THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, *Administrative Law Judge*

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Lower Case No. 15-ALJ-04-0078-AP

Appellate Case No. 2015-001519

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James A. Sellers, # 243348,.....Appellant,

v.

South Carolina Department of Corrections.....Respondent.

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# FINAL BRIEF OF RESPONDENT

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November 3, 2015

SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS

Christina Catoe Bigelow
Office of General Counsel
P.O. Box 21787
Columbia, SC 29221
803-896-1738

Counsel for Respondent

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## STATEMENT OF THE ISSUE ON APPEAL

**DID THE ADMINISTRATIVE LAW COURT CORRECTLY AFFIRM THE DEPARTMENT'S FINAL AGENCY DECISION, WHERE THAT DECISION WAS BASED ON SUBSTANTIAL EVIDENCE AND WAS NOT CLEARLY ERRONOUS, ARBITRARY, CAPRICIOUS, OR AN ABUSE OF DISCRETION?**

## STATEMENT OF THE CASE

This matter is before the Court pursuant to the appeal of James A. Sellers, SCDC #243348 (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (SCDC or Department). This is an appeal from a June 12, 2015 final decision of the Administrative Law Court (ALC), which affirmed the Department's January 22, 2015 final decision denying Appellant's Step 2 grievance.

Appellant filed a Step 1 grievance on January 16, 2014 claiming that the Department is incorrectly calculating his sentence for Accessory Before the Fact to a Felony (Murder) (*R.* at 6). According to Appellant's view, the sentence should not be considered a "mandatory minimum," day-for-day offense. (*Id.*) The Department subsequently denied the Step 1 when it was determined that Appellant's sentence was, in fact, being calculated correctly. (*Id.*) Appellant then filed a Step 2 grievance on February 27, 2014, raising the same issue. (*R.* at 8). The Department denied Appellant's Step 2 grievance on January 22, 2015, stating in relevant part:

> In reference to SCDC calculating sentences, per *Bennett v. State*, we calculate based on the statute and that is how your sentence is calculated. Per statute 16-01-0040, 0050, Accessory before the fact to a felony (violent if violent), the offense is punished as the principal felon [*sic*]. Therefore, since the offense of murder carries a mandatory minimum of 30 years to life, your 25 years had to follow the mandatory minimum guidelines based on statute.

(*Id.*)

Appellant appealed the Step 2 decision to the ALC on February 11, 2015, and the ALC affirmed the Department's final decision on June 12, 2015. (*R.* at 4).

## STANDARD OF REVIEW

S.C. Code § 1-23-610(B) provides the applicable standard of review:

> The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code § 1-23-610(B); *see also* S.C. Code § 1-23-380(5).

In an appeal of the final decision of an administrative agency, the standard of appellate review is whether the ALC's findings are supported by substantial evidence. S.C. Code § 1-23-610(B). A reviewing court shall not substitute its own judgment for that of the ALC as to findings of fact, but it may reverse or modify decisions that are controlled by errors of law or that are clearly erroneous in view of the substantial evidence on the record as a whole. *Id.* In determining whether the ALC's decision is supported by substantial evidence, this Court need only find, considering the record as a whole, evidence upon which

reasonable minds could rely in reaching the same decision that the ALC reached. *DuRant v. S.C. Dep't of Health & Environ. Control*, 361 S.C. 416, 420, 604 S.E.2d 704, 706 (Ct. App. 2004). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. *Id.*

## ARGUMENT

**THE ADMINISTRATIVE LAW COURT CORRECTLY AFFIRMED THE DEPARTMENT'S FINAL AGENCY DECISION BECAUSE THAT DECISION WAS BASED ON SUBSTANTIAL EVIDENCE AND WAS NOT CLEARLY ERRONOUS, ARBITRARY, CAPRICIOUS, OR AN ABUSE OF DISCRETION.**

This Court should affirm the ALC's June 12, 2015 final order for the reasons contained in that order and for the reasons stated below.

Appellant is incorrect that the Department is miscalculating his sentence for the Accessory Before the Fact to a Felony (Murder). The statute that was in effect at the time of sentencing is currently located at S.C. Code § 16-1-40 and reads: "A person who aids in the commission of a felony or is an accessory before the fact in the commission of a felony by counseling, hiring, or otherwise procuring the felony to be committed is guilty of a felony and, upon conviction, *must be punished in the manner prescribed for the punishment of the principal felon.*" (emphasis added). The murder statute under which Appellant was convicted on August 6, 1997 had recently been amended, as explained in detail in an opinion of the South Carolina Attorney General:

> In 1995 Acts No. 83, §10, the statute was amended to provide the following:

> [a] person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, ***or by a mandatory minimum term of imprisonment for thirty years***. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. ***No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section.***
>
> We note that this Act which amended § 16-3-20 specifically addressed its effective date. Section 62 states that the Act "takes effect January 1, 1996, *and applies prospectively to all crimes committed on or after that date . . .*" 1995 Acts No. 83, § 62 [Emphasis in original].

Opinion of the Attorney General, to the Honorable Barry J. Barnette, 2011 WL 2214058 (May 24, 2011).

Since the Accessory statute refers the sentencing judge to the operative penalty statute for the crime for which a defendant was an accessory, Judge Floyd correctly looked to the version of S.C. Code § 16-3-20 that was in the Code at the time of sentencing. While it is true that Judge Floyd sentenced Appellant to a mandatory minimum term of less than the 30 years required by statute, that fact does not at all alter the fact that the reduced 25-year sentence actually imposed on Appellant is to be served as a "mandatory minimum," flat-time sentence precisely the same way as would a 30-year sentence under the same statute. And

Appellant offers no on-point source of law to the contrary. The Department has an affirmative obligation to enter a sentence imposed by a judge of competent jurisdiction in this State. In this case, Appellant received a *reduction* by five years in the total amount of time imposed for the Accessory Before the Fact for a Felony (Murder), since the judge could have sentenced him to at least the mandatory minimum period of 30 years.

However, Judge Floyd exercised his discretion and lowered the mandatory minimum period of total incarcerative time to 25 years to match the other sentence imposed. If there was a problem with the sentence imposed (although it is doubtful that Appellant would have argued *against* a lower-than-statutorily-required sentence), then the time to raise that issue would have been within the 10-day motions window. In the alternative, Appellant had PCR as an available option (and, indeed, had a PCR case on other issues). Moreover, the South Carolina Supreme Court affirmed Appellant's convictions and his sentences on direct appeal. *State v. Sellers*, Op. No. 99-MO-79 (S.C. Sup. Ct. filed Nov. 15, 1999).

Regarding the mandatory minimum service requirement for Appellant's sentence, at least one case that discusses the effect of credit-limiting language in a statute is *Nelson v. Ozmint*, 390 S.C. 432, 702 S.E.2d 369 (2010). In *Nelson*, the inmate's counsel wrote to SCDC requesting it to reevaluate its interpretation of § 16-25-20(B)(3), which provides that for CDV 3rd, an individual "must be imprisoned *not less than a mandatory minimum* of one year but not more than five years." 390 S.C. at 436, 702 S.E.2d at 371 (emphasis added). The inmate argued that "inmates convicted of CDV 3rd should be permitted to earn good time

credits and earned work credits such that they could reduce their terms of actual imprisonment below the mandatory minimum of one year." *Id.* The argument was based in part on the fact that the CDV statute for a third offense did not say SCDC could *not* apply credits. *Id.* Our Supreme Court disagreed, holding instead that the absence of credit-bestowing language for a third offense—as contrasted with the inclusion of such language for a second offense—was evidence that "the legislature intended § 16-25-20(B)(3) to require inmates convicted of CDV 3rd to actually be imprisoned for the mandatory one-year minimum." *Id.* at 436–37, 702 S.E.2d at 371; *see id.* ("We find that, by omitting such language from the provision at issue, the legislature intended to make an inmate convicted of CDV 3rd ineligible to receive good time and earned work credits to reduce the time they are required to serve below the mandatory minimum of one year.").

Just recently, at the April Term, this Court acknowledged the mandatory minimum, day-for-day service requirement for a term-of-years sentence for murder. *See generally Dean v. State*, No. 2015-UP-176, 2015 WL 1481686 (S.C. Ct. App. Apr. 1, 2015) (unpublished); *id.*, at *3 ("In this case, the plea court informed Dean that he was facing a sentence of thirty years' to life imprisonment with no recommendation from the solicitor, and Dean stated he still wished to plead guilty. Furthermore, the plea court informed Dean he would not be eligible for parole and twice stated his sentence would be 'day-for-day.'"). In fact, there is no criminal penalty provision related to sentencing in the entire Code more unambiguous and clear as the following qualifier:

> **No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section.**

S.C. Code § 16-3-20.

The crux of Appellant's argument is this: Because Appellant was sentenced to less than the 30 years required by the murder statute, his 25-year sentence is exempt from the day-for-day service requirement—meaning, essentially, that Appellant's sentence should actually be calculated as a "no parole" offense subject to § 24-13-100 *et seq*. Appellant's argument fails for two reasons. First, Appellant's sentence cannot fall under the rules governing "no parole" offenses because "no parole" offenses include a mandatory release to community supervision, and § 16-3-20 unambiguously states that no one sentenced under the murder statute "is eligible for parole or any early release program." The murder statute, as amended in 1995, does not contemplate that an offender sentenced under the murder statute will serve anything less than the minimum sentence imposed by the court. Community supervision is a type of early release because an offender is not considered to have completed his total sentence until successful completion of the program.

Second, and most importantly, this Court is constrained to give effect to the clear legislative intent of the statute. *Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) ("The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature."); *Nelson*, 390 S.C. at 436, 702 S.E.2d at 371. The phrase "**nor is the**

**person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section**" can mean only one thing: The Department is precluded from applying any type of sentence-reducing credit whatsoever—Earned Work Credits, Earned Education Credits, and Good Time Credits—such that the inmate does less than the *actual* amount of the mandatory term of imprisonment of 30 years. However, even if this Court were to find that language ambiguous, the Court should nonetheless uphold the ALC's conclusion, for crafting a rule that adopts Appellant's argument "would lead to a result so plainly absurd that it could not have been intended by the Legislature," effectively thwarting "the plain legislative intention." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342–43, 713 S.E.2d 278, 283 (2011).

While it is true that Judge Floyd was technically required by the Code to sentence Appellant to at least 30 years on his accessory conviction, for whatever reason, Judge Floyd exercised discretion and gave Appellant a more lenient sentence. That somehow Appellant should be able to take unfair advantage of this already-generous situation by arguing that *on top of* this reduced sentence he should *also* do no more time than an offender serving a "no parole" offense (*i.e.*, no less than 85% of the incarcerative sentence) is as ludicrous a proposition as it wholly unsupportable as a matter of law, or public policy for that matter. Adoption of Appellant's argument would serve only to accentuate the disparity in calculation of sentences for those individuals who are convicted of a true mandatory minimum crime but,

for whatever reason, receive less than that minimum by the sentencing judge. And while such a practice of circumventing the clear legislative criminal penalty scheme can find no positive support in the controlling law of this State, the reality with which this Court is confronted includes one where there have been and will continue to be inmates in the Department's custody with sentences such as Appellant's that do not adhere to statutory penalty guidelines.

In all such cases, where this Court does not otherwise have jurisdiction to remedy such actions, this Court could at least "stop the leak" by adopting Respondent's argument and holding that a sentence that is less than the statutorily required mandatory minimum term of imprisonment is nonetheless calculated as though the offender received the mandatory minimum term. In this case, for example, such a holding would lead to the inevitable and correct conclusion that Appellant's 25-year sentence, while an exception to the statutory penalty scheme to be sure, should be subject to the credit-limiting language contained in § 16-3-20 and which applies to all mandatory minimum terms of 30 years or more.

The ALC's order is supported by substantial evidence, contains no erroneous legal analysis, and is not arbitrary, capricious, or an abuse of discretion. Accordingly, this Court should affirm the decision below.

## CONCLUSION

Because the ALC correctly found that the Department is properly calculating Appellant's sentence for Accessory Before the Fact to a Felony (Murder), this Court should

affirm the ALC's June 12, 2015 order.

Respectfully submitted,

**SOUTH CAROLINA DEPARTMENT OF CORRECTIONS**

BY: 

DANIEL J. CROOKS III
Staff Attorney
Office of General Counsel
Post Office Box 21787
Columbia, South Carolina 29221
(803) 896-1355 [direct dial]
Crooks.Daniel@doc.sc.gov

*Counsel for Respondent*

Columbia, South Carolina
November 3, 2015

## CERTIFICATE OF COUNSEL

I, the undersigned, certify that to the best of my ability, this *Final Brief of Respondent* complies with Rule 211(b), SCACR and the April 15, 2014 Order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

DANIEL J. CROOKS III
Staff Attorney
Office of General Counsel
South Carolina Department of Corrections
4444 Broad River Road
Post Office Box 21787
Columbia, South Carolina 29221
(803) 896-1355

*Counsel for Respondent*

Columbia, South Carolina
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**CERTIFICATE OF SERVICE**

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I certify that I served on Appellant this *Final Brief of Respondent* by depositing a copy of same in the United States Mail on November 3, 2015, addressed to: James A. Sellers, #243348, Wateree Correctional Institution, P.O. Box 189, Rembert, SC 29128.

DATED: November 3, 2015

DANIEL J. CROOKS III
Staff Attorney
Office of General Counsel
Post Office Box 21787
Columbia, S.C. 29221
(803) 896-1355