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S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**CERTIORARI-COA
APPEAL FROM ADMINISTRATIVE LAW COURT
Ralph K. Anderson, III, Administrative Law Judge**

**Appellate Case No. 2023-001971
Lower Case No. 2019ALJ040277AP**

Gregory Pencille # 312332 Petitioner.

vs.

South Carolina Department of Corrections Respondent

PETITIONER'S REPLY TO RESPONDENT'S RETURN

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Argument

Did the South Carolina Department of Corrections violate the religious rights of Gregory Pencille and the Wiccan community as protected by South Carolina Code § 24-27-500, South Carolina Code § 1-32-10, *et seq.* and SCDC policy P.S. 10.05 when the Department of Corrections refused to permit Mr. Pencille and the Wiccan community the use of religious oil when the Department failed to establish any security reason for prohibiting the use of the religious oils?

Error Preservation

When a litigant constantly refers to a policy of the party on the other side, and the policy incorporates the statutes that rise to the policy, the statutes contained in the policy are part of the basis for the claim. App. at 13. To contend that citing to SCDC policy P.S. 10.05 which plainly incorporates South Carolina Code § 24-27-500 and South Carolina Code § 1-32-10, *et seq.* does not preserve for review the law of the two cited statutes is to put form over substance. As this Court has said, “However, this is not a ‘gotcha’ game aimed at embarrassing attorneys or harming litigants, but rather is an adherence to settled principles that serve an important function.” *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329–30, 730 S.E.2d 282, 285 (2012). The Respondent in this case cannot seriously argue they were misled or surprised by a specific argument based on the two statutes when the pleadings below referenced SCDC policy P.S. 10.05. To so contend, the respondent is urging this court to put form over substance.

This Court has long held, “In matters of appeal, so far as it appears, all that this Court has ever required is that the questions presented for its decision must first have been fairly and

properly raised in the lower Court and passed upon by that Court.” *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187, 189 (1939). When the relevant statutes were mentioned in the Policy the application of the statutes to the case was clearly presented to the Administrative Law Court and ruled upon by the Court of Appeals. The issue is preserved for this court to review.

Merits

As to the merits of the issue, the Respondent appears to ignore the burden of proof set forth in the statute. South Carolina Code § 24-27-500 provides:

A state or local correctional facility's regulation must be considered “in furtherance of a compelling state interest” *if the facility demonstrates that the religious activity:*

- (1) sought to be engaged by a prisoner is presumptively dangerous to the health or safety of that prisoner; or
- (2) poses a direct threat to the health, safety, or security of other prisoners, correctional staff, or the public. (Emphasis added)

Once an inmate establishes that a particular practice is part of their religious services, their burden of proof has been satisfied. At that point, the Department of Corrections must demonstrate that the practice is a danger to the institution. As noted in the Petition filed in this matter, that burden is not high, but the department must produce some evidence.

Mr. Pencille met his burden under the statute in two respects. To be more precise, Mr. Pencille had made allegations that meet his burden of proof. The record shows that previously the Wiccan community in the prison was given the right to use religious oils. This establishes that the department has recognized this as a part of the Wiccan religious practices. Secondly, Mr. Pencille has alleged, and such allegations have not been refuted, other religions are permitted to use oils as part of their religious practices. The Court of Appeals in its order acknowledged this fact. As no hearing was held at the Administrative Law Court Level, the Respondent is incorrect

when it alleges Mr. Pencille produced no evidence. The ALC judge decided the case on the pleadings and not on the taking of any testimony. The allegations Mr. Pencille made in his filing establish facts that are sufficient to come under the South Carolina RFRA statute.

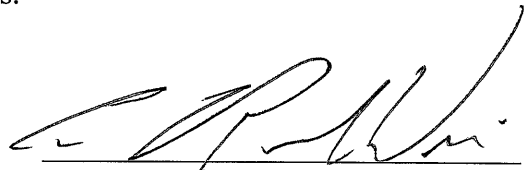
Mr. Pencille has alleged a state created liberty interest in the practice of his religion. Were the use of oils not important to the religious practice, a safe assumption can be made that the department would not have permitted the previous use of oils. Based on the facts alleged in the appeal, Mr. Pencille has made sufficient allegations to establish a state created right under the South Carolina RFRA. The Department did not deny the request by Mr. Pencille on the basis that the oil was not an important part of the religious ceremony. The department denied the use of the oils for security reason only. App. at 7. Whether oils were essential or important was not an issue with the department raised below. Security is not a word that ends all inquiry. Rather, it is a defense that the department must use facts to establish.

Contrary to the position of the Respondent, a remand to the Administrative Law Court is an appropriate remedy. As noted, this case was decided on the pleading without testimony or affidavits. The Administrative Law Court dismissed on the ground they did not have jurisdiction, thus no facts were found. The Court of Appeals, without any facts to support the conclusion, said, “SCDC’s denial of Pencille’s request for the use of religious oils was due to security concerns.” *Pencille v. South Carolina Department of Corrections*, Op. № 2023-UP-321 (S.C.Ct. App. filed November 1, 2023) at 11. The facts should be developed at the hearing below.

CONCLUSION

For the reason set forth in the Petition for Writ of Certiorari and in this Reply, this court should grant the Petition for Writ of Certiorari and reverse the decision of the court of appeals and hold that the South Carolina Department of Corrections failed to establish a compelling reason to deny Gregory Pencille and the Wiccan community the use of oils in religious services. In the alternative, after granting the petition, this court should remand the case to the South Carolina Administrative Court for a hearing on the merits.

March 6, 2024



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