THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
Appeal from Honorable Ralph King Anderson, III, Administrative Law Judge

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Lower Court Case No. 08-ALJ-04-01076-AP
Appellate Tracking Number 2012-206988

David Ray Tant, #306170, ... Respondent,

v.

South Carolina Department of Corrections, ... Petitioner.

BRIEF OF RESPONDENT

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May 1, 2013
West Columbia, South Carolina

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STATEMENT OF THE CASE

This Court granted certiorari on petition by the South Carolina Department of Corrections (hereinafter "Department) to review the decision of the South Carolina Court of Appeals, *David Ray Tant (Tant) v. South Carolina Dept. of Corrections*, 3395 S.C. 446, 718 S.E.2d 753 (Ct.App. 2011)(App p. 1). That Court of Appeals decision in turn reversed a decision of the Administrative Law Court (ALC) (App. 21), in which the ALC affirmed the internal agency action by the South Carolina Department of Corrections (SCDC or Department) to increase Tant's sentence from 15 years to 40 years[1].

Tant had pleaded guilty to multiple indictments on November 22, 2004, and was sentenced by Circuit Court Judge Wyatt Saunders, who announced sentences from the bench and completed written sentencing sheets. (App. P. 46-52; p. 197-198). Tant was remanded to the custody of the Department, who waited two years before notifying Tant that his sentence had been unilaterally changed. Tant initiated an inmate grievance under the provisions dictated by the Department. (App. P. 45). Tant's grievance was denied. (App. P. 44). Tant appealed that denial to the ALC, which remanded the matter back to the Department for reconsideration without consideration of a letter obtained from the sentencing judge that, years after the fact, purportedly "interpreted" his sentence imposed on Tant. (App. P. 21 – 26).

No appeal was taken by the Department, making those findings the law of the case. *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 338 S.C. 171, 525 S.E.2d

[1] The 40 year sentence was subsequently reduced to 30 years by order of Judge Howard King; and that reduction is not in question. (App. Pp. 27-32).

869 (2000)(ruling as part of order of remand to trial court must be appealed or will become law of the case for purposes of appeal of trial court order following remand).

After remand from the ALC, the Department again denied an internal grievance by Tant, in reliance upon a transcript of the proceedings provided by counsel for Tant. (App. P. 43). Tant appealed to the ALC again, which affirmed the Department's decision. (App. Pp. 21-26).

Tant then appealed to the South Carolina Court of Appeals, raising seven (7) issues, including two constitutional challenges related to the Department's violation of Tant's due process rights, and the improper consideration by the Department of the trial transcript. (App. 260). The Court of Appeals issued their opinion and reversed the ALC, although it did not address all issues raised by Tant. That Court of Appeals opinion is the subject of this petition to the State Supreme Court.

STATEMENT OF THE FACTS

When Tant pleaded guilty to multiple indictments on November 22, 2004, Circuit Court Judge Wyatt Saunders (hereafter "sentencing judge.") announced the imposed sentences from the bench. (App. P. 46-52; p. 197-198). The announced sentences from the bench totaled 15 years. *Id.* The sentencing sheets transmitted from the judicial department to the Department reflected a sentence which totaled 15 years. *Id.* After the sentence was announced (and apparently after sentencing sheets prepared and signed), the prosecutor asked the sentencing judge to repeat the sentence. (App. P. 199). The sentencing judge attempted to repeat himself, but his second statement did not match his first, and no one asked for clarification. (App. 199-200). The sentencing sheets matched the judge's first verbal imposition of sentence, which totaled 15 years. (App. Pp. 46-52).

Tant was remanded to the custody of the Department, which initially and correctly calculated his sentence from the sentencing sheets, and recorded it as 15 years. (App. P. 225). From November 23, 2004 until June 13, 2007, the Department's records (as well as public records) reflected that Tant's total sentence was fifteen years, with parole eligibility in 2008[2]. (App. Pp. 219-225). There was no ambiguity, actual or claimed, by any party.

[2] The Department may have already begun changing its records to increase Tant's sentence, before receiving either the sentencing transcript or Judge Saunders' letter in 2007 (but after its internal notes reflect the gears turning to accomplish the change). Department staff began the *ex parte* contact to the (former prosecutor in January, 2006. (App. P. 136). Internal records reflect "recalculations" of Tant's sentence on individual indictments may have occurred as early as April of 2006. (App. 213). There is a final entry on June 13, 2007 acknowledging receipt of a letter from the sentencing judge, apparently completing the change initiated 18 months earlier (in January 2006) by Department staff. (App. 207).

In 2006, internal staff at the Department initiated *ex parte* contact with one of the (former) prosecutor(s) and to the sentencing judge, seeking a court order from the sentencing judge to increase the sentence to 40 years. (App. P. 136-140). No attempt was made to notify Tant or his counsel that this was occurring. The *ex parte* communication from the Department's staff resulted in a letter from the sentencing judge in June 2007 indicating that he had intended his sentence to be 40 years, not 15 years. (App. P. 254). The letter was requested and obtained despite the sentencing judge having issued an order one year earlier in the same case, expressly noting he had no continuing jurisdiction to modify Tant's sentence. (App. P. 34-35). The Department's own records clearly indicate the Department's General Counsel David Tatarsky solicited this letter and planned to use it as evidence to dispel the position of Tant's counsel that Tant's parole eligibility date was determined by the 15-year sentence. (App. Pp. 137-139).

The surreptitious agency action occurred more than two years after Tant was taken into the custody by the Department and more than two years after the Department itself recorded Tant's sentence as 15 years. Without notice to Tant, and in the absence of a hearing or any proceedings of any kind, the Department unilaterally increased Tant's sentence in its computer system from 15 years to 40 years. (App. P. 218)[3]. Tant learned of the change on July 12, 2007, approximately a month after the Department's records were actually changed. (App. P. 218 & P. 245).

[3] The sentencing sheets on file with the Clerk of Court have never been changed and the Charleston County records have always reflected a sentence of 15 years. The change in sentence was accomplished unilaterally by the Department by simply making an entry in Tant's records in the Department's computer system.

When Tant learned that his sentence had been unilaterally changed by the Department, he initiated an inmate grievance under the provisions dictated by the Department. Tant's grievance was answered by David Tatarsky, the same attorney within the Department who had participated in the *ex parte* contact to the prosecutor and to the sentencing judge. (App. Pp. 137-139). The denial stated:

> Your sentence was corrected on 13 June 2007 after all pertinent documentation was reviewed. The transcript of your plea provided by your lawyers demonstrates that [your sentence was] 40 years. . .

(App. 44).

Tatarsky also referenced the letter from the sentencing judge, without revealing the letter had been improperly sought by the Department (and without revealing his own personal involvement) using *ex parte* communications to the lawyer who had prosecuted the case initially and *ex parte* communications to the sentencing judge. *Id.*

When Tant's inmate grievance was denied, he appealed the denial to the Administrative Law Court. The ALC ruled (in 2008) that "[c]learly, SCDC officials do not have authority to change an inmate's sentence. The Department only has the authority to impose the sentence given by the circuit court." (App. P. 40). The ALC further held that the sentencing judge lacked authority to "consider a criminal matter after the expiration of a criminal term of court" and in that event, "the court would be without authority to issue explanations of its sentence." (App. P. 41). Nonetheless, the ALC ultimately affirmed the Department's action after a remand to the Department for further proceedings. (App. P. 21 – 26).

No appeal was taken by the Department, making those findings the law of the case. *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000)(ruling as part of order of remand to trial court must be appealed or will become law of the case for purposes of appeal of trial court order following remand). Nonetheless the Department continues to improperly argue that the Judge's 2007 letter should be considered in determining the intent of the sentencing judge. (Petitioner's Brief p. 2, p. 7).

After remand from the ALC, the Department again denied an internal grievance by Tant, in reliance upon a transcript of the proceedings provided by counsel for Tant. (App. P. 43). Tant appealed to the ALC again, which affirmed the Department's decision. (App. Pp. 21-26).

Tant appealed to the South Carolina Court of Appeals, raising seven (7) issues, including two constitutional challenges related to the Department's violation of Tant's due process rights, and the improper consideration by the Department of the trial transcript. (App. 260). Following oral argument, the Court of Appeals concluded that sentencing sheets were unambiguous, the sentence clearly 15 years, and no reason to look at the sentencing transcript or anything else. (App. Pp. 1-2). That is, of course, precisely what the Department had done itself when it originally calculated Tant's sentence. Those same sentence sheets signed by the prosecutor, sentencing judge, and the defendant are still on record in the Charleston County clerk's office, unchanged since 2004.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY FOUND THE SENTENCING SHEETS TO BE UNAMBIGUOUS, THEREBY CONCLUSIVELY ESTABLISHING THE INTENT OF THE SENTENCING JUDGE AND PRECLUDING ANY EXPANDED INQUIRY BEYOND THE CONTENTS OF THE SENTENCING SHEETS.

The Department argues[4] that the Court of Appeals erred in not relying on the transcript from the sentencing to determine the "manifest intent" of the sentencing judge. The Department's own actions in interpreting the unambiguous sentencing sheets to provide a sentence of 15 years shows that this argument is frivolous. The "manifest intent" of the sentencing judge was clear to everyone until the Department actively sought to create grounds to justify its illegal actions to increase the sentence more than two years after the proper 15 year sentence had begun to be served.

The ALC correctly concluded that it was prohibited from considering the transcript of the sentencing proceeding when addressing the issues before it. (App. P. 41, footnote 2). The court undermined its own ruling, however, by remanding to the Department and instructing the Department to consider the transcript. *Id.* The effect of the ALC's ruling was to allow the Department to supplement, i.e. bootstrap after the fact, the agency's record with the transcript. Any further appeals would have the transcript available to help *create* an ambiguity when none otherwise existed[5].

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[4] The three issues argued by the Department are really a single layered question phrased differently in each instance, but all asking whether the sentencing sheets were unambiguous and therefore sufficient and controlling. For that reason, Tant addresses the argument as a single issue.

[5] The error of the ALC in directing the transcript to be considered at all was one of the issues raised by Tant to the Court of Appeals, which has not yet been ruled upon. *See* Section II of Argument.

The Department overlooks the fact that sentencing sheets are the only record of the sentence that is maintained as the official record of the sentence imposed. *See* S.C.Code Ann. § 14-17-540(2). Unless an inmate appeals or seeks post-conviction relief, no transcript is ever prepared, as evidenced by the Department only having received the transcript in this matter because it was obtained and provided by Tant's counsel. (App. P. 44). The Department always, and should, base its sentence calculations only on the sentencing sheets.

Here, the Department did base its calculations on the sentencing sheets initially, and properly concluded that the sentence was 15 years. If the sentencing sheets had been ambiguous, the Department would have searched for clarification much earlier, not waited more than two years and only seeking contrary interpretations upon Tant being evaluated for parole. Nevertheless, in January, 2006, for reason(s) not apparent from the record, general counsel and staff of the Department decided Tant's sentence should be increased from 15 years to 40 years. (App. Pp. 36-40). They set into motion a series of events which culminated in the 2007 letter from the sentencing judge, just the sort of document the Department needed to justify its internal decision to change the sentence despite unambiguous sentencing sheets clearly expressing the judge's intent. The Department had to create or find something that it did not already have. Hence, the backroom, *ex parte* contact to the prosecutor to contact the sentencing judge, all without notice to Tant.

This is not a situation in which the Department is struggling in the first instance to determine the intent of the sentencing judge to record the sentence for its records; if that were the case, other sources of the judge's intent might be relevant. This is, instead, a

circumstance where, more than two years after Tant was remanded to its custody, the Department secretly generated documentation to support its own determination that Tant's sentence should be increased significantly.

Tatarsky's communication with Stobbe clearly indicates that he was seeking some authority to change the Department's records (and therefore did not already have such authority, from the sentencing sheets or otherwise). (App. P. 139). The Court of Appeals' opinion specifically tells the Department that it had no authority to go looking for documents to support its decision to change Tant's sentence. The intent of the sentencing judge was clearly construed from the sentencing sheets. (App. P. 2). The Department created the ambiguity it now attempts to exploit by undertaking *ex parte* contact to the prosecutor and the judge to provide a reason for its own decision to change Tant's sentence.

As noted by the Court of Appeals, the Department did not even have the transcript until it was furnished by Tant's trial counsel, who was then being told by Tatarsky the sentence was really 40 years. (App. P. 2). Tant was sentenced in 2004. The transcript was provided to the Department by Tant's trial counsel in 2007 to show that the initial oral pronouncement exactly matched the sentencing sheets.

The Department's reliance on *Boan v. State*, 388 S.C. 272, 695 S.E.2d 850 (2010), is misplaced. There, this Court correctly held that a trial counsel was ineffective when counsel failed to request clarification of the sentencing sheets (which said 30 years) versus the oral pronouncement (which said 20 years). *Id.* That decision was expressly limited to "a situation such as the one on appeal...". *Id.* at 277, 852. It thus provided a

framework for determining sentencing, not an axiomatic ruling that the oral pronouncement controlled. In that instance the oral pronouncement did control, but under circumstances in which the oral pronouncement was the *lesser* sentence. This Court noted that the trial judge could not increase the sentence outside the presence of the defendant, and under *those circumstances,* due process required the sentence to be determined from the oral pronouncement (which was the lesser of the sentences). *Id.* Had the sentencing sheets provided a lesser sentence than the oral pronouncement, the *Boan* decision would have been quite different (and might not have even arisen).

This is a simple issue which the Department attempts to complicate. The Department received unambiguous sentencing sheets which expressed the intent of the sentencing judge,[6] and then set about to create an ambiguity after the fact more than two years later to justify its own decision to increase Tant's sentence. The Court of Appeals correctly determined the trial judge's intent from the sentencing sheets, and determined that the sentencing sheets were unambiguous. The inquiry ends there. If it does not, then the other issues Tant raised on appeal, but not decided by the Court of Appeals, must be addressed by this Court.

[6] The Department now attempts a convoluted analysis of the sentencing sheets to suggest that the Department itself misconstrued the sentencing sheets when it calculated the 15 year sentence, and now that it looks closely at the sentencing sheets, perhaps it was wrong in the first place. If that is the case, *Boan* clearly requires the affected defendant be provided notice and an opportunity to be heard, which did not occur here.

II. TANT RAISED ADDITIONAL LEGAL ISSUES NOT ADDRESSED BY THE COURT OF APPEALS, EVEN THOUGH THOSE ISSUES ARE INDEPENDENT, ADDITIONAL SUSTAINING GROUNDS THAT JUSTIFY AFFIRMATION OF THE RESULT REACHED BY THE COURT OF APPEALS.

Tant's original appeal raised seven legal issues. (App. Pp. 259-282). Because the Court of Appeals reversed the ALC on two of the grounds raised by Tant, there remain five other arguments raised by Tant on appeal, each of which Tant respectfully submits are sufficient to justify ruling in his favor if fully addressed on appeal. The Court of Appeals, however, specifically did not rule on those remaining issues. (App. P. 3, fn. 4). Instead, the Court of Appeals based its ruling on Tant's issues A and D. (App. P. 260). Tant hereby incorporates by reference as fully as if repeated herein his arguments on Issues B, C, E, F, and G, (App. Pp. 272-281) and specifically asserts those as additional sustaining grounds upon which to affirm the decision of the Court of Appeals. *Grimsley v. South Carolina Law Enforcement Division*, 396 S.C. 276, 721 S.E.2d 423 (2012).

This Court has previously used the doctrine of "additional sustaining grounds" to affirm a decision of the Court of Appeals on a proceeding on Certiorari. *Cole v. Raut*, 378 S.C. 398, 663 S.E.2d 30 (2008). Therefore, while most decisions discussing additional sustaining grounds refer the use by an "appellate" court, the doctrine has been applied equally on this Court's review by Certiorari. *Id.*

While this Court's order granting Certiorari did not specify the issues on which it required additional briefing (Supreme Court Order dated February 2, 2013), the Court has before it all of the briefing on the remaining issues for use in affirming the decision of the Court of Appeals. (App. Pp. 259-304). Both sides have fully briefed and argued before the Court of Appeals the remaining unaddressed issues.

Tant would respectfully urge that his undecided appellate issues, specifically those raising constitutional challenges[7] to the Department's authority to change his sentence years after he began serving it, be addressed as independent, additional sustaining grounds in the event this Court disagrees with the Court of Appeals' stated analysis on the narrow issue on which its decision is based.

In the interests of not burdening this Court with unnecessary repetition of the arguments previously made and already before the Court, Tant incorporates by reference his Final Brief to the Court of Appeals (App. Pp. 259-285) and his Final Reply Brief to the Court of Appeals. (App. Pp. 304-321), and all arguments[8] set forth therein, in support of his request that the Court of Appeals decision be affirmed.

CONCLUSION

Tant respectfully submits that the decision of the Court of Appeals be affirmed, as the sentencing sheets are unambiguous, and thus a sufficient and proper basis on their own to determine definitively the sentence intended and actually imposed.

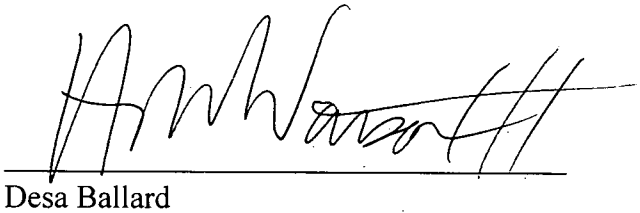
Should this Court conclude that the Court of Appeals' decision was in error, however, Tant urges this Court to affirm on the basis of the additional sustaining grounds presented, including the due process considerations noted previously in the *Boan*

[7] Tant asserted that his due process rights were violated because of the delay between original sentencing and subsequent illegal modification thereof, especially since it occurred outside his presence as also required by the dictates of due process.

[8] Although set forth in great detail in the referenced and incorporated briefs, the grounds not addressed by the Court of Appeals by raised by Tant are as follows: his due process rights were violated because of the delay between original sentencing and subsequent illegal modification thereof; due process was violated because the modification occurred outside Tant's presence; the ALC erred in allowing the Department to use the transcript to justify their decision after the fact; even with inclusion of the transcript, the ALC order was clearly erroneous in view of the reliable, probative, and substantial evidence in the entire record; and finally that ambiguity is decided in favor of Tant as the convicted party.

decision. That *Boan* decision was expressly limited to "a situation such as the one on appeal...", 388 S.C. 2d at 277, 695 S.E.2d at 852, and thus provides framework for due process consideration in determining sentencing, within which the Court of Appeals arrived at the proper result that would be dictated by due process analysis, not the result that would be reached improperly by a reflexive matching of results from *Boan*, independent of the reasoning behind the results reached on those different facts.

Respectfully submitted,



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David Ray Tant, #306170, ... Respondent,

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CERTIFICATE OF SERVICE:
BRIEF OF RESPONDENT

I, Malory L. Hogg, an employee with the Law Offices of Ballard Watson Weissenstein, do hereby certify that on May 1, 2013, I served a copy of the **BRIEF OF RESPONDENT** in the above-captioned case on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

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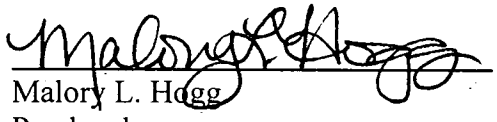

May 1, 2013
West Columbia, South Carolina

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