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THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
The Honorable Edward W. Miller, Circuit Court Judge
Certiorari to the Court of Appeals

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S.C. Supreme Court

Opinion No. 5335 (Filed July 29, 2015)
Appellate Case No. 2012-209506

NORMAN J. HAYES

RESPONDENT,

v.

STATE OF SOUTH CAROLINA

PETITIONER.

APPENDIX II

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ATTORNEYS FOR PETITIONER

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Norman J. Hayes, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-209506

ON WRIT OF CERTIORARI

Appeal From Lexington County
L. Casey Manning, Plea Judge
G. Thomas Cooper, Probation Revocation Judge
Edward W. Miller, Post-Conviction Relief Judge

Opinion No. 5335
Heard May 4, 2015 – Filed July 29, 2015

REVERSED

Appellate Defender Laura Ruth Baer, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Daniel Francis Gourley, II, both of Columbia, for Respondent.

SHORT, J.: Norman J. Hayes (Petitioner) appeals from the denial and dismissal of his application for post-conviction relief (PCR), arguing his sentence exceeded the maximum authorized by law because sentencing credit for time served was not

properly applied by the South Carolina Department of Corrections (the Department). We reverse.

I. BACKGROUND

In 2004, Petitioner pled guilty to possession of crack cocaine and criminal conspiracy. The trial judge sentenced Petitioner to five years' imprisonment, suspended to time served and three years' probation; ordered Petitioner to pay $225; and credited Petitioner with 240 days of time served.

Petitioner was subsequently charged with various probation violations, and on July 30, 2010, the probation revocation judge revoked his probation and reinstated his five-year suspended sentences. On rehearing, the probation revocation judge reduced the reinstated sentences to three years and terminated probation, noting Petitioner had previously served 240 days; thus, he would receive credit for the 240 days served. On September 27, 2011, Petitioner filed his application for PCR, alleging he was being unlawfully detained because the Department did not apply the 240 days to his reduced sentence.

Michael Stobbe, the branch chief of release and records management for the Department, testified at the PCR hearing. Stobbe stated Petitioner served 240 days of pretrial detention, and when his probation was revoked, the Department subtracted 240 days from five years, "which gave him a total sentence of four years and 125 days and an incarcerative sentence of four years and 125 days." When asked whether the Department gave Petitioner credit for time served on the three-year sentence, the following colloquy occurred:

> A: Yes, sir, the 240 days was applied to his total sentence. In other words, five years minus the 240 days, which would give him a total sentence of [four] years and 125 days.
>
> Q: Was it applied to the three-year sentence that was modified on February 4th?
>
> A: Yes, sir. The 240 days was applied to the remainder of the original five-year sentence.

Q: But it wasn't credited toward the three years that he was actually serving; is that right?

A: Well, you have a total sentence and an incarcerative sentence. Two hundred forty days, with a command of the English language, couldn't be reduced -- could not reduce the three years. So the 240 days reduced his total sentence from five years to four years and 125 days. The 240 days was not subtracted from the three years, no, sir.

Q: But it was subtracted from the five years that he was no longer serving?

A: No. As far as I know, on the Form 9 on both February 4, 2011, and July 30, 2010, the remainder of the original sentence on the Form 9 was never marked out. So he is still held responsible for the total sentence of five years minus the 240 days. That's what his parole date is based on.

Stobbe testified, "[T]he 240 days has got to come off the five years. It can't be subtracted from three years."

The Form 9 was created by the South Carolina Department of Probation, Parole and Pardon Services. The Form 9 includes a charging section, listing the probation conditions the Petitioner is alleged to have violated and the probation revocation judge's findings on the allegations. The second section was prefaced, "Therefore, IT IS ORDERED that:" and followed by numerous sentencing choices. In this case, the judge ordered "the suspended sentence be revoked and the [Petitioner] be required to serve 3 . . . years, the remainder of the original sentence, and/or pay $ XX TERMINATE PROBATION." The sentence entitled "Additional Conditions ordered by the Court" included the judge's statement, "CONVERT FINE TO CIVIL JUDGMENT." The third section of the Form 9 included two sentences, which the judge checked as applying in this case.[1] First, "[t]he defendant is given credit for pre-revocation hearing detention time on current probation violation . . .

[1] A third sentence relating to electronic monitoring was also included in this section.

." Second, "[t]he defendant has previously served 240 days on this sentence." In parentheses beneath the second sentence, the form reads, "split sentence time and/or prior partial revocation time."

In response to the PCR court's questions, Stobbe admitted if the Form 9 had stated "three years" and "the remainder of the original sentence" language was crossed out, the Department would consider Petitioner's sentence would be three years. Stobbe further stated if "Credit for 240 days time served" had been written in the portion of the Form 9 providing, "Additional Conditions ordered by the Court," the Department would have given Petitioner the credit for 240 days on the three-year sentence. Finally, Stobbe stated if the probation revocation court had omitted the sentence, "The defendant previously served 240 days on this sentence," it "would have sort of put us into the investigative mode" to determine if Petitioner was entitled to time served on his three-year sentence.

Petitioner testified that when he began serving the revoked portion of his sentence, his projected release date was March 2013. He stated when his sentence was reduced to three years, his projected release date became April 2012, including good time credit. Petitioner further stated his projected release date at the time of the PCR hearing was February 18, 2012, which also included earned work credits.

In its order dismissing Petitioner's application, the PCR court noted Petitioner's original sentence was a split sentence,[2] the "time served" was Petitioner's pre-sentence detention of 240 days, and "he was given credit for that time by being released directly from sentencing to probation." The PCR court found the probation revocation judge "simply noted that [Petitioner] had previously served 240 days on this sentence, but [the probation court] did not, and should not, have awarded double credit for the 240 days . . . ." The PCR court further found when a court imposes a split sentence, "time served prior to trial should not be used to calculate the amount of time a probationer must serve on a reinstated sentence, because the pretrial detention time was already awarded to satisfy the time served portion of the split sentence." The court found the Form 9 does not change the fact that Petitioner had already received credit for his time served and the only sentence

[2] "[A] 'true split sentence[]' occurs when the judge sentences the defendant to incarceration but suspends a portion of the term." *Franklin v. State*, 545 So.2d 851, 852 (Fla. 1989).

is the one imposed by the original sentencing judge.[3] The PCR court dismissed Petitioner's application, and this petition for a writ of certiorari followed.

III. STANDARD OF REVIEW

In an action for PCR, an appellate court reviews questions of law *de novo*, and it will reverse the PCR court's decision when it is controlled by an error of law. *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

IV. LAW/ANALYSIS

Petitioner argues the PCR court erred in dismissing his application because the plain language of the statute explaining how prison time should be calculated requires pretrial detention credit to be awarded to a partially revoked sentence. He argues the Department misapplied the statute, and notes if the Department applied the statute in the same way to a full revocation, the result would be a longer sentence than authorized by law. We agree.

The PCR statute allows an inmate to file an application for PCR when he claims his sentence has expired and he is being unlawfully held in custody. S.C. Code Ann. § 17-27-20(5) (2014). Because Petitioner is no longer incarcerated, this issue is moot. However, "an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001). The issue here is capable of repetition but evading review; therefore, we address the merits. *See Nelson v. Ozmint*, 390 S.C. 432, 433-34, 702 S.E.2d 369, 370 (2010) (addressing moot issue of the Department's calculation of the prisoner's sentence as not including good time credits or earned work credits because it was an issue that was capable of repetition, yet it would usually evade review).

Section 24-13-40 of the South Carolina Code (Supp. 2014) provides the following:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be

[3] The PCR court took judicial notice that the Form 9 had been modified in recent years, but the section governing split sentences had remained the same for over ten years.

> calculated from the date of the imposition of the sentence. However, when . . . (b) the commencement of the service of the sentence follows the revocation of probation, . . . the computation of the time served must be calculated from the date of the commencement of the service 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.

The requirement that a prisoner receive credit for time served is mandatory. *State v. Boggs*, 388 S.C. 314, 316, 696 S.E.2d 597, 598 (Ct. App. 2010). In *Boggs*, the sentencing judge indicated he did not want to give the defendant credit for time served and did not check off the box on the sentencing sheet indicating credit for time served. *Id.* at 316, 696 S.E.2d at 598. The judge acknowledged the defendant was entitled to credit but stated on the record that "when I don't check it off" the Department would not give the defendant the credit, concluding, "I am just telling you how it works in the real world." *Id.* at 315-16, 696 S.E.2d at 598. This court reversed the sentencing judge, finding 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.* at 316, 696 S.E.2d at 598.

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. S.C. Code Ann. § 24-13-40 (Supp. 2014). Furthermore, section 24-21-460 of the South Carolina Code provides a court may "revoke the probation or suspension of [a] sentence" and has the discretion "to require the defendant to serve all or a portion only of the sentence imposed." S.C. Code Ann. § 24-21-460 (2007).

"Where the terms of a statute are clear, the court must apply those terms according to their literal meaning." *Allen v. State*, 339 S.C. 393, 395, 529 S.E.2d 541, 542 (2000). "The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand its scope." *Id.*

We find the PCR court erred as a matter of law when it determined a probationer who receives a split sentence should not receive credit for time served prior to trial against a reinstated sentence "because the pretrial detention time was already awarded to satisfy the time served portion of the split sentence." This finding contradicts section 24-13-40, which states the following: "[W]hen . . . (b) the commencement of the service of the sentence follows the revocation of probation, . . . the computation of the time served shall be reckoned from the date of the commencement of the service of the sentence. In every case . . . full credit . . . shall be given for time served prior to trial and sentencing." § 24-13-40. The statute does not make a distinction for split sentences; thus, under the plain language of the statute, we find the pre-trial detention time should apply against a probation revocation whenever a probationer receives a split sentence.

V. CONCLUSION

Based on the foregoing reasons, the decision of the PCR court is

REVERSED.

LOCKEMY and MCDONALD, JJ., concur.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Edward W. Miller, Post-Conviction Relief Judge

Appellate Case No. 2012-209506

THE STATE,

RESPONDENT,

V.

NORMAN J. HAYES,

APPELLANT.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Comes now Respondent, above named, by and through the Office of the Attorney General of South Carolina, and pursuant to Rules 219(a) and 221(a), SCACR, hereby respectfully petitions this Court for rehearing and suggests that it be reheard *en banc*.

STATEMENT OF THE CASE

The Lexington County Grand Jury indicted Petitioner at the April term of General Sessions for Criminal Conspiracy (2004-GS-32-1203) and Possession of Crack Cocaine—First Offense (2004-GS-32-1645). (App.pp.128-31). After the State called the case, Petitioner pled guilty as charged. On July 10, 2004, the Honorable Casey Manning sentenced Petitioner to concurrent terms of five years imprisonment suspended upon the service of time served (two-hundred and forty days) and three years probation for each charge. Petitioner did not appeal.

Petitioner's probation case was transferred to Richland County, his county of residence. Petitioner was subsequently charged with various probation violations. On July 30, 2010, a probation violation hearing was convened in Richland County before the Honorable G. Thomas Cooper. Petitioner proceeded pro-se. (App.pp.1-8). Judge Cooper revoked Petitioner's probation and reinstated the five year suspended sentence. (App.p.8).

On August 9, 2010, Petitioner served and filed a pro se notice of appeal with the South Carolina Court of Appeals; however, on August 4, 2010, five days before filing the notice of appeal, Richland County Public Defender James May, Esquire, filed a motion to be appointed as counsel and a motion to reconsider the probation revocation. (App.p.9-10).

On February 4, 2011, Judge Cooper convened a hearing on the pending motions. Petitioner was present and was represented by James May, Esquire. John Benjamin Aplin, Esquire, of the Department of Probation, Parole, and Pardon Services appeared on behalf of the State. (App.pp.11-27). Judge Cooper granted the motion to appoint James May as counsel and heard arguments on the motion to reconsider. Judge Cooper ruled to reduce the length of Petitioner's reinstated sentence to three years and terminated probation. The revocation order noted, "The [Petitioner] has previously served 240 days on this sentence. (split sentence time and/or prior partial revocation time)." (App.pp.26-7). On August 5, 2011, Tristan Shaffer, Esquire, of the office of Appellate Defense withdrew Petitioner's notice of appeal. (App.pp.38-39).

Petitioner filed an Application for post-conviction relief (PCR) on September 27, 2011 (App.pp.40-7). A hearing was convened at the Lexington County Courthouse on November 30, 2011. (App.pp.49-106). Petitioner was present and represented by Tristan M. Shaffer, Esquire. Kaelon E. May, Esquire, of the South Carolina Attorney General's Office and Mr. Aplin,

represented Respondent.

At the PCR hearing, Petitioner alleged his sentence exceeded the maximum authorized by law because he had not been given full credit against his probation revocation sentence for two-hundred and forty days of time served prior to trial. Michael Stobbe of the South Carolina Department of Corrections testified. (App.pp.52-92). Additionally, Petitioner testified. (App.pp.92-6).

The Honorable Edward W. Miller denied relief in an order dated January 30, 2012. (App.pp.121-7). The PCR Judge found:

> The fact that a Judge presiding over a subsequent probation violation matter may choose to re-instate less than the entire suspended sentence and terminate probation, does not modify the "sentence" imposed by the original sentencing Judge. In fact, once the sentencing court's order became final, the probation Judge would not be permitted to alter the sentence that was handed down.

(App.pp.124-5). The PCR Judge found that in the present case, "the original sentence was a split sentence of five years imprisonment suspended upon the service of time served and three years probation. The time served was [Petitioner's] pre-sentence detention of two hundred and forty days, and pursuant to Section 24-13-40, he was given credit for that time by being released directly from sentencing to probation." (App.p.124). The PCR Judge further found "the probation revocation Judge simply noted [Petitioner] had previously served 240 days on this sentence, but did not, and should not have awarded double credit for the 240 days under Section 24-13-40 of the South Carolina Code or, or any other provision." (App.p.124).

The PCR Judge found "the revocation of probation and reinstatement of a portion or all of the original sentence is not a new 'sentence' in and of itself." (App.p.125). Thus, the PCR Judge ruled, "in the [Petitioner's case], it appears the Form 9 simply acknowledges the 240 days he previously served on the five year original sentence. It does not award an additional 240 days

to be taken off the three year re-instated portion of the five year sentence." (App.pp.125-6).

On July 29, 2015, this Court issued a published opinion reversing the PCR Court's finding that SCDC properly applied Appellant's credit for time served. State v. Hayes, 2015 WL 4549207 (July 29, 2015). The State respectfully requests a rehearing to address: (1) whether the plain language of Section 24-13-40 of the South Carolina Code (Supp. 2014) requires Appellants 240 days credit for time served be applied to his three year probation revocation, where Appellant's 240 days credit for time served has already been applied to his original sentence of five years imprisonment.

STANDARD OF REVIEW

"[A] petition for rehearing must 'state with particularity the points supposed to have been overlooked or misapprehended by the court.' " Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) (quoting Rule 221(a), SCACR). Similarly, "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Kennedy v. S.C. Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, et. At., Appellate Practice in South Carolina 309 (1999)). Although rehearing *en banc* is not favored, it should be granted "when consideration by the full court is necessary to secure or maintain uniformity in its decisions." Rule 219(a), SCACR.

ARGUMENTS

I. The appellate panel misapprehended the plain language of Section 24-13-40 of the South Carolina Code when holding that the statute requires the pre-trial detention time be applied against the probation revocation sentence whenever a probationer receives a split sentence.

The appellate panel misapprehended the plain language of Section 24-13-40 of the South Carolina Code when holding that the statute requires the pre-trial detention time be applied against the probation revocation sentence whenever a probationer receives a split sentence. Section 24-13-40 of the South Carolina Code provides the following:

> 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. However, when . . . (b) the commencement of the service of the sentence follows the revocation of probation, . . . the computation of the time served must be calculated from the date of the commencement of the service 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 (Supp 2014). The appellate panel conflated the concepts of a plea judge's original sentence with a probation judge's revocation. Section 24-13-40 deals with sentences. The only sentence given to Appellant is the five year total sentence imposed by the plea judge. The three year revocation is not a "sentence" under the under S.C. Code Section 24-13-40. The testimony at the PCR hearing was clear – SCDC recognizes Appellant's credit for 240 days towards his five year sentence. As such, the most time the probation revocation judge

could have reinstated was four years and 125 days. A partial revocation of three years is only a portion of the four years and 125 days Appellant had left to serve. Because the Probation Judge only reinstated three years, Appellant could theoretically still be required to serve one year and 125 days of incarceration.[1]

Under the appellate panel's reasoning, an offender who is partially revoked, continued on probation, then violates again, could receive double, if not triple credit for his pretrial detention because the statute mandates the award of owed credit at each revocation proceeding. For example, consider a defendant who has previously served one year of pretrial dentition time at the date of the imposition of the sentence. The Plea Judge sentences Defendant to five years suspended upon time served and five years' probation. Assuming the Defendant then violated his probation and his probation was revoked one year, under the appellate panel's reasoning in this case, the Defendant would not have to return to the department of corrections, despite his probation violation. The legislature could surely not have intended such an absurd result.

Furthermore, the State respectfully submits that the appellate panel misinterpreted the effect of the revocation order itself. Appellant served 240 days prior to his guilty plea, and when the plea court sentenced Appellant, the plea court gave him credit for this time served. Then, when Appellant's probation was revoked, the probation court reinstated three years of the suspended portion of the sentence. The Form 9 revocation order indicated Appellant had previously served 240 days of the sentence. The 240 days previously served is not applied to the three year sentence imposed at the probation revocation hearing. Rather, it already applied toward Appellant's original sentence of five years' imprisonment. Cf. Gates v. Wallace, 278 S.C.

[1] The State recognizes that the Probation Revocation judge terminated probation. However, the State submits that the early termination of probation does not modify the original five year total sentence.

214, 294 S.E.2d 41 (1982) (holding appellant is not entitled to credit for time served prior to the revocation of the suspended sentence when computing parole eligibility).

Although unpublished, this Court previously found in Martin v. SCDC that Martin was not entitled to 562 days credit towards his five year sentence imposed at his probation revocation hearing. Martin v. SCDC, Op. No. 2010-UP-367 (S.Ct. App. filed July 14, 2010) (Shearouse Adv. Sh. No. 28 at 6). Martin pled guilty and the plea judge sentenced Martin to ten years suspended upon time served with five years' probation. Id. This Court reversed the Administrative Law Court's finding that Martin was entitled to 562 days credit against his five year sentence imposed at his revocation hearing. Id. In so doing, this Court noted "the 562 days previously served is not applied to the five-year sentence imposed at the probation revocation hearing" because it had previously been applied towards Martin's original sentence of ten years imprisonment. Id. Similar to Martin, Appellant should not receive credit for 240 days against his three year sentence imposed at his probation revocation hearing because the 240 days credit has already been applied towards his five year original sentence.

In summary, the State respectfully asks this Court to rehear this case *en banc* because the majority's opinion is in direct contradiction to this Court's unpublished opinion in State v. Martin and rehearing is necessary to secure uniformity in this Court's decision.

CONCLUSION

Based off the foregoing, Respondent requests that the panel reconsider this matter and suggest that it be heard *en banc*.

Respectfully Submitted,

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

The Honorable Edward W. Miller, Post-Conviction Relief Judge

Appellate Case No. 2012-209506

THE STATE,.....RESPONDENT,

v.

NORMAN J. HAYES,.....APPELLANT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Petition for Rehearing and Suggestion for Rehearing *En Banc*** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

Laura R. Baer, Esquire
South Carolina Commission on Indigent Defense
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Post Office Box 11589
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This 11th day of August, 2015.

DANIEL GOURLEY, SC Bar #100934
ATTORNEY FOR RESPONDENT

SWORN to before me this 11th day of August, 2015.

Notary Public for South Carolina.
My Commission Expires: May 14, 2024

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NORMAN J. HAYES,

APPELLANT

APPELLATE CASE NO. 2012-209506

RETURN TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

On July 29, 2015, this Court issued an opinion unanimously reversing the circuit court judge's order dismissing Petitioner's application for post-conviction relief after concluding that S.C. CODE ANN. § 24-13-40 mandated Appellant's pre-trial detention time be applied against a probation revocation whenever a probationer receives a "split sentence". *Hayes v. State*, Op. No. 5335 (S.C. Ct. App. filed July 29, 2015).

Pursuant to Rule 221(a), SCACR, the State petitioned this Court rehearing and specifically requested that the court hold the rehearing *en banc*. In its Petition, the State argues that the Court of Appeals overlooked and failed to address "(1) whether the plain language of Section 24-13-40 of the South Carolina Code (Supp. 2014) requires Appellant['s] 240 days credit for time served be applied to his three year probation revocation, where Appellant's 240 day

credit for time served has already been applied to his original sentence of five years imprisonment." Respondent's Pet. p. 4.

However, this Court did not misapprehend or overlook this issue. The issue was raised before this Court, fully considered, and properly and accurately addressed in the Court's Opinion. The State has simply restated the argument in its petition that it previously made in its briefing and at oral argument.

STATEMENT OF THE CASE[1]

Guilty Plea

On April 5, 2004, Petitioner Norman J. Hayes was indicted by the Lexington County Grand Jury for possession with the intent to distribute (PWID) crack cocaine, first offense, and criminal conspiracy.

On June 10, 2004, Petitioner pled guilty to possession of crack cocaine and criminal conspiracy before the Honorable L. Casey Manning. App. 107, 131. Judge Manning sentenced Petitioner to concurrent terms of five years imprisonment suspended upon the service of time served and three years of probation for each charge.

Petitioner was given credit for pre-trial detention of two hundred and forty (240) days pursuant to S.C. CODE ANN. § 24-13-40. App. 107, 131. Petitioner's probation case was transferred to Richland County, his county of residence. Petitioner was subsequently charged with various probation violations. App. 122.

[1] Because of its germaneness to the issue, this Return will review the complicated procedural history of the case.

Probation Revocation Hearing

On July 30, 2010, a probation violation hearing was held before the Honorable G. Thomas Cooper. App. 1 – 7. Petitioner appeared *pro se*, and Probation Field Agent Marion Mack represented the State. Judge Cooper found that Petitioner violated the conditions of his probationary sentence and revoked the balance of Petitioner's five-year sentence, thus sentencing Petitioner to five years. App. 8.

On August 4, 2010, unbeknownst to Petitioner, Assistant Public Defender James H. May filed a motion to be appointed as Petitioner's counsel and a motion to reconsider Petitioner's probation revocation. App. 9 – 10. Five days later, Petitioner filed a *pro se* notice of appeal with the South Carolina Court of Appeals on August 9, 2010. App. 38. Petitioner was incarcerated from July 30, 2010, through February 4, 2011.

Reconsideration Hearing

On February 4, 2011, a hearing on the motions for appointment of counsel and to reconsider Petitioner's probation revocation was held before Judge Cooper. App. 11 – 25. Judge Cooper granted the motion to appoint Mr. May as counsel and Petitioner's motion to reconsider. Judge Cooper reduced Petitioner's reinstated sentence from five years to a three-year revocation sentence and terminated probation. App. 24, ll. 5-6. After the hearing, Judge Cooper issued a written Order amending Petitioner's probation revocation which reflected the reduced sentence of three years. Finally, Judge Cooper gave Petitioner "credit for any pre-revocation hearing detention time" noting that Petitioner had "previously served 240 days on this sentence." App. 26-27.

The State did not appeal Judge Cooper's Order, and thus, this Order becomes the law of Petitioner's case. Pursuant to the Order, the South Carolina Department of Corrections ("SCDC")

reduced Petitioner's sentence to three years, but denied him credit for the 240 days of pre-trial detention despite a court order to this effect. App. 56, ll. 2-3.

PCR Application and Evidentiary Hearing

On September 27, 2011, Petitioner filed an application requesting post-conviction relief (PCR), alleging that his sentence exceeded the maximum authorized by law or that his sentence had expired because he was not given full credit against his probation revocation sentence for 240 days of time served for pre-trial detention. App. 40 – 47. Because the PCR application raised a time sensitive issue regarding sentence calculation, the State agreed to schedule an expedited evidentiary hearing in lieu of filing a formal return. An evidentiary hearing was held before the Honorable Edward W. Miller on November 30, 2011. App. 48 – 106. Petitioner and Michael John Stobbe, of the SCDC records department, testified at the evidentiary hearing. App. 52-95.

Stobbe was the branch chief of release and records management at the SCDC. App. 52, ll. 15-23. In sum, Stobbe's testimony was that the SCDC views Petitioner as having two separate sentences: (1) a theoretical maximum sentence; and (2) an incarceration sentence. Based on this rationale, SCDC takes the position that awarding Petitioner pre-trial detention credit toward his three-year incarceration sentence would be awarding Petitioner credit twice since Petitioner also received pre-trial detention credit toward his "theoretical" five-year maximum sentence. App. 52 – 92.

Stobbe's indicated that when Judge Cooper revoked Petitioner's probation in full and reinstated Petitioner's sentence of five years, the SCDC did subtract the pre-trial detention time served of 240 days from the five-year sentence giving Petitioner an incarceration sentence of four years and 125 days. App. 54, ll. 2-5.

However, when Judge Cooper reduced Petitioner's sentence to three years following the

motion to reconsider, partially revoking Petitioner's probation instead of revoking it in full, the SCDC was no longer willing to subtract the 240 days of pre-trial detention from the three-year sentence. According to Stobbe: "So the 240 days reduced [Petitioner's] total sentence from five years to four years and 125 days. The 240 days was not subtracted from the three years . . . ." App. 55, l. 16 – 56, l. 3.

Stobbe further stated that Petitioner could not get credit for the 240 days on the three-year sentence because Petitioner "already has had that credit because the 240 days reduced the five years to 4 years, 125 days." App. 69, ll. 5-11.

Order of Dismissal

On January 30, 2012, Judge Miller ruled in his Order of Dismissal that "[Petitioner's] PCR Application should be denied and dismissed because he has failed to carry his burden of proof." App. 121 – 127. The PCR court first found that Petitioner's "original sentence was a 'split sentence' of five (5) years imprisonment suspended upon the service of 'time served' and three (3) years probation." According to the PCR court, the time served was Petitioner's "pre-sentence detention of two hundred and forty (240) days, and pursuant to Section 24-13-40, he was given credit for that time by being released directly from sentencing to probation." App. 124.

Additionally, the PCR court found, "[A]t the subsequent violation hearing, the probation revocation judge simply noted that [Petitioner] had previously served 240 days on this sentence, but did not, and should not, have awarded double credit for the 240 days under Section 24-13-40 of the South Carolina Code, or any other provision." App. 124. The PCR court also found, "The 'Form 9' certainly does not suggest otherwise." App. 124. The PCR court further found:

> The fact that a judge presiding over a subsequent probation violation matter may choose to re-instate less than the entire suspended sentence and terminate probation, does not modify the 'sentence' imposed by the original sentencing judge. In fact, once the

> sentencing court's order became final, the probation judge would not be permitted to alter the sentence that was handed down.

App. 124 – 125.

Furthermore, the PCR court found that "under § 24-13-40, in the case of a split sentence, time served prior to trial should not be used to calculate the amount of time a probationer must serve on a reinstated sentence, because the pre-trial detention time was already awarded to satisfy the time served portion of the split sentence." App. 125. The PCR court also ruled that "in [Petitioner's] case, it appears the Form 9 simply acknowledges the 240 days he previously served on the five (5) year original sentence. It does not award an additional 240 days to be taken off the three (3) year re-instated portion of the five (5) year sentence." App. 126.

PCR Appeal and Court of Appeals Opinion

On July 29, 2015, this Court issued an opinion reversing the PCR Court's finding that SCDC had properly applied Appellant's credit for time served. *State v. Hayes*, 2015 WL 4549207 (July 29, 2015). This Court held that § 24-13-40 "does not make a distinction between for split sentences." *Id* at p. 7. Citing *Boggs v. State*, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. 2010), this Court noted that the mandatory language of the statute identified only two circumstances where a defendant is not eligible to receive credit for time served, neither of which were applicable to Petitioner's case. *Id.* at p. 6.

STANDARD OF REVIEW

A petition for rehearing should not be a request to have the case tried for a second time before the appellate courts. *Arnold v. Carolina power & Light Co.*, 168 S.C. 163, 167 S.E.2d 234 (1933)

ARGUMENT

This Court correctly apprehended that the plain language of S.C. CODE ANN. § 24-13-40 mandated that pre-trial detention time be applied against any probation revocation sentence regardless of whether the revocation was in full or in part and without reference to whether a probationer received a split sentence.

In substance, the State's petition is a slightly different iteration of its previous arguments. Instead of advancing that partial revocations from a split sentence must be treated differently than full revocations from a split sentence, the State now contends that S.C. CODE ANN. § 24-13-40 carries a distinction, heretofore totally unappreciated, between a "sentence" imposed following a trial or a guilty plea and a "sentence" imposed following a revocation of probation:

> The ***appellate panel conflated the concepts of a plea judge's original sentence with a probation judge's revocation.*** Section 24-13-40 deals with sentences. The only sentence given to Appellant is the five year total sentence imposed by the plea judge.

Respondent's Pet. p. 5 (*emphasis added*).

This argument is unavailing, plainly at odds with the applicable statutes, and yet another erroneous distinction that the State has created *sua sponte* in an effort to circumvent the plain meaning and legislative intent of both § 24-13-40 and § 24-21-460 of the South Carolina Code. *State v. Gaines*, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008) ("legislative intent should be found in the plain language of the statute itself.").

The State cites no authority supporting its assertion that the three year sentence of incarceration served by Appellant does not qualify as a "sentence" within the meaning of § 24-13-40. Respondent's Pet. p. 5. The State's dearth of supporting authority is likely due to § 24-21-460, which mandates that a court revoking a defendant's probation or suspension of sentence:

> [S]hall proceed to deal with the case **as if there had been no probation or suspension of sentence** except that the circuit judge before whom such defendant

> may be so brought shall have the right, in his discretion, to require the defendant to serve all or a portion only of the sentence imposed.

S.C. CODE ANN. § 24-21-460 (2010)(*emphasis added*).

In Appellant's case, the probation judge initially sentenced him to five years imprisonment, fully revoking probation. App. 8. Upon reconsideration, the court reduced Appellant's sentence to three years imprisonment and terminated probation. App. 24, ll. 5-6; *State v. Allen*, 370 S.C. 88, 97, 634 S.E.2d 653, 657 (2006) (while probation is a matter of judicial grace, defendant is entitled to fair treatment). The amended, written revocation order expressly gave Petitioner "credit for any pre-revocation hearing detention time" and recorded that Petitioner had "previously served 240 days on this sentence." App. 26 – 27.

Under § 24-21-460 a probation judge sentences the defendant anew; the earlier sentence only imposes a due process limitation on the sentencing range of the probation judge. *State v. Archie*, 322 S.C. 135, 470 S.E.2d 380 (Ct. App. 1996) (action of SCDC in imposing additional conditions on probationer amounted to unconstitutional enhancement of defendant's original sentence). As noted by this Court § 24-13-40, "does not make a distinction for split sentences." *Hayes,* Opinion No. 5335 (Ct. App.) p. 7. Similarly, the statute makes no distinction between a "plea judge's original sentence" and a later sentence imposed by a "probation judge's revocation" when mandating that a prisoner receive credit for time served.

Whether the defendant is being sentenced for the first time or is being sentenced following a revocation of probation; the defendant must receive credit for any time served unless two narrow exceptions are in play. *State v. Boggs*, 388 S.C. 314, 316, 696 S.E.2d 597, 598 (Ct. App. 2010)("section 24-13-40 . . . mandates prisoners receive credit for the time they served prior to trial unless one of two exceptions exist, either: (1) the prisoner was an *escapee* or (2) the prisoner was already serving a sentence on a *different* offense. Because the language of section

24-13-40 is mandatory, a judge cannot deny a defendant credit for time served prior to trial unless one of the two exceptions applies."). Accordingly, Appellant was entitled to have the 240 days of pre-trial detention credit applied to all sentences when his probation was terminated.[2]

Finally, the State's petition rehashes – in greater detail – the specter of probation violators receiving a sentencing "windfall" because they would receive "double, if not triple credit for [their] pretrial detention". Respondent's Pet. p. 6. The State has raised this argument at every stage in Appellant's PCR action. This Court rightly, unanimously rejected it. *Arnold v. Carolina power & Light Co., supra.*

The State's angst over theoretically inadequate punishments and hypothetical gamesmanship by defendants is also unfounded. This Court's ruling provides probation judges with clear guidance: when sentencing a defendant who has violated probation, the court should take into consideration the total amount of time the defendant has already served as the defendant must receive credit for all time served prior to trial and prior to the revocation hearing. § 24-13-40; *see also Boggs*, 388 S.C. at 316, 696 S.E.2d at 598.

Crucially, this Court's ruling forecloses on the far graver risk that a defendant would serve a longer sentence than is authorized by law because his probation was revoked in full and he was denied credit for time served prior to his trial or guilty plea. *See* § 24-21-460; *see State v. Johnson*, 396 S.C. 182, 189, 720 S.E.2d 516, 520 (Ct. App. 2011) (courts should reject statutory interpretations that lead to absurd results not intended by the legislature or that would defeat

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[2] The State's petition relies heavily on *Gates v. Wallace*, 278 S.C. 214, 294 S.E.2d 41 (1982). *Gates* is readily distinguishable. First, the *Gates* defendant was serving to multiple consecutive sentences. 278 S.C. at 216, 294 S.E.2d at 42. Second, *Gates* addresses the calculation of parole eligibility, as opposed to the application of pre-trial detention time to sentences imposed by a judge. The only other case relied on by the State is an unpublished opinion of no precedential value. SCACR 268(d)(2).

plain legislative intention). The State endeavored to argue around this obvious due process violation by "finding" a distinction between partial and full revocation of split sentences.

The State's contention, that partial revocations from a split sentence should be treated differently than full revocations from a split sentence, was rejected this Court. The argument now made in the State's petition, that a "sentence" revoking probation is distinct from a "sentence" imposed by the trial court, is equally unavailing and similarly unsupported by statutory authority or case law.

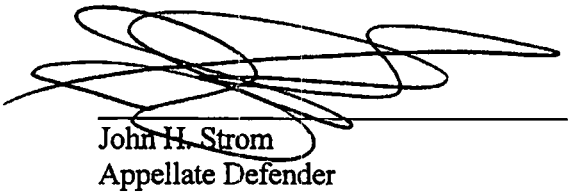
The State disregards the practical effect of what happened in this case. The probation judge gave Petitioner an active sentence of three years and terminated any further probation. App. 24 – 27. Had Petitioner successfully completed probation, the issue of time served would be moot. The active three year sentence is logically the only sentence that time served should apply to, not SCDC's arbitrary policy of applying it to a five year sentence that did not come into existence. Petitioner is not getting "double credit" for time served. Any "credit" against the five year sentence was purely hypothetical.

Therefore, the Court of Appeals correctly determined that the PCR court erred reversibly by denying Appellant's application and that "pre-trial detention time should apply against a probation revocation whenever a probationer receives a split sentence." *Hayes* Op. No. 5335 (S.C. Ct. App. filed July 29, 2015) p. 7. A rehearing, including a rehearing *en banc*, is unwarranted.

CONCLUSION

Consistent with the foregoing, Appellant respectfully requests this Court to deny the Petition for Rehearing by Respondent.

Respectfully submitted,



John H. Strom
Appellate Defender

This 24th day of August, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NORMAN J. HAYES,

APPELLANT

APPELLATE CASE NO. 2012-209506

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Return to the Petition for Rehearing in the above-entitled case has been served upon John Walt Whitmire, Esquire, this 24th day of August, 2015.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 24th day
of August, 2015.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.

The South Carolina Court of Appeals

Norman J. Hayes, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-209506

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paula G. Short, Jr. J.

J.

J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Laura Ruth Baer, Esquire
Daniel Francis Gourley, II, Esquire
John Harrison Strom, Esquire

FILED
Oct 8, 2015