NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2009 CA 1826

ALBERT LEWIS

VERSUS

LOUISIANA STATE PENITENTIARY, DEPARTMENT OF CORRECTIONS, RICHARD STALDER, SECRETARY, AND BURL CAIN, WARDEN

Judgment Rendered: May 7, 2010

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 560,518, Section 25

The Honorable Wilson Fields, Judge Presiding

John M. Smart, Jr., Commissioner

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Albert Lewis **Angola, Louisiana**	**Plaintiff/Appellant** **In Proper Person**
Terri L. Cannon **Baton Rouge, Louisiana**	**Counsel for Defendant/Appellee** **Department of Public Safety and Corrections, and Richard Stalder, Secretary**

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BEFORE: DOWNING, GAIDRY, AND McCLENDON, JJ.

Downing, J. concurs and assigns reasons.

GAIDRY, J.

SUMMARY DISPOSITION

Albert Lewis, a prisoner in the custody of the Louisiana Department of Public Safety and Corrections (the Department), appeals a judgment dismissing his petition for judicial review of a final agency decision under the Corrections Administrative Remedy Procedure Act, La. R.S. 15:1171, *et seq.* Plaintiff is serving a life sentence for the offense of second degree murder committed on July 30, 1976. As part of his sentence, he was declared ineligible for parole for 40 years. Plaintiff contends that the Department has failed to correct his master prison record to reflect that he is eligible for parole after he has served 40 years of his sentence, and that he should accordingly be allowed to seek parole consideration before the Louisiana Parole Board upon serving 40 years. The action was initially referred to a commissioner for review and screening pursuant to La. R.S. 15:1178. The commissioner recommended that the suit be dismissed with prejudice. Following its *de novo* review of the record, the trial court adopted the commissioner's recommendation and dismissed plaintiff's action. We affirm.

The basis of the trial court's judgment was the fact that plaintiff's life sentence has not been commuted to a fixed number of years, as required by La. R.S. 15:574.4(B) in order for plaintiff to be eligible for parole consideration. It is well established that parole eligibility and eligibility for parole consideration are distinct and different matters. *Bosworth v. Whitley*, 627 So.2d 629, 634-35 (La. 1993). *See also Richardson v. La. Dep't of Pub. Safety & Corr.*, 627 So.2d 635, 637 (La. 1993), and *Schouest v. La. State Parole Bd.*, 08-0962, p. 1 (La. App. 1st Cir. 12/23/08), 2008 WL 5377800 (unpublished opinion), *writ denied*, 09-0662 (La. 1/22/10), 25 So.3d 143.

Finding that the commissioner's report and the trial court's judgment adequately explain our decision, we affirm the judgment of the trial court.

DECREE

We accordingly affirm the judgment of the trial court through this summary disposition, in accordance with Rules 2-16.2(A)(2), (4), (5), (6), (7), (8), and (10) of the Uniform Rules of the Louisiana Courts of Appeal. All costs of this appeal are assessed to the plaintiff-appellant, Albert Lewis.

AFFIRMED.

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DOWNING, J., concurs and assigns reasons

It is well settled that a plea agreement is considered a contract between the state and the criminal defendant. *See* **State v. Nall**, 379 So.2d 731, 733 (1980); **State v. Peyrefitte**, 04-0742, pp. 1-3 (La.10/15/04), 885 So.2d 530, 530-31. In **State v. Canada**, 01-2674, pp 3-4 (La.App. 1 Cir.5/10/02), 838 So.2d 784, 786-88, this court explained that contract principles apply to plea bargains. The Canada court also explained that, "[u]nder the substantive criminal law, there are only two alternative remedies available for a breach of a plea agreement: (1) specific performance of the agreement, or (2) nullification or withdrawal of the plea." (Citations omitted.) **Canada**, 01- 2674 at p. 5, 838 So.2d at 788.

If the defendant had bargained with the state, and the trial court accepted the bargain, there may be an argument that a contract exists regarding good time that could not be altered by subsequent legislation. Even so, this concern is not an issue in the matter on appeal before us. We therefore, do not directly address this issue.

In this concurring opinion, I agree with the majority's analysis and result as applied to the facts presented in the record.