No. 20-

IN THE

Supreme Court of the United States

SHADRECK KIFAYATUTHELEZI A/K/A NORMAN HAYES,

Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS AND MICHAEL STOBBE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

TRISTAN M. SHAFFER
THE LAW OFFICE OF
TRISTAN MICHAEL SHAFFER
225 Columbia Avenue
Chapin, SC 29036
(803) 941-7514

KYLE J. WHITE
Counsel of Record
WHITE, DAVIS, AND WHITE
LAW FIRM, P.A.
209 East Calhoun St.
Anderson, SC 29621
(864) 231-8090
kyle@wdwlawfirm.com

Counsel for Petitioner

299422

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

I. Whether the Eighth Amendment, the Fourteenth Amendment, and/or state law provide a source of compensation when an inmate is incarcerated past his lawful release date.

II. Whether dismissal of the Petitioner's claims violated the Petitioner's right to a jury trial afforded by the Seventh Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

The captioned parties, Petitioner Shadreck Kifayatuthelezi a/k/a Norman Hayes, Respondent South Carolina Department of Corrections, and Respondent Michael Stobbe, are the only parties to this proceeding.

STATEMENT OF RELATED CASES

The following is a list of all proceedings in other courts that are directly related to the case in this Court:

- *State of South Carolina v. Hayes*, Indictment Nos. 2004-GS-32-1203 and 2004-GS-32-1645, Richland County, South Carolina Court of General Sessions, Sentenced June 10, 2004
- *State of South Carolina v. Hayes*, Indictment Nos. 2004-GS-32-1203 and 2004-GS-32-1645, Richland County, South Carolina Court of General Sessions, Probation Revoked July 30, 2010
- *State of South Carolina v. Hayes*, C.A. No. 2011CP3203630, Lexington County, South Carolina Court of Common Pleas, Judgement Entered February 7, 2012.
- *Hayes v. State of South Carolina*, App. No. 2015-002294, South Carolina Court of Appeals, Judgement Entered November 9, 2016.
- *Kifayatuthelezi aka Hayes v. SCDC et al,* United States District Court for the District of South Carolina, Judgment Entered September 25, 2019.
- *Kifayatuthelezi aka Hayes v. SCDC et al,* United States Court of Appeals Fourth Circuit, Judgment Entered July 1, 2020.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

STATEMENT OF RELATED CASES ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 4

STATEMENT OF THE CASE 5

Legal Framework 5

Facts and Procedural history 8

REASONS FOR GRANTING THE PETITION 9

I. There must be recourse when an inmate is held past his or her release date in violation of applicable law 9

II. Petitioner's rights were clearly established, and Respondents had a nondiscretionary duty to avoid violating those rights 12

III. Petitioner was illegally incarcerated over six months too long 14

IV. Petitioner is entitled to a jury trial on his Civil Rights claims 14

V. Respondents are not entitled to Qualified Immunity 17

VI. The constitutionality of qualified immunity should be evaluated 20

VII. The application of the incorrect legal standard to the state law claims deprived Petitioner of his constitutional right to a jury trial 21

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

Cases:

Alexander v. Perrill,
916 F.2d 1392 (9th Cir. 1990) 16

Amaechi v. West,
237 F.3d 356 (4th Cir. 2000) 18

American Mfrs. Mut. Ins. Co. v. Sullivan,
526 U.S. 40 (1999) 14

Anderson v. Creighton,
483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) 6, 18

Austin v. Paramount Parks, Inc.,
195 F.3d 714 (4th Cir. 1999) 14

Baldwin v. Erickson,
No. 92-2437, 1993 WL 387898 (E.D. Pa. Sept. 28, 1993) 16

Caldwell v. K-mart Corp.,
306 S.C. 27 (1991) 24

Caldwell v. K-mart Corp.,
306 S.C. 27 (1991) 8

Clark v. S.C. Dep't of Pub. Safety,
578 S.E.2d 16 (S.C. Ct. App. 2002), *aff'd*, 608 S.E.2d 573 (S.C. 2005) .. 7, 22, 24

Clem v. Corbeau,
284 F.3d 543 (4th Cir. 2002) 18, 19

Collins v. Harker Heights,
503 U.S. 115 (1992) 15

Cox v. Quinn,
828 F.3d 227 (4th Cir. 2016) 6, 19

Cruz-Caraballo v. Rodriguez,
113 F. Supp. 3d 484 (D. P.R. 2014) 17

Davis v. United States,
131 S. Ct. 2419 (2011) 15

Degenhart v. Knights of Columbus,
309 S.C. 114, 420 S.E.2d 495 (1992) 25

Douglas v. Murphy,
6 F.Supp.2d 430 (E.D. Pa. 1998), *aff'd*, 248 F.3d 1129 (3d Cir. 2000) 16

Duncan v. Hampton County School Dist.# 2,
335 S.C. 535, 517 S.E.2d 449 (S.C. App., 1999) 8, 22

Estate of Jones v. City of Martinsburg,
App. No. 18-2142 (4th Cir. June 9, 2020).. 20

Etheredge v. Richland School Dist. I,
499 S.E.2d 238, 330 S.C. 447 (S.C. App. 1998) 8, 22

Faile v. S.C. Dep't of Juvenile Justice,
350 S.C. 315, 566 S.E.2d 536, 545 (2002)... 8, 23

Fairchild v. SCDOT,
398 S.C. 90 (2012).. 8, 24

Farmer v. Brennan,
511 U.S. 825 (1994) 15

Franklin v. State,
545 So.2d 851 (Fla. 1989).. 12

Gist v. Berkeley Cty. Sheriff's Dep't,
336 S.C. 611, 521 S.E.2d 163 (Ct. App. 1999) 22

Graham v. Gagnon,
831 F.3d 176 (4th Cir. 2016).. 18

Hayes v. State,
413 S.C. 553 (S.C. App. 2015)... 12

Haygood v. Younger,
769 F.2d 1350 (9th Cir. 1985) 16

Heien v. North Carolina,
574 U.S. ___ (2014)... 15

Hollins v. Richland Co. Sch. Distr. One,
427 S.E.2d 654 (S.C. 1993) 7, 22

Jackson v. South Carolina Dept. of Corrections,
390 S.E.2d 467, 301 S.C. 125 (S.C. App. 1989) 8, 23

James v. Kelly Trucking Co.,
377 S.C. 628, 661 S.E.2d 329 (2008).. 25

Jamison v. McClendon,
3:16-cv-00595-CWR-LRA (Aug. 4, 2020) 20

Jinks v. Richland County,
355 S.C. 341, 585 S.E.2d 281 (S.C. 2003)... 8, 24

Kifayatuthelezi v. South Carolina Dept. Corrections,
App. No. 19-7379 (4th Cir. 2020) 1

Lundblade v. Franzen,
631 F. Supp. 214 (N.D. Ill. 1986) 16

Madison v. Babcock Ctr., Inc.,
638 S.E.2d 650 (S.C. 2006) 8, 24

Niver v. S.C. Dep't of Highways & Public Transp.,
395 S.E.2d 728 (S.C. Ct. App. 1990) 7, 22, 25

Parrish ex rel. Lee v. Cleveland,
372 F.3d 294 (4th Cir. 2004) 15

Pearson v. Callahan,
555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) 6, 18

Pike v. S.C.D.O.T.,
540 S.E.2d 87 (S.C. 2000) 25

Plumb v. Prinslow,
847 F. Supp. 1509 (D. Or.1994) 16, 17

Russell v. Lazar,
300 F. Supp. 2d 716 (E.D. Wis. 2004) 5, 7, 16, 19

Sample v. Diecks,
885 F.2d 1099 (3d Cir. 1989) 16

Sims v. Labowitz,
885 F.3d 254 (4th Cir. 2018) 6, 18

State v. Boggs,
696 S.E.2d 597 (Ct. App. 2010) 12

Steinke v. South Carolina Dep't of Labor, Licensing, and Regulation,
336 S.C. 373, 520 S.E.2d 142 (1999) 8, 23

Thompson v. Virginia,
878 F.3d 89 (4th Cir. 2017) 6, 19

Toney-El v. Franzen,
777 F.2d 1224 (7th Cir. 1985) 16

United States v. Lanier,
520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) 17

Williamson v. Stirling,
Appeal No. 17-6922 (4th Cir. Dec. 21, 2018) 15

Wortman v. Spartanburg,
425 S.E.2d 18 (1992) 21

Ziglar v. Abbasi,
582 U.S. __ (June 19, 2017) 20, 21

Statutes & Other Authorities:

U.S. Const., amend. VII 3, 4

U.S. Const., amend. VIII 3, 16

U.S. Const., amend. XIV 3

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 .... 1, 4, 14

24 C.J.S. Criminal Law § 1599 (1989) 16

S.C. Code § 15-78-30(5) 22, 24

S.C. Code § 15-78-40 .... 2, 21

S.C. Code § 15-78-60 .... 2, 23

S.C. Code § 15-86-60(25) 7, 23

S.C. Code § 24-13-40 .... 2, 4, 8, 10

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit rendered an unpublished, per curiam opinion in this matter on May 20, 2020. *Kifayatuthelezi v. South Carolina Dept. Corrections*, App. No. 19-7379 (4th Cir. 2020). The Fourth Circuit opinion is attached to this petition as Appendix A. The district court opinion is attached to the petition as Appendix B, and the Report and Recommendation of the magistrate judge is attached to the petition as Appendix C.

JURISDICTION

The Fourth Circuit filed its opinion in this matter on May 20, 2020. A petition for rehearing was filed on June 2, 2020, and the petition for rehearing en banc was denied on June 23, 2020, with the final judgment being entered July 1, 2020. This Court may review the Fourth Circuit's decision pursuant to 28 U.S.C. § 1254(1). Pursuant to this Court's Covid-19 order entered March 19, 2020, the time for the Petitioner to file the instant petition was extended until November 20, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provisions at issue in this case are 42 U.S.C.A. Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

S.C. Code § 15-78-40:

> The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.

S.C. Code § 15-78-60:

> The governmental entity is not liable for a loss resulting from: . . . (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee; . . . (21) the decision to or implementation of release, discharge, parole, or furlough of any persons in the custody of any governmental entity, including but not limited to a prisoner, inmate, juvenile, patient, or client or the escape of these persons; . . . (25) responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner;

S.C. Code § 24-13-40:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence.

> However, when (a) a prisoner shall have given notice of intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, the computation of the time served must be calculated from the date of the commencement of the service of the sentence. In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.

The Seventh Amendment to the United States Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

This is a case which tests the judiciary's commitment to applying the plain language of statutes such as 42 U.S.C.A. Section 1983, and which squarely implicates the Seventh Amendment to the United States Constitution, which provides that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Petitioner was held in prison over six months too long in violation of the plain language of the applicable sentencing statute and seeks the benefit of the plain language of Section 1983 and the Seventh Amendment in this action.

Petitioner was sentenced to serve three years in the South Carolina Department of Corrections (SCDC) following a revocation of his probation. Based on the plain language of S.C. Code § 24-13-40 and his pre-trial detention credit, Respondents were required to release Petitioner from prison on July 21, 2011. Respondent Michael Stobbe, the SCDC employee who calculated Petitioner's sentence, ignored the mandates of S.C. Code § 24-13-40 based on an alleged "split sentence" policy that applied the pre-trial detention credit to a fictional "total sentence" as opposed to applying the pre-trial detention credit to the Petitioner's actual sentence as the law requires. As a result, the Petitioner was illegally held for over six months past his lawful release date. This violated Petitioner's clearly established constitutional right to have his sentence calculated correctly, as well as the clearly established constitutional right to be released at the conclusion of his

sentence. The district court granted the Respondents' motion for summary judgment, and the Fourth Circuit affirmed. The practical implication is that an inmate held past his or her release date in the Fourth Circuit has no recourse under state or federal law, and the Petitioner asks the Court to correct this grave injustice.

STATEMENT OF THE CASE

Legal Framework

Petitioner's rights afforded to him under the United States Constitution were violated when he was illegally incarcerated by the Respondents past his release date. Petitioner was incarcerated for over six months beyond his release date based on a patently illegal calculation by Respondent Stobbe. Further, Respondent Stobbe failed to even read the applicable statute even after Petitioner requested a recalculation and brought the error to the Respondents' attention. State officials violate an inmate's Eighth Amendment rights when they are deliberately indifferent to the risk that he may be incarcerated beyond his release date. *See Russell v. Lazar*, 300 F. Supp. 2d 716, 725 (E.D. Wis. 2004). The Constitution also provides inmates with a protected liberty interest and a due process right in being timely released. *See Id.* at 716. Here, as Petitioner was no longer lawfully an inmate at the conclusion of his sentence, the Fourteenth Amendment is the proper standard, but under either standard, the Petitioner should still prevail, and a jury should decide the outcome.

Second, qualified immunity is not applicable here, because the rights at issue were clearly established at the time of the violation. The doctrine of qualified immunity only shields government officials from liability for civil damages when their

conduct does not violate clearly established constitutional or other rights that a reasonable officer would have known. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L.Ed.2d 565 (2009); *Graham v. Gagnon*, 831 F.3d 176, 182 (4th Cir. 2016). Qualified immunity is not available if the official should have known that his acts were unlawful under clear precedent at the time they occurred. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987).

To be clearly established, the "contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right." *Id.* "Accordingly, a constitutional right is clearly established for qualified immunity purposes not only when it has been specifically adjudicated but also when it is manifestly included within more general applications of the core constitutional principle invoked." *Sims v. Labowitz*, 885 F.3d 254 (4th Cir. 2018) (citing *Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002)) (quoting *Anderson*, 483 U.S. at 640, 107 S. Ct. 3034). Officials should not be entitled to qualified immunity when the official's conduct knowingly violated the law, or constituted deliberate indifference. *Thompson v. Virginia*, 878 F.3d 89, 97 n.3 (4th Cir. 2017) (suggesting that the Court may skip the "clearly established" prong of the qualified immunity analysis in the event of an "officer's knowing violation of the law" because it is "per se unreasonable."); *Cox v. Quinn*, 828 F.3d 227, 238 n.4 (4th Cir. 2016) ("Although we need not reach the issue here, we note that some courts have concluded that it is not necessary to consider the objective reasonableness prong of the qualified immunity inquiry at all when summary judgment is denied on deliberate indifference."). Here, regardless of

whether the rights at issue were clearly established as early as the summer of 2000 (*see, e.g., Russell*, 300 F. Supp. 2d at 725), or whether they were clearly established as of the date that Petitioner's incarceration began (*see Hayes*, 777 S.E.2d at 10; JA127-128), the rights set forth herein were clearly established at the time that the Respondents calculated the Petitioner's sentence. Here, Stobbe admitted in his deposition that all of the rights at issue were clearly established at the relevant times. (JA127-128). Accordingly, the rights were clearly established by the Respondent's own admission and the Respondents were not entitled to summary judgment based on qualified immunity.

Finally, the Petitioner's state claims should also be decided by a jury. "The burden of establishing a limitation upon liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense." *Niver v. S.C. Dep't of Highways & Public Transp.*, 395 S.E.2d 728 (S.C. Ct. App. 1990). Whether a defendant is immune from liability under one of the exemptions in the South Carolina Tort Claims Act, including Section 15-78-30(5) or Section 15-78-30(25), is generally a question for the jury, as the inquiry involves questions of fact. *See, e.g., Clark v. S.C. Dep't of Pub. Safety*, 578 S.E.2d 16 (S.C. Ct. App. 2002), *aff'd*, 608 S.E.2d 573 (S.C. 2005); *Hollins v. Richland Co. Sch. Distr. One*, 427 S.E.2d 654 (S.C. 1993). At worst, the outcome here should be the application of a gross negligence standard as opposed to an absolute bar on recovery, as the exemptions at issue are not available to state agency where a Petitioner proves gross negligence, but the outcome is ultimately for the jury to decide. *See* S.C. Code Section 15-86-60(25);

Duncan v. Hampton County School Dist.# 2, 335 S.C. 535, 517 S.E.2d 449 (S.C. App., 1999); *Etheredge v. Richland School Dist. I*, 499 S.E.2d 238, 330 S.C. 447 (S.C. App. 1998); *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536, 545 (2002); *Steinke v. South Carolina Dep't of Labor, Licensing, and Regulation*, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999); *Jackson v. South Carolina Dept. of Corrections*, 390 S.E.2d 467, 301 S.C. 125 (S.C. App. 1989). And there is ample evidence of negligence and gross negligence due to violations of South Carolina law. *Fairchild v. SCDOT*, 398 S.C. 90 (2012); *Caldwell v. K-mart Corp.*, 306 S.C. 27 (1991); *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (S.C. 2003); *Madison v. Babcock Ctr., Inc.*, 638 S.E.2d 650 (S.C. 2006). For these reasons, the district court's order granting summary judgment on the state law claims was error and violated the Petitioner's Constitutional right to a jury trial.

Facts and Procedural history

This is a case in which the Petitioner was held in prison over six months too long in violation of the plain language of the applicable sentencing statute. Petitioner was sentenced to serve three years in the South Carolina Department of Corrections (SCDC) following a revocation of his probation. Based on the plain language of S.C. Code § 24-13-40 and his pre-trial detention credit, Petitioner should have been released from prison on July 21, 2011. Respondent Michael Stobbe, the SCDC employee who calculated Petitioner's sentence, ignored the mandates of S.C. Code § 24-13-40 based on an alleged internal "split sentence" policy that applied the pre-trial detention credit to a fictional "total sentence" as opposed to applying the pre-trial

detention credit to the Petitioner's actual sentence as the law requires. As a result, the Petitioner was illegally held for over six months past his lawful release date.

The Respondents' explanation for this illegal incarceration is that SCDC trained its employees to calculate these sentences illegally and developed internal policies that violated South Carolina law with regard to calculation of these sentences. This violated Petitioner's clearly established constitutional right to have his sentence calculated correctly and the clearly established constitutional right to be released at the conclusion of his sentence. In an underlying administrative proceeding, the South Carolina Court of Appeals concluded that Petitioner's extended sentence was unlawful. In the lawsuit seeking damages however, the district court granted summary judgment as to all state and federal claims, and the Fourth Circuit affirmed, meaning that the Petitioner can never be compensated for his lost freedom, absent reversal of that decision by this Court.

REASONS FOR GRANTING THE PETITION

I. There must be recourse when an inmate is held past his or her release date in violation of applicable law.

Petitioner was arrested on or about April 2, 2010 and was charged with a probation violation. Petitioner appeared before the Honorable G. Thomas Cooper on July 30, 2010 without an attorney. Judge Cooper revoked 5 years the probation violation. The sentencing sheet indicated that the Petitioner was to be credited 240 days time-served. (JA106). On August 4, 2010, Assistant Public Defender Jim May filed a motion to reconsider on Petitioner's behalf. (JA107-108). In a hearing on February 4, 2011, Judge Cooper granted the motion to reconsider, and resentenced

Petitioner to three years and terminated probation. On the February 4, 2011 sentencing sheet, Judge Cooper again indicated that Petitioner was to be given credit for 240 days of time served. (JA109).

Stobbe admitted in his deposition that the Petitioner's sentence was supposed to be calculated by applying the information on the sentencing sheet to S.C. Code Section 24–13–40, which SCDC colloquially refers to as "the jail time statute."[1] (JA116-119, 122). The jail time statute provides as follows:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. However, **when** (a) a prisoner shall have given notice of intention to appeal, (b) **the commencement of the service of the sentence follows the revocation of probation**, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, **the computation of the time served must be calculated from the date of the commencement of the service of the sentence.** <u>In every case</u> **in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest**. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense . . . .

S.C. Code Section 24–13–40 (emphasis added). Stobbe admitted in his deposition that, based on the plain language of the jail time statute, when the sentence follows the revocation of probation, the following are true:

- The computation of the time served must be calculated from the date of the commencement of the service of the sentence. (JA123-124).

[1] For ease of reference, Section 24–13–40 will be referred to herein as "the jail time statute."

- In every case in computing the time served by a prisoner, the “general rule” or “start[ing] assumption” is that full credit against the sentence must be given for time served prior to trial and sentencing. (JA126-127).
- That the only exceptions to the general rule are (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense. (JA124-125).

Based on the jail time statute and Stobbe’s admissions, it is undisputed that the plain language of Petitioner’s revised sentencing sheet provided the following:

1) Petitioner’s sentence was three years; and
2) Petitioner was entitled to 240 days of time served credit. (JA131).

Stobbe admitted that he is required to know and understand the jail time statute, that he is never allowed to violate South Carolina law with regard to calculating sentences, and that the inmate has various clearly established constitutional rights to have their sentence comply with South Carolina law. (JA128-129, 143-144). Notwithstanding, even after the Petitioner **challenged** the calculation of his sentence on the basis that he was not given jail time credit, Stobbe **never even read the jail time statute**. (JA143-144). Instead of following the unambiguous and admittedly applicable jail time statute, Stobbe calculated Petitioner’s sentence such that the time served credit was only applied to the five-year sentence that predated the revised three-year sentence. (JA152, 154-157). Respondents treated the five-year sentence as a “total sentence,” and applied the time served credit to the total sentence, but not to the Petitioner’s actual three-year sentence. (JA152, 154-157).

The absurd result was that the Petitioner would never receive the benefit of the time served credit unless he remained in prison beyond the date that the Respondents were required to release him.

The South Carolina Court of Appeals agreed that this split sentence calculation defied the plain language of the statute, and declared that it was patently unlawful. *Hayes v. State*, 413 S.C. 553, 560 (S.C. App. 2015) ("The statute does not make a distinction for split sentences; thus, **under the plain language of the statute**, we find the pre-trial detention time should apply against a probation revocation whenever a probationer receives a split sentence." (emphasis added)).

II. Petitioner's rights were clearly established, and Respondents had a nondiscretionary duty to avoid violating those rights.

The Court of Appeals opinion declaring Petitioner's sentence to be unlawful also demonstrates that the inmate's right to time-served credit has been clearly established since at least 2010[2]. *Hayes*, 413 S.C. at 560 ("The requirement that a prisoner receive credit for time served is mandatory.") (citing **2010 opinion**[3] in *State v. Boggs*, 696 S.E.2d 597, 598 (Ct. App. 2010)). Stobbe also admitted that the

---

[2] Respondents attempted to muddy the waters in summary judgment briefing with the unpublished Court of Appeals opinion in *Martin v. SCDC*. (JA54). Note that *Martin* dealt with a scenario in which "the probation court revoked Martin's probation and required Martin to serve five years of the original sentence and then be reinstated on probation." *Id.* In other words, *Martin* appears to have involved a split sentence. *Id.* Here, Petitioner's probation was fully revoked, with no probationary period following the reinstated sentence, and it is undisputed that the sentencing judge in this case included 240 days of time served credit on the sentencing sheet. *Hayes*, 413 S.C. at 560 n.2. The Court of Appeals specifically distinguished this case from one involving a "true split sentence" such as the split sentence in *Martin*. *Id.* (citing *Franklin v. State*, 545 So.2d 851, 852 (Fla. 1989)). For these reasons, the Respondent's reliance on Martin is misplaced.

[3] *Boggs* was decided June 30, 3010, before Petitioner was even sentenced on the probation revocation.

following rights of inmates were clearly established as of the time that Petitioner was sentenced and began the incarceration at issue:

- The right to be released on their release date. (JA116).
- The right to have SCDC calculate their sentence correctly. (JA116).
- The right to have their sentence calculated in accordance with the wording of the applicable statute. (JA117; 143-144); and
- The right to have time served factored into the sentence calculation. (JA127-128).

Stobbe also admitted that SCDC has a duty to:

- Calculate an inmate's sentence correctly. (JA115);
- Follow the plain language of the applicable statute when calculating sentences. (JA117); and
- Follow the applicable statute if the SCDC policy and the statute conflict. (JA143-144).

Stobbe further admitted that SCDC does not have the discretion to:

- Keep an inmate beyond their release date. (JA115-116).
- Deviate from the South Carolina statutes that dictate the way sentences and release dates are to be calculated. (JA117); or
- Ignore the inmate's right to have time serve credited factored into the sentence. (JA129).

Accordingly, Petitioner's rights at issue in this case were clearly established as of the date that he entered the relevant incarceration, and Respondents' violations of these rights did not involve any discretion.

III. Petitioner was illegally incarcerated over six months too long.

Had Petitioner's sentence been calculated pursuant to the plain language of the jail time statute, Petitioner would have been released from prison on July 21, 2011. (JA177, 179)[4]. Because of Respondents' failure to follow the plain language of the jail time statute, Petitioner was incarcerated until February 1, 2012. (JA31, 130). In other words, Petitioner was incarcerated by Respondents 194 days past the date that South Carolina law says Respondents were allowed to incarcerate him.

IV. Petitioner is entitled to a jury trial on his Civil Rights claims.

A Plaintiff overcomes summary judgment as to a claim for violations of his civil rights pursuant to 42 U.S.C. § 1983 when there is a genuine issue of fact as to whether he was "deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." *Austin v. Paramount Parks, Inc.*, 195 F.3d 714, 727 (4th Cir. 1999) (citing *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999)).

The first reason the district court's decision was error is that it rests on application of the incorrect legal standard. South Carolina law afforded Respondents authority to incarcerate the Petitioner until July 21, 2011. Accordingly, between July

[4] SCDC changed its sentence calculation policy shortly after the Court of Appeals opinion. (JA177).

21, 2011 and February 1, 2012, the Petitioner was being held illegally, in the absence of a conviction or active legal sentence, so he had a clearly established right under the Fourteenth Amendment to be free from **<u>any punishment</u>** during that time. *Williamson v. Stirling*, Appeal No. 17-6922, (4th Cir. Dec. 21, 2018) ("It has been clearly established since at least 1979 that pretrial detainees are not to be punished."). Fourteenth Amendment due process rights are "abridged by executive action only when such action 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *Collins v. Harker Heights*, 503 U.S. 115, 128 (1992) (internal quotation marks omitted). The "deliberate indifference" standard imposes liability where the evidence shows (1) the officer subjectively recognized a substantial risk of harm, and (2) the officer subjectively recognized that his actions were inappropriate in light of that risk. *Parrish ex rel. Lee v. Cleveland*, 372 F.3d 294, 303 (4th Cir. 2004). "'A factfinder may infer that an officer knew of a substantial risk from the very fact that the risk was obvious.'" *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)). Also, ignorance of the law does not excuse Stobbe's conduct, particularly here where the ignorance of the law, if any, was self-inflicted. *Heien v. North Carolina*, 574 U.S. ___, 2 (2014) ("This Court's holding does not discourage officers from learning the law. Because the Fourth Amendment tolerates only objectively reasonable mistakes, an officer can gain no advantage through poor study.") (internal citation omitted)); *see also Davis v. United States*, 131 S. Ct. 2419, 2427 (2011) (""[r]esponsible law-enforcement officers will take care to

learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules.").

To the extent the Eighth Amendment standard applies, state officials violate an inmate's Eighth Amendment rights when they are deliberately indifferent to the risk that he may be incarcerated beyond his release date. *See Russell v. Lazar*, 300 F.Supp.2d 716, 725 (E.D. Wis. 2004) ("Thus, I conclude that in the summer of 2000 it was clearly established that the Eighth Amendment prohibited prison officials from incarcerating an inmate beyond his release date if such incarceration was the result of the officials' deliberate indifference."); *Alexander v. Perrill*, 916 F.2d 1392, 1398-99 (9th Cir.1990); *Sample v. Diecks*, 885 F.2d 1099, 1108-09 (3d Cir. 1989); *Haygood v. Younger*, 769 F.2d 1350, 1354-55 (9th Cir. 1985) (en banc)); *Douglas v. Murphy*, 6 F.Supp.2d 430, 431-32 (E.D. Pa. 1998), *aff'd*, 248 F.3d 1129 (3d Cir. 2000) (table); *Plumb v. Prinslow*, 847 F. Supp. 1509, 1521 (D. Or.1994); *Baldwin v. Erickson*, No. 92-2437, 1993 WL 387898, at *4 (E.D. Pa. Sept. 28, 1993); *Lundblade v. Franzen*, 631 F. Supp. 214, 218 (N.D. Ill. 1986); *Alexander v. Perrill*, 916 F.2d 1392, 1398-99 (9th Cir. 1990); *see also* 24 C.J.S. Criminal Law § 1599, at 199 (1989).

The Constitution also provides inmates with a protected liberty interest and due process right to be timely released. *See Russell*, 300 F. Supp. 2d at 716 (E.D. Wis. 2004); *Sample*, 885 F.2d at 1115-16 (holding that prisoner had due process right to have his claim that his release date was miscalculated "meaningfully and expeditiously considered"); *Toney-El v. Franzen*, 777 F.2d 1224, 1227 (7th Cir. 1985) (implicitly holding that prison officials must conduct informal written review when

prisoner challenges sentence calculation); *Plumb*, 847 F. Supp. at 1516-21 (holding that prisoner had protected liberty interest in release date and that plaintiff should have opportunity to show that existing predeprivation procedures did not comport with due process); *Cruz-Caraballo v. Rodriguez*, 113 F.Supp.3d 484, 492-493 (D. P.R. 2014) (citing *United States v. Lanier*, 520 U.S. 259, 271 n. 7, 117 S. Ct. 1219, 137 L.Ed.2d 432 (1997)).

Here, under any of the possibly applicable standards, Petitioner presented a genuine issue for trial as to violations of his constitutional rights. Petitioner was incarcerated for over six months beyond his release date based on a calculation by Stobbe that defied the plain language of the statute. Stobbe failed to even read the applicable statute even after Petitioner requested a recalculation and brought the error to the Respondents' attention. The patently illegal disregard for the statute was rebuked by the South Carolina Court of Appeals in the administrative action, but condoned by the district court and Fourth Circuit in the lawsuit seeking damages. Contrary to the divergent views of the district court and Fourth Circuit, there is a genuine issue of fact as to the violations of the Petitioner's constitutional rights described herein, and a jury should decide the outcome.

V. Respondents are not entitled to Qualified Immunity.

Respondents were not entitled to calculate sentences in a patently illegal manner without consequence until a court specifically told them to stop. The doctrine of qualified immunity only shields government officials from liability for civil damages when their conduct does not violate clearly established constitutional or

other rights that a reasonable officer would have known. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L.Ed.2d 565 (2009); *Graham v. Gagnon*, 831 F.3d 176, 182 (4th Cir. 2016). Qualified immunity seeks to balance two interests, namely, the "need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Graham*, 831 F.3d at 182 (quoting Pearson, 555 U.S. at 231, 129 S. Ct. 808). Qualified immunity is not available if the official should have known that his acts were unlawful under clear precedent at the time they occurred. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987). To be clearly established, the "contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right." *Id.*

In this analysis, the Court is tasked with reviewing "cases of controlling authority in [this] jurisdiction, as well as the consensus of cases of persuasive authority from other jurisdictions." *Amaechi v. West*, 237 F.3d 356, 363 (4th Cir 2000) (internal quotation and citation omitted). We observe that the "exact conduct at issue need not" previously have been deemed unlawful for the law governing an officer's actions to be clearly established. *Id.* at 362 (citing *Anderson*, 483 U.S. at 640, 107 S. Ct. 3034). Instead, the Court must "determine whether pre-existing law makes 'apparent' the unlawfulness of the officer's conduct." *Sims v. Labowitz*, 885 F.3d 254 (4th Cir. 2018) (citing *Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002)) (quoting *Anderson*, 483 U.S. at 640, 107 S. Ct. 3034). "Accordingly, a constitutional right is clearly established for qualified immunity purposes not only when it has been

specifically adjudicated but also when it is manifestly included within more general applications of the core constitutional principle invoked." *Id.* (internal quotation and citation omitted). To be clearly established, it is not required that the very action in question has previously been held unlawful, rather in light of pre-existing, in the light of pre-existing law, the unlawfulness must be apparent. *Connor v. Thompson*, No. 15-1353, *16-17 (4th Cir. May 2, 2016) (unpublished).

Officials are likely not entitled to qualified immunity when the official's conduct knowingly violated the law, or constituted deliberate indifference. *Thompson v. Virginia*, 878 F.3d 89, 97 n.3 (4th Cir. 2017) (suggesting that the Court may skip the "clearly established" prong of the qualified immunity analysis in the event of an "officer's knowing violation of the law" because it is "per se unreasonable."); *Cox v. Quinn*, 828 F.3d 227, 238 n.4 (4th Cir. 2016) ("Although we need not reach the issue here, we note that some courts have concluded that it is not necessary to consider the objective reasonableness prong of the qualified immunity inquiry at all when summary judgment is denied on deliberate indifference.").

Here, regardless of whether the rights at issue were clearly established as early as the summer of 2000 (*see, e.g., Russell*, 300 F.Supp.2d at 725), or whether they were clearly established as of the date that the Petitioner's incarceration began (*see Hayes*, 777 S.E.2d at 10, the rights set forth herein were clearly established at the time that the Respondents' calculated Petitioner's sentence. Stobbe is not entitled to qualified immunity.

VI. The constitutionality of qualified immunity should be evaluated.

As the Fourth Circuit has expressed recently in the context of law enforcement misconduct and qualified immunity: "**This has to stop**." (emphasis added). *Estate of Jones v. City of Martinsburg*, App. No. 18-2142, *20 (4th Cir. June 9, 2020). Qualified immunity undermines the purpose of Section 1983, originally called the Ku Klux Klan Act, which was originally enacted to provide consequences for "perpetrators of racial terror," many of whom "were members of law enforcement." *Jamison v. McClendon*, 3:16-cv-00595-CWR-LRA, *20 (Aug. 4, 2020) (Docket Entry No. 72). Section 1983, this federal statute which provides United States citizens with redress against state actors who violate their Civil Rights, provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ." The divergence from the plain language of the statute via qualified immunity has been troubling to many.

In his dissent in *Ziglar v. Abbasi*, Justice Thomas authored a compelling dissenting opinion to address his "growing concern with our qualified immunity jurisprudence." 582 US _ (June 19, 2017). Justice Thomas noted that, while immunity for legislators, judges, and prosecutors was well-established at common law when Section 1983 was passed, immunity for police officers and other officials was not so established. *Id.* Justice Thomas went on to explain that "[i]n further

elaborating the doctrine of qualified immunity for executive officials, however, we have diverged from the historical inquiry mandated by statute." *Id.* Justice Thomas explained that the judicial construct of qualified immunity as it exists currently looked quite different from immunity doctrines from which qualified immunity was supposedly derived. *Id.* Justice Thomas concluded by opining that "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence." *Id.* While many cases are deserving of such reconsideration, this case is deserving as well as it embodies the purpose of Section 1983.

VII. The application of the incorrect legal standard to the state law claims deprived Petitioner of his constitutional right to a jury trial.

Petitioner has alleged, and has presented virtually undisputed evidence supporting, that the Respondents illegally detained the Petitioner for six months beyond his release date in violation of the sentencing statute. As an initial matter, this claim should be analyzed under an ordinary negligence standard. Section 15-78-40 of the Tort Claims Act provides that "[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts <u>in the same manner and to the same extent as a private individual under like circumstances</u>, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." (emphasis added). In other words, the default under the Tort Claims Act is that the state is liable for negligence just like any other person or entity, unless another provision of the Tort Claims Act provides otherwise. *Wortman v. Spartanburg,* 425 S.E.2d 18 (1992) (gross negligence not included as element of false arrest claim brought under Tort Claims Act). The South Carolina Court of Appeals

has specifically held that false imprisonment under the Tort Claims Act is not subject to a gross negligence standard. *Gist v. Berkeley Cty. Sheriff's Dep't*, 336 S.C. 611, 619, 521 S.E.2d 163, 167 (Ct. App. 1999) (finding based on Section 15-78-40 and *Wortman* that "[n]one of the exceptions from liability impose a standard of gross negligence on the torts of false arrest **and imprisonment**."). Accordingly, the proper inquiry is whether the Petitioner has shown a genuine issue of material fact as to whether the illegal detention of the Petitioner for six months beyond his release date was negligent. *Gist v. Berkeley County Sheriff's Dept.*, 336 S.C. 611, 521 S.E.2d 163 (S.C. App., 1999).

"The burden of establishing a limitation upon liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense." *Niver v. S.C. Dep't of Highways & Public Transp.*, 395 S.E.2d 728 (S.C. Ct. App. 1990). Whether a defendant is immune from liability under one of the exemptions in the Tort Claims Act, including Section 15-78-30(5) or Section 15-78-30(25), is generally a question for the jury, as the inquiry involves questions of fact. *See, e.g., Clark v. S.C. Dep't of Pub. Safety*, 578 S.E.2d 16 (S.C. Ct. App. 2002), *aff'd*, 608 S.E.2d 573 (S.C. 2005); *Hollins v. Richland Co. Sch. Distr. One*, 427 S.E.2d 654 (S.C. 1993). So, to the extent any exemptions apply to the negligence claims, that question should be decided by the jury.

If Petitioner proves gross negligence, none of the exemptions or immunities apply. *See Duncan v. Hampton County School Dist.# 2*, 335 S.C. 535, 517 S.E.2d 449 (S.C. App. 1999); *Etheredge v. Richland School Dist. I*, 499 S.E.2d 238, 330 S.C. 447

(S.C. App. 1998) (citing *Jackson* for the rule that "[i]f a defendant is grossly negligent under § 15-78-60(25), it cannot claim immunity under any of § 15-78-60's other subsections because 'the exception to the normal rule of immunity applies.'"); *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536, 545 (2002) ("even if Dorsey's actions fell within the release exception, a jury could find his actions were grossly negligent.").

Additionally, the gross negligent standard should be read into the other immunities to the extent they apply, because Respondents raised at least one of the immunities that carry a gross negligence standard in their answer. *Steinke v. South Carolina Dep't of Labor, Licensing, and Regulation*, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999) ("This Court and the Court of Appeals previously have recognized that the correct approach, when a governmental entity asserts various exceptions to the waiver of immunity, is to read exceptions that do not contain the gross negligence standard in light of exceptions that do contain the standard."). In the Defendants' answer, they raised the entire Tort Claims Act as an affirmative defense. (JA24 at ¶ 34). Section 15-86-60(25) of the Tort Claims Act applies specifically to any "responsibility or duty including but not limited to . . . **confinement or custody of any . . . prisoner, inmate**, except when the responsibility or duty is exercised in a grossly negligent manner." (emphasis added). Accordingly, the gross negligence standard should be read into every one of the immunities raised by Respondents to the extent that they apply. *Steinke*, 336 S.C. at 395; *Jackson v. South Carolina Dept. of Corrections*, 390 S.E.2d 467, 301 S.C. 125 (S.C. App. 1989) ("if the Department was

grossly negligent in its duty to control, confine, or maintain custody of Atkinson and this negligence proximately caused Jackson's death, its immunity from liability under the Act is waived.").

When a defendant adopts internal policies or self-imposed rules and thereafter violates those policies, a jury may consider such violations as evidence of negligence and gross negligence. *See Fairchild v. SCDOT*, 398 S.C. 90 (2012) (violations of laws negligence per se); *Caldwell v. K-mart Corp.*, 306 S.C. 27 (1991) (evidence of violations of internal polices admissible as to whether standard of care breached); *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (S.C. 2003) (gross negligence verdict for the Plaintiff supported by, among other evidence, that the conduct "was contrary to County's established detention center policies."); *Madison v. Babcock Ctr., Inc.*, 638 S.E.2d 650 (S.C. 2006). Accordingly, the Respondent's violations of South Carolina law here (as well as internal policies which require compliance with South Carolina law) are in and of themselves enough to send the case to the jury on negligence and gross negligence.

Finally, with regard to Sections 15-78-30(5) of the Code, as Stobbe repeatedly admitted in his deposition, it was not within Respondents' discretion to violate Petitioner's constitutional rights, and it was not within their discretion to ignore South Carolina law in calculating the Petitioner's sentence. Even putting these virtually dispositive admissions aside, functions like the ones at issue are operational in nature, are not the type of discretionary act contemplated by the Tort Claims Act and, thus, do not fall within the discretionary immunity exception. *Clark v. S.C. Dep't*

of Pub. Safety, 578 S.E.2d 16, 23 (S.C. Ct. App. 2002) ("The fact that employees had to make decisions or exercise some judgment in their activities is not determinative."). Respondents' immunity under subsection (5) is "contingent on proof" that Respondents, faced with alternatives, "actually weighed competing decisions and made a conscious choice" in the process of illegally calculating Petitioner's sentence. *Niver v. S.C. Dept. of Highways and Public Transp.,* 395 S.E.2d 728, 730 (S.C. App. 1990); *Pike v. S.C.D.O.T.*, 540 S.E.2d 87, 90-91 (S.C. 2000) (discretionary immunity standard "is inherently factual."). There is no evidence that this weighing of competing decisions took place, and in any event, the factual determination is for the jury to decide.

Further, the Report and Recommendation adopted by the district court acknowledged that Respondents' excuse for the false imprisonment is that it was "consistent with the training they had received." (JA268). If true, this simply demonstrates that SCDC is liable under state law for negligently training Stobbe to break the law, and for negligently supervising Stobbe in the performance of his duties. *James v. Kelly Trucking Co.*, 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008); *Degenhart v. Knights of Columbus*, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992). As the Tort Claims Act contains no applicable exemption for negligent training or supervision of an employee, this **negligent training and supervision of Stobbe** should go to the jury and should be analyzed under an ordinary negligence standard as well.

Petitioner has presented sufficient evidence to show that Respondents failed to exercise even slight care in the hiring, supervising, retaining, or training Stobbe,

and that Respondent SCDC and its employees violated South Carolina and Federal law, as well as its own policies and procedures (e.g. the requirement that sentences be calculated in accordance with the applicable statute). Additionally, Stobbe has admitted that the acts and omissions at issue were non-discretionary, and Respondents otherwise failed to establish that the decisions at issue were discretionary as a matter of law such that they are entitled to summary judgment on a highly factual affirmative defense. For these reasons, Respondents' motion should have been denied so that the jury can sort out the facts, and dismissal of these claims violated Petitioner's Seventh Amendment right to a jury trial

CONCLUSION

This case presents an important question for this Court to consider. Namely, whether there are any state or federal claims available to an inmate who is incarcerated past his release date. Petitioner respectfully requests this Court grant the writ of certiorari and remand this case for proper application of the law.

Respectfully submitted,

TRISTAN M. SHAFFER
THE LAW OFFICE OF
TRISTAN MICHAEL SHAFFER
225 Columbia Avenue
Chapin, SC 29036
(803) 941-7514

KYLE J. WHITE
Counsel of Record
WHITE, DAVIS, AND WHITE
LAW FIRM, P.A.
209 East Calhoun St.
Anderson, SC 29621
(864) 231-8090
kyle@wdwlawfirm.com

Counsel for Petitioner

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7379

SHADRECK KIFAYATUTHELEZI, a/k/a Norman Hayes,

Plaintiff - Appellant,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; MICHAEL STOBBE, individually and in his official capacity,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Anderson. Terry L. Wooten, Senior District Judge. (8:17-cv-03139-TLW)

Submitted: April 29, 2020 Decided: May 20, 2020

Before NIEMEYER, WYNN, and RUSHING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Kyle J. White, WHITE, DAVIS, AND WHITE LAW FIRM, PA, Anderson, South Carolina; Tristan M. Shaffer, Chapin, South Carolina, for Appellant. William H. Davidson, II, Kenneth P. Woodington, DAVIDSON, WREN & DEMASTERS, P.A., Columbia, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Shadreck Kifayatuthelezi appeals the district court's order accepting the recommendation of the magistrate judge, granting summary judgment to the Appellees, and dismissing Kifayatuthelezi's 42 U.S.C. § 1983 (2018) civil rights claims and his claims under the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 to 15-78-220. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Kifayatuthelezi v. S.C. Dep't of Corr.*, No. 8:17-cv-03139-TLW (D.S.C. Sept. 25, 2019). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Shadreck Kifayatuthelezi,
also known as Norman Hayes,

Plaintiff,

v.

South Carolina Department of Corrections,
Michael Stobbe,

Defendants.

Case No. 8:17-cv-03139-TLW-JDA

ORDER

Plaintiff Shadreck Kifayatuthelezi filed this action alleging violations of his constitutional rights pursuant to 42 U.S.C. §1983 as well as claims under the South Carolina Tort Claims Act. This matter is now before the Court for review of the Report and Recommendation ("Report") filed by United States Magistrate Judge Jacquelyn D. Austin, to whom this case was assigned pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2), (D.S.C.). In the Report, the Magistrate Judge recommends that Defendants' motion for summary judgment be granted. ECF No. 28. Plaintiff filed objections to the Report, ECF No. 29, to which the Defendants replied. ECF No. 31. This matter is now ripe for disposition.

The Court is charged with conducting a *de novo* review of any portion of the Magistrate Judge's Report and Recommendation to which a specific objection is registered, and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636. In conducting this review, the Court applies the following standard:

> The magistrate judge makes only a recommendation to the Court, to which any party may file written objections…. The Court is not bound by the recommendation of the magistrate judge but, instead, retains responsibility for the final determination. The Court is required to make a *de novo* determination of those portions of the report or specified findings or recommendation as to which an

> objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the report and recommendation to which no objections are addressed. While the level of scrutiny entailed by the Court's review of the Report thus depends on whether or not objections have been filed, in either case the Court is free, after review, to accept, reject, or modify any of the magistrate judge's findings or recommendations.

Wallace v. Housing Auth. of the City of Columbia, 791 F. Supp. 137, 138 (D.S.C. 1992) (citations omitted).

The Court has carefully reviewed the Report and Plaintiff's objections thereto in accordance with this standard, and it concludes that the Magistrate Judge accurately summarizes the case and the applicable law. This Court notes that the Magistrate Judge concludes that qualified immunity is a basis for summary judgment. This Court agrees for the reasons stated and notes that a state post-conviction relief court made a decision adverse to the Plaintiff which was reversed by the South Carolina Court of Appeals. Until the Court of Appeals ruled, only then would an alleged violation be clearly established. As the Magistrate Judge notes, "given the murkiness of the legal landscape at the time SCDC made its decision," it would not be appropriate to conclude that defendants violated any constitutional or statutory right that was clearly established at the time of the alleged violation. For the reasons stated in the Report, it is hereby **ORDERED** that the Report, ECF No. 28, is **ACCEPTED**, and Plaintiff's objections, ECF No. 29, are **OVERRULED**. For the reasons articulated by the Magistrate Judge, the Defendants' motion for summary judgment, ECF No. 14, is **GRANTED** and the Complaint is **DISMISSED**.

IT IS SO ORDERED.

s/ Terry L. Wooten
Terry L. Wooten
Chief United States District Judge

September 24, 2019
Columbia, South Carolina

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Shadreck Kifayatuthelezi *also known as* Norman Hayes, Plaintiff, v. South Carolina Department of Corrections, Michael Stobbe, Defendants.	)))))))))))	Case No. 8:17-cv-03139-TLW-JDA **REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE**

This matter is before the Court on a motion for summary judgment filed by Defendants. [Doc. 14.] Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2), D.S.C., this magistrate judge is authorized to review all pretrial matters in cases filed under 42 U.S.C. § 1983 and to submit findings and recommendations to the District Court.

Plaintiff filed this action in the Richland County Court of Common Pleas on July 28, 2017, alleging violations of his constitutional rights pursuant to 42 U.S.C. § 1983 as well as claims under the South Carolina Tort Claims Act ("SCTCA"). [Doc. 1-1.] The case was removed to this Court on November 17, 2017. [Doc. 1.] On November 19, 2018, Defendants filed a motion for summary judgment. [Doc. 14.] Plaintiff filed a response in opposition to the motion on December 17, 2018, and a supplement to that response on December 26, 2018. [Docs. 17; 23.] Defendants filed a reply on January 7, 2019. [Doc. 24.] The motion is ripe for review.

BACKGROUND

Viewed in the light most favorable to Plaintiff, the record reveals the following facts. The initial facts are as described by the South Carolina Court of Appeals:

> In 2004, Petitioner pled guilty to possession of crack cocaine and criminal conspiracy. The trial judge sentenced Petitioner to five years' imprisonment, suspended to time served and three years' probation; ordered Petitioner to pay $225; and credited Petitioner with 240 days of time served.
>
> Petitioner was subsequently charged with various probation violations, and on July 30, 2010, the probation revocation judge revoked his probation and reinstated his five-year suspended sentences. On rehearing, the probation revocation judge reduced the reinstated sentences to three years and terminated probation, noting Petitioner had previously served 240 days; thus, he would receive credit for the 240 days served. . . .
>
> . . . .
>
> The Form 9 was created by the South Carolina Department of Probation, Parole and Pardon services [("SCDPPP")]. The Form 9 includes a charging section, listing the probation conditions the Petitioner is alleged to have violated and the probation revocation judge's findings on the allegations. The second section was prefaced, "Therefore, IT IS ORDERED that:" and followed by numerous sentencing choices. In this case, the judge ordered "the suspended sentence be revoked and [Petitioner] be required to serve 3 . . . years, the remainder of the original sentence, and/or pay $XX TERMINATE PROBATION." The sentence entitled "Additional Conditions ordered by the Court" included the judge's statement, "CONVERT FINE TO CIVIL JUDGMENT." The third section of the Form 9 included two sentences, which the judge checked as applying in this case. First, "[t]he defendant is given credit for pre-revocation hearing detention time on current probation violation . . . ." Second, "[t]he defendant has previously served 240 days on this sentence." In parentheses beneath the second sentence, the form reads, "split sentence time and/or prior partial revocation time."

Hayes v. State, 777 S.E.2d 6, 8 (S.C. Ct. App. 2015) (footnote omitted; some alterations in original).

At issue in the present case is S.C. Code Ann. § 24-13-40, which provides that "[t]he computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence." The statute provides, with exceptions not applicable here,[1] that when "*commencement of the service of the sentence* follows the revocation of probation . . . , the computation of the time served must be calculated from the date of the *commencement of the service* of the sentence. In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing." S.C. § Code 24-13-40 (emphasis added). Interpreting this statute, the South Carolina Court of Appeals had issued a decision just prior to the revocation of Plaintiff's probation, that absent application of one of the enumerated exceptions, which are not applicable here, the statute mandates that a prisoner receive credit for time served. *State v. Boggs*, 696 S.E.2d 597, 598 (S.C. Ct. App. 2010).

Defendant Michael Stobbe is the branch chief of release and records management for the South Carolina Department of Corrections ("SCDC"). *Hayes*, 777 S.E.2d at 8. In his deposition in this case, Stobbe explained that SCDC's determinations of release dates

---

[1]The exceptions are that

> credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.

S.C. Code Ann. § 24-13-40.

for prisoners in Plaintiff's situation were based on training SCDC employees received from the SCDPPP's head lawyer. [Doc. 14-6 at 3.] The lawyer instructed SCDC employees that generally if a defendant receiving an original sentence is entitled to time served, "you subtract [the time served] from the total sentence that he originally received," and the amount remaining is the "total sentence that [is] enter[ed] into the computer" and that same amount also represents the defendant's "incarcerative time." [*Id.*] Stobbe explained that if a defendant has his probation revoked and he is required to serve a portion of the previously suspended sentence, his "total sentence," which would still include the original reduction for the time served, would remain the same. [*Id.*] However, the portion of the sentence that he was ordered to serve would be his incarcerative time. The defendant would not be entitled to any additional credit for time served since he already received the credit when he was originally sentenced. [*Id.* at 3–7.] However, the defendant would continue to benefit from the credit for time served because that credit would have a continued effect on his "total sentence," reducing the amount of time until he became eligible for parole. [*Id.* at 5–7.]

Maintaining he was entitled to an earlier release date, Plaintiff filed an application for post-conviction relief ("PCR") on September 27, 2011. [Doc. 14-2 at 4.] He alleged he was being unlawfully detained because the 240 days he had served prior to imposition of his original sentence were not being credited toward completion of the reduced sentence he received after his parole was revoked. [*Id.*]

The PCR Court ruled against him. [*Id.* at 7.] In its Order, the Court referred to the original sentence as a "split sentence" insofar as it included some credit for time served and

the remainder of the sentence was suspended.[2] [*Id.* at 5, 6.] The PCR Court concluded that Plaintiff received all of the credit toward completion of his sentence that he was entitled to because the only "sentence" the statute references is "the one by the original sentencing judge." [*Id.* at 5.] The Court further reasoned that "[t]he fact that a judge presiding over a subsequent probation violation matter may choose to re-instate less than the entire suspended sentence and terminate probation[] does not modify the 'sentence' imposed by the original sentencing judge." [*Id.* at 5–6.] Accordingly, the PCR Court concluded

> that under § 24-13-40, in the case of a split sentence, time served prior to trial should not be used to calculate the amount of time a probationer must serve on a reinstated sentence, because the pretrial detention time was already awarded to satisfy the time served portion of the split sentence. Indeed, this Court finds that the revocation of probation and reinstatement of a portion or all of the original sentence is not a new "sentence" in and of itself.

[*Id.* at 6.] As for the significance of the statement on Plaintiff's Form 9 that he "is given credit for pre-revocation hearing detention time on current probation violation," the PCR Court understood that to refer to the fact that when Plaintiff was originally sentenced, "'he was given credit for that time by being released directly from sentencing to probation.'" *Hayes*, 777 S.E.2d at 9. However, the PCR Court concluded, as SCDC had, that because Plaintiff had received credit for the 240 days when the original sentence was imposed, he was not entitled to receive that credit toward completion of his "new" sentence of three years. [*Id.*]

---

[2]The South Carolina Court of Appeals pointed out that a "true split sentence occurs when the judge sentences the defendant to incarceration but suspends a portion of the term." *Hayes*, 777 S.E.2d at 9 n.2 (alteration and internal quotation marks omitted).

Plaintiff appealed the PCR Court's decision, and the South Carolina Court of Appeals reversed. The appellate court held that "the PCR court erred as a matter of law when it determined a probationer who receives a split sentence should not receive credit for time served prior to trial against a reinstated sentence 'because the pretrial detention time was already awarded to satisfy the time served portion of the split sentence.'"[3] *Hayes*, 777 S.E.2d at 10.

Plaintiff subsequently filed this action, alleging two claims against Stobbe and two against SCDC, all based on SCDC's refusal to release Plaintiff on the date he claims he should have been released.[4] [Doc. 1-1.] Pursuant to 42 U.S.C. § 1983, Plaintiff alleged that Stobbe violated his Eighth Amendment right to be free from cruel and unusual punishment and his Fourteenth Amendment right to due process. [Doc. 1-1 at 7–9.] He also alleged claims under the SCTCA against SCDC for false imprisonment and gross negligence. [*Id.* at 9–10.]

APPLICABLE LAW

Requirements for a Cause of Action Under § 1983

This action is filed pursuant to 42 U.S.C. § 1983, which provides a private cause of action for constitutional violations by persons acting under color of state law. Section 1983

---

[3]Plaintiff was released from prison on approximately February 1, 2012. [Doc. 14-3 at 2.] The South Carolina Court of Appeals nevertheless exercised jurisdiction over Plaintiff's case because the issue presented was "'capable of repetition but evading review.'" *Hayes*, 777 S.E.2d at 9 (quoting *Curtis v. State*, 549 S.E.2d 591, 596 (S.C. 2001)). The Supreme Court of South Carolina later granted certiorari but subsequently dismissed it as improvidently granted. *Hayes v. State*, 792 S.E.2d 907 (S.C. 2016).

[4]Plaintiff asserts that he should have been released on July 21, 2011, instead of on February 1, 2012. [Doc. 17 at 1, 6.]

"'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). Accordingly, a civil action under § 1983 allows "a party who has been deprived of a federal right under the color of state law to seek relief." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707 (1999).

Section 1983 provides, in relevant part,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. § 1983. To establish a claim under § 1983, a plaintiff must prove two elements: (1) that the defendant "deprived [the plaintiff] of a right secured by the Constitution and laws of the United States" and (2) that the defendant "deprived [the plaintiff] of this constitutional right under color of [State] statute, ordinance, regulation, custom, or usage." *Mentavlos v. Anderson*, 249 F.3d 301, 310 (4th Cir. 2001) (third alteration in original) (citation and internal quotation marks omitted).

The under-color-of-state-law element, which is equivalent to the "state action" requirement under the Fourteenth Amendment,

> reflects judicial recognition of the fact that most rights secured by the Constitution are protected only against infringement by governments. This fundamental limitation on the scope of constitutional guarantees preserves an area of individual freedom by limiting the reach of federal law and avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.

Id. (quoting *Dowe v. Total Action Against Poverty in Roanoke Valley,* 145 F.3d 653, 658 (4th Cir. 1998)) (internal citations and quotation marks omitted). Nevertheless, "the deed of an ostensibly private organization or individual" may at times be treated "as if a State has caused it to be performed." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Specifically, "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Id.* (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). State action requires both an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State . . . or by a person for whom the State is responsible" and that "the party charged with the deprivation [is] a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). A determination of whether a private party's allegedly unconstitutional conduct is fairly attributable to the State requires the court to "begin[ ] by identifying 'the specific conduct of which the plaintiff complains.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982)).

Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure states, as to a party who has moved for summary judgment:

> The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(a). A fact is "material" if proof of its existence or non-existence would affect disposition of the case under applicable law. *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. When determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings. *Id.* at 324. Rather, the non-moving party must demonstrate specific, material facts exist that give rise to a genuine issue. *Id.* Under this standard, the existence of a mere scintilla of evidence in support of the non-movant's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion. *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. Further, Rule 56 provides in pertinent part:

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> > (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). Accordingly, when Rule 56(c) has shifted the burden of proof to the non-movant, he must produce existence of a factual dispute on every element essential to his action that he bears the burden of adducing at a trial on the merits.

DISCUSSION

Federal Claims

Defendants argue that Stobbe is entitled to summary judgment on the basis of qualified immunity. [Doc. 14-1 at 5–11.] The Court agrees.

Qualified immunity protects government officials performing discretionary functions from civil damage suits as long as the conduct in question does not "violate clearly established rights of which a reasonable person would have known."[5] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, qualified immunity does not protect an official who violates a constitutional or statutory right of a plaintiff that was clearly established at the time of the alleged violation such that an objectively reasonable official in the official's position would have known of the right. *Id.* Further, qualified immunity is "an immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

---

[5]Plaintiff notes that Justice Thomas has stated in a dissenting opinion that the Court "'[i]n an appropriate case, . . . should reconsider [its] qualified immunity jurisprudence.'" [Doc. 17 at 11 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., dissenting)). Regardless, though, until the Supreme Court decides otherwise, the doctrine of qualified immunity continues to apply.

"In determining whether an officer is entitled to summary judgment on the basis of qualified immunity, courts engage in a two-pronged inquiry." *Smith v. Ray*, 781 F.3d 95, 100 (4th Cir. 2015). The first concerns whether the facts, viewed in the light most favorable to the plaintiff, demonstrate that the officer's conduct violated a federal right. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). The second "asks whether the right was clearly established at the time the violation occurred such that a reasonable person would have known that his conduct was unconstitutional." *Smith*, 781 F.3d at 100. For purposes of this analysis, a right is "clearly established" if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

District court judges are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). If a court decides in the negative the first prong it considers—i.e., the court decides the plaintiff has not alleged the deprivation of an actual constitutional right or the right was not clearly established at the time of the alleged violation—the court need not consider the other prong of the qualified immunity analysis. *See id.* at 243–45; *Torchinsky v. Siwinski*, 942 F.2d 257, 260 (4th Cir. 1991) (holding the court "need not formally resolve" the constitutional question of "whether the [plaintiffs] were arrested without probable cause" to address the plaintiffs' § 1983 claim; the court stated that it "need only determine whether [the defendant]—a deputy sheriff performing within the normal course of his employment—acted with the objective reasonableness necessary to entitle him to qualified immunity").

Here, Plaintiff cannot even overcome the first qualified-immunity prong because he has not forecasted evidence that would support a reasonable finding that his rights under the Eighth Amendment or Fourteenth Amendment were violated.

Eighth Amendment Claim

The standard for an Eighth Amendment claim in the context of detention beyond the term of a sentence was described by the United States Court of Appeals for the Third Circuit in *Sample v. Diecks*:

> [A] plaintiff must first demonstrate that a prison official had knowledge of the prisoner's problem and thus of the risk that unwarranted punishment was being, or would be, inflicted. Second, the plaintiff must show that the official either failed to act or took only ineffectual action under circumstances indicating that his or her response to the problem was a product of deliberate indifference to the prisoner's plight. Finally, the plaintiff must demonstrate a causal connection between the official's response to the problem and the infliction of the unjustified detention.

885 F.2d 1099, 1110 (3d Cir. 1989); *see also Golson v. Dep't of Corr.*, 914 F.2d 1491, at *1 (4th Cir. 1990) (unpublished table decision) ("To prevail under an eighth amendment theory, a plaintiff must demonstrate that defendants acted with deliberate indifference." (citations omitted)); *Haygood v. Younger*, 769 F.2d 1350, 1355 (9th Cir. 1985) ("Detention beyond the termination of a sentence could constitute cruel and unusual punishment if it is the result of 'deliberate indifference' to the prisoner's liberty interest." (citation omitted)). Deliberate indifference exists when prison officials know of a substantial risk of serious harm to a prisoner and consciously disregard that risk. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

Here, there is no evidence that Stobbe was deliberately indifferent to any risk to Plaintiff. Nothing in the record suggests that SCDC made anything less than a good-faith effort to apply the law in a manner consistent with the training they had received regarding the controlling legal principles or that they even suspected that the training might not be correct. Accordingly, the Court concludes Defendants' summary judgment motion should be granted as to Plaintiff's Eighth Amendment claim.

Fourteenth Amendment Claim

The Court also concludes that Defendants' summary motion should be granted regarding Plaintiff's Due Process claim.

"[T]o recover under the due process clause, a plaintiff m[us]t establish that defendants acted with something more than mere negligence." *Golson*, 914 F.2d 1491, at *1; *see Wilson v. Byras*, No. 4:11-02837-MGL, 2013 WL 144939, at *2 (D.S.C. Jan. 14, 2013). Here, no evidence indicates that Stobbe or any SCDC employee even acted unreasonably in following the training they had received from SCDPPP's counsel regarding what the law required.[6] In fact, given the murkiness of the legal landscape at the time SCDC made its decision, there is no basis for a conclusion that the legal principles they

---

[6]Plaintiff argues that "Stobbe failed to even read the applicable statute even after Plaintiff requested a recalculation and brought the error to the Defendants' attention." [Doc. 17 at 8.] However, as Defendants point out, Plaintiff "has not alleged or proven that he requested a review of his sentence by Stobbe, much less that Stobbe responded inappropriately to such a request. Instead, it appears that the issue of Plaintiff's sentence computation arose in the context of his PCR case, in which the PCR trial court held . . . that Plaintiff was being lawfully held in custody." [Doc. 24 at 6.] Moreover, to the extent that Stobbe indicated that he did not go back and actually re-read the statute in regard to Plaintiff's case, it was because he had been working with the statute for many years and was very familiar with it and with the construction he had learned about during training. [Doc. 14-6 at 4.]

were instructed to apply were an unreasonable interpretation of the applicable statute. Accordingly, Defendants' summary judgment motion should be granted as to Plaintiff's Fourteenth Amendment claim.

SCTCA Claims

Defendants also contend SCDC is entitled to summary judgment on Plaintiff's SCTCA claims.

The SCTCA "governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees." *Paradis v. Charleston Cty. Sch. Dist.*, 819 S.E.2d 147, 151 (S.C. Ct. App. 2018) (internal quotation marks omitted). Although the SCTCA operates as a limited waiver of sovereign immunity, it also contains many enumerated exceptions to that waiver. *Proctor v. Dep't of Health & Envtl. Ctrl.*, 628 S.E.2d 496, 502 (S.C. Ct. App. 2006). Those exceptions are required to be "liberally construed in favor of limiting the liability of the governmental entity." S.C. Code Ann. § 15-78-200. SCDC maintains that several of the enumerated exceptions apply to provide SCDC with immunity here as a matter of law. [Doc. 14-1 at 12–14.]

The Court agrees that SCDC is entitled to summary judgment. Most clearly, § 15-78-60(3) bars liability arising from the "execution, enforcement, or implementation of the orders of any court."[7] As SCDC contends, its implementation and enforcement of the order

[7]Plaintiff contends that each of the enumerated immunity exceptions to the SCTCA's sovereign immunity waiver are themselves limited in that the exceptions do not apply to actions that are grossly negligent. [Doc. 17 at 12–13.] The issue is a moot point in this case, however, where there is no evidence of even simple negligence, let alone gross negligence.

imposing Plaintiff's sentence are the basis for Plaintiff's state-law claims.[8] *See Jackson v. S.C. Dep't of Corr.*, No. 3:14-2262-MGL-SVH, 2016 WL 403588, at *2 (D.S.C. Jan. 12, 2016) (ruling that the SCTCA barred SCDC's liability on a false imprisonment claim), *Report and Recommendation adopted by* 2016 WL 374826 (D.S.C. Feb. 1, 2016).

RECOMMENDATION

Wherefore, based upon the foregoing, the Court recommends that Defendants' motion for summary judgment [Doc. 14] be GRANTED.

IT IS SO RECOMMENDED.

s/Jacquelyn D. Austin
United States Magistrate Judge

March 4, 2019
Greenville, South Carolina

[8]Because the Court concludes that SCDC is entitled to summary judgment on the basis of immunity under § 15-78-60(3), the Court declines to address Defendants' alternative arguments regarding SCDC's liability.

APPENDIX D

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Norman J. Hayes, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-209506

ON WRIT OF CERTIORARI

Appeal From Lexington County
L. Casey Manning, Plea Judge
G. Thomas Cooper, Probation Revocation Judge
Edward W. Miller, Post-Conviction Relief Judge

Opinion No. 5335
Heard May 4, 2015 – Filed July 29, 2015

REVERSED

Appellate Defender Laura Ruth Baer, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Daniel Francis Gourley, II, both of Columbia, for Respondent.

SHORT, J.: Norman J. Hayes (Petitioner) appeals from the denial and dismissal of his application for post-conviction relief (PCR), arguing his sentence exceeded the maximum authorized by law because sentencing credit for time served was not

properly applied by the South Carolina Department of Corrections (the Department). We reverse.

I. BACKGROUND

In 2004, Petitioner pled guilty to possession of crack cocaine and criminal conspiracy. The trial judge sentenced Petitioner to five years' imprisonment, suspended to time served and three years' probation; ordered Petitioner to pay $225; and credited Petitioner with 240 days of time served.

Petitioner was subsequently charged with various probation violations, and on July 30, 2010, the probation revocation judge revoked his probation and reinstated his five-year suspended sentences. On rehearing, the probation revocation judge reduced the reinstated sentences to three years and terminated probation, noting Petitioner had previously served 240 days; thus, he would receive credit for the 240 days served. On September 27, 2011, Petitioner filed his application for PCR, alleging he was being unlawfully detained because the Department did not apply the 240 days to his reduced sentence.

Michael Stobbe, the branch chief of release and records management for the Department, testified at the PCR hearing. Stobbe stated Petitioner served 240 days of pretrial detention, and when his probation was revoked, the Department subtracted 240 days from five years, "which gave him a total sentence of four years and 125 days and an incarcerative sentence of four years and 125 days." When asked whether the Department gave Petitioner credit for time served on the three-year sentence, the following colloquy occurred:

> A: Yes, sir, the 240 days was applied to his total sentence. In other words, five years minus the 240 days, which would give him a total sentence of [four] years and 125 days.
>
> Q: Was it applied to the three-year sentence that was modified on February 4th?
>
> A: Yes, sir. The 240 days was applied to the remainder of the original five-year sentence.

> Q: But it wasn't credited toward the three years that he was actually serving; is that right?
>
> A: Well, you have a total sentence and an incarcerative sentence. Two hundred forty days, with a command of the English language, couldn't be reduced -- could not reduce the three years. So the 240 days reduced his total sentence from five years to four years and 125 days. The 240 days was not subtracted from the three years, no, sir.
>
> Q: But it was subtracted from the five years that he was no longer serving?
>
> A: No. As far as I know, on the Form 9 on both February 4, 2011, and July 30, 2010, the remainder of the original sentence on the Form 9 was never marked out. So he is still held responsible for the total sentence of five years minus the 240 days. That's what his parole date is based on.

Stobbe testified, "[T]he 240 days has got to come off the five years. It can't be subtracted from three years."

The Form 9 was created by the South Carolina Department of Probation, Parole and Pardon Services. The Form 9 includes a charging section, listing the probation conditions the Petitioner is alleged to have violated and the probation revocation judge's findings on the allegations. The second section was prefaced, "Therefore, IT IS ORDERED that:" and followed by numerous sentencing choices. In this case, the judge ordered "the suspended sentence be revoked and the [Petitioner] be required to serve _3_ . . . years, the remainder of the original sentence, and/or pay $ XX TERMINATE PROBATION." The sentence entitled "Additional Conditions ordered by the Court" included the judge's statement, "CONVERT FINE TO CIVIL JUDGMENT." The third section of the Form 9 included two sentences, which the judge checked as applying in this case.[1] First, "[t]he defendant is given credit for pre-revocation hearing detention time on current probation violation . . .

[1] A third sentence relating to electronic monitoring was also included in this section.

." Second, "[t]he defendant has previously served _240_ days on this sentence." In parentheses beneath the second sentence, the form reads, "split sentence time and/or prior partial revocation time."

In response to the PCR court's questions, Stobbe admitted if the Form 9 had stated "three years" and "the remainder of the original sentence" language was crossed out, the Department would consider Petitioner's sentence would be three years. Stobbe further stated if "Credit for 240 days time served" had been written in the portion of the Form 9 providing, "Additional Conditions ordered by the Court," the Department would have given Petitioner the credit for 240 days on the three-year sentence. Finally, Stobbe stated if the probation revocation court had omitted the sentence, "The defendant previously served 240 days on this sentence," it "would have sort of put us into the investigative mode" to determine if Petitioner was entitled to time served on his three-year sentence.

Petitioner testified that when he began serving the revoked portion of his sentence, his projected release date was March 2013. He stated when his sentence was reduced to three years, his projected release date became April 2012, including good time credit. Petitioner further stated his projected release date at the time of the PCR hearing was February 18, 2012, which also included earned work credits.

In its order dismissing Petitioner's application, the PCR court noted Petitioner's original sentence was a split sentence,[2] the "time served" was Petitioner's pre-sentence detention of 240 days, and "he was given credit for that time by being released directly from sentencing to probation." The PCR court found the probation revocation judge "simply noted that [Petitioner] had previously served 240 days on this sentence, but [the probation court] did not, and should not, have awarded double credit for the 240 days . . . ." The PCR court further found when a court imposes a split sentence, "time served prior to trial should not be used to calculate the amount of time a probationer must serve on a reinstated sentence, because the pretrial detention time was already awarded to satisfy the time served portion of the split sentence." The court found the Form 9 does not change the fact that Petitioner had already received credit for his time served and the only sentence

---

[2] "[A] 'true split sentence[]' occurs when the judge sentences the defendant to incarceration but suspends a portion of the term." *Franklin v. State*, 545 So.2d 851, 852 (Fla. 1989).

is the one imposed by the original sentencing judge.[3] The PCR court dismissed Petitioner's application, and this petition for a writ of certiorari followed.

III. STANDARD OF REVIEW

In an action for PCR, an appellate court reviews questions of law *de novo*, and it will reverse the PCR court's decision when it is controlled by an error of law. *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

IV. LAW/ANALYSIS

Petitioner argues the PCR court erred in dismissing his application because the plain language of the statute explaining how prison time should be calculated requires pretrial detention credit to be awarded to a partially revoked sentence. He argues the Department misapplied the statute, and notes if the Department applied the statute in the same way to a full revocation, the result would be a longer sentence than authorized by law. We agree.

The PCR statute allows an inmate to file an application for PCR when he claims his sentence has expired and he is being unlawfully held in custody. S.C. Code Ann. § 17-27-20(5) (2014). Because Petitioner is no longer incarcerated, this issue is moot. However, "an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001). The issue here is capable of repetition but evading review; therefore, we address the merits. *See Nelson v. Ozmint*, 390 S.C. 432, 433-34, 702 S.E.2d 369, 370 (2010) (addressing moot issue of the Department's calculation of the prisoner's sentence as not including good time credits or earned work credits because it was an issue that was capable of repetition, yet it would usually evade review).

Section 24-13-40 of the South Carolina Code (Supp. 2014) provides the following:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be

---

[3] The PCR court took judicial notice that the Form 9 had been modified in recent years, but the section governing split sentences had remained the same for over ten years.

> calculated from the date of the imposition of the sentence. However, when . . . (b) the commencement of the service of the sentence follows the revocation of probation, . . . the computation of the time served must be calculated from the date of the commencement of the service of the sentence. In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.

The requirement that a prisoner receive credit for time served is mandatory. *State v. Boggs*, 388 S.C. 314, 316, 696 S.E.2d 597, 598 (Ct. App. 2010). In *Boggs*, the sentencing judge indicated he did not want to give the defendant credit for time served and did not check off the box on the sentencing sheet indicating credit for time served. *Id.* at 316, 696 S.E.2d at 598. The judge acknowledged the defendant was entitled to credit but stated on the record that "when I don't check it off" the Department would not give the defendant the credit, concluding, "I am just telling you how it works in the real world." *Id.* at 315-16, 696 S.E.2d at 598. This court reversed the sentencing judge, finding the statutory credit for time served was mandatory and "[a] judge's disappointment in the maximum sentence he can impose is not one of the exceptions to the mandatory language" in the statute. *Id.* at 316, 696 S.E.2d at 598.

Thus, a prisoner will receive credit for time served unless either (1) they were an escapee or (2) the prisoner was already serving a sentence on a different offense. S.C. Code Ann. § 24-13-40 (Supp. 2014). Furthermore, section 24-21-460 of the South Carolina Code provides a court may "revoke the probation or suspension of [a] sentence" and has the discretion "to require the defendant to serve all or a portion only of the sentence imposed." S.C. Code Ann. § 24-21-460 (2007).

"Where the terms of a statute are clear, the court must apply those terms according to their literal meaning." *Allen v. State*, 339 S.C. 393, 395, 529 S.E.2d 541, 542 (2000). "The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand its scope." *Id.*

We find the PCR court erred as a matter of law when it determined a probationer who receives a split sentence should not receive credit for time served prior to trial against a reinstated sentence "because the pretrial detention time was already awarded to satisfy the time served portion of the split sentence." This finding contradicts section 24-13-40, which states the following: "[W]hen . . . (b) the commencement of the service of the sentence follows the revocation of probation, . . . the computation of the time served shall be reckoned from the date of the commencement of the service of the sentence. In every case . . . full credit . . . shall be given for time served prior to trial and sentencing." § 24-13-40. The statute does not make a distinction for split sentences; thus, under the plain language of the statute, we find the pre-trial detention time should apply against a probation revocation whenever a probationer receives a split sentence.

V. CONCLUSION

Based on the foregoing reasons, the decision of the PCR court is

REVERSED.

LOCKEMY and MCDONALD, JJ., concur.

APPENDIX E

COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	Eleventh Judicial Circuit
	)	2011-CP-32-3630
Norman J. Hayes, #127361	)	
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

RECEIVED
FEB 0 3 2012
LEGAL - DPPPS

A. PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed September 27, 2011. Because the Application raised a time sensitive sentence calculation issue, the Respondent (the State) agreed to schedule an expedited hearing in lieu of filing a formal Return. An evidentiary hearing into the matter was convened on November 30, 2011, at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by Tristan M. Shaffer, Esquire. The Respondent was represented by J. Benjamin Aplin of the South Carolina Department of Probation, Parole and Pardon Services and Kaelon May of the South Carolina Office of the Attorney General.

At the hearing, the Applicant called Michael Stobbe, Branch Chief for Release and Records Management at the South Carolina Department of Correction (SCDC), to testify on his behalf. Also before this Court were the records of the Lexington County Clerk of Court regarding the subject conviction; the Applicant's records from the South Carolina Department of Corrections (SCDC); and the Applicant's records from the South Carolina Department of Probation, Parole, and Pardon Services (the Department). Following the hearing, this Court

granted the Applicant's request to submit post-hearing memoranda in support of their respective positions. On December 7, 2011, the Applicant submitted a "Memorandum in Support of Post Conviction Relief" and on January 5, 2012, the State filed a "Memorandum in Opposition to Application for PCR." On January 19, 2012, the Applicant submitted a Reply Memo.

The records before this Court indicate that the Applicant is presently confined in the Evans Correctional Institution with the South Carolina Department of Corrections. The Applicant was indicted by the grand jury for Lexington County for criminal conspiracy (2004-GS-32-1203) and possession of crack cocaine - first offense (2004-GS-32-1645). On July 10, 2004, he pled guilty to both charges and was sentenced by the Honorable Casey Manning to concurrent terms of five (5) years imprisonment suspended upon the service of time served [two-hundred and forty (240) days] and three (3) years probation for each charge. The Applicant did not appeal his convictions or sentences.

The records further indicate that supervision of the Applicant's probation case was transferred to Richland County, his county of residence. The Applicant was subsequently charged with various probation violations. On July 30, 2010, a probation violation hearing was convened in Richland County before the Honorable G. Thomas Cooper. The Applicant proceeded pro se and at the conclusion of the hearing the court revoked his probation and reinstated his five (5) year suspended sentence. On August 9, 2010, the Applicant served and filed a pro se notice of appeal with the South Carolina Court of Appeals; however, on August 4, 2010, five days **before** filing that notice of appeal, Richland County Assistant Public Defender James May filed a motion to be appointed as counsel, and a motion to reconsider the probation revocation on Appellant's behalf. On February 4, 2011, Judge Cooper convened a hearing on the pending motions. The Applicant was present and appeared with Mr. May. Mr. Aplin

appeared on behalf of the State. Judge Cooper granted the motion to appoint Mr. May as counsel and heard arguments on the motion to reconsider. After hearing from both parties the court granted the Applicant's motion to reconsider, reducing the length of his reinstated sentence to three (3) years, and terminating probation. The revocation order noted: "The defendant has previously served 240 days on this sentence. (split sentence time and/or prior partial revocation time)" On August 5, 2011, the Court of Appeals issued an order dismissing the Applicant's appeal from Judge Cooper's pre-amendment July 30, 2010, revocation order. On September 27, 2011, the Applicant filed this application for post-conviction relief (PCR) challenging the sentence calculation from his February 4, 2011, probation revocation.

B. ALLEGATIONS

In his Application for PCR, the Applicant alleges that he is being held in custody unlawfully for the following reason:

> That his "sentence exceeds the maximum authorized by law" or "his sentence has expired" because he has not been given full credit against his probation revocation sentence for 240 days of time served prior to trial.

C. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon his or her credibility. This Court has weighed all of the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

In a post-conviction relief action, the Applicant has the burden of proving the allegations

in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). This Court finds the Applicant's PCR Application should be denied and dismissed because he has failed to carry his burden of proof. The South Carolina Code sets forth how the computation of time served by prisoners under sentences imposed by the courts of South Carolina shall be reckoned. It provides in part that: "In every case in computing the time served by a prisoner, full credit against the sentence shall be given for time served prior to trial and sentencing." S.C. Code Ann. § 24-13-40 (2007). In the Applicant's case, the original sentence was a "split sentence" of five (5) years imprisonment suspended upon the service of "time served" and three (3) years probation. The "time served" was the Applicant's pre-sentence detention of two hundred and forty (240) days, and pursuant to Section 24-13-40, he was given credit for that time by being released directly from sentencing to probation. This Court finds that at the subsequent violation hearing, the probation revocation judge simply noted that the Applicant had previously served 240 days on this sentence, but did not, and should not, have awarded double credit for the 240 days under Section 24-13-40 of the South Carolina Code, or any other provision. The "Form 9" certainly does not suggest otherwise. Indeed, this Court finds it is a form created by the South Carolina Department of Probation, Parole and Pardon Services that was specifically designed for probation revocation hearings, with consultation from SCDC, and approval for use by Court Administration. This Court takes judicial notice that the "Form 9" has gone through some minor modifications in recent years, but the section where the probation court notes "split sentence time and/or prior partial revocation time" has remained the same for over ten years. This Court finds that the "sentence" referenced in that section is the only "sentence" imposed in the case - the one by the original sentencing judge. The fact that a judge presiding over a subsequent probation violation matter may choose to re-instate less than the entire suspended sentence and terminate

probation, does not modify the "sentence" imposed by the original sentencing judge. In fact, once the sentencing court's order became final, the probation judge would not be permitted to alter the sentence that was handed down. State v. Davis, 375 S.C. 12, 16, 649 S.E.2d 178, 180 (2007); See also State v. Best, 257 S.C. 361, 373-74, 186 S.E.2d 272, 277-78 (1972) (noting that the court lacks subject matter jurisdiction to modify, change, or amend a sentence after adjournment of the term of court at which the court imposed the sentence).

This Court finds that under § 24-13-40, in the case of a split sentence, time served prior to trial should not be used to calculate the amount of time a probationer must serve on a reinstated sentence, because the pretrial detention time was already awarded to satisfy the time served portion of the split sentence. Indeed, this Court finds that the revocation of probation and reinstatement of a portion or all of the original sentence is not a new "sentence" in and of itself. In other words, this portion of the form is used to let SCDC know exactly how much time an inmate has already served on the original sentence in an effort to ensure they correctly calculate how much time he has left to serve. In the case of a split sentence, the active portion of the original sentence that has already been satisfied by the defendant is typically noted here. By way of example, if a defendant got a five (5) year sentence suspended to two (2) years imprisonment and five (5) years probation, and later was facing a probation revocation, the Form 9 should note that "The defendant has previously served 2 years on this sentence.". If the same defendant also had a prior partial revocation of two (2) months, the Form 9 should note that "The defendant has previously served 2 years and 2 months on this sentence." This Court finds that in the Applicant's case, it appears the Form 9 simply acknowledges the 240 days he previously served on the five (5) year original sentence. It does not award an additional 240 days to be taken off

the three (3) year re-instated portion of the five (5) year sentence. Therefore, this Court finds that the Applicant has failed to carry his burden of proof in this action and that the application must be denied and dismissed.

D. CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant's allegations are unsubstantiated by the record or the testimony presented. The Applicant has failed to carry his burden of proving that his sentence has expired or that he is otherwise being held in custody unlawfully. For all of these reasons, this Court finds that this application for PCR must be denied and dismissed with prejudice.

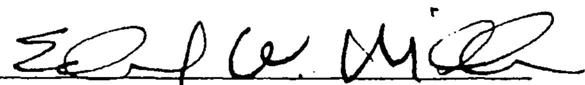
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure the appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and

2. That the Applicant be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 30 day of Jany, 2012.



The Honorable Edward W. Miller
Presiding Judge of the Eleventh Circuit

Greenville, South Carolina

APPENDIX F

FILED: June 23, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7379
(8:17-cv-03139-TLW)

SHADRECK KIFAYATUTHELEZI, a/k/a Norman Hayes

Plaintiff - Appellant

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; MICHAEL STOBBE, individually and in his official capacity

Defendants - Appellees

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk