

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

**RECEIVED**  
DEC 12 2019  
SC Court of Appeals

Appeal from Administrative Law Court

Honorable HW Funderburk, Jr., Administrative Law Judge

Appellate Case No.: 2019-001291

Terry Smith 160785 .....Appellant

v.

South Carolina Department of Corrections.....Respondent

**RESPONSE TO MOTION TO REQUIRE MODIFICATION OF THE RECORD ON APPEAL**

This matter is before the Court pursuant to Terry Bo Smith’s appeal of Administrative Law Court Judge HW Funderburk, Jr.’s July 22, 2019 dismissal order. The Respondent has motioned for modification of the Record on Appeal on November 27, 2019.

**Arguments**

Foremost, the Respondent correctly identifies that the root of the matter before this Court rests in the Appellant’s grievance of May 26, 2017. In that grievance, the Appellant stated a broad claim about the calculation of his release date without marking a particular point as the root of the Respondent’s miscalculation of his sentence. Therefore, any matter which affects the Respondent’s calculation of the Appellant’s sentence is properly before this Court.

More specifically in reference to the Respondent’s motion, the Respondent states first that the Appellant failed to include a Jail Time Report from Spartanburg County in the Record. One Jail Time

Report is included as page 94 of the Record already submitted, and the other was inadvertently omitted.<sup>1</sup> With the leave of the Court, this record is attached to this Response—labelled page 94b—and let it be included in the Record on Appeal in the appropriate place.

As a second matter, the Respondent asks that portions of the Record be stricken as not being procedurally connected to ALC Case No. 18-ALJ-04-0438-AP, which was dismissed by the ALC in its July 22, 2019 Order. In this second matter, the Respondent uses a procedural argument to avoid facing the merits of the matter before this Court. This is contrary to the purpose of administrative remedy—to give the correctional institution the opportunity to address (and hopefully resolve) the grieved-of conduct/condition before the dispute moves to litigation<sup>2</sup>—and deliberately ignores substantial facts that require that the full Record be placed before this Court.

### I.

The first substantial fact that requires the full Record to come ~~before~~<sup>before</sup> this Court occurred after the Order of Remand issued by the ALC when the grievance was first heard in that court; subsequent to the remand, the Respondent issued a Final Agency Response to the Order of Remand. After that Response, the Respondent suggested that an immediate Final Order was intended to allow the Appellant to proceed immediately to the ALC without needing to repeat Step 1 and Step 2 grievances. [See attached letter from Ms. Rumler, dated October 5, 2018.]

As an unnoted side-effect, at that time, immediate resubmission to the ALC also kept the matter confined to the original record of the first ALC hearing—which specifically did not include the Canadian documents which have a direct bearing on the proper calculation of the Appellant's release date. The Appellant, being an ignorant layman, of course did not comprehend this outcome, whereas the Respondent, trained in the law and already aware of the Canadian documents that the Appellant had attempted to submit in the first hearing by the ALC, did of course comprehend this outcome.

This outcome was clearly within the notice of the ALC as evidenced by the letters and motions on the record. This Court sits in review of the *actions* of the ALC in this administrative matter, not merely for a cursory scan of papers, but to determine whether the actions of the lower court were proper given the circumstances. The ALC acted improperly by not reviewing the Canadian documents—in the second instance where the ALC was well aware of these documents—and determining whether the information they contained should affect the Respondent's calculation of the Appellant's sentences. By striking a

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<sup>1</sup> Another fine example of haste-makes-waste.

<sup>2</sup> *Parker v Robinson*, 2008 WL 2222040 at \*7 (D Mc, May 22, 2008)

portion of the relevant Record, the Respondent hopes to keep this matter from the notice of this reviewing Court.

## II.

The second substantial fact that requires the full Record to come before this Court is founded in the uneven handling of documents by the ALC. The ALC failed to secure the records necessary to reach a proper conclusion in the determination of the Appellant's sentence start date. This failure rested primarily in the Respondent's hands, but while the ALC did ask the Respondent to produce additional documents, the ALC did not ask the Appellant to produce additional documents, although some documents had become available in the interim [Niagara Regional Police Service Reports detailing more than one topic] and the Appellant so informed the ALC by letter and motion [Motion for Expansion of the Record and Appellant's Brief (First)].

These pertinent details could have been produced from the Spartanburg County records, but the Respondent withheld those portions of the Spartanburg file. Without any doubt whatsoever, the Appellant's Spartanburg file contains matter corresponding to the Canadian documents which clearly indicate that Spartanburg County transmitted holds/warrants for the alleged robbery in 2002, but the Respondent plainly withheld these items from the Spartanburg files where they would have instructed the ALC on the proper determination of the Appellant's sentence start date.

The Respondent plainly hopes that a procedural shenanigan will obscure the matter, but that is not the proper purpose of the Court, or the proper usage of the Court's time and energy. Let the matter be addressed on the merits.<sup>3</sup>

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## III.

As the Appellant has argued in his brief before this Court, and will also be relevant for the hearing of this motion, the Respondent's current calculation of the max-out date of the Appellant's 2006 sentences comes as the fruit—the terminal point—of the Respondent's miscalculations. The Respondent's miscalculations seem plain in three (3) instances:

First, the Respondent denies the Appellant proper parole sentence credits between 2002 and 2004 by relying on *State v Hackett*, 363 SC 177, 609 SE 2d 553 (Ct App 2005), despite that Hackett controls the application of tolling for a probations case where Hackett was not in custody during the tolled period;

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<sup>3</sup> If prison officials decide the merits of a grievance, they cannot later rely on the prisoner's procedural missteps as a basis for dismissal. See *Kretchmar v Beard*, 2006 WL 2038687 at \*5 (ED Pa, July 18, 2006).

but in the Appellant's case, the determination should be made in accordance with *Sanders v MacDougall*, 135 SE 2d 836 (1964) and *Robinson v State*, 495 SE 2d 433 (1998), which control the application of parole credits in cases where the defendant was actually in custody, even where that custody was in jurisdictions external to South Carolina. *Sanders*: "time spent on parole must be calculated as time served"; and *Robinson*: "[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 a South Carolina detainer." The Appellant was held in Canadian custody from 2002 through 2004. As such, he is entitled to sentence credit for that period.

Second, even if the calculation of the Appellant's 1994 sentences proved irrelevant to the determination of the max-out date of the Appellant's 2006 sentences, the sentence start-date of the 2006 sentences is legally erroneous since it is determined by a conjunction between the Appellant's release from his 1994 sentences and his 2006 sentencing, but in fact it must be calculated from the transmission of the warrant to the Canadian authorities in 2002.

This is in accordance with *Blakeney v State*, 339 SC 86, 529 SE 2d 9. The formal arrest in 2004 followed by the plea and sentencing in 2006 were not legally relevant to the calculation of the sentence start-date, since the warrant was transmitted in 2002 and the Appellant was held thereby and never released from custody during the entire period. The Respondent evidently seeks to upend this firmly established South Carolina precedent.

Third, if the calculation of the Appellant's 1994 sentences proved relevant to the determination of the start-date of the Appellant's 2006 sentences, through reliance upon SC Code Ann § 24-13-40, then the proper calculation of the 1994 sentences would not be moot, and must be properly determined instead of being left undetermined. The ALC, in any event, failed to apply moot analysis in a situation where such analysis was entirely appropriate (to guide the Respondent's future behavior in similar circumstances). See *Curtis v State*, 345 SC 557, 549 SE 2d 591 (2001).

### **Conclusion**

WHEREFORE, the Appellant is entitled to full redress from a gross miscarriage of justice that springs from the government's deliberate misconduct. "Prisoners remain citizens, and live also under the protection of the Constitution and the laws." See *Wolff v McDonnell*, 418 US 539 (1974) at III. The Appellant respectfully requests that the Court grant the following relief:

1. Order costs plus one dollar compensatory damages for the Appellant. The Appellant filed to

this Court for appeal in 2018, and accordingly wishes to recover his expenses.

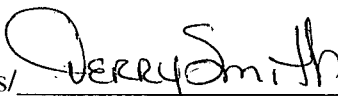
2. Order punitive damages by vacating or setting aside Appellant's 2006 sentences with prejudice, since they are derived entirely from the government's misconduct. Consequently Order Appellant's immediate release.

[Asked how punitive damages could be something other than money, the Appellant suggests that the government *prints* money, and has an endless supply; punitive damages should take from the government something that the government actually desires, and they seem to desire to hold the Appellant in custody.]

3. Remand the case for proper determination with all relevant documents.

4. Provide such other and further relief that this Court may deem just and proper.

Respectfully Submitted,



s/ Terry Smith  
Terry Smith 160785 F4B Pro Se  
Lee Correctional Institution  
990 Wisacky Highway  
Bishopville SC 29010

December 7, 2019  
Bishopville, SC

THE STATE OF SOUTH CAROLINA

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Appeal from Administrative Law Court

Honorable HW Funderburk, Jr., Administrative Law Judge

Appellate Case No.: 2019-001291

Terry Smith 160785 .....Appellant

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South Carolina Department of Corrections.....Respondent

Proof of Service

The undersigned hereby certifies that on December 10, 2019, true and correct copies of the RESPONSE TO MOTION TO REQUIRE MODIFICATION OF THE RECORD ON APPEAL was served by depositing the same in the prison mail system, postage prepaid, to the following addresses:

Dept of General Counsel  
SC Dept of Corrections  
PO Box 21787  
Columbia SC 29221

Clerk's Office  
South Carolina Court of Appeals  
PO Box 11629  
Columbia SC 29211

December 10, 2019  
Bishopville, SC

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SC Court of Appeals

s/ Terry Smith

Terry Smith 160785 F4B  
Lee Correctional Institution  
990 Wisacky Highway  
Bishopville SC 29010



HENRY McMASTER, Governor  
BRYAN P. STIRLING, Director

October 5, 2018

Terry Smith #160785  
Lee Correctional Institution, F4-1245-B  
990 Wisacky Highway  
Bishopville, SC 29010

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Reference: Motion dated September 6, 2018 in case 18-ALJ-04-0050-AP

Dear Mr. Smith:

My office received the "Motion to Join, and Motion to Compel, and Motion for Summary Judgment" you attempted to file in Administrative Law Court case 18-ALJ-04-0050-AP on September 6, 2018. In this document you mention the August 24, 2018 letter I sent to you in response to Judge Funderburk's remand order in the above referenced case. In your "Motion to Join, and Motion to Compel, and Motion for Summary Judgment" you state that I indicated that my letter was SCDC's final agency decision in order to prevent you from being able to seek review of that decision. That was not my intention. In fact, my intention was to make it easier for you to seek review of that decision. The Administrative Law Court can only review final agency decisions. Normally, to receive a final agency decision from SCDC you would have to first send a Request to Staff Member and then appeal the response to that Request to Staff Member through the Grievance process. By stating that my August 24, 2018 letter was a final agency decision, I intended to enable you to appeal it to the Administrative Law Court directly without having to go through the Grievance process. In order to do this you would need to file a Notice of Appeal in compliance with the Administrative Law Court rules. The court would then be able to assign a case number. I have included a Notice of Appeal form for you. I hope that this information is helpful.

Sincerely,

Annie Rumler  
Staff Attorney  
South Carolina Department of Corrections

Enclosure: Notice of Appeal form  
cc w/o enclosure: The Honorable H.W. Funderburk, Jr.

# JAIL TIME REPORT FOR SCDC TRANSFER

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS  
INMATE RECORDS OFFICE, PO BOX 21787, COLUMBIA, SC 29221-1787  
OFFICE #: (803) 896-8531 FAX #: (803) 896-1217

COUNTY SUBMITTING FORM: Spartanburg County Detention

PURSUANT TO SC STATUTE 24-13-40 ... 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 ...

Name: <u>Smith, Terry Lee</u>		Date of Birth: <del>          </del>		
Social Security #: <del>          </del>		Race/Sex: <u>B/m</u>		
SID #:		FBI #:		
Arrest Date	Charge	Warrant # (or)	Release Date	Reason for Release *
		Indictment #		
<u>1-17-04</u>	<u>Viol. Parole</u>	W #	<u>3-3-04</u>	<u>Sent. to DOC</u>
		I # <u>94G511949</u>		
		W #		
		I #		
		W #		
		I #		
		W #		
		I #		
		W #		
		I #		
		W #		
		I #		
Approved By: <u>J. Wofford</u>		Date: <u>3-3-04</u>		

\* Reason for Release (i.e., Explain if transferred to another county/city jail, or if inmate bonded). Please submit this form at the time of the inmate's transfer and admission to the SCDC, however, if unable to do so, please mail or fax to the address or number listed above.

TERRY Smith #160785  
LEE CI #431243  
990 Wisacky Highway  
Bishopville, SC 29010

626291-11262



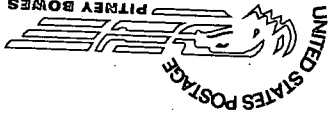
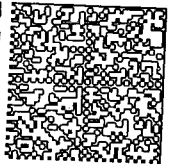
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