

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Jaquese Neely, #308317, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 South Carolina Department of Probation, )  
 Parole and Pardon Services, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

Docket No. 19-5117-AD  
**RECEIVED**

DEC 31 2019

FINAL ORDER

SC Court of Appeals

**FILED**

DEC 03 2019

SC ADMIN. LAW COURT

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to an appeal filed by Jaquese Neely (Appellant), an inmate incarcerated in the South Carolina Department of Corrections. On April 2, 2015, Appellant pled guilty before the Honorable John C. Hayes to two (2) counts of Distribution of Crack Cocaine, 3<sup>rd</sup> Offense, in York County, South Carolina. Pursuant to the terms of the negotiated plea and sentence, Appellant was sentenced to concurrent terms of ten (10) years on each offense. Appellant now appeals the Final Decision of the South Carolina Department of Probation, Parole and Pardon Services (Department or Respondent) in which the Department determined him to be ineligible for parole under South Carolina law due to a prior drug conviction.

**STATEMENT OF THE CASE**

Appellant was indicted for two counts of Distribution of Crack Cocaine, 3<sup>rd</sup> Offense, under S.C. Code Ann. § 44-53-375(B)(3) (2010) with corresponding CDR Code 3039.<sup>1</sup> Both sentencing sheets reflect that the plea agreements and sentences for these charges were negotiated. (Record, p. 2, 5). At the time of his sentencing, Appellant also had a prior 2005 conviction for Possession with Intent to Distribute Marijuana within Proximity of a School (PWID Marijuana Proximity) under S.C. Code Ann. § 44-53-445 (1995).<sup>2</sup> According to Appellant, although not included in the

<sup>1</sup> Indictment Number 14-GS-46-03426 was for an incident that occurred on November 1, 2013. Indictment Number 14-GS-46-03428 corresponds to an incident date of January 22, 2014. (Record, p. 2-7).

<sup>2</sup> According to the sentencing sheet provided by the Department as part of the Record on Appeal, on March 23, 2005, Appellant pled guilty to this charge (Indictment Number 2005-GS-46-1292) and was sentenced to serve five years to run concurrently with another sentence he received for a probation violation. The sentencing sheet reflects that this plea was also negotiated. (Record, p. 8).

Record on Appeal, as part of the plea negotiations in 2005, the State agreed to *nolle proes* on accompanying charge of Possession with Intent to Distribute Marijuana (PWID Marijuana) in exchange for Appellant's plea to PWID Marijuana Proximity. (App. Brief, p. 1).

At the time of Appellant's 2013 and 2014 distribution offenses and during his plea and sentencing in 2015 for two counts of Distribution of Crack Cocaine, 3<sup>rd</sup> Offense (Distribution 3<sup>rd</sup>), § 44-53-375(B) provided an offender would not be parole eligible if he were convicted for a third or subsequent offense or if convicted two or more times in the aggregate for any narcotic drug, marijuana, depressant, stimulant, or hallucinogenic drug offense. A conviction for a first or second offense or for a third offense in which all prior convictions were for possession only allows for parole eligibility. See S.C. Code Ann. §44-53-375(B) (2010).

Thus, because of Appellant's plea to two counts of Distribution 3<sup>rd</sup> under § 44-53-375(B) in 2015 and due to his prior conviction for PWID Marijuana Proximity, the Department determined that Appellant was not eligible for parole. In a letter dated March 21, 2017, General Counsel for the Department informed Appellant of his parole ineligibility:

On April 2, 2015, you pled to Distribution of Crack, third offense, in Indictment Numbers 14-GS-46-03426 and 03428. Pursuant to South Carolina law a person convicted of this offense with two or more aggregate violations of the law relating to drugs is not eligible for parole.

A review of your prior record reveals a prior drug conviction, therefore, your current offense is ineligible for parole pursuant to South Carolina law. You will not be considered for parole on this offense.

(Record, p. 1).

Appellant wrote to the Department on April 12, 2019, asserting that he did not have the requisite prior conviction(s) that would prevent his being considered for parole under § 44-53-375(B)(3). Appellant asked the Department to change his classification to parole eligible or, in the alternative, provide notice and clarification of the prior convictions used to classify the distributions as third offenses as opposed to second drug offenses, which would qualify him as parole eligible under the statute.

In a letter dated April 22, 2019, General Counsel for the Department responded to Appellant's request:

I am responding to your letter of April 12, 2019, concerning your parole eligibility.

As previously explained to you, you are ineligible for parole consideration. I am enclosing a copy of our previous letter to you dated March 21, 2017. No further correspondence will be sent regarding this matter.

(See Notice of Appeal filed May 21, 2019).<sup>3</sup>

On May 21, 2019, Appellant timely appealed the Final Decision of the Department to this Court asserting that the decision is in error because he does not have the requisite prior conviction(s) to render him parole ineligible under § 44-53-375(B)(3) for a third or subsequent offense.

### ISSUE

Did the Department err in determining that Appellant is not eligible for parole based on his current and prior convictions under S.C. Code Ann. § 44-53-110, et seq. (2010) (hereinafter collectively referred to as the Controlled Substances Act)?

### DISCUSSION

An individual has a right to ALC review of a final decision of the Department or the Parole Board 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 Services*, 352 S.C. 594, 598-99, 576 S.E.2d 146, 149-50 (2003); *see also Sullivan v. S.C. Dep't of Corrections*, 355 S.C. 437, 443, 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 (2007), the statute does not create a liberty interest in the granting of parole itself. *Furtick*, 352 S.C. at 598, 576 S.E.2d at 149 n. 4.

In claiming that the Department erred in determining that he was ineligible for parole, Appellant has properly brought his Appeal before the ALC. *Cooper v. S.C. Dep't of Prob., Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008). Here, Appellant is not appealing the denial of parole but, rather, is challenging the Department's determination of parole ineligibility on the grounds that the decision is in violation of constitutional or statutory provisions and is affected by an error of law. Thus, under *Cooper*, a sufficient liberty interest is involved to warrant due process review by this Court. *Id.*, 377 S.C. at 502, 661 S.E.2d at 113.

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<sup>3</sup> This letter was not provided by the Department as part of the Record on Appeal. The letter was filed with the Court on May 21, 2019, by Appellant as part of his Notice of Appeal and will be considered by the Court as the Final Decision of the Department.

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

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.

*Id.* (Supp. 2018).

Appellant argues the Department erred in its determination of parole ineligibility under several different theories: (1) PWID Marijuana Proximity is not a prior “drug” conviction for enhancement purposes; (2) the statute under which Appellant was convicted of Distribution 3<sup>rd</sup> is in conflict with another statute in the Controlled Substance Act defining second and subsequent offenses; and (3), when read together, the statute under which Appellant was convicted of Distribution 3<sup>rd</sup> and the statute defining second and subsequent offenses are unconstitutionally vague and did not provide fair notice to Appellant that a prior Proximity conviction would be used for enhancement purposes in violation of Appellant’s right to due process under the Fourteenth Amendment.

#### I.

Appellant asserts that his prior conviction for PWID Marijuana Proximity cannot be used for enhancement purposes because a conviction under this statute, S.C. Code Ann. § 44-53-445 (1995), is a “separate criminal offense” as opposed to a drug offense. Appellant argues that the dismissed PWID Marijuana would have been his only prior drug offense and since that charge was *nolle prossed* as part of the plea agreement, the remaining Proximity conviction involves only an incidental, “separate criminal offense” unrelated to the controlled substance. Appellant’s argument is without merit.

The statutory elements of § 44-53-445 are clear. It is a separate criminal offense for a person to

distribute, sell, purchase, manufacture, or unlawfully possess with intent to distribute a controlled substance while in, on, or within a one-half mile radius of the grounds of a school. Appellant was convicted of Possession with Intent to Distribute Marijuana within Proximity of a School under this statute. As an element of the offense, he was in unlawful possession of a quantity of marijuana over twenty-eight grams or one ounce as set forth in S.C. Code Ann. § 44-53-370. While the additional proximity element must be met to afford the separate criminal conviction under § 44-53-445, the underlying element of possession of the controlled substance with intent to distribute must also be satisfied. Thus, Appellant's prior conviction for PWID Marijuana Proximity constitutes a prior drug conviction under the Controlled Substance Act.

## II.

Appellant also contends that his 2015 convictions for Distribution 3<sup>rd</sup> pursuant to S.C. Code Ann. § 44-53-375(B)(3) (2010) should not render him parole ineligible because that statute conflicts with the general statute defining second and subsequent drug offenses for purposes of the Controlled Substances Act as a whole. *See* S.C. Code Ann. § 44-53-470 (2010). Appellant argues, quite artfully, that when there is an ambiguity in the statutes that renders them in conflict and produces a result unintended by the Legislature, the rules of statutory construction direct that penal statutes are to be strictly construed. Further, Appellant asserts that the rule of lenity applicable when a criminal statute is ambiguous requires that the ambiguity be resolved in favor of the accused. (App. Brief, p. 3-8). Ever mindful of the rules of statutory construction and the extensive line of cases involving the various interpretations of statutes in the Controlled Substance Act relating to enhancements and sentencing, the Court agrees that an ambiguity exists. *Compare, e.g., Robinson v. State*, 387 S.C. 568, 693 S.E.2d 402 (2010) (abrogated on other grounds by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2017)); *Thomas v. State*, 319 S.C. 471, 465 S.E.2d 350 (1995); *Rainey v. State*, 307 S.C. 150, 414 S.E.2d 131 (1992); *State v. Miles*, 421 S.C. 154, 805 S.E.2d 204 (Ct. App. 2017) (cert denied October 18, 2018); *State v. Dupree*, 354 S.C. 676, 583 S.E.2d 437 (Ct. App. 2003); *see also Bolin v. South Carolina Dep't of Corrections*, 415 S.C. 276, 781 S.E.2d 914 (Ct. App. 2016).<sup>4</sup>

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<sup>4</sup>The Court recognizes that, while the issues discussed in these cases may parallel Appellant's argument, the majority of these cases stem from writs of certiorari arising from the grant or denial of post-conviction relief (PCR) actions. Two are the result of direct appeals and *Bolin v. South Carolina Dep't of Corrections* is an appeal from an ALC decision.

At the time of the 2013 and 2014 offenses of Distribution 3<sup>rd</sup> and during Appellant's plea and sentencing for these charges, § 44-53-375(B) specifically addressed the offense of Distribution of Crack Cocaine, 3<sup>rd</sup> Offense, providing in pertinent part:

A person who ... distributes ... cocaine base, in violation of the provisions of Section 44-53-370, is guilty of a felony and, upon conviction:

(3) for a third or subsequent offense or if the offender has been convicted two or more times in the aggregate of any violation of the laws of the United States or of any state, territory, or district relating to narcotic drugs, **marijuana**, depressant, stimulant, or hallucinogenic drugs, the offender must be imprisoned for not less than ten years nor more than thirty years, or fined not more than fifty thousand dollars, or both.

...Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and is eligible for parole... Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsection (A), may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. In all other cases, the sentence may not be suspended nor probation granted.

S.C. Code Ann. § 44-53-375(B)(3) (2010)<sup>5</sup> (emphasis added).

In contrast, § 44-53-470 entitled "Second and subsequent offenses for purposes of drug offenses, defined" provided:

(A) An offense is considered a second or subsequent offense if:

(3) for an offense involving a controlled substance other than marijuana pursuant to this article, the offender has been convicted within the previous ten years of a first violation of a controlled substance provision, **other than a marijuana offense provision**, of this article or of another state or federal statute relating to narcotic drugs, depressants, stimulants, or hallucinogenic drugs; and

(4) for an offense involving a controlled substance other than marijuana pursuant to this article, the offender has at any time been convicted of a second or subsequent violation of a controlled substance offense provision, **other than a marijuana offense provision**, of this article or of another state or federal statute relating to narcotic drugs, depressants, stimulants, or hallucinogenic drugs.

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<sup>5</sup> This statute was amended as a result of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 and was effective from June 2, 2010 until April 20, 2016. (2010 Act. No. 273, §38).

S.C. Code Ann. § 44-53-470 (2010)<sup>6</sup> (emphasis added).

Reviewing the plain language of each section, Appellant is correct in his contention that the two statutes seem to conflict. Specifically addressing the third or subsequent offense of distribution of crack cocaine, § 44-53-375(B)(3) provides that for purposes of enhancement, a prior conviction can include narcotic drugs, *marijuana*, depressants, stimulants, or hallucinogenic drugs. To the contrary, in defining a second or subsequent offense for purposes of the Controlled Substance Act in general, § 44-53-470(3) provides that a controlled substance offense involving crack cocaine cannot be enhanced by a previous conviction for an offense involving marijuana by the language "...the offender has been convicted within the previous ten years of a first violation of a controlled substance provision, *other than a marijuana offense provision*, of this article or of another state or federal statute relating to *narcotic drugs, depressants, stimulants, or hallucinogenic drugs*." *Id.* (emphasis added).

In *Rainey v. State*, the Court found a conflict between the statute under which the defendant was sentenced as a second offender, an earlier version of § 44-53-375(B), and the general second offense statute of § 44-53-470. *Rainey*, 307 S.C. 150, 414 S.E.2d 131 (1992). Rainey pled guilty to Distribution of Crack and had a prior conviction for Distribution of Marijuana. He was sentenced as a second offender under the crack cocaine statute which provided for an enhanced sentence for a second offender or one whose first conviction was related to *narcotic* drugs. Applying for post-conviction relief, Rainey argued he should not have been sentenced as a second offender under the crack statute since that statute only enhanced for prior narcotic convictions and marijuana was not a narcotic. *Id.* The State argued that Rainey was a second offender under the general statute, a former version of § 44-53-470, defining second offenses as those convictions involving *any prior drug*. *Id.* Finding a conflict between the two statutes, the Supreme Court held that the later, more specific crack statute under which Rainey was sentenced must prevail over the general second offense statute. *Id.*

In Appellant's case, both § 44-53-375(B) and § 44-53-470 were amended by Act No. 273 and became effective on the same day in 2010. Section 44-53-375(B)(3), involving the Distribution of Crack Cocaine (Third or Subsequent Offense), is the more specific statute and sets forth the

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<sup>6</sup> This statute was amended as a result of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 and was effective from June 2, 2010 until April 20, 2016. (2010 Act. No. 273, §41).

sentence for a third or subsequent offense or for two or more aggregate prior convictions for any offenses relating to narcotic drugs, *marijuana*, etc. While the Court may be correct to assume that the more specific statute would prevail under *Rainey*, because both were enacted at the same time, the Court will continue its analysis to ascertain legislative intent. A statute should be read as a whole. *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Further, “[s]tatutes which are part of the same legislative scheme should be read together.” *Great Games, Inc. v. S.C. Dep’t of Revenue*, 339 S.C. 79, 84, 529 S.E.2d 6, 8 (2000). “Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning.” *Mid-State Auto*, 324 S.C. at 69, 476 S.E.2d at 692. “The primary rule of statutory construction is to ascertain and give effect to the intent of the [L]egislature.” *Id.*

Appellant points to the 2016 amendments to both of the conflicting statutes as evidence of legislative intent to resolve the ambiguity at issue by expressly precluding enhancement for subsequent offenses when prior convictions involve marijuana offenses.<sup>7</sup> Indicative of such intent, Appellant correctly states that § 44-53-375(B)(3) was amended in 2016 to read “for a third or subsequent offense the offender must be imprisoned for not less than ten years nor more than thirty years, or fined not more than fifty thousand dollars, or both.” S.C. Code Ann. § 44-53-375(B)(3) (Supp. 2016). By deleting the previous directive that all prior offenses were to include narcotic drugs, marijuana, depressants, stimulants, and hallucinogenic drugs, Appellant asserts that the General Assembly intended to resolve the conflict by defining prior offenses solely through the language contained in § 44-53-470, which would have excluded his 2005 PWID Marijuana Proximity as a prior offense for enhancement purposes had his case arisen after April 20, 2016.

Moreover, Appellant asserts that the 2016 amendment to § 44-53-470 provides further evidence of legislative intent to resolve the conflict by continuing to explicitly exclude certain marijuana convictions as prior offenses. While the actual description of what is to be considered a prior offense for enhancement purposes remained unchanged in 2016, the title of § 44-53-470 was revised to “‘Second or subsequent offense’ defined; **certain convictions considered prior offenses.**” S.C. Code Ann. § 44-53-470 (Supp. 2016) (emphasis added). *See Univ. of S.C. v. Elliot*, 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966) (“[I]t is proper to consider the title or caption of an

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<sup>7</sup> Both statutes were amended as a result of 2016 Act. No. 154, §§ 9 & 10, effective April 21, 2016.

act in aid of construction to show the intent of the [L]egislature.”) The title of the amended statute is evidence that, in recognizing the ambiguity and conflict presented by the previous statutes, the Legislature intended to repeal the definition of prior convictions set forth in the crack statute in favor of exclusive reliance on the definitions set forth in § 44-53-470 under the amended title.

Also pursuant to the 2016 amendments, Appellant points out that subsection (B) was added to § 44-53-470 to clarify that a conviction for Trafficking Marijuana or any other controlled substance must be considered a prior offense for purposes of any prosecution pursuant to the article. *See* S.C. Code Ann. § 44-53-470 (Supp. 2016). Appellant correctly asserts that prior to the 2016 amendment, pursuant to the language of § 44-53-470 (2010), Trafficking Marijuana could only be considered a prior offense for enhancement purposes when the statute for the offense contained its own enhancement language like that found in § 44-53-375(B) specifically enumerating the controlled substances to be considered as prior convictions. *See Thomas v. State*, 319 S.C. 471, 465 S.E.2d 350 (1995); *State v. Dupree*, 354 S.C. 676, 583 S.E.2d 437 (Ct. App. 2003) (when there is no specific enhancement language in the statute under which defendant was convicted, there is no conflict and the general statute defining a prior offense as any prior drug offense applies); *contra Rainey v. State*, 307 S.C. 150, 414 S.E.2d 131 (1992) (discussed *infra*).

Thus, Appellant argues that the Legislature certainly could not have intended that the lesser included offense of PWID Marijuana Proximity should be considered a prior conviction for enhancement purposes when Trafficking Marijuana could not be used to enhance a trafficking or possession offense under the language of § 44-53-470 (2010). Bolstering his legislative intent argument, Appellant also correctly points out that, as it stands today, a sole prior conviction for PWID Marijuana Proximity cannot be used to enhance a current drug offense involving any other controlled substance under § 44-53-470(3) (Supp. 2019).

Finally, Appellant argues that under the canon of statutory construction, penal statutes are to be strictly construed. When a genuine ambiguity exists as a result of the proposed application of a penal statute to a given situation, the rule of lenity requires that the doubt must be resolved in the defendant's favor. *See State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (recognizing the settled rule that penal statutes must be strictly construed in the defendant's favor); *Bryant v. State*, 384 S.C. 525, 683 S.E.2d 280 (2009); *Berry v. State*, 381 S.C. 630, 675 S.E.2d 425 (2009) (holding that the Legislature intended a prior offense to qualify for enhancement

purposes only if the prior offense “relates to” one of the statutorily enumerated drugs).

Dovetailing with the argument that the rule of lenity should apply to resolve the conflict in his favor, Appellant also claims that because of the ambiguity in the statutes, both § 44-53-375(B)(3) (2010) and § 44-53-470 (2010) are unconstitutionally void for vagueness in their “failure to unambiguously provide the fair notice required by the Fourteenth Amendment of the United States Constitution.” (App. Brief, p. 6). Appellant contends that neither statute unambiguously and sufficiently forewarned or provided him fair notice that a PWID Marijuana Proximity conviction could be used to enhance his distribution offenses or affect future convictions of other controlled substance provisions. *Id.*

While the Court agrees with Appellant that an ambiguity did exist in the statutes from 2010 until their respective amendments in 2016, the Court does not agree that the ambiguity must be resolved in Appellant’s favor pursuant to the rule of lenity in this case, nor does the Court agree that the ambiguity resulted in a failure to apprise Appellant of the enhancement. Appellant neglects to address one important fact in his argument: he pled guilty to two counts of Distribution 3<sup>rd</sup> as the result of a negotiated plea bargain.

Remaining cognizant that the ALC is not the proper venue to determine or attack the validity of a plea, the Court must also render a decision and, in doing so, must recognize that this case involves negotiated pleas to two counts of Distribution 3<sup>rd</sup> that the Court must presume were valid.<sup>8</sup> In criminal prosecutions, a defendant is free to negotiate a plea bargain and the defendant and prosecutor may enter a plea agreement for a multitude of legitimate reasons. Moreover, it is well-settled that as part of a plea bargain, a defendant may plead guilty to a crime of which he may not be guilty or to an offense for which a valid legal challenge may exist. *See Rollison v. State*, 346 S.C. 506, 552 S.E.2d 290 (2001); *Anderson v. State*, 342 S.C. 54, 535 S.E.2d 649 (2000) (finding that the decision to accept a plea to voluntary manslaughter notwithstanding the lack of any provocation was simply a tactical maneuver to avoid the possibility of a harsher verdict and, as such, was knowing and voluntary). As long as the defendant understands the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, he is free to bargain for multiple offenses, lesser included offenses, or enhanced offenses. *Rollison*,

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<sup>8</sup> The Record on Appeal consists only of the Department’s 2017 letter to Appellant and the indictments and sentencing sheets for the Distribution 3<sup>rd</sup> offenses and the 2005 PWID Marijuana Proximity conviction. The Court is limited to these documents and limited in the scope of review pursuant to the nature of the appeal filed with the ALC.

346 S.C. at 511-12, 552 S.E.2d 290, 292-93. When a case involves a plea bargain, the agreement is governed by contract principles and the defendant is free to negotiate the terms. *Id.*

Upon the information provided to the Court in the Record, both of Appellant's sentencing sheets reflect that Appellant pled to "Distribution of Crack 3<sup>rd</sup> Offense" with the corresponding statute (§ 44-53-375(B)(3)) and CDR Code (3039) listed in two different areas on both pages. Section 44-53-375(B)(3) states that an offense involving marijuana will be considered a prior offense. Both §44-53-375(B)(3) and the language mirrored in CDR Code 3039 provide that a conviction for Distribution of Crack Cocaine, 3<sup>rd</sup> Offense, will not be considered parole eligible. In addition, both sentencing sheets reflect that the pleas were negotiated and, under the terms of the plea bargain, Appellant received the minimum sentence of ten years, out of a possible thirty, on each charge to run concurrently. Appellant received the benefit of the agreement for which he bargained. Moreover, Appellant pled to not one, but two third offenses. If Appellant only one had prior drug offense from his 2005 PWID Marijuana Proximity conviction, then it would stand to reason that as part of the bargain, he voluntarily agreed to skip a conviction for a second offense by pleading to two third offenses and receiving some benefit thereby.

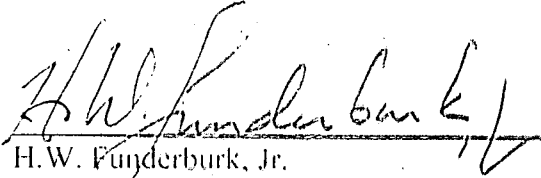
Finally, Appellant *agreed* to have his convictions deemed third or subsequent offenses by virtue of his negotiated pleas to Distribution 3<sup>rd</sup> under the contractual terms of his plea agreement. A judge did not discretionarily determine him to be a third or subsequent offender during sentencing, nor did the Department in its determination of parole ineligibility. Instead, Appellant voluntarily chose his third offense classification pursuant to § 44-53-375(B)(3) (2010) which provides "for a third or subsequent offense or if the offender has been convicted two or more in the aggregate...." (emphasis added). Appellant negotiated the third offenses on his own accord, he was not erroneously sentenced as a third offender. He had been convicted two or more times in the aggregate.

The Court finds that Appellant was properly classified as ineligible for parole due to his pleas and convictions for Distribution of Crack Cocaine, 3<sup>rd</sup> Offense, pursuant to S.C. Code Ann. § 44-53-375(B)(3) (2010). It is, therefore,

**ORDERED** that the decision of the Department is **AFFIRMED**.

**AND IT IS SO ORDERED.**

December 3, 2019  
Columbia, South Carolina

  
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H.W. Funderburk, Jr.  
Administrative Law Judge

**NOTICE OF SERVICE**  
I hereby 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 thereof,  
by United States mail, postage paid, or in the alternative  
by personal delivery addressed to the party(ies) and/or attorney(s).

on 3<sup>rd</sup> day of December, 2019  
by Elizabeth A. Perkins  
Judicial Law Clerk

**FILED**

DEC 03 2019

SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA  
Administrative Law Court  
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