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**Apr 22 2024**

**SC Court of Appeals**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

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**APPEAL FROM THE ADMINISTRATIVE LAW COURT**

**Sebastian P. Lenski, Administrative Law Judge**

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**Appellate Case No. 2023 – 001291**

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John Garvin..... Appellant,

v.

South Carolina Department of Corrections ..... Respondent.

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***FINAL REPLY BRIEF OF APPELLANT***

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**I.**  
**ARGUMENT**

**APPELLANT’S REPLY TO RESPONDENT’S RESPONSE BRIEF**

Appellant, John Garvin, replies to the South Carolina Department of Corrections (“SCDC”) Brief of Respondent as follows.

**A. Liberty Interest**

SCDC, relies on *Kentucky Dep’t. of Corr. v. Thompson*, 490 U.S. 454, 109 S.Ct. 1904 (1989), to argue that Appellant Garvin does not have a liberty interest, regarding visitation, that was created by the State. Brief of Respondent at p. 5. *Thompson*, however, actually holds that “an individual claiming a protected interest must have a legitimate claim of entitlement to it. Protected liberty interests ‘may arise from two sources —the Due Process Clause itself and the laws of the State.’” *Id.* at 460 (quoting *Hewitt v. Helms*, 459 U.S. 460, 468, 103 S.Ct. 864 (1983)). Although *Thompson* recognized “unfettered visitation” is not guaranteed by the Due Process Clause, the Court also reminded, “this is not to say that a valid conviction extinguishes visitation.” Rather here, Appellant merely just protests SCDC denying him visitation with family members and friends who do not provide their social security number — upon conducting an arbitrary and capricious individualized determination. Especially, when SCDC’s 19-127 visitation form, specifically gives instructions to applicants, who do not wish to provide their social security number, the option not to. See R. 29. SCDC’s denial of Appellant grandchildren’s visitation forms, has conducted such an arbitrary and capricious individualized determination, to whereas, Appellant Garvin has a liberty interest pursuant to the Due Process Clause<sup>1</sup> in visitation regarding the issue presented in this litigation.

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<sup>1</sup> U.S. Const. Amend. XIV; see also S.C. Const. Art. I, § 3

This Court has laid out the criteria for a state-created liberty interest in visitation, in *Allen v. S.C. Dep't. of Corr.*, *supra.*, 434 S.C. 114, 862 S.E.2d 268 (2021) (citing *Ky. Dep't. of Corr. v. Thompson*, 490 U.S. 454, 109 S.Ct. 1904 (1989)). See Brief of Appellant at pp. 9 – 10. Appellant also argues that, “SCDC’s visitation policy [uses] explicit[] mandatory language requiring a particular outcome when factual predicates are met. SCDC’s policy expressly states visitors deemed to be a security risk will not be permitted to visit inmates and that visitation is not a guaranteed right. See S.C. Dep’t. of Corr. Policy/Procedure, No. OP-22.09, Inmate Visitation § 1.4 (Aug. 1, 2016). [Although], this policy vest SCDC with wide discretion; thus, it does [] mandate an outcome. Since there is [a] mandated outcome there [is a] state-created interest in visitation with [Appellant’s family members and friends].” quoting *Allen*, 434 S.C. at 119. (citations and quotation marks omitted). *Allen, Supra.*, goes even further by stating that:

“States may also create liberty interests protected by the Due Process Clause by limiting an inmate’s freedom from restraint in such a way that imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”

See *Id.* at 119 – 20.

The denial of Appellant Garvin’s visitation with family members and friends is a violation of his right to freedom from restraint that is atypical, and does create a significant hardship on Appellant in relation to ordinary prison life because the record does contain evidence that SCDC treats other inmates who’s family members and friends that do provide their social security numbers are treated differently from the one’s that don’t provide their social security number. Therefore, S.C. Code Ann. § 24-1-90 and SCDC Policy OP-22.09, does create a liberty interest to visit with family members and friends. As discussed below, SCDC’s denial of Appellant grandchildren’s visitation forms involved in this appeal are arbitrary and capricious.

## **B. Arbitrary and Capricious**

SCDC's argument that, "Appellant's proposed visitors failed to fully complete the 19-127 (the visitation application form) because they failed to include the social security numbers of the proposed visitors." See Respondent's Brief at pp. 5 – 6. This argument does not have a leg to stand on and it fails, because SCDC's 19-127 visitation form, specifically states that, **"If you do not wish to provide your social security number (SS#); please complete the form, leaving off the number and attach a "photocopy" of your driver's license/State ID. )."** See R. 28. SCDC's 19-127 visitation form also states that, **"[t]he ONLY minors (under 18 yrs. of age) that may apply to visit are the inmate's children, brothers/sisters, step-children, grandchildren, or step-children. The relationship Must be verified by attaching a "photocopy" of the minor's long-form, certified birth certificate."** See R. 28. Clearly, the language used in SCDC's 19-127 visitation form, is the same language that SCDC policy OP-22.09 §§ 5.1, 5.3, and 5.3.1, uses and "mandates an outcome" for visitors to visit with inmates at an SCDC correctional institution that will be approved to visit. See OP-22.09 § 5.1. So contrary, to the Respondent's argument that, Appellant grandchildren's "father[, JaJuan Garvin,] failed to provide their social security numbers on the visitation application," has no merit to it, whatsoever. Because SCDC's 19-127 visitation forms gave him the option not to. Therefore, Yolande Wesley, Program Assistant of SCDC's Division of Visitation & Inmate Drug Testing, has denied Appellant Grandchildren's visitation forms for failing to provide their social security numbers was arbitrary and capricious. Whereas, the ALC improperly dismissed Appellant's appeal, when it should have not, because SCDC policy OP-22.09 is a state-created liberty interest that was implicated, as discussed above.

### **C. The Social Security Act of 1935 and The Privacy Act of 1974**

The Respondent's interpretation of the Social Security Act and the Privacy Act, is misguided. The Respondent's argues that, "Appellant has failed to present any valid or relevant authority supporting the notion that SCDC cannot require social security numbers to process visitation applications." Title 42 U.S.C. § 405(c)(2)(C)(i) (2018) is a key statute that requires the disclosure of social security numbers in the Social Security Act (SSA), which expressly permits a State agency to use social security numbers for the purpose of identifying individuals "in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction."

The SSA also permits a state agency to use social security numbers to issue birth certificates and to enforce child support orders, the Secretary of Agriculture to use social security numbers in administering the Food and Nutrition Act of 2008, and the Federal Crop Insurance Corporation to use them in administering the Federal Crop Insurance Act. See 42 U.S.C. §§ 405(c)(2)(C)(i), (ii), (iii) and (iv). The Social Security Act, does not list SCDC or any other State Department of Corrections as a state agency that is permitted to utilize a social security number for the purpose of identifying an individual. Therefore, SCDC's denial of Appellant grandchildren's visitation forms for not providing their social security numbers, is unlawful pursuant to Section 7 of Pub.L. 93-579(a)(1), the Privacy Act of 1974, as amend, 5 U.S.C. § 552a note (Disclosure of Social Security Number).

The Respondent have stated repetitively within it's brief that visitation is a privilege and has failed to dispute Appellant's argument that, "S.C. Code Ann. § 24-1-90 and SCDC Policy OP-22.09, creates a liberty interest to visit with family members and friends." See Appellant's Brief at p. 10. Inasmuch as, SCDC has arbitrarily deprived Appellant of this privilege to visit with family

members and friends for failing to provide their social security numbers on the visitation application.

Now, under Section 7 (a)(1) of the Privacy Act, which states as follows: “It shall be unlawful for any Federal, State or Local government agency to deny to any individual any right, benefit, or privilege provided by law, because of such individual’s refusal to disclose his social security account number.” See Pub.L. 93-579. Accordingly, Appellant’s argument regarding the Privacy Act is clearly being violated by SCDC.

Appellant’s grievance has triggered procedural due process guarantees of a state-created liberty interest that has been implicated in this case. Appellant’s arguments are very valid and with merit. Whereas, the ALC has improperly dismissed Appellant’s appeal.

### **CONCLUSION**

For the foregoing reasons set forth in the Brief of Appellant and this Reply Brief, this Court should reverse the Administrative Law Judge’s Order and remand for a determination on the merits because Appellant, John Garvin has a liberty interests in visitation with family members and friends.

**DATED: April 22, 2024**

**RESPECTFULLY SUBMITTED,**



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