THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-001162

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SC Court of Appeals

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

v.

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

FINAL BRIEF OF APPELLANT

Derek S. Carter, #275938, MB-27
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Kershaw, S.C. 29067
Appellant pro se

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STATEMENT OF THE CASE

Appellant is presently confined in the South Carolina Department of Corrections ("SCDC") pursuant to orders of commitment of the Clerk of Court for Anderson County. Appellant was indicted in 2001 for the offenses of S.C. Code Ann. §§ 16-3-85(A)(1) and 16-3-95(A), and subsequently pleaded guilty before the Honorable John W. Kittredge on June 12, 2001. Judge Kittredge sentenced Appellant to a concurrent term of thirty (30) years confinement.[1]

On June 3, 2014, Appellant filed a Summons and Complaint alleging the Respondent's application of S.C. Code Ann. § 24-21-560(B) (2011) to Appellant's current sentence alters preexisting statutory criteria for the determination of Appellant's access to the Community Supervision Program ("CSP"), and changes the quantum of punishment by requiring Appellant to consent to be subject to search or seizure, without a search warrant, with or without cause, *prior* to entering and participating in the CSP.

Respondent filed an Answer and Motion to Dismiss on July 22, 2014 contending that Appellant lacked standing. Appellant filed a Reply on August 7, 2014. The matter came before the circuit court on March 5, 2015, whereby the circuit court granted Respondent's motion and dismissed the case on March 24, 2015. Appellant timely filed a Motion to Alter or Amend the Judgment, Rule 59(e), SCRCP, on April 3, 2015. The circuit court denied the motion on April 23, 2015; Appellant received written notice on May 26, 2015.

This appeal follows.

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1 Appellant's current projected release date is April 19, 2026. At the time of Appellant's convictions, state law mandated those convicted of a "no parole offense" to serve up to two years in the Community Supervision Program upon the completion of the incarceration part of their sentence. S.C. Code Ann. § 24-21-560 (1996).

ARGUMENTS

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).

Appellant argues the circuit court erred in granting Respondent's motion to dismiss this declaratory judgment action by determining no justiciable controversy existed because 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 CSP is ripe for adjudication. The CSP statute existing at the time of Appellant's offenses, in relevant part, is as follows:

> (B) A community supervision program operated by the Department of Probation, Parole and Pardon Services must last no more than two continuous years. The period of time a prisoner is required to participate in a community supervision program and the individual terms and conditions of a prisoner's participation shall be at the discretion of the department based upon guidelines developed by the director.
>
> **Section 24-21-560** (1995 Act No. 83, eff. January 1, 1996)

The current CSP statute at issue, of which the Respondent claims applies (R. 5, lns. 2-3) to Appellant's sentence upon his release from prison, in relevant part, is as follows:

> (B) A community supervision program operated by the Department of Probation, Parole and Pardon Services must last no more than two continuous years. The period of time a prisoner is required to participate in a community supervision program and the individual terms and conditions of a prisoner's participation shall be at the discretion of the department based upon guidelines developed by the director; however, the conditions of participation must include the requirement that the offender must permit the search or seizure, without a search warrant, with or without cause, of the offender's person, any vehicle the offender owns or is driving, and any of the offender's possessions by:
>
> (1) any probation agent employed by the Department of Probation, Parole and Pardon Services; or
> **(2)** any other law enforcement officer,...
>
> **Section 24-21-560** (2010 Act No. 151, eff. January 1, 2011) (emphasis added)

An appeal is not an open invitation for factual interpretation, but rather a venue for review of real errors in legal judgment that can be deemed to cause prejudice to a party to the extent that they rise to the level of reversible error. Brown v. Stewart, 348 S.C. 33, 557 S.E.2d 676 (S.C.App. 2001). The focus generally is upon the propriety of rulings made by the circuit court in response to a party's motions or objections. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).

To state a cause of action under the Uniform Declaratory Judgments Act, a party must demonstrate a justiciable controversy. Consignment Sales LLC v. Tucker Oil Co., 391 S.C. 266, 705 S.E.2d 73 (S.C.App. 2010); See also Holden v. Cribb, 349 S.C. 132, 561 S.E.2d 634 (S.C.App. 2002). Where a concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty with respect thereto which are denied by the adverse party, there is a justiciable controversy calling for the invocation of a declaratory judgment action. Dantzler v. Callison, 227 S.C. 317, 88 S.E.2d 64 (1955). A justiciable controversy is a real and substantial controversy that is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute. Graham v. State Farm Mutual Automobile Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995).

A. *Complaint Alleges a Concrete Issue*

Appellant argues a party is not required under the Uniform Declaratory Judgments Act to spend time and money complying with what allegedly is an invalid or unconstitutional statute. Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S.C. 449, 455, 415 S.E.2d 801, 805 (1992) (finding a justiciable controversy in a pre-election review of a voter-initiated ordinance and reasoning that, when an ordinance is alleged to be facially defective, is wholly unjustified to allow voters to give their time, thought, and deliberation to the question of desirability of the legislation as to which they are to cast their ballots, and thereafter, if their vote be in the affirmative, confront them with a judicial decree that their action was vain). The record reflects the circuit court's reasoning in dismissing Appellant's complaint is similar to the S.C. Supreme Court's reasoning in Town of Hilton Head Island:

> **THE COURT:** It sounds like I'm going to have to dismiss your case today, but if they penalize him in any way, he can then file.
>
> **MR. EVANS:** He can refile in 11 years when it comes to that point.

MR. CARTER: Well, Your Honor, the statute [15-53-40] says I don't have to wait until a breach of that existing right to file a claim.

THE COURT: Well, I don't rule on things prematurely, that is the problem. The statute doesn't say that, but the bottom line is you are going to lose today. You are a good brief writer. You will be able to handle it.

(R. 9, lns. 9-21) (emphasis added)

To determine a party's standing to challenge the unconstitutionality of S.C. Code Ann. § 24-21-560 (2011) by requiring the burden of demonstrating an actual injury, a casual connection between the injury and the conduct complained of, and the likelihood that the injury will be redressed by a favorable decision, as the Respondent suggests, Sea Pines Assoc. for the Protection of Wildlife v. S.C. Dept. of Natural Resources, 345 S.C. 594, 550 S.E.2d 287 (2001), is inconsistent with the legislative purpose and intent of the Uniform Declaratory Judgments Act. cf. State v. Whitesides, 397 S.C. 313, 725 S.E.2d 487 (2012) ("A court's sole function is to determine and, within constitutional limits, give effect to the intent of the General Assembly, with reference to the meaning of the language used and the subject matter and purpose of the statute"). Such an interpretation of the statute would require "a primary right of the [Appellant] plaintiff *actually* violated by the defendant," See Edwin E. Bryant, The Law of Pleading Under the Code of Civil Procedure, p. 170 (2nd ed. 1899), which is exactly what the General Assembly intended to avoid.[2] The intent of the Act is "remedial," and "[i]ts purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. It is to be liberally construed and administered." S.C. Code Ann. § 15-53-130. Appellant is entitled to "restrain or prevent" such action by the Respondent. *Id.*; see also Town of Hilton Head Island, 415 S.E.2d at 805 (1992).

B. *Complaint Alleges Definite Assertion of Legal Rights*

The Fourteenth Amendment prohibits the Respondent from depriving an inmate of life, liberty, or property without due process of law. U.S. Const. art. XIV, §1; see also S.C. Const. art. I, §3. In analyzing the procedural safeguards owed to an inmate under the Due Process Clause, the Court must look at two distinct elements: (1) a deprivation of a constitutionally protected liberty or

2 See S.C. Code Ann. §§ 15-53-70, which states, "The Court may refuse to render or enter a declaratory judgment or decree when such judgment or decree, if rendered or entered, would *not* terminate the uncertainty or controversy giving rise to the proceeding."

property interest; and (2) a denial of adequate procedural protections. McQuillion v. Duncan, 306 F.3d 895, 900 (9th Cir. 2002); Brewster v. Bd. of Educ. of Lynwood School District, 149 F.3d 971, 982 (9th Cir. 1998).

Accordingly, this case presents a novel issue because this Court must first address whether Appellant has a liberty interest in *accessing* the CSP, and in his Fourth Amendment right against unreasonable searches and seizures by "any other law enforcement officer" *prior to and during* participation in the CSP. In Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), the S.C. Supreme Court explained that procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property. *Id.* 527 S.E.2d at 750.

The purpose of due process is generally not to keep the government from doing certain things altogether, but rather to keep it from acting in an arbitrary and unfair manner. Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government"). In 1995, the U.S. Supreme Court, in Sandin v. Conner, 515 U.S. 472, 115 S.Ct. 2293 (1995), limited the due process protections of prisoners, holding that in-prison restrictions[3] deprive them of "liberty" within the meaning of the Due Process Clause only if the restrictions "impose atypical and significant hardship on inmates in relation to the ordinary incidents of prison life."

Under Sandin, prisoners' liberty is protected by due process in two situations. One involves deprivations "so severe in kind or degree (or so removed from the original terms of confinement) that they amount to deprivations of liberty," regardless of the terms of state law. Sandin, 515 U.S. at 497. The paradigm cases are commitment of a prisoner to a mental institution or the involuntary administration of psychotropic drugs.

The second situation in which Sandin recognizes prisoners' liberty includes cases in which the state has—as it may "under certain circumstances" created a liberty interest and deprivation of that interest in relation to the ordinary incidents of prison life." After Sandin, it is clear that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions

3 Sandin by its terms applies only to in-prison restrictions. The Court, after noting that the deprivation of statutory good time involved an inmate of "real substance," 515 U.S. at 478, was careful to distinguish the prisoner's placement in segregation from actions that "inevitably affect the duration of his sentence." *Id.* at 487.

but the nature of those conditions themselves "in relation to the ordinary incidents of prison life."

In Wilkinson v. Austin, 545 U.S. 209, 125 S.Ct. 2384 (2005), the Court held mandatory language and substantive predicates no longer create a liberty interest. However, at issue in Wilkinson was a 2002 prison policy of classifying inmates for maximum security prisons of the Ohio Department of Rehabilitation and Correction. The instant case does not involve an "in-prison restriction" but concerns a state statute that specifically mandates participation of certain prisoners in the CSP.

A statute, rule or regulation creates a liberty or property interest if it limits the discretion of officials. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 462, 109 S.Ct. 1904 (1989). The most common way of limiting discretion is to use "explicitly mandatory language in connection with requiring substantive predicates." Hewitt v. Helms, 459 U.S. 460, 472, 103 S.Ct. 864 (1983). "Mandatory language" often means words such as "shall," "will", or "must." Board of Pardons v. Allen, 482 U.S. 369, 374-80, 107 S.Ct. 2415 (1987). "Substantive predicates" are "substantive limitations on official discretion," Olim v. Wakinekona, 461 U.S. 238, 249, 103 S.Ct. 1741 (1983), or "particularized standards of criteria" that guide decision-makers. Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 101 S.Ct. 2460 (1981). The CSP statute existing at the time of Appellant's offenses, in relevant part, is as follows:

> "(A) Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, any sentence for a 'no parole offense' as defined in Section 24-13-100 **must include** any term of incarceration **and** completion of a community supervision program operated by the Department of Probation, Parole, and Pardon Services. No prisoner who is serving a sentence for a 'no parole offense' is eligible to participate in a community supervision program until he has served the minimum period of incarceration as set forth in Section 24-13-150...."
>
> **Section 24-21-560** (1995 Act No. 83, eff. January 1, 1996) (emphasis added)

Appellant asserts the mandatory language of S.C. Code Ann. § 24-21-560 creates a liberty or property interest in the "completion of [the CSP]" and limits the discretion of Respondent. The General Assembly has specifically included the mandatory phrase "must include" in Section 24-21-560, which establishes an inmate's state-created right to access *and* participate in the CSP; the purpose of which is to successfully complete, satisfy and be discharged from his sentence. S.C. Code Ann. § 24-21-560(E) (1996). In South Carolina, a statutory requirement is separate and

distinct from the prohibitions contained within the Federal and State Constitutions. In fact, the S.C. Supreme Court has recognized that statutes which contain mandatory language actually impose stricter requirements than the constitutional provisions. State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000).

The United States Supreme Court addressed a similar statute in McQuillion, wherein a California state prisoner had been granted a parole date by the California Board of Prison Terms, only to have it rescinded by a subsequent Board. The U.S. Supreme Court found that the statute "uses mandatory language and is largely parallel to the scheme found in Greenholtz and Allen...," therefore a liberty interest was created. The U.S. Supreme Court's decisions in Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100 (1979), and Allen, *supra*, were decided under the following premise:

> While there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence, a state's statutory scheme, if it uses mandatory language, creates a presumption that release will be granted when or unless certain designated findings are made, and thereby gives rise to a constitutional liberty interest (emphasis added).

The CSP statute existing at the time of Appellant's offenses explicitly limits Respondent's discretion regarding his successful completion of the incarceration part of his sentence. In fact, as a separate and distinct agency from the SCDC, the Respondent has no authority to determine the timing of Appellant's release from prison, or when Appellant becomes eligible for the CSP. The statute controlling eligibility and release, in relevant part, is as follows:

> "(A) Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, a prisoner convicted of a 'no parole offense' as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections, including a prisoner serving time in a local facility pursuant to a designated facility agreement authorized by Section 24-3-20, **is not eligible for** early release, discharge, or community supervision as provided in Section 24-21-560, **until** the prisoner has served at least eighty-five percent of the actual term of imprisonment imposed..."
>
> **Section 24-13-150** (1995 Act no. 83, eff. January 1, 1996) (emphasis added)

In a case similar to the one at issue, the S.C. Supreme Court in Furtick v. S.C. Dept. of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2003), held that "*parole* is a

privilege, not a right" (emphasis added). In the case of Steele v. Benjamin, 362 S.C. 66, 72, 606 S.E.2d 499, 502 (S.C.App.2004), this Court recognized "Furtick established that an inmate has a right to a [ALC] review of an agency's final decision denying parole eligibility, but an inmate does not have a right to review of a denial of parole. The distinction is that the review or consideration for parole is a right granted by statute whereas parole is only a privilege." Appellant asserts an inmate has a right to review by the ALC of the SCDC's final decision denying CSP eligibility pursuant to Section 24-13-150. Moreover, since participation in the CSP is an integral, mandatory part of an inmate's 'no parole offense' sentence, cf. Schwartz v. Muncy, 834 F.2d 396, 398 fn. 8 (4th Cir.1987) ("parole eligibility is part of the law annexed to the crime at the time of a person's offense"), access and participation in the CSP is also a state-created right granted by the mandatory language of Section 24-21-560(A).[4] Therefore, Appellant asserts the CSP is not a privilege because, unlike parole, an inmate's access and participation are not granted upon the "satisfaction" of the Respondent. cf. S.C. Code Ann. § 24-21-640.

C. *Complaint Alleges a Positive Legal Duty Denied by Respondent*

While guilty pleas are a matter of criminal jurisprudence, most courts have held they are subject to contract principles. United States v. Ringling, 988 F.2d 504 (4th Cir. 1993). Appellant argues his guilty plea manifests a mutual assent to the mandatory terms and conditions of the actual term of imprisonment, as well as the mandatory requirement of participation in the CSP, as defined by S.C. Code Ann. §§ 24-21-560 and 24-13-150, and establishes a binding legal contract[5] between

4 Respondent will likely assert Section 24-21-13(A)(2) to make the point that, "The requirements for an offender's participation in the [CSP] and an offender's progress toward completing the program are to be decided administratively by the [Respondent]," and that "[n]o inmate or future inmate shall have a 'liberty interest' or an 'expectancy of release' while in a [CSP] administered by the [Respondent]." However, Appellant would point out that the General Assembly has created an unfair situation whereby an inmate convicted ***prior*** to January 1, 2011, is required to satisfy the requirements of the CSP, pursuant to Sections 24-13-150 and 24-21-560, in order to successfully complete his sentence, although he is now coercively forced to waive his federally-protected Fourth Amendment liberty interest to be free from unreasonable search or seizures by "any other law enforcement officer," pursuant to Section 24-21-560(B)(2), in order to gain access to and participate in the mandated program. In short, Section 24-21-13(A)(2) is misleading in light of the 1996 version of Section 24-21-560 that implicitly retained the federally-protected Fourth Amendment liberty interest to be free from unreasonable search or seizures by "any other law enforcement officer" ***other than*** agents of the Respondent ***prior*** to January 1, 2011. The new version of this statute now forcibly strips inmates of that right. Consent must be voluntary.

5 S.C. Code Ann. § 15-53-40 states, "A contract may be construed either before or after there has been a breach thereof." In order to recover for breach of contract, a plaintiff must allege and prove (1) the existence of a contract, (2) breach of the contract, and (3) damages caused by the breach. Fuller v. E. Fire

Appellant and Respondent as a collateral consequence. cf. State v. McGrier, 378 S.C. 320, 663 S.E.2d 15 (2008); see also Edens v. Laurel Hill Inc., 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978) (In general, a binding contract requires a manifestation of mutual assent to its terms).

The Respondent has expressly declared the intent to apply the amended CSP statute upon Appellant's release from incarceration (R. 4, ln. 23—R. 5, ln. 3), and has also expressly declared the intent to deny their legal duty to satisfy their obligation to the assented terms of the original contract of Appellant's guilty plea. Pursuant to Section 15-53-40, Appellant has a statutory right to present this claim before the court to declare the assented terms of the original contract "either before or after there has been a breach thereof" (R. 9, lns. 14-16); see also S.C. Const. art. I, §§4 and 10.

Appellant argues the determination of whether consent to a warrantless search is voluntary or whether it is the result of duress or coercion is a question of facts to be determined from the totality of the circumstances. cf. State v. Provet, 391 S.C. 494, 706 S.E.2d 513 (2010) (State has the burden to prove voluntariness of consent). Appellant claims this case does present a justiciable controversy, or at least the ripening seeds of a controversy,[6] because the current CSP statute contemplates Appellant must consent[7] (R. 9, lns. 1-4) to the waiver of his Fourth Amendment right against unreasonable searches and seizures *prior* (R. 8, lns. 5-8) to entering the CSP. Appellant retained the protections of this constitutional right at the time of his offenses, even as a "reduced right" (R. 8, ln. 13), and Appellant was not statutorily required to consent to the waiver of this constitutional right in order to gain *access* to the CSP upon his release from incarceration.

Respondent argues the applicable CSP statute is the statute that exists at the time of Appellant's release from prison on April 19, 2026, and therefore it is unknown whether Appellant will be required to be subject to search or seizure, without a search warrant, with or without cause, *prior* to entering and participating in the CSP at the time of his release. (R. 38). cf. Thompson v. State, 409 S.C. 386, 762 S.E.2d 51 (S.C.App. 2014). Respondent argues further that because the

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& Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962).

6 See Waller v. Waller, 220 S.C. 212, 223, 66 S.E.2d 876, 882 (1951) (Declaratory Judgment Act is a proper vehicle in which to bring this cause of action before this Court because there is an existing controversy ***or at least the ripening seeds of a controversy***).

7 Warrantless search and seizures are unreasonable absent a recognized exception to the Fourth Amendment's warrant requirement. See State v. Brown, 389 S.C. 473, 698 S.E.2d 811 (S.C.App. 2010). Warrantless search and seizures by law enforcement are per se unreasonable, unless they fall within one of several recognized exceptions, which include: (1) search incident to a lawful arrest; (2) hot pursuit; (3) stop and frisk; (4) automobile exception; (5) plain view doctrine; (6) abandonment; and (7) **consent** (emphasis added).

CSP statute does not require Appellant to enter and participate in the CSP until he is released from prison, and because the CSP statute may be amended between now and Appellant's release, the circuit court properly dismissed Appellant's claim (R. 38). Appellant contends this argument lacks merit.

Appellant asserts Thompson is distinguishable from the instant case. Thompson pleaded guilty to four kidnappings[8] and six armed robbery offenses in 2001. Because the law did not require Thompson to register as a sex offender until he was released from prison, and because the sex offender registry statute may have been amended before Thompson's release, the circuit court dismissed Thompson's action.

Appellant contends, unlike the statute at issue in Thompson, the CSP statute is an integral, mandatory part of the actual sentence. As Respondent asserts, Appellant "is not given a choice" (R. 58). Statutes enacted or amended *after* an inmate was sentenced cannot be applied to alter the conditions of or revoke preexisting eligibility, nor can they take the form of a post hoc alteration of the punishment for the earlier offense. cf. Fender v. Thompson, 883 F.2d 303 (4th Cir.1989). Therefore, the challenged statute at issue nevertheless accomplishes an impermissible enhancement of the punishment for an earlier offense because it mandates the waiver of a constitutional right in order to access and participate in the CSP, it coercively broadens and grants authority to "any other law enforcement officer" to subject those in the CSP to searches or seizures, without a search warrant, with or without cause, and it increases the likelihood of incarceration beyond eighty-five percent of the actual term of imprisonment imposed, and thereby alters Appellant's punishment for that earlier offense to his disadvantage. cf. State v. Walls, 348 S.C. 26, 558 S.E.2d 524, 525 (2002) ("For a law to fall within *ex post facto* prohibitions, the law must...disadvantage the offender affected by it").

By contrast, the language of S.C. Code Ann. § 23-3-400 (Supp. 2000) indicates the General Assembly's intention of the sex offender registry statute was to create a non-punitive act that is civil in nature. State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). Appellant argues the sex offender registry statute contemplates the offender has *satisfied* the completion of their actual

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8 At that time, a person convicted of kidnapping was required to register as a sex offender when released from prison "except when the court makes a finding...the offense did not include a criminal sexual offense." S.C. Code Ann. § 23-3-430(C)(15) (Supp. 2000); *see also* S.C. Code Ann. § 23-3-430(A), -440(1) (Supp. 2000).

sentence; it is not an integral, mandatory part of the actual sentence itself.[9] In addition, the sex offender registry statute does not require, either explicitly or implicitly, the mandated waiver of a constitutional right *prior* to registry.[10]

Appellant claims the instant case is ripe for adjudication. In support of this claim Appellant would direct this Court's attention again to the case of Thompson. While the majority in Thompson held S.C. Code Ann. § 23-3-430(C)(15) (Supp. 2000) had no effect until Thompson was released from prison, Appellant argues the language of S.C. Code Ann. § 23-3-430(C)(15) (Supp. 2000) was never intended by the General Assembly to alter or amend the terms of a person's actual sentence.

Likewise, in the instant case, although the Respondent claims the consent requirement "doesn't affect his actual punishment" (R. 4, lns. 21-22), the Respondent's application of S.C. Code Ann. § 24-21-560(B) (2011) has the effect of altering preexisting statutory criteria for the determination of an offender's access to and participation in the CSP.[11] cf. Marshall v. Garrison, 659 F.2d 440, 444-46 (4th Cir. 1981).

> **MR. CARTER:** Now, the CSP didn't require this at the time of my sentence. And so there is no real penalty in the statute to say if I just say, you know what, I'm not going to sign this piece of paper, I'm not going to enter the CSP, there is no stipulation in the statute that would give him a penalty to impose or to violate me. And I don't understand that part of it.
>
> **THE COURT:** Well, you are not going to violate him, are you?

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9 S.C. Code Ann. § 24-21-560(E) (1996) states, "A prisoner who ***successfully completes*** a community supervision program pursuant to this section has ***satisfied his sentence*** and must be discharged from his sentence." Although Appellant was on notice by the terms of S.C. Code Ann. § 24-21-560 (1996) that the completion of the CSP was a requirement of his originally-imposed sentence, he would not have been aware that his access to the CSP could potentially be altered to require the waiver of a constitutionally-protected right originally retained by Appellant at the time of the imposition of his sentence.

10 S.C. Code Ann. § 23-3-450 (Supp. 2000) provides "The offender shall register with the sheriff of the county in which he resides. To register, the offender must provide information as prescribed by SLED...A copy of this information must be kept by the sheriff's department...An offender shall not be considered to have registered until all information prescribed by SLED has been provided to the sheriff."

11 The Uniform Declaratory Judgments Act does not require a person to file a declaratory judgment action upon their release from prison to litigate the propriety of the requirements of a statute that has the effect of changing the quantum of punishment. A plaintiff has standing if a complaint alleges facts of "a primary right of the plaintiff actually violated by the defendant, ***or alternatively, the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent.***" See Edwin E. Bryant, The Law of Pleading Under the Code of Civil Procedure, p. 170 (2nd ed. 1899). See also Sunset Cay LLC v. City of Folly Beach, 357 S.C. 414, 593 S.E.2d 462 (2004) (The basic purpose of the Act is to provide for declaratory judgments ***without*** awaiting a breach of existing rights). S.C. Code Ann. §§ 15-53-30, -40 (1976); *see also* Rule 57, SCRCP.

> **MR. EVANS:** Well, not my specific agent. But I have got a feeling that if he doesn't want to waive that right they are going to allow him to stay at the Department of Corrections. I mean, that is an actual condition that he must abide to...
>
> (R. 8, ln. 15—R. 9, ln.4) (emphasis added)

The retrospective application of S.C. Code Ann. § 24-21-560(B) (2011) accomplishes an impermissible enhancement of the punishment for an earlier offense and, for persons who committed crimes *before* the statute's amendment, substantially alters the consequences attached to a crime already completed, and therefore changes the quantum of punishment. Weaver v. Graham, 450 U.S. 24, 33, 101 S.Ct. 960, 966-67, 67 L.Ed.2d 17 (1981). Although Section 24-13-150 mandates Appellant would be eligible to access and participate in the CSP upon the successful completion of 85% of his actual sentence, the Respondent's application of the amended CSP statute (R. 4, ln. 20—R. 5, ln. 3) would reasonably increase Appellant's term of imprisonment.

Respondent's claim this consent requirement "always" existed in the CSP statute (R. 9, lns. 5-8) has no merit. Section 24-21-560 was amended to include this statutory requirement on April 28, 2010; prior to this date it existed, if at all, as an agency policy of the Respondent, which would not have legally granted this specific authority of subjecting persons in the CSP to search or seizure, without a search warrant, with or without cause, without their expressed consent, to "any other law enforcement officer" (R. 17, para. 12; R. 21, para. 71; R. 22, para. 72 and 75; R. 23, para. 77; R. 5, lns. 16-23). Since participation in the CSP is mandatory, the Respondent is prohibited from *requiring* Appellant to waive a constitutional right in order to access and participate in the program. As an agency policy, the Respondent may require the condition of Appellant's consent to be subject to search or seizure, without a search warrant, with or without cause, while under their immediate supervision in the CSP as a reduced right because the CSP is a mandated part of Appellant's actual sentence. However, warrantless search and seizures are unreasonable by "any other law enforcement officer" absent a recognized exception to the Fourth Amendment's warrant requirement. Brown, fn. 5, *supra*. Warrantless search and seizures by "any other law enforcement officer," other than an agent of the Respondent or the SCDC, must fall within one of several recognized exceptions, even while person's are incarcerated in the SCDC or supervised by the Respondent in the CSP. S.C. Const. art. I, §§4 and 10. For this reason, the CSP statute is unconstitutional.

CONCLUSION

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

Respectfully submitted,

12 - 9 - , 2015

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-001162

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

v.

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

CERTIFICATE OF SERVICE

I certify that I have served the Initial Brief of Appellant on the Respondent by depositing a copy of the same in the United States Mail, postage prepaid, on the 9 day of December, 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.

12/9, 2015

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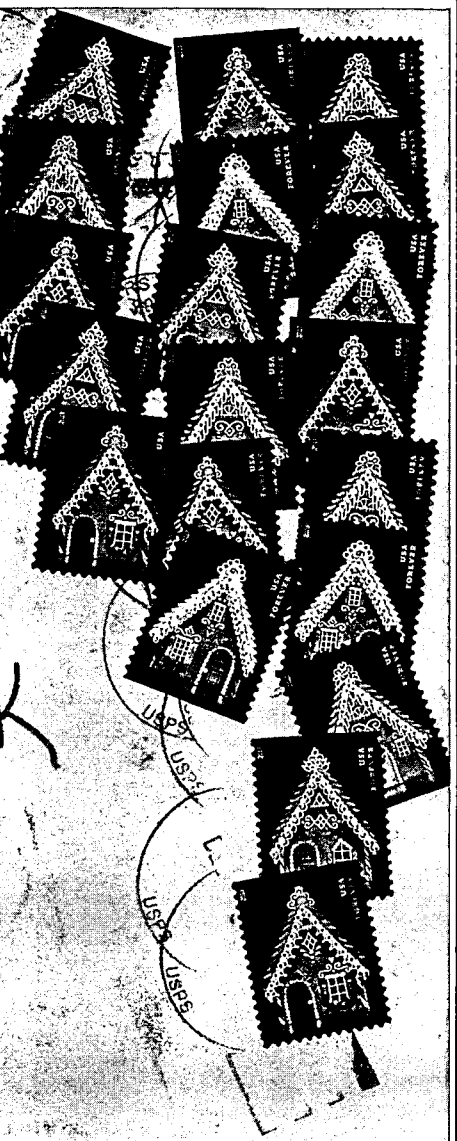

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