

STATE OF VERMONT

**SUPERIOR COURT
Washington Unit**

**CIVIL DIVISION
Docket No. 718-11-15 Wncv**

**BERNARD CARTER
Plaintiff**

v.

**LISA MENARD, COMMISSIONER,
Vermont Department of Corrections
Defendant**

**DECISION
Cross-Motions for Summary Judgment**

Inmate Bernard Carter alleges that the application to him of 13 V.S.A. § 5301(7) and the Vermont Department of Corrections’ Level C inmate classification directives has retroactively increased the punishment for his offenses in violation of the Ex Post Facto Clause of the United States Constitution, U.S. Const. art. I, § 10, by substantially prolonging his effective ineligibility for parole.¹ As Mr. Carter has acknowledged, this is the same claim brought by another inmate in a different case. See Supplement to Plaintiff’s Opposition to Motion to Dismiss 2 (filed Feb. 16, 2016) (describing *Wool v. Pallito*, 759-12-13 Wncv, as “a case which presents the same Ex Post Facto claim as presented herein”). In the *Wool* case, the court concluded that this claim is controlled by the reasoning in *Chandler v. Pallito*, 2016 VT 104, and ruled in favor of the State. See *Wool v. Pallito*, 759-12-13 Wncv, Decision on Cross-Motions for Summary Judgment 2 (Vt. Super. Ct. Mar. 8, 2017) (“The *Chandler* decision controls this case.”).²

Mr. Carter does not now attempt to distinguish this case from Mr. Wool’s. He does, however, assert that this case is different from Mr. Chandler’s. He notes that Mr. Chandler was not classified as Level C and he is, and he relies heavily on 13 V.S.A. § 5301(7), which was enacted after Mr. Carter committed his crimes.

Mr. Carter’s reliance on 13 V.S.A. § 5301(7) is wholly misplaced. That subsection defines “listed crimes” for purposes of Vermont’s statutes protecting crime victims. 13 V.S.A. §§ 5301–5322. The only connection § 5301(7) has to Mr. Carter’s ex post claim is that the DOC incorporates “listed crimes” of § 5301(7) into a more expansive list of violent crimes that it considers when making a Level C designation. DOC Directives 371.10, 371.11. Neither § 5301(7) nor related statutes compel the DOC to do that or limits or changes its discretion in any

¹ In his amended complaint, Mr. Carter also relies on 28 V.S.A. § 725. It is not clear in the summary judgment briefing that he does so any longer. In any event, § 725 merely requires the DOC to make a recommendation about parole to the parole board in certain situations. It does not purport to control what that recommendation is or what the parole board does with it. It alters neither the DOC’s nor the parole board’s discretion in any way relevant to Mr. Carter’s claim.

² *Wool* is currently on appeal before the Supreme Court.

relevant way. The existence of § 5301(7) simply has no bearing on the ex post claim.

Mr. Carter's claim is no different from Mr. Wool's and both claims are untenable under the reasoning of *Chandler*. In *Chandler*, the Court comprehensively analyzed the DOC's current regime of inmate classification, programming, and early release and the parole board's discretion over parole. "[T]here are many written directives that govern how offenders are categorized for treatment programming; nevertheless, *all of these* directives plainly preserve the discretion the Department has always had over plaintiff's treatment programming and early release." *Chandler v. Pallito*, 2016 VT 104, ¶ 36 (emphasis added). Mr. Carter points to nothing about his Level C designation that suggests any different outcome here.

ORDER

For the foregoing reasons, the State's motion for summary judgment is granted, and Mr. Carter's motion for summary judgment is denied.

Dated at Montpelier, Vermont this ____ day of June 2017.

Mary Miles Teachout
Superior Judge