STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

ADMINISTRATIVE LAW JUDGE D.B. Durden

ALC Case No. 18-ALJ-04-0095-AP

APPELLATE Case No. 2018-001981

Damon T. Brown # 357300 — APPELLANT

v.

South Carolina Dept. of Corrections — RESPONDENT

RECORD ON APPEAL

Damon T. Brown #357300
B2-11
Kirkland Corr. Inst.
4344 Broad River Rd
Columbia, SC 29210

INDEX

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Damon Brown, #357300, Appellant, vs. South Carolina Department of Corrections, Respondent.	Docket No. 18-ALJ-04-0095-AP Grievance No. KCI 0009-17 **ORDER**

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Notice of Appeal filed on March 12, 2018, by Damon Brown (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (Department). Appellant argues that the Department miscalculated his release date. Upon careful consideration of the record on appeal, the parties' briefs, and a review of the applicable law, the Department's decision is affirmed.

BACKGROUND

Appellant is serving two concurrent sentences for drug related offenses. On October 3, 2013, Appellant was sentenced to fourteen years for Trafficking in Cocaine Base/Meth. 10 – 28 grams, 2nd offense in violation of Section 44-53-375(C)(1)(b), the most serious offense and the offense which determines Appellant's parole eligibility. S.C. Code Ann. § 44-53-375 (Supp. 2012). Appellant was also sentenced on October 3, 2013, to fourteen years for Distribution of Cocaine, 2nd offense, in violation of Section 44-53-370(b)(1). S.C. Code Ann. § 44-53-370 (Supp. 2012).

On January 3, 2017, Appellant filed a Step 1 grievance stating that the Department incorrectly calculated his projected release date thereby increasing the time he must serve on his sentence. Appellant maintains that since he was sentenced to less than the mandatory sentence of twenty-five years, he is eligible for parole, extended work release, and supervised furlough. Appellant's Step 1 grievance was denied on the basis that Appellant's violation of Section 44-53-375 was violent and thus, Appellant had to serve at least eighty-five percent of his sentence. On November 3, 2017, Appellant filed a Step 2 grievance which was denied for the same reason.

ISSUE

Whether the Department properly classified Appellant as an offender who must serve eighty-five percent of his sentence.

STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decision of the South Carolina Supreme Court in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). The Court's appellate jurisdiction in inmate appeals is limited to state created liberty interests typically involving: (1) cases in which an inmate contends that prison officials have erroneously calculated his sentence, sentence-related credits, or custody status; and (2) cases in which an inmate has received punishment in a major disciplinary hearing as a result of a serious rule violation. Id.

When reviewing the Department's decisions in inmate grievance matters, the court sits in an appellate capacity. Id. at 377; 527 S.E.2d at 754; see also S.C. Code Ann. § 1-23-600(E) (directing administrative law judges to conduct appellate review in the same manner prescribed in Section 1-23-380 of the South Carolina Code). Section 1-23-380(5) states:

> 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).

Consequently, an administrative law judge may not substitute his judgment for that of an agency "as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5) (Supp. 2017). Furthermore, an administrative law judge may not reverse or modify an agency's decision

unless the record reflects that substantial rights of the appellant have been prejudiced because the decision is clearly erroneous in view of the substantial evidence, arbitrary or affected by an error of law. S.C. Code Ann. § 1-23-380(5) (Supp. 2017); see also Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety, 337 S.C. 133, 137, 522 S.E.2d 605, 607 (Ct. App. 1999); S.C. Dep't of Labor, Licensing and Regulation v. Girgis, 332 S.C. 162, 166, 503 S.E.2d 490, 492 (Ct. App. 1998).

"'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the Record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." Lark v. Bi-Lo, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (quoting Law v. Richland County Sch. Dist. No. 1, 270 S.C. 492, 495-96, 243 S.E.2d 192, 193 (1978)). Accordingly, the possibility of drawing two (2) inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995).

LAW/ANALYSIS

On October 3, 2013, Appellant pled guilty and was sentenced to fourteen years for Distribution of Cocaine, 2nd offense, in violation of Section 44-53-370(b)(1). Also, on October 3, 2013, Appellant pled guilty and was sentenced to fourteen years for Trafficking in Cocaine Base/Meth. 10 – 28 grams, 2nd offense in violation of Section 44-53-375(C)(1)(b). The sentences were ordered to run concurrently.

Absent any ambiguity in the sentencing sheet, the Court must presume that the sentencing court's sentence is correct. See Tant v. S.C. Dep't of Corr., 408 S.C. 334, 337, 759 S.E.2d 398, 399 (2014), reh'g denied (July 10, 2014) ("[T]he Department is generally confined to the face of the sentencing sheets in determining the length of a sentence . . . [unless] there is an ambiguity in the sentencing sheets."). Here, the sentencing sheets for Appellant's October 3, 2013 convictions are unambiguous, and the Department was required to calculate Appellant's sentence according to those sheets.

Section 44-53-375(C)(1)(b) provides that a person convicted of a second offense of "trafficking in methamphetamine or cocaine base," in a quantity of ten grams but less than twenty-

eight grams is guilty of a felony and must serve "a term of imprisonment of not less than five years nor more than thirty years, no part of which may be suspended nor probation granted[.]" The offense is classified as a Class A felony under Section 16-1-90(A). S.C. Code Ann. § 16-1-90 (Supp. 2017). "[A] class A, B, or C felony or an offense exempt from classification" is a "no parole offense." S.C. Code Ann. § 24-13-100 (2007). Regarding no parole offenses, Section 24-13-150(A) sets forth the following:

> (A) **Notwithstanding any other provision of law**, except in a case in which the death penalty or a term of life imprisonment is imposed, an inmate convicted of a "no parole offense" . . . is not eligible for early release, discharge, or community supervision . . . until the inmate 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 ...

(Emphasis added). S.C. Code Ann. § 24-13-150(A) (Supp. 2017). Because Appellant's second offense is a Class A felony, it is a "no parole defense," generally requiring a service of eighty-five percent of the sentence.

On June 2, 2010, the Omnibus Crime Reduction and Sentencing Reform Act of 2010 became effective. As the Court of Appeals discussed in Bolin v. S.C. Dep't of Corr., 415 S.C. 276, 781 S.E. 2d 914 (Ct. App. 2016), the Act did not amend the definition of a "no parole offense" but in its amendments to Section 44-53-375 (and -370), the legislature used the phrase, "Notwithstanding any other provision of law," signaling its intent to repeal Section 24-13-100 to the extent it conflicts with amendments to Sections 44-53-375 and -370." Bolin, 415 S.C. at 282, 781 S.E. 2d at 917.

The 2010 Omnibus Crime Reduction and Sentencing Reform Act only amended Section 44-54-375(B), which relates to those convicted of drug distribution, manufacturing, and possession with the intent to distribute charges. The Act did not amend any of the other subsections of the statute including the drug trafficking statutes contained in Section 44-53-375(C). Thus, neither Bolin nor the Act repeal Section 24-13-100 as it pertains to Appellant's conviction for drug trafficking under Section 44-54-375(C)(1)(b).

Appellant also argues that he is entitled to parole eligibility under Section 44-53-375(F) because he was not sentenced "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 . . .". The Court disagrees. As discussed above, Section 24-13-150 requires an inmate convicted of a no-parole offense to serve at least eighty-five percent of his sentence before he is eligible for early release, discharge, or community supervision. Section 24-13-100 defines the term "no-parole offense," in pertinent part, as "a class A, B, or C felony." Whether a felony is a Class A, B, or C felony depends on the maximum sentence for the felony--a Class A felony is a felony punishable by not more than thirty years. S.C. Code Ann. § 16-1-20 (2015). See also S.C. Code Ann. § 16-1-30 (2015) ("All criminal offenses created by statute after July 1, 1993, must be classified according to the maximum term of imprisonment provided in the statute and pursuant to Sections 16-1-10 and 16-1-20, except as provided in Section 16-1-10(D)."); S.C. Code Ann. § 16-1-10(D) (Supp. 2017) (listing offenses that are exempt from classification). It matters not that Appellant was only sentenced to serve fourteen years, but rather, that the maximum allowable sentence for the type of crime and its felony classification. Based on the foregoing, Appellant is properly classified as an eighty-five percent offender.

For the first time on appeal, Appellant argues that the application of Sections 24-13-100 and 24-13-150 as applied, violate the due process clause under the Fourteenth Amendment. This issue is not preserved for appellate review. "It is axiomatic that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912 (Ct. App. 2004) (quoting Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). As Appellant failed to raise this issue in his Step 1 or 2 grievances, the issue is not preserved for appellate review.

ORDER

IT IS THEREFORE ORDERED that the South Carolina Department of Corrections' decision is **AFFIRMED.**

AND IT IS SO ORDERED.

Deborah Brooks Durden, Judge
S.C. Administrative Law Court

October 19, 2018
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 18th day of October 2018
By: _____
Judicial Law Clerk

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
INMATE GRIEVANCE FORM
STEP 1

INMATE NAME: Damon Brown
SCDC NUMBER: 357300
INSTITUTION: KCI
HOUSING UNIT: EA2-37
WORK ASSIGNMENT: Barber

Office Use Only
Grievance No. KCI 6009-17
Code: General P
Policy — SENTENCE TIME
Disc. Hear.
Class.
Date Received 2-27-17
IGC Initials SR

STATE GRIEVANCE (include documentation, and date of incident; if SCDC Policy, indicate which policy)

The Dept. of Cor. incorrectly calculated my projected release date. My conviction is under section 44-53-375(C)(2). My argument is how the statutory provision of 44-53-375(C)(2) conflicts with the D.O.C interprets the full reading of the statute. The statute clearly provides that only when convicted under subsection (C) or (E) to a mandatory term of 25yrs, a mandatory minimum term of 25yrs, or a mandatory minimum of not less than 25yrs nor mor than 30yrs is not eligible for parole, extended work release, or supervised furlough. This section excludes any reference to a sentence below a mandatory minimum of 25yrs. My mandatory minimum under 44-53-375(C)(2) is 5years. Thus I am eligible for parole, extended work release, and supervised furlough.

ACTION REQUESTED:

I request for my sentence to be recalculated with the correct provisions of the statute to which I am sentenced under. To receive parole eligibility, extended work release eligibility, and supervised furlough to be given.

SPECIFY HOW AND WHEN INFORMAL RESOLUTION WAS ATTEMPTED BY GRIEVANT:

On 7-23-16 I filed on the kiosk and it was returned on 8-3-16 with incorrect and absurd answer. On 8-7-16 on kiosk again and returned on 9-1-16 with no answer, just a code. On 9-12-16 on kiosk and returned 10-23-16 with an incomplete answer.

Damon Brown 1-3-17
Grievant Signature Date

ACTION TAKEN BY IGC: Processed — Done 10/25/17

Your grievance has been received, however your grievance is being returned. Must attach an answered RTSM to Inmate Records for an informal resolution attempt. You may submit a grievance with these corrections so grievance can properly be investigated according to policy.

SLAM 2-28-17
IGC Signature Date

☒ I accept the action taken by the IGC and consider the matter closed.
☐ I do not accept the action taken and wish to appeal.

N/A
Grievant Signature Date

SCDC 10-5 (Rev. November 1997)

(CONTINUED ON REVERSE SIDE)

WARDEN'S DECISION AND REASON:

Inmate Brown Damon 357300;

This is in response to KCI-0009-17. Pertinent information and documentation has been reviewed. It is documented on your sentencing sheet, signed by the Judge, that you current conviction is classified as Violent. Also, you do have a mandatory sentence requirement of 11 years and 10 months and 24 days. Taking into account the above mentioned facts, that is why you do not have a parole date and do not qualify for supervised furlough or extended work release. However, you are getting Earned Work Credits. Therefore, SCDC calculations of your Sentence are correct.

Based on this information, your requested action is denied. If not satisfied with my response, see Step 5 below.

Warden Signature 10-25-17 Date

☐ I accept the Warden's decision and consider the matter closed.
☑ I do not accept the Warden's decision and wish to appeal.

Damon Brown 11/2/17
Grievant Signature Date

IGC Signature 11/2/17 Date

INSTRUCTIONS FOR COMPLETING STEP 1 GRIEVANCE FORM

1. An informal resolution shall be attempted prior to the filing of Step 1.
2. Complete each section in its entirety, writing only in the space provided for inmate use.
3. Only one (1) issue is to be addressed on each form.
4. Submit the completed form to the Institutional Grievance Coordinator within fifteen (15) days of an alleged incident; policy grievances at any time. Do not write in the space provided for the Warden's response.
5. If you are not satisfied with the Warden's decision, you may appeal to the appropriate responsible official within five (5) days of your receipt of the Warden's decision, via the Institutional Grievance Coordinator.

RECEIVED
NOV 13 2017

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
INMATE GRIEVANCE FORM

DUE: 11/7/17

STEP 2

RECEIVED
NOV 03 2017
KIRKLAND RECEPTION & EVALUATION CENTER
11-3-17

RECEIVED
JAN 31 2018
DIVISION OF CLASSIFICATION & INMATE RECORDS

Office Use Only
Grievance No. KCI-0009-17
Code: General
Policy
Disc. Hear.
Class
Date Received
IGC Initials

INMATE NAME: Daman Brown
SCDC NUMBER: 357300
INSTITUTION: KCI
HOUSING UNIT: EA2-37
WORK ASSIGNMENT: Barber

INMATE'S REASON FOR APPEAL (state specific dissatisfaction):

The Dept. of Cor. incorrectly calculated my projected release dat. My conviction is under section 44-53-375(C)(2). My argument is how the statutory provision of 44-53-375(c)(2) conflicts with how the D.O.C. interprets the full reading of the statute. The statute clearly provides that only when convicted under subsection (c) or (e) to a mandatory term of 25 years, a mandatory minimum term of 25 years, or a mandatory minimum of not less than 25 years nor more than 30 yrs one is not eligible for parole, extended work release, or supervised furlough. This section excludes ax reference to a sentence below a mandatory minimum of 25 years. My mandatory minimum under 44-53-375 (c)(2) is 5 years. Therefore, I am eligible for parole, extended work release, and supervised furlough.

Daman Brown 11/3/17
Grievant Signature Date

RESPONSIBLE OFFICIAL'S DECISION AND REASON:

I have reviewed your concern. In your grievance you stated that SCDC has incorrectly calculated your release date. You further stated that your conviction was under Section 44-53-375(C) (2) and it conflicts with how SCDC interprets the full reading of the statute. You finally stated that you are eligible for parole, work release and supervised furlough. The Warden responded to your concern on Step 1 Inmate Grievance Form 10-5 dated 10/25/17. You were convicted for violating SC Code of Laws 44-53-370 (b) (1), Distribution of Cocaine, Second Offense and 44-53-375 (C) (1) (c), Trafficking in Cocaine Base/Meth., Second Offense. You were sentenced on 10/3/2013 as a violent and serious offender to 14 years on each convictions to run concurrently. Predicated on these charges you are not eligible for supervised re-entry or the work program. Your interpretation of the above laws is incorrect. Your projected release date is 8/24/2025 and your custody/security level is 1B. If you have further concerns regarding your incarcerated sentence, please speak with your local classification caseworker.

Therefore, your grievance is denied.

You may appeal this decision under the South Carolina Administrative Procedures Act to the South Carolina Administrative Law Court. In order to appeal, you must complete the attached Notice of Appeal Form (Form) and submit it as instructed on the Form within thirty (30) days of receipt.

Signature 2/2/18
Date

The decision rendered by the responsible official exhausts the appeal process of the Inmate Grievance Procedure. I hereby acknowledge receipt of the official's response and understand this is the Agency's final response to this matter.

Daman Brown 2-15-18
Grievant Signature Date

IGC Signature 2/15/18
Date

(SEE REVERSE SIDE FOR INSTRUCTIONS)

INSTRUCTIONS FOR COMPLETING STEP 2 GRIEVANCE FORM

1. Complete form in its entirety, writing only in the space provided for inmate use.
2. State your specific reason for further appeal. Do not submit any new issues for review.
3. Submit this completed form with your original Step 1 attached, to the Institutional Grievance Coordinator within five (5) days of your receipt of the Warden's decision. Do not write in the space provided for the responsible official.
4. The decision rendered by the responsible official exhausts the appeal process of the SCDC Inmate Grievance Procedure.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
ADMINSTRATIVE LAW COURT

Damon T. Brown #357300
Appellant

V.
South Carolina Department
of Corrections, Respondent

Brief in Compliance
With Rule 60, AL.C.R.
Judge Durden
Case No. 18C0095

STATEMENT OF THE ISSUES on APPEAL

Under SC Code Ann. 44-53-375(C), sentences not carrying the "mandatory minimum of not less than 25 years", language required to serve 85% of the sentence before release from incarceration and are these sentences entitled to parole eligibility and the other provisions listed within the statute?

Is the application of SC Code Ann 24-13-100 and 24-13-150 a violation to Appellant's due process of the U.S.C.A. 14th amendment and statutory provisions under 44-53-375(C) to parole eligibility, work release, and supervised furlough by requiring Appellant to serve 85% of his sentence before his parole eligibility date?

By Appellant showing that SC Code Ann 24-13-100 is unconstitutional on it's face, through substantial evidence within the statute, he is requesting the ALC to grant Apellant an injunction prohibiting its enforcement where it is unconstitutional.

STATEMENT OF THE CASE

This matter is before the Adminstrative Law Court, pursuant to the grievances filed within the South Carolina Department of Corrections by Damon T. Brown (Apellant), an inmate incarcerated within the Department of Corrections. The Appellant argues the Department of

Corrections is in err by applying SC Code Ann. 24-13-100 and 24-13-150 to his sentence. The Appellant plead guilty to 44-53-375(C)(1)(b) and was sentenced to 14 years. Appellant argues that his conviction is a parole eligible offense. Under the Code of Laws of South Carolina, which is the controlling authority when sentencing inmates, SC Code Ann 44-53-375(C) establishes Liberty Interest to parole eligibility, work release, and supervised furlough. Which makes 24-13-100 and 24-13-150 unconstitutional to offenders not serving sentences containing the mandatory minimum 25 year requirement. Resulting in violations of the statutory provision and the U.S.C.A. 14th amendment and state statute 44-53-375(C). Because of these violations, the D.O.C. should recalculate the sentences for inmates sentenced under 44-53-375(C).

ARGUMENT

Under SC Code Ann. 44-53-375(C), sentences not carrying the "mandatory minimum of not less than 25 years", language required to serve 85% of the sentence before release from incarceration and are these sentences entitled to parole eligibility and the other provisions listed within the statute?

Standard of Review. Courts held that if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is proper where it exists. Citizens United v. Federal Election Commission 558 U.S. 310, 333, 130 S.Ct. 876 175 L.Ed. 2d 753 Furthermore, a severability clause could impose such a requirement on the courts, legislature would easily be able to insulate unconstitutional statutes from most facial reviews. When a part of a statute is unconstitutional, the question arises whether other parts of the statute must go. If a statute says that provisions found to be unconstitutional can be severed from the rest of the statute, the valid provisions are allowed to stand. The courts repealed statutes 24-13-100 when deemed unconstitutional to offenders sentenced under SC Code Ann 44-53-375(B)(2), which carries a sentencing language of 5 years nor more than 30 years. And 44-53-375(B)(3) which carries the sentencing language of ten years nor

more than 30 years. Bolin v. South Carolina Department of Corrections (2015) Because SC Code Ann 24-13-100 is deemed unconstitutional, it is presumed to be severable. But when a presumption of severability arises, the party asking the court to strike down a portion of the statute must present strong evidence that congress would not have enacted the challenged portion of the statute in the unconstitutional provision. The strong evidence is within the statute of 44-53-375(C) for the statute uses explicit language, separating legislature's intent to provide provisions at sentencing. -375(C) has a self contained enhancement ladder for sentencing purposes. A clear and reasonable reading of -375(C) and -375(F) show how the application of 24-13-100 creates a conflict. Furthermore, -375(C) determines enhancement of the offense according to the weight and number of offenses of controlled substances. As the weight and number of offenses increase, the provisions decrease. Offenses carrying the mandatory minimum language of not less than 25 years, do harmonize with the application of 24-13-100 and 24-13-150. But Appellant's sentence under 44-53-375(C)(1)(b) doesn't. So Appellant contends that he is entitled to parole eligibility and other provisions that are being deprived because of the application of 24-13-100. Furthermore, when a defendant is sentenced under a statute that is specific in nature, and that statute specifically describes how an offense under that statute is to be enhanced from a first to a second or subsequent offense, the provisions of that statute control over the more general statutes such as 24-13-100 and 24-13-150. 24-13-100 and 24-13-150 only harmonize with sentences containing the "mandatory minimum of not less than 25 years" sentences. Research has revealed no amendment to 44-53-375(C), therefore the plain language of the statute must be construed in favor of the Appellant and most strictly against the state. The invalid parts of 24-13-100 and 24-13-150 must be dropped without affecting the remainder thereof if valid parts is fully operable to the law. Champlin Refining Co. v. Corporation Commission of State of OKL 286 U.S. 210 (1932). Appellant is asking the court to repeal SC Code Ann 24-13-100 and 24-13-150 so that statutes may be construed in such a matter as to avoid a constitutional question whenever this is possible. Eaton v. Davis.

176 VA 330, 339, 10 S.E. 2d. 893 (1940) In that context, the court must narrowly construe a statute where such a construction is reasonable and avoids a constitutional infirmity. Pederson v. City of Richmond 219 VA 1061, 1065, 254 S.E. 2d 95 (1979) McClurg v. Deaton 395 S.C. 85 716, S.E. 2d 387 (2011). making the Appellant not required to serve 85% of his sentence before parole eligibility.

ARGUMENT

Is the application of SC Code Ann 24-13-100 and 24-13-150 a violation to Appellant's due process of the U.S.C.A. 14th amendment and statutory provision under 44-53-375 (C) to parole eligibility, work release and supervised furlough by requiring Appellant to serve 85% of his sentence before his parole eligibility date?

Standard of Review. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property with the due process of law, nor shall deny to any person within jurisdiction the equal protection of the law. U.S.C.A. 14th Bermudez v. Duenas 936 F.2d 1064 (1991) South Carolina Code of Laws is the controlling authority when sentencing inmates. State v. Bennett 375 S.C. 164, 173 (2007). It is unconstitutional and unreasonable to characterize an offense for which the offender is eligible for parole as a no-parole offense. Pursuant to statute 24-13-100 even if the maximum sentence for the offense places it within a classification encompassed by 24-13-100 et. Al. Bolin v. South Carolina Department of Corrections 415 S.C. 276, 781 S.E. 2d 914 (2016). The courts turned to canons of statutory construction to harmonize provisions Chevron 467, U.S, at 843 N.9 104 S.Ct. 2778 (1984) which instructs the courts to employ traditional tools of statutory construction to ascertain congress' clear intent. The specific terms of a statutory scheme governs the general ones. D.B. v. Cardall 826 F. 3d 721, 735 (4th Cir. 2016) Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions. As it has done

in the sentencing context of SC Code Ann 44-53-375(C) when read as a whole and not in part as intended by Congress and the legislature. To provide that "only" sentences specifically imposed with the mandatory minimum language of not less than 25 years, are the only sentences that harmonize with SC Code Ann. 24-13-100 and 24-13-150. State statutory law creates liberty interest to parole eligibility and other provisions listed within SC Code Ann 44-53-375(C) making 24-13-100 and 24-13-150 unconstitutional to Appellant's sentence.

ARGUMENT

By Appellant showing that SC Code Ann 24-13-100 is unconstitutional on its face, through substantial evidence within the statute, he is requesting the ALC to grant Appellant an injunction prohibiting its enforcement where it is unconstitutional.

Standard of Review. Substantial evidence was shown through SC Code Ann 44-53-375 when read as a whole and in its entirety. Explicit language implies a separation of provisions to parole eligibility by using the 25 years mandatory minimum language. Because South Carolina Code of Laws is the controlling authority and SC Code Ann 44-53-375(C) doesn't harmonize with 24-13-100, it is unconstitutional to Appellant's sentence. Leaving no reason for the ALC to not allow an injunction to be granted prohibiting its enforcement where it is unconstitutional

CONCLUSION

The Appellant requests to receive his parole eligibility date before serving 85% of his sentence and to receive work release, Earned Work Credits, Earned Education Credits, and supervised furlough.

Damon Brown 357300
Kirkland Correctional Institution
4344 Broad River Rd
Columbia, SC 29210

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Damon Brown, #357300, Appellant, v. South Carolina Department of Corrections, Respondent.	)	Docket No.: 18-ALJ-04-0095-AP Grievance No.: KCI 9-17 RESPONDENT'S BRIEF *Honorable Deborah Brooks Durden*

STATEMENT OF THE CASE

This case is before the Administrative Law Court ("ALC") pursuant to the appeal of Damon Brown ("Appellant"), an inmate incarcerated with the Department of Corrections ("SCDC"). Appellant filed a Step One Grievance on January 3, 2017, claiming his projected max out date was not being calculated properly. This grievance was investigated and denied when it was determined that SCDC has properly calculated Appellant's sentence. Appellant filed a Step Two Grievance on November 3, 2017. This grievance was also investigated and denied. Appellant subsequently filed his Notice of Appeal. Because Appellant's sentence has been properly calculated, the final determination of the Department should be affirmed.

JURISDICTION

The ALC's jurisdiction to hear this matter is derived entirely from the decision of the South Carolina Supreme Court in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). In *McNeil v. South Carolina Department of Corrections*, 00-ALJ-04-00336-AP (September 5, 2001), the ALC interpreted the breadth of its jurisdiction pursuant to *Al-Shabazz*. That decision holds that the ALC's appellate jurisdiction in inmate appeals is

limited to two types of cases: (1) cases in which an inmate contends that prison officials have erroneously calculated his sentence, sentence-related credits, or custody status; and (2) cases in which the SCDC has taken an inmate's created liberty interest as punishment in a major disciplinary hearing. Jurisdiction of the ALC was most recently addressed in *Sullivan v. SCDC*, 355 S.C. 437, 586 SE.2d 124 (2003).

In this case, appellant contends that SCDC has incorrectly calculated his sentence. Consequently, the ALC has jurisdiction to hear his appeal.

STANDARD OF REVIEW

A reviewing court will not disturb findings of an administrative agency if its findings are supported by substantial evidence on record as a whole. *Pearson v. JPS Converter & Industry Corp.*, 327 S.C. 393, 489 S.E.2d 219 (Ct. App. 1997). "Substantial evidence" is evidence which, considering record as a whole, would allow a reasonable mind to reach the conclusion reached by the administrative agency. *Hendley v. S.C. State Budget & Control Bd.*, 325 S.C. 413, 481 S.E.2d 159 (Ct. App. 1996). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995). Administrative agencies are afforded wide latitude in making decisions, as shown in the deferential standard of appellate review. *Heater of Seabrook, Inc. v. Public Svc. Comm'n of S.C.*, 332 S.C. 20, 503 S.E.2d 739 (1998).

ARGUMENT

I. APPELLANT HAS MISINTERPRETED *BOLIN v. S.C. DEP'T OF CORR.* AND S.C. CODE ANN. § 44-53-375

In his Brief, Appellant cites to *Bolin v. S.C. Dep't of Corr.*, 415 S.C. 276, 282, 781 S.E.2d 914, 917 (Ct. App. 2016), and argues that his conviction for drug trafficking is not an 85%, "no parole" offense. However, as will be explained below, the *Bolin* case does not apply to drug trafficking offenses, and Appellant's trafficking offense qualifies as an 85%, no parole offense under the applicable law.

On June 2, 2010, the Omnibus Crime Reduction and Sentencing Reform Act of 2010 went into effect. The Act amended portions of S.C. Code Ann. § 44-53-375(B) by adding the following language:

> 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, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. In all other cases, the sentence must not be suspended nor probation granted."
>
> 2010 Act No. 273, § 38.

In 2016, the South Carolina Court of Appeals stated in *Bolin v. S.C. Dep't of Corr.* that the legislature's use of the phrase "Notwithstanding any other provision of law" signaled its intention to "repeal section 24-13-100 to the extent it conflicts with the amended sections of 44-54-375 and -370." *Bolin v. S.C. Dep't of Corr.*, 415 S.C. 276, 282, 781 S.E.2d 914, 917 (Ct. App. 2016), reh'g denied (Feb. 24, 2016). The court further said that "without this implicit repeal, the amendments themselves would be meaningless". *Id.* at 283, 781 S.E.2d at 917. However, this "implicit repeal" of § 24-13-100 is limited to § 44-53-375(B). *Id* at 286, 781 S.E.2d at 919 ("Based on the foregoing, we hold that a second offense under section 44–53–375(B) is no longer a no-parole

offense"). Therefore, after *Bolin*, an inmate convicted of certain drug offenses under § 44–53–375(B) is considered a non-85% offender and is eligible for parole. This includes an offender who:

> manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base, in violation of the provisions of Section 44-53-370.
>
> S.C. Code Ann. § 44-54-375(B).

Again, the 2010 Omnibus Crime Reduction and Sentencing Reform Act only amended S.C. Code Ann. § 44-54-375(B), which relates to those convicted of **drug distribution, manufacturing, and possession with intent to distribute** charges. *Id.* (emphasis added). The Act did not amend any of the other subsections of the statute. More specifically, the Act did not amend any portions of the drug trafficking statutes contained in S.C. Code § 44-53-375(C). Therefore, *Bolin* and the 2010 Omnibus Crime Reduction and Sentencing Reform Act do not repeal § 24-13-100 as it pertains to Appellant's conviction for drug **trafficking** under § 44-54-375(C)(1)(b).

II. APPELLANT'S SENTECE HAS BEEN CORRECLTY CALUCLATED BY RESPONDENT

On October 3, 2013, Appellant was sentenced to fourteen years for Trafficking in Cocaine Base/Meth under S.C. Code § 44-53-375(C)(1)(b). *See* Sentencing Sheet. Appellant argues his conviction is a non-85%, parole-eligible offense under *Bolin;* however, this is not correct. As discussed above, *Bolin* only applies to drug distribution, manufacturing, and possession with intent to distribute offenses under S.C. Code § 44-53-375(B). *Id.*

Appellant's sentence for Trafficking in Cocaine Base/Meth is a Class A felony and the conviction of such carries "a term of imprisonment of not less than five years nor more than thirty years, no part of which may be suspended nor probation granted[.]" By definition, this meets the classification of a "no parole offense." *See* S.C. Code Ann. § 24-13-100 ("A 'no parole offense' means a class A, B, or C felony . . .."); § 16-1-30 ("All criminal offenses created by statute after July 1, 1993, must be classified according to the maximum term of imprisonment provided in the statute and pursuant to Sections 16-1-10 and 16-1-20 . . . ."); § 16-1-20(A)(1) ("A person convicted of classified offenses, must be imprisoned as follows: (1) for a Class A felony, not more than thirty years."). Accordingly, Appellant must serve at least 85% of his sentence. S.C. Code Ann. § 24-13-150(A) provides:

> Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, an inmate convicted of a "no parole offense" as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections [. . .] is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the inmate has served **at least eighty-five percent of the actual term of imprisonment imposed**.

(Emphasis added).

The 85% mandatory service requirement for a fourteen year sentence is eleven years, ten months, and twenty-four days. Appellant's sentence start date is October 3, 2013. *See* Conviction Summary. Appellant's current projected max out date is August 24, 2025, which is approximately eleven years, ten months, and twenty-four days after his sentence start date. *Id.* Appellant has not carried his burden to demonstrate SCDC is incorrectly calculating his sentence.

III. CONSTITUTIONAL ISSUE NOT PRESERVED FOR REVIEW NONETHELESS, APPELLANT IS NOT ELIGIBLE FOR PAROLE AND THEREFORE HIS DUE PROCESS RIGHTS HAVE NOT BEEN VIOLATED.

Appellant argues that the application of S.C. Code Ann. § 24-13-100 and 24-13-150 violate the due process clause under the Fourteenth Amendment. However, these issues are not preserved for appellate review because Appellant failed to raise them at his earliest opportunity.

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). When a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. *State v. Sullivan*, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see *State v. Williams*, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *State v. Johnson*, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

Here, Appellant did not raise the Fourteenth Amendment issue in his Step 1 or Step 2 grievances. Therefore this issue is not preserved for appellate review.

Nevertheless, Appellant is not eligible for parole and therefore his due process rights have not been violated under the due process clause of the Fourteenth Amendment.

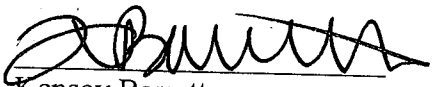
IV. RESPONDENT'S FINAL DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The record conclusively establishes that the "substantial evidence on the whole record" supports the Department's final agency decision. Appellant has the burden of proving that the decision of the Department is clearly erroneous, or arbitrary or capricious, or an abuse of discretion. *See Porter v. Public Service Comm'n*, 333 S.C. 12, 507 S.E.2d 328 (1998). Appellant has not met this burden and his claim should be dismissed with prejudice.

CONCLUSION

Appellant has not met his burden to demonstrate SCDC is incorrectly calculating his sentence, and the Department's calculation is supported by substantial evidence. Therefore, Respondent respectfully requests this Court dismiss this case with prejudice.

Respectfully submitted,



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July 10, 2018
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STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Damon T. Brown, #357300 Appellant, v. South Carolina Department of Corrections, Respondent.	Docket No.: 18-ALJ-04-0095-AP Grievance No.: KCI 9-17 Appellant's Reply Brief Honorable Deborah Brooks Durden

STATEMENT OF THE CASE

Appellant filed a Step One Grievance on January 3, 2017, stating his projected max out date was not being calculated properly. This grievance was denied. Appellant then filed a Step Two Grievance on November 3, 2017. This grievance was also denied. Appellant subsequently filed a Notice of Appeal to the ALC.

JURISDICTION

The ALC's jurisdiction to hear this matter is derived entirely from the decision of the South Carolina Supreme Court in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).

STANDARD OF REVIEW

A person convicted and sentenced under subsection (C) or (E) et. AL, 44-53-375(C). Legislature and Congress did not grant special privilege and a wide latitude for Respondent to act. Louisiana Public Service Commission v. F.C.C., 476 U.S. 355, 106 S.Ct 1890, 74

P.U.R. 4th)(1986). South Carolina Code of Laws is the controlling authority for classification when sentencing inmates, statutes dictate the sentence. State v. Bennett, 375 S.C. 164, 173 (2007). when a manifest or gross error of law has been committed by an Agency, Courts must not submit its judgement for the Agency's as weight of question of the facts. Lake v. BI-LO Inc., 276 S.C. 130 (1981). It's unreasonable to characterize offenses eligible for parole as NO PAROLE offenses pursuant to 24-13-100, 24-13-150(A), and 44-53-470. Kerr v. State, 345 S.C. 183 (2001). The Agency's evidence is insufficient and has failed to interpret the statute in its entirety as a whole and not in part. State v. Landis, 362 S.C. 97(2001). Statute is to be enhanced from a 1st, to a 2nd, or 3rd or subsequent offense, the provision of that statute control over more general enhancement statutes such as 24-13-100, 24-13-150(A) and 44-53-470. Rainey v State, Supra. Legislature only used the term "mandatory" in stating the sentence for a 3rd and subsequent offense. State v. Taub, 336 S.C. 310 (1999). Making the application of 24-13-100, 24-13-150(A), and 44-53-470 to the 1st and 2nd offense unconstitutional and severance is appropriate. Whole Women's Health v. Hellerstedt, 136 S.Ct 2292 (2016).

ARGUMENT

DOES S.C. CODE 24-13-100 AND 24-13-150(A) (Definition of NO-PAROLE) AND 44-53-470 (Enhancement Statute), BECOME UNCONSTITUTIONAL WHEN APPLIED TO

THE PROVISIONS OF S.C.CODE.ANN. 44-53-375(C)(1)(b), WHERE SPECIFIC LANGUAGE ESTABLISHES LIBERTY INTEREST TO PROVISION OF PAROLE ELIGIBILITY, WHERE HIS OFFENSE DOES NOT CONTAIN THE "MANDATORY" or "MANDATORY MINIMUM" LANGUAGE, MAKING THE CONSTITUTIONAL VIOLATION OF DUE PROCESS OF THE 14TH U.S.C.A. AMENDMENT BY REQUIRING SERVICE OF 85% OF HIS SENTENCE BEFORE PAROLE ELIGIBILITY?

Under S.C. Code Ann. 44-53-375(C), a person convicted for trafficking in a quantity of ice, crank, or cocaine base of 10 grams or more, but less than 28 grams "must be punished" as follows: 1) for a 1ST offense, a term of imprisonment of not less than 3 years nor more than 10 years, no part of which may be suspended or probation granted, and a fine of $25,000.00; 2) for a 2ND offense, a term of imprisonment of not less than 5 years nor more than 30 years, no part of which may be suspended or probation granted, and a fine of $50,000.00; 3) for a 3RD offense, or subsequent, a mandatory ~~term~~minimum term of imprisonment of not less than 25 years nor more than 30 years, no part of which may be suspended or probation granted, and a fine of $50,000.00. Furthermore, 44-53-375(F) states; Sentences for violations of the provisions of subsections (C) or (E) may not be syspended nor probation granted. A person convicted and sentenced under subsection (C) or (E) to a mandatory term of imprisonment of 25 years, a mandatory minimum term of imprisonment of 25 years, or a mandatory minimum term of imprisonment of not less than 25 years nor more than 30 years is not eligible for parole, extended work release, or supervised furlough.

Legislature and Congress did not grant special privilege and a wide latitude for the Respondent to act. Chevron, 467 U.S. 843 [N9] 104 S.Ct. 2778 and Louisiana Public Service Commsn. v. F.C.C., 476 U.S. 355, 106 S.Ct. 1890, 74 P.U.R. 4th 1 (1986). South Carolina Code of Laws is the controlling authority when sentencing inmates, statutes dictate the sentence. State v. Bennett, 375 S.C. 164, 173 (2007). When a manifest or gross error of law has been committed by an Agency, Courts must not substitute its judgement for the Agency's as weight of question of the facts. Lake v. BI-LO Inc., 276 S.C. 130 (1981). It's unreasonable to characterize offenses eligible for parole as NO-PAROLE pursuant to 24-13-100, 24-13-150 (A), and 44-53-470, Kerr v. State, 345 S.C. 183 (2001) and Nelson v. Ozmint, 390 S.C. 432 (2010). The Agency's evidence is insufficient and has failed to interpret the statute in its entirety as a whole and not in part, State v. Landis, 362 S.C. 97 (2004).

44-53-375 (C) contains its own self contained enhancement ladder for the purpose of sentencing and also specifically what constitutes NO-PAROLE under this subsection. The court held in Rainey v. State, Supra, that where a defendant is sentenced under a specific statute and that statute specifically deals with how an offense under that statute is to be enhanced from a 1ST, to a 2ND, or 3RD or subsequent offense, the provisions of that statute control over more general enhancement statutes such as 24-13-100, 24-13-150 (A), and

44-53-470. Appellant's provisions should not be deprived until the 3RD or subsequent offense. Legislature only used the term "mandatory" in stating the sentence for a 3RD or subsequent offense. State v. Taub, 336 S.C. 310 (1999). "Interpretation of statute was held incorrect and held that the phrase 'mandatory' and 'mandatory minimum' are distinguishable," Kerr. Making the application of 24-13-100, 24-13-150(A) and 44-53-470 to the 1ST and 2ND offense of 44-53-375 (C), unconstitutional and severance is appropriate. Whole Women's Health v. Heller Stedt., 136 S.Ct. 2292 (2016).

Furthermore, Appellant is not adequately experienced at quoting law. However, parole, work release, and supervised furlough are all State created Liberty Interest to the 14TH U.S.C.A amendment to Due Process and Appellant did list these in his Step 1 and 2 grievances.

CONCLUSION

Appellant requests this Honorable Court to sever the unconstitutional parts of 24-13-100, 24-13-150(A) and 44-53-470, where they are unconstitutionally applied to the provisions and Liberty Interests of parole, work release and supervised furlough, within 44-53-375 (C)(1)(b) and parole eligibility be given at 1/3 of Appellant's sentence.

#357300 Damon T. Brown
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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge Deborah Brooks Durden

ALC Case No. 18-ALJ-04-0095-AP
Appellate Case No. 2018-001981

DAMON BROWN, #357300,

APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

INITIAL BRIEF OF RESPONDENT

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

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ATTORNEY FOR RESPONDENT

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II. APPELLANT'S CONSTITUTIONAL ISSUE IS NOT PRESERVED FOR APPELLATE REVIEW.

STATEMENT OF THE CASE

This matter is comes before the Court pursuant to the appeal of Damon Brown, an inmate incarcerated with the Department of Corrections. Appellant filed a Step One Grievance on January 3, 2017, claiming his projected max out date was not being calculated properly. This grievance was investigated and denied when it was determined that SCDC has properly calculated Appellant's sentence. Appellant filed a Step Two Grievance on November 3, 2017. This grievance was also investigated and denied. Appellant filed a Notice of Appeal in the Administrative Law Court on March 9, 2018. Thereafter, on October 18, 2018, the Honorable Deborah Brooks Durden issued an order affirming the decision of the Department of Corrections. This appeal follows.

STANDARD OF REVIEW

S.C. Code Ann. § 1-23-610(B) provides the applicable standard of review:

> The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (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).

In an appeal of a final decision of an administrative agency, the standard of appellate review is whether the ALC's findings are supported by substantial evidence. S.C. Code Ann. § 1-23-610(B). "Substantial evidence" is evidence which, considering the record as a whole, would allow a reasonable mind to reach the same conclusion that administrative agency reached. *Hendley v. S.C. State Budget & Control Bd.*, 325 S.C. 413, 481 S.E.2d 159 (Ct. App. 1996). A reviewing court shall not substitute its own judgment for that of the ALC as to findings of fact, but it may reverse or modify decisions that are controlled by errors of law or that are clearly erroneous in view of the substantial evidence on the record as a whole. *Id.*

ARGUMENTS

I. THE ADMINISTRATIVE LAW COURT PROPERLY AFFIRMED THE DECISION OF THE DEPARTMENT OF CORRECTIONS WHERE APPELLANT FAILED TO SHOW THE DEPARTMENT'S CALCULATION OF HIS SENTENCE WAS INCORRECT.

In this case, the Administrative Law Court properly affirmed the decision of the Department of Corrections, and Appellant has failed to show that the Department of Corrections committed any error with respect to the calculation of his sentence. On October 3, 2013, Appellant was sentencing to fourteen years for Trafficking in Cocaine Base/ Meth 10 – 28 grams, second offense, in accordance with S.C. Code § 44-53-375(c)(1)(b). *See* Sentencing Sheet for Indictment Number 2012-GS-08-1108. Appellant was also sentenced to fourteen years for Distribution of Cocaine, second offense, pursuant to S.C. Code § 44-53-370(b)(1) on October 3, 2013. *See* Sentencing Sheet for Indictment Number 2012-GS-08-1107. Appellant's Trafficking conviction is his controlling sentence for determining his maxout date and non-eligibility for parole. Appellant argues that Respondent is incorrectly applying S.C. Code § 24-13-100 to his sentence. *See* App. Initial Brief, p. 2. This is not correct.

On June 2, 2010, the Omnibus Crime Reduction and Sentencing Reform Act of 2010 went into effect. The Act amended portions of S.C. Code § 44-53-370 and § 44-53-375 by adding the following language to certain subsections dealing with manufacturing/distribution-level drug offenses:

> 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, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. 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 must not be suspended nor probation granted.

This language was **not** added to any of the subsections dealing with trafficking-level offenses. *See* S.C. Code § 44-53-370(e) and S.C. Code § 44-53-375(C).

The case of *Bolin v. S.C. Dep't of Corr.*, 415 S.C. 276, 282, 781 S.E.2d 914, 917 (Ct. App. 2016), *reh'g denied* (Feb. 24, 2016), held that the addition of the above-quoted language to the manufacturing/distribution-level subsections signaled the legislature's intent to repeal S.C. Code § 24-13-100 (the "85% law") to the extent it conflicted with the amended portions of S.C. Code § 44-53-370 and -375. Accordingly, the *Bolin* court found that these specific offenses were no longer to be considered to be 85%, "no-parole" offenses. However, since the language discussed in *Bolin* was **not** added to the trafficking subsections of the drug statutes, *Bolin* has no application to convictions for trafficking. *See* ALC Order, p. 4 of 5.

Appellant's trafficking conviction falls under the 85% "no parole" statute because the offense is a Class A felony, which carries a maximum sentence of thirty years. *See* S.C. Code § 44-53-375(c)(1)(b) (stating that second-offense trafficking in cocaine base/ meth, 10-28 grams, carries a sentence of five to thirty years); S.C. Code § 24-13-100 and -150 (generally, stating that offenses carrying twenty years or more are 85% no-parole offenses) and S.C. Code § 16-1-20(A)(1) ("A person convicted of classified offenses, must be imprisoned as follows: (1) for a Class A felony, not more than thirty years."); *See also* ALC Order, pp. 3-4 of 5.

Appellant argues that the following language contained in subsection F of S.C. Code § 44-53-375 requires that he be eligible for parole, extended work release, or supervised furlough:

> 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.

Initially, this language has no application to Appellant's conviction since he did not receive a "mandatory" or "mandatory minimum" term of imprisonment of twenty-five to thirty years. More importantly, this language (which, notably, was never mentioned or discussed in the *Bolin* case), does not repeal, implicitly or otherwise, the 85% provisions as applied to Appellant's drug trafficking offense. *See* ALC Order, p. 4 of 5. The above language became effective on January 12, 1995. *See* S.C. Code § 44-53-375(f) (Supp. 1995). At that time, there was no law requiring an inmate to serve an 85%, no-parole term, so the provision prohibiting parole for certain serious drug trafficking offenses had meaning. However, subsequently, on January 1, 1996, the 85% "no-parole" statutes were enacted. *See* S.C. Code § 24-13-100 and -150 (Supp. 1996). These broader statutes require 85%, no-parole terms for **all** sentences for class A, B, or C felonies or those exempt from classification but carrying a possible penalty of twenty years or more. *See* S.C. Code § 24-13-100 and -150 (Supp. 1996).

Additionally, as a part of the January 1, 1996 enactments, S.C. Code § 24-21-560 was added, which requires that all inmates sentenced for 85%, "no parole" offenses must be released directly to a community supervision program under the supervision of the Department of Probation, Parole, and Pardon Services for a period not to exceed two years. *See* S.C. Code § 24-21-560(A) & (B). All of this subsequent legislation - including S.C. Code § 24-13-100, § 24-13-150, and § 24-21-560 - to the extent it conflicts with the language in S.C. Code § 44-53-375(f), supersedes -375(f). *See, e.g., Williams v. Town of Hilton Head Island*, S.C., 311 S.C.

417, 421, 429 S.E.2d 802, 804 (1993) (in instances where it is not possible to harmonize two sections of a statute, a later legislation supersedes an earlier enactment); *State v. Brown*, 317 S.C. 55, 58, 451 S.E.2d 888, 891 (1994) ("More recent and specific legislation supersedes prior general law.").

Therefore, Appellant must be incarcerated for at least 85% of his sentence. *See* S.C. Code Ann. § 24-13-150(A); *see also* ALC Order, p. 5 of 5. Appellant's sentence start date is October 3, 2013. *See* Conviction Summary printout from SCDC's Offender Management System. Eighty-five percent of Appellant's fourteen year sentence is approximately eleven years, ten months, and twenty-four days. Appellant's current projected maxout date is August 24, 2025, which is approximately eleven years, ten months, and twenty-two days from his sentence start date. Appellant has failed to show that the Department's calculation is incorrect in any way. Therefore, Respondent respectfully requests that the order of the Administrative Law Judge be upheld.

II. APPELLANT'S CONSTITUTIONAL ISSUE IS NOT PRESERVED FOR APPELLATE REVIEW.

Appellant argues that the application of S.C. Code § 24-13-100 and 24-13-150 violate the due process clause under the Fourteenth Amendment. However, these issues were not preserved for the ALC to review and are not preserved for appellate review because Appellant failed to raise them at his earliest opportunity. *See* ALC Order, p. 5 of 5.

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). When a perceived error arises, the

defendant must object at the first opportunity to do so or the issue is waived. *State v. Sullivan*, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see *State v. Williams*, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *State v. Johnson*, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

Here, Appellant did not raise the Fourteenth Amendment issue in his Step 1 or Step 2 grievances. Therefore, this issue is not preserved for appellate review. *See* ALC Order, p. 5 of 5.

CONCLUSION

For the foregoing reasons, the Court should affirm the Administrative Law Court's decision below.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

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