No. 21-7554

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

William Burke, Petitioner

vs.

State of Georgia, Respondent

Dooly Superior Court, Case No. 21DV-0012

Georgia Court of Appeals, Case No. A21A1604

Georgia Supreme Court, Case No. S22C0105

PETITION FOR WRIT OF CERTIORARI

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31091

QUESTIONS PRESENTED

Preface : The first eight questions were presented to the Georgia Supreme Court in an application for writ of certiorari, which was denied without comment, implying they lack "gravity or great public importance". They are presented again here for this Court's adjudication and opinion of their importance beyond the parties involved, which in turn would answer Question 9.

1. Does OCGA § 42-12-8 unconstitutionally prevent equal access to the courts to a specific group, i.e. incarcerated litigants?
2. Is OCGA § 42-12-8 void for vagueness?
3. Does OCGA § 42-12-8 serve any necessary state interest not otherwise achievable?
4. Is it fundamentally unfair not to provide inmates with ample warning of the procedural morass of appeal upon notification of a dispositive ruling?
5. Does OCGA § 42-12-8 constructively amend OCGA § 5-6-35 which is contary of Ga. Const. Article III, Section V, Paragraph IV?
6. Are Rules of the Court fundamentally unfair to incarcerated litigants when the time to respond is lessened by the notification delays of the postal service and the prison mailroom?
7. If an incarcerated litigant has paid out of pocket all filing fees should the State have any interest in the proceedings?
8. If the trial courts don't abide by OCGA § 43-12-6 is enforcement of OCGA § 43-12-8 precluded?
9. Does a challenge to the constitutionality of laws merit consideration in a state court, irrespective of an article in that state's constitution that allows an arbitrary determination of 'public interest'?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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STATUTES AND RULES

Appeals of all actions filed by prisoners shall be as provided in Code Section 5-6-35.

OCGA § 5-6-35(a) 1,4,7,9,11,12

(a) Appeals in the following cases shall be taken as provided in this Code section:

(1) Appeals from decisions of the superior courts reviewing decisions of the State Board of Workers' Compensation, the State Board of Education, auditors, state and local administrative agencies, and lower courts by certiorari or de novo proceedings; provided, however, that this provision shall not apply to decisions of the Public Service Commission and probate courts and to cases involving ad valorem taxes and condemnations;

(2) Appeals from judgments or orders in divorce, alimony, and other domestic relations cases including, but not limited to, granting or refusing a divorce or temporary or permanent alimony or holding or declining to hold persons in contempt of such alimony judgment or orders;

(3) Appeals from cases involving distress or dispossessory warrants in which the only issue to be resolved is the amount of rent due and such amount is $2,500.00 or less;

(4) Appeals from cases involving garnishment or attachment, except as provided in paragraph (5) of subsection (a) of Code Section 5-6-34 ;

(5) Appeals from orders revoking probation;

(5.1) Appeals from decisions of superior courts reviewing decisions of the Sexual Offender Registration Review Board;

(5.2) Appeals from decisions of superior courts granting or denying petitions for release pursuant to Code Section 42-1-19 ;

(6) Appeals in all actions for damages in which the judgment is $10,000.00 or less;

(7) Appeals, when separate from an original appeal, from the denial of an extraordinary motion for new trial;

(8) Appeals from orders under subsection (d) of Code Section 9-11-60 denying a motion to set aside a judgment or under subsection (e) of Code Section 9-11-60 denying relief upon a complaint in equity to set aside a judgment;

(9) Appeals from orders granting or denying temporary restraining orders;

(10) Appeals from awards of attorney's fees or expenses of litigation under Code Section 9-15-14 ;

(11) Appeals from decisions of the state courts reviewing decisions of the magistrate courts by de novo proceedings so long as the subject matter is not otherwise subject to a right of direct appeal; and

(12) Appeals from orders terminating parental rights.

Georgia Supreme Court Rules:

Except as otherwise provided in this rule, a document will be deemed filed in the Supreme Court of Georgia on the date it is electronically filed or physically received in the Supreme Court Clerk's office and stamped filed by the Clerk's office staff.

(2) Filings by Pro Se Prisoners. A document submitted by a prisoner who is not represented by counsel shall be deemed filed on the date the prisoner delivers the document to prison officials for forwarding to the Supreme Court Clerk. In the absence of an official United States Postal Service postmark showing a date on or before the filing deadline, such delivery shall be shown by the date on the certificate of service or on an affidavit submitted by the prisoner with the document stating that the prisoner is giving the document to prison officials with sufficient prepaid postage for first-class mail. Such a certificate or affidavit will give rise to a presumption that the date of filing reflected therein is accurate, but the State may rebut the presumption with evidence that the document was given to prison officials after the filing deadline or with insufficient postage. If the institution has a system designed for legal mail, the prisoner must use it to benefit from this rule.

Motions for Reconsideration. Except when otherwise ordered, all motions for reconsideration, see Rule 27, must be physically received or electronically filed in the Clerk's office within 10 days of the order or judgment for which reconsideration is sought.

A motion for reconsideration may be filed regarding any matter in which the Court has ruled within 10 days from the date of decision. See Rule 13. A copy of the opinion or disposition to be reconsidered shall be attached. See Rule 61 regarding motions to stay the remittitur.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Georgia State Constitution:

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgements below.

OPINIONS BELOW

The case at issue was never adjudicated on merits, which necessitates this application.

Dooly Superior Court, Case No. 21DV-0012 , dismissed for jurisdiction citing immunity.

Georgia Court of Appeals, Case No. A21A1604, procedurally dismissed citing Prison Litigation Reform Act OCGA § 42-12-8.

Georgia Supreme Court, Case No. S22C0105. Cert. denied without comment.

These cases are not known to be published.

JURISDICTION

The last order issued in the action was the 'postcard' denial of writ of certiorari from the Supreme Court of Georgia on January 11, 2022.

A petition for reconsideration was denied as untimely citing Ga. Supreme Court Rule 27.

STATEMENT OF THE CASE

I. SUMMARY OF GRIEVANCES

A literal reading of OCGA § 42-12-8 does not say an inmate has no right of direct appeal, yet the court's interpretation makes that claim nor does OCGA § 5-6-35 ever specially mention 'prisoner' or 'inmate'. Burke challenges the constitutional purpose of OCGA § 42-12-8 and it's interpretation and application by the state courts. Burke also complains that inmates facing the same time to paper file as those with electronic filing and digital communications is fundamentally unfair especially when the 10 day rules are involved.

II. STANDARDS OF REVIEW

Caminetti v. United States, 242 U.S. 470 @496 (1917) MR. JUSTICE McKENNA, with whom concurred the CHIEF JUSTICE and MR. JUSTICE CLARKE, dissenting.

"Undoubtedly in the investigation of the meaning of a statute we resort first to its words, and when clear they are decisive. The principle has attractive and seemingly disposing simplicity, but that it is not easy of application or, at least, encounters other principles, many cases demonstrate. The words of a statute may be uncertain in their signification or in their application. If the words be ambiguous, the problem they present is to be resolved by their definition; the subject-matter and the lexicons become our guides. But here, even, we are not exempt from putting ourselves in the place of the legislators. If the words be clear in meaning but the objects to which they are addressed be uncertain, the problem then is to determine the uncertainty. And for this a realization of conditions that provoked the statute must inform our judgment. Let us apply these observations to the present case."

Matthews v. Eldridge, 424 U.S. 319 (1976) @334 "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e. g., Goldberg v. Kelly, supra, at 263-271.

State v. Langley, Ga COA A20A1806 "When interpreting any statute, we necessarily begin our analysis with familiar and binding canons of construction. In considering the meaning of a statute, our charge as an appellate court is to presume that the General Assembly meant what it said and said what it meant. Toward that end, we must afford the statutory text its plain and ordinary meaning, consider the text contextually, read the text in its most natural and reasonable way, as an ordinary speaker of the English language would, and seek to avoid a construction that makes some language mere surplusage. Further, when the language of a statute is plain and susceptible to only one natural and reasonable construction, courts must construe the statute accordingly.'

Mullaney v. Wilbur 421 U.S. 684,689 (1975) "The Court of Appeals for the First Circuit affirmed, subscribing in general to the District Court's analysis and construction of Maine law. 473 F.2d 943 (1973). Although recognizing that "within broad limits a state court must be the one to interpret its own laws," the court nevertheless ruled that "a totally unsupportable construction which leads to an invasion of constitutional due process is a federal matter." Id., at 945."

III. RELEVANT PROCEDURAL HISTORY

The common denominator of every aspect leading to this point is the Prison Litigation Reform Act (PLRA) as codified in OCGA § 42-12-1 *et seq.* Burke was granted *in forma pauperis* status to file for habeas and that fee of $265 was paid from his inmate account per OCGA § 42-12-7.1. Then the clerk of the Dooly Superior Court extracted $321 more from Burke's inmate account, without authorization, for court cost for filing an appeal his habeas denial to the Georgia Supreme Court. There is no fee to file an Application for Certificate of Appeal. Burke filed a motion to ask the court to reimburse the funds citing OCGA § 9-14-53 (Reimbursement of habeas court costs), which was denied by the unrealistic and irrelevant misapplication of OCGA § 42-12-7.1 (indigent filing of habeas petition) which demonstrates the courts tendentious misapplication of PLRA statutes in general.

To get his money back Burke resorted to a civil suit against the clerks of the court, which was dismissed for lack of jurisdiction [1]. A timely notice of appeal to the Georgia Court of Appeals [2] was denied [see Appendix C] as cited below:

> Prison inmate William Burke filed a civil action against two clerks of the Dooly County Superior Court. The defendants filed a motion to dismiss based on official immunity, which the trial court granted. Burke now appeals directly to this Court, but we lack jurisdiction.
>
> Because Burke is incarcerated, his appeal is controlled by the Prison Litigation Reform Act of 1996, OCGA § 42-12-1 et seq. Under OCGA § 42-12-8, an appeal of a civil action filed by a prisoner "shall be as provided in Code Section 5-6-35." And under OCGA § 5-6-35, the party wishing to appeal must file an application for

[1] Dooly Superior Court, Case No. 21DV-0012

[2] Georgia Court of Appeals, Case No. A21A1604

discretionary appeal to the appropriate appellate court. Because a prisoner has no right of direct appeal in civil cases, we lack jurisdiction to consider this direct appeal from the trial court's order. See Jones v. Townsend, 267 Ga. 489, 490 (480 S.E.2d 24) (1997). This appeal is therefore DISMISSED.

Burke's protestations that those statues do not, as written, reflect the ruling above fell on deaf ears. An Application for Writ of Certiorari questioning the validity of OCGA § 42-12-8 was presented to the Georgia Supreme Court was denied in an unsigned memo [see Appendix A], supposedly for lack of public interest. Burke submits any challenge to the constitutionally of statutes are of greater concern than the two issues in the writs granted (16 were denied) that day, submitted for comparison, that follow.

SUPREME COURT OF GEORGIA Case No. S21C1250;

Coe v. Rose, Court of Appeals Case No. A21A0142

This Court is particularly concerned with the following issue or issues:

1. Were the Plaintiffs' claims of fraud and negligent misrepresentation barred by the four-year statute of limitations period applicable to legal malpractice claims?

2. Did the Plaintiffs fail, as a matter of law, to exercise ordinary care to discover the Defendant's allegedly fraudulent acts?

SUPREME COURT OF GEORGIA Case No. S21C0405;

Stanley v. Patterson et al.. Court of Appeals Case No. A20A0987

This Court is particularly concerned with the following issue or issues:

Did the trial court err in granting a directed verdict in favor of the defendants based on quasi-judicial immunity? See Spann v. Davis, 2021 WL 5610019, at *7-*8 (Case No. S20G1536, decided November 23, 2021) (McMillian, J., concurring); Withers v. Schroeder, 304 Ga. 394, 399-400 (3) (819 SE2d 49) (2018); Hicks v. McGee, 289 Ga. 573, 575-577 (1) (713 SE2d 841) (2011).

In the first instance above it is certainly questionable whether the concerns of that court extend beyond the parties of that case. In the second instance the court seems particularly concerned with extending their immunity to their staff. This exemplifies the disconnect of impartiality : Burke's civil suit at it's core involves the immunity of court clerks and explicitly cites and depends on the same *Hicks v. McGee*, 289 Ga. 573 prominently mentioned in the case granted certiorari.

The notice of denial was received by Burke, via the prison mailroom, on January 19, 2022. At that point eight of the ten days to request reconsideration were gone. The motion for reconsideration was denied per Rule 27. [see Appendix B]

IV. QUESTION 9

> **Article VI. Section V. Paragraph II. Exclusive appellate jurisdiction of Supreme Court.** The Supreme Court shall be a court of review and shall exercise exclusive appellate jurisdiction in the following cases:
>
> (1) All cases involving the construction of a treaty or of the Constitution of the State of Georgia or of the United States and all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn in question;

Burke further asks if there is no definitive precedent on the constitutional questions presented does that court have the option to pass on that duty? Does the right to petition the courts require a reasoned comment or opinion in answer?

V. DISCUSSION OF QUESTIONS

The same supporting arguments to the questions passed upon by the Supreme Court of Georgia as presented to that court follows;

<u>Question 1:</u> Does OCGA § 42-12-8 unconstitutionally prevent equal access to the courts to a specific group, i.e. incarcerated litigants?

Statutes that restrict a fundamental right or effect a suspect class are not presumed to be constitutional.

OCGA § 42-12-2(3) states ".. In forma pauperis status will continue to allow the filing of an action by a prisoner, thus providing the prisoner with the constitutional right to access to courts." It's the impediment to that constitutional right at issue here.

> *Bonds v. Smith*, 430 U.S. 817, 828 (1977) Prisoners have fundamental constitutional right to adequate, effective and meaningful access to courts to challenge violations of constitutional rights.
>
> *Johnson v. Avery*, 393 U.S. 483, 485 (1969) prisoner's right of access to courts may not be denied or obstructed.

The United States Constitution : 14th Amendment : Section 1. "..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 the law; nor deny to any person within it's jurisdiction the equal protection of the laws."

Taylor v. McSwain, 335 fed appx 32 ("Access to the courts is a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment and/or the Fourteenth Amendment.'")

Ga Constitution Article 1, Section 1 Paragraph XII. Right to the courts. No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state.

Ga. Constitution, Article I, Section I, Paragraph XVII. Bail; fines; punishment; arrest, abuse of prisoners. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; nor shall any person be abused in being arrested, while under arrest, or in prison.

Ga. Constitution, Article I, Section I, Paragraph XXIX. Enumeration of rights not denial of others. The enumeration of rights herein contained as a part of this Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed.

Ga. Constitution, Article I, Section II,Paragraph V. What acts void. Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them.

Question 2: Is OCGA § 42-12-8 void for vagueness?

Boos v. Barry, 485 U. S. at 329(When addressing a facial overbreadth challenge, the court's first task is to ascertain whether the statute reaches a substantial amount of constitutionally protected conduct.)

42-12-8 is poorly written and constitutionally void for vagueness. If the intention was that all inmate appeals be discretionary, it should have said just that. If that law was aimed at filers who used state funds, that also should have been distinguished.

Houston v. Lowes of Savannah, Inc., 235 Ga. 201, 203, 219 S.E.2d 115 (1975) ("it is not presumed that the legislature intended that any part would be without meaning").

OCGA § 42-12-8 simply states in it's entirety - "Appeals of all actions filed by prisoners shall be as provided in Code Section 5-6-35."

Brown v. Crawford, 289 Ga. 722, 715 S.E.2d 132 (2011) @ 135 "Brown asks us to overrule Ray v. Barber, 273 Ga. 856, 548 S.E.2d 283 (2001), which held that the Prison Litigation Reform Act's (PLRA) appeals provision—"[a]ppeals of all actions filed by prisoners shall" proceed by discretionary application, OCGA § 42-12-8 requires even non-prisoner appellants to file discretionary applications. Id. I agree the case was probably wrongly decided. The linchpin in its reasoning is that "filed by prisoners" only modifies the term "actions," meaning the provision should be read to say "in all actions filed by prisoners, appeals must come by discretionary application." Id. But this reading seemingly overlooks the definition of "action" (indeed, Barber never mentions the definition), which only includes "civil lawsuit[s], action[s], or proceeding[s] ... filed by a prisoner." OCGA § 42-12-3(1) (emphasis added). Because an "action" is, by definition, "filed by a prisoner," reading "filed by a prisoner" in the appeals provision to only modify "actions" renders the phrase superfluous. The better reading—particularly in view of the PLRA's stated purpose of minimizing frivolous prisoner filings, OCGA § 42-12-2—is to interpret "filed by a prisoner" in the appeals provision as describing the entire preceding phrase, "Appeals of any actions." Thus, contrary to Barber, the appeals provision only requires a discretionary application for an "[a]ppeal[] of any action" that is "filed by a prisoner"—in other words, an appeal filed by a prisoner, and only a prisoner.

But stare decisis supports continuing to apply Barber. The decision was not demonstrably wrong, as the appeals provision is not a model of clarity, and applying the definition of "action" to the appeals provision is like fitting a round peg into a slightly oval hole. (For instance, the definition says that an "appeal" counts as an action, meaning the appeals provision applies to "[a]ppeals of any [appeal].") State v. Jackson, 287 Ga. 646, 658, 697 S.E.2d 757 (2010). Barber has also been law for over a decade and has been applied in a number of cases. Moreover, the clear procedural rule Barber supplies is workable, id., as it simply requires the State to file a discretionary application to appeal in prisoner actions. This makes little difference: Where the State is not granted discretionary review, it likely would have lost on appeal anyway. Most importantly, the Barber rule is an interpretation of a statute, so the General Assembly is free to change it. Id. ("Stare decisis is an important principle that promotes the rule of law, particularly in the context of statutory interpretation, where our incorrect decisions are more easily corrected by the democratic process.")

If OCGA § 5-6-35 was followed as written, a fair percentage of appeals would fail the test of that statute's subsection (a) and no longer require an application for discretionary appeal. OCGA § 42-12-8 makes no concession for that, so the court's interpretation of it that "and now in appeals of civil cases filed by prisoners, there is no right of direct appeal" *Jones v. Townsend,* 267 Ga. 489, 480 S.E.2d 24 (1997), is beyond that piece of legislation as codified.

*Bickford v. Nolen,*240 Ga. 255 ,240 S.E.2d 24(1977) Justice Hall, dissenting @ 259;

> "The doctrine of stare decisis is usually interpreted to mean that the court should adhere to what it has previously decided and not disturb what is settled. It does not undercut the power of a court to overrule its previous decisions. On the contrary, it is a rule of policy tending to consistency and uniformity of decision and is not inflexible. The reason for the rule is more compelling in cases involving the interpretation of a statute." Mitchell v. State, 239 Ga. 3, 6 (235 SE2d 509) (1977). See also Walker v. Walker, 122 Ga. App. 545, 546 (178 SE2d 465) (1970).
>
> Unfortunately, "stare decisis" is often a mere facade to cover the court's preference for the rule under consideration. If the court likes the precedent, stare decisis is involved with loud incantations; if it dislikes the precedent, the court dons the mantle of "justice" and charges forth with the rhetoric of a knight errant. Stripped of theatrics, the present issue boils down to a question of which way we want to go on the guest-passenger rule" [the issue of the cited case].

The courts seem to like the precedent of *Jones* Id. Appeals by inmates are afforded nothing beyond a cursory glance to see if the hidden and unrealistic requirements of 42-12-8, 5-6-35 are all discovered, understood and complied with within 30 days or less by litigants with no legal training.

Question 3: Does OCGA § 42-12-8 serve any necessary state interest not otherwise achievable?

Once again the purpose of Title 14; Chapter 12, as stated by Justice Nahmias in *Brown v. Crawford,* 289 Ga. 722, 715 S.E.2d 132 (2011);

> @133 "In 1996 the Georgia General Assembly passed the Prison Litigation Reform Act for the stated purpose of addressing the dramatic rise in the costs of litigation, the overwhelming burden on Georgia courts, and other problems caused by the ever-increasing filing of nonmeritorious lawsuits "by prisoners who view litigation as a recreational exercise." OCGA § 42-12-2; Ga. L.1996, pp. 400, 401, § 1."

The courts already have broad discretionary jurisdiction as to filing lawsuits with OCGA § 9-15-2(d) ;

> "When a civil action is presented for filing under this Code section by a party who is not represented by an attorney, the clerk of court shall not file the matter but shall present the complaint or other initial pleading to a judge of the court. The judge shall review the pleading and, if the judge determines that the pleading shows on its face such a complete absence of any justiciable issue of law or fact that it cannot be reasonably believed that the court could grant any relief against any party named in the pleading, then the judge shall enter an order denying filing of the pleading. If the judge

> does not so find, then the judge shall enter an order allowing filing and shall return the pleading to the clerk for filing as in other cases. An order denying filing shall be appealable in the same manner as an order dismissing an action."

If the courts were to apply the above methodology to *pro se* litigants as designed, which covers most prisoners, as that code allows, the problem of filing 'nonmeritorious' and 'recreational' lawsuits would be halted on the front end as opposed to the appellate stage, making OCGA § 42-12-8 superfluous. If OCGA § 42-12-8 was to state all civil suits shall be provided as in code section 9-15-2(d), there would not be an issue and the intent of OCGA 42-12-2 would be achieved.

An action by an inmate needs to be decided whether or not it has merit upon filing, otherwise there is a presumption that action automatically falls into the purview of OCGA § 42-12-2(1):

> The costs of litigation are rising dramatically. It is the responsibility of this body to seek out and adopt measures to rectify this situation. One source of the rise in litigation costs is frivolous prisoner lawsuits. Meritless lawsuits are being filed at an ever-increasing rate by prisoners who view litigation as a recreational exercise. *To address the problems caused by the filing of nonmeritorious lawsuits* [emphasis added] and to relieve some of the burden placed on Georgia cities, counties, state agencies, the courts, and the Department of Corrections, this chapter is enacted.

Question 4: Is it fundamentally unfair not to provide inmates with ample warning of the procedural morass of appeal upon of a dispositive ruling?

The expectation that and incarcerated *pro se* appellant could get up to the level of a trained attorney in 30 days is preposterous. Just making a timely notice to appeal under the circumstances is a laudable achievement with no guidance from the court.

> *Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1972) (allegations of pro se complaint held "to less stringent standards than formal pleadings drafted by lawyers ...").
>
> Due process requires only that a statute define the offense in terms that advise people of ordinary intelligence of the conduct sought to be prohibited, and that provide sufficient guidelines to prevent arbitrary enforcement. *Bell v. State,* 252 Ga. 267 (313 S.E.2d 678) (1984); *Kolender v. Lawson,* 461 U.S. 352 (103 S.C. 1855, 75 LE2d 903) (1983).

If a party files an application when the party should have filed a direct appeal, the application will be granted and the party will have the right to file a notice of appeal within ten days of

the date of the order granting the application. This does not hold true in the reverse. That is, if a party files a direct appeal and should have filed an application, the direct appeal will be dismissed for lack of jurisdiction. But see *Thompson v. State* ,Court of Appeals of Georgia, July 6, 2021.No. A21A1467 where the case was dismissed for an untimely response and remanded ("Because procedural deficiencies have deprived the appellant of the right of appellate review, the appellant is hereby informed of the following in accordance with Rowland v. State, 264 Ga. 872 (452 S.E.2d 756) (1995):..."). That is not equal treatment of procedural infirmity. The court could just as well remand for correction *pro se* appeals that lack discretionary applications.

Question 5: Does OCGA § 42-12-8 constructively amend OCGA § 5-6-35 which is contary of Ga. Const. Article III, Section V, Paragraph IV?

> *Ga. Const., Article III, Section V, Paragraph IV.* Statutes and sections of Code, how amended.
>
> No law or section of the Code shall be amended or repealed by mere reference to its title or to the number of the section of the Code; but the amending or repealing Act shall distinctly describe the law or Code section to be amended or repealed as well as the alteration to be made.

If one were to follow the conditional branching of OCGA § 5-6-35(a), one would most likely be redirected to OCGA § 5-6-34. In the instant case none on the 12 enumerations of 5-6-35(a) were met, so that statute is not applicable.

By not specifically pointing to a subsection of OCGA § 5-6-35, OCGA § 42-12-8 fails if it's intention that all inmate appeals be discretionary. This once again recalls the vagueness and ambiguity of that poorly worded statute.

> *State v. Jones,* 265 Ga. App. 493, 494 (2) (594 SE2d 706) (2004) ('Because we are faced with the interplay of these two statutes, we note that statutory interpretation principles require that a specific statute control over a general statute unless there is a contrary legislative intent.)

If OCGA § 42-12-8 does indeed tacitly intend all appeals be discretionary, which 5-6-35 does not, then a general statute controls a specific one.

It is axiomatic that when the language of a statute is unambiguous, the court has no authority to imply a contrary intent. See *Hollowell v. Jove*, 247 Ga. 678, 681 (279 S.E.2d 430) (1981). Neither should subtle nor forced constructions of the statute be used to limit or extend its scope. *Earth Mgmt. v. Heard County,* 248 Ga. 442, 444 (283 S.E.2d 455) (1981).

Question 6: Are Rules of the Court fundamentally unfair to incarcerated litigants when the time to respond is lessened by the notification delays of the postal service and the prison mailroom?

The Rules of the Courts give the same allotted time to office based litigants, who have instantaneous communication with the courts with email and efiling, that is given to incarcerated pro se litigants, who are dependant on the whims the U.S. Postal Service and the prison mailroom. A notice from the court clerk immediately received by the former may take 3 to 5 days best case and usually more for the latter. The prison mailbox rule does not fully compensate for this. The notice to file a motion for reconsideration within 10 days was delivered to Burke on the 9th day. That is fundamentally unfair and restricts due process.

> *Pearson v. Grand Blanc*, 961 F.2d 1211(6th 1992) (Substantive due process involves the right not to be subject to aribitary or capricious action by a state either by legislative or administrative action.)

Question 7: If an incarcerated litigant has paid out of pocket all filing fees should the State have any interest in the proceedings?

OCGA § 42-12-4 provides: "The following provisions shall apply when an indigent prisoner commences an action:.."

Burke did not file this civil action *in forma pauperis*, so there is no burden on the state. An incarcerated litigant paying his own way seems to be excluded from the rigors of this chapter by the wording of OCGA § 42-12-2(2):

> Before filing any sort of civil action, all citizens must evaluate the strengths of their claim in light of their own personal financial situation. Private individuals are forced to balance the strength of their case against the reality of court costs, filing fees, and the potential consequences of filing a frivolous or meritless lawsuit. Georgia's prisoners currently face no such dilemma. In light of the fact that all prisoners' needs are provided at city, county, or state expense, a prisoner cannot claim that his or her financial status or security would be compromised by a requirement to pay court costs and fees. To address this inequity, the General Assembly enacts this chapter.

OCGA 42-12-2 explains the purpose of enacting this chapter was to address the burden caused by the filing of nonmeritorious lawsuits, appeals are not mentioned here, and the cost of *in forma pauperis* filings. And since Burke, not the State, paid his filing fee, whether or not he is incarcerated creates no burden on the State, so he should be allowed to proceed with an appeal as any other person would be treated. Nor was it ever determined his action was not meritorious. Not to allow this appeal to proceed denies due process and equality under the law.

<u>Question 8:</u> If the trial courts don't abide by OCGA § 43-12-6 is enforcement of OCGA § 43-12-8 precluded?

Because Burke is incarcerated, this litigation is controlled by the Prison Litigation Reform Act of 1996, OCGA § 42-12-1 et seq. Under OCGA § 42-12-6, upon the dismissal of a prisoner action or upon the entry of judgment in favor of the responding party, the court shall make a finding as to whether the prisoner's action was frivolous. That didn't happen. The trial court failed to follow this required step, therefore the appellate court should have remanded the case with instructions that both OCGA § 42-12-6 and OCGA § 42-12-8 need to be satisfied.

There seems to be selective enforcement of compliance of OCGA § 42-12-1 *et seq.* by the courts. Had the court properly ruled on Burke's original Motion For Reimbursement instead of misapplying OCGA § 42-12-7.1 we would not be here. If the courts properly applied all sections with the same vigor as OCGA § 42-12-8, Burke's action would not have been necessary.

Also, if the trial court is required to make a finding as to whether the prisoner's action was frivolous, what purpose does OCGA § 42-12-8 serve beyond an excuse to procedurally obfuscate a prisoner's right of redress of grievances?

> *State v. Abbott,* 309 Ga. 715, 719 (2) (848 S.E.2d 105) (2020) ("Trial judges too are presumed to know the law and apply it in making their decisions, absent some indication in the record suggesting otherwise." (citation and punctuation omitted))

REASONS FOR GRANTING THE WRIT

Redress of grievances is a hollow promise without the dignity of a sound and proper response. The Declaration of Independence justified the American Revolution by noting that King George III had repeatedly ignored petitions for redress of the colonists' grievances. Granting the writ assures a grievance that has not been addressed by precedent and yet is meritorious will be seen and heard.

And as for any thought of comity, a totally unsupportable construction of a statute which leads to an invasion of constitutional due process is a federal matter.

CONCLUSION

United States Constitution, Fourteenth Amendment Section 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

Prisoners are still citizens and are still entitled to all privileges and immunities promised all citizens and Article III employs and empowers this Court as the ultimate guarantor and guardian of those promises.

In *Railroad Commission v. Pullman Co.*,312 U.S. 496 (1941) the Court held that constitutional adjudication could "be avoided if a definitive ruling on the state issue would terminate the controversy."

Admittedly, this should have been handled in the lower courts, but the obstinacy of those courts denied that. Here now, the highest court has the opportunity to remind those courts of their sworn duty to extend every right in both state and federal constitutions to every citizen within accordance of the egalitarian concepts the United States was built upon.

Burke prays this Court will grant certiorari and render a decision on this relatively simple conflict as to the legitimacy of OCGA § 42-12-8 and the rules of the state court, both which seem designed to impede a suspect class equal access to the courts in violation of Amendments I and VIX , therefore unenforceable and 'repugnant' to the Constitutions of both the State and the United States of America.

Respectively Submitted,

William Burke

William Burke, *pro se*

Appendix A

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