THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Appeal from Administrative Law Court

Honorable HW Funderburk, Jr., Administrative Law Judge

Appellate Case No.: 2018-001456

Terry Smith 160785 .....Appellant

v.

South Carolina Department of Corrections.....Respondent

INITIAL BRIEF OF APPELLANT

Terry Smith 160785 F4B 1207
Lee Correctional Institution
990 Wisacky Highway
Bishopville SC 29010
Pro Se Appellant

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Statement of the Case

This matter is before the South Carolina Supreme Court pursuant to the Notice of Appeal filed on August 3, 2018, by Terry Smith ("Appellant"), an inmate incarcerated in the South Carolina Department of Corrections ("Respondent" or "SCDC" or "government"). Appellant appeals the Final Order of the Honorable HW Funderburk, Jr., dated July 3, 2018 from the South Carolina Administrative Law Court ("ALC"), that issued from Appellant's grievance of May 26, 2017, appealing SCDC's miscalculation of his sentence. The grievance proceeds from Respondent's miscalculation of Appellant's prior sentence that began in 1994, which miscalculation proceeded forward into the calculation of the start of Appellant's current sentence.

SCDC contended, in its Final Agency Response of January 20, 2018, that no miscalculation had occurred. In the earlier Step One response to Appellant's grievance, SCDC admitted a minor miscalculation that failed to address the enormity of the actual miscalculation.

The ALC received Briefs and the Record, and on July 3, 2018, issued a Final Order reversing and remanding SCDC's Final Agency Response to require recalculation of Appellant's sentence without redressing the entirety of Appellant's grievance. The Appellant is constrained to file this appeal and proceed with his grievance because of specific failures in the review by the ALC.

Arguments

Preamble

Since it is settled as a matter of law that SCDC did not properly construct and calculate Appellant's 1994 sentences, and held Appellant in custody unlawfully from 2004 through 2006, the start-date of the Appellant's current sentences are incorrect. But this erroneous calculation forms only part of the miscalculation of Appellant's current sentences, because SCDC, as the final acting agent of the government of South Carolina, merely performs the service of holding the Appellant in violation of the Constitution and Laws of the United States and of the State of South Carolina.

The ALC ordered a recalculation of Appellant's sentence to begin from the expiry of the Distribution sentence of 1994, as if recalculating the sentence start-date could make an adequate redress for the unlawful injuries. But in 2004, when the Respondent began its illegal custody, the Appellant's continued custody under the 2002 warrants was only prospective. This pretends, after the fact, that a later conviction can *excuse* two years of unlawful confinement that irreparably damaged, *inter alia*, Appellant's mental stability, or *explain* why the Respondent held the Appellant at all, in what a recalculation seeks to

re-purpose as mere prospective pretrial confinement.[1] A simple recalculation cannot accomplish that purpose. This is the primary error in the ALC's Order, and this primary error is accompanied by others.

The unlawful custody occurred because the government had a purpose for its misconduct, a purpose rooted in an earlier matter. The motive force of the Appellant's unlawful confinement and 2006 sentences is written into the available record in a way that disguises the government's deliberate misconduct: the Appellant was convicted of Homicide in 1994, and then that conviction was reversed by the Supreme Court of South Carolina in 1996. But the government of South Carolina[2] was determined to circumvent that outcome.

After the 1996 dismissal, the government resorted to a methodology built beforehand for more general purposes, *and built with the intention of legitimizing indefinite custody,* to attempt to retain custody of the Appellant for life. This became the government's specific intention in regard to this Appellant as a response to the Supreme Court's restraining action, but it was also its intention, all along, to use this methodology as a general tool against both the Appellant and other defendants.

This is a fundamental violation of due process that prejudiced the Appellant in numerous ways, producing a gross miscarriage of justice which requires this Court's attention and redress. "The touchstone of due process is protection of the individual against arbitrary action of the government." See *Dent v West Virginia*, 129 US 114 (1889).

The Government Misconduct

In 1989, Appellant was charged with Pointing a Firearm in Cherokee County, South Carolina. The court imposed a 2 year sentence. In 1993, Appellant was again charged with Pointing a Firearm in

[1] Pretrial detention belongs to the circuits. Punitive detention belongs to the SCDC. The Appellant was held in "punitive" pretrial detention? This exists in America?

[2] South Carolina uses SCDC as their ultimate agent; "SCDC" and "government" may be considered interchangeable terms in the following argument because SCDC is the confining actor at the direction of the government-general.

Cherokee County, South Carolina. The court imposed an 8 month sentence. These minor charges will become important later.[3]

In 1994, Appellant was charged with ABHAN, Distribution of Cocaine, and Homicide in Cherokee County, South Carolina. The court imposed a life sentence for the Homicide, and a 10 year concurrent sentence for the ABHAN; four months later, the court imposed a 10 year *consecutive* sentence for the Distribution. Students of the court could wonder what difference 4 months made in the sentencing practice, since the Distribution charge arose from merely $80 worth of crack cocaine.

While it is true that South Carolina was in the middle of the War on Drugs, America has long decided that the disparity of these sentencing practices is unacceptable. But ten years for less than a gram of cocaine seems excessive even then, and to be served *consecutively* to a life sentence that, less than 4 months before had *not* been enhanced with consecutive sentencing to a coupled ABHAN, suggests a change in the court's intentions toward the Appellant.

As shown below, the court would have already been made aware that the Homicide charge was vulnerable to reversal, and the court probably intended, even then, that the Distribution had to run consecutively to the ABHAN simply to reach a 20 year sentence. The court's intention was punitive for a reason that was outside the boundaries of the charge before the bar, and this is significant of deliberate misconduct.

In 1996, the Supreme Court of South Carolina overturned the Appellant's Homicide conviction. This came less than two years after the sentencing for Distribution. An observation about the practice of criminal justice in South Carolina seems necessary. The entire state has less than 100 Solicitors and assistant Solicitors; this small number of professional practitioners forms a cosy, interconnected group of about the size of a college football team. In fact, they are as emotionally involved with each other as members of a highly competitive sports team. Overall, they prosecute a hundred or so homicides each year, and since homicides are the headline of crime, these prosecutions are closely watched. South Carolina has a

[3] These matters, as they exist in the record currently before this Court, differ from their representations in the records made available previously by SCDC. In legal terms, these records are in a state of tension with previously offered records. More plainly, the current records have been fabricated to support SCDC's current contentions about the Appellant. Readers of George Orwell will be familiar with the method and purpose.

microscopically small reversal rate for any conviction, and even less so for homicide. The 1996 Supreme Court reversal of Appellant's homicide conviction made the Appellant instantly notorious, moreso that the reversal came upon direct appeal in a mere two years time. This was the ultimate in-your-face victory dance for a criminal defendant.

But that moment did not come as a shock to the Solicitors and Circuit Judges of South Carolina; the overturn was a long touchdown pass that they were forced to watch from the sideline in nail-biting agony as it lumbered downfield for two years. Only one segment of the criminal justice community in South Carolina was positioned to play, and that led to the slap-to-the-face consecutive sentence for the Distribution conviction in Cherokee County.

And of course the misconduct did not end with the courtrooms and lawyers. The government recruited and welcomed SCDC into the misconduct. The Appellant was made notorious within the correctional community for the reversal of his conviction, and the primary method of surreptitious retribution was the misuse of SCDC's Classification System. The Appellant was immediately denied the Classification advancement appropriate to his changed sentence length[4].

The Respondent unlawfully held Appellant in custody as if he was still serving a life sentence until a lawyer intervened for the Appellant. The Appellant accepted the resulting custody advancement without pursuing the matter further, because he thought at the time that he faced a simple mistake—the deliberate course of misconduct was not yet evident. But while housed at the Givens Correctional Institution, when the Appellant asked for a job advancement and was told that he could not advance—and that the refusal was based upon some unspoken or unspeakable reason, despite the fact that he was serving only a nonviolent 10 year sentence for Distribution.

In 2000, Appellant was paroled, but was restricted to house arrest and restricted with an ankle monitor. These restrictions were maliciously and arbitrarily imposed, without being part of ordinary parole treatment for a Distribution sentence or contained in the sentence itself. The Appellant chafed at the

[4] In the 1990s Classification system employed by SCDC, the change from a life sentence to a nonviolent sentence would have equaled the immediate emergence into minimum custody score.

treatment, and after four years plus some substantial parole time had passed from the reversal of the Homicide conviction, he was severely distressed.

The Appellant's movement to Canada followed, but the timing is peculiar. The government issued a prescient parole warrant on May 2, 2002, that seemed to trigger the warrants of May 21 and June 28, 2002. Which came first, the persecution or the criminal behavior? No felony conduct was required to issue the parole warrant because the government had motives other than the service of justice. This entire course of events sprang from the government's malicious, sadistic and vengeful mistreatment and the Appellant's consequent stress and discomfort. The Appellant was alienated from his freedom by the government's misconduct, and the Appellant suffered prejudice that led to attempted flight—and of course this triggered the government's "lawful" pursuit.[5]

Canadian authorities arrested the Appellant on July 13, 2002, at the behest of the government, and administered a savage beating upon that arrest consequent to their mistaken belief that they were apprehending a fugitive murderer—a belief instigated by the government's postings. Charges filed by the Canadian authorities represent the after-the-fact search for self-justification normal in police misconduct, where they seized items from Appellant that were not evident prior to arrest, and charged Appellant with assault for the act of resisting brute force with his body—as evident even in the poor photocopy of the16-year-old arrest record. [See Fingerprint Identification Form, NRPS.] The arresting officers were not harmed and did not receive medical attention.

Nonetheless, the Appellant was charged and served time in Canada. The Appellant requested to serve time in Canada because he feared to return to South Carolina custody—he already understood, in a sense, that the government of South Carolina meant to hold him permanently. He didn't fear the pending

[5] "Ours is a statutory society. If an act is not explicitly forbidden, it is not a crime. The result has been an enormous volume of laws and ordinances, covering every conceivable arena of human action. Cops are the officials ultimately responsible for enforcing the countless rules governing behavior. Given the sheer number of rules, not only have they the power to pick and choose which laws to apply but they can even prod and maneuver a target into an inadvertent breach of conduct. Experienced cops usually develop a broad, general awareness of the laws, confident that they'll find something they can, like a Procrustean bed, apply to the circumstances. A favorite ploy is to provoke an angry citizen into sufficiently loud outbursts to justify an arrest for disorderly conduct. The challenge is to push the target over an imaginary line that instinct will tell him or her constitutes a breach of something. The ability to maneuver the unwary into a trap is well known to cops but rarely realized by outsiders."

--*The Police Mystique*, Chief Anthony V. Bouza (Ret.)

charges; his fear arose from the certainty that no matter the actions or charges, he would be imprisoned and no effort at defense would be fruitful. In fact, the government could have easily tried him *in absentia,* but did not do so. His state of mind was already seriously damaged due to the government's deliberate misconduct and aggravated by the serious beating he suffered in Canada.

After his sentence expired in Canada, the Appellant was extradited to New York in late 2003 or early 2004. Then he was extradited to South Carolina and remanded to the custody of SCDC. By policy, upon intake, SCDC searches the records of the entering offender and performs a thorough and complete classification to achieve proper assignment of the offender, and the results are entered into the Offender Management System. At this time, the Respondent would have been aware that they possessed no parole revocation order and understood the law as applied in the case of parole and external custody[6]—that parole custody is fully equivalent to time served. Appellant's release from SCDC custody was either imminent or actual at the time of his return.

It seems plain that at this moment of transfer that especial care would have been taken in Appellant's case. The Appellant was returned via extradition, this required unusual paperwork, and would have received special oversight from supervisors. External police agencies participated in the transfer and exchange of custody. At this point, the government deliberately decided to retain custody of the Appellant and calculated his sentence unlawfully.

This moment is especially significant of deliberate misconduct. Even if faceless individual members of the government exerted influence from external agencies to bring these conditions about, the Respondent remains responsible for an outcome that was subject to its oversight. SCDC was well aware of the controlling law and the instant circumstances, and claims benefit of "the expertise and discretion of prison officials"[7]—another way of saying that they are expert at their tasks—but expertise does not produce such grievous errors accidentally.

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[6] *State v Robinson*, 305 SC 469, 409 SE 2d 404, 112 S Ct 1477 (1992): "while a convict is subject to a South Carolina detainer, he is constructively in South Carolina custody. As a result, a convict will receive credit for time spent in another jurisdiction while subject to a South Carolina detainer."

[7] From *Sellers v State*, 259 SC 564, 193 SE 2d 513 (1972),

Appellant complained about the unlawful confinement, but his complaints were ignored until his "release" in 2006. According to the Respondent's record[8], the Appellant was released to Cherokee County, but he was in fact returned to Spartanburg County. This fiction of release was possibly spuriously based upon supposedly lawful custody consequent to the Pointing a Firearm charges from Cherokee County (1989 and 1993). The haste of Appellant's departure from SCDC custody is made plain by the disposition of Appellant's property; this was held by the Respondent, who variously denied existence, returned part of the property (at McCormick CI), and returned a second part of the property (at Lee CI) during subsequent custody based upon the 2006 sentencing sheets. At the point of Appellant's sudden "release" from SCDC custody in 2006, supervisors in Respondent's classification division must have been aware of the "error", and they immediately took steps to cover the deliberate misconduct.

In 2006, the Appellant belatedly faced the charges issuing from 2002 warrants, where the actions, facts, and memories had been deliberately left to grow stale. Appellant's counsel on the 2006 sentences, Gerald Wilson, PA, told him, in the course of plea negotiations, that the Solicitor would allow no downward departure in the plea range, *and that this was because the Solicitor had knowledge and involvement in the 1994 Homicide charge that was subsequently overturned.* In fact, every Solicitor in South Carolina would have been aware of the overturned Homicide, since Appellant is one of only 20 or so men currently living [?] who have had a Homicide of any type overturned. The Appellant had a real belief in Wilson's statement, a belief reinforced by the government's unlawful custody that he had complained of unavailingly for 2 years, and was prejudiced as a result.

Plainly, Appellant foresaw nothing in his future but continued imprisonment, even contrary to law and fact. Appellant pled to the charges in 2006 in fear and despair. Appellant's state of mind was induced by the malicious acts of the government, which was determined to keep him imprisoned, even unlawfully. Whether a 23 year sentence was valid for the crimes charged (in Appellant's case the purported Armed Robbery was committed with gestures from a beer bottle), the court deliberately chose the middle point of the range of sentencing agreed in the plea bargain, and then informed the Appellant by letter that the court

[8] The SCDC record as it existed in 2006, where the Appellant was "released to probation".

was unable to impose a specific calculation upon his time-served and that that power lay in the hands of the government. [Letter from Judge Alford, dated December 13, 2006.]

After 2006, the Respondent computed the Appellant's current sentences from the facially correct 2006 sentencing sheets, consequent to a plea that the government had secured with the tool of its deliberate misconduct. Since then, SCDC slyly reminds the Appellant of the Homicide charge by "inadvertently" mentioning it at Classification reviews where it is used to deny him custody advancement—in exactly the same manner that the Homicide charge was used against him during the 1990s. The government still smarts, 22 years later, from the humiliation of the overturned conviction and cannot refrain from reminding the Appellant. This is the ultimate in-your-face victory dance for the men with the chains, keys, guns, and licenses to use them.

But more importantly, the repeated denial of custody advancement (in which the Appellant possesses a significant liberty interest) is significant of the government's continued deliberate misconduct, and demonstrates that the overturned Homicide charge is indeed the wellspring of its malice against the Appellant. The government's malice has prejudiced the Appellant through applied, deliberate misconduct. The Appellant's state of mind is grievously injured by the certainty that the government intends to unlawfully hold him in custody permanently through manipulation of the record.

I. DID THE ALC IMPROPERLY FAIL TO EXAMINE AND REDRESS EVERY ELEMENT OF APPELLANT'S GRIEVANCE?

At the outset, the ALC failed to examine and redress every element of the Appellant's grievance. This simply followed the suit played by the Respondent, since SCDC likewise ignored the complaints embedded in the original grievance in the exact manner that they ignored the primary point about the calculation of the Appellant's sentence. The impact of the miscalculation on the Appellant's custody status and general classification are the primary remaining points within the control of the Respondent. Suggesting that the sentence calculation and the fruit of the sentence calculation are two separate issues is

clearly meant to delay process, and here SCDC has repeatedly used sentence miscalculation to constrain the Appellant's confinement. The court should not "divide issues past the point of logic". See *Johnson v Yancey*, 2005 WL 2290253 (ED Ark, Sep 16, 2005).

Since the point of a grievance is to give Respondent prison officials an opportunity to address and rectify the complaint, it would serve little purpose to stop and wait for the promised relief on one part when other parts of the same grievance were not redressed by the Respondent or the ALC. By appealing those points, the Appellant prays that this Court can address the issues squarely and provide relief. This also serves the interest of judicial economy by saving a repetition of the process of grievance to address matters that are already available at this time, since they were raised or implicated in the Appellant's grievance. "The interest of judicial economy is strongly served by litigating all of the claims within a single action, rather than piecemeal". See *Kennedy v Mendez*, 2004 WL 2280225 at *1-2 (MD Pa, Oct 7, 2004).

II. DID THE ALC IMPROPERLY FAIL TO INCLUDE CUSTODY DETERMINATION IN ITS ORDERED REDRESS?

Other issues were not redressed by the ALC despite being squarely presented, notably the claim arising from the erroneous calculation of custody advancement. "An inmate may seek review of Department's final decision in an administrative matter . . . These administrative matters typically arise in two ways: (1) when an inmate is disciplined and punishment is imposed and (2) when an inmate believes prison officials have erroneously calculated his sentence, sentence-related credits, or *custody* status." (Emphasis added.) See *Al-Shabazz v State*, 338 SC 354, 527 SE 2d 742 (2000).

These issues should have been redressed at least for the simple purpose of judicial economy, and moreso because they implicated the Appellant's contention that he has been targeted for specific mistreatment. The government's misconduct has become evident during the course of the grievance procedure, and this misconduct directly prejudices the Appellant in ways available to the Court's examination.

III. DID THE ALC ACT IMPROPERLY BY FAILING TO GRANT APPELLANT'S MOTION FOR THE EXPANSION OF THE RECORD?

The ALC should have granted the Appellant's motion for expansion of the record [Motion for Expansion of the Record], but refused to do so stating: "However, because this proposed document does not address the grievance at issue in this case, the Court will not consider . . . " But in fact the Step 2 Grievance was squarely on point with an allegation in the instant grievance—the Respondent's deliberate usage of a charge overturned by the Supreme Court.

This denial of motion was contrary to established law in dealing with prison grievance matters, which examine the factual background of prisoner complaints, and sometimes use evidence from other matters to determine by inference the substance of factual arguments, such as finding an issue of material fact where defendants said plaintiff filed no grievances but plaintiff produced copies of the grievances and the decisions on them. See *Baker v Schriro*, 2008 WL 3877973 at *5 (D Ariz, Aug 20, 2008). In this case, the proffered document spoke directly of the government's misconduct.

And in general, a prisoner needs a fair and substantial opportunity to enlarge the record; this requires the assistance of the reviewing court, or at least its indulgence. The court has noted the inability of incarcerated persons to conduct their own investigations, and even under a name-the-defendant rule, doesn't require a prisoner to provide information he does not possess. See *Kikumura v Osagie*, 461 F3d 1269 (10th Cir 2006) and *Brown v Sikes*, 212 F3d 1205 (11th Cir 2000).

A disconnected series of incidents coalesced, during examination, into the clear pattern of deliberate government misconduct, and yet this misconduct has not, because it cannot due to the Appellant's circumstances, be made perfectly clear without an enlargement of the record. In the initial brief to the ALC, the Appellant made this clear by stating: "[And in any event, the Appellant is still searching for the relevant document to prove these issues; they should be forthcoming.]" And in the Motion for Expansion of the Record, "The Appellant submitted his brief on April 3, 2018; in that brief, Appellant explained to the Court that further documentation could be forthcoming. [Appellant's Brief, p 9.] While the Appellant,

strictly speaking, intended to produce documents related to his confinement in Canada and the government's refusal to try him speedily [and still so intends]".

IV. DID THE ALC FAIL TO SUPPLY THE PROPER COMPULSION TO THE RESPONDENT'S FEEBLE EFFORTS TO APPLY THE COURT'S ORDER?

The Appellant clearly understands that grievance results are often pointless, rendered useless by the Respondent saying "yes" or "yes, but", and then doing nothing corrective. In the instant grievance, the Respondent did exactly that—granted "relief" in the Step 1 Grievance that was *never applied.* Even after the ALC Final Order, the Respondent has done nothing, to date, to correct Appellant's sentence or custody. This renders the process of grievance useless, by simply withholding the fruits of the recalculated sentence.

These instant specifics represent the Respondent's general pattern of behavior toward the Appellant in the course of 22 years since the Supreme Court overturned the homicide conviction—ie, continue to impose whatever penalties and exactions remain within its power, even unlawfully, to render the judgment of that court irrelevant *by pretence of agreement followed by continued penalization.* The ALC admitted that it could not do more than: "affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced . . . "; Final Order at pp3-4, quoting SC Code Ann Sec 1-23-380(5). The ALC did reverse, but it appears that it lacks the authority to properly compel the Respondent to comply with its Order.

And so the Appellant needs this Court to be the Court of sufficient authority to compel the Respondent's actions—not merely remand them into further mismanagement and deliberate misconduct. The court has observed that "requiring a prisoner who has won his grievance in principle to file another grievance to win in fact," risking the prospect of a "never-ending cycle of grievances," and "could not be tolerated". See *Dixon v Page*, 291 F3d 485 (7th Cir 2002).

V. DID THE ALC IMPROPERLY FIND THAT THE CONSTITUTIONAL QUESTION WAS NOT PRESERVED?

Despite the ALC's notice in its order ["However, Appellant did not raise this constitutional issue prior to his initial brief. As such, this issue was not preserved . . ."; Order, page 3, note 6.] the constitutional matter was properly raised in the institutional grievance and clarified at the appellate level, within the constraints of the space provided in SCDC grievance documents and the space allotted for briefs in the ALC. In both of these places the limits constrained the narrative of facts and argument necessary to enunciate the complaint.

But a full enunciation was not required. A grievance need not "allege a specific legal theory or facts that correspond to all the required elements of a particular legal theory". See *Burton v Jones*, 321 F3d 569 (6th Cir 2003). "When the administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. As in a notice pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming." See *Strong v David*, 297 F3d 646 (7th Cir 2002). And also, "claims not enumerated in an initial grievance are allowed notwithstanding the exhaustion requirement if they 'are like or reasonably related to the substance of charges timely brought before [the agency]'". See *Carter v Symmes*, 2008 WL 341640 at*4 (D Mass, Feb 4, 2008). Appellant gave a clear statement of his purpose in challenging SC Code Ann Section 24-13-40 as applied to the calculation of his sentence.

Additionally, the ALC was incapable of reviewing the constitutional issue, as the Appellant admitted in his Reply Brief: "[the Respondent is] wasting the Court's attention with a lengthy explanation of the Court's lack of jurisdiction over the Constitutional violations committed under color of state law that form Question Two. The Respondent must surely know that the matters in Question Two of the Appellant's complaint are presented to secure exhaustion prior to presentation in a higher court where the jurisdiction and scope of review will be substantially different." [Reply Brief, p 2] And this admission is in accordance with controlling law. "When an inmate challenges the constitutionality of a statute,

Department and the ALJ must follow the statute and leave the question of whether it is constitutional to the courts." See *Al-Shabazz v State*, 338 SC 354, 527 SE 2d 742 (2000).

In any event, the Appellant did briefly raise the Constitutional issue in his Notice of Appeal to the ALC, following the Final Agency Decision from his Step 2 Grievance. [See exhibit, where Appellant asserted that the Respondent's behavior was in violation of SC Code Ann Sec 1-23-380(5)(a).] Thus, the ALC's finding to the contrary was erroneous.

VI. IS SCDC ENTITLED TO HOLD APPELLANT IN CUSTODY BY CALCULATING HIS SENTENCE PURSUANT TO SC CODE ANN SECTION 24-13-40 WHEN THE USAGE OF THE STATUTORY PROVISION DIRECTLY PROVOKES VIOLATIONS OF THE APPELLANT'S 6TH, 8TH, AND 14TH AMENDMENT RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CUSTODY WAS MALICIOUSLY CONSTRUCTED BY THE GOVERNMENT AS A REPLACEMENT FOR THE HOMICIDE CONVICTION OVERTURNED BY THE SUPREME COURT IN 1996?

The government of South Carolina utilizes SC Code Ann Section 24-13-40 as an instrument in unconstitutional operations. Specifically:

By relying on prosecutorial discretion to pick and choose which charges or other matters to address at any given time;
By relying on an indefinite statute of limitations to allow charges and other matters to languish until needed as a tool to produce confinement; and
By relying on the language of 24-13-40 which allows the government to serialize the confinement for a conviction in indifference to the date of commission of the offense charged.

Using these, the government performs a gestalt operation under the color of state law that violates the constitutional rights of the citizens.

In Appellant's case this is meant to serialize a sequence of minor charges into a life sentence—to replace and revenge the life sentence that was overturned by this Court in 1996. The instant course of deliberate misconduct is particular to this Appellant, but the methodology was honed and perfected through partial deferments of prosecutions for numerous defendants until it became accepted into general use, and so the government must be constrained both from the general usage and this specific use.

The more general motive is made clear by the government's usage of the Pointing a Firearm charges from Cherokee County, minor felonies that should have been adjudicated, penalized, and served out within a few years. These charges were so minor at their inception that the court passed sentences of 8 *months* and 2 *years,* but the charges remain unresolved after 19 *years.*[9]

This failure to properly and timely prosecute and penalize a charge, under the guise of prosecutorial discretion, is a direct challenge to the purpose of the Sixth and Fourteenth Amendments when the deferred charge is subsequently used to prolong confinement. Prosecutorial discretion does not override the purpose of the Sixth Amendment, which is plainly meant to prevent excessive confinement while awaiting the disposition of charges. The example Pointing a Firearm charges were allowed to remain idle, despite every chance to complete prosecution and confinement, with the deliberate intent to revive them when necessary to prolong the Appellant's confinement.

Likewise, the government had warrants in hand for the Appellant in 2002—a parole warrant for May 2, 2002, and warrants for more serious felonies from crimes alleged to occur on May 21, 2002, and June 28, 2002. Then the government refused to accept custody of the Appellant from Canada and proceed with trial in the manner described in the Sixth Amendment—speedily.

This lapse was intentional, and relied on the statutory enactment of SC Code Ann Section 24-13-40 which computes the time served on a sentence from the date of the imposition of the sentence—but nowhere in that statute does it grant the government power to ignore the Sixth and Fourteenth Amendments. The government may not under any circumstances delay trial merely to extend the length of confinement. This usage violates the Sixth and Fourteenth Amendments.

The government meant to enhance the length of the eventually imposed sentence by waiting until the ultimate moment of the Appellant's "release", in 2006, for trial of the 2002 charges—as if that impact were the intention of 24-13-40. In fact, SC Code Ann Section 24-13-40 provides the government motive

[9] The Pointing a Firearm charges from Cherokee County have transmuted, in the record before this Court, into something far different than what they were presented as in 2006. SCDC's calculations are visible in the preserved remnants of the 2006 records that were made available to the Appellant during the course of his plea to the 2002 warrants. This record differs so substantially that it seems, in fact, altered. But the 2006 records are not available to this Court without some special effort and permission.

to break the Sixth Amendment; SC Code Ann Section 24-13-40 invites the government to act in an arbitrary manner in violation of the constitution.

If, as it seems likely, that the government would argue that they did not have Appellant present for trial, then this Court should ask the government how they have been willing to try defendants *in absentia* in hundreds, if not thousands, of felony cases in the last decade alone. Since trial *in absentia* is acceptable in circumstances where a defendant has no excuse whatsoever for absence, then it must have been acceptable in Appellant's circumstances—except that the truth of the government's motive is clearly that the delay was intended to take advantage of the language of 24-13-40 and permit a lengthy addition to the Appellant's sentence before it legally began, by falsely constructing the sentence start-date from a date far removed from the time of arrest.

At the same time, by illegally enhancing the length of the sentence, the government imposes cruel and unusual punishment by artificially constructing a sentence in excess of the length mandated by law and imposed by the court. Whether the 23 year sentence was valid for the crimes charged (in Appellant's case the purported Armed Robbery was committed with gestures from a beer bottle) becomes irrelevant when the government may, by merely postponing trial, impose an additional four years sentence for the crimes charged. This violates the Fourteenth and Eighth Amendments. This usage of SC Code Ann Section 24-13-40 likewise invites the government to act in an arbitrary manner in violation of the constitution.

In Appellant's case, the government brought to bear an agenda derived from a prior overturned conviction (the 1994 Homicide), and deliberately serialized the prosecution of the Appellant to impose additional confinement beyond the sentence imposed by the court. [See discussion above.] The government, in this instance, was both aware of the prior reversed conviction and determined to avenge it by exceeding the confinement imposed by the sentencing court. This violated the Eighth Amendment as well as the Fourteenth Amendment.

This overturned conviction in 1996 was the turning point in the government's treatment of the Appellant. Until that moment, the government simply mistreated the Appellant as they would any other defenseless citizen (the Homicide charge itself was unjustified by fact or circumstance, but that is the

treatment that the government accords any defenseless citizen). After that turning point, the government actively attempted to revenge itself upon the Appellant with arbitrary acts of mistreatment.

Whatever the advertised legislative intent of SC Code Ann Section 24-13-40, the law grants the executive branch an as-applied writ to infringe the constitutional rights of the citizens under color of state law; 24-13-40 is unconstitutional as applied. And when the legislature enacted 24-13-40, they acted in consultation with the executive, and colluded to this very outcome—in a general sense. In the intervening years, this methodology has been used to oppress the boisterous young men of the State of South Carolina, and that was a foreseeable outcome more in accord with South Carolina's apartheid past than its supposed colorblind present or future. Danger exists in leaving the tools of oppression lying about for whoever might find them—that is no different than leaving a pistol out where a child might reach it. These tools, and especially this law, must be disarmed—broken—to prevent future oppressions.

In the Appellant's case the problem doesn't lie, so much, in the imposition or calculation of any single sentence, but in the gestalt—the administration of an aggregate of sentences with the intention of retaining indefinite unlawful custody, clearly typified by the revocation and reimposition of probation on Cherokee County charges to retain custody throughout a 20-year span (from an original 8-month charge that was handily available as a revocation at any time Appellant was released, despite that service should have long ended with proper prosecution on that minor sentence) and the deliberate delay in prosecution of the 2002 warrants despite the Appellant's concurrent confinement (where at the same time the government is quite willing to try, *in absentia*, defendants that are not even in custody). In sum:

SC Code Ann Section 24-13-40 *Computation of time served by prisoners* violates the Sixth, Eighth, and Fourteenth Amendments to the US Constitution by handing the government control of the sentence start-date through the usage of delayed prosecution, specifically in this instance, for four years past the time where they had custody of the Appellant and should have brought him speedily to trial. [If the trial court has no discretion in whether a defendant will receive credit for time served, how can the government have discretion? See *State v Boggs*, 388 SC 314, 696 SE 2d 597 (Ct App 2010).]

The government may not claim that they did not foresee that 24-13-40 was unconstitutional as applied; ignorance of any law provides no defense; and surely any usage of law should be first compared to the fundamental outline of our law—the Constitution—before, during, and after usage by any practitioner. A good carpenter measures the results of his work against his intentions at all times, and learns thereby. So must the government likewise act.

Conclusion

WHEREFORE, the Appellant is entitled to full redress from a gross miscarriage of justice that springs from the government's deliberate misconduct. "Prisoners remain citizens, and live also under the protection of the Constitution and the laws." See *Wolff v McDonnell*, 418 US 539 (1974) at III. The Appellant respectfully requests that the Court grant the following relief:

1. Order costs plus one dollar compensatory damages for the Appellant.

2. Order punitive damages by vacating or setting aside Appellant's 2006 sentences with prejudice, since they are derived entirely from the government's misconduct. Consequently Order Appellant's immediate release.

[Asked how punitive damages could be something other than money, the Appellant suggests that

the government *prints* money, and has an endless supply; punitive damages should take from the government something that the government actually desires, and they seem to desire to hold the Appellant in custody.]

3. A Declaratory Order to force the Respondent to cease calculating sentences from the sentencing-date of a latterly-imposed sentence, in violation of the constitutional rights of the citizens.

4. As an alternative to number 2, Order the Respondent to compute the sentence start-date for Appellant's 2002 warrants to begin at his 2002 arrest, despite that the government failed, in violation of the Sixth, Eighth, and Fourteenth Amendments, and as part of a pattern of deliberate misconduct, to prosecute those charges until 2006.

5. Provide such other and further relief that this Court may deem just and proper.

Respectfully Submitted,

s/ Terry Smith

August 17, 2018
Bishopville, SC

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Appeal from Administrative Law Court

Honorable HW Funderburk, Jr., Administrative Law Judge

Appellate Case No.: 2018-001456

Terry Smith 160785 ..... Appellant

v.

South Carolina Department of Corrections.....Respondent

Proof of Service

The undersigned hereby certifies that on August 17, 2018, true and correct copies of the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal were served by depositing the same in the prison mail system, postage prepaid, to the following addresses:

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Clerk's Office
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August 17, 2018
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