THE STATE of SOUTH CAROLINA

IN THE COURT of APPEALS

[IN THE SUPREME COURT]

APPEAL FROM RICHLAND COUNTY

ADMINISTRATIVE LAW COURT

Deborah Durden, Administrative Law Judge

Case No. 18-ALJ-04-0095-AP

Damon T. Brown 357300 Appellant,

V.

South Carolina Dept. of Corrections Respondent.

Appellate Case No. 2018-001981

[Initial Brief of Appellant]

Damon T. Brown 357300

Kirkland Cor. Inst. B2-11

4344 Broad River Rd

Columbia, SC 29210

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STATEMENT OF THE CASE

The matter is before the South Carolina Court of Appeals, pursuant to the notice of appeal filed October, 2012 by Damon T. Brown (Appellant) an inmate incarcerated with the South Carolina Dept. of Corrections. The Appellant argues the South Carolina Dept. of Corrections (SCDC), Alternative Law Court (ALC), is in error by unconstitutionally applying SC Code 24-13-100 and 24-13-150(A) in connection with Title 16 of the South Carolina laws. (16-1-10, 16-1-20, 16-1-30, 16-1-60) to his sentence. The appellant agreed to a plea deal, and was sentenced to 14 years under SC Code 44-53-375 (c)(1)(b) ten grams of cocaine base but not more than 28 grams, second offense.

Appellant states that his conviction and sentence is a parole eligible offense, under the SC Code of Laws, which is the controlling authority.

SC Code 44-53-370 (e)(2) and 44-53-375 (C) establish liberty to parole eligibility, work credits, work release, and supervised furlough. This makes 24-13-100 and 24-13-150(A) unconstitutional to offenders not serving the twenty five year mandatory minimum sentence requirement, and violations of Federal, Constitutional, and statutory provisions of the 14th Amend., SC Codes 44-53-370(e)(2) and 44-53-375(C), thus the SCDC/ALC decision must be reversed.

STATEMENT OF THE ISSUES ON APPEAL

Did the ALC Judge error, thus creating Due Process violation, by allowing an unconstitutional application of SC Code 24-13-100 and SC Code 24-13-150(A) to classify Appellant's sentence under no-parole, violating the 14th amendment of the Constitution of a protected liberty interest to a parole eligible conviction and sentence?

Did the ALC Judge error by allowing SCDC to use SC Code 24-13-100 and 24-13-150(A), an unconstitutional application to Appellant's sentence as its substantial evidence standard as a matter of law for its classification purposes?

Under SC Code 44-53-375(C), -375(F) and SC Code 44-53-370(e)(2) are the sentences not carrying the mandatory or mandatory minimum of not less than 25 years, Ft. All required to serve 85% and are these sentences entitled to parole eligibility because of severability of an unconstitutional application to a parolable offense?

ARGUMENT

Did the ALC Judge error, thus creating Due Process violation, by allowing an unconstitutional application of SC Code 24-13-100 and SC Code 24-13-150(A) to classify Appellant's sentence under no-parole, violating the 14th amendment of the Constitution of a protected liberty interest to a parole eligible conviction and sentence?

STANDARD OF REVIEW: No state shall make or enforce any law which shall abridge the privileges or immunities of the citizen of the United States, nor shall any state deprive any person of life, liberty or property with the Due Process of Law, nor shall deny to any person within jurisdiction the Equal Protection of the law, US.C.A. Const. Amend 14th Bermudez v. Duenas 936 F.2d 1064 (1991). South Carolina Code of Law is controlling authority for classification and statute for it dictates sentencing. See State v. Bennett 375 S.C. 164, 173 (2007). It is unconstitutional and unreasonable to characterize an offense for which the offender is eligible for parole as a no-parole offense pursuant to statute 24-13-100, even if the maximum sentence for the offense places it within a classification encompassed by 24-13-100 Et. Al, See Bolin v. SCDC 415 S.C. 276, 781 (2016).

Here, the SCDC/Agency relies on the external application of general statute SC Code 24-13-100 and 24-13-150(A) to the specific nature of Statutes 44-53-375(c), 44-53-375(f) and 44-53-370(e)(2). SC Code 44-53-375(c) and 44-53-370(e)(2) explains the punishment

of the crime, increasing, as the weight and number of the offense increase, until it reaches the specific written levels in the statutes explicitly implied therein, then as encompassed by legislature does the intent for no-parole stand as intended in the specific language mandated in SC Code 44-53-375(f).

SC Code 44-53-375(c)(1)(a) starts at 10 grams, less than 28 grams, a first 1st, sentence of 3 to 10 years; for a second 2nd, a sentence of 5 to 30 years, and for a third 3rd, a mandatory minimum term of imprisonment of not less than 25 nor more than 30 years
SC Code 44-53-375(c)(2)(a) starts at 28 grams, less than 100 grams, for first 1st a sentence of 7 to 25 years; for a second 2nd, a sentence of 7 to 30 years, and for a third 3rd, a mandatory minimum term of imprisonment ..... 25 to 30 years.
SC Code 44-53-370(e)(2)(a)(i) 1st, 370(e)(2)(a)(ii) 2nd, and 3rd 370(e)(2)(a)(iii) all carry the identical statutory language
SC Code 44-53-370(e)(2)(b)(i), 1st, 370(e)(2)(b)(ii) 2nd, and 370(e)(2)(b)(iii) 3rd all carry the identical statutory language.
SC Code 44-53-375(f) sentences for violations of the provisions of subsection (c) or (e) .... A person sentenced and convicted under subsection (c) or (e) to a mandatory term of imprisonment of 25 years, a mandatory minimum term of 25 years, or a mandatory minimum of not less than 25 years nor more than 30 years is not eligible for parole.

This specific increase by legislature mandates the nature of the statutes specific construction for a self contained statutory provision for and of "No Parole". Only the specific classification

of the statutes, mandatory and mandatory minimum are given the specific language for "No Parole" and if the legislature wished or intended the others parts of the specific statute of -375(c) and -370(e)(1st or 2nd offenses) to contain the phrases mandatory or mandatory minimum of 25 years or 25 to 30 years, then it would have been easy for them to do so.

As it is, the lesser level offenses specify "a term of imprisonment", where SCDC explains that SC code 44-53-375(f) (Supp. 1995) was used before the enactment of SC Code 24-13-100 and 24-13-150(A) (Supp. 1996) using only the mandatory 25 and mandatory minimum 25 or 30 years to specify "Not eligible for parole" as the legislature wrote in the statute, also provides that appellant is correct that the intent of legislature was only to provide "No Parole" at their intention of a mandatory or mandatory minimum and the SCDC admits that. As such the language in the trafficking offenses contain the same language from the date of their enactment.

It is true the legislature only used the term "mandatory" in stating the sentence for a third or subsequent offense and as such appellant's conviction/sentence statute is 44-53-375(c)(1)(b), it provides that "No part of the term of imprisonment may be suspended nor probation granted" (Supp. 2016), it clearly does not say "mandatory", "mandatory minimum", or "Not eligible for parole". Additionally, appellant's sentencing sheet for trafficking -375(c), 10 grams but less than 28 grams, indictment 2012 GS08 1108 does not state that appellant is not eligible for parole and as such the ALC can not use a piece of substantial evidence for its conclusitory

Findings against appellant. As such, the penalty assessed for SC Code 44-53-375 (C1) and -370 (e2) trafficking offenses is clear and unambiguous and the legislature's intent for construction provides that only the "mandatory" or "mandatory minimum" under third or subsequent offenses are intended under the plain language for NO parole. See State v. Taub 519 SE.2d 797, 800-801 (S.C App. 1999)

Appellant states because of this plain meaning of the words employed and the statute being read as a whole indicates that it is not necessary for the external application of SC Code 24-13-100 and -150 (A) to -375 (C) or -370 (e)(2) first or second offenses for it is obvious of the Legislature's intent for a self contained enhancement resulting at a third or subsequent for "No Parole". The SC Code 24-13-100 and -150(A), general definition and classification statutes (Supp. 1996) conflict with -375(C) and -370 (e)(2), the specific mandate of trafficking statutes prevail over general statutory authority of -100 and -150(A) because first and second offenses are parole eligible by legislative intent and applying them to a parolable offense is unconstitutional and a violation of due process, the 14th Amendment.

SC Code 44-53-375(F) is a statute of specific nature as is 375(C) and statutes of a specific nature are not to be considered as repealed in whole or in part by a later general statute unless there is a direct reference to the former statute or the intent of legislature to do so is explicitly implied therein, See Strickland v. State 274 SE.2d 430, 432 (1981). This is supported by the fact that if the legislature

intended for -375(f) to have no current application to -375 (c) first or second offenses, then it would have been a very easy for the legislature to add the "mandatory" or "mandatory minimum" and "Not eligible for parole" to the statute of -375(c), first and second offenses as well as -370(e)(2). The legislature did not and the language is plain only for third or subsequent offenders under the mandatory provisions. The appellant is sentenced under a specific statute and that statute specifically deals with how an offense under that statute is to be enhanced from a first offense (-375(c)(1)(a) parole eligible), to a second that has the same language construction, except the possible sentence could be up to 30 years instead of 10 years. The provisions of that statute control over more general enhancement statutes.

Under SC Code 44-53-375(F), SCDC provides that first and second offenders of section -375(c) were eligible for parole and that the statute at the time "Had Meaning." That only the more serious trafficking with "mandatory" or "mandatory minimum" sentences were classified as "Not eligible for parole", as it clearly still provides today. The legislature's classification for "No Parole" is evident in the plain language of the statute and it clearly harmonized legislatures intent, that the possible length of a sentence for a first and second offenders does not preclude them from parole eligibility, See State v. Tamb 519 SE.2d 797, 801(1999), only if it was a third or subsequent by the "mandatory minimum" te

language for "Not eligible for parole."

Strictly construing -375(C) and -375(f) it is clear from the plain language of the two sections, that in a trafficking case such as this one only third or subsequent offenders for sentencing/classification purposes are not eligible for parole. The legislature intended 375(C) with (375(f) and 370(e)(2) to have its own set of enhancements. See State v. Burton 391 SE.2d 583 (1990), stating that since the legislature specifically excluded Y.O.A. sentences from certain offenses, it can be inferred that the legislature intended Y.O.A. to apply to youthful offenders guilty of all other offenses and (" in determining the meaning of a statute, it must be inferred that statutes specifically excluding certain things evidence the intent of the legislature to include all other things not mentioned.") State v. Taub 519 SE.2d 797, 801 (1999).

The SCDC/Agency's General Counsel agree that there are two possible inconsistant conclusions, creating ambiguity, and yet they say can be read without any conflict, this is incorrect. See State v. Stewart 688 SE.2d 569, 575 (2010). The application would render the language defining first and second from a third or subsequent without any operative meaning of "mandatory" or "mandatory minimum" the legislature intended. State v. Taub 519 SE.2d 797, 801 (SC. App. 1999), State v. Tisdale 467 S.E.2d 270 (Ct. App (996), State v. Woody 545 S.E.2d 521 (Ct. App 2001). Statutes that are part of the same statutory scheme must be construed together where reasonable. It is evident that -375(C) and -375(f) are part of the same statutory scheme". As such, the two subsections must be construed together

, if a reasonable construction exists. See Beaufort City v. SC State Election Comm'n. 718 S.E.2d 432, 435 (2011)("It is well settled that statutes dealing with the same subject matter are in pari materia and must be construed together, if possible, to provide a single, harmonious result.") when interpretation is in conflict with the plain language of the statute, deference is [NOT] Due, National R.R. Passenger Corp. v Boston and Maine Corp. 503 U.S. 407, 417, 112 S.Ct. 1394, 1401 (1992). ("where the language of the statute is clear, resort to the agencies interpretation is improper") Chevron USA Inc. v National Resources Defense Counsel Inc. 467 U.S. 837, 842-43, 104 S.Ct 2778 (1984).

Appellant states that it is clear that trafficking -375(c) first and second offenses are parole eligible offenses from the plain language by legislature mandate and as such it renders the extend attachment of SC code 24-13-100 and -150(A) to an offense that is already parole eligible an unconstitutional application, a violation of appellant's 14th amendment to protected liberty interest in parole eligibility, good conduct credits, work credits, education credits, and work release.

ARGUMENT

Did the ALC Jude error by allowing the SCDC to use SC Code 24-13-100 and 24-13-150(A), an unconstitutional application to appellant's Sentence as its substantial evidence standard and as a matter of law for its classification purposes?

STANDARD OF REVIEW: SC Code 1-23-610(B) states: "A decision of the administrative tribunal can be overturned due to unsupported substantial evidence or controlled by some error of law. The ALC Judge's duty was to reject the respondent's statutory interpretation as substantial evidence. for it leads to an absurd result clearly intended by the legislative. See Bay Bell Constr. Co v. Sch. Dist of Greenville County 331, SC 19, 26, 501 S.E. 2d 725, 729 (1998). (However plain the ordinary meaning of the words used in the statute may be, the courts will reject that meaning, when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by legislature...") In this situation the true purpose and intentions of the legislature will prevail over the literal import of the words.

Statutes as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design and policy of lawmakers. See Moon v. City of Greer, 348 S.C. 184, 188, 558 S.E.2d 527, 529 (App. Ct. 2002), State v. Taub 519 S.E.2d 797 (App. Ct. 1999) State v Smith 330 SC 237 (1998), State v. Tisdale 467 S.E.2d 270 (Ct. App. 1996)

The legislatures intentions are for SC Code 44-53-375(C) and -370(e)(2) to have its own enhancement from a first, to a

second, to third or subsequent offense by the weight of the controlled substances, additionally, appellant's sentencing sheet does not state or provide no parole. As such, the ALC ruling in favor of SCDC/respondent is incorrect. The statutes SC Code 24-13-100 and-150(A) is unreasonable in its application and unconstitutional to appellant's sentence. The fact that a given law of procedure is efficient, convenient and useful in facilitating functions of Government, standing alone will not save it if it is contrary to the constitution, see INS v. Chadha 462 U.S. 919, 103 S.ct. 2764 (1983). for the appellant asserts that his liberty interest was created by SC Code 44-53-375(C), -375(F) to parole eligibility, work release, good conduct credits, work credits, education credits, and supervised furlough. The appellant's Due Process, U.S.C.A. 14th amendment rights are being violated and that appellant is entitled to equal protection of the law.

The decision of the ALC should be overturned because it is controlled by error of law.

ARGUMENT

UNder SC Code 44-53-375(c), -375(f) and 44-53-370(e)(2) are the sentences not carrying the mandatory, or mandatory minimum of not less than 25 years, Et. all, required to serve 85% and are these sentences entitled to parole eligibility because of severability of an unconstitutional application to a parolable offense?

STANDARD OF REVIEW: Federal rules of Civil Procedure 54(c) provides that a final judgement should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings. Courts held that if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is "proper" See Citizens United v. Federal Election Commin 558 US 310, 333, 130 S.Ct 876 (2010), the ALC did not do so. Additionally, a severability clause in a statute is merely an aide not an inexorable command, See whole Woman's Health v. Hellerstedt. 136 S.Ct. 2292, 195 L.Ed. 665 (2016). For if a severability clause could impose such a requirement on the courts, legislature would easily be able to insulate unconstitutional statutes from most facial review. When a part of a statute is held to be unconstitutional, the question whether other parts of the statute must go. If a statute says that provisions found to be unconstitutional can be severed from the rest of the statute, the valid provisions are allowed to stand. The courts have already repealed SC code 24-13-100 and -150(A) to sentences that carry the possibility of greater than 20 years. Here, the applicant's sentence is already presumed parole eligible See State v. Taub 519 S.E2d 797 (1999), when a presumption

of severability arises, the party asking the courts to strike down a portion of the statute must present "strong evidence" that congress would not have enacted the challenged portion of the statute in the unconstitutional provision. The strong evidence is within the statutes of SC Code 44-53-375(C), -375(F) and -370(e)(2) for these statutes have explicit language, stating legislature's instructions on sentencing. It is clear that first and second offenders are already parole eligible and attachment of SC Code 24-13-100 and -150(A) is unconstitutional and as such severability arises (seperation of powers) State v. Taub 519 S.E.2d 797, 800-801 (1999), State v. Tisdale 321 S.C. 153 (1996).

SC Code 44-53-375(f) provides legislative proof that the intent of the legislature of SC Code 44-53-375(c) and -370(e)(2) have self contained enhancement ladder for sentencing purposes, that "Not eligible for parole" is clear from only the mandatory or mandatory minimums and as such the language provides first and second offenses are not precluded from receiving parole eligibility. A clear and reasonable reading of -375(f), -375(c), and -370(e)(2) shows how the statutes conflict with the later and general statutes of SC Code 24-13-100 and -150(A). See State v. Tisdale 321 SC 153 (1996). Furthermore, -375(F), -375(C), and -370(e)(2) determine enhancement of the offense according to the weight of the amount of controlled substance, for the punishment increases and the provisions decrease as the weight of the substance increases, as such is the operative meaning leading up to no parole as the legislature intended.

Offenses carrying the mandatory and mandatory minimum language of not less than 25 years, Et. all, do harmonize with statutes 24-13-100 and -150(A). But the appellant's sentence, SC Code 44-53-375(c)(1)(b) does not have the mandatory language, thus it does not apply. The appellant contends that he is entitled to parole eligibility and the other provisions, that are being withheld unconstitutionally because of the SC Code 24-13-100 and -150(A) application.

When a defendant is sentenced under a statute that is specific in nature, and that statute specifically deals with how an offense under that statute is to be enhanced from first to second or a subsequent offense, the provisions of that statute control over the more general statutes such as SC Code 24-13-100 and -150(A) See State v. Tisdale 321 S.C. 153 (1996); State v Taub 519 S.E.2d. 797, 800-801 (1999).

The plain language of the legislative intent must be construed in favor of the appellant and most strictly against the state. For the invalid parts of statutes 24-13-100 and -150(A) must be dropped without affecting the remainder thereof if valid is fully operative to the law. See Champlin Refining Co v. Corporation Comm'n of State of Okl 286 U.S 210 (1932).

The appellant is asking the courts to repeal 24-13-100 and 24-13-150(A) so that the statutes be construed in such a matter as to avoid a constitutional question wherever this is possible. See Eaton v. Davis 176 VA 330, 339, 10 S.E.2d. 893 (1940).

In that context, the court must narrowly construe a statute where such a construction is reasonable and avoids a constitutional infirmity. See Pederson v. City of Richmond 219 VA 1061, 1065, 254 S.E.2d 95 (1979). See McClurg v. Denton 395 SC 85, 716, S.E.2d. 887 (2011). Making the appellant not required to serve 85% of his sentence before parole eligibility.

CONCLUSION

The appellant requests to receive his parole eligibility, good conduct credits, earned work credits, earned education credits, work release, and supervised furlough.

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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

[IN THE SUPREME COURT]

APPEAL FROM RICHLAND COUNTY

ADMINISTRATIVE LAW COURT

Deborah Durden, Administrative Law Judge

Case No. 18-ALJ-04-0095-AP

Damon T. Brown 357300 Appellant,

v.

South Carolina Dept. of Corrections Respondent

Appellate Case No. 2018-001981

PROOF OF SERVICE

I certify that I have served the Initial Brief on Respondents by depositing a copy of it in the United States mail, postage prepaid on January 28, 2019, addressed to South Carolina Dept. of Corrections attorney of record Christina C. Bigelow at 4444 Broad River Rd, Columbia, SC 29221 and upon Jenny A. Kitchings, clerk of South Carolina Court of Appeals, PO Box 11629 Columbia, SC 29211.

Date of Proof of Service: January 28, 2019

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RE: Damon T. Brown 357300
Appellant, v. S.C.D.C., Respondent
Appellate Case No. 2018-001981

Dear Mrs. Kitchings,

I am required by Rule 209 (SCAR) to file a designation of matter with my initial brief.

I desire to have: KCI 0009-17 grievance (1 and 2), Appellant's initial brief and exhibits, reply brief (ALC court), General Counsel's initial brief, order from Honorable Deborah Durden, ALC Judge.

I Damon T. Brown 357300 certify that the above designation of matters is relevant to Appellant's appeal.

Date of proof of service: January 28, 2019

Damon T. Brown 357300
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cc: Christina C. Bigelow, Esquire
General Counsel SCDC

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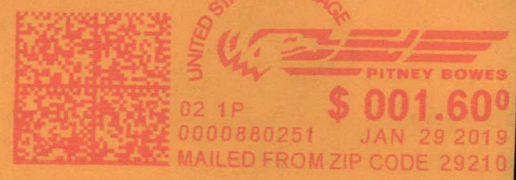

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