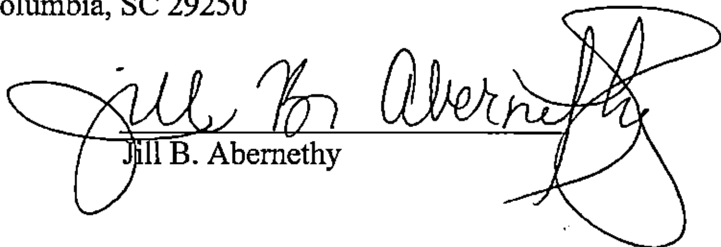
V.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Appellant's Initial Brief was served by first class United States mail, postage prepaid, this 17th day of December, 2020, upon the following:

Matthew Buchanan
Department of Probation, Parole and Pardon Services
P.O. Box 50666
Columbia, SC 29250



Jill B. Abernethy

JUSTICE (360) ADVANCING EQUALITY IN THE CRIMINAL JUSTICE SYSTEM
900 ELMWOOD AVENUE
SUITE 200
COLUMBIA, SC 29201
OFFICE 803.765.1044
WWW JUSTICE360SC.ORG

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December 17, 2020

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

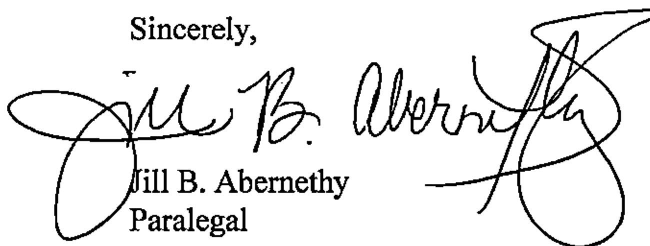
RE: *Joseph G. Kelsey, SCDC#217218 v. SC Department of Probation, Parole, & Pardon Services 2020-001473*

Dear Ms. Kitchings:

Please find enclosed for filing, along with certificate of service, the original and one copy of Appellant's Initial Brief in regards to the above captioned case. Please clock-in the extra copy and return it to me in the enclosed self-addressed stamped envelope.

If you should have any questions, please feel free to contact our office.

Sincerely,



Jill B. Abernethy
Paralegal

Enclosure

cc: Matthew Buchanan, Esq.
Joseph G. Kelsey

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900 ELMWOOD AVENUE
SUITE 200
COLUMBIA, SC 29201

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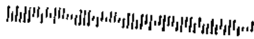

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