THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

Case No. 16-ALJ-15-0002-AP

South Carolina Department of Probation,
Parole and Pardon Services

Respondent,

v.

Billy Rice, 0083744

Appellant.

INITIAL BRIEF OF APPELLANT

RECORD ON APPEAL

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STATEMENT OF ISSUES ON APPEAL

1. The Administrative Law Court (ALC) erred and abused its discretion in dismissing Appellant's Notice of Appeal, and ruling that he failed to file Notice of Appeal in a timely fashion with the Court, denying him due process and equal protection of the law.

2. The South Carolina Department of Probation, Parole, and Pardon Services (Department) failed to promulgate and/or give notice of new parole criteria pursuant to rules and regulation requirement; and failed to perform non-discretionary duties resulted in undue prejudice, and denied due process.

3. The Department arbitrarily capriciously denies annual parole review to prisoners sentenced prior to 1981 void legitimate authority, laws, regulations, or certified administrative policy; irregularities in procedure; and denied rights to appeal parole rejection, violated both State and Federal Constitutional rights.

4. The Appellant submits that he has a statutory right to have his life sentence defined as thirty (30) years sentence for all purposes, void deduction allowance of time for good behavior.

STATEMENT OF CASE/FACTS

The Appellant Billy Rice, and alleged co-defendant were charged and convicted of murder on October 1976, and sentence to a term of ten (10) years, paroleable life sentence classified as Felony, and currently incarcerated with the South Carolina Department of Corrections (SCDC). During the time of sentencing no law existed determining how long a person must wait until a parole hearing is scheduled after rejecting, and currently there is no valid written authority regarding the frequency of parole hearings prior to 1981 codified statute (emphasis added), however, annual parole review hearings by the South Carolina Department of Probation, Parole, and Pardon Services (Department), after parole rejection, the practice were that all parole candidates were reviewed every twelve months thereafter for the purpose of such determination. On December 17, 2015 request to produce bi-annual parole reviews authority that Department believes support its posture, no tangible authority/proof was produced. Likewise all prisoners were statutorily eligible to recieve earn work credits SC Code Sec. 24-21-635 (1978) to accelerate parole and/or max-out sentence. South Carolina Codes of Criminal Procedures provide for prisoners of his class to define ten (10) years paroleable life sentence as thirty (30) years, for all purposes including determination of release. The Department has long failed to adhere to legislative mandate to create a criteria for the granting of parole, and currently fail to promulgate new criteria related to legislative mandate SC Code Ann Sec 24-21-10(F)(1), that Appellate first learned of new criteria reflected in his Notice of Rejection letter, void prior notice, and void adequate time to prepare for hearing. The Appellate sought relief via Mandatory Informal Resolution; and Administrative remedies/Grievance system, raising issues properly/timely filed, and appealed to ALC on January 25, 2016, and subsequently dismissed February 8, 2016. However, on February 15, 2016 the Appellant filed consolidated Rule Motions 52, 59(e), and 60(b), SCRCP, and exhibits currently pending, now comes before this Honorable Court.

FIRST ARGUMENT

The Administrative Law Court (ALC) erred and abused its discretion in dismissing Appellant's Notice of Appeal, and ruling that he failed to file Notice of Appeal in a timely fashion with the Court, denying him due process and equal protection of the law.

The Appellant contends that the ALC erred and abused its discretion and improperly dismissing his Notice of Appeal in ruling that he fail to file Notice of Appeal in a timely fashion to the Court and that the ALC lack jurisdiction as a result. The ALC mistake/oversight constitutes a manifest error/plain error, where the ALC's action are inconsistent with exhaustion/grievance standards.

The Doctrine of Exhaustion of Administrative Remedies requires a person seeking relief from the action of an administrative agency to pursue all available administrative remedies before seeking such relief from the courts. See, Pullman Co. v. Pub. Serv. Comm'n, 234 SC 365, 108 SE 2d 571 (1959). Further, the basic rationale for the doctrine of exhaustion is so that the Department may correct its own errors and to compile a cord which is adequate for judicial review.

In addition, according to Agency grievance policy/procedure GA-01.12 Inmate Grievance System (See, Affadavit Exhibit A.) Inmates must make an effort to informally resolve a grievance by submitting inquiry to appropriate staff, therefore the following actions ensued:

*On October 28, 2015, Appellant recieved written parole rejection letter.
*On November 25, 2015, Appellant timely filed for (Review, and Re-Examination for Parole Warranted) request for parole reconsideration.
*On December 15, 2015, Appellant recieved reply letter to parole reconsideration request (See, Affadavit Exhibit B.)
*On December 17, 2015, Appellant timely filed grievance after informal resolution attempt.
*On January 11, 2016, Appellant recieved grievance reply. (See, Affadavit Exhibit C).
*On January 25, 2016, Appellant timely filed Notice of Appeal with ALC.
*On February 8, 2016, the ALC filed Order of Dismissal.
*On February 15, 2016, Appellant timely filed consolidated Rule Motion 52, 59(e), & 60(b) SCRCP.

The Appellant submits that at all times relevant he complied with the

doctrine of exhaustion, that included "informal resolution" and "grievance process" in order to perfect the appeal, before filing Notice of Appeal, and that at all times relevant time for filing Notice of Appeal was tolled, thereby Notice of Appeal was properly filed, and procedures properly followed.

For the sake of argument assuming arguendo, that Appellant was arguing parole eligibility, procedurals were not correctly followed. However, the Appellant submits that he is not challenging a routing denial of parole, but rather whether the Department's actions/procedures used were improper; irregularities in procedures; Ex Post Facto violations; due process; disparity in treatment, issues constitutionally within expectation for review. For said reasons, the Honorable Court must determine that the ALC's Order is defective, and the decision was arbitrary and capricious.

SECOND ARGUMENT

The South Carolina Department of Probation, Parole, and Pardon Services (Department) fail to promulgate and/or give notice of new parole criteria pursuant to Rules and Regulation requirement; and fail to perform non-discretionary duties resulted in undue prejudice, and denied due process.

The Appellant submits that October 21, 2015 parole review hearing was unfair, incomplete and resulted in undue prejudice, and denied due process, when the Department fail to:

(1) Give fair notice of new criteria derived from SC Code Ann Sec 24-21-10(F)(1), that stated at pertinent part "The Department must develop a plan that includes the following . . . which the parole board shall use in making parole decisions, including additional objective criteria that may be used in parole decision." The Appellant submits that he was not apprised of new criteria before the Department reflected in Notice Rejection Letter, used cite as a factor in decision to deny parole, void reasonable fair notice . . . unfair disadvantage and unfair surprise cause to be unprepared for parole hearing/coordinate appropriate emphasis on related concern. Appellant submits that he has a reason to know and a right to know what said criteria involve and entail. See, Wolf v. McDonnell, 418 US 539,564, 94 SCt 2963 (1974). Though there is no absolute right to parole, the Appellant has a right to prepare for consideration. The Department arbitrarily deprived him of that

entitlement.

(2) Perform non-discretionary duties that required assessment of parole candidate and his family. Assessment factors alluded to in rejection letter didn't occur. Mere mention of cite in rejection letter and nothing more does not satisfy legislative intent or minimal due process, because legislature did not intend a futile act, but rather to accomplish a legitimate government objective. Tns. Mills Inc. v. SC Dept of Revenue, 331 SC 611, 503 SE 2d 477(1999). The result would have been different based on evidence of probative value that support parole suitability as a result. However, the Appellant was unduly prejudice by the Department's failure to promulgate and give notice of new criteria, denied liberty interest rights and due process. For said reasons prehearing process was flawed and incomplete, require immediate rehearing.

(3) As a minimum the due process clause [Fourteenth Amendment] requires within a reasonable time following the hearing to whom parole was denied must be given a full and fair explanation (emphasis added), in writing of the essential facts relied upon in prisoner's record. Furthermore requires that Agencies/Departments adhere to legislative commands in conducting functions.

To the contrary the Department denies parole on basis of immutable aspect of criminal liable/misconduct not susceptible to change and politics:

*Nature and seriousness of current offense
*Indication of violence in this or previous offense
*Use of deadly weapon in this or previous offense
*Prior criminal record indicates poor community adjustment
*Failure to successfully complete a community supervision program

Mere administrative "boiler plate" reasoning usurping Appellant permanently unsuitable for parole, is Constitutionally inadequate, United States ex rel. Johnson v. Chairman of NY State Bd. of Parole, 500 F 2d 925 (2d Cir). Probative value of admitting said facts does not outweigh its prejudice. South Carolina Rules of Evidence 403 and 609 (SCRE) exclude criminal convictions in civil matters. Prior convictions are used only to impeach credibility, not to show that parole candidates are a bad person, or that they ought to be denied parole, and since there are no dispute regarding inferred "Finding of Facts" statements, it only serves to prejudice the candidates because it fail to prove/disprove matters already settled, lacking in probative value, because it fail to prove or disprove Appellant's parole

suitability 26 years later. Furthermore, Finding of Facts as used violates [Appellant's] Double Jeopardy rights of the Fifth Amendment of the United Sates Constitution, contrary to legislative intent to grant parole rendered procedure flawed and unfair when conclusions are drawn from stale facts that merely prejudice candidates.

Second: The Department fail to perform non-discretional duties subscribed by South Carolina Legislature branch of government's literal expressed language pursuant to SC Code 1952/1964 Code of Law Sec 24-21-13(b), that read at pertinent part:

> ". . . It [Board] shall develop written policies and procedure for the following . . . (b) The granting of parole and pardon. See also, SC Code Ann Sec 24-21-640, "The Board shall establish written specific criteria for the granting of parole, and provisional parole. The criteria shall be made available to all prisoners."

The Department's actions and "Finding of Facts" statements for denying parole are inconsistent with the logic plan of legislative intent to grant parole. In view of the South Carolina statutes (1952/1964 Code Sec. 55-612) "Circumstances warranting parole . . .", a prisoner's right to consideration for parole is an aspect of liberty to which the due process clause applies. Since the State of South Carolina made parole an integral part of its penalogical system, and provided that those parole eligible [are] to be released on parole after:

> "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."

The Department abused its discretion/authority by arbitrarily denying suitable candidates parole unfairly drawn from stale facts, and immutable aspect of criminal liability and misconduct not susceptible to change, does not satisfy minimum due process requirement, because finding of facts are not sufficient to enable a reviewing body to determine whether parole has been denied for impermissible reason or for no reason at all. Despite of statutory criterion that creates a protectible interest, the Department continue to

avoid creating mandated legislature geared to grant parole. For said reasons the Department's interpretation of legislative intent to create criteria fro granting parole is constitutionally flawed. The statutory language must be construed in light of the intended purpose of statute. Town of Mt. Pleasant v. Robert, 393 SC 332, 342, 713 SE 2d 278, 283 (2011).

Third: The Department failed to promulgate, and give fair notice of new criteria, and Appellant opportunity to prepare or make ready for parole hearing, violated procedural rules, and regulations of fair notice; and failure to perform legislative mandate pursuant to SC Code Ann Sec. 24-21-10(F)(1); and before referring to 24-21-10(F)(1) in Appellant's rejection letter as a factor in denying parole, resulting in undue prejudice, and further denied Appellant's due process rights, Wolf v. McDonnell, id.

THIRD ARGUMENT

> The Department arbitrary capriciously denies annual parole review to prisoners sentenced prior to 1981 void legitimate authority, Laws, Regulations, or Certified Administrative policy; Irregularities in procedures; and Felony classification usurped to Violent classification; and denied rights to appeal parole rejection, violated both State and Federal Constitutional rights.

The Appellant submits that at time of his offense [1976] annual parole review for members of his class was routine practice (See, Affadavit Exhibits D), despite no codified statutory law determining how long an inmate must wait to reappear after denial of parole. From inception of the South Carolina Probation, Parole, and Pardon Board proviso [1942 Code Sec 1038-11; 1942 (42) 1456; 1906(25)], allowed caucasian prisoners to apply for parole opportunity after denial every twelve (12) months. Annual parole review hearings by Department was so permanently and well-settled as to having the force of law, Monell v. NY City of Social Services, 436 US at 690-691. Appellant submits that he is denied equal protection of law and treatment when, (a) Department began denying annual parole review [to him/members of his class], void certified authority. (b) Disparate in treatment from similarly situated parole candidates, whom offenses occurred between 1978-1980 recieving annual reviews. (c) Failure to promote uniformity in Department's procedures, and

(d) Arbitrary capriciously changed Felony classification and definition to Violent classification definition. Ex Post Facto clause protects against retroactive legislative provisions, rules, regulations, or policies which are disadvantageous to the offender. The Appellant submits that, he and similar class are entitled to annual parole review hearing. The courts has never adjudicated or tested the veracity of the Department's posture and supporting facts there of, regards to annual parole review hearings class prior whether worthy of acceptance, and conforming to, pursuant to Rule of Evidence 901 and 902; and Rule 1001, 1002, and 1003, SCRE.

Furthermore, at time of Appellant's Felony offense 1976 murder, criminal offenses was either classified/defined as "Misdemeanor or Felony offenses", See, State v. King, 105 SC 251, 155 SE 2d 409; SC Code Sec. 16-11. The term Felony was not an express part of sentence. The SCDC's classification system currently classify Appellant's 1976 offense as an [Felony] non-violent classification equivalent to Felony definition, (See, Affadavit Exhibit E). Non-violent/Violent offender imply and encompass different connotation in contrast to misdemeanor/felony offender. Differences are more dramatic than initially appears. The violent offense/offender classification characterization encompass and ascribes harsher punishment; heightened sanctions; broaden range of restrictions; limited priviledges; greater quantum of parole votes/larger quorum of Board members; custody level restrictions; program participation restrictions; work release restriction, etc., are all assessed against individuals class as violent offense/offender. Despite thereof the Department wrongfully classify Appellant's 1976 under violent proviso, SC Code Ann Sec, 16-1-60 (1986), constitutes Ex Post Facto violation.

The Appellant further argue that 1986 Crime Bill Sec, 16-1-60 statutory construction does not operate retroactively, because it is not procedural or remedial. Statutory enactments are to be considered prospective, unless there is a specific provision in the enactment, or clear legislative intent. Moreover, if the General Assembly intended for section 16-1-60 to operate retroactively the statute would contain language to that effect, to extend scope to matters that have occurred in the past. See, Hercules, Inc v. SC Tax Comm, 274 SC 137, 143, 262 SE 2d 45, 48 (1980); SC Jurisprudence Action Sec. 15 (2007). The law need not impair a vested right to violate the Ex Post Facto prohibition, it need only make punishment more onerous than the law in effect at time offense occurred, See, Weaver v. Graham, 450 US 24, 30, 101

SCt 960, 965; Gwong v. Singletary, 683 So 2d 109 (1996) (Law altered the definition of criminal conduct; increases the penalty by which a criminal is punishable, or that the regulation, policy, procedure was made more onerous than the practice in effect on the date of offense). Our Legislature is granted the power and the authority to define crimes and set punishment for those crimes. Jernigan v. State, 184 SE 2d 259, 265 (1971). The Department exceeded its authority by misconstruing and placing his 1976 Felony conviction classification/custody status under Sec. 16-1-60; and further defied the Court's interpretation of South Carolina revise law that inferred, "Inmates will be entitled to a parole hearing each year unless the crime they committed was classified a violent crime at the time of the offense." (See, Affadavit News Articles F, G).

In addition, the Appellant submits that the Department arbitrarily and capriciously denied him administrative rights pursuant to, "SC Board of Paroles and Pardons, Operations Manual, Part III, Re-Hearings of Parole Cases," to request rehearing after rejection of parole, denied him due process and equal protection of the law. (See, Affadavit Exhibit H).

FOURTH ARGUMENT

The Appellant submits that he has a statutory right to have his life sentence defined as thirty (30) years sentence for all purposes, void deduction allowance of time for good behavior.

On December 17, 2015, Appellant filed an administrative grievance arguing among other issues, that when the Appellant's offense occurred South Carolina General Assembly legislature branch Code of Law Sections 55-611 and 55-611.1, provided that if sentence to life imprisonment or imprisonment for any period in excess of thirty years, granted him a statutory right to have his life sentence treated as a thirty (30) year sentence for all purposes, including the determination of his unconditional release date. The Appellant contends that he should have recieved earned work credits [Sec. 24-21-635 (1978)], and actual days served, that together he had completed his 30 years sentence and, therefore, was entitled to immediate release. When Appellant's offense was committed SC Code Ann Sec. 55-611 and Sec. 55-611.1 provided that a life sentence should be considered as imprisonment for 30 years.

South Carolina Codes of Criminal Procedures and statutory law provided the following:

> Sec. 55-611:
> (1) Who, if sentenced for not more than thirty years, shall have served at least one-third of the term for which he was sentenced.
> (2) Who, if sentenced to life imprisonment or imprisonment for any period in excess of thirty years, shall have served at least ten years, or
> (3) Who, if he is a first offender and is sentenced for an indeterminate term shall have served the minimum for which he was sentenced, not deducting in any instance any allowance of time for good behavior
>
> Sec. 55-611.1:
> After a prisoner has served one third of his sentence, if such sentence exceed one year, the Board shall review his case, irrespective of whether or not any application has been made therefor, for the purpose of determining whether or not such prisoner is entitled to any of the benefits provided for in this chapter.
>
> State of South Carolina Office of the Attorney General Opinion No. 23719, February 25, 1966:
> Section 55-611.1 of the 1962 Code makes it mandatory that the SC Probation, Parole, and Pardon Board review prisoners record for parole consideration if he has served <u>one-third</u> of his sentence.

The Appellant submits that since there was no way to calculate a <u>third</u> of a life sentence, Section 55-611.1, defined life sentence as a term of 30 years or more so that prisoners with 10 years paroleable life sentences would be eligible for parole after serving the minimum of 10 years. Sec. 55-611.1 makes a life sentence equivalent to 30 years day for day. <u>See</u>, <u>State v. Atkins</u>, 303 SC 214, 399 SE 2d 760 (1964), (held that, a cursory review of provisions for incarceration, reveals the legislature's cognizance that actual prison time served under a life sentence may not extend to the end of natural life. <u>See also</u>, <u>State v. Bobby E. Bowden</u>, ____NC____, 668 SE 2d 107 (2008) (. . . life sentence to be considered as a sentence of 40 years). The Legislature has exclusive power to determine the State's penalogical system and prescribe punishments for crime. Having served 30 plus years sentence has expired. (SEE, AFFIDAVIT EXHIBIT-I).

CONCLUSION

The Appellant submits that the Department's failure to adhere to non-discretionary duties/legislative mandates, laws, rules, regulations, and administrative policies/procedures. Parole decision was not based upon consideration of all relevant factors. Additional fail to give notice of new criteria relating SC Code Ann Sec 24-21-10(F)(1); and fail to create criteria for the granting of parole pursuant to SC Code Ann Sec. 24-21-13(b)(1964); arbitrarily applied SC Code Sec 16-1-60 (1986) to his 1976 Felony offense; and further denied opportunity to exercise administrative appeal remedy after parole rejection; and fail to calculate earned work credits and actual time served for completion of life sentence defined as 30 years at time of offense. There is a large segment of SCDC's prisoners currently incarcerated that is wrongfully denied annual parole hearings. For said reasons outlined in brief, multiple rules, regulations was violated denied minimum due process, and rights guaranteed him by both State and Federal Constitutions.

s/ Billy Rice

Billy Rice, #0083744, Pro Se