

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from the Administrative Law Court  
The Honorable John D. McLeod, Administrative Law Judge  
Case No. 16-ALJ-0018-AP

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Case No. 2016-002131

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**RECEIVED**

JAN 09 2017

**SC Court of Appeals**

JOHNNY BURTON; #213281,.....RESPONDENT

v.

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

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**RECORD ON APPEAL**

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Tommy Evans, Jr.  
Assistant General Counsel

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

Johnny Burton, Pro Se, #213281  
Perry Correctional Institution  
430 Oaklawn Road  
Pelzer, S.C. 29669

ATTORNEY FOR RESPONDENT

ATTORNEY FOR APPELLANT

## INDEX

	<b>Page</b>
Judge McLeod's Order Dated October 12, 2016 .....	1
Record on Appeal in the Administrative Law Court .....	4
Respondent's Brief in Administrative Law Court .....	10
Appellant's Brief in Administrative Law Court .....	23
Notice of Appeal Dated April 16, 2016 .....	29
Notice of Rejection Fated February 20, 2014 .....	31

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

Johnny Burton, #213281, )  
)  
Appellant, )  
)  
vs. )  
)  
South Carolina Department of Probation, )  
Parole and Pardon Services, )  
)  
Respondent. )

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Docket No. 16-ALJ-15-0018-AP

**ORDER OF REMAND**

**FILED**

OCT 13 2016

**STATEMENT OF THE CASE**

**SC ADMIN. LAW COURT**

This matter is before the Administrative Law Court (“ALC”) pursuant to the appeal of the above named Appellant (“Inmate”), an inmate incarcerated with the South Carolina Department of Corrections. Inmate appeals from a decision of the South Carolina Department of Probation, Parole and Pardon Services (“Department” or “PPPS”) Parole Board, which denied his parole. In his brief, Inmate argues that he was denied due process in violation of the Eighth Amendment of the United States Constitution in the denial of parole because he was a juvenile when he committed his offense. In addition, Inmate argues that he was denied due process because he was unaware of the Correctional Offender Management Profiling for Alternative Sanctions (“COMPAS”) risk assessment tool as criteria for parole consideration. For the following reason, the Department’s decision is reversed and the matter remanded to the Parole Board for a new hearing.

**BACKGROUND**

On January 22, 1994, Inmate, who was seventeen at the time, shot a victim several times. A few days later, the victim died as a result of the gunshot wounds. Inmate was charged with the offense of murder and possession of a firearm during the commission of a violent offense.

Inmate was convicted of both charges and sentence to a period of incarceration for the remainder of his natural life for the offense of murder; and five years for the possession of a firearm during the commission of a violent offense.

On February 19, 2014, Inmate made his initial appearance before the Parole Board, which denied Inmate an opportunity to be released on parole. Appellant again appeared before the Parole

Board on April 20, 2016. The Parole Board again denied parole because: 1) the nature and seriousness of current offense; 2) indication of violence in this or previous offense; and 3) use of deadly weapon in this or previous offense.

#### DISCUSSION

An individual has a right to ALC review of a final decision of the Board only when that decision affects a liberty interest for which due process is required. See Furtick v. S.C. Dep't of Prob., Parole and Pardon Servs., 352 S.C. 594, 576 S.E.2d 146, 149-50 (2003); see also Sullivan v. S.C. Dep't of Corr., 355 S.C. 437, 586 S.E.2d 124, 127 (2003) (explaining the nature of the right to ALC review). In Furtick, the South Carolina Supreme Court held that although an inmate has a liberty interest in parole eligibility pursuant to S.C. Code Ann. § 24-21-620, the statute does not create a liberty interest in the granting of parole itself. Furtick, 352 S.C. at 598, 576 S.E.2d at 149 n. 4. Claims arising from the Board's decision denying parole are not appealable to the ALC. See S.C. Code Ann. § 1-23-600(D) (Supp. 2015) ("An administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Correction... involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services."). Therefore, only claims that the Board failed to consider the appropriate criteria amount to an abrogation of parole eligibility. Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs., 377 S.C. 489, 661 S.E.2d 106 (2008). The Department, specifically the Parole Board, "has the sole authority to determine parole eligibility." Id. at 496, 661 S.E.2d at 110 (citing State v. McKay, 300 S.C. 113, 115, 386 S.E.2d 623, 623-24 (1989)).

When acting in an appellate capacity, the ALC must apply the criteria of S.C. Code Ann. § 1-23-380(5) (Supp. 2015), which reads:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial

evidence on the whole record; or

- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Inmate argues that he was denied due process because he was not given notice of the COMPAS assessment prior to his most recent parole hearing. S.C. Code Ann. § 24-21-10(F)(1) (Supp. 2015) mandates "establishment of a process for adopting a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contribute to criminal behavior, which the parole board shall use in making parole decisions, including additional objective criteria that may be used in parole decisions." Pursuant to S.C. Code Ann. § 24-21-640, the criteria for determining parole "must be made available to all prisoners at the time of their incarceration and the general public."

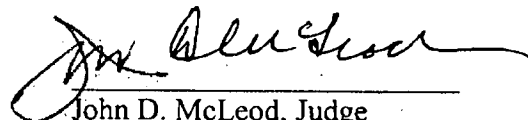
There is nothing in the Record before this Court to substantiate that Inmate was aware of the COMPAS assessment. In its brief, PPS argues that Inmate was informed of the criteria because he was "given a copy of the criteria prior to [his] hearing." However, conclusory statements in the brief are unavailing. In addition, the Criteria for Parole Consideration, included in the record before this Court, does not inform Inmate of the COMPAS assessment. As a result, Inmate was denied due process because he was not informed of the COMPAS assessment, which is a mandatory criteria for determining parole. Therefore, Inmate is entitled to a new parole hearing. Prior to the hearing, the Parole Board shall inform Inmate of all criteria that will be considered by the Parole Board, including the COMPAS assessment. In addition, the Parole Board shall enter proof into the record that Inmate was informed of the COMPAS assessment.

**ORDER**

For the foregoing reasons, the order appealed from is **REVERSED** and this appeal is **REMANDED** to the Parole Board to hold a hearing within thirty (30) days of the date of this Order.<sup>1</sup>

**AND IT IS SO ORDERED**

Columbia, S.C.  
October 12, 2016



John D. McLeod, Judge  
South Carolina Administrative Law Court

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this date

<sup>1</sup> Because this case is remanded for new hearing the Court will not address the remaining issues raised by Inmate. See Futch v. McAllister To the Honorable Court of Appeals of the State of South Carolina, 399 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 12 day of October, 2016

By: [Signature]  
Judicial Law Clerk

STATE OF SOUTH CAROLINA  
In The Administrative Law Court  
Docket Number 16-ALJ-15-0018

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APPEAL OF FINAL DECISION  
Department of Probation, Parole, and Pardon Services

---

JOHNNY BURTON, #213281 ..... APPELLANT

v.

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

---

**RECORD ON APPEAL**

---

**Tommy Evans, Jr.,  
Assistant General Counsel**

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

**ATTORNEY FOR RESPONDENT**

**INDEX**

	<b>Page</b>
Respondent's Letter Dated April 21, 2016 .....	1
Criteria for Parole Consideration.....	2
SCDC Inmate Summary .....	3

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

NIKKI R. HALEY  
Governor



JERRY B. ADGER  
Director

2221 Devine Street, Suite 600  
Post Office Box 50666  
Columbia, South Carolina 29250  
Telephone: (803) 734-9220  
Fax: (803) 734-9440  
www.dppps.sc.gov

April 21, 2016

Mr. Johnny Burton #00213281  
Perry Correctional Institution  
430 Oaklawn Rd.  
Pelzer, SC 29669

RE: NOTICE OF REJECTION

Dear Mr. Burton:

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); (3) the factors outlined in Section 24-21-640 of the South Carolina Code of Laws, and (4) actuarial risk and needs assessment factors pursuant to Section 24-21-10 (F) (1) of the South Carolina Code of Laws. The Parole Board had determined that your 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

Sincerely,

A handwritten signature in black ink, appearing to read "Larry Ray Patton, Jr.".

Larry Ray Patton, Jr.  
Director of Parole Board Support Services

4/20/2016

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

SC Board of Probation, Parole and Pardon Services  
P. O. Box 50886  
Columbia, SC 29250

Inmate Name <b>Johnny Burton</b>	SCDC # <b>213281</b>
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WJ 3 A FB

**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 §16-1-80 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 <b>Johnny J. Burton</b>	Date <b>10-7-15</b>	Witness <b>[Signature]</b>	Date <b>10-7-15</b>
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**Inmate:** BURTON, JOHNNY LEE (SCDC ID: 00213281) Custody: 3 Loc: PERRY Bldg: Q1A Room: 0117

Inmate Summary Relatives Priors Victims/Parties Social History Flags

SCDC SID: 00938608 Status: INCARCERATED Location: PERRY Medical Parole Consideration:  
 PPP SID: 00938608 Packet #: Max Out: 01/01/9999 SVO: Firearm:  
 Sex: Male DNA: COLLECTED Init Ellg: 01/25/2014 PPP VOI: Y No Parole/Hold:  
 DOB: 09/01/1976 SPreview: Next Hear: 04/20/2018 ATU/SPICE: Perm Waive:  
 Race: BLACK Offender Type: ADULT-STRAIGHT SENTENCE GPS: N Jernigan:

Interview	Waive	PPI's	Notify	Summary	Reviewed	Hearing	Outcome
		12/02/2013	04/21/2016				

Current Convictions User's County Not User's County Maxed Out

Edit	V	S	Sentenced	Co	Indict.	Offense	Max Out	PPI	Badge	No Par
<input checked="" type="checkbox"/>	Y	N	04/12/1994	04	94G50400825	PPP - Murder	01/01/9999	12/02/2013	0483	N
<input checked="" type="checkbox"/>	N		04/12/1994	04	9404823	SCDC - FIREARMS PROVISION	01/25/1999			N

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STATE OF SOUTH CAROLINA  
In The Administrative Law Court  
Docket Number 16-ALJ-15-0018

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APPEAL OF FINAL DECISION  
Department of Probation, Parole, and Pardon Services

---

JOHNNY BURTON, #213281 ..... APPELLANT

v.

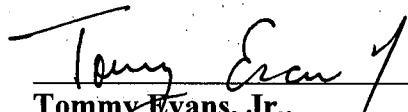
S.C. DEPARTMENT OF PROBATION, PAROLE AND  
PARDON SERVICES, ..... RESPONDENT

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***CERTIFICATE OF COUNSEL***

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The undersigned certifies that this Record on Appeal complies with Rule 61 of the Rules of Procedure for the Administrative Law Court and contains all material proposed to be included in the Record on Appeal by all of the parties and not any other material.

  
\_\_\_\_\_  
**Tommy Evans, Jr.,**  
**Assistant General Counsel**

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

August 3, 2016

STATE OF SOUTH CAROLINA  
In The Administrative Law Court  
Docket Number 16-ALJ-15-0018

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APPEAL OF FINAL DECISION  
Department of Probation, Parole and Pardon Services

---

JOHNNY BURTON, #213281.....APPELLANT

v.

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

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**BRIEF OF RESPONDENT**

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**Tommy Evans, Jr.**  
**Assistant General Counsel**

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

**ATTORNEY FOR RESPONDENT**

**TABLE OF CONTENTS**

Table of authorities.....ii

Statement of issues on appeal.....iii

Statement of the case.....1

Arguments

    1. The denial of the Appellant’s parole was not in violation of the Eighth Amendment of the United States Constitution.....2

    2. The COMPAS assessment was part of the Appellant’s parole case in 2014, so he had knowledge of this requirement, there exist no violation of due process.....4

Conclusion..... 8

**TABLE OF AUTHORITIES**

**CASES**

*Burrough v. Worsham*, 352 S.C. 382, 574 S.E.2d 215 (S.C. App. 2002).....6

*Compton v. S.C. Dept. of Probation, Parole, and Pardon Services*, 385 S.C. 476, 685 S.E.2d 175 (2009).....7

*Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008).....5,6

*Curtis v. State*, 345, S.C. 557, 549 S.E.2d 591 (2001).....4

*Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).....3

*Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100 (1979).....6

*Miller v. Alabama*, 132 S.Ct. 2455 (2012).....2,3

*Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972).....6

*State v. McKnight*, 352 S.C. 635, 576 S.E.2d 168 (2003).....2

**RULES**

Rule 28(b), SCRCrimp.....7

**CONSTITUTION**

U.S. Const. Amend. VIII.....2

**STATUTES**

S.C. Code Ann. §24-21-10(F)(1)(Supp. 2015).....5

S.C. Code Ann. §24-221-640(Supp. 1990).....3

**STATEMENT OF ISSUE ON APPEAL**

- 1. Was the Appellant denied due process in violation of the eighth amendment in the denial of the Appellant's parole due to the fact he was a juvenile when he committed the offense?**
- 2. Was the Appellant denied due process when he was denied access to the parole criteria?**

## STATEMENT OF THE CASE

On January 22, 1994, the Appellant while attending a party shot the victim in the chest, lower back, and buttocks. The authorities were called, the victim was still alive when they arrived so the Appellant was originally charged with the offense of assault and battery with intent to kill. However, three days later the victim died as a result of these gunshot wounds. The Appellant was then recharged with the offense of murder, and possession of a firearm during the commission of a violent offense.

On April 12, 1994, the Appellant appeared before the Honorable H. Hall for both of these offenses. Upon the conclusion of this appearance, the Court sentenced the Appellant to a period of incarceration for the remainder of his natural life for the offense of murder; and, five years for the possession of a firearm during the commission of a violent offense. The Court further ordered that these offenses were to be served consecutively.<sup>1</sup> At the time the Appellant committed this offense South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of twenty years.

On February 19, 2014, the Appellant made his initial appearance before the Parole Board. Upon the conclusion of this hearing the Board decided to deny the Appellant an opportunity to be released on parole. Since this initial hearing the Appellant once again appeared before the Parole Board on April 20, 2016. At the conclusion of this hearing the Board decided to deny parole due to: 1) the nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; and, 3) the use of a deadly weapon in this or a previous offense. Upon being notified of this denial of parole the Appellant filed a notice of appeal before the Administrative Law Court (ALC). Within this appeal the Appellant argues that he was unlawfully denied parole

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<sup>1</sup> The Appellant completed his sentence for the charge of possession of a firearm during the commission of a violent offense on January 25, 1999.

in violation of the eighth amendment, and due process. The Respondent argues that the Appellant was allowed to appear before the Parole Board so there exist no violation of any of the Appellant's Constitutional rights. The Board has shown that all of the mandatory criteria was applied and considered, so the denial of parole was lawful. The brief of the Respondent supporting these defenses follows.

**1. The denial of the Appellant's parole was not in violation of the eighth amendment of the United States Constitution.**

The Appellant argues that since he was seventeen at the time he committed the offense the denial of parole is in violation of the eighth amendment of the United States Constitution. He is of the opinion that due to his youth at the time he committed the offense, the denial of his parole should be considered cruel and unusual punishment. The United States Constitution specifically states, "Excessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The South Carolina Supreme Court reviews three factors in assessing proportionality of the sentence for Eighth Amendment purposes: (1) the gravity of the offense compared to the harshness of the penalty; (2) sentences imposed on other criminals; and, (3) sentences for the same crime in other jurisdictions. *State v. McKnight*, 352 S.C. 635, 576 S.E.2d 168 (2003). Within his brief the Appellant cites the United States Supreme Court case of *Miller v. Alabama*, 132 S.Ct. 2455 (2012). In *Miller*, the Supreme Court determined that a mandatory life without parole sentence for those under the age of eighteen at the time they committed their offense violates the eighth amendment. *Miller* does not apply to the present case, in *Miller* the Appellant committed the offense of murder and automatically received a life sentence without the possibility of parole. In the present case the Appellant does have the possibility of a future release on parole. A State is not required to guarantee eventual freedom but must provide "some meaningful opportunity to obtain release

based on demonstrated maturity and rehabilitation.” *Miller*, at 2468, quoting, *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2010). According to the Supreme Court, as long as there is some review considering the maturity and rehabilitation, and the possibility of a future release on parole, a life sentence given to a juvenile is valid. Pursuant to South Carolina law the Department must create criteria, the board must establish written, specific criteria for the granting of parole and provisional parole. S.C. Code Ann. §24-21-640 (Supp. 1990). One of the department criteria is the, “inmates adjustment while in confinement, including his/her progress in counseling, therapy, and other similar programs designed to encourage the inmate to improve himself/herself. This criteria takes into account the rehabilitation, and change of the Appellant, so this denial cannot be considered a violation of the eighth amendment.

Within his brief the Appellant also argues that he is being essentially permanently denied parole in violation of *Miller*. This is due to the Board consideration of the facts in his case. It is his position that since the facts of his case will never change he is being permanently denied parole. Pursuant to South Carolina law the prior record of the inmate must be taken into consideration. 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. 1990).

It is clear by this and the department criteria that the prior offense is not the only criteria the board considers. So there is a possibility that he would one day be released on parole. There are many people currently on parole that have committed the offense of murder.

For an offense to be prohibited under the eighth amendment the sentence must be grossly out of proportion to the severity of the crime. *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591 (2001). The Appellant was sentenced to life for the offense of murder. He took the life of another person so the sentence is not out of proportion of the severity of the crime. The Appellant argues that being denied parole should be considered cruel and unusual punishment, this is due to the fact he committed the offense as a juvenile. The denial of parole due to the nature and seriousness of the offense of murder; the violence that occurred in committing this offense; and, the use of a gun in committing this offense are valid reasons that falls under the mandatory criteria. As long as the Appellant is allowed an opportunity to be release on parole there exist no Eighth Amendment violation.

**2. The COMPAS assessment was part of the Appellant's parole case in 2014, so he had knowledge of this requirement, there exist no violation of due process.**

The Appellant alleges that not including the COMPAS assessment in his 2014 order of denial failed to give notice of this requirement prior to his more recent hearing. The Respondent argues that the COMPAS assessment was performed prior to his 2014 hearing so he had knowledge of this requirement. The Respondent will further argue that this statute is made available to all inmates, and the Appellant has not revealed any prejudice due to the assessment; therefore, he is not entitled a remand. This assessment is mandatory so its consideration should warrant an affirmation by the ALC.

As part of the South Carolina Reduction of Recidivism Act of 2010 the Board is now required to consider a risk and needs assessment prior to any decision regarding parole. The South Carolina Code of Laws specifically state:

The department must develop a plan that includes the establishment of a process for adopting a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors

that contributed to criminal behavior, which the parole board shall use in making parole decisions, including additional objective criteria that may be used in parole decisions.

S.C. Code Ann. §24-21-10(F)(1)(Supp. 2015).

The risk assessment utilized by the Department is referred to as the Correctional Offender Management Profiling for Alternative Sanctions, or COMPAS. This risk assessment tool is conducted for each prisoner prior to appearing before the Parole Board. The results of each assessment is always provided to the Board for consideration prior to their final decision.

The Appellant argues that the Board failed to inform him of his criteria in violation of due process. According to South Carolina law the Board is required to make the Department criteria available to all prisoners at the time of their incarceration and to the general public. As part of the inmate handbook the criteria is listed, and each inmate is given a copy of the criteria prior to their hearing. The criteria given to the Appellant is found in the record. R. p. 2.

The Appellant argues that the Board violated Due Process by including the risk assessment in the order of denial after his 2016 denial, and not his 2014 denial. Pursuant to the South Carolina Supreme Court decision in *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008), the Court decided that the ALC can determine if the Board failed to use the proper protocol in the determination of parole. In *Cooper*, the Court decided that if the Parole Board failed to consider and apply all the statutory-related parole criteria, it has the effect of rendering an inmate ineligible for parole, which warrants review by the ALC. *Id.*, at 502. In *Cooper*, the Supreme Court established what future Parole Board orders should consist of, in *Cooper* it specifically states:

We emphasize that in future parole review hearings the Parole Board may avoid the result in the instant case if it clearly states in its order denying parole that it considered the factors outlined in section 24-21-640 and the fifteen factors published, the decision will constitute

a routine denial of parole and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure.

*Id.*

As stated previously, the General Assembly added as a part of the mandatory criteria a risk assessment that must be considered. In 2014, even though the Board did consider the risk assessment, it was not placed in the final order of denial. Many inmates have raised this on appeal and due to the failure to reveal if the risk assessment was considered, it resulted in several remands of parole decisions. Due to these decisions the Board decided to add it to the final order of denial. The Appellant argues that he was not made aware of this; however, a risk assessment was completed in 2014 so he was aware of the practice. The Appellant has also revealed no prejudice regarding the fact the COMPAS assessment was used and its consideration was stated in the order of denial. To warrant reversal the Appellant must show both error of the ruling and resulting prejudice. *Burroughs v. Worsham*, 352 S.C. 382, 574 S.E.2d 215 (S.C. App. 2002).

The Appellant also argues that since he was not notified as to the mandatory risk assessment, this failure violated due process. In the United States Supreme Court case of *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972), the Court acknowledged that a person having his parole revoked does have minimal due process rights. In *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100 (1979), a distinction was made between a person currently on parole and a person seeking parole.<sup>2</sup> In *Greenholtz*, the Supreme Court determined there exist no conditional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. *Greenholtz*, at 2104. The Appellant

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<sup>2</sup> There is a crucial distinction between being denied a conditional liberty one has, as in parole and being denied 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 to a normal life." *Greenholtz*, 408 U.S. at 482, 92 S.Ct. at 2600.

was allowed to appear before the Board where he was allowed to present evidence in his favor. It was shown in the order of denial that the mandatory criteria and risk assessment were considered prior to denial, so there exist no violation of due process.

The Appellant also argues that this case should be reversed due to after discovered evidence. The Appellant argues that finding out about the risk assessment upon the conclusion of his latest denial should be considered after discovered evidence. This argument is invalid due to the fact this is not a criminal trial, and this is evidence could be ascertained by the exercise of reasonable diligence. Rule 28(b), SCRCrimP In 2014, a COMPAS risk assessment was applied to the Appellant and considered by the Board prior to the final decision, so he should have known of its existence. The Appellant also has access to the South Carolina Code of Laws which the statute regarding the risk assessment can be found. So it is reasonable that, the Appellant should have been aware of this requirement; therefore, this is not considered after discovered evidence. The fact a COMPAS risk assessment was performed on the Appellant should not allow him reversal, but should allow this Court to affirm the decision of the Board. The application of COMPAS reveals that all mandatory criteria was applied by the Board prior to denial. The Supreme Court has previously ruled that if the Board reveals that all the mandatory criteria was followed, no further review is needed by the ALC.<sup>3</sup>

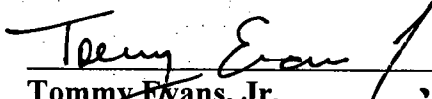
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<sup>3</sup> In the instant case, the Parole Board clearly stated in its notice of rejection that it considered the statutory criteria and the criteria set forth in Form 1212, which is sufficient under *Cooper. Compton v. S.C. Dept. of Probation, Parole and Pardon Services*, 385 S.C. 476, 685 S.E.2d 175 (2009).

**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.**  
**Assistant General Counsel**

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

Columbia, South Carolina  
September 19, 2016

STATE OF SOUTH CAROLINA  
In The Administrative Law Court  
Docket Number 16-ALJ-15-0018

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APPEAL OF FINAL DECISION  
Department of Probation, Parole, and Pardon Services

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JOHNNY BURTON, #213281 ..... APPELLANT

v.

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

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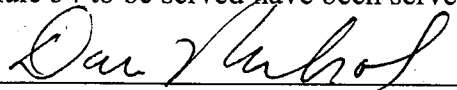
**CERTIFICATE OF SERVICE**

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I, Dawn K. Nichols, Executive Assistant to counsel for Respondent, certify that I have served the within *Brief*, dated September 19, 2016, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, the 19<sup>th</sup> day of September, 2016, addressed to:

Johnny Burton, #213281  
Perry Correctional Institution  
430 Oaklawn Road  
Pelzer, South Carolina 29669

I further certify that all parties required by Rule 54 to be served have been served.



**Dawn Nichols**  
**Executive Assistant**  
South Carolina Department of Probation,  
Parole, and Pardon Services  
P. O. Box 50666  
Columbia, South Carolina 29250

STATE OF SOUTH CAROLINA  
In The Administrative Law Court  
Docket Number 16-AIJ-15-018

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APPEAL OF FINAL DECISION  
Department of Probation, Parole, and Pardon Services

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Johnny Burton, #213281.....Appellant,

v.

S.C. Department of Probation, Parole  
and Pardon Services,.....Respondent.

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BRIEF OF APPELLANT

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Johnny Burton, #213281  
Appellant

Perry Correctional  
Institution Q1 A117  
430 Oaklawn Road  
Pelzer, S.C. 29669

STATEMENT OF THE CASE

Appellant was indicted at the 1994 term of the Anderson County grand jury of the offense(s) of murder, and pointing a firearm and carrying a pistol. Appellant appeared before the Honorable H. Dean Hall, on April 11, 1994, and proceeded to a jury trial and was sentenced shortly thereafter for the offenses and received a life prison term for murder and five years imprisonment for the firearm conviction.

Appellant was seventeen (17) years old at the time of his offense, conviction and sentence. S.C. law provided that an individual serving a life sentence for murder would become eligible for parole following completion of twenty-years of his sentence. Appellant initially appeared before the Board of Probation, Parole and Pardon Services (the Parole Board) on February 20, 2014, and the Board denied him parole following that hearing.

The reason for denial was due in part to 1) nature and seriousness of current offense; 2) indication of violence in this offense or previous offense; and, 3) use of deadly weapon in this or previous offense. Appellant's most recent appearance before the Board on April \_\_, 2016, is among the issues here.

Appellant asserts that he is being deprived of liberty interest in parole criteria of 24-21-640 and 24-21-10(F)(1) of the South Carolina Code (Supp. 2014). Appellant also contend he is being denied due process of law by the additional adopted procedures parole criteria.

ARGUMENTS

IS APPELLANT BEING DENIED DUE PROCESS OF LAW IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE SOUTH CAROLINA PAROLE BOARD AS A SECOND GENERATION MILLER JUVENILE?

The South Carolina Probation, Parole and Pardon Service's (SCDPPP'S), the Parole Board, suppose to be the avenue for a meaningful opportunity for second-generation Miller Juveniles. This opportunity does not extend to appellant when the parole board denies an offender who was convicted when he was a juvenile parole based on "unchangeable circumstances" a meaningful opportunity do not guarantee appellant a secured opportunity for release as contemplated by the Miller decision. Aikens v. Byars, 755 S.E.2d 572 (2014) or Montgomery v. Louisiana, 135 S.Ct. 1546 (2015). Also, address a salient issue here whether juveniles convicted for crime will have a guarantee opportunity for release.

A close look at the notice of rejection in appellant's two parole hearings before the Board, he was essentially denied parole for the same reasons. If closely examined it can be seen and understood that these factors will never change in the future. The only finding of fact that can change here is appellant's institutional record, which clearly showed the rehabilitation and maturity as evident in his recent hearing before the Board.

The parole board failed to rely upon the fact that appellant was a seventeen year old juvenile when his offense was committed, Miller, relied heavily upon the fact that a child's character is not yet fully formed; his traits are "more transitory and less fixed" and his actions less likely to be "evidence of irretrievable depravity." Miller, 132 S.Ct. at 2464; also see, Roper v. Simmons, 534 U.S. at 570. The Court also noted that children "have limited control over their own environment," lack maturity and responsibility, and are thus inclined toward "recklessness, impulsivity and needless risk-taking." *Id.* The Court noted "the great difficulty ... of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption... We believe that incorrigibility is inconsistent with youth." Miller, 132 S.Ct. at 2469 (quoting Roper, 543 U.S. at 573); see, also Graham v. Florida, 130, S.Ct. at 2026-27; Workman v. Commonwealth, 429 S.W.2d at 378.

Significantly, "[n]othing the Court said about children - about their distinctive (and transitory) mental traits and environmental vulnerabilities - is crime-specific." Miller, 132 S.Ct. at 2465. Those characteristics are "evident in the same way, and to the same degree" in juveniles who commit homicide as they are in those who commit armed robbery, kidnapping or any other offense. *Id.* at 2465. In short, the constitutional difference between juvenile and adult offenders does not turn in any respect on the nature of the crime, and any purported distinction on that basis finds no support in the Court's recent decisions.

Finally, the Court also relied upon the difficulty of distinguishing between the "unfortunate" and the truly culpable offender: "To justify life without granting parole on the assumption that the juvenile offender forever will be a danger to society requires the Board to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable." Graham, 130 S.Ct. at 2030. In deed, it is difficult, if not impossible, for even highly trained psychologists and psychiatrists to differentiate juvenile offenders whose crimes are the product of permanent

fixed character traits from those whose crimes are the result of circumstances and the transient qualities of youth. Miller, 132 S.Ct. at 2469 (citing Roper, 543 U.S. at 573, and Graham, 130 S.Ct. at 2067-27).

It is equally impossible for the Parole Board to make such a determination. The potential for reform that is present in all juvenile offenders thus requires the Board to maintain the possibility of release and not ignore the juvenile's "potential to attain a mature understanding of his own humanity." Roper, 543 U.S. at 573.

Due to the heightened capacity for change in all juvenile offenders, who were sentenced when they were seventeen years old, a continual denial of a guarantee avenue for release for a crime committed when he was a juvenile violates both the 8th Amendment to the United States Constitution and Article I, 15 of the South Carolina Constitution.

WAS APPELLANT DENIED DUE PROCESS WHEN THE BOARD FAILED TO MAKE ADOPTED PAROLE CRITERIA READILY AVAILABLE TO HIM?

It is only fair to apprise prisoners of the standards to which they must conform. Indeed, an administrative agency's failure to articulate the standards of eligibility for a government benefit is an indicium of a denial of due process.

Inmates should have a right to know the law that so vitally affects them: It is an essential element of justice that the rules and processes for measuring parole readiness be known to the inmate...One can imagine nothing more cruel, inhuman, and frustrating than serving a prison term without knowledge of what will be measured and the rule for determining whether one is ready for release.

Due process clause requires the Board to make their "parole criteria" readily available to all inmates. Franklin v. Shields, 399 F. Supp. 309 (W.D.Va. 1975).

In Appellant's "Notice of Rejection" dated April 21, 2016, under the Board's CONCLUSION OF LAW: Appellant discovered an added 4th finding - that the Board considered: (4) actuarial risk and needs assessment factors pursuant to Section 24-21-10 (F) (1) of the S.C. Code of Laws.

In appellant's initial hearing of 2014 under the same CONCLUSION OF LAW: This finding (4) Section 24-21-10 (F) (1) S.C. Code of Laws is absent. Appellant will show the relevant standard(s) as follows:

In appellant's "Notice of Rejection" Dated April 21, 2016:

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); (3) the factors outlined in Section 24-21-640 of the S.C. Code of Laws, and (4) actuarial risk and needs assessment factors pursuant to Section 24-21-10 (F) (1) of the S.C. Code of Laws. The Parole Board had determined that your parole must be denied.

In contrast, appellant's initial "Notice of Rejection" Dated February 20, 2014:

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.

The added/adopted procedure by the Board in appellant's 2016 hearing by the Board was not made readily available to appellant as evident in the "Criteria For Parole Consideration" certified Form 1212 Revision A March 18, 2002 (Stock), verified by appellant's signature and witnessed and signed by the parole examiner.

In contrast to appellant's interest in promptly learning the adopted assessment tool to the criteria by which his application for parole is measured, the Board can assert no logical explanation for denying appellant knowledge of adopted parole criteria.

The National Advisory Commission of Criminal Justice Standards and Goals has emphasized that it is the state's advantage to acquaint prisoners with parole standards:

Articulation of criteria for making decisions and development of basic policies is one of the chief tasks that parole decision makers need to undertake.... Articulation of criteria is crucial to staff and inmates alike. The notion of an inmate's participation in a program of change depends on an open information system. His sense of just treatment is inextricably bound with it.

Accordingly, the due process clause requires the Board to make their parole criteria readily available to all prisoners. U.S. Court of Appeals for the Fourth Circuit, 569 F.2d 784; 1977 U.S. App. Lexis 11494

LIBERTY INTEREST; DUE PROCESS VIOLATION/AFTER DISCOVERED EVIDENCE:

This matter comes by way of after discovered evidence which is material evidence which has never been presented to this Court by appellant, which is a genuine issue of material fact that will prove that the appellant just discovered this evidence.

Appellant discovered this due process violation upon receiving his parole "Rejection Notice" dated April 21, 2016, CONCLUSION OF LAW: (4) actuarial risk and need assessment factors pursuant to Section 24-21-10 (F) (1) of S.C. Code of Laws. Appellant found that the parole board was required to administer and consider this same validated individualized risk assessment in his initial hearing before the Board on February 20, 2014 according to Section 24-21-10 (F) (1) (Supp. 2013). Appellant makes this discovery [within 1-year] of actual discovery pursuant to McCoy v. State, 737 S.E.2d 623 2013; and Coates v. State, 575 S.E.2d 557 (S.C. 2002).

Section 24-21-10 (F) (1) requires the parole board to evaluate an inmate's risk using the Department's adopted assessment tool in reaching a decision to grant or deny parole. See, 24-21-10 (F) (1) ("Department must develop a plan that includes the establishment of a process for adopting a validated actuarial risk and needs assessment tool consistent with evidenced based practices and factors that contribute to criminal behavior, which the parole board "shall" use in making parole decisions...." (emphasis added)).

Appellant contends that his substantive rights have been prejudiced because the finding, conclusion and decision is affected by other error of law, James v. S.C. Dep't of Prob., Parole & Pardon Servs., 377 S.C. 564, 566, 660 S.E.2d 283, 290 (Ct. App. 2003) ("Section 1-23-610 of the South Carolina Code [(2005 & Supp. 2014)] sets fourth the standard of review when the court of appeals is sitting in review of a decision by the ALC on an appeal from an administrative agency."); see also, Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs., 377 S.C. 489, 499, 661 S.E.2d 106, 112 (2003) (holding an inmate has state-created liberty interest in requiring the [P]arole [B]oard to adhere to statutory criteria in rendering a decision).

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Johnny Lee Burton, #213281, )

Appellant, )

vs. )

**NOTICE OF APPEAL**

South Carolina Department of Corrections, )

Respondent. )

DOCKET NO. ALJ-04-

GRIEVANCE NO.: \_\_\_\_\_

Notice is hereby given that Johnny Lee Burton, #213281 does hereby appeal the final decision of the South Carolina Department of Corrections dated April 21, 2016 and received on April, 2016, a copy of which is attached. A **general** statement of the grounds for appeal is (See S.C. Code Ann. § 1-23-380(A)(6)):

This court has jurisdiction over an inmate appeal when it sufficiently implicate's a state-created liberty interest. Cooper v. SCDPP'S, 489, 497, 661 S.E.2d 106, 110 (2008). This court does not review the routine denial of parole, but instead reviews the procedure by which the determination of denial was reached. See Id, at 499, 661 S.E.2d at 112. This court has the right and obligation to determine whether an inmate is deprived of a "State created right" or "Liberty Interest" granted to him by rule, a statute of regulation promulgated by the government. Meachum v. Fano, 96 S.Ct. 2532 (1976).

Johnny Lee Burton, #213281

Appellant's Name

Signed

Perry Corr. Inst., 430 Oaklawn Rd.

Mailing Address

Dated

Pelzer, S.C. 29669

City, State, Zip Code

**CERTIFICATE OF SERVICE**

I hereby certify that I, \_\_\_\_\_ (your name), on the \_\_\_ day of April, 2016, in Pelzer (city), South Carolina, served a copy of the foregoing Notice of Appeal on all parties to this matter by depositing the same in the United States Mail, postage paid, or in the mail room of the undersigned's institution and addressed as follows:

Name of person/Agency served: SCDPPP'S 2221 Devine St., Suite 600, P.O. Box 50666

Address: Columbia, S.C. 29250

City, State, Zip Code: \_\_\_\_\_

Print your name: \_\_\_\_\_

Sign your name: \_\_\_\_\_

(See reverse side for instructions)

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(continued on reverse side)

Instructions for filing an appeal of the final agency decision from the South Carolina Department of Corrections:

- 1) You must complete the **Notice of Appeal** on the reverse side of these instructions and mail it to the Administrative Law Court at the following address:

**Clerk's Office**  
**South Carolina Administrative Law Court**  
**1205 Pendleton Street, Suite 224**  
**Columbia, SC 29201**

A copy of the Notice of Appeal must also be forwarded to the Office of General Counsel at the Department of Corrections.

- 2) **In order for your case to be processed by the ALC, a copy of the final decision from the Department of Corrections must be attached to the Notice of Appeal.**

Appellant asserts that the parole procedures that the SCPPP'S has established create such liberty interest which cannot be "arbitrarily abrogated". An agency's failure to afford an individual procedural safeguards required under its own regulations may result in the invalidation of the ultimate administrative determination. U.S. v. Morgan, 193 F.3d 252, 256 (4th Cir. 1999).

Appellant also asserts that he was denied Due Process when the Board failed to make their parole criteria readily available to him, when the Department's (Parole Board) adopted assessment tool was added in reaching a decision to grant or deny parole. It is evident by appellant's initial parole hearing February 20, 2014, this requirement was not made available to him.

Signed \_\_\_\_\_

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

NIKKI R. HALEY  
Governor



KELA E. THOMAS  
Director

2221 Devine Street, Suite 600  
Post Office Box 50666  
Columbia, South Carolina 29250  
Telephone: (803) 734-9220  
Fax: (803) 734-9440  
www.dppps.sc.gov

February 20, 2014

Mr. Johnny Burton #00213281  
Lieber Correctional Institution  
P.O. Box 205  
Ridgeville, SC 29472

RE: NOTICE OF REJECTION

Dear Mr. Burton:

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  
Institutional Record Is Unfavorable

Sincerely,

A handwritten signature in cursive script, appearing to read "Larry Ray Patton, Jr.".

Larry Ray Patton, Jr.  
Director of Parole Board Support Services

27

31

2/19/2014

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court  
The Honorable John D. McLeod, Administrative Law Judge  
Case No. 16-ALJ-0018-AP

RECEIVED

Case No. 2016-002131

JAN 09 2017

SC Court of Appeals

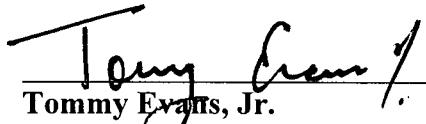
JOHNNY BURTON, #213281,.....RESPONDENT

v.

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

**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Record on Appeal complies with Rule 210(c), SCACR and with the South Carolina Supreme Court's order dated August 13, 2007, and contains all material proposed to be included by any of the parties and not any other material.

  
Tommy Evans, Jr.  
Assistant General Counsel

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

January 6, 2017

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court  
The Honorable John D. McLeod, Administrative Law Judge  
Case No. 16-ALJ-0018-AP

**RECEIVED**

JAN 09 2017

**SC Court of Appeals**

Case No. 2016-002131

JOHNNY BURTON, #213281, .....RESPONDENT

v.

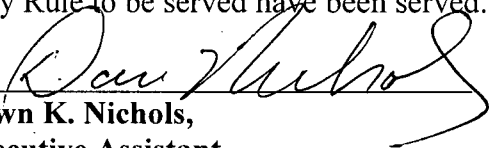
SOUTH CAROLINA DEPARTMENT OF PROBATION,  
PAROLE AND PARDON SERVICES .....APPELLANT

**CERTIFICATE OF SERVICE**

I, Dawn K. Nichols, Executive Assistant to counsel for Appellant, certify that I have served a copy of the *RECORD ON APPEAL*, dated January 6, 2017, on Respondent by depositing the same in the United States mail, postage prepaid, this 6<sup>th</sup> day of January, 2017, addressed to:

**Johnny Burton, #213281  
Perry Correctional Institution  
430 Oaklawn Road  
Pelzer, S.C. 29669**

I further certify that all parties required by Rule to be served have been served.

  
**Dawn K. Nichols,  
Executive Assistant**

S. C. Department of Probation,  
Parole, and Pardon Services  
P. O. Box 50666  
Columbia, South Carolina 29250