

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

David Ray Tant,)	
)	
Plaintiff,)	Civil Action Number: 3:15-cv-3001-MBS
)	
vs.)	
)	
William Frick; South Carolina Office)	
of the Attorney General; South Carolina)	<u>OPINION AND ORDER</u>
Department of Probation, Parole, and)	
Pardon Services; Solicitor’s Office for)	
the Sixth Judicial Circuit; South Carolina)	
Department of Corrections;)	
)	
Defendants.)	

Plaintiff David Ray Tant (“Plaintiff”), filed this action alleging constitutional rights violations and state law tort claims against Defendants Solicitor William Frick (“Frick”); South Carolina Department of Corrections (“SCDC”); South Carolina Office of the Attorney General (“Attorney General’s Office”); South Carolina Department of Pardon, Probation, and Parole Services (“SCDPPPS”); and Solicitor’s Office for the Sixth Judicial Circuit (“Solicitor’s Office”) (collectively, “Defendants”)¹ arising out of the alteration of his prison sentence following a state court criminal conviction in 2004. Pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C), this case was referred to United States Magistrate Judge Paige J. Gossett for all pre-trial proceedings. This case is now before the court on the Magistrate Judge’s Report and Recommendation (“Report and Recommendation”) recommending the court grant Defendants’ motions for summary judgment. ECF No. 67.

¹ Additional Defendants John Does 1-5, Norris Ashford, C David Baxter, Orton Bellamy, Henry S Eldridge, Beverly Rice McAdams, and Larry Ray Patton, Jr., were dismissed by stipulation of dismissal on September 28, 2016, after they filed a motion for summary judgment. ECF No. 61.

I. PROCEDURAL HISTORY

This case has a lengthy procedural history. In 2012, Plaintiff filed suit in the Court of Common Pleas for Richland County, South Carolina, alleging constitutional violations under 42 U.S.C. § 1983 as well as state law claims stemming from the alteration of his prison sentence from fifteen to forty years. The suit was removed to federal court. The original claim under 42 U.S.C. § 1983 was lodged solely against Defendant Frick. *Tant v. Frick*, No. 3:12-3020-JFA, 2014 WL 4417372, at *2 (D.S.C. Sept. 8, 2014). The court granted summary judgment in favor of Defendants on Plaintiff's federal claim and remanded the state law claims. *Id.* at *3. Following remand, the Court of Common Pleas granted Plaintiff leave to file a supplemental complaint. Plaintiff's supplemental complaint "incorporates the allegations of the original complaint in this action, where relevant, as amended where applicable by prior rulings of this Court and the United States District Court for the District of South Carolina." ECF No. 1-1 at ¶ 1. Plaintiff's supplemental complaint states "[t]he causes of action set forth herein concern matters which occurred subsequent to the filing of the initial action and are therefore appropriate for consideration by way of supplemental complaint." *Id.* at ¶ 2. Plaintiff's supplemental complaint states (1) a claim against Defendants pursuant to 42 U.S.C. § 1983 alleging a violation of his constitutional rights; (2) a state law claim against Defendants for intentional infliction of emotional distress; (3) a state law claim against Defendant SCDC for abuse of process; (4) state law claims of negligence and gross negligence against Defendants; and (5) a state law claim for false imprisonment against Defendants SCDC and SCDPPPS. After Plaintiff filed the supplemental complaint including additional claims under 42 U.S.C. § 1983, Defendants again removed to federal court.

Defendant SCDC moved for summary judgment on September 7, 2016. ECF No. 54. On September 9, 2016, Defendants Frick, Solicitor's Office, and Attorney General's Office jointly moved for summary judgment. ECF No. 55. Defendant SCDPPPS filed a separate motion for summary judgment on September 9, 2016. ECF No. 56. Plaintiff filed a consolidated response on September 29, 2016. ECF No. 59.

On February 9, 2017, Magistrate Judge Gossett issued a Report and Recommendation recommending that Defendants' motions be granted. ECF No. 67. Magistrate Judge Gossett recommended the court dismiss the action against Defendants SCDC, SCDPPPS, and Attorney General's Office because Defendants are "entities or agencies of the State of South Carolina, and, as such, do not qualify as 'persons' under § 1983." ECF No. 67 at 5-6 (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70-71 (1989)). Magistrate Judge Gossett noted that the § 1983 claim against Defendant Frick was previously dismissed on summary judgment. *Id.* at 5 n.2. As such, Magistrate Judge Gossett found that the

controlling [c]omplaint in this action acknowledges that the allegations are amended where applicable by prior rulings in the previous action and that the instant causes of actions concern matters that have occurred subsequent to the filing of the previous action. (ECF No. 1-1 at 2.) None of these additional actions mention Defendant Frick. (*See generally* ECF No. 1-1.).

Id. Accordingly, Magistrate Judge Gossett recommended the court grant summary judgment on the renewed § 1983 claim against Defendant Frick. Magistrate Judge Gossett then examined the various state law claims, and recommended the court grant summary judgment on those claims as well. Plaintiff asserted numerous objections to the Report and Recommendation. ECF No. 68. As pertinent here, Plaintiff claims that the Magistrate Judge (1) erred in finding that § 1983 does not provide a cause of action against Defendant agencies, and (2) erred in finding Plaintiff's § 1983 claim "failed to demonstrate Defendant Frick 'acted personally.'" ECF No. 68 at 1-2.

The matter is now before the court for review of the Magistrate Judge’s Report and Recommendation. The court is charged with making a de novo determination of any portions of the Report and Recommendation to which a specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation by the Magistrate Judge or may recommit the matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b). After carefully considering the parties’ submissions and the applicable law, the court adopts the Report and Recommendation as to the federal law claim. However, the court declines to exercise jurisdiction over the state law claims and remands them for adjudication in the state court.

II. FACTUAL BACKGROUND

In 2004, Plaintiff pleaded guilty to assault and battery of a high and aggravated nature (“ABHAN”), possession of a dangerous animal, and forty-one counts of animal fighting. *Tant v. S.C. Dep’t of Corr.*, 759 S.E.2d 398, 399 (S.C. 2014). On November 22, 2004, the Honorable Wyatt T. Saunders, Jr. orally sentenced Plaintiff

to serve ten years’ imprisonment for the ABHAN and “five years consecutive to [the ABHAN sentence]” on six of the animal fighting counts with the condition that if restitution were paid on two of those convictions, those sentences would be null and void. [Plaintiff] was also sentenced to five years’ imprisonment, suspended, on the remaining animal fighting charges and three years’ imprisonment, suspended, for possession of a dangerous animal.

Id. at 399-400. Judge Saunders asked if there were any questions regarding the sentence.

Defendant Frick, the South Carolina solicitor responsible for prosecuting the case, requested clarification on the first part of the sentence. Judge Saunders responded that the first “four indictments for which [Plaintiff] has been convicted of animal fighting, are consecutive to each other and consecutive to [the ABHAN sentence].” *Id.* at 400. Judge Saunders asked “if [the sentence] was clear, and there was no objection.” *Id.* Judge Saunders “then [repeated] the two

additional animal fighting sentences were for five years consecutive to the ABHAN sentence, but would be null and void upon payment of restitution. Again, there was no objection.” *Id.*

The sentencing sheets for all six of the animal fighting charges, which were signed by the judge, the solicitor, and Plaintiff’s attorney, indicated each animal fighting sentence was consecutive to the ABHAN sentence, but failed to indicate whether the animal fighting charges were consecutive to each other. *Id.* After receiving the sentencing sheets, Defendant SCDC initially interpreted the animal fighting charges as running concurrently with each other and consecutive to the ABHAN charge. *Id.* Defendant SCDC recorded Plaintiff’s sentence as fifteen years imprisonment. Defendant SCDPPPS calculated Plaintiff’s initial parole eligibility date as August 24, 2008. ECF No. 59-4 at 3.

In January 2006, Defendant Frick reviewed Plaintiff’s SCDC records and determined that SCDC’s calculation of the sentence was inconsistent with Judge Saunders’s oral pronouncement. Based on Judge Saunders’s oral pronouncement, the sentencing sheets should have shown each animal fighting sentence running consecutively to the ABHAN sentence, for a total of forty years imprisonment. *See id.* Defendant Frick contacted Defendant SCDC employee Michael Stobbe, who verified that Defendant SCDC calculated Plaintiff’s sentence as fifteen years imprisonment rather than forty. ECF No. 59-10 at 52-53. In June 2007, after Defendant SCDPPPS advised Judge Saunders that there was confusion regarding Plaintiff’s sentence, Judge Saunders sent a letter to Defendant SCDC stating, “[i]t was my intent for [Plaintiff] to receive a sentence of 10 years on the ABHAN charge and 5 years consecutive for each of the six charges of Animal Fighting, for a total of 40 years.” ECF 59-16 at 1. On June 13, 2007, after receiving Judge Saunders’s letter, Defendant SCDC recalculated Plaintiff’s sentence to be in accordance with Judge Saunders’s stated intention. ECF 59-17 at 1-2. After Plaintiff’s sentence was recalculated,

Defendant SCDPPPS changed his initial parole eligibility date to September 16, 2010, and parole ending date was February 4, 2029. ECF No. 59-33.

Plaintiff immediately pursued administrative and judicial avenues to challenge the recalculation. In 2014, the South Carolina Supreme Court ordered that Plaintiff's sentence be reinstated for a total of fifteen years' imprisonment. *Tant*, 759 S.E.2d at 346. The Court held that because "both the sentencing sheets and the transcript were ambiguous, [Plaintiff's] sentence must be construed to run concurrently." *Id.* After the South Carolina Supreme Court decision, Plaintiff's parole eligibility date remained as September 16, 2010, but the end date was modified to May 13, 2012.²

III. LEGAL STANDARD

Section 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 "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) (internal quotations omitted). To state a claim under § 1983, a plaintiff must allege: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). A plaintiff must affirmatively show that a defendant acted personally in the deprivation of his or her constitutional rights. *Vinnedge v. Gibbs*, 550 F.2d 926, 928 (4th Cir. 1977).

² Plaintiff's parole eligibility date remained the same as Plaintiff was released on parole while his appeal was pending.

IV. DISCUSSION

A. Cause of Action Against Agency Defendants

Plaintiff objects to the Magistrate Judge's finding that he could not sue any of the state agencies under § 1983 "for the deprivation of federal rights caused by its own policy, custom, or practice." ECF No. 68 at 6. In *Monell v. Department of Social Services*, 436 U.S. 658, 663 (1978), the Supreme Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961), and held that local governments, municipalities, and school boards were "persons" subject to liability under § 1983. The Court held that local governments could be sued for constitutional violations arising from a local government's "policy or custom." *Id.* at 694. However, in *Will*, the Court clarified that *Monell* cannot be similarly extended to states, or "governmental entities that are considered 'arms of the state.'" *Will*, 491 U.S. at 70. The Court reasoned that the disparity of treatment occurs because "States are protected by the Eleventh Amendment while municipalities are not." *Id.* Defendant SCDC, Defendant Attorney General's Office, and Defendant SCDPPPS are state entities. Accordingly, Defendants cannot be sued under § 1983.

The court notes that the Magistrate Judge did not specifically address whether Defendant Solicitor's Office may be sued under § 1983. *See* ECF No. 67 at 5-6. However, Plaintiff objected to the finding that he may not sue Defendant Solicitor's Office "for the deprivation of federal rights caused by its own policy, custom, or practice." ECF No. 68 at 6. Accordingly, the court will address whether Defendant Solicitor's Office may be sued under § 1983. While Defendant Solicitor's Office may be considered an arm of local government, thus liable for a "custom or policy" of the agency, Plaintiff must first demonstrate that Defendant Solicitor's Office is a legal entity capable of being sued. In *Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 393 (4th Cir. 2014), the Fourth Circuit Court of Appeals held that a county solicitor's office may

be a “person” for purposes of § 1983 if the office was created by the state constitution or state statute. *Id.* at 393. Otherwise, “the Solicitor’s Office consists of buildings, facilities, and grounds—inanimate objects that do not act under color of state law—and thus is not a ‘person’ within the meaning of § 1983.” *Cave v. Morgan*, No. 0:09-056, 2009 WL 982196, at *3 (D.S.C. Apr. 9, 2009); *Davis v. Henry*, No. 3:16-3371, 2016 WL 7118556, at *2 (D.S.C. Nov. 15, 2016) (collecting cases).

The position of solicitor was created under the South Carolina Constitution and given effect in the South Carolina Code. S.C. Const. art. V, § 24 (“in each judicial circuit a solicitor shall be elected by the electors thereof”); S.C. Code Ann. § 1-7-310 (“[t]here is one solicitor for each judicial circuit, to be elected by the qualified electors of the circuit, who holds his office for a term of four years.”). Only the position of solicitor, and not the Office of Solicitor, was established under the laws of South Carolina.³ Defendant Solicitor’s Office is not an entity capable of being sued, because it was not established under any statutory or constitutional provision, and as a result bears no unique legal identity.

B. Cause of Action Against Defendant Frick

Plaintiff states that the amended complaint only concerns matters arising after the initial complaint. *Id.* at ¶ 2. Plaintiff fails to allege any action Defendant Frick took after Plaintiff filed his initial complaint that could give rise to an additional claim under § 1983.

³ In comparison, the South Carolina General Assembly expressly created the Office of the State Inspector General and position for State Inspector General. *See* S.C. Code Ann. § 1-6-20 (“[t]here is hereby established the Office of the State Inspector General that consists of the State Inspector General, who is director of the office, and has a staff of deputy inspectors general . . .”). This demonstrates that the South Carolina General Assembly knew how to create such an office, yet declined to do so.

V. CONCLUSION

The court has conducted a careful review of the record, the applicable law, the Report and Recommendation, and the objections thereto. The court adopts the recommendation that the federal claim should be dismissed on summary judgment. That having been said, the court is constrained to remand the remaining state law claims to the state court from which this case was removed. The court believes that the state court is the appropriate forum to address Plaintiff's claims. The Report and Recommendation is adopted in part and rejected in part. As to the state law claims asserted in this action, such claims are hereby remanded to the Court of Common Pleas for Richland County, South Carolina.

IT IS SO ORDERED.

s/ Margaret B. Seymour
Honorable Margaret B. Seymour
Senior United States District Judge

July 28, 2017
Columbia, South Carolina