

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

**RECEIVED**

J. Ernest Kinard, Jr., Circuit Court Judge

AUG 26 2015

SC Court of Appeals

Appellate Case No. 2015-001162

Derek S. Carter,.....Appellant,

v.

South Carolina Department of Probation, Parole, and Pardon Services,.....Respondent.

REPLY TO INITIAL BRIEF OF RESPONDENT

Derek S. Carter, #275938, MB-27  
Kershaw Correctional Institution  
4848 Goldmine Hwy  
Kershaw, S.C. 29067  
Appellant pro se

Other Counsel of Record:

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## ARGUMENTS IN REPLY

- I. THE CIRCUIT COURT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS APPELLANT'S DECLARATORY JUDGMENT ACTION BY DETERMINING NO JUSTICIABLE CONTROVERSY EXISTED IN THE QUESTION OF WHETHER APPELLANT SHOULD BE REQUIRED TO BE SUBJECT TO SEARCH OR SEIZURE, WITHOUT A SEARCH WARRANT, WITH OR WITHOUT CAUSE, PRIOR TO ENTERING AND PARTICIPATING IN THE COMMUNITY SUPERVISION PROGRAM UPON HIS RELEASE FROM INCARCERATION PURSUANT TO THE AMENDED STATUTE, S.C. CODE ANN. § 24-21-560 (2010).

Incorporated by reference herein are the statements of facts and arguments supporting the claims of Appellant, as if fully stated here.

Contrary to Respondent's misrepresentation, Appellant has never argued that the current law allowing the search of any individual under CSP supervision without the benefit of a warrant is unconstitutional (Initial Brief of Respondent, p. 3). Instead, Appellant has claimed Respondent has violated Appellant's rights under the Fourth Amendment of the U.S. Constitution, and under Article I, sec. 4 and 10 of the S.C. Constitution, by interpreting and retroactively applying S.C. Code Ann. § 24-21-560 (2010 Act No. 151, eff. January 1, 2011) as being the terms and conditions of Appellant's access, and subsequent participation in, the CSP (Complaint, p. 8-10). Appellant's claim is not concerned with how the Respondent intends to apply the current law to "any individual"; rather, Appellant's concern is about how Respondent retroactively applies the amended CSP statute to Appellant's sentence.

The question before this Court, therefore, is not focused on Appellant's participation in the CSP, but rather his access. Respondent maintains since Appellant is not yet a participant in the CSP, he has not suffered an injury in fact. However, Appellant would point out the United States Supreme Court has defined an injury in fact as "in invasion of a legally protected interest." Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Appellant's injury has to be concrete and particularized; meaning, it must affect Appellant in a personal and individual way. Lujan, 504 U.S. at 561, 112 S.Ct. at 2136.

Appellant asserts that Respondent readily admits Appellant's participation in the CSP is mandatory when he is released from incarceration; in fact, he "has no choice" (Initial Brief of Respondent, p. 6). Yet, Respondent seeks to avoid any liability by coercively forcing Appellant to sign a waiver allowing warrantless searches by "any other law enforcement officer" as a

precondition to access the CSP, although this statutory prerequisite to obtain access to the CSP as a condition of a person's "no parole offense" sentence did not exist when Appellant was sentenced on June 12, 2001.

Appellant maintains this case is distinguishable from Thompson v. State, 409 S.C. 386, 762 S.E.2d 51 (2014). Although this Court did rule Thompson's case was not yet ripe for adjudication until his release from incarceration, Thompson was not challenging a statute similar in affect to the CSP statute. Since the mandatory completion of the CSP must be satisfied before Appellant successfully satisfies his "no parole" sentence, and since he cannot complete the CSP without accessing the same, then the CSP is an integral, compulsory condition of Appellant's actual sentence. By applying the current CSP statute to Appellant's sentence, Respondent has retroactively altered the statutory condition by which Appellant must access the CSP, and it has taken the affect of a post hoc alteration of the penalty for an earlier offense. Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989).

Respondent seeks to mislead this Court by arguing Appellant currently lacks standing to raise this cause of action because he is not a current participant in the CSP (Initial Brief of Respondent, p. 1). This position avoids the fact that the mechanism by which Appellant must access the CSP is an actual, integral part of Appellant's sentence. By Respondent's retroactive application of the amended CSP statute to Appellant's sentence, Respondent, in effect, seeks to coercively force Appellant to waive consent before he will be permitted to access and complete a mandatory condition of his imposed sentence.

This Court has never determined a case that directly affects a person's sentence based on what the law "might be," but rather upon what the law is at the time of the person's offense. However, the Respondent is asking this Court to affirm the decision of the lower court granting the Respondent's motion to dismiss precisely because "this requirement might not even exist by the time the Appellant is released from incarceration" (Initial Brief of Respondent, p. 4). Of course, the implication is obvious: If the current law does exist when Appellant is released from incarceration, Respondent will force Appellant to sign the waiver to consent—or suffer the consequence of extended incarceration beyond 85% if he refuses; this is, by definition, coercion.

The actual or threatened extension of incarceration beyond that which is prescribed by law for an otherwise eligible inmate, S.C. Code Ann. § 24-13-150(A), constitutes coercion and/or

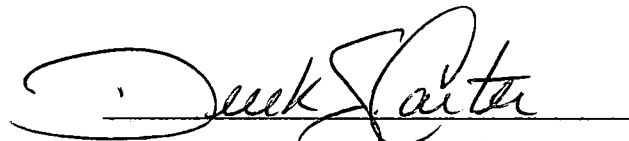
duress if made for the purpose of compelling Appellant to waive consent; no other means of immediate relief exists without such waiver. Respondent is asserting undue influence to unlawfully compel Appellant to waive consent to warrantless searches by "any other law enforcement officer"—or he will remain incarcerated if he refuses. Where there once was no line drawn in the sand, and no consequence beyond it, now there is (Transcript p. 8, ln. 15—Transcript p. 9, ln. 4). Yet, Respondent seeks to avoid any liability for having drawn the line in Appellant's sentence. Appellant has standing because the complaint alleges facts of a primary right of Appellant—the right to be free from warrantless searches by "any other law enforcement officer"—and the threatened violation of such right by Respondent, which threatened violation Appellant is entitled by law to restrain or prevent. See S.C. Code Ann. 15-53-30, -40 (1976); also Rule 57, SCRPC.

#### CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the circuit court and remand for further proceedings.

Respectfully submitted,

August 25, 2015

A handwritten signature in black ink, reading "Derek S. Carter". The signature is written in a cursive style and is positioned above a horizontal line.

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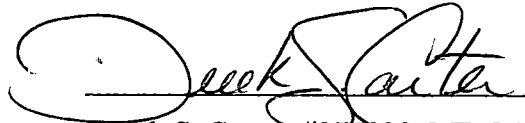
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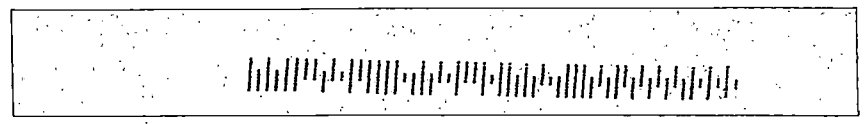
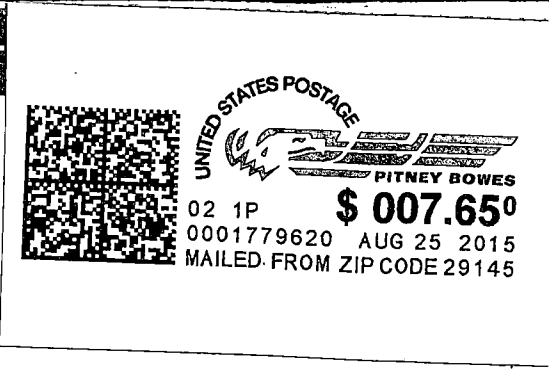
I certify that I have served the Reply To Initial Brief of Respondent on the Respondent by depositing a copy of the same in the United States Mail, postage prepaid, on the \_\_\_ day of August, 2015, addressed to Respondent's counsel, Tommy Evans, Jr., Assistant General Counsel, S.C. Department of Probation, Parole and Pardon Services, 2221 Devine St., Suite 600, Columbia, S.C. 29250.

August 25, 2015



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The Honorable Jenny Kitchings  
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