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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Richland County
Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STACARDO GRISSETT,

PETITIONER.

APPELLATE CASE NO. 2022-000299

BRIEF OF PETITIONER

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1.

Did the Court of Appeals err by failing to review the revocation judge's refusal to give Petitioner credit for the time he served in custody between when he was served with a community supervision violation warrant and his revocation hearing, where the judge revoked Petitioner's community supervision, since, despite being moot, the issue is capable of repetition, yet will almost always evade review given the relatively short duration (one year) of the sentence a defendant found in violation of his community supervision can receive pursuant to law?

2.

Did the revocation judge err by refusing to give Petitioner credit for the nearly two hundred days he served in custody between when he was served with the community supervision violation warrant and his revocation hearing, where the judge revoked Petitioner's community supervision, since credit for time served was mandatory pursuant to S.C. Code Ann. § 24-13-40, and the judge's refusal to provide credit for time served allowed Petitioner's sentence for the revocation to exceed the one year maximum permitted by S.C. Code Ann. § 24-21-560(C)?

STATEMENT OF THE CASE

A Richland County grand jury indicted Petitioner on April 15, 2009 for strong arm robbery, kidnapping, and second degree lynching. R. 31-36. On August 23, 2010, Petitioner pled guilty as indicted before the Honorable L. Casey Manning. R. 37-39. Sentencing was deferred. On September 16, 2010, Judge Manning sentenced Petitioner to ten years for strong arm robbery, ten years for second degree lynching, and eight years for kidnapping. R. 37-39. The sentences were ordered to be served concurrently. R. 37-39. Assistant Solicitor L. Eden Hendrick represented the state, and Tynika Claxton represented Petitioner. R. 37-39.

Petitioner completed his sentence for strong arm robbery while he was incarcerated in the Department of Corrections. On August 1, 2017, after serving 85 percent of his sentence for lynching and kidnapping, Petitioner was released from incarceration and enrolled in a community supervision program (CSP). R. 26. On November 1, 2017, Petitioner was arrested for violating the terms and conditions of his CSP. R. 26. On May 18, 2018, Petitioner appeared before the Honorable Clifton Newman for a CSP violation hearing. R. 1. Agent Amanda King appeared on behalf of the Department of Probation, Parole, and Pardon Services (the Department). R. 1. Zoe Bruck represented Petitioner. R. 1.

At the conclusion of the hearing, Judge Newman found Petitioner violated the terms and conditions of his CSP and revoked the remainder of Petitioner's CSP. R. 11, ll. 3-15. However, the judge refused to give Petitioner credit for the 198 days he had spent in custody since his arrest on the violation warrant. R. 11, l. 7 – 14, l. 8; R. 16-17.

On May 24, 2018, Petitioner filed a motion to reconsider arguing he was entitled to credit for time served pursuant to S.C. Code Ann. § 24-13-40 and State v. Boggs, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. 2010). R. 18-20. On June 5, 2018, the Department, represented by

Matthew Buchanan, filed a reply to Petitioner's motion to reconsider. R. 21-24. By order filed August 7, 2018, Judge Newman denied the motion. R. 25.

Petitioner filed a timely notice of appeal. After briefing, the Court of Appeals dismissed the appeal as moot. State v. Grissett, 2021-UP-351 (S.C. Ct. App. filed October 13, 2021); App. 1-3. On October 28, 2021, Petitioner filed a petition for rehearing requesting the Court of Appeals grant rehearing and address the underlying merits because the sentencing issue presented was capable of repetition, yet will evade review due to the short duration of the sentence permitted for a CSP violation. App. 4-15. By order filed February 14, 2022, the Court of Appeals denied the petition. App. 16.

On March 16, 2022, Petitioner filed a petition for writ of certiorari with this Court. The state filed a return on April 8, 2022. By order dated September 8, 2022, this Court granted the petition for writ of certiorari and ordered further briefing pursuant to Rule 242(i), SCACR.

This brief of petitioner follows.

STATEMENT OF FACTS

At the beginning of the revocation hearing, Agent King told the judge that Petitioner was on community supervision. Petitioner had been sentenced to ten years for second degree lynching and eight years for kidnapping. R. 3, ll. 9-16. His community supervision, as determined by the Department, was to be sixteen months long. R. 3, ll. 16-17. Agent King alleged Petitioner violated the terms of his CSP by failing to provide a current address, moving without permission, willfully associating with a person whom Petitioner knew had a criminal record, and being arrested on several new charges, including armed robbery, kidnapping, and criminal conspiracy. R. 3, l. 18 – 4, l. 25; See R. 26. Consequently, she requested Petitioner's CSP be revoked, noting he had 299 days remaining. R. 5, ll. 9-11.

Petitioner admitted to part of the allegations raised by Agent King. R. 5, ll. 12-15. Specifically, he admitted to having contact with individuals Petitioner knew had criminal records. R. 5, ll. 17-19. However, he "adamantly" denied the remaining allegations. R. 5, l. 17 – 6, l. 5. Despite his admission, Petitioner requested the judge continue his CSP due to his poor health. Petitioner was stabbed eighteen times in 2016 and was in a coma for four months. Although he survived, he continued to suffer from serious complications as a result. At the time of the hearing, Petitioner had a catheter that had to be changed frequently and "full blown" sepsis. His counsel explained that because Petitioner repeatedly succumbed to infections, he ultimately would require surgery. Petitioner was also scheduled to receive radiation treatment. Due to his poor health, Petitioner's counsel asserted "sending him to SCDC [the South Carolina Department of Corrections] . . . would possibly be a death sentence." R. 6, l. 8 – 8, l. 13. Consequently, Petitioner requested the judge continue his CSP and allow him to "serve out those remaining 299 days." R. 8, ll. 11-13.

The judge ultimately revoked Petitioner's CSP. R. 11, ll. 3-4. When asked by Agent King whether he was giving Petitioner credit for time served, the judge asserted, "He [Petitioner] gets credit for whatever he is entitled to credit for." R. 11, ll. 10-13. However, Agent King maintained if Petitioner's CSP was revoked in full and he received credit for the time he served since his arrest for the violation then he would "come back out on community supervision again for the time that he has been incarcerated." R. 11, ll. 14-20. She further explained, "To max out the sentence, Your Honor, he would not be . . . allowed to have credit for the time that he has been in [jail awaiting his revocation hearing]. Otherwise, he will come back out on a new certificate." R. 12, ll. 1-5.

An individual only identified as Mr. Cannon[1] further claimed, "Your Honor, if you provide him [Petitioner] with credit for time served, the Department of Corrections will calculate back to when . . . he was incarcerated on the CSP warrant, which would be roughly six months, so that would apply that six months to the 299 days. He would therefore be released ultimately six months prior to his max out date, then he will have six months more of CSP to do. If you were to just revoke the 299 days and not provide for the time served, he would do 299 days and then his CSP would be done." R. 12, ll. 8-19.

The judge ultimately revoked the 299 days Petitioner had remaining on CSP and ordered he not receive credit for time served. R. 13, l. 23; R. 16-17.

Petitioner filed a motion to reconsider arguing he was entitled to credit for the 198 days he spent in custody between when he was served with the violation warrant and the date of his revocation hearing pursuant to S.C. Code Ann. § 24-13-40 and State v. Boggs, 388 S.C. 314, 696 S.E.2d 597 (2010). R. 18-20. Petitioner asserted "it is mandatory that a defendant receive credit

[1] Presumably, this individual was Matthew C. Buchanan, General Counsel for the Department and counsel for Respondent.

for the time that he was held awaiting sentencing." R. 16. Because neither exception found in § 24-13-40 applied to Petitioner, he argued he must receive credit for time served. R. 16-19.

Additionally, citing to S.C. Code Ann. § 24-21-560(C)(5), Petitioner explained that if a prisoner is in violation of his CSP, the court "may revoke the prisoner's community supervision and impose a sentence of *up to one year* for violation of the community supervision program." R. 18 (emphasis in original). Based on this statute, Petitioner argued that because he had already served 198 days, he could only serve an additional 167 days in the custody of the Department of Corrections for this revocation. R. 19. By refusing to give him credit for time served, Petitioner asserted his sentence for the revocation was effectively 496 days, 130 days over the maximum revocation allowed by statute. R. 19.

In reply, the Department argued the second exception found in § 24-13-40, which states credit for time served prior to trial and sentencing shall not be given when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense, applied to Petitioner since "he was not only incarcerated on the CSP warrant, but also warrants for" two counts of kidnapping, two counts of armed robbery, assault and battery first degree, criminal conspiracy, and three counts of possession of a firearm by a violent felon. R. 21-22; See S.C Code Ann. § 24-13-40.

Citing to S.C. Code Ann. § 24-21-560(C), the Department also argued "the CSP statute explicitly states that the inmate is not entitled to earn credits that would reduce the sentence." R. 21. Consequently, according to the Department, Petitioner was not entitled to credit for the 198 days he served on the CSP warrant awaiting his revocation hearing. R. 22-23.

Further, the Department argued:

> CSP is not like Probation. The supervision is limited to the suspended portion of the sentence or the remaining fifteen percent of a defendant's sentence

> after serving 85 percent at the Department of Corrections. See State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845 (2010). Consequently, when an inmate begins a term of CSP, the Department calculates the number of days of the program. *Each day the inmate is not absconded reduces that number, whether the inmate is incarcerated or in the community*. For example, if the inmate has 100 days remaining on CSP, that inmate will be finished with his supervision after 100 days. If, however, the inmate is given a 100-day revocation and is given 40 days of pre-sentence time, that inmate would serve 60 days and would therefore have to serve 40 more days in the community.

R. 22 (emphasis added).

Lastly, the Department argued "to apply pre-sentence credit" would undo the intent of the sentencing judge. The judge intended for Petitioner to serve the remaining portion of his CSP, 298 days, in prison. R. 22-23. According to the Department, if the "presentence credit" was applied to Petitioner's sentence, he would not be finished with his CSP upon release. R. 23. He would, in effect, be released 198 days earlier than the judge intended, "with that same amount of days of CSP that must be completed." R. 23.

After noting the court cannot terminate CSP, the Department concluded the revocation judge could not sentence Petitioner to incarceration for the remainder of his CSP while Petitioner also received credit for his presentence detention, arguing "[t]o do so and terminate CSP at the same time would amount to double credit." R. 23.

The revocation judge denied the motion to reconsider finding "the sentence imposed is not improper nor excessive under the circumstances." R. 25.

On appeal, Petitioner argued the revocation judge erred by refusing to give Petitioner credit for the nearly two hundred days he served in custody between when he was served with the CSP violation warrant and his revocation hearing after the judge revoked Petitioner's CSP since (1) credit for time served was mandatory pursuant to S.C. Code Ann. § 24-13-40 and (2)

the judge's refusal to provide credit for time served allowed Petitioner's sentence for the revocation to exceed the one year maximum permitted by S.C. Code Ann. § 24-21-560(C).

In an unpublished *per curiam* opinion, the Court of Appeals held the issue is moot because Petitioner had already completed his sentence and was no longer incarcerated. State v. Grissett, 2021-UP-351 (S.C. Ct. App. filed October 13, 2021); App. 1-3. The court declined to accept Petitioner's request for appellate review under the circumstances. App. 3. The court stated it "would be more inclined to accept [Petitioner's] request for appellate review if this were a situation in which a defendant was held for an extended period of time before his revocation hearing on a CSP warrant for solely technical violations of his CSP conditions." App. 3. However, the court maintained that "in situations such as the current matter, where a defendant was being held concurrently on additional pending violent offenses," it was "less apt to address the matter." App. 3. Therefore, the court dismissed Petitioner's appeal. App. 3.

On October 28, 2021, Petitioner filed a petition for rehearing requesting the Court of Appeals grant rehearing and address the underlying merits because the sentencing issue presented was capable of repetition, yet will evade review due to the short duration of the sentence permitted for a CSP violation. App. 4-15; See Hayes v. State, 413 S.C. 553, 558, 777 S.E.2d 6, 9 (Ct. App. 2015). By order filed February 14, 2022, the Court of Appeals denied the petition. App. 16.

STANDARD OF REVIEW

"The determination of whether to revoke probation in whole or part rests within the sound discretion of the trial court." State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006) (citing State v. Miller, 122 S.C. 468, 474-475, 115 S.E. 742, 745 (1923); State v. Proctor, 345 S.C. 299, 301, 546 S.E.2d 673, 674 (Ct. App. 2001)); See State v. Garrard, 390 S.C. 146, 151, 700 S.E.2d 269, 272 (Ct. App. 2010) (applying the standard of review in Allen to an appeal from an order revoking community supervision). "The trial court must determine whether the State has presented sufficient evidence to establish that a probationer has violated the conditions of his probation." Id. (citing State v. King, 221 S.C. 68, 73, 69 S.E.2d 123, 125 (1952); State v. White, 218 S.C. 130, 135, 61 S.E.2d 754, 756 (1950); State v. Hamilton, 333 S.C. 642, 648–49, 511 S.E.2d 94, 97 (Ct. App. 1999)).

"An appellate court will not reverse the trial court's decision unless that court abused its discretion." Allen, 370 S.C. at 94, 634 S.E.2d at 656 (citing White, 218 S.C. at 135, 61 S.E.2d at 756; Hamilton, 333 S.C. at 647, 511 S.E.2d at 96). "An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious." Id.

ARGUMENT

1.

The Court of Appeals erred by failing to review the revocation judge's refusal to give Petitioner credit for the time he served in custody between when he was served with a community supervision violation warrant and his revocation hearing, where the judge revoked Petitioner's community supervision, since, despite being moot, the issue is capable of repetition, yet will almost always evade review given the relatively short duration (one year) of the sentence a defendant found in violation of his community supervision can receive pursuant to law.

Because Petitioner is no longer incarcerated and has completed his CSP, this issue is moot. See Hayes v. State, 413 S.C. 553, 558, 777 S.E.2d 6, 9 (Ct. App. 2015) (explaining an individual's completion of a sentence renders an appeal on the propriety of that sentence moot). However, "an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." Id. (quoting Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)) (internal quotation marks omitted). As this Court held in Hayes, where the defendant did not receive credit for time served due to the split nature of his sentence, the issue here is capable of repetition but evading review. See Id. It is apparent, based on the record before this Court, that the Department is urging circuit court judges to order defendants, such as Petitioner, not receive credit for time served to which they are entitled pursuant to § 24-13-40. Consequently, defendants, such as Petitioner, are being ordered to serve sentences that exceed the one year maximum per revocation allowed pursuant to § 24-21-560(C).

The mootness analysis in State v. Simpson, 429 S.C. 83, 837 S.E.2d 669 (Ct. App. 2020), reh'g denied (Feb. 14, 2020), demonstrates why this Court should address the merits in the present case. In Simpson, the state appealed Simpson's sentence following his guilty plea to four

counts of second degree sexual exploitation of a minor. Id. at 85, 837 S.E.2d at 670. The state argued the lower court erred when it sentenced Simpson to two years of home detention rather than the mandatory minimum two years' imprisonment mandated by S.C. Code Ann. § 16-15-405. Id. On appeal, Simpson argued the issue before the court was moot because he had already completed his two year home detention sentence. Id. at 88, 837 S.E. at 671-672.

The Court of Appeals determined "*the question of Simpson's own sentence [was] moot* due to his completion of the determinate home detention portion of the sentence." Id. at 89, 837 S.E.2d at 672 (emphasis added). However, the court held the state "argued persuasively that the sentencing question here is capable of repetition yet generally evades review in that the suspension of mandatory minimum sentences continues to occur in circuit court, but due to the duration of the home detention or probationary portions of such sentences, the question presented here generally evades review." Id. Accordingly, the court addressed the merits. Id. at 89, 837 S.E.2d at 672 (citing Nelson v. Ozmint, 390 S.C. 432, 434, 702 S.E.2d 369, 370 (2010)).

In Nelson v. Ozmint, this Court likewise addressed a moot sentencing issue. Nelson pled guilty to criminal domestic violence, third or subsequent offense, and was sentenced to fifteen months' imprisonment. 390 S.C. at 434, 702 S.E.2d at 370. The South Carolina Department of Corrections (SCDC) determined Nelson would be eligible for release one year after he was originally incarcerated. Id. SCDC interpreted S.C. Code Ann. § 16-25-20(B)(3) (Supp. 2009) to mean Nelson was required to actually serve one year, not including good time credits or earned work credits, before he was eligible for release. Id. Nelson filed an action in this Court's original jurisdiction seeking a writ of mandamus directing SCDC to apply good time and earned work credits to reduce the actual time Nelson must serve. Id. at 433, 702 S.E.2d at 369-370.

Because Nelson had already served his sentence and had been released from SCDC, this Court held the underlying claim was moot. Id. at 434, 702 S.E.2d at 370. However, the Court found the "issue is one that is capable of repetition, yet will usually evade review because most inmates will have served the year required by SCDC's interpretation of the statute before the lawfulness of the interpretation can be reviewed." Id. at 434-435, 702 S.E.2d at 370. Consequently, this Court addressed the merits. Id. at 435-437, 702 S.E.2d at 370-371.

By its nature, the sentencing issue in this case is subject to similar time limitations such as those present in Nelson and Simpson. In Simpson, the state argued the appeal should be heard on the merits, despite Simpson having completed his sentence, because home detention sentences are relatively short in duration and are likely to conclude before an appeal can be adjudicated. Id. at 88, 837 S.E.2d at 672. Accordingly, the error committed by circuit court judges in suspending mandatory minimum sentences and allowing home detention was capable of repetition, but generally evaded review. Id. In Nelson, this Court reviewed the merits of the underlying sentencing issue because most prisoners would have served the year required by SCDC's interpretation of the criminal domestic violence statute before the lawfulness of its interpretation could be reviewed on appeal. In this case, the maximum Petitioner, or any other defendant found in violation of his or her CSP, can be sentenced to for violating the terms of the program is one year, a relatively short duration. Given this short duration, this issue will almost always evade review. Moreover, it is likely that circuit court judges are continuing to refuse to give defendants found in violation of their CSP credit for time served given the Department's stance on the matter.

The Court of Appeals' reasoning for refusing to apply the "capable of repetition but generally evading review" exception to the mootness doctrine conflicts with this state's

precedent. Respectfully, this Court should review the lawfulness of the revocation judge's refusal to give Petitioner credit for time served and resolve this issue for the benefit of the lower courts.

2.

The revocation judge erred by refusing to give Petitioner credit for the nearly two hundred days he served in custody between when he was served with the community supervision violation warrant and his revocation hearing, where the judge revoked Petitioner's community supervision, since credit for time served was mandatory pursuant to S.C. Code Ann. § 24-13-40, and the judge's refusal to provide credit for time served allowed Petitioner's sentence for the revocation to exceed the one year maximum permitted by S.C. Code Ann. § 24-21-560(C).

I. Credit for Time Served is Mandatory Pursuant to S.C. Code Ann. § 24-13-40 Toward a Sentence for a Revocation of Community Supervision

Petitioner was entitled to credit for the time he served between when he was served with the CSP violation warrant and the date of his revocation hearing pursuant to S.C. Code Ann. § 24-13-40 because neither exception found in the statute applied. The statute states:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. . . . In every case in computing the time served by a prisoner**, full credit against the sentence must be given for time served prior to trial and sentencing**, and may be given for any time spent under monitored house arrest. Provided, however, that **credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.**

S.C. Code Ann. § 24-13-40 (emphasis added).

"The requirement that a prisoner receive credit for time served is mandatory." Hayes v. State, 413 S.C. 553, 559, 777 S.E.2d 6, 10 (Ct. App. 2015) (citing State v. Boggs, 388 S.C. 314, 316, 696 S.E.2d 597, 598 (Ct. App. 2010)). "Thus, a prisoner will receive credit for time served unless either (1) they were an escapee or (2) the prisoner was already serving a sentence on a different offense." Id. at 560, 777 S.E.2d at 10 (citing S.C. Code Ann. § 24-13-40).

In Boggs, the sentencing judge indicated he did not want to give the defendant credit for time served and did not check the box on the sentencing sheet indicating credit for time served. Boggs, 388 S.C. at 316, 696 S.E.2d at 598. The judge acknowledged Boggs was entitled to credit for the time he served in custody before he pled guilty, but stated on the record that "when I don't check it off" the Department of Corrections would not give Boggs the credit, concluding, "I am just telling you how it works in the real world." Id. Th Court of Appeals reversed the sentencing judge, holding the statutory credit for time served was mandatory and a "judge's disappointment in the maximum sentence he can impose is not one of the exceptions to the mandatory language" in the statute. Id.

In Hayes, the defendant pled guilty to possession of crack cocaine and criminal conspiracy and was sentenced to five years' imprisonment, suspended to time served and three years' probation. The trial judge ordered Hayes receive credit for 240 days time served. Hayes, 413 S.C. at 555, 777 S.E.2d at 8. Hayes was subsequently charged with various probation violations. Id. The probation revocation judge ultimately revoked his probation, reinstated three years of his suspended sentence, and terminated probation. Id. The judge noted Hayes had previously served 240 days and should receive credit for this time. Id. However, the Department of Corrections refused to apply the 240 days to Hayes' reduced sentence. Hayes argued on appeal that the plain language of § 24-13-40 required his pretrial detention credit be awarded to his partially revoked sentence. Id. at 558, 777 S.E.2d at 9. He also emphasized that if the Department of Corrections applied the statute in the same way to a full revocation, the result would be a longer sentence than authorized by law. Id.

The Court of Appeals agreed and held Hayes was entitled to credit for the 240 days time served based on the plain language of the statute. Id. at 560, 777 S.E.2d at 10. The court

emphasized the statute does not make a distinction for split sentences and pretrial detention time should apply against a probation revocation whenever a probationer received a split sentence. Id.

Like the defendants in Boggs and Hayes, Petitioner was entitled to credit for the presentence time he served on the CSP warrant while awaiting his revocation hearing as neither of the exceptions found in § 24-13-40 applied. Petitioner was not an escapee and he was not already serving a sentence on a different offense. See Hayes, 413 S.C. at 560, 777 S.E.2d at 10 (citing S.C. Code Ann. § 24-13-40). Consequently, credit for time served was mandatory. See Boggs, 388 S.C. at 316, 696 S.E.2d at 598.

In its reply to Petitioner's motion to reconsider, the Department argued Petitioner was not entitled to credit for time served pursuant to § 24-13-40 because he was not only incarcerated on the CSP warrant, but also on warrants for his new pending charges. R. 21. According to the Department, "the jail time credit that he [Petitioner] is seeking credit for is time while he is awaiting trial and sentence [for] another offense." R. 21. Given these circumstances, the Department asserted Petitioner was not entitled to credit for time served pursuant to the second exception found in the statute. R. 21-22. However, this argument is based on a misreading of the statute and/or a misunderstanding of Petitioner's circumstances.

Again, the exception states in relevant part: "credit for time served prior to trial and sentencing shall not be given . . . when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense *in which case he shall not receive credit for time served prior to trial in a reduction of his sentence* ***for the second offense***." S.C. Code Ann. § 24-13-40. Petitioner was incarcerated and serving a sentence for kidnapping and second degree lynching, offenses he pled guilty to on August 23, 2010. He was also incarcerated on pending charges for which he was awaiting trial and sentence. Petitioner's new charges constitute the

"second offense" referenced in the statute. Consequently, Petitioner would not be entitled to credit for the time he served on the CSP warrant and his ultimate CSP revocation if he was later convicted of and sentenced for his pending charges.

As the judge recognized during the revocation hearing: "Well, a person on community supervision is an inmate outside of the institution. You are still serving time. And you are placed outside the institution into the community under community supervision." R. 10, ll. 3-7. It is undisputed that Petitioner was still serving his sentence for his 2010 convictions for kidnapping and second degree lynching when he was arrested on the new charges. Consequently, Petitioner was entitled to credit towards his 2010 sentence for the presentence time he served on the CSP warrant. However, he would not be entitled to credit for the time he served on his CSP revocation toward any sentence he may receive on his new charges.

Additionally, the Department argued to give Petitioner credit for time served "would be unwieldy and contrary to" the intent of the revocation judge who desired Petitioner serve the remaining 299 days of his CSP in prison. BOR at 5; See R. 22-23. However, as the Court of Appeals made clear in Boggs, a "judge's disappointment in the maximum sentence he can impose is not one of the exceptions to the mandatory language" in § 24-13-40. See Boggs, 388 S.C. at 316, 696 S.E.2d at 598. The judge's desire for Petitioner to serve the remainder of his CSP incarcerated is not one of the exceptions to the mandatory language in § 24-13-40. Consequently, regardless of the judge's intent, Petitioner was entitled to credit for the time he served presentence.

Moreover, based on the Department's own argument, Petitioner was entitled to credit for time served. In its reply to Petitioner's motion to reconsider, the Department asserted, "CSP is not like Probation. The supervision is limited to the suspended portion of the sentence or the

remaining fifteen percent of a defendant's sentence after serving 85 percent at the Department of Corrections. Consequently, when an inmate begins a term of CSP, the Department calculates the number of days of the program. *Each day the inmate is not absconded reduces that number, whether the inmate is incarcerated or in the community*." R. 22. Based on the Department's own statement, Petitioner was entitled to credit for the time he served on the CSP warrant before his revocation hearing since he was not absconded at the time. The 198 days Petitioner spent incarcerated presentence had to reduce the amount of time he had remaining on CSP.

Respectfully, this Court should hold Petitioner was entitled to credit for time served pursuant to § 24-13-40 because neither exception outlined in the statute applied.

II. Petitioner's Sentence Exceeded the One Year Revocation Allowed Pursuant to S.C. Code Ann. § 24-21-560(C)

Pursuant to S.C. Code Ann. § 24-21-560(C), the Department argued in its reply to the motion to reconsider that Petitioner was not entitled to credit for time served while in custody awaiting his revocation hearing because this statute states an inmate is not entitled to earn credits that would reduce the sentence for a violation of the community supervision program. R. 22. However, receiving credit for time served would not reduce Petitioner's sentence for the violation of his CSP. In fact, the opposite is true. Not providing Petitioner credit for time served extended his sentence longer than allowed by law. Section 24-21-560(C) states in relevant part:

> If the court determines that a prisoner has willfully violated a term or condition of the community supervision program, the court may impose any other terms or conditions considered appropriate and may continue the prisoner on community supervision, or *the court may revoke the prisoner's community supervision and impose a sentence of* ***up to one year*** for violation of the community supervision program. A prisoner who is incarcerated for revocation of the community supervision program is not eligible to earn any type of credits which would reduce the sentence for violation of the community supervision program.

S.C. Code Ann. § 24-21-560(C) (emphasis added).

Because Petitioner had already served 198 days of the one year sentence the court could impose pursuant to the statute, he could only serve an additional 167 days in the custody of the Department of Corrections for this revocation. Petitioner's sentence, which denied him credit for the time he served between his arrest on the CSP warrant and his revocation hearing, was effectively a 497 day sentence, which is 132 days over the maximum revocation allowed by law. Consequently, Petitioner's sentence as ordered by the revocation judge was illegal as it was in clear violation of § 24-21-560(C).

Citing to State v. Scott, 351 S.C. 584, 571 S.E.2d 700 (2002), the Department properly acknowledged that the court cannot terminate CSP. R. 23. Because Petitioner was entitled to credit for time served pursuant to § 24-13-40 and because the revocation judge could not terminate Petitioner's CSP, Petitioner should have been ordered to serve an additional 167 days incarcerated, which was the remainder of the one year revocation permitted by law, and then serve an additional 132 days in the community to satisfy his sentence. The judge's desire to terminate Petitioner's CSP cannot trump the law. This avoids Petitioner receiving "double credit" as suggested by the Department. See R. 23.

The Department further argued, "To follow [Petitioner's] argument that the judge must consider the inmate's previously served time, then every day spent on CSP would therefore have to be credited toward a revocation, which strains credulity. In another scenario, if an inmate spends an entire year awaiting a CSP violation hearing, the judge would be powerless to address the violation if [Petitioner's] argument is followed." BOR at 6; See Return at 9. Respectfully, the Department's argument is nonsensical. Petitioner has only ever argued that he was entitled to credit for the time he served *incarcerated* awaiting his revocation hearing after the CSP violation warrant was served. Petitioner has never suggested that he was entitled to credit for all the time

he previously spent in the community on CSP toward his revocation. Moreover, to address the Department's other "scenario," if an inmate spends an entire year *incarcerated* awaiting a CSP violation hearing, while the revocation judge could revoke the inmate's CSP, the judge could not order the inmate be further incarcerated as the inmate has already served the maximum sentence permitted pursuant to § 24-21-560(C).

Respectfully, this Court should hold Petitioner's sentence violated § 24-21-560(C) because he was ordered to serve 167 days more than one year permitted for a revocation.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court hold credit for the time Petitioner served in custody between when he was served with the community supervision violation warrant and his revocation hearing was mandatory pursuant to S.C. Code Ann. § 24-13-40 and that Petitioner's sentence exceeded the one year maximum permitted by S.C. Code Ann. § 24-21-560(C).

Respectfully submitted,

s/ Lara M. Caudy
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Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of October, 2022.