STATE OF SOUTH CAROLINA

In The Court of Appeals

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SC Court of Appeals

APPELLATE CASE NO. 2022-000641

APPEAL FROM GREENVILLE COUNTY

Court of General Sessions

The Honorable Frank R. Addy, Jr., Circuit Judge

Trial Court Case No. 2002-GS-23-09233, 2002-GS-23-09234,

2002-GS-23-09235, 2002-GS-23-09239

STATE OF SOUTH CAROLINA ..... RESPONDENT,

V.

PATRICK LEE BOOKER ..... APPELLANT.

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The reply (set forth *infra*) of Patrick L. Booker will demonstrate that the state of South Carolina, via the Respondent's Brief, is engaged in an outright attempt to dance around the issues by creating smoke and mirrors through "**double-talk**"[1] (spoken with a "**forked tongue**")[2] that only serves as an attempt to confuse the Court. For example, the State's attorney of record, Jessica E. Kinard, state in the Respondent's Brief: "***The Director…cannot and does not alter offenders' sentences***" yet she acknowledges that Patrick Booker's "***sentence was modified***" by the director's administrative order imposing a term and condition that was not a part of the court's pronouncement of the sentence.[3] Separately, Ms. Kinard further state: At the August 15, 2022, hearing Patrick Booker "***included the argument that the Director of SCDPPPS did not have the authority to put anyone on CSP because it violates separation of powers***." Yet she goes on to contend: "***This argument was neither raised [to] nor ruled upon by the trial court***."[4] Further still Ms. Kinard takes issue with the Appellant styling this matter as a "criminal appeal" (stating

[1] The phrase "double-talk" means language that appears to be earnest and meaningful but in fact is a mixture of sense and nonsense. *See, Merriam-Webster Dictionary.*

[2] The phrase "forked tongue" means intent to mislead or deceive. *See, Merriam-Webster Dictionary.*

[3] After acknowledging that the Appellant's "**sentence was modified**" by the director's CSP certificate, Ms. Kinard attempts to deflect attention away from that fact (despite "unlawful sentence modification" being the issue at hand) by going on to explain the purpose of the sentence modification (i.e., to allow release from prison). The "reason" for modifying a final judgment/sentence is not the issue: the issue is that the director, a member of the executive branch, cannot lawfully modify a final sentence, irrespective of reason.

[4] The Appellant did make the argument at the August 15,2022, hearing that the SCDPPPS Director lacked authority or power- as a member of the executive branch- to alter/modify his judicially imposed sentence. The Court ruled that the director was indeed empowered by South Carolina law to do so. Accordingly, the issue was raised to and ruled upon by the trial court.

"to treat [this matter] as a direct criminal appeal or post-conviction relief application would be *inappropriate.*") yet she recognizes that this is an "*appeal*" from orders entered in a "criminal" case thereby appropriately making this matter be styled as a "**criminal appeal**".

This matter is indeed a criminal appeal, a lawfully made and a timely filed criminal appeal, but again, ***it is nacho average criminal appeal***: it was made ***after*** the Appellant's period in confinement. The State itself made this result occur, however, because the State of South Carolina, in its Return to the PCR Application bearing case number 2008-CP-23-07865, argued that the Appellant's claim of Involuntary Guilty Plea (based upon the failure of the trial court to inform of CSP) would not become ripe for judicial review until the Appellant participated in the CSP. The PCR court judge, now-Justice John Cannon Few, agreed that the claim was ***unripe*** for judicial review until the Appellant participated in the CSP: on April 7, 2010, all five justice members of the Supreme Court of South Carolina agreed with now-Justice Few that the Appellant's claim would not become ripe until the Appellant participated in the CSP, *thus preserving the issue for judicial review.*

Whereas this criminal appeal arises out of proceedings directly related to the Appellant's participation in the CSP, and whereas the Appellant's arguments were raised to and ruled upon by the trial court, this matter, and the arguments made in support of the claims decided by the trial court, are properly before this Court on this *criminal* appeal.

REPLY ARGUMENTS

I. The Community Supervision Program-Just Like the Felony Gun Ban-is a direct consequence of *the guilty plea* (apart from the sentence) and the failure to inform of either one at time of plea renders the plea invalid for lack of due process.

Contrary to the State's argument (that it would be inappropriate to treat this matter as *a direct criminal appeal*), this matter is appropriately filed as a *criminal appeal* to the extent that it emanates from the orders of general sessions court which heard and decided the merit of the claims made by the Appellant, claims that the Supreme Court itself *agreed* would not become ripe for judicial review until the Appellant's participation in the Community Supervision Program. Thus, these issues are properly before the Court for appellate review.

The State believes that the first threshold issue is "whether CSP is a collateral or direct consequence *of sentencing*." (see Rep. Brf. at 4). This is error. The issue is whether CSP is a collateral or direct consequence ***of the guilty plea***, irrespective of the sentence. As the Supreme Court have observed, "[s]entencing, although often combined with the admission of guilt in a hearing, is a separate issue from guilt and a distinct phase of the criminal process." Easter v. State, Opinion No. 25677 (S.C. 2003). As we are assessing the validity ***of the guilty plea***, the issue is whether the CSP is a collateral or direct consequence **of the guilty plea**, *not of the sentence*.

As acknowledged by the State in its brief, "[t]his is fundamental because it is well-settled South Carolina law that collateral consequences do not have to be disclosed to or discussed with a defendant prior to entry of '*a guilty plea or sentencing*'[]", recognizes that there is a distinction between the consequences of *a guilty plea or of sentencing*.

While the sentence is the *penalty* for the offense, the guilty plea is the *conviction* which authorizes the entry of the sentence/judgment (penalty) for the offense.

The Supreme Court of the United States have made clear that a guilty plea may only be entered "***by one fully aware of the direct consequences***" of the plea. Brady v. United States, 397 U.S. at 755, 90 S.Ct. at 1472(1970).

Because the State's position is that CSP—a statutorily mandated component of the *sentence* for a "no parole offense" (i.e., a class A, B, or C felony offense)—is merely a collateral consequence of the sentence, *this matter now requires* the Court to set forth a standard of law accurately clarifying the difference between collateral and direct consequences, and whether there is a materially different effect of those consequences on a defendant's guilty plea compared to the sentence entered, based upon that guilty plea.

Hence, the State's position has "opened the door" to the *Elephant-in the-Room* question about the felony firearms ban—a *similarly* statutory mandated component of the *sentence* for a felony offense--whether it is truly a collateral consequence *of the sentence* or whether is it in fact a direct consequence *of the guilty plea.* Federal statutory law (18 U.S.C. 922(g)(1)) and state statutory law (S.C. Code of Law 16-23-500) prohibits and restrains humans who have been convicted of a felony offense from ***lawfully*** purchasing, possessing, and utilizing a firearm ***for any purpose***.[5] Thus, just like when a judge accepts and enters *a guilty plea* to a felony offense for *CSP*, one of the direct consequences of that guilty plea is an definite, immediate, and a largely automatic effect on the range of the human's punishment[6] to wit: a **life-time ban** (*restriction/forfeiture*) on that human's Second Amendment right to "possess and use firearms for traditionally lawful purposes, including self-defense within the home." Prior to pleading guilty to a felony offense, ***the human*** freely enjoys the federal constitutional right ***to possess and to use firearms*** for traditionally lawful purposes, including self-defense. However, upon pleading guilty

[5] In District of Columbia v. Heller, the U.S. Supreme Court on June 26, 2008, held (5-4) that the Second Amendment guarantees an individual right to possess firearms independent of service in a state militia and ***to use firearms for traditionally lawful purposes, including self-defense within the home.***

[6] While the courts of this state have yet to define what constitutes a direct consequence as opposed to a collateral consequence of the plea and of the sentence, the United States Court of Appeals for the Fourth Circuit have observed that "the distinction between 'direct' and 'collateral' consequences of a plea...turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364 (4th Cir. 1973).

to a felony offense and having that plea accepted by a judge, **a human's** federal constitutional right to possess and use firearms for the ***lawful* purpose of the *human/legal right of self-defense*** is definitely, immediately and largely automatically forfeited [7] *for life* **as a direct result of the guilty plea,** irrespective of the sentence. That is certainly a direct consequence of the human-being's guilty plea, irrespective of the sentence.

Yet, *under current law, the courts are telling its judges that a judge, prosecutor/ attorney of record, does not have to inform a human-being that, as part of their guilty plea to a felony offense that that human-being would be, by pleading guilty, relinquishing his human/legal right to possess and use firearms for lawful purpose of self-defense for the rest of his human life.* There are many courts which have told its hundreds of judges that the ***felony-firearms ban*** is merely a collateral consequence of sentencing, of which a defendant need not be specifically advised before entering a guilty plea. When have the Supreme Court, or any court, ever held that restriction/or forfeiture of any federal constitutional right can be, and is, merely a *collateral consequence* of a guilty plea to a felony offense? A constitutional right is a direct right, emanating directly from the human: *its waiver, relinquishment, restriction or forfeiture*, to be valid, must be made both

[7] The term forfeit means to lose or lose the right to especially by some error, offense, or crime. *See, Merriam-Webster Dictionary.*

knowingly and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

Accordingly, *the waiver, relinquishment, restriction, or forfeiture* of the Second Amendment right to keep and bear arms is, and always has been, a **direct-*life long*-consequence** of a human-being's guilty plea to a felony offense, that many trial courts are not informing defendants about. **This is *unjust* criminal justice!**

Despite the Felony-Firearms Ban being clearly a direct consequence of the guilty plea, no one informed the Appellant, at the time of his plea, that by pleading guilty to the charges he would be forever forfeiting both his constitutional right, as well as his human right, to keep and bear arms for the lawful purpose of self-defense. Thus, the Appellant's guilty plea *was/is* entered involuntarily, as he was unaware, at the time of his plea, that he would be forever losing his right to possess and use firearms for the lawful purpose of self-defense.

The Respondent states "*CSP is explicitly different from parole*" but fails to explain the difference. The Respondent refuses to explain how the "CSP is explicitly different from parole", but it says: "despite Appellant's arguments to the contrary, CSP is not a mandatory parole term." Rather than explain how the "CSP is explicitly different from parole" the Respondent tries to shift focus to the **function** of CSP, which is the same thing the state Supreme Court did in *Jackson v. State*, 349 S.C. 62, 562 S.E.2d 475 (2002). But to focus on the ***function*** of the CSP is to merely analyze the purpose or the operation of the CSP.

There is no need to analyze the function or the operation of the CSP: this case is about failure of the trial court to inform of the legal consequences of the CSP. The State, as did the state Supreme Court in *Jackson*, likens the CSP to "parole" by analyzing the similar nature of how CSP ***functions*** likes parole. While the two may function alike, parole and its eligibility relates to the time at which the sentence actually imposed may in effect be reduced, at least insofar as the requirement for serving time in prison is concerned. On the other hand, the CSP term involves the imposition of an additional adverse consequence upon the defendant—a substantial period of time during which his freedom is limited significantly commencing ***after*** the defendant has served his sentence of imprisonment.[8]

The reason the State challenges the Appellant's characterization (that CSP is a mandatory parole term) while refusing or failing to explain how the "CSP is explicitly different from parole" is because the State recognizes the accuracy of the opinion of the United States Court of Appeals, in *Carter v. McCarthy*, where that court observed: "for purposes of determining whether a plea is voluntarily and intelligently made, the critical fact is not that the imposition of the parole term is mandatory but that the parole term is to be served '*in addition to the term of confinement under the sentence*'. In these circumstances, the judge handling the criminal proceedings must advise the defendant, *inter alia*, of the maximum

[8] "Serving his sentence of imprisonment" means the period time served in confinement under the actual sentence imposed.

period his liberty may be restrained both by way of imprisonment and parole." *Id.*, 806 F.2d 1373 (9th Cir. 1986).

The critical factual difference between CSP and parole is that parole is purely discretionary and provides a benefit to the prisoner—a reduction in the period of confinement. CSP is mandatory and takes place *after, or in addition, to the period of confinement.* That makes it a mandatory parole term!

The State, however, challenges the Appellant's characterization of the CSP as a mandatory parole term because the State is further aware that the court in *Carter v. McCarthy*, correctly observed that: "The proper initial inquiry here is whether a mandatory parole term is a direct consequence of a guilty plea, or merely a collateral one. If a mandatory parole term is a direct consequence, we must then determine whether Carter was fully aware that he was subject to that additional penalty." *Id.*, supra.

After considerate deliberation, the *Carter* court stated: "We agree with the view expressed in *In re Carabes* and implicitly recognized by the Seventh Circuit. Where a criminal statute imposes a mandatory parole term to be served following completion of the period of confinement, the parole term necessarily is a direct consequence of the guilty plea." *Id.*

Here, S.C. Code of Laws, section 24-21-560(A) requires a period of CSP to be served following completion of the period of confinement; the Appellant's CSP term is thus a direct consequence of his plea.[9]

The Respondent is correct in that our Supreme Court has specifically held that length of service on CSP, when combined with actual carceral time, may not exceed the length of the original sentence. *State v. McGrier*, 378 S.C. 320, 332, 663 S.E.2d 15, 21 (2008). However, placing a cap on the length of maximum service on CSP did not alter the fact that it is a direct consequence of the guilty plea. Again, the critical fact is that CSP occurs after, or in addition to, the period of confinement under the sentence.

The Respondent says CSP functions "by decreasing the amount of time an offender spends in an institution by allowing them to earn good time credits and receive other benefits, thus allowing them to spend up to 15% of their sentence in the community. This time in the community is part of an offender's original sentence and does not add any time to his punishment."

[9] The *en banc* decision of the Supreme Court of Washington is more informative of exactly how and why a mandatory post-release supervision component of sentence is a direct consequence of a guilty plea. *See, State v. Ross*, 129 Wash. 2d 279, 916 P.2d 405 (1996). The learned judicial minds of that court were able to accurately rebut every argument set forth by the State as those wise judges elaborated the law to convincingly showing how and why a mandatory post-release component is a direct, rather than collateral, consequence of the guilty plea. Similarly, the wise judicial members who heard and decided the matter of *People v. Catu*, 4 NY3d 242, 244, 825 N.E.2d 1081 (2005) were effective at convincing any learned legal mind that mandatory post-release supervision is not a collateral consequence but rather is indeed a direct consequence of guilty plea.

Actually that is incorrect: CSP does not function to decrease *any* amount of time; pursuant to statutory law South Carolina prisoners amount of time served in an institution automatically decreases either at the rate three days per month or at the rate of twenty days per month by way of the application SCDC's calculation of a prison-inmate's original actual sentence imposed including, if eligible to receive, all available earned good conduct, work and educational credit. Therefore, once a prison-inmate have served at least eighty-five (85%) in prison, he/or she is eligible for early release from prison. The CSP, a mandatory parole term, kicks in *after* the person have been released from confinement. Thus, it did not decrease any amount of time served.

Irrespective of its function, the CSP (a statutorily mandated post-release supervision component of the sentence to be imposed : same as its counterpart, Felony Firearms Ban) is a mandatory requirement of the sentence which requires notice to the defendant, at time of the guilty plea and imposition, through the court pronouncement of sentence on the record of the court, in order to comport with due process.

Because it is clear that no one informed the Appellant of the direct consequence of the CSP nor the Felony Firearms Ban at the time of his plea, this court has power at this juncture to declare the guilty plea invalid as entered involuntarily.

II. Statutory law vesting the Director of the South Carolina Department of Probation, Parole and Pardon Services with the authority to modify final judgment/sentence is, and always was, unconstitutional as it violates both the separation of powers doctrine as well as due process of law.

As noted by the State, Patrick Booker's (and by extension everyone else') "**sentence was modified**" the SCDPPPS Directors' signing, issuance of the CSP Certificate.

That is an acknowledgment made by the State in its Respondent's Brief, though counsel for the State quickly attempted to divert attention away from that quint essential issue by stating the director's modification of the sentence was in the Appellant's benefit. The director cannot be, and never was, lawfully empowered to alter or modify final judicially imposed sentence, for any reason. Only a judge can impose a sentence and it must be through pronouncement, in the defendants presence, on the records of the court which includes the minutes of the proceeding and the documents related thereto. No matter how the State may attempt to dance around it, it is clear that the Appellant's sentence was modified unlawfully, CSP was never lawfully a part of the Appellant's sentence as it was not pronounced at sentencing or otherwise entered upon the records of the court.

The State attempt to confuse this Court by comingling the lawful duties and responsibilities of the SCDPPPS Director with authority and power he simply do not, and cannot, lawfully possess. While it is true that "someone must develop the guidelines for the program"[10] the Appellant agree that the statute lawfully empowers the director to establish guidelines: however, it is not true that the director is lawfully authorized to modify a final judicially imposed sentence.

Allowing the Director of SCDPPPS to modify a defendants' sentence, is unlawful. Once the judge imposes the law and thereby pronounce the judgment, that judgment becomes final. It would be, and it is, a clear case of violating the separation of powers doctrine to allow a member of the executive branch to alter or modify a final judgment, and it becomes even more a clear case of violating the defendant's due process right to be informed of this component of his sentence at the time of his plea, and by hearing its pronouncement. Of course, the South Carolina legislature cannot empower an executive official to perform a judicial function. This case is a clear case of an administrative official (the DPPPS Director) issuing an administrative order purporting to modify the terms and conditions of the Appellant's final sentence as entered upon the records of the court. Materially indistinguishable from the facts of the matter of Earley v. Murray.

[10] The Appellant agree that this *someone* here is the SCDPPPS Director. Its his duty under the statute to establish guidelines for the program.

III. **By the State's failure to respond the other arguments made by the Appellant the Court must assume that the State concedes the argument.**

The Honorable Bruce Howe Hendricks, United States district judge, have observed that when the "plaintiff failed to respond to [defendant's] argument...the Court can only assume that Plaintiff concedes the argument." *Campell v. Rite Aid Corp.*, No. 7;13-CV-02638-BHH, at *2 (D.S.C. Aug. 5, 2014).

To disagree that the State of South Carolina have conceded the following arguments, is to directly disagree with a federal judge on a clear point of law:

Although the State, through its counsel of counsel, responded to many of the Appellant's argument and claims, there are a couple of the Appellant's arguments and claims that went unaddressed and not responded to: for example, the Appellant, at footnote 9 of the Initial Brief of the Appellant, accuses the state supreme court of erroneously stating (in the first paragraph) in *Jackson v. State, supra* that the community supervision program was defined in S.C. Code Ann. Section 24-13-100(Supp.2001). The State, in its Respondent's brief, failed to address, failed to respond, or failed to dispute the Appellant's argument and claim that the state supreme court was wrong in setting forth **a publicly recorded erroneous conclusion of law**. Thus, the State conceded that.

The State further concedes the Appellant argument and claim, as noted on page 4 of the Initial Brief of Appellant, that all five of the state supreme court justices participating on April7, 2010, all banded/conspired together against Appellant's civil rights, in violation of S.C. Code of Laws, section 16-5-10, "Conspiracy Against Civil Rights", when they all agreed, upon their own motion, to deny Appellant due process and equal protection of the

law when Chief Justice Jean Toal, Justice Costa Pleicones, Justice Donald Beatty, Justice John Kittredge, and Justice Kaye Hearn all agreed to issue a pre-filing injunction but they all agreed to not notify the Appellant of, and to failed to afford him the opportunity to defend against, their sua sponte issuance of a pre-filling injunction against him.

The State, in its Respondent's Brief, failed to address, failed to respond, or failed to dispute the Appellant's arguments and claims and thus, pursuant to the judicial opinion of an Article III judge, the Court may only assume the State concedes the argument and claim.

CONCLUSION

WHEREFORE, having made his Reply to the Respondent's Brief, the Appellant hereby respectfully request the Court to reverse the trial court's judgment, vacate the guilty plea, and return the Appellant's funds.

March 05, 2023 Patrick L. Booker

Greenwood, South Carolina Patrick L. Booker

CERTIFICATE OF SERVICE

I, Patrick L. Booker, do hereby declare that I did this date serve the foregoing upon the state of South Carolina by depositing a copy of the same in the United States Mail, postage prepaid, addressed as follows: Jessica E. Kinard, Legal Counsel, SCDPPPS P.O. Box 207, Columbia, S.C. 29202; Alan C. Wilson, Attorney General of South Carolina, P.O. Box 11594, Columbia S.C. 29211.

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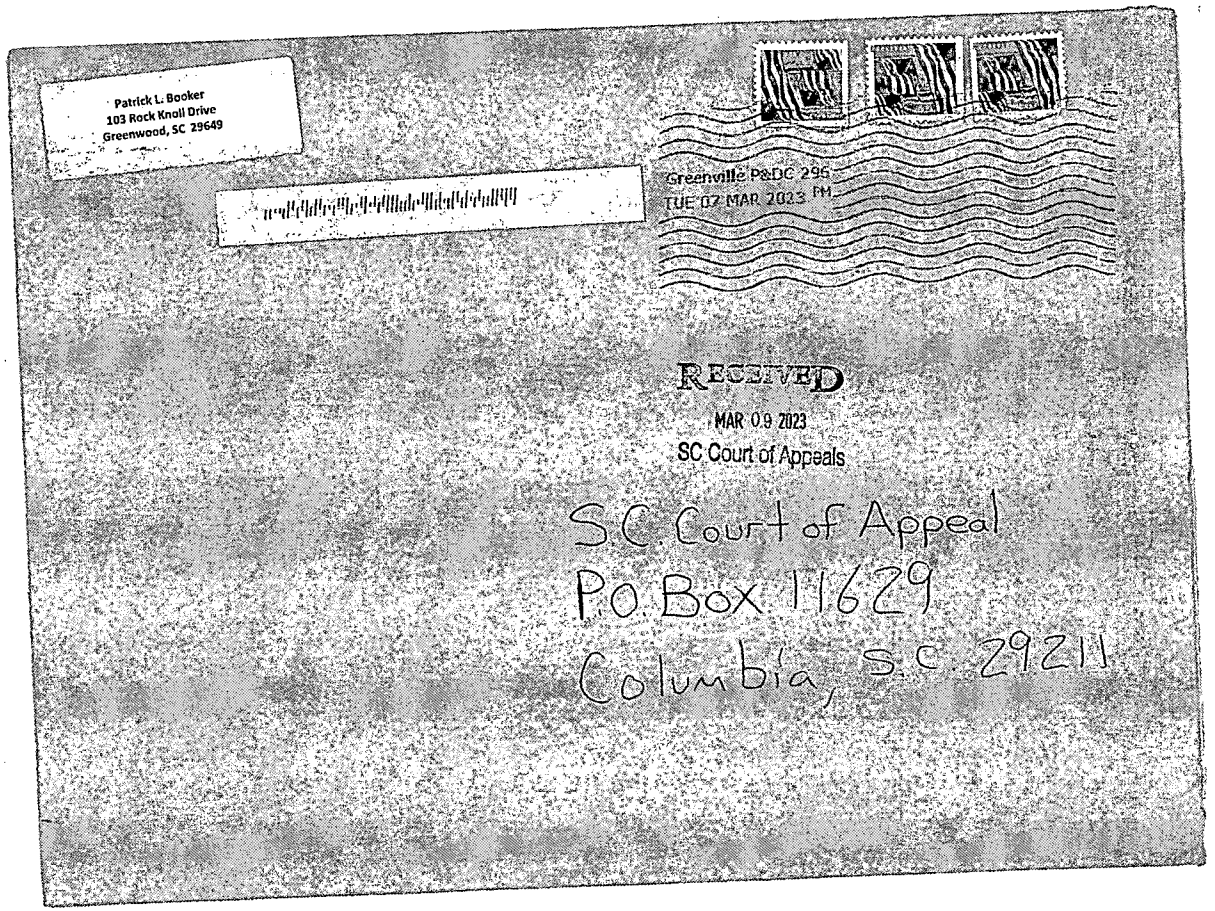
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