THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Judge H.W. Funderburk, Jr.

RECEIVED
MAY 02 2019
SC Court of Appeals

Case No. 2019-000532

CHARLES TYSON, #113360..APPELLANT

V.

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

RECORD ON APPEAL

Charles Tyson
Appellant, pro-se

Lee Correctional Institution
990 Wisacky Hwy
Bishopville, SC 29010

/.

RECEIVED
APR 08 2019
SC Court of Appeals

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Judge H. W. Funderburk, Jr.

Case No. 18-ALJ-150030-AP

Charles Tyson,

Appellant

v.

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

NOTICE OF APPEAL

Charles Tyson appeals the order of the Honorable H.W. Funderburk dated February 26, 2019. Appellant received written notice of entry of final order on March 1, 2019.

Charles Tyson

Charles Tyson #113360
Lee Correctional Inst.
990 Wisacky Hwy
Bishopville, SC 29010

cc:
Tommy Evans, Jr. Assistant General Counsel
Department of Legal Services
PPPS
PO Box 50666
Columbia, SC 29250

FILED
APR 08 2019
SC ADMIN LAW COURT

3.

RECEIVED
MAR 29 2019
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Administrative Law Court
Judge H.W. Funderburk
Case: 18-ALJ-150030-AP

Notice of Appeal

Charles Tyson Appellant do hear by Appeal the finale decision of the Administrative Law Court Case; decided February 26, 2019. Appellant received notices of the finale decision on March 1, 2019 and hear by attaching a copy of the finale decision to this notices.

Charles Tyson

FILED
MAR 29 2019
SC ADMIN LAW COURT

3.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Case No.18P030

Charles K.B. Tyson, #113360, Appellant,	)	
v.	)	BRIEF OF APPELLANT
S.C. Dept. of Probation, Parole and Pardon Services Respondent.	)	

Mr. Charles Tyson, SCDC# 113360
Perry Correctional Institution
430 Oaklawn Road
Pelzer, South Carolina 29669

Appellant

FILED
JAN 02 2019
SC ADMIN. LAW COURT

STATEMENT OF ISSUES

ISSUE I

WHETHER SCDPPPS LACKS AUTHORITY OR JURISDICTION TO GRANT OR DENY APPELLANT PAROLE WHERE THE AUTHORITY OR JURISDICTION IS BASED UPON A STATE COURT JUDGMENT THAT IS VOID AS A MATTER OF FEDERAL AND STATE LAW?

ISSUE II

WHETHER SCDPPPS VIOLATED STATE AND FEDERAL EX POST FACTO CLAUSE WHEN IT DENIED APPELLANT PAROLE USING CRITERIA THAT WAS NOT LAW IN 1981?

ISSUE III

WHETHER SCDPPPS VIOLATED PROCEDURAL DUE PROCESS WHEN IT DENIED APPELLANT PAROLE WITHOUT FIRST GIVING ADVANCE NOTICE OF PAROLE CRITERIA?

STATEMENT OF THE CASE

Charles Tyson, SCDC# 113360 (Appellant) is a inmate incarcerated within the South Carolina Department of Corrections. On July 18, 2018 the South Carolina Department of Probation, Parole and Pardon Services (SCDPPPS) denied Appellant parole. Appellant received written notice of the denial on July 26, 2018. On August 22, 2018, Appellant wrote SCDPPPS requesting that it reconsider its earlier decision and grant him another hearing because SCDPPPS violated due process when it relied upon the wrong criteria for determining his parole worthiness, that the criteria relied upon violated state and federal ex post facto clause and that SCDPPPS fail to give advance notice of parole criteria. On September 21, 2018 Appellant received a letter from SCDPPPS dated September 18, 2018 stating that "there is no rehearing/appeal

process for the routine denial of parole; therefore, no action will be taken on your request." The letter does not state that it was the final decision of SCDPPPS, however, Appellant believed it to be and on October 17, 2018 filed Notice of Appeal.

BACKGROUND

Appellant was arrested on August 8, 1981. On October 29, 1981 the Florenec County grand jury indicted him for murder, armed robbery and aggravated resisting arrest. Appellant was convicted only for murder and armed robbery on Sunday September 19, 1982.

On September 21, 1982 the circuit court sentenced Appellant to life for the murder and 25-years for armed robbery. The armed robbery sentence was to run consecutively to the life sentence. At the time of Appellant arrest and convictions, South Carolina 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 SCDPPPS on April 28, 1999, after completing twenty years of his sentence through the award of earned work credits. SCDPPPS denied Appellant parole following that hearing and on sixteen subsequent occasions.

ARGUMENT I

THE DEPARTMENT LACKS AUTHORITY OR JURISDICTION TO GRANT OR DENY APPELLANT PAROLE WHERE THE AUTHORITY OR JURISDICTION IS BASED UPON A STATE COURT JUDGMENT THAT IS VOID AS A MATTER OF FEDERAL AND STATE LAW.

The record in this matter shows Appellant in a state court room on trial and subsequently being convicted for the crimes he is presently imprisoned for on September 19, 1982. See: Appellant Exhibit 1, Tr. p. 484 lines 3-6, Tr. p. 529 lines 1-25, Tr. p. 530 lines 1-25 and Tr. p. 531 lines 1-15. However, September 19, 1982 is a Sunday. See: Appellant Exhibits 2 and 3. A court judgment issued on a Sunday in the United States or in South Carolina is void.

A void judgment is a judgement that has no legal force or effect, the invalidity of which may be asserted by any party whose rights are affected at any time and any place, whether directly or collaterally. From its inception, a void judgment continues to be absolutely null. It is incapable of being confirmed, ratified, or enforced in any manner or to any degree. See: Black Law Tenth Edition page 973 Void Judgment. Also, under federal law which is applicable to all states, the U.S. Supreme Court stated 'that if a court is without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to recovery sought even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgment or sentence, are considered in law, as trespassers." <u>Ellot v. Piersol</u>, 1 Pet. 328, 340, 26 U.S. 328, 340 (1828). "A judgment rendered in violation of due process is void in the rendering State and is not entitled

to full faith and credit elswhere. Pennoyer v. Neff, 95 U.S. 714, 732-33 (1878)." "Void judgment is one where court lacked personal or subject matter jurisdiction or entry of order violated due process. 5-Triad Energy Corp. v. McNell, 110 F.R.D. 382 (S.D.N.Y. 1986).

The U.S. Supreme Court in Ball v. United States, 140 U.S. 118, 11 S.Ct. 761 (1891)(held that "[I]f this could be regarded as the judgment of the court, it was void because entered on Sunday.")(Citing) Mackalley's case, 5 Coke 111; Swann v. Broome, 3 Burrow, 1595; Baxtar v. People, 3 Gilm. (8Illinois) 368; Chapman v. State, 5 Blackford, 111. (The question presented by this record is; "Could the justice examine and decide the cause on a Sunday? Our answer is, that he could not. Sunday is dies non jurisdicus; and by the common law all judicial proceedings which take place on that day are void)). However, in South Carolina, where courts are directed to sit two weeks, if the jury, having retired to consider of their verdict before midnight of Saturday in the first week, return into court after midnight and before daylight of Sunday, their verdict may be received and publish. Hiller v. English, 4 Strob, 486 (S.C. App. L. 1848). "If a verdict is delivered in on Sunday morning after the expiration of the twelfth hour, it is void and will be good ground for a new trial, agreeable to the common law maxim, dies dominicus, non est dies jurisdicus. Shaw v. McCombs, 2 Bay 232 (S.C. Const. App. 1799). Dies non jurisdicus means; "A day exempt from judicial proceedings such as a holiday or Sunday. Black Law Tenth Edition page 550.

The State trial court did not have legal authority to set, return a verdict or issue judgment on Sunday September 19, 1982. According to federal law it is unconstitutional for the state court to have done so. Ball v. United States supra. Therefore, according to federal and state law the judgment of that court is void. Likewise, the Department lacks authority or jurisdiction to grant or deny Appellant parole, that is because the power to do so rest upon a state court judgment that is void. Without said void judgment..., Appellant wouldn't even be in SCDC to appear before SCDPPPS for a parole hearing.

ARGUMENT II

THE SCDPPPS VIOLATED STATE AND FEDERAL EX POST FACTO CLAUSE WHEN IT DENIED APPELLANT PAROLE USING CRITERIA THAT WAS NOT LAW IN 1981.

Prior to Appellant arrest the S.C. State Legislature amended the 1976 parole statute with ACT 100, 1981. (ACT 100). ACT 100 went into effect on June 15, 1981.

Section 12 of ACT 100 amended S.C. Code Section 24-21-640 mandating that SCDPPPS establish written, specific criteria for the granting of parole and provisional parole. ACT 100 further mandated what the criteria was to be, therefore mandating what SCDPPPS could consider and or review during Appellant parole hearing(s). ACT 100 only allows SCDPPPS; "to carefully consider the record of Appellant before and after his imprisonment for the purpose of determining whether he has; 1." shown a disposition to reform; 2. that in the future he will probably obey the law and lead a correct life; 3. that by his conduct he has merited a

lessening of the rigors of his imprisonment; 4. that the interest of society will not be impaired thereby; 5. and that suitable employment has been secured for him." See Appellant Exhibit 4, p. 341-342. Appellant contends that it is this 1981 criteria mandated by ACT 100 that SCDPPPS is suppose to use during his parole hearing/reviews and not its 2017 criteria. ACT 100 criteria only allows SCDPPPS to use (5) specific criteria in their review process, whereas the 2017 criteria allows (16) and any other criteria SCDPPPS likes. See Appellant Exhibit 5; such as the "attitudes of the sentencing judge, the solicitor, local law enforcement, the feelings of the victims family, an actuarial risk and needs assessment as outlined in S.C. Code of Laws § 24-21-10 (F)(1). The 2017 criteria also allows SCDPPPS to use a victim Impact Statement, as well as allowing alleged victims and other State Agents to appear, make statement's without allowing Appellant an opportunity to respond and refute such statements. See Appellant Exhibit 6, which is a copy of Appellant 2018 parole hearing. On this CD, the court will hear SCDPPPS ask Appellant to step out of the hearing room and then people identifying themselves as victims/witnesses, and victims advocate. The application of the 2017 criteria constitutes a ex post facto violation because it came into play after Appellant crime and conviction and changes the reviewing process, causing it to be more onerous than those in place at the time of committed offence. Himes v. Thompson, 336 F.3d 848 (2003).

The United States and South Carolina Constitution prohibits the passage of ex post facto laws. U.S. Const. art 1, §§ 9, 10; S.C.

Const. art 1 § 4. A measure is an ex post facto law when it 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). The ex post facto clause applies by its terms to "law." As such, the clause reaches "every form in which the legislative power of a state is exerted," including "a regulation or order." Ross v. State of Oregon, 227 U.S. 150, 162-63 (1913). The relevant inquiry regarding an increase in punishment is whether a legislative amendment "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." Id. (quoting Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 509 (1995). However, Appellant is entitled under ex post facto clause to have SCDPPPS grant or deny parole on factors as they existed at time of arrest. Mickens-Thomas v. Vaughn, 321 F.3d 374 (3rd Cir. 2003).

ARGUMENT III

THE SCDPPPS VIOLATED PROCEDURAL DUE PROCESS WHEN IT DENIED APPELLANT PAROLE WITHOUT FIRST GIVING ADVANCE NOTICE OF PAROLE CRITERIA.

ACT 100 mandate SCDPPPS to provide "Advance Notice" of parole criteria. Exhibit 4, p. 334. Section 12 of ACT 100 Section 24-21-640 mandate SCDPPPS to establish written, specific criteria for the granting of parole... and make it available to all prisoners at the time of their incarceration and the general public. Exhibit 4, p. 342. Prior to Appellant 2018 parole hearing SCDPPPS provided him with a form entitled "Criteria For Parole Consideration." This form was created in 2017 and given for the first time on 3-23-18. Exhibit 5. Appellant contends that this form and the date given to him does not comport with the mandates

of ACT 100 Section 12 Section 24-21-640, because it was not provided to Appellant in advance ie when he entered SCDC in 1982. The failure to provide the criteria when he entered SCDC violates procedural due process as mandated by the 14th Amend U.S. Const. It also deprives Appellant of "Notice" of the criteria. In this case Appellant has been force to serve 37-years of a parolible life sentence without ever knowing what the criteria was. In Franklin v. Shield, 399 F.Supp. 309 (W.D.Va 1975) and Franklin v. Virg,Pro,Parol,Bd, 569 F.2d 784 (4th Cir 1978) the court address the advance notice issue and held that the failure to give it was cruel, inhuman and frustrating. The courts also held that the due process clause requires advance notice of parole criteria. Id.

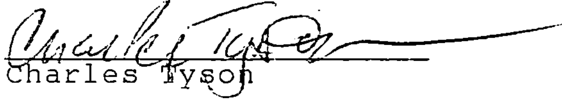
CONCLUSION

For all the reason(s) stated SCDPPPS lacks authority or jurisdiction, violated ex post facto clause and failed to give advance notice.

RELIEF SOUGHT

That the court reverse SCDPPPS, order the release of Appellant on parole forthwith, with an order to terminate the parole once he is release.

Respectfully submitted



Charles Tyson

CC: FILE

FILED
JAN 02 2019
SC ADMIN. LAW COURT

1 COURT: All right, then. We will be in recess until
2 9:30 in the morning.
3 (Court was recessed for the evening at 5:35 p.m.
4 Commencing at 9:30 a. m., September 19, 1982, prior to the
5 jury's return to open court, the following proceedings were
6 had:)
7 COURT: Gentlemen, first off this morning, our chief
8 bailiff wants to apprise us of a conversation that a juror
9 had with him. All right, sir, come forward and just tell
10 us what the juror said?
11 SLED AGENT RAY SHUPE: As I was leaving the courthouse
12 yesterday after recess, Carl Alexander came up to me and said
13 that he wanted to ask me a question, and I told him to go
14 ahead. He said that the last two witnesses that testified
15 live right across the street from him, and that he knew them
16 and that they delivered the paper in the neighborhood. I
17 asked him at the time, "Do you think that would affect your
18 consideration in this case?" He said, "I don't know." We
19 were loading up, and as we got in the car I told him, "We
20 won't discuss it any more, I'll just bring it to the atten-
21 tion of the judge this matter we were talking about and let
22 him make the decision." He said, "Well, they just live in
23 the neighborhood and I know 'em, and they deliver the paper."
24 And about that time, Mr. Timmons, who was sitting in the back
25 seat, said, "I know 'em too." He said, "They deliver papers

1 MR. STROBEL: Your Honor, can we examine the box
2 (referring to box of exhibits)?
3 COURT: Certainly. Go ahead and take a look at it.
4 MR. STROBEL: Your Honor, might I ask what is on the
5 back of that (referring to State's Exhibit 1, the diagram of
6 the scene)?
7 COURT: I don't know what that is. Let me see it,
8 please? On the back of this diagram are some drawings. It's
9 obviously where they had started to draw the scene and then
10 decided they would draw it on the other side. Is there any
11 objection to what's on the back? It doesn't appear to be
12 anything other than just a false start.
13 MR. STROBEL: Let the record reflect that there is
14 no objection by Mr. Tyson.
15 COURT: All right then. Go ahead and please take them
16 on in?
17 (At 2:18 p. m., the exhibits and indictment were de-
18 livered to the jury room, with instructions the jury could
19 commence deliberations.
20 (WHEREUPON, at 4:10 p. m., the jury returned to open
21 court to report its verdict.)
22 CLERK: Mr. Foreman and ladies and gentlemen of the
23 jury, have you reached a verdict?
24 FOREMAN: Yes, sir.
25 COURT: You can publish it, sir.

1 CLERK: The State v. Charles Tyson, indictment for
2 murder and armed robbery. Verdict: Count 1, Guilty;
3 Count 2, Guilty. Signed, Willie R. Timmons, Foreman.
4 Mr. Foreman and ladies and gentlemen of the jury, is
5 this your verdict, so say ye all?
6 (All responded affirmatively.)
7 COURT: Do you desire to have the jury polled?
8 MR. HINNANT: We do, Your Honor.
9 COURT: All right, sir. What that means, ladies and
10 gentlemen, is this. The clerk is going to ask you a ques-
11 tion--he'll call out each of your names and he'll say words
12 that mean this: Was this your verdict when you were in the
13 jury room, and is it still your verdict, or it will be words
14 to that effect. And then, just answer yes or no.
15 (Each juror was polled as to each count, whereupon
16 all responded in the affirmative.)
17 COURT: Mr. Foreman and ladies and gentlemen of the
18 jury, I'll ask that you go back to your jury room for just a
19 few minutes.
20 (In the absence of the jury, the following proceedings
21 transpired:)
22 COURT: The jury having found the defendant guilty,
23 our law provides that there will be a separate proceeding
24 relative to the matter of sentence. The law provides that
25 the second proceeding be held as soon as practicable after

1 the lapse of 24 hours, unless it is waived by the defendant.
2 Now, I would ask whether or not the defendant desires to
3 wait the 24 hours, or to proceed with that hearing in the
4 morning or at some other time short of 24 hours?
5 MR. STROBEL: He will not waive it, Your Honor.
6 MR. HINNANT: Your Honor, should I make the usual
7 motions at this time? I'm prepared to.
8 COURT: Yes, sir, that will be fine. Let me get this
9 part out of the way though? As I understand it then, now
10 24 hours would, of course, be 4:15 tomorrow afternoon. Is
11 it your desire to start at 4:15 to begin with the hearing,
12 or to wait until Tuesday morning?
13 MR. STROBEL: Tuesday morning; yes, sir.
14 COURT: All right then, we will begin that Tuesday
15 morning. Now Mr. Hinnant, I'll hear from you?
16 MR. HINNANT: Your Honor, at this time we would move
17 for a new trial or, in the alternative, judgment n.o.v., on
18 the ground that the verdict was unsupported by the evidence.
19 Of course, we renew all previous motions. We feel that there
20 was no instruction as to felony murder; lacking an instruc-
21 tion as to felony murder, we feel that they would not have
22 sufficient instruction or evidence to come in with a murder
23 conviction.
24 COURT: I deny your motions. I find there was suf-
25 ficient evidence from which the jury could base its verdict

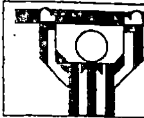
September 1982

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

calendarlabs.com

NewsBank
News Article - State (published as The State) - September 19, 1982 - page 1
September 19, 1982 | State (published as The State) | Columbia, South Carolina | Page 1

Tyson v. SCDPPPS Case No. 18P030



Duke 30	Ga. Tech 36	Furman 27	Lenoir-Rhyne 7	Gardner-Webb 29
USC 17	Citadel 7	Appalachian 21	Wofford 3	Newberry 7
Clemson 17	S.C. State 27	PC 17	N.C. State 30	UNC 34
BC 17	N.C. A&T 6	Mississippi Col. 16	Wake Forest 0	Vanderbilt 10

Weather

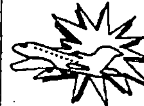
Partly cloudy with a chance of showers. Lows mostly in the 60s and highs in the 80s. Sunrise, 7:10; sunset, 7:26. Details on 19-C.

The State

South Carolina's Largest Newspaper

91st Year — No. 261 •• Columbia, South Carolina — Sunday, September 19, 1982 • 9 Sections — 170 Pages

Inside



Unpredictable Death From The Sky

"Wind shears," a weather phenomenon that pilots encounter often without warning at low altitudes and with little chance of surviving, are linked to some of the nation's worst air tragedies. 1-B.

MUSC Takes Inventory Again

After going 42 years without taking an inventory and after being stung by a series of state and federal complaints about its property management system, the Medical University of South Carolina is beginning to get its economic house in order. The third inventory in the last two years is now underway at the Charleston school. 1-C

Multinationals And Power Limits

The Siberian pipeline embargo is providing the Reagan administration with a lesson in limits on its power in an international economy dominated by multinational firms. 1-F

Foundation Laid For Future House

It's not as grim as it sounds, but the house of tomorrow might have a lot in common with the very first dwelling — the cave. 1-E

Index

Classified	7-F
Crossword	2-E
Editorials	2-B
Living	1-E
Horoscope	2-E
Sports	1-D
Television	TV Weekly
Theaters	17-C

Deaths

Mrs. Emma C. Brewer, Anderson.
Angela E. Charping, Anderson.
Ernest B. Craps, Leesville.
Michael B. Crawford, Anderson.
Mrs. Frances R. Fairey, Orangeburg.
Barton W. Fordham Sr., Beaufort.
Mrs. Jacie W. Garvin, Aiken.
Mrs. Annie W. Gaston, Rock Hill.
Mrs. Maude R. Gillespie, Greer.
Mrs. David Gilmore, Columbia.
Ralph L. Hewitt, Georgetown.
Mrs. Bertie J. Jones, Columbia.
Elzie C. Jones, Orangeburg.
George McCutchen Jr., Bishopville.
Mrs. Winifred S. Miller, West Columbia.
Edward T. Morris, Manning.
Mrs. Catherine D. Pfahler, North Myrtle Beach.
Dexter F. Quattlebaum, Batesburg.
Mark R. Ricard, Leesville.
Mrs. Kathleen E. Sentrell, North Augusta.
Murray B. White Sr., Fort Mill.
Mrs. Alberta G. Wilson, Great Falls.
James D. Wylie Sr., Rock Hill.
Rudolph Young, St. Matthews.

Details, 12-C, 14-C.

Former Protester, General Unite In Fight With CBS

By LEVONA PAGE

In the late 1960s a young Philadelphia native named Dan Burt was marching in protests against the war in Vietnam while the troops fighting that war were being led by Gen. William C. Westmoreland.

Burt, a Washington lawyer, and Westmoreland, retired in Charleston, now are united in battle — a $120 million libel suit against CBS for a program the general says portrayed him to 20 million viewers as a liar and a criminal.

CBS reported in a Jan. 23 special that at Westmoreland's direction, enemy strength purposely was underestimated to offset growing opposition to the Vietnam war.

"The issue here is not the war," Burt said in a telephone interview about the suit his law firm filed Monday. "The issue is whether Gen. Westmoreland is a liar and a criminal. CBS charged that he conspired and lied.

"I can't tell you too much about our strategy, but there will be a lot of talking about conspiracy. They already backed away from it, you know."

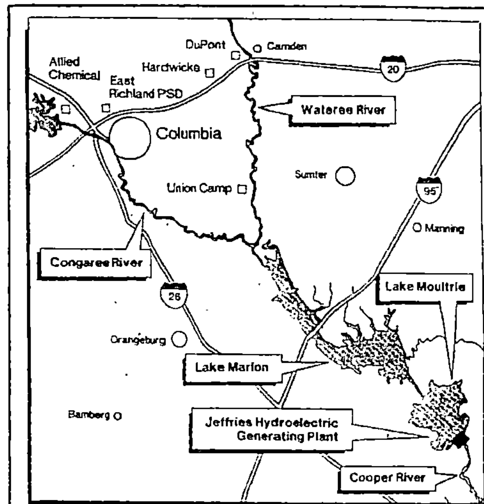
The CBS program began by telling viewers it would present "evidence of what we have come to believe was a conscious effort, indeed a conspiracy, at the highest levels of American military intelligence" to falsify the number of enemy in Vietnam just before the 1968 Tet offensive.

The 90-minute special pieced together comments by various Westmoreland subordinates who said they believed their commander didn't want their enemy strength estimates because the numbers were much higher than thought.

Quote from Gen. Joseph McChristian, Westmoreland's intelligence chief: *"And when General Westmoreland saw the large increase in figures that we had developed, he was quite disturbed by it, and by the time I left his office, I had the definite impression that he felt that if he sent those figures to Washington at that time, it would create a political bombshell."*

Quote from Col. George Hamscher: *"We can't live with a*

(See THE, 16-A, Col. 1)



Pair Of Created Lakes Play Crucial Environmental Role

First in a series

By HOWARD SCHNEIDER

Lakes Marion and Moultrie sprawl across the state's southeastern portion like a giant rough-hewn fossil.

Starting near the common border of Richland, Calhoun and Sumter counties, the two man-made lakes run down to the middle of Berkeley County, covering 170,900 acres with 522.7 billion gallons of freshwater.

Lake Marion alone, fed by rivers as far away as North Carolina's Catawba and including the Wateree and Congaree in South Carolina, annually accepts 241 trillion pounds of water from its tributaries and discharges an almost equal amount into Lake Moultrie and the Santee River.

Lake Moultrie, in turn, empties into the Cooper River, which, along with the Santee, runs on to the Atlantic Ocean.

Santee-Cooper

Together, Marion and Moultrie form an important part of what is called the Santee-Cooper basin — a complex lake and river system that winds through and nourishes a large portion of the Carolinas.

And, together, they play a crucial role in the environmental and economic health of South Carolina — a role that would have been hard to foresee when the lakes were created in the late 1930s.

As a source of recreation, tourism and electric power, the two lakes are directly responsible for millions of dollars in income and taxes, and probably thousands of jobs.

Because of their nature, they also aid the economy by accepting, so far with relatively little damage, a tremendous industrial and municipal wasteload.

(See SANTEE, 2-A, Col. 1)

Palestinian Civilians Massacred

By JACK REDDEN
United Press International

BEIRUT, Lebanon

Hundreds of Palestinian civilians were massacred in two refugee camps on the outskirts of Beirut, apparently by Lebanese Christian militiamen given control of the camps by Israeli occupation forces, reporters at the scene said Saturday.

Three United Press International reporters saw bullet-torn bodies piled in groups of 10 or more scattered through the ruins of the Sabra and Chatila camps.

It was impossible to get an accurate estimate of the total number of Palestinians shot to death at the camps because the bodies were strewn across several acres. It appeared the final toll would be well over 1,000.

THE RAMPAGE apparently began Friday. Reporters who tried to get into the camps early that day discovered the Israelis had turned them over to the militia of the Phalangists, the Israeli-allied Lebanese Christian group that has repeatedly threatened the Palestinians.

While Israeli soldiers manned positions on a hill less than a quarter mile away from the Chatila camp, the Phalangists apparently rounded up and killed everyone they could find.

At the United Nations, Palestine Liberation Organization representative Zehdi Labib Terzi claimed that as many as 1,500 civilians had been killed. He was still attending a U.N. session late Saturday and unavailable for further comment.

In Jerusalem, a senior Israeli official said the Lebanese army has agreed to move into the Chatila, Sabra and Fakahani Palestinian refugee camps on the outskirts of west Beirut at 10 a.m. this morning (2 a.m. EDT).

The official said the Israelis had turned back west Beirut's main financial street Saturday to the Lebanese but stressed this did not signal the start of an Israeli withdrawal as demanded by President Reagan and the United Nations.

The U.N. Security Council, after two hours of private consultations, convened an urgent meeting Saturday night to consider sending troops back into west Beirut to prevent further bloodshed.

Arab nations planned to ask that 5,900 U.N. troops in south Lebanon, members of the earlier peacekeeping force, be sent in to protect civilians and that the Council's five permanent members then send additional forces, according to Jordan's ambassador, Hazem Nuseibeh.

EARLIER, U.N. Secretary General Javier Perez de Cuellar agreed with an urgent appeal from the United States, France and Italy to send additional U.N. observers to west Beirut.

The Italian government asked that the French, Italian and U.S. peacekeeping force be reinstated, but the State Department said there was no contemplation "at this time" of sending U.S. forces back to Lebanon.

Palestine Liberation Organization leader Yasser Arafat, in an interview from Damascus, said intelligence reports showed Israelis — not militiamen — massacred the civilians.

"They (the Israelis) sent special commandos with guides only from (Lebanese army Maj.) Saad Haddad," he said.

Israeli officials expressed shock at the deaths but said they had prevented an even greater massacre. One senior Israeli official said, "The moment we heard what was going on, we moved to stop it," but he admitted he didn't know what time that was.

In Washington, Reagan expressed "outrage and revulsion" at the slaughter and said Israel had failed to carry out its promise to prevent such incidents.

At the Chatila camp Saturday, there were no guards or gunmen anywhere in the camp and no one left alive to tell what happened.

A spokesman for the Phalangist Lebanese Front, who asked not to be identified, said, "The Lebanese Front were never in the camps." Western reporters, however, saw Phalangists in the camps Friday.

The camps had been under the control of the regular Lebanese army until the Israeli advance on west Beirut three days ago in the aftermath of the assassination of Lebanese President-elect Beshir Gemayel, leader of the Phalangists.

Israeli military sources said the Israeli army moved forcefully to prevent violence and did not hesitate to open fire "even on extremist

(See HUNDREDS, 18-A, Col. 1)

World Bids Farewell To Princess Grace

By PETER OSNOS
Washington Post

MONTE CARLO, Monaco

Prince Rainier, his face puffy with grief, his cheeks wet with tears, bid farewell to his wife, Princess Grace, Saturday at an emotional funeral in the cathedral of their tiny realm on the Riviera.

For all the glamour of her public life and despite the live television coverage of this final page of the Grace Kelly story, the funeral seemed an intensely personal affair for Rainier and two of his children, Albert and Caroline.

Rainier attempted no pose of dignified remorse, instead letting the world see vividly the extent of his sorrow.

Just after 10 a.m. (4 a.m. EDT) on a sun-dappled morning, Rainier, with his children at his side, led a cortege from the family palace along the narrow Rue Bellando de Castro, followed by pallbearers drawn from the order of Black Penitents.

Only citizens and residents of Monaco were permitted to watch as the procession made its way the few hundred yards to the cathedral.

While his 24-year-old son Albert walked composed and erect, and his 25-year-old daughter Caroline dabbed at misty eyes, Rainier, looking a decade older than his 59 years, had to be gently assisted along the way.

Princess Grace died Tuesday, at 52, after suffering a stroke while driving on a hillside near Monte Carlo and tumbling down a ravine in her Rover 3500. Her 17-year-old daughter Stephanie was with her and remains in the hospital suffering from a cracked vertebra.

Misleading early reports, understating Princess Grace's injuries as well as other rumors about the circumstances of the accident had given events here last week an overheated quality of suspected scandal.

But police, doctors and the media now appear to be satisfied that the confusion arose largely from the shock of what happened and that nothing of importance remains to be uncovered about the incident.

So with speculation finally put to rest, what remained for the funeral Saturday was merely the tragedy of an untimely passing, the memory of a famous movie star and a gracious princess.

The 75-minute service was shorter than it might have been, apparently on Prince Rainier's orders. He was

(See PRINCE, 8-A, Col. 1)

Prince Rainier
Farewell to his princess

18.

STATE OF SOUTH CAROLINA
In the Administrative Law Court
Docket Number 18-ALJ-15-0030

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

CHARLES TYSON, #113360...APPELLANT

v.

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

BRIEF OF RESPONDENT

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

Argument

1. The Circuit Court has jurisdiction over the Appellant's case so this conviction was valid, thereby, giving the Parole Board the ability to determine parole..............................2

2. The consideration on the current criteria for the Appellant's parole does not violate ex post facto...3

3. The Appellant was given a copy of the criteria prior to his parole hearing, so there exist no violation of due process...6

Conclusion.. 7

30.

TABLE OF AUTHORITIES

CASES

Elmore v. State, 305 S.C. 456, 409 S.E.2d 397 (1991)....4,6

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

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2594 (1972)....6

State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (2003)....3

State v. Huiett, 302 S.C. 169, 394 S.E.2d 486 (1990)....5

State v. Tyson, 283 S.C. 375, 323 S.E.2d 770 (1984)....3

RULES

Rule 203(2)SCACR....3

CONSTITUTION

U.S. Const. Ament. V....2

STATUES

S.C. Code Ann. §16-1-60(1982)....3
S.C. Code Ann. §24-21-10(F)(1)(2018)....5
S.C. Code Ann. §24-21-50(1962)....7
S.C. Code Ann. §24-21-640(1986)....4,6
S.C. Code Ann. §55-612(1962)....4

STATEMENT OF ISSUES ON APPEAL

1. **Did the Respondent lack the authority or jurisdiction to grant or deny the Appellant parole where the authority or jurisdiction is based upon a state court judgment that is void as a matter of federal and state law?**

2. **Did the Respondent violate ex post facto when it denied the Appellant's parole using the criteria that did not exist in 1981?**

3. **Did the Respondent violate procedural due process when it denied the Appellant parole without first giving advance notice of the parole criteria?**

STATEMENT OF THE CASE

On August 8, 1981, the Appellant entered the USA gas station in Florence South Carolina. Armed with a firearm, he demanded money from the cashier. During the course of this robbery the Appellant shot the victim causing his death. He was later apprehended and charged with the offenses of murder and armed robbery. The solicitor's office decided to seek the death penalty. The Appellant was spared the death penalty; however, a jury of his peers did find him guilty of both offenses.

The Appellant appeared before the Honorable John Hamilton Smith on September 19, 1982. At the conclusion of this appearance the Court sentenced the Appellant to a term of incarceration for the remainder of his natural life for the offense of murder; and, twenty-five years for armed robbery. At the time the Appellant committed these offenses South Carolina law allowed an inmate parole eligibility upon the service of twenty years.

The Appellant made his initial appearance on April 28, 1999.[1] At the conclusion of this hearing the Board decided to deny the Appellant an opportunity to be released on parole. Since this initial denial the Appellant has appeared before the Board an additional sixteen times each resulting in a denial of parole.[2] His most recent appearance occurred on July 18, 2018. Parole was denied due to: 1) the nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; 3) the use of a deadly weapon in this or a previous offense; and, 4) a criminal record that indicates poor community adjustment. (R. p. 2) The Appellant requested a rehearing which was denied on September 18, 2018. (R. p. 3)

When the Appellant was informed of this denial of parole he decided to file a notice of appeal before the Administrative Law Court (ALC). Within this appeal the Appellant alleges that

---

[1] Due to good time credits the Appellant became eligible for parole upon the service of seventeen years.
[2] The Appellant waived his appearance on May 5, 2004.

being sentenced on a Sunday makes this conviction unlawful. He also argues that the denial of parole violates ex post facto and due process.

The Respondent will argue that as long as the Circuit Court had jurisdiction over his case the conviction and sentence were lawful regardless of what day it occurred. There also exist no violation of due process or ex post facto in the denial of parole. The Respondent's brief supporting these arguments follows.

ARGUMENTS

1. **The Circuit Court had jurisdiction over the Appellant's case so this conviction was valid, thereby, giving the Parole Board the ability to determine parole.**

Within his brief the Appellant argues that since he was convicted and sentenced on a Sunday that conviction was invalid. Without a valid conviction the Board failed to have jurisdiction over his parole.

There exist no law that disallows a conviction due to it occurring on Sunday. Once a case is indicted by the Grand Jury, the Circuit Court automatically has jurisdiction. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury. U.S. Const. Amend. V. The Appellant was indicted by the Florence County grand jury for the offenses of murder and armed robbery. Once that occurred the Appellant was tried before a jury of his peers and convicted of both crimes. There exist no violation of the law in this conviction and sentence.

The Respondent will also argue that if The Appellant's conviction was unlawful it should have been previously argued. The Appellant was sentenced on September 19, 1982, some thirty-six years ago, well beyond the time period allowed to contend a conviction. After a plea or trial resulting in conviction or a proceeding resulting in revocation of probation, a notice of appeal shall

be served on all respondents within ten (10) days after the sentence is imposed. Rule 203(2) SCACR.

Pursuant to South Carolina law at the time of his conviction, a person who was convicted of murder would receive a life sentence with parole eligibility upon the service of twenty years.[3] Once an inmate becomes eligible for parole that person must be allowed to appear before the Parole Board. When the Appellant became eligible he appeared before the Board pursuant to South Carolina law. There exist no wrongdoing on behalf of the Parole Board. If the Appellant was wrongfully convicted, that is a matter not related to parole. Any arguments regarding a wrongful conviction must be brought up during his appeal before the Court of Appeals. The Appellant failed to raise this argument; therefore, it is waived. *See, State v. Tyson,* 283 S.C. 375, 323 S.E.2d 770 (1984).

The Appellant has created a new argument that his conviction was not lawful due to it occurring on a Sunday. This argument was not previously raised before the Circuit nor Appellant courts. This argument is not relevant and should not be considered by the ALC. A defendant may not argue one ground below and another on appeal. *State v. Adams,* 354 S.C. 361, 380, 580 S.E.2d 785, 795 (2003). Unless the Appellant presents some after discovered evidence the Appellant no longer has any recourse regarding this conviction.

2. **The consideration of the current criteria for the Appellant's parole does not violate ex post facto.**

The Appellant argues that the criteria is different now as it was when he committed the offense, and applying the current criteria violates ex post facto. The law existing at the time of the offense and not at the time of sentencing determines whether an increase of punishment or

[3] A person who is convicted of or pleads guilty to murder must be punished by death or by imprisonment for life and is not eligible for parole until the service of twenty years. S.C. Code Ann. §16-1-60 (1982)

reduction of benefits constitutes an ex post facto violation. *Elmore v. State,* 305 S.C. 456, 409 S.E.2d 397 (1991). However, the law regarding the mandatory criteria is identical to what existed at the time the Appellant committed his offense. The Respondent also argues that the minor changes in the statute are not penal in nature so there exist no violation of ex post facto.

At the time the Appellant committed this offense section 55-612 of the South Carolina Code of Laws revealed the mandatory criteria the Parole Board was obligated to follow prior to the denial or acceptance of parole. Section 55-612 of the South Carolina Code of Laws specifically state:

> The Probation, Parole and Pardon Board shall carefully consider the record of the prisoner before, during and after imprisonment, and no such prisoner shall be paroled until it appear to the satisfaction of the Board, that the prisoner has shown a disposition to reform; that the 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 imprisonment; that the interests of society will not be impaired thereby; and that suitable employment has been secured for him.

S.C. Code Ann. §55-612 (1962).

The current criteria can be found in Section 24-21-640. The two statues are almost identical, however there are some differences. The word "shall" was replaced by the word "may," and the Board now is responsible for creating and considering their own criteria.[4] The Department created criteria encompasses all of the criteria that exist within the statute. It is just a more narrow criteria some of which could be to the prisoner's detriment, (ex. The nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it,) or could be to the inmates favor, (ex. The inmate's efforts to solve his problems such as seeking treatment

[4] The board must establish written, specific criteria for the granting of parole and provisional parole. This criteria must reflect all of the aspects of this section and include a review of a prisoner's disciplinary and other records. The criteria must be made available to all prisoners at the time of their incarceration and the general public. S.C. Code Ann. §24-21-640 (1986).

for substance abuse, enrolling in academic and vocational education courses, and in general using whatever resources the Department of Corrections has made available to the inmate to help with their problems.)

Another addition made by the General Assembly is that the Department is required to consider a risk assessment prior to any parole decision.[5] Since this mandatory element was added, each inmate prior to appearing before the Board has had a Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) risk assessment completed. The results are always considered by the Board prior to their final decision. These two additions were placed within statute in order to assist the Board in having a more informative hearing. This will benefit the Appellant not hinder him.

The Appellant argues that the use of the current criteria violates ex post facto. These additions cannot be considered a violation of ex post facto because they are not penal in nature. In order for the ex post facto clause to be applicable, the statute in question must be criminal or penal in purpose and nature. *State v. Huiett,* 302 S.C. 169, 394 S.E.2d 486 (1990). The additions do not increase the measure of punishment, and is merely procedural because it allows further criteria that can assist the Appellant. These additions does not make it more difficult to be granted parole, it does not add to the amount of members who sit on the board, nor does it add to the amount of affirmative votes needed to be awarded parole. It does not count as an increase in punishment, so it cannot be considered a violation of ex post facto. The ex post facto clause protects against retroactive legislature provisions which are disadvantageous to the offender; a mere procedural

[5] The Department must develop a plan that includes the establishment of a process for adopting a validated actuarial risks 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. S.C. Code Ann. §24-21-10(F)(1)(2018).

change in the law, not increasing punishment or changing the elements of the offense does not result in an ex post facto violation. *Elmore,* S.C. at 459, S.E.2d at 399.

3. **The Appellant was given a copy of the criteria prior to his parole hearing, so there exist no violation of due process.**

The Appellant argues that he was not given a copy of the Department created criteria prior to his first parole hearing; therefore, he was denied due process. Pursuant to South Carolina law the Department created criteria, "must be made available to all prisoners at the time of their incarceration and the general public." S.C. Code Ann. §24-21-640 (1986). The Appellant argues that when he was initially incarcerated he was not given a copy of this criteria. This is due to the fact that when he was initially incarcerated South Carolina law did not require Department created criteria. The Respondent could not be expected to abide to a law that does not yet exist.

The Appellant argues that not being given a copy of the criteria at that time of his initial incarceration violates due process. Prior to his latest hearing, the Appellant was provided a copy of Form 1212. This form list all Department created criteria. The Appellant signed the form acknowledging receipt of that form. (R. p. 1) So he had knowledge of this criteria. He was allowed to appear before the Board and present mitigating evidence in support of him being awarded parole. So there exist no violation of due process.

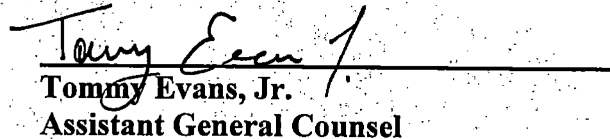
An individual appearing before the Parole Board does have minimal due process rights. In the United States Supreme Court case of *Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2594 (1972), the court acknowledged that a person having his parole revoked does have minimal due process rights. However, in *Greenholtz v. Inmate of Nebraska Penal and Correctional Complex,* 442 U.S. 1, 99 S.Ct. 2100 (1979) the United States Supreme Court determined that there is no constitutional or inherent right of a convicted person to be conditionally release before the expiration of a valid sentence. *Greenholtz,* at 2104. There exist no right to parole just a hearing in order to present

evidence on your behalf. Parole is a privilege not a right. *Sullivan v. South Carolina Department of Corrections*, 355 S.C. 437, 443, 586 S.E.2d 124 127 n.4 (2003). The Appellant was allowed to appear before the Board, and allowed to present evidence in mitigation. The board shall grant hearings and permit arguments and appearances by counsel or any individual before it at any such hearing while considering a case for parole, pardon or any other form of clemency provided for under law. S.C. Code Ann. §24-21-50 (1962). The Appellant was given a copy of the form listing the criteria created by the Department. The Appellant has presented no evidence that South Carolina law was violated in the denial of his parole. There exist no violation of due process. So the decision of the Board should be upheld.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests the final decision of the Parole Board 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
February 5, 2019

STATE OF SOUTH CAROLINA
In The Administrative Law Court
Docket Number 18-ALJ-15-0030

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

CHARLES TYSON, #113360 .... APPELLANT

v.

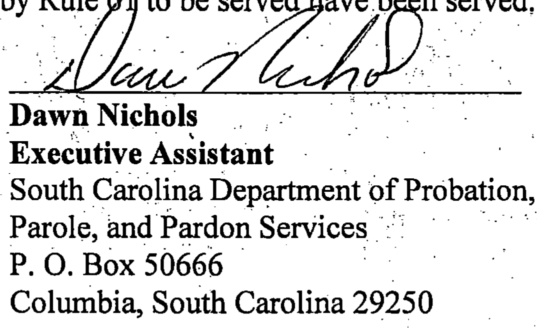
S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES, ... RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant to counsel for Respondent, certify that I have served the within *Record on Appeal*, dated November 28, 2018, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, the 28th day of November, 2018, addressed to:

Charles Tyson, #113360
Perry Correctional Institution
430 Oaklawn Road
Pelzer, S.C. 29669

I further certify that all parties required by Rule 61 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

30c

STATE OF SOUTH CAROLINA
In The Administrative Law Court
Docket Number 18-ALJ-15-0030

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

CHARLES TYSON, #113360 .... 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

Page

Criteria for Parole Consideration 1

Notice of Rejection 2

Respondent's Letter Dated September 18, 2018 3

Appellant's Request for Rehearing 4

31

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Charles Tyson, #113360, Appellant, vs. South Carolina Department of Probation, Parole and Pardon Services Respondent.	)	Docket No. 18-ALJ-15-0030-AP **FINAL ORDER** FILED FEB 26 2019 SC ADMIN. LAW COURT

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court ("ALC") pursuant to the appeal of Charles Tyson ("Appellant"), an inmate incarcerated with the South Carolina Department of Corrections. Following a conviction for murder and armed robbery in 1982, he was sentenced to life in prison for murder and twenty-five years for armed robbery. At the time of his conviction, an inmate who served a minimum of twenty (20) years could be eligible for parole. Appellant first applied for and was denied parole on April 28, 1999. The South Carolina Department of Probation, Parole and Pardon Services ("Department") Parole Board ("Board") denied his subsequent sixteen applications for parole, most recently on July 18, 2018. Appellant requested a rehearing, which was effectively denied by letter on September 18, 2018.[1]

Appellant filed an appeal to the ALC on October 17, 2018.

ISSUES ON APPEAL

Appellant raised two grounds in his appeal. First, he argues that he was not provided a copy of

---

[1] Respondent does not actually deny the request but states that there is no rehearing process, therefore, it will take no action on the request. The Administrative Procedures Act ("APA"), S.C. Code Ann. § 1-23-380(1) (Supp. 2017) states as follows:

> Proceedings for review are instituted by serving and filing notice of appeal as provided in the South Carolina Appellate Court Rules within thirty days after the final decision of an agency or, **if a rehearing is requested**, within thirty days after the decision is rendered. [Emphasis added.]

The Department is an agency subject to the APA. *See Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008). Therefore, the legislature allows a party before any agency subject to the APA to request a rehearing or reconsideration.

the Criteria for the Granting of Parole (Criteria for Parole Consideration) prior to his parole hearing. Second, he argues that the Criteria for Parole Consideration that he received on March 23, 2018, was not the criteria in effect when he was convicted in 1982 and that his parole should have been evaluated by the criteria which went into effect when the governor signed Act 100 on June 15, 1981.

Appellant adds a third issue (Argument I in the brief) in which he argues that his conviction was void because the jury rendered its verdict on September 19, 1982, a Sunday.

This ground was not raised in the case before the Board nor included in the grounds raised on appeal to the ALC. Moreover, as an attack on the jurisdiction of the trial court, it is a matter for direct appeal, and cannot be considered in the Department's parole hearing nor by the ALC in its administrative review of that proceeding.

The Record on Appeal contains a copy of the Criteria for Parole Consideration. Its receipt by Appellant is verified by his witnessed signature dated March 23, 2018, prior to his appearance before the Parole Board on July 18, 2018. Thus, his argument that he did not receive the criteria prior to his hearing can only be based on his contention that the criteria should have been the criteria in effect when he was convicted. Appellant claims that the Board violated the ex post facto clauses of the South Carolina Constitution, S.C. Const. art. I, 4, and the United States Constitution, U.S. Const. art I, § 10, by using criteria that was not the law in 1981 when his crime was committed.

In *Cooper v. S.C. Dep't of Prob., Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008), the South Carolina Supreme Court rejected this argument and determined that S.C. Code Ann. § 24-21-640 had not been substantively amended since Cooper's conviction in 1984.[2] The Court stated as follows:

> This section specifically authorizes the Board to establish written criteria for the granting of parole. Therefore, we find the Parole Board did not exceed its authority by creating the written criteria. Given the Parole Board was authorized to establish these criteria, we do not believe the Parole Board changed the law in violation of the Ex Post Facto clause.

[2] Both Appellant's and Cooper's convictions occurred between the 1981 and the 1986 amendments.

Id. at 502, 661 S.E.2d at 113-114 (citation omitted).

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, 576 S.E.2d at 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). Appellant makes a claim of an ex post facto violation. Since an ex post facto claim questions the procedure used by the Board, the ALC has jurisdiction. *Sanders v. S.C. Dep't of Corr.*, 379 S.C. 411, 421, 665 S.E.2d 231, 236 (Ct. App. 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:
>
> (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 criteria used by the Parole Board did not violate ex post facto provisions.

Appellant argues that the criteria considered by the Board did not exist at the time he committed his crime and therefore the use of the current criteria violates constitutional ex post facto prohibitions. The current law setting forth parole criteria is nearly identical to the law in effect on August 1, 1981, the date of the murder and armed robbery for which Appellant is incarcerated.[3]

At the time Appellant committed his offense, S.C. Code Ann. § 24-21-640 identified the criteria that the Parole Board had to apply to an inmate seeking parole as follows:

> The Board shall carefully consider the record of the prisoner before and after imprisonment, and no such prisoner shall be paroled until it shall appear to the satisfaction of the Board that the prisoner has shown a disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interests of society will not be impaired thereby; and that suitable employment has been secured for him. The Board shall establish written, specific criteria for the granting of parole and provisional parole. Such criteria shall reflect all of the aspects of this section.

S.C. Code Ann. § 24-21-640 (Supp. 1981).

The criteria also set out in the current §24-21-640, reads as follows:

> 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.
>
> * * *
>
> The board must establish written, specific criteria for the granting of parole and provisional parole. This criteria must reflect all of the aspects of this section and include a review of a prisoner's disciplinary and other records.

S.C. Code Ann. § 24-21-640 (Supp. 2017).

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

[3] The statute was effective June 15, 1981.

crime." *Jernigan v. State*, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000) (citations removed). The Court held that an ex post facto violation occurred when there was a change of parole eligibility review from annual to biannual. *Id.* at 264, 531 S.E.2d at 512. The Court reasoned that such a change "'produces a sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Id.* at 261, 531 S.E.2d at 509 (quoting *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 509, 115 S.Ct. 1597, 1603 (1995)). 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 comparing the above statutes, the differences are limited to the word "shall" being replaced by the words "must" and "may". This minor difference is procedural and is not a violation of ex post facto. There is nothing in the slight word change that would suggest a sufficient risk of increasing punishment. Therefore, there is no ex post facto violation as to the statute.

Next, Appellant argues that the use of the sixteen criteria found in Department Form 1212 is a violation of ex post facto. Appellant notes that the sixteen criteria were not in existence when he committed his offense. The sixteen criteria created by the Board are used to help guide the Board to make a decision on whether the prisoner should be granted parole. There is nothing that would clearly show that Appellant has been disadvantaged by the criteria listed in the form used by the Board. *See Huiett* at 171, 394 S.E.2d at 486. The use of the criteria is for evaluation and in no measure is used to increase the punishment of an inmate.

The addition of the sixteen criteria falls within the innocuous types of post-conviction changes in the law listed in *Morales*, which includes:

> Changes to the membership of the Board of Prison Terms, restrictions on the hours that prisoners may use the prison law library, reductions in the duration of the parole hearing, restrictions on the time allotted for a convicted defendant's right of allocution before a sentencing judge, and page limitations on a defendant's objections to presentence reports or on documents seeking a pardon from the governor.

Morales, at 508, 115 S. Ct. at 1603.

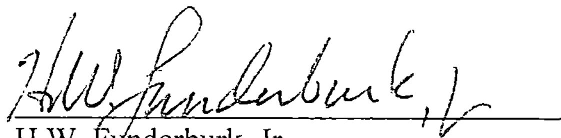
The United States Supreme Court further noted that these types of "changes might create some

speculative, attenuated risk of affecting a prisoner's actual term of confinement by making it more difficult for him to make a persuasive case for early release, but that fact alone cannot end the matter for ex post facto purposes." *Id.* at 508-09, 115 S. Ct at 1603. As noted in *Morales* and *Jernigan*, the important determination to be made by the Court is whether there is a "sufficient risk of increasing the measure of punishment." *Jernigan* at 261, 531 S.E.2d at 509. Here, the use of the sixteen criteria could, at most, create a speculative risk of increasing punishment, and therefore, there is no violation of ex post facto.

In addition, and alternatively, the statutory criteria set forth in § 24-21-640 are virtually identical to the six criteria contained in § 55-612. The six criteria are: 1) the record of the prisoner, before, during and after imprisonment; 2) whether the prisoner has shown a disposition to reform; 3) whether in the future the prisoner will probably obey the law and lead a correct life; 4) whether the prisoner's conduct has merit a lessening of the rigors of imprisonment; 5) whether the interests of society will be impaired by the prisoner's parole; and 6) whether suitable employment has been secured for the prisoner. The sixteen criteria created by the Board under the direction of § 24-21-640 are questions that could be asked to discover whether the prisoner satisfies the original six statutory criteria. The sixteen criteria are subsumed by the six statutory criteria, and the Board has not created anything new. Accordingly, the Court concludes that Appellant has not been disadvantaged by the Board's creation or consideration of the sixteen criteria. *Cf. Cooper* (finding no ex post facto violation where the Board created fifteen criteria on parole form after the commission of inmate's crimes).

IT IS THEREFORE ORDERED that the Board's denial of Parole is **AFFIRMED.**

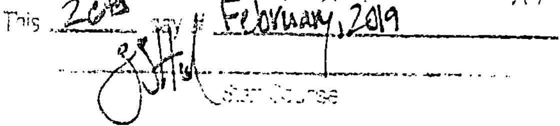
AND IT IS SO ORDERED.



H.W. Funderburk, Jr.
Administrative Law Judge

February 26, 2019
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).
This 26th day of February, 2019



Staff Counsel

FILED
FEB 26 2019
SC ADMIN. LAW COURT