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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

AUG 25 2023

SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Francis Ackerman #266928, Tyrone Aiken #244428, Tyrone Aiken #248367, Malik Aljalil #219551, Linso Allen #269378, Frank Anderson #282800, Sherman Austin #300028, Henry Baker #263398, Quentin Baker #297868, Michael Baylor #265682, Jacob Beach #301270, Darryel Beasley #222388, Michael Benninger #264212, James Bogan #288111, Taurus Bowman #252745, Lazarus Brannon #227847, Ronald Brewer #285756, Frederick Brown #289602, Keith Brown #295762, Timothy Brown #238461, Edward Bryant #255998, Gary Bryant #258972, Pete Bryant #242370, Terrell Buchanon #277262, Douglas Bude #263537, Larry Burke #281911, Christopher Busch #300690, Michael Busques #191961, Richard Butler #162467, Thomas Butler #257552, Derek Carter #275938, Kenneth Carter #243538, Thomas Carter #249362, Rudy Cassady #238732, Leroy Choice #113990, Sheldon Clark #264772, Zawaski Cobb #187136, Baron Cobbs #280479, Kamathene Cooper #145333, Frank Corley #292975, Gladstone Cummings #267450, Patrick Curtis #175139, Quintin Daniels #196284, Curtis Davis #238776, Garry Davis #106144, Heyward Dempsey #134171, Phillip Denney #240678, Perry Deveaux #109601, Daniel Dewey #276678, Calvin Drummond #236322, Jerome Durham #270393, Paul Durham #219573, Harlan Edger #261866, Keith Eigner #299153, Willie Elder #246208, Rodney Elliott #251337, Anthony English #238474, James Enriquez #215539, Kirlan Etheredge #236635, Keith Eugene, unknown, James Evans #267837, David Feggins #287157, Bernard Felder #122099, Terry Ferguson #299080, Jose Flores #240563, James Foye #211523, Ray Gadsden #187527, Maxie Gamble #254413, Robert Garrett #291096, Jermaine Garriett #191274, Fred Gatewood #289775, Jammie Gaymon #208922, Reginald Geddis #183851, Marvin Gilbert #273934, Dennis Goff #177506, Charles Graham #294453, Richard Graham #228235, Gregory Grant #109656, Howard Grant #255473, Nehemiah Greene #243339, Gary Grooms #283860, Nelson Hampton #286427, Willie Hare #256641, Wayne Harlen #245705, David Harrell #260004, James Hartman #219770, Gary Hayes #263985, Johnny Hayes #267910, Steven Hickenbottom #196263, Johnny Holden #245199, Michael Hood #279897, Willie House #257820, Don Hughes #256862, Timothy Inman #151123, Chuck Jackson #266425, James Jackson #267718, Peter Jenkins #257321, Wilbur Jordan #272264, Alfred Joyner #260442, Keith Kelly #257556, Joseph Kelsey #217218, Michael Key #266890, Dennis Knight #286981, Nick Lambros #215080, Alain Lareau #128014, Nikia Law #260855, Stephen Lease #137016, Archie Lee #226354, Harry Leonard #249996, Rick Libby #274681, Quintin Linen #238553, Raymond Livingston #277133, Donald Lyles #296135, Earl Mack #216237, Lavanza Mack #189340, Percy Martin #270035, Cedric Martino #291396, Donald McAteer #292961, Larry McClam #282972, Herbert McFadden #184297, James McFadden #235419, Michael McFarland #266870, Tony McNeil #235846, Thomas Miles #246763, Darrin Miller #259593, Ernest Miller #235474, Wilbert Mills #244004, Roy Morris #288777, John Moultrie #276527, Matin Muntaqim #142282, Anthony Murphy #295893, Anthony Murray #237867, James Murray #165487, Robert Norris #266101, Chauncy Orr #177069, Joe Pannell #89592, Frank Patterson #283098, Tony Pitts

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v.

South Carolina Department of Corrections, Respondent.

APPELLANTS' MEMORANDUM

Pursuant to the Clerk of Court's request of August 15, 2023, this memorandum will address the issue of appealability of this matter. The memorandum will also address the timeliness of the appeal. The appeal contests the 2019 back wage calculations of the Department of Corrections (SCDC). The case is currently on remand in SCDC, following Court of Appeals remand to the Administrative Law Court (ALC) in 2016 (Ackerman, et al. v. SCDC 415 S.C. 412, 421), and ALC remand to SCDC in 2017. Appellants contend SCDC's calculations violate various provisions of the South Carolina and United States Constitutions. These violations will be briefed based on documents in the record.

Appealability

This appeal is filed pursuant to S.C. Code §1-23-380 ("..judicial review available under other means of review..provided by law"), and the following provisions of the South Carolina and United States Constitutions:

(1) S.C. Constitution, Article I, Sections 22, 23. These provisions prohibit the deprivation of property by an administrative agency unless by a mode of procedure prescribed by the General Assembly. Section 22 states an aggrieved person "**..shall have..the right to judicial review**". Section 23 states the provisions in the Constitution "**..shall be..construed to be mandatory and prohibitory**, except where expressly made directory or permissive by its own terms". For example, see League of Women Voters of Georgetown County v. Litchfield-by-the-Sea 305 S.C. 424, 426-7, 409 S.E. 2d 378, 380 (S.C., 1991) (Applying Article I, Section 22's "superseding constitutional due process provisions" for hearing and judicial review to a non-binding determination of the Coastal Council which, as an administrative agency, must comport with the standards of due process in Article I, Section 22). Article I, Section 22 has no time limit to file appeal.

(2) S.C. Constitution, Article I, Sections 22, 23, and S.C. Constitution,

Article I, Section 3, and U.S. Constitution, Amendment 14, Section 1. The latter two provisions prohibit the deprivation of property without due process of law, and carry the same protection of mandatory judicial review as provided in S.C. Constitution, Article I, Sections 22, 23 (S.C. Ambulatory Surgery Center Ass'n v. S.C. Workers Comp. Comm'n 389 S.C. 380, 699 S.E. 2d 146, 152 (S.C., 2010) (Court states it has consistently indicated that the protections under Article I, Section 22 are equivalent to those afforded by the due process clauses of our state and federal constitutions)).

(3) S.C. Constitution, Article I, Section 3 due process and U.S. Constitution, Amendment 14, Section 1 due process. These provisions provide for: constitutionally required judicial review despite statutory provisions to the contrary, in absence of clear legislative intent otherwise (C.J.S. (2014), Adm. Law & Procedure, §379); judicial review as a matter of constitutional necessity despite a statute attempting to preclude review (Am Jur 2d (2014), Adm. Law, §388); a presumption of judicial review for constitutional questions, unless Congress' intent to foreclose review is clearly manifested (Califano v. Sanders 430 U.S. 99, 109, 97 S. Ct. 980 (1977)); and a requirement of judicial review to determine if confinement violates the Constitution, or prison officials have acted arbitrarily and capriciously (Al Shabazz v. State 338 S.C. 354, 381, 527 S.E. 2d 742 (S.C., 2000)). These South Carolina and federal due process provisions have no time limit to file appeal.

Timeliness

Appellants contend the following facts and authorities further support the timeliness of this appeal. First, SCDC's calculations are incomplete. They were done for an inmate work program which ran from about 1998 to 2013. However, the calculations computed back wages only up to July 2007. Many appellants worked during the period July 2007-2013. Also, no calculation was done

for appellant Vondell Sanders. Appellants submit the calculations are facially incomplete, and they were not required to appeal until a more complete decision is issued, which has not occurred (SCACR 203(b)(6) (If a decision indicates that a more full and complete decision is to follow, a party **need not** appeal until receipt of the more complete decision)).

Second, the calculations are not a final decision. In addition to their incompleteness, the calculations do not compute statutory interest, overtime pay, or back wages and interest for Appendix 2 additional work periods. The cover sheet for the calculations states they are for "settlement and mediation purposes only". Further, SCDC has indicated it would issue final decision and continue litigation if the parties could not settle. Thus, appellants contend the calculations are not a final decision (Torrence v. SCDC 433 S.C. 224, 230, 857 S.E. 2d 549, 552 (S.C., 2021) (If there is some further act which must be done by the court prior to determination of the parties' rights, the order is interlocutory)). As a result, appellants submit they did not have to appeal within 30 days of receipt of the calculations in 2019 (Office of Regulatory Staff v. S.C. Public Service Commission 374 S.C. 46, 647 S.E. 2d 223, 229 (S.C., 2007) (Appellants were not required to appeal within 30 days after issuance of an order under S.C. Code §1-23-380(A)(1) because the order was not final. The hearings in 1999 and 2000 left various issues to be resolved. It was not until 2001 that Commission issued final orders from which appellants now timely appeal)).

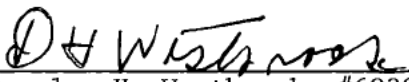
Third, appellants contend their January 3, 2020 Motion for SCDC to Amend Back Pay Analysis Spreadsheets was a petition for rehearing under §1-23-380 (1). This stayed the time to appeal until receipt of SCDC's decision on that motion, which did not occur as SCDC filed no response to the motion. See, Rhame v. Charleston County School District 412 S.C. 273, 279, 772 S.E. 2d 159,

162 (S.C., 2015) (Plaintiff's motion for rehearing under §1-23-380(1) stayed time to serve notice of appeal for 30 days from receipt of the decision denying the motion). Finally, §1-23-380(1) has no time limit to file petition for rehearing. Appellants submit their motion to amend was timely filed as it was still suitable and opportune for SCDC to amend its calculations.

Fourth, to the extent a stay resulted from the January 3, 2020 motion, or this appeal is precluded by any state statute or court rule, appellants contend the stay or state provision is (a) **superseded** by the constitutional due process provisions in S.C. Constitution, Article I, Sections 3, 22, 23, and in U.S. Constitution, Amendment 14, Section 1. See (1)-(3) above; and (b) **pre-empted** by U.S. Constitution, Amendment 14 due process and federal constitutional right to appeal stemming therefrom (U.S. Constitution, Article VI, Clause 2, Supremacy Clause; Kansas v. Garcia 140 S. Ct. 791, 801 (2020) (Pursuant to the Supremacy Clause, if a federal law confers rights and state law imposes restrictions conflicting with federal law, state law is preempted)).

Fifth, to the extent there is a conflict between §1-23-380(1) and any general state provision, the former prevails (Bone v. U.S. Food Service 404 S.C. 67, 84, 744 S.E. 2d 552, 561 (S.C., 2013) (In agency appeals, the APA is controlling over general provisions that conflict with its terms)).

Respectfully submitted,


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Attorney for Appellants

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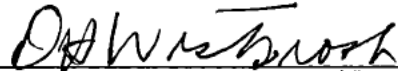
v.

South Carolina Department of Corrections, Respondent.

PROOF OF SERVICE

I certify that I have served the Appellants' Memorandum on the South Carolina Department of Corrections by depositing a copy of it in the United States Mail, postage prepaid, on August 23, 2023, addressed to its attorney of record, Lake E. Summers, Esquire, Malone, Thompson, Summers & Ott, LLC, 339 Heyward St., Ste. 200, Columbia, SC 29201.

August 23, 2023



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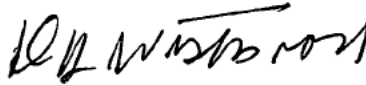
Re: Francis Ackerman, #266928 v. SCDC
App. Case No. 2023-001204

Dear Ms. Harrison:

Pursuant to your letter of August 15, 2023, please find enclosed for filing with the Court Appellants' Memorandum, with Proof of Service.

By copy of this letter, I have this date served a copy of same on counsel for the Department of Corrections, Lake E. Summers.

Sincerely,



Douglas H. Westbrook

DHW/

cc: Lake E. Summers, Esq.

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