

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Pickens County  
Edward W. Miller, Circuit Court Judge  
\_\_\_\_\_

**RECEIVED**  
JAN 17 2019  
SC Court of Appeals

THE STATE,

RESPONDENT,

v.

ORIN JERRELL KEMP,

APPELLANT

APPELLATE CASE NO. 2018-000161

\_\_\_\_\_  
**RETURN TO MOTION TO STRIKE**  
\_\_\_\_\_

On January 7, 2019 counsel for Respondent moved have an item stricken from the designation of matter and from Appellant's brief. Respondent moved for the service and filing of an Amended Initial Brief of Appellant that does not have any reference to the item, to hold the case in abeyance until a ruling on Respondent's motion to strike, and for any relief the Court may deem as just and proper.

**Procedural Posture**

On December 7, 2018, undersigned counsel filed and served an initial brief of appellant and designation of matter in the above-referenced case. Counsel for respondent requested a copy of an item in the designation of matter entitled, "Email from Christine

Bigelow to Christopher Brumback.” Undersigned counsel provided a copy of the email sent from South Carolina Department of Corrections (SCDC) Deputy General Counsel Bigelow to counsel for Respondent. The email from Ms. Bigelow to Brumback explained to Brumback SCDC’s strictly ministerial role in awarding time served credit.

### **Legal analysis and discussion**

Counsel for respondent argues that the email from Christine Bigelow should be struck from the pleadings in this case because the email itself was not presented to the trial judge. Undersigned counsel included the email from Christine Bigelow because I was not certain whether the Court could take judicial notice over the fact that SCDC does not calculate time served credit on their own. SCDC only inputs what they are told by the circuit court and/or the county detention centers.

While undersigned counsel understands the Rule 210(c) rule in general that the designation of matter shall not include matter not presented to the lower court, I did not think an email written from a law enforcement agency explicating its policy would prejudice the state in this case and would more likely assist the Court in reaching the correct result.

In support of its argument Respondent cites State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007). However, its reliance on White here is misguided. Unlike in White, the item in the present designation that Respondent requests to be struck does not constitute evidence that should have been presented in front of the trial judge for him to be aware of it. In White, a co-defendant’s subsequent written statement recanting his trial testimony was not presented to the trial judge. Id. at 387, 642 S.E.2d at 619. Thus, the Court of Appeals found it unpreserved for review.

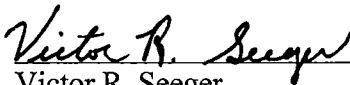
Here, the item Respondent sought to have struck, is not a piece of evidence that needed be put in front of the circuit court to be preserved for review. The email SCDC Deputy General Counsel wrote constituted SCDC's interpretation of its own function regarding the awarding of time served for inmates.

SCDC's stated policy should be known by the circuit courts without having to have it presented to each judge at every individual trial. For example, the Department of Juvenile Justice's (DJJ) stated policy is contained within its mission statement. The mission statement reads, "[I]t is the mission of the South Carolina Department of Juvenile Justice to protect the public and reclaim juveniles through prevention, community services, education, and rehabilitative services in the *least restrictive environment*." South Carolina Department of Juvenile Justice Mission Statement, South Carolina Department of Juvenile Justice (May 14, 2015) available at <https://www.state.sc.us/djj/pdfs/mission-statement.pdf>. (emphasis added). In appeals where a juvenile defendant argues that the circuit court failed to determine the "least restrictive environment" before sentencing him, that juvenile defendant does not need to present DJJ's mission statement to the circuit court to preserve that issue for appeal. The circuit court should be aware of what DJJ's function is within the government and should apply it properly in all juvenile cases without having it presented to them in each individual case.

Similarly, here the email from Bigelow to Brumback was SCDC's an explanation of policy and constituted SCDC's interpretation of its own governmental function. Namely, that SCDC views its role in the awarding of time served credit as entirely ministerial.

Therefore, the email did not need to be presented to the circuit court for it to be designated in the Record on Appeal.

Respectfully submitted,

  
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Victor R. Seeger  
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of January, 2019

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Pickens County  
Edward W. Miller, Circuit Court Judge

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THE STATE,

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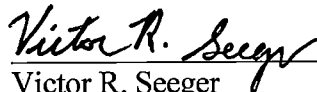
APPELLATE CASE NO. 2014-001318

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CERTIFICATE OF SERVICE

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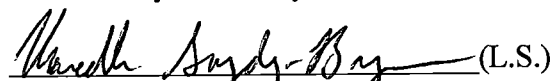
The undersigned attorney hereby certifies that a true copy of the Return to Motion to Strike in the above referenced case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17<sup>th</sup> day of January, 2019.



Victor R. Seeger  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 17th day of January, 2019.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 26, 2028.