STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Spencer Utsey, #192660, Appellant, vs. South Carolina Department of Corrections, Respondent.	)	Docket No. 18-ALJ-04-0259-AP **ORDER OF DISMISSAL**

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to the Notice of Appeal filed by Spencer Utsey (Appellant), who is incarcerated with the South Carolina Department of Corrections (SCDC or Department). The Appellant is serving a thirty year sentence for a 1999 Armed Robbery conviction in violation of S.C. Code Ann. § 16-11-330(A), a Class A felony, which is further defined as a "no parole" offense under S.C. Code Ann. § 24-13-100 (2007).[1] The "no parole" designation means that an inmate convicted of such an offense must serve "at least eighty-five percent of the actual term of imprisonment imposed." S.C. Code Ann. § 24-13-150(A) (2007).

Appellant filed his Step 1 grievance arguing that under *Bolin v. S.C. Department of Corrections*, 415 S.C. 276, 781 S.E.2d 914 (Ct. App. 2016) his own sentence for Armed Robbery should no longer be subject to the 85% requirement. In *Bolin*, the South Carolina Court of Appeals recognized that § 24-13-100 had been impliedly repealed for certain drug offenses by a later statute such that inmates convicted of those defined drug offenses were no longer subject to the 85% requirement. *Id.*, 276 S.C. at 282-3, 781 S.E.2d at 917.

Appellant's Step 1 Grievance was denied by prison officials who responded that his sentence was calculated correctly. The Appellant's Step 2 Grievance was similarly denied. Appellant filed his appeal with this Court on May 21, 2018 and submitted his brief on June 5,

[1] S.C. Code Ann. § 16-1-90(A) defines Appellant's offense as a Class A felony and sets the maximum term of imprisonment for the same as not more than 30 years.

2018. The Department filed the Record on Appeal on August 10, 2018. [2] On September 21, 2018, the Department filed a Motion to Dismiss (Motion) along with its substantive brief, alleging that the Appellant's case should be dismissed on the basis of *res judicata* because it is the same as an appeal he filed with the ALC in *Utsey v. South Carolina Department of Corrections*, Docket No. 16-ALJ-04-0707-AP (February 23, 2017) (hereinafter "2017 Order"). The Appellant filed a return to the Department's Motion on October 2, 2018 opposing the relief, asserting that that there are differences in the two cases which makes *res judicata* inappropriate. The Court denies the Department's motion for dismissal based on *res judicata*. [3] Nevertheless, the Court finds the 2017 Order to be persuasive authority.

In the 2017 Order, the ALC ruled, in pertinent part, that:

> This statute [§16-11-330(A)] has not been amended since 1996. Therefore, any changes to Appellant's sentence or sentence calculation would have to be effected by another statute or case law. Section 16-1-90 classifies Appellant's offense as a Class A felony. Class A felonies are subject to Section 24-13-100 (footnote omitted), which defines Class A, B and C felonies as "no parole offenses." In Bolin, the Court of Appeals construed specific language in a drug offense statue that repealed Section 24-13-100, *only* insofar as it conflicted with the drug statute's special provisions because of the phrase "notwithstanding any other provision of law." The drug statutes containing the "notwithstanding" provisions have no bearing

[2] In response to the Record, on August 14, 2018, the Appellant filed what he captioned as a Motion to Object to the State's Discovery" contending that the Record was incomplete and contained "no denials of the allegations/reasons within Grievance #MACCI 10-18..." The Court denies the Appellant's motion.

[3] At first glance, it would seem *res judicata* would bar the Appellant's appeal. See, *Plum Creek Development Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) ("To establish *res judicata*, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.") The parties here are the same parties before the ALC in the 2017 Order and the subject matter is the same inasmuch as the Appellant again, as he did previously, argues that *Bolin's* recognition of the implicit repeal of § 24-13-100 for certain drug offenses translates into a repeal of this statute for his offense of Armed Robbery. Finally, the 2017 Order did adjudicate the issue – the 2017 Order rejected Appellant's argument made therein that § 24-13-100 had been repealed for the purposes of his conviction. However, this matter is before the Court in its appellate capacity. See, *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000) and the Court's review is, therefore, limited to the record. *Res judicata* is an affirmative defense that should not be raised for the first time on appeal. See, *Delta Apparel v. Farina*, 406 S.C. 257, 750 S.E.2d 615 (Ct. App. 2013) (stating that a party cannot raise the affirmative defense of *res judicata* for the first time on appeal.) While mindful of the flexibility and lack of formality in the inmate grievance proceedings below, the Court believes it is, nevertheless, constrained by the rules on issue preservation. See, *Wilder Corporation v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but that must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Home Medical Systems, Inc., v. South Carolina Department of Revenue*, 382 S.C. 556, 563, 677 S.E.2d 556, 586 (2009) ("As in other appellate matters, we require issue preservation in administrative appeals.")

> on Appellant's case because he was sentenced for armed robbery under a completely separate statute. Therefore, Section 24-13-100 remains in full effect [for Appellant's sentence]. (emphasis in original)

The 2017 Order correctly addressed the legal question presented to the ALC at that time. In his brief in the instant action, Appellant cites to *Bolin* for the proposition that §24-13-100 has been repealed to allow him to escape the 85% requirement for his sentence on the conviction for Armed Robbery under §16-11-330. However, *Bolin* recognized the General Assembly's intent to repeal § 24-13-100 only with regard to certain drug offenses under S.C. Code Ann. § 44-53-375. The Appellant's conviction under § 16-11-330 is not affected by *Bolin*. The Appellant has not cited any intervening appellate court decision which alters the rationale used in the 2017 Order and points to no statutory amendment which impacts the issue. Further, the Court has not been able to discern any change in the law in this regard. Without more, then, the instant appeal is controlled by the legal reasoning cited in the 2017 Order, and the same result must be reached. [4]

Appellant cites to *Motors Insurance Corporation v. State, et al.*, 313 S.C. 279, 437 S.E.2d 555 (Ct. App. 1993) and *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993) to argue that because the Department failed to deny the allegations in his Step 1 and Step 2 grievances that § 24-13-100 has been repealed as to him, those allegations have been deemed admitted. While this is generally a correct statement of the law as it relates to pleading in the court of common pleas, the Court is not persuaded that it has any applicability here. As pointed out by the Department in its brief, both Appellant's Step 1 and Step 2 grievances were appropriately denied by the prison officials.

Therefore, for the foregoing reasons the decision appealed from is affirmed and this appeal is hereby **DISMISSED, WITH PREJUDICE.**

March 7, 2019
Columbia, SC

Milton G. Kimpson, Judge
South Carolina Administrative Law Court

Certificate of Service
This is to certify that the undersigned has this date served this order in the above-referenced 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 7 day of March, 2019
By: [illegible]

[4] The Court is not aware whether the Appellant sought to appeal the 2017 Order to the South Carolina Court of Appeals. Filing an appeal of that order would have been the proper vehicle to challenge that ruling instead of filing a new inmate grievance. While the Court declined to dismiss this case based on *res judicata*, the Appellant should be mindful that absent a change in law, filing duplicative appeals raising the same issues may result in such actions being declared frivolous. Pursuant to SCALC Rule 62, if the "presiding judge determines that the appeal is frivolous ..., the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct may require."