STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Robert F. Spigner, #65500 Appellant, vs. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	)	Docket No. 13-ALJ-15-0004-AP **ORDER**

This matter is before the Administrative Law Court (ALC or Court) pursuant to the Appellant Robert F. Spigner's (Appellant) appeal from the South Carolina Department of Probation, Parole and Pardon Services' (Department) decision denying him parole. Appellant requested a rehearing of this decision, but the Department denied that request. Appellant filed this appeal with the Court on January 22, 2013.

BACKGROUND

On December 23, 1970, Appellant and his co-defendant were involved in the murder and robbery of a victim. Appellant was later arrested and charged with murder. On September 8, 1971, Appellant was convicted of murder, after which he was sentenced to life imprisonment. In 1981, Appellant was granted parole upon his initial appearance.[1] In September 2000, the Parole Board revoked Appellant's parole for various offenses, including cocaine use (to which Appellant admitted), absconding supervision, failure to maintain employment, and testing positive for marijuana.

Since revocation of his parole, Appellant has appeared before the Parole Board a number of times, and has been denied each time. Appellant's last appearance occurred on October 10, 2012, after which parole was denied for the following reasons: (1) nature and seriousness of the current offense; (2) an indication of violence in this or a previous offense; (3) use of a deadly weapon in this or a previous offense; (4) a prior criminal record indicates poor community

[1] At the time of Appellant's offense, Section 55-611(2) of the Code of Laws of South Carolina, 1962 (Supp. 1970) allowed an inmate parole eligibility for the offense of murder upon the service of ten (10) years.

adjustment; and (5) a failure to successfully complete a community supervision program. On October 25, 2012, Appellant requested a rehearing, but the Board denied this request on December 13, 2012. Appellant thereafter filed his Notice of Appeal before this Court.

DISCUSSION

Appellant argues that: (1) the Department failed to follow the mandatory statutory criteria, specifically the South Carolina Omnibus Crime Reduction Act of 2010 (the Act),[2] prior to denying him parole; (2) the Department decided his case by denying him parole before he was interviewed, thereby denying his due process rights; and (3) in deciding to deny him parole, the Department failed to apply the requisite criteria for classifying his offense that was applicable at the time of his offense and instead used the current classification scheme under Section 16-1-60, thereby violating the *ex post facto* clauses of the federal and state constitutions.

Compliance with Statutory Criteria Governing Parole

In his Initial Brief, Appellant contends that the Department failed to comply with the Act because it did not use "COMPAS" (Correctional Offender Management Profiling for Alternative Sanctions)[3] before his case went before the Parole Board. S.C. Code Ann. § 24-21-10(F)(1) (Supp. 2010) requires:

> The department must develop a plan that includes the following:
>
> > (1) establishment of a process for adopting 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, including additional objective criteria that may be used in parole decisions.

The South Carolina Supreme Court provided guidance for this issue in *Cooper v. S.C. Dep't of Probation, Parole and Pardon Servs.*, 377 S.C. 489, 661 S.E.2d 106 (2008). The Court emphasized:

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[2] In his Initial Brief, Appellant references the Act and quotes the language of S.C. Code Ann. § 24-21-10(F)(1) (Supp. 2010), but mistakenly cites to Section 1-23-380, which governs the judicial review by the ALC upon a party's exhaustion of administrative remedies. Appellant also references S.C. Code Ann. § 1-23-380(A)(6)(C) (Supp. 2010) in his Reply Brief, but no such provision existed in 2010 or exists now. Moreover, it remains unclear how Section 1-23-380 "clearly supports appellant's position that he should have been given the COMPASS Assessment[.]"

[3] The Department refers to this program as "COMPASS," but Appellant refers to it as "C.O.M.P.A.S," at least in his Initial Brief. Because Appellant additionally provides the words that comprise the acronym that he uses, the Court will adopt his usage, though, for sake of convenience, the Court will remove the periods and refer to the program as "COMPAS."

> [I]n future parole review hearings the Parole Board may avoid the result in the instant case if it 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. If the Board complies with this procedure, 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. Under that scenario, the ALC can summarily dismiss the inmate's appeal.

Indeed, S.C. Code Ann. § 1-23-600(D) (Supp. 2012) states in pertinent part that "[a]n administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections involving . . . the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services." Thus, this Court is concerned only with the mandatory procedural requirements as set forth in S.C. Code Ann. § 24-21-640 (Supp. 2010) and the fifteen (15) factors found in the Department's parole form. Section 24-21-640 mandates in pertinent part the following:

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

The Department's fifteen (15) factors are set forth in its Form 1212, a copy of which Appellant received on July 11, 2012, during his pre-parole investigation and prior to his October 11, 2012 parole hearing.

In this case, Appellant has cited no legal authority showing the Department was required to use COMPAS. He asserts that it is "research-based and serves as an objective risk and needs assessment instrument." He also asserts that "[t]he program consist[s] of questions used to determine overall risk potential and criminogenic needs. The C.O.M.P.A.S. assesses risk and needs to inform decisions regarding offender release, placement and management." Appellant further asserts that the intent of the Legislature as to the Act is clear – that "[t]his tool, C.O.M.P.A.S. questionnaire, is to be used as a part of the criteria in making parole decisions." However, though Appellant makes occasional references to the Act, albeit with the incorrect citation thereto, he offers no explanation as to how those authorities support his assertions. Rule 37(B)(3) of the South Carolina Administrative Law Court Rules (SCALCR) requires each appellate brief to be "divided into as many parts as there are issues to be argued, and each part

shall bear an appropriate caption, followed by **a discussion and citation of authority**." (Emphasis added).[4] Mere conclusory statements and general references to legal authority without any discussion or explanation as to how that authority supports those assertions is insufficient to preserve on appeal the issue that they concern. In short, Appellant has abandoned any issues to which those assertions may have given rise. *See* Rule 208(b)(1)(D), SCACR (requiring the citation of authority in the argument portion of an appellant's brief); *Divine v. Robbins*, 385 S.C. 23, 38, 683 S.E.2d 286, 294 (Ct. App. 2009) (noting that when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal (citing *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994))); *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.").[5]

Moreover, the record reflects, and Appellant has failed to show otherwise, that the Parole Board relied on the factors published in Department Form 1212, the statutory factors set forth in Section 24-21-640, and on the characteristics of Appellant's current offense(s), prior offense(s), prior supervision, history, prison disciplinary record, and/or prior criminal record. Therefore, the Parole Board in this case committed no procedural error warranting remand to the Parole Board. *See Compton v. S.C. Dep't of Probation, Parole and Pardon Servs.*, 385 S.C. 476, 479, 685 S.E.2d 175, 177 (2009) ("In the instant case, the Parole Board clearly stated in its notice of rejection that it considered the statutory criteria and the criteria set forth in Form 1212, which is sufficient under *Cooper*.").[6]

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[4] Rule 37(B)(3), SCALCR is based on Rule 208(b)(1)(D), SCACR.

[5] It is noteworthy that the Department argues in its Brief that COMPAS has never been mandatory and was not being used as a recommendation tool when Appellant appeared before the Parole Board, because COMPAS was unavailable in parole cases at that time, being initially available only in supervision cases.

[6] Appellant makes another argument in his discussion of his third issue that may be addressed here, as it relates to statutory criteria regarding parole. He asserts that the Parole Board used "S.C. Code Ann. § 16-1-60 criteria 'Violent', while ignoring S.C. Code § 16-1-60[(B)]," and that the Parole Board used this criteria relating to those who were never on parole instead of using criteria for parole violators, specifically 55-616 of the South Carolina Code of Laws, 1962. However, this argument has no merit. Appellant fails to demonstrate that Section16-1-60 was even used by the Parole Board in reaching its decision, or that it is only used for those who have never been granted parole. The Parole Board can take into consideration, as one of the fifteen (15) factors on Form 1212, "[t]he nature and seriousness of the inmate's offense. . . ." For the same reasons given above, this argument is considered abandoned on appeal for failure to explain how the authority he cites supports his argument.

Denial of Parole Prior to Interview by Parole Board

Appellant next asserts that the Parole Board violated his due process rights because it denied him parole before granting him an interview. "The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Liberty interests protected by the Fourteenth Amendment may arise from the Constitution itself or from an expectation or interest created by state laws or policies. *Id.*; *Hewitt v. Helms*, 459 U.S. 460, 466 (1983), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).

The U.S. Supreme Court has held that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 7 (1979). In other words, "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." *Meachum v. Fano*, 427 U.S. 215, 224 (1976). Thus, if Appellant has a liberty interest in parole, then it must emanate from state law. *See Ellis v. Dist. of Columbia*, 84 F.3d 1413, 1415 (D.C. Cir. 1996). The South Carolina Supreme Court has held that a state-created liberty interest is implicated by the Parole Board's failure to follow proper procedure in making its decision to deny parole. *Cooper*, *supra.*

In this case, Appellant submitted a "Request To Staff Member" form provided by the South Carolina Department of Corrections (SCDOC) on which he submitted a request for "the Dates and Results of All [His] Parole Hearing[s]." Appellant also requested his classification status and whether it was violent or nonviolent. Under the section of the form entitled "Disposition By Staff Member," a SCDOC staff member wrote a list of time periods of imprisonment, beside which was written either "Parole Granted" or "Parole Denied." The final entry on the list read as follows: "6-23-10 – 6-23-12 Parole Denied." Under this entry was written the phrase, "You are classified as violent." This form was dated on 9-10-12.

Appellant argues that because this form states that his parole was denied on June 23, 2012, which was before the Parole Board hearing on October 11, 2012, he was denied due process. The Department argues that inmates never appear before the Parole Board prior to the completion of their pre-parole investigations, and that Appellant thus did not appear before the

Parole Board until October 11, 2012. It is understandable why Appellant may have been under the impression that the Parole Board had decided to deny his parole on June 23, 2012, prior to a hearing before the Parole Board in October of that year. However, I find this to be a mere scrivener's error. *See, e.g., State v. Sosbee*, 371 S.C. 104, 113, 637 S.E.2d 571, 575 (Ct. App. 2006) (finding that the erroneous listing of charges and CDR codes on the defendant's sentencing sheet was a mere scrivener's error and thus did not warrant reversal and remand). The record does not reflect that the Parole Board met or rendered a decision around this time. Indeed, had the Parole Board denied Appellant's parole, there would have been no need or reason for it to have denied Appellant's parole again less than four (4) months later, on October 11, 2012. Rather, the record reflects that Appellant was given the Form 1212, which he signed, on July 11, 2012, during his pre-parole investigation. Also, the Parole Board held a hearing on October 11, 2012, at which time Appellant was allowed to present mitigating evidence and/or make any presentation or statements to the Parole Board that he wished. Thus, even had the Parole Board denied Appellant parole prior to a hearing, that procedural defect was cured by the subsequent pre-parole investigation and October 11, 2012 hearing. *Unisys Corp. v. S.C. Budget and Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 174, 551 S.E.2d 263, 272 (2001) ("An adequate de novo review renders harmless a procedural due process violation based on the insufficiency of the lower administrative body."). Therefore, Appellant was not deprived of his due process rights.

Compliance with Statutory Offense Classifications

Finally, Appellant argues that the Department applied the incorrect statutory criteria in determining whether to grant him parole because it applied the "violent" classification of his crime under Section 16-1-60 instead of applying the criteria in effect at the time of his offense, i.e. Sections 55-611, -12, and -66 of the South Carolina Code of Laws, 1962 (Supp. 1970). He thus argues that Department violated his due process rights by using the wrong criteria and retroactively applying Section, 16-1-60.

First, it is true that "[t]he law existing at the time of the offense, not the time of sentencing, determines whether an increase of punishment or reduction of benefits constitutes an *ex post facto* violation." *Elmore v. State*, 305 S.C. 456, 409 S.E.2d 397 (1991) (citing *Miller v. Florida*, 482 U.S. 423 (1987), *overruled on other grounds by Al-Shabazz v. State*, 338 S.C. 354,

427 S.E.2d 742 (2000). However, Appellant has provided no support for his assertion that the Parole Board used the "violent offense" classification from Section 16-1-60 in reaching its decision as to Appellant's parole. The Parole Board is free to take into consideration, as one of the fifteen (15) factors on Form 1212, "[t]he nature and seriousness of the inmate's offense . . . ." However, for the same reasons given above, this argument is considered abandoned on appeal for failure to explain how the authority Appellant cites supports his argument. Furthermore, Section 55-612 of the South Carolina Code of Laws, 1962 (Supp. 1970), is nearly identical to the current version, Section 24-21-640 (Supp. 2010). Section 55-612 reads in pertinent part:

> The Probation, Parole and Pardon Board shall carefully consider the record of the prisoner, before and after imprisonment, and no such prisoner shall be paroled until it shall appear, to the satisfaction of the Board, that the prisoner has shown a disposition to reform that, in the future, he will probably obey the law and lead a correct life, that by his conduct he has merited a lessening of the rigors of his imprisonment, that the interests of society will not be impaired thereby and that suitable employment has been secured for him.

Section 24-21-640 states:

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

Comparing the two provisions, both Section 24-21-640 (Supp. 2010) and its predecessor, Section 55-612 (Supp. 1970), require the Parole Board to "carefully consider the record of the prisoner" before he can be paroled. The record in this case reflects that the Board took Appellant's record into consideration. Moreover, the only differences in the pertinent language of these two statutes is the use of "must" in the later version instead of "shall" in the earlier version, the use of "may" in the later version instead of the second use of the term "shall," the replacement of commas with semicolons, the simplification of the "Probation, Parole, and Pardon Board" to "board," and the addition of the term "during" in the later version. However, none of these differences are significant. The only two changes that warrant any discussion are the use of "may" and the inclusion of "during" in the later version.

"'May' signifies permission and generally means the action spoken of is optional or discretionary. But when the question arises whether 'may' is to be interpreted as mandatory or

permissive in a particular statute, legislative intent is controlling." *Robertson v. State*, 276 S.C. 356, 358 278 S.E.2d 770, 771 (1981) (internal citations omitted); *see also Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 352-53, 549 S.E.2d 243, 250 (2001) (finding that the term "may" in the applicable statute did not give the Retirement System unfettered discretion to grant or deny unused annual leave). In this case, "may" as used in the later version is synonymous with "shall," because as with the earlier version, Section 24-21-640 mandates that no prisoner can be granted parole unless a condition is met, and that condition is the Parole Board's satisfaction in the areas set forth in the remainder of the provision. As to the inclusion of "during" in Section 24-21-640 (Supp. 2010) and not in Section 55-612 (Supp. 2012), it is clear that "during" was included in the latter for clarification of what was already present in the former. In Section 55-612, as in the Section 24-21-640, the Parole Board has to look at whether "the prisoner **has shown a disposition to reform** that, in the future, he will probably obey the law and lead a correct life, that **by his conduct** he has merited a lessening of the rigors of his imprisonment, that the interests of society will not be impaired thereby." (Emphasis added). The meritorious conduct referenced can refer to none other than that displayed **during** the prisoner's imprisonment. Likewise, the only opportunity a prisoner would have to demonstrate a disposition to reform would be **during** his incarceration. Therefore, it is clear that the later inclusion of "during" in the statutory language was meant to clarify the meaning already manifest in the prior version of the statute. Hence, the differences between the two statutes and the procedures that they govern are insignificant.

Moreover, even had there been a procedural change that disadvantaged Appellant, that would not necessarily mean that there was an *ex post facto* violation. *See State v. Huiett*, 302 S.C. 169, 171-72, 394 S.E.2d 486, 487 (1990) ("Even though a procedural change may have a detrimental impact on a defendant, a mere procedural change which does not affect substantial rights is not *ex post facto*.").[7] Here, there was no retroactively punitive change in procedure that affected any substantial rights of Appellant, and therefore there was no *ex post facto* violation in this case.

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[7] The Department may wish to reconsider the way in which it worded the rule it attributes to *Roller v. Gunn*, 107 F.3d 227 (1997), particularly in light of *Jernigan v. State*, 340 S.C. 256, 531 S.E.2d 507 (2000).

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **AFFIRMED**.

AND IT IS SO ORDERED.

Ralph K. Anderson, III
Chief Administrative Law Judge

May 24, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair
Judicial Law Clerk

May 24, 2013
Columbia, South Carolina