

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Heath P. Taylor, Circuit Court Judge

Appellate Case No. 2024-001727
Case No. 2017-CP-18-1125

RECEIVED

Apr 10 2025

S.C. SUPREME COURT

Calvin Henson, Daniel James Collins, Jason Robinson,
Russell Taylor, and All Those Similarly Situated, ... Respondents,

v.

South Carolina Department of Corrections and the
South Carolina Department of Juvenile Justice, ... Petitioners.

APPENDIX

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Index

Court of Appeals Order Dismissing Appeal, filed January 3, 2025.....	1
Court of Appeals Order Denying Petition for Rehearing, filed March 11, 2025	3
Supreme Court Order Transferring to Court of Appeals, filed October 17, 2024	5
Notice of Appeal, or in the Alternative, Petition for Writ of Certiorari, filed October 14, 2024	7
Respondents’ Motion to Dismiss Appeal, filed October 21, 2024.....	21
Appellants’ Return in Opposition to Motion to Dismiss Appeal, filed November 7, 2024	29
Reply to Motion to Dismiss Appeal, filed November 12, 2024	43
Petition for Rehearing, filed January 21, 2025	49
Memorandum in Support of Petition for Rehearing, filed January 21, 2025	51
Amended Order Granting Plaintiffs’ Motion to Certify, filed September 13, 2024	60
Order Granting Plaintiffs’ Motion to Certify, filed May 22, 2024.....	76
Notice of Motion and Motion to Alter or Amend Order and/or Motion to Reconsider, filed June 3, 2024	92
Exhibit: April 10, 2024 email from Defendants’ counsel to Judge Heath P. Taylor	104
Amended Class Action Complaint, filed February 15, 2023	111
Plaintiffs’ Motion to Certify Class, filed August 31, 2023	128
Memorandum in Support of Plaintiffs’ Motion to Certify Class, filed January 11, 2024	130
Exhibit 1: Affidavit of James E. Aiken	159
Exhibit 2: Affidavit of C. Alan Runyan	176

The South Carolina Court of Appeals

Calvin Henson, Daniel James Collins, Jason Robinson,
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Respondents,

v.

South Carolina Department of Corrections and the South
Carolina Department of Juvenile Justice, Appellants.

Appellate Case No. 2024-001727

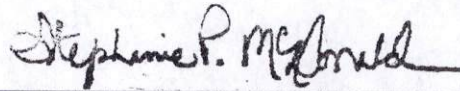
ORDER

Appellants filed a notice of appeal from a class certification order. The order provided that "mechanisms for notification and 'opt-out' would be more appropriately addressed by the assigned judge." Additionally, the order stated that "[q]uestions with regard to the conduct of discovery and manner of trial will [be] more appropriately addressed by the assigned judge who will be in a better position to full evaluate the positions and the needs of the parties." The order severed the claims against Appellants for class certification and trial. The court defined sexual battery according to section 16-3-651(h) of the South Carolina Code (2015) and adopted the following class definitions:

All individuals that have been under the custody and care of the South Carolina Department of Corrections ("SCDC") in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery.

All individuals that have been under the custody and care of the South Carolina Department of Juvenile Justice ("SCDJJ") in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery.

In their notice of appeal, Appellants argue the order is immediately appealable. On October 21, 2024, Respondents filed a motion to dismiss, arguing the order on appeal is interlocutory, not immediately appealable, and not ripe for appellate review. Appellants filed a return, maintaining their argument that the class certification order is immediately appealable. Respondents filed a reply. After careful consideration of the filings, we dismiss the appeal as not immediately appealable. *See Stanley v. S. States Police Benevolent Ass'n*, 435 S.C. 524, 526, 868 S.E.2d 412, 413 (Ct. App. 2021) ("Where, . . . [a] class certification order does not address the merits, it is interlocutory and may not be appealed until after final judgment."); *Hensley v. S.C. Dep't of Soc. Servs.*, 429 S.C. 144, 147, 838 S.E.2d 510, 512 (2020) ("[C]lass certification orders are ordinarily not immediately appealable."); *Salmonson v. CGD, Inc.*, 377 S.C. 442, 448, 661 S.E.2d 81, 85 (2008) ("The general rule established by [the supreme court] is that class certification orders are not immediately appealable."); *id.* at 452, 661 S.E.2d at 87 (dismissing an appeal from a class certification order as not immediately appealable); *id.* (concluding an order establishing an "opt-in" procedure for class members is immediately appealable because it affects a mode of trial).



FOR THE COURT

Columbia, South Carolina

cc:

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Hugh W. Buyck, Esquire
Gordon Wade Cooper, Esquire
David Allan DeMasters, Esquire
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FILED
Jan 03 2025

The South Carolina Court of Appeals

Calvin Henson, Daniel James Collins, Jason Robinson,
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South Carolina Department of Corrections and the South
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ORDER

After careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

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FILED
Mar 11 2025

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The Supreme Court of South Carolina

Calvin Henson, Daniel James Collins, Jason Robinson,
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v.

South Carolina Department of Corrections and the South
Carolina Department of Juvenile Justice, Appellants.

Appellate Case No. 2024-001727

ORDER

Pursuant to Rule 204(a) of the South Carolina Appellate Court Rules, this matter is hereby transferred to the South Carolina Court of Appeals.

FOR THE COURT

BY Patricia A. Howard
CLERK

Columbia, South Carolina
October 17, 2024

cc: Andrew F. Lindemann
Hugh W. Buyck
Gordon Wade Cooper
David Allan DeMasters
Andrew William Kunz
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The Honorable Jenny A. Kitchings

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Oct 14 2024

APPEAL FROM DORCHESTER COUNTY
Heath P. Taylor, Circuit Court Judge

S.C. SUPREME COURT

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Case No. 2017-CP-18-1125

Calvin Henson, Daniel James Collins, Jason Robinson,
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v.

South Carolina Department of Corrections and the
South Carolina Department of Juvenile Justice, ... Appellants-Petitioners.

**NOTICE OF APPEAL, OR IN THE ALTERNATIVE,
PETITION FOR WRIT OF CERTIORARI**

The Appellants-Petitioners South Carolina Department of Corrections (“SCDC”) and the South Carolina Department of Juvenile Justice (“SCDJJ”) hereby appeal the Amended Order Granting Plaintiffs’ Motion to Certify issued by Circuit Court Judge Heath P. Taylor on September 13, 2024.

The Appellants-Petitioners’ counsel received written notice of entry of the Amended Order Granting Plaintiffs’ Motion to Certify filed September 13, 2024, on that same date.

The Appellants-Petitioners submit that the Amended Order Granting Plaintiffs’ Motion to

Certify affects the mode of trial and therefore is immediately appealable. However, in the event that the Court were to disagree and find that the mode of trial is not implicated, the Appellants-Petitioners alternatively present several critical issues for the Court's consideration by way of a petition for writ of certiorari.

BACKGROUND

The Respondents Calvin Henson, Daniel James Collins, and Jason Robinson allege that they were SCDC inmates who were sexually assaulted, and the Respondent Russell Taylor alleges that he was sexually assaulted while in the custody of SCDJJ. The Respondents, individually and as representatives of putative classes, have brought a claim for negligence/gross negligence alleging that SCDC and SCDJJ “fail[ed] properly to implement and enforce their policies and procedures, including but not limited to classification of inmates, monitoring of inmates by employees, allowing gross overcrowding, and by failing to provide appropriate employees and staff at the various locations in Defendants’ facilities which would have prevented the sexual assaults suffered by Plaintiffs.” *See*, Amended Complaint, ¶ 76. The Respondents seek monetary relief for themselves and for all putative class members. The Respondents also seek declaratory and injunctive relief.

LEGAL ANALYSIS

I. Direct Appeal

As indicated, the Appellants-Petitioners submit that the Amended Order Granting Plaintiffs’ Motion to Certify affects the mode of trial and therefore is immediately appealable. South Carolina law is clear that “[o]rders affecting the mode of trial affect a substantial right as defined in section

14-3-330(2) of the South Carolina Code (1976), and must, therefore, be appealed immediately.” *Frampton v. South Carolina Dept. of Transportation*, 406 S.C. 377, 752 S.E.2d 269, 274 (Ct. App. 2013). Additionally, “the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue.” *Id.* See also, *Pelfrey v. Bank of Greer*, 270 S.C. 691, 244 S.E.2d 315 (1978) (holding that an order denying a compulsory reference affects the mode of trial and is immediately appealable); *Foggie v. CSX Transportation, Inc.*, 313 S.C. 98, 431 S.E.2d 587, 591 (1993) (“[i]ssues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable”).

Importantly, in the leading case of *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008), the South Carolina Supreme Court ruled that an order adopting an “opt-in” rather than an “opt-out” notification procedure in a class action affects the mode of trial. The Supreme Court recognized that the “traditional analysis of claims of denial of a mode of trial requires a determination of whether or not a party is erroneously denied a trial by jury in a law case.” 661 S.E.2d at 87. The Supreme Court further explained that “the mode of trial analysis indubitably includes the consideration of the availability of trial” and hence “[t]he question of the denial of an actual trial is intrinsic.” *Id.* The *Salmonsens* Court also reiterated that South Carolina law requires that a litigant seek an immediate appeal on a mode of trial issue or otherwise the right to appeal is deemed waived. *Id.*

In its Amended Order Granting Plaintiffs’ Motion to Certify, the trial court adopted two class definitions, one for each Defendant. For the Defendant SCDC, the class definition is “[a]ll individuals that have been under the custody and care of the South Carolina Department of Corrections (“SCDC”) in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery.” See, Amended Order, p. 14. Similarly, for the Defendant SCDJJ,

the class definition is “[a]ll individuals that have been under the custody and care of the South Carolina Department of Juvenile Justice (“SCDJJ”) in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery.” *See*, Amended Order, p. 14. Thus, the trial court has adopted class definitions that use the language “who were victims of a nonconsensual sexual battery,” which in turn incorporates the statutory definition of “sexual battery” from S.C. Code Ann. § 16-3-651(h). Critically, before being deemed a member of either class, each putative class member will need to prove both (1) that he/she was a victim of a “sexual battery” based on that statutory definition and (2) that the sexual battery was nonconsensual. In effect, in order to determine whether a particular SCDC inmate or SCDJJ juvenile meets the class definition, the trial court will be required to engage in hundreds of mini-trials or evidentiary hearings. These class definitions consequently raise significant mode of trial issues from the outset.

Although the trial court declined to address procedures for notification of the defined classes in its Amended Order Granting Plaintiffs’ Motion to Certify, it is well established in *Salmonsens* that South Carolina law recognizes only one type of class action in a monetary relief case – a class action with “opt-out” procedures. As the Supreme Court held in *Salmonsens*, “an ‘opt-out’ notification procedure is the proper method to be offered to putative class members in the instant case and *future class action cases*.” *Salmonsens*, 661 S.E.2d at 91. (Emphasis added). It goes without saying that in order to comply with opt-out procedures, the members of the class must be identified before notification of the class can be made. Hence, before class notices are prepared and mailed, the trial court will be required to determine which SCDC inmates and which SCDJJ juveniles meet the class definitions. Only once those class members are identified may notification of the classes even commence.

The question thus arises as to how the trial court will make a judicial determination as to the

class membership. To reiterate, for both the SCDC and the SCDJJ classes, using the class definitions as adopted, the trial court will need to determine (1) whether each putative class member was a victim of a “sexual battery” using the statutory definition of “sexual battery” from S.C. Code Ann. § 16-3-651(h), and (2) whether any sexual battery as found was nonconsensual. As indicated, both the Plaintiffs and the Defendants have requested a jury trial. Notably, the Supreme Court has held that there is no constitutional or statutory right to a jury trial for a shareholder’s derivative action in *Pelfrey v. Bank of Greer*, 270 S.C. 691, 244 S.E.2d 315 (1978), which is one form of a class action in equity. Yet, the Supreme Court has never ruled definitively whether or not there is a right to a jury trial in a class action brought pursuant to Rule 23, SCRPC, particularly a class action which is an action at law, as is the case at bar, in which monetary relief is sought for each class member. One commentator has discussed the mode of trial for a class action under South Carolina precedent as follows:

As for class actions, no clear precedent was found, but two cases offer weak support for a jury trial right. In *Salmonsens v. CGD, Inc.*, the South Carolina Supreme Court rejected opt-in class actions finding an opt-in provision “effectively denies [putative class members] a trial by jury.” In *The Gates at Williams-Brice Condominium Ass’n v. DDC Construction, Inc.*, the South Carolina Court of Appeals reversed the trial court’s denial of defendants’ motion for a nonjury trial based on a waiver in a master deed but did not hold that class actions are never entitled to a jury trial.

Scarlett, *Jury Trial Disparities Between Class Actions and Shareholder Derivative Actions in State Court*, 72 Okla. L. Rev. 283, 331 (2020).

Assuming that the parties are entitled to a jury trial as they have all demanded in their pleadings, the mode of trial is significantly intertwined with and implicated by the class definitions adopted by the trial court. The two-part findings that will need to be made by the factfinder to determine class membership are also a significant part of the merits of each putative

class member's cause of action, and those findings will need to be determined before class notification even occurs. As indicated, that determination will need to be made by a jury per the jury trial demand made by all parties. Moreover, before there can be a full hearing on liability – again by a jury – the qualifying class members would need to be notified and given the opportunity to opt-out per *Salmonsens*. Thus, in order to provide the jury trial requested by all parties, the jury trial would need to be bifurcated, with the second phase of the trial on liability issues held months later after the “opt-out” period has expired.

To further complicate the process, the same jury will be required to decide whether each SCDC inmate and SCDJJ juvenile meets the class definitions and then later determines liability and, if necessary, damages. As federal courts have recognized, “[t]he right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have jurable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial) and not reexamined by another finder of fact.” *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 3003 (7th Cir. 1995) (collecting cases). The same would be true under state law. That extended process will create a tremendous burden and hardship of time and inconvenience on that jury (as well as the court), and more significantly, it will also not be reasonably feasible for the jury to hear the evidence relevant to determining whether each putative class member qualifies as a class member and then months later be called upon to determine liability and, if necessary, damages, both of which determinations will rely on or at least be extensions of the fact-finding performed in the “class definition” phase of the trial held months earlier.

In effect, as the foregoing discussion reflects, the class definitions adopted by the trial court create what are commonly referred to as “fail-safe” classes. A fail-safe class is one that “is defined so that whether a person qualifies as a member [of the class] depends on whether the

person has a valid claim.” *EQT Production Co. v. Adair*, 764 F.3d 347, 360, n.9 (4th Cir. 2014), citing *Messner v. Northshore University Health Systems*, 669 F.3d 802, 825 (7th Cir. 2012). Fail-safe classes are considered improper for two principal reasons. First, in a fail-safe class, “a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment.” *Messner*, 669 F.3d at 825. Second, fail-safe classes do not comply with Rule 23. As discussed in more detail below, Rule 23 requires that members of a proposed class be readily identifiable, which is a principle called “ascertainability.” See, *EQT*, 764 F.3d at 358 (“Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable”). Under this so-called “ascertainability” requirement, “[a] class cannot be certified unless a court can readily identify the class members in reference to objective criteria.” *Id.* In other words, a class action should not proceed “if class members are impossible to identify without extensive and individualized fact-finding or mini-trials.” *Id.* Therefore, because a fail-safe class requires a court to engage in individualized fact-finding or mini-trials to identify the members of the class, fail-safe class definitions violate these principles.

In sum, if those fail-safe class definitions are allowed to proceed, there will be a significant impact on issues related to mode of trial – issues which are unavoidable in order to comply with the requirements of an “opt-out” notification process as mandated by the Supreme Court in *Salmonsens*. Therefore, the appeal should be permitted to proceed as a direct appeal.

In addition, in examining these class definitions and the resulting mode of trial issues, the trial court failed to consider or at least address instructive case law from the South Carolina Supreme Court. For instance, the trial court failed to consider the Supreme Court’s latest decision in *Hensley v. South Carolina Dept. of Social Services*, 429 S.C. 144, 838 S.E.2d 510 (2020), in which the Supreme Court explains that “there must be a proper balance between

common and individualized issues in order to achieve the efficiencies the class procedure was designed to promote.” 838 S.E.2d at 514. The Supreme Court further speaks of the need for the court “to balance the efficiency to be gained from one trial on common issues versus the difficulty to be suffered by having to conduct individual trials or hearings on issues that are not common.” *Id.* The Supreme Court also cited a well-respected treatise on South Carolina civil procedure for the following:

The commonality requirement [of Rule 23(a), SCRCP] is a condition of class action status, but the existence of common questions alone is not sufficient *[T]he class action must be a better procedural mechanism for resolving the litigation than named joinder or separate litigation.* Under Fed. R. Civ. P. 23(b)(3), this is reflected in the requirement that the common questions predominate over individual issues. Although not specifically required by this Rule, it is inherent in the general conditions for class actions. The Court should first determine the existence of common questions, and then whether they are sufficient[ly] central to justify the class action.

Id., citing Harry M. Lightsey & James F. Flanagan, *South Carolina Civil Procedure* 199 (1st ed. 1985). (Emphasis added).

As indicated, the reason *Hensley* is so critical here is that, based on the class definitions adopted by the trial court, it will be required to conduct mini-trials or evidentiary hearings *just to determine who qualifies as a class member* and that must occur before the “opt-out” notification procedure can begin. That is not typical of proper class actions where the class membership may be determined by objective criteria which do not require individualized fact-finding. That alone demonstrates why these cases are not appropriate for class certification.¹

¹ Of note, one of the foremost experts on class actions, Professor Newberg cautions that “[i]n a money-damages class action, common issues must predominate over individual ones so as make a class trial ‘manageable,’ thereby rendering it a superior form of adjudication. If a case is likely to devolve into thousands of individual mini-trials concerning each class member’s damages, that process may threaten the efficiency gains of class treatment and render a class

Similarly, the trial court gave no consideration to the importance and impact of *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003). While the trial court mentions *Gardner*, it never distinguishes *Gardner* nor explains why it is not controlling. In *Gardner*, the Supreme Court explained that "[t]o establish commonality, a party must show that there are questions of law or fact common to the class. In practical terms this means the party must articulate the existence of *significant* common, legal, or factual issues that bind the proposed class together." 577 S.E.2d at 200. (Emphasis added). Importantly, "[c]ommonality is met only where the class shares a *determinative* issue." 577 S.E.2d at 200-201. (Emphasis added). Relying on federal jurisprudence, the Supreme Court in *Gardner* explained that "questions that are in no way dispositive and which simply propel the action into a posture where judicial scrutiny is necessary for just adjudication are insufficient to establish commonality." 577 S.E.2d at 201. Most importantly, the Supreme Court held that "a representative plaintiff cannot establish commonality if the court must investigate each plaintiff's individual claim." *Id.*²

The *Gardner* case is instructive in addressing not only the commonality prong, but in the present case, it is instructive on the propriety and utility of the class definitions as well. In *Gardner*, a proposed plaintiff class of taxpayers sued the Department of Revenue and numerous

action unhelpful." 4 *Newberg on Class Actions* § 12:6 (5th ed.). See also, *O'Quinn v. Beach Associates*, 272 S.C. 95, 249 S.E.2d 734, 738 (1978), as cited in *Gardner*, 577 S.E.2d at 201 ("[t]he very purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action").

² The trial court also gave no consideration to the recent decision of the Court of Appeals in *Robinson v. South Carolina Department of Employment and Workforce*, 443 S.C. 63, 902 S.E.2d 41 (Ct. App. 2024). In that case, the Court of Appeals reversed all orders on appeal, including the Circuit Court's orders certifying a class action. The Court of Appeals specifically ruled that "the circuit court erred by finding Claimants were not required to exhaust their administrative remedies." 902 S.E.2d at 50. *Robinson* demonstrates that class certification is not appropriate based upon the need to separately adjudicate the exhaustion of administrative remedies defense which required individualized inquiry and decision-making with respect to each putative class member.

governmental entities who attempted to use the Setoff Debt Collection Act to recover monies owed by taxpayers from their tax refunds. The Supreme Court reversed the certification of a plaintiff class for a lack of commonality. The Supreme Court found that, in addition to showing that the notice required by statute was deficient, a showing of prejudice was also required and that an individualized examination of each class member's claim was necessary before a class member could prevail. The Supreme Court explained that "[a] representative class cannot exist where the court must investigate each plaintiff's prejudice claim ... Requiring such individualized examination negates the benefits of a class action suit." *Gardner*, 577 S.E.2d at 201.

That same level of individualized inquiry, if not a much greater level of such inquiry, is necessary in the present case – particularly just to identify the putative class members. Similar to the individualized issue of prejudice in *Gardner*, the present action turns on the individualized issue of consent, among others.³ As discussed at length, the putative class members in the case at bar cannot even qualify as a class member until they can show they are a victim of a “nonconsensual sexual battery.” By its very nature, consent – like prejudice – requires individualized inquiry.

In sum, the Appellants-Petitioners submit that the order on appeal impacts the mode of trial, as was the case in *Salmonsens*, and a direct appeal should be permitted to proceed.

³ In addition to requiring individualized inquiry just to determine if a putative class member meets the class definition, as discussed above, a determination on the merits of each Plaintiff's and putative class member's liability claims will require a jury to determine the facts and circumstances of each claim of a “nonconsensual sexual battery,” as well as the conduct of the Defendants and particularly whether the Defendants' conduct rises to the level of gross negligence. *See*, S.C. Code Ann. § 15-78-60(25) (governmental entities are entitled to sovereign immunity for acts of simple or ordinary negligence). Moreover, for each Defendant, there will be issues of notice to that Defendant and likely issues implicating comparative negligence, in addition to immunity defenses under S.C. Code Ann. § 15-78-60. Moreover, the liability determination for each Plaintiff and each putative class member will also require a determination of a statute of limitations defense given the brought temporal scope of the class definitions.

B. Petition for Writ of Certiorari

If this Court concludes that there is no mode of trial issue similar to what was presented in *Salmonsens*, and as a result, a direct appeal is not available, the Appellants-Petitioners alternatively submit that these issues are of such significant public interest and importance that they warrant the issuance of a writ of certiorari. The Supreme Court may hear an interlocutory issue in its original jurisdiction when “the public interest is involved, or if special grounds of emergency or other good reasons exist.” Rule 245, SCACR. *See also*, S.C. Const. art. V, § 5 (setting forth that “[t]he Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs”). In *Lafitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009), the Supreme Court recognized that “a writ of certiorari may be issued when exceptional circumstances exist.” 674 S.E.2d at 160. The Court further explained that a writ of certiorari may be issued in “the interests of judicial economy” to address a “novel issue of significant public interest.” 674 S.E.2d at 160-61.

As already addressed above, the description of the two classes using the class definitions adopted by the trial court does not allow for the class members to be identified by objective criteria and indeed would require mini-trials or evidentiary hearings to determine just the class membership. As indicated, each potential class member will need to prove that he/she was a victim of a “sexual battery” and moreover that the sexual battery was nonconsensual before being deemed a member of the class. Neither the trial court nor the parties identified any existing South Carolina case addressing the current scenario where the inclusion of a person in the class requires individualized inquiry. Hence, this scenario is a novel one, for which immediate guidance from the Supreme Court by way of a writ of certiorari is merited. Likewise,

there is no existing appellate authority addressing the propriety of a “fail-safe” class under South Carolina law.

Where there is an absence of governing law on a rule of civil procedure, the Supreme Court directs that courts seek guidance from case law interpreting and applying the equivalent federal rule. In *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 404 S.E.2d 200 (1991), the Supreme Court states: “Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.” 404 S.E.2d at 201.

The federal courts direct that “[a]s a preliminary matter, the court should consider the definition of the class when determining the appropriateness of class certification.” *Cuming v. South Carolina Lottery Commission*, 2008 WL 906705, *1 (D.S.C. 2008). In *EQT Production Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014), the Fourth Circuit recognized that “Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable.” 764 F.3d at 358. The Fourth Circuit has explained that “[a] class cannot be certified unless a court can readily identify the class members in reference to objective criteria.” *Id.* Importantly, “if class members are impossible to identify without extensive and individualized fact-finding or ‘mini-trials,’ then a class action is inappropriate.” *Id.* As the federal district court has further explained, “[t]he proposed class definition must not depend on subjective criteria or the merits of the case or require an extensive factual inquiry to determine who is a class member.” *Cuming*, 2008 WL 906705, *1. “Where the practical issue of identifying class members is overly problematic, the court should consider that the administrative burdens of certification may outweigh the efficiencies expected in a class action.” *Id.*

To reiterate, from a practical standpoint, if the identity of the putative class members cannot be identified without the trial court holding separate mini-trials or individualized evidentiary hearings, then it is impossible to effectuate the “opt-out” notification procedure. Obviously, the class representatives cannot give notice to persons whom they cannot identify. This demonstrates why this issue needs to be addressed at the class notification stage and not after final judgment.

For these reasons, the Appellants-Petitioners request that the Court grant a writ of certiorari to address the following issues which are novel and of significant public importance:

- (1) Does South Carolina law recognize an “ascertainability requirement” under Rule 23, SCRCP?
- (2) Does South Carolina law allow for a class definition that requires the trial court to conduct mini-trials or evidentiary hearings to determine class membership, and if so, are the mini-trials or evidentiary hearings conducted with a jury as the fact finder?
- (3) Are the class definitions as adopted by the trial court proper under South Carolina law and do they allow for the manageability and efficiencies required of a class action?

CONCLUSION

The Appellants-Petitioners South Carolina Department of Corrections and the South Carolina Department of Juvenile Justice respectfully request that this Court accept this appeal as a proper direct appeal. In that case, the Appellants-Petitioners leave it to the Court’s discretion whether to transfer the appeal to the Court of Appeals or to retain jurisdiction under Rule 204, SCACR. Alternatively, if the Court finds that the direct appeal does not impact the mode of trial and the Amended Order Granting Plaintiffs’ Motion to Certify is accordingly not immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2), the Court is nonetheless requested to issue

a writ of certiorari in its original jurisdiction to address the critical issues of public importance raised herein.

Respectfully submitted,

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October 14, 2024

Oct 21 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Heath P. Taylor, Circuit Court Judge

Appellate Case No. 2024-001727
Case No. 2017-CP-18-1125

Calvin Henson, Daniel James Collins, Jason Robinson,
Russell Taylor, and All Those Similarly Situated, ... Respondents,

v.

South Carolina Department of Corrections and the
South Carolina Department of Juvenile Justice, ... Appellants-Petitioners.

MOTION TO DISMISS APPEAL

The Respondents, Calvin Henson, Daniel James Collins, Jason Robinson, Russell Taylor, and All Those Similarly Situated, hereby move to dismiss the Notice of Appeal of the Appellants-Petitioners, South Carolina Department of Corrections (“SCDC”) and the South Carolina Department of Juvenile Justice (“SCDJJ”) dated October 14, 2024. The grounds for this motion are that the class certification order appealed from is interlocutory, not immediately appealable and not ripe for review.

PROCEDURAL HISTORY

On October 14, 2024, Appellants-Petitioners filed a Notice of Appeal from the “Amended Order Granting Plaintiffs’ Motion to Certify dated September 13, 2024”. The Amended Order granted Respondents Motion to Certify Class and granted in part and denied in part Appellants-Petitioners’ Motions to Sever and/or Bifurcate. The Amended Order:

- Denied the Appellants-Petitioners claims of misjoinder under Rule 20, SCRCP,
- Granted Appellants-Petitioners claim to sever the cases pursuant to Rule 21, SCRCP for the purposes of class certification and for trial, and
- Granted the Respondents motion to certify a damages class and an injunctive class against SCDC and separately against SCDJJ.

DISCUSSION

I. The Amended Order is Interlocutory and not immediately appealable

The appeal from the Amended Orders should be dismissed as interlocutory and not immediately appealable. *See Hensley v. S.C. Dep't of Soc. Servs.*, 429 S.C. 144, 148, 838 S.E.2d 510, 512 (2020) (“As the court of appeals correctly recognized, class certification orders are ordinarily not immediately appealable”); *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 449, 661 S.E.2d 81, 85 (2008) (“The general rule established by this Court is that class certification orders are not immediately appealable”); *Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992) (“Orders under Rule 23, SCRCP are interlocutory and thus, immediately appealable only in certain circumstances.”); *see also Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002) (“Usually, an order denying class certification is interlocutory and not immediately appealable.”); *Schein v. Lamar*, 274 S.C. 329, 331, 263 S.E.2d 383, 384 (1980)

(finding issue of class certification sought to be raised on appeal was interlocutory and appeal regarding that issue was dismissed); *Knowles v. Standard Sav. & Loan Ass'n*, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979) (dismissing class certification order as interlocutory on the grounds that “[c]lass certification, essentially procedural in nature, does not involve substantial or essential legal rights which require attention prior to final judgment”).¹

As a result, Appellants-Petitioners’ Notice of Appeal should be dismissed.

II. The Amended Order does not contain appealable issues

Appellants-Petitioners’ Notice of Appeal contain no appealable issues.

A. Injunctive Class Certification

First, injunctive class definition is not being appealed since notice is not required to those absent class members. Because “defendants are legally obligated to comply [with any relief the court orders] ... it is usually unnecessary to define with precision the persons entitled to enforce compliance.” § 3:7. Definiteness not required for class actions certified under 23(b)(2), 1 Newberg and Rubenstein on Class Actions § 3:7 (6th ed.); *In re Monumental Life Ins. Co.*, 365 F.3d 408, 413 (5th Cir. 2004) (“Some courts have stated that a precise class definition is not as critical where certification of a class for injunctive or declaratory relief is sought under rule 23(b)(2).”); *See Battle v. Commonwealth*, 629 F.2d 269, 271 n. 1 (3d Cir.1980) (“Where ... the class action seeks

¹ Our state had the opportunity to include Federal Rule 23(f), Federal Rules of Civil Procedure (FRCP), permitting immediate appeal from an order granting or denying class-action certification, but the drafters of Rule 23, South Carolina Rules of Civil Procedure (SCRCP) intentionally omitted that section from our state rule. *See Littlefield v. S.C. Forestry Comm'n*, 337 S.C. 348, 354–55, 523 S.E.2d 781, 784 (1999). Appellants-Petitioners are attempting to insert right this into our Court system even though it does not exist and the drafters explicitly rejected that option.

only injunctive or declaratory relief, for which the notice provision of Fed.R.Civ.P. 23(c)(2) is not mandatory, the district court has even greater freedom in both the timing and specificity of its class definition”); *Rice v. City of Philadelphia*, 66 F.R.D. 17, 19 (E.D.Pa.1974) (“[T]he precise definition of the [(b)(2)] class is relatively unimportant. If relief is granted to the plaintiff class, the defendants are legally obligated to comply, and it is usually unnecessary to define with precision the persons entitled to enforce compliance....”).

There is no appealable issue regarding the injunctive class that was certified.

B. Mode of Trial Not Affected

Second, the only issue raised to the trial court regarding mode of trial issues was the Appellants-Petitioners argument that all class members must be identified prior to class notification. The trial court does not need to make a judicial determination as to the identify of all class members for notice. Once the trial court ruled that “a class representative has standing, the case is justiciable and the proponent of the class suit need not demonstrate that each class member has standing.” Newberg on Class Actions § 2:3 (5th ed.); *see also Dreher v. Experian Info. Solutions, Inc.*, 856 F.3d 337 (4th Cir. 2017) (“In a class action matter, we analyze standing based on the allegations of personal injury made by the named plaintiff”), *quoting Beck v. McDonald*, 848 F.3d 262, 269-70 (4th Cir. 2017), *in turn citing Doe v. Obama*, 631 F.3d 157, 160 (4th Cir. 2011); *see also Neale v. Volvo Cars of North Am., LLC*, 794 F.3d 353, 362 (3d Cir. 2015); *Kohen v. Pacific Inv. Mgmt. Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009); *Milbourne v. JRK Residential Am., LLC*, 2016 WL 1071564, at *6 (E.D. Va. Mar. 15, 2016) (Payne, J.); *Lewis v. Casey*, 518

U.S. 343, 395 (1996) (Souter, J., concurring).²

Identification of absent class members for class notification does not affect the mode of trial. *Salmonsens* is not instructive in this opt-out damages class case. In that case the South Carolina Supreme Court found the transformation of an opt-out class into an opt-in class affected the mode of trial that created the appealable issue. “This Courts traditional analysis of claims of denial of a mode of trial requires a determination of whether or not a party is erroneously denied a trial by jury in a law case, or is erroneously required to proceed before a jury in an equity case.” *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 453, 661 S.E.2d 81, 87 (2008). The transformation of that class into an opt-in class would bar some of the claims of putative class members and the statute of limitations would bar others which would affect those absent class members’ mode of trial. *Id.* Unlike *Salmonsens*, this damages class is an opt-out class and none of the absent class members claims would be barred following the notification procedure.

Appellants-Petitioners seek appellate review of a potential notice issue that has not been subject to any trial court ruling. Second, class notification for opt-out must be done in a manner sufficient to satisfy Rule 23, SCRCP, and the due process clause of the state and federal constitutions. Identifying the complete composition of the class at certification or prior to class notice is not required.

As a result, Appellants-Petitioners Notice of Appeal should be dismissed.

² If Appellants-Petitioners argument regarding identification of absent class members was mandatory prior to notification, then notice by publication or other forms of mass media would never be found to pass constitutional due process. *See S.C. Pub. Serv. Auth. v. Citizens & S. Nat. Bank of S.C.*, 300 S.C. 142, 158, 386 S.E.2d 775, 785 (1989); *Premium Inv. Corp. v. Green*, 283 S.C. 464, 475, 324 S.E.2d 72, 78–79 (Ct. App. 1984).

CONCLUSION

Appellants-Petitioners appeal is merely an attempt to convert the class action to a massive individual action. The class definition is clear enough to permit absent class members to exercise their discretion to opt-out of the litigation if they choose following class notification. For these reasons stated above, this court should dismiss the Notice of Appeal of the Appellants-Petitioners' dated October 14, 2024.

Respectfully submitted,

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Beaufort, South Carolina
This 21st day of October, 2024

Oct 21 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Heath P. Taylor, Circuit Court Judge

Appellate Case No. 2024-1727
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Calvin Henson, Daniel James Collins, Jason Robinson,
Russell Taylor, and All Those Similarly Situated, ... Respondents,
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South Carolina Department of Corrections and the
South Carolina Department of Juvenile Justice, ... Appellants-Petitioners.

CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), the undersigned employee of Runyan & Platte, LLC., counsel for the Respondents, does hereby certify that service of the **Motion to Dismiss the Notice of Appeal** in the above-captioned matter was made upon all counsel of record by email only this the 21st day of October 2024, as follows:

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Nov 07 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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APPEAL FROM DORCHESTER COUNTY
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Calvin Henson, Daniel James Collins, Jason Robinson,
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South Carolina Department of Corrections and the
South Carolina Department of Juvenile Justice, ... Appellants.

APPELLANTS' RETURN IN OPPOSITION TO
MOTION TO DISMISS APPEAL

The South Carolina Department of Corrections ("SCDC") and the South Carolina Department of Juvenile Justice ("SCDJJ") submit this return in opposition to the Respondents' Motion to Dismiss Appeal.

BACKGROUND

The Respondents Calvin Henson, Daniel James Collins, and Jason Robinson allege that they were SCDC inmates who were sexually assaulted, and the Respondent Russell Taylor alleges that he was sexually assaulted while in the custody of SCDJJ. The Respondents,

individually and as representatives of putative classes, have brought a claim for negligence/gross negligence alleging that SCDC and SCDJJ “fail[ed] properly to implement and enforce their policies and procedures, including but not limited to classification of inmates, monitoring of inmates by employees, allowing gross overcrowding, and by failing to provide appropriate employees and staff at the various locations in Defendants’ facilities which would have prevented the sexual assaults suffered by Plaintiffs.” *See*, Amended Complaint, ¶ 76. The Respondents seek monetary relief for themselves and for all putative class members. The Respondents also seek declaratory and injunctive relief.

LEGAL ANALYSIS

The Respondents request that this Court dismiss the Appellants’ appeal of the Amended Order Granting Plaintiffs’ Motion to Certify because the order does not impact the mode of trial, and as a result, is not immediately appealable. The Appellants strongly disagree.

As stated in the Notice of Appeal, the Appellants submit that the Amended Order Granting Plaintiffs’ Motion to Certify affects the mode of trial and therefore is immediately appealable. South Carolina law is clear that “[o]rders affecting the mode of trial affect a substantial right as defined in section 14-3-330(2) of the South Carolina Code (1976), and must, therefore, be appealed immediately.” *Frampton v. South Carolina Dept. of Transportation*, 406 S.C. 377, 752 S.E.2d 269, 274 (Ct. App. 2013). In fact, “the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue.” *Id.* *See also, Pelfrey v. Bank of Greer*, 270 S.C. 691, 244 S.E.2d 315 (1978) (holding that an order denying a compulsory reference affects the mode of trial and is immediately appealable); *Foggie v. CSX Transportation, Inc.*, 313 S.C. 98, 431 S.E.2d 587, 591 (1993) (“[i]ssues regarding mode of trial must be raised in the trial court at the first opportunity,

and the order of the trial judge is immediately appealable”). Thus, the Appellants will arguably waive their mode of trial-related issues if those are not immediately appealed.

Importantly, in the leading case of *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008), the South Carolina Supreme Court ruled that an order adopting an “opt-in” rather than an “opt-out” notification procedure in a class action affects the mode of trial. The Supreme Court recognized that the “traditional analysis of claims of denial of a mode of trial requires a determination of whether or not a party is erroneously denied a trial by jury in a law case.” 661 S.E.2d at 87. The Supreme Court further explained that “the mode of trial analysis indubitably includes the consideration of the availability of trial” and hence “[t]he question of the denial of an actual trial is intrinsic.” *Id.* The *Salmonsens* Court also reiterated that South Carolina law requires that a litigant seek an immediate appeal on a mode of trial issue, or otherwise the right to appeal is deemed waived. *Id.*

In its Amended Order Granting Plaintiffs’ Motion to Certify, the trial court adopted two class definitions, one for each Defendant. In their current motion, the Respondents argue with no basis that the trial court certified two classes: “a damages class and an injunctive class.” *See*, Motion to Dismiss Appeal, p. 2. Not surprisingly, they fail to cite any such language in the Amended Order. The trial court, in fact, rejected the Respondents’ request to certify a “damages class” and an “injunctive class.” The trial court expressly cited the court’s discretion in “defining the scope of the class” and further explained that it “is not bound by the class definition proposed in the complaint.” *See*, Amended Order, pp. 13-14. The trial court then stated that it “will modify the proposed class definition to fit the procedural posture of the current case.” *See*, Amended Order, p. 14.

With that said, the trial court identified a *single* class against the Defendant SCDC and a

single class against the Defendant SCDJJ. For SCDC, the class definition is “[a]ll individuals that have been under the custody and care of the South Carolina Department of Corrections (“SCDC”) in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery.” *See*, Amended Order, p. 14. Similarly, for SCDJJ, the class definition is “[a]ll individuals that have been under the custody and care of the South Carolina Department of Juvenile Justice (“SCDJJ”) in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery.” *See*, Amended Order, p. 14.

Notably, as to both classes, the trial court adopted class definitions that use the language “who were victims of a nonconsensual sexual battery,” which in turn incorporates the statutory definition of “sexual battery” from S.C. Code Ann. § 16-3-651(h). Critically, before being deemed a member of either class, each putative class member will need to prove both (1) that he/she was a victim of a “sexual battery” based on that statutory definition and (2) that the sexual battery was nonconsensual. In effect, in order to determine whether a particular SCDC inmate or SCDJJ juvenile meets the class definition, the trial court will be required to engage in hundreds of mini-trials or evidentiary hearings. These class definitions consequently raise significant mode of trial issues from the outset.

Although the trial court declined to address procedures for notification of the defined classes in its Amended Order Granting Plaintiffs’ Motion to Certify, it is well established in *Salmonsens* that South Carolina law recognizes only one type of class action in a monetary relief case – a class action with “opt-out” procedures.¹ As the Supreme Court held in *Salmonsens*, “an ‘opt-out’

¹ The Respondents cannot dispute the requirement of an “opt-out” procedure. In addition to being mandated in *Salmonsens*, the Respondents themselves pled in their Amended Complaint that “[e]xcluded from the class are all persons who timely exercise their rights under

notification procedure is the proper method to be offered to putative class members in the instant case and *future class action cases*.” *Salmonsens*, 661 S.E.2d at 91. (Emphasis added). It goes without saying that in order to comply with “opt-out” procedures, the members of the class must be identified before notification of the class can be made. Hence, before class notices are prepared and mailed, the trial court will be required to determine which SCDC inmates and which SCDJJ juveniles meet the class definitions. Only once those class members are identified may notification of the classes even commence.

To the extent that the Respondents try to argue that mode of trial is unaffected, they are actually arguing the merits of the Appellants’ appeal. In fairness and to be procedurally correct, the appealability issue should not be decided in a preliminary motion requiring the Court to make a final decision *on the merits* before the merits are even briefed, subject to oral argument, and decided by the panel of three judges. Yet, that is what the Respondents are asking this Court to do -- prematurely decide the merits. The proper route should be to allow for full briefing and argument, and *only then* does the Court make a ruling on the merits.

Nonetheless, to the extent deemed relevant at this juncture, it should be pointed out that the Respondents are simply wrong on the merits. They assert that “[t]he trial court does not need to make a judicial determination as to the identity of all class members for notice.” *See*, Motion to Dismiss Appeal, p. 4. They cite no South Carolina law for that unsubstantiated and frankly illogical premise. They do not even cite any favorable law from any other jurisdiction. Instead, they attempt to re-characterize the issue as one of “standing” and then provide a string-cite of federal cases addressing standing, which, of course, has nothing to do with the court being able to identify the

South Carolina Rule of Civil Procedure 23 to opt out of the defined Class.” *See*, Amended Complaint, ¶ 70.

putative class members so that they may be given proper notice *and most importantly* the opportunity to “opt-out” as is mandated by South Carolina law per *Salmonsens*. Again, common sense should prevail here – a court cannot give notice of the right to “opt-out” to a putative class member who has not been identified. The rights of the class members are at stake, and it is the court’s duty and function to protect those rights. *See*, Rule 23(d)(2), SCRCP (“The court may at any time impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought”).²

As the Appellants argued in the trial court, the question thus arises as to how the trial court will make a judicial determination as to the class membership. To reiterate, for both the SCDJ and the SCDJJ classes, using the class definitions as adopted, the trial court will need to determine (1) whether each putative class member was a victim of a “sexual battery” using the statutory definition of “sexual battery” from S.C. Code Ann. § 16-3-651(h), and (2) whether any sexual battery as found was nonconsensual. As indicated, both the Plaintiffs and the Defendants have requested a jury trial. Notably, the Supreme Court has held that there is no constitutional or statutory right to a jury trial for a shareholder’s derivative action in *Pelfrey v. Bank of Greer*, 270 S.C. 691, 244 S.E.2d 315 (1978), which is one form of a class action in equity. Yet, the Supreme Court has never ruled definitively whether or not there is a right to a jury trial in a class action brought pursuant to Rule 23, SCRCP, particularly a class action which is an action at law, as is the case at bar, in which monetary relief is sought for each class member. One commentator has discussed the mode of trial

² The Respondents also miss the point (perhaps deliberately) when they write: “this damages class is an opt-out class and none of the absent class members claims would be barred following the notification process.” *See*, Motion to Dismiss Appeal, p. 5. The issue at stake is not the “dismissal” of the claims of class members who do not receive notice, but rather it is each class member’s right to “opt-out,” and it is that right that will be jeopardized if each class member does not receive the class notice with an explanation of the right to “opt-out” which our Supreme Court found in *Salmonsens* to be mandated by South Carolina law.

for a class action under South Carolina precedent as follows:

As for class actions, no clear precedent was found, but two cases offer weak support for a jury trial right. In *Salmonsens v. CGD, Inc.*, the South Carolina Supreme Court rejected opt-in class actions finding an opt-in provision “effectively denies [putative class members] a trial by jury.” In *The Gates at Williams-Brice Condominium Ass’n v. DDC Construction, Inc.*, the South Carolina Court of Appeals reversed the trial court’s denial of defendants’ motion for a nonjury trial based on a waiver in a master deed but did not hold that class actions are never entitled to a jury trial.

Scarlett, *Jury Trial Disparities Between Class Actions and Shareholder Derivative Actions in State Court*, 72 Okla. L. Rev. 283, 331 (2020).

Assuming that the parties are entitled to a jury trial as they all have demanded in their operative pleadings, the mode of trial is significantly intertwined with and implicated by the class definitions adopted by the trial court. The two-part findings that will need to be made by the factfinder to determine class membership are also a significant part of the merits of each putative class member’s cause of action, and those findings will need to be determined before class notification even occurs. As indicated, that determination will need to be made by a jury per the jury trial demand made by all parties. Moreover, before there can be a full hearing on liability – again by a jury – the qualifying class members would need to be notified and given the opportunity to “opt-out” per *Salmonsens*. Thus, in order to provide the jury trial requested by all parties, the jury trial would need to be bifurcated, with the second phase of the trial on liability issues held months later after the “opt-out” period has expired.

To further complicate the process, the same jury will be required to decide whether each SCDC inmate and SCDJJ juvenile meets the class definitions and then later determine liability and, if necessary, damages. As federal courts have recognized, “[t]he right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have jurable issues

determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial) and not reexamined by another finder of fact.” *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 3003 (7th Cir. 1995) (collecting cases). The same would be true under state law. That extended process will create a tremendous burden and hardship of time and inconvenience on that jury (as well as the court), and more significantly, it will also not be reasonably feasible for the jury to hear the evidence relevant to determining whether each putative class member qualifies as a class member and then months later be called upon to determine liability and, if necessary, damages, both of which determinations will rely on or at least be extensions of the fact-finding performed in the “class definition” phase of the trial held months earlier.

In effect, as the foregoing discussion reflects, the class definitions adopted by the trial court create what are commonly referred to as “fail-safe” classes. A fail-safe class is one that “is defined so that whether a person qualifies as a member [of the class] depends on whether the person has a valid claim.” *EQT Production Co. v. Adair*, 764 F.3d 347, 360, n.9 (4th Cir. 2014), citing *Messner v. Northshore University Health Systems*, 669 F.3d 802, 825 (7th Cir. 2012). Fail-safe classes are considered improper for two principal reasons. First, in a fail-safe class, “a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment.” *Messner*, 669 F.3d at 825. Second, fail-safe classes do not comply with Rule 23. As discussed in more detail below, Rule 23 requires that members of a proposed class be readily identifiable, which is a principle called “ascertainability.” See, *EQT*, 764 F.3d at 358 (“Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable”). Under this so-called “ascertainability” requirement, “[a] class cannot be certified unless a court can readily identify the class members in reference to objective criteria.” *Id.* In other words, a class action should not proceed “if class members are impossible

to identify without extensive and individualized fact-finding or mini-trials.” *Id.* Therefore, because a fail-safe class requires a court to engage in individualized fact-finding or mini-trials to identify the members of the class, fail-safe class definitions violate these principles.

In sum, if those fail-safe class definitions are allowed to proceed, there will be a significant impact on issues related to mode of trial – issues which are unavoidable in order to comply with the requirements of an “opt-out” notification process as mandated by the Supreme Court in *Salmonsens*. Therefore, the appeal should be permitted to proceed as a direct appeal.

In addition, in examining these class definitions and the resulting mode of trial issues, the trial court failed to consider or at least address instructive case law from the South Carolina Supreme Court. For instance, the trial court failed to consider the Supreme Court’s latest decision in *Hensley v. South Carolina Dept. of Social Services*, 429 S.C. 144, 838 S.E.2d 510 (2020), in which the Supreme Court explains that “there must be a proper balance between common and individualized issues in order to achieve the efficiencies the class procedure was designed to promote.” 838 S.E.2d at 514. The Supreme Court further speaks of the need for the court “to balance the efficiency to be gained from one trial on common issues versus the difficulty to be suffered by having to conduct individual trials or hearings on issues that are not common.” *Id.* The Supreme Court also cited a well-respected treatise on South Carolina civil procedure for the following:

The commonality requirement [of Rule 23(a), SCRCF] is a condition of class action status, but the existence of common questions alone is not sufficient *[T]he class action must be a better procedural mechanism for resolving the litigation than named joinder or separate litigation.* Under Fed. R. Civ. P. 23(b)(3), this is reflected in the requirement that the common questions predominate over individual issues. Although not specifically required by this Rule, it is inherent in the general conditions for class actions. The Court should first determine the

existence of common questions, and then whether they are sufficient[ly] central to justify the class action.

Id., citing Harry M. Lightsey & James F. Flanagan, *South Carolina Civil Procedure* 199 (1st ed. 1985). (Emphasis added).

As indicated, the reason *Hensley* is so critical here is that, based on the class definitions adopted by the trial court, it will be required to conduct mini-trials or evidentiary hearings *just to determine who qualifies as a class member* and that must occur before the “opt-out” notification procedure can begin. That is not typical of proper class actions where the class membership may be determined by objective criteria which do not require individualized fact-finding. That alone demonstrates why these cases are not appropriate for class certification.³

Similarly, the trial court gave no consideration to the importance and impact of *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003). While the trial court mentions *Gardner*, it never distinguishes *Gardner* nor explains why it is not controlling. In *Gardner*, the Supreme Court explained that “[t]o establish commonality, a party must show that there are questions of law or fact common to the class. In practical terms this means the party must articulate the existence of *significant* common, legal, or factual issues that bind the proposed class together.” 577 S.E.2d at 200. (Emphasis added). Importantly, “[c]ommonality is met only where the class shares a *determinative* issue.” 577 S.E.2d at 200-201. (Emphasis

³ Of note, one of the foremost experts on class actions, Professor Newberg cautions that “[i]n a money-damages class action, common issues must predominate over individual ones so as make a class trial ‘manageable,’ thereby rendering it a superior form of adjudication. If a case is likely to devolve into thousands of individual mini-trials concerning each class member’s damages, that process may threaten the efficiency gains of class treatment and render a class action unhelpful.” 4 *Newberg on Class Actions* § 12:6 (5th ed.). See also, *O’Quinn v. Beach Associates*, 272 S.C. 95, 249 S.E.2d 734, 738 (1978), as cited in *Gardner*, 577 S.E.2d at 201 (“[t]he very purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action”).

added). Relying on federal jurisprudence, the Supreme Court in *Gardner* explained that "questions that are in no way dispositive and which simply propel the action into a posture where judicial scrutiny is necessary for just adjudication are insufficient to establish commonality." 577 S.E.2d at 201. Most importantly, the Supreme Court held that "a representative plaintiff cannot establish commonality if the court must investigate each plaintiff's individual claim." *Id.*⁴

The *Gardner* case is instructive in addressing not only the commonality prong, but in the present case, it is instructive on the propriety and utility of the class definitions as well. In *Gardner*, a proposed plaintiff class of taxpayers sued the Department of Revenue and numerous governmental entities who attempted to use the Setoff Debt Collection Act to recover monies owed by taxpayers from their tax refunds. The Supreme Court reversed the certification of a plaintiff class for a lack of commonality. The Supreme Court found that, in addition to showing that the notice required by statute was deficient, a showing of prejudice was also required and that an individualized examination of each class member's claim was necessary before a class member could prevail. The Supreme Court explained that "[a] representative class cannot exist where the court must investigate each plaintiff's prejudice claim ... Requiring such individualized examination negates the benefits of a class action suit." *Gardner*, 577 S.E.2d at 201.

⁴ The trial court also gave no consideration to the recent decision of the Court of Appeals in *Robinson v. South Carolina Department of Employment and Workforce*, 443 S.C. 63, 902 S.E.2d 41 (Ct. App. 2024). In that case, the Court of Appeals reversed all orders on appeal, including the Circuit Court's orders certifying a class action. The Court of Appeals specifically ruled that "the circuit court erred by finding Claimants were not required to exhaust their administrative remedies." 902 S.E.2d at 50. *Robinson* demonstrates that class certification is not appropriate based upon the need to separately adjudicate the exhaustion of administrative remedies defense which required individualized inquiry and decision-making with respect to each putative class member.

That same level of individualized inquiry, if not a much greater level of such inquiry, is necessary in the present case – particularly just to identify the putative class members. Similar to the individualized issue of prejudice in *Gardner*, the present action turns on the individualized issue of consent, among others. As discussed at length, the putative class members in the case at bar cannot even qualify as a class member until they can show they are a victim of a “nonconsensual sexual battery.” By its very nature, consent – like prejudice – requires individualized inquiry.

In closing, the Court should reject the Respondents’ attempt to re-characterize the nature of the appeal and the appealable issues that affect the mode of trial, as in *Salmonsens*. The Respondents provide a string-cite of cases holding that “class certification orders are *ordinarily* not immediately appealable.” *Hensley*, 838 S.E.2d at 512. (Emphasis added). They choose to ignore the term “ordinarily.” Indeed, South Carolina jurisprudence is clear that a trial court order on class certification *which affects the mode of trial* not only is immediately appealable, but must be immediately appealed or the challenge to mode of trial is waived and cannot be asserted after final judgment.⁵

⁵ The Respondents also appear to suggest that the Appellants -- in filing this appeal -- are relying on Rule 23(f), FRCP, which grants discretionary power to the *federal* courts of appeal to hear an immediate appeal of an order granting or denying class action certification. The Respondents point out that Rule 23(f) has not been adopted in South Carolina. To be clear, the Appellants are not relying on Rule 23(f) of the Federal Rules, nor are the Appellants citing a host of federal cases, unlike what the Respondents have done in their Motion to Dismiss Appeal. Nonetheless, the Appellants are also compelled to point out that the Respondents are misinformed. Rule 23(f) was not even part of the Federal Rule 23 when the South Carolina Rules of Civil Procedure were first adopted in 1985. Rule 23(f) was added to Federal Rule 23 in 1998. Thus, it is incorrect to argue that the original drafters of the State Rule 23 intentionally omitted Rule 23(f) in 1985 because quite simply it did not exist at that time. Moreover, the case of *Littlefield v. South Carolina Forestry Commission*, 337 S.C. 348, 523 S.E.2d 781 (1999), which the Respondents cite as a basis for its position, never addressed Rule 23(f), FRCP. Instead, the Supreme Court referred only to Rule 23(b), FRCP, in writing: “The drafters of Rule

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants urge the Court to find that the order on appeal impacts the mode of trial, as was the case in *Salmonsens*, and a direct appeal should be permitted to proceed. Accordingly, the Respondents' Motion to Dismiss Appeal should be denied, and this appeal should be heard on its merits.

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23, South Carolina Rules of Civil Procedure (SCRCP) intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B), Federal Rules of Civil Procedure (FRCP).” 523 S.E.2d at 784.

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November 7, 2024

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Nov 12 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Heath P. Taylor, Circuit Court Judge

Appellate Case No. 2024-001727
Case No. 2017-CP-18-1125

Calvin Henson, Daniel James Collins, Jason Robinson,
Russell Taylor, and All Those Similarly Situated, ... Respondents,

v.

South Carolina Department of Corrections and the
South Carolina Department of Juvenile Justice, ... Appellants-Petitioners.

REPLY TO MOTION TO DISMISS APPEAL

The Respondents, Calvin Henson, Daniel James Collins, Jason Robinson, Russell Taylor,
and All Those Similarly Situated, submit this Reply in support of their Motion to Dismiss Appeal.

Justice Delayed is Justice Denied.

This is a simple motion to dismiss for the Court of Appeals to grant. Appellants-Petitioners’
(South Carolina Department of Corrections (“SCDC”) and the South Carolina Department of
Juvenile Justice (“SCDJJ”)) response to the motion to dismiss buttresses the propriety of dismissal.

Appellants-Petitioners' Return required twice the number of pages to attempt to explain a strained theory that would justify this aberrant interlocutory appeal. It is clear there are no easily definable boundaries to this attempt to overreach; expanding the term "mode of trial" to cover any possible subject to create an appealable issue.

Appellants-Petitioners reliance on *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008), to support their argument that this Court should accept the appeal is mistaken and in fact provides no basis for interlocutory appellate review. *Salmonsens* involved the changing of an opt-out class to an opt-in class. The South Carolina Supreme Court answered that open question by ruling that an opt-out class was the preferred method of class in South Carolina. The procedural necessity and unanswered questions of law for the state that formed the basis for the Supreme Court to accept that appeal, are not present in the current request.¹ The mode of trial argument in *Salmonsens* focused upon the fact that an opt-in class required absent class members to affirmatively respond to notice to be included in the adjudication of the class and failure to respond would extinguish any ability to adjudicate the rights of absent class members in the class or on their own. The Court found that opt-in procedure was not contemplated by the provisions of Rule 23. What *Salmonsens* did not do was decide that the determination of an opt-out class, like this class, affected the mode of trial issue.

Appellants-Petitioners' series of arguments opposing the certification including the arguments on Class notice procedural issues², whether there was a so called "fail safe" class, if the

¹ If this Court were to determine that this novel argument does justify the interlocutory appeal, then the gate is flung wide open to every decision concerning certification resulting in piecemeal appeals that were rejected when South Carolina did not add 23(f) appeals to the South Carolina Rules of Civil Procedure.

² Appellants-Petitioners argument requiring a certified class direct notice ignores not only the United States Supreme Court, but also the South Carolina Supreme Court's requirement that notice satisfy the due process clause, which includes notice by publication and did not mandate only

trial court sufficient addressed their arguments on *Gardner* or *Hensley* in its order, are all well within the trial court's exercise of discretion in granting of class certification and are not permitted by an interlocutory appeal.

Appellants-Petitioners notice of appeal is merely an attempt to freeze litigation by the interlocutory appeal of the class certification order and an attempt to have this Court, acting without the full record before the trial court, procedurally go where the trial court was unwilling, converting the class action to a massive collection of individual actions. The Appellants-Petitioners return fails to identify any clear boundaries for this proposed avenue of mid-stream appeals. For these reasons stated above and in the motion to dismiss appeal, this court should dismiss the Notice of Appeal of the Appellants-Petitioners' dated October 14, 2024.

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direct notice, *see S.C. Pub. Serv. Auth. v. Citizens & S. Nat. Bank of S.C.*, 300 S.C. 142, 158, 386 S.E.2d 775, 785 (1989); *Premium Inv. Corp. v. Green*, 283 S.C. 464, 475, 324 S.E.2d 72, 78–79 (Ct. App. 1984), and would fundamental re-define the notice provision in Rule 23.

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Beaufort, South Carolina
This 12th day of November 2024

Nov 12 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Heath P. Taylor, Circuit Court Judge

Appellate Case No. 2024-1727
Case No. 2017-CP-18-1125

Calvin Henson, Daniel James Collins, Jason Robinson,
Russell Taylor, and All Those Similarly Situated, ... Respondents,
v.
South Carolina Department of Corrections and the
South Carolina Department of Juvenile Justice, ... Appellants-Petitioners.

CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), the undersigned employee of Runyan & Platte, LLC., counsel for the Respondents, does hereby certify that service of the **Reply in Support of the Motion to Dismiss Appeal** in the above-captioned matter was made upon all counsel of record by email only this the 12th day of November 2024, as follows:

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Jan 21 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Heath P. Taylor, Circuit Court Judge

Appellate Case No. 2024-001727
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Calvin Henson, Daniel James Collins, Jason Robinson,
Russell Taylor, and All Those Similarly Situated, ... Respondents,

v.

South Carolina Department of Corrections and the
South Carolina Department of Juvenile Justice, ... Appellants.

PETITION FOR REHEARING

The Appellants South Carolina Department of Corrections and the South Carolina Department of Juvenile Justice petition the South Carolina Court of Appeals for a rehearing of the Court's January 3, 2025 Order dismissing this appeal as not being immediately appealable.

The grounds for the Appellants' petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Appellants' petition for rehearing is based on the Court's January 3, 2025 Order dismissing this appeal; the supporting memorandum filed herewith; the motion to dismiss appeal briefs; Rule 221(a) and Rule 221(c), SCACR; and other rules of court.

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January 21, 2025

RECEIVED

Jan 21 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Heath P. Taylor, Circuit Court Judge

Appellate Case No. 2024-001727
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Calvin Henson, Daniel James Collins, Jason Robinson,
Russell Taylor, and All Those Similarly Situated, ... Respondents,

v.

South Carolina Department of Corrections and the
South Carolina Department of Juvenile Justice, ... Appellants.

**MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING**

The Appellants South Carolina Department of Corrections and the South Carolina Department of Juvenile Justice have petitioned the South Carolina Court of Appeals for a rehearing of the Court’s January 3, 2025 Order dismissing this appeal as not being immediately appealable. The Appellants respectfully submit that the following points were overlooked or misapprehended by this Court:

In their Notice of Appeal filed October 14, 2024, the Appellants specifically stated that the Amended Order Granting Plaintiffs’ Motion to Certify filed September 13, 2024, “affects the mode of trial and therefore is immediately appealable.” *See*, Notice of Appeal, p. 2. In that Notice of Appeal, the Appellants provided an explanation as to how the Amended Order impacts

the mode of trial. As the Appellants cited to this Court, South Carolina law is clear that “[o]rders affecting the mode of trial affect a substantial right as defined in section 14-3-330(2) of the South Carolina Code (1976), and must, therefore, be appealed immediately.” *Frampton v. South Carolina Dept. of Transportation*, 406 S.C. 377, 752 S.E.2d 269, 274 (Ct. App. 2013). In fact, “the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue.” *Id.* See also, *Pelfrey v. Bank of Greer*, 270 S.C. 691, 244 S.E.2d 315 (1978) (holding that an order denying a compulsory reference affects the mode of trial and is immediately appealable); *Foggie v. CSX Transportation, Inc.*, 313 S.C. 98, 431 S.E.2d 587, 591 (1993) (“[i]ssues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable”). Thus, the Appellants will arguably waive their mode of trial-related issues if those are not immediately appealed.

Despite that background and a detailed explanation as to how the Amended Order impacts the mode of trial and the potential detriment to the Appellants were they not to seek an immediate appeal on issues impacting the mode of trial, this Court issued an Order dismissing the appeal which does not address whether or not the Amended Order impacts the mode of trial. Instead of addressing the mode of trial implications, the Court simply states that “we dismiss the appeal as not immediately appealable.” (Order at 2). That is followed by a string citation that does not address whether or not the Amended Order impacts the mode of trial as the Appellants have raised.

The string citation includes *Hensley v. South Carolina Dept. of Social Services*, 429 S.C. 144, 838 S.E.2d 510 (2020), in which the Supreme Court explained that “class certification orders are *ordinarily* not immediately appealable.” *Hensley*, 838 S.E.2d at 512. (Emphasis added). This use of the term “ordinarily” should not be overlooked. Indeed, South Carolina jurisprudence is clear that a trial court order on class certification *which affects the mode of trial*

not only is immediately appealable, but must be immediately appealed or the challenge to mode of trial is waived and cannot be asserted after final judgment.

The string citation also includes *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008), in which the Supreme Court ruled that an order adopting an “opt-in” rather than an “opt-out” notification procedure in a class action can affect the mode of trial. The Supreme Court recognized that the “traditional analysis of claims of denial of a mode of trial requires a determination of whether or not a party is erroneously denied a trial by jury in a law case.” 661 S.E.2d at 87. The Supreme Court further explained that “the mode of trial analysis indubitably includes the consideration of the availability of trial” and hence “[t]he question of the denial of an actual trial is intrinsic.” *Id.* The *Salmonsens* Court also reiterated that South Carolina law requires that a litigant seek an immediate appeal on a mode of trial issue, or otherwise the right to appeal is deemed waived. *Id.*

Despite including *Hensley* and *Salmonsens* in the string citation, the Court overlooks and fails to address the Appellants’ arguments as to how the Amended Order impacts the mode of trial in this case. Notably, this Court’s Order never states even whether the mode of trial is impacted or not. Instead, it simply dismisses the appeal as “not immediately appealable” because “ordinarily” that is the correct result.

Respectfully, that is not the correct result here. The Appellants continue to believe that the critical issues they raise impact the mode of trial, thereby justifying a direct and immediate appeal at this stage in the litigation. To reiterate, the Appellants have not been advised conclusively by this Court (or the Supreme Court) that the mode of trial is not impacted by their challenge to the class definitions. Thus, the Appellants remain at serious risk of waiving their mode of trial arguments by not taking an immediate appeal and exhausting those appellate rights. The Appellants cannot take those chances in a case of this significance and wide-ranging impact.

As discussed in detail in the Notice of Appeal and in the Appellants' opposition to the Respondents' Motion to Dismiss Appeal, there is a valid and meritorious argument that the mode of trial is impacted by the Amended Order. To recap, in its Amended Order, the trial court identified two classes -- a single class against the Defendant SCDC and a single class against the Defendant SCDJJ. For SCDC, the class definition is "[a]ll individuals that have been under the custody and care of the South Carolina Department of Corrections ("SCDC") in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery." *See*, Amended Order, p. 14. Similarly, for SCDJJ, the class definition is "[a]ll individuals that have been under the custody and care of the South Carolina Department of Juvenile Justice ("SCDJJ") in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery." *See*, Amended Order, p. 14.

Notably, as to both classes, the trial court adopted class definitions that use the language "who were victims of a nonconsensual sexual battery," which in turn incorporates the statutory definition of "sexual battery" from S.C. Code Ann. § 16-3-651(h). Critically, before being deemed a member of either class, each putative class member will need to prove both (1) that he/she was a victim of a "sexual battery" based on that statutory definition and (2) that the sexual battery was nonconsensual. In effect, in order to determine whether a particular SCDC inmate or SCDJJ juvenile meets the class definition, the trial court will be required to engage in hundreds of mini-trials or evidentiary hearings. As the Appellants have explained, these class definitions consequently raise significant mode of trial issues from the outset.

Although the trial court declined to address procedures for notification of the defined classes, the trial court did state definitively that these would be "opt-out" classes, which is no surprise – that procedure is required by our Supreme Court in *Salmonsens*. *See, Salmonsens*, 661 S.E.2d at 9 ("an 'opt-out' notification procedure is the proper method to be offered to putative

class members in the instant case and future class action cases”). The Respondents do not deny that the classes, as certified by the trial court, are opt-out classes.

However, because they are opt-out classes and given the lack of “ascertainability” of the classes as defined by the trial court, the mode of trial is impacted by the Amended Order. As the Appellants have explained, it logically follows that in order to comply with “opt-out” procedures, the members of the class must be identified *before* notification of the class can be made. Thus, the fact that the trial court did not set forth notification procedures does not make this mode of trial argument premature. Regardless of whatever the notification procedures may be, for an opt-out class as required in *Salmonsens*, the trial court will be required to determine which SCDC inmates and which SCDJJ juveniles meet the class definitions. Only once those class members are identified may the notification of the classes even commence.

Importantly, both the Plaintiffs and the Defendants have demanded a jury trial in their operative pleadings. However, the mode of trial is significantly intertwined with and implicated by the class definitions adopted by the trial court. To reiterate, for both the SCDC and the SCDJJ classes, using the class definitions as adopted, the trial court will need to determine (1) whether each putative class member was a victim of a “sexual battery” using the statutory definition of “sexual battery” from S.C. Code Ann. § 16-3-651(h), and (2) whether any sexual battery as found was nonconsensual. The two-part findings that will need to be made by the factfinder to determine *each* class member are also a significant part of the merits of each putative class member’s cause of action, and those findings will need to be determined before class notification even occurs. As the Appellants have explained, that is unprecedented. That determination will need to be made by the jury per the jury trial demand made by all parties. Moreover, before there can be a full hearing on liability – again by the jury – the qualifying class members would need to be notified and given the opportunity to “opt-out” per *Salmonsens*.

Thus, in order to provide the jury trial requested by all parties, the jury trial would need to be bifurcated, with the second phase of the trial on liability issues held months later after the “opt-out” period has expired.

To further complicate the process, the same jury will be required to decide whether each SCDC inmate and SCDJJ juvenile meets the class definitions and then later determine liability and, if necessary, damages. As federal courts have recognized, “[t]he right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have jurable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial) and not reexamined by another finder of fact.” *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 3003 (7th Cir. 1995) (collecting cases). The same would be true under state law. That extended process will create a tremendous burden and hardship of time and inconvenience on that jury (as well as the court), and more significantly, it will also not be reasonably feasible for the jury to hear the evidence relevant to determining whether each putative class member qualifies as a class member and then months later be called upon to determine liability and, if necessary, damages, both of which determinations will rely on or at least be extensions of the fact-finding performed in the “class definition” phase of the trial held months earlier.

Of further significance, as the foregoing discussion reflects, the class definitions adopted by the trial court create what are commonly referred to as “fail-safe” classes. A fail-safe class is one that “is defined so that whether a person qualifies as a member [of the class] depends on whether the person has a valid claim.” *EQT Production Co. v. Adair*, 764 F.3d 347, 360, n.9 (4th Cir. 2014), citing *Messner v. Northshore University Health Systems*, 669 F.3d 802, 825 (7th Cir. 2012). Fail-safe classes are considered improper for two principal reasons. First, in a fail-safe class, “a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment.” *Messner*, 669 F.3d at 825. Second, fail-safe classes do

not comply with Rule 23. As discussed in more detail below, Rule 23 requires that members of a proposed class be readily identifiable, which is a principle called “ascertainability.” *See, EQT*, 764 F.3d at 358 (“Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable”). Under this so-called “ascertainability” requirement, “[a] class cannot be certified unless a court can readily identify the class members in reference to objective criteria.” *Id.* In other words, a class action should not proceed “if class members are impossible to identify without extensive and individualized fact-finding or mini-trials.” *Id.* Therefore, because a fail-safe class requires a court to engage in individualized fact-finding or mini-trials to identify the members of the class, fail-safe class definitions violate these principles.

In sum, if those fail-safe class definitions are allowed to proceed, there will be a significant impact on issues related to mode of trial – issues which are unavoidable in order to comply with the requirements of an “opt-out” class as mandated by the Supreme Court in *Salmonsens* and as already established by the Amended Order. Therefore, the appeal should be permitted to proceed as an immediate appeal.

To further support their position, the Appellants have cited to such seminal Supreme Court cases as *Hensley*, *supra*, and *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003), both of which contain useful analysis regarding the pitfalls of classes which require individualized inquiry and decision-making with respect to each putative class member.¹ *Hensley* and *Gardner* are slightly different from the case at bar in that the determination of class membership in those cases did not require individualized inquiry; only a determination of commonality required individualized inquiry. However, those cases explain

¹ This Court’s recent decision in *Robinson v. South Carolina Department of Employment and Workforce*, 443 S.C. 63, 902 S.E.2d 41 (Ct. App. 2024), is another example where class certification was found not to be appropriate due to the need to separately adjudicate the exhaustion of administrative remedies defense which required individualized inquiry and decision-making with respect to each putative class member.

that individualized inquiry and the need for mini-trials or evidentiary hearings negate the benefits of a class action. *See, Gardner*, 577 S.E.2d at 201 (“[r]equiring such individualized examination negates the benefits of a class action suit”). It certainly is much more problematic – and indeed affects the mode of trial – where as here the individualized inquiry is needed on the front-end to determine whether each putative class member even meets the two-prong definition of the class itself.

Clearly, the same level of individualized inquiry as in *Gardner*, if not a much greater level of such inquiry, is necessary in the present case – particularly just to identify the putative class members. Similar to the individualized issue of prejudice in *Gardner*, the present action turns on the individualized issue of consent, among others. As discussed at length, the putative class members in the case at bar cannot even qualify as a class member until they can show they are a victim of a “nonconsensual sexual battery.” By its very nature, consent – like prejudice – requires individualized inquiry and adjudication.

In sum, there has not been a class certified – certainly not in South Carolina – that requires a jury trial to determine if a putative class member even qualifies as a class member so that notification procedures can take place and ultimately each class member can make an opt-out decision. Yet, that is the posture of this class action given the fact-intensive class definitions adopted by the trial court. Those are indeed fail-safe class definitions which clearly impact the mode of trial for the reasons discussed herein.

Based on the foregoing discussion, the Appellants South Carolina Department of Corrections and the South Carolina Department of Juvenile Justice respectfully request that the Court rehear and reconsider the dismissal of this appeal and allow this appeal to proceed.

Respectfully submitted,

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January 21, 2025

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	Case No.: 2017-CP-18-1125
CALVIN HENSON, DANIEL JAMES	)	
COLLINS, JASON ROBINSON,	)	
RUSSELL TAYLOR and ALL THOSE	)	
SIMILARLY SITUATED,	)	AMENDED ORDER GRANTING
	)	PLAINTIFFS' MOTION
Plaintiffs,	)	TO CERTIFY
	)	
v.	)	
	)	
SOUTH CAROLINA DEPARTMENT	)	
OF CORRECTIONS and the SOUTH	)	
CAROLINA DEPARTMENT OF	)	
JUVENILE JUSTICE	)	
	)	
Defendants.	)	
	)	

This matter is before the Court on the Defendants' Motion to Alter or Amend Order and/or Motion to Reconsider filed June 3, 2024. The subject of the motion is this Court's Order Granting Plaintiffs' Motion to Certify filed May 22, 2024. Plaintiffs Calvin Henson, Daniel James Collins, Jason Robinson, and Russell Taylor, moved to certify a class pursuant to Rule 23(a) of the South Carolina Rule of Civil Procedure and Motions of Defendants South Carolina Department of Corrections ("SCDC") and South Carolina Department of Juvenile Justice ("SCDJJ") to Sever and/or Bifurcate. A hearing on this matter was held January 12, 2024. Prior to the hearing, Plaintiffs filed their Memorandum in Support of Class Certification and Defendants filed their Memorandum in Support of the Motion to Sever and/or Bifurcate. Defendants filed their Memorandum in Opposition to Class Certification after the hearing on January 29, 2024, and Plaintiffs filed a Reply Memorandum in Support of Class Certification on February 10, 2024. After careful consideration and as set forth herein, Plaintiffs' Motion remains **GRANTED** and Defendants Motions are **GRANTED IN PART** and **DENIED IN PART** as amended herein.

The Court will first address the Defendants Motions to Sever and/or Bifurcate, then address the Motion for Class Certification against both SCDC and SCDJJ individually.

DEFENDANTS MOTION TO SEVER AND/OR BIFURCATE

The Defendants previously filed the same motions and were denied by the court in an order issued January 28, 2019. Following the completion of combined discovery, the Defendants refiled their motions to sever and/or bifurcate the Plaintiffs claims misjoinder under Rule 20, SCRCPP and Rule 21, SCRCPP.

Misjoinder under Rule 20, SCRCPP

Defendants argued misjoinder of the Plaintiffs under Rule 20, SCRCPP because each of the Plaintiffs claims will allegedly require individualized findings and any award of damages will need to be determined individually. Defendants' entire argument ignores the role that Rule 23, SCRCPP plays in civil actions such as this one. Rule 23, SCRCPP "does not demand that all questions of law and fact be common, only that there be common issues among the class. In fact, a single common issue will suffice if it is important enough." *McGann v. Mungo*, 287 S.C. 561, 566, 340 S.E.2d 54, 158 (Ct. App. 1986). Defendants' argument that these are separate actions requiring separate proof fails to recognize "the very purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action." *O'Quinn v. Beach Associates*, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (1978).

Plaintiffs have alleged on behalf of a putative class that there are common issues of fact and law arising out of the common fact that they were each sexually assaulted while in the custody of Defendants. In addition, they also allege on their behalf, and on behalf of others who have been sexually assaulted while in the Defendants custody, that these sexual assaults are the product of "the Defendants' failure to implement and enforce their own policies and practices." Defendant's

motion seeks to accomplish the very thing class actions are designed to do: eliminate the need to re-litigate the common issues in a large number of individual cases. “Put simply, it is less expensive and time consuming to process one class action than many individual actions.” Newberg on Class Actions, §1.9 (5th Ed. 2011) at 27. Plaintiffs have carried their burden of showing that this case should be certified as a class action and because of this, the Defendants motion to sever Plaintiffs claims because of misjoinder under Rule 20, SCRCP is denied.

Severance of Defendants under Rule 21, SCRCP

Defendants argued that the claims against the Defendants should be severed pursuant to SCRCP 21.¹ In their complaint, Plaintiffs advance claims against SCDC and SCDJJ through four different Plaintiffs, three Plaintiffs with allegations against SCDC and one Plaintiff with allegations against SCDJJ. No Plaintiff made allegations against both Defendants in the Amended Complaint. Because no Plaintiff has claims against both Defendants, this Court will grant the Defendants request to sever the Defendants for purposes of class certification and trial. For purposes of case management, the parties will continue to utilize the current case number for the time being. The undersigned has very little exposure to this case and lacks knowledge of the intricacies of this case or the breadth and scope of discovery. The undersigned will not be assigned this case for administrative purposes or trial. Questions with regard to the conduct of discovery and manner of trial will more appropriately addressed by the assigned judge who will be in a better position to fully evaluate the positions and needs of the parties. Likewise, mechanisms for notification and “opt-out” would be more appropriately addressed by the assigned judge.

¹ The Defendants additionally argued that the Plaintiffs individual claims should be severed against the Defendants under SCRCP 21. As previously discussed, Plaintiffs’ claims have been brought under SCRCP 23 and have been certified as a class action against each Defendant separately. The Court denies Defendants request to sever the individual Plaintiffs’ case.

PLAINTIFFS MOTIONS FOR CLASS CERTIFICATION

Considering the Court's order severing the claims against two Defendants in this case for class certification and trial, the Court will treat the Plaintiffs' motion for class certification as a Motion for Class Certification by Calvin Henson, Daniel James Collins, Jason Robinson against SCDC and a Motion for Class Certification by Russell Taylor against SCDJJ. The Court will now address the elements of class certification for both Defendants.

STANDARD

"Proponents of class certification bear the burden of proving five prerequisites under South Carolina law." *See Waller v. Seabrook Island Property Owners Assn.*, 300 S.C. 465, 388 S.E.2d 799 (1990); Rule 23(a), SCRCP. The prerequisites are:

1. the class must be "so numerous that joinder of all members is impracticable;"
2. there must be "questions of law or fact common to the class;"
3. the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class;"
4. "the representative parties [must] fairly and adequately protect the interests of the class;" and
5. "the amount in controversy [must] exceed one hundred dollars for each member of the class."

Rule 23(a), SCRCP.

The South Carolina Supreme Court "has expressed the viewpoint that class actions are favored in this state[.]" *Grazia v. South Carolina State Plastering. LLC*, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010).

Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23, South Carolina Rules of Civil Procedure (SCRCP) intentionally omitted from our state rule the additional requirements found in Federal Rule 23(8), Federal Rules of Civil Procedure (FRCP). By omitting the additional requirements,

Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart.

Id. (quoting *Littlefield v. South Carolina Forestry Comm’n*, 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999)). “[T]he class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.” *Id.* (citation omitted).

ANALYSIS

The Amended Complaint filed in this case proposes an injunctive class and a damages class with the following definition of the class seeking certification by the Court:

All individuals that have been under the custody and care of the South Carolina Department of Corrections (“SCDC”) or the South Carolina Department of Juvenile Justice (“SCDJJ”) in South Carolina from 2012 until present who were victims of rape and/or sexual assault.

Amended Complaint, ¶ 70 (Feb. 15, 2023). In determining whether the class may be certified the Court will consider each of the five requirements listed in Rule 23(a), SCRCP.

1. Numerosity

Plaintiffs indicate in their Memorandum in Support of Class Certification that the putative plaintiff class may range from 1,600 to 64,000 inmates for SCDC and 70 to 2,800 residents for SCDJJ. In its Opposition, Defendants do not challenge the potential number of class members asserted, instead arguing that Plaintiffs have failed to identify any additional plaintiffs other than those listed in the caption. On Reply, Plaintiffs provided SCDC’s own statistics regarding self-reported data on sexual assaults between 2012-2022 which establishes SCDC reported 659 non-consensual sexual acts (42 substantiated), 161 reported abusive sexual contacts (10 substantiated), 590 acts of staff sexual misconduct (65 substantiated). SCDJJ reported 255 abusive sexual contacts (54 were substantiated), 34 sexual harassments (7 substantiated), and 69 sexual misconducts

through 2018 (6 substantiated). This Court notes that both the SCDC and SCDJJ reported sexual assaults may be under reported based on information from the reports from the South Carolina General Assembly Legislative Audit Council and the Department of Justice. Joinder of all members of a SCDC class or SCDJJ class this size would clearly be impracticable.

Defendants argue that Plaintiffs have failed to identify other putative plaintiffs since the filing of this case and that failure is evidence that class treatment is not necessary. Defendants also argue that since not all incarcerated individuals would be putative class members and not all inmates would have claims, then class certification is not appropriate. “[I]t is well settled that a plaintiff need not allege the exact number or specific identity of proposed class members.” 1 Newberg and Rubenstein on Class Actions § 3:13 (6th ed.). “How many (if any) of the class members have a valid claim is the issue to be determined *after* the class is certified.” *Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities Inc.*, 747 F.3d 489, 492 (7th Cir. 2014) (quoting *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014)). The Defendants arguments fail to counter the evidence they compiled while self-reporting non-consensual sexual acts over a 10-year period starting in 2012. The court finds these statistics appear to be the minimum of potential putative class members and that the numerosity requirement of Rule 23(a)(1), SCRCF is satisfied.

2. Common Questions of Law or Fact

Rule 23(a)(2), SCRCF, requires that there be common questions of law or fact for the class. This “commonality” requirement looks at “the capacity of a class wide proceeding to generate common answers apt to drive the resolution of the litigation.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011). “This requirement is not onerous.” *Matthews v. Buel, Inc.*, No. CA 7:11-162-TMC, 2012 WL 1825273, at *2 (D.S.C. May 18, 2012).

Not all questions in a case need to be common; rather, the presence of one appropriate common question is sufficient. *Ealy v. Pinkerton Gov't Servs.*, 514 Fed. Appx. 299, 304 (4th Cir. 2013); *see also Gray v. Hearst Communications, Inc.*, 444 Fed. Appx. 698, 702 (4th Cir. 2011) (“determination of whether [defendant] breached its standard distribution obligation will resolve in one stroke an issue that is central to the validity of the class members’ breach of contract claims”). The Rule does not demand all questions of law and fact to be common, only that common issues exist among the class. In fact, a single common issue will suffice if it is important enough. *McGann*, 287 S.C. at 568, 340 S.E.2d 54 at 157-58.

Plaintiffs put forth a substantial list of common questions of law and fact that, they argue, overwhelm any distinctions that could theoretically exist between class members. These include:

- The federal PREA standards for both prisons/jails and juvenile facilities are substantially similar, have been adopted by both Defendants as state standards (“SCDC/SCDJJ standards”) and are applicable to both Defendants.
- All federal PREA standards adopted by both Defendants are applicable to each facility that housed putative class members, the individual facilities did not have different standards.
- Defendant’s individual facilities are not permitted to deviate from the SCDC/SCDJJ standards.
- Did Defendants fail to enforce their policies and procedures which would have prevented the sexual assaults suffered by the Plaintiffs?
- Did Defendants breach their duty of care to Plaintiffs?
- Whether Defendants actions in failing to implement policies were reckless, willful and wanton, and grossly negligent?
- Whether the Defendants failure to classify inmates properly, failure to monitor inmates, allowing gross overcrowding, and failure to provide appropriate employees and staff at the various location of Defendants’ facilities would have prevented the sexual assaults suffered by Plaintiffs?
- Whether Defendants actions were the proximate cause of Plaintiffs physical and emotional injuries, incurred medical expenses, permanent scarring, and permanent impairment and disability?
- Did Defendants fail to fully implement and enforce standards and requirements set forth in their policies and procedures?

- Did Defendants knowingly and intentionally fail to implement and enforce its own policies and practices including:
 - Fail to classify inmates and residents properly?
 - Fail to monitor inmates and residents?
 - Allow gross overcrowding at facilities?
 - Fail to provide appropriate employees and staff at the Defendants' facilities?
 - Fail to implement prescribed security measures?
- Did Defendants' failure to implement and enforce their policies and practices resulted in unsafe conditions for the inmates/residents?
- Were the unsafe conditions for the inmates and residents result in the foreseeable sexual assaults of the putative class members while under the custody and care of the Defendants?

Regardless of the individual circumstances of their sexual assaults, Plaintiffs allege that all inmates find themselves in the same situation where the Defendants affirmatively adopted agency standards to protect the inmates based on the Federal PREA standards, yet Defendants failed to enforce those state standards in their facilities and the class representatives were sexually assaulted while in Defendants custody and care. The Court agrees with the Plaintiffs argument at the class certification stage of the litigation.

Defendants' main argument against class certification in this case is that the claims are based on unique and individualized facts. The one case cited by the Defendants to support their theory that individual facts defeat class certification, *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003), neither supports their argument nor supports their conclusion. In *Gardner*, the South Carolina Supreme Court found that a finding of liability against the defendant required an individual determination of prejudice by the court regarding the notice sent by the defendants before they could seize plaintiff's income tax refunds for delinquent debts owed to state agencies. *Id.* at 14-15. Since a finding on liability required this individual determination, the Supreme Court found the class was not certifiable. *Id.* at 22.

The Court finds that in this case every proposed class member has a similar legal theory against the Defendants and that Defendants actions impacted every proposed class member in a similar manner. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999). Additionally, Defendants do not refute the Affidavit of James Aiken submitted in support of the class certification. Mr. Aiken testified that Defendants' failure to implement these standards directly contributed to the sexual assaults each putative class representative suffered while they were in the custody of the Defendants. Given the common legal theories shared by the putative class members and the finding of a foreseeable injury of the putative class members due to the actions of the Defendant, the Court finds the class satisfies the requirement of common questions of law or fact. *See Temp. Servs., Inc. v. Am. Int'l Grp., Inc.*, No. 3:08-CV-00271-JFA, 2012 WL 13008138, at *2 (D.S.C. July 31, 2012) ("Rule 23(a)(2)'s commonality requirement is met where the defendant engaged in a common course of conduct.")

3. Typicality of Claims or Defenses

The idea of typicality runs closely with the idea of commonality. As the Eastern District Court in Virginia has stated, "[t]he Rule 23(a) requirements of commonality and typicality tend to merge analytically." *In Re Mills Corp. Securities Litigation*, 257 F.R.D. 101, *105 (E.D.Va. 2009). In general, commonality requires that there be "questions of law or fact common to the class," and typicality requires that "the claims or defenses of representative parties are typical of the claims or defenses of the class." *Id.* (citing *In Re BearingPoint, Inc. Sec. Litig.*, 232 F.R.D. 524, 538 (E.D.Va. 2006) (citing *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982))).

"A claim is typical if it arises from the same course of conduct that gives rise to the claims of the class members and if the claims are based on the same legal theories." *Central Wesleyan*

Cent. Wesleyan Coll. v. W.R. Grace & Co., 143 F.R.D. 628, 637 (D.S.C. 1992), *aff'd*, 6 F.3d 177 (4th Cir. 1993). This test does not require that the representatives have identical claims which other class members might present. “The question of typicality [instead] focuses on the similarity of the legal and remedial theories of claims of the named and unnamed plaintiffs.” *Bates v. TencoServices, Inc.*, 132 F.R.D. 160, 163 (D.S.C. 1990); *see also* Flanagan, *South Carolina Civil Procedure* (2d Ed. 1996) at 180 (“the use of the word ‘typical’ suggests that the claims or defenses do not need to be co-extensive, but rather similar to, or shared by most members of the class”). Moreover, “[t]ypicality is generally presumed when common questions exist.” Newberg, *Newberg on Class Actions* at 164 (2d. Ed. 1985). To satisfy the “typicality” requirement, the named plaintiffs claims must be similar enough to those of the class to assure that the class’s interests are vigorously prosecuted. 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 1764 (2d ed. 1986).

The proposed class members’ claims arise as current or former inmates of the Defendants who were sexually assaulted while in the custody and control of the Defendants and suffered injuries from those sexual assaults. There are no conflicts between the Plaintiffs, each Plaintiff’s claim arises from the same standard of care and the breach of that standard of care by the Defendants.

In opposition to certification, Defendants argue that the class cannot satisfy the typicality requirement because of unique defenses applicable to certain putative class members and not others. “To defeat class certification, a defendant must show some degree of likelihood a unique defense will play a significant role at trial. If a court determines an asserted unique defense has no merit, the defense will not preclude class certification.” *Beck v. Maximus, Inc.*, 457 F.3d 291, 300 (3d Cir. 2006) (citing *Hardy v. City Optical Inc.*, 39 F.3d 765, 770 (7th Cir.1994)); *see* 1 Newberg

and Rubenstein on Class Actions § 3:45 (6th ed.). There are certainly cases that clearly articulate unique defenses that may preclude certification, but Defendants have not asserted any unique defense to this court or presented any cases in support of their position. Therefore, the court finds the arguments of the Defendants with regard to typicality do not preclude certification since all claims of the named Plaintiffs are typical of those of the putative class.

4. Adequacy of Representation

Rule 23(a)(4), SCRCF, requires that the representative parties “fairly and adequately protect the interests of the class.” This standard has been described as whether counsel is “qualified, experienced and generally able to conduct the proposed litigation.” *South Carolina National Bank v. Stone*, 139 F.R.D. 325, 329 (D.S.C. 1991).

Encompassed in this rule is the requirement that class counsel’s interests are not in conflict with the interests of members of the class. *Waller*, 300 S.C. at 468, 388 S.E.2d at 801. Defendants contend that not every adult or juvenile inmate will have the same claims, damages, nor will the same defenses be applicable. The Court finds the Defendants have provided “no evidence of adequacy-defeating conflicts of interest, such as differences in the type of relief sought, a theory of law or fact that benefits some class members, but harms others, or a scenario where some class members benefit from the Defendant’s conduct.” *Marcoux v. Szwed*, No. 2:15-CV-093-NT, 2016 WL 5720713, at *3 (D.Me. Oct. 3, 2016); *Menking ex rel. Menking v. Daines*, 287 F.R.D. 174, 180 (S.D.N.Y. 2012); see *Sharp Farms v. Speaks*, 917 F.3d 276, 297 (4th Cir. 2019) (finding a conflict of interest where class representatives were pursuing claims from a common cooperative reserve fund based on a different legal theory from certain class members.)

Defendants do not argue that the named Plaintiffs cannot adequately represent the putative class members in this case. Their arguments center around the claim that the remedies sought are

disparate, individualized, available to individuals without the need of a class, and not every inmate will have the same claims, damages, or the same defenses. Those arguments do not address the adequacy of named plaintiffs to represent the interests of the putative class members under Rule 23(a)(4), SCRCP. The existence of, or differences in, the amount of damages that each class member may recover is not to be considered in determining class certification. *McGann*, 287 S.C. at 569, 340 S.E.2d at 158 (“The mere fact that the plaintiffs may be entitled to different amounts of damages does not prevent them from banding together and asserting their rights jointly in one action.”); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417 (4th Cir. 2003) (affirming the certification of a class of 1400 consumers in the State of South Carolina even with differences in individual damages within the class). This Court finds that the Defendants have provided no arguments why the Plaintiffs cannot adequately represent the interests of the putative classes.

The named Plaintiffs in this case were inmates under the custody and control of the Defendant, just like the other putative class members. Each Defendant created policies and procedures to protect the putative class members from being sexually assaulted while inmates in the Defendant’s facilities. Like the named Plaintiffs, the other putative class members suffered sexual assaults. The Court finds the named Plaintiffs’ fairly and adequately protect the interest of the class since they all alleged they suffered sexual assaults from the failure of the Defendant to implement and enforce their policies and procedures.

The class representatives do not have conflicts with absent class members or with each other. In deciding if the named Class Representatives will adequately represent the interests of the class the court must consider whether the plaintiff “has common interests with the unnamed members of the class” and will “vigorously prosecute the interests of the class.” *See Runion v. U.S. Shelter*, 98 F.R.D. 313, 317 (D.S.C. 1983); *Waller*, 300 S.C. at 468, 388 S.E.2d at 801 (citing

Runion as a decision which “sets forth all criteria to be considered in determining whether a named plaintiff will adequately represent a proposed class.”). The Court finds the plaintiffs have demonstrated fidelity to the class and have prosecuted this case since inception. The class representatives do not have conflicts with absent class members or with each other. The named Plaintiffs interests are aligned with the members of the class they seek to represent, and this Court finds they are adequate representatives of the class.

Defendants have chosen not to challenge the adequacy of class counsel. Plaintiffs’ counsel submitted an affidavit as to their adequacy to prosecute this case on behalf of all class members. There is a wealth of legal experience from lawyers in South Carolina, including significant class action experience. The court is satisfied that counsel for the class is adequate and appropriately experienced with this type of litigation to prosecute this civil action on behalf of the entire class.

Accordingly, the Court finds that Plaintiffs have satisfied the adequacy requirement of Rule 23(a)(4), SCRCF.

5. *Amount in Controversy*

Plaintiffs’ monetary damages for the injuries suffered for being sexually assault while in the Defendants custody and control. The potential damages for each of these sexual assaults exceed the \$100 in controversy amount for members of the class. Defendants also have not challenged that members of the class will have claims in excess of \$100. Additionally, the request for declaratory and injunctive relief do not require an amount in controversy. Therefore, the Court finds the Plaintiffs satisfy the amount in controversy requirement of Rule 23(a)(5) for both classes.

6. *Altering the Class Definition by the Court*

The Court has discretion in ruling on a motion to certify a class. *Waller*, 300 S.C. at 468, 388 S.E.2d at 801. This discretion extends to defining the scope of the class. *Shapiro v. Midwest*

Rubber Reclaiming Co., 626 F.2d 63, 71 (8th Cir. 1980). The “court is not bound by the class definition proposed in the complaint,” *Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir. 1993), and “are permitted to limit or modify class definitions to provide the necessary precision.” *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004). In this case, upon the severing of the cases against the Defendants, the court will modify the proposed class definition to fit the procedural posture of the current case. The court will adopt the following class definition for claims against SCDC:

All individuals that have been under the custody and care of the South Carolina Department of Corrections (“SCDC”) in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery.

The court will adopt the following class definition for claims against SCDJJ:

All individuals that have been under the custody and care of the South Carolina Department of Juvenile Justice (“SCDJJ”) in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery.

Nonconsensual sexual battery² is defined as follows:

Sexual battery means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings another person’s body, except when such intrusion is accomplished medically recognized treatment or diagnostic purposes.

CONCLUSION

Having considered the requirements Defendants motion to sever and/or bifurcate and Plaintiffs motion for class certification under Rule 23(a), SCRCP the Court orders that Defendants motion to sever and/or bifurcate is **granted in part** and **denied in part** and Plaintiffs’ Motion to Certify Class is **granted**.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. Claims against the Defendants will be severed for class certification and trial;

² See, S.C. Code Ann. § 16-3-651 (h) (2015).

2. The action is certified as a class action pursuant to Rule 23, SCRCP, on behalf of the Classes as defined herein;
3. Calvin Henson, Daniel James Collins, Jason Robinson, are appointed Class Representatives for the SCDC classes;
4. Plaintiffs' counsel are appointed class counsel for the SCDC Classes;
5. Russell Taylor is appointed Class Representatives for the SCDJJ classes; and
6. Plaintiffs' counsel are appointed class counsel for the SCDJJ Classes.

AND IT IS SO ORDERED!



Dorchester Common Pleas

Case Caption: Daniel James Collins , plaintiff, et al VS Department Of Corrections
South Carolina , defendant, et al

Case Number: 2017CP1801125

Type: Order/Other

IT IS SO ORDERED.

Heath P. Taylor

Electronically signed on 2024-09-10 13:49:03 page 16 of 16

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	Case No.: 2017-CP-18-1125
CALVIN HENSON, DANIEL JAMES	)	
COLLINS, JASON ROBINSON,	)	
RUSSELL TAYLOR and ALL THOSE	)	
SIMILARLY SITUATED,	)	ORDER GRANTING
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	)	
v.	)	
	)	
SOUTH CAROLINA DEPARTMENT	)	
OF CORRECTIONS and the SOUTH	)	
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	)	
Defendants.	)	

Before the Court is the Motion of Plaintiffs Calvin Henson, Daniel James Collins, Jason Robinson, and Russell Taylor, to certify a class pursuant to Rule 23(a) of the South Carolina Rule of Civil Procedure and Motions of Defendants South Carolina Department of Corrections (“SCDC”) and South Carolina Department of Juvenile Justice (“SCDJJ”) to Sever and/or Bifurcate. A hearing on this matter was held January 12, 2024. Prior to the hearing, Plaintiffs filed their Memorandum in Support of Class Certification and Defendants filed their Memorandum in Support of the Motion to Sever and/or Bifurcate. Defendants filed their Memorandum in Opposition to Class Certification after the hearing on January 29, 2024, and Plaintiffs filed a Reply Memorandum in Support of Class Certification on February 10, 2024. After careful consideration and as set forth herein, Plaintiffs’ Motion is **GRANTED** and Defendants Motions are **GRANTED IN PART** and **DENIED IN PART**.

The Court will first address the Defendants Motions to Sever and/or Bifurcate, then address the Motion for Class Certification against both SCDC and SCDJJ individually.

DEFENDANTS MOTION TO SEVER AND/OR BIFURCATE

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Misjoinder under Rule 20, SCRCPP

Defendants argued misjoinder of the Plaintiffs under Rule 20, SCRCPP because each of the Plaintiffs claims will allegedly require individualized findings and any award of damages will need to be determined individually. Defendants' entire argument ignores the role that Rule 23, SCRCPP plays in civil actions such as this one. Rule 23, SCRCPP "does not demand that all questions of law and fact be common, only that there be common issues among the class. In fact, a single common issue will suffice if it is important enough." *McGann v. Mungo*, 287 S.C. 561, 566, 340 S.E.2d 54, 158 (Ct. App. 1986). Defendants' argument that these are separate actions requiring separate proof fails to recognize "the very purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action." *O'Quinn v. Beach Associates*, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (1978).

Plaintiffs have alleged on behalf of a putative class that there are common issues of fact and law arising out of the common fact that they were each sexually assaulted while in the custody of Defendants. In addition, they also allege on their behalf, and on behalf of others who have been sexually assaulted while in the Defendants custody, that these sexual assaults are the product of "the Defendants' failure to implement and enforce their own policies and practices." Defendant's motion seeks to accomplish the very thing class actions are designed to do: eliminate the need to re-litigate the common issues in a large number of individual cases. "Put simply, it is less expensive

and time consuming to process one class action than many individual actions.” Newberg on Class Actions, §1.9 (5th Ed. 2011) at 27. Plaintiffs have carried their burden of showing that this case should be certified as a class action and because of this, the Defendants motion to sever Plaintiffs claims because of misjoinder under Rule 20, SCRCP is denied.

Severance of Defendants under Rule 21, SCRCP

Defendants argued that the claims against the Defendants should be severed pursuant to SCRCP 21.¹ In their complaint, Plaintiffs advance claims against SCDC and SCDJJ through four different Plaintiffs, three Plaintiffs with allegations against SCDC and one Plaintiff with allegations against SCDJJ. No Plaintiff made allegations against both Defendants in the Amended Complaint. Because no Plaintiff has claims against both Defendants, this Court will grant the Defendants request to sever the Defendants for purposes of class certification and trial. For purposes of case management, the parties will continue to utilize the current case number. In the event of a trial, each Defendant will receive a separate trial pursuant to this order. See, Rules 20(b), 21 and 42(b), SCRCP.

PLAINTIFFS MOTIONS FOR CLASS CERTIFICATION

Considering the Court’s order severing the claims against two Defendants in this case for class certification and trial, the Court will treat the Plaintiffs’ motion for class certification as a Motion for Class Certification by Calvin Henson, Daniel James Collins, Jason Robinson against SCDC and a Motion for Class Certification by Russell Taylor against SCDJJ. The Court will now address the elements of class certification for both Defendants.

¹ The Defendants additionally argued that the Plaintiffs individual claims should be severed against the Defendants under SCRCP 21. As previously discussed, Plaintiffs’ claims have been brought under SCRCP 23 and have been certified as a class action against each Defendant separately. The Court denies Defendants request to sever the individual Plaintiffs’ case.

STANDARD

“Proponents of class certification bear the burden of proving five prerequisites under South Carolina law.” See *Waller v. Seabrook Island Property Owners Assn.*, 300 S.C. 465, 388 S.E.2d 799 (1990); Rule 23(a), SCRCP. The prerequisites are:

1. the class must be “so numerous that joinder of all members is impracticable;”
2. there must be “questions of law or fact common to the class;”
3. the “claims or defenses of the representative parties [must be] typical of the claims or defenses of the class;”
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The South Carolina Supreme Court “has expressed the viewpoint that class actions are favored in this state[.]” *Grazia v. South Carolina State Plastering, LLC*, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010).

Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23, South Carolina Rules of Civil Procedure (SCRCP) intentionally omitted from our state rule the additional requirements found in Federal Rule 23(8), Federal Rules of Civil Procedure (FRCP). By omitting the additional requirements, Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart.

Id. (quoting *Littlefield v. South Carolina Forestry Comm’n*, 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999)). “[T]he class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.” *Id.* (citation omitted).

ANALYSIS

The Amended Complaint filed in this case proposes an injunctive class and a damages class with the following definition of the class seeking certification by the Court:

All individuals that have been under the custody and care of the South Carolina Department of Corrections (“SCDC”) or the South Carolina Department of Juvenile Justice (“SCDJJ”) in South Carolina from 2012 until present who were victims of rape and/or sexual assault.

Amended Complaint, ¶ 70 (Feb. 15, 2023). In determining whether the class may be certified the Court will consider each of the five requirements listed in Rule 23(a), SCRCP.

1. Numerosity

Plaintiffs indicate in their Memorandum in Support of Class Certification that the putative plaintiff class may range from 1,600 to 64,000 inmates for SCDC and 70 to 2,800 residents for SCDJJ. In its Opposition, Defendants do not challenge the potential number of class members asserted, instead arguing that Plaintiffs have failed to identify any additional plaintiffs other than those listed in the caption. On Reply, Plaintiffs provided SCDC’s own statistics regarding self-reported data on sexual assaults between 2012-2022 which establishes SCDC reported 659 non-consensual sexual acts (42 substantiated), 161 reported abusive sexual contacts (10 substantiated), 590 acts of staff sexual misconduct (65 substantiated). SCDJJ reported 255 abusive sexual contacts (54 were substantiated), 34 sexual harassments (7 substantiated), and 69 sexual misconducts through 2018 (6 substantiated). This Court notes that both the SCDC and SCDJJ reported sexual assaults may be under reported based on information from the reports from the South Carolina General Assembly Legislative Audit Council and the Department of Justice. Joinder of all members of a SCDC class or SCDJJ class this size would clearly be impracticable.

Defendants argue that Plaintiffs have failed to identify other putative plaintiffs since the filing of this case and that failure is evidence that class treatment is not necessary. Defendants also argue that since not all incarcerated individuals would be putative class members and not all

inmates would have claims, then class certification is not appropriate. “[I]t is well settled that a plaintiff need not allege the exact number or specific identity of proposed class members.” 1 Newberg and Rubenstein on Class Actions § 3:13 (6th ed.). “How many (if any) of the class members have a valid claim is the issue to be determined *after* the class is certified.” *Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities Inc.*, 747 F.3d 489, 492 (7th Cir. 2014) (quoting *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014)). The Defendants arguments fail to counter the evidence they compiled while self-reporting non-consensual sexual acts over a 10-year period starting in 2012. The court finds these statistics appear to be the minimum of potential putative class members and that the numerosity requirement of Rule 23(a)(1), SCRCF is satisfied.

2. Common Questions of Law or Fact

Rule 23(a)(2), SCRCF, requires that there be common questions of law or fact for the class. This “commonality” requirement looks at “the capacity of a class wide proceeding to generate common answers apt to drive the resolution of the litigation.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011). “This requirement is not onerous.” *Matthews v. Buel, Inc.*, No. CA 7:11-162-TMC, 2012 WL 1825273, at *2 (D.S.C. May 18, 2012). Not all questions in a case need to be common; rather, the presence of one appropriate common question is sufficient. *Ealy v. Pinkerton Gov’t Servs.*, 514 Fed. Appx. 299, 304 (4th Cir. 2013); see also *Gray v. Hearst Communications, Inc.*, 444 Fed. Appx. 698, 702 (4th Cir. 2011) (“determination of whether [defendant] breached its standard distribution obligation will resolve in one stroke an issue that is central to the validity of the class members’ breach of contract claims”). The Rule does not demand all questions of law and fact to be common, only that common

issues exist among the class. In fact, a single common issue will suffice if it is important enough. *McGann*, 287 S.C. at 568, 340 S.E.2d 54 at 157-58.

Plaintiffs put forth a substantial list of common questions of law and fact that, they argue, overwhelm any distinctions that could theoretically exist between class members. These include:

- The federal PREA standards for both prisons/jails and juvenile facilities are substantially similar, have been adopted by both Defendants as state standards (“SCDC/SCDJJ standards”) and are applicable to both Defendants.
- All federal PREA standards adopted by both Defendants are applicable to each facility that housed putative class members, the individual facilities did not have different standards.
- Defendant’s individual facilities are not permitted to deviate from the SCDC/SCDJJ standards.
- Did Defendants fail to enforce their policies and procedures which would have prevented the sexual assaults suffered by the Plaintiffs?
- Did Defendants breach their duty of care to Plaintiffs?
- Whether Defendants actions in failing to implement policies were reckless, willful and wanton, and grossly negligent?
- Whether the Defendants failure to classify inmates properly, failure to monitor inmates, allowing gross overcrowding, and failure to provide appropriate employees and staff at the various location of Defendants’ facilities would have prevented the sexual assaults suffered by Plaintiffs?
- Whether Defendants actions were the proximate cause of Plaintiffs physical and emotional injuries, incurred medical expenses, permanent scarring, and permanent impairment and disability?
- Did Defendants fail to fully implement and enforce standards and requirements set forth in their policies and procedures?
- Did Defendants knowingly and intentionally fail to implement and enforce its own policies and practices including:
 - Fail to classify inmates and residents properly?
 - Fail to monitor inmates and residents?
 - Allow gross overcrowding at facilities?
 - Fail to provide appropriate employees and staff at the Defendants’ facilities?
 - Fail to implement prescribed security measures?
- Did Defendants’ failure to implement and enforce their policies and practices resulted in unsafe conditions for the inmates/residents?

- Were the unsafe conditions for the inmates and residents result in the foreseeable sexual assaults of the putative class members while under the custody and care of the Defendants?

Regardless of the individual circumstances of their sexual assaults, Plaintiffs allege that all inmates find themselves in the same situation where the Defendants affirmatively adopted agency standards to protect the inmates based on the Federal PREA standards, yet Defendants failed to enforce those state standards in their facilities and the class representatives were sexually assaulted while in Defendants custody and care. The Court agrees with the Plaintiffs argument at the class certification stage of the litigation.

Defendants' main argument against class certification in this case is that the claims are based on unique and individualized facts. The one case cited by the Defendants to support their theory that individual facts defeat class certification, *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003), neither supports their argument nor supports their conclusion. In *Gardner*, the South Carolina Supreme Court found that a finding of liability against the defendant required an individual determination of prejudice by the court regarding the notice sent by the defendants before they could seize plaintiff's income tax refunds for delinquent debts owed to state agencies. *Id.* at 14-15. Since a finding on liability required this individual determination, the Supreme Court found the class was not certifiable. *Id.* at 22.

The Court finds that in this case every proposed class member has a similar legal theory against the Defendants and that Defendants actions impacted every proposed class member in a similar manner. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999). Additionally, Defendants do not refute the Affidavit of James Aiken submitted in support of the class certification. Mr. Aiken testified that Defendants' failure to implement these standards directly contributed to the sexual assaults each putative class representative suffered while they

were in the custody of the Defendants. Given the common legal theories shared by the putative class members and the finding of a foreseeable injury of the putative class members due to the actions of the Defendant, the Court finds the class satisfies the requirement of common questions of law or fact. *See Temp. Servs., Inc. v. Am. Int'l Grp., Inc.*, No. 3:08-CV-00271-JFA, 2012 WL 13008138, at *2 (D.S.C. July 31, 2012) (“Rule 23(a)(2)’s commonality requirement is met where the defendant engaged in a common course of conduct.”)

3. Typicality of Claims or Defenses

The idea of typicality runs closely with the idea of commonality. As the Eastern District Court in Virginia has stated, “[t]he Rule 23(a) requirements of commonality and typicality tend to merge analytically.” *In Re Mills Corp. Securities Litigation*, 257 F.R.D. 101, *105 (E.D.Va. 2009). In general, commonality requires that there be “questions of law or fact common to the class,” and typicality requires that “the claims or defenses of representative parties are typical of the claims or defenses of the class.” *Id.* (citing *In Re BearingPoint, Inc. Sec. Litig.*, 232 F.R.D. 524, 538 (E.D.Va. 2006) (citing *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982))).

“A claim is typical if it arises from the same course of conduct that gives rise to the claims of the class members and if the claims are based on the same legal theories.” *Central Wesleyan Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 143 F.R.D. 628, 637 (D.S.C. 1992), *aff’d*, 6 F.3d 177 (4th Cir. 1993). This test does not require that the representatives have identical claims which other class members might present. “The question of typicality [instead] focuses on the similarity of the legal and remedial theories of claims of the named and unnamed plaintiffs.” *Bates v. TencoServices, Inc.*, 132 F.R.D. 160, 163 (D.S.C. 1990); *see also* Flanagan, *South Carolina Civil Procedure* (2d Ed. 1996) at 180 (“the use of the word ‘typical’ suggests that the claims or defenses

do not need to be co-extensive, but rather similar to, or shared by most members of the class”). Moreover, “[t]ypicality is generally presumed when common questions exist.” Newberg, *Newberg on Class Actions* at 164 (2d. Ed. 1985). To satisfy the “typicality” requirement, the named plaintiffs claims must be similar enough to those of the class to assure that the class’s interests are vigorously prosecuted. 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 1764 (2d ed. 1986).

The proposed class members’ claims arise as current or former inmates of the Defendants who were sexually assaulted while in the custody and control of the Defendants and suffered injuries from those sexual assaults. There are no conflicts between the Plaintiffs, each Plaintiff’s claim arises from the same standard of care and the breach of that standard of care by the Defendants.

In opposition to certification, Defendants argue that the class cannot satisfy the typicality requirement because of unique defenses applicable to certain putative class members and not others. “To defeat class certification, a defendant must show some degree of likelihood a unique defense will play a significant role at trial. If a court determines an asserted unique defense has no merit, the defense will not preclude class certification.” *Beck v. Maximus, Inc.*, 457 F.3d 291, 300 (3d Cir. 2006) (citing *Hardy v. City Optical Inc.*, 39 F.3d 765, 770 (7th Cir.1994)); see 1 Newberg and Rubenstein on Class Actions § 3:45 (6th ed.). There are certainly cases that clearly articulate unique defenses that may preclude certification, but Defendants have not asserted any unique defense to this court or presented any cases in support of their position. Therefore, the court finds the arguments of the Defendants with regard to typicality do not preclude certification since all claims of the named Plaintiffs are typical of those of the putative class.

4. Adequacy of Representation

Rule 23(a)(4), SCRCF, requires that the representative parties “fairly and adequately protect the interests of the class.” This standard has been described as whether counsel is “qualified, experienced and generally able to conduct the proposed litigation.” *South Carolina National Bank v. Stone*, 139 F.R.D. 325, 329 (D.S.C. 1991).

Encompassed in this rule is the requirement that class counsel’s interests are not in conflict with the interests of members of the class. *Waller*, 300 S.C. at 468, 388 S.E.2d at 801. Defendant makes the conclusory statement that not every adult or juvenile inmate will have the same claims, damages, nor will the same defenses be applicable, but fail to support that statement with any factual evidence. The Court finds the Defendants have provided “no evidence of adequacy-defeating conflicts of interest, such as differences in the type of relief sought, a theory of law or fact that benefits some class members, but harms others, or a scenario where some class members benefit from the Defendant’s conduct.” *Marcoux v. Szwed*, No. 2:15-CV-093-NT, 2016 WL 5720713, at *3 (D.Me. Oct. 3, 2016); *Menking ex rel. Menking v. Daines*, 287 F.R.D. 174, 180 (S.D.N.Y. 2012); see *Sharp Farms v. Speaks*, 917 F.3d 276, 297 (4th Cir. 2019) (finding a conflict of interest where class representatives were pursuing claims from a common cooperative reserve fund based on a different legal theory from certain class members.)

Defendants do not argue that the named Plaintiffs cannot adequately represent the putative class members in this case. Their arguments center around the claim that the remedies sought are disparate, individualized, available to individuals without the need of a class, and not every inmate will have the same claims, damages, or the same defenses. Those arguments do not address the adequacy of named plaintiffs to represent the interests of the putative class members under Rule 23(a)(4), SCRCF. The existence of, or differences in, the amount of damages that each class member may recover is not to be considered in determining class certification. *McGann*, 287 S.C.

at 569, 340 S.E.2d at 158 (“The mere fact that the plaintiffs may be entitled to different amounts of damages does not prevent them from banding together and asserting their rights jointly in one action.”); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417 (4th Cir. 2003) (affirming the certification of a class of 1400 consumers in the State of South Carolina even with differences in individual damages within the class). This Court finds that the Defendants have provided no arguments why the Plaintiffs cannot adequately represent the interests of the putative classes.

The named Plaintiffs in this case were inmates under the custody and control of the Defendant, just like the other putative class members. Each Defendant created policies and procedures to protect the putative class members from being sexually assaulted while inmates in the Defendant’s facilities. Like the named Plaintiffs, the other putative class members suffered sexual assaults. The Court finds the named Plaintiffs’ fairly and adequately protect the interest of the class since they all alleged they suffered sexual assaults from the failure of the Defendant to implement and enforce their policies and procedures.

The class representatives do not have conflicts with absent class members or with each other. In deciding if the named Class Representatives will adequately represent the interests of the class the court must consider whether the plaintiff “has common interests with the unnamed members of the class” and will “vigorously prosecute the interests of the class.” *See Runion v. U.S. Shelter*, 98 F.R.D. 313, 317 (D.S.C. 1983); *Waller*, 300 S.C. at 468, 388 S.E.2d at 801 (citing *Runion* as a decision which “sets forth all criteria to be considered in determining whether a named plaintiff will adequately represent a proposed class.”). The Court finds the plaintiffs have demonstrated fidelity to the class and have prosecuted this case since inception. The class representatives do not have conflicts with absent class members or with each other. The named

Plaintiffs interests are aligned with the members of the class they seek to represent, and this Court finds they are adequate representatives of the class.

Defendants have chosen not to challenge the adequacy of class counsel. Plaintiffs' counsel submitted an affidavit as to their adequacy to prosecute this case on behalf of all class members. There is a wealth of legal experience from lawyers in South Carolina, including significant class action experience. The court is satisfied that counsel for the class is adequate and appropriately experienced with this type of litigation to prosecute this civil action on behalf of the entire class.

Accordingly, the Court finds that Plaintiffs have satisfied the adequacy requirement of Rule 23(a)(4), SCRCP.

5. *Amount in Controversy*

Plaintiffs' monetary damages for the injuries suffered for being sexually assault while in the Defendants custody and control. The potential damages for each of these sexual assaults exceed the \$100 in controversy amount for members of the class. Defendants also have not challenged that members of the class will have claims in excess of \$100. Additionally, the request for declaratory and injunctive relief do not require an amount in controversy. Therefore, the Court finds the Plaintiffs satisfy the amount in controversy requirement of Rule 23(a)(5) for both classes.

6. *Altering the Class Definition by the Court*

The Court has discretion in ruling on a motion to certify a class. *Waller*, 300 S.C. at 468, 388 S.E.2d at 801. This discretion extends to defining the scope of the class. *Shapiro v. Midwest Rubber Reclaiming Co.*, 626 F.2d 63, 71 (8th Cir. 1980). The "court is not bound by the class definition proposed in the complaint," *Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir. 1993), and "are permitted to limit or modify class definitions to provide the necessary precision." *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004). In this case, upon the severing of the

cases against the Defendants, the court will modify the proposed class definition to fit the procedural posture of the current case. The court will adopt the following class definition for claims against SCDC:

All individuals that have been under the custody and care of the South Carolina Department of Corrections (“SCDC”) in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery.

The court will adopt the following class definition for claims against SCDJJ:

All individuals that have been under the custody and care of the South Carolina Department of Juvenile Justice (“SCDJJ”) in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery.

Nonconsensual sexual battery² is defined as follows:

Sexual battery means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings another person’s body, except when such intrusion is accomplished medically recognized treatment or diagnostic purposes.

CONCLUSION

Having considered the requirements Defendants motion to sever and/or bifurcate and Plaintiffs motion for class certification under Rule 23(a), SCRCP the Court orders that Defendants motion to sever and/or bifurcate is **granted in part** and **denied in part** and Plaintiffs’ Motion to Certify Class is **granted**.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. Claims against the Defendants will be severed for class certification and trial;
2. The action is certified as a class action pursuant to Rule 23, SCRCP, on behalf of the Classes as defined herein;
3. Calvin Henson, Daniel James Collins, Jason Robinson, are appointed Class Representatives for the SCDC classes;
4. Plaintiffs’ counsel are appointed class counsel for the SCDC Classes;

² See, S.C. Code Ann. § 16-3-651 (h) (2015).

5. Russell Taylor is appointed Class Representatives for the SCDJJ classes; and
6. Plaintiffs' counsel are appointed class counsel for the SCDJJ Classes.

AND IT IS SO ORDERED!



Dorchester Common Pleas

Case Caption: Daniel James Collins , plaintiff, et al VS Department Of Corrections
South Carolina , defendant, et al

Case Number: 2017CP1801125

Type: Order/Class Certification

IT IS SO ORDERED.

Heath P. Taylor

Electronically signed on 2024-05-21 15:21:17 page 16 of 16

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
Calvin Henson, Daniel James Collins,	)	
Jason Robinson, Russell Taylor, and	)	Civil Action No. 2017-CP-18-1125
All Those Similarly Situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	NOTICE OF MOTION AND
	)	MOTION TO ALTER OR AMEND
South Carolina Department of Corrections	)	ORDER AND/OR MOTION TO
and the South Carolina Department	)	RECONSIDER
of Juvenile Justice,	)	
	)	
Defendants.	)	
_____	)	

TO: THE HONORABLE HEATH P. TAYLOR

ANDREW W. KUNZ, C. CARTER ELLIOTT, JR., LAUREN K. SLOCUM,
C. ALAN RUNYAN, ANDREW S. PLATTE, AND ARNOLD S. GOODSTEIN,
COUNSEL FOR PLAINTIFFS

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for the Defendants South Carolina Department of Corrections (“SCDC”) and South Carolina Department of Juvenile Justice (“SCDJJ”) will move before the Honorable Heath P. Taylor at such time and place as may be set by the Court, for an Order, pursuant to Rule 59(e), SCRCP, altering, amending, and reconsidering the Order Granting Plaintiffs’ Motion to Certify filed May 22, 2024. The Defendants’ counsel received written notice of entry of the Order on that same date.

The Defendants’ motion is based upon the following grounds:

1. On page 3 of the Order Granting Plaintiffs’ Motion to Certify, the Court grants the Defendants’ motions to sever under Rule 21, SCRCP, “for purposes of class certification and trial.”

However, in the same section of that Order titled “Severance of Defendants under Rule 21, SCRCP,” the Court then states the following: “For purposes of case management, the parties will continue to utilize the current case number. In the event of a trial, each Defendant will receive a separate trial pursuant to this order.” *See*, Order, p. 3. The Court then cites to Rule 42(b) and Rule 20(b), SCRCP, which allow for a separate trial under differing circumstances.

The Defendants respectfully request that the Court reconsider and amend this portion of the Order. There is a distinct difference between severance and separate trials. The Court is correct in ordering that the claims against SCDC and SCDJJ be severed under Rule 21, SCRCP; however, that severance should be complete and should not consist solely of the granting of separate trials. For reasons discussed below, this class action will be difficult (if not impossible) to manage; however, there is no logical reason to manage these cases under one civil action number with what will be consolidated discovery. In essence, the Court has merged the concepts of severance and separate trials, although they are distinct concepts and provide for different procedural mechanisms. In addition, the merger of the cases against SCDC and SCDJJ will result in judicial inefficiency, increased costs of defense for both SCDC and SCDJJ which will be required to engage in discovery that is not directed at claims against those parties, and is clearly contrary to Rule 20(a), SCRCP, which mandates that each plaintiff must have a claim against each defendant in order to proceed. In this case, based on the current pleadings, it is obvious that each plaintiff or putative class member has a claim against SCDC or SCDJJ, **but not against both Defendants**, which results in the misjoinder that the severance was intended to correct. *See*, Rule 20(a), SCRCP; *Valentine v. Davis*, 319 S.C. 169, 460 S.E.2d 218 (Ct. App. 1995); *Ellis v. Oliver*, 307

S.C. 365, 415 S.E.2d 400 (1992).¹ That was obviously acknowledged by the Court in granting the severance in the first place; however, by keeping these separate, severed cases together for adjudication under one civil action number and consolidated discovery, the Court defeats the purpose of severance and does not correct the improper joinder. For all practical purposes, the Court has denied severance (except in name alone) and has granted only separate trials. The Court is respectfully requested to reconsider that decision.

2. In its Order Granting Plaintiffs' Motion to Certify, the Court has not addressed the notification procedures per Rule 23(d), SCRCP, and the process to be implemented for putative class members to "opt out." *See, Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81, 91 (2008) (South Carolina Supreme Court held that "an 'opt-out' notification procedure is the proper method to be offered to putative class members in the instant case and future class action cases"). Those notification procedures are integrally connected to whether these cases are appropriate for class certification. As *Salmonsens* dictates, the "opt-out" notification procedure is mandatory under

¹ Under Rule 20(a), SCRCP, a party may join or be joined if he asserts or there is asserted against him "any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." Rule 20(a), SCRCP. As to joining parties as defendants, Rule 20(a) states: "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action." Rule 20(a), SCRCP. This case does not satisfy Rule 20(a). In many respects, this case is similar to *Valentine v. Davis*, 319 S.C. 169, 460 S.E.2d 218 (Ct. App. 1995), where the Court of Appeals found misjoinder under Rule 20(a) because the allegations asserted by the separate groups of plaintiffs "do not arise out of the same transaction or series of transactions or occurrences," and "[i]n fact, the only connection between the claims is that the Valentines, Slother, and the Williams are represented by the same attorney and they all assert different personal claims against the Davis group." 460 S.E.2d at 220. Similarly, in *Ellis v. Oliver*, 307 S.C. 365, 415 S.E.2d 400 (1992), the Supreme Court recognized that the existence of a "common question of law or fact" is not sufficient because "joinder requires the additional requirement that the claims must arise out of the same transaction or occurrence." 415 S.E.2d at 401.

South Carolina law, particularly in cases, such as this one, where the Plaintiffs and putative class members are seeking awards of monetary relief. The Court is respectfully requested to address the notification procedure and to include an opt-out requirement.

3. As a corollary to the previous point, in its Order, the Court quotes the *Newberg* treatise as stating that “it is well settled that a plaintiff need not allege the exact number or specific identity of proposed class members.” *See*, Order, p. 6. That is not consistent with South Carolina law as articulated in *Salmonsens*, which mandates the use of an “opt-out” notification procedure. From a practical standpoint, if the identity of the putative class members cannot be identified, then it is impossible to effectuate the “opt-out” notification procedure. Obviously, the class representatives cannot give notice to persons whom they cannot identify.

This also demonstrates the problem with the class definition since the class members will need to be identified *before the “opt-out” notification procedure can take place*, and that cannot be done without the Court holding separate mini-trials or individualized evidentiary hearings just to determine who the class members are. In its Order, the Court has adopted class definitions that uses the language “who were victims of a nonconsensual sexual battery,” which in turn incorporates the statutory definition of “sexual battery” from S.C. Code Ann. § 16-3-651(h). Therefore, whether a particular SCDC inmate or SCDJJ juvenile meets the class definition, the Court will be required to engage in hundreds of mini-trials or evidentiary hearings. Each potential class member will need to prove that he/she was a victim of a “sexual battery” and, moreover, that the sexual battery was nonconsensual before being deemed a member of the class. The Court has not identified any South Carolina case where the inclusion of a person in the class required individualized inquiry.

However, the Court has clearly overlooked dispositive case law from the South Carolina Supreme Court. For instance, the Court failed to consider or even cite to the Supreme Court's latest decision in *Hensley v. South Carolina Dept. of Social Services*, 429 S.C. 144, 838 S.E.2d 510 (2020), in which the Supreme Court explains that "there must be a proper balance between common and individualized issues in order to achieve the efficiencies the class procedure was designed to promote." 838 S.E.2d at 514. The Supreme Court further speaks of the need for the court "to balance the efficiency to be gained from one trial on common issues versus the difficulty to be suffered by having to conduct individual trials or hearings on issues that are not common." *Id.* As indicated, the reason *Hensley* is so critical here is that this Court will be required to conduct individual trials or evidentiary hearings *just to determine who qualifies as a class member* and that must occur before the "opt-out" notification procedure can begin. That is not typical of proper class actions where the class membership is certain and does not require individualized fact-finding. That alone demonstrates why these cases are not appropriate for class certification.

Moreover, there is a mode of trial question that arises as well based on the class definitions as adopted in the Order Granting Plaintiffs' Motion to Certify. In their Amended Complaint, the Plaintiff made a jury trial demand. Both Defendants have also made a jury trial demand. As previously stated, in order to determine whether a Plaintiff or putative class member qualifies as a class member, the Court will need to conduct individualized hearings or mini-trials to determine whether he/she was a victim of a "sexual battery" per the statutory definition and that the sexual battery was nonconsensual. Therefore, at least a portion of the merits of each Plaintiff's or putative class member's cause of action will need to be determined before class notification occurs. Under these unusual circumstances, that determination will need to be made by a jury even though class membership is normally determined by the court. Moreover, before there can be a full hearing on

liability – again by a jury – the qualifying class members would need to be notified and given the opportunity to opt-out per *Salmonsens*. Thus, in order to provide the jury trial requested by all parties, the jury trial would need to be bifurcated, with the second phase of the trial held months later after the “opt-out” period has expired. In short, this presents mode of trial issues to be considered by the Court, which further demonstrates that these cases are not manageable nor appropriate as class actions.

For each of these reasons, the Court is respectfully requested to consider and address these critical issues, including the importance and impact of the *Hensley* decision.

4. The Court has also overlooked the importance and impact of *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003). While the Court mentions *Gardner* (Order, p. 8), the Court never distinguishes *Gardner* nor explains why it is not controlling. In *Gardner*, the Supreme Court explained that “[t]o establish commonality, a party must show that there are questions of law or fact common to the class. In practical terms this means the party must articulate the existence of *significant* common, legal, or factual issues that bind the proposed class together.” 577 S.E.2d at 200. (Emphasis added). Importantly, “[c]ommonality is met only where the class shares a *determinative* issue.” 577 S.E.2d at 200-201. (Emphasis added). Relying on federal jurisprudence, the Supreme Court in *Gardner* explained that “questions that are in no way dispositive and which simply propel the action into a posture where judicial scrutiny is necessary for just adjudication are insufficient to establish commonality.” 577 S.E.2d at 201. Most importantly, the Supreme Court held that “a representative plaintiff cannot establish commonality if the court must investigate each plaintiff’s individual claim.” *Id.*

Further expounding on its earlier holdings, in *Hensley, supra*, the Supreme Court addressed the commonality requirement and explained that “there must be a proper balance between common

and individualized issues in order to achieve the efficiencies the class procedure was designed to promote.” 838 S.E.2d at 514. The Supreme Court further speaks of the need for the court “to balance the efficiency to be gained from one trial on common issues versus the difficulty to be suffered by having to conduct individual trials or hearings on issues that are not common.” *Id.* The Supreme Court also cited a well-respected treatise on South Carolina civil procedure for the following:

The commonality requirement [of Rule 23(a), SCRCPP] is a condition of class action status, but the existence of common questions alone is not sufficient ***[T]he class action must be a better procedural mechanism for resolving the litigation than named joinder or separate litigation.*** Under Fed. R. Civ. P. 23(b)(3), this is reflected in the requirement that the common questions predominate over individual issues. Although not specifically required by this Rule, it is inherent in the general conditions for class actions. The Court should first determine the existence of common questions, and then whether they are sufficient[ly] central to justify the class action.

Id., citing Harry M. Lightsey & James F. Flanagan, *South Carolina Civil Procedure* 199 (1st ed. 1985). (Emphasis added).

Of note, one of the foremost experts on class actions, Professor Newberg cautions that “[i]n a money-damages class action, common issues must predominate over individual ones so as make a class trial ‘manageable,’ thereby rendering it a superior form of adjudication. If a case is likely to devolve into thousands of individual mini-trials concerning each class member's damages, that process may threaten the efficiency gains of class treatment and render a class action unhelpful.” 4 *Newberg on Class Actions* § 12:6 (5th ed.). See also, *O’Quinn v. Beach Associates*, 272 S.C. 95, 249 S.E.2d 734, 738 (1978), as cited in *Gardner*, 577 S.E.2d at 201 (“[t]he very purpose of a class

action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action”).²

In properly evaluating a proposed class action for commonality, the *Gardner* case is very instructive and deserving of additional consideration by this Court. In that case, a proposed plaintiff class of taxpayers sued the Department of Revenue and numerous governmental entities who attempted to use the Setoff Debt Collection Act to recover monies owed by taxpayers from their tax refunds. The Supreme Court reversed the certification of a plaintiff class for a lack of commonality. The Supreme Court found that, in addition to showing that the notice required by statute was deficient, a showing of prejudice was also required and that an individualized examination of each class member's claim was necessary before a class member could prevail. The Supreme Court explained that “[a] representative class cannot exist where the court must investigate each plaintiff's prejudice claim ... Requiring such individualized examination negates the benefits of a class action suit.” *Gardner*, 577 S.E.2d at 201.

That same level of individualized inquiry, if not a much greater level of such inquiry, is necessary in the present case. In addition to requiring individualized inquiry just to determine if a putative class member meets the class definition, as discussed above, a determination on the merits of each Plaintiff's and putative class member's liability claims will require a jury to determine the

² The Court is also urged to consider the recent decision of the Court of Appeals in *Patterson v. South Carolina Department of Employment and Workforce*, Op. No. 6055 (S.C. Ct. App. filed April 3, 2024). In that case, the Court of Appeals reversed all orders on appeal, including the Circuit Court's orders certifying a class action. The Court of Appeals specifically ruled that “the circuit court erred by finding Claimants were not required to exhaust their administrative remedies.” (Slip Op. at 13). *Patterson* demonstrates that class certification was not appropriate based upon the need to separately adjudicate the exhaustion of administrative remedies defense which required individualized inquiry and decision-making with respect to each putative class member. *Patterson*, which is not mentioned in the Order Granting Plaintiffs' Motion to Certify, supports the Defendants' position that these cases are not appropriate for class certification.

facts and circumstances of each claim of a “nonconsensual sexual battery,” as well as the conduct of the Defendants and particularly whether the Defendants’ conduct rises to the level of gross negligence. *See*, S.C. Code Ann. § 15-78-60(25) (governmental entities are entitled to sovereign immunity for acts of simple or ordinary negligence). Moreover, for each Defendant, there will be issues of notice to that Defendant and likely issues implicating comparative negligence, in addition to immunity defenses under S.C. Code Ann. § 15-78-60. Moreover, as discussed below, the liability determination for each Plaintiff and each putative class member will also require a determination of a statute of limitations defense given the temporal scope of the class definitions. The Court is thus respectfully requested to give consideration to the *Gardner* decision and that the individualized inquiries needed to fully adjudicate the claims of the Plaintiffs and putative class members weigh against the certification of a class action.

5. There are additional issues with the class definitions that the Court is requested to address on reconsideration. Both of the class definitions, as established by the Court, have a temporal scope of “from 2012 until present.” That presents three issues for reconsideration.

First, the term “present” is undefined and hence ambiguous. By using the term “present,” it is unclear whether the “present” is the date of filing of the Complaint, the date of the filing of the Order Granting Plaintiffs’ Motion to Certify (which is May 22, 2024), some other date that has passed, or some future date. This is critical to the ability to manage the class, and more importantly, to the ability of the parties to conduct meaningful and complete discovery. If the class membership is constantly changing, particularly in a case where monetary relief is sought for each putative class member, that will significantly impact the class notification process and the ability for the Defendants to conduct individualized discovery as to each “nonconsensual sexual battery” as alleged by the putative class members.

Second, the use of the temporal term “from 2012 until present” is ambiguous. It is unclear whether that phrase is modifying when the putative class members have been in the custody of either SCDC or SCDJJ, or whether the phrase is modifying the date of any alleged “nonconsensual sexual battery” that occurred at an SCDC or SCDJJ facility. Presumably, the Court intended the latter, but that is not clear from the placement of the phrase before and not after the language “who were victims of a nonconsensual sexual battery.”

Third, if the Court intended for the temporal term “from 2012 until present” to apply to the date of any alleged “nonconsensual sexual battery,” the Court does not take into account the applicable two-year statute of limitations under the South Carolina Tort Claims Act. *See*, S.C. Code Ann. § 15-78-110. The Complaint was filed on July 3, 2017, and as a result, all incidents of a “nonconsensual sexual battery” that occurred before July 3, 2015, would be time-barred unless an exception under S.C. Code Ann. § 15-3-40 applies (which would require an individualized inquiry). By expanding the temporal scope of the class to including January 1, 2012 through July 2, 2015, the Court is expanding the class and unnecessarily requiring the need for individualized inquiry, which should be avoided per the *Gardner* decision. This issue was raised to the Court but has not been addressed in the Order Granting Plaintiffs’ Motion to Certify.

6. In its Order Granting Plaintiffs’ Motion to Certify, the Court writes: “Defendant makes the conclusory statement that not every adult or juvenile inmate will have the same claims, damages, nor will the same defenses be applicable, but fail to support that statement with any factual evidence.” *See*, Order, p. 11. While the Court found that the Defendants’ arguments are “conclusory,” the Court respectively employs a double standard because all of the Plaintiffs’ arguments in support of class certification are equally conclusory. The Plaintiffs have not presented anything more than allegations. It is, nonetheless, unclear why the Court rejects the

Defendants' arguments as "conclusory" when the Court clearly cannot consider the merits of any claims or defenses at this stage. *See Tilley v. Pacesetter*, 333 S.C. 33, 508 S.E.2d 16, 21 (1998) ("A court may not look to the merits when determining whether to certify a class"). On pages 10 and 11, the Order cites federal case law that is at complete odds with binding South Carolina law on this very point. The Order, in fact, states that the Defendants must show "some degree of likelihood that a unique defense will play a significant role at trial" and "if a court determines an asserted unique defense *has no merit*, the defense will not preclude class certification." *See*, Order, p. 10. (Emphasis added). Respectfully, that citation is counter to South Carolina law. In sum, at this stage of the litigation, the Defendants are allowed to point out to the Court why the use of a class action is not efficient or manageable given the need for individualized trials or evidentiary hearings consistent with the admonitions by the Supreme Court in *Hensley*. Those arguments should not be rejected out of hand as "conclusory."

The Defendants' motion is based upon the pleadings filed in this case; Order Granting Plaintiffs' Motion to Certify filed May 22, 2024; the April 10, 2024 email from Defendants' counsel to Judge Heath P. Taylor addressing the proposed order submitted by Plaintiffs (copy attached); the rules of court; and such other matters as may be properly presented to the Court at the time of the hearing.

s/ G. Wade Cooper

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G. WADE COOPER #69692

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*Counsel for Defendant South Carolina
Department of Juvenile Justice*

June 3, 2024

Oral Argument Requested

Wade C

From: Wade C
Sent: Wednesday, April 10, 2024 4:35 PM
To: 'Taylor, Heath P. Law Clerk (Caroline Clark)'; Taylor, Heath P. Secretary (Catherine C. Wilson)
Cc: Hugh W. Buyck; Kristi Parker; Dave DeMasters; Lauren Knight; Andrew Kunz; agoodstein@goodsteinfirm.com; Alan Runyan; Janice Swofford; Andrew Platte
Subject: RE: 2017-CP-18-01125; Henson, et al v. SCDC, DJJ -Defendants' response and objections to proposed Order certifying class action

Your Honor,

Thank you for allowing Defendants time to review, comment and formally object to the proposed Order Certifying Class in this matter. While I regret the length of this email, it is due to the breadth of issues, questions, and concerns raised by Plaintiffs' proposed Order. If you would prefer we also file these comments and objections in a more formal matter, I will be happy to prepare the same on the case caption and do so. As you will recall, Hugh Buyck and I are representing Defendant SCDC and Dave DeMasters represents SCDJJ. I've spoken with Mr. DeMasters about the proposed Order and we agree on the following points and concerns we feel compelled to bring to the Court's attention.

First, a few practical and procedural points. While the Order reflects the Court's ruling that the two cases should be severed between the two Defendants, it is silent as to how this will be done. As it stands, the Order gives no guidance whatsoever to either the Clerk of Court or the Parties as to the procedural severance of the cases against SCDC and DJJ. Will the Plaintiffs be required to file new lawsuits, with the adult Plaintiffs vs. SCDC and the minor Plaintiff vs. DJJ? Will the Clerk assign new civil action numbers to one or both severed cases? Which causes of action against which Defendants survive the severance? We just don't know, because this was not addressed at the hearing on January 12th, nor is it mentioned in the Order proposed by Plaintiffs. In an effort to provide some suggestion in this regard, the Plaintiffs should be required to replead their respective cases against each Defendant to make it clear which claims are directed to which Defendant. Furthermore, the Order does not address inmates who either have or are currently litigating similar claims against SCDC and/or DJJ.

Furthermore, there is nothing in the proposed Order that gives the Court or the Parties any direction as to how these severed class actions will be managed. While the proposed Order does address the Plaintiffs' arguments as to each of the elements to be considered by the Court (numerosity, typicality, amount in controversy, etc.), there is no consideration of the inevitable inefficiencies that will plague this litigation during the initial steps of simply identifying class members. While the Plaintiffs' point is well taken that class actions are favored as an efficient mechanism for resolving multiple common cases under the umbrella of a single suit, this case in particular promises no such thing. As pointed out in Defendants' memos opposing class certification, even determining who is a class member will almost certainly require hundreds (if not thousands as Plaintiffs suggest) of individualized discovery investigations followed by an equal number of "mini-trials" to determine who is and who is not a member of the proposed class. As pointed out on Page 5 of the proposed Order, the statistical data relied upon by Plaintiffs to support their "numerosity" argument provides multiple categories of "sexual assault" for which they delineate between "reported" and "substantiated." In other words, is a current or former inmate to be a class member simply because he or she claimed they were the victim of a sexual assault? What about those who *now* claim they were assaulted, but did not report it at the time? As SCDC pointed out at the hearing on the class certification motion, at *least* half of the named Plaintiffs' (Robinson and Henson) claims of sexual assault were determined not to be credible ("unsubstantiated"). While this fact alone severely undermines Plaintiffs argument that these individuals have claims "typical" of the proposed class, or that they

“fairly and adequately protect the interests of the class,” it most assuredly forecasts an inefficient process for determining who is and who is not a proper member of the class. *Each and every* putative class member’s case will require a judicial finding as to whether they meet the defined class membership requirement. In other words, the class definition will require an individualized trial to determine who even is a class member: who *was* a victim of rape and/or sexual assault versus those who *claimed* they were. The procedural hoops that come with certification of this just to be able to potentially identify class members defeats the efficiency of a typical Rule 23 class action.

On this point, considering that these will likely be exclusively assigned to Your Honor given the ruling on class certification, there is a complete lack of clarity as to what the next steps should be. For instance, while the proposed Order ultimately concludes with severance of the cases and certification of the classes, the Order does not address the SCRC 23(d) notification process to the putative class members, nor of the mandatory opt-out procedure. “After much consideration, we come to the conclusion that **an 'opt-out' notification procedure is the proper method to be offered to putative class members in the instant case and future class action cases.**” *Salmonsens v. CQD, Inc.*, 377 S.C. 442, 661 S.E.2d 81, 91 (2008)(emphasis added).

On that same point, the proposed order on page 6 quotes the *Newberg* treatise as stating that “it is well settled that a plaintiff need not allege the exact number or specific identity of proposed class members.” That is not consistent with South Carolina law as articulated in *Salmonsens*, which mandates the use of an “opt-out” notification procedure. From a practical standpoint, if the identity of proposed class members cannot be identified, then it is impossible to effectuate the “opt-out” notification procedure. The class representatives cannot give notice to person who they cannot identify. This also demonstrates the problem with the class definition since the class members will need to be identified before the “opt-out” notification procedure can take place, and as discussed above, that cannot be done without the court holding separate mini-trials or individualized hearing just to determine who the class members are.

Not surprisingly the Plaintiffs’ counsel did not mention in the proposed Order the Supreme Court’s latest decision in *Hensley v. SCDSS*, 429 S.C. 144, 838 S.E.2d 510 (2020), but that decision is deserving of another look by the Court and certainly should not be ignored in the proposed Order. In *Hensley*, the Supreme Court explains that “there must be a proper balance between common and individualized issues in order to achieve the efficiencies the class procedure was designed to promote.” 838 S.E.2d at 514. The Supreme Court further speaks of the need for the court “to balance the efficiency to be gained from one trial on common issues versus the difficulty to be suffered by having to conduct individual trials or hearings on issues that are not common.” *Id.* The reason *Hensley* is so critical here is that this Court will be required to conduct individual trials or hearings just to determine who qualifies as a class member and that must occur before the “opt-out” notification procedure can begin. That is not typical of proper class actions where the class membership is certain and does not require individualized fact-finding. That alone demonstrates why these cases are not appropriate for class certification.

The Court may also want to consider the Court of Appeals’ decision in *Patterson v. South Carolina Department of Employment and Workforce*, Op. No. 6055 (S.C. Ct. App. filed April 3, 2024), which was issued last week. In that case, the Court of Appeals reversed all orders on appeal, including the Circuit Court’s orders certifying a class action. The Court of Appeals specifically ruled that “the circuit court erred by finding Claimants were not required to exhaust their administrative remedies.” (Slip Op. at 13). *Patterson* demonstrates that class certification was not appropriate based upon the need to separately adjudicate the exhaustion of administrative remedies defense which required individualized inquiry and decision-making with respect to each putative class member. We believe that *Patterson*, which is not addressed in the proposed Order given its recent issuance, supports the Defendants’ position that this case is not appropriate for class certification.

As for the Plaintiffs’ proposed “definition” of the classes (pg. 14):

For claims against SCDC:

All individuals that have been under the custody and care of the South Carolina Department of Corrections (“SCDC”) in South Carolina from 2012 until present who were victims of rape and/or sexual assault.

For claims against SCDJJ:

All individuals that have been under the custody and care of the South Carolina Department of Juvenile Justice (“SCDJJ”) in South Carolina from 2012 until present who were victims of rape and/or sexual assault.

Again, these proposed definitions mandate a preliminary finding of those “who **were** victims of rape and/or sexual assault” in order to determine class members. As argued, this fact alone heavily disfavors certification of the classes, as it all but assures protracted and inefficient individualized trials rather than serving the purpose of class action. Thus, the claims are not common, rather each will be individualized.

Moreover, Plaintiffs’ usage of terms of art – “rape” and “sexual assault” – in the proposed class definition are vague, ambiguous, and not specifically defined for class member determination. Without a precise definition, reasonable persons may differ as to the meaning of “rape” and “sexual assault” within this context.

Additionally, the proposed Order contains improper findings and conclusions of law which were not dictated by the Court. On page 8, in particular, the proposed Order states:

The Court finds that in this case every proposed class member has a similar legal theory against the Defendants and that Defendants actions impacted every proposed class member in a similar manner. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999). The determinative issue on liability to be decided is whether Defendants breached their standard of care to the plaintiffs by failing to implement and enforce their policies and procedures to prevent sexual assaults in their facilities. If that is answered in the affirmative, that finding of liability is applicable to each putative class member and because of that, commonality is satisfied.

At the very least, this paragraph should be stricken because at no time did the Court issue these purported “findings” nor was there any determination from the bench as to what “standard of care” the Defendants owed their respective inmates, nor that a breach of this supposed “standard of care” formed the basis of “every” proposed class member’s claims against the respective Defendants. These “ultimate” legal conclusions were not and should not be made a part of the Order. To allow them to remain will only serve to unfairly prejudice the Defendants.

We would also note that the proposed Order repeatedly describes the Defendants’ arguments as “conclusory” and rejects them on that basis alone (pp. 10-11). Yet, in all due respect, that presents a double standard because all of the Plaintiffs’ arguments are equally conclusory. Frankly, we are uncertain why the Court rejects the Defendants’ arguments as “conclusory” when the Court clearly cannot consider the merits of any claims or defenses at this stage. *See Tilley v. Pacesetter*, 333 S.C. 33, 508 S.E.2d 16, 21 (1998) (“A court may not look to the merits when determining whether to certify a class”). On page 10, the proposed Order cites federal case law that is at complete odds with binding South Carolina law on this very point. The proposed Order, in fact, states that the Defendants must show “some degree of likelihood that a unique defense will play a significant role at trial” and “if a court determines an asserted unique defense has no merit, the defense will not preclude class certification.” (p. 10). Respectfully, that citation is counter to South Carolina law. In sum, at this stage of the litigation, the Defendants are allowed to point out to the Court why the use of a class action is not efficient or

manageable given the need for individualized trials or hearings consistent with the admonitions by the Supreme Court in *Hensley*. Those arguments should not be rejected out of hand as “conclusory.”

Finally, there is no mention whatsoever in the proposed Order of the South Carolina Tort Claims Act. There is no dispute that Defendants are both “governmental entities” of the State of South Carolina. As such, Plaintiffs’ case – whether certified as a class, or not – is subject to the SCTCA’s limitations and exemptions from liability.

Statute of Limitations:

SECTION 15-78-110. Statute of limitations.

Except as provided for in Section 15-3-40, any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

Plaintiffs have proposed a class definition “from 2012 until present” while the record will reflect that the Complaint was not filed in this matter until July 3, 2017. There was no verified claim filed to extend the statute of limitations, and thus, the class definition must be limited to “from July 3, 2015 to the present” at the very least. Class actions do not subvert the Tort Claims Act. “Notwithstanding any provision of law, this chapter, the “South Carolina Tort Claims Act”, is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty. The provisions of this chapter establish limitations on and exemptions to the liability of the governmental entity and must be liberally construed in favor of limiting the liability of the governmental entity.” S.C. Code Ann. Section 15-78-200 (emphasis added). Even as a class action, the Plaintiffs’ claims will be controlled by the Tort Claims Act.

Exceptions to waiver of immunity:

SECTION 15-78-60. Exceptions to waiver of immunity.

The governmental entity is not liable for a loss resulting from . . . (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies.

Finally, it must be said that the Plaintiffs entire case – as expressed in both their Complaints as well as in their proposed Order certifying class – is premised upon the notion that their alleged injuries proximately resulted from SCDC and SCDJJ’s failure to implement and enforce certain policies and procedures to prevent sexual assaults. Furthermore, every “common question of law and fact” included on page 7 of the proposed Order touches on this theory that the class member’s injuries were caused by a failure to implement and/or enforce policies and procedures. Section 15-78-60(4) specifically states that SCDC and DJJ are not liable for losses resulting from the failure to adopt or enforce any rule, regulation, or written policies. As the SC Supreme Court unequivocally stated in *Adkins v. Varn*, 312 S.C. 188, 439 S.E.2d 822 (1993), “The provisions of Section 15-78-60(4) are clear and unambiguous on their face, and are not subject to judicial interpretation. The statute clearly exempts from liability any loss resulting from the failure to enforce an ordinance.” *Id.* To allow these claims to go forward as pled, and by certifying these cases as class actions, ignores the waiver of immunity exceptions directly on point as well as the legislative directive that “[t]he provisions of this chapter establish limitations on and exemptions to the liability of the governmental entity and must be liberally construed in favor of limiting the liability of the governmental entity.” S.C. Code Ann. Section 15-78-200.

In sum, Your Honor, while we respect the Court’s ruling, we also maintain that the claims involved are not proper for class certification for the reasons cited in our opposing briefs as well as those cited above. The proposed Order lacks direction and proper definition; even the proposed “class definition” is vague, ambiguous and – if allowed

to remain as such – will require hundreds/thousands of individualized findings to just determine who are members of the class. The Tort Claims Act restricts the class to two years prior to filing of the original Complaint, but also precludes liability for exactly what the Plaintiffs are indeed claiming to be the common issues of fact and law that merit class certification. Defendants object to the proposed Order certifying class for each of these reasons.

As I say above, I would be happy to submit these comments and objections in a more formal manner on the current case caption and e-filed with the Court if you would prefer.

Respectfully,

G. Wade Cooper, Esq.
Buyck Law Firm, LLC
P.O. Box 2424
Mt. Pleasant, SC 29465 – 2424
Ph: (843) 377-1400

From: Taylor, Heath P. Law Clerk (Caroline Clark) <htaylorlc@sccourts.org>
Sent: Monday, April 1, 2024 9:39 AM
To: Wade C <GWC@Buyckfirm.com>; Taylor, Heath P. Secretary (Catherine C. Wilson) <htaylorsc@sccourts.org>
Cc: Hugh W. Buyck <HWB@Buyckfirm.com>; Kristi Parker <Kristi@buyckfirm.com>; Dave DeMasters <DDeMasters@rplfirm.com>; Lauren Knight <lauren@elliottphelanlaw.com>; Andrew Kunz <Andrew@elliottphelanlaw.com>; agoodstein@goodsteinfirm.com; Alan Runyan <arunyan@runyanplatte.com>; Janice Swofford <jswofford@runyanplatte.com>; Andrew Platte <aplatte@runyanplatte.com>
Subject: RE: 2017-CP-18-01125; Henson, et al v. SCDC, DJJ - Plaintiffs Reply Memo. in Support of Motion to Certify Class

Good morning,

Judge Taylor will allow for a 10-day extension to review the proposed Order.

Best,

Caroline M. Clark
Law Clerk for the Honorable Heath P. Taylor
First Judicial Circuit
151 Docket Street
P.O Box 1949
Orangeburg, South Carolina 29116
(803) 535-2356
HTaylorLC@sccourts.org

From: Wade C <GWC@Buyckfirm.com>
Sent: Friday, March 29, 2024 9:57 AM
To: Taylor, Heath P. Secretary (Catherine C. Wilson) <htaylorsc@sccourts.org>; Taylor, Heath P. Law Clerk (Caroline Clark) <htaylorlc@sccourts.org>
Cc: Hugh W. Buyck <HWB@Buyckfirm.com>; Kristi Parker <Kristi@buyckfirm.com>; Dave DeMasters <DDeMasters@rplfirm.com>; Lauren Knight <lauren@elliottphelanlaw.com>; Andrew Kunz <Andrew@elliottphelanlaw.com>; agoodstein@goodsteinfirm.com; Alan Runyan <arunyan@runyanplatte.com>; Janice Swofford <jswofford@runyanplatte.com>; Andrew Platte <aplatte@runyanplatte.com>
Subject: RE: 2017-CP-18-01125; Henson, et al v. SCDC, DJJ - Plaintiffs Reply Memo. in Support of Motion to Certify Class

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Judge Taylor,

Counsel for Defendants SCDC and SC DJJ would respectfully request a 10-day "review and comment" stay on the proposed Order regarding certification of the class. Ordinarily, we would not need as much time for this, but those of us who have children in school know that next week is "Spring Break" for the kids and we are scheduled to go out-of-state until the following Sunday. I did request Court Protection during this time.

On behalf of our firm and SC DJJ's counsel David DeMasters, we appreciate your consideration in this regard.

Respectfully,

G. Wade Cooper, Esq.
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From: Andrew Platte <aplatte@runyanplatte.com>

Sent: Wednesday, March 27, 2024 4:38 PM

To: Taylor, Heath P. Secretary (Catherine C. Wilson) <htaylor@scdcourts.org>; Taylor, Heath P. Law Clerk (Caroline Clark) <htaylorlc@scdcourts.org>

Cc: Hugh W. Buyck <HWP@Buyckfirm.com>; Wade C <GWC@Buyckfirm.com>; Kristi Parker <Kristi@buyckfirm.com>; Dave DeMasters <DDeMasters@rplfirm.com>; Lauren Knight <lauren@elliottphelanlaw.com>; Andrew Kunz <Andrew@elliottphelanlaw.com>; agoodstein@goodsteinfirm.com; Alan Runyan <arunyan@runyanplatte.com>; Janice Swofford <jswofford@runyanplatte.com>

Subject: Re: 2017-CP-18-01125; Henson, et al v. SCDC, DJJ - Plaintiffs Reply Memo. in Support of Motion to Certify Class

Dear Judge Taylor,

As directed by the Court, please find attached the proposed order addressing the Court's findings and conclusions regarding the motion to certify and the motion to sever and/or bifurcate in Word format.

Respectfully,

Andrew Platte

--

Andrew S. Platte
Runyan & Platte
2015 Boundary Street, Suite 238
Beaufort, SC 29902
(843) 473-6800

From: Taylor, Heath P. Secretary (Catherine C. Wilson) <htaylor@scdcourts.org>

Date: Tuesday, March 12, 2024 at 12:07 PM

To: Andrew Platte <aplatte@runyanplatte.com>, Taylor, Heath P. Law Clerk (Caroline Clark) <htaylorlc@sccourts.org>

Cc: Hugh W. Buyck <HWB@Buyckfirm.com>, Wade C <GWC@Buyckfirm.com>, Kristi Parker <Kristi@buyckfirm.com>, Dave DeMasters <DDeMasters@rplfirm.com>, Lauren Knight <lauren@elliottphelanlaw.com>, Andrew Kunz <Andrew@elliottphelanlaw.com>, agoodstein@goodsteinfirm.com <agoodstein@goodsteinfirm.com>, Alan Runyan <arunyan@runyanplatte.com>, Janice Swofford <jswofford@runyanplatte.com>

Subject: RE: 2017-CP-18-01125; Henson, et al v. SCDC, DJJ - Plaintiffs Reply Memo. in Support of Motion to Certify Class

Counsel,

After a review of the motions and memos in the case, I find and conclude the motion to certify class should be certified. However, the claims against SCDJJ must be severed from the claims against SCDC. The remaining motions to sever and/or bifurcate are denied. Plaintiffs counsel is directed to submit a proposed order within 15 days of today's date.

Judge Taylor

Catherine C. (Cathy) Wilson
Administrative Assistant to
The Honorable Judge Heath P. Taylor
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Orangeburg, S.C. 29116
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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
	)	
	)	
CALVIN HENSON, DANIEL JAMES	)	
COLLINS, JASON ROBINSON,	)	Case No.: 2017-CP-18-1125
RUSSELL TAYLOR, and ALL	)	
THOSE SIMILARLY SITUATED,	)	
	)	
Plaintiffs,	)	AMENDED CLASS ACTION
	)	COMPLAINT
	)	
v.	)	(JURY TRIAL DEMANDED)
	)	
SOUTH CAROLINA DEPARTMENT	)	
OF CORRECTIONS and the SOUTH	)	
CAROLINA DEPARTMENT OF	)	
JUVENILE JUSTICE	)	
	)	
Defendants.	)	
	)	

TO: THE ABOVE-NAMED DEFENDANTS AND THEIR ATTORNEYS:

Plaintiffs, Daniel James Collins, Jason Robinson, Calvin Henson, and Russell Taylor, hereby allege, on their behalf and on behalf of those similarly situated, as follows:

PARTIES

1. The Plaintiff, Daniel James Collins, is a resident of the Broad River Correctional Institute in Columbia, South Carolina and is in the custody and under the care of the Defendant SCDC.

2. The Plaintiff, Jason Robinson, is a resident of the Turbeville Correctional Institute in Turbeville, South Carolina and is in the custody and under the care of the Defendant SCDC.

3. The Plaintiff, Calvin Henson, is a resident of York County, South Carolina, and a former resident of Kirkland Correctional Institute in Columbia, South Carolina in October and November 2020, under the care and custody of Defendant SCDC.

4. The Plaintiff Russell Taylor is currently a citizen and resident of North Carolina, and was formerly in the custody and under the care of the Defendant SCDJJ at the Coastal Evaluation Regional Center facility in Ridgeville, South Carolina from April 8, 2016 until June 28, 2016.

5. The Defendant, South Carolina Department of Corrections is a governmental agency/entity existing under the laws of the State of South Carolina and has facilities located throughout the State, and more particular in Dorchester County, South Carolina, where the Lieber Correctional Institute (hereinafter “Lieber”) is located (hereinafter “SCDC”). At all times hereinafter mentioned in this lawsuit, the Defendant acted and carried on its business by and through its agents, servants, and/or employees at its various locations including Lieber. Additionally, these agents, servants, and/or employees (to include and not be limited to the correctional and medical personnel mentioned below) were operating within the scope of their official assigned and/or compensated duties.

6. The Defendant, South Carolina Department of Juvenile Justice is a governmental agency/entity existing under the laws of the State of South Carolina and has facilities located throughout the State, and more particular in Dorchester County, South Carolina, where the Coastal Evaluation Regional Center (hereinafter “Coastal”) is located (hereinafter “SCDJJ”). At all times hereinafter mentioned in this lawsuit, the Defendant SCDJJ acted and carried on its business by and through its agents, servants, and/or employees at its various locations including Coastal. Additionally, these agents, servants, and/or employees (to include and not be limited to the correctional and medical personnel mentioned below) were operating within the scope of their official assigned and/or compensated duties. Acts and omissions giving rise to the Plaintiffs’ claims occurred in Dorchester County in South Carolina.

SUBSTANTIVE ALLEGATIONS

Calvin Henson

7. On or about October 8, 2020, Calvin Henson was placed in the care and custody of the Kirkland Correctional Institute. He remained at Kirkland until approximately December 14, 2020. Thereafter he was transferred to Kershaw Correctional Institute until his release in 2022.

8. The Plaintiff is informed and believes that prior to the events in question, Kirkland Correctional Institute had a long history of failing to provide adequate security and supervision over the inmates located at the facility.

9. Despite being bound to protect all those within its custody by following all protocol and procedure regarding the safety of those within its custody, the Defendant SCDC has failed to follow processes specifically designed to prevent the harm suffered by the Plaintiff.

10. During Mr. Henson's intake to SCDC, staff failed to properly complete the SCDC Offender Summary in regards to if Mr. Henson had ever be physically or sexually abused. In addition, they failed to properly classify Mr. Henson and the other inmates in which he was housed.

11. Mr. Henson was physically assaulted multiple times beginning on October 9, 2020, in Unit A1. He was also sexually assaulted on October 9, 2020, at which time he was rectally penetrated by one of his two cellmates.

12. At this time, there were no dorm officers in Unit A1 of Kirkland and, upon information and belief, the entire unit was placed on lockdown.

13. Mr. Henson was in his unlit cell with the inmates that sexually assaulted him for roughly three weeks. During this time, Mr. Henson was essentially held as a hostage in his cell and threatened to not leave his room or talk to anyone that passed his cell door.

14. The entire dorm was then moved to Unit C1 and Mr. Henson's roommates were

made dorm workers by the correctional staff. Correctional Officer Hardee would unlock the doors in Mr. Henson's wing from 6:30am until 6:30pm. While in Unit C1, Mr. Henson was continuously physically assaulted and was again raped via episodes of insertion of gloved fingers into his rectum, and having been penetrated orally and rectally. Mr. Henson was, again, held as a hostage in his cell.

15. After this second sexual assault occurrence, Mr. Henson passed a note to CO Hardee requesting help from the physical and sexual violence. CO Hardee gave the note to Mr. Henson's cellmates/attackers whom physically and sexually assaulted him again. Upon information and belief, Mr. Henson's cellmates were Blood gang members and CO Hardee was

16. Mr. Henson, whose tablet had been take by his cellmates as soon as received at Kirkland, went to Room 54, where Inmate Honeycutt resided, and used his tablet to contact the PREA hotline at *22. Mr. Henson used Mr. Honeycutt's tablet at least 5 times, filing PREA requests each time, but nothing happened and no one responded.

17. Finally, on October 26, 2020, Mr. Henson was able to pass a note to a new correctional officer working in the Unit (CO Parris), notifying him of the physical and sexual assaults and the hostage situation. CO Parris returned with a sergeant and a lieutenant to escort Mr. Henson out of the dorm.

18. Mr. Henson was transported to the emergency department at Prisma Health Richland Hospital. Mr. Henson underwent a Sexual Assault Nurse Exam (SANE) Mr. Henson underwent imaging studies for his face, nose, teeth, hip, spine, and shoulder, and was diagnosed with a fractured left nasal bone, multiple areas of maxillofacial soft tissue swelling, traumatic dental injuries sustained in the upper left anterior and posterior quadrant including missing and loose teeth, and injuries to his left hip, left cervical spine, and right shoulder.

19. Mr. Henson was returned to Kirkland Correctional Institute and was threatened on multiple occasions by inmates with weapons not to testify or give statements about what occurred. Additionally, various inmates extorted Mr. Henson and his family for money based on threats on his life and threats of further sexual assaults.

20. After these incidents, SCDC failed to follow generally accepted proper protocol and failed to perform a proper investigation of the incidents in question. As a result, and upon information and belief, the inmates responsible for the sexual assaults went unpunished and unprosecuted.

Daniel James Collins

21. Around January 2016, Daniel James Collins was placed in the care and custody of Lieber, where he remained until around June 2016. Thereafter, he was transferred to Broad River Correctional Institute where he remains to this present day.

22. The Plaintiff is informed and believes that prior to the events in question, Lieber had a long history of failing to provide adequate security and supervision over the inmates located at the facility.

23. Despite being bound to protect all those within its custody by following all protocol and procedure which protects the safety of those within its custody, the Defendant SCDC has failed to follow processes specifically designed to prevent the harm suffered by the Plaintiff.

24. In May or June 2016, Plaintiff's former cellmate was moved. Inmate Terry Whisenhunt sought out Plaintiff Collins attempting to coerce agreement to share a cell. Plaintiff Collins refused these attempts.

25. Upon information and belief, Inmate Whisenhunt requested of Defendant SCDC's agents and/or employees that Whisenhunt and the Plaintiff room together and this request was

made without Plaintiff's knowledge or consent.

26. Classification of the inmates by SCDC, based upon conduct and crimes committed, should have prevented the two from being housed together.

27. Upon information and belief, SCDC employees at Lieber had knowledge of Whisenhunt's prior sexual predatory behavior including reputation for sexually assaulting other inmates.

28. Plaintiff Collins did not know that Mr. Whisenhunt may be a sexual predator and did not know that Whisenhunt has a reputation of sexually assaulting other inmates.

29. The Defendant SCDC assigned and placed Mr. Whisenhunt in the room with Plaintiff Collins in violation of procedure and without advising Plaintiff Collins of the material facts known by Defendant SCDC concerning the history of Whisenhunt including his history of sexually assaulting others.

30. Despite this knowledge and even though Defendant SCDC knew that Plaintiff Collins was at increased risk of being the victim of sexual assault, Defendant SCDC made no effort to either warn or protect Plaintiff Collins from the enhanced risk.

31. Following this assignment, on two occasions in June of 2016, first on the evening of June 23 and then again on the evening of June 28, Whisenhunt rendered Plaintiff Collins defenseless with the aid of illegal contraband in the form of a drug which was involuntarily injected into Plaintiff Collins.

32. Then Whisenhunt sexually assaulted Plaintiff Collins for several hours. The assault was uninterrupted due to lack of proper supervision.

33. On both occasions, due to lack of proper oversight by prison officials, Whisenhunt's conduct was never interrupted despite lasting several hours.

34. After regaining his strength, Mr. Collins reported the incident to a corrections officer and he was transported to medical for evaluation for the sexual assault.

35. Mr. Collins was eventually examined at the Medical University of South Carolina and received a rape kit.

36. Following the incident, SCDC failed to follow generally accepted proper protocol and failed to perform a proper investigation of the incidents in question. As a result, the above-mentioned inmate went unpunished and unprosecuted.

Jason Robinson

37. Around September 2015, Jason Robinson was placed in the care and custody of the Ridgeland Correctional Institute, where he remained until around December 2016. Thereafter, he was transferred to Broad River Correctional Institute where he remains to this present day.

38. The Plaintiff is informed and believes that prior to the events in question, Ridgeville Correction Institute had a long history of failing to provide adequate security and supervision over the inmates located at the facility.

39. Despite being bound to protect all those within its custody by following all protocol and procedure which protects the safety of those within its custody, the Defendant SCDC has failed to follow processes specifically designed to prevent the harm suffered by the Plaintiff.

40. At the end of September 2015, Mr. Robinson was assaulted by fellow inmates who threatened to kill and rape him.

41. Plaintiff Robinson reported the assault to an agent and/or employee of the Defendant SCDC while being treated for the injuries he sustained. Plaintiff Robinson requested protective custody, which was denied causing him to remain in the general prison population.

42. In February 2016, Plaintiff Robinson was assigned a roommate in violation of

protocol and procedure which would protect the safety of those in the care and custody of the Defendant SCDC.

43. Plaintiff Robinson's roommate, in an act which was a foreseeable consequence of Defendant SCDC's failure to take necessary and reasonable steps to protect Plaintiff Robinson, held him at knife point while sexually assaulting him. Plaintiff Robinson's roommate repeated the sexual assault again two nights later.

44. Plaintiff Robinson reported the incident to agents and/or employees of the Defendant SCDC and again requested protective custody.

45. Defendant SCDC again refused to provide protection causing Plaintiff Robinson to remain in the general prison population and with the same roommate who had just sexually assaulted him.

46. After being refused proper assistance by local agents of the Defendant SCDC, Plaintiff Robinson then called the SCDC Crisis Hotline.

47. Only after this call did an agent and/or employee of SCDC take him to the prison's medical facilities where pictures were taken of his injuries.

48. The call that Plaintiff Robinson made to the hotline also resulted in South Carolina Law Enforcement Division investigators questioning Plaintiff Robinson about the sexual assault.

49. Plaintiff Robinson again requested protective custody and the Defendant SCDC again denied his request.

50. After these cries for help, over his objections and requests, Plaintiff Robinson was returned to the general prison population where he was again sexually assaulted.

51. Following his latest attack, Plaintiff Robinson was again taken to prison medical facilities and pictures were taken of the injuries and he also was placed on suicide watch.

52. When Mr. Robinson was returned to the general prison population, he was sexually assaulted yet again and stabbed over 30 times by his roommate.

53. After these incidents, SCDC failed to follow generally accepted proper protocol and failed to perform a proper investigation of the incidents in question. As a result, the inmates responsible for the sexual assault and assaults went unpunished and unprosecuted.

John Doe

54. Around February 22, 2016, Plaintiff John Doe was placed in the care and custody of Coastal where he remained until the end of April 2016.

55. In May 2016, Plaintiff John Doe was then transferred to another SCDJJ facility, Birchwood High School in the Broad River Road Complex in Columbia, South Carolina until he was release from SCDJJ custody around June 28, 2016.

56. The Plaintiff is informed and believes that prior to the events in question, Coastal had a long history of failing to provide adequate security and supervision over the inmates located at the facility.

57. Despite being bound to protect all those within its custody by following all protocol and procedure which protects the safety of those within its custody, the Defendant SCDJJ has failed to follow processes specifically designed to prevent the harm suffered by the Plaintiff.

58. Between April 10 and April 15, 2016, Plaintiff John Doe was asleep in a bed in the middle of the unit and was assaulted by fellow inmates who sodomized him with a broomstick.

59. Plaintiff John Doe reported the incident to Coastal Evaluation Regional Center staff who conducted a rectal exam and began to investigate the sexual assault.

60. The Defendant SCDJJ did not fully investigate the sexual assault terminating the investigation on May 18, 2016 after Plaintiff John Doe allegedly signed a refusal to prosecute

form.

61. The Defendant SCDJJ reopened the case in June 2016, but after conducting an interview with the Plaintiff John Doe, investigators concluded Plaintiff John Doe did not want to pursue charges and the Defendant SCDJJ closed the investigation.

62. The Plaintiff John Doe did not sign either refusal to prosecute form and requested that the investigators punish the boys responsible for his injuries.

63. On June 28, 2016, Plaintiff John Doe was released from SCDJJ custody.

64. After these incidents, SCDJJ failed to follow generally accepted proper protocol and failed to perform a proper investigation of the incidents in question. As a result, the inmates responsible for the sexual assault and assaults went unpunished and unprosecuted.

CLASS ALLEGATIONS

65. This action seeks to remedy the continuing failure of the Defendants SCDC and SCDJJ to implement and enforce their own policies and practices to prevent and reduce rape and sexual assault of those in the custody and care of the Defendants. The continuing violations by the Defendants in their failure to implement and enforce these policies and procedures result in the rape and sexual assault of persons in the custody and care of the Defendant SCDC and SCDJJ in their facilities around the state of South Carolina.

66. Specifically, SCDC and SCDJJ intentionally and knowingly failed to implement and enforce these policies and practices including but not limited to classification of inmates, monitoring of inmates by employees, allowing gross overcrowding, by failing to provide appropriate employees and staff at the various locations in Defendants' facilities which would have

prevented the sexual assaults suffered by Plaintiffs, as well as other prescribed security measures, all aimed at eliminating foreseeable events of sexual assault on those within the custody of the Defendants.

67. Further, SCDC knew or should have known that their failure implement and enforce their policies and practices and to provide adequate security measures would result in unsafe conditions for the inmate population and specifically resulted in the foreseeable sexual assaults suffered by the Plaintiffs and putative class.

68. For several years prior to and during these incidents, SCDC and SCDJJ were aware of the standards and requirements set forth by their policies and procedures, but failed to fully implement and enforce these standards and requirements. SCDC and SCDJJ's failure to implement these standards and requirements had foreseeable results and is the proximate cause of the rapes and sexual assaults suffered by the representative Plaintiffs and other similarly situated inmates and former inmates under the care of the Defendants SCDC and SCDJJ.

69. The Plaintiffs are in substantially the same or similar position as others who have suffered sexual assaults while in the custody of SCDC and SCDJJ and the assaults on the Plaintiffs were all a foreseeable consequence of the Defendants' failures to take reasonable precautionary steps by following their policies and procedures.

70. The Class consists of all prisoners and former prisoners in South Carolina who are or have been in the custody and care of SCDC and SCDJJ in South Carolina from 2012 who were victims of rape and/or sexual assault as a result of the Defendants' failure to implement and enforce their own policies and practices. The Class is so numerous that the individual joinder of all its members, in this or any action, is impracticable. Excluded from the class are:

- a. all persons who timely exercise their rights under South Carolina Rule

of Civil Procedure 23 to opt out of the defined Class;

- b. all persons who have executed a release and/or received compensation in any form from SCDC or SCDJJ for any claims or complaints concerning a rape or sexual assault while in the custody and care of the Defendants.

71. The Plaintiff representatives will fairly and adequately protect the interests of absent class members. The interests of the Plaintiffs are not antagonistic to those of absent class members and the Plaintiffs are represented by able counsel experienced in class actions.

72. Plaintiffs' claims are typical of the class members' claims and are derived from a common nucleus of operative facts in SCDC and SCDJJ's negligent/gross negligent and improper conduct in failing to follow their procedures and policies have injured Plaintiffs and all others similarly situated.

73. Questions of law or fact common to the class predominate over any liability questions affecting only individual class members and a class action is superior to other available methods for the fair and efficient and cost effective resolution of these claims.

74. This action is maintainable as a class action under Rules 23(a) of the South Carolina Rules of Civil Procedure.

FOR A FIRST CAUSE OF ACTION
NEGLIGENCE/GROSS NEGLIGENCE

75. Plaintiffs repeat and reiterate every allegation in this Complaint as if specifically restated herein.

76. The Plaintiffs are members of the class intended to be protected by the ignored policies and the Plaintiffs' resulting injuries were proximately caused by the neglect, gross negligent, reckless, and willful and wanton acts of the Defendants in failing properly to implement

and enforce their policies and procedures, including but not limited to classification of inmates, monitoring of inmates by employees, allowing gross overcrowding, and by failing to provide appropriate employees and staff at the various locations in Defendants' facilities which would have prevented the sexual assaults suffered by Plaintiffs.

77. As a direct result of the Defendants' reckless, willful and wanton, and grossly negligent conduct, the Plaintiffs have been severely injured, both physically and emotionally, suffered needlessly, incurred medical expenses, incurred permanent scarring, and incurred permanent impairment and disability.

FOR A SECOND CAUSE OF ACTION
DECLARATORY ACTION/INJUNCTIVE RELIEF

78. The Plaintiffs repeat and reiterate every allegation in this Complaint as if specifically restated herein.

79. Defendants adopted and allegedly implemented policies and practices to reduce the number of rapes and sexual assaults committed by inmates, employees, and agents within the facilities under the control of the Defendants.

80. Defendants' policies and practices, allegedly implemented and enforced to prevent rapes and sexual assaults suffered by inmates in the custody and control of the defendant, include but are not limited to, proper classification of the inmates, monitoring of inmates by employees and agents of Defendants, and by providing appropriate employee and staff to inmate ratio at the Defendants' facilities.

81. Defendants have failed to implement and enforce these policies and practices. The Defendants have failed to properly classify inmates, allowed gross overcrowding, and failed to properly monitor inmates. The Defendants failures to implement and enforce these policies and

practices are not limited to these examples.

82. Plaintiffs have suffered and will continue to suffer injuries from rapes and sexual assaults as a direct and proximate cause of the Defendants failure to implement and enforce their own policies and procedures designed to reduce and prevent rapes and sexual assaults.

83. Defendants have funds designated to implement these policies and practices to prevent and reduce the number of rapes and sexual assaults suffered by those within their custody and to whom they owe a duty to keep safe from foreseeable risks.

84. Defendants have failed to use these funds to implement and enforce these policies and practices.

85. Plaintiffs, on behalf of themselves and all others similarly situated, request a declaratory judgment that:

- a. The Defendants have failed to implement and enforce the policies and practices to reduce and prevent rape and sexual assault of inmates at facilities under the custody and control of the Defendants;
- b. The Defendants have failed to properly use funds to implement and enforce the policies and practices to reduce and prevent rape and sexual assault of inmates at facilities under the custody and control of the Defendants;
- c. The harms suffered by the Plaintiffs are proximately caused by the Defendant's failures because these harms are not only foreseeable but are the exact type of harm that the ignored policies and protocol were intended to prevent

86. Plaintiffs, on behalf of themselves and all others similarly situated, request temporary and permanent injunctive relief:

- a. Requiring Defendants to implement and enforce the policies and practices,

including proper classification of inmates, proper monitoring of inmates, and to provide an adequate number of staff and employees within the Defendants facilities, to reduce and prevent the rape and sexual assaults of inmates at facilities under the custody and control of the Defendants;

- b. Requiring Defendants to use the funds designated to implement and enforce the policies and procedures to reduce and prevent rape and sexual assaults of inmates at facilities under the custody and control of the Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand a jury trial and pray for judgment, joint and several, against the Defendants and that the Court:

- A. Certify a class action as pled;
- B. Declare the Defendants have failed to implement and enforce the policies and practices to reduce and prevent rape and sexual assault of inmates at facilities under the custody and control of the Defendants;
- C. Declare the Defendants have failed to properly use funds to implement and enforce the policies and practices to reduce and prevent rape and sexual assault of inmates at facilities under the custody and control of the Defendants;
- D. Immediately and permanently enjoin the Defendants from failing to implement and enforce the policies and practices, including proper classification of inmates, proper monitoring of inmates, and to provide an adequate number of staff and employees within the Defendants facilities, to reduce and prevent the rape and sexual assaults of inmates at facilities under the custody and control of the Defendants;
- E. Immediately and permanently enjoin the Defendants from failing to use the funds

designated to implement and enforce the policies and procedures to reduce and prevent rape and sexual assaults of inmates at facilities under the custody and control of the Defendants;

- F. Direct the Defendants to immediately implement and enforce the policies and procedures adopted to reduce prevent the sexual abuse of inmates in the custody of the Defendants;
- G. Retain jurisdiction in this case until the unlawful conditions, practices, policies, acts and omissions complained of herein no longer exist and this court is satisfied that they will not recur;
- H. Award Plaintiffs, both on their behalf and all others similarly situated, the general and special compensatory damages determined to have been sustained by them;
- I. Plaintiffs recover the costs of this suit, including reasonable attorneys' fees; and,
- J. The Court grants such other, further, or different relief as may be deemed just and proper.

Respectfully submitted,

ELLIOTT, PHELAN, KUNZ & SLOCUM, LLC

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ATTORNEYS FOR THE PLAINTIFF

Georgetown, South Carolina
This 15th day of February, 2023

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	Case No.: 2017-CP-18-1125
CALVIN HENSON, DANIEL JAMES	)	
COLLINS, JASON ROBINSON,	)	
RUSSELL TAYLOR and ALL THOSE	)	
SIMILARLY SITUATED,	)	PLAINTIFFS MOTION TO
	)	CERTIFY CLASS
Plaintiffs,	)	
	)	
v.	)	
	)	
SOUTH CAROLINA DEPARTMENT	)	
OF CORRECTIONS and the SOUTH	)	
CAROLINA DEPARTMENT OF	)	
JUVENILE JUSTICE	)	
	)	
Defendants.	)	

The Plaintiffs, by and through their undersigned counsel, hereby move this Court pursuant to the provisions of Rule 23, SCRCPP, for an Order:

1. Certifying this action as a class action on behalf of the plaintiff classes identified in the Complaint.
2. Appointing the plaintiffs as the class representatives; and,
3. Appointing plaintiffs' counsel as class counsel in this action.

This motion is based upon the nature of the claims, including the common legal rights and status of the parties as established by the law of South Carolina as well as any additional matters to be supplied to the Court prior to a hearing in this matter, including Plaintiffs Memorandum in Support of Motion to Certify Class.

Respectfully submitted,

s/ Andrew S. Platte

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and

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ATTORNEYS FOR THE PLAINTIFF

Beaufort, South Carolina
This 31st day of August, 2023

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	Case No.: 2017-CP-18-1125
CALVIN HENSON, DANIEL JAMES	)	
COLLINS, JASON ROBINSON,	)	
RUSSELL TAYLOR and ALL THOSE	)	
SIMILARLY SITUATED,	)	MEMORANDUM IN SUPPORT OF
	)	PLAINTIFFS MOTION TO
Plaintiffs,	)	CERTIFY CLASS
	)	
v.	)	
	)	
SOUTH CAROLINA DEPARTMENT	)	
OF CORRECTIONS and the SOUTH	)	
CAROLINA DEPARTMENT OF	)	
JUVENILE JUSTICE	)	
	)	
Defendants.	)	
	)	

The Plaintiffs hereby submit this memorandum in support of their motion to certify this action as an injunctive class and an opt-out class action pursuant to the provisions of Rule 23, South Carolina Rules of Civil Procedure.

I. Introduction

This is a putative class action brought by Calvin Henson, Daniel James Collins, Jason Robinson, and Russell Taylor. Plaintiffs seek certification of a class under Rule 23, SCRCF, for declaratory and injunctive relief and damages.

Calvin Henson, Daniel James Collins, and Jason Robinson were housed in South Carolina Department of Corrections (“SCDC”) facilities where they were sexually assaulted multiple times. Russell Taylor was housed in a South Carolina Department of Juvenile Justice (“SCDJJ”) facility where he was sexually assaulted.

This case seeks to remedy the continuing failure of SCDC and SDJJ to implement and enforce their own adopted policies and practices to prevent and reduce rape and sexual assault on

inmates and residents under the Defendants custody and care through injunctive relief and money damages for negligence and gross negligence. The Plaintiffs allege these failures, on behalf of themselves and others, were the proximate cause of their sexual assaults.

II. Background

In 2001, approximately one in every 140 people in the United States were behind bars, either in federal or state prisons or local jails.¹ Criminal justice reforms in the second half of the twentieth century led to a rapid increase in the incarceration rate within the United States. In 1985 the inmate population stood around 750,000 individuals. By the early 1990s it was over 1.1 million and was growing on average 6.5 percent annual.² The peak of the incarcerated prisoner population was around 2008 with 2.3 million individuals behind bars.³ Levels have dipped over the last decade but remain over 1.75 million individuals in 2021.⁴

The true extent of sexual assaults in prison was limited in the mid-twentieth century with only anecdotal reports existing. A groundbreaking study on sexual abuse in the Philadelphia jail system in 1968 by Alan Davis estimated that at least 3 percent of the 60,000 individuals in the Philadelphia jails were sexually victimized annually, which translated into at least 2,000 incidents of sexual assault in 12 months.⁵ Two thirds of the reported incidents were completed rapes and

¹ Human Rights Watch, *No Escape, Male Rape in U.S. Prisons*, https://www.hrw.org/reports/2001/prison/report2.html#N_29 (accessed Oct. 14, 2023).

² U.S. Department of Justice, Office of Justice Programs, *Bureau of Justice Statistics Bulletin*, <https://bjs.ojp.gov/content/pub/pdf/p00.pdf> (August 2001); Human Rights Watch, *No Escape, Male Rape in U.S. Prisons*, https://www.hrw.org/reports/2001/prison/report2.html#N_29 (accessed Oct. 14, 2023).

³ U.S. Department of Justice, Office of Justice Programs, *Bureau of Justice Statistics Bulletin*, <https://bjs.ojp.gov/content/pub/pdf/cpus10.pdf> (December 2011).

⁴ U.S. Department of Justice, Office of Justice Programs, *Correctional Populations in the United States, 2021 – Statistical Tables*, <https://bjs.ojp.gov/library/publications/correctional-populations-united-states-2021-statistical-tables> (accessed Oct. 14, 2023).

⁵ See Alan J. Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans, Transaction*, vol. 6, no. 2 pp. 8-16 (December 1968).

young, slightly built prisoners seemed to be the most at risk.⁶ Subsequent studies have yielded 14-20% of randomly selected prisoners have reported through anonymous questionnaires that they have been sexually victimized or pressured to have sexual contact at least once while incarcerated.⁷ While most of the research done by the early 2000s focused on incarcerated men, those studies that surveyed incarcerated women found that females were four times more likely than males to be victims of sexual violence.⁸

The Prison Rape Elimination Act (PREA) of 2003 was signed into law on September 3, 2004. Pub. L. No. 108-79, 117 Stat. 972 (2003). The goal of PREA was to eradicate prisoner rape in all types of correction facilities across the country. Congress set forth the following series of findings to support the passage of PREA:

- (1) 2,100,146 persons were incarcerated in the United States at the end of 2001: 1,324,465 in Federal and State prisons and 631,240 in county and local jails. In 1999, there were more than 10,000,000 separate admissions to and discharges from prisons and jails.
- (2) Insufficient research has been conducted and insufficient data reported on the extent of prison rape. However, experts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison. Many inmates have suffered repeated assaults. Under this estimate, nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000.
- (3) Inmates with mental illness are at increased risk of sexual victimization. America's jails and prisons house more mentally ill individuals than all of the Nation's psychiatric hospitals combined. As many as 16 percent of inmates in State prisons and jails, and 7 percent of Federal inmates, suffer from mental illness.
- (4) Young first-time offenders are at increased risk of sexual victimization. Juveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities -often within the first 48 hours of incarceration.

⁶ National Prison Rape Elimination Commission, *Report*, <https://www.ojp.gov/pdffiles1/226680.pdf>, p. 37-38 (June 2009).

⁷ *Id.*

⁸ Nancy Wolff, Cynthia Blitz, Jing Shi, Ronet Bachman, and Jane Siegel, *Sexual Violence Inside Prisons: Rates of Victimization*, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2438589/> (May 23, 2006).

- (5) Most prison staff are not adequately trained or prepared to prevent, report, or treat inmate sexual assaults.
- (6) Prison rape often goes unreported, and inmate victims often receive inadequate treatment for the severe physical and psychological effects of sexual assault -- if they receive treatment at all.
- (7) HIV and AIDS are major public health problems within America's correctional facilities. In 2000, 25,088 inmates in Federal and State prisons were known to be infected with HIV/AIDS. In 2000, HIV/AIDS accounted for more than 6 percent of all deaths in Federal and State prisons. Infection rates for other sexually transmitted diseases, tuberculosis, and hepatitis B and C are also far greater for prisoners than for the American population as a whole. Prison rape undermines the public health by contributing to the spread of these diseases, and often giving a potential death sentence to its victims.
- (8) Prison rape endangers the public safety by making brutalized inmates more likely to commit crimes when they are released -- as 600,000 inmates are each year.
- (9) The frequently interracial character of prison sexual assaults significantly exacerbates interracial tensions, both within prison and, upon release of perpetrators and victims from prison, in the community at large.
- (10) Prison rape increases the level of homicides and other violence against inmates and staff, and the risk of insurrections and riots.
- (11) Victims of prison rape suffer severe physical and psychological effects that hinder their ability to integrate into the community and maintain stable employment upon their release from prison. They are thus more likely to become homeless and/or require government assistance.
- (12) Members of the public and government officials are largely unaware of the epidemic character of prison rape and the day-to-day horror experienced by victimized inmates.
- (13) The high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution. In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Supreme Court ruled that deliberate indifference to the substantial risk of sexual assault violates prisoners' rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Eighth Amendment rights of State and local prisoners are protected through the Due Process Clause of the Fourteenth Amendment. Pursuant to the power of Congress under Section Five of the Fourteenth Amendment, Congress may take action to enforce those rights in States where officials have demonstrated such indifference. States that do not take basic steps to abate prison rape by adopting standards that do not generate significant additional expenditures demonstrate such indifference. Therefore, such States are not entitled to the same level of Federal benefits as other States.
- (14) The high incidence of prison rape undermines the effectiveness and efficiency of United States Government expenditures through grant programs such as those dealing with health care; mental health care; disease prevention; crime prevention, investigation, and prosecution; prison construction, maintenance, and operation; race relations; poverty; unemployment and homelessness. The effectiveness and efficiency of these federally funded grant programs are compromised by the failure

of State officials to adopt policies and procedures that reduce the incidence of prison rape in that the high incidence of prison rape: -

- (A) increases the costs incurred by Federal, State, and local jurisdictions to administer their prison systems;
- (B) increases the levels of violence, directed at inmates and at staff, within prisons;
- (C) increases health care expenditures, both inside and outside of prison systems, and reduces the effectiveness of disease prevention programs by substantially increasing the incidence and spread of HIV, AIDS, tuberculosis, hepatitis B and C, and other diseases;
- (D) increases mental health care expenditures, both inside and outside of prison systems, by substantially increasing the rate of post-traumatic stress disorder, depression, suicide, and the exacerbation of existing mental illnesses among current and former inmates;
- (E) increases the risks of recidivism, civil strife, and violent crime by individuals who have been brutalized by prison rape; and
- (F) increases the level of interracial tensions and strife within prisons and, upon release of perpetrators and victims, in the community at large.
- (15) The high incidence of prison rape has a significant effect on interstate commerce because it increases substantially –
 - (A) the costs incurred by Federal, State, and local jurisdictions to administer their prison systems;
 - (B) the incidence and spread of HIV, AIDS, tuberculosis, hepatitis B and C, and other diseases, contributing to increased health and medical expenditures throughout the Nation;
 - (C) the rate of post-traumatic stress disorder, depression, suicide, and the exacerbation of existing mental illnesses among current and former inmates, contributing to increased health and medical expenditures throughout the Nation; and
 - (D) the risk of recidivism, civil strife, and violent crime by individuals who have been brutalized by prison rape.

Pub. L. No. 108-79, §2, 171 Stat. at 972-74.

One of the Act's main purposes was to "(3) develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape" to "(7) protect the Eighth Amendment rights of Federal, State, and local prisoners" and "(8) increase the efficiency and effectiveness of Federal expenditures through grant programs such as those dealing with health care; mental health care; disease prevention; crime prevention, investigation, and prosecution;

prison construction, maintenance, and operation; race relations; poverty; unemployment; and homelessness.” Pub. L. No. 108-79, §3, 171 Stat. at 974-75.

Under PREA, Congress authorized the Attorney General to make grants to the states to “assist those States in ensuring that budgetary circumstances (such as reduced State and local spending on prisons) do not compromise efforts to protect inmates (particularly from prison rape) and to safeguard the communities to which inmates return. The purpose of grants under this section shall be to provide funds for personnel, training, technical assistance, data collection, and equipment to prevent and prosecute prisoner rape.” Pub. L. No. 108-79, §6, 171 Stat. at 978-80. Each grant application required a certification of the chief executive of that state receiving such a grant the state “(i) has adopted all national prison rape standards that, as of the date on which the application was submitted, have been promulgated under this Act; and (ii) will consider adopting all national prison rape standard that are promulgated under this Act after such date.” *Id.*

The Act additionally set a timeline for the adoptions of national standards “for the detection, prevention, reduction, and punishment of prison rape” by the Attorney General. Pub. L. No. 108-79, §9, 171 Stat. at 987. The Act made adoption of the national standards by the state a requirement for accepting Federal Funding from the Attorney General. Those states who did not adopt the national standards would have their grants under the subsection reduced by 5 percent. States could submit a certification saying the state has adopted or that not less than 5 percent of the grant amounts shall be used for the purpose of enabling the state to adopt and achieve full compliance with the national standards. Pub. L. No. 108-79, §8, 171 Stat. at 985-87.

Pursuant to PREA, Congress established the National Prison Rape Reduction Commission (“the Commission”) to carry out a Comprehensive legal and factual study of the penalogical, physical, mental, medical, social, and economical impacts of prison rate in the United States on

federal, state, and local governments; communities and social institutions generally, and including individuals, families, and businesses within such communities and social institutions from which it would present its findings and conclusions and recommend national standards for reducing prison rape, and recommend protocols for preserving evidence and treating victims of prison rape. Pub. L. No. 108-79, §7, 171 Stat. at 980-85. Over the next 6 years, the Commission conduct their fact-finding mission and develop national standards as requested by Congress. The National Prison Rape Elimination Commission Report was published in June 2009.⁹ After the Commission released their report, the Department of Justice took those national standards and promulgated standards that were published in the Code of Federal Regulations in May 2012, 28 C.F.R. § 115 (2012), with the PREA standards taking effect on August 20, 2012. The standards are broken down based on the confinement facilities to which they apply.

Within the Code of Federal Regulations, all standards begin with “115.”, followed by an extension that indicates what facility they apply to: Prisons and jails: two digits such as 115.13, Lockups: three digits beginning with .1, such as 115.113, Community confinement: three digits beginning with .2, such as 115.213, and Juvenile facilities: three digits beginning with .3, such as 115.313. The Standards issued for Prisons and jails¹⁰ are substantively the same as the Juvenile facility¹¹ standards. Both standards are broken down into following main topics found in both standards:

- General Definitions,
- Definitions related to sexual abuse,

⁹ National Prison Rape Elimination Commission, *Report*, <https://www.ojp.gov/pdffiles1/226680.pdf>, p. 37-38 (June 2009).

¹⁰ <https://www.prearesourcecenter.org/implementation/prea-standards/prisons-and-jail-standards>

¹¹ <https://www.prearesourcecenter.org/implementation/prea-standards/juvenile-facility-standards>

- Prevention Planning,
- Responsive Planning,
- Training and Education,
- Screening and Risk of Sexual Victimization and Abusiveness,
- Reporting,
- Official Response Following a Inmate (or Resident) Report,
- Investigations,
- Discipline,
- Medical and Mental Care,
- Data Collection and Review,
- Audits,
- Auditing and Corrective Action, and
- State Compliance.

The main difference between the Juvenile facilities and Prisons and Jails standards is the additional language applying to minors and the applicability of local child abuse laws in the juvenile facility standards.

The PREA standards are applicable to all prisons and jails, local lockups, community confinement, and juvenile facilities and impose requirements on agencies of a state, local, corporate, or nonprofit authority with direct responsibility for the operation of any facility that confines inmates, detainees, or residents. 28 C.F.R. § 115.5. The Federal government enforces PREA through grant reductions triggered by state governor's certification. Pub. L. No. 108-79, §8, 171 Stat. at 985-87. State governors indicate whether their state is in compliance with the PREA standards or give an assurance that the state is working toward full compliance for the state to not

be subject to a loss of five percent of certain DOJ grant funds the state would otherwise receive. The governor submits an assurance that that the state is committing not less than five percent of certain DOJ grant funds will be used solely for the purpose of enabling the state to achieve and certify full compliance with the standards in the future or that the funds be held in abeyance by the DOJ pending disposition consistent with the statute.

In addition to the fund reduction penalty, the DOJ offered certain grants to assist states to work toward full compliance with the PREA standards. Starting in 2014, the Department of Justice (DOJ) introduced three grant programs subject to the PREA statutory provision related to the submission of certifications and assurances. The Office of Justice Programs (OJP) administered two grant programs: (1) BJA's Edward Byrne Memorial Justice Assistance Grant Program, and (2) the Office of Juvenile Justice and Delinquency Prevention's (OJJDP's) Juvenile Justice and Delinquency Prevention Act (JJDP) Formula Grant Program. The Office on Violence Against Women (OVW) administered a third grant program, the Services, Training, Officers, and Prosecutors (STOP) Violence Against Women Formula Grant Program. The Justice for All Reauthorization Act of 2016 specified that programs administered by OVW are not "covered programs" for the purpose of PREA. Starting with 2017 funds, the STOP Violence Against Women Formula Program was not included as a program subject to PREA.

South Carolina's governor submitted assurance to the DOJ that the state was committing the five percent of federal grant funds to implementation of the National PREA standards starting in 2014¹² and has submitted the same assurance each subsequent year through the most recent for

¹² U.S. Department of Justice, Bureau of Justice Assistance, *Prison Rape Elimination Act (PREA) Overview*, https://bja.ojp.gov/program/prea/overview?Program_ID=76 (accessed Oct. 14, 2023).

2022.¹³ In addition to the assurance submission from the governor to the DOJ preserving the 5% of federal funding, The South Carolina Department of Public Safety submitted proposals for grants from the Department of Justice to help SCDC and SCDJJ to implement the PREA standards in South Carolina prisons and juvenile facilities. The first DOJ specific PREA grant was issued in 2014 which South Carolina accepted \$75,646 for SCDC and SCDJJ to “work collaboratively in establishing zero tolerance cultures for sexual abuse across all of their facilities through the PREA Advocacy Project. South Carolina proposes that, within the twelve-month project period, both agencies will demonstrate, through this project, significant compliance with the PREA standards 115.21 and 115.53, Inmate Access to Outside Confidential Support Services.” See U.S. Department of Justice, Bureau of Justice Assistance, *South Carolina FY2014 Prison Rape Elimination ACT (PREA) Reallocation Fund (JAG Program)*, <https://bja.ojp.gov/funding/awards/2014-xt-bx-0021> (accessed Oct. 14, 2023). SCDC and SCDJJ have accepted funds every subsequent year to “be utilized to support staff training and the production of inmate

¹³ Fiscal Year 2014 Grants: Assurance BJA JAG \$75,646, OJJDP JJDPA \$17,883, OVW STOP Grant \$105,273, Total \$198,802. See https://www.prearesourcecenter.org/sites/default/files/content/departement_of_justice_prea_compliance_press_release.pdf; <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/fy14-prea-reallocations.pdf>. Fiscal Year 2015 Grants: Assurance BJA JAG \$69,509, OJJDP JJDPA \$26,186, OVW STOP Grant \$102,120, Total \$197,814. See <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/fy15-prea-grant-impact.pdf>. Fiscal Year 2016 Grants: Assurance BJA JAG \$72,298, OJJDP JJDPA \$16,758, OVW STOP Grant \$112,661, Total \$201,717. See <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/fy16-prea-grant-impact.pdf>. Fiscal Year 2017 Grants. See <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/fy17-prea-certification-assurance-submissions.pdf>. Fiscal Year 2018 Grants. See <https://bja.ojp.gov/doc/fy18-prea-certification-assurance-submissions.pdf>. Fiscal Year 2017 Grants: Assurance Grant Reallocation BJA JAG \$68,172, OJJDP JJDPA \$25,604, Total \$93,776. See <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/FY2019-PREA-Grant-Impact.pdf>. Fiscal Year 2020 Grants: Assurance Grant Reallocation BJA JAG \$62,062, OJJDP JJDPA \$31,191, Total \$93,253. See <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/fy2020-prea-grant-impact.pdf>; Fiscal Year 2021. See <https://bja.ojp.gov/doc/fy21-prea-certification-assurance-submissions.pdf>. Fiscal Year 2022. See <https://bja.ojp.gov/doc/fy22-prea-certification-assurance-submissions.pdf>.

awareness publications for sexual safety, diminishing the potential for victimization,” See U.S. Department of Justice, Bureau of Justice Assistance, *South Carolina FY2015 PREA JAG Reallocation Program*, <https://bja.ojp.gov/funding/awards/2015-xt-bx-0033> (accessed Oct. 14, 2023) (total funding equaled \$69,509), and “Funds will be utilized to provide victim advocacy services.” U.S. Department of Justice, Bureau of Justice Assistance, *South Carolina FY2016 Prison Rape Elimination ACT (PREA) Reallocation Fund (JAG Program)*, <https://bja.ojp.gov/funding/awards/2016-xt-bx-0005> (accessed Oct. 14, 2023) (total funding equaled \$72,298).¹⁴ In total, SCDC and SCDJJ have accepted \$875,913 from the Department of Justice to implement the PREA standards to prevent sexual assaults in their facilities.

¹⁴ See 2017 JAG PREA Reallocation Grant, <https://bja.ojp.gov/funding/awards/2017-xt-bx-0005> (\$71,644); 2018 JAG PREA Reallocation Grant, <https://bja.ojp.gov/funding/awards/2018-xt-bx-0016> (\$69,875) (“The goals of the FY 2018 PREA Reallocation JAG Program are to continue implementation of the national standards to prevent, detect, and respond to prison rape in order to protect individuals from sexual abuse and sexual harassment in confinement... The South Carolina Department of Public Safety will utilize the FY18 PREA Reallocation funds to support the South Carolina Department of Corrections and the South Carolina Department of Juvenile Services. Funds will be utilized for victim advocacy services.”); 2019 JAG PREA Reallocation Grant, <https://bja.ojp.gov/funding/awards/2019-xt-bx-0018> (\$68,172); 2020 JAG PREA Reallocation Grant, <https://bja.ojp.gov/funding/awards/2020-xt-bx-0011> (\$62,062); 2021 JAG PREA Reallocation Grant, <https://bja.ojp.gov/funding/awards/15pbja-21-gg-00344-jagp> (\$68,512); 2022 JAG PREA Reallocation Grant, <https://bja.ojp.gov/funding/awards/15pbja-22-gg-01094-jagp> (\$71,132) (“Through the use of proposed Prison Rape Elimination Act (PREA) Reallocation Funds, SCDC and SCDJJ intend to continue the transformation of agency culture to one of zero tolerance for sexual abuse, regardless of where an inmate is housed. SCDC and SCDJJ are confident that, with these additional PREA funds, they will continue to demonstrate substantial progress toward the definitive goal of increasing the safety of inmates and staff in all of its facilities.”); See also 2019 Building Capacity to Sustain PREA Compliance Grant, <https://bja.ojp.gov/funding/awards/2019-rp-bx-0006> (\$247,063) (“The recipient will utilize FY19 Implementing the PREA Standards, Protecting Inmates, and Safeguarding Communities to support the South Carolina Department of Corrections (SCDC). Funds will be utilized to reduce sexual abuse in SCDC facilities by instilling a zero-tolerance-for-sexual abuse culture through improved engagement of offenders, training of staff, capacity-building strategies, improved surveillance, and enhanced accountability processes.”).

South Carolina's agencies that are directly responsible over the operation of facilities that confine inmates, detainees, or residents are the Defendants South Carolina Department of Corrections and the South Carolina Department of Juvenile Justice. These agencies, in response to PREA, adopted the federal standards to be implemented as policies and procedures new within South Carolina's SCDOC and SCDJJ facilities.

South Carolina Department of Corrections Policies Adopted PREA Standards

SCDC adopted policy OP-21.12 "Prevention, Detection, and Response to Sexual Abuse/Sexual Harassment" on October 29, 2014 (it later became GA-06.11 and GA-06.11B on July 8, 2020) and GA-01.12 "Inmate Grievance System" on May 12, 2014. See South Carolina General Assembly Legislative Audit Council, *A Limited Review of the S.C. Department of Corrections*, South Carolina General Assembly Legislative Audit Council, p. 136 (August 2019) (available at https://lac.sc.gov/sites/lac/files/Documents/Legislative%20Audit%20Council/Reports/A-K/SCDC_2019.pdf). Additionally, SCDC had adopted policy OP-21.04 "Inmate Classification Plan" on October 21, 2013. These policies appear to be SCDC's attempt at implementing the PREA standards in SCDC department policy.

A 2019 Legislative Audit Council ("LAC") Report found that "SCDC has also not complied with federal regulations implemented under the Prison Rape Elimination Act (PREA), particularly those regarding auditing and accountability." *Id.* at p. 113. The LAC found that SCDC is undercounting, underreporting, and not investigating all possible incidents to sexual assault in their facilities. *Id.* at p. 133-35. "Without clear definitions of sexual abuse and harassment that are consistent with federal PREA regulations and consistent across divisions of the agency, SCDC will continue to report incomplete, inconsistent information regarding sexual abuse and harassment." *Id.* at p. 135. "SCDC policy regarding staff sexual misconduct with inmates is unclear

and inconsistent with federal PREA regulations. This policy was last updated in 2004, 8 years before PREA regulations were finalized and promulgated.” *Id.* at p. 136. The LAC recommended that the S.C. Department of Corrections:

- Prepare annual reports detailing corrective actions it has taken to prevent sexual abuse, the number of allegations and substantiated incidents of sexual abuse by facility, and comparisons with data from prior years;
- These reports should further be publicly released on the agency’s website;
- Revise its policy to more accurately reflect federal regulations promulgated under the Prison Rape Elimination Act; and
- Revise its policy to include procedures to ensure that resignations from employees under investigation or terminated for sexual misconduct are not accepted.

Id. at p. 137.

South Carolina Department of Juvenile Justice Policies Adopted PREA Standards

In 2017, the South Carolina General Assembly Legislative Audit Council found that the “S.C. Department of Juvenile Justice is not currently in compliance with the Federal Prison Rape Elimination Act (PREA). We have no evidence that the agency has accurately determined the additional resources that are needed to be in compliance with key requirements of the law.” South Carolina General Assembly Legislative Audit Council, *A Limited Review of the S.C. Department of Juvenile Justice*, p. 17-18 (January 2017) (available at <https://lac.sc.gov/sites/lac/files/Documents/Legislative%20Audit%20Council/Reports/A-K/DJJ.pdf>). The LAC found:

- an under staffing of 126 corrections officers,
- SCDJJ had not developed adequate staffing plans for each of its facilities,
- and the SCDJJ PREA Coordinator position was vacant for 32 months (until it was filled in 2017).

Id. at p. 17-18. SCDJJ then adopted the PREA Standards in Policy H-3.16 “Application of the PREA Standards” on March 5, 2018, and Policy H-3.15 “Prevention of Sexual Offenses toward

Juveniles” on June 13, 2018. The department updated the 2018 policies with Policy 336 and Policy 321 on May 6, 2021.

SCDJJ’s failure to meet the PREA standards for staffing levels continued into 2021 when the South Carolina General Assembly Legislative Audit Council conducted a follow up on their 2017 audit and found that “[c]urrent staffing does not meet even the minimal staffing patterns set forth in the staffing plans.” South Carolina General Assembly Legislative Audit Council, *A Limited Review of the S.C. Department of Juvenile Justice and Follow Up to Our January 2017 Audit*, p. 8 (April 2021) (available at <https://lac.sc.gov/sites/lac/files/Documents/Legislative%20Audit%20Council/Reports/A-K/DJJ-2021.pdf>). The LAC also found that “PREA audit reports conducted by a certified auditor with experience within the Georgia Department of Juvenile Justice corroborated the insufficient staffing levels at DJJ.” *Id.* at p. 7-8. Even though DJJ told the LAC it was compliant with the PREA standards including juvenile/staff ratio in 2021, DJJ admitted in 2022 that “[c]urrently, at Broad River Road Complex, we do not consistently meet the staff-to-youth 1:8 waking hours ratio on all pods on all shifts.” South Carolina Department of Juvenile Justice, *DJJ Initial Implementation Plan, SCDJJ, Broad River Road Complex*, p.9 (Aug. 12, 2022) (available at <https://djj.sc.gov/sites/djj/files/Documents/BRRC%20Initial%20Implementation%20Plan%20Summary.pdf>).

In 2022, after a February 5, 2020, notice regarding a Department of Justice (“DOJ”) investigation of the SCDJJ, the DOJ issued a report on SCDJJ’s Broad River Road Complex that found that the “DJJ failed to investigate or fully investigate incidents for a variety of reasons, including delays in initiating the investigations, leading to a loss of access to the witnesses; an inadequate video retention policy and practice; inadequate scrutiny of incidents that did not generate complaints; and non-reporting by staff.” United States Department of Justice Civil Rights

Division, *Investigation of South Carolina Department of Juvenile Justice's Broad River Road Complex*, p. 4 (April 14, 2022) (available at <https://www.justice.gov/d9/press-releases/attachments/2022/04/14/2022.04.14 - sc broad river use of force findings report final 0.pdf>). The DOJ also filed a lawsuit¹⁵ and subsequent settlement agreement in federal court in April 2022 involving SCDJJ's Broad River Road Complex in which SCDJJ agreed to continue to reform its policies and procedures to remedy certain conditions that violated the constitutional rights of youth at BRRC. *Agreement between The United States and the South Carolina Department of Juvenile Justice*, p.1 (April 14, 2022) (available at <https://www.justice.gov/d9/press-releases/attachments/2022/04/14/2022.04.13 south carolina agreement final signed 0.pdf>).

The DOJ additionally found that PREA screening prior to 2022 and classification policy and process had design flaws that did not identify sexually vulnerable youth. *DJJ Initial Implementation Plan, SCDJJ, Broad River Road Complex*, at p. 25 ("This includes a new PREA risk screening tool that is being developed that will more accurately identify vulnerable youth. The prior screening tool had design flaws that may not have fully ensured BRRC was aware of its sexually vulnerable youth. Though PREA and sexual safety was not a matter identified by the DOJ as an issue at BRRC, the agency is ensuring when it discovers an issue, it is resolved.").

SCDC and SCDJJ Policies Are Applicable to Each Facility Under the Agencies Control

The policies and SCDC and SCDJJ are applicable to each facility that is under the control of those respective agencies, either directly or through contracts with third parties. See SCDC, *Policy GA-01.01 Policies/Procedures and Forms*, Policy Statement (Feb. 1, 2022) (available at

¹⁵ *United States of America v. S.C. Dept. of Juvenile Justice*, 3:22-cv-01221-MGL (D.S.C. Apr. 13, 2022) (available at <https://www.justice.gov/d9/press-releases/attachments/2022/04/14/2022.04.13 south carolina agreement final signed 0.pdf>).

<https://doc.sc.gov/sites/doc/files/Documents/policy/GA-01-01.pdf>); *Policy GA-06.11B Applying the Prison Rape Elimination Act (PREA)*, §1.2 (Nov. 23, 2021) (available at <https://doc.sc.gov/sites/doc/files/Documents/policy/GA-06-11B.pdf>); SCDJJ, *Policy 336 Application of the PREA Standards*, §A.1-A.2 (May 6, 2021) (available at <https://djj.sc.gov/sites/djj/files/Documents/Policy%20-%20Application%20of%20PREA%20Standards.pdf>). Each facility is required to implement the PREA standards in 25 C.F.R. Part 115 as set forth for their respective facilities. Individual facilities do not have the authority to choose which policies of their parent agency they will implement. *Id.*

III. Class Certification

This action is an Injunctive Class with regards to both Defendants failure to fully implement the standards adopted pursuant to the passage of PREA and an “opt-out” class action with regards to damages being sought by Plaintiffs for the sexual assaults suffered while inmates or residents in Defendant’s facilities, brought under Rule 23, South Carolina Rules of Civil Procedure (“SCRCP”). The Plaintiffs seek the certification of the following class:

All individuals that have been under the custody and care of the South Carolina Department of Corrections (“SCDC”) or the South Carolina Department of Juvenile Justice (“SCDJJ”) in South Carolina from 2012 until present who were victims of rape and/or sexual assault.

Amended Complaint, ¶ 70 (Feb. 15, 2023).

A. Generally

The party seeking class action treatment has the burden of demonstrating that the perquisites to certification have been met.

1. Prerequisites to Certification

“Proponents of class certification bear the burden of proving five prerequisites under South Carolina law.” *See Waller v. Seabrook Island Property Owners Assn.*, 300 S.C. 465, 388 S.E.2d 799 (1990); Rule 23(a), SCRCF. The prerequisites are:

- 1) the class must be "so numerous that joinder of all members is impracticable;"
- 2) there must be "questions of law or fact common to the class;"
- 3) the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class;"
- 4) "the representative parties [must] fairly and adequately protect the interests of the class;" and
- 5) "the amount in controversy [must] exceed one hundred dollars for each member of the class."

Rule 23(a), SCRCF.

The first four criteria are often referred to as the requirements for numerosity, commonality, typicality, and adequacy of representation. The final requirement is a requirement unique to South Carolina and can be addressed through a class definition including a threshold showing. Deposition testimony and discovered documents buttress and highlight the advantages of class treatment including that class treatment provides the Court with the most efficient, just, and expedient method of dealing with the known facts. When all the prerequisites have been met, then it is within the Court’s discretion to decide whether the class is to be certified. *King v. Am. Gen. Fin., Inc.*, 386 S.C. 82, 88, 687 S.E.2d 321, 324 (2009).

2. Elements Not Considered

When analyzing these factors, the South Carolina Supreme Court has recognized and endorsed an expansive view of class actions. “Since the adoption of Rule 23, SCRCF, this Court has heard many cases that have used the class action procedure to allow adequate representatives

to address issues which affect large groups of citizens in our state.” *Littlefield v. S.C. Forestry Comm’n*, 337 S.C. 348, 355, 523 S.E.2d 781,784 (2000). Additionally, our State Supreme Court has recognized that the state Rule 23(a) is not as restrictive as its federal counterpart because it omitted the factors contained in part (b) of the federal rule. Thus, while federal case law on certain class requirements such as those contained in Rule 23(a) may be instructive, federal cases concerning the additional requirements of Rule 23(b), FCRP, do not apply:

Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23 (SCRCP) intentionally omitted from our state rule the additional requirements found in federal rule 23(b) By omitting the additional requirements, Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart.

Id. at 355-56, 523 S.E.2d at 784.

A trial judge's ruling on whether an action is properly maintainable as a class action is within his discretion. *Waller*, 300 S.C. 465, 388 S.E.2d 799. Proponents of the class certification have the burden of proving the prerequisites have been met. *Id.* The focus is on whether the prerequisites of Rule 23 have been met, but if any doubt as to class certification exists, “any error, if there is to be one, should be committed in favor of allowing the class action.” *Hoffman Elec. Inc. v. Emerson Elec. Co.*, 754 F.Supp. 1070 (W.D. Pa. 1991). In other words, class actions are favored in South Carolina. *Grazia v. South Carolina State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197 (2010). This is so because “the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.” *Id.* at 576, 703 S.E.2d at 204 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979)).

Elements of the action that are not to be considered in determining whether the proponent has met its burden of establishing the prerequisites for certification are: (1) the merits of the case,

i.e., whether the claims will likely succeed and the defenses to class member claims,¹⁶ *King*, 386 S.C. at 88, 687 S.E.2d at 324 (citing *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 43, 508 S.E.2d 16, 21 (1998)); and (2) the existence of, or differences in, the amount of damages that each class member may recover. *McGann v. Mungo*, 287 S.C. 561, 569, 340 S.E.2d 154, 158 (Ct. App. 1986) (“The mere fact that the plaintiffs may be entitled to different amounts of damages does not prevent them from banding together and asserting their rights jointly in one action.”); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417 (4th Cir. 2003) (affirming the certification of a class of 1400 consumers in the State of South Carolina even with differences in individual damages within the class).

B. The proposed class is so numerous that joinder of all members is impracticable, Rule 23(a)(1)

SCDC operates 21 facilities serving about 16,000 inmates in 2023¹⁷ and SCDJJ operates five facilities with an average daily population of around 700 youth offenders.¹⁸ If you accept the low end of the statistical analysis that 1% of the prison population has suffered sexual assault, then 160 inmates in SCDC and 7 residents in SCDJJ have suffered a sexual assault in 2023. If you accept the high end of the statistical analysis more than 40% of the inmate population has been sexually assaulted, then 6,400 inmates in SCDC and 280 residents in SCDJJ have suffered a sexual assault in 2023. Expanding those estimates across the relative time frame of 2014-present, the potential number of class members can range from 1,600 to 64,000 inmates for SCDC and 70 to 2,800 residents for SCDJJ.

¹⁶ 1 *Newberg on Class Actions* § 3.16, at 3-88 – 90 (3d ed. 1992) (defenses applicable to individual class members should be resolved in a trial on the merits and do not preclude maintenance of a class action, as the focus of class certification “is properly on the typicality of the plaintiff’s claim as it applies to the general liability issues [and] not on the plaintiff’s ultimate ability to recover”).

¹⁷ <https://www.doc.sc.gov/about-scdc#:~:text=The%20S.C.,prisons%20serving%20about%2016%2C000%20inmates>

¹⁸ <https://djj.sc.gov/sites/djj/files/Documents/Report%20Cards/2019%20Report%20Card.pdf>

Professor Arthur Miller stated the following guideline as distilled from an exhaustive review of the cases on the numerosity requirement under Rule 23, Fed.R.Civ.Proc.,: “If the class has more than forty people in it, numerosity is satisfied; if the class has less than twenty- five people in it, numerosity probably is lacking; if the class has between twenty-five and forty, there is no automatic rule and other factors, discussed below, become relevant.” Miller, Arthur, *An Overview of Federal Class Actions: Past, Present and Future*, Federal Judicial Center Education & Training Series, p. 22 (2d Ed. 1977). Under any test the potentially massive number of inmates confirms that joinder of all putative class members would be impracticable. *Grant v. Sullivan*, 131 F.R.D. 436 (M.D.Pa. 1990) (14 class members) *see also* *Arkansas Education Assn. v. Board of Education*, 446 F.2d 763 (8th Cir. 1971) (17 class members); *Cypress v. Newport News General and Nonsectarian Hospital Assn.* 375 F.2d 648 (4th Cir. 1967) (18 class members); *MacNeal v. Columbine Exploration Corp.*, 123 F.R.D. 181 (E.D.Pa. 1988) (36 class members); *Dameron v. Sinai Hospital*, 595 F.Supp. 1404 (D.Md. 1984) (25-30 class members); *Pabon v. McIntosh*, 546 F.Supp. 1328 (30-40 class members); *National Gypsum v. Kirbyville Independent School District*, 770 S.W.2d 621 (Tex.Civ.App.-Beaumont 1989) (67 class members); *Republic National Bank of Dallas v. Denton & Anderson Co.*, 68 F.R.D. 208 (N.D.Tex. 1975) (class in excess of 40 members me “numerosity” as a matter of law); *Sharon Steel Corp. v. Chase Manhattan Bank*, 88 F.R.D. 38 (S.D.N.Y. 1980) (87 class members); *Polich v. Burlington N, Inc.*, 116 F.R.D. 258 (D.Mont. 1987) (60 class members).

Under any analysis, numerosity is established.

C. Commonality, Rule 23(a)(2)

The commonality requirement of Rule 23 is not a stringent requirement. “To establish commonality, a party must show that there are questions of law or fact common to the class.”

Gardner v. S.C. Dep't of Revenue, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003) (citing Rule 23, SCRCF) (quotations removed). “In practical terms this means the party must articulate the existence of ‘significant common, legal, or factual issues’ which bind the proposed class together. *Id.* (citing *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 64 (S.D.Ohio 1991). One common fact or issue is sufficient to satisfy this requirement, if important enough. *McGann v. Mungo*, 287 S.C. at 568, 340 S.E.2d at 158 (citing, Lightsey & Flanagan, South Carolina Civil Procedure, p.198 (1985) (“a single common issue will suffice if it is important enough”)); *Newberg, H, Newberg on Class Actions*, 2d Ed., p. 154 (1985) cases cited at p. 140-1). “When the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all parties affected.” *Newberg on Class Actions*, at p.154. Accordingly, “the majority of decisions on the common question issue ... have held that the presence of individual questions will not prevent satisfaction of the [Rule 23] requirements.” *Id.*, at 159. “Critically, [n]ot every issue in the case must be common to all class members.” *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200 (quotations removed). In fact, “[t]he commonality requirement is relatively easy to satisfy.” *Buchanan v. Consolidated Stores Corp.*, 217 F.R.D. 178, 187 (D.Md. 2003). Factual differences among the class members’ cases “will not preclude certification if the class members share the same legal theory.” *Mitchell-Tracey v. United Gen. Title Ins. Co.*, 237 F.R.D. 551, 557 (D.Md. 2006) (quoting *Peoples v. Wendover Funding, Inc.*, 179 F.R.D. 492, 498 (D.Md.1998)); *Parra v. Bashas’, Inc.*, 536 F.3d 975, 979 (9th Cir. 2008) (“Plaintiffs here establish commonality even though their individual factual situations differ because they all seek a common legal remedy for a common wrong.”); *Patterson v. Gen. Motors Corp.*, 631 F.2d 476, 481 (7th Cir. 1980) (“a class action will not be defeated solely because of some factual variations among class members’ grievances”); *Senter v. Gen. Motors*

Corp., 532 F.2d 511, 524 (6th Cir. 1976) (“Factual identity between the plaintiff’s claims and those of the class he seeks to represent is not necessary.”); *Carter v. City of Montgomery*, No. 2:15-CV-555-RCL, 2021 WL 2042090, at *5 (M.D. Ala. May 21, 2021) (“The existence of factual differences does not prevent a finding of commonality when common legal questions are central to the case.”); *Belezos v. Bd. of Selectmen of Hingham, Massachusetts*, No. CV 17-12570-MBB, 2019 WL 6358247, at *8 n.10 (D. Mass. Nov. 27, 2019) (“It is well settled that the requirement of ‘common questions of law or fact’ in Rule 23(a) is disjunctive; that is, *either* a question of law or a question of fact will suffice.”). “[T]he existence of routine and standardized practices giving rise to numerous claims weigh in favor of finding commonality, as well as typicality.” *Mitchell-Tracey*, 237 F.R.D. at 557. “Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury.’ This does not mean merely that they have all suffered a violation of the same provision of law.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-350 (2011) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. at 157).

In this case, common issues of fact and law clearly predominate over individual class member issues. The core of this case involves a common origin, the adoption of the PREA standards for prisons and juvenile facilities through the acceptances of federal grants. These PREA standards are essential identical for preventing sexual assaults of individuals housed in these facilities. The Defendants failure to implement these standards directly contributed to the sexual assaults each putative class representatives suffered while they were in the custody of the Defendants. See Exhibit 1 - Aff. of James Aiken (Nov. 17, 2023). Without a certified class, the Court would be forced to examine these cases individually to determine the rights of each victim. Common class treatment is appropriate and superior to any other method.

Facts and legal issues common to the claims of plaintiffs, which could give rise to findings that Defendants standard of care are as follows:

- The federal PREA standards for both prisons/jails and juvenile facilities are substantially similar and are applicable to both Defendants.
- All federal PREA standards are applicable to each facility that housed putative class members, the individual facilities did not have different standards.
- Defendant's individual facilities are not permitted to deviate from the SCDC/SCDJJ standards.
- Did Defendants fail to enforce their policies and procedures which would have prevented the sexual assaults suffered by the Plaintiffs?
- Did Defendants breach their duty of care to Plaintiffs?
- Whether Defendants actions in failing to implement policies were reckless, willful and wanton, and grossly negligent?
- Whether the Defendants failure to classify inmates properly, failure to monitor inmates, allowing gross overcrowding, and failure to provide appropriate employees and staff at the various location of Defendants' facilities would have prevented the sexual assaults suffered by Plaintiffs?
- Whether Defendants actions were the proximate cause of Plaintiffs physical and emotional injuries, incurred medical expenses, permanent scarring, and permanent impairment and disability?
- Did Defendants fail to fully implement and enforce standards and requirements set forth in their policies and procedures?
- Did Defendants knowingly and intentionally fail to implement and enforce its own policies and practices including:
 - Fail to classify inmates and residents properly?
 - Fail to monitor inmates and residents?
 - Allow gross overcrowding at facilities?
 - Fail to provide appropriate employees and staff at the Defendants' facilities?
 - Fail to implement prescribed security measures?
- Did Defendants' failure to implement and enforce their policies and practices resulted in unsafe conditions for the inmates/residents?
- Were the unsafe conditions for the inmates and residents result in the foreseeable sexual assaults of the putative class members while under the custody and care of the Defendants?

Regardless of the individual circumstances of their sexual assaults, all inmates find themselves in the same situation where the Defendants affirmatively adopted standards to protect the inmates, yet Defendants failed enforce those standards in their facilities and the class representative were sexually assault while under Defendants custody and care.

D. The Claims set forth in the Amended Complaint are Typical of the Representative Class and thus Satisfy the Typicality Requirement of Rule 23(a)(3) of the South Carolina Rules of Civil Procedure

The idea of typicality runs closely with the idea of commonality. As the Eastern District Court in Virginia has stated “[t]he Rule 23(a) requirements of commonality and typicality tend to merge analytically.” In general, commonality requires that there be “questions of law or fact common to the class,” and typicality requires that “the claims or defenses of representative parties are typical of the claims or defenses of the class.” *In re Mills Corp. Securities Litigation*, 257 F.R.D. 101, 105 (E.D.Va. 2009) (citing *In re BearingPoint, Inc. Sec. Litig.*, 232 FR.D. 524, 538 (E.D.Va. 2006) (citing *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982))).

“A claim is typical if it arises from the same course of conduct that gives rise to the claims of the class members and if the claims are based on the same legal theories.” *Central Wesleyan College v. W. R. Grace & Co.*, 143 F.R.D. at 637. This “test does not require that the representatives have identical claims which other class members might present. The question of typicality [instead] focuses on the similarity of the legal and remedial theories of claims of the named and unnamed plaintiffs.” *Bates v. TencoServices, Inc.*, 132 F.R.D. 160, 163 (D.S.C. 1990); *see also*, Flanagan, *South Carolina Civil Procedure* (2d Ed. 1996) at 180 (“the use of the word ‘typical’ suggests that the claims or defenses do not need to be co-extensive, but rather similar to, or shared by most members of the class”). Moreover, “[t]ypicality is generally presumed when common questions exist.” *Newberg on Class Actions* at 165. To satisfy the “typicality”

requirement, the named plaintiffs claims must be similar enough to those of the class to assure that the class's interests are vigorously prosecuted. 7A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure, § 1764 (2d ed. 1986). In 2009, the South Carolina Supreme Court found the typicality requirement of Rule 23(a) was satisfied in a case involving application of the attorney preference statute, which required certain creditors to ascertain the borrowers' preference as to legal counsel for the closing of the loan. *King*, 386 S.C. 82, 687 S.E.2d 321 (2009). Despite the fact that the plaintiffs had different factual circumstances regarding their specific loans and the notice provided to them, the Supreme Court found typicality existed "in the common feature of the lender failing to timely provide the attorney preference disclosure." *Id.* at 91, 687 S.E.2d at 325. The Court also found that commonality had been met. *Id.*

In the case at hand, the claims of the class representatives as well as the putative class members are (1) current or former inmates or residents of the Defendants (2) who were sexually assaulted while under the custody and control of the Defendants and (3) suffered injuries from those sexual assaults. There are no conflicts between the Plaintiffs, each Plaintiff's claim arises from the same standard of care and the breach of that standard of care by the Defendants. Accordingly, all claims of the named Plaintiffs are typical of those of the putative class.

E. Adequacy, Rule 23(a)(4)

The hallmark of a class action is its representative character. This procedural device enables one case to resolve issues involving many potential plaintiffs often whose need for resolution would be outweighed by the costs of achieving it. Class actions also promote the administrative efficiency of the judicial system by avoiding a multiplicity of actions and preventing inconsistent adjudications. However, for vicarious representation to function consistently with constitutional due process, those present in court (class representatives and their counsel) must

adequately represent those who are not. The adequacy prerequisite focuses on the interest of the named plaintiffs in the litigation and on the qualification, experience, and conduct of their counsel. Rule 23(a)(4) requires that the named plaintiff fairly and adequately protect the interests of the class. That protection involves two factors: (1) counsel must be qualified, experienced and generally able to conduct the proposed litigation; and (2) plaintiffs' claims must be sufficiently interrelated and not antagonistic to the class claims. *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 561 (D.S.C. 2000).

Because absent class members will be bound by the judgment entered in the action, to fairly and adequately represent them, the class representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case, and they must not have interests that conflict with those of absent members. *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 99 (4th Cir. 2011). There are four class representatives in this case, each of whom has a personal stake in its outcome and each of whom has a justiciable claim. These individuals suffered sexual assaults while under the custody and care of the Defendants. Three of these Plaintiffs (Henson, Collins, and Robinson) were under the custody and care of SCDC and one Plaintiff (Taylor) was under the custody and care of SCDJJ. The Plaintiffs were sexually assault between 2015 and 2020 while under the custody and care of the Defendants.

The class representatives also have been directly and continuously involved in protecting the class members in this case during the six years since its commencement. Three of the class representative's deposition were taken on all issues in the case at least once and the fourth was offered on numerous dates, but the Defendants chose not to take his deposition. Each class representative has met with counsel and produced any documents requested of them during written

discovery. There can be no serious question raised that the class representatives have only a technical interest and not a genuine personal interest in the outcome of this case.

i. The Named Representatives are all Members of the Putative Class and have no Interests that are Antagonistic of those of the Class

The class representatives do not have conflicts with absent class members or with each other. In deciding if the named Class Representatives will adequately represent the interests of the class the court must consider whether the plaintiff “has common interests with the unnamed members of the class” and will “vigorously prosecute the interests of the class.” *See Runion v. U.S. Shelter*, 98 F.R.D. 313, 317 (D.S.C. 1983); *Waller*, 300 S.C. at 468, 388 S.E.2d at 801 (citing *Runion* as a decision which “sets forth all criteria to be considered in determining whether a named plaintiff will adequately represent a proposed class.”). The plaintiffs have demonstrated absolute fidelity to the class and have vigorously prosecuted this case since inception. The class representatives do not have conflicts with absent class members or with each other.

ii. Class Counsel

Counsel have submitted affidavits as to their adequacy to prosecute this case on behalf of all class members. There is a wealth of legal experience from lawyers in South Carolina, including significant class action experience. *See Exhibit 2 – Affidavit of C. Alan Runayn*. Since the class representatives do not have conflicts with each other, or with absent class members, this representation by their counsel is likewise not in conflict.

F. In cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each class member – Rule 23(a)(5)

Plaintiffs are seeking declaratory relief that would require the Defendants to implement the PREA standards fully in all their facilities. As such, the amount in controversy would not apply. In addition, however, Plaintiffs are seeking monetary damages for the injuries suffered for being

sexually assaulted while in the Defendants custody and control. The potential damages for each of these sexual assaults exceed the \$100 in controversy amount. Accordingly, the amount in controversy requirement of Rule 23(a)(5) is satisfied.

IV. Conclusion

This case meets the requirements and purposes of a class action and the Plaintiffs have adequately alleged the elements necessary to support their motion for class certification. The putative class is made of potentially hundreds if not thousands of current and former inmates and residents of the Defendants, whose claims all arise from the breach of the standard of care required by PREA. Each member's damages easily exceed the \$100 threshold required in South Carolina law. Additionally, Plaintiffs are seeking injunctive and declaratory relief where the amount in controversy is not applicable. Plaintiffs' motion for class certification is proper and appropriate and the Court should grant Plaintiffs' motion.

Respectfully submitted,

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ATTORNEYS FOR THE PLAINTIFF

Beaufort, South Carolina
This 11th day of January, 2024

Exhibit 1

Affidavit of James E. Aiken

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	Case No.: 2017-CP-18-1125
CALVIN HENSON, DANIEL JAMES	)	
COLLINS, JASON ROBINSON,	)	
RUSSELL TAYLOR and ALL THOSE	)	
SIMILARLY SITUATED,	)	AFFIDAVIT OF
	)	JAMES E. AIKEN
Plaintiffs,	)	
	)	
v.	)	
	)	
SOUTH CAROLINA DEPARTMENT	)	
OF CORRECTIONS and the SOUTH	)	
CAROLINA DEPARTMENT OF	)	
JUVENILE JUSTICE	)	
	)	
Defendants.	)	

I. Qualifications

1. My name is James E. Aiken, and I am a former Commissioner on the National Prison Rape Elimination Commission, the body charged with developing the Prison Rape Elimination Act (PREA) standards for the prevention, detection, and elimination of prison rape that apply to corrections departments across the country.
2. I also have over 52 years of experience in the administration, operation, and management of Departments of Correction and male and female correctional facilities and have held positions including Warden and Commissioner/Director.
3. For example, I served as the Director of the Bureau of Corrections for the United States Virgin Islands, where I was given the specific mission to remedy overcrowding, gang problems, random and systemic violence, and general mismanagement. I served as the Commissioner of the Indiana Department of Correction, where I was responsible for the overall administration of the Indiana corrections system that consisted of approximately 46 separate adult and juvenile facilities.

I served as a Deputy Regional Administrator of the South Carolina Department of Corrections, where I supervised sixteen South Carolina institutions at all security levels. I served as Warden of the Central Correctional Institution, once the largest correctional facility in South Carolina, housing medium-security, maximum-security, death row inmates and county safe-keepers. I also served as the Warden of the South Carolina Women's Correctional Institution, where I was responsible for all aspects of female inmate welfare and rehabilitation.

4. I have consulted with the United States Department of Justice, National Institute of Corrections, and federal, state, and local prisons on a variety of subjects, including, but not limited to: inmate classification, management of women offenders, management of youthful offenders in adult prisons, prison security systems, security operational performance, prison critical event avoidance, and riot/gang management. I have conducted thousands of inmate security evaluations in the spectrum ranging from the first-time non-violent offender to an international terrorist that killed thousands. I have also conducted hundreds of disciplinary hearings regarding inmates while serving as a member and chairman. I have conducted hundreds of disciplinary hearing reviews as the authority to ensure the hearings and findings were conducted in accordance with policy and sound correctional practice.

5. I am currently the President of James E. Aiken & Associates, Inc., serving as an expert witness and consultant on prison conditions and future inmate dangerousness. I have served as an expert witness or consultant in approximately 350 civil and criminal proceedings in at least 30 state and federal (United States) jurisdictions as well as Canada. I have also provided expert consultancy internationally, including in Costa Rica and the Dutch Kingdom. I have also taught courses in Corrections at the university and technical college levels.

6. I received a Master Degree in Criminal Justice from the University of South Carolina and a Bachelor of Arts from Benedict College, Columbia, South Carolina.

7. A true and accurate copy of my curriculum vitae is attached as Exhibit A.

II. Materials Considered

8. In preparing this Affidavit, in addition to my extensive professional experience, I reviewed materials concerning Plaintiff's background, criminal history, confinement in the South Carolina Department of Corrections (SCDC) from 2015 to 2020, and confinement in the South Carolina Department of Juvenile Justice (SCDJJ) during 2016. These materials include the Amended Complaint in this case, the depositions of John Barkley, Kenneth James, Niaja Kennedy, and Yolonda Reid; discovery responses from Plaintiff and Defendants, SCDC and SCDJJ records detailing the Plaintiffs criminal history and housing placement, documentation re: investigations into Plaintiff's reports of sexual assault, policies and procedures from DJJ and SCDC, PREA National Standard (May 17, 2012), PREA statistics (individual incidents reported) various research to include but no limited to the 2014 JAG Allocations; Dept. of Justice Efforts to Prevent Staff Sexual Abuse of Federal Inmates, etc. (Dropbox link provided by Counsel).

9. In addition, I reviewed the South Carolina Department of Corrections' Inmate Classification Plan, OP-21.04, issued October 21, 2013; SCDC's Inmate Grievance System, GA-01.12, issued May 12, 2014; SCDC's Prevention, Detection, and Response to Sexual Abuse / Sexual Harassment, OP-21-12, issued October 29, 2014; SCDC's Prevention, Detection, and Response to Sexual Abuse / Sexual Harassment, GA-06.11, issued July 29, 2023, (Supersedes August 10, 2022, November 23, 2021, July 8, 2020, and OP-21.12); and SCDC's Applying the Prison Rape Elimination Act (PREA), GA-06.11B, issued November 23, 2021, (Supersedes July 8, 2020).

10. I also reviewed the South Carolina Department of Juvenile Justice's policy on Investigations, I-3.5, issued December 9, 2014; SCDJJ's Application of PREA Standards, H-3.16, issued March 5, 2018; SCDJJ's Prevention of Sexual Offenses toward Juveniles, H-3.15, issued June 13, 2018; SCDJJ's Investigations, Policy No. 328, issued April 18, 2019, (Superseded I-3.5); SCDJJ's Prevention of Sexual Offenses Toward Youth, Policy No. 321, issued May 6, 2021, (Superseded H-3.15); and SCDJJ's Application of PREA Standards, Policy No. 336, issued May 6, 2021, (Superseded H-3.16).

11. A complete list of the materials I considered is attached as Exhibit B.

III. Statement of Opinions

12. The South Carolina Department of Corrections and the South Carolina Department of Juvenile Justice adopted standards of care that were set forth by the Department of Justice in response to the passage of PREA.

13. SCDC and SCDJJ adopted the PREA standards for prisons and jails and juvenile facilities. These standards set forth prevention, planning, training and education, screening for risk of sexual victimization and abusiveness, reporting, official response following an inmate report, investigation, discipline, medical and mental care, data collection and review, and audits and corrective action all which if implemented fully reduces the foreseeability of sexual assault and sexual harassment within correctional facilities.

14. This standard of care was adopted to reduce the likelihood of sexual assaults and sexual harassment within correctional facilities.

15. Based on information provided thus far, SCDC and SCDJJ have not fully implemented these standards uniformly across all the facilities under their control. At the time of the Plaintiffs sexual assaults, these standards were not fully implemented by the Defendants in their facilities.

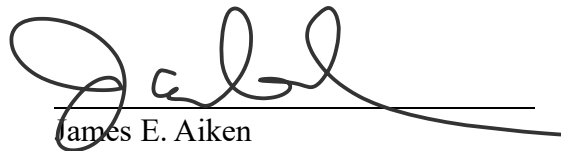
16. The sexual assaults and the resulting injuries suffered by the Plaintiffs were a foreseeable consequence of the Defendants act of not implementing the PREA standards fully in their facilities.

17. I reserve the right to supplement and/or amend my opinions as new information is obtained and/or reviewed by me, or as any new analysis of existing data are completed.

18. I am competent to testify to the matters stated herein and this Affidavit is based upon my own personal knowledge.

Date: November 17, 2023

Respectfully submitted,



James E. Aiken

James Evans Aiken

The undersigned maintains a consulting concern in prison management and adjustment matters as James E. Aiken & Associates, Inc. I also served as Director of Corrections for the United States Virgin Islands, and Commissioner for the Indiana Department of Correction. I began my corrections career in 1971 at the South Carolina Department of Corrections as a counselor with the Comprehensive Drug Abuse Treatment Program. Also, while with the South Carolina Department of Corrections, I held positions as Deputy Regional Administrator in the Midlands Correctional Region (managing 16 prisons), Deputy Warden and Administrative Assistant to the Warden of the Manning Correctional Institution, Deputy Warden and Warden at the Central Correctional Institution (state penitentiary), and Warden of the Women's Correctional Center. While serving in these positions, I received extensive experience in the areas of prison classification and management of inmate population. During my years in prison work, I have conducted thousands of inmate classification evaluations relative to their adjustment to prison and current/future danger to the public, prison staff, and other inmates. These reviews included minimum custody (low security offenders) to maximum security (violent, high profile, disruptive, predatory, aggressive inmates). Additionally, I participated in the development of prison classification systems designed to better protect inmate population from other more violent inmates and the public.

The United States Congress appointed me, in July 2004 to the National Prison Rape Elimination Commission. Over a five (5) year period, the Commission conducted comprehensive hearings and examined all penalogical, economic, physical, mental, medical and social issues relating to prison rape in America. At the conclusion of it's review, the Commission issued a comprehensive report on the subject, including a recommended set of national standards to reduce and eliminate prison rape. Also, a grant program made annual grants (up to \$40 million each year) to state and local programs that enhanced the prevention and punishment of prison rape and maintain safe and secure prisons despite budget reductions. The Commission had authority to issue subpoenas, and the statute allows for the Attorney General to seek enforcement of subpoenas in district court. The Federal Bureau of Prisons must have total compliance to the final standards. (Resume attached)

I received a Masters Degree in Criminal Justice from the University of South Carolina and Bachelors of Arts Degree from Benedict College, Columbia, South Carolina. I have also taught a number of courses in corrections at the university and technical college levels.

I have consulted with the U.S. Department of Justice, National Institute of Corrections, as well as served as a private contract provider to federal, state and county jurisdictions (jails and prisons) in a number of areas to include but not limited to inmate classification, managing violent youthful offenders in adult prisons, managing prison security systems, correctional leadership development, assessment of security operational performance, executive training for new and experienced wardens, prison critical event avoidance,

management of super-maximum security prisons, management of the hard to manage-violent inmate, and riot/gang management.

I also have consulted with attorneys and render expert testimony in capital as well as other criminal/civil cases. I have been qualified as an expert and provided such testimony in the states of Georgia, Montana, Delaware, Arizona, North Carolina, Pennsylvania, New York, South Carolina, Indiana, Virginia, Maryland, Louisiana, Oregon, New Hampshire, Missouri, Alabama, Mississippi, Florida, New York, Washington, Texas and in the United States District Courts of New York, Virginia, Ohio, South Carolina, Arizona, West Virginia, Florida, Texas, Connecticut, Georgia, Alabama, Missouri, Tennessee, District of Columbia and Pennsylvania relative to future danger, prison adjustment issues, prison conditions and other prison/jail/ criminal justice matters.

More specific overview of background qualifications is submitted: From August 1992 to August 1994, I was Director of the Bureau of Corrections for the United States Virgin Islands. My responsibilities encompassed the overall administration of the bureau which included jail and prison facilities. I also worked closely with other territorial agencies, the legislature, courts, and federal governmental entities. In the Virgin Islands, I had a specific mission to re-establish a correctional system (prison and jail) which was diminished by overcrowded conditions, gang problems, escapes, non-compliance with court orders (to include medical care and delivery issues), general mismanagement, and public mistrust.

From March 1989 until August 1992, I was Commissioner for the Indiana Department of Corrections. I was responsible for the overall administration of the Indiana corrections system that consisted of 46 separate adult and juvenile facilities with a population of 14,000 inmates and parole services with a population of 3,490 parolees. I reported directly to the Governor of Indiana and worked closely with the state legislature. Also, during my Indiana administration, I created a Division of Security to address gang problems, contraband control, drug testing, and other concerns. My administration also initiated an Offender Relations Division to resolve offender grievances and complaints, and to reduce court involvement.

From September 1971 until March 1989, I was with the South Carolina Department of Corrections in a variety of capacities including Deputy Regional Administrator, and different times as Warden of the Central Correctional Institution, Warden of the Women's Correctional Institution and as an inmate social worker.

As Deputy Regional Administrator from April 1987 to March 1989, I supervised sixteen South Carolina institutions at all security levels including maximum. I supervised a workforce of 2,500 with an annual budget of \$97 million. This position required that I select institution heads and I was intimately involved with new facility design.

As Warden of the Central Correctional Institution (state penitentiary) from May 1982 until April 1987, I operated the largest correctional facility in South Carolina with 1,800 medium and maximum custody inmates, 530 staff members, and an annual budget of \$8

million. I was personally responsible for all activities involving security and treatment staff, as well as coordinating and supervising all welfare and morale services for inmates. CCI is now closed. At the time it was where the South Carolina death row was located and where executions were carried out. I was called upon to carry out two executions. From September 1976 until September 1979, I was deputy warden of this institution.

As Warden of the Women's Correctional Institution from September 1979 until May 1982, I was chief administrator of a state women's prison. I was responsible for all employee hiring, evaluation, and supervision as well as, all aspects of inmate welfare. During my tenure, I studied and reviewed all available records and files on assigned inmates to evaluate their behavior changes and rehabilitation progress.

From about 1990 to 1992, I was also Adjunct Professor at the Indiana University-Purdue University in Indianapolis, teaching corrections related criminal justice courses.

I am able to render an expert opinion, in an operational context, regarding future danger and adaptability of inmates as well as issues pertaining to prison/jail safety, operations, administration and security.

My fee for service is \$150.00 per hour plus direct out of pocket expenses that are approved by Counsel. There is no fee for service charge for travel. There is a \$1,200.00 per day fee for deposition testimony.

A handwritten signature in black ink, appearing to read 'James E. Aiken', with a stylized, cursive script.

James E. Aiken

Resume

James Evans Aiken

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jea1assocs@aol.com e-mail

Summary of Qualifications:

Mr. Aiken has over forty (40) years experience in correctional administration, facility operations/management, inspection/assessment of facility performance and technical assistance consultations with clients in the United States, Dutch Kingdom, Canada, Costa Rica, Puerto Rico, and U.S. Virgin Islands. He has provided services to federal, state, county and local correctional facilities and jurisdictions in the areas of correctional leadership/organizational development, management of prison disturbances, system productivity, cost containment, enhancing prison security systems, managing the violent youthful offender in adult prisons, gang/security threat group (STG) management, new warden's training, super maximum security facility management training, inmate classification, assessment of prison security/operational performance, prison staffing analyses, reduction of prison critical security events (murder/suicide/riot/hostage situation) and advising governments relative to prison privatization transactions/productivity. He has been granted court expert status in the states of Georgia, Montana, Arizona, Delaware, North Carolina, Pennsylvania, New York, South Carolina, Indiana, Virginia, Maryland, Louisiana, Oregon, New Hampshire, Missouri, Alabama, Mississippi, Florida, New York, Washington, Texas and in the United States District Courts of New York, Virginia, Ohio, South Carolina, Arizona, West Virginia, Florida, Texas, Connecticut, Georgia, Alabama, Missouri, Tennessee, District of Columbia and Pennsylvania relative to future danger, prison adjustment issues, prison conditions and other prison/jail/ criminal justice matters.

The United States Congress appointed me, in July 2004 to the National Prison Rape Elimination Commission. Over a five (5) five year period, the Commission conducted comprehensive hearings and examined all penalogical, economic, physical, mental, medical and social issues relating to prison rape in America. At the conclusion of it's review, the Commission issued a comprehensive report on the subject, including a recommended set of national standards to reduce and eliminate prison rape. Also, a grant program made annual grants (up to \$40 million each year) to state and local programs that enhanced the prevention and punishment of prison rape and maintain safe and secure prisons despite budget reductions. The Commission had authority to issue subpoenas, and the statue allows for the Attorney General to seek enforcement of subpoenas in district court. The Federal Bureau of Prisons must have total compliance to the final standards.

Education:

M. A., Criminal Justice, University of South Carolina - Columbia, South Carolina. 1985
 B. A., Benedict College- Columbia, South Carolina. 1972

Employment History:

August 1994 to present, president, James E. Aiken and Associates, Inc. (correctional consultant firm); August, 1992 to August 1994, Director, Bureau of Corrections, United States Virgin Islands and consultant; March, 1989 to August, 1992, Commissioner, Indiana Department of Correction; April, 1987 to March 1989, Deputy Regional Administrator, South Carolina Department of Corrections; May, 1982 to April, 1987, Warden, Central Correctional Institution (state penitentiary) South Carolina Department of Corrections; September, 1979 to May, 1982, Warden, Women's Correctional Center, South Carolina Department of Corrections; September, 1976 to September, 1979, Deputy Warden for Administration, Central Correctional Institution (state penitentiary) South Carolina Department of Corrections; February, 1974 to September, 1976, Deputy Warden for Institutional Operations, Manning Correctional Institution, South Carolina Department of Corrections; September, 1972 to February 1974 Administrative Assistant to Warden, Manning Correctional Institution, South Carolina Department of Corrections; September, 1971 to September, 1972, Social Worker for Substance Abuse Treatment, South Carolina Department of Corrections.

Relevant Experience:

Mr. Aiken has provided direct professional and consultant services in almost every aspect of the correctional field. More specifically, his scope of expertise includes the following:

Director, Bureau of Corrections, United States Virgin Islands

Held the position as Director that encompassed authority and responsibility for the overall administration of the Corrections Bureau for the United States Virgin Islands (jails and prison). Worked closely with other territorial agencies, the legislature, courts and federal governmental agencies.

Mr. Aiken's task was to coordinate a project to re-establish a jail/prison correctional system which was diminished by overcrowded conditions, lack of medical care, escapes, and noncompliance to court orders, corruption, general mismanagement, negative media, gang involvement, work force dysfunction, and public mistrust.

Commissioner, Indiana Department of Correction

The position encompassed the overall administration of the Department of Correction for the State of Indiana, which consisted of forty-six (46) separate adult and juvenile facilities (population 14,000) and parole services (population 3, 490) with an operations budget of \$305 Million.

As Commissioner, reported directly to the Governor of the State of Indiana and worked closely with the legislature, other state and federal agencies, the courts and the public. Mr. Aiken's tasks were to establish an operational mission and priority of issues for the agency; establish agency mission goals; manage overpopulation, develop a new basic

employee supervision program; and reorganized daily operations to ensure a more responsive and efficient structure.

His accomplishments included but were not limited to:

Offender Health Care Delivery: The department contracted with the Indiana University School of Medicine to provide a medical director for clinical services. Developed and implemented a program to reduce cost and increase the quality of medical care.

Security: Created the Division of Security to address agency security needs. Initiated a gang intelligence network to tract and evaluate their activities. Increased contraband control efforts by additional searches, drug testing, use of K-9 units, provided additional training and equipment, and increased prosecution efforts. Designed 650 bed maximum security unit that conforms to modern correctional security management and Court mandates. Conducted meetings with the National Guard, State Police, as well as other mutual aid agencies to coordinate and develop an emergency response and disaster preparedness program. Conducted full response drills to evaluate the agency's response capability. Evaluated and enhanced escape prevention/apprehension measures. Conducted security audits and inspections of facilities.

Offender Relations: Established an Offender Relations Division and appointed a coordinator. This division functions as part of Internal Audits and works in tandem with the Division of Internal Affairs, the Operations Division and the Division of Legislative and Information Services. The task of this division is to resolve offender grievances and complaints that originate from inside the agency and resolve them prior to court involvement.

Prison Population:

- Completed site selection, plans and construction of a new maximum security Institution
- Increased community corrections coverage from 35 to 50 counties (from 3,500 to 7,000 clients)
- Established community service/restitution programs
- Established county work release programs
- Established residential treatment programs and created home detention utilizing electronic monitoring
- Created over five hundred (500) new emergency prison beds within the first nine months of tenure

Juvenile Justice:

- Reduced Indiana Boy's School population from a high of 670 in 1989 to a low of 380 in 1990
- Conducted comprehensive reviews using several committees of community representatives concerning treatment programs, educational programs and employee training programs
- Established a Research Department at the Indiana Boy's School.

- Group home placements had tripled during 1992.
- Community involvement and recreational programs have been increased at both Indiana Boy's School and Indiana Girl's School.

Cost Containment: Developed a plan to increase participative management and input to the budget process. Meetings were held with State Budget Agency personnel on a regular basis in an effort to increase the Budget Agency's participation in the department's budget preparation regarding cost control. Reduced the operational budget of 305 million dollars by 41 million dollars for fiscal year 1992.

Deputy Regional Administrator, Midlands Correctional Region, South Carolina Department of Corrections

Served as the Deputy Chief Administrator for the following: Directly planned, prescribed and supervised activities of sixteen (16) institutions, including minimum, medium and work release, shock probation (boot camp), restitution centers and maximum security facilities. Also, had general supervision of a ninety-seven (97) million dollar budget, as well as a work force of 2,500 employees. Duties also included policy development and interaction with lawmakers, management of over population, the community and other departmental agencies concerning long-range agency planning and developing agency future needs. Additionally, made selections of institutional heads, as well as being involved in new facility design, reviewed all use of force actions, and provided supervision to prison wardens during emergency situations and normal operations.

Warden, Central Correctional Institution, South Carolina Department of Corrections

The previous largest correctional facility in South Carolina with 1800 medium/-maximum/super maximum custody inmates, 530 staff members, and an operating budget of eight (8) million dollars. Served as the chief administrator for the following areas/-activities: Directly planned, prescribed and supervised all security control and safety activities/operations, as well as, conducted announced and unannounced inspections of the institution. Interviewed, selected and evaluated employee's performance and effected other personnel actions as required. Personally responsible for all activities involving population management, security and treatment staff, as well as, coordinated and supervised all welfare/morale services for inmates to include medical delivery and access.. Supervised and coordinated all activities with representatives from non-departmental agencies. Duties also involved emergency preparedness, interpreting all laws, policies, rules and regulations, compliance with court orders (conditions of confinement) and operating procedures for employees and inmates. Studied and analyzed long-range department requirements for institutions, as well as participating in litigation action involving the South Carolina Department of Corrections. Duties also included meeting with the Inmate Advisory Council and acting on recommendations received from the Inmate Grievance Committee, as well as meeting with members of the legislature on matters relating to corrections. Also was responsible for carrying out the capital punishment laws for the state of South Carolina. This facility also provided high security management for population that were under the jurisdiction of the South Carolina

Department of Mental Health and for population that were in pre-adjudication status that required more intense security to which the jail system could not provide.

Warden, Women's Correctional Institution, South Carolina Department of Corrections

Served as the chief administrator for the following: Directly planned, prescribed and supervised all security, control and safety activities and operations, personally responded to all disturbances and emergencies, interviewed/selected and evaluated employee's performance, counseled employees, supervised and coordinated all activities of the security and treatment staff, management of overpopulation, coordinated and supervised all welfare and morale services for female inmates including clothing, food service, mail service, visitation, medical services, religious services, educational programs and recreational programs. Supervised the implementation and executing of all laws, policies, rules, regulations and operating procedures applicable to the Women's Correctional Center. Also, studied and reviewed all available records/files on assigned inmates to evaluate their behavioral changes and rehabilitation progress. Duties included meeting with the Inmate Advisory Council as well as receiving and acting upon recommendations received from the Inmate Grievance Committee.

Deputy Warden/Administration, Central Correctional Institution, South Carolina Department of Corrections

Served as the Institutional Coordinator for the following areas/activities:

Maintenance/construction, boiler room/energy, food service, employee parking, canteen services, Adjustment Committee, mail service, all security systems, transportation, pest control, criminal investigations and emergency response.

Deputy Warden/Institutional Operations, Manning Correctional Institution South Carolina Department of Corrections

Served as the Institutional Coordinator for the following areas: Youthful Offender Division, medical services, living areas, maintenance/construction, laundry services, visitation, emergency response, security, transportation, food service, commissary, administrative/punitive segregation, officer's quarters, classification teams, inmate interview/correspondence, recreation programs, energy (usage/conservation), Parole Board (prepared parole evaluations), supervision of security staff of fifty-five (55) employees, Chairman of Employee Evaluation Committee, purchasing, inmate pay and Chairman of Adjustment Committee. Prepared correspondence for the warden, conducted the majority of institutional investigations, coordinated all escape apprehension efforts and remained on twenty-four (24) hour call.

Administrative Assistant/Institutional Operations, Manning Correctional Institution, South Carolina Department of Corrections

Responsibilities included vocational rehabilitation, alcoholics anonymous, Project Mate (Paraprofessional Counseling Program), Classification Team #2, Pastoral Care, Drug Abuse Treatment Program, Recreation Program, Occupational Safety and Health Act (O.S.H.A.), Emergency Response, Work Release Program, Education Program, tours, Employee Evaluation Committee member and inmate interviewing/correspondence.

Performed duties of deputy warden in his absence and remained on twenty- four (24) hour call at all times.

Social Worker/Drug Abuse Treatment Program, Manning Correctional Institution, South Carolina Department of Corrections

Responsibilities included conducting group therapy and individualized counseling to offenders with drug problems. Conferred with the warden and staff to integrate the Drug Abuse Program with other institutional activities. Member of the Adjustment committee and the Warden's Treatment Team.

EXH. B

MATERIALS REVIEWED via DROPBOX LINK PROVIDED:

1. DEPOSITIONS
 - a. JDI 30B6 – TARA GRAHAM
 - b. Plaintiffs
 - c. John Barkeley
 - d. Niaja Kennedy
 - e. Roland Reid
 - f. Kenneth James
 - g. AW Sheppard
 - h. AW Stanley
2. PLAINTIFF’S RECORDS TO DEFS IN RTRFP
 - a. 2ND IG FILE
 - b. Collins Grievance 4-13-17
 - c. Daniel Collins Hospital Intake Form
 - d. DJJ County File
 - e. DJJ
 - f. IG File
 - g. Juvenile Detention Center File
 - h. Other Juvenile Records
 - i. SCDC- Collins
 - j. SCDC – Robinson
 - k. SCDC 3848-4570 (bates)
 - l. SCDC 4571-4648 (bates)
 - m. Shift Log- Collins
3. PLEADINGS
 - a. Amended Summons & Complaint
4. RECORDS PRODUCED BY DJJ
 - a. Def SCDDJJ ATI
 - b. Def SCDJJ RTRFP
 - c. DJJ Records Classification File
 - d. DJJ records Clinical and Social Worker File
 - e. DJJ records Coastal Evaluation Center File
 - f. DJJ records Education File
 - g. DJJ records Juvenile Detention Center File
 - h. DJJ records- Medical file
5. RECORDS PRODUCED BY SCDC
 - a. SCDC Answers to Ps 1st Set of RFP
 - b. Answers to Ps 1st Set of Rogs
 - c. L- P2nd Int and RFP to Def SCDC
 - d. SCDC 3848-4570 (bates)
 - e. SCDC 4571-4648 (bates)
 - f. SCDC Bates No. MUSC 1-1172 Daniel Collins Recs
 - g. SCDC RTRFP Bates N. 1-3817

6. RESEARCH

- a. 2014 JAG State Allocations
- b. 2014 JAGTechRpt
- c. 2014 SC JAG Allocations
- d. 2014-12-09 I-3.5 Investigations
- e. 2016 Preventing Sexual Violence and Victimization Project – Office of DJJ and Delinquency Prevention
- f. 2018-03-05 H. 3.16 Application of PREA Standards
- g. 2018-06-13-H-3.15 Prevention of Sexual Offenses towards Juveniles
- h. Distribution of Juvenile Justice Formula Grants by State 2
- i. Distribution of Juvenile Justice Formula Grants by State
- j. JAG-PREA-FAQ
- k. JAGFAQ
- l. JAGState16
- m. Limited Review of the SC Dept. of Juvenile Justice
- n. OJJDP Awards- SCDC Public Safety
- o. PREA ANNUAL 2018
- p. PREA Standards USDJ Final Rule (May 2012)
- q. SC PREA Statistics – individual incidents reported
- r. SC PREA statistics summary
- s. SCDC Policy re Prevention Detection and Response Sexual Harassment
- t. The Dept of Justice Effort to Prevent Staff Sexual Abuse of Federal Inmates
- u. August 2019 Legislative Audit Council – A Limited Review of the South Carolina Department of Corrections
- v. January 2017 Legislative Audit Council – A Limited Review of the South Carolina Department of Juvenile Justice
- w. January 2021 Legislative Audit Council – A Limited Review of the South Carolina Department of Juvenile Justice and Follow Up to Our January 2017 Audit
- x. February 5, 2020 DOJ Notice to S.C. Department of Juvenile Justice Regarding Investigation
- y. April 14, 2022 DOJ Filed Federal Court Complaint Against SCDJJ
- z. April 14, 2022 DOJ Settlement Agreement with SCDJJ Regarding Federal Court Complaint
- aa. April 14 2022 DOJ Final Report on SCDJJ Use of Force Findings
- bb. August 2022 SCDJJ Broad River Road Correctional Facility Initial Implementation Plan
- cc. October 2022 SCDJJ Compliance Monitoring Report
- dd. April 2023 SCDJJ Compliance Monitoring Report

Exhibit 2

Affidavit of C. Alan Runyan

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	Case No.: 2017-CP-18-1125
CALVIN HENSON, DANIEL JAMES	)	
COLLINS, JASON ROBINSON,	)	
RUSSELL TAYLOR and ALL THOSE	)	
SIMILARLY SITUATED,	)	AFFIDAVIT OF
	)	C. ALAN RUNYAN
Plaintiffs,	)	
	)	
v.	)	
	)	
SOUTH CAROLINA DEPARTMENT	)	
OF CORRECTIONS and the SOUTH	)	
CAROLINA DEPARTMENT OF	)	
JUVENILE JUSTICE	)	
	)	
Defendants.	)	

PERSONALLY APPEARED before me C. Alan Runyan, who being duly sworn, deposes and says:

1. I am counsel in this action together with Andrew S. Platte of Runyan & Platte; C. Carter Elliott Jr., Andrew W. Kunz, and Lauren K. Slocum of Elliott, Phelan & Kunz, LLC; and Arnold S. Goodstein of Goodstein Law Firm, LLC.

2. This affidavit is based on my personal knowledge and I am competent to testify to the matters stated herein.

3. I am an attorney and partner in the firm of Runyan & Platte, 2015 Boundary Street, Beaufort, South Carolina. I was previously a partner in the firm of Speights & Runyan, also at 2015 Boundary Street, Beaufort, South Carolina. I have been licensed to practice law in the State of South Carolina since 1976. I am admitted to practice before the District Courts of South Carolina and the Fourth Circuit Court of Appeals. I am a member of the American Board of Trial Advocates (ABOTA).

4. Andrew S. Platte is a partner in Runyan & Platte, 2015 Boundary Street, Beaufort, South Carolina. He has been licensed to practice law in the State of South Carolina since 2008. He is admitted to practice before the District Courts of South Carolina and the Fourth Circuit Court of Appeals.

5. Runyan & Platte has extensive nationwide state and federal case experience in the prosecution of complex cases including class actions. I have prosecuted such cases in the Federal and State courts of 19 states.

I have been sole class counsel, lead class counsel or co-class counsel in several nationwide and statewide class actions including: *In Re: Asbestos School Litigation*, 789 F.2d 996 (3rd Cir.), *cert. denied*, 479 U.S. 852, 915 (1986) (representing approximately 36,000 schools in the United States); *Central Wesleyan College, et al. v. W.R. Grace & Co., et al.*, 133 FRD 628 (D.S.C. 1992), *affirmed*, 6 F3d 177 (4th Cir. 1993) (representing most of America's colleges and universities in the United States); *Prince George Center, Inc. v. United States Gypsum Company*, No. 5388 (Pa. Comm. Pleas, Philadelphia County, April 18, 1992) (representing most lessors of buildings in the U.S. to the Federal Government); *Fairey, et al v. Exxon Corporation*, No. 94-CP-38-118, Court of Common Pleas, Orangeburg County, South Carolina (representing South Carolina owners of property contaminated by leaking underground storage tanks in South Carolina) ("Exxon does not dispute, and the Court independently finds that the Fairey's have adequate class counsel. In the nationwide class action for asbestos property contamination, the Court noted that the class counsel's law firm "has abundant experience in class actions". "*Central Wesleyan College*, 143 F.R.D. at 637"); *Lewis, et. al. v. Flue-Cured Tobacco Cooperative Stabilization Corporation*, 05-CVS-188, 05-CVS-1938 (Superior Court Wake County, NC) (representing approximately 200,000 member and former member tobacco

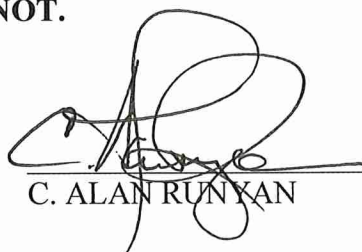
farmers who the Cooperative had wrongfully retained an excessive reserve from member's profits) (the case was settled in Federal Bankruptcy Court where the court certified a settlement class composed of the state case certified class and appointed Runyan & Platte as class counsel, *In re: U.S. Tobacco Cooperative, Inc., et al*, 21-01511-5-JNC, Doc. N0. 806 (Bankr. Ct. E.D.N.C June 23, 2022)).

My firm or I also have been class counsel in other South Carolina class or putative class complex litigation: *Eddie Dean v. The South Carolina Department of Public Safety*, No. 01-CP-03-149, Court of Common Pleas, Allendale County, South Carolina (a class action on behalf of South Carolina Highway Patrol officers to secure denied employment benefits); *Jean Townsend, et al. v. Pfizer Inc.*, No. 9-00-2427-08, USDC, District of SC, Beaufort Division (a nationwide putative class action for the owners of dogs who had been injured or killed by the use of a drug for canine arthritis); *Marvin Thomas, et al. v. USX Corporation, et al.*, No. 96-CP-03-215, Court of Common Pleas, Orangeburg, South Carolina (a local class action for homeowners whose soil and ground water is polluted by contaminants from a nearby fertilizer factory); *Jack Brooks, et al. v. GAF Materials Corporation*, No. 8:06-1613-HMH, USDC, Anderson/Greenwood Division, South Carolina, (a putative class for southeastern U.S. residence owners whose roofs were shingled with a defectively manufactured type of shingle).

6. I have represented clients in complex cases, including class actions, in the state courts of Alaska, Arizona, California, Colorado, Connecticut, Georgia, Kentucky, Missouri, New Mexico, North Carolina, North Dakota, South Carolina, South Dakota, Pennsylvania, Tennessee and Wisconsin and in the federal courts of California, Colorado, Delaware, Florida, Kentucky, Louisiana, Missouri, North Dakota, Puerto Rico, South Carolina and Pennsylvania.

7. In my previous firm, in one sub-specialty of this practice, asbestos building contamination, I pioneered some of the theories of recovery and established key legal precedents. I was lead counsel in cases in 11 states in this area of litigation including the following reported cases: *Clayton Center Associates v. W.R. Grace & Co.*, 861 S.W.2d 686 (Mo.App.1993); *Kansas City Airport, a Municipal Corporation v. W.R. Grace & Co., et al.*, 778 SW2d 264 (Mo.App. 1989); *Farm Credit Bank of Louisville v. United States Mineral Products Co.*, 864 F.Supp. 643 (W.D. Ky. 1994). *Northridge Company v. W.R. Grace & Co.*, 556 N.W.2d 345 (Wis.App.1996); *Robles, et al. v. United States Gypsum Company*, Civ. No. 97-1035 (D.P.R. May 25, 1999) (in a class action on behalf of the residents of low income housing, the Court stated that counsel was “well prepared, highly qualified and experienced.”)

FURTHER, THE AFFIANT SAYETH NOT.


C. ALAN RUNYAN

SWORN TO before me this
10th day of January, 2024.

Sally L. McLeod (L.S.)

Notary Public for South Carolina

My Commission Expires: 4/14/2033

