

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2013-000167

William A. Cudd, #280216,

Appellant

v.

William R. Byars, Jr., Director, S. C. Dept.
of Corrections; and Alan R. Wilson,
Attorney General for South Carolina

Respondents.

RECORD ON APPEAL

William A. Cudd, #280216
1657 Jonesville Hwy,
Union, SC 29379
APPELLANT, PRO SE

Christopher D. Florian
Post Office Box 21787
Columbia, SC 29221
ATTORNEY FOR RESPONDENT

Alan Wilson
South Carolina Attorney General
Post Office Box 11549
Columbia, SC 29211
ATTORNEY FOR RESPONDENT

RECEIVED

MAR 25 2013

SC Court of Appeals

INDEX

Petitioner's Petition For Habeas Corpus	1
Respondents' Brief In Support of Motion To Dismiss	13
Respondents' Supplemental Memorandum in Support of Motion to Dismiss	22
Petitioner's Return to Respondents' Post Hearing Brief	29
Court Reporter's Explanation for Lack of Transcript	37
Order to Dismiss Writ of Habeas Corpus	39

CERTIFICATE OF APPELLANT

The undersigned hereby certifies that the Record On Appeal contains all material proposed to be included by any of the parties and not any other material.

Date March 22, 2013

William A. Cudd
William A. Cudd, #280216
1657 Jonesville Highway
Union, SC 29379
APPELLANT, PRO SE

RECEIVED

MAR 25 2013

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE CIRCUIT COURT

PETITION FROM DORCHESTER COUNTY

Case No. _____

2011-CP-18-2032

William A. Cudd #280216,

Petitioner,

vs.

William R. Byars, Jr., Director,
S. C. Dept. of Corrections; and,
Alan Wilson, Attorney General for
South Carolina,

Respondents.

CLERK OF COURT
DORCHESTER COUNTY

2011 OCT 10 PM 3:51

NOTIFIED COPY

COMPLAINT
(Petition For Habeas Corpus)

William A. Cudd
1657 Jonesville Highway
Union, SC 29379

2

THE STATE OF SOUTH CAROLINA
IN THE CIRCUIT COURT

PETITION FROM DORCHESTER COUNTY

2011-CP-18- 2032

Case No. ~~0-08 cv 0241 RBH~~

William A. Cudd, 280216

vs.

William R. Byars, Jr. Director,
S.C. Dept. of Corrections; and
Alan Wilson, Attorney General for
South Carolina

Petitioner

CLERK OF COURT
DORCHESTER COUNTY

Respondents

CERTIFICATE OF SERVICE
(PETITION FOR HABEAS CORPUS)

I hereby certify that I have this date served upon the Respondents a true copy of
Petitioner's NOTICE OF PETITION FOR HABEAS CORPUS AND COMPLAINT by
placing same into the United States Mail, first class postage affixed and addressed as
follows:

OFFICE OF THE GENERAL COUNSEL
S.C. Dept. of Corrections
4444 Broad River Road
Columbia, SC 29210

Mr. Alan Wilson
S.C. Attorney General
Post Office Box 11549
Columbia, SC 29211

Dated: 6-25-2011

/s/

William A. Cudd
William A. Cudd, Petitioner
1657 Jonesville Highway
Union, SC 29379
10

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MAR 25 2013

SC Court of Appeals

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

William A. Cudd, #280216

Petitioner

vs.

William R. Byars, Jr., Director,
S.C. Dept. of Corrections; and
Alan Wilson, Attorney General,

Respondents.

IN THE CIRCUIT COURT

Case No. ~~0-08-cv-0241-RBH~~

2011-CP-18-2032

APPLICATION TO PROCEED
WITHOUT PREPAYMENT OF
COSTS AND AFFIDAVIT IN
SUPPORT THEREOF

I, William A. Cudd, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefore. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) I am an inmate within the South Carolina Department of Corrections, and receive no compensation for my labor.
- (3) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor.

Dated: 6-21-2011
Union, South Carolina

Is/ William A. Cudd
William A. Cudd, #280216
Petitioner

SWORN AND SUBSCRIBED TO before

me this 21 day of June, 2011.

Robert Garner
Notary Public of South Carolina

My Commission Expires 4/18/15

RECEIVED

MAR 25 2013

SC Court of Appeals

4

THE STATE OF SOUTH CAROLINA
IN THE CIRCUIT COURT

PETITION FROM DORCHESTER COUNTY

2011-CP-18-

2032

Case No. (

William A. Cudd, #280216

Petitioner,

vs.

William R. Byars, Jr., Director, S.C.
Dept. of Corrections; and Alan Wilson,
Attorney General for South Carolina

Respondent.

NOTICE OF PETITION FOR
HABEAS CORPUS

YOU WILL PLEASE TAKE NOTICE that the above named petitioner, William A. Cudd, will move before the Circuit Court for Dorchester County to issue a Writ of Habeas Corpus for the immediate release of the Petitioner, and that this petition shall be heard at a date and time to be specified by the Court.

Under Rule 4 and 5, South Carolina Rules of Civil Procedure, you are hereby SUMMONED and required to respond to the enclosed Petition for Habeas Corpus, a copy of which is herewith served upon you, and to serve a copy of your Reply to the petition upon the Petitioner at the address shown below, within thirty (30) days after service hereof, exclusive of the day of service, and if you fail to Reply to the Petition For Habeas Corpus, judgment by default will be sought against you by the Petitioner for the relief demanded in the petition.

Dated: 6-25-2011
Union, South Carolina

/s/ William A. Cudd
William A. Cudd, Petitioner
1567 Jonesville Highway
Union, South Carolina 29379

RECEIVED

MAR 25 2013

SC Court of Appeals

EXHAUSTION

On December 3, 2001, Petitioner plead guilty in Dorchester County, South Carolina, to manufacturing marijuana. Petitioner was sentenced to the Department of Corrections for fifteen years, to be completed upon service of eighty-five percent (85%), and without parole. Petitioner did not appeal his sentence or conviction.

On November 27, 2002, the Petitioner filed an application for post-conviction relief. On January 18, 2006, approximately three years after he filed for post-conviction relief, an evidentiary hearing was convened to adjudicate Petitioner's allegations. On May 25, 2006, Petitioner's application for post-conviction relief was denied. Petitioner appealed to the South Carolina Supreme Court, seeking a Writ of Certiorari. Petitioner's petition for certiorari was denied on June 12, 2008.

Petitioner sought a Writ of Habeas Corpus from the Federal District Court on July 8, 2008. On September 25, 2009, the Honorable R. Bryan Harwell issued an order granting the State's motion for summary judgment. Petitioner appealed, and on September 10, 2010, the Fourth Circuit Court of Appeals denied Petitioner's petition. The Petitioner petitioned the United States Supreme Court for a writ of certiorari, but was denied on March 15, 2011. All remedies available to the Petitioner have been exhausted.

JURISDICTION

This Court has jurisdiction over the parties and matter herein pursuant to South Carolina Code Sections 17-17-10, 17-17-30, and 17-17-100. Further, Article 1,

6

Section 18, and Article 5, Section 20, of the Constitution for the State of South Carolina, invests a detainee the right to petition the Circuit Court for review of unlawful detentions.

The Circuit Court has jurisdiction to hear this case because it is situated within the narrow confines of judicial rules which permit Circuit Courts to consider petitions for habeas corpus relief. Over the course of three cases heard between January and March of 1998, the South Carolina Supreme Court held that the Uniform Post Conviction Procedure Act severely limited the availability of habeas corpus, in that the "Act" takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of a conviction or sentence. S.C. Code Section 17-27-20. However, the Supreme Court acknowledged that in some cases the Circuit Courts may hear and grant habeas corpus petitions to those few persons who can clear the procedural hurdles.

In Gibson vs. State, 495 S. E.2d 426 (S.C. 1998) (Decided Jan. 12, 1998), the Supreme Court held that a habeas petitioner must first exhaust all available PCR remedies. Further, a petitioner must allege sufficient facts to show why other remedies, such as PCR, are unavailable or inadequate, and that the issues raised in the habeas petition could not have been raised in a prior PCR application. The Court's opinion in Gibson appeared to enumerate a clear set of rules for seeking habeas relief from the lower courts.

On the same day on which Gibson was decided, the Court also decided Simpson vs. State, 495 S.E.2d 429 (S.C. 1998). Like Gibson, Simpson involved a constitutionally

7

inadequate malice charge to the jury which the defendant failed to include in his initial PCR application. In an attempt to raise the belated issue, Simpson filed a petition for habeas relief.

Though the supporting facts of Gibson and Simpson were practically identical, the Court took a more severe stance when deciding Simpson. The Court held, "we now hold that a matter which is cognizable under the Act may not be raised by a petition for a writ of habeas corpus before the circuit or other lower." (Simpson at 431, internal citation omitted). At first blush, the Court's holding appears to end the lower court's ability to hear habeas petitions, but in the concluding paragraphs, the Court held, "However, our action today does not suspend the writ, but merely curtails its use to those situations where the act would not be applicable." (Simpson at 431). Simpson acknowledges that in some cases it would be necessary for the lower court to review and possibly grant petitions for habeas corpus relief.

Finally, in Keeler vs. Mauney, 500 S.E.2d 123 (S.C. App. 1998), the Court of Appeals interpreted and applied the rules established in Gibson and Simpson, holding that "The import of the holdings in Gibson and Simpson is clear. A person is procedurally barred from petitioning the circuit court for a writ of habeas corpus where the matter alleged is one which **could have been** raised in a PCR application." (Keeler at 124, emphasis added). This holding implies that a defendant is procedurally barred from petitioning the lower court for habeas corpus relief on any ground which could have been raised in a **prior** PCR application, or at a **prior** time period.

The Court of Appeals' decision in Keeler accomplishes several objectives. First,

8

it validates the continued efficacy of the rules established in Gibson and Simpson for seeking habeas relief in the lower court. Second, it provides a firm rule for petitioning the lower court for a writ of habeas corpus: A Person may seek habeas relief 'where the matter alleged is one which could not have been raised in a [prior] PCR application.'

The factual basis underlying the instant petition for habeas corpus did not exist prior to July of 2010, and therefore, the Petitioner could not have included the present claims in his original post-conviction application. A Legislative expansion of the rights available to Petitioner has rendered Petitioner's sentence void.

Post Conviction relief in the present context must be viewed as inadequate, because pursuing that avenue of relief would result in one to three years of additional incarceration of Petitioner. Petitioner's present sentence is void, now, and an additional period of incarceration would only compound the harm to Petitioner. Consequently, post conviction relief is an inadequate remedy for the due process violations being exacted on the Petitioner.

As the Petitioner has exhausted all remaining avenues of relief, save that afforded by the present action, this Court's jurisdiction is proper and necessary in order to remedy the Constitutional due process violations arising from Petitioner's continued detention. Upon belief and knowledge, the Petitioner alleges that the Respondents are in violation of Petitioner's Fourteenth Amendment Due Process Rights, in that Petitioner has served out his maximum term of imprisonment to which the Court had power to sentence him, and that the excessive portion of Petitioner's sentence should be declared void, and the Petitioner discharged from custody.

9

FACTS SUPPORTING ISSUANCE OF WRIT

1. In Dorchester County on December 3, 2001, Petitioner plead guilty to manufacturing marijuana and received a 15-year sentence, under . S. C. Code Section 44-53-370 (b) (2).
2. Upon entry to the S.C. Dept. of Corrections the Petitioner was informed that he must serve a minimum of eighty-five percent (85%) of his sentence prior to his release, a term of imprisonment approximately thirteen (13) years in length.
3. Petitioner appealed his conviction and sentence, but was denied relief by the post conviction court of Dorchester County; the Supreme Court of South Carolina; the Federal District Court; the Fourth Circuit Court of Appeals; and the United States Supreme Court.
4. The Petitioner states that all avenues of relief have been exhausted, and the present habeas corpus petition is his only available means of remedy.
5. A statutory amendment to S.C. Code Section 44-53-370 (b) (2) altered the status of Petitioner's sentence by decreasing the length of time which must be served in order to satisfy the court's commitment order. The previous sentence guidelines required service of 85% of Petitioner's sentence before completion. The new guidelines require but 51%; the variance effected through allowance of additional good conduct credits.
6. The above referenced statutory amendment further altered the status of Petitioner's sentence by providing for consideration for parole, and participation in community-based re-entry programs, opportunities not fully available to Petitioner at present.

- 10
7. The Petitioner holds these amendments must be applied retroactively to the Petitioner, in that the amendments are remedial in nature, and the amended statute does not specifically forbid retro-active application of the statute's amendments.
 8. The Petitioner states that under the Supreme Court's holding in S.C. Dept. of Revenue vs. Rosemary Coin Machines, 528 S.E.2d 416 (S.C. 2000), the amendments to S.C. Code Section 44-53-370 (b) (2) must be applied retroactively to Petitioner's case. In Rosemary, the Court held that, "...statutes that are remedial or procedural in nature are generally held to operate retroactively. Statutes affecting the remedy, not the right, are generally retrospective."
 9. The Petitioner states that the amendments to S.C. Code Section 44-53-370 (b) (2) affect the remedy and not the right, in that Petitioner may presently receive good conduct credits to the value of 15% of his sentence, and the amended statutes merely increases that percentage to 49%. As the amendments to the statute effect the remedy and the right, they must be applied retrospectively to Petitioner's case.
 - Point ① 10. The South Carolina Court of Appeals defined "remedial" as "A statute is remedial when it creates new remedies for existing rights or enlarges the rights of persons under liability." Hooks vs. Southern Bell Telephone Co., 351 S.E.2d 900 (1986). The amendments to S. C, Code Section 44-53-370(b) (2) created no new rights benefiting Petitioner, but only enlarged Petitioner's existing rights, and therefore the amendments must be applied to Petitioner's case.

11. The Petitioner states that application of the amended statute to his case renders his sentence satisfied, and that further incarceration is unlawful and in violation of Petitioner's Fourteenth Amendment Due Process Rights.
12. Petitioner states that the excess of his sentence is void, which invests this Court with the authority to grant Petitioner habeas corpus relief, ordering his immediate release.

WHEREFORE, having shown good and just cause, the Petitioner respectfully moves this Court to grant the immediate release of the Petitioner, based on Petitioner's satisfaction of the sentence ordered by the Dorchester County Circuit Court.

Respectfully submitted,

Dated: 6-25-2011

Union, South Carolina

/s/ William A. Cudd

William A. Cudd, Petitioner

STATE OF SOUTH CAROLINA,

COUNTY OF

IN THE COURT OF COMMON PLEAS

JUDICIAL CIRCUIT

William A Cudd

Plaintiff

280266

vs.

**MOTION AND AFFIDAVIT TO
PROCEED IN FORMA PAUPERIS**

William R Byars Jr.
etal

Defendant.

FILE NO.

2011-CP-18-

2032

I, , being duly sworn, state that I am the Plaintiff and that I do not have the funds available to pay the costs of filing and service in the present matter. I hereby request that the complaint be filed and service made without costs.

Sworn to and Subscribed before me
this day of ,2.

Notary Public for South Carolina

My Commission expires

FILED
CLERK OF COURT
DISTRICT COURT
OCT 10 PM 3:51
CERTIFIED COPY

Signature of Plaintiff or
Person Filing Complaint on Behalf of
Plaintiff

ORDER

☒ Leave is *granted* to proceed in forma pauperis without payment of the filing fee.

☒ Leave is *granted* to proceed in forma pauperis without payment of the service cost.

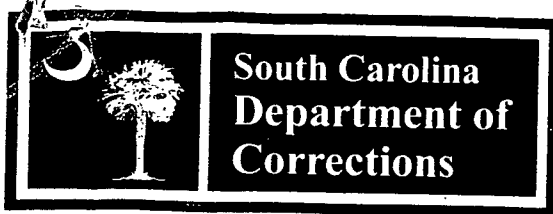
☐ Leave is *denied* to proceed in forma pauperis.

Dated: Sept. 29, 2011

Orangeburg, South Carolina

JUDGE/CLERK OF COURT

NOTICE TO PLAINTIFF: The Court may assess costs against either party at hearing.



13

NIKKI R. HALEY, Governor
WILLIAM R. BYARS, JR., Director

November 1, 2011

Cheryl L. Graham
Dorchester County Clerk of Court
5200 E Jim Bilton Blvd
St George, SC 29477-8020

Re: **William A. Cudd, # 280216 v. William R. Byars**
Case No.: 2011-CP-18-2032

Dear Ms. Graham:

Enclosed please find the original and one copy of Respondents' Motion to Dismiss, as well as the original and one copy of its Respondents' Brief in Support of Motion to Dismiss. Please file each original and return one copy of each to me in the enclosed self-addressed stamped envelope. By copy of this letter I am serving these documents upon the petitioner.

If you have any questions, please do not hesitate to contact me.

Respectfully,

Christopher D. Florian
Deputy General Counsel

cc: William A. Cudd, # 280216,
Union County Detention Center
1657 Jonesville Highway
Union, SC 29379

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

William A. Cudd, # 280216

☐ Plaintiff

v.

William R. Byars, Jr.

☒ Defendant.

14
IN THE COURT OF COMMON PLEAS

CASE NO.

2011-CP-18-2032

MOTION INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney:

Pro Se, Bar No. N/A

Address:

Union County Detention Center

1657 Jonesville Highway

Union, SC 29379

phone: N/A fax: N/A

e-mail: N/A other: N/A

Defendant's Attorney:

Christopher D. Florian, Bar No. 76670

Address:

S.C. Dept. of Corrections

P.O. Box 21787

Columbia, SC 29221-1787

phone: 803-896-8508 fax: 803-896-1766

e-mail: florian.chris@doc.sc.gov other: N/A

☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: Motion to Dismiss

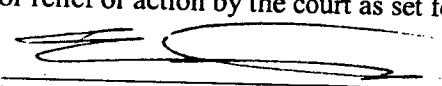
Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached

☐ Form Motion --

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

November 1, 2011

Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT:

☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status

☒ State Agency v. Indigent Party

☐ Sexually Violent Predator Act

☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication

☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by: _____

Date Filed: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

) Case No.: 2011-CP-18-2032

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Motion to Dismiss

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Respondents.

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TO: William A. Cudd, # 280216, Pro se Petitioner:

PLEASE TAKE NOTICE that respondents will move before the presiding Judge for the Court of Common Pleas of Dorchester County in the Dorchester County Courthouse, at 10:00 a.m. on the tenth (10th) day after service hereof or at such other time and place as is convenient to the Court and the Pro se Petitioner as follows:

For an Order dismissing this case pursuant to Gibson v. State, 329 S.C. 37, 495 S.E.2d 426 (1998); State v. Varner, 310 S.C. 264, 423 S.E.2d 133 (1992); and Rule 12(b)(6) SCRCP.

Respondents also reserve the right to petition the Court for a finding that the conditions of S.C. Code Ann. § 24-27-200 have been satisfied.

By:

Christopher D. Florian
Deputy General Counsel
S.C. Dept. of Corrections
P.O. Box 21787
Columbia, SC 29221-1787
803-896-8508

November 1, 2011

COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

) Case No.: 2011-CP-18-2032

Certificate of Service

William R. Byars, Jr., Director, S.C. Dept. of Corrections; and Alan Wilson, Attorney General for South Carolina,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss was this date served upon the following individual(s) by placing a copy of the same in the United States Mail, postage prepaid, and sent to his/her last known address as follows:

William A. Cudd, # 280216,
Union County Detention Center
1657 Jonesville Highway
Union, SC 29379

Christopher D. Florian
Deputy General Counsel
S.C. Dept. of Corrections
P.O. Box 21787
Columbia, SC 29221
803-896-8508

Columbia, SC
November 1, 2011

COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

) Case No.: 2011-CP-18-2032

)

)

Brief in Support of Motion to Dismiss

)

))

COME NOW, respondents and submit this Brief in Support of their Motion to Dismiss and show this Honorable Court the following:

STATEMENT OF FACTS

Petitioner is an inmate incarcerated in the South Carolina Department of Corrections (SCDC).¹ He is currently serving a fifteen-year sentence for manufacturing marijuana pursuant to S.C. Code Ann. § 44-53-370(b)(2).

Petitioner has filed a petition for a writ of habeas corpus claiming he is entitled to immediate release because of changes to the law he alleges apply retroactively. For the reasons that follow, SCDC respectfully requests the petition be dismissed.

ARGUMENT AND CITATION OF AUTHORITY

**THE PETITION FOR A WRIT OF HABEAS CORPUS DOES NOT MEET
ESTABLISHED REQUIREMENTS BECAUSE THE PETITION DOES NOT MAKE
OUT A PRIMA FACIE CASE SHOWING PETITIONER IS ENTITLED TO RELIEF.**

The petition should be dismissed because petitioner has not made a showing he is entitled

¹ SCDC has designated the Union County Detention Center as petitioner's current place of confinement pursuant to S.C. Code Ann. § 24-3-20(A).

to relief as required.

A habeas corpus petition must support the requested relief. Gibson v. State, 329 S.C. 37, 40, 495 S.E.2d 426, 427 (1998). Although the allegations in the petition are to be treated as true, the petition must make out a prima facie case showing petitioner is entitled to relief. Id. A petitioner must exhaust all other remedies and present sufficient factual allegations to support the petition, and the petition must set out a constitutional claim that “violation, which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice.” Id. (citing Butler v. State, 302 S.C. 466, 397 S.E.2d 87 (1990)). The only remedy that can be granted in a petition for habeas corpus is release from custody. Id.

Petitioner alleges he is entitled to immediate release because of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, which among other many other provisions, contains changes to the criminal penalty for manufacturing marijuana. See 2010 Act No. 273.² However, the 2010 amendments do not apply retroactively and do not have any effect on petitioner’s conviction and sentence. See State v. Varner, 310 S.C. 264, 423 S.E.2d 133 (1992).

In Varner, a criminal defendant was sentenced to life imprisonment for kidnapping, as was required by statute at the time of sentencing. Varner appealed, and while his appeal was pending, the legislature amended the kidnapping statute to reduce the maximum penalty for

² The 2010 Act amended S.C. Code Ann. § 44-53-370(b)(2) in relevant part by adding:

Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this item for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsections (c) and (d), may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. In all other cases, the sentence must not be suspended nor probation granted.

2010 Act No. 273 § 37.

19

kidnapping to thirty years' imprisonment. On appeal, Varner claimed he was entitled to be re-sentenced because the legislature had reduced the maximum punishment applicable to his crime. The South Carolina Supreme Court rejected Varner's argument and upheld the life sentence on appeal, noting there was no language in the act indicating legislative intent for it to apply retroactively. The Court explained:

In the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced, unless it is greater than the punishment provided for when the offense was committed. The correct penalty is the one in effect at the time of sentencing, even if the penalty is repealed while appeal is pending. Thus, **a criminal defendant receives the benefit of punishment mitigated by legislative amendment only when the amendment becomes effective before sentence is pronounced.**

Varner, 310 S.C. at 133-34; 423 S.E.2d at 265 (emphasis added).

The Court's holding in Varner is dispositive of petitioner's allegations. Similar to the act at issue in Varner, there is nothing in the language of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 indicating legislative intent for the changes to S.C. Code Ann. § 44-53-370(b)(2) to apply retroactively. Consequently, the common-law rule applies, and the punishment applicable to petitioner's crime in the one is existence at the time his sentence was imposed.

As a result, because petitioner's allegations depend on retroactive application of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, the petition is manifestly without merit.. Accordingly, the petition does not meet the requirements established by Gibson v. State, 329 S.C. 37, 40, 495 S.E.2d 426, 427 (1998), and it should be dismissed pursuant to Rule 12, SCRPC.

CONCLUSION

WHEREFORE, based on the foregoing reasons and legal authorities, SCDC respectfully requests that this matter be DISMISSED.

Respectfully Submitted,

By: 

Christopher D. Florian
Deputy General Counsel
S.C. Dept. of Corrections
P.O. Box 21787
Columbia, SC 29221
803-896-8508

Columbia, SC
November 1, 2011

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

William A. Cudd, # 280216,

Petitioner,

VS.

William R. Byars, Jr., Director, S.C. Dept. of Corrections; and Alan Wilson, Attorney General for South Carolina,

Respondents.

Case No.: 2011-CP-43-1635

Certificate of Service

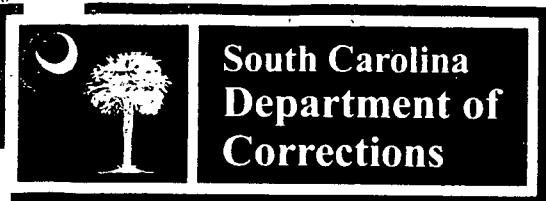
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following individual(s), on November 1, 2011, by placing a copy of the same in the United States Mail, postage prepaid, and sent to his/her last known address as follows:

William A. Cudd, # 280216,
Union County Detention Center
1657 Jonesville Highway
Union, SC 29379

Christopher D. Florian
Deputy General Counsel
S.C. Dept. of Corrections
P.O. Box 21787
Columbia, SC 29221-1787
803-896-8508

Columbia, SC
November 1, 2011



22

NIKKI R. HALEY, Governor
WILLIAM R. BYARS, JR., Director

February 28, 2012

Cheryl L. Graham
Dorchester County Clerk of Court
5200 E Jim Bilton Blvd
St George, SC 29477-8020

Re: **William A. Cudd, # 280216 v. William R. Byars**
Case No.: 2011-CP-18-2032

Dear Ms. Graham:

Enclosed please find the original and one copy of Respondents' Supplemental Memorandum in Support of Motion to Dismiss. Please file the original and return the copy to me in the enclosed self-addressed stamped envelope. By copy of this letter I am serving this document upon the petitioner.

If you have any questions, please do not hesitate to contact me.

Respectfully,

Christopher D. Florian
Deputy General Counsel

cc: William A. Cudd, # 280216,
Union County Detention Center
1657 Jonesville Highway
Union, SC 29379

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

William A. Cudd, # 280216,

Petitioner,

vs.

William R. Byars, Jr., Director, S.C. Dept. of
Corrections; and Alan Wilson, Attorney
General for South Carolina,

Respondents.

) Case No.: 2011-CP-18-2032

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**Supplemental Memorandum in Support of
Motion to Dismiss**

In response to questions raised during the February 23, 2012 hearing of respondents' motion to dismiss, respondents hereby submit this supplemental memorandum in support of their motion to dismiss.

STATEMENT OF FACTS

Petitioner is an inmate incarcerated in the South Carolina Department of Corrections (SCDC).¹ He is currently serving a fifteen-year sentence for manufacturing marijuana pursuant to S.C. Code Ann. § 44-53-370(b)(2).

Petitioner filed a petition for a writ of habeas corpus claiming he is entitled to immediate release because of changes to the law he alleges apply retroactively. Specifically, petitioner alleged he is entitled to immediate release because of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, which among other many other provisions, contains changes to the criminal penalty for manufacturing marijuana. See 2010 Act No. 273.²

¹ SCDC has designated the Union County Detention Center as petitioner's current place of confinement pursuant to S.C. Code Ann. § 24-3-20(A).

² The 2010 Act amended S.C. Code Ann. § 44-53-370(b)(2) in relevant part by adding:

Notwithstanding any other provision of law, a person convicted and sentenced

In response, respondents submitted a motion to dismiss arguing the changes in law do not apply retroactively in cases where the conviction and sentencing occurred before the amendments. During the February 23, 2012 hearing of respondents motion, the Court requested additional legal authority for respondents' position. Consequently, respondents now submit this supplemental memorandum in support of their motion

ADDITIONAL ARGUMENT AND CITATION OF AUTHORITY

1. THE SAVINGS CLAUSE OF THE OMNIBUS CRIME REDUCTION AND SENTENCING REFORM ACT OF 2010 UNAMBIGUOUSLY SHOWS LEGISLATIVE INTENT THAT THE CHANGE IN LAW DOES NOT APPLY RETROACTIVELY.

In enacting the Omnibus Crime Reduction and Sentencing Reform Act of 2010, the legislature included a savings clause clearly expressing legislative intent that amendments to criminal penalties not apply retroactively.

All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Id. What the legislature says in the text of a statute is

pursuant to this item for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsections (c) and (d), may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. In all other cases, the sentence must not be suspended nor probation granted.

considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature. Id. The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons. Sweat, 386 S.C. at 351, 688 S.E.2d at 575.

The savings clause to the Omnibus Crime Reduction and Sentencing Reform Act provides:

The repeal or amendment by the provisions of this act or any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

2010 S.C. Act 273, § 65 (June 2, 2010).

The savings clause dispels any doubt of that the legislature intended that the changes to criminal penalties do not apply retroactively. Specifically, this provision directs that the amendments contained in the act do not alter any penalty incurred under the prior law.

In the case at hand, petitioner's conviction and sentence occurred in 2001, well before the Omnibus Crime Reduction and Sentencing Reform Act was enacted. According to the plain language of the savings clause, the criminal penalties applicable to petitioner's sentence were not altered by amendments contained within the Act.

As a result, because petitioner's allegations depend on retroactive application of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, the petition is manifestly

2010 Act No. 273 § 37.

without merit. Accordingly, the petition does not meet the requirements established by Gibson v. State, 329 S.C. 37, 40, 495 S.E.2d 426, 427 (1998), and it should be dismissed pursuant to Rule 12, SCRCP.

2. **DISMISSAL IS APPROPRIATE BECAUSE EVEN IF THE PENALTY AS AMENDED BY THE OMNIBUS SENTENCING REFORM ACT WERE APPLIED TO PETITIONER'S SENTENCE, IT WOULD NOT RESULT IN PETITIONER'S IMMEDIATE RELEASE.**

The petition should be dismissed because, even if the amended penalty for petitioner's offense were applied, it would not result in his immediate release.

A habeas corpus petition must support the requested relief. Gibson v. State, 329 S.C. 37, 40, 495 S.E.2d 426, 427 (1998). The only remedy that can be granted in a petition for habeas corpus is release from custody. Id.

The amended language of S.C. Code Ann. § 44-53-370(b)(2) provides, in relevant part:

Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this item for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsections (c) and (d), may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. In all other cases, the sentence must not be suspended nor probation granted.

Petitioner argues that pursuant to the above quoted language, under the amended law, offenders are no longer required to serve 85% of their sentences. However, petitioner's argument is incorrect. Under the amended language, offenders are eligible for parole, but if they are not paroled, they are still required to serve 85% of their sentences. See S.C. Code Ann. § 24-13-150(A) ("Notwithstanding any other provision of law . . . an inmate convicted of a 'no parole offense' as defined in Section 24-13-100 . . . is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed.") (emphasis added); S.C. Code

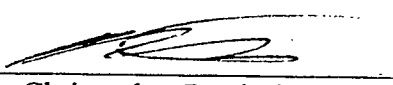
Ann. § 24-13-100 ("For purposes of definition under South Carolina law, a 'no parole offense' means a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more."); S.C. Code Ann. § 24-21-560(A) ("No prisoner who is serving a sentence for a 'no parole offense' is eligible to participate in a community supervision program until he has served the minimum period of incarceration as set forth in Section 24-13-150.").

Therefore, because petitioner would not be entitled to immediate release even if the amended law were retroactively applied to his sentence, the petition should be dismissed.

CONCLUSION

WHEREFORE, based on the foregoing reasons, as well as those contained in the original brief in support of this motion, respondents respectfully request that this matter be DISMISSED.

Respectfully Submitted,

By: 

Christopher D. Florian
Deputy General Counsel
S.C. Dept. of Corrections
P.O. Box 21787
Columbia, SC 29221
803-896-8508

Columbia, SC
February 28, 2012

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF DORCHESTER

FIRST JUDICIAL CIRCUIT

William A. Cudd, # 280216,

Petitioner,

vs.

William R. Byars, Jr., Director, S.C. Dept. of
Corrections; and Alan Wilson, Attorney
General for South Carolina,

Respondents.

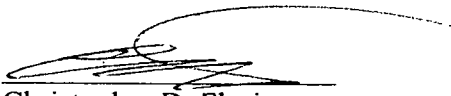
) Case No.: 2011-CP-43-1635

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following individual(s), on February 28, 2012, by placing a copy of the same in the United States Mail, postage prepaid, and sent to his/her last known address as follows:

William A. Cudd, # 280216,
Union County Detention Center
1657 Jonesville Highway
Union, SC 29379


Christopher D. Florian
Deputy General Counsel
S.C. Dept. of Corrections
P.O. Box 21787
Columbia, SC 29221-1787
803-896-8508

Columbia, SC
February 28, 2012

March 22, 2012

Cheryl L. Graham
Dorchester County Clerk of Court
5200 E Jim Bilton Blvd.
St. George, SC 29477-8020

29
CERTIFIED MAIL
2012 MAR 26 PM 12:44
Cheryl L. Graham
CLERK OF COURT
DORCHESTER COUNTY

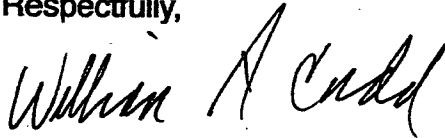
Re: William A. Cudd #280216 v. William R. Byars
Case No. 2011-CP-18-2032

Dear Ms. Graham:

Enclosed please find the original and one copy of Petitioner's Return to Respondents' Post Hearing Brief. Please file the original and return the copy to me in the enclosed self-addressed stamped envelope. By copy of this letter I am serving this document upon the Respondents.

If you have any questions, please contact me.

Respectfully,



William A. Cudd, Petitioner
1657 Jonesville Hwy.
Union, SC 29379

Christopher D. Florian
Deputy General Counsel
S.C. Dept. of Corrections
P. O. Box 21787
Columbia, SC 29221

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

CONTY OF DORCHESTER

FIRST JUDICIAL CIRCUIT

William A. Cudd #280216

) Case No.: 2011-CP-18-2032

Petitioner,

)
)

vs.

) Petitioner's Return to Respondents'
) Post Hearing Brief

William R. Byars Jr., Director of S.C. Dept.
of Corrections; and Alan Wilson, Attorney
General for South Carolina,

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Respondents,

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Clerk of Court
DORCHESTER COUNTY

STATEMENT OF FACTS

On February 23, 2012, a hearing was convened in Dorchester County to hear the Petitioner's Petition for a writ of habeas corpus. At the conclusion of the hearing, the Honorable Diane S. Goodstein requested more legal authority on the issues presented.

DISCUSSION I

From what I have read of the materials I received, it appears that -- the Respondents have argued that the savings clause (Section 65) of the Omnibus Crime Reduction and Sentencing Reform Act (the Act), demands perspective application of the Acts numerous sections. However, the Respondents' arguments are misplaced, in that the savings clause cannot be read in isolation, but must be considered in light of the remaining text of the Act. Consequently, when the savings clause is read in context with the remaining text of the Act, it becomes apparent that, in regard to this Petitioner, the Act is ambiguous.

The overriding intent and purpose of the Legislature in passage of the Act is not to be found at the end of the Act (Section 65), but at the beginning of the Act. Section One of the Act reads,

SECTION 1. This bill may be cited as the “Omnibus Crime Reduction and Sentencing Reform Act of 2010”. It is the intent of the General Assembly to preserve public safety, reduce crime, and use correctional resources most effectively. Currently, the South Carolina correctional system incarcerates people whose time in prison does not result in improved behavior and who often return to South Carolina communities and commit new crimes, or are returned to prison for violations of supervision requirements. It is, therefore, the purpose of this act to reduce recidivism, provide fair and effective sentencing options, employ evidence-based practices for smarter use of correctional funding, and improve public safety.”

The impact on prisons with implementation of the Act, as envisioned by the Legislature, was better use of scarce financial resources, reductions in recidivism rates, and lowered prison populations. The stated goals of the Legislature in Section One of the Act are rendered meaningless if subordinated to the language of Section 65, the savings clause. At best, the two sections create a paradox; at worst, the two sections render the Act ambiguous with regard to the Legislature’s true intent.

All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. State v. Sweat, 386 S.C. 339, 351, 688 S.E. 2d 569, 575 (2010). Even though penal statutes are to be strictly construed, the cannons of construction certainly allow the court to consider a penal statute as a whole and to interpret its words in light of the context. Bostic v. American Home Mortg. Inc., 600 S.E. 2d 479 (S.C. App. 2007). A penal statute as a whole must be examined to determine and fulfill the legislature’s intent. Dykeman v. wells Fargo Home Mortg., Inc., 673 S.E. 2d

804, 381 S.C. 333 (S. C. 2009).

When considered as a whole, it is clear that the intent of the Legislature in passage of the Act is reductions in crime, recidivism rates, and prison populations, and those goals are inconsistent with the unfettered applications of Section 65. If given equal weight, a literal reading of Sections 1 and 65 render the Act ambiguous as to its intent. Consequently, any ambiguities in the interpretation of the Act must be resolved in favor of the Petitioner.

In construing a criminal statute, courts are guided by the rule of lenity –the principle that any ambiguity must be resolved in favor of the accused. Berry v. State, 675 S.E. 2d 425, 381 S.C. 630 (S.C. 2009). Penal statutes are to be construed strictly against the state and in favor of the defendant. State v. Thomas, 642 S.E. 2d 724, 372 S.C. 466 (S. C, 2007). Application of the savings clause, at least in the case of this Petitioner, undermines the stated intent of the Legislature, and therefore must be deemed ambiguous.

Moreover, a second, equally valid, basis exists for granting the Petitioner's habeas petition: The remedial nature of the Act as applied to the Petitioner. A statute is remedial and applies retroactively when it creates new remedies for existing rights, or enlarges the rights of persons under disability. Wiesart v. Stewart, 665 S.E. 2d 187, 379 S.C. 300) S.C. App. 2008). (See also Hooks v. Southern Bell Telephone Co., 351 S.E. 2d 900 (1986)). Whether considered as a person under a disability whose rights have been enlarged, or merely creating new remedies for existing rights, the Petitioner is entitled to the retroactive application of the Act to his existing sentence.

If the Petitioner were presently entitled to no good time credits, then the amendments to S. C. Code §44-53-370(b) (2) would not be remedial as applied to Petitioner's case. If under the old law no prior right to good time credits exists, then a change in law allowing good time credits is not remedial as to the old law, for it creates a new right, rather than enlarging a pre-existing right.

However, in the case of this Petitioner, he presently receives good time credits valued at fifteen percent (15%) of his aggregate sentence. Consequently, when the amended S. C. Code §44-53-370(b) (2) is applied to the Petitioner, it doesn't create a new right (to receive good time credits), but merely enlarges Petitioner's existing rights. This same reasoning is valid with regard to participation in work release and furlough programs, and all other opportunities available to parole-eligible inmates. (S.C. Code Section 44-53-370(b))2), as amended, June 2010.)

DISCUSSION II

The Respondents' second objection to the grant of the petition before this Court is tragically flawed, and is based on a misunderstanding of the governing statutes.

Respondents argue that, even if the amendments to S.C. Code §44-53-370(b) (2) were applied retroactively to Petitioner's case, it would not entitle the Petition to release, because he must yet serve eighty-five percent (85%) of his sentence. The Respondents' arguments are base exclusively on S. C. Code §24-13-150(A). However, the Respondents' arguments are misplaced, because they rely on a statute last amended in 1996.

South Carolina Code Section 24-13-150(A) was last amended in January 1996. This statute required those sentenced for no-parole offenses to complete eighty-five percent (85%) of their aggregate sentence before release. Inmates convicted of no-parole offenses were also denied access to work release and furlough programs, and were barred from receiving education credits or other credits entitling the inmate to release prior to completing 85% of his sentence.

Prior to the Legislature's enactment of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 (the Act), the Petitioner was confined under the terms of S. C. Code §44-53-370(b) (2); an offense categorized as a "no-parole" offense. However, with regard to this Petitioner, the amendments to S. C. Code §44-53-370(b)(2) removed the no-parole requirement, rendering the Petitioner eligible for parole, additional work credits, and all other benefits offered by a paroleable offense. The 2010 Legislative amendments to S. C. Code §44-53-370(b)(2), state:

"Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsection (c) and (d), may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. In all other cases, the sentence must not be suspended nor probation granted."

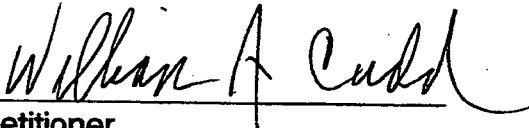
(Section 37 of the Act; Amendments to S. C. Code §44-53-370(b)(2)).

If the 2010 amendments to S. C. Code §44-53-370(b)(2) are applied to the Petitioner, he would be immediately eligible for release, as the Petitioner has completed well over fifty-one percent (51%) of his sentence; the minimum prison term required to complete a fifteen-year sentence. The Respondents' arguments to the contrary are

without a basis in fact.

Further, it is a well established doctrine of law that the latter, more recent, statute supersedes the earlier, contradictory statute. The Respondents' reliance on S. C. Code §24-13-150(A), amended 1996, is negated in light of the amendments to S. C. Code §44-53-370(b)(2). For practical purposes, the Act of 2010 repealed S. C. Code §24-13-150 (A), as it applies to the Petitioner and S. C. Code §44-53-370(b)(2).

Respectfully Submitted.


Petitioner

Union, SC
March 22, 2012

THE STATE OF SOUTH CAROLINA
IN THE CIRCUIT COURT

PETITION FROM DORCHESTER COUNTY

Case No. 2011-CP-18-2032

William A. Cudd, #280216

vs.

William R. Byars, Jr., Director,
S.C. Dept. of Corrections; and
Alan Wilson, Attorney General for
South Carolina

Petitioner

Respondents

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2012 MAR 26 PM 12:44
CLERK OF COURT
DORCHESTER COUNTY

CERTIFICATE OF SERVICE
(PETITIONERS RETURN TO RESPONDENTS' POST HEARING BRIEF)

I hereby certify that I have this date served upon the Respondents a true copy of PETITIONER'S RETURN TO RESPONDENTS' POST HEARING BRIEF by placing same into the United States Mail, first class postage affixed and addressed as follows:

Christopher D. Florian
OFFICE OF THE GENERAL COUNSEL
S. C. Dept. of Corrections
4444 Broad River Road
Columbia, SC 29210

Dated:

March 22, 2012

/s/

William A. Cudd

William A. Cudd, Petitioner
1657 Jonesville Highway
Union, SC 29379

September 19, 2012

Mr. William A. Cudd
1657 Jonesville Highway
Union, South Carolina 29379

Re: Dismissal Hearing: Thursday, February 23, 2012
William A. Cudd vs. William R. Byars, Jr.

Dear Mr. Cudd:

I hope this letter finds you in good spirits. Mr. Cudd, as you know, I was the court reporter for your hearing that was held on February 23, 2012 before The Honorable Diane Goodstein in Dorchester County. [I have, unfortunately, had difficulty in transcribing not only your hearing but a number of hearings that were held on that day due to technical difficulties with my microphones that were attached to my recording equipment.] I have spent days and hours listening and relistening to your hearing trying to get a complete record, but have been unsuccessful in doing so. When I realize there was a problem, I didn't want to give up until I had tried everything possible to retrieve the record. You so kindly, upon my request, forwarded payment in the amount of One Hundred Sixty-two Dollars and fifty cents (\$162.50) as a deposit. [I have been able to type as much of the hearing as I can possibly make out; however, I can not in good faith attach a certificate of service to same indicating that it is a verbatim transcript. Therefore, I am attaching a copy of what I have been able to type, in hopes that it will help you in some way, of the events that took place that day at no charge.]

Again, Mr. Cudd, I apologize for this. I apologize for the inconvenience that I'm sure it causes. I have tried all that I can and have spent many hours trying to prepare a full and complete transcript, but have been unsuccessful. I hope that you will understand that I have truly made every effort I know to try and prepare this transcript. It is just something that unfortunately happens sometimes with equipment.

Please advise me, at your earliest convenience, which address you would like me to send the refund of \$162.50. I have received two addresses from you in earlier correspondence. One is, of course, the Union address to you and the other is the address of your mother, Elsie B. McDowell, 7743 Parris Bridge Road, Chesnee, South Carolina 29323. Upon notification from you with instructions on where you would like me to send the refund I will do same. I will await notification from you with regard to your refund. If; however, I have not heard from you within the next twenty (20) days I will return a refund by money order to you at 1657 Jonesville Highway, Union, South Carolina 29379.

Mr. William A. Cudd
Page Two
September 19, 2012

Thanking you in advance for your understanding, I am

Sincerely,


Melissa R. Singletary
CVR-M

:mrs
Enclosure (10) pages

39

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

FORM 4
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JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP1802032

William A Cudd Jr

William A Cudd

William R Byars Jr

Alan Wilson

CLERK OF COURT
DORCHESTER COUNTY

Department of
Corrections

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☒ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☒ See attached order; (formal order to follow)

☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Diane S. Goodstein
Circuit Court Judge

2112
Judge Code

12/20/2012
Date

For Clerk of Court Office Use Only

This judgment was entered on 12-20-2012, and a copy mailed first class or placed in the appropriate attorney's box on 12-20-2012, to attorneys of record or to parties (when appearing pro se) as follows:

William A Cudd #280216 Union County Detention Center
1657 Jonesville Highway Union, SC 29379

ATTORNEY(S) FOR THE PLAINTIFF(S)

Christopher D. Florian PO Box 21787 Columbia, SC
292211787

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Cheryl Graham - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

COURT OF COMMON PLEAS

FIRST JUDICIAL CIRCUIT

William A. Cudd, # 280216,

Petitioner,

vs.

William R. Byars, Jr., Director, S.C. Dept. of
Corrections; and Alan Wilson, Attorney
General for South Carolina,

Respondents.

Case No.: 2011-CP-18-2032

ORDER

41
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Clerk of Court
DORCHESTER COUNTY

This matter is before the undersigned pursuant to a Petition for a Writ of Habeas Corpus filed by William A. Cudd, # 280216. Both parties having had an opportunity to present their positions in this matter at a hearing on February 3, 2012, I now dismiss this case with prejudice.

Petitioner claims he is entitled to immediate release because of changes to the law he alleges apply retroactively to his 2001 sentence for manufacturing marijuana. Specifically, petitioner alleges he is entitled to immediate release because of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, which among other provisions, contains changes to the criminal penalty for manufacturing marijuana. See 2010 Act No. 273.¹ Respondents contend the changes in law do not apply retroactively in cases where the conviction and sentencing occurred before the amendments.

A habeas corpus petition must support the requested relief. Gibson v. State, 329 S.C. 37,

¹ The 2010 Act amended S.C. Code Ann. § 44-53-370(b)(2) in relevant part by adding:

Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this item for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsections (c) and (d), may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. In all other cases, the sentence must not be suspended nor probation granted.

40, 495 S.E.2d 426, 427 (1998). Although the allegations in the petition are to be treated as true, the petition must make out a prima facie case showing petitioner is entitled to relief. Id. A petitioner must exhaust all other remedies and present sufficient factual allegations to support the petition, and the petition must set out a constitutional claim that “violation, which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice.” Id. (citing Butler v. State, 302 S.C. 466, 397 S.E.2d 87 (1990)). The only remedy that can be granted in a petition for habeas corpus is release from custody. Id.

In enacting the Omnibus Crime Reduction and Sentencing Reform Act of 2010, the legislature included a savings clause expressing legislative intent that amendments to criminal penalties not apply retroactively. The savings clause provides:

The repeal or amendment by the provisions of this act or any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

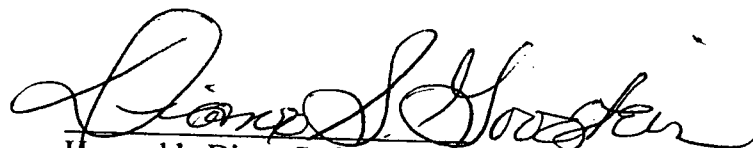
2010 S.C. Act 273, § 65 (June 2, 2010) (emphasis added). The language of the savings clause establishes that the legislature intended for the changes to criminal penalties to not apply retroactively. See State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (explaining all rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute).

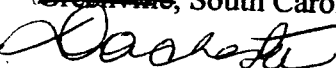
As an alternative basis for dismissing this petition, even if the amended penalty for petitioner’s offense were applied, it would not result in his immediate release. Under the

amended language, offenders are eligible for parole, but if they are not paroled, they are still required to serve 85% of their sentences. See S.C. Code Ann. § 24-13-150(A) (“**Notwithstanding any other provision of law . . . an inmate convicted of a ‘no parole offense’ as defined in Section 24-13-100 . . . is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed.**”) (emphasis added); S.C. Code Ann. § 24-13-100 (“For purposes of definition under South Carolina law, a ‘no parole offense’ means a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more.”); S.C. Code Ann. § 24-21-560(A) (“No prisoner who is serving a sentence for a ‘no parole offense’ is eligible to participate in a community supervision program until he has served the minimum period of incarceration as set forth in Section 24-13-150.”). Therefore, because petitioner would not be entitled to immediate release even if the amended law were retroactively applied to his sentence, he is not entitled to a writ of habeas corpus. Gibson v. State, 329 S.C. 37, 40, 495 S.E.2d 426, 427 (1998).

Based on the above findings, I therefore find the present case should be DISMISSED WITH PREJUDICE.

AND IT IS SO ORDERED.


Honorable Diane S. Goodstein
Judge, First Judicial Circuit


~~October~~, 2012
~~Greenville~~, South Carolina


44

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goldstein, Circuit Court Judge

Case No. 2013-000167

William A. Cudd, #280216

Appellant,

v.

William R. Byars, Jr., Director, S. C. Dept. of Corrections;
and Alan Wilson, Attorney General for South Carolina,
respondents.

CERTIFICATE OF SERVICE

I, William A. Cudd, hereby certify that I have this date served upon the Respondents a true copy of RECORD ON APPEAL, by placing same into the United States Mail, first class postage affixed, and addressed as follows:

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Dated: March 22, 2013

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RECEIVED

MAR 25 2013

SC Court of Appeals