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STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM ADMINISTRATIVE LAW COURT  
Deborah Brooks Durden, Administrative Law Judge

S.C. Supreme Court

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Unpublished Opinion No. 2012-UP-332  
Filed 30 May 2012

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George Lee Tomlin,

Petitioner

V

South Carolina Department of Probation  
Parole And Pardon Services (SCDPPPS)

Respondent.

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APPENDIX

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George L. Tomlin  
RCI, GA-6, POB 2039  
Ridgeland, S.C. 29936

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STATE OF SOUTH CAROLINA  
In The Court Of Appeals

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Appeal From Administrative Law Court  
Deborah Brooks Durden, Administrative Law Judge

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Docket No. 10-ALJ-15-0016-AP  
2010179746

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George Lee Tomlin,

Appellant,

V.

South Carolina Department of  
Probation Parole And Pardon  
Services (SCDPPPS)

Respondent.

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FINAL BRIEF OF APPELLANT

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S/ George Lee Tomlin

George Lee Tomlin #166361  
RCI GA-6, P.O. Box 2039  
Ridgeland, S.C. 29936

STATEMENT OF ISSUES ON APPEAL

1. Did The Administrative Law Court (ALC) Err holding that section 24-21-710 of S.C. Code Ann (Supp. ) does not constitute an unconstitutional Ex Post Facto Law and No Due Process Applications?
2. Whether the ALC err suggesting that Tomlin's ex post facto, due process and equal protection right's have not been violated where he has been subjected to respondent's criteria for parole consideration?
3. Has the ALC err finding that appellant's untimely initial parole hearing claim was "Moot" and rejecting the due process claim?
4. Was the ALC in err finding there was no due process right(s) implication(s) under respondent's criteria?

STATEMENT OF THE CASE

Tomlin was indicted at the September 1989 term of the Court of General Sessions for Sumter County for the offenses CSC 2nd, murder, and possession of a weapon during a violent crime which supposedly occurred on or about 28 June 1988. He entered guilty pleas on or about 8 February 1990 to CSC 2nd, Voluntary Manslaughter, and the weapon charge (App. p. 5 ). He was sentence to 20 years, 30 years, an five (5) years consecutively. He had the initial parole release hearing on or about 3-17-10.

A notice of rejection was forwarded to him from which he timely filed a notice of appeal to the ALC. After the appeal was perfected the ALC issued a 11-5-10 order which is before this court on appeal herein.

ARGUMENT(S)

I. THE ALC ERRED HOLDING THAT SECTION 24-21-710 OF SOUTH CAROLINA CODE ANN; (SUPP. 199 ) DOES NOT CONSTITUTE AN UNCONSTITUTIONAL EX POST FACTO LAW AND THERE ARE NO DUE PROCESS RIGHTS IMPLICATION(S).

The ALC erred holding that section 24-21-710 of S.C. Code Ann. (Supp. 199 ) does not constitute an unconstitutional ex post facto law and there are no due process rights implication(s), more, the ALC's order related:

24-21-50 specifically states that "[n] o inmate has a right of confrontation at the [parole] hearing"

(R. p. 9 )

Section 24-21-50 of S.C. Code Ann. (Supp, 1987) commanded, "The Board shall grant hearing and permit arguments and appearance by counsel or any individual before it at any such hearing while considering any case for parole, pardon or any other form of clemency provided for under law." Terrell v. U.S. 564 F.3d 422 (cab 2009)

The (revised 6-88) P E Form 6 Parole Criteria Document declared, " A decision for or against parole may be made in the absence of the inmate, but any inmate rejected in absence will have an opportunity to request a personal appearance before the Board". (R. P. 2 ) Tomlin interprets "appearances by counsel or any individual before it" as denoting in personal appearance and the failure of respondent to provide it violate his statutory and criteria policy state created rights. Where the ALC's order indicated, "while section 24-21-710 was enacted after appellant committed his offenses, it is not criminal or penal in nature; it does not disadvantage appellant in any manner since he was still able to participate full in his parole hearing; and it constitutes only a change in the procedure by which parole hearings are conducted." (R. p. 10 )

Appellant fails to agree and understand how the ALC arrive to a finding that section 24-21-710 is not a criminal and/or penal law(s). Sanders v. SCDC, 665 S.E.2d 231, 236 (S.C. App. 2008); In Re DNA EX Post Facto Issues, 561 F.3d 294 (ca4 2009). This constitutes an error of law by the ALC as the ALC suggests, video-conference is a procedure change-it is substantial as section 24-21-710 has no application to pardon(s) and/or clemency proceeding(s). With reference to appellant's due process claim herein the ALC's order stated, "no liberty interest in such a hearing has been created by the state, and Appellant's due process rights were not violated." (R. p 9 )

This finding by the ALC constitutes error of law if Hinton v. Dept. or Probation, Parole, 592 S.E.2d 335 (S.C. App. 2004) is read along with Cooper v. SCDPPPS, 661 S.E.2d 106 (2008). There is a liberty interest to a parole hearing under S.C. Laws.

II. THE ALC ERRED SUGGESTING THAT TOMLIN'S EX POST FACTO, DUE PROCESS AND/OR EQUAL PROTECTION RIGHT(S) HAVE NOT BEEN VIOLATED WHERE HE HAS BEEN SUBJECTED TO RESPONDENT'S CRITERIA FOR PAROLE CONSIDERATION

The ALC erred suggesting that Tomlin's ex post facto, due process and/or equal protection right(s) have not been violated where he has been subjected to respondent's criteria for parole consideratin. (R. p. 10 ) SCDPPPS'S criteria for parole consideration (form 1212) was created, enacted and/or promulgated thereafter Tomlin's offense(s) occurrence of June 28, 1988. Again, Tomlin has made the "Parole Criteria" document (P E Form 6) of 6-88 part of the evidence or supporting material in this case. (R. p. 1 ) which shows the proper criteria for parole release whereby he should have been subjected thereto when he made an application for parole release, Cooper v. SCDPPPS, 661 S.E.2d 106 (2008)

The ALC's order declared, "Although form 1212 was not promulgated until after appellant was convicted of his crimes, the South Carolina Supreme Court has held the criteria were lawfully created and do not violate the ex post facto clause." (R.p. 11) Cooper did not exhibit or present the "Parole Criteria" which was in effect in 1988 for comparison and contrast and the ALC failed to apply objective criticism analysis and this constitutes error of law. Specifically, it was not discussed how "Board establishes the following guidelines in denying parole." (R. p 1 ) There is simply no provision in the 1988 "Parole Criteria" that "the Board or Panel deliberates upon the "Reasonable probability" that an inmate will not again violate the law," (R. p 6 )

Which is most critical regarding the ex post facto change and/or claim. Why does form 1212 state "the publication of these parole criteria in no way creates an expectancy of release;... .. or establish any presumption of entitlement to parole:." (R.p 6 ) This is another critical change as the 1988 parole criteria does not reference any language suggesting the absence of liberty interest. The notice or rejection stated, "After careful consideration of: (1)... .. (2) the factors published in Department form 1212 (criteria for parole consideration)" (R.p 7 )

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The 1976 Act changed section 55-613 (1962 code) to section 24-21-640; the 1990 act 510 sec. 1 changed all remaining shall(s) to "must" except for one "shall" which did not relate to parole criteria but for punishment for conviction(s) for two violent crimes under section 16-1-60. The legislature did not amend section 24-21-30 of act 100 of 1981 which mandated parole and procedure(s) for granting of parole. In response to directive of addition to section 24-21-640 of Act 100 of 1981 information suggests that Board promulgated or ratified (SCDC 19-109 Jan. 1982). Thereafter, the Board established guidelines for denying parole. (R. p 1 )

Respondent's form 1212 of 2010 is nothing more than an extension of the unlawful parole criteria in 1980's and 1990's, since SCDPPPS created parole criteria for denying parole release when title 24-21-13 commanded the respondent promulgated parole criteria for "granting parole" release, see Tant v. Dan River, inc, 345 S.E.2d 495, 496 (1996). The criteria promulgated by the Board in 1982 which existed until July 1991 had the effect of law and must be considered in conjunction with section 24-21-640. In promulgating criteria, policies, rules the respondent must, of course, do so lawfully, SCDPPPS did unlawfully never established specific criteria for granting parole, Board was mandated to grant parole if prisoner met criteria under section 24-21-640, since respondent did not apply the relevant lawful parole criteria to Tomlin from 1988. SCDPPPS denied him the equal protection of the law based on social status (indigent and/or prisoner). Hendrix V. Taylor, 579 S.E.2d 320, 32 \_\_\_ (2003). There is simply no rationale basis for respondent's procedure and SCDPPPS has failed to issue to Tomlin what process is due.

### III. THE ALC ERRED FINDING THAT APPELLANT'S UNTIMELY PAROLE HEARING CLAIM WAS "MOOT" AND REJECTING THE DUE PROCESS CLAIM

The ALC erred finding that appellant's untimely parole hearing claim was "moot" and rejecting the due process claim. It does not matter which one of those parole criteria document(s) the ALC and/or respondent utilize for 6-88 Parole Criteria Stated " to request a personal appearance before the Board " (R. p 6 ) and form 1212 suggest, "the inmate has the right to appear at his parole hearing" (R. p 6 ) as Tomlin did not receive a timely hearings for those occasion(s) that were wrongfully denied. Hinton supra, The ALC's order stated, "because the parole hearing has already taken place and a decision has been rendered this argument is moot. " (R. p 12 )

Tomlin is serving a 55 year sentence where the weapon conviction represents a no or non parolable offense. In Tilly v. State, 511 S.E.2d 689 ( ), the court ordered sentence restructuring which required service of the weapon (5 year) sentence first. The ALC should have acknowledge Tomlin's initial parole release consideration date as 5 years plus 10 years. 2001 or 2002 or 2003 should have been appellant's initial parole release date, and every two year thereafter the initial parole release consideration appearance, he should have had parole release re consideration hearing(s) instead of him having only one (1) 2010 parole release hearing

### IV. THE ALC ERRED IN FINDING THERE WAS NO DUE PROCESS RIGHT(S) IMPLICATION(S) UNDER RESPONDENT'S CRITERIA

The ALC erred in finding there was no due process right(s) implication(s) under respondent's parole criteria, Appellant has a federal due process liberty interest as South Carolina Statutory Law(s) from 1962 to 1991 did cabin the discretion of S.C. Parole Board. Both sections 24-21-13 and 24-21-640 contained the statutory command "shall" establish criteria and etc for granting or parole release. More, title 24-21-14 was repealed "by 1991 Act No, 143, § 26, eff. June 12, 1991".

Board of Pardons V. Allen, 482 U.S. 369, 107 S.C. 2415, 96 L.Ed.2d 303 (1987), suggests "Parole is a privilege, rather than a right, only in the sense that state has no duty to establish parole system and may place conditions on parole release", which is what South Carolina Legislative did in 1986 under section 24-21-640, " The Board must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in section 16-1-60." The ALC's order response wrong, "This argument has been addressed by the United States Supreme Court;

There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. (R. p 12 ) (10)

Even the amendment of section 24-21-640 suggests that there is a liberty interest to parole release as compared to individuals who do not fit that criteria. Because of the presumption, general legitimate expectation of section 24-21-640 and specific legitimate expectation(s) of the 1988 and/or 1990 'notice of rejection' "Parole will be granted when it shall appear" created a liberty interest in Parole release for Tomlin. (R. p 3 )

Furthermore, if there had been any other significant change(s) in the parole criteria from 1988 to 1990; it would have been revealed differently in the 1988 and 1990 notice(s) of rejection' (R. pp 3-4 ). The 1988 and 1990 notice of rejection are nearly identical as compared to the 2010 notice or rejection of Tomlin (R. p 3-4 )

CONCLUSION

Wherefore, this court should reverse the order of the ALC, remand for further proceedings in accordance with constitutional commands there with.

This 22 day of February 2011

S/ George Lee Tomlin  
George Lee Tomlin #166361  
RCI GA-6, P.O. Box 2039  
Ridgeland, S.C. 29936

AL

STATE OF SOUTH CAROLINA  
In The Court of Appeals  
Docket Number 10-ALJ-15-0016-AP  
Tracking No. 2010179746

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

GEORGE LEE TOMLIN #166361

APPELLANT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE, AND  
PARDON SERVICES

RESPONDENT

CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant Final Brief dated 22 February 2011  
complies with Rule 211(b), SCACR.

S/ \_\_\_\_\_  
George Lee Tomlin #166361  
RCI GA-6, P.O. Box 2039  
Ridgeland, S.C. 29936

March 9, 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has caused true and correct copies of his Final Brief, to be mailed, postage prepaid, to respondent's attorney whose name and address are set forth below herein this 22 day of February 2011.

s/ George Lee Tomlin  
George Lee Tomlin #166361

Mailed To:

Tommy Evans, Jr.  
Legal Counsel, SCDPPPS  
2221 Devine Street, Suite 600  
Post Office Box 50666  
Columbia, S.C. 29250

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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal From Administrative Law Court  
Deborah Brooks Durden, Administrative Law Judge

---

Docket No. 10-ALJ-15-0016-AP  
Tracking No. 2010179746

---

George Lee Tomlin,

Appellant

-v-

South Carolina Department Of Probation  
Parole and Pardon Services (SCDPPPS)

Respondent,

---

RECORD ON APPEAL

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s/ George Lee Tomlin  
George Lee Tomlin #166361  
RCI GA-6, P.O. Box 2039  
Ridgeland, S.C. 29936

Tommy Evans, Jr.  
Legal Counsel, SCDPPPS  
P.O. Box 50666, suite 600  
2221 Devine St.  
Columbia, S.C. 29250  
Attorney for Respondent

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SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES BOARD

P.O. Box 50666 (Five Points Station)  
Columbia, SC 29250

PAROLE CRITERIA

The South Carolina Department of Probation, Parole, and Pardon Services Board is mandated under Code of Laws of South Carolina 1976 Section 24-21-640 to consider "Circumstances Warranting Parole." The Board establishes the following criteria for the granting of parole:

"The 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."

In conjunction with the above criteria, the South Carolina Department of Probation, Parole, and Pardon Services Board establishes the following guidelines in denying parole. The Board will not parole an individual if it determines:

1. That there is a substantial risk that the individual will not conform to the conditions of parole based on one or more of the following factors:
  - a. Criminal Record.
  - b. Length and seriousness of criminal record.
  - c. Indications of assaultive or violent behavior.
  - d. Previous experience under parole or probation supervision.
  - e. Refusal to be supervised on parole.
  - f. No acceptable employment and/or residence.
  - g. Results of psychological or psychiatric evaluations indicating individual is not likely to conform.
  - h. Indication of habitual criminal activity.
  
2. That the individual's release would depreciate the seriousness of the crime or promote disrespect for the law based on one or more of the following:
  - X a. Nature and seriousness of the offense.
  - X b. Use of a deadly weapon in current or previous offense.
  - c. The offense is one of Murder, Attempted Murder or Killing an Individual, Robbery with a Weapon, Rape, Indecent Liberties, Lewd or Lascivious Acts on a Minor, Deviate Sexual Assault, Kidnapping, Armed Violence, Aggravated Arson, Treason, or Calculated Drug Conspiracy.

(continued on back)

3. That the individual's release would have a substantially adverse effect on institutional discipline based on one or more of the following factors:

- a. Physical attack upon another inmate or institutional staff.
- b. Possession of weapons or drugs.
- c. Repeated violation of institutional rules.
- d. Violation of any act prohibited by law.

4. That the individual's continued correctional treatment will substantially enhance his/her capacity to lead a law-abiding life when released at a later date based on one or more of the following factors:

- a. Lack of immediately available community treatment resources.
- b. Need for vocational counseling or other training which could be more readily provided in the institution.
- \* c. Need for psychiatric or medical treatment which could not be feasibly obtained outside the institution.

In all cases considered for parole where the individual receives favorable consideration but lacks suitable employment and/or residence or the Board needs additional time to further evaluate the individual's case, the Board may grant a Conditional Parole. The individual will be informed of the goals he must accomplish before the parole can become effective. In all cases where Conditional Parole has been granted, the individual must obey all rules and regulations of the South Carolina Department of Corrections during the conditional period or the Conditional Parole may be rescinded and the individual may be rejected.

Any individual who refuses to be heard for parole will be rejected for parole by the Board. Individuals serving for a violent offense(s), as defined in Section 16-1-60 SC Code of Laws, will not be eligible for parole consideration until two years from the date of rejection. Individuals serving for a non-violent offense(s), as defined in Section 16-1-70 SC Code of Laws, will be eligible for parole consideration one year from the date of rejection. The Board will not allow the postponement of a parole hearing for the purpose of disposing of detainers or pending charges.

An investigation will be conducted by the staff of the Parole Board to compile the information as outlined above to be considered by the Parole Board. A decision for or against parole may be made in the absence of the inmate, but ~~any inmate rejected in absence will have an opportunity to request a personal appearance before the Board if he/she so desires.~~

The publishing of the criteria in no way binds the Parole Board to favorable parole consideration in any case under consideration.

I certify that the above has been read and explained to me and I hereby receipt for a copy of this Parole Criteria. I also understand that I am to pay \$240.00 per year supervision fee as required by South Carolina Statutory Law. I also understand that I am to pay \$10.00 per week supervision fee as long as I am placed under Intensive Supervision as a part of my parole.

Signature of Inmate

Number

Parole Examiner

Date

*A Bowers* 7-2-90

South Carolina Department of Parole and Community Corrections

HON. RHETT JACKSON  
CHAIRMAN  
DISTRICT TWO

HON. LEE R. CATHCART  
SECRETARY  
DISTRICT FIVE

HON. WILLIE E. GIVENS, JR., D.D.  
DISTRICT ONE

HON. RAYMOND J. ROSSI  
MEMBER AT LARGE



MICHAEL J. CAVANAUGH  
EXECUTIVE DIRECTOR

GRADY A. WALLACE  
COMMISSIONER

HON. DR. JERRY M. NEAL  
VICE CHAIRMAN  
DISTRICT THREE

HON. MARION BEASLEY  
DISTRICT FOUR

HON. J. P. HODGES  
DISTRICT SIX

ADDRESS: 2221 DEVINE STREET  
P. O. BOX 50668  
COLUMBIA, SC 29250

February 17, 1988

Mr. Isiah James (96883)  
Kirkland Correctional Institution  
4344 Broad River Rd.  
Columbia, SC 29210

RE: NOTICE OF REJECTION

Dear Mr. James:

After careful consideration of your record before and after imprisonment, the Parole Board has decided that you do not yet merit a lessening of the rigors of imprisonment. Your parole has therefore been denied.

Reasons for rejection:

- Nature and seriousness of current offense.
- Indication of violence in this or prior offense.
- Use of a deadly weapon in this or previous offense.

Parole will be granted when it shall appear to the satisfaction of the Board that you have shown a disposition to reform; that by your conduct you merit a lessening of the rigors of imprisonment; that the interest of society will not be impaired; that you have secured suitable employment; and in the future you will probably obey the law and lead a correct life.

In light of your current conviction, you will again be eligible for parole consideration on February 17, 1990.

Sincerely,

Grady A. Wallace  
Commissioner

GAW/pat

cc: Mr. David Bartles  
Mr. Thomas J. Lowery, Sumter County



South Carolina Department of Probation, Parole, and Pardon Services

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HON. DR. JERRY M. NEAL  
CHAIRMAN  
DISTRICT THREE



HON. RAYMOND J. ROSSI  
VICE CHAIRMAN  
MEMBER AT LARGE

HON. LEE R. CATHCART  
SECRETARY  
DISTRICT FIVE

HON. MARION BEASLEY  
DISTRICT FOUR

HON. WILLIE E. GIVENS, JR., D.D.  
DISTRICT ONE

MICHAEL J. CAVANAUGH  
EXECUTIVE DIRECTOR

HON. J. P. HODGES  
DISTRICT SIX

HON. RHETT JACKSON  
DISTRICT TWO

GRADY A. WALLACE  
COMMISSIONER

ADDRESS: 222 DEVINE STREET  
P.O. BOX 50666  
COLUMBIA, SC 29259

March 7, 1990

Isiah James, Jr. (96883)  
Waterlee River Correctional Institution  
P.O. Box 189  
Rembert, SC 29128

Re: NOTICE OF REJECTION

Dear Mr. James:

After careful consideration of your record before and after imprisonment, the Parole Board has decided that you do not yet merit a lessening of the rigors of imprisonment. Your parole has therefore been denied.

Reasons for rejection:

- Nature and seriousness of current offense.
- Indication of violence in this or prior offense.
- Use of a deadly weapon in this or previous offense.

Parole will be granted when it shall appear to the satisfaction of the Board that you have shown a disposition to reform; that by your conduct you merit a lessening of the rigors of imprisonment; that the interest of society will not be impaired; that you have secured suitable employment; and in the future you will probably obey the law and lead a correct life.

In light of your current conviction, you will again be eligible for parole consideration on March 7, 1992.

Sincerely,

*Grady A. Wallace*

Grady A. Wallace  
Commissioner

GAW/eja  
cc: Mr. David Bartles  
Thomas J. Lowery, Sumter County

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STATE OF SOUTH CAROLINA )  
COUNTY OF SUMTER )

COURT OF GENERAL SESSIONS

CERTIFIED TRUE COPY  
OF ORIGINAL FILED  
*Anna M. Proccati*  
DEPUTY CLERK OF COURT  
SUMTER COUNTY  
SOUTH CAROLINA

The State -vs- George Lee Tomlin

Indictment Number: 89-GS-43-922

Court Reporter: Margaret Sullivan Attorney: Martha Upshur + Jim Stoddard

GUILTY PLEA

The defendant is put to the bar and arraigned and, upon his arraignment, pleads guilty as charged to Criminal Sexual Conduct with A Minor Second Degree, Voluntary Manslaughter, and Possession of a Weapon During A Violent Crime.

Attest: O. V. Player Jr

George L. Tomlin

O. V. Player, Jr. Clerk of Court

Signature of Defendant

SENTENCE CSC-2d degree Count I

The defendant is committed to the State Department of Corrections/~~Court~~ for a term of 20 yrs months/years and/or to pay a fine of \$ \_\_\_\_\_; provided upon the service of \_\_\_\_\_ months/years and/or payment of \$ \_\_\_\_\_ plus ~~pay~~/waive costs and assessments as applicable\*, the balance suspended with probation for \_\_\_\_\_ months/years.

Restitution For physical injury \$ \_\_\_\_\_  
Yes/No property damage \$ \_\_\_\_\_

to be paid \_\_\_\_\_  
(Pay to Victim's Compensation if Subrogated)

Other conditions \_\_\_\_\_

Date FEB 8 1990

James M. Morris  
James M. Morris  
Presiding Judge, Third Judicial Circuit

Fine \$ \_\_\_\_\_  
\*Cost and Assessments  
Non-waivable \$ \_\_\_\_\_  
Not Waived \$ \_\_\_\_\_  
TOTAL COSTS AND ASSESSMENTS \$ \_\_\_\_\_  
TOTAL AMOUNT DUE \$ \_\_\_\_\_

O. V. Player Jr  
O. V. Player, Jr.  
Clerk of Court

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South Carolina Department of Probation, Parole and Pardon Services  
Criteria For Parole Consideration

SC Board of Probation, Parole and Pardon Services  
P. O. Box 50666  
Columbia, SC 29250

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Inmate Name George L. Tomlin	SCDC # 166361
---------------------------------	------------------

3/17/88

Criteria For Parole Consideration

The South Carolina parole law creates no right to be released on parole. Parole in South Carolina is strictly a matter of privilege or grace. The South Carolina Board of Probation, Parole and Pardon Services has absolute discretion to grant or deny parole. As such, the publication of these parole criteria in no way creates an expectancy of release; nor does it bind the Parole Board in any way to a favorable parole decision or establish any presumptions of entitlement to parole.

In deciding whether or not to grant parole, the Parole Board considers, among other things, the inmate's record before incarceration as well as during incarceration. The record itself is prepared through investigations conducted for the Parole Board, and it becomes a part of the inmate's parole file. These files are maintained by the Department of Probation, Parole and Pardon Services and are, by the statute, privileged and confidential. The confidentiality of the parole file is far reaching; inmates themselves have no right to inspect the contents of their files. If the inmate thinks his/her file is somehow incomplete or contains some error or other inaccuracy, he/she must notify the Board of the specific error or inaccuracy. The Board will investigate the inquiry and notify the inmate of the action taken.

Inmates do, however, enjoy certain rights in the parole process. The inmate has the right to appear at his parole hearing. If the inmate fails to appear, the Board may decide his/her case in absence. The inmate has the right to be represented by an attorney; however, he/she has no right to have an attorney appointed if he/she cannot afford one. At the hearing, the inmate has the right to present witnesses and evidence on his/her own behalf, but an inmate does not have a right to confront witnesses.

In deciding whether or not an inmate should be granted parole, the Board or Panel of the Board exercises its absolute discretion to the limits allowed by state and federal law. The discretion of the Board or panel aims at protecting the best interest of both society and the inmate being considered for parole. In its concern for the protection of society's and the inmate's best interests, the Board or Panel deliberates upon the "reasonable probability" that an inmate will not again violate the law, if parole is granted. When deliberating upon the reasonable probability that an inmate will not again violate the law, the Board or Panel weighs the factors listed below. The Board or Panel, in its absolute discretion, also considers any other factors not listed below which it considers relevant in a particular case.

1. The risk the inmate poses to the community;
2. The nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it;
3. The inmate's prior criminal records and his/her adjustment under any previous programs or supervision;
4. The inmate's attitude toward his/her family, the victim, and authority in general;
5. The inmate's adjustment while in confinement, including his/her progress in counseling, therapy, and other similar programs designed to encourage the inmate to improve himself/herself;
6. The inmate's employment history, including his/her job training and skills and his/her stability in the work place;
7. The inmate's physical, mental and emotional health;
8. The inmate's understanding of the cause of his/her past criminal conduct;
9. The inmate's efforts to solve his/her problems, such as seeking treatment for substance abuse, enrolling in academic and vocational education courses, and in general using whatever resources the Department of Corrections has made available to inmates to help with their problems;
10. The adequacy of the inmate's overall parole plan. This includes inmates living arrangements, where he/she will live and who he will live with; the character of those with whom the inmate plans to associate in both his/her working hours and his/her off-work hours; the inmate's plans for gainful employment;
11. The willingness of the community into which the inmate will be released to receive the inmate;
12. The willingness of the inmate's family to allow him/her to return to the family circle;
13. The attitudes of the sentencing judge, the solicitor, and local law enforcement officers respecting the inmate's parole;
14. The feelings of the victim's family, and any witnesses to the crime about the release of the inmate;
15. Other factors considered relevant in a particular case by the Board.

Reservation of Discretionary Power of the Parole Board

These criteria in no way limit the absolute discretion of the Parole Board or Panel to make parole decisions on a case-by-case basis and to grant or deny parole as it determines to be in the best interest of society and the inmate under review.

In some cases, the Board may decide that an inmate should be granted parole if the inmate completes one or more stated conditions. When this is the case, the Board may grant a parole that becomes effective when the inmate completes one or more stated conditions. Should the inmate disobey any rule or regulation of the South Carolina Department of Corrections before satisfying the stated conditions to make his parole effective, the Board may rescind the inmate's parole and treat the case as though parole had been rejected. In other cases, the Board may feel it needs more time to form its decision. In such cases, the Board may simply take the parole consideration under advisement and reschedule it at a later date. Similarly, the Board may postpone a parole hearing in order to dispose of detainers or pending charges.

If the Board rejects an inmate for parole, the inmate will be given written notice of rejection stating the reasons for rejection. Decisions of the Board have no precedential effect whatever and in no way limit the Board's absolute discretion at later parole hearings.

After rejection for parole, the procedure of scheduling of rehearing is as follows:

1. An individual serving time for a violent offense defined in §16-1-60 of the South Carolina Code of Laws 1976 will be reheard for parole two years following the date of parole rejections. Applicable legal exceptions may allow for a one year hearing.
2. An individual serving time for a nonviolent offense defined in §16-1-70 of the South Carolina Code of Laws 1976 will be reheard for parole one year following the date of parole rejections.

I certify that the above material has been explained to me, and I have received a copy.

Inmate's Signature George L. Tomlin	Date 11-17-88	Witness K. K. K...	Date 11-17-88
--	------------------	-----------------------	------------------

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State of South Carolina  
Department of Probation, Parole and Pardon Services

MARK SANFORD  
Governor



SAMUEL B. GLOVER  
Director

March 17, 2010

2221 Devine Street, Suite 600  
Post Office Box 50666  
Columbia, South Carolina 29250  
Telephone: (803) 734-9220  
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www.dppps.sc.gov

Mr. George Tomlin #00166361  
Ridgeland Correctional Institution  
P.O. Box 2039  
Ridgeland, SC 29936

RE: NOTICE OF REJECTION

Dear Mr. Tomlin:

It is my responsibility to inform you, on behalf of the South Carolina Parole Board, that the Board has reached a decision regarding your parole hearing. The Board hereby makes the following CONCLUSION OF LAW:

After careful consideration of: (1) the characteristics of your current offense(s), prior offense(s), prior supervision history, prison disciplinary record, and/or prior criminal record, as described in the findings of fact below; (2) the factors published in Department Form 1212 (Criteria for Parole Consideration); and (3) the factors outlined in Section 24-21-640 of the South Carolina Code of Laws, the Parole Board concludes that parole must be denied.

You will be notified 30 days prior to your next scheduled parole consideration date.

FINDINGS OF FACT:

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

Sincerely,

A handwritten signature in cursive script that reads "Heyward A. Hinton".

Heyward A. Hinton  
Director of Hearings & Parole Board Support

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3/17/2010  
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STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

George Tomlin. # 166361.

Docket No. 10-ALJ-15-0016-AP

Appellant.

vs.

ORDER

South Carolina Department of Probation,  
Parole and Pardon Services,

Respondent.

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or Court) pursuant to the appeal of George Tomlin (Appellant), an inmate incarcerated with the South Carolina Department of Corrections. On March 17, 2010, the South Carolina Department of Probation, Parole and Pardon Services (Department) notified Appellant of its determination that he was denied parole. Appellant filed this appeal with the Court on April 13, 2010. Appellant raises the following arguments in his appeal: (1) Appellant was denied due process and subjected to ex post facto violations by not personally appearing before the Parole Board; (2) the criteria followed by the Department resulted in a violation of due process, equal protection, and the ex post facto clause; (3) Appellant was denied due process of law by being subjected to an untimely parole release hearing; and (4) Appellant has a due process liberty interest in parole release. For the following reasons, the Department's decision is affirmed.

DISCUSSION

Video Conferencing

Appellant first argues that he was denied due process by having to appear before the Parole Board via video conference rather than in person. This argument is without merit. First, the South Carolina General Assembly has enacted a statute authorizing the Board to conduct hearings via video conference. S.C. Code Ann. § 24-21-710 (2007) provides in pertinent part:

(E) The Department of Corrections may install, maintain, and operate a two-way closed circuit television system in one or more correctional institutions of the department that confines persons eligible for parole. The Board of Probation, Parole

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and Pardon Services shall install, maintain, and operate closed circuit television systems at locations determined by the board and conduct parole hearings by means of a two-way closed circuit television system provided in this section. . . .

The statutes governing the Board of Probation, Parole and Pardon Services do not contain any provisions giving the inmate a right to an in-person parole hearing. Moreover, S.C. Code Ann. § 24-21-50 specifically states that “[n]o inmate has a right of confrontation at the [parole] hearing.” At a video conference conducted pursuant to the statute, all persons present are able to see the Board members on the video screen and to communicate with the Board, and the Board members are able to see and hear the inmate and any other persons in attendance. The inmate has the ability to make a statement to the Board, to have others make statements on his behalf, and to present any evidence he may have. In this case, the Department followed statutory procedures in holding Appellant’s parole hearing. Appellant has not provided any specific evidence that the Department failed to follow statutory requirements, nor has he cited any authority to support his argument that his constitutional rights were violated by appearing at his parole hearing via the closed circuit television system authorized by South Carolina law. Pappas v. Kentucky Parole Bd, 156 S.W.3d 303 (Ky. Ct. App. 2004) (holding that video conferencing did not violate due process in a parole hearing and finding no authority holding to the contrary).

Furthermore, the inquiry into whether an inmate is entitled to review of the Board’s final decision is based on whether the inmate “has a liberty interest in gaining access to the parole board.” Furtick v. S.C. Dept. of Probation, Parole and Pardon Services, 352 S.C. 594, 598, 576 S.E.2d 146, 149 (2003). In South Carolina, parole is a privilege, not a matter of right. Major v. S.C. Dept. of Probation, Parole and Pardon Services, 384 S.C. 457, 682 S.E.2d 795 (2009). Parole is a creature of statute and is exclusively in the province of the legislative branch of government. Id. The statutes governing parole hearings do not grant inmates any entitlement to an in-person parole hearing. Accordingly, no liberty interest in such a hearing has been created by the State, and Appellant’s due process rights were not violated.

Appellant further contends that his appearance before the Board via closed circuit television constitutes an ex post facto violation. Appellant committed his offenses in 1988 and the statute providing for parole hearings via video conference was not enacted until 1996. Appellant therefore asserts that he is being subjected to laws that did not exist when he committed the crime.

In order to establish the existence of an ex post facto violation, two elements must be present: the law must apply to events which occurred before its enactment, and the offender of the law must be disadvantaged by the law. State v. Walls, 348 S.C. 26, 30, 558 S.E.2d 524, 525 (2002); see also Jernigan v. State, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000) (ex post facto violation occurs when a change in the law retroactively alters the definition of a crime or increases the punishment for a crime). In order for the ex post facto clause to be applicable, the statute in question must be criminal or penal in purpose and nature. State v. Huiett, 302 S.C. 169, 394 S.E.2d 486 (1990). Moreover, no ex post facto violation occurs where a change in the law does not alter substantial personal rights, but merely changes procedure. Although a procedural change may have a detrimental effect on a defendant, procedural changes do not implicate the ex post facto clause. Id.; see also Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987).

In this case, while Section 24-21-710 was enacted after Appellant committed his offenses, it is not criminal or penal in nature; it does not disadvantage Appellant in any manner, since he was still able to participate fully in his parole hearing; and it constitutes only a change in the procedure by which parole hearings are conducted. Accordingly, it does not constitute an unconstitutional ex post facto law. See Huiett, 302 S.C. at 174.

Parole Criteria

Appellant next argues that he was “subjected to ex post facto parole criteria and denied due process and equal protection of the law” through the Board’s use of the criteria provided in S.C. Code Ann. § 24-21-640 and Form 1212. The gist of Appellant’s argument seems to be that the criteria promulgated by the Department are unlawful and the Board must apply the same guidelines that were applicable at the time he committed his offenses, and that to do otherwise violates the constitutional provision against ex post facto legislation. This argument is likewise without merit.

First, at the time of Appellant’s offenses in 1988, Section 24-21-640 contained language requiring the Board to develop “specific criteria” to be examined and applied in parole proceedings. This language remains unchanged in the present version of the statute. See Cooper v. S.C. Dept. of Probation, Parole and Pardon Services, 377 S.C. 489, 661 S.E.2d 106 (2008) (noting that Section 24-

21-640 had not been substantively amended since 1984).<sup>1</sup> In response to this statutory directive, the Department promulgated a list of fifteen factors set forth in Form 1212, which is distributed to all inmates. Although Form 1212 was not promulgated until after Appellant was convicted of his crimes, the South Carolina Supreme Court has held the criteria were lawfully created and do not violate the ex post facto clause. Specifically, the Court stated that “the Parole Board did not exceed its authority by creating the written criteria. . . . we do not believe the Parole Board changed the law in violation of the Ex Post Facto clause.” Cooper, 377 S.C. at 501 (finding no violation of ex post facto principles in applying Form 1212 criteria to an inmate whose crimes were committed in 1984).<sup>2</sup>

Second, to the extent Appellant is arguing that he has been denied due process because the Board’s order fails to evince consideration of the relevant statutory criteria, the South Carolina Supreme Court in Cooper, supra, held that if the Board’s order contains a provision stating that it considered the factors outlined in Section 24-21-640 and the factors published in Form 1212, it is sufficient to withstand due process analysis. Cooper, 377 S.C. at 499-500; see also Compton v. S.C. Dept. of Probation, Parole and Pardon Services, 385 S.C. 476, 685 S.E.2d 175 (2009) (stating that the Board must only state in its order denying parole that it considered the relevant factors).

Here, the relevant portion of the Board’s order of March 17, 2010 states:

After careful consideration of: (1) the characteristics of your current offense(s), prior offense(s), prior supervision history, prison disciplinary record, and/or prior criminal record. . . (2) the factors published in Department Form 1212 (Criteria for Parole Consideration); and (3) the factors outlined in Section 24-21-640 of the South Carolina Code of Laws, the Parole Board concludes that parole must be denied.

<sup>1</sup> Section 24-21-640 was amended in 2010 to include provisions relating to a parolee’s consent to be subjected to certain warrantless searches and seizures. However, the language at issue in this case regarding the establishment of criteria for parole consideration was not amended. See 2010 S.C. Acts 151, § 12 (effective April 28, 2010).

<sup>2</sup> Appellant appears to argue that the criteria set forth in Form 1212 are somehow unlawful because they are “guidelines for denying parole” rather than criteria for the “granting of parole.” Section 24-21-640 states that “[t]he board must establish written, specific criteria for the granting of parole. . . .” (emphasis added). This argument is nothing more than an exercise in semantics, since there is nothing in Section 24-21-640, or in any other statute dealing with parole, which creates an absolute entitlement to release on parole. As the South Carolina Supreme Court has stated, “Although [Section 24-21-620] creates a liberty interest in parole eligibility, it does not create a liberty interest in parole.” Furtick v. S.C. Dep’t of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 n. 4 (2003); see also Sullivan v. S.C. Dep’t of Corrections, 355 S.C. 437, 586 S.E.2d 124 (2003). Moreover, as is set forth herein, the Supreme Court has specifically upheld the lawfulness of the Department’s promulgation of the criteria in Form 1212. See Cooper, 377 S.C. 489, 501, 661 S.E.2d 106, 112-13.

As the Board clearly stated that it considered the statutory criteria as well as the criteria set forth in Form 1212, it complied with the procedure set forth in Cooper and Compton. Thus, no denial of due process results from the Board's order.

Finally, Appellant argues that the Board's application of the criteria in the denial of his parole is violative of the equal protection clause. To establish an equal protection violation, Appellant must show that similarly situated persons received disparate treatment. TNS Mills, Inc. v. S.C. Dept. of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998); Olson v. S.C. Dept. of Health and Env'tl. Control, 379 S.C. 57, 663 S.E.2d 497 (Ct. App. 2008). In this case, the Board follows the same procedures and applies the same criteria in all parole hearings. Appellant has simply not shown that the Board treated him differently from other inmates. Therefore, his equal protection claim must fail.

Date of Parole Hearing

Appellant asserts that he was denied due process of law by being subjected to an untimely initial parole hearing. The Department claims that Appellant's hearing was properly scheduled according to his sentence and the applicable statutes. Because the parole hearing has already taken place and a decision has been rendered, this argument is moot. See Collins Music Co., Inc. v. IGT, 365 S.C. 544, 619 S.E.2d 1 (Ct. App. 2005) (a matter becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy).

Federal Due Process

Appellant finally argues that he has a "federal due process liberty interest" in parole release. This argument is based upon his assertion that Section 24-21-640 grants inmates a liberty interest in parole release. This argument has been addressed by the United States Supreme Court:

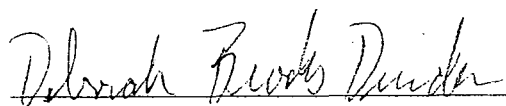
There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: '[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.'

Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7, 99 S.Ct. 2100, 2104 (1979) (citation omitted) (emphasis added).

Furthermore, "[t]hat the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained. To that extent the general interest asserted here is no more substantial than the inmate's hope that he will not be transferred to another prison, a hope which is not protected by due process. *Id.*, 442 U.S. at 11, 99 S.Ct. at 2105 (citations omitted). It is well settled in South Carolina that an inmate has no liberty interest in parole release, only in parole eligibility. *Furtick*, 352 S.C. 594; *Sullivan*, 355 S.C. 437, 586 S.E.2d 124 (2003). Appellant has not shown that the Department has effectively denied him parole eligibility. Accordingly, his due process rights are not implicated here.

**ORDER**

**IT IS THEREFORE ORDERED** that Respondent's decision is **AFFIRMED**.  
**AND IT IS SO ORDERED.**

  
\_\_\_\_\_  
Deborah Brooks Durden  
Administrative Law Judge

November 5, 2010  
Columbia, South Carolina

CERTIFICATE OF SERVICE  
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the interagency Mail Service addressed to the party(ies) or their attorney(s)  
This 5<sup>th</sup> day of November 2010  
By: Robin E. Colver  
Judicial Law Clerk

CERTIFICATE OF APPELLANT

The undersigned hereby certifies that this Record on Appeal contains all the material proposed to be included by any of the parties and not any other material.

February 22, 2011

s/ George Lee Tomlin  
George Lee Tomlin #166361

CERTIFICATE OF SERVICE

Appellant hereby certifies that he has caused true and correct copies of The Record on Appeal to be mailed, postage prepaid, to respondent attorney, Tommy Evans Jr., Legal Counsel, P.O. Box 50666, Suite 600, Columbia, S.C. 29250, This \_\_\_\_\_ day of February 2011.

s/ George Lee Tomlin  
George Lee Tomlin #166361

STATE OF SOUTH CAROLINA  
In the Court of Appeals  
Docket Number 10-ALJ-15-0016

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

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GEORGE E. TOMLIN #166361

APPELLANT

S.C. DEPARTMENT OF PROBATION, PAROLE AND  
PARDON SERVICES

RESPONDENT

---

FINAL BRIEF OF RESPONDENT

---

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ATTORNEY FOR THE RESPONDENT

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**STATEMENT OF ISSUE ON APPEAL**

1. **WAS THE APPELLANT DENIED THE STATUTORY RIGHT UNDER SECTION 24-21-50 OF THE SOUTH CAROLINA CODE ANN., DUE PROCESS RIGHT(S), SUBJECTED TO EX POST FACTO AND DUE PROCESS VIOLATIONS?**
2. **HAS THE APPELLANT BEEN SUBJECTED TO EX POST FACTO PAROLE CRITERIA AND DENIED PAROLE RELEASE CONTRARY TO THE DUE PROCESS AND EQUAL PROTECTION OF THE LAW?**
3. **WHETHER APPELLANT WAS DENIED DUE PROCESS OF LAW BEING SUBJECTED TO UNTIMELY PAROLE RELEASE HEARING?**
4. **DOES TOMLIN HAS A DUE PROCESS LIBERTY INTEREST TO PAROLE RELEASE UNDER THE FEDERAL DUE PROCESS CLAUSE?**

STATEMENT OF THE CASE

On June 28, 1988, the Appellant sexually assaulted his fourteen (14) year old step-daughter in a wooded area near his home. After completion of this sexual assault, the Appellant entered his home and stabbed his wife Carol Tomlin, about the head, neck and chest, a total of eleven times, she later died as a result of these stabbed wounds. After committing these offenses the Appellant fled the scene. The authorities were later contacted, and the Appellant's step-daughter gave the a written statement, implicating him in the commission of these crimes. He was later caught and arrested for the offenses of voluntary manslaughter, criminal sexual conduct in the second degree (CSC 2<sup>nd</sup>), and possession of a weapon during the commission of a violent crime.

On February 8, 1990, the Appellant appeared before the Honorable James Morris to answer to the above stated offenses. The Appellant was sentenced to a thirty (30) year period of incarceration for voluntary manslaughter; twenty (20) years for CSC 2<sup>nd</sup>, and five (5) years for possession of a weapon during a crime of violence. (R.p.5). The court ordered that these sentences are to be served consecutively.<sup>1</sup> Due to the consecutive nature of these sentences, the Appellant did not initially appear before the parole board until March 17, 2010. At the conclusion of this hearing the Parole Board decided to deny parole due to: 1) nature and seriousness of the current offense; 2) indication of violence in this or a previous offense; 3) use of a deadly weapon in this or a previous offense; and, 4) his prior criminal record indicates poor community adjustment. (R.p.7). Upon receiving the order of denial the Appellant filed a notice of appeal

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<sup>1</sup>The Appellant completed his sentences for possession of a weapon during the commission of a violent offense on June 24, 1994, and for CSC 2<sup>nd</sup> on May 24, 2004.

before the Administrative Law Court (ALC). Within his notice of appeal the Appellant alleges that the parole hearing being held through video conference was a violation of ex post facto and due process. The Appellant also alleges, that the criteria followed is in violation of his constitutional rights; and the denial of parole is a violation of his liberty interest.

In response the Respondent argued, that parole hearings being held through video conferencing is not a violation of any of the Appellant's constitutional rights; and, that the criteria established thru policy is a lawful narrowing of the criteria created by the legislature.

On November 5, 2010, the Honorable Deborah Brooks Durden Administrative Law Judge issued an order determining that there exist no constitutional violations of the denial of the Appellant's parole. She decided to affirm the decision of the Respondent. (R.p.8-p.13). Upon receiving the decision of the ALC, the Appellant decided to file a notice of appeal before the South Carolina Court of Appeals. The Respondent's final brief revealing their arguments follows.

### ARGUMENTS

**1. The Appellant was not denied any Constitutional rights by not personally appearing before the Parole Board.**

The Appellant argues that it is a violation of due process and ex post facto for him not to be allowed to appear in person before the Parole Board. No individual has a right to be released on parole just the right to appear before the Board. There exist no law that guarantees the Appellant the right to appear before the Board in person. The Respondent has followed South Carolina law by allowing the Appellant the opportunity to appear, and present evidence in mitigation. A parole hearing is not a trial, the Appellant is not being accused of committing a

crime so he has no right to confront witnesses. The board shall grant hearings and permit arguments and appearances by counsel or any individual before it at any such hearing while considering a case for parole , pardon or any other form of clemency provided for under law. No inmate has a right of confrontation at the hearing. S.C. Code Ann. §24-21-50 (Supp. 2008)(emphasis added.)

The right to a hearing does not give the Appellant the right to physically appear before the board. At one time inmates were brought to Columbia to personally appear before the Parole Board. The expenditures this caused were realized by the South Carolina legislature, and laws were established that ordered the Department of Corrections to install, maintain, and operate close circuit television systems at locations determined by the Board, and conduct parole hearings by means of a two-way closed circuit television system. S.C. Code Ann. §24-21-710(E)(Supp. 2008). This is in no way violate any rights of the Appellant. A parole hearing procedure in which Parole Board members participated by video link did not violate inmate's due process rights. Papps v. Kentucky Parole Board, 156 S.W.3d 303 (2004).

The Appellant also argues that allowing him to appear before the Board thru close circuit television is a violation of ex post facto. The Appellant committed his offenses in 1988 and the statute regarding close circuit television parole hearings did not come into effect until 1996. The Appellant argues that he is being subjected to laws that did not exist when he committed the crime. A hearing held on close circuit television is identical to an inmate arriving in person. Everything said or shown can be heard and seen by both parties. The Appellant has the ability to present evidence in mitigation, address the Board, or have anyone address the Board on his behalf. The application of this law does not deny any right to the Appellant. The Ex Post Facto

clause protects against retroactive legislative provisions which are disadvantageous to the offender; a mere procedural change in law, not increasing punishment or changing elements of the offense, does not result in an ex post facto violation. Elmore v. State, 305 S.C. 456, 409 S.E.2d 397 (1991). Regarding the issue of whether an increase of punishment constitutes an ex post facto violation, the relevant inquiry is whether the legislative amendment produces a sufficient risk of increasing the measure of punishment attached to the covered crimes. Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000). Since there exist no right for a person appearing before the Parole Board to confront witnesses, nor was the appearance on close circuit television disadvantageous to the Appellant, there exist no violation of due process or ex post facto.

**2. The criteria followed by the Respondent was not a violation of due process or ex post facto.**

The ability to award or deny parole lies totally with the Parole Board. Though there exist certain criteria that must be considered, the responsibility has always been with the Parole Board to determine whether or not to award parole. The South Carolina Code of Laws specifically state:

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.

S.C. Code Ann. §24-21-640 (Supp. 2009).

The Appellant is of the opinion that the Board violated due process, equal protection, and ex post facto by applying the department mandated criteria. This criteria includes everything within the criteria established by the legislature, but it is more narrowly formed. All parole eligible inmates

are subject to an investigation prior to their parole hearing. The general criteria created by the Legislature is considered by the board in determining parole. The detailed factors which flow from that general criteria and which are used by the board include:

1. The risk the inmate poses to the community;
2. The nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate attitude toward it;
3. The inmate's prior criminal records and his/her adjustment under any previous programs or supervision;
4. The inmate's attitude toward his/her family, the victim and authority in general;
5. The inmate's adjustment while in confinement, including his/her progress in counseling, therapy and other similar programs designed to encourage the inmate to prove himself/herself;
6. The inmate's employment history, including his/her job training and skills and his/her stability in the work place;
7. The inmate's physical, mental and emotional health;
8. The inmate's understanding of the cause of his/her past criminal record;
9. The inmate's efforts to solve his/her problems, such as seeking treatment for substance abuse, enrolling in academic and vocational education courses, and in general using whatever resources the Department of Corrections has made available to inmates to help with their problems;
10. The adequacy of the inmate's overall parole plan. This includes inmates living arrangements, where he/she will live and who he will live with; the character of those with whom the inmate plans to associate in both his/her working hours and his/her off-work hours; the inmate's plans for gainful employment;
11. The willingness of the community into which the inmate will be released to receive the inmate;
12. The willingness of the inmate's family to allow him/her to return to the family circle;
13. The attitudes of the sentencing judge, the solicitor, and local law enforcement

officers respecting the inmate's parole;

- 14. The feelings of the victim's family, and any witnesses to the crime about the release of the inmate;
- 15. Other factors considered relevant in a particular case by the Board.

It is the Appellant's position that the Board failed to apply the relevant lawful criteria in the denial of parole which denies him equal protection. The United States Constitution does not allow any state to deny a person within its jurisdiction equal protection of the law. U.S. Const. amend. XIV, §1. To establish an equal protection violation the Appellant must show that similarly situated persons received disparate treatment. TNS Mills, Inc. v. South Carolina Dept. Of Revenue, 331 S.C. 611, 503 S.E.2d 417 (S.C. 1998). All inmates convicted of voluntary manslaughter during the identical time period is allowed to appear before the Parole board, with the identical criteria being applied to each inmate. Since the Appellant has not been able to reveal to this Court that he was not allowed the opportunity given to other inmates in identical situations he has failed to prove a denial of equal protection.

**3. The Appellant was appropriately scheduled a parole hearing pursuant to South Carolina law.**

The Appellant argues that he was unlawfully denied parole hearings in 2001, 2002, and 2003. The Appellant was convicted of possession of a weapon during the commission of a crime of violence. The State of South Carolina has chosen to impose an additional punishment for a defendant convicted of committing this crime. A person who has been convicted of committing this crime must be imprisoned for five years in addition to the punishment for the principle crime, and though this five years may be applied concurrently or consecutively, "the five years may not be suspended and the person may not complete his term of imprisonment in less than

five years pursuant to good-time credits or work credits.” S.C. Code Ann. §16-23-490 (2010).

The South Carolina Supreme Court has ruled that in a consecutive sentence for the weapon offense cannot be placed in a manner that would deny parole. See, Major v. S.C. Dept. of Probation, Parole and Pardon Services, 384 S.C. 457, 682 S.E.2d 795 (2009). Due to this Supreme Court decision the service for the weapon offense was applied initially. Due to the consecutive nature of the offense, the sentence for the weapon’s offense and CSC 2<sup>nd</sup> had to be completed before of his thirty (30) year sentence for voluntary manslaughter could begin. With good time credits he served six years prior to his initial parole hearing, the one-third required prior to being eligible for parole.<sup>2</sup>

The Appellant’s sentence was properly calculated, he was scheduled and allowed to participate in a correctly scheduled and valid parole hearing. Due to the hearing being scheduled properly, the ALC was proper in determining the Appellant’s argument is moot. The Appellant was scheduled and received a parole hearing; therefore, the ALC reversing the decision would not assist the Appellant. A case becomes moot when judgment, if rendered will have no practical effect upon the existing controversy. Mathis v. South Carolina State Highway Dep’t, 260 S.C. 344, 195 S.E.2d 713 (1973).

Even if the Court decides that the Respondent was in error and award the Appellant a parole hearing it will not provide him any relief. Before any action can be maintained, there must exist a justiciable controversy. Midland Guardian Co. v. Thacker, 280 S.C. 563, 314 S.E.2d 26

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<sup>2</sup>In all case cognizable under this chapter the Board may, upon ten days written notice to the solicitor and judge who participated in the trial of any prisoner, parole a prisoner convicted of a crime and imprisoned in the state penitentiary, in any jail, or upon the public works of any country who if: (1) sentenced to more than thirty years has served at least one-third of the term. S.C. Code Ann. §24-21-610 (2009).

(Ct. App. 1984) *cert denied*, (1984). A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination as distinguished from a dispute or difference of a contingent hypothetical or abstract character. Guimarin & Doan, Inc. v. Georgetown Textile & Mfg., Co., 249 S.C. 561, 155 S.E.2d 618 (1967). For a case not to become moot the Appellant must receive some type of remedy sought, he received a parole hearing in March 2010, so he has received the remedy he seeks.

**4. The Appellant was not denied due process nor a liberty interest in the Respondent's denial of parole.**

The Appellant argues that the Board's failure to award him parole is a denial of due process. Pursuant to the United States Constitution, "no state shall deprive any person of life, liberty, or property, without the due process of law." S.C. Amend. XIV §1. The United States Supreme Court has acknowledged in the case of Morrissey v. Brewer, 408 U.S. 92 S.Ct. 2593 (1972), that a person facing a revocation of parole has minimal due process rights. However, a distinction between a person currently on parole and a person seeking parole was made in the case of Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100 (1979).<sup>3</sup> In Greenholtz, the United States Supreme Court determined that there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. Id., at 2104. The denial of parole is not a denial of a liberty interest. It has been largely held before the Court that parole is not a right but a privilege.

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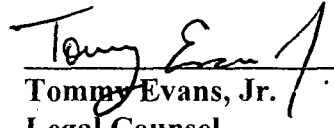
<sup>3</sup>There is a crucial distinction between being denied a conditional liberty one has, as in parole, and being a conditional liberty that one desires. The parolees in Morrissey (and probationers in Gagnon) were at liberty and as such could "be gainfully employed and [were] free to be with family and friends and to form other enduring attachments of normal life." Greenholtz, at 2105.

Sullivan v. S.C. Dept. of Corrections, 355 S.C. 437, 586 S.E.2d 124 (2004) There is no liberty interest in obtaining parole, an inmate just have a right to a hearing. Although this provision creates a liberty interest in parole eligibility it does not create a liberty interest in parole. Furtick v. South Carolina Department of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.,E.2d 146 (2003). The Appellant was allowed an opportunity to appear before the Parole Board; to present evidence in mitigation; and, to make his plea for parole. In order for the Appellant to be denied due process there must exist some Constitutional right in being released on parole. Since no liberty interest is implicated when a potentially eligible inmate is denied parole there exist no right to due process.

**CONCLUSION**

Based on the foregoing reasons the Respondent respectfully requests that the final decision of the South Carolina Department of Probation, Parole and Pardon Services be affirmed.

Respectfully submitted,



\_\_\_\_\_  
**Tommy Evans, Jr.**  
**Legal Counsel**

South Carolina Department of Probation,  
Parole and Pardon Services  
P.O. Box 50666  
Columbia, South Carolina 29250  
(803) 734-9220

Attorneys for the Respondent

Columbia, South Carolina  
February 25, 2011

STATE OF SOUTH CAROLINA  
In the Court of Appeals  
Docket Number 10-ALJ-15-0016

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

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GEORGE L. TOMLIN, #166361, ..... APPELLANT

v.

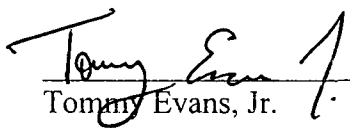
S.C. DEPARTMENT OF PROBATION, PAROLE, AND  
PARDON SERVICES, ..... RESPONDENT

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and with the South Carolina Supreme Court's order dated August 13, 2007.

  
\_\_\_\_\_  
Tommy Evans, Jr.  
Legal Counsel

February 25, 2011

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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Appeal From Administrative Law Court  
Deborah Brooks Durden, Administrative Law Judge

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Docket No. 10-ALJ-15-0016-AP  
2010179746

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George Lee Tomlin

Appellant,

v.

South Carolina Department of  
Probation, Parole and Pardon  
Services (SCDPPS),

Respondent.

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APPELLANT FINAL REPLY BRIEF

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S/

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George Lee Tomlin #166361  
RCI GA-, P.O. Box 2039  
Ridgeland, S.C. 29936

Appellant is in receipt of Respondent Initial Brief on February 8, 2011. Respondent is in Err or misleading the court in his "argument" (section "3" pg-7), which states, "Due to consecutive nature of the offense, the sentence for the weapon's offense and CSC 2nd had to be completed before or his (30) year sentence for voluntary manslaughter could begin, with good time credits he served six years prior to his initial parole hearing, the one third required prior to being eligible for parole. The South Carolina Code of Law §24-21-610 (2), clearly states, "Sentenced to life imprisonment or imprisonment for any period in excess of thirty years, has served at least ten years. In addition, (pg-1 (1) of Respondent Initial Brief states, "The appellant completed his sentences for possession of a weapon during the commission of a violent offence on June 24, 1994, and CSC 2nd on May 24, 2004 so in addition to appellant being scheduled to an untimely Parole hearing, he was also denied a parole hearing on the charges of CSC 2nd.

This \_\_\_\_\_ day of March 2011.

S/ \_\_\_\_\_  
 George Lee Tomlin #166361  
 RCI GA-6, P.O. Box 2039  
 Ridgeland, S.C. 29936

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

S/ \_\_\_\_\_  
George Lee Tomlin #166361

March 9, 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has caused true and correct copies of "Appellant Final Reply Brief", to be mailed, postage prepaid, to respondent's attorney whose name and address are set forth below herein this \_\_\_\_ day of March 2011.

S/ \_\_\_\_\_  
George Lee Tomlin #166361

Mailed TO:

Tommy Evans, Jr.  
Legal Counsel, SCDPPPS  
2221 Devine Street, Suite 600  
Post Office Box 50666  
Columbia, S.C. 29250

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

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

George Tomlin, Appellant,

v.

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

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Appeal from the Administrative Law Court  
Deborah Brooks Durden, Administrative Law Court Judge

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Unpublished Opinion No. 2012-UP-332  
Submitted May 1, 2012 – Filed May 30, 2012

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**VACATED AND REMANDED**

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George Tomlin, pro se.

Teresa A. Knox, J. Benjamin Aplin, and Tommy  
Evans, Jr., all of Columbia, for Respondent.

**PER CURIAM:** George Tomlin appeals the Administrative Law Court's (ALC) order affirming the Department of Probation, Parole and Pardon Services's (the Department) decision denying him parole. He argues the ALC erred in finding (1) the code section permitting the Department to conduct parole hearings via video conferencing is not a violation of the ex post facto clause of the United States and South Carolina Constitutions; (2) the Department's criteria for parole consideration did not violate Tomlin's due process and equal protection rights and did not constitute a violation of the ex post facto clause; (3) Tomlin's claim that he should have been eligible for parole at an earlier date was moot; and (4) no due process rights were implicated by the Department's criteria for parole eligibility.

Because all of Tomlin's issues stem from a routine denial of parole, we vacate<sup>1</sup> the order of the ALC pursuant to Rule 220(b)(1), SCACR, and remand with instructions to dismiss the appeal in accordance with the following authorities: S.C. Code Ann. § 1-23-600(D) (Supp. 2011) (providing the ALC "shall not hear . . . an appeal involving the denial of parole to a potentially eligible inmate by the Department"); Compton v. S.C. Dep't of Prob., Parole & Pardon Servs., 385 S.C. 476, 479, 685 S.E.2d 175, 177 (2009) (holding an order denying parole and stating consideration of all statutory and Department criteria is sufficient to avoid deeming an inmate effectively ineligible for parole).

**VACATED AND REMANDED.**

**PIEPER, KONDUROS, and GEATHERS, JJ., concur.**

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<sup>1</sup> We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA  
In The Court of Appeals

George Lee Tomlin

Appellant  
(Petitioner)

V.

South Carolina Department of Probation,  
Parole, and Pardon Services (SCDPPS)

Respondent.

Appeal From The Administrative Law Court  
Deborah Brooks Durden, Administrative Law Judge

Unpublished Opinion No. 2012-UP-332  
(Filed 30 May 2012)

PETITION FOR REHEARING WITH  
SUGGESTION FOR REHEARING EN BANC

Petitioner Tomlin prays respectfully that this Court will grant the Petition for rehearing herein according to South Carolina Appellate Court Rules (SCACR) 221(a) with suggestion for rehearing En Banc according to SCACR 219(a) as the Court's panel apparently disregarded, misapprehended and/or overlooked relevant fact(s), jurisdiction and appeal (Constitutional Law(s), Court Rule(s), Statutory Law(s), and etc.

1. Although the "Per Curiam" opinion cites Compton v. SCDPPPS, 685 S.E.2d 175 (2009) which does reference Al-Shabazz v. State, 527 S.E.2d 742, 7 (2000); it is derived from South Carolina Uniform Post-Conviction Relief Procedure Act, title 17-27-10-20 mentioning

"it comprehends and takes the place of all other common law, statutory or other remedies heretofore available to challenging the validity... 'sentence.'"

2. The "Per Curiam" opinion points, "(3) Tomlin's claim that he should have been eligible for parole at an earlier date was moot" (p.2). The opinion failed to reference on the weapon charge that he would max out its sentence in 1994 and he had to serve ten (10) years on the remainder of his consecutive sentence minus any applicable work-related credit(s) deduction(s) which would schedule his parole release eligibility date in or before 2004, but he was denied the liberty interest to a parole hearing until spring 2010. Cooper v. SCDPPPS, 661 S.E.2d 106 (2008)

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3. More the 5-30-12 decision stressed "eligible" for parole at an earlier date was moot" (p.2) because when Tomlin would have been eligible for parole release in 2004 whereas S.C. Code Ann. section 1-23-600 (D) was amended to prohibit the Administrative Law Court (ALC) from entertaining this type of appeal until winter of 2009; specifically, under 2008 Act No. 188 § 1 eff. January 1, 2009; the Court of Appeals should have looked to and considered Peterson Outdoor Ad. Corp v. Beaufort Cty. 354 S.E.2d 563, 565, (1987) (the Court considered, "In ... that the repeal and reenactment were effectuated solely to preclude appellate review')

4. The Court's panel should have distinguished jurisdiction, subject matter jurisdiction, appellate jurisdiction, appellate review and judicial review. State v. Campbell, 656 S.E.2d 371 (2008); State v. Gentry, 610 S.E.2d 494, 4 (2005); and Allison v. W.L. Gore & Associates, 714 S.E.2d 547 (2011) ("The question of compliance with rules, regulations and statutes governing an appeal is one of appellate jurisdiction rather than subject matter jurisdiction, overruling ..."), further section 1-23-600 of S.C. Code Ann. engaged a prior amendment of appellate jurisdiction under the 2006 Act. No. 387, § 5 eff. July 1, 2006

State v. Gentry, 610 S.E.2d 494, 49 (2005) stands for the definition of subject matter jurisdiction ("i.e. whether the trial court has the power to hear a case") citing U.S. v. Cotton, 122 S. Ct. 1781 (2002) CF. State v. Campbell, 656 S.E.2d 371 (2008)

5. The Court's panel did not reference S.C. Code section 1-23-380 (5) (f) which is a specific statutory law and it governs appellate review before the ALC and it [ALC] is an administrative agency according to section 1-23-500 of S.C. Code Ann. of the Administrative procedures Act (APA) but the specific subsection of the specific statutory law above references decision(s) of respondent(s) which are "arbitrary or capricious ..." are appealable and the ALC should correct those error(s)

6. The Court's panel's "Per Curiam" opinion disregarded, misapprehended and/or overlooked Article I, section 22 of South Carolina Constitution which commands judicial review of administrative agency's decision and where decision asserted "shall not hear .. an appeal involving denial of parole to a potentially eligible inmate by the Department "(p.2) it represents a grave contradiction;

7. Of course the court of appeals could not reference SCACR 203(d) (i) (A) (ii) "any final judgement involving a challenge on State or federal grounds to the Constitutionality of a state law or county or municipal ordinance ..."and S.C. Const. Art. V, § 5 grants the General Assembly the right to establish appellate jurisdiction of court(s) in the judicial branch of state government. See S.C. Code Ann. Section 14-3-330 ( )

8. The court's panel which was authorize to adjudicate under statutory interpretation General vs. Specific, failed to note conflict in/between sections 1-23-380, 1-23-600(D) and 17-27-10-120 [which established a preponderance of evidence standard of appellate review];

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9. more, section 1-23-600(D) violates Art. I, § 8 of S.C. Const. (separation of powers clause) more importantly, Art V, § 9 of S.C. Const. "binding effect of Supreme Court decisions;" Its application of Compton v. SCDPPPS, Supra is misplaced as Al-Shabazz and its progeny were grounded on the exclusive and specific statutory law(s) 17-27-10-120-160; consequently, South Carolina General Assembly enacted the APA; legislators enacted the Uniform Post-Conviction Procedure Act;

10. When The General Assembly enacted section 1-23-600(D) which limited appeals authorized through Al-Shabazz and its progeny, legislators attempted to overturn and/or alter the final judicial decision (judgement) contrary to Art. I, § 8 of S.C. Const. which cannot trump Al-Shabazzs and Jernigan v. State, 531 S.E.2d 507 (2000)

11. Section 1-23-600(A) references Art. I § 22 of S.C. Const. and references the preponderance of the evidence standard in certain case(s). Ward v. Dixie Nat Life Ins. Co, 595 F.3d 164 (CA4 2010) and Simmons v. Greenville Hosp. System, 586 S.E.2d 569 (2003) and the 2006 amendment of section 1-23-600 put the Circuit Court out- of- the appeal from ALC whereas the 2009 amendment of section 1-23-600 limit the appellate jurisdiction of ALC.

12. The Per Curiam opinion points "is not a violation of the ex post facto clause or The United States and South Carolina Constitutions' (p.2) which is contrary to the Sanders v. SCDC, 665 S.E.2d 231, 232,235, (S.C. App. 2008) decision, moreover, the Court of appeals should have reference James v. SCDPPPS, 660 S.E.2d 288, 289 (S.C. App. 2008) where the court held ALC has jurisdiction to review respondent's decision.

CONCLUSION

Wherefore, this Court should grant the petition herein,

Respectfully submitted this 7 day of June 2012.

s/ George Lee Tomlin  
George Lee Tomlin 166361  
P.O. Box 2039  
RCI GA-6  
Ridgeland, S.C. 29936

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SC COURT OF APPEALS

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he have caused true and correct copies of the petition herein and attachment(s) to be mailed, postage prepaid, to respondent attorney, Teresa A. Knox, P.O. Box 50660, Columbia, S.C. 29250

s/ George Lee Tomlin  
George Lee Tomlin

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# The South Carolina Court of Appeals

George Tomlin, Appellant,

v.

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

Appellate Case No. 2010-179746

\_\_\_\_\_  
ORDER  
\_\_\_\_\_

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Daniel G. Pieper J.

A. Ke J.

John O. Seatter J.

Columbia, South Carolina

cc:

George Tomlin

Tommy Evans, Jr.

John Benjamin Aplin

**FILED**

September 19, 2012

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