STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Ernest Battle, #165247, Appellant, vs. South Carolina Department of Corrections, Respondent.	Docket No. 16-ALJ-04-0003-AP Grievance No. MaCCI 0124-15 **FINAL ORDER**

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to the Notice of Appeal filed January 4, 2016, by Ernest Battle (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (Department). Appellant requests review of the Department's final decision regarding the calculation of Appellant's sentence.

BACKGROUND

As reflected by the record in this case:

- On July 16, 1999, Appellant entered Charleston County jail and was released on bond on November 27, 1999.
- On October 19, 2000, Appellant entered Charleston County jail.
- On November 29, 2000, Appellant was tried in absentia; found guilty of three counts of fraudulent check, less than $500; and sentenced to thirty days in jail, each consecutive, for warrant numbers G154452, G280192, and G321315.
- On December 12, 2000, Appellant was released from Charleston County jail on bond.
- On June 7, 2001, Appellant entered Charleston County jail.
- On June 15, 2001, Appellant was sentenced in Charleston, South Carolina to twenty-five years, concurrent, for "Trafficking Cocaine 28 to 100 grams 3d offense," pursuant to Section 44-53-370(e)(2)(b)(3), for indictment number 1999-GS-107109.
- On June 15, 2001, Appellant was also sentenced to ten years, concurrent, for "Distribution with Intent to Distribute Prox. of School," pursuant to Section 44-53-445, for indictment number 1999-GS-10-7110.

- On June 21, 2001, Appellant was released from Charleston County jail and transferred to Department custody.[1]
- On June 21, 2001, Appellant was served with the bench warrants and sentences for the fraudulent check charges.

During Appellant's intake, the Department apparently calculated Appellant's sentence as one where only eighty-five percent of the time sentenced must be served. See generally S.C. Code Ann. § 24-13-150(A) (Supp. 2016). In approximately 2011,[2] the Department recalculated his twenty-five-year sentence, with the new projected release, or "max-out," date reflecting the requirement that Appellant serve one hundred percent of his sentence, instead of eighty-five percent. After apparently exhausting other avenues of possible resolution, such as staff requests, Appellant filed a grievance, which was denied. In this appeal, Appellant challenges the Department's decision that he must serve his sentence day for day.

ISSUE ON APPEAL

Whether the Department erred in recalculating Appellant's sentence on the basis that he must serve one-hundred percent of his twenty-five-year sentence. In a previous order, the Court concluded that Appellant timely filed his grievance before the Department. Therefore, that issue is not addressed here.

STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decision of the South Carolina Supreme Court in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). The Al-Shabazz decision explained that "procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property." Wicker v. S.C. Dept. of Corrs., 360 S.C. 421, 424, 602 S.E.2d 56, 58 (2004). Such as a liberty interest is at stake in the calculation of an inmate's sentence. Tant v. S.C. Dept. of Corrs., 408 S.C. 334, 341, 759 S.E.2d 398, 401 (2014) (citation omitted) ("There can be no doubt the length of an inmate's incarceration implicates a constitutional liberty interest."); see also

[1] The Court was previously concerned about the calculation of Appellant's credit for time served, based upon a calculation made on one of the jail time reports. However, the Department has satisfactorily clarified that the notation on the report reflects the exclusion of time spent in county jail between sentencing and transfer to Department custody.

[2] There is no evidence in the record of the exact time when the recalculation was made, or when Appellant became aware of the change. It is apparent that Appellant was investigating the matter in 2011. The Court notes that, consistent with the standard of review in an appeal to the ALC, it does not consider "exhibits" attached to party briefs. See S.C. Code Ann. § 1-23-380(4) (Supp. 2016).

Sullivan v. S.C. Dept. of Corrs., 355 S.C. 437, 441–42, 586 S.E.2d 124, 126 (2003) (quoting Al-Shabazz, 338 S.C. at 369, 527 S.E.2d at 750) (recognizing that Al-Shabazz created review in the ALC for sentence calculation cases).

In sentence calculation cases, the Court sits in an appellate capacity, applying the appellate standard of the Administrative Procedures Act (APA). Al-Shabazz, 338 S.C. at 377–80, 527 S.E.2d at 754–56. Consequently, the Court's review is limited to the record. S.C. Code Ann. § 1-23-380(4) (Supp. 2016). Additionally, the Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, but may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5) (Supp. 2016). Substantial rights of the appellant are prejudiced when the agency's decision, including the agency's findings, inferences, and conclusions, are in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Id.

DISCUSSION

Appellant argues that by requiring him to serve one hundred percent of his sentence, the Department is altering the original sentence imposed by the circuit court judge. The Court disagrees. In a 2014 case, the South Carolina Supreme Court ruled "the Department must provide an inmate with timely, formal notice when it seeks to recalculate its initial determination of his sentence and advise him of his right to file a grievance and obtain a hearing." Tant, 408 S.C. at 346, 759 S.E.2d at 404. However, in that case, the Department altered its recordation of the actual term of imprisonment imposed by the judge, changing Tant's term of incarceration from fifteen to forty years. Id., 408 S.C. at 337–40, 759 S.E.2d at 399–401. In this case, the Department's recalculation does not change in any way the original term of imprisonment imposed by the sentencing judge and recorded by the Department, but merely corrects a record-keeping error concerning what portion of the original term of imprisonment Appellant must serve. In adjusting Appellant's sentence from an eighty-five percent to a one hundred percent calculation, the Department merely corrects an administrative error and does not reinterpret

Appellant's sentencing sheet. Therefore, the Court concludes that it was not necessary for the Department to follow the protocol laid out in Tant in this case.

Indeed, the circuit court judge does not control what portion of Appellant's sentence he must serve. The sentencing judge sets the term of imprisonment, within the confines of the statute; however, the amount of that term that the inmate must actually serve is dictated by the legislature and administratively implemented by the Department. See Nelson v. Ozmint, 390 S.C. 432, 437, 702 S.E.2d 369, 371 (2010) (distinguishing between restrictions on the sentencing judge in suspending a sentence and mandatory provisions under which the Department calculates the time an inmate must remain in prison).

In this case, Appellant was convicted under Section 44-53-370(e)(2)(b)(3):

> (e) Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of:
> ***
> (2) ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as "trafficking in cocaine" and, upon conviction, must be punished as follows if the quantity involved is:
> ***
> (b) twenty-eight grams or more, but less than one hundred grams:
> ***
> 3. for a third or subsequent offense, a **mandatory minimum term of imprisonment of not less than twenty-five years** and not more than thirty years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars[.]

S.C. Code Ann. § 44-53-370(e)(2)(b)(3) (Westlaw through 2001) (emphasis added).

At the end of subsection (e), the statute also provides:

> A person convicted and sentenced under this subsection to a mandatory term of imprisonment of twenty-five years, a mandatory minimum term of imprisonment of twenty-five years, or a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years is not eligible for parole, extended work release, as provided in Section 24-13-610, or supervised furlough, as provided in Section 24-13-710.

§ 44-53-370(e).

Under this statute, a person sentenced to a mandatory minimum twenty-five-year sentence, like Appellant, must serve each day of the sentence. See Nelson, 390 S.C. at 436, 702

S.E.2d at 371 (construing the mandatory minimum language of a different sentencing statute as requiring that the inmate "actually be imprisoned" for the whole mandatory minimum term); see also Kerr v. State, 345 S.C. 183, 187, 547 S.E.2d 494, 496 (2001) (distinguishing between "mandatory term of imprisonment" and "mandatory minimum term of imprisonment" for purposes of parole eligibility); State v. Taub, 336 S.C. 310, 314–16, 519 S.E.2d 797, 799–801 (Ct. App. 1999) (discussing the additional meaning of the term "mandatory minimum"). Appellant cites Kerr in support of his argument regarding parole eligibility under a mandatory sentence. However, the statute under which Appellant was sentenced contains none of the ambiguities presented in the Kerr case. See Kerr, 345 S.C. at 187, 547 S.E.2d at 496. In 2001, Section 44-53-370(e)(2)(b)(3) clearly provided for a "mandatory minimum term of imprisonment of not less than twenty-five years."

In addition to arguing that he is excluded from the requirement of day-for-day service based upon the terms of the sentencing statute, Appellant also argues that his sentence is included in the normal scheme for "no-parole" offenses—that is, early release after completing eighty-five percent of the actual term of imprisonment. While the Department originally recorded Appellant's sentence under this rubric, it was in error. A no parole offense is defined as "a class A, B, or C felony or an offense exempt from classification." S.C. Code Ann. § 24-13-100 (2007). Appellant's offense is one exempt from classification. S.C. Code Ann. § 16-1-10(D) (2015). For no parole offenses the law provides:

> (A) **Notwithstanding any other provision of law**, except in a case in which the death penalty or a term of life imprisonment is imposed, an inmate convicted of a "no parole offense" . . . is not eligible for early release, discharge, or community supervision . . . until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed. This percentage must be calculated without the application of earned work credits, education credits, or good conduct credits, and is to be applied to the actual term of imprisonment imposed, not including any portion of the sentence which has been suspended. . . .

S.C. Code Ann. § 24-13-150(A) (Supp. 2016) (emphasis added).

In this case, the mandatory minimum language in Section 44-53-370 is another, more specific, provision of law, which controls. See Bolin v. S.C. Dept. of Corrs., 415 S.C. 276, 282–83, 781 S.E.2d 914, 917 (Ct. App. 2016), reh'g denied (Feb. 24, 2016) (recognizing that a more specific statute generally controls over a general one). Appellant's offense is thus excluded from the standard eighty-five percent calculation and he must serve the whole twenty-five-year sentence, as provided by Section 44-53-370(e).

Even though the Department is correct about this central issue, an error did become evident in reviewing Appellant's sentence calculation. Appellant currently has two "active" sentences: the twenty-five-year felony and three thirty-day fraudulent check sentences, which have been combined by the Department into one ninety-day sentence. The fraudulent check sentences were marked by the magistrate as "consecutive." There is no doubt, therefore, that they must run consecutive to each other and thus total ninety days. However, it appears that the Department has also run the ninety days consecutive to the twenty-five-year sentence, which was handed down **after** the thirty-day sentences. It is axiomatic that the magistrate could not have made, nor intended to make, the thirty-day sentences consecutive to a twenty-five-year sentence which did not yet exist, regardless of which date Appellant was served with the sentences. Cf. Blakeney v. State, 339 S.C. 86, 89, 529 S.E.2d 9, 11 (2000) (where arrest warrant could have been executed, but was not, inmate is entitled to credit for time served). Moreover, any ambiguity in sentencing must be construed in favor of the inmate. Tant v. S.C Dept. of Corrs., 408 S.C. 334, 342, 759 S.E.2d 398, 402 (2014). Thus, while the thirty-day sentences must be run consecutively to each other, they must also be run concurrently to the twenty-five-year sentence, which was marked concurrent by the circuit court judge. However, even though this error became apparent during the calculation of Appellant's sentence in the review of this case, he did not raise the issue. Therefore, because South Carolina does not recognize the plain error rule, the Court does not rule on this matter. Elam v. S.C. Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). The proper recourse for resolving this issue would be for Respondent to simply correct it now that it has been pointed out. Otherwise, Appellant may file an additional grievance with the Department.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the decision of the Department is **AFFIRMED.**

IT IS SO ORDERED.

Deborah Brooks Durden, Judge
S.C. Administrative Law Court

November 15, 2016
Columbia, South Carolina

PROOF OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the interagency Mail Service addressed to the party(ies) or their attorney(s).
This 15th day of November 2016
By: R. E. Cole
Judicial Law Clerk

PROOF OF SERVICE

I, Ernest Battle,#165247, did on this ____ day of December, 2016, being duly sworn, served a true copy on Notice of Appeal to the S.C. Administrative Law Court as required by Appellate Court Rule 203(b)(6), SCACR by via, U.S. Mail, postage prepaid at the below listed address.

Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, S.C. 29201

Respectfully submitted,
S/ Ernest Battle
Ernest Battle,#165247

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 9th DAY OF December
19 2016
NOTARY PUBLIC
STATE OF SOUTH CAROLINA
MY COMMISSION EXPIRES 3/4/2024

THE SOUTH CAROLINA COURT OF APPEALS

JENNY ABBOTT KITCHINGS
CLERK
P.O. BOX 11689
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MR. ERNEST BATTLE,1¢9@$&
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December 9, 2016

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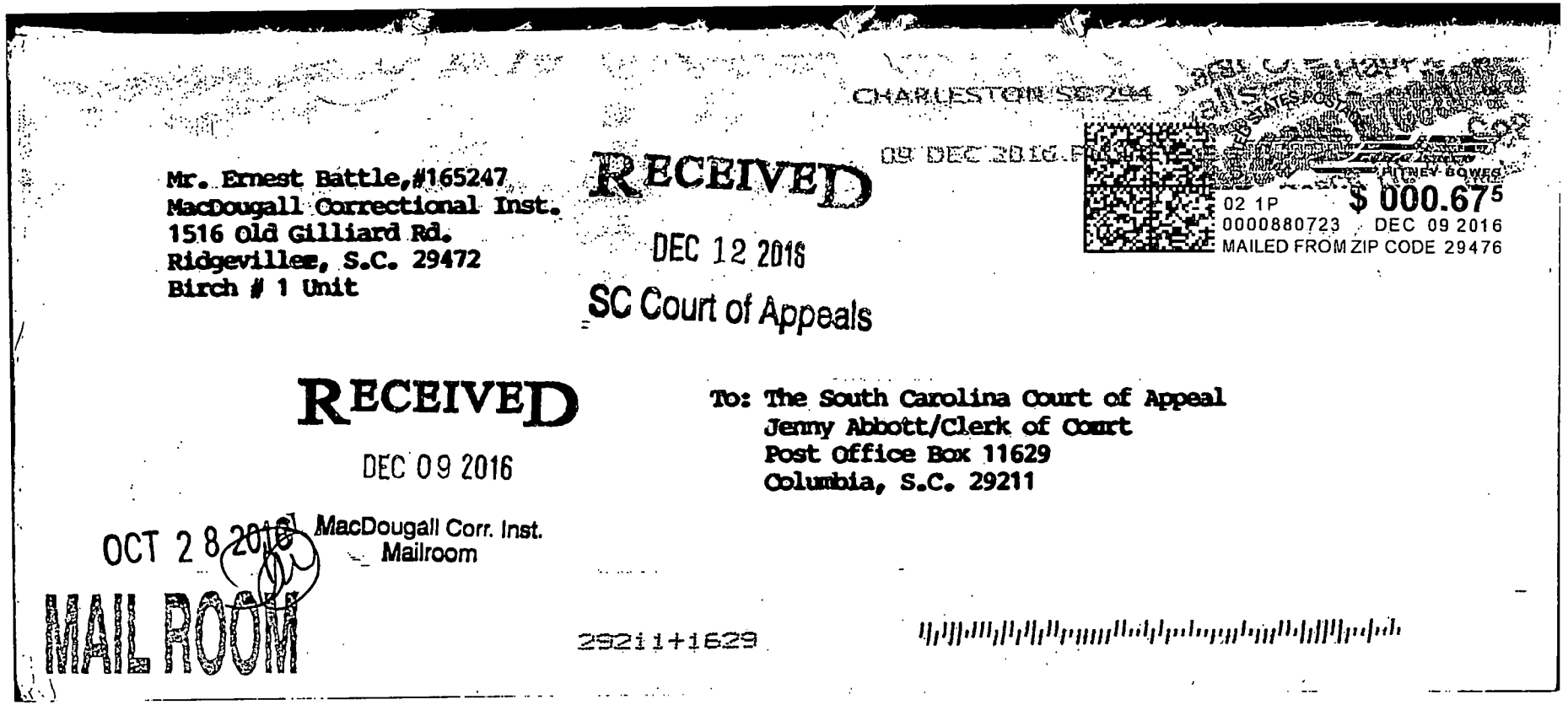
SC Court of Appeals

Re: Ernest Battle # 165247
Appellate Case No. 2016-002412

Dear Clerk:

In response to your letter dated December 6, 2016, enclosed please find a true copy of proof of servive of Notice of Appeal to the Administrative Law Court as required by Rule 203(b)(6), SCACR, and Order/Judgement challenged on appeal. This appeal is brought pursuant to Al-Shabazz v. State, 338, S.C. 354, 527 S.E.2d 742 (2000)., Which states that the filing fee will be assesed only for the third and subsequent appeals filed by an inmate during a given calender year. This is my first appeal within the calender year.

Respectfully submitted,
S/ Ernest Battle
Ernest Battle,#165247



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