THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT
Honorable Ralph K. Anderson, III, Administrative Law Judge

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**Appellate Case No. 2012-210767**
Case No. 10-ALJ-04-0637-AP

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Thomas J. Torrence, #094651 . . . . . APPELLANT

v.

S.C. Department of Corrections . . . . . RESPONDENTS

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# APPELLANT'S FINAL BRIEF

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APPELLANT, Pro se

Other counsel of record:

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## Question Presented

Did the Administrative Law Judge err in applying South Carolina Code of Laws Ann. § 24-13-40 (1989) to Appellant's credit for pre-trial jail time served in affirming the final agency decision?

## Table of Authorities

### Cases



### Statutes

## STATEMENT OF THE CASE

Appellant filed an agency grievance with the South Carolina Department of Corrections ("DOC") in November 2000, claiming he was owed jail credit for the period April 6, 1987 - May 25, 1992, on the offenses for which he was first arrested and is currently serving time. The DOC calculated and awarded Appellant two hundred four (204) days of pre-sentence jail credit for the period from arrest (April 6, 1987) to sentence on a later indictment in Charleston (October 30, 1987). Appellant appealed the final agency decision to the South Carolina Administrative Law Court ("ALC"). The ALC affirmed the DOC's decision, ROA.[1]

## STATEMENT OF FACTS

Appellant was arrested in Lexington County on April 6, 1987 for multiple charges surrounding a double homicide, ROA. He was taken before Lexington and West Columbia Magistrates that day and denied bonds, ROA 13-15. On April 7, 1987, Appellant was arrested for an unrelated murder in Charleston County. Appellant pled guilty to Accessory After the Fact and received ten (10) years in Charleston on October 30, 1987. The DOC placed Appellant in maximum

[1] Record on Appeal: March 2, 2012 Order, *Thomas J. Torrence v. S.C. Department of Corrections*, Case No. 10-ALJ-04-00637-AP

security and held the Lexington detainers against him for housing, classification and privilege purposes, ROA 6. Appellant waived two (2) parole hearings on the 10-year sentence based on the pending detainers. Appellant filed motions for a speedy trial in the Lexington County Court of General Sessions, ROA 9-12. One of Appellant's complained of issues was loss of the right to concurrent sentences; *Id.* The detainers were held against Appellant until his trial May 18-25, 1992, ROA 6. The trial judge did not address the issue of jail time at the sentencing and the DOC started Appellant's "sentence start date" as 5/25/92. Appellant raised this issue on his 1995 PCR. That PCR was not heard until November 2000, at which time it was no longer cognizable on PCR.

**ARGUMENT**

The Administrative Law Judge erred in his application of S.C. Code §24-13-40 (1989) to Appellant's claim for pre-sentence credit in affirming the Department of Correction's final agency decision.

The Administrative Law Court ("ALC") erred in applying the second exception clause of S.C. Code Ann. §24-13-40 (1989). S.C. Code Ann. §24-13-40 (1989) provides in pertinent part:

> In every case in computing the time served by a prisoner, ***full*** credit against the sentence ***shall*** be given for ***time served prior to trial and sentencing***. Provided, however, that credit for time served prior to trial and sentencing shall not be given... ... (2) when the prisoner is serving a sentence for one offense and is ***awaiting trial and sentence for a second offense*** in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.
>
> S.C. Code Ann. §24-13-40 (1989) (emphasis supplied)

The Department of Correction's ("DOC") final agency decision, and subsequently the ALC, erred in its statutory application of §24-13-40 to the facts of the Appellant's case here.

The DOC and ALC fail to recognize, despite the abundantly replete record before the ALC (ROA), that Appellant was arrested for the Lexington offenses *first;* made "*first appearance*" in Lexington, *first;* and he was indicted in Lexington County in July 1987. After

sentencing in Charleston he was returned to Lexington County for one (1) month. Lexington County transferred Appellant to the DOC with copies of detainers. The DOC at all times held the detainers against Appellant, to his detriment, until trial in May 1992, ROA 6.

The ALC incorrectly relied upon *State v. Higgins*[2] in application to the facts of the case before this Court, ROA at 3. This Court found that 'time served,' in respect to §24-13-40 is "the time during which a defendant is in pretrial confinement *and* charged with the offense for which he is sentenced (so long as he is not serving time for a prior conviction)." It is distinguished that *Higgins* involved credit for house arrest, not incarceration without bond, as here. This Court, in *Higgins*, relied upon *Blakeney v. State*[3], as did the ALC. Appellant suggests *Blakeney* is the correct application of §24-13-40 to the facts of this case now before this Court. However, the ALC erred in failing to correctly apply *Blakeney* here.

Section 24-13-40 clearly states "*and is awaiting trial and sentence for a second offense.*"

Appellant was to be tried in May 1988 with his co-defendant brother, Michael.[4] Appellant's trial was delayed

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[2] 357 S.C. 382, 384, 593 S.E.2d 180, 181 (Ct.App. 2004) (internal citations omitted)
[3] 339 S.C. 86, 529 S.E.2d 9, 10-11 (2000)
[4] *State v. Michael Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)

(as a matter of the ROA before our Supreme Court in Appellant's direct appeal) where the State took the position that Michael's trial would change capital litigation in South Carolina and Appellant's claims would be identical.

Appellant diligently and vigorously sought disposition of the Lexington charges. These charges and detainers were not a "second offense" as considered by §24-13-40. Appellant is serving time for the offenses for which he was arrested and charged on April 6, 1987. The sentence in one court should not arrest the credit for time served on the charged offenses in the first instance where Appellant remained incarcerated thereon.

Although a case dealing with an out-of-state detention, *Robinson v. State*[5] sheds light on the question of detainers where our Supreme Court held that while a "convict is subject to a South Carolina detainer, he is constructively in South Carolina custody. As a result, a convict will receive credit for time spent in another jurisdiction while subject to the South Carolina detainer."

Appellant asserts this lawful detainer formula supports the instant case by exchanging the name [Lexington] for that of South Carolina. Because Appellant

[5] 329 S.C. 65, 71, 495 S.E.2d 433, 436-37 (1998)

was under lawful detainers, he is entitled to credit. Where Appellant was actively litigating against the detainers, he is entitled to credit on any subsequent South Carolina sentence, *see, e.g., State v. Dozier*, 263 S.C. 26, 210 S.E.2d 225, 227 (1974).

Appellant submits that our Supreme Court shed light on the applicability of §24-13-40 and the timing of arrest warrants in determining the right to credit on a sentence in *Crooks v. State*, 326 S.C. 171, 485 S.E.2d 364 (1997).

Similarly, in *Allen v. State*[6] the defendant was arrested for malicious injury to property and released on bond 18 days later. He was re-arrested four (4) days *later* on *separate* charges. Our Supreme Court held Allen was entitled to credit on the first arrest, as he was not serving any sentence *at the time of arrest*. The Court further held that after the bond was revoked for the first arrest, he was "*clearly in custody on all charges*", *Id.*

This Court has made a similar disposition on the matter of arrest timing and jail credit. In *State v. McCord*[7], also relying on *Allen*[8], the facts indicate counsel's position was that McCord "has been in jail on

[6] 339 S.C. 393, 529 S.E.2d 541 (2000)
[7] 349 S.C. 477, 487, 562 S.E.2d 689 (S.C. App. 2002)
[8] 339 S.C. at 395, 529 S.E.2d at 542

this charge - *these warrants were served on him* on January 7th of 1977," 349 S.C. at 486-487 (emphasis supplied).

Generally, penal statutes are to be construed "strictly against the State and in favor of the defendant," *Williams v. State*, 306 S.C. 89, 91, 410 S.E.2d 563, 564 (1991). In construing a statute, the words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *See, State v. Leopard*, 349 S.C.467, 471, 563 S.E.2d 342, 344 (Ct. App. 2002).

Credit for jail time awaiting trial is constitutionally mandated, *Ohio v. Johnson*, 476 U.S. 493, 499 (1984); *Durkin v. Davis*, 538 F.2d 1037 (4th Cir. 976); and for pre-sentence confinement *when it is related to the offense for which he is sentenced*, *Tate v. Short*, 401 U.A. 392 (1971).

In an appeal of the final agency decision of an administrative agency pursuant to the Administrative Procedures Act, an appellate court's review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by some error of law. *Grant v. Grant Textiles*, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. §1-23-380(A)(5) (Supp. 2006).

This Court may reverse or modify a decision of the Appellate Panel if the findings, inferences, conclusions or decisions of the panel are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," S.C. Code Ann. §1-23-380(A)(5)(e) (Supp. 2006); *Bass v. Kenco Group*, 366 S.C. 450, 457, 622 S.E.2d 577, 580. Appellant submits that, based upon his indigent status, he could not reproduce the required number of copies of the entire record before the ALC. However, Appellant asserts that based on the record before the ALC, Judge Anderson's decision is not supported by the record.

An appellate court may reverse or modify the decision of the Appellate Panel if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are affected by other error of law, S.C. Code Ann. §1-23-380(A)(5)(d) (Supp. 2006). *Porter v. Labor Depot*, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007) cert. denied.

Appellant suggests the ALC made an error of law in the interpretation of S.C. Code Ann. §24-13-40 and its application to the facts of Appellant's case.

## CONCLUSION

**WHEREFORE**, based upon the error of law in the ALC's interpretation and application of §24-13-40, Appellant respectfully asks this Honorable Court to reverse or modify the decision of the Administrative Law Court to correctly calculate and award Appellant his pre-trial jail credit.

Respectfully submitted,

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**APPELLANT**, Pro se

October 1, 2012

**CERTIFICATE OF PRO SE COUNSEL**

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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October 1, 2012

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## CERTIFICATE OF SERVICE

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The undersigned *pro se* Appellant hereby certifies that he has served a true and correct copy of Appellant's Final Brief and Record on Appeal on counsel for Respondents, Christopher Florian, Esq., by depositing a copy of same in the U.S. Mail, first-class postage affixed thereto, this 2nd day of October, 2012, addressed as follows:

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