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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT  
S. Phillip Lenski, Administrative Law Judge  
Case No. 21-ALJ-15-0007-AP/2021-001145

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CHARLES WILLIAMS, #086721.....APPEALANT,

v.

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

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**INITIAL BRIEF OF  
APPELLANT CHARES WILLIAMS**

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Charles Williams, SCDC #086721  
Broad River C.I., GRN 2104  
4460 Broad River Rd.  
Columbia, S.C. 29210

**APPELLANT PRO SE**

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## **QUESTIONS PRESENTED**

1. Did the Administrative Law Court err when it failed to find an ex post facto violation when Williams was denied parole through the retroactive application of the Board's Dept. Form 1212's, Nature and seriousness of the offense, parole rule?
2. Did the Administrative Law Court err when it failed to find that the Parole Board's procedure was unlawful when it utilized an inappropriate criteria to render its decision?

## **STATEMENT OF THE CASE**

This is an appeal of a September 2, 2021 order of the Administrative Law Court ("ALC") affirming the South Carolina Department of Probation, Parole, and Pardon Services ("Respondent") decision to deny Williams parole. This decision was preceded by Williams' hearing before the Parole Board on March 24, 2021.

## **STATEMENT OF THE FACTS**

Williams was convicted on April 16, 1976 for the murders of Rhonda Adams, Cynthia Jones, and Kathy Smith, and was sentenced by the Honorable Judge Frank Epps to death by electrocution. This sentence was later reversed due to the South Carolina Supreme Court decision of *State v. Rumsey*, 267 S.C. 236, 226 S.E.2d 894 (1976) (the statute imposing a mandatory death sentence upon a finding of murder is unconstitutional). Williams reappeared before Judge Epps and was sentenced to a term of life with the possibility of parole for each offense of murder. At the time Williams committed these offenses on September 26, 1975, South Carolina law allowed an inmate serving a life sentence for murder parole eligibility upon service of ten years.

When Williams began serving his life sentence he was 26 years old. He is now 71. Williams made his initial appearance before the Parole Board on December 19, 1984. At all parole hearings relevant to this appeal, to include the most recent parole hearing on March 24, 2021, Respondent has denied Williams the opportunity to be released on parole due to the nature and seriousness of the offense.

In 1975, the parole statute provided in circumstances warranting parole that “no such prisoner shall be paroled until it shall appear, to the satisfaction of the Board, that the prisoner has shown a disposition to reform...” S.C. Code Ann. Section 55-612. (1962). In 1981, the General Assembly amended the parole statute authorizing the Board to establish a specific criteria for the granting of parole as a part of Act. No. 100 (Supp. 1981). The current parole criteria retains the nature and seriousness of the offense rule requirement. See Dept. form 1212(2).

Williams have submitted materials to the Parole Board in Support of his request for parole. These materials described the educational achievements and awards he has obtained, the leadership roles he has undertaken in various rehabilitative and religious programs, and the exemplary work record he has compiled while in prison. These materials also described the strong support from his family, church and community.

The Parole Board denied Williams’ request for parole because of the nature and seriousness of his offense (murder). According to the DPPPS, the Board determined its decision by the nature and seriousness of the offense standard of Dept. Form 1212. The Parole Board retroactively applied its current parole rule to Williams.

On July 28, 2021, Williams appealed the denial of his request for parole to the ALC. In his appeal, Williams asserted that applying the current parole criteria creates an ex post facto violation. On September 2, 2021, the ALC upheld the decision of the Parole Board and DPPPS denying Williams’ request for parole.

**STANDARD OF REVIEW**

The Court of Appeals may reverse or modify the decision of the ALC if the substantive rights of Williams’ have been prejudiced because the decision is: (i) in violation of constitutional or statutory provisions; (ii) in excess of the statutory authority of the agency; (iii) made upon unlawful procedure; (iv) affected by other error of law; (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-610; *MRI at Belfair, LLC v. S.C. Dep’t of Health and Env’tl. Control*, 392 S.C. 314, 318, 709 S.E.2d 626, 628 (2011).

## ARGUMENT

### I. RETROACTIVE APPLICATION OF THE DEPT. FORM 1212's CURRENT PAROLE CRITERIA RESULTS IN AN EX POST FACTO VIOLATION

The United States and South Carolina Constitutions specifically prohibit the passage of ex post facto laws, U.S. Const. art. 1, section 9, 10; S.C. Const. art. 1, section 4. A measure is an ex post facto law when it retroactively alters the definition of a crime or increases the punishment for a crime. *Jernigan v. State*, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000). The relevant inquiry regarding an increase in punishment is whether a legislative amendment “produce a sufficient risk of increasing the measure of punishment attached to the cover crimes.” (quoting *Cal. Dept. of Corr. v. Morales*, 514 U.S. 499, 509 (1995)).

To determine whether the application of the current criteria for parole to Williams results in an ex post facto violation the “question is whether the amended...[rule]. Produces a sufficient risk of prolonging incarceration.” *Garner v. Jones*, 529 U.S. 244, 251 (2000); *Jernigan v. State*, 340 S.C. 256, 261, 531 S.E.2d at 509. “When the rule does not by its own terms show a significant risk, the [inmate] must demonstrate, by evidence drawn from the rule’s practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule.” *Garner*, at 255; *Jernigan*, 340 S.C. at 261, 531 S.E.2d 509 (Courts must analyze “the effect of the statute on the quantum of punishment” imposed) (quoting *Lynce v. Mathis*, 519 U.S. 433, 444-45 (1997)).

#### A. Ex Post Facto by its own terms

The General Assembly substantively amended the parole statute in 1981 as a part of Act. No. 100 that authorized the Respondent to establish a specific criteria for the granting of parole. Instead, the respondent established a criteria that increased the required rules for parole with disadvantaged standards. This change in the law makes it more difficult to obtain parole by the added disadvantaged rules that an inmate must satisfy the Parole Board’s satisfaction of the nature and seriousness of the offense. Moreover, as this substantive change in the rule makes obtaining parole more disadvantageously difficult by its own terms and standard, it creates a “significant risk” of increased incarceration, and the Court need go no further to find an ex post facto violation. *Garner*, at 255; *Jernigan*, 340 S.C. at 265, 531 S.E.2d at 512. See *Cooper v. S.C. Dept. of Probation, Parole, and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106

(2008) citing *State v. Walls*, 348 S.C. 26, 30, 558 S.E.2d 524, 525 (2002) (recognizing that while both the United States and South Carolina Constitutions specifically prohibit ex post facto laws, two critical elements must be present for a law to fall within the prohibition: (1) the law must apply to events that occurred before its enactment' and (2) the offender of the law must be disadvantaged by the law).

The 1981 Dept. Form 12-B added the nature and seriousness of the offense in its established specific criteria as a guideline in denying parole. see parole criteria form 12-B. The Respondent revised Form 12-B to Dept. Form 1212, Criteria for parole consideration. In the revision, Dept. Form 1212 retains the guideline of the nature and seriousness of the offense to deny parole based on 12-B guidelines.

Williams contends that the circumstances warranting parole, section 55-612, provides a state-created liberty interest in the shown disposition of a prisoner to reform from criminal behavior. "No such prisoner shall be paroled until it shall appear, to the satisfaction of the Board, that the prisoner has shown a disposition to reform... see S.C. Code section 55-612 (sup. 1962).

#### **B. Ex Post Facto Demonstrated**

Williams asserts that the "evidence drawn from the [1981 amendment's] practical implementation" confirms that the retroactive application of this change to the parole criteria standard creates an ex post facto violation. *Garner*, at 255.

As set forth above, Williams was denied parole by the applied retroactive criteria rule, the nature and seriousness of the offense, at his March 24, 2021 hearing. Therefore, if the Respondent had applied the circumstances warranting parole of section 55-612 to Williams in rendering its decision he would have received parole. The Board did not. Instead, the Board applied the current parole rule, the nature and seriousness of the offense, that denies parole.

As Williams remains in prison today solely because the current parole rule was applied, and has been applied to him, for 37 years, Williams has undeniably demonstrated that he has experienced a longer period of incarceration than under the earlier rule. *Gardner*, at 255. Williams has, therefore, established an ex post facto violation.

### C. The DPPPS's ex post facto analysis is flawed

Despite Williams establishing that the change to the parole criteria rule, by its own terms and in practice, creates a significant risk of increased incarceration, the ALC found no ex post facto violation. The DPPPS reached this result by finding that the change in the parole criteria rule is not penal in purpose and nature, and is “purely procedural.”

#### 1. The DPPPS's analysis relies heavily on the characterization of the change as none penal and procedural

The DPPPS's order states that, “a change in the law does not violate the ex post facto clause if it merely affects a mode of procedure and is not penal in purpose and nature. The DPPPS's reliance on *State v. Huiett*, 302 S.C. 169, 384 S.E.2d 486 (1990), is misplaced. The DPPPS took its statement of law from *Huiett*, which, in turn, took it from *Miller v. Florida*, 482 U.S. 423 (1987).

Review of *Miller* and the cases it cites makes it clear that whether a statute is procedural or not is not dispositive. Procedural statutes can be *ex post facto*. *Id.* While considering whether a statute is procedural is part of the *ex post facto* analysis, it should not be allowed to replace the *ex post facto* test. That test, as set forth above, is whether the change in the law creates a significant risk of increased incarceration. *Garner*, at 251; *Jernigan*, 340 S.C. at 261, 531 S.E.2d. at 509. In fact, this statement of law regarding procedural statutes could be read to incorporate the significant risk test when it conditions its application to statutes that do not alter “substantial personal rights,” *Huiett*, 302 S.C. at 171, 384 S.E. 2d at 487, or statutes that do not “change the quantum of punishment,” *Dobbert v. Florida*, 432 U.S. 282, 294 (1977). Because Williams has established that the retroactive application of the current parole statute has increased the quantum of his punishment, whether this change is characterized as procedural or not is of no moment. *Jernigan*, 340 S.C. at 264-65, 531 S.E.2d at 512 (holding that a procedural change in the law decreasing the frequency of parole hearing is *ex post facto*).

Consideration of the *Miller* Court's application of the *ex post facto* analysis to the statute at issue in that case is also instructive. The Court considered the retroactive application of a change in Florida law that increased the number of points assessed to persons convicted of sexual offenses in a sentencing formula. *Miller*, at 423. While this

change was described by Florida as “procedural,” the Supreme Court nonetheless found it was *ex post facto* because it increased the quantum of punishment for individuals that were subjected to these new assessments. *Id.* at 433-34.

*Huiett* should not be relied upon for its *ex post facto* analysis here, since it relies heavily upon procedural/none penal purpose discussed above, and it does not appear to consider whether the change in law creates a significant risk of increasing punishment.

**2. Williams’ assertion that the change in the law increased his incarceration is not speculative or procedural**

An *ex post facto* claim fails if the retroactive application of a new law creates only “the most speculative and attenuated possibility” of increased punishment. *California Dep’t of Corrections v. Morales*, 514 U.S. 499, 509 (1995); *Jernigan*, 340 S.C. at 261, 531 S.E.2d at 509. In *Morales*, the Supreme Court held that the inmate’s *ex post facto* challenge to a statute that decreased the frequency of parole hearing failed as speculative because the statute applied “only to a class of prisoners for whom the likelihood of release on parole is quite remote,” and the decrease in the frequency was imposed only after the parole board made the affirmative determination that it was unreasonable to expect the inmate in question would receive parole at the next hearing. *Id.* at 510-11.

In sharp contrast to *Morales*, *Williams* does not offer a “speculative, procedural or none penal possibility” that the nature and seriousness of the offense rule may increase his incarceration. Instead, *Williams* has established that the new requirement already has increased his incarceration.

**II. UNLAWFUL PROCEDURE**

The ALC’s order states that the Board followed proper procedure in making its determination by the Board’s Form, Dept. 1212. The ALC relies on *Cooper v. S.C. Dept. of Probation, Parole, and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008).

*Williams* contends that the Court emphasized, “in future parole review hearing the Parole Board may avoid the result in the “instant case” (*Cooper*) if it clearly states in its order denying parole that it considered criteria of section 24-21-640 and the fifteen factors of the parole form,

do not entirely apply to Williams' case. Williams' offense was committed before the Legislature's authorization to the Respondent to establish its Dept. Form 12-B and revised Dept. Form 1212. Cooper's offense was committed in 1984. The parole rules had not been substantively amended since he was convicted. The Court in its opinion used the term "instant case," avoiding the assertion to apply an inappropriate criteria to offenses that were committed before the substantive amendment to section 24-21-640. See *Cooper v. S.C.Dept. of Probation, Parole, and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008). "If a Parole Board deviates from or fails to render its decision without consideration of the [appropriate] criteria, we believe it essentially abrogates an inmate's right to parole eligibility and, thus, infringes on a state-created liberty interest."

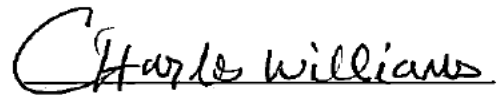
Williams asserts that the Board is not without certain parameter to render its decisions. "Undoubtedly, the Parole Board is the sole authority with respect to decisions regarding the grant or denial of parole. However, the legislature created this board to operate within certain parameter. We do not believe the legislature established the board and intended for it to render decisions without any means of accountability." *Cooper v. S.C.Dept. of Probation, Parole, and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008).

Making it more difficult, and at worst impossible, for an inmate to obtain parole simply because he must satisfy the Parole Board's satisfaction of the nature and seriousness of the offense, as described above, arbitrarily deprives the inmate of a liberty interest.

### CONCLUSION

For reasons set forth above, Williams respectfully requests that the Court: (i) reverse the order of the ALC; (ii) require the ALC, DPPPS, and/or the Parole Board to grant or deny Williams parole based on whether he has shown a disposition to reform; and (iii) provide any further relief that is just and proper.

Respectfully submitted,



Charles Williams, SCDC #086721  
Broad River C.I., GRN 2104  
4460 Broad River Rd.  
Columbia, S.C. 29210

February 1, 2021  
Columbia, South Carolina

**APPELLANT PRO SE**

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v.

DEPARTMENT OF PROBATION, PAROLE, AND  
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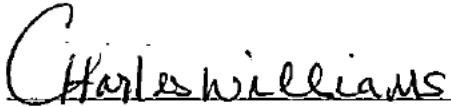
I certify that I have served the *Initial Brief* on the S.C. Department of Probation, Parole, and Pardon Services by depositing a copy of the same in the United States Mail, postage prepaid, on February 1, 2022, addressed to the attorney of record, Matthew C. Buchanan, General Counsel, S.C. Department of Probation, Parole, and Pardon Services, 293 Greystone Blvd., P.O. Box 207, Columbia, S.C. 29202. I further certify that all parties required by rule to be served have been served.

February 1, 2022  
Columbia, South Carolina

cc: S.C. Administrative Law Court, Clerk  
1205 Pendleton Street, Suite 224  
Columbia, S.C. 29201

Matthew C. Buchanan, General Counsel  
S.C. Department of Probation,  
Parole and Pardon Services  
293 Greystone Blvd.  
P.O. Box 207  
Columbia, S.C. 29202

ATTORNEY FOR RESPONDENT

  
Charles Williams, SCDC #086721  
Broad River C.I., GRN 2104  
4460 Broad River Rd.  
Columbia, S.C. 29210

APPELLANT PRO SE

Broad River Corr, INST, GRN. 2104  
4460 Broad River Rd.  
Columbia, S.C. 29210

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