THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Appellate Case No.: 2020-001628

HARDY MARVIN LANIER, #381975,

Appellant,

v.

SOUTH CAROINA DEPARTMENT OF CORRECTIONS,

Respondent.

FINAL BRIEF OF THE APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. **DID THE ADMINISTRATIVE LAW COURT ERR IN AFFIRMING THE DEPARTMENT OF CORRECTIONS DETERMINATION THAT THE APPEALLANT'S OFFENSE AND SENTENCE FOR TRAFFICKING METHAMPETAMINE 28 GRAMS TO 100 GRAMS (1ST OFFENSE) FALLS UNDER THE NO PAROLE PROVISIONS OF S.C. CODE ANN §24-13-100 AND 150, IN LIGHT OF THE PROVISIONS OF S.C. CODE ANN. 44-53-375(F)?**

STATEMENT OF THE CASE

On December 19, 2019, the Appellant, Hardy Marvin Lanier, entered a plea of guilty on two separate indictments for Trafficking Methamphetamine in the Court of General Sessions for York County. Judge Daniel Hall was the plea and sentencing judge, and imposed the following sentences on each of the respective indictments, to run concurrently:

Trafficking Methamphetamine 28 grams or more, but less than 100 grams (1st Offense)

Code Section:	S.C. Code Ann. §44-53-375(C)(2)(a)
CDR Code:	0-3-9-2
Felony Classification:	Class B felony
Indictment No.:	2019-GS-46-3262
Arrest Warrant No.:	2018A4610201398
Date of Offense:	August 16, 2018
Sentence:	13 years

Trafficking Methamphetamine 10 grams or more, but less than 28 grams (1st Offense)

Code Section:	S.C. Code Ann. §44-53-375(C)(1)(a)
CDR Code:	0-4-5-0
Felony Classification:	Class E felony
Indictment No.:	2019-GS-46-6576
Arrest Warrant No.:	2018A4610202226
Date of Offense:	December 13, 2018
Sentence:	10 years

That as alleged in the indictments against the Appellant, and as summarized above, the offenses in question occurred on August 16, 2018, and December 13, 2018. R. pp. 34, 36.

That subsequent to the sentencing of the Appellant, he was transferred to the South Carolina Department of Corrections and thereafter he was informed that he was ineligible for parole on the offense of Trafficking Methamphetamine 28 grams to 100 grams (1st Offense).

Upon being advised that he was ineligible for parole on the offense of Trafficking Methamphetamine 28 grams to 100 grams (1st Offense), the Appellant filed an inmate grievance pursuant to the Department of Corrections inmate grievance procedure, which stated that the Department of Corrections Records Division had incorrectly characterized his offenses as "no parole" offenses, and that under the provisions of section 44-53-375(F), he was eligible for parole. R. p. 30

The Appellant's grievance was denied at Step 1. R. p. 31. The Appellant then requested that the denial of his grievance be reviewed at Step 2 of the grievance procedure. R. p. 29. The Appellant was informed in writing that the grievance had again been denied at Step 2. R. p. 29.

Having exhausted the Department of Corrections inmate grievance procedure, on May 31, 2020, the Appellant timely filed a Notice of Appeal with the Administrative Law Court stating as a

ground for the appeal that the Department of Corrections had incorrectly treated his offense of Trafficking Methamphetamine 28 grams to 100 grams (1st Offense) as a no parole offense. The Appellant appealed the Department of Corrections determination pursuant to the South Carolina Supreme Court's decision in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000), which vests the Administrative Law Court with appellate jurisdiction to hear matters relating to an inmate's erroneous sentence calculation, sentence related credits or custody status.

Following the submission of briefs by the Appellant and the Department of Corrections to the Administrative Law Court, Judge Ralph King Anderson, III, issued an order on November 23, 2020, affirming the ruling of the Department of Corrections, i.e., finding that the Appellant was ineligible for parole on his offense of Trafficking Methamphetamine 28 grams to 100 grams (1st Offense). R. p. 2.

On December 7, 2020, the Appellant timely filed his Notice of Appeal with the Court of Appeals. R. p. 39.

STANDARD OF REVIEW

Section 1-23-610(B) of the South Carolina Code (Supp. 2019) sets forth the standard of review when the Court of Appeals is sitting in review of a decision by the Administrative Law Court on an appeal from an administrative agency. Specifically, section 1-23-610(B) allows this Court to reverse the Administrative Law Court's decision if it violates a constitutional or statutory provision or is affected by any other error of law. S.C. Code Ann. §1-23-610(B)(a),(d)(Supp. 2019). Here, the sole issue on review involves a question of statutory interpretation, which is a question of law "subject to de novo review." *Barton v. South Carolina Department of Probation, Parole & Pardon Services,* 404 S.C. 395, 414, 745 S.E. 2d 110, 120 (2013). Further, while the interpretation of a statute by the agency charged with its administration "will be accorded the most respectful consideration," an agency's interpretation "affords no basis for the perpetuation of a patently erroneous application of the statute." *State v. Sweat,* 386 S.C. 339, 351, 688 S.E.2d 569, 575-76 (2010)(quotation marks omitted).

ARGUMENT

I. THE ADMINISTRATIVE LAW COURT ERRED IN AFFIRMING THE DEPARTMENT OF CORRECTIONS DETERMINATION THAT THE APPEALLANT'S OFFENSE AND SENTENCE FOR TRAFFICKING METHAMPETAMINE 28 GRAMS TO 100 GRAMS (1ST OFFENSE) FALLS UNDER THE NO PAROLE PROVISIONS OF S.C. CODE ANN §24-13-100 AND 150, IN LIGHT OF THE PROVISIONS OF S.C. CODE ANN. 44-53-375(F).

A. STATEMENT OF THE APPLICABLE LAW

As noted above, the issue before this Court is a question of law regarding the statutory construction and interplay between the provisions of sections 24-13-100 and 150, and subsection 44-53-375(F).

The Department of Corrections has treated Appellant's conviction for Trafficking Methamphetamine 28 grams to 100 grams, (which is classified as a B Class felony under section 16-1-90(B)), as being a "no parole" offense under the provisions of sections 24-13-100 and 150. The Appellant contends the offense of Trafficking Methamphetamine 28 grams to 100 grams (1st Offense) is parole eligible under the specific provisions of subsection 44-53-375(F).

A. THE PROVISIONS OF S.C. CODE ANN. §§24-13-100 and 150

As a general matter, pursuant to sections 24-13-100 and 150, when a person is convicted of an offense that is classified as an A, B, or C felony (all of which carry possible sentences of twenty years or more), or an unclassified offense which is punishable by

a maximum term of imprisonment of twenty years or more, such person will be ineligible for parole until he has served at least eighty-five percent (85%) of his sentence. The provisions of section 24-13-100, which were enacted in 1995, and have not been amended since that time, and read as follows:

> **§24-13-100. Definition of no parole offense; classification.**
>
> For purposes of definition under South Carolina law, a "no parole offense" means a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more.
>
> **HISTORY: 1995 Act No. 83, §1, eff January 1, 1996.**

As noted above, the significance of a person's offense being classified as a "no parole offense", is that such person will be ineligible for parole until he has served at least eighty-five percent (85%) of his sentence, as provided for by section 24-13-150(A), which reads:

> **§24-13-150. Early release, discharge, and community supervision; limitations; forfeiture of credits.**
>
> (A) Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, a prisoner convicted of a "no parole offense" as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections, including a prisoner serving time in a local facility pursuant to a designated facility agreement authorized by Section 24-3-20, is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the prisoner has served at least eighty-five percent of the actual term of imprisonment

> imposed. This percentage must be calculated without the application of earned work credits, education credits, or good conduct credits, and is to be applied to the actual term of imprisonment imposed, not including any portion of the sentence which has been suspended. Nothing in this section may be construed to allow a prisoner convicted of murder or a prisoner prohibited from participating in work release, early release, discharge, or community supervision by another provision of law to be eligible for work release, early release, discharge, or community supervision.

The only exception to the provisions of sections 24-13-100 and 150, is when an A, B, or C felony has a statutory exemption that permits parole. For example, pursuant the amendments of sections 44-53-370 and 44-53-375, as set forth in the Omnibus Crime Reduction and Sentencing Reform Act of 2010, certain offenses classified as A, B, or C felonies were made parole eligible. *See Bolin v. South Carolina Department of Corrections*, 415 S.C. 276, 781 S.E.2d 914 (Ct.App. 2016)(Court of Appeals held that the Department of Corrections was not correctly applying the amended provisions of subsection 44-53-375(B)(2), which provided that "Notwithstanding any other provision of law…" a person convicted for a second offense for distribution, manufacturing, possession with intent to distribute, etc., (punishable by up to 30 years) was no longer parole ineligible under section 24-13-100).

B. THE PROVISIONS OF S.C. CODE ANN. §44-53-375(C) AND (F)

In 1987, South Carolina, as with many other States before and after, enacted legislation to specifically address the "crack cocaine" epidemic that began in the early 1980s. In response to the crack cocaine epidemic, the provisions of section 44-53-375 were enacted (1987 Act No. 128) which imposed severe mandatory punishments for offenses involving the possession, distribution, sell etc. of crack cocaine.[1] Notably, when the provisions of section 44-53-375 were first enacted in 1987, the statute only applied to crack cocaine, and contained no provisions for the trafficking of crack cocaine.

In 1990, the provisions section 44-53-375 were amended to include "ice" or "crank", i.e., methamphetamine, and the statute was further amended to include a provision for trafficking ice, crank or crack cocaine for 100 grams or more. *See* 1990 Act No. 606, §8.

In 1993, the provisions of section 44-53-375 were twice amended, with such amendments eliminating mandatory sentences for some possession offenses, and some offenses involving possession

1 For example, under the 1987 statute, a conviction for possession with intent to distribute crack cocaine (1st offense), was punishable by a mandatory sentence of at least 15 years, up to 20 years. By contrast, the current statute provides that such offense is punishable by a sentence of up to 15 years, which may be suspended and probation granted. Over the past 34 years the provisions of S.C. Code Ann. §44-53-375 have been amended seven times, with several of the amendments addressing the reduction of possible punishments for offenses under the statute.

with intent to distribute and related offenses. The 1993 amendments also introduced a graduated trafficking scheme addressing amounts as low as 10 grams, up to 400 grams or more, and included mandatory minimum sentences for all trafficking offenses. *See* 1993 Act No. 58, §2; 1993 Act No. 184, §74.

In 1995, (the same year the "no parole" the provisions of section 24-13-100 were enacted), the provisions of section 44-53-375 were again amended to add for the first time, the subsection at issue in the matter before the Court, which addressed, in part, parole eligibility for persons convicted of trafficking offenses, and read:

> (D) Except for a first offense, as provided in subsection (A) of this section, sentences for violation of this section may not be suspended and probation may not be granted. A person convicted and sentenced under this subsection to a mandatory term of imprisonment of twenty-five years, a mandatory minimum term of imprisonment of twenty-five years, or a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years is not eligible for parole, extended work release as provided in Section 24-13-610, or supervised furlough as provided in Section 24-13-710. (Emphasis added.)
>
> **1995 Act No. 7, Part I, §18.**

In 2005, the provisions of section 44-53-375 were substantially amended, with the amendments changing, *inter alia*, the verbiage of the controlled substance from "ice crank or crack cocaine" to "methamphetamine or cocaine base", and adding a section

criminalizing and punishing the possession of ephedrine, pseudoephedrine, or phenylpropanolamine. Notably, the former provisions of section 44-53-375(D) that addressed parole eligibility for persons convicted of trafficking offenses, were re-codified under subsection (F) of the amended statute.

In 2010, as part of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, the provisions of section 44-53-375 were again substantially amended, with the amendments changing, *inter alia*, the punishment for offenses involving possession, and possession with intent to distribute, etc., and the parole eligibility of certain offenses previously deemed "no parole" offenses by the Department of Corrections. Notably, again, the provisions of subsection 44-53-375(F) addressing parole eligibility for persons convicted of trafficking offenses, were re-codified *and amended*, so as to read:

> (F) Sentences for a violation of subsections (C) or (E) may not be suspended and probation may not be granted. A person convicted and sentenced under subsection (C) or (E) to a mandatory term of imprisonment of twenty-five years, a mandatory minimum term of imprisonment of twenty-five years, or a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years is not eligible for parole, extended work release as provided in Section 24-13-610, or supervised furlough as provided in Section 24-13-710. (Emphasis added.)
>
> **2010 Act No. 273, §38.**

The 2010 amendments to subsection (F) deleted language referencing subsection (A) of the statute, and added language to address the issue of parole eligibility for the mandatory sentences found in subsection (E).

In 2016, the provisions of section 44-53-375 were amended to delete language defining what constituted a prior conviction for sentencing enhancement purposes, in keeping with all offenses found in Article 53, of Title 44. The current pertinent provisions of subsections 44-53-375(C)(2)(a) and (F), as they apply to the Appellant's case, read as follows:

> (C) A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base, as defined and otherwise limited in Section 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), is guilty of a felony which is known as "trafficking in methamphetamine or cocaine base" and, upon conviction, must be punished as follows if the quantity involved is:
>
> (2) twenty-eight grams or more, but less than one hundred grams:
>
> (a) <u>for a first offense, a term of imprisonment of not less than seven years nor more than twenty-five years</u>, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars; (Emphasis added.)
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> ---

(F) Sentences for violation of the provisions of subsections (C) or (E) may not be suspended and probation may not be granted. A person convicted and sentenced under subsection (C) or (E) to a mandatory term of imprisonment of twenty-five years, a mandatory minimum term of imprisonment of twenty-five years, or a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years is not eligible for parole, extended work release as provided in Section 24-13-610, or supervised furlough as provided in Section 24-13-710. (Emphasis added.)

HISTORY: 1987 Act No. 128 §1; 1990 Act No. 604, §8; 1993 Act No. 58, §2; 1993 Act No. 184, §74; 1995 Act No. 7, Part I, §18; 2005 Act No. 127, §5, eff June 7, 2005; 2010 Act No. 273, §38, eff June 2, 2010; 2016 Act No. 154 (H.3545), §9, eff April 21, 2016.

C. STATUTORY CONSTRUCTION

The sole issue before the Court is the statutory construction, and the interplay between the provisions of sections 24-13-100 and 150, and section 44-53-375(F).

It is well settled law that, "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.") *id.* at 351, 688 S.E. 2d at 575. "Courts will reject a statutory interpretation

which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." *id.* at 351, 688 S.E. 2d at 575. "In interpreting a statute, the court will give words their plain and ordinary meaning, and will not resort to forced construction that would limit or expand the statute." *State v. Johnson,* 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011). "A statute should be so construed that no word, clause, sentence or provision or part shall be rendered surplusage, or superfluous." *State v. Sweat,* 386 S.C. 339, 351, 688 S.E.2d 569, 575 (Ct.App. 2008). Furthermore, as is applicable in this case, the cannon of construction "*expression unius est exclusio alterius*" or "*inclusio unis est exclusio alterius*" holds that "to express or include one thing implies exclusion of another or the alternative." *Hodges v. Rainey,* 341 S.C. 79, 533 S.E.2d 578, 582 (2000).

When it appears that two statutes "are in conflict, the more recent and specific statute should prevail so as to repeal the earlier, general statute". *Stone v. State,* 313 S.C. 533, 535, 443 S.E.2d 544, 545 (1994). *See also Hair v. State,* 305 S.C. 77, 79, 406 S.E. 2d 332, 334 (1991)("The law clearly provides that if two statutes are in conflict, the latest statute passed should prevail so as to repeal the earlier statute to the extent of the repugnancy."). Without this implicit repeal, the amendments themselves would be meaningless. *See State v. Long,* 363 S.C. 360,

364, 610 S.E. 2d 809, 811 (2005)("The legislature is presumed to intend that its statutes accomplish something.").

"Statutes of a specific nature are not to be considered as repealed in whole or in part by a later general statute unless there is a direct reference to the former statute or the intent of the legislature to do so is explicitly implied therein." *Strickland v. State*, 276 S.C. 17, 19, 274 S.E.2d 430, 432 (1981). It is presumed that the Legislature was familiar with prior legislation, and that if it intended to repeal or nullify existing laws it would have expressly done so; hence, if any fair or liberal construction of the two acts may be made to harmonize, no court is justified in deciding that the last repealed the first. *State v. Hood*, 181 S.C. 488, 188 S.E. 134, 136 (1936).

D. APPLYING THE LAW TO THE APPELLANT'S CASE

In the matter before the Court, the position of the Department of Corrections is a simplistic application of the provisions of sections 24-13-100 and 150, to the Appellant's offense. That is, the Appellant pled guilty to the offense of Trafficking Methamphetamine 28 grams or more, which is a Class B felony. Section 24-13-100 defines a no parole offense as a Class A, B, or C felony. Accordingly, because the Appellant was convicted of a Class B felony, a "no parole" offense, he must serve eighty-five (85%) percent of his sentence as required by section 24-13-150.

The position of the Department of Corrections is flawed in that it ignores the express and unequivocal intent of the General Assembly to remove certain trafficking offenses found in section 44-53-375 from the "no parole" provisions of sections 24-13-100 and 150, as evidenced by the provisions of subsection (F), being enacted in 1995, re-codified in 2005 and last amended in 2010. Pursuant to the provisions of subsection (F), *only* those trafficking offenses punishable by mandatory sentences of twenty-five years or more are ineligible for parole. Applying the canon of construction "to express or include one thing implies exclusion of another or the alternative," all other trafficking offenses not being punishable by the said mandatory sentences are thus excluded from the no parole provisions of subsection (F). Because the Appellant's offense of Trafficking Methamphetamine 28 grams to 100 grams (1st Offense) is punishable by a possible sentence of seven years to twenty-five years, and not a mandatory sentence of twenty-five years or more, he is eligible for parole under section 44-53-375(F).

Before the Administrative Law Court, the Department of Corrections argued that the Appellant is ineligible for parole under the provisions of subsection 44-53-375(F) because: (1) subsection 44-53-375(F) was enacted in 1995, before the mandatory "no parole" provisions of sections 24-13-100 and 150 were enacted in 1995, and therefore, the provisions of section 44-53-375(F)

have been superseded (R. p. 21-22); and (2) the later recodification and amendments after 1995 to subsection 44-53-375 (F), had no legal affect as to parole eligibility for any trafficking offense, and merely reiterated parole ineligibility for some, but not all, trafficking offenses found under section 44-53-375(C). (R .p. 21)

As to the first proposition, that the provisions of section 44-53-375(F), which became effective on January 12, 1995, were superseded by the "no parole" provisions of sections 24-13-100 and 150, which became effective on January 1, 1996, the Department of Corrections ignores the subsequent legislative history of subsection 44-53-375(F) which was amended and recodified *after* 1996. The recodifications and amendments to subsection 44-53-375(F) repeatedly and consistently contained the language limiting parole ineligibility to trafficking offenses punishable by "a mandatory term of imprisonment of twenty-five years, a mandatory minimum term of imprisonment of twenty-five years, or a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years." If the later most recent statute should be controlling, then subsection 44-53-375(F) should control in this instance.

As to the second proposition, that the General Assembly was merely reiterating the parole ineligibility for some, but not all, trafficking offenses, this reading is contrary to a plain reading

of subsection 44-53-375(F). As noted above, presumably the General Assembly is aware of its own acts. Accordingly, had the General Assembly desired to merely reiterate the parole ineligibility of any trafficking offense, it could have done so by referencing the "no parole" provisions of sections 24-13-100 and 150, or by not referring to parole eligibility at all. Instead, after 1996, the General Assembly, when it amended, re-enacted or recodified subsection (F), it repeatedly and consistently used the language limiting parole ineligibility to trafficking offenses punishable by "a mandatory term of imprisonment of twenty-five years, a mandatory minimum term of imprisonment of twenty-five years, or a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years." This is not a mere reiteration of parole ineligibility for some, but not all, trafficking offenses. Such a construction of subsection (F), as advanced by the Department of Corrections, would be confusing and misleading at best. Rather, the choice of the language by the General Assembly used in subsection (F) was a clear and express statement of legislative intent that trafficking offenses not punishable by mandatory sentences of twenty-five or more years be treated as being parole eligible.

The Department of Corrections and the Administrative Law Court have both emphasized that the statutory language in subsection 44-53-375(F) does not contain the same language that

was at issue in *Bolin v. South Carolina Department of Corrections*, 415 S.C. 276, 781 S.E.2d 914 (Ct.App. 2016), in the provision of subsection 44-53-375(B), that read: "Notwithstanding any other provision of law…" To this the Appellant would respond by stating that every statutory exception or exemption created by the General Assembly need not contain the magical incantation of: "Notwithstanding any other provision of law…" The lexicon of the General Assembly is not so limited. Other words and phrases can be used by the General Assembly to accomplish that body's legislative intent without resort to the rote redundancy of using the words: "Notwithstanding any other provision of law…".

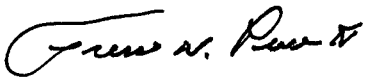
Words have meaning. Subsection 44-53-375(F) was enacted, amended and re-enacted as standalone provision of section 44-53-375.

Subsection (F) was intended to remove certain trafficking offenses from the no parole provisions of section 24-13-100. If this is not the meaning of subsection (F), then what possible meaning can be attributed to the language of subsection (F)? The Department of Corrections' reading of the statute would nullify any import that subsection (F) might have, and would treat this specifically enacted subsection as mere surplusage, resulting in a meaningless absurdity.

Subsection (F) exists for a reason.

CONCLUSION

For the reasons stated above, the Appellant respectfully submits that the decision of the Department of Corrections, as affirmed by the Administrative Law Court, should be reversed, and that this Court find that the Appellant does not fall under the no parole provisions of sections 24-13-100 and 150 for the offenses for which he is currently incarcerated.



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CERTIFICATE OF COUNSEL

I hereby certify that this "Final Brief of the Appellant," complies with Rule 211(b), SCACR.

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