

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

—————
Certiorari to York County

Honorable Daniel D. Hall, Circuit Court Judge
—————

DENNIS RODGER DAVIS, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-001116
—————

PETITION FOR WRIT OF CERTIORARI
—————

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S.C. SUPREME COURT

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ISSUES PRESENTED

I.

Whether the PCR court erred in summarily dismissing Petitioner's second PCR application as time barred and successive where Petitioner could not have raised the legality of his sentence in his initial PCR application and where Petitioner raised the legality of his sentence within the statute of limitations?

II.

Whether this Court should consider the merits of Petitioner's PCR application which raises a purely legal issue of statutory interpretation where there is a real threat that Petitioner has and will remain incarcerated beyond the legal sentence due to the additional time it would take to pursue a PCR remedy?

STATEMENT OF THE CASE

On March 8, and April 5, 2013, officers with the York County drug enforcement unit employed a confidential informant to conduct controlled purchases of marijuana from a subject known as “Mack.” App. 6, l. 22-App. 8, l. 12. Both transactions took place within a half mile of a school campus. App. 7, ll. 18-19; App. 8, ll. 12-13. During the investigation the confidential informant identified “Mack” as Dennis Davis, Petitioner. App. 7, ll. 20-24; App. 8, ll. 14-15. On April 16, 2013, Petitioner was arrested on the controlled purchase warrants and was found to have 13.9 grams of marijuana on his person. App. 8, l. 16-App. 9, l. 1.

During the August 2013 York County grand jury term Petitioner was indicted for two counts of distribution of marijuana, two counts of distribution of marijuana within the proximity of a school, and one count of simple possession of marijuana. App. 148-162. Based on Petitioner’s prior convictions¹ the distribution charges were enhanced to third offenses and the simple possession charge was enhanced to a second offense. App. 9, ll. 3-17.

On May 21, 2014, Petitioner appeared before the Honorable G. Edward Welmaker to plead guilty as charged. Petitioner was represented by Creighton Hayes²; the State was represented by Hattie Boyce. App. 1; App. 40, l. 13. During the plea hearing Counsel Hayes stated that “because of the nature of [Petitioner’s] record the department [of corrections] will treat [any sentence] as 85% before he is eligible to make parole” and asked the court for a

¹ Petitioner’s prior drug convictions are a 2002 trafficking crack cocaine 10 to 28 grams, a 2002 possession with intent to distribute crack cocaine, and a 2009 simple possession of marijuana. App. 9, ll. 3-10.

² A scrivener’s error on the first page of the plea transcript shows Davida Mathis as Petitioner’s attorney during the plea. However, it is clear from the transcript and the PCR proceedings that Petitioner was represented by Creighton Hayes. App. 1; App. 3, ll. 1-3; App. 40, l. 13.

sentence in the five to eight year range. App. 21, 1. 20-App. 22, 1. 2. The court sentenced Petitioner to an aggregate term of 125 months imprisonment. App. 23, ll. 12-18.

Petitioner appealed his convictions and sentences; the appeal was dismissed on February 11, 2014, pursuant to Rule 203(d)(1)(B)(iv), SCACR. The remittitur was sent on September 5, 2014. App. 33. On March 12, 2015, Petitioner filed an initial application for post-conviction relief alleging that plea counsel was ineffective for failing to challenge the use of an invalid conviction for enhancement purposes, failing to challenge the sufficiency of the chain of custody, and failing to preserve his right to a direct appeal. App. 25-31. The State filed a return dated August 7, 2015. App. 32-36.

A hearing was held before the Honorable Paul M. Burch on January 20, 2016. App. 37. The State was represented by Justin Hunter. Petitioner was represented by Leah Moody. App. 37. Petitioner and plea counsel Creighton Hayes testified at the hearing. App. 38. At the beginning of the hearing Judge Burch reviewed the “pitfalls” of moving forward with a PCR hearing and informed Petitioner that his file reflected that he would be eligible for parole in three and a half months. App. 41, 1. 19-App. 42, 1. 6.

Some testimony regarding the parole eligibility advice that Counsel Hayes provided to Petitioner prior to his guilty plea was elicited during the PCR hearing. App. 62-64; App. 86-87. Of note was Counsel Hayes testimony that after speaking with SCDC attorneys it was his understanding that under the Omnibus Crime Reduction and Sentencing Reform Act of 2010 (the Act) Petitioner was parole eligible. However, if Petitioner was not granted parole then SCDC

would treat Petitioner’s convictions as “no-parole” offenses³ moving forward which would require Petitioner to serve 85% of his sentence. App. 86, l.19-App. 87, l. 14. Petitioner asserted that this advice was incorrect, considering he was in fact parole eligible, and that this erroneous advice impacted his decision to plead guilty. App. 61-64; App. 66, ll. 19-24.

An order of dismissal was filed on June 13, 2016. App. 91. In the order the court found counsel credible and persuasive while finding Petitioner was not credible. App. 96. The PCR court ruled that Petitioner had failed to provide any evidence of deficient performance by counsel. Further the court ruled that Petitioner had failed to show any prejudice. App. 96-99.

As noted during the first PCR hearing, Petitioner had initially been classified as parole eligible. Petitioner was informed in late June 2016⁴ that he was no longer parole eligible and that his sentence would be recalculated at 85%. Petitioner appealed the change in his sentence to

³ This interpretation of the Act by SCDC was challenged in Bolin v. South Carolina Department of Corrections, 415 S.C 276, 781 S.E.2d 914 (Ct. App. 2016). The Bolin Court held that the amendments made by the Act to S.C. Code § 44-53-375 and -370 implicitly repealed the no-parole offense statute such that second offenses under those sections were no longer considered no-parole offenses requiring an inmate to serve 85% of their sentence.

⁴ In late June 2016 SCDPPPS sent Petitioner a letter informing him that based on his prior drug convictions he was not eligible for parole. Petitioner disputed this finding through the Administrative Law Court (ALC). In March 2017, Petitioner initiated a direct appeal of the decision from the ALC. On October 17, 2018, the Court of Appeals affirmed the findings of the ALC in an unpublished opinion. Dennis Davis v. SCDPPPS, 18-UP-385 (Ct. App. 2018). A petition for rehearing was denied on December 13, 2018. Petitioner filed a pro se Petition for Writ of Certiorari in the Supreme Court that was dismissed due to failure to comply with filing formalities on January 1, 2019. Pursuant to Rule 201(b), SCRE, and S.C. Code § 1-23-330(4) (notice may be taken of judicially cognizable facts) Petitioner request that this Court take judicial notice of Appellate Case number 2017-000663, Dennis Davis v. SCDPPPS, which contains filings which are relevant to track the progress of Petitioner’s case prior to filing the present PCR application. “[O]riginal judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable. A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records. It is not error for a judge to take judicial notice of what was stated in [a] former opinion in [a] prior action of the same case.” Wise v. Wise, 394 S.C. 591, 600–01, 716 S.E.2d 117, 122 (Ct. App. 2011) (internal citations omitted).

the ALC. The ALC issued an order in February 2017 finding that the South Carolina Department of Probation, Parole and Pardon Services (the Department) recalculation of Petitioner's sentence was proper. Petitioner appealed this matter up to the South Carolina Supreme Court where it was eventually dismissed for failure to comply with filing formalities. The remittitur was issued on March 11, 2019.

On December 12, 2018, Petitioner filed the present PCR application alleging that he was being held in custody unlawfully due to the improper recalculation of his max out date and removal of his parole eligibility. App. 100-106. On September 20, 2019, the State filed a return and motion to dismiss arguing that Petitioner's claim was successive and time barred. App. 107-113. Specifically, Respondent argued that Petitioner's "current [PCR] application is practically identical to his prior application" and that Petitioner was well past the one-year statute of limitations articulated in the PCR statute. App. 110-111.

The Honorable Daniel D. Hall signed a conditional order of dismissal containing language that was nearly indistinguishable from Respondent's return on October 30, 2019. App. 114-119. Petitioner filed a *pro se* motion in opposition of the conditional order of dismissal. In the *pro se* filing Petitioner argued that this was the first opportunity he had to raise the specific claim of being held unlawfully in the PCR context and therefore the application was proper. App. 120-125. In support of his argument, Petitioner submitted a SCDC classification record that showed his parole eligibility (May 31, 2016), max out (September 13, 2019), and supervised furlough release (March 17, 2017) dates as of October 17, 2016. App. 126.

A final order of dismissal was filed on July 14, 2020. The order stated that Petitioner had failed to provide any valid legal explanation that would allow him to bypass the statute of limitations or the bar on successive applications. App. 127-128. Notably, prior to the filing of

the order, the South Carolina Attorney General's Office sent a letter to Judge Hall inquiring whether there should be a hearing on the motion to dismiss but Judge Hall declined to hold such a hearing. App. 127.

Petitioner filed a notice of appeal of Judge Hall's order of dismissal. The South Carolina Supreme Court requested an explanation under Rule 243(c), SCACR, as to why the appeal should be allowed to continue. App. 129-130. Petitioner's *pro se* response was filed on September 11, 2020. App. 131-146. By letter dated October 20, 2020, the South Carolina Supreme Court granted Petitioner the ability to move forward with the appeal. App. 147-148.

This petition for writ certiorari⁵ follows.

⁵ Petitioner also currently has a federal case, C/A No.: 0:19-2720-TLW-PJG Dennis Rodger Davis, Jr., v. Tonya James, pending in the United States District Court for the District of South Carolina requesting a writ be issued directing that the determination that Petitioner is ineligible for parole be rescinded.

ARGUMENTS

I.

The PCR court erred in summarily dismissing Petitioner's second PCR application as time barred and successive where Petitioner could not have raised the legality of his sentence in his initial PCR application and where Petitioner raised the legality of his sentence within the statute of limitations.

Despite assertions to the contrary, Petitioner's second PCR application contained a single allegation that was wholly distinct from the allegations he had raised in his first PCR application. The single allegation raised was that Petitioner was being held unlawfully due to the recalculation of his max out date and removal of his parole eligibility. While not necessarily presented in the clearest of terms, it was apparent from the application and Petitioner's subsequent *pro se* filings that he was challenging the legality of his sentence after he discovered it had been recalculated by SCDC and his parole eligibility had been removed. Additionally, Petitioner had no way to raise the issue of the legality of his sentence in his first PCR application, filed on March 12, 2015, because the issue did not exist at that time. Accordingly, the lower court erred in summarily dismissing Petitioner's current PCR application as successive and time barred.

“The [PCR] court may grant a motion by either party for summary disposition of the [PCR] application when ... there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” S.C. Code Ann. § 17-27-70(c). “When considering the State's motion for summary dismissal of an application for PCR, *a judge must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant.*” Wilson v. State, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002) (citing Al-Shabazz

v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000)) (emphasis added). Likewise, the appellate courts must view the facts in the same fashion when reviewing the appropriateness of a dismissal. Leamon, 363 S.C. at 434, 611 S.E.2d at 494. “Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, *a question of fact is raised which can only be resolved by a hearing.*” McCoy v. State, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013) (internal citations omitted) (emphasis added).

In McCoy, *supra*, the South Carolina Supreme Court reviewed the summary dismissal of McCoy’s second PCR application which alleged a newly discovered material fact, specifically that a juror had withheld information about her relationship to the prosecuting Solicitor’s office. McCoy at 366, 737 S.E.2d at 625. The State argued McCoy’s application was barred as untimely and successive because McCoy had failed to present sufficient reason why he could not have raised the juror allegation in his first PCR application. Id. at 367-68, 737 S.E.2d at 625-26. The PCR court granted the State’s motion for summary dismissal, finding that the application was untimely because it had not been filed within one year of McCoy’s trial. The PCR court also found the application successive stating McCoy had not demonstrated a sufficient reason why the juror allegation could not have been raised in his first PCR application. Id.

The Supreme Court reversed the PCR court holding that summary dismissal of McCoy’s second application had been improper because genuine issues of material fact existed as to whether the application was successive or barred by the statute of limitations. Id. at 368, 737 S.E.2d at 626. In reaching its decision the Court noted that the PCR court improperly calculated McCoy’s original PCR application deadline using the date of his conviction, instead of the date

that the appellate court had issued the remittitur, and that the PCR Court had failed to consider section 17-27-45(C). The Court wrote,

As to the timeliness issue, we conclude the PCR judge misconstrued section 17-27-45(A) in finding Petitioner was required to file his claim within one year after his trial, rather than one year after the remittitur was sent from his direct appeal. The time limitation in § 17-27-45(A) provides that, where a defendant appeals his conviction (as Petitioner did), the one-year period begins the date the remittitur is sent by the appellate court—not the date of conviction. *Further, the PCR judge apparently overlooked the discovery rule in section 17-27-45(C), which allows one year after the discovery of “material facts not previously presented and heard that require[] vacation of the conviction or sentence” to file a PCR application.* Petitioner argued he did not discover the juror's misconduct until November 2009, and he promptly filed his second PCR application after making that discovery. Because Petitioner's claim that he is entitled to the benefit of the discovery rule is not conclusively refuted by the record, the PCR judge erred by summarily dismissing Petitioner's claim.

Id. at 368-69, 737 S.E.2d 626 (emphasis added). The Court further held the State's assertion that McCoy's claim could have been discovered through the exercise of due diligence, and therefore included in McCoy's original application, required a hearing to resolve a critical factual dispute. Id. at 370, 737 S.E.2d at 627.

In Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999), Tilley entered a guilty plea to kidnapping, first degree criminal sexual conduct, and possession of a firearm during the commission of a violent crime. Tilley at 26, 511 S.E.2d at 690. At the time of his plea Tilley believed he was parole eligible. Tilley received a letter from SCDPPPS on October 26, 1995, informing him that he was not eligible for parole. Id. Within a month of receiving the letter Tilley filed a fourth PCR application alleging his plea was involuntarily entered because he was not fully aware of the no-parole consequences of his guilty plea. Id. The State argued that Tilley's application should be dismissed as successive. The Supreme Court held that Tilley's application concerning parole eligibility was not successive because he could not have raised the

claim prior to being informed of his parole ineligibility on October 26, 1995. *Id.* at 28, 511 S.E.2d at 691.

In the present matter, as in *McCoy, supra*, Respondent argued, and the lower court agreed, that Petitioner's present application was untimely⁶ pursuant to S.C. Code Ann. § 17-27-45(A). This argument completely ignored S.C. Code Ann. § 17-27-45(C) which specifically allows an applicant to file a PCR application one year after the discovery of "material facts not previously presented and heard that requires vacation of the conviction or sentence." The discovery rule of subsection (C) creates a statute of limitations separate and distinct from the one articulated in subsection (A).

Petitioner initially received notice of the change in his sentence and parole eligibility in June 2016. Petitioner immediately and properly appealed the matter to the ALC. *See Al-Shabazz* at 368, 527 S.E.2d at 749 (holding that the claims listed in 17-27-20(a)(5) may be raised in PCR or as non-collateral matters through SCDC's internal process and the ALC). The final decision of the ALC was issued in February 2017. Petitioner appealed that decision to the Court of Appeals and the remittitur was issued on March 11, 2019. Therefore March 11, 2019, was the first time Petitioner had the opportunity to properly raise this matter in a post-conviction relief application. The application filed on December 12, 2018, two months after the Court of Appeals affirmed the finding of the ALC, was well within the statute of limitations.

⁶ It is worth noting that, along with relying on the wrong section of the PCR Act to calculate the statute of limitations in Petitioner's case, the date calculations pursuant to S.C. Code Ann § 17-27-45(A) that Respondent did include in its return and which were relied upon in the order of dismissal were incorrect. Respondent calculated the due date of any PCR application as one year after Petitioner's plea date. The correct calculation for an initial PCR application when a direct appeal has been taken is one year from the date that the remittitur was sent to the lower court from an appeal or the filing of the final decision on appeal, whichever is later, as stated clearly in the statute. Incidentally, the statute was referenced two paragraphs prior to the incorrect calculations. The actual due date of an initial PCR application in Petitioner's case would have been September 6, 2016. App. 109-10.

Additionally, Petitioner had no way to raise the allegation that his parole eligibility had been removed and his max out date changed in his original PCR application as SCDC had not recalculated his sentence when he filed his initial PCR application. As the judge noted during the hearing, Petitioner was actual parole eligible at the time of his first PCR hearing. As in Tilley, *supra*, Petitioner did not have the ability to raise the claim prior to the Court of Appeals issuing a final determination that the ALC, and the Department, had properly deemed him ineligible for parole.

The lower court erred in summarily dismissing Petitioner's PCR application. Petitioner's assertion that he was informed of the change in his parole eligibility and max out date after his original PCR application had been dismissed, and Respondent's return arguing against that assertion, created a genuine issue of fact as to the timeliness and successiveness of the present PCR application that required a hearing. Petitioner's current PCR application is neither successive nor time barred. Petitioner is entitled to a remand for a hearing on this matter. However, because this Court can take judicial notice of its own actions, as well as the actions of the ALC, and the question at the heart of Petitioner's current application is purely one of statutory interpretation, Petitioner requests that his application be considered on the merits by this Court.

II.

This Court should consider the merits of Petitioner's PCR application which raises a purely legal issue of statutory interpretation where there is a real threat that Petitioner has and will remain incarcerated beyond the legal sentence due to the additional time it would take to pursue a PCR remedy.

The typical remedy requested when a PCR application has been improperly dismissed is a remand for an evidentiary hearing. However, because Petitioner's current PCR application presents this Court with a question of law regarding the statutory construction and interplay of S.C. Code Ann §§ 24-13-100, 24-13-150, and 44-53-370(b)(2), and because remanding for a hearing would create a real threat that Petitioner would remain incarcerated beyond the legal sentence due to the amount of time it would take to pursue a PCR hearing, Petitioner request this Court consider the application on its merits. State v. Johnston, 333 S.C 459, 463-64 & n.3, 510 S.E.2d 423, 425 & n.3 (1999) (finding a narrow exception to the preservation requirement exists with respect to sentencing only in the "exceptional circumstance" where there is a real threat that the defendant will remain incarcerated beyond the legal sentence due to the additional time it will take to pursue PCR remedies to review an illegal sentence and where the facts are unique and demand an expedited result).

Moreover, "[t]he issue of interpretation of a statute is a question of law for the court." Charleston County Parks Rec. Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995) (holding the determination of legislative intent is a matter of law). "This Court is free to decide questions of law with no particular deference to the lower court." Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). Hence, this Court can and should consider Petitioner's PCR application on the merits as an exercise of judicial economy. See S. Bell Tel. &

Tel. Co. v. Hamm, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (holding, where a party argued that the trial court erred in rendering judgment on a constitutional issue inasmuch as such an analysis was “purely advisory,” because the issue would be raised to the court at some future time and since both parties had fully briefed the issue, it was proper for the appellate court to decide the matter in the interest of judicial economy); Jeter v. S.C. Dep't of Transp., 369 S.C. 433, 441 n. 6, 633 S.E.2d 143, 147 n. 6 (2006) (holding, regardless of any preservation problems, the appellate court would address an issue in the interest of judicial economy).

Finally, S.C. Code Ann. § 15–53–30 allows a party whose rights, status, and other legal relations are affected by a statute may seek a court's determination of any question of construction or validity of the statute and obtain a declaration of the party's rights, status, or other legal relations thereunder. Therefore, this Court could construe this as an action for a declaratory judgment. See Also S.C. Code Ann. § 15–53–130 (2005) (purpose of the Declaratory Judgment Act is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and it is to be liberally construed and administered); Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S.C. 449, 415 S.E.2d 801 (1992) (the Supreme Court can render a declaratory judgment when a justiciable controversy setting legal rights of parties exists).

In 2010 the South Carolina Legislature enacted the Omnibus Crime Reduction and Sentencing Reform Act (the Act). The overall purpose of the Act was to,

[P]reserve 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.*

2010 Act No. 273, § 1 (emphasis added).

The General Assembly further specified its intent concerning each part of the Act. Regarding the revisions to various criminal punishment, the legislature sought to “provide consistency in sentencing classifications, provide proportional punishments for the offenses committed, and reduce the risk of recidivism.” 2010 Act No. 273, § 2. Regarding release and supervision revisions the intent was “to provide cost-effective prison release and community supervision mechanisms and cost-effective and incentive-based strategies for alternatives to incarceration in order to reduce recidivism and improve public safety.” Act No. 273, § 44. Regarding oversight the legislature sought to “provide oversight revisions to fiscal impact statements and also a committee to continue oversight of the implementations of the Sentencing Reform Commission recommendations.” Act No. 273, § 60.

The Act created sweeping changes to then existing drug penalties. Subsequently many drug offenses that had not been eligible for probation, parole or early release credits became eligible for such treatment. Specific to Petitioner’s case, S.C. Code Ann. § 44-53-370(B)(2) was changed to read, 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.

In analyzing the impact of the Act, the often cited *The Criminal Law of South Carolina* stated,

Even third offenders who sell or possess drugs with intent to distribute are eligible for these sentencing and punishment options if “all prior offenses were for possession of a controlled substance pursuant to subsections (c) and (d)....”

If any of the prior offenses were for manufacturing, selling or possessing with intent to distribute, or trafficking in drugs then a third offender who violates § 44-53-470(a) or § 44-53-475(B) is not eligible for a suspended sentence or probation. **They would apparently still be eligible for parole and the other sentence reduction programs.**

McAninch, Fairey & Coggiola, THE CRIMINAL LAW OF SOUTH CAROLINA, Pg. 499-500 (6th ed. 2013) (emphasis added).

The basic principles of statutory construction as applied to criminal statutes have been clearly and repeatedly set forth by the appellate courts of this state. The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). When a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). However, 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). Additionally, when applying the rules of statutory construction a “[c]ourt must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something.” Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002); See Also State v. Long, 363 S.C. 360, 364, 610 S.E.2d 809, 811 (2005) (“The legislature is presumed to intend that its statutes accomplish something”).

In 2016 the Court of Appeals applied the rules of statutory construction in deciding Bolin v. South Carolina Dept. of Corrections, 415 S.C. 276, 781 S.E.2d 914 (Ct. App. 2016). SCDC had informed Bolin that pursuant to S.C. Code Ann § 44-53-375(B) he was eligible for parole however if he was denied parole he would then be treated as a no-parole offender requiring him to serve 85% of his sentence pursuant to S.C. Code Ann. §§ 24-13-100 and 24-13-150. Id. at

278-79, 781 S.E.2d at 915. Bolin appealed the decision of SCDC to the ALC which upheld the determination. Id. at 279-80, 781 S.E.2d 915. The Court of Appeals reversed finding that the 2010 amendment to section 44-53-375(B) implicitly repealed section 24-13-100 to the extent that the two sections were in conflict. The Court wrote,

The legislature's use of the phrase "Notwithstanding any other provision of law," in the amendments to sections 44-53-375 and -370 expresses its intent to repeal section 24-13-100 to the extent it conflicts with amended sections 44-53-375 and -370. Even if the language of section 24-13-100 could be considered more specific than the amendment to section 44-53-375(B), the intent to repeal section 24-13-100 to the extent it conflicts with the amendments to sections 44-53-370 and -375 is "explicitly implied" in the language of the amendments stating, "Notwithstanding any other provision of law." Without this implicit repeal, the amendments themselves would be meaningless.

Id. at 282-83, 781 S.E.2d at 917 (internal citations omitted).

Prior to the ratification of the Act, Petitioner's conviction for distribution of marijuana third offense would have unquestionably been a "no-parole" offense under sections 24-13-100 and -150. However, applying Bolin and the rules of statutory construction to Petitioner's case reveal that while Petitioner's prior drug convictions bar him from receiving a suspended sentence or probation they do not bar him from being eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.

The Act explicitly allows that a third time offender "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" when their prior convictions are for simple possession. S.C. Code Ann. § 44-53-370(B)(2). The Act then removes the ability for a third time offender to receive a suspended sentence or probation in all other cases. The Act does not discuss the removal of parole eligibility and early release credits for third time offenders in all other cases.

If the legislature had intended to allow only third time offenders whose prior convictions were for simple possession the benefit of parole and the other programs enumerated, it would have specifically stated that intention. See Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (the canon of construction “expressio unius est exclusio alterius ” or “inclusio unius est exclusio alterius ” holds that “to express or include one thing implies the exclusion of another, or of the alternative”). Instead, the legislature intended that in all other cases third time offenders must serve some actual prison time but would still qualify for parole and early release credits. Thus, the intent of the legislature to create proportional punishments along with reducing the number of individuals housed in SCDC would be effectuated.

The Department and the ALC interpreted the sentence “in all other cases, the sentence must not be suspended nor probation granted” to mean Petitioner is not parole eligible because his prior convictions are not simple possession offenses. This interpretation ignores the intent of the legislature to reduce the prison population through shorter sentences and enhanced chances at parole, probation, and release credits. Further, it construes any potential ambiguity in the Act in favor of the State when any ambiguity must be construed in the favor of a defendant, and it ignores the specific dictate that in all other cases **only** the chance at a suspended sentence or probation is removed. The Department erred when it removed Petitioner’s parole eligibility.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on these issues.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of May, 2021.