The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

December 5, 1995

Jack Sinclaire, Esquire
Deputy Solicitor, Ninth Judicial Circuit
2144 Melbourne Avenue
North Charleston, South Carolina 29405

Re: Informal Opinion

Dear Mr. Sinclaire:

You set forth the following factual information and seek an opinion regarding the Ex Post Facto Clause of the Constitution:

> Tellis Edwards had been convicted in Family Court on April 4, 1985 and sentenced to probation for the Housebreaking of and Grand Larceny from the home of Mr. Larry Cox, a resident of Charleston. Tellis Edwards was convicted at trial of the Susan Tinger Armed Robbery on May 16, 1986 and sentenced to 12 years in prison. He pleaded guilty February 27, 1987 to the Voluntary Manslaughter of Nikita and received the maximum sentence of 30 years.
>
> I attended Tellis Edwards' first parole hearing on June 7, 1995 and fortunately the inmate was denied parole. However, at the hearing I was informed that the defendant would be re-eligible for parole every 12 months. It was my understanding from the South Carolina Supreme Court's decision in Gunter v. State, that the 1986 charge in South Carolina Code § 24-21-645 would not be an ex post facto clause violation, and that inmates such as Tellis Edwards

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> would not be re-eligible for parole until 24 months after their first application for parole is denied. When I explained my position to Marianne Lindsey and Brett McGargle from the Department of Victim Services in the Department of Probate, Parole and Pardon Services, I was told the South Carolina Department of Corrections bases its determination of subsequent parole eligibility hearings on the date the crime occurred. Based on Roller v. Cavanaugh, I can understand the SCDC's position, but wouldn't California Department of Corrections v. Morales, a U.S. Supreme Court decision, supercede the 4th Circuit opinion? Would this apparent disparity warrant an Attorney General's opinion?

The short answer to your question is that, while we cannot predict with certainty what the courts will do, a credible argument can now be made, based upon Morales, that South Carolina can apply Section 24-21-645 to this situation. Clearly, Morales provides considerably more flexibility to ex post facto considerations than did either Roller v. Cavanaugh or previous Supreme Court cases. Moreover, as will be seen, the Fourth Circuit has now applied Morales to uphold the application of Virginia's change in law governing parole hearings to those convictions prior to adoption. Unfortunately, neither the United States Supreme Court nor other courts have squarely addressed this issue in the context of a statute such as South Carolina's since Morales was decided, and Morales did not really go as far as we would have liked. Nevertheless, as will be shown below, and as you contend, a good argument can be made that Morales would allow application of Section 24-21-645 to Edwards' case.

LAW / ANALYSIS

S.C. Code Ann. Sec. 24-21-645 provides in pertinent part:

> Provided, that upon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole.

This provision was enacted as part of the Omnibus Criminal Justice Improvement Act of 1986, effective June 3, 1986. In Op. No. 86-102 (October 9, 1986), we concluded that while "[a]dmittedly, this question is a close one", the provision "concerning review in two years upon rejection rather than the next year is applicable to the entire offender population." We referenced In re Jackson, 703 P.2d 100 (Cal. 1985) as support for this conclusion, and noted that Jackson

> ... reasoned that (1) it did not alter the criteria by which parole suitability is determined; (2) it did not change the criteria governing an inmate's release on parole; and (3) most important, the amendment did not entirely deprive an inmate of the right to a parole suitability hearing. 703 P.2d at 105. Instead, the amendment changed only the frequency with which the Board must give an inmate the opportunity to demonstrate parole suitability. 703 P.2d 105.

We further opined that, with respect to Section 24-21-645,

> ... the scheduling of the next parole hearing in two years occurs only after the inmate was denied parole by the Board and implicitly found not to qualify under the circumstances warranting parole set out in Sec. 24-21-640. In Portley v. Grossman, 444 U.S. 1311, 62 L.Ed.2d 723, 100 S.Ct. 714 (1980), Justice [now Chief Justice] Rehnquist denied a stay request relying on Dobbert v. Florida, 432 U.S. 282 (1977), that the prohibition of ex post facto laws do not extend to every change of law that "may work to the disadvantage of a defendant." He opined that "it is intended to secure substantial personal rights from retroactive deprivation and does not limit the legislative control of remedies and modes of procedure which do not affect matters of substance." He held, assuming the ex post facto clause applies to parole, that using the new reparole guidelines in effect at the time of parole rather than those in effect at the time of sentencing was not impermissible because it neither deprived the prisoner of any pre-existing right nor enhanced the punishment imposed because the terms of the sentence had not been altered. "The change in guidelines assisting the Commission is in the nature of a procedural change found permissible in Dobbert, supra." See also: Zink v Lear, 101 A.2d 72 (N.J. 1953) (parole is a matter of legislative grace and not a thing of right and it may be granted or withheld, as legislative discretion may impel). Therefore, the provision concerning review in two years upon rejection rather than next year is applicable to the entire violent offender population.

This same line of reasoning was subsequently adopted by our Supreme Court in Gunter v. State, 298 S.C. 113, 378 S.E.2d 443 (9189). Also relying upon In Re Jackson, the Court concluded:

> ... the standards governing petitioner's parole eligibility have not been changed. Instead, only the frequency with which petitioner can be reconsidered for parole has been altered. We find no ex post facto violation in the application of the questioned statute to petitioner.

298 S.C. at 116.

The Fourth Circuit's decision in Roller v. Cavanaugh, 984 S.C. 120 (4th Cir. 1993) was to the contrary, however. Placing considerable reliance upon the Eleventh Circuit's decision of Akins v. Snow, 922 F.2d 1558 (11th Cir.), cert. den., _____ U.S. _____, 111 S.Ct. 2915, 115 L.E.2d 1079 (1991), which had held that a Georgia statute that decreased the frequency of parole hearings from once a year to once every eight years, violated the Ex Post Facto Clause, the Fourth Circuit concluded that with respect to Section 24-21-640,

> [t]he appellees cannot convincingly distinguish Akins. They concede that a seven year increase in a prisoner's wait between reconsiderations is so long that it is substantive, but assert ... that a one-year wait is "procedural" and presents no ex post facto difficulty .... We are not willing to disparage the "substance" of a year, especially a year in prison ... . South Carolina has undoubtedly applied its new statute to "alter the conditions of ... [Roller's] preexisting parole eligibility." Indeed, it has effectively "revoked" eligibility for an extra year following denial.

Following Roller, our Supreme Court overruled Gunter in Griffin v. State, _____ S.C. _____, 433 S.E.2d 862 (1993). There, the Court held that application of Section 24-21-645 to an inmate who had pled guilty to voluntary manslaughter prior to the effective date of the Omnibus Criminal Justice Improvement Act violated the Ex Post Facto Clause. Said the Court,

> [t]he Fourth Circuit's analysis [in Roller] is compelling. It is difficult to determine where the difference lies between a review once every two years and once every eight years. This gray area tortures the ex post facto analysis between a change in the standards of review and a procedural change in timing.

> The Akins court was faced with a statute that provided for a procedural change which effectively charged the standards for parole. We must now acknowledge that where a procedural rule is so overly intrusive that it substantively effects the review standard, it then becomes an ex post facto violation. In adopting the Fourth Circuit's holding in Roller, we overrule our holding in Gunter, 298 S.C. 113, 378 S.E.2d 443.

California Dept of Corrections v. Morales, was then decided by the United States Supreme Court this past term. In Morales, the Court held that a statute, which permitted the California Board of prison terms to lengthen the period between parole suitability hearings, could be constitutionally applied to a prisoner who, when he committed murder was entitled to an annual suitability review. Such application did not violate the Ex Post Facto Clause, concluded the Court.

The Morales Court distinguished the situation there from many of its previous ex post facto decisions such as Lindsey v. Washington, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937), Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987) and Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). The Court reasoned that Collins v. Youngblood, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) represented the applicable standard in judging the constitutionality of California's statute.

> After Collins, the focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of "disadvantage," nor as the dissent seems to suggest, on whether an amendment affects a prisoner's "opportunity to take advantage of provisions for early release," see post, at _____, 131 L.Ed.2d at 602, but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

131 L.Ed.2d at 595, n. 3. The Court emphasized that it had "long held that the question of what legislative adjustments 'will be held to be of sufficient moment to transgress the constitutional prohibition' must be a matter of 'degree.'" Further,

> [i]n evaluating the constitutionality of the 1981 amendment, we must determine whether it produces a sufficient risk of increasing the measure of punishment attached to the covered crimes.... The amendment creates only the most speculative and attenuated possibility of producing the prohibited effect of

> increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the Ex Post Facto Clause.

131 L.Ed.2d at 597.

The United States Supreme Court in Morales pointed to a number of factors with respect to the California legislation that convinced it that the amendment did not produce a "sufficient risk of increasing the measure of punishment attached to the covered crimes." First, was the fact that the amendment "applies only to a class of prisoners for whom the likelihood of release on parole is quite remote." Second, the Court was impressed with the fact that the "amendment has no effect on the date of any prisoner's initial parole suitability hearing; it affects the timing only of subsequent hearings." Further, the Court noted that the Board "retains the authority to tailor the frequency of subsequent suitability hearings to the particular circumstances of the individual prisoner." In that regard, the Court noted that in some cases, there could be a 3 year delay a between suitability hearings, but in cases involving lesser threats, the Board possessed the discretion to defer the hearing only 2 years. Moreover, the Court noted that there also existed the possibility that the prisoner could seek an expedited hearing from the Board. However, also emphasized was the fact that

> [e]ven if a prisoner were denied an expedited hearing, there is no reason to think that such postponement would extend any prisoner's actual period of confinement. According to the California Supreme Court, the possibility of immediate release after a finding of suitability for parole is largely "theoretica[l], "In re Jackson [supra]; in many cases, the prisoner's parole release date comes at least several years after a finding of suitability. To the extent that these cases are representative, it follows that "the 'practical effect' of a hearing postponement is not significant."

131 L.Ed.2d at 598.

Recently, in Hill v. Jackson, 64 F.3d 163 (4th Cir. 1995), the Fourth Circuit followed Morales in upholding Virginia's deferral of parole review for up to three years for certain inmates serving either life sentences or lengthy sentences for a violent offense. As indicated above, the Court recognized and relied upon the fact that Morales "identified certain features of the parole review deferral statute which negated any risk of increasing the 'measure of punishment' thereunder." 64 F.3d at 168. The Fourth Circuit set forth these criteria as follows:

> First, the statute applied "only to a class of prisoners for whom the likelihood of release is quite remote .... Second, a parole board's authority was "carefully tailored" under the statute, which required the board to make a particularized finding that "it is not reasonable to expect that parole would be granted at a hearing during the following years." ... Third, the statute had "no effect on the date of any prisoner's initial parole suitability hearing; it affects the timing only of subsequent hearings," and thus the amendment had "no effect on any prisoner unless the Board has first concluded, after a[n initial hearing], ... that the prisoner is unsuitable for parole." ... In addition, the court noted that "the Board retain[ed] the authority to tailor the frequency of subsequent suitability hearings to the particular circumstances of the individual prisoner," and "the current record provides no basis for concluding that a prisoner who experiences a drastic change in circumstances would be precluded from seeking an expedited hearing from the Board." ... Moreover, the Court observed that if the Board's decision to defer parole review is subject to administrative appeal, "[a]n expedited hearing by the Board -- either on its own volition or pursuant to an order entered on an administrative appeal -- would remove any possibility of harm." ... Finally, the Morales Court noted that the challenged statute addressed the frequency of "suitability" hearings, and that the possibility of immediate release after a finding of suitability for parole is largely theoretical; in many cases, the prisoner's parole release date comes at least several years after a finding of suitability" and so "the practical effect of a hearing postponement is not significant." ....

64 F.3d at 169.

The Fourth Circuit applied these factors to the Virginia statute, noting that "[a]s in Morales, the Parole Board's policy has no effect on the substantive standards for scheduling an inmate's initial parole eligibility date, nor does it change the criteria for determining either an inmate's suitability for parole or his or her release date."

> Moreover, the policy by its terms applies only to a narrow class of inmates, for whom the likelihood of parole release is remote. In its procedural guide, the Parole Board

> states that the 1993 "affects less than 3 percent of the [prison] population ... approximately 500 inmates," and that "[i]nmates covered by these procedures are most likely to receive multiple denials [of parole]. In addition, the Board is required to conduct an initial review of an inmate's eligibility for parole, and only after parole has been denied at this initial stage can subsequent reviews be deferred. These reviews are particularized to the individual inmates, and deferrals under the policy are not automatic. The policy requires the Parole Board to notify inmates in writing of its decision to defer parole consideration and the number of years they will be deferred.
>
> Finally, inmates may appeal the Board's decision to defer parole review at any time during the deferral period, in the event that there is a change in circumstances or the procedures have been misapplied. Thus, as in Morales, there is "no basis for concluding that a prisoner who experiences a drastic change of circumstances would be precluded from seeking an expedited hearing from the Board." _____ U.S. _____, 115 S.Ct. at 1604. Hence it follows that, like the parole review amendment in Morales, the Virginia Parole Board's 1993 parole review deferral policy is less likely to "produce[] a sufficient risk of increasing the measure of punishment attached to the covered crimes," id., 115 S.Ct. at 1603 and thus does not violate the Ex Post Facto Clause.

Moreover, in a recent Eleventh Circuit case, Jones v. Georgia State Bd. of Pardons and Paroles, 59 F.3d 1145 (11th Cir. 1995), the Court noted in passing that the holding of Akins v. Snow, supra, is now in doubt, based upon Morales. It will be recalled that Akins was the principal case relied upon by the Fourth Circuit in the Roller decision. The Court in Jones made the following comment regarding the Akins case:

> In Morales, however, decided subsequent to Akins, the Supreme Court determined that retrospective applications of a statute permitting a decrease in the frequency of parole reconsideration hearings from every year to every three years did not constitute an ex post facto violation. See Morales, _____ U.S. at _____ ___ _____, 115 S.Ct. at 1600-05. In light of Morales, the continuing validity of Akins is questionable. (emphasis added).

59 F.3d at 1149, n. 8.

Thus, the question is whether South Carolina statutory change from one year review intervals to two years, fits sufficiently well into the Court's analysis in Morales and the Fourth Circuit's analysis in Hill. Morales recognized that the Court will refuse to engage in "the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures ... ." 131 L.Ed.2d at 596. Such changes indeed "... might create some speculative, attenuated risk of affecting a prisoner's actual term of confinement by making it more difficult for him to make a persuasive case for early release, but that fact alone cannot end the matter for ex post facto purposes." In short, the key is whether a particular delay "effectively increases a prisoner's term of confinement ...". Id.

Clearly, with respect to application of Section 24-21-645, the statute has no effect upon "scheduling an inmate's initial parole eligibility date, nor does it change the criteria either for determining either an inmate's suitability for parole or his or her release date." Hill v. Jackson, supra.

With respect to the issue of whether the class is sufficiently narrow and the likelihood of parole release is satisfactorily remote, South Carolina's statute relates to all violent offenders as defined in Section 16-1-60, which is a class considerably larger than in Morales or Hill. On the other hand, I am advised that the likelihood of parole of these offenders is extremely remote, particularly following the initial denial. The courts would have to analyze this particular factor based upon the relevant facts; however, based on my information, the likelihood of these offenders being granted parole is extremely unlikely.

South Carolina has no procedure for an expedited hearing for a particular prisoner. However, I am advised that, depending upon where a particular inmate falls in the review system, it is possible that some inmates as a fact do receive their reviews earlier than 2 years. Moreover, even though a prisoner does not normally receive an earlier hearing, just as in Morales, "there is no reason to think that any such postponement would extend any prisoner's actual period of confinement." In part because of the requirement that parole for violent offenders in South Carolina requires a 2/3 vote of the Board and because of public policy considerations, violent offenders in this State are not receiving parole in any significant numbers.

An important distinction from the facts in Morales is this: there, the Board possessed the authority to defer the hearing up to three years, but the discretion to delay the hearing less in certain cases. As the Court said,

> [t]hus, a mass murderer who has participated in repeated violent crimes both in prison and while on parole could

> perhaps expect a 3-year delay between suitability hearings, while a prisoner who poses a lesser threat to the "public safety" ... might receive only a 2-year delay.

In our situation, all violent offenders, not just certain ones, receive a hearing in two years. Thus, the fact that the Board in South Carolina cannot "tailor the frequency of subsequent suitability hearings to the particular circumstances of the individual prisoner" is far less significant here than in Morales. If the Court has already approved a three year delay with the Board's discretion to reduce that time to two years, it would certainly seem logical to believe that only a two year statutory delay for every prisoner in the class could be upheld as well.

Obviously, however, Morales is not on all fours with the South Carolina situation. Unfortunately, California's statute is somewhat different from Section 24-21-645. Nevertheless, it is my understanding that counsel for the Probation, Parole and Pardon Board is continuing to argue in litigation that Morales seriously erodes and undermines Roller and Griffin. Based upon what I have said above, I agree with that conclusion. Morales is sufficiently close to South Carolina's situation that it calls these earlier cases into question just as the Eleventh Circuit has now recognized that Akins v. Snow, the chief case upon which Roller relied, is now "questionable." Jones, supra. However, we will have to wait and see how the courts go in this direction as new cases arise.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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