STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HARRY ANTHONY,

APPELLANT

APPELLATE CASE NO. 2012-206627

FINAL BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial judge should have granted a motion for a mistrial after the State elicited an inadmissible prior bad act from its first witness?

2.

Whether the trial judge should have granted a motion for recusal as a sanction in response to judge shopping by the State?

3.

Whether appellant is entitled to a judicial determination on whether he should receive credit for time served while on house arrest?

STATEMENT OF THE CASE

On April 12, 2007, a York County grand jury indicted Harry Anthony for four counts of distribution of cocaine base (crack). R. 297. These indictments alleged conduct that was over two years old. R. 297-304. In November 2007, Anthony filed a motion requesting that the Honorable John C. Hayes, III recuse himself from the case. R. 257. On November 29, 2007, Judge Hayes held a hearing on this issue. R. 215. Anthony was represented by Melvin Roberts and Mindy Hervey Lipinski represented the State. R. 215. Judge Hayes denied the motion from the bench and on December 4, 2007, issued a written order. R. 288. R. p 215, ll. 14 – 23; R.288.

Anthony immediately appealed Judge Hayes' order and it was dismissed as interlocutory. R. 255. On March 25, 2008, Anthony's petition for rehearing was denied. R. 238. Anthony's petition for writ of certiorari was denied by the South Carolina Supreme Court on October 8, 2008. R. 294. The Court of Appeals issued the remittitur on October 13, 2008. R. 296.

On January 9, 2012, Anthony was tried before Judge Hayes and a jury. R. 1. Anthony's former counsel, Melvin Roberts, was tragically murdered and B.J. Barrowclough and Harry Dest represented Anthony at trial. R. 1. Mindy Hervey Lipinski and Chris Epting represented the State. R. 1. The jury convicted Anthony on all four counts. R. 208, l. 18 – 209, l. 9. Judge Hayes sentenced Anthony to concurrent terms of fifteen years' imprisonment. R. 213, ll. 3 – 4. On January 13, 2012, Anthony filed and served a notice of appeal. This appeal follows.

STATEMENT OF FACTS

Harry Anthony ("Anthony") was tried in 2012 for conduct the State alleged occurred in 2005. R. 68, ll. 9 – 12. The State wanted to charge Anthony in their investigation of the death of a woman named Margaret Matthews ("Matthews"). R. 68, ll. 9 – 15. The State sent evidence related to that investigation to Quantico, Virginia and once the analysis of this evidence was made, the State concluded they did not have sufficient evidence to charge Anthony with any crime related to Matthews' death. R. 68, ll. 9 – 20.

Unsatisfied with this result, the State then decided to try Anthony for possession with intent to distribute crack cocaine. R. 68, ll. 20 – 22. They charged Anthony with being a crack dealer despite the fact that during several searches, police never found any drugs, drug residue, baggies, customer lists, cell phone records indicative of drug dealing, computer records indicative of drug dealing, scales, and never made an attempt to buy drugs with a confidential informant. R. 93, l. 22 – 96, l. 22. The searches were executed in 2006. R. 92, ll. 15 – 19. Anthony was not indicted until April 12, 2007. R.297-304. Anthony spent the next five years on house arrest awaiting trial. R. 212, ll. 9 – 11.

The evidence used against Anthony on the crack charges came from Patricia Littlejohn ("Littlejohn"). R. 73, ll. 17 – 23. The police admitted that Littlejohn had an extreme addiction to crack cocaine. R. 74, ll. 19 – 22. Littlejohn had prior convictions for obtaining goods by false pretenses and shoplifting. R. 118, l. 18 – 119, l. 11. When asked by the solicitor whether she had a pending charge for forgery, Littlejohn replied, "That's because I'm a witness in another case, yes." R. 119, ll. 9 – 11. Littlejohn denied the solicitor had promised her anything regarding the outcome of the forgery charge in exchange for her testimony against Anthony. R. 119, ll. 12 – 15. However, on cross-

examination when the defense attorney asked her about the pending forgery charge, Littlejohn replied, "Pending, as a witness." R. 123, ll. 24 – 25. The defense lawyer asked:

Q. Pending, as a defendant?

A. No.

Q. Right now you have a charge of forgery against you.

A. I know.

Q. Being prosecuted –

A. But that ain't got –

Q. – by this prosecutor's office?

A. – nothing to do with this case.

Q. Excuse me?

A. It ain't got nothing to do with this case.

Q. Well I'm asking you, do you have a charge of forgery pending against you?

A. I have a charge pending, yes.

Q. In which you're the defendant?

A. Excuse me?

Q. I said, in which you are the defendant.

A. I assume, yes.

Q. Being prosecuted by this Solicitor's Office.

A. I don't know who's prosecuting me. All's I know is I got to be here.

R. 124, ll. 1 – 20. When asked again about her pending forgery charge on redirect, Littlejohn stated, "Yeah, they just took me uptown and booked me because I'm a witness to that case." R. 125, l. 25 – 126, l. 4.

Even though Littlejohn admitted smoking crack and trading sex and money for crack, she was never charged with distribution of crack, possession of crack, prostitution, or anything else in conjunction with this case. R. 100, ll. 10 – 19. The police never attempted to search Littlejohn's residence for crack. R. 98, ll. 8 – 12. When asked if they could have pursued a search warrant for Littlejohn's residence, the police witness responded, "If that was the target of my investigation, yes." R. 98, ll. 18 – 20.

Littlejohn allegedly told the police that she would trade Anthony sexual favors for crack cocaine. R. 76, ll. 7 – 13. She also told the police that Anthony videotaped their sexual encounters. R. 76, ll. 7 – 13. The police searched Anthony's house in seized numerous videotapes. R. 78, l. 21 – 79, l. 3. The State moved six DVDs into evidence that they culled from the videotapes seized from Anthony's house. R. 88, ll. 6 – 12; (State's Exhibits 1 – 6.).

The DVDs shown at trial depict Littlejohn and Anthony engaged in a wide variety of sexual activities. (State's Exhibits 1 – 6.)[1] At no point in the videos do the encounters appear to be anything but consensual. (State's Exhibits 1 – 6.); R. 183, ll. 10 – 21. There is no mention in any of the videos of an exchange of sex for crack. (State's Exhibits 1 – 6); R. 183 ll. 5 – 7. The videos do show Anthony and Littlejohn smoking something which Littlejohn claimed in her testimony was crack solely provided by Anthony, but the videos do not show who brought the substance to the encounter. (State's Exhibits 1 – 6.); R. 183, ll. 16 – 21. R.116, ll. 6 – 118, l. 10. Acknowledging this reality, the solicitor told the jury in her closing "all [that] is required for distribution is sharing, a transfer of ownership, a giving of one thing the crack cocaine to another. It does not have to be an exchange for money. It

[1] State's Exhibits 1-6 have been transported to the Court.

does not have to be an exchange for sex. There is no quid pro quo. It can be a gift." R.158, ll. 11 – 15. Obviously concerned about this issue, during deliberations the jury asked again to be charged on the definition of "distribution." R. 226, l. 24 – 228, l. 7. After the trial judge's re-charge, the jury returned a little over an hour later with verdicts of guilty. R.207, ll. 13 – 14.

ARGUMENT

1.

The trial judge should have granted a motion for a mistrial after the State elicited an inadmissible prior bad act from its first witness.

Prior to trial, the court discussed the defense's motions with the parties. R. 12, ll. 8 – 10. The trial judge asked the State about "prior bad acts or Lyle evidence." R. 12, ll. 8 – 10. The State agreed that it would not elicit testimony from its witnesses regarding an alleged prior bad act by Anthony. R. 13, ll. 2 – 15. Littlejohn allegedly told the police that Anthony like to brand his prostitutes with a wire and "put an 'H' or an 'A' on some part of their body." R. 13, ll. 2 – 15. The solicitor told the court, "I do not intend to [elicit] that testimony on direct." R. 13, ll. 8 – 9. Defense counsel told the court that the solicitor's representation "covered prior topics that my motion was addressing." R. 13, l. 17 – 19. After a Jackson v. Denno, 378 U.S. 368 (1964), hearing, the State again told the court that it did not "anticipate going as to the branding of Miss Littlejohn." R. 36, ll. 23 – 24. On both of these occasions, the solicitor told the court that this agreement was dependent on whether the defense opened the door to this testimony on cross-examination. R. 13, ll. 8 – 10. R. 36, l. 24 – 37, l. 1.

The State's first witness was Lieutenant Tim Hager. R. 72, ll. 3 – 12. Lieutenant Hager had been employed by the York County Sheriff's Office for thirty-two years. R. 72, ll. 21 – 23. Lieutenant Hager was in the courtroom during the court's discussion of the branding issue. R. 104, ll. 16 – 19. On direct examination, the following occurred:

> Q. And when Ms. Littlejohn told you about going to Mr. Anthony as one of her potential sources, did she indicate to you anything unusual based on your experience and training about the nature of their transactions?

A. She was trading sexual favors for crack cocaine, and also he was videotaping these encounters, and also he was branding her with a –

MR. BARROWCLOUGH: Your Honor, I object on a matter of law.

THE COURT: Just –

MS. LIPINSKI: I'll move on, Your Honor.

THE COURT: Okay, just move on.

Q. And did she –

THE COURT: Disregard that last statement from the witness, members of the jury.

R. 76, ll. 7 – 21. At the next break when Lieutenant Hager left the stand, Anthony moved for a mistrial. R. 104, l. 5 – 105, l. 5. Anthony argued that Lieutenant Hager, since he was in the courtroom during the discussions on branding, intentionally injected the issue into the trial. R. 104, ll. 6 – 105, l. 5. Trial counsel noted the officer's experience and that he was a sophisticated witness. R. 104, ll. 16 – 21. Trial counsel argued that a mistrial was required because the State intentionally placed the defendant's character in evidence.

Amazingly, the State agreed that Hager intentionally testified about the branding. The solicitor stated, "I don't believe it was any inadvertence or misstep on the part of Mr. Hager." R. 105, ll. 9 – 10. The solicitor said, "Why we agreed that we would try to avoid that, I also stated that it would nonetheless become – may nonetheless become part of this. **Obviously the defendant's character is an issue by the very admission of these tapes.** So to suggest that we have put his character at issue when it was otherwise not an issue, I

think is a misstep."[2] R. 105, ll. 10 – 16 (emphasis added). The trial judge denied the motion for a mistrial. R. 107, ll. 13 – 16.

The trial court erred in not granting a mistrial because the State admittedly elicited inadmissible character evidence from its first witness, a thirty-two year police veteran. Character evidence is not admissible. SCRE 404(a). The branding would not be admissible under any of the exceptions of Rule 404(b). SCRE 404(b). The trial judge ordered it stricken from the record; therefore, the only question before the Court was whether the State's conduct and the prejudicial impact of hearing that Anthony branded Littlejohn was sufficiently severe to warrant a mistrial.

In State v. Parker, 391 S.C. 606, 609, 707 S.E.2d 799, 800 (2011), the trial court granted a mistrial in part based on the solicitor's playing of an unredacted videotape containing graphic evidence. Id. The parties previously agreed to redact the videotape, but claiming "inadvertence," the solicitor played the unredacted version for the jury.[3] Id. Whether the prosecution intentionally elicits inadmissible evidence is a factor the Court considers in determining whether to grant a mistrial. State v. Ferguson, 376 S.C. 615, 619, 658 S.E.2d 101, 103 (2008). Here, the solicitor admitted that Lieutenant Hager intentionally mentioned branding.

---

[2] This claim was somewhat disingenuous when, minutes earlier, the Solicitor told the jury in her opening, "I don't want you to convict Mr. Anthony based on your personal appeal or revulsion to these videos." R. 56, ll. 3 – 5. In her closing, the Solicitor again told the jury, "I also told you that the State is not asking you to convict the defendant based on some emotional and gut reaction to these videos. We didn't show them to you because of their shock value." R. 154, l. 24 – 155, l. 2.

[3] The solicitor who caused the mistrial in Parker is the same solicitor who elicited the testimony about branding from Lieutenant Hager in this case.

In State v. Ross, 272 S.C. 249 S.E.2d 159 (1978), the defendant asked for a mistrial after the prosecutor elicited character evidence. The Court reversed and granted the defendant a new trial, stating that "the testimony elicited had the effect of placing the bad character of the defendant in issue when she herself had not placed her good character in issue." Id. at 60, 249 S.E.2d at 161. Similarly, despite its earlier promise not to do so, the State intentionally placed Anthony's character at issue. The allegation about branding made Littlejohn a more sympathetic witness. The State argued that the distribution of crack in this case was worse than a typical transaction because of "how low crack cocaine can drag members of the community." R. 154, ll. 18 – 19. The branding allegation also made Anthony seem like a sadist. It lessened the chance that the jury would believe this was a consensual encounter and that Littlejohn supplied her own crack. For these reasons, Anthony's conviction should be reversed.

2.

The trial judge should have granted a motion for recusal as a sanction in response to judge shopping by the State.

Relevant Facts

On August 8, 2007, Assistant Solicitor Ryan Holloway wrote Anthony's lawyer, Melvin Roberts ("Roberts") notifying him that Anthony's trial would be held either the week of October 1, October 15, October 29, or November 26. R. 264. The next day, August 9, 2007, Roberts replied. R. 262-263. Roberts reiterated a prior conversation during which he told the solicitor that he was protected because of another trial for October 1-12, 2007. Roberts also wrote:

> The other day, you called and we discussed another possible trial date but you kept skipping over anytime that Judge John C. Hayes, III was not here

> because you insisted that you wanted this case tried before Judge John C. Hayes, III and no other judge. When I asked you why your answer was "because." When I further persisted and asked you because of what, you[r] answer was that I was berating you. I still would like to know why you insist that this case can only be tried before Judge John C. Hayes, III of all the other circuit court judges that we have in the State of South Carolina, all of whom are competent judges as far as I am concerned. So is Judge Hayes. I have tried many cases before him and I find him to be a very fair and reasonable judge. I have no problem with Judge Hayes, however when you say that you will only try this case before Judge Hayes, it makes me wonder what do you know that I don't know that would make Judge Hayes more favorable to the State, than any other judge in the State of South Carolina.

R. 262-263. Roberts copied Judge Hayes and the Circuit Solicitor on this letter. R. 263.

Instead of a response from Assistant Solicitor Holloway, the Circuit Solicitor for York County, Kevin S. Brackett ("Brackett") wrote Roberts. R.260-261. Brackett did not refute Roberts' version of the conversation with the assistant solicitor. R.260-261. Brackett told Roberts that he had a "busy schedule" and cited the "complexities of planning and managing a criminal docket." R. 260. Brackett took over the case. He closed his letter saying, "In light of the frustration you expressed over your communications with Mr. Holloway I have instructed him to refer any future questions or problems he may have to me." R. 260-261.

The case was not tried in October or November. On November 21, 2007, the State filed a motion seeking a DNA sample from Anthony. R. 291. The State asked for a hearing on November 29, 2007. R. 291. In response, Roberts filed a motion asking for Judge Hayes to recuse himself and also addressing the DNA issue. R. 257. Referencing his conversations and correspondence with the State in August, Roberts argued that the State was "judge shopping." R. 257. Roberts did not allege any impropriety on the part of Judge

Hayes, but argued that recusal was the appropriate sanction for the State's judge shopping. R. 257-258.

On November 29, 2007, Judge Hayes held a hearing on the recusal and DNA issues. R. 215. At the hearing, Roberts told Judge Hayes he was not alleging improprieties or misconduct on the trial judge's part, but explained that his motion for recusal was based on the State's judge shopping. R. 217, l. 16 – 218, l. 1. Judge Hayes stated he did not recall receiving any of the August correspondence between Roberts and the Solicitor's office, but Roberts handed Brackett's August 14 letter and his own letter up to the court. R. 218, ll. 2 – 21. Judge Hayes then refused to talk about judge shopping and remarked that defense lawyers should not be able to excuse a judge simply by copying the court on a letter. R. 218, l. 23 – 219, l. 13. Without further argument, Judge Hayes said, "But I'm not going to recuse myself. I don't remember anything about this case." R. 219, ll. 14 – 15. Roberts then again proffered his argument that the State had insisted that Judge Hayes was the only judge in the State of South Carolina that could hear this case and that judge shopping warranted recusal. R. 219, ll. 24 – 220, l. 6. At no point in the hearing did the State attempt to refute the allegation of judge shopping.

On December 4, 2007, Judge Hayes entered a written order regarding the DNA issue which also stated, "The Court has, on the record, denied defendant's motion to recuse himself." R. 288. Anthony filed a notice of appeal and on December 27, 2007, the Court of Appeals received his "Memorandum as to Appealability of Intermediate Order in a Criminal Case." R. 278. The Attorney General responded on behalf of the State and asserted that the appeal should be dismissed as interlocutory and not immediately appealable. R. 283. On January 10, 2008, the Court of Appeals dismissed the appeal. R. 255. Subsequent petitions

for rehearing and the petition for certiorari to the Supreme Court were denied, with the Supreme Court's order denying certiorari dated October 8, 2008. R. 294. Almost three and one-half years later, Anthony was tried and convicted before Judge Hayes.

Discussion

Melvin Roberts anticipated by five years the Supreme Court's landmark decision stripping solicitors of their complete control over the docket. State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012). In Roberts' argument to the Court of Appeals on appealability, he wrote:

> [T]his appeal should be allowed to go forward so that our Appellate Courts can set perimeters on "judge shopping." It may be that the time is right to have a court coordinator (independent of both prosecution and defense) to set cases to be heard before any judge holding court in the circuit and not before a particular judge as requested by either of the parties.

R. 297. While the exact method of calling cases in General Sessions court remains to be determined, the Supreme Court made it clear in Langford that the solicitors' complete control over the docket was at an end. Langford at 436, 735 S.E.2d at 479.

One of the evils of the solicitors' control of the docket discussed in Langford was the exact issue raised by Anthony: judge shopping. Id. at 436-440, 735 S.E.2d at 479-481. It does not appear from the opinion that the Court was faced with the blatant judge shopping that occurred in this case. Id. The Court only states that Langford argued that the solicitors' control over the docket permitted them to select the judge. The Court treats this argument theoretically. Id. Nothing in the Langford case is as egregious as the assistant solicitor's comments to Roberts that no other judge but Judge Hayes would try Anthony. Therefore, the Langford Court required some "actual partiality and prejudice on the part of the judge." Id. at 438, 735 S.E.2d at 480. The Court noted that the "only" support for an allegation of

bias in Langford was that the judge ruled against the defendant on several issues and found this allegation "untenable." Id. at 438-39, 735 S.E.2d at 480.

Anthony asserts that the Court's requirement of prejudice in Langford should not apply in this case because of the blatant judge shopping by the State. "Without a doubt, permitting solicitors—who represent a party in the case—to select the judge raises the specter of partiality and calls the validity of the entire system into question." Id. at 437, 735 S.E.2d at 480. In Langford, the Court faced a theoretical assertion of judge shopping. In this case, the Court is presented with a concrete example of judge shopping. In Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984), the defendants' attorney sought to have his clients sentenced before Judge Timmerman instead of Judge Moss, who counsel referred to as the "hanging judge." Id. at 132, 318 S.E.2d at 360. When Judge Timmerman unexpectedly sentenced the defendants to prison terms, they sought (and were granted) post-conviction relief from their pleas. Id. The Supreme Court reversed the grant of PCR and chastised the defense attorneys for "judge shopping." Id. at 133, 318 S.E.2d at 360-61.

In State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002), this Court dealt with a solicitor's refusal to call a case for trial before Judge Dennis because of off-the-record remarks Judge Dennis had made regarding admissibility of evidence. Id. at 110-12, 561 S.E.2d at 623-24. However, the State called the case before the next available judge. Id. The Court framed the question as concerning the impartiality of the trial judge who ultimately heard the case. Id. In this respect, Cheatham is distinguishable from this case because while the State successfully avoided a judge in Cheatham, in this case the State deliberately sought and obtained Judge Hayes for the trial of this case. Because of the

unique circumstances of this case, the Court should dispense with any prejudice inquiry and reverse as a sanction for the judge shopping that occurred.

In the event that the Court imposes a prejudice inquiry, Anthony can show two instances of prejudice. Again, as argued by Roberts in his appeal, this prejudice argument is not meant as a personal attack on the impartiality of Judge Hayes. Appellate counsel does not allege any secret or malevolent bias on the part of Judge Hayes. In fact, as the record will show, Judge Hayes ruled in Anthony's favor on some objections. However, Anthony's situation is unique in two respects. First, even after the Supreme Court decided the interlocutory appeal in 2008, it was still another three years before his case was tried. The solicitor admitted this was not due to any lack of evidence regarding the instant case. It is apparent that the State had all of the evidence it presented in this case—the tapes and Littlejohn's testimony—in 2006. The sole reason for the delay was the State's unsuccessful attempt to link Anthony to its unrelated investigation of Matthews' death. Had control of the docket been stripped from the solicitors as it was in Langford, Anthony's case would not have languished for years. As will be seen in Argument 3, Anthony was on house arrest during that period and may not receive credit for that time against his sentence. Since Langford became law before Anthony's appeal was decided, he is entitled to the policy considerations inherent in that decision and this should serve as a basis for prejudice.

Second, Anthony received a severe sentence for this crime. Judge Hayes sentenced him to fifteen years' imprisonment. The sentencing range for Anthony's alleged crime at the time of the offense was zero to twenty-five years. 1993 South Carolina Laws Act 184 (H.B. 3151). The State presented no evidence that Anthony was a drug dealer in any conventional sense of the term. No evidence—including the tapes and Littlejohn's

testimony—showed that Anthony gave, sold or shared drugs with anyone other than his sex partner, Littlejohn. A reasonable interpretation of the tapes is that they depict two consenting adults sharing a substance during a sexual encounter. While the State attempted to portray Anthony as a depraved man who preyed on Littlejohn, her long criminal history undercuts this depiction. Indeed, Littlejohn herself denied that she was a prostitute, which lends credence to the idea that these encounters were more consensual instead of a sex-for-drugs exchange. R. 121, ll. 8 – 11.

There was no evidence that Anthony sold drugs to anyone else, sold drugs to children, employed other subordinate dealers, or anything else indicating he was a danger to the community, yet the sentence he received was harsh. Counsel acknowledges the State will argue that Judge Hayes' sentence was within the statutory range and not the maximum, but perhaps the likelihood of this stiff sentence from Judge Hayes and knowledge of his sentencing tendencies constituted the impetus behind the State's desire that no other judge would try this case. Anthony submits that if the Court requires a showing of prejudice, these two circumstances should satisfy that burden, especially when considered alongside the State's blatant judge shopping.

3.

Appellant is entitled to a judicial determination on whether he should receive credit for time served while on house arrest.

At sentencing, defense counsel noted for the court that Anthony had been on house arrest for five years prior to trial. R. 212, ll. 9 – 16. Anthony turned sixty years old shortly after the trial. R. 211, l. 25 – 212, l. 1. Judge Hayes sentenced Anthony to concurrent terms of fifteen years' imprisonment. R. 213, ll. 3 – 4. On the sentencing sheet, Judge Hayes

checked the box ordering that, "The Defendant is to be given credit for time served pursuant to S.C. Code Ann. § 24-13-40 **to be calculated and applied by the State Department of Corrections.**" R. 305-308.

At the time of Anthony's sentencing, section 24-13-40 did not allow a prisoner to receive credit against his sentence for time spent on house arrest.[4] State v. Higgins, 357 S.C. 382, 593 S.E.2d 180 (Ct. App. 2004). On June 7, 2013, an amended section 24-13-40 went into effect. 2013 South Carolina Laws Act 34 (H.B. 3193). This act was titled:

> AN ACT TO AMEND SECTION 24-13-40 . . . **RELATING TO THE COMPUTATION OF TIME** SERVED BY A PRISONER, SO AS TO PROVIDE THAT ANY TIME SERVED UNDER HOUSE ARREST BY A PRISONER MAY BE USED **IN COMPUTING** TIME SERVED BY A PRISONER.

Id. (emphasis added). The amended statute states that a prisoner "must" be given "full credit" for time served prior to trial and "may be given" credit for "any time spent under monitored house arrest." Id.

Anthony should be allowed to receive a judicial determination as to whether he is entitled to credit for time spent on house arrest pursuant to the amended section 24-13-40. Appellate counsel contacted the Department of Corrections and was informed that its position is that it will not recompute prisoners' time who were sentenced before the revised section 24-13-40 went into effect. The reasoning given to appellate counsel by the Department is that the discretionary language of section 24-13-40 can only mean that a judge—not the Department—has the discretion to decide the credit for house arrest.

---

[4] To the extent that the State will make an argument that this issue is not preserved for appeal, Anthony replies that trial counsel could not have asked for credit for the time spent on house arrest because of the Higgins decision. Anthony is raising this issue at his first available opportunity.

Anthony does not disagree with the Department's reasoning. It is clear that the discretion contemplated by the amended 24-13-40 is vested within the judiciary, not the Department. However, Anthony does disagree with the Department's decision not to apply the statute to him for several reasons. First, prisoners are entitled to the benefit of new law created after their conviction and sentencing but before their appeal becomes final. See Davis v. United States, 131 S.Ct. 2419, (2011) (stating that newly announced rules of constitutional criminal procedure apply to all cases not yet final on direct review). While certainly the amendment of section 24-13-40 is not a new rule of constitutional criminal procedure as discussed in Davis, the principle that a defendant should get the benefit of favorable law passed before his direct review becomes final should inform the Court's decision in this case.

In State v. Spencer, 177 S.C. 346, 181 S.E. 217 (1935), the Court dealt with the issue of the retrial of a defendant after the repeal of prohibition. Spencer was tried without his attorney and the Court set aside his conviction on that ground. Id, 181 S.E. at 219. However, in the interim, prohibition's repeal went into effect in South Carolina with the passage of a new temperance law. Id. at 220-22. The Court ruled that Spencer could not be retried because his case was pending on direct review and not yet final. Id

In a recent case, the Supreme Court dealt with the issue of whether a defendant was entitled to be sentenced under a statute amended after her crime but before her sentencing. State v. Dawson, 402 S.C. 160, 740 S.E.2d 501 (2013). In Dawson, the crime occurred in 2009. Id. at 162, 740 S.E.2d at 501. At the time of the crime, the maximum sentence was five years' imprisonment. Id. In 2010, the legislature amended the statute and reduced the

maximum sentence to thirty days' imprisonment. Id. The trial court sentenced the defendant under the statute in effect at the time of the crime. Id.

The Supreme Court affirmed the sentence. Id. The basis for the affirmance in Dawson, however, shows that Anthony should receive the benefit of the amended section 24-13-40. The act in Dawson had a savings clause that said it did not affect pending actions. Id. at 164-65, 740 S.E.2d at 503. The amendment to section 24-13-40 has no such savings clause. Without such a savings clause, Anthony is entitled to the general rule that "a convicted criminal receive[s] the punishment in effect at the time he is sentenced, unless it is greater than the punishment provided for when the offense was committed." Id at 164, 740 S.E.2d at 503. But see State v. Varner, 310 S.C. 264, 423 S.E.2d 133 (1992)(stating that defendant was not entitled to resentencing when new law was passed while case was pending on direct appeal because no language in the act required retroactive application). Since Anthony's conviction is still on direct review, he should receive the benefit of this change.

Furthermore, the amended version should not only apply to prisoners whose appeals are not yet final on direct review, but should apply to all prisoners because it concerns the calculation of their sentence. The Department of Corrections routinely recalculates prisoners' sentences according to their behavior and earned credits. The express language of the act states that it relates to the "computation of time served." 2013 South Carolina Laws Act 34 (H.B. 3193). Since this involves the computation of time, there is no compelling reason why it should not apply to all prisoners, not just Anthony.

Public policy would also support giving Anthony credit for time served while on house arrest. South Carolina's prisons are overcrowded and allowing the recalculation of

sentences to include credit for time served while on house arrest would do much to alleviate this problem. Violent offenders do not receive house arrest. The earlier release of non-violent offenders comports with the Legislature's intentions in passing this amendment.

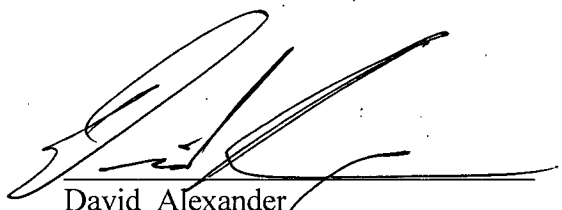
Allowing all prisoners to benefit from this amendment would not necessarily create a strain on judicial resources. For current cases, the standard sentencing sheet should be changed to reflect the new law and allow trial judges to exercise their discretion in a clear manner for the benefit of defendants and the Department. For prisoners who have already been sentenced who served time on house arrest, a form consent order could be created that a prisoner could forward to the solicitor. If the solicitor did not oppose credit for house arrest, such a consent order could be forwarded to the trial judge for consideration. In these cases, no hearing need be held. In cases where a solicitor opposed a prisoner's request, both parties could submit written requests to the trial judge. As the Court would be extending a defendant's right arguably past the minimum requirements of due process, hearings would not be mandated. Alternatively, this Court could determine that the judicial discretion that must be exercised for past prisoners could be exercised by an administrative law judge pursuant to Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999),

Finally, to the extent the State argues this issue must be subjected to the Al-Shabazz procedure, Anthony's case is ripe for decision now and should be decided in the interest of judicial economy. The Court will be in no better position to decide this issue after it winds its way through the prison grievance system and through the administrative law courts. Furthermore, because of the length Anthony spent on house arrest, credit for this time could substantially affect his release date. Given Anthony's age, a decision now may mean the difference between Anthony dying in prison or one day being free.

CONCLUSION

For the foregoing reasons, Anthony's convictions should be reversed and the case remanded for a new trial. In the alternative, the Court should allow Anthony to have a judicial determination of whether he is entitled to credit for time served while on house arrest.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of January, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JAN 13 2014
SC Court of Appeals

Appeal from York County
John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HARRY ANTHONY,

APPELLANT

APPELLATE CASE NO. 2012-20662

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Jennifer Ellis Roberts, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of January, 2014.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of January, ~~2014~~.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 13th, 2014

David Alexander
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1568