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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Administrative Law Court
Crystal M. Rookard, Administrative Law Judge

Case No. 2026-001548
ALC Docket No. 25-ALJ-15-00033-AP

Herbert Bell, #132646,

v.

South Carolina Department of Probation,
Parole and Pardon Services,

Appellant,

Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
---------------------------	-----

STATEMENT OF ISSUES ON APPEAL	1
-------------------------------------	---

REPLY ARGUMENTS.....	2
----------------------	---

I. The Administrative Law Court (ALC) erred when it found it did not have authority to reach the merits of Herbert Bell’s appeal.

a. The holdings from *Cooper v. S.C. Dept. of Prob. Pardon and Parole Services*, 377 S.C. 489, 66 S.E.2d 106 (2008) and *Compton v. S.C. Dep’t of Prob. Pardon and Parole Services*, 385 S.C. 476, 685 S.E.2d 175 (2009) are not a shield for a statutorily incorrect parole process, and the ALC has authority to review the parole process to determine if South Carolina’s Department of Probation, Parole, and Pardon Services (DPPPS) is following its statutory and regulatory mandates.

b. Regardless, DPPPS’ failure to correct Herbert’s parole file renders the Parole Board’s denial of Herbert’s parole arbitrary, and therefore and the denial was not routine under *Cooper* and *Compton*.

c. In Herbert’s case, the opportunity to address the Parole Board during his parole hearing about the inaccuracies in his file did not cure DPPPS’ error in failing to correct the inaccuracies in Herbert’s parole file.

II. DPPPS violated Herbert Bell’s right to a statutorily correct parole process when it administered the Static 99-R to Herbert Bell and when it reported the results of that test to the Parole Board.

a. Under section 24-21-10 (F)(1) of the South Carolina Code, DPPPS is required to use “a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contribute to criminal behavior” when preparing a parole file to give to the Parole Board for consideration. DPPPS violated this mandate when it administered a Static 99-R to a person who has not convicted sexual misconduct because the Static 99-R cannot produce validated, evidence-based risk assessment results for a person who has not committed sexual misconduct.

b. Whether an offense qualifies or does not qualify for South Carolina’s Sex Offender Registry is not dispositive of whether the offender committed sexual misconduct.

III. *Thompson v. State*, 415 S.C. 560, 566, 785 S.E.2d 189, 192 (2016) applies to Herbert’s case.

CONCUSION.....	11
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TABLE OF AUTHORITIES

<i>Greenholtz v. Inmates of Nebraska Penal & Corr. Complex</i> , 442 U.S. 1, 15 n.7 (1979).....	5
<i>Matter of Hyman</i> , 447 S.C. 573, 578, 930 S.E.2d 1, 3 (2026), reh'g denied (June 15, 2026).....	7
<i>Allen v. S.C. Dep't of Corr.</i> , 439 S.C. 164, 886 S.E.2d 671 (2023).....	2
<i>Compton v. S.C. Dep't of Prob. Pardon and Parole Services</i> , 385 S.C. 476, 685 S.E.2d 175 (2009).	<i>passim</i>
<i>Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.</i> , 377 S.C. 489, 496, 661 S.E.2d 106, 110 (2008), <i>abrogated on other grounds by Allen v. S.C. Dep't of Corr.</i> , 439 S.C. 164, 886 S.E.2d 671 (2023).....	<i>passim</i>
<i>State v. Walls</i> , 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002).	9
<i>Thompson v. State</i> , 415 S.C. 560, 566, 785 S.E.2d 189, 192 (2016).....	9, 10
<i>Sosebee v. Leeke</i> , 293 S.C. 531, 535, 362 S.E.2d 22, 24 (1987).....	5
<i>Kelsey v. S.C. Dep't of Prob., Parole, & Pardon Servs.</i> , 441 S.C. 373, 379, 893 S.E.2d 588, 591–92 (Ct. App. 2023).....	<i>passim</i>
<i>Thompson v. State</i> 409 S.C. 386, 762 S.E.2d 51 (Ct. App. 2014)	10
<i>State v. Andrews</i> , 324 S.C. 516, 479 S.E.2d 808, 813 (Ct. App. 1996).....	9
<i>Blackwell v. S.C. Dep't of Prob. Parole & Pardon Servs.</i> , Op. No. 2024-UP-211 (S.C. Ct. App. filed June 12, 2024).....	4, 6
S.C. Code Ann. § 1-23-600(D) (West 2026)	1, 2
S.C. Code Ann. § 23-3-430 (West 2026).....	6
S.C. Code Ann. § 23-3-430(C)(3)(d) (West 2026).....	6
S.C. Code Ann. § 24-21-10 (F)(1) (West 2026).....	6
<i>Policy and Procedure Manual Parole Board Manual</i> , South Carolina Board of Paroles and Pardons	3, 4
A. Phenix, et.al., 2016 Static-99R Coding Rules, “Definitions: Sex Offense”	9, 10
<i>Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders</i> , 14 Temp. Pol. & Civ. Rts. L. Rev. 1, 12–13 (2004).....	7, 8
L. Maaike Helmus et. al., <i>Static-99r: Strengths, 10 Limitations, Predictive Accuracy Meta-Analysis, and Legal Admissibility Review</i> , 28 Psychol. Pub. Pol'y & L. 307, 309 (2022)	8

APPELANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the South Carolina Department of Probation, Parole, and Pardon Services (DPPPS) violated Herbert Bell's due process right to a statutory and regulatory correct parole procedure when it failed to give Herbert the opportunity to present evidence to the Parole Board indicating Herbert's parole file contained inaccurate information regarding: 1) the nature and seriousness of his current offense, and 2) the indication of violence in his offense.
2. Whether DPPPS violated Herbert's due process right to a statutory and regulatory correct parole procedure when it: 1) required Herbert, who has not committed sexual misconduct, to undergo an actuarial risk assessment test intended for men who have committed sexual misconduct, and then 2) submitted the results of that test to the Parole Board for its consideration in granting or denying parole.
3. Whether the Administrative Law Court (ALC) erred in failing to review the record and reach the merits of Herbert's above arguments because it ruled that DPPPS complied with *Cooper v. S.C. Dept. of Prob. Pardon and Parole Services*, 377 S.C. 489, 66 S.E.2d 106 (2008) and *Compton v. S.C. Dep't of Prob. Pardon and Parole Services*, 385 S.C. 476, 685 S.E.2d 175 (2009) in denying Herbert parole.

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the Administrative Law Court erred when it dismissed the appeal after it determined the Parole Board followed the proper procedure as outlined in *Cooper* and *Compton*?
2. Whether the ALC erred when it determined its limited authority over appeals from routine denials of parole required it to dismiss the appeal and not address Appellant's arguments about perceived inaccuracies in his parole file when he had the opportunity to report them to the Board?
3. Whether the ALC erred when it determined its limited authority over appeals from routine denials of parole required it to dismiss the appeal and not address Appellant's arguments about a sex offender assessment tool or to make a *Thompson v. State* analysis?

REPLY ARGUMENTS

I. The ALC erred when it found it did not have authority to reach the merits of Herbert Bell's appeal.

DPPPS asserts that, under section 1-23-600(D) of the South Carolina Code, the ALC does not have authority to review an appeal from the denial of parole when the following two conditions are met: 1) the prisoner remains parole eligible and 2) the Parole Board issues notice, as required by *Cooper* and *Compton*, that it considered the relevant, statutory criteria when it denied that prisoner parole. **(Resp. Br. 4-5).** This is not an accurate statement of the law.

First, the South Carolina Supreme Court has held that, even when a prisoner remains parole eligible, there are some procedural failures in the parole process that “raise[a] sufficient state-created liberty interest to trigger due process requirements.” *Cooper*, 377 S.C. at 499, 661 S.E.2d at 111, *abrogated on other grounds by Allen*, 439 S.C. 164, 886 S.E.2d 671 (2023). One of these failures is when DPPPS or the Parole Board does not follow the “procedure promulgated by the Legislature” in conducting a parole review. *Id.* In *Kelsey v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, this Court further found DPPPS must follow its own regulations and policies as well when administering the parole process. *See Kelsey*, 441 S.C. 373, 378, 893 S.E.2d 588, 591 (Ct. App. 2023) (finding DPPPS was required to follow the language of DPPPS' Form 1212 and allow a prisoner the opportunity to review and correct his or her parole file).

In Herbert's case, DPPPS failed to follow its statutory and regulatory mandates when it 1) failed to correct factual inaccuracies in Herbert's parole file after those inaccuracies were brought to DPPPS' attention, and 2) when it failed to allow Herbert the opportunity to present evidence of the factual inaccuracies in the parole file to the Parole Board for their review. Finally, DPPPS also failed to follow statutory requirements when it administered a Static 99-R test to Herbert despite the fact that the Static 99-R is not a valid recidivism test for someone who has not committed

sexual misconduct. Therefore, and—as we explain in more detail below—in Herbert’s case, the ALC erred when it found that, under section 1-23-600(D), it did not have authority to review DPPPS’ procedural errors. As the *Cooper* Court stated, “We do not believe the Legislature established [DPPPS] and intended for it to render decisions without any means of accountability.” *Cooper*, 377 S.C. at 499, 661 S.E.2d at 111.

- a. The holdings from *Cooper* and *Compton* are not a shield for a statutorily incorrect parole process, and the ALC has authority to review the parole process to determine if DPPPS is following its statutory and regulatory mandates.**

In the parole process, DPPPS and the Parole Board have distinct statutory and regulatory mandates. the Parole Board is required to weigh relevant, statutorily mandated parole criteria and render a decision of whether to grant or deny parole. *Compton*, 385 S.C. at 476, 685 S.E.2d at 175; *Cooper*, 377 S.C. at 496, 661 S.E.2d at 110. In *Cooper* and *Compton*, the Supreme Court found that, when the Parole Board demonstrates it has considered the statutorily mandated parole criteria when rendering a parole decision, it has discharged its due process requirements. Importantly, *Cooper* and *Compton* do not hold that DPPPS has also discharged its due process requirements when the Parole Board weighed the relevant criteria. In contrast to the Parole Board, DPPPS is required, among other things, to administer actuarial risk assessments to parole-eligible prisoners, create a parole file, present that parole file to the prisoner and the Parole Board for review before a parole hearing, and correct the parole file if it is inaccurate. *See Kelsey*, 441 S.C. at 379, 893 S.E.2d at 591 (holding inmates have a right to review their parole file to report any inaccuracies to the Parole Board); *Policy and Procedure Manual, South Carolina Board of Pardons and Paroles*, 21, (Nov. 2019) (requiring DPPPS to create a parole file that includes “[t]he [prisoner’s] criminal offense and a description of it.”

https://ppp.sc.gov/sites/dppps/files/Documents/Parole%20Pardon%20Release/Board_of_Pardons

[and Pardons 11062019.pdf](#) (last visited Sep. 4, 2026). If this is not done, then, at the very least, DPPPS must, give a prisoner sufficient opportunity to present his or her own evidence to the Parole Board in support of the contention that the parole file is inaccurate. *Blackwell v. S.C. Dep't of Prob. Parole & Pardon Servs.*, Op. No. 2024-UP-211 (S.C. Ct. App. filed June 12, 2024)¹ (holding inmate was entitled to offer evidence to Parole Board in support of his contention that his parole file mischaracterized facts relevant to his parole consideration).

In Herbert's initial brief, we outlined the relevant procedure required for all parole reviews in South Carolina, and we contended that DPPPS erred in failing to correct the inaccuracies in Herbert's 2024 parole file before it created the 2025 parole file. (**App. Br. 3-6**). Additionally, because the 2025 parole file was not given to Herbert until the day of his 2025 hearing for review, there was not adequate opportunity for DPPPS to correct the 2025 parole file before the 2025 parole hearing. (**App. Br. 3-6, 11-14**). Finally, DPPPS refused to give the transcript to the Parole Board for reconsideration of Herbert's parole decision after its 2025 denial. (**App. Br. 5-6**). Today, we contend due process requires DPPPS to follow its own statutory and regulatory mandates in investigating, preparing, and correcting a parole file—regardless of whether the Parole Board has held a hearing or weighed parole criteria. The holdings from *Cooper* and *Compton* are not a shield for DPPPS' failures to adhere to its own constitutional, legislative, and regulatory mandates when administering the parole process.

¹ *Blackwell v. S.C. Dep't of Prob. Parole & Pardon Servs.*, Op. No. 2024-UP-211 is not published, and it is therefore not precedential. Nevertheless, it is the only case in South Carolina that has applied the recent holding from *Kelsey*; therefore, we believe it is persuasive authority in Herbert's case.

b. Regardless, DPPPS’ failure to correct Herbert’s parole file renders the Parole Board’s denial of Herbert’s parole arbitrary, and therefore the denial was not routine under *Cooper* and *Compton*.

We further wish to reiterate that it is not possible for a Parole Board to exercise discretion in weighing the relevant parole criteria as required by *Cooper* and *Compton* if the criteria it is weighing is “wholly inaccurate.” *Greenholtz*, 442 U.S. at 15 n.7. In Herbert’s case, the parole file indicated Herbert’s kidnapping conviction involved gun violence and sexual misconduct. As the transcript from his kidnapping trial demonstrates, the kidnapping conviction did not involve either; therefore, Herbert’s parole denial was not routine. Today, we are asking this Court to require DPPPS to correct Herbert’s parole file, or, in the alternative, to allow Herbert the opportunity to present this transcript to the Parole Board. In this way, the Parole Board’s decision of whether to grant or deny Herbert parole will not be not arbitrary—but rather, based on discretion. *Id.*

c. In Herbert’s case, the opportunity to address the Parole Board during his parole hearing about the inaccuracies in his file did not cure DPPPS’ error in failing to correct the inaccuracies in Herbert’s parole file.

Throughout DPPPS’ brief and elsewhere in the Record, DPPPS seems to contend that, as long as Herbert “had an opportunity to explain to the Board his position that there was no gun present during the kidnapping and that there was no sexual assault that took place during the kidnapping,” there is no due process error in Herbert’s parole process. **(Resp. Br. 7).** We disagree. The fact that Herbert was able to *argue* to the Parole Board that the parole file was incorrect does not absolve DPPPS from correcting an inaccurate parole file. *See e.g., Sosebee v. Leeke*, 293 S.C. 531, 535, 362 S.E.2d 22, 24 (1987) (holding lawyer’s argument to the factfinder is “not evidence” and therefore could not cure erroneous and prejudicial misinformation presented by a judge at trial); *see also 2024 Parole Hearing Audio Recording* (demonstrating Parole Board’s dismissal of Herbert’s argument regarding the characterization of his offense because Herbert’s arguments contradicted the parole file).

This is especially true when DPPPS prohibited Herbert from presenting *evidence* of the inaccuracies by: 1) failing to give the parole file to Herbert until the day of the hearing, even when the Parole Board had the file for two weeks before the hearing, and 2) refusing to send the Herbert's transcript to the Parole Board after the denial of Herbert's parole. *See Blackwell.*, Op. No. 2024-UP-211 (holding there was no due process error for an inaccurate parole file when the Parole Board was able to examine *evidence* of an inaccurate file on the day of the parole hearing). Finally, DPPPS asserts "[i]t is not the place of [a reviewing court] to arbitrate a factual dispute over what goes into a parole file." (**Resp. Br. 8**). Respectfully, when that factual dispute implicates due process, then it is exactly the role of a reviewing court to do so.

II. DPPPS violated Herbert Bell's right to a statutorily correct parole process when it administered the Static 99-R to Herbert Bell.

DPPPS contends that because section 23-3-430 (C)(3)(d) of the South Carolina Code requires Herbert to register for the Sex Offender Registry upon his release from South Carolina Department of Corrections' custody, then DPPPS did not err in either administering a Static 99-R test to Herbert or providing the results of that test to the Parole Board for review. (**Resp. Br. 9-10**). DPPPS further asserts that neither the ALC nor this Court has authority to "dictate what sort of actuarial risk and needs assessment tool is permissible under S.C. Code 24-21-10(F)(1). (**Resp. Br. 9-10**). We disagree.

DPPPS is required by statute to provide the Parole Board with the results of "a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contribute to criminal behavior." S.C. Code Ann. § 24-21-10 (F)(1). Accordingly, Herbert has the due process right to ensure that DPPPS is following this statutory mandate in administering actuarial risk and needs assessment to him in a way that is reliable and will produce valid results. *Cooper*, 377 S.C. at 499, 661 S.E.2d at 112 ("Parole is a privilege and Cooper has no right to be

paroled; however, Cooper does have a right to require [DPPPS] to adhere to statutory requirements”). Finally, this Court has the authority to review DPPPS’ parole process to ensure that DPPPS is following its statutory mandates. *Id.* at 502, 661 S.E.2d at 113 (holding a parole eligible prisoner’s claim may raise “a sufficient liberty interest to trigger due process requirements of judicial review” and one of those types of claims is when it is alleged the parole process is not being administered according to its statutory requirements).

- a. **Under section 24-21-10 (F)(1) of the South Carolina Code, DPPPS is required to use “a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contribute to criminal behavior” when preparing a parole file to give to the Parole Board for consideration and administering a Static 99R to a person who has not convicted sexual misconduct will not produce validated, evidence-based risk assessment results.**

In the recent case of *Matter of Hyman*, the South Carolina Supreme Court found the penile plethysmography test (PPG) for male sexual arousal did not produce reliable and scientifically valid results such that the test results were admissible in a commitment trial under the Sexually Violent Predator Act. 447 S.C. 573, 578, 930 S.E.2d 1, 3 (2026), *reh'g denied* (June 15, 2026). The *Hyman* Court discussed what “reliability” and “validity” means for tests designed to demonstrate sexual proclivity. *Id.* In discussing the reliability of the PPG, the *Hyman* Court emphasized that standardization in administering the test is essential in determining whether the results of the test will be valid. *Id.* at 580, 930 S.E.2d at 4. As part of the discussion indicating why PPG tests were considered generally unreliable, the Court quoted a law review article that stated, “Manufacturers of PPG devices provide instructions and protocols, but these do not appear to be consistently followed, and their manner of use differs from one facility or researcher to the next.” *Id.* (quoting *Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders*, 14 Temp. Pol. & Civ. Rts. L. Rev. 1, 12–13 (2004)). In other words, it is

essential for the person administering a test such as the PPG or the Static-99R to follow the instructions and protocols of the test’s designer in order for the results of that test to be valid.

Herbert has not committed sexual misconduct, therefore—according to the Static 99-R’s own protocols—the Static 99-R cannot give valid results as to his likelihood that he will commit sexual misconduct in the future. (**App. Br. 19**). Importantly, it has been noted by legal scholars that “[t]he appropriate population for Static-99R may not fully correspond with the population of individuals labeled as ‘sex offenders’ in the criminal legal system.” L. Maaïke Helmus et. al., Static-99r: Strengths, 10 Limitations, Predictive Accuracy Meta-Analysis, and Legal Admissibility Review, 28 Psychol. Pub. Pol’y & L. 307, 309 (2022). As such, the Static 99-R will only produce valid results as to sexual proclivity for men who have all ready, in *actual fact* (not legal fiction), committed sexual misconduct. As is clear from the trial transcript of Herbert’s kidnapping conviction, sexual misconduct was not alleged, testified to, or even mentioned at all. Herbert is not a candidate for the Static 99-R test, and DPPPS violated his due process rights when it administered the test to him in a way that could not produce a “valid” actuarial risk assessment of his future dangerousness “consistent with evidence-based practices and factors.” S.C. Code Ann § 24-21-10 (F)(1).

b. Whether an offense qualifies or does not qualify for South Carolina’s Sex Offender Registry is not dispositive of whether the offender committed sexual misconduct.

In its brief, DPPPS asserts that “South Carolina presumes sexual intent” for a kidnapping conviction when that conviction is required to be listed on the Sexual Offender Registry. (**Resp. Br. 9**). Respectfully, there are many ways the Sexual Offense Registry is used, but it is important to note that it is not a criminal statute, and it is problematic to say the Registry may be used to “presume[] sexual intent.” (**Resp. Br. 9**). See generally, *State v. Andrews*, 324 S.C. 516, 479 S.E.2d 808, 813 (Ct. App. 1996) (discussing constitutional implications of “presumed intent” for

criminal statutes); *see also State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002) (finding Registry classification of an offense is a criminal penalty, and therefore the Sexual Offense Registry Act does not violate the prohibition on *ex post facto* laws).

Whether a conviction qualifies for the Sexual Offense Registry is not dispositive of who is a scientifically valid candidate for the Static-99R test. This is due to the simple reality that the Sexual Offense Registry does not reflect the scope of the prisoner population who have committed sexual misconduct. Some prisoners have pled down to non-registerable offenses, such as battery. These prisoners may be good candidates for the Static 99-R, but—if DPPPS only gives the test to men who will be placed on the Registry—then these men who received favorable plea deals will not be tested for their risk of committing sexual misconduct if paroled.

In contrast, some prisoners who have been convicted of trafficking or kidnapping must go through an entire, time-consuming legal process to receive a *Thompson v. State* finding in order to be removed from the Registry. Others, like Herbert, may receive a *Thompson v. State* finding that they did commit sexual misconduct,² but will still not qualify to be removed from the Registry upon their release from SCDC custody. Nevertheless, Herbert and others who have not committed actual sexual misconduct are not valid candidates for the Static 99-R.

Finally, according to its own protocols, the Static 99-R cannot be used to “presume sexual intent.” (**Resp. Br. 9**). *See* 2016 Static-99R Coding Rules, “Whom Can you Use the Static-99R on?”, 13, (“This instrument is not recommended for . . . those who have never committed a sex

² We point out that there are many reasons why the State may want to maintain a registry of people convicted of kidnapping minors, even if that kidnapping was not sexually motivated. What if a grandparent or stepparent commits a kidnapping in the midst of a custody dispute? These non-sexual kidnappings will be also placed on the Registry under section 23-3-430 (C)(3)(d), and the legal fiction that these people are sex offenders will also exist. Nevertheless, the only valid Static 99-R results are for prisoners who have, in actual fact, committed sexual misconduct.

offence, nor is it recommended for making recommendations regarding the determination of guilt or innocence in those accused of a sex offence”). Rather, the Static 99R will only give valid results when used “where there is reason to believe an *actual* sex offence has occurred . . . with an identifiable victim[.]” *Id* (emphasis added). It violates Herbert’s due process right to administer this test to him and then give the invalid results to the Parole Board for their review.

III. *Thomson v. State* does apply to Herbert’s case

In *Thompson v. State*, the Supreme Court of South Carolina made two relevant findings for Herbert’s case. First, the *Thompson* Court found a person convicted of kidnapping is entitled to be meaningfully heard on whether the kidnapping offense involved a sexual component after his criminal proceedings were completed. 415 S.C. 560, 566, 785 S.E.2d 189, 192 (2016). Second, the *Thompson* Court found Thompson requested two distinct declarations: “(1) that his kidnapping offenses did not involve a sexual element (the first declaration); and (2) that therefore he would not have to register as a sex offender in the future (the second declaration).” *Id.* at 565, 785 S.E.2d at 191. In other words, whether a person convicted of kidnapping will have to register on the Sexual Offender Registry is a distinct inquiry from whether the crime that person committed was sexual in nature. The reason for these separate inquiries includes the fact that there are “immediate and harmful ramifications” for people who have been convicted of sexual misconduct, including—but not limited to—the fact that a person convicted of sexual misconduct is “ineligible for substance abuse services and the ninety-day pre-release program” within SCDC. *Id.* at 563, 785 S.E.2d at 190 (quoting *Thompson v. State* 409 S.C. 386, 762 S.E.2d 51 (Ct. App. 2014) (Thomas, J., dissenting)).

In Herbert’s case, because Herbert was convicted of kidnapping, DPPPS has determined he will be administered the Static 99-R and the results of that test will be given to the Parole Board for their consideration. DPPPS has decided to do this despite the fact that Herbert is not a valid

candidate for the test, as he has not committed sexual misconduct in actual fact, and therefore the results of the Static 99-R are not reliable.

The fact that these invalid, unreliable risk assessment results have been given to the Parole Board for their review is a harmful ramification of the fact that Herbert been convicted of kidnapping.³ No Court has made a *Thompson* finding that Herbert's kidnapping offense did not involve sexual misconduct. Herbert's overall COMPAS score for recidivism showed a low risk for reoffending. The general COMPAS test results are the only valid actuarial risk assessment results that should be included in his parole file.

At this time, this Court has the entire transcript of Herbert's kidnapping conviction for its review. We therefore ask this Court to make a *Thompson* finding that Herbert's kidnapping conviction did not involve sexual misconduct. We are hoping that with a *Thompson* finding, DPPPS will no longer subject Herbert to a risk assessment test that will be unable to provide valid results to the Parole Board.

CONCLUSION

Today we ask that this Court define the parameters of the parole process so that Herbert—and all of South Carolina's other parole-eligible prisoners—get a fair shot at a discretionary parole review. We are not asking this Court to reweigh the criteria the Parole Board considered when it denied Herbert's parole. Instead, we are asking this Court to hold DPPPS to its statutory and regulatory mandate to provide accurate information to the Parole Board about the nature and

³ At this point, we are not sure how unusual Herbert's situation is at DPPPS. At the ALC, we requested to conduct limited discovery to determine how DPPPS selects who will be administered the Static 99R—is it the entire parole-eligible prison population? Is it prisoners who have committed crimes that may qualify for the Registry? We are not sure. One thing we do know, is that there does not seem to be a separate inquiry made by DPPPS into whether the offender, in actual fact, committed sexual misconduct as mandated by the Static 99R's coding rules.

seriousness of the offense that occurred, as well as to administer actuarial risk assessments in scientifically reliable way, so that the Parole Board may weigh parole criteria to decide whether Herbert should be granted the privilege of parole. We further ask this Court to clarify the due process requirements of correcting a parole file when it is not accurate. We understand the constraints on DPPPS in facilitating the parole review process; nevertheless, in Herbert's case, the process is not working as it should. Herbert was convicted of kidnapping forty years ago at a time in South Carolina law when the sentence for that crime was mandatory life in prison. His crime did not involve gun violence or sexual misconduct. Today, we are asking this Court to ensure, as due process requires, that DPPPS presents this accurate information to the Parole Board.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel for Appellant Herbert Bell, of the legal aid Time Served, do hereby certify that I have served opposing counsel with the Initial Reply Brief by regular United States mail, postage prepaid, at the below address.

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