STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
ROBERT E. HOOD, CIRCUIT COURT JUDGE

Case No. 2016-CP-40-6916
Appellate Case No. 2017-002577

Charles Eugene Carpenter,.....Appellant,

v.

South Carolina Department of Corrections and
The State of South Carolina, ...Respondents.

INTIAL BRIEF OF APPELLANT

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VI. Were actions of the trial court so prejudicial to the proceedings such that they effectuated a denial of due process that compels relief on behalf of Appellant to avoid an affront to the judicial system?

STATEMENT OF THE CASE

This matter was initiated by Appellant Charles Eugene Carpenter (hereinafter "Carpenter") filing of a Summons and Complaint against Respondent South Carolina Department of Corrections (hereinafter "SCDC") on November 18, 2016. The Complaint included causes of action for declaratory judgment pursuant to S.C. Code Ann. Section 15-53-10 et seq. as well as a Petition for Writ of Habeas Corpus. (Complaint). Carpenter also filed a separate Petition for Writ of Habeas Corpus (Expedited) that same day. (Pet. For Writ of Habeas Corpus). Defendant SCDC filed a Motion to Dismiss on December 28, 2016. (SCDC Motion to Dismiss). Following a hearing on that motion, the Honorable Casey Manning ordered on February 23, 2017 that the State of South Carolina (hereinafter "the State") be made a defendant to the action. (Order of Judge Manning, 2.23.17). An amended Summons was filed on February 21, 2017 and served on Respondent State on that same day. The State filed a Return and Motion to Dismiss on March 31, 2017. (State Motion to Dismiss).

Retired Chief Justice Jean Toal, sitting as a circuit court judge by designation, denied both Motions to Dismiss by order dated April 19, 2017 and filed April 25, 2017. (Order dated April 25, 2017).

The matter was then tried before the Honorable Robert Hood on June 7, 2017, who subsequently issued two orders. The first order was captioned as "Order for Judgment in Favor of the South Carolina Department of Corrections" (hereafter "SCDC order") and was dated September 12, 2017, but not filed until October 2, 2017 at 11:19 A.M. (Order for Judgment in Favor of the [SCDC]). The second order was captioned as "Order Dismissing Petition for Writ of Habeas Corpus," (hereafter "Habeas Order") likewise was dated for September 12, 2017 but only filed on October 2, 2017 at 11:20 A.M. (Order Dismissing Petition for Writ of Habeas Corpus).

The habeas order stated that it "dispenses with the claims made against the State." (Id., p. 1).

Appellant timely filed a Motion to Reconsider pursuant to Rule 59(e), SCRCP, on October 10, 2017. (Mot. To Reconsider). An Order denying reconsideration was signed and filed on December 18, 2017. (Order 12.18.17). Appellant timely appealed the final orders and order denying reconsideration thereof by filing a Notice of Appeal on December 20, 2017. (Notice of Appeal). The same day, Appellant petitioned the Supreme Court for Certification of the Appeal to that Court, and for consolidation with his Petition in the Original Jurisdiction of the Supreme Court that was filed on December 20, 2017. The Supreme Court has not ruled on those petitions.

STATEMENT OF FACTS

Carpenter is currently confined in the Evans Correctional Institution. On April 7, 1990, Carpenter signed a plea agreement with the State to resolve multiple outstanding charges. (plea agreement). The terms for that agreement provided, *inter alia*,

(a) Carpenter would enter a plea of guilty to two counts of violating S.C. Code. Ann. Section 44-53-370(e), *i.e.*, trafficking in marijuana and cocaine.

(b) Sentencing would be done pursuant to Section 44-53-370(e)(2) with regard to Count One of Indictment 90GS4705002;

(c) Sentencing would be done pursuant to Section 44-53-370(e)(1)(d) with regard to Count One of Indictment 90GS4705001.

(d) The State will recommend that the Court impose a total sentence of 25 years.

(e) Carpenter would provide information to the State and cooperate in investigations.

(f) If the State's obligations under the plea agreement become "null and void... the State may argue for a maximum sentence for the offenses to which [Carpenter] pled guilty"

(g) "The Attorneys for the State agree to recommend that any sentences of incarceration of the Defendant, Charles Eugene Carpenter... receives as a result of these pleas shall be concurrent terms of incarceration, and that the Defendant has no right to withdraw his plea, with the further understanding that should the Defendant fail to fulfill the terms of this agreement, then the State may recommend that any sentence be run consecutive, each Count to the other."

(h) "The parties hereby agree that this Plea Agreement supersedes all prior promises, representations and statement of the parties, that this Agreement may be modified only in writing and signed by all parties, except as to the matters placed on the record in open court on April 7, 1990, and that any and all other promises, representations and statements, whether made prior to or after this Agreement, are null and void."

Carpenter entered his plea on April 7, 1990. At the time Carpenter's plea, the presiding judge, Judge Cottingham, stated "Now, I tell you that this Court will abide by this plea agreement. I tell you that upon the record." (Plea Tr. page 10, lines 19 – 20). Judge Cottingham also stated "If I conclude upon proper presentation that you have not [cooperated with law enforcement], then this plea agreement to you and to me is void and of no effect." (Plea Tr. page 11, lines 4-6). In Judge Cottingham's colloquy with counsel, he stated "And as I understand it the understanding is it is 25 years concurrent?" and the reply was "yes." (Plea Tr. page 13, lines 5-7).

Prior to entry of the plea, the prosecutor stated "If I could also ask that the Defendant understand that this is a mandatory term of imprisonment, that it is a mandatory minimum, the sentence cannot be suspended, probation can't be granted and it is a sentence that does not have eligibility for parole until the passage of 25 years." Carpenter's counsel indicated Carpenter's understanding of that term as part of the plea. (Plea Tr. page 20, lines 1-7).

Judge Cottingham concluded the entry of the plea by stating that "I am going to abide by the plea agreement. [Carpenter] is entitled to that, and I will do that." (*Id.* at lines 14-15).

Sentencing proceedings reconvened on June 4, 1990. At the time of sentencing on that date, the State advised the Court that Carpenter "has not been conforming to the terms of the agreement." (June Tr. page 9, lines 6-8). Judge Cottingham stated:

> [I]t is my intention to comply exactly with the terms of the plea agreement. In doing so, however, I would require the Defendant to do the exact same thing. Now the question has been raised as to whether or not he has in effect complied. If he has, of course, I am going to sentence him to the minimum 25 years concurrent... If he has not, then I will deal with him accordingly and I would change his sentence to speak to his lack of cooperation.

(June Tr. page 10, lines 16-24) (emphasis added).

Upon inquiry by Carpenter's counsel, Judge Cottingham stated that he was going to decide whether to sentence Carpenter on both indictments after hearing from the State, and

> if... there exists probable cause to hold a hearing as to whether or not he has in effect complied with this hearing [*sic*], I am going to sentence him on one Count, cocaine. I am going to sentence him exactly according to the plea agreement. I then later will hold a hearing as to whether or not he has complied with his plea agreement... If I conclude from that hearing that he did, in effect, comply, I will make any sentence on that charge, which is the trafficking in marijuana, concurrent with what I do today. If I conclude that he has not complied with the plea agreement, then I will impose such additional sentence as I think is appropriate under the circumstances.

(June Tr. page 11, line 13 – p. 12, line 3) (emphasis added).

The State asked the trial judge to "enforce the terms of the plea agreement by requiring or imposing a consecutive sentence" upon Carpenter. (June Tr. p. 11, lines 13-16). Carpenter's counsel objected to the bifurcation of sentencing. (June Tr. p. 16, lines 16-25). Counsel's position was that the entire sentencing under the plea agreement had to be done at the same time. (June Tr. p. 19, line 20 – p. 20, line 1). Judge Cottingham executed the sentencing sheet for Case 90GS475002 on June 4, 1990.

Judge Cottingham convened a second hearing on August 9, 1990. Carpenter again objected to the second hearing, renewing an earlier objection made in June, all of which was acknowledged by the Court. (Aug. Tr. p. 4, lines 18-24). The trial judge characterized the proceedings which were occurring as a hearing on "contempt in disobedience of the plea agreement." (Aug. Tr. p. 144, lines 22-24). He also characterized the inquiry which was occurring as a determination of whether Carpenter had "breached his agreement." (Aug. Tr. p. 144, lines 14 – 25).

Without a criminal charge pending against Carpenter, without advising Carpenter of his rights to a jury trial or other constitutional protections, and notwithstanding the existence of his plea already having been entered and accepted and a sentencing hearing already concluded, the trial judge proceeded to take testimony from witnesses to determine whether Carpenter had complied with his obligations under the plea agreement. *Id.*

Carpenter's Counsel objected and correctly pointed out that there were no additional charges brought against Carpenter, and the evidence to be presented had to do with matters which occurred after the plea agreement had been entered and accepted, and therefore were not properly up for consideration. Carpenter's counsel astutely observed "There is a clean way for the State to accomplish what they're attempting to do. This is a muddy way, but I guess they're entitled to proceed whichever way they want to proceed." (Aug. Tr. p. 10, lines 9-13).

After hearing from witnesses, the trial judge said "There has not been made, before me, a single showing of additional cooperation by [Carpenter] since the plea agreement was entered into. Nobody has come forward and said, Judge, he cooperated, he did this, that, and the other. There's not one single incident today before me where, and according to that plea agreement, he has done anything." (Aug. Tr. p. 134, lines 12 – 19). The trial judge continued "I'm inclined to think he

knows who [an unidentified alleged co-conspirator] is... I'm not asking him to disclose that to me, but, you know... [I] was born at night but not last night." (Aug. Tr. p. 136, lines 19-25).

The trial judge continued "I may be wrong, but I really conclude that... Carpenter has absolutely, is absolutely thumbing his nose at the Court and to the State of South Carolina... ." (Aug. Tr. p. 138, lines 10-13). The trial judge continued:

> This Defendant pled guilty to serious charges, trafficking in cocaine and marijuana. Of course, I've been the presiding judge over this whole grand jury indictment and I've got a feel now, based on the pleadings and what I have heard now, for what occurred and who did what. There's no question about it, that this man was the key man at the top of the whole organization. It's clear[1]. If anybody in the world has got information about who did what, it's him.... I've got to conclude that he failed to cooperate.
>
> (Aug. Tr. P. 139, lines 16-24; p. 140, line 2).

The trial judge concluded:

> I find beyond absolutely any doubt in my mind that the State of South Carolina has lived up to their agreement in every respect. I further find that he has failed to do so. And based on the plea agreement, I'm going to, one, leave the first part of the sentence, on the number two indictment, as it was. . . And I find he's failed to cooperate in this one. And I find he's failed to cooperate with the terms of the agreement. I further find that an enhancement of the sentence is proper under the circumstances and that connection with regards to the indictment for trafficking in marijuana, it is the sentence of this court that he be confined for a period of twenty-five (25) years, consecutive to the sentence previously imposed upon the indictment for trafficking in cocaine.
>
> (Aug. Tr. P. 141, lines 2 – 25).

[1] The Fourth Circuit Court of Appeals has noted that there would be "manifest impropriety in permitting the government, without satisfying a judge that the evidence proves that a defendant broke his promise, to escape the obligation the government undertook in the plea bargain. *United States v. Simmons*, 537 S.E.2d 1260 (4th Cir. 1976). By openly declaring his knowledge from other cases as support for his decision to find that Carpenter has not complied with the plea agreement, the trial judge effectively allowed the government to determine whether Carpenter had complied with the agreement.

The trial judge made no determination or statement as to the burden of proof or persuasion to which he subjected the evidence he considered, or the weight of the evidence that he relied upon to declare that Carpenter's sentence should be "enhanced." (Aug. Tr. p. 144, line 12).

The trial judge referenced the questionable authority retained as of August 9, 1990 when he stated:

> "As you well know, ordinarily during a week of general sessions court our Supreme Court has said that the term ends on Friday and the judge cannot, thereafter, change the sentence later. I don't know what our Supreme Court will say in connection with this."

(Aug. Tr. p. 141, line 21 – p. 142, line 1).[2]

Trial judge conducted the hearing and then ultimately concluded "I'm just leaving an avenue open in the event he demonstrates to you, to the extent that you [the State] wants to make a motion for me to reconsider this hearing and I'll do it, but I'll do it within thirty days. (Aug. Tr. p. 143, lines 2 – 6).

The trial judge reiterated "Now, let me get this clear. The hearing is now over." (Aug. Tr. p. 145, lines 6-8). "I've made a ruling. I'm gone *[sic]* stand by it. And I'm not gonna re-open that." (Aug. Tr. p. 145, lines 18-19). But despite repeated claims he would not reopen the hearing,[3] the judge continued to allow for reconsideration of the consecutive nature of the sentence imposed if the State, not Carpenter, requested the reconsideration be made. (Aug. Tr. p. 146, lines 1 – 6).

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[2] The trial judge stated that "ordinarily, in general sessions court, after the term ends, but nobody knows when the term of the grand jury ends." (Aug. Tr. p. 142, lines 19-21). The trial judge may have been arguing that he had continuing jurisdiction, not as a general sessions judge, but as the judge who was presiding over the grand jury, to leave open the sentencing and make an evidentiary ruling that permitted him to "enhance" the sentence.

[3] "I don't want to do anything to open up this hearing again and I'm not gone [sic] beat a dead horse to death." (Aug. Tr. p. 146, lines 9-11).

In concluding the August 9, 1990 hearing, the trial judge attempted to sentence Carpenter on Case No. 1990-GS-47-05001 to a fine of $50,000 and a term of 25 years, consecutive to the sentence earlier entered on Case No. 1990GS-47-05002. (Sentencing sheets).

Upon his remand to the custody of SCDC in 1991, the SCDC determined Carpenter's sentence to be a total of 50 years, and it recorded in Carpenter's "Conviction Summary" that Carpenter's "max-out" or projected release date for 1990-GS-47-5001 was October 4, 2003, while his "max-out" date on 1990-GS-47-5002 was November 23, 2016. (Complaint Exhibit G).

From that time forward, Carpenter's published max-out dates fluctuated between dates in which the recalculation was documented. To wit:

- As of June 2, 1993, Carpenter's Program Status Review from SCDC reflected a projected "max-out" date of July 7, 2015. (Complaint Exhibit H).
- As of May 26, 1993, Carpenter's Offender Summary reflected a projected "max-out" date of July 7, 2015. (Complaint Exhibit I)
- As of January 20, 1995, Carpenter's Offender Summary reflected a work release eligibility projection of February 6, 2015 and a projected "max-out" date of April 4, 2017. (Complaint Exhibit J).[4]
- As of March 30, 1995, Carpenter's Offender Summary reflected a work release eligibility projection of July 4, 2017 and a projected "max-out" date of December 4, 2019. (Complaint Exhibit K).[5]
- As of June 22, 1999, Carpenter's Offender Summary reflected a projected "max-out" date

[4] The records do not reflect any disciplinary action or other adjudicated extension of Carpenter's projected "max-out" date from July 7, 2015 to April 4, 2017. Carpenter was not notified of a change in this calculation or basis therefore.

[5] There is no explanation provided in the SCDC records for the acceleration in Carpenter's projected "max-out" date as compared to the date shown previously on January 2, 1995 records. Carpenter was not notified of the change in this calculation or basis therefore.

of July 4, 2019. No work release eligibility was shown. (Complaint Exhibit L).

- As of March 28, 2002, Carpenter's Offender Summary reflected a projected "max-out" date of November 7, 2016. (Complaint Exhibit M).
- As of May 16, 2005, Carpenter's Offender Summary reflected a projected "max-out" date of November 7, 2016. (Complaint Exhibit N).
- As of January 17, 2008, Carpenter's Offender Summary reflected a projected "max-out" date of February 7, 2018. (Complaint Exhibit O).
- As of June 28, 2010, Carpenter's Offender Summary reflected a projected "max-out" date of May 20, 2016. (Complaint Exhibit P).
- As of June 24, 2011, Carpenter's Offender Summary reflected the same sentence, with a projected "max-out" date of April 7, 2040. (Complaint Exhibit Q).

On September 12, 2011, after learning that his sentence had been increased by 24 years, Carpenter contacted SCDC classification officials and inquired into the matter. Carpenter received a written response on December 2, 2011 from an employee of SCDC that stated, "Your sentence was modified to show as 25 yr. mandatory minimum day-for-day sentence on 6/24/11." (Complaint Exhibit R).

SCDC records reflect, however, that the day before the modification of Carpenter's sentence and increase by 24 years, an internal transaction was undertaken at SCDC to "give" Carpenter 57 days credit on his newly-modified sentence for time he had served prior to conviction, before transfer into the custody of SCDC. (Complaint Exhibit S). Carpenter has repeatedly attempted to address the unilateral change in his sentence internally and the Department of Corrections has offered explanations for why his sentence was unilaterally increased without notice to Carpenter or an opportunity to be heard. Staff at SCDC have attempted to justify its

changes made more than 20 years after he was taken into Department custody. (Complaint Exhibits T and U).

In 2010, an inmate named Carlos Gonzales wrote a letter to Chief Justice Toal, asserting that he was being illegally held because his sentence had expired. (Trial Exhibit 1, Gonzales letter). Upon receipt of Gonzales' letter, the clerk of the Supreme Court sent the letter to Jon Ozmint, who was then the director of SCDC.

Upon receipt of Gonzales' letter, SCDC began an internal audit of all "inmates with a drug trafficking offense prior to 1/1/96 with an incarceration sentence of 25 years or more" who were still in the custody of SCDC as of March 18, 2010. (Trial Exhibit 2, Gonzales review). Carpenter was among those inmates. (Id at pp. 3623, 3635 and 3675). In its "Drug Trafficking Audit Results" SCDC produced a listing of inmates whose sentences had been examined in response to Gonzales' letter. (Id. at pp. 3675 and 4977). According to SCDC's own records, the 2010 survey resulted in his unilateral decision to "update" Carpenter's sentence to a "mandatory minimum." Several other inmates, in addition to Carpenter, had their sentences "updated" to a mandatory minimum. *Id.* Some, however, had already been "deemed parolable" so nothing was done to change those sentences or correct the issue. (*Id.* at p. 3675, Inmates 138725, 141971).

One inmate died during the audit. (*Id.* Inmate 126120). The inmate whose inquiry started the audit, Carlos Gonzales, had his sentence changed by SCDC, the change was noted as "updated to mandatory minimum prior to audit." (*Id.* Inmate No. 217075) (emphasis added). Mr. Gonzales remains incarcerated.

Upon learning of the change in his sentence, Carpenter initiated internal grievances to challenge the change in his sentence. In a memorandum to Mr. Carpenter dated December 21,

2012, a staff member acknowledged that Carpenter's sentence had been changed as a result of the 2011 audit. (Trial Exhibit C).

Mr. Carpenter retained a prior attorney in 2015 to look into the matter. In responding to Mr. Carpenter's prior attorney (Jon Ozmint, then in private practice), SCDC expressly admitted its 2011 change to the sentence in response to the Gonzales audit, as it also admitted it had earlier "updated" Mr. Carpenter's sentence in 1997 "per the drug statute to show that is was non parolable." (Trial Exhibit D).

SCDC also unilaterally removed good time and work credits that Carpenter had previously earned to his record. In Carpenter's 1993 offender summary (Complaint Exhibit I), SCDC recorded that Carpenter had already earned 700 "GT days" and 102 "earned work credits" for a "total service time earned" of "001072." (*Id.* at p. GC391). Another undated Offender Summary produced by SCDC reflects no good time or work credits, but does reflect that Carpenter will become eligible for work release on February 6, 2015. (Complaint Exhibit J p. GC460).[6]

ARGUMENT

I. CARPENTER LAWFULLY ASSERTED CLAIMS IN THE CIRCUIT COURT, FOR REASONS RECOGNIZED AND DETERMINED BY JUDGE TOAL, WHO ADDRESSED AND RULED ON THE ISSUE PRIOR TO THE TRIAL BELOW.

Before addressing the merits of the underlying claims, the Habeas Order determined that Carpenter was procedurally barred from bringing his claims (all treated as habeas corpus but not exclusively consisting of a claim for habeas corpus, as discussed in argument section III infra) in the circuit court. Notwithstanding statutory diversion of many similar matters to a separate adjudicatory process, Carpenter was not barred from raising his claims fully and freely in the

[6] This Offender Summary reflects Carpenter's "max-out" date as "04/07/2017."

circuit court. Former Chief Justice Toal recognized the same and reduced that determination to a written order in this case, and nothing factually referenced or legally cited in the final orders now being appealed properly justify any determination or action to the contrary.

A. The habeas petition may be considered by the circuit court.

The first supposed procedural bar identified in the Habeas Order is the assertion that a habeas petition must be filed in the original jurisdiction of the State Supreme Court.[7] (Toal Order, p. 9). Judge Toal, speaking as to that issue in her order, stated the following (footnotes retained but renumbered):

> The file reflects that in 1993[8], Carpenter filed a petition for writ of habeas corpus with the circuit court, and when it was denied, an appeal was taken to the South Carolina Supreme Court. In denying the relief Carpenter then sought, the Supreme Court held that the writ of habeas corpus "entitles an incarcerated prisoner to be released from confinement and is not available where a decision in the prisoner's favor would leave him incarcerated[9]." The current petition does, in fact, allege that Carpenter is being illegally held, both based on errors committed at the time of sentencing, and because of changes by SCDC to his max-out date, as evidenced by the exhibits attached to the petition. Twenty-four years later, Carpenter now brings a different question before the Court seeking a writ of habeas corpus. This Court has jurisdiction and authority to consider this petition on the merits.

(Order denying motion to dismiss, p. 5).

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[7] Although for the reasons set forth in this brief, Appellant contends that he is not limited to the original jurisdiction of the State Supreme Court for consideration of his habeas petition, Appellant has nevertheless already taken action to file a petition in their original jurisdiction on December 20, 2017. Defendants have opposed that petition, which remains outstanding.

[8] [Footnote 1 to Toal Order] Exhibit 1 to Carpenter's Memorandum in Opposition to SCDC's Motion to Dismiss dated February 17. 2017. The proceeding was an appeal from a petition of writ of habeas corpus filed in the circuit court of Marlboro County.

[9] [Footnote 2 to Toal Order] Carpenter's 1993 petition asserted that his sentence should be credited for the pre-trial period that he was incarcerated before his plea. The file reflects that SCDC later credited this time against Carpenter's sentence.

On its first page, the Habeas Order acknowledges Toal having previously denied the motion to dismiss, but then contradicts the ruling directly by accepting the legal assertion as to the circuit court lacking jurisdiction over the habeas petition. Respondents may assert this is an apples-to-oranges comparison, that Judge Toal merely ruled as to a motion based on Rule 12(b), SCRCP, while Judge Hood ruled as to the merits. However, the basis for ruling in each circumstance was identical, the purely legal issue of the subject matter jurisdictional limits of the circuit court with respect to habeas petitions. That determination by Judge Toal not being immediately appealable. *See Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 714 S.E.2d 547 (2011). And while subject matter jurisdiction can be raised at any time, even for the first time upon appeal, Appellant contends that Judge Hood had no authority to revisit and upend a prior circuit court determination regarding the exact same legal issue in the same matter during trial.

B. Appellant's claims are not restricted to adjudicatory processes outside the circuit court.

The "Background" portion of the Habeas Order makes extensive reference to prior PCR and habeas efforts instituted by Appellant. However, that factual detail regarding the same makes clear that the issues raised in those separate matters was not the same as currently raised by Appellant in the underlying circuit court action. (Habeas order, pp. 4-5).

The Habeas Order endorses the Respondents' reduction and overgeneralization of Appellant's causes of action into a mere improper sentence calculation claim, finding that all such matters must be handled via PCR instead of being allowed for determination in the circuit court. (Habeas Order, p. 9). While a statutory procedure exists for purposes of challenging constitutional violations related to the criminal conviction, it is not the exclusive method for challenging an unlawful sentence. *See e.g. Williams v. Ozmint* 380 S.C. 473, 671 S.E.2d 600

(2008). Declaratory relief remains available "to accomplish it intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships." *Thompson v. State of South Carolina,* Op. No. 27610 (S.C. Sup. Ct. filed Mar. 2, 2017) (Davis Adv. Sh. No. 9 at 25).

Judge Toal also addressed this claimed legal basis for dismissal of Appellant's claims as part of her order, and again, made a determinative ruling as to this legal issue with sound legal justification that Carpenter incorporates and asserts was appropriate. With no basis therefore changing during the brief life of the case in circuit court, it was not properly subject to revision after trial. (Order denying motion to dismiss, p. 3-4).

II. THE SENTENCING JUDGE LOST AUTHORITY/JURISDICTION TO "ENHANCE" OR "CHANGE" A SENTENCE THAT WAS IMPOSED IN A PREVIOUS TERM OF COURT, REGARDLESS OF WHY THE SENTENCING JUDGE WAS ASSIGNED TO THE MATTER FOR SENTENCING INITIALLY.

Judge Cottingham's general authority to accept the guilty plea and then sentence Carpenter arose by virtue of an order of Chief Justice George Gregory, dated November 15, 1989, which vested Judge Cottingham with authority to "dispose of all matters... arising from State Grand Jury Investigation No. 89-005." (Order appointing Cottingham). Accordingly, Carpenter does not take issue with the general conclusion in the Habeas Order that states "Judge Cottingham had the authority to manage [Carpenter's] case as he saw fit." (Habeas Order p. 12). That acknowledgement was not appreciated by the trial court, however, as the Habeas Order mistakenly asserts that Carpenter "argues that the trial court did not have jurisdiction to impose a sentence on the trafficking in marijuana indictment." (Habeas order, p. 10).

More correctly and precisely, Carpenter merely contends that the sentencing judge lost that jurisdiction or authority to alter or "enhance" Carpenter's previously imposed sentence when he

failed to retain jurisdiction past the expiration of the term of court *sine die* in which Carpenter's sentence was fully, finally, and properly imposed by Judge Cottingham. Importantly and consequently, Carpenter thus takes issue with the improper *re-sentencing* after the loss of jurisdiction/authority to do so, i.e. after the concurrent sentences were imposed initially.

The Habeas Order addresses that issue, without support by any citation to authority of any sort, by stating "The trial court was not limited in its jurisdiction as it may have been if Judge Cottingham had been assigned a specific weekly term of court because he was vested with continuing jurisdiction over the case, unique to SGJ cases." (Habeas Order p. 12). That statement is inconsistent with South Carolina law, and as applied to Carpenter results in a void sentence that nevertheless has forced Carpenter to remain incarcerated past his lawful sentence expiration.

A. **Mere appointment over cases arising from the State Grand Jury did not provide the sentencing judge with jurisdiction in perpetuity over any such case, in contravention of basic and universal rules limiting jurisdiction in criminal matters.**

The state grand jury (SGJ) was born from legislation enacted in 1987, which went into effect in February 1989, when Article I, Section 11 and Article V Section 22 of the South Carolina Constitution were amended to accommodate the establishment of the SGJ. 1987 Act No. 150. Thus, the SGJ process was in its infancy at the time Carpenter's pleas were taken in 1990, and procedures in place at that time remain in some respects unclear. In an effort to fill that gap, the Habeas Order's discussion of the purported authority retained by the sentencing judge references the Supreme Court's Administrative order for the SGJ dated March 20, 2003, an order established approximately thirteen years after Carpenter was sentenced. (Habeas Order, p. 11). In a footnote, the Habeas order summarily acknowledges the administrative order came after the relevant sentencing, but justifies reference thereto by saying "...but these were the procedures in place at the time" with no citation to any document, exhibit, or authority. *Id.*

The South Carolina Supreme Court has had to issue a series of Administrative Orders to create procedure for the handling of cases which arise from indictments of the SGJ. *See* 2000-12-07-01, which states, *inter alia*, that "it has been necessary for the Supreme Court... to set out through administrative orders certain duties and responsibilities" governing the SGJ. Administrative Order 2000-1207-01 spelled out a procedure for assigning judges to hear cases following the return of indictments by the SGJ that is identical to the one set forth in the 2003 Administrative Order cited by the Habeas Order. Nevertheless, no published orders appear prior to the 2000 order, so the actual procedure that was in place a decade before is unknown. The procedure generally, however, is irrelevant. What is relevant is the jurisdiction or authority of the sentencing judge at the time of purported sentencing.

The Chief Justice's authority to assign circuit judges for individual terms of court has remained unchanged at least since the last amendment to Article V, Section 4 of the South Carolina Constitution via 1985 Act 9. Article V, Section vests the Chief Justice with exclusive authority to "set the terms of court and... assign any judge" to preside over that term. Therefore, the "term of court" analysis set forth in *State v. Campbell* and its progeny, discussed *infra.*, is the applicable and controlling law in this case, notwithstanding any subsequent orders that may have been issued regarding statewide grand jury proceedings and/or any statutory amendments, including S.C. Code Ann. § 14-7-1630(B) cited in the Habeas Order. That statute relates only to the establishment and operating of the SGJ, and identifying the duties of the presiding judge of the statewide grand jury, it does not speak to the individual terms of court assigned by the Chief Justice.

Thus, nothing in the statutes regarding the SGJ or otherwise supersedes the constitutional authority of the South Carolina Supreme Court to assign judges as necessary to carry on the business of the courts of general sessions. S.C. Const. art. V, 4. Nor could the statutes attempt to

usurp the authority of the Supreme Court and the Chief Justice to assign judges under its exclusive right to do so. A statute which attempted to do so would violate the separation of powers doctrine. *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012) (invalidating the statutory procedure which purported to vest in circuit solicitors with authority to control the docket in general sessions court, as violative of the separation of powers doctrine).

Accordingly, the 1989 order appointing Judge Cottingham to "dispose" of certain cases arising out of a particular grand jury did not create or provide for any continuing jurisdiction in perpetuity. It merely made certain that Carpenter's matter would be brought before Judge Cottingham and that judge only, but still within the framework of whatever term of court during which Judge Cottingham received it. If the jurisdiction of Judge Cottingham continued in perpetuity, the case itself would continue, and thus could never be "disposed" of permanently by Judge Cottingham. That would be inconsistent with the long-standing default rule that a trial judge loses jurisdiction over a particular criminal matter when the term of court during which it was concluded adjourns *sine die*. *State v. Campbell*, 376 S.C. 212, 656 S.E.2d 371 (2008).

The Habeas Order's conclusion as to jurisdiction in perpetuity is so broad as to be absurd, as presumably Judge Cottingham could reconvene a hearing today, some twenty-eight years later, and conduct proceedings on Indictments 90GS4705001 and 5002. The Supreme Court rejects arguments and constructions that lead to an "absurd result," and such holding leading to such results should be reversed. *See Sloan v. Hardee*, 371 S.C. 495, 640 S.E.2d 457 (2007).

B. **Carpenter was fully sentenced on June 4, 1990 such that the subsequent purported actions against him as to his sentence in August 1990 were void for lack of authority on the part of the sentencing judge.**

As correctly noted in the Habeas Order, "Judgment in a criminal case is not final until sentence is imposed." *State v. Robinson*, 287 S.C. 173, 174, 337 S.E.2d 204 (1985). Carpenter's

plea was entered on April 7, 1990, but because Judge Cottingham did not impose any sentence at that time, he thus naturally retained jurisdiction to impose sentences at a later date. *State v. Campbell*, 376 S.C. 212, 656 S.E.2d 371 (2008). Carpenter contends, as is supported by the facts set forth in extensive detail in the Statement of Facts supra, that he was fully and finally sentenced on June 4, 1990. To wit, the Court said "Now, I tell you that this Court will abide by this plea agreement. I tell you that upon the record." (Plea Tr. page 10, lines 19 – 20) and "I am going to abide by the plea agreement. [Carpenter] is entitled to that, and I will do that." (Plea Tr. p. 20, lines 14-15) before executing at least the sentencing sheet for Case 90GS475002 that day, thereby effectuating a resolution of the two charges that were being disposed of jointly.

In other words, having tied the two matters together via the plea agreement that was pointedly and purposefully accepted in April, the matters remained inseparable at time of sentencing, and absent vacation of the entirety of the plea agreement, and resolution of -5002 in June was resolution as to them both concurrently.

The August hearing transcript contains statements as to why Judge Cottingham was attempting to then sentence Carpenter to 25 years consecutive on Indictment No. 90GS47-05001, which confirm that he had already sentenced Carpenter to concurrent sentences in accordance with the plea agreement previously. He determined that he would leave "the first part" of the sentence intact but that he was "enhancing" the sentence on the second indictment. (Aug. Tr. P. 141, lines 2 – 25). No sentencing sheet on 97GS4705001 from the June 4, 1990 proceeding has been found. But the trial judge's statements on August 9, 1990 make clear that he thought he was enhancing a sentence that had already been imposed, on June 4, 1990 when the sentence on 97GS47-5002 was completed. He was clear in his intent on both dates, but equally lacking in continuing authority on the latter, just as he seemed to be aware and acknowledge:

> As you well know, ordinarily during a week of general sessions court our Supreme Court has said that the term ends on Friday and the judge cannot, thereafter, change the sentence later. I don't know what our Supreme Court will say in connection with this.

(Aug. Tr. p. 141, line 21 – p. 142, line 1).

It is well settled that a trial judge loses authority to change a sentence in a criminal matter after the term of court adjourns *sine die*. *Id.* at 373 ("It is a long-standing rule of law that a trial judge is without jurisdiction to consider a criminal matter once the term of court during which judgment[10] was entered expires."). Each week of court is a separate term. *State v. Mixon*, 275 S.C. 575, 274 S.E.2d 406 (1981), cited with approval in *Campbell*.

State v. Campbell is startlingly similar to this case. The defendant Campbell was sentenced pursuant to a plea agreement. *Id.* at 372. After a trial in a related matter, at which Campbell allegedly did not comply with the plea agreement's requirement to cooperate, the State made a motion to vacate Campbell's plea agreement and sentence. The sentencing judge scheduled a hearing, vacated the earlier sentence, and re-sentenced Campbell to life in prison. The Supreme Court[11] vacated the life sentence, determining that the trial judge lacked the authority to reconvene the proceeding and change Campbell's sentence. *Id.* at 374.

The ruling in *Campbell*, confirming that the trial judge's subject jurisdiction is lost at the end of the term has recently been reaffirmed. *Tant v. State*, 408 S.C. 334, 759 S.E.2d 398 (2014), citing to *Campbell*. In *Campbell*, the Supreme Court said that the trial judge's authority in a particular criminal matter ends at the end of a term of court, but that the lack of authority was not

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[10] Judgement was not entered on April 7, 1990, because while the plea was accepted, no sentence was imposed. Judgment was entered on June 4, 1990. The South Carolina Supreme Court has recognized that the "typical procedure" is the defendant pleads guilty pursuant to a plea agreement and then sentencing is held in abeyance until after the defendant has cooperated at the co-defendant's trial." State v. Campbell, at 373-374.

[11] Campbell's appeal was filed with the Court of Appeals, and the Supreme Court certified the case for its own consideration pursuant to Rule 204(b), SCACR. *Id.*

an issue related to subject matter jurisdiction. The Supreme Court's reliance for that declaration was *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 594 (2005). However, the *Gentry* decision construed subject matter jurisdiction issues with respect to a defective indictment and overruled prior decisions that had held that a defective indictment deprived the trial court of subject matter jurisdiction. The discussion regarding subject matter jurisdiction in *Campbell* was not necessary to the Supreme Court's decision as to sentencing after adjournment *sine die* (because Campbell's matter was a direct appeal) and is therefore dicta. Carpenter asserts that, if a trial judge loses authority to act in particular criminal matter after adjournment *sine die*, the trial judge lacks jurisdiction over that particular matter. As confirmed by the Supreme Court in *Tant*, lack of "authority" over a particular criminal matter equates to subject matter jurisdiction in that particular matter.

Carpenter was, in fact, sentenced to 25 years in prison on June 4, 1990 on Count One of Case No. 990-GS-47-5001. (Sentence sheet). It is not known whether the sentencing sheet was executed before, during or after, the in-court proceedings on that date. It is also not known whether a sentencing sheet for the second charge, 90GS475001 was executed on that date, but Judge Cottingham's authority to impose or affect Carpenter's sentence concluded at the adjournment *sine die* of the term of General Sessions court which began June 4, 1990.

C. **Appropriate relief for Carpenter is recognition of expiration of sentence.**

The Habeas Order concludes the discussion on the merits of Carpenter's claim that he only received concurrent sentences for the two indictments by disputing the relief requested by Carpenter. The opinion states that the argument of Carpenter, if accepted, would only result in the absence of a sentence as to the second indictment charge. This misapprehends the argument set forth above, that Carpenter contends he was lawfully sentenced on that indictment, just that it

occurred with finality on June 4, 1990 with the imposition of a concurrent sentence despite apparent misgivings by Judge Cottingham. As such, a determination in his favor should result in recognition that he has fully served his twenty-five-year concurrent sentences.

III. THE "HABEAS ORDER" FAILS TO ADDRESS CARPENTER'S DECLARATORY JUDGMENT BASES FOR RELIEF SOUGHT IN THE ACTION BELOW, SEPARATE AND BEYOND THE HABEAS CORPUS CLAIM.

A. The declaratory judgment claim was fairly raised and is preserved, although never ruled upon by the court below.

Carpenter asserted claims for both declaratory judgment and habeas corpus in its complaint filed in the action below. (Complaint). The Complaint discusses in detail, in the portion of the complaint under the "Declaratory Judgment" heading, and under a sub-heading labeled "Lack of Jurisdiction and Due Process Violation," the facts and circumstances surrounding Appellant's now-disputed sentencing. *Id.* Those allegations address both the purported overreach of authority by the sentencing judge as discussed in section II, as well as the process employed by the judge while acting within the scope of his believed authority at the August hearing when the sentence was "enhanced."

Those two factual and legal bases for relief, which Appellant sought to address via declaratory judgment, directly involved state actors and processes in addition to any involvement by those acting under the auspices of SCDC. That was the exact reason why SCDC argued initially, and Judge Manning agreed, that those portions of the complaint were in the nature of claims that fell upon the responsibility of the State at large. That was, in turn, the basis for Judge Manning's order requiring that the State be added as a party to the action. (Order dated 2.23.17).

Counsel for the State eventually argued at the outset of the trial below, during a discussion as to whether the State should be held in default for failing to respond to the declaratory judgment

portions of the Complaint because the responsive pleading it filed merely addressed habeas corpus, that "I never believed that the declaratory judgment portion of the action really concerned us." (Tr. p. 9, lines 14-15). Perhaps the trial court agreed, as the Habeas order, the one purporting to "dispense[] with the claims made against the State," only referenced and addressed the habeas corpus claim in its caption and body. But as such, the order is not completely dispositive as it purports to be regarding the Defendant State.

The order's failure to directly rule on the declaratory judgment aspect of the action as it relates to the State was pointed out in numbered paragraph two of Appellant's Motion for Reconsideration (Mot. to Reconsider). Once an issue has been properly raised by motion under Rule 59(e), SCRCP, a second motion is not required to sufficiently preserve the issue for review, even if the trial court does not specifically rule on the issue in response to the first motion for reconsideration. *See Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006).

B. Carpenter is entitled to judgment in his favor as to the manner in which his sentence was "changed" and "enhanced" in August 1990.

Discussion on the record at the June 4, 1990 sentencing made clear that the sentencing judge was going to, *sua sponte,* conduct a factual hearing on a later date on new matters that were not embraced by the pleas already entered (and which were not the subject of further charges, arrests or indictment) at a later date to determine whether he, under his erroneously continued jurisdiction as discussed above, would choose to adjudicate facts, without a jury trial to determine whether to sentence Carpenter on the second indictment to a concurrent term or a consecutive term. *See* (June Tr. p. 24, line 6 – p. 27, line 3).

The trial judge characterized the proceedings in August as a hearing on "contempt in disobedience of the plea agreement." (Aug. Tr. p. 144, lines 22-24). Without a criminal charge

pending against Carpenter, without advising Carpenter of his rights to a jury trial or other constitutional protections, and notwithstanding the existence of his plea already having been entered and accepted and a sentencing hearing already concluded, the trial judge proceeded to take testimony from witnesses to determine whether Carpenter had complied with his obligations under the plea agreement. *Id.*

The trial judge made no determination or statement as to the burden of proof or persuasion to which he subjected the evidence he considered, or the weight of the evidence that he relied upon to declare that Carpenter's sentence should be "enhanced." The "sound discretion of the trial judge" would have been the standard for something like withdrawal of a guilty plea. *State v. Riddle*, 278 S.C. 148, 150, 292 S.E.2d 795 (1982). But here, Carpenter was being held to the plea, and forced to prove his compliance therewith.

To wit, the Court stated "I find beyond absolutely any doubt in my mind that the State of South Carolina has lived up to their agreement in every respect. I further find that he has failed to do so." (Aug. Tr. P. 141, lines 2 – 25). First, the matter being inquired about required an examination of Carpenter's actions, not those of the State, so a statement as to what the State had shown seems irrelevant.[12] More importantly, however, this seems to have intimated that it was Carpenter who was required to prove, *beyond a reasonable doubt*, that he had fulfilled the plea terms.

[12] It's unclear what the state had accomplished/proven "beyond absolutely any doubt," other than what would presumably be their only obligation as part of the plea agreement: to cease prosecuting the other charges faced by Carpenter prior to his plea on the two specified charges.

Other statements by the court on that date[13] do not evidence any clear, objective standard governing the proceedings:

- "I'm inclined to think he knows who [an unidentified alleged co-conspirator] is... I'm not asking him to disclose that to me, but, you know... [I] was born at night but not last night." (Aug. Tr. p. 136, lines 19-25).

- The trial judge continued "I may be wrong, but I really conclude that... Carpenter has absolutely, is absolutely thumbing his nose at the Court and to the State of South Carolina..." (Aug. Tr. p. 138, lines 10-13).

Our Supreme Court has addressed discovery and disclosures and standards of proof for probation revocation proceedings, and how they differ from pure criminal proceedings to establish guilt. *State v. Hill*, 630 S.E.2d 274, 368 S.C. 649 (2006). But upon information and belief, no clear authority establishes the standard to which Carpenter should have been afforded in this August hearing, to the dubious extent it was lawful anyway, although *Hill* opinion implies some manner of disclosure should have been done prior to the August hearing. Carpenter's counsel raised these due process issues when he stated "There is a clean way for the State to accomplish what they're attempting to do. This is a muddy way, but I guess they're entitled to proceed whichever way they want to proceed." (Aug. Tr. p. 10, lines 9-13). Carpenter also raised these in

[13] Judge Cottingham also appears to have allowed knowledge of grand jury proceedings generally, perhaps beyond those immediately before the court, to factor into the proceedings against Carpenter at that time we well, "I've been the presiding judge over this whole grand jury indictment and I've got a feel now, based on the pleadings and what I have heard now, for what occurred and who did what." (Aug. Tr. P. 139, lines 16-24). Judge Cottingham was, therefore, moving beyond the terms of the plea agreement and holding Carpenter accountable for facts and information obtained by the judge as part of the grand jury process, but to which Carpenter was shielded by law. See S.C. Code Section 4-7-1720.

his complaint in the underlying matter, but they were not ruled upon despite adequately having been raised and brought to the attention of the trial court.

They may have been previously described as "muddy," but they were fatally deficient, justifying the setting aside of all proceedings occurring in August 1990 as they relate to Carpenter, even if the judge retained some manner of authority or jurisdiction.

IV. SCDC ENGAGED IN ACTIVITY THAT CONSTITUTED A "CHANGE" WITH RESPECT TO THE CRIMINAL SENTENCE BEING SERVED BY CARPENTER, WHICH TRIGGERED DUE PROCESS RIGHTS FOR CARPENTER THAT WERE NOT MET.

"Under both our state and federal due process clauses, no person shall be deprived of life, liberty, or property without due process of law." *Tant v. SC Dep't of Corr.*, 408 S.C. 334, 340, 759 S.E.2d 398, 401 (2014) citing U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Id.* The "length of an inmate's incarceration implicates a constitutional liberty interest" which requires compliance with due process requirements. *Id.* (citing *Greenholtz v. Inmates Of Neb. Penal & Corre. Complex*, 442 U.S. 1, 18, 99 S.Ct. 2100, 60 L.Ed. 668 (1979) ("Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary government action.")). As result, the *Tant* court held that whenever SCDC "alters an inmate's sentence in its records, it must give the inmate formal notice of the change and advise him of his right to file a grievance and obtain a hearing." *Id.* 408 S.C. at 342, 759 S.E.2d 401.

A. SCDC altered the "sentence in its records" when it revised upwards the calculation of Carpenter's projected max-out date, and changed his status from parolable to non-parolable.

The SCDC Order errs in its conclusion that Carpenter's "sentence was not recalculated from SCDC's initial determination" and therefore Carpenter's due process rights were never implicated. (SCDC Order p. 4). This statement blatantly ignores the undisputed evidence. It is undisputed that Carpenter's max-out date suddenly increase in "projected max-out" date after years of steady decline, and two decades of incarceration. (Offender summaries, exhibits I-Q to petition). Never "recalculated" despite an email communication from staff of SCDC to Carpenter's former counsel that stated "Carpenter's sentences were updated..." and "...prior to his sentence being changed..." (emphasis added) (Hearing exhibit D, email from Stephanie Willis dated 4.20.15).[14] Never "recalculated" despite an internal audit report prepared by SCDC that referenced Carpenter with the note "Sentence updated...". (Trial Exhibit B, "Gonzales review").

The SCDC Order incorrectly concludes "there was no change in the sentences." (SCDC Order p. 5). That is a clear misreading of Tant, which recognizes a trigger of due process rights whenever SCDC "alters an inmate's sentence *in its records*," and not when it changes the actual sentence itself. In *Tant*, the sentences themselves never changed, merely SCDC's interpretation thereof and related records.

Furthermore, the SCDC order is internally inconsistent, at least once in consecutive sentences of the order. At one point, it states "SCDC did not alter Plaintiff's sentence." But the very next sentence begins "SCDC made a clerical adjustment..." (SCDC Order, p. 5). Later in

[14] That same email acknowledged the only reason Carpenter did not receive a due process hearing was because "that was not the process at the time," not because anyone disputed the implication of SCDC actions as to Carpenter's rights. *Id.*

the order, whatever SCDC did was labeled as a "ministerial change." *Id.* at p. 6. And at another point, the SCDC Order states "While [Carpenter's] sentence was corrected in 2011..." (SCDC Order p. 8).

Conclusions that such "updates" and "corrections" and "changes" do not constitute SCDC "altering the sentence in its records" is plainly at odds with the standards articulated in Tant.

B. SCDC effectuated another "alteration" of Carpenter's sentence when it revoked sentence credits.

The other clear "change" perpetrated by SCDC was the removal of credits previously earned by Carpenter. In Carpenter's 1993 offender summary (Complaint Exhibit I), SCDC recorded that Carpenter had already earned 700 "GT days" and 102 "earned work credits" for a "total service time earned" of "001072." *Id.* at p. GC391. A presumably later, but undated Offender Summary produced by SCDC reflects no good time or work credits, but does reflect that Carpenter will become eligible for work release on February 6, 2015. (Complaint Exhibit J p. GC460).[15] It is unclear (at least from records produced) when SCDC unilaterally removed Carpenter's work and good time credits, but equally clear that it has, and violated Carpenter's due process rights by taking away earned credits without due process.

SCDC cannot remove earned credits from an inmate's record once they have been earned. *Furtick v. S.C. Dep't of Corr.*, 374 SC. 334, 549 S.E.2d 35 (2007). "The statutory right to sentence-related credits is a protected 'liberty' interest under the Fourteenth Amendment, entitling an inmate to minimal due process to insure the state created right was not arbitrarily abrogated." *Id.* 649 S.E.2d 37. In *Furtick*, the South Carolina Supreme Court quoted from *Superintendent, Mass. Corr.*

[15] This Offender Summary reflects that Carpenter's "max-out" date is "04/07/2017."

Inst. v. Hill, 472 U.S. 445,454, 105 S. Ct. 2768, 86 L.Ed.2d 356 (1985) to state "[w]here a prisoner has a liberty interest in good time credits, the loss of such credits threatens his prospective freedom from confinement by extending the length of imprisonment. Thus, the inmate has a strong liberty interest in assuring the loss of good time credits is not imposed arbitrarily."

V. SCDC ENGAGED IN ACTIVITY THAT VIOLATED CARPENTER'S DUE PROCESS RIGHTS THROUGH ITS INTENTIONALLY DISPARATE TREATMENT OF CARPENTER AS COMPARED TO OTHERS SIMILARLY SITUATED.

The Equal Protection Clause states, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *King v. Rubenstein*, 825 F.3d 206, 220 (4th Cir. 2016).

A. Carpenter was treated differently than others with whom he was similarly situated.

Bobby G. Horne (hereafter "Horne") was arrested in connection with the same course of events as was Carpenter, and also pleaded guilty to a violation of S.C. Code Ann. Section 44-53-370(e). (Trial Exhibit F, pp. 3-4). Horne's plea was to trafficking in cocaine, and was included as part of Case No. 90-GS-47-5002, the same case in which Carpenter pleaded guilty to trafficking in cocaine. Horne was also sentenced to 25 years under Section 44-53-370(e). His sentence for trafficking in cocaine was therefore identical to Carpenter's, cementing his status as "similarly situated" to that of Carpenter.

As to unequal treatment, Horne was given sentence credits for good time served, pursuant to S.C. Code Section 24-13-210, earned work credits pursuant to S.C. Code Section 24-13-230, was eligible for parole, and was eligible for work release and release and supervised furlough. As

a result, Horne was released from active custody to supervised furlough on August 30, 2001, and his sentence terminated completely on March 1, 2002. (Trial Exhibit F, pp. 1-2). On information and belief, other inmates who have been in the custody of SCDC with 25-year sentences for trafficking in cocaine in violation of Section 44-53-370(e) have been granted work credits, good time credits, other administrative credits, have been released on supervised furlough or some combination thereof. (Trial Exhibit B, p. 3675).

Carpenter was initially allowed to earn the same credits that Horne earned, and was originally made eligible for work release. At some point, after Carpenter's earned credits were stripped from him, and his eligibility for work release was also extinguished, all unilateral acts by SCDC. These disparate treatments occurred on a sentence on the same indictment, and of the same offense, as was Carpenter sentenced. Thus "treated differently from others with whom he is similarly situated" cannot fairly be contested.

B. Carpenter's ongoing different treatment is intentional and arbitrary.

As discussed supra, SCDC changed Carpenter's sentence in its records, apparently at the same time that it engaged in such changes to the records of many other individuals. Even assuming such changes were proper, they occasioned an opportunity to treat every such affected inmate in the same manner, yet have failed. Horne remains released, without any apparent desire or attempt on the part of the State to seek the claimed lawful fulfillment of his full sentence. In the words of SCDC's counsel at trial, "Mr. Horne got out. He got lucky." (Tr. p. 70, line 23). Further, counsel stated "I think if the Department had the resources to have gone out and bring people back in or legally do that, maybe they would have." (Tr. p. 71, line 6-8).

It is respectfully submitted that the acknowledgement that others in the exact same position as Carpenter merely "got lucky" and will not be subject to the allocation of nearly unlimited resources of the State to apprehend them, despite leaving confinement "early" by supposed clerical or calculation error or otherwise, constitutes "intentional or purposeful discrimination" by the State against Carpenter.

VI. ACTIONS OF THE TRIAL COURT SO COMPLETELY PREJUDICED THESE PROCEEDINGS AS TO CONSTITUTE A DENIAL OF CARPENTER'S DUE PROCESS RIGHTS, REQUIRING RELIEF BE GRANTED TO CARPENTER TO AVOID AN AFFRONT TO THE JUDICIAL SYSTEM.

As noted above, the non-jury merits hearing before Circuit Court Judge Robert E. Hood occurred on Tuesday, June 6, 2017 and the matter was taken under advisement. The following Monday, June 12, 2017, Judge Hood's office advised that "would like a time this week to discuss this case in chambers." (Email 2017.06.12 requesting status conference). After hearing from counsel, Judge Hood confirmed the in chambers conference for 10:00 a.m. on June 13, 2017. (Email 2017.06.12 confirming status conference).

At the in-chambers conference attended by Judge Hood and counsel for the parties, Judge Hood proposed that Carpenter execute a full general release in favor of the state, in which case he would grant Carpenter's petition for habeas corpus. (2017.06.30 db to Judge Hood).[16] Judge Hood asked the parties to work out the details and agree to that resolution no later than June 30, 2017. *Id.*

[16] Neither Judge Hood nor defense counsel have disputed the recitation of events memorialized by Carpenter's counsel in the multiple communications with the Court. Neither have they disputed Judge Hood's proposal for a grant of habeas corpus in exchange for Carpenter's full release in favor of the State.

That same day, Carpenter was reached by telephone and agreed to release any civil claims he may have against any department of the State of South Carolina as a condition of the grant of habeas corpus, as proposed by Judge Hood. Carpenter's counsel communicated Carpenter's agreement to a release to defense counsel. (2017.06.13 db to defense counsel). Carpenter executed a full general release in favor the State and the Department of Corrections as proposed by Judge Hood, and a copy of the full release was transmitted to defense counsel by email on Friday, June 16, 2017. (2017.06.16 hw email to defense counsel with signed release).

There were several weeks of no communication with either Judge Hood or defense counsel, and on June 27, 2017, Carpenter's counsel contacted defense counsel to inquire as to the status of their discussions with their respective clients (since the June 30, 2017 deadline imposed by Judge Hood was approaching). (2017.06.23. hw to defense counsel). Counsel for SCDC responded that SCDC was "unable to alter or amend Carpenter's sentence). (2017.06.23 Damon to HW). Similarly, counsel for the State responded that the State as "unable to consent to Mr. Carpenter's release." (2017.06.23 Mitchell to hw).

On June 26, 2017, Carpenter's counsel sent a proposed order granting habeas corpus to Judge Hood, along with the correspondence between counsel and a copy of the general release executed by Carpenter as requested by Judge Hood. (2017.06.26 hw to Hood with exhibits). To preserve the record, Carpenter's counsel filed the entirety of the correspondence and communication referenced above, including the full release signed by Carpenter, with the Richland County Clerk of Court, so the events following Judge Hood's proposal for a consent resolution of the petition for writ of habeas corpus were properly a part of the record. (Letter to Clerk of Court

from db 6-28-2017 with email and proposed order to Judge Hood, with exhibits A through F[17]). Judge Hood's secretary confirmed receipt of the June 28, 2017 correspondence and advised that Judge Hood was on vacation. She related, however, "please feel free to continue to work toward a final resolution if at all possible." (2017.06.28 secretary to counsel).

Carpenter's counsel was aware at all times that Judge Hood's proposed release in exchange for a grant of habeas corpus was likely improper. (EAO-05-17)[18]. However, after consulting with appropriate persons, Carpenter and his counsel consented to the proposal, because it would rapidly effectuate the ultimate and proper result in this action, which counsel has attempted to expedite[19] from the outset.

On June 30, 2017, Carpenter's counsel sent Judge Hood a proposed order addressing the merits of the petition for writ of habeas corpus, in light of the objection raised by counsel for the State. (2018.06.30 db to Hood with proposed order 002). Judge Hood went silent. Carpenter's counsel requested a status conference. (2017.07.11 db to Hood). Instead, Judge Hood requested "proposed orders" to Judge Hood for consideration. (2017.07.12 Hood asking for proposed orders). The directive provided no guidance as to how Judge Hood intended to rule. Both defense counsel sent proposed orders to Judge Hood. (Proposed Orders).

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[17] The Clerk's office returned the $25.00 check confirmed that the "documents placed in file." (2017.07.03 clocked letter).

[18] That opinion, dated October 21, 2015, opined that a solicitor could NOT "use the criminal process to obtain a favorable result for a third party in a civil action (potential or actual) even if the solicitor has no direct involvement in the civil action."

[19] The initial, separate habeas corpus pleading was captioned as "Petition for Writ of Habeas Corpus (expedited)." While no order was every signed specifically designating the matter as expedited, the Chief Administrative Judge assisted with an expediting scheduling of hearings in the matter.

Judge Hood eventually signed the proposed orders submitted by defense counsel, but there were months of silence before the orders were issued. (2017.08.28 db to Hood). The signed orders were finally provided to all counsel of record on October 2, 2017. (Motion for Reconsideration).

Until the merits hearing in this matter on June 6, 2017, Carpenter and his counsel were unaware that Judge Hood had previously served as a prosecutor for the statewide grand jury.[20] In retrospect, and with that knowledge, there is an explanation for Judge Hood efforts to advocate for the State so as to protect his former employer. Carpenter's counsel can only assume that Judge Hood's reticence to meet or communicate with counsel for the parties after Carpenter accepted Judge Hood's proposal to grant habeas corpus to Carpenter in exchange for a to execute a general release in favor of the State (which proposal was accepted by Carpenter) must have stemmed from Judge Hood's realization that he had stepped over the line in advocating for the State and proposing the deal which Carpenter accepted.

Carpenter asserts that the trial judge's obvious bias in favor of the State compels the appellate court to vacate Judge Hood's orders and allow the matter to be decided by the South Carolina Supreme Court, where the matter is currently pending on a petition for that Court to hear the matter in its original jurisdiction. In the alternative, Carpenter assets that his rights have been so violated by the trial judge's proposal that equitable relief should be granted to Carpenter as set forth in his petition for habeas corpus and request for declaratory judgment.

Carpenter and his counsel recognize that they did not object to Judge Hood's proposal, and that under normal circumstances, an issue to which no objection is made at the trial court level is not preserved for appeal. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641

[20] http://www.sccourts.org/circuitCourt/displaycirjudge.cfm?judgeid=2164

S.E.2d 903. However, other instances where appellate courts have not required an issue to have been first raised to and ruled upon by the trial court include the following: *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 633 S.E.2d 143 (2006) (addressing issue in the interest of judicial economy regardless of preservation problem); *Main Corp. v. Black*, 357 S.C. 179, 592 S.E.2d 300 (2004) (addressing the issue of appealability *ex mero motu* when not raised by the parties); *State v. Higgenbottom*, 344 S.C. 11, 542 S.E.2d 718 (2001) (agreeing with the Court of Appeals that raising issue after the trial court increased petitioner's sentence would have been futile); and *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (2000) (stating a party need not engage in a futile act in order to preserve an issue).

Carpenter asserts on appeal that the trial judge's obvious bias in favor of the State, as evidenced by his proposal to protect the State from any civil liability in exchange for granting Carpenter's request for habeas corpus, so prejudiced these proceedings so as to require the affirmative grant of relief by the appellate court. Had the trial judge disclosed his bias in favor of the State prior to the merits hearing, Carpenter would have asked that Judge Hood disqualify himself from hearing the case, although it likely would have been a futile act, regardless. As events unfolded, it is apparent that the trial judge harbored an extrajudicial bias that made it inappropriate to decide the issues presented by Carpenter's petition. Canon 3E(1)(a), Rule 501, SCACR.

The application of this rule in prior precedent reflects that Judge Hood's bias in favor of the State was, in fact, disqualifying. *See State v. Jackson*, 353S.C. 625, 578 S.E.2d 744 (Ct. App. 2003), citing *Payne v. Holiday Towers Inc.*, 283 S.C. 210, 321 S.E.2d 179 (Ct. App. 1984) for the principle that bias sufficient to disqualify a judge from hearing a particular matter must "stem from an extra-judicial source and result in a decision based on information other than what the trial

judge learned from his. . . participation in the case as a judge." *State v. Jackson*, 353 S.C. at 627. This rule is clearly articulated by both appellate courts following the Supreme Court's decision in the seminal case of *Patel v. Patel*, 359 S.C. 515, 599 S.E.2d 114 (2004). *See Koon v. Koon*, 379 S.C. 149, 666 S.E.2d 230 (2008); *Srivastava v. Srivastava*, 411 S.C. 481, 769 S.E.2d 442 (Ct.App. 2014).

In examining this standard, numerous statements of the trial judge during the merits hearing, which seemed innocuous at the time, reflect his personal knowledge and approval of the process of prosecutions before the statewide grand jury system.

- The trial judge declared that Carpenter's case had been prosecuted as a state-wide grand jury case based on the case number of the underlying criminal matter. "Was he in a state grand jury case? . . . Okay. Then he was in a state grand jury case." (Tr. P. 13, lines 10-17).
- On two occasions, the trial judge dismissed relevant authorities because they were not "state grand jury cases." (Tr. P. 23, line 13-21; Tr. P. 31, lines 12-17).
- The trial judge presumed that Court Administration had assigned Judge Cottingham to hold the term of Court in August, 1990, when Judge Cottingham changed Carpenter's sentence under indictment number 1990-GS47-5001, even though there was no evidence that such an order existed. (Tr. P. 37, line 16 – p. 41, line 9).
- In referring to the length of time between the time of Carpenter's original sentencing, the trial judge stated "[t]hat's part of the problem why you're not supposed to handle these cases 27 years later." (Tr. P. 41, lines 18-24).

- In response to Carpenter's argument that the original trial judge erred in changing Carpenter's sentence on indictment 5001 without charging Carpenter with any additional offenses, the trial judge stated "[y]ou don't have to file a charge to have a cooperation hearing." (Tr. P 46, lines 1-4).

- In response to Carpenter's argument that he had a liberty interest in work credits he was given, but which were taken away from him without a hearing, the trial judge stated "some eight-dollar-an-hour employee at the Department of Corrections makes a mistake, he gets it all[21]?"

- He's giving him another chance to cooperate. It's clear as day. . . I mean, he doesn't explicitly say that, but anybody that's ever handled as many state grand jury cases as I have know that's exactly what happened." (Tr. P. 96, line 13-20).

Once Judge Hood insisted on a full release of the State as a condition precedent to granting Carpenter's writ of habeas corpus (a week after the hearing and Judge Hood's statements set forth above were made), it became clear that Judge Hood had evolved away from his role as a judicial arbiter and had become an advocate for the State. Bias is evident. Appellate relief is required.

In *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000) the Supreme Court vacated a conviction and death sentence based on improper actions taken by the solicitor, which was "a case involving deliberate prosecutorial intrusion into a privileged conversation between a criminal defendant and his attorney." The Supreme Court stated that "[t]he integrity of the entire judicial system is called into question" by the intentional misconduct of the prosecutors in *Quattlebaum*.

[21] Existing case law establishes that earned work credits, once earned, cannot be taken away without due process. *Furtick v. S.C. Dep't of Corr.*, 374 SC. 334, 549 S.E.2d 35 (2007).

Id. 527 S.E.2d. at 109. The Supreme Court also stated that "deliberate prosecutorial misconduct raises in irrebuttable presumption of prejudice." *Id.*

Carpenter submits that the appellate courts of this State have authority to remedy outrageous wrongs committed below. Just as the Supreme Court noted it had was "fortunate" that it had not previously had to address the misconduct of the solicitor's office in Quattlebaum, it is equally fortunate that no precedent exists wherein a trial judge has attempted to cut a deal with an inmate who seeks habeas corpus. Carpenter submits that conduct of Judge Hood in this matter is in proposing a "deal" with Carpenter that he would grant habeas corpus if Carpenter would grant a full release against the State for any civil remedies he may have is equally as prejudicial as the prosecutorial misconduct in *Quattlebaum*.

By way of analogy, Carpenter craves reverence to the decision of the South Carolina Supreme Court in *Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010). In *Vasquez*, the Supreme Court reversed the PCR judge's ruling that a failure by Vasquez's trial attorneys to object to a solicitor's reference to Vasquez as "a domestic terrorist" did not constitute ineffective assistance of counsel. The Supreme Court disagreed and concluded that the failure of trial counsel to object to the reference to their client as "a domestic terrorist" by the solicitor constituted ineffective assistance of counsel constituted a denial of due process because "so infected the trial with unfairness as to make the resulting death sentence a denial of due process." *Id.* at 567.

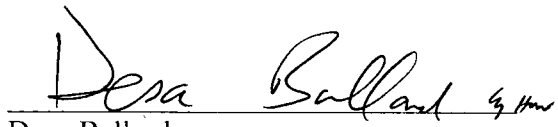
The trial judge's proposed deal between Carpenter and himself and/or the defendants was abhorrent and a complete distortion of the legal process. Relief by the appellate court is required.

Carpenter has complied with that portion of Judge Hood's orders that concluded that Carpenter's request for habeas corpus must be initiated in the original jurisdiction of the South

Carolina Supreme Court[22]. Carpenter has also asked the Supreme Court to certify this appeal and consolidate it with the pending Petition in the Original Jurisdiction. (Petition for Certification of Appeal dated December 20, 2017).[23] Should the Supreme Court grant original jurisdiction (as Judge Hood said was appropriate), without consolidating it with this appeal, it may not be necessary for the appellate court to decide on any relief from the advocacy and proposed "deal" Judge Hood made, and that Carpenter attempted to accept.

CONCLUSION

For the reasons set forth more fully above, Carpenter contends that his claims were not given full and fair consideration pursuant to South Carolina law, and therefore prays for an order reversing the two orders dismissing his claims for declaratory relief and writ of habeas corpus, with remand of the matter back to the trial court for further proceedings.



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February 2, 2018

[22] Carpenter has done so even through Judge Hood's ruling directly contradicted (and in effect reversed) the prior order of Retired Chief Justice Toal in this action.

[23] Carpenter's position is that this appeal should be consolidated with the original jurisdiction proceeding, so the Supreme Court can consider: the appellate issues and the effect of the trial judge's role as an advocate for the State, fully reach the merits of the habeas corpus petition that was denied in the court below, and consider the declaratory judgment claim that was not addressed.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
ROBERT E. HOOD, CIRCUIT COURT JUDGE

Case No. 2016-CP-40-6916
Appellate Case No. 2017-002577

Charles Eugene Carpenter,.....Appellant,

v.

South Carolina Department of Corrections and
The State of South Carolina, ...Respondents.

PROOF OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on March 12, 2018, I served a copy of the **Appellant's Initial Brief** and **Appellant's Designation of Matter** in the above-captioned case on the following individuals by standard US Mail, with sufficient first-class postage affixed, addressed as follows:

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March 12, 2018

Via U.S. Mail
Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Charles Eugene Carpenter v. SC Department of Corrections, et. al.*
Appellate Case No.: 2017 – 002577

Dear Ms. Kitchings:

Please find enclosed for filing an original and one copy of the **Appellant's Initial Brief** in the above-referenced matter. Also enclosed are an original and one copy of **Appellant's Designation of Matter** pursuant to Rule 209, SCACR. After both have been filed, please return the clocked copies to our office in the enclosed, self-addressed, stamped envelope.

Please do not hesitate to contact our office if you should have any questions. With warm personal regards, I am,

Sincerely yours,

Desa Ballard
desab@desaballard.com

cc: *Via U.S. Mail*
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