SOUTH CAROLINA
ATTORNEY GENERAL'S OFFICE

September 25, 2021

VIA EMAIL
Honorable Chris Wooten
Subcommittee Chair
Legislative Oversight Committee
South Carolina House of Representatives
P.O. Box 11867
Columbia, South Carolina 29211
HCommLegOv@schouse.gov

Re: Calculation of Time Served Request

Dear Representative Wooten:

You inquired of the Attorney General on September 10, 2021 on behalf of the House Legislative Oversight Committee's Law Enforcement and Criminal Justice Subcommittee that is currently performing an oversight study of the S.C. Department of Probation, Parole, and Pardon Services (SCDPPPS). Your request concerns our Office's role in calculation of time served by South Carolina inmates. I am responding on his behalf as the chief of the Criminal Division.

The three inquiries that you have set out are the following:

1. Please explain the entities upon whom the Attorney General's Office relies when handling matters related to calculation of time served by an offender (e.g., Section 17-27-20, etc.).

2. What information does the Attorney General's Office receive from those entities?

3. What type of evidence does the party claiming an incorrect calculation of time served typically present?

Our office's role in the litigation concerning calculation or miscalculation of time served is very limited and only would arise in state post-conviction proceedings or federal habeas corpus litigation. Other litigation, particularly under the Administrative Procedures Act pursuant to *Al-Shabazz v. State*, 338 S.C. 354, 383–84, 527 S.E.2d 742, 757–58 (2000), would be handled by agency lawyers from the South Carolina Department of Corrections and South Carolina Department of Probation Parole and Pardon Services rather than our staff. In *Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 598, 576 S.E.2d 146, 148–49 (2003) the Court noted that: "In *Al-Shabazz*, the Court recognized that "[t]hese administrative matters typically arise in two ways: (1) when an inmate is disciplined and punishment is imposed and (2) when an inmate believes prison officials have erroneously calculated his sentence, sentence-related credits, or custody status." 338 S.C. at 369, 527 S.E.2d at 750." The Attorney General's Office is not involved in those prisoner administrative matters under our present structure. In *McNeil v. South Carolina Department of Corrections*, the ALJD, sitting *en banc*, held that this tribunal's jurisdiction to hear inmate appeals under *Al-Shabazz* is limited to: (1) cases in which an inmate contends that prison officials have erroneously calculated his sentence, sentence-related credits, or custody status, and (2) cases in which the Department

has taken an inmate's created liberty interest as punishment in a major disciplinary hearing. *McNeil v. S.C. Dep't of Corrections*, No. 00-ALJ-04-00336-AP, slip op. at 4-5 (S.C. Admin. Law Judge Div. Sept. 5, 2001) (en banc). See also, *Delahoussaye v. State*, 369 S.C. 522, 633 S.E.2d 158 (2006) (Defendant's claim for credit for time served in federal custody could be brought under the Post Conviction Relief Act, and was not required to be filed under the Administrative Procedures Act (APA).

On a rare occasions in which our prosecution staff were involved in the trial, issues about sentence calculation may arise. Examples of these are *Tant v. S.C. Dep't of Corr.*, 408 S.C. 334, 346, 759 S.E.2d 398, 404 (2014), *Tant v. Frick*, No. 3:15-CV-3001-MBS, 2017 WL 3205796, at *1 (D.S.C. July 28, 2017) and *State v. Field*, 429 S.C. 578, 840 S.E.2d 548 (2020). These settings are different than the statutory post-conviction relief setting.

The Attorney General's office handles all state post-conviction relief proceedings brought by South Carolina inmates or convicted individuals. S.C. Code Ann. §17-27-20 concerning the exclusiveness of the PCR remedy, includes the following grounds for relief:

> A) Any person who has been convicted of, or sentenced for, a crime and who claims:
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> (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
> (2*) That the court was without jurisdiction to impose sentence;*
> (3) *That the sentence exceeds the maximum authorized by law;*
> (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> (5) *That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint;* or . . .

Potential claims concerning the sentence which may require a calculation of the time may occur in the PCR applicant's claims pursuant to subsection (5). These claims and our responses may need a review and determination of jail time pretrial detainee credits, good behavior credits, other state or federal jurisdiction detention credits and earned work credits to determine the appropriate time served to determine whether the sentence has expired.

These determinations are decided based upon an interpretation of S.C. Code Ann. §§ 24-13-40, 24-13-210, 24-23-230. See *State v. Brown*, 426 S.C. 63, 824 S.E.2d 476 (Ct. App. 2019), reh'g denied (Mar. 21, 2019), cert. denied (Aug. 5, 2019) (defendant was entitled to credit for time served for the period of time he was civilly committed after he was found incompetent to stand trial and was deemed to have a genuine mental illness). In *State v. Higgins*, 357 S.C. 382, 593 S.E.2d 180 (2004), the court interpreted the statute which addresses credit in sentencing for time served, S.C. Code § 24-13-40, and held that "time served" did not include pretrial home confinement because that was a condition of release from custody, not time in custody. However, in June of 2013, this statute was amended to provide that credit "may be given for any time spent under monitored house arrest". 2013 South Carolina Laws Act 34 (H.B. 3193). See *State v. Field*, No. 2015-000210, 2018 WL 1905146, at *1 (S.C. Ct. App. Apr. 4, 2018), aff'd, 429 S.C. 578, 840 S.E.2d 548 (2020) (holding State did not preserve, for purposes of appeal, its claim that sentencing court did not have the authority to give defendant credit for the entire 15 months that defendant served on house arrest; when State filed its motion to reconsider sentence, the State did not argue the sentencing court committed error, and instead, the State merely asserted that, pursuant to plea agreement, any sentence was in discretion of sentencing court, but, on appeal, the State squarely argued the sentencing court committed error in giving the credit, and the State could not argue one ground at trial and alternate ground on appeal).

The applicable statute currently reads:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. However, when (a) a prisoner shall have given notice of intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, the computation of the time served must be calculated from the date of the commencement of the service of the sentence. In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (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.

> *1. Please explain the entities upon whom the Attorney General's Office relies when handling matters related to calculation of time served by an offender (e.g., Section 17-27-20, etc.).*

This office relies upon the Department of Corrections when claims are presented challenging the sentence calculation and whether the sentence has expired. Our practice in every filed PCR action (regardless of the claims) is to contact SCDC and request offender information and inmate records from SCDC Inmate Records staff. If a sentencing issue is presented, our staff may reach out to the Office of General Counsel at SCDC with a specific request to review the records. This may include additional contact with a staff member from Inmate Records. Our staff notes that it is rare that we need to reach out to SCDPPPS for anything other than an offender address, but if we do, then we generally reach out to the General Counsel or Deputy Director of that agency for similar information and records. Of course, based upon the calculations, our staff will make the legal determination of the position to present to the court based upon our review of the factual presentation each agency presents to us. See *Bordeaux v. State*, 410 S.C. 495, 499, 765 S.E.2d 143, 145 (2014).

Whether a sentencing transcript or sentencing sheet is ambiguous is a question of law. See *Tant v. S.C. Dep't of Corr.*, 408 S.C. 334, 346, 759 S.E.2d 398, 404 (2014). Likewise, whether a PCR applicant is serving an illegal sentence is a question of law. See *Talley v. State*, 371 S.C. 535, 545, 640 S.E.2d 878, 883 (2007); see also *United States v. Johnson*, 765 F.3d 702, 710 (7th Cir.2014) (comparing the sentencing transcript with the written judgment to determine whether an error occurred as a matter of law). *Tant*, 408 S.C. at 344–45, 759 S.E.2d at 403–04 (finding both the oral and written sentencing pronouncements were ambiguous because it was not clear from either whether Tant's sentences were to run concurrently or consecutively). An unambiguous sentencing pronouncement will control over an ambiguous sentence, whether oral or written, so long as giving effect to that pronouncement does not result in an illegal sentence or a deprivation of a defendant's constitutional rights. See, e.g., *Boan v. State*, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010) (declining to give effect to an unambiguous sentencing sheet over an unambiguous plea colloquy because to do so would result in a deprivation of the defendant's right to due process).

> 2. *What information does the Attorney General's Office receive from those entities?*

The office will initially receive, upon our request inmate records from the Department of Corrections which includes circuit court sentencing sheets and indictments. It also usually includes the South Carolina Department of Corrections Record Summary Report which is a computer face sheet which includes

information about current incarceration sentence, projected max-out date, projected parole date, current offenses and sentence start dates, history of movements within the department, history of earned work assignments, among other items.

If the inmate is claiming that he was entitled to jail time or other credit that he did not receive, we will make a request through the SCDC legal staff for a review of the inmate's records. We are provided a worksheet from Inmate Records with the calculations and whether there was a correction that was made by SCDC. We may receive an affidavit from an SCDC staff member and may require the staff members' attendance at an evidentiary hearing to explain to the hearing judge the calculation. This office's staff will also review the sentencing sheet as well as the transcript of the trial or plea concerning any statements by the court about the sentencing structure or the existence of a plea bargain, however recognizing the limitations.

Due to the addition of the fact that credit "may be given for any time spent under monitored house arrest" issues have arisen on whether the use of "may" means a mandatory "shall" and whether "monitored house arrest" requires GPS monitoring and proof that he was actually monitored during the duration of the house arrest. This additional inquiry may require additional records from company and agency monitoring the detainee or convicted inmate.

Rarely, an inmate is claiming his sentence was completed while on parole or probation. When it appears to the Attorney General's Office that a sentence has been completed and the defendant in his collateral litigation maybe claiming entitlement to a new trial, we will request records or confirmation that the challenged sentence was completed from either SCDC or SCPPPS. As to parole, this would include information about the existence of current supervision or an agency order that probation or parole was completed or terminated.

3. What type of evidence does the party claiming an incorrect calculation of time served typically present?

The inmate may rely upon their jail booking report, the sentencing transcript, entries made on a South Carolina Department of Corrections Record Summary Report, or a calculation sheet done by Inmate Records. The inmate may also rely upon testimony from original counsel. In evidentiary hearings, the state's evidence would normally come from SCDC in the form of testimony from Inmate Records personnel or an affidavit at an evidentiary hearing. This is pretty rare, because most of the time, the sentencing calculation claim is not ripe pursuant to *Al-Shabazz v. State* (not subject to immediate release, so it is not a PCR issue and the inmate instead must go through the SCDC grievance process, then appeal through the Administrative Law Court), or once a legitimate error is discovered, SCDC internally corrects the issue.
If you have any further questions, please do not hesitate to contact me.

Sincerely,

Donald J. Zelenka
Deputy Attorney General
Chief of Criminal Division

Cc: The Honorable Alan Wilson, Attorney General of South Carolina
Chief Deputy Attorney General Jeffrey Young
Deputy Attorney General Barry Bernstein