

Board to grant parole. On June 3, 1986, an amendment to § 24-21-645 requiring a two-thirds vote to authorize parole for violent crimes went into effect as part of the Omnibus Criminal Justice Improvement Act of 1986. Appellant was convicted of the offense in August 1986, after the two-thirds requirement became effective.² Appellant claims that the Board violated the constitutional prohibitions against ex post facto laws by not using the correct version of § 24-21-645.

ISSUE ON APPEAL

Did a quorum of the Parole Board apply the version of S.C. Code Ann. § 24-21-645 in effect prior to 1986, which requires a majority of the Board to authorize parole?

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. *Id.* at 598, 149 n. 4. Therefore, the ALC may summarily dismiss claims arising from the Board's decision denying parole. The ALC will review claims that the Board failed to consider the appropriate criteria so as to be tantamount 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).

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

² The law existing at the time of the offense, and not at the time of the sentencing determines whether an increase of punishment or reduction of benefits constitutes an ex post facto violation. *Elmore v. State*, 305 S.C. 456, 459, 409 S.E.2d 397, 399 (1991).

- (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.

S.C. Code Ann. § 1-23-380(5) (Supp. 2017).

The Parole Board lawfully denied Appellant's parole application.

Appellant argues that the Board did not use the version of the statute in effect at the time he committed the offense for which he is incarcerated.

The South Carolina Supreme Court has stated that “[a]n *ex post facto* violation occurs when a change in the law retroactively alters the definition of a crime or increases the punishment for a crime.” *Jernigan v. State*, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000) (citations omitted). If the change in law only produces a “speculative and attenuated possibility” of increasing inmate’s punishment, then there is no *ex post facto* violation.” *Barton v. S.C. Dep’t of Prob., Parole and Pardon Servs.*, 404 S.C. 395, 403, 745 S.E.2d 110, 114 (2013) (citing *Jernigan* at 261, 531 S.E.2d at 509). Also, a change in the law does not violate the *ex post facto* clause if it only affects a mode of procedure and does not alter substantial personal rights. *State v. Huiett*, 305 S.C. 169, 172, 394 S.E.2d 486, 487 (1990).

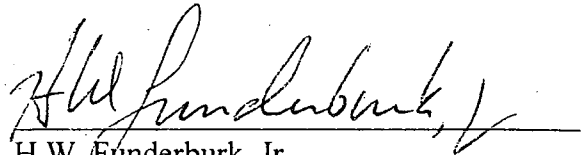
In *Barton* the Supreme Court held that, in the absence of a statutory provision to the contrary, “the common-law rule that a majority of the whole board is necessary to constitute a quorum applies” to the Parole Board. *Id.* at 417, 122. In this case, six members of the Board participated in the decision. That is a legal quorum. As indicated in *Barton*, the controlling version of § 24-21-645 is the version in effect at the time Appellant committed the offense. *Id.* at 403, 114. Appellant argues and Respondent admits that, in this case, that means a majority of the participating Board members is required to authorize parole. However, in this instance the six participants split, three for parole

and three against.³ This constitutes a valid vote by a quorum of the Board. Since Appellant did not obtain the majority required for parole to be granted, parole was properly denied.

ORDER

IT IS THEREFORE ORDERED that the Board's decision denying the Appellant parole is **AFFIRMED**.

AND IT IS SO ORDERED.



H.W. Funderburk, Jr.
Administrative Law Judge

February 26, 2019
Columbia, South Carolina

RE

FILED

FEB 26 2019

SC ADMIN. LAW COURT

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy herof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party, (est) or their attorney(s).

This 26th day of February, 2019

By: [Signature]

³ The Board decision was not included in the Record on Appeal but was attached to Appellant's notice of appeal and referenced by both parties in their respective briefs. Therefore, its contents are not in dispute.