THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

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Francis Ackerman, #266928, Malik Aljalil, #219551, Linso Allen, #269378, Michael Benninger, #264212, Frederic Brown, #289602, Timothy Brown, #238461, Terrell Buchanon, #277262, Christopher Buch, #200690, Rudy Cassady, #238732, Sheldon Clark, #264772, Zawaski Cobb, #187136, Kamathene Cooper, #145333, Gladstone Cummings, #267450, Patrick Curtis, #175139, Quintin Daniels, #196284, Curtis Davis, #238776, Heyward Dempsey, #134171, Phillip Denney, #240678, Paul Durham, #219573, Jerome Durham, #270393, Keith Eigner, #299153, Bernard Felder, #122099, Jermaine Garriett, #191274, Fred Gatewood, #289775, Dennis Goff, #177506, Gregory Grant, #109656, Nelson Hampton, #286427, James Hartman, #219770, Gary Hayes, #263985, Michael Hood, #279987, Nikia Law, #260855, Stephen Lease, #137016, Harry Leonard, #249996, Herbert McFadden, #184297, Michael McFarland, #266870, Earl Mack, #216237, John Moultri, #276527, Matin Muntaqim, #266870, Tony Pitts, #280597, Germaine Pringle, #250390, Gene Richardson, #93614, Dennis Richey, #233472, Ignacio Rivera, #300424, Vondell Sanders, #241308, James Sattler, #235043, Joseph Schmitz, #173987, Arthur Scott, #251957, Jerome Scott, #153381, Roosevelt Scott, #275631, Archie Simmons, #161419, Robert Smith, #199324, James Williams, #282929, Gary Bryant, #258972, Harlon Edger, #261866, Johnny Holden, #245199, Don Hughes, #256862, Michael Key, #266890, Archie Lee, #226354, Isaac Richardson, #232574, Larkland Richards, #281768, John Wojcik, #219463, James Bogan, #288111, Larry Burke, #281911, Jammie Gaymon, #208922, David Harrell, #260004, Jeff Stinson, #260047, Ricky Libby, #274681, Alain Lareua, #128014, Quentin Baker, #297868, Frank Corley, #292975, James Jackson, #267718, Quintin Linen, #238553, Thomas Miles, #246763, Chauncy Orr, #177069, Isaiah Scott,

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v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2012-210588

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**RESPONDENT SCDC'S INITIAL BRIEF**

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## STATEMENT OF ISSUES ON APPEAL

The Respondent, the South Carolina Department of Corrections ["SCDC"], accepts the "Statement of Issues on Appeal" identified by the Appellants in their brief.

## STATEMENT OF THE CASE

This matter concerns 197 administrative grievances filed by the Appellants under the Inmate Grievance System Policy promulgated by SCDC. SCDC's Inmate Grievance System Policy is designated as Policy GA-01.12 (ALC 1st Supp. ROA, pp. 323 – 32).

The Appellants include current and former inmates who either currently participate or at one time participated in a prison industries service project operated by SCDC at Lieber Correctional Institution ["Lieber"] in which first Williams Technologies, Inc., participated and now Caterpillar, Inc., participates as the private industry sponsor.

In each of their grievances, the Appellants asserted that they were and are entitled to back pay and a higher hourly rate of pay for the labor they have provided or currently provide to the prison industries service project operated by SCDC at Lieber. Specifically, the Appellants asserted in their grievances that they were and are entitled to the so-called "prevailing wage," pursuant to S.C. Code Ann. § 24-3-430(D), for the labor they voluntarily provided to this service project. In its entirety, Section 24-3-430(D) provides as follows:

> No inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector.

The Appellants asserted in their grievances that the proper hourly rate of pay for their labor ranged between $8.40 and $12.06 per hour. (ALC Abbv. ROA, p. 9).

However, the South Carolina General Assembly enacted a budget proviso, effective July 1, 2001, by which it permitted SCDC to pay inmates who participate in prison industries service projects, like the service project at Lieber, less than the "prevailing wage." In its entirety, the

proviso effective July 1, 2001, H.B. 3687, § 37.31, 2001 – 2002 Gen. Assem., Gen. Appropriations (S.C. 2001), read as follows:

> The Director of [SCDC] may enter into contracts with private sector entities that would allow for inmate labor to be provided for **prison industry service work**. The use of such inmate labor may not result in the displacement of employed workers within the local region in which work is being performed. **Service work is defined as any work such as repair, replacement of original manufactured items, packaging, sorting, labeling, or similar work that is not original equipment manufacturing**. The department may negotiate the wage to be paid for inmate labor provided under prison industry service work contracts, and **such wages may be less than the prevailing wage for work of a similar nature in the private sector**. [emphasis supplied].

The General Assembly enacted an identical or nearly identical proviso each year thereafter until it codified the proviso as S.C. Code Ann. § 24-1-295, effective August 1, 2007.

The Appellants acknowledged within their grievances that they are not now and have not been entitled to the so-called "prevailing wage" for their labor since the July 1, 2001 effective date of the above-quoted proviso. Instead, the Appellants asserted that SCDC owes them back pay and higher current pay attributable to a so-called "negotiated wage" of $4.00 per hour. (ALC Abbv. ROA, p. 9).

Two (2) decisions issued by our Supreme Court on August 23, 2004 serve as the focal point of the Appellants' arguments the instant matter: *Adkins v. S.C. Dep't of Corr.*, 602 S.E.2d 51 (S.C. 2004) and *Wicker v. S.C. Dep't of Corr.*, 602 S.E.2d 56 (S.C. 2004). In these two (2) cases, inmates, like the Appellants, who then participated or at one time participated in prison industries projects operated by SCDC at other correctional facilities alleged that they were also entitled to the so-called "prevailing wage" pursuant to § 24-3-430(D).[1]

[1] The parties agree that the types of projects operated by SCDC in *Adkins* and *Wicker* differed from the type of project operated by the agency at Lieber, and, therefore, the budget proviso discussed above did not and does not apply to the hourly rates of pay associated with the projects at issue in those two (2) cases.

## PROCEDURAL HISTORY

### I. THE APPELLANTS' CLASS ACTION LAWSUIT STYLED AS *Williams*

At the time our Supreme Court issued *Adkins* and *Wicker*, the Appellants, through the efforts of their counsel, had pending in circuit court a class action lawsuit in which they sought back pay and higher current pay under the provisions of § 24-3-430(D). In their class action, styled as *Williams, et al., v. S.C. Dep't of Corr. and Williams Technologies, Inc.*, the Appellants also invoked the provisions of our state's Payment of Wages Act. Only after the release of *Adkins* and *Wicker* on August 23, 2004, did the Appellants' counsel, on September 22, 2004, file with SCDC officials at Lieber an initial set of grievances on behalf of some of the Appellants.[2]

The Appellants' counsel submitted this initial set of grievances as well as the remainder of the Appellants' grievances under the provisions of SCDC's Inmate Grievance System Policy. As stated at the outset of its instant brief, Policy GA-01.12, its preceding editions, and its successive editions constitute SCDC's Inmate Grievance System.[3] In accordance with the applicable provisions of the policy, SCDC officials began processing and adjudicating the claims presented within the first sets of the Appellants' grievances.

However, on November 3, 2004, the circuit court judge presiding over the class action lawsuit styled as *Williams*, which was still active, granted a request from the Appellants' counsel

[2] As discussed further below in note 39, the Appellants' counsel has continuously represented the Appellants since approximately late 2002. As reflected by the Record, the Appellants and their counsel began filing the 197 grievances which comprise the instant matter on September 22, 2004, 30 days after our Supreme Court issued *Adkins* and *Wicker*. As also reflected by the Record, the Appellants' counsel filed approximately 90 inmate grievances on September 22, 2004, and he filed approximately 81 grievances on or about September 30, 2004. As further reflected by the Record, the Appellants' counsel filed the remaining grievances after September 30, 2004. (ALC 1st Supp. ROA, Vol. 1, Tab A and Vols. 2 – 5).

[3] SCDC first issued tandem written policies regarding its Inmate Grievance System on May 1, 1996, and the agency designated these tandem policies as Policy Number PS-10.01 and PS-10.01 (OP). On January 30, 1998, SCDC re-designated the policies regarding its Inmate Grievance System as Policy GA-01.12 and GA-01.12 (OP), and it published new editions of these tandem policies under this new designation. On April 1, 2000, SCDC consolidated its tandem polices into a single new edition of Policy GA-01.12, and, since April 1, 2000, the agency has continued to publish new editions of this policy under the same designation.

and stayed SCDC's efforts to process and adjudicate all administrative grievances which it had received from or on behalf of inmates who articulated pay claims attributed to their participation in the agency's service project at Lieber, including, obviously, the Appellants' grievances.

However, after it imposed this stay on November 3, 2004, the circuit court granted motions for dismissal filed by both SCDC and Williams Technologies, Inc., the private industry sponsor. By an order filed July 1, 2005, the circuit court dismissed the Appellants' class action lawsuit styled as *Williams*, and it decertified the class it had originally recognized. In its July 1, 2005 order, the circuit court also lifted the stay it had imposed on November 3, 2004. However, as the Appellants' counsel appealed the circuit court's order, the entirety of the circuit court's July 1, 2005 order came under review by this Court, and, the stay imposed by the circuit court on November 3, 2004, which halted SCDC's processing and adjudication of the Appellants' grievances, remained in place.[4]

Our Supreme Court later accepted direct review of the appeal filed by the Appellants, through their counsel, from the circuit court's decision, and, on February 26, 2007, it affirmed the circuit court's dismissal of the class action lawsuit by its opinion in *Williams, et al., v. S.C. Dep't of Corr. and Williams Tech., Inc.*, 641 S.E.2d 885 (S.C. 2007).

Consequentially, the stay imposed by the circuit court on November 3, 2004 ceased being effective on or about May 22, 2007.[5] Thereafter, SCDC resumed processing and adjudicating

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[4] On June 8, 2005, the Appellants' counsel petitioned this Court for an order lifting the stay imposed by operation of South Carolina Appellate Court Rule ["SCACR"] 225(a) upon the entirety of the order filed by the circuit court in *Willliams* on July 1, 2005. By an order dated December 7, 2005, this Court denied the petition filed by the Appellants' counsel.

[5] Our Supreme Court denied the Petition for Rehearing filed by the Appellants' counsel by an order issued March 21, 2007. On March 22, 2007, the Clerk of Court for Dorchester County, the county in which the Appellants' counsel filed the Appellants' class action, received notice of the Supreme Court's denial of the Petition for Rehearing. Thus, the section of the order issued by the circuit court on July 1, 2005, which lifted the stay on grievance processing first imposed on November 3, 2004, finally went into effect. Therefore, SCDC had 60 days

the Appellants' grievances pursuant to Policy GA.01.12. The Appellants then appealed SCDC's final decisions denying their respective grievances to the South Carolina Administrative Law Court ["ALC"].

## II. PROCEEDINGS BEFORE THE ALC WHICH YIELED THE TWO (2) ORDERS SUBJECT TO THE INSTANT APPEAL

Pursuant to an order dated April 14, 2010 (R. pp. ____ - ____), the ALC, in the interest of judicial economy, consolidated the 197 appeals into a single matter, and it instructed the parties that it would consider the issues relevant to all of the appeals in a "three level approach." Regarding "Level One," the ALC declared as follows (ALC 4/14/10 Order, p. 1):

> **Level One shall consist of a review of the issues of whether or not [*Wicker*] and [*Adkins*] created a new remedy and/substantive right <u>and</u> whether the application of [*Wicker*] and [*Adkins*] applies prospectively or retrospectively.** ... Upon resolution of the first level of review, the Court will instruct the parties on the appropriate manner in which to proceed with review of level's two and three, including further briefing and supplementation to the record. [emphasis supplied].

The ALC then ordered SCDC to prepare and "file an abbreviated Record on Appeal, sufficient to cover the issues in the Level One stage of the appeal." (ALC 4/14/10 Order, p. 2).

After the ALC issued an order on November 23, 2010 which addressed the contents and other aspects of the abbreviated Record on Appeal it described in its April 14, 2010 order (R. pp. ___ - ___), SCDC's undersigned counsel, on December 2, 2010, filed and served the abbreviated Record on Appeal. (R. pp. ____ - ____).

By the order it issued March 10, 2011 (R. pp. ___ - ___), the ALC addressed the two (2) issues it had determined constituted the "Level One" stage of review in the instant matter: (1)

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from the date the Dorchester County Clerk of Court received notice of the Supreme Court's denial of the Petition for Rehearing or May 22, 2007 to resume its processing of grievances.

whether *Adkins* and *Wicker* created new substantive rights and/or new remedies;[6] and (2) whether *Adkins* and *Wicker* applied prospectively or retrospectively.[7]

At the outset of its March 10, 2011 order (ALC 3/10/11 Order, pp. 2 and 9), the ALC determined (1) that *Adkins* and *Wicker* created neither new substantive rights nor new remedies and (2) that both decisions applied retrospectively.

With resolution of these two (2) issues, the ALC, at the conclusion of its March 10, 2011 order (ALC 3/10/11 Order, p. 9), declared that "the second level of review must now commence." Accordingly, the ALC identified the following single issue for its consideration at the "Level Two" stage (ALC 3/10/11 Order, pp. 9 – 10):

> The next issue to be addressed by this Court is the timeliness of each Appellant's grievance under [Policy GA-01.12].

The ALC, after concluding that further briefing and supplementation of the record were necessary, ordered as follows (ALC 3/10/11 Order, p. 10):

> IT IS HEREBY ORDERED that, ... , [SCDC], with the assistance of Appellants as needed, shall supplement the Record on Appeal **to include a spreadsheet showing the following information: (i) the date each Appellant filed his or her grievance with [SCDC] in the instant matter; and (ii) the date each Appellant receive his or her most recent paycheck, for work performed in the prison industries program relating to the instant matter, in which he or she is alleged to have received less than that required under South Carolina law.**
>
> IT IS FURTHERMORE ORDERED that the parties prepare brief **on the issue of when the fifteen (15) day time period for filing a grievance under [Policy GA-01.12] began to run, taking into account the Court's rulings in this Order**. [emphasis supplied].

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[6] *See* the Appellants' first issue on appeal (Appellants' Brief, p. 1), and their first argument (*Id.*, pp. 6 – 11).

[7] The Appellants conceded during the "Level One" stage that *Adkins* and *Wicker* applied retrospectively, and the ALC agreed with the Appellants on this point. Consequentially, they did not appeal the ALC's ruling on this issue to this Court. However, as developed further below, the Appellants now effectively assert to this Court that *Adkins* and *Wicker* apply both retrospectively and prospectively. SCDC respectfully argues below that such an assertion is fatally defective, and accordingly, many of the Appellants' arguments are fatally undermined by such an inherently contradictory assertion.

Per the ALC's March 10, 2011 order, SCDC, by and through its undersigned counsel, filed the "1st Supplemental Record on Appeal" on May 6, 2011. (R. pp. ____ - ____). Along with the spreadsheet discussed by the ALC in its March 10, 2011 order, SCDC included additional relevant materials in the "1st Supplemental Record on Appeal.[8]"

On May 23, 2011, the Appellants moved to supplement the "1st Supplemental Record on Appeal" with a variety of additional materials. However, by its August 5, 2011 order (R. pp. ____ - ____), the ALC decided against, with limited exceptions, including the materials identified by the Appellants in their May 23, 2011 motion in the "1st Supplemental Record on Appeal.[9]" By submissions to the ALC on August 29, 2011 (R. pp. ____ - ____) and September 6, 2011 (R. pp. ____ - ____), SCDC added the materials identified by the ALC in its August 5, 2011 order to the "1st Supplemental Record on Appeal," and, in doing so, SCDC satisfied the directives issued by the ALC in its August 5, 2011 order.

On July 26, 2012, the ALC issued the second amended version of its "Level Two" order in the instant consolidated matter. (R. pp. ____ - ____). As reflected at the outset of its order, the ALC considered the eight (8) arguments articulated by the Appellants regarding the timeliness of the filing of their grievances. (ALC 7/26/12 Order, p. 2).

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[8] *See* the Table of Contents for the "1st Supplemental Record on Appeal." (R. p. ___). Pursuant to an order issued August 5, 2011 by the ALC, SCDC filed a new version of the spreadsheet on September 6, 2011 which supplanted the version of the spreadsheet which appeared at Tab A in Volume 1 of the "1st Supplemental Record on Appeal." (R. pp. ___ - ___).

[9] The Appellants did not and, to date, have not appealed the order issued by the ALC on August 5, 2011 which denied their motion to supplement the "1st Supplemental Record on Appeal." However, the Appellants still designated for inclusion in the record on appeal before this Court most if not all of the materials that the ALC rejected for inclusion in the record compiled for the instant matter. Accordingly, SCDC concurrently files a motion to strike these items from the Appellants' designation for matter.

The ALC rejected each of the eight (8) arguments advanced by the Appellants at the "Level Two" phase of its review of the instant matter, and, in doing so, it affirmed SCDC's denial of all but one (1) of the 197 administrative grievances filed by the Appellants.[10]

Thereafter, on August 22, 2013, the Appellants timely filed their amended Notice of Appeal to this Court, and, by their amended notice, they indicated that they were appealing both the ALC's "Level One" order and its "Level Two" order. (R. pp. ____ to ____).

**STANDARD OF REVIEW**

ALC Rule of Procedure 65 states that "[j]udicial review of any decision of the [ALC] in a matter heard on appeal from final decisions pursuant to *Al-Shabazz v. State*, 527 S.E.2d 742 (S.C. 2000)] shall be as provided in S.C. Code Ann. § 1-23-610 (2005) (as amended)." *See also S.C. Dep't of Corr. v. Mitchell*, 659 S.E.2d 233, 234 (S.C. Ct. App. 2008) ("Section 1-23-610 ... sets forth the standard of review when the court of appeals is sitting in review of a decision by the ALC on an appeal from an administrative agency.").

Thus, the provisions of § 1-23-610, specifically § 1-23-610(B), establish the standard of review applicable to this Court's consideration of the Appellants' challenge of the ALC's orders. In its entirety, § 1-23-610(B) reads as follows:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact.[11] The court of appeals may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if substantial rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

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[10] By an order dated filed July 5, 2013, this Court advised the parties that the ALC had jurisdiction to proceed on the merits of the matter styled as *Fred Gatewood v. S.C. Dep't of Corr.*, ALC Docket No. 07-ALJ-04-00517-AP. As of the date of SCDC's instant brief, Inmate Gatewood's appeal of SCDC's denial of his prison industries pay grievance remains pending before the ALC.

[11] *See generally, Mitchell*, 659 S.E.2d at 235 (The ALC must apply the standard articulated in § 1-23-380(5) when reviewing, on appeal, an administrative agency's decision.). SCDC also respectfully submits that the standards of review set forth in §§ 1-23-380(5) and 1-23-610(B) are identical if not nearly identical.

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Pursuant to § 1-23-610(B), this Court "may reverse or modify the [ALC's] decision **only if** [the Appellants prove their] substantive rights [have] been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law." *Mitchell,* 659 S.E.2d at 234 [emphasis supplied] (reversing the ALC's order because the "order [was] devoid of any finding of evidence adduced by [the Appellant] warranting the ALC's reversal of the Department."). Moreover, the Appellants must "distinctly and specifically direct the court's attention to the errors or abuses allegedly committed by the [ALC]. [The Appellants] must include all that is necessary to enable [this Court] to decide whether the [ALC] made an erroneous or unsubstantiated ruling. A mere expression of dissatisfaction with the ruling is not sufficient.[12]" *Al-Shabazz*, 527 S.E.2d at 755 (citations omitted).

Critically, the Appellants have the burden of proving convincingly that the ALC's decision to uphold SCDC's decision is unsupported by substantial evidence. *Mitchell,* 659 S.E.2d at 235. Substantial evidence is relevant evidence "when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the ALC arrived at in justifying its decision." *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 669 S.E.2d 899, 905 (S.C. Ct. App. 2008).

[12] In 2006, the General Assembly amended the Administrative Procedures Act so that a party must appeal a decision of the ALC, in which the ALC considered an appeal of an administrative agency's decision, to this Court rather than the circuit court.

The Appellants also have the burden of proving the ALC's decision is arbitrary and otherwise characterized by an abuse of discretion. *Mitchell,* 659 S.E.2d at 234. A decision is arbitrary if no rational basis for the conclusion exists, or when it is based on one's will and not upon any course of reasoning and exercise of judgment. A decision may also be arbitrary if it is made at pleasure without adequate determining principles or is governed by no fixed rules or standards. *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 564 S.E.2d 341, 345 (S.C. Ct. App. 2002). An "abuse of discretion occurs when the judge's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the judge is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case." *Ex parte Capital U-Drive-It, Inc.*, 630 S.E.2d 464, 467 (S.C. 2006).

## ARGUMENT

### I. OVERVIEW OF ALC'S OPERATIVE RULINGS AND THE APPELLANTS' OVERARCHING THEORIES ON APPEAL

In its "Level One" and "Level Two" orders, the ALC made the following 10 rulings:

(1) *Adkins* and *Wicker* created neither new substantive rights nor new remedies (ALC 3/10/11 Order, pp. 4 – 9);[13]

(2) Both *Adkins* and *Wicker* apply retrospectively (ALC 3/10/11 Order, p. 9);[14]

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[13] Importantly, the ALC observed that both SCDC and the Appellants agreed that *Adkins* and *Wicker* did not create new substantive rights, and, after conducting a review of both cases, the ALC agreed with the parties. (ALC 3/10/11 Order, p. 4). However, the ALC acknowledged that, while they conceded *Adkins* and *Wicker* did not create new substantive rights, the Appellants claimed that the two (2) cases created new grievance remedies. Specifically, the ALC recognized that the Appellants argued that, before *Adkins* and *Wicker*, inmates did not have the right to grieve so-called "prevailing wage" disputes. (ALC 3/10/11 Order, p. 6). The ALC also recognized that the Appellants claimed that *Wicker* created new appeal remedies to vindicate inmates' right to so-called "prevailing wages" under the provisions of § 24-3-430(D). (ALC 3/10/11 Order, p. 7). The ALC rejected both of these arguments.

[14] *See* note 7 above. (ALC 3/10/11 Order, p. 9).

(3) The Appellants' Step 1 grievances did not concern "policies/procedures" as that term is used in ¶13.9 of Policy GA-01.12, and thus the fifteen day filing deadline from ¶13.1 applied to their grievances (ALC 7/26/12 Order, pp. 5 – 10);

(4) The Appellants did not have reasonable cause under ¶13.9 by which they did not have to file their grievances within the fifteen day time limit established by ¶13.1, or, alternatively stated, the Appellants were not "effectively barred" from filing their Step 1 grievances before our Supreme Court issued *Adkins* and *Wicker* (ALC 7/26/12 Order, pp. 10 – 12);

(5) SCDC did not violate the Appellants' due process rights by applying the fifteen day filing deadline from ¶13.1 to their claims (ALC 7/26/12 Order, pp. 13 – 14);

(6) SCDC did not waive its right to apply the fifteen day filing deadline from ¶13.1 (ALC 7/26/12 Order, pp. 14 – 18);

(7) SCDC was not equitably estopped from applying the fifteen day filing deadline from ¶13.1 (ALC 7/26/12 Order, pp. 19 – 20);

(8) The fifteen day filing deadline from ¶13.1 was not tolled until after our Supreme Court issued *Adkins* and *Wicker* (ALC 7/26/12 Order, pp. 20 – 23);[15]

(9) The fifteen day filing deadline from ¶13.1 was not tolled when, on January 29, 2002, the Appellants filed their class action suit (i.e. *Williams*) in circuit court (ALC 7/26/12 Order, pp. 23 – 24); and

(10) The Appellants' did not comply with the fifteen day filing deadline from ¶13.1 if they filed their grievances within fifteen days of a term of "employment" (ALC 7/26/12 Order, pp. 24 – 26).

Obviously, the Appellants challenge, explicitly or otherwise, each of these rulings. SCDC, by and through its undersigned counsel, respectfully submits that the nine (9) arguments from the Appellants' brief are frequently overlapping and, at times, repetitive.

SCDC, therefore, respectfully submits that the arguments the Appellants articulated in their brief to this Court are best considered when they are reduced to the following three (3) overarching theories:

[15] The Appellants argued to the ALC that the filing deadline from ¶13.1 was tolled until after the issuance of *Adkins* and *Wicker*, because, prior to the issuance of these two (2) opinions, they were "effectively barred" from exercising any grievance and appeal rights. Thus, this particular argument by the Appellants to the ALC constituted an amalgam of the issues determined by the ALC in rulings #1, #2, and #4 above. *See* also notes 22 and 23 below.

1. *Adkins* and *Wicker* created, contrary to the ALC's ruling(s), new grievance and appeal remedies, which apply to the Appellants' pre-existing pay claims, and any applicable limitations period on the Appellants' pre-existing pay claims began to run only after our Supreme Court issued the remittiturs for *Adkins* and *Wicker*.[16]

2. Contrary to the ALC's rulings regarding the applicability of the fifteen day filing deadline from ¶13.1, the Appellants should not be subjected to any filing deadlines or limitations period whatsoever by which they must file grievances challenging the rates at which SCDC paid them for the labor they provided to the prison industries project service at Lieber;[17]

3. Even if the ALC correctly determined both that the Appellants possessed grievance and appeal remedies before our Supreme Court issued *Adkins* and *Wicker* and that the fifteen day filing deadline from ¶13.1 applied to their grievances, the Appellants possess numerous and legitimate excuses as to why they failed to comply with the deadline.[18]

The Appellants' theories and the arguments from their brief in support of these theories are fatally defective and unpersuasive, and, accordingly, SCDC respectfully urges this Court to affirm each of the rulings issued by the ALC in its "Level One" and "Level Two" orders.

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[16] The Appellants articulated these theories in their first, third, fourth and ninth arguments.

[17] The Appellants articulated these theories in their second and eighth arguments.

[18] The Appellants articulated these theories in their third, fourth, fifth, sixth, seventh, and ninth arguments.

## II. THE APPELLANTS' THREE (3) THEORIES ARE FATALLY DEFECTIVE

### A. *Adkins* AND *Wicker* DID NOT CREATE NEW GRIEVANCE OR APPEAL REMEDIES IN FAVOR OF THE APPELLANTS OR OTHER INMATES

In their first argument,[19] the Appellants assert that the ALC erred when it concluded that *Adkins* and *Wicker* did not create new grievance and appeal remedies by which inmates could prosecute their "pre-existing right" to the so-called "prevailing wage."

In their third, fourth, and ninth arguments, the Appellants assert that even if the ALC correctly ruled that *Adkins* and *Wicker* did not create new grievance and appeal remedies in their favor, the ALC still erred when it concluded (1) that they did not have reasonable cause not to file their grievances within the time frame from ¶13.1 of Policy GA-01-12 (ALC 1st Supp. ROA, p. 328);[20] (2) that the application of the time frame from ¶13.1 to their grievances did not violate their due process rights;[21] (3) that the time frame from ¶13.1 was not tolled before our Supreme Court issued *Adkins* and *Wicker*;[22] and (4) that they were not "effectively barred" from filing the grievances in which they articulated their prison industries pay claims before the issuance of *Adkins* and *Wicker*.[23]

SCDC respectfully asserts that all of these assertions constitute nothing more than hollow excuses by the Appellants for their failure to file the grievances in which they articulated their

[19] *See* Appellants' Brief, pp. 6 – 11.

[20] *Id.*, pp. 21 – 25 (i.e. the Appellants' third argument).

[21] *Id.*, pp.26 – 27 (i.e. the Appellants' fourth argument).

[22] *Id.*, pp. 44 – 47 (i.e. the Appellants' ninth argument).

[23] *Id.*, pp. 21 – 25 and 44 – 47 (i.e. the Appellants' fourth and ninth arguments).

pay claims before September 22, 2004,[24] the date upon which they contend *Adkins* and *Wicker* became "final.[25]"

The Appellants' excuses are best considered in two (2) two categories: (1) the positions articulated by SCDC before the ALC in *Wicker v. S.C. Dep't of Corr.*, 2001 WL 1005574 (S.C.A.L.J.D. August 13, 2001), prevented or excused them from filing grievances prior to September 22, 2004, and (2) the decision issued by the ALC in *McNeil v. S.C. Dep't of Corr.*, 00-ALJ-04-00336-AP (S.C.A.L.J.D. Sept. 5, 2001), *and enforced in* 2001 WL 1262667 (S.C.A.L.J.D. Oct. 1, 2001) also prevented or excused them from filing grievances prior to September 22, 2004.

The ALC, after reviewing the decisions it rendered in *Wicker* and *McNeil*, as well as our Supreme Court's decision in *Sullivan v. S.C. Dep't of Corr.*, 586 S.E.2d 124 (S.C. 2003), did not err when it denied the arguments offered by the Appellants concerning the first, third, fourth and ninth arguments from their brief to this Court. Likewise, an analysis of the ALC's decisions in *Wicker* and *McNeil*, our Supreme Court's decisions in *Sullivan* and *Al-Shabazz*, as well as, obviously, *Adkins* and *Wicker*, confirms that the ALC correctly ruled on these issues.

**1. The ALC's Decision in *Wicker*.**

The Appellants assert that the position articulated by SCDC before the ALC when the ALC considered the appeal of Inmate Bennie Wicker somehow demonstrates that the decisions

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[24] The Record, specifically the spreadsheet labeled "9-6-11" (R. pp. ___ - ___), clearly establishes that none of the Appellants filed a Step 1 grievance until September 22, 2004.

[25] According to the Appellants, *Adkins* and *Wicker* did not become final until fifteen days had expired after the remittiturs associated with these decisions had been issued. *See* Appellants' Brief, pp. 44 – 45. However, the Appellants' contention conflicts with *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213, 216 (S.C. Nov. 18, 1985) ("[T]he termination at will doctrine, ... applies only to this case and to those causes of action arising after the filing of this opinion, November 18, 1985."); and *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 508 S.E.2d 565, 576 (S.C. 1998) ("We therefore apply our present ruling to the instant case and to all causes of action that arise or accrue after the date of this opinion. Thus, except for this case, if a cause of action arose or accrued prior to our decision today, it will be governed by the common law form of assumption of risk...").

issued by our Supreme Court in *Adkins* and *Wicker* created new grievance and appeal remedies, because, according to the Appellants, SCDC had, prior to the issuance of *Adkins* and *Wicker*, prevented inmates from prosecuting prison industries pay claims under Policy GA-01.12.[26]

The ALC's August 13, 2001 decision in *Wicker*, 2001 WL 1005574, *1, however, explained SCDC's position as follows:

> [SCDC] raises two positions. First, [SCDC] argues that Wicker's complaint is non-grievable. Second, if grievable, [SCDC] disagrees with Wicker's position on the merits. [SCDC] argues that Wicker voluntarily accepted the "training pay" of $.25 for the first 160 hours and $.75 for the next 160 hours. According to [SCDC], Wicker was entitled to $5.25 per hour only after the first 320 hours.[27]

Thus, SCDC, in its presentation to the ALC, offered both procedural and substantive arguments in opposition to the issues raised by Inmate Wicker in his appeal of SCDC's decision to deny the grievance in which he articulated a prison industries pay claim.[28]

SCDC argued to the ALC that Inmate Wicker's pay dispute constituted "a 'non-grievable' challenge to an institutional job assignment," but the ALC disagreed, and it concluded that Inmate Wicker challenged his wages, not his job assignment. 2001 WL 1005574, *1. Moreover, the ALC, 2001 WL 1005574, *1, concluded as follows:

> Wicker's wage dispute falls under the listed issues considered 'grievable' under [SCDC] policy at GA-01.12(OP), Specific Procedures, paragraph 7;

[26] *See* Appellants' Brief, pp. 7 – 8.

[27] No part of Inmate Wicker's administrative grievance (i.e. his Step 1, his Step 2, or SCDC's responses to his Step 1 and Step 2) appears in the Record for the instant matter.

[28] As reflected by the Record, the decisions by which SCDC denied the Appellants' grievances reflect both procedural and substantive grounds, just as SCDC raised both procedural and substantive grounds in opposition to the issues identified by Inmate Wicker in the appeal he filed with the ALC. Likewise, Policy GA-01.12 and its preceding editions served as the foundational document for SCDC's arguments in opposition to Inmate Wicker's appeal to the ALC as well as its consideration of the Appellants' grievances. In both *Wicker* and the instant matter, the ALC invoked the same provision of Policy GA-01.12 to conclude that inmates' prison industries pay disputes are grievable. In their fifth argument, the Appellants contend that because SCDC denied their grievances on procedural and substantive grounds, SCDC waived the fifteen day filing deadline. *See* Appellants' Brief, pp. 27 – 32. SCDC respectfully submits that, in light of the ALC's decision in *Wicker* which our Supreme Court later affirmed, the Appellants' contention is without merit.

the first issue listed is "Department policies/procedures, directives, or conditions which directly affect an inmate.

The ALC found that "Wicker is directly affected by [SCDC's] arrangement with private industry to pay inmates" a specific wage, and, consequentially, it ruled that Inmate Wicker's "wage dispute [was] grievable under [SCDC's] grievance system." 2001 WL 1005574, *1.

Thus, contrary to SCDC's position, the ALC, in its August 13, 2001 decision in *Wicker*, expressly held that prison industries pay claims are "grievable" under Policy GA-01.12. Thus, as of its August 13, 2011 decision in *Wicker*, the ALC recognized that inmates could, under the provisions of Policy GA-01.12, file grievances in which they articulated prison industries pay claims and that SCDC's denial of any such claims were subject to judicial review by the ALC.

The Record demonstrates that numerous Appellants began participating in the prison industries project before the ALC's August 13, 2001 decision in *Wicker*.[29] However, despite the ALC's August 13, 2001 decision in *Wicker*, no evidence exists in the Record that any of the 197 Appellants filed a Step 1 grievance with SCDC in which a prison industries pay claim appear prior to September 22, 2004. The Appellants argued that "[w]hile inmates could have filed a wage grievance, it would *probably* have been dismissed as non-grievable, or for want of jurisdiction.[30]" [italicized emphasis supplied]. While the Appellants also assert that SCDC "summarily dismissed" prison industries pay grievances as "non-grievable," no evidence in the Record supports their assertion.[31]

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[29] *See* the spreadsheet labeled "9-6-11." (R. pp. ___ - ___). The ALC also recognized this fact. (ALC 7/26/12 Order, p. 24).

[30] *See* Appellants' Brief, p. 46.

[31] *Id.*, p. 8. The Appellants conveniently neglect to assert that any of them appealed such a decision by SCDC to the ALC, and nothing in the Record evidences that any of the Appellants undertook such an appeal. Inmate Wicker, on the other hand, appealed the decision he received from SCDC regarding the grievance in which he articulated his prison industries pay claim to the ALC, and, on August 13, 2001, the ALC issued a decision in his favor. SCDC appealed the ALC's August 13, 2001 decision to the circuit court, and the circuit court affirmed the ALC's decision.

Even if one of the Appellants had filed such a grievance, no evidence exists that, upon a denial of the grievance by SCDC, a concerned Appellant appealed SCDC's denial to the ALC. As no Appellant filed a grievance in which he challenged the rate at which he was paid for his prison industries labor or otherwise appealed to the ALC an adverse decision from SCDC regarding such a grievance, SCDC never had the opportunity to consider and respond to such a challenge prior to our Supreme Court's issuance of its decision in *Wicker*.

Thus, no evidence exists in the Record which demonstrates how SCDC would have treated any prison industries pay grievance submitted by any of the Appellants. This Court must confine its review to the evidence in the Record, not hypothetical results conjured up by the Appellants. *See* § 1-23-610(B) ("The review of the [ALC Order] must be confined to the record."). *See also Mitchell*, 659 S.E.2d at 258 (same).

Succinctly stated, none of the Appellants, who possessed the benefit of competent counsel, did what Inmate Wicker managed to do *pro se*.

**2. The ALC's decision in *McNeil*.**

The Appellants also argue in their brief that, regardless of its August 13, 2001 decision in *Wicker*, the ALC did not have jurisdiction to review inmate wage grievances because of the *en banc* decision issued by the ALC on September 5, 2011 in *McNeil*. The Appellants also argue that, before our Supreme Court affirmed the ALC's original decision in *Wicker*, they did not have the ability to appeal any prison industries pay grievances they may have filed to the ALC.

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SCDC appealed the circuit court's decision, and our Supreme Court accepted SCDC's appeal on direct review. Thus, our Supreme Court's decision in *Wicker* ultimately affirmed the ALC's August 13, 2001 decision.

Accordingly, the Appellants argue in their brief (1) that *Adkins* and *Wicker* created new grievance and appeal remedies;[32] (2) that they had reasonable cause under ¶13.9 (ALC 1st Supp. ROA, p. 330) not to file their grievances within the time frame established by ¶13.1;[33] (3) that the application of fifteen day filing deadline from ¶13.1 to their grievances violated their due process rights;[34] (4) that fifteen day filing deadline from ¶13.1 was tolled before our Supreme Court issued *Adkins* and *Wicker*;[35] and (5) they were barred or "effectively barred" from challenging the rate at which SCDC paid them for their prison industries labor until the publication of *Adkins* and *Wicker*.[36]

SCDC again respectfully submits that this Court should affirm the ALC's rulings on these points, and specifically that it should affirm the ALC's ruling that *Wicker* did not create new appeal rights in favor of inmates concerning their prison industries pay claims. SCDC also respectfully submits that this Court should deem as invalid all of the reasons offered by the Appellants to excuse their failure to file a single grievance in which one of them protested the rate at which SCDC paid them for their prison industries labor prior to September 22, 2004.

In its "Level One" order (ALC 3/10/11 Order, pp. 8 – 9), the ALC concluded that our Supreme Court's decision in *Wicker* did not create new appeal remedies and that its *en banc* order in *McNeil* did not preclude the Appellants from seeking appellate review of any denial by SCDC of their prison industries pay claims prior to our Supreme Court issuing *Wicker*. Regarding its order in *McNeil*, the ALC explained as follows (ALC 3/10/11 Order, pp. 8 – 9):

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[32] *See* Appellants' Brief, pp. 6 – 11 (i.e. the Appellants' first argument).

[33] *Id.*, pp. 21 – 25 (i.e. the Appellants' third argument).

[34] *Id.*, pp. 26 – 27 (i.e. the Appellants' fourth argument).

[35] *Id.*, pp. 44 – 48 (i.e. the Appellants' ninth argument).

[36] *Id.*, pp. 21 – 25 and 44 – 48 (i.e. the Appellants' fourth and ninth arguments).

> According to Appellants, the ALC's *en banc* decision [in *McNeil*] answered the appealability question "with finality" until Wicker was decided. I find this argument to be without merit. Because the ALC is a lower court, its decisions do not constitute binding precedent. See 21 C.J.S. Courts § 212 (updated Dec. 2010) ("Trial and other inferior courts' decisions are not precedent, either with regard to appellate courts or other trial judges. ..."). Given that the ALC cannot create judicial precedent, it certainly cannot answer legal questions with "finality."

In its "Level Two" order (ALC 7/26/12 Order, pp. 10 – 12 and 22), the ALC concluded that its *en banc* order in *McNeil* did not provide inmates with reasonable cause not to file their Step 1 grievances before September 22, 2004 and that its *en banc* order in *McNeil* did not toll any provision of Policy GA-01.12 until our Supreme Court issued its decision in *Wicker*. The ALC assessed the invocation of *McNeil* by the Appellants to justify their failure to file any of their grievances prior to September 22, 2004 as follows (ALC 7/26/12 Order, p. 12):

> Indeed, as [SCDC] correctly notes, the McNeil decision was not the final word on the appealability of inmate grievances. In [Sullivan], a decision issued a year prior to Adkins and Wicker, our Supreme Court specifically instructed the ALC to refrain from relying upon McNeil when determining its jurisdiction to hear inmate appeals. See id. at 445 n. 5, 586 S.E.2d at 128 n. 5 ("[B]ecause we know McNeil has been relied upon by the ALJ in other cases to deny jurisdiction, the ALJD and the circuit court are instructed to look to this opinion, not McNeil, for guidance in future cases."). ... Notwithstanding the issuance of Sullivan in August 2003, the earliest any of the Appellants filed a grievance regarding their prevailing wage claims was September 22, 2004. **Thus, in light of Sullivan, it seems disingenuous for the Appellants to suggest that they would have filed their grievances earlier had it not been for McNeil.** [emphasis supplied].

The ALC explained later in its "Level Two" order as follows (ALC 7/26/12 Order, p. 22):

> However, as noted above, McNeil was an ALC decision and did not constitute binding precedent. See 21 C.J.S. Courts § 212 (updated Dec. 2011). Had the Appellants timely filed grievances and had the ALC denied their grievances based upon McNeil, the Appellants could have appealed to the Court of Appeals, which possessed the authority to reverse McNeil. In fact, as discussed above, the pertinent portions of McNeil were unmistakably superseded by the Sullivan decision in August 2003 – a full year before any of the Appellants filed a grievance. See Sullivan,

> 355 S.C. at 445 n. 5, 586 S.E.2d at 128 n. 5. **Thus, while McNeil may have discouraged the Appellants from filing their prevailing wage grievances, it did not bar them from doing so.** [emphasis supplied].

The Appellants nonetheless argue that ALC erroneously interpreted both *McNeil* and *Sullivan*. The Appellants interpret our Supreme Court's decision in *Sullivan* as instructing the ALC to look to the decision in *Sullivan*, rather than *McNeil*, in disputes implicating only liberty interests. The Appellants contend *Sullivan* was silent on cases implicating only property interests, and, therefore, *Sullivan* did not have any impact on appealability of inmates wage claims.[37] The Appellants even contend that, if they had appealed to the ALC, received an adverse decision from the ALC, and then appealed such an adverse decision to this Court, their appeal to this Court "would have *probably* resulted in dismissal.[38]"

Succinctly stated, the Appellants' untested and erroneous belief in the futility purportedly associated with prosecuting their prison industries pay claims through SCDC via Policy GA-01.12, to the ALC, to the circuit court, and then to this Court simply does not constitute a valid excuse by which they could sleep on their known rights.[39]

Again, the Appellants offer no evidence that any of them filed a wage related grievance that SCDC dismissed or returned as "non-grievable." Furthermore, the Appellants offer no evidence that any of them prosecuted an appeal of such a grievance to the ALC after having received such an adverse decision from SCDC. No evidence exists that the ALC ever dismissed such the appeal of such a grievance filed by any of the Appellants for lack of jurisdiction. The

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[37] *See* Appellants' Brief, p. 25.

[38] *Id.*, p. 46.

[39] The Appellants originally filed their class action styled as *Williams* in January 2002. Beginning in approximately late 2002, the Appellants' counsel has represented the Appellants, and he has continuously represented them since. Thus, the Appellants cannot now claim that any of them were unaware of their purported right to the so-called "prevailing wage" prior to the issuance of *Sullivan* in 2003. Moreover, as clearly reflected by the Record and as recognized by the ALC in its "Level Two" order, none of the Appellants filed a grievance until September 22, 2004.

Appellants have not and cannot reference a single ALC decision issued after *Sullivan* in which the ALC relied on its *en banc* decision in *McNeil* and denied the appealability of prison industries pay claims or other inmate property claims.

SCDC respectfully submits, as correctly determined by the ALC, that any claim by the Appellants that *McNeil*, in light of the *Sullivan* decision, prevented them from filing a wage related grievance or appeal to the ALC is disingenuous. Thus, SCDC respectfully submits that the Appellants offer no legitimate excuse for their failure to file a single grievance after *Sullivan* and prior to September 22, 2004.

Assuming that the *en banc* decision in *McNeil*, even for a short period of time, precluded the ALC from reviewing decisions issued by SCDC which denied prison industries pay grievances filed by the Appellants or other inmates, the decision in *McNeil* relates solely to the ALC's jurisdiction and has absolutely no impact on Policy GA-01.12 or what may constitute "grievable" issues under Policy GA-01.12. Any impediment concerning the appealability of decisions issued by SCDC which denied such prison industries pay claims simply did not prevent or preclude the Appellants or other inmates from timely filing grievances with SCDC.

**3. The Appellants mistakenly rely on the ALC's decision in *Ingram*.**

Contrary to the argument offered by the Appellants in their brief, this reality is reflected in the ALC's decision in *Willie Ingram, #83404, v. S.C. Dep't of Corr.*, ALJ Docket No. 01-ALJ-04-00190-AP, 2001 WL 1397430 (S.C.A.L.J.D October 23, 2001). In *Ingram*, the ALC observed that the inmate protested various aspects of his prison industries pay. Although the ALC does not discuss the adjudication of his administrative grievance by SCDC, Inmate Ingram must have filed an administrative grievance in which he articulated some kind of prison industries pay claim and SCDC must have denied Inmate Ingram's claim(s) in order for Inmate

Ingram to have appealed SCDC's denial of his claims to the ALC. *See also Gary Slezak, # 109201 v. S.C. Dep't of Corr.,* ALC Docket No. 01-ALJ-04-00169-AP,2001 WL 1870457 (S.C.A.L.J.D. Dec. 7, 2001) (dismissing Inmate Slezak's grievance appeal in which he protested various aspects of his prison pay).

Even though the ALC apparently dismissed Inmate Ingram's appeal in light of *McNeil*, the decision in *Ingram* reflects the reality that inmates, such as Inmate Ingram and Inmate Wicker, could still file grievances under Policy GA-01.12 by which they could challenge the rate at which SCDC paid them for their prison industries labor. Additionally, no evidence exists that Inmate Ingram appealed the ALC's decision to the circuit court or to an appellate court. Regardless of *McNeil's* impact on ALC jurisdiction, *McNeil* did not impact an inmate's ability to file a grievance with SCDC to challenge his inmate wages.

Thus, as demonstrated above, the ALC correctly concluded the following: (1) that neither *Adkins* nor *Wicker* created new grievance or appeal remedies (ALC 3/10/11 Order, p. 9); (2) that the Appellants did not have reasonable cause under ¶13.9 to not file their grievances within the time frame established by ¶13.1 (ALC 7/26/12 Order, p. 10); (3) that the Appellants were not "effectively barred" from filing Step 1 grievances before the issuances of *Adkins* and *Wicker* (ALC 7/26/12 Order, pp. 12 and 20); (4) that SCDC did not violate the Appellants' due process rights (ALC 7/26/12 Order, p. 14); and (5) that the ALC's *en banc* decision in *McNeil* did not bar inmates, including the Appellants, from filing grievances in which they articulated prison industries pay claims, and therefore, the fifteen day filing deadline from ¶13.1 was not equitably tolled until our Supreme Court issued its decisions in *Adkins* and *Wicker* (ALC 7/26/12 Order, p. 22). For the foregoing reasons, this Court should affirm the ALC's decision on these points.

### B. OUR SUPREME COURT'S DECISIONS IN *Adkins* AND *Wicker* APPLY RETROSPECTIVELY, AND THEY CANNOT APPLY BOTH RETROSPECTIVELY AND PROSPECTIVELY

The Appellants argue that *Adkins* and *Wicker* created new grievance and appeal remedies and that such remedies apply to their "pre-existing" wage claims that arose before our Supreme Court issued its decisions in the two (2) cases. Their argument, however, actually supports the ALC's determination that *Adkins* and *Wicker* apply retrospectively.

Such an argument by the Appellants is unsurprising since they conceded during the "Level One" phase that *Adkins* and *Wicker* apply retrospectively.[40] As the Appellants have not appealed this critical point, the ALC's ruling constitutes the law of the case. *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 489 S.E.2d 470, 472 (S.C. 1997) ("This unappealed ruling is the law of the case ... and should not [be] reconsidered by the Court of Appeals."); *First Union National Bank of S.C. v. Pierce*, 511 S.E.2d 372, 378 (S.C. Ct. App. 1998) ("The unchallenged ruling, right or wrong, is the law of the case and requires affirmance.").

The Appellants then argue that they could prosecute their prison industries pay claims only after *Adkins* and *Wicker* purportedly created these new grievance and appeal remedies. Thus, according to their argument, no limitations period of any kind applied to any of the Appellants' prison industries pay claims which accrued before the issuance of *Adkins* and *Wicker*. However, by asserting that the fifteen day time from ¶13.1 only began to run after our Supreme Court issued the remittiturs in *Adkins* and *Wicker*,[41] the Appellants effectively assert that the applicable limitations period applies *prospectively* to their claims.

As stated above, the Appellants assert, in their first, third, and ninth arguments, that they were barred or effectively barred from exercising their pre-existing rights to enforce their prison

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[40] *See* note 7 above.

[41] *See* note 25 above.

industries pay claims before our Supreme Court issued *Adkins* and *Wicker*.[42] The Appellants further assert, in their fourth argument, that their rights to due process would be violated if this Court affirms the ALC's decision which upheld SCDC's application of the fifteen day filing deadline from ¶13.1 during the period of time before our Supreme Court issued *Adkins* and *Wicker*.[43] The Appellants also contend, in their ninth argument that any limitations period applicable to their prison industries pay claims began running only after our Supreme Court issued the remittiturs associated with *Adkins* and *Wicker*.[44]

However, the Appellants' arguments on these points are irreconcilable with the reality that they conceded during the "Level One" phase of the ALC's review that *Adkins* and *Wicker* apply retrospectively and that the ALC endorsed and agreed with their concession.[45]

**1. The Appellants misunderstand or simply ignore the definitions of retrospective and prospective.**

Furthermore, the Appellants misunderstand or simply ignore the definitions "retrospective" and "prospective," and they further misunderstand or ignore concepts of retrospective and prospective applications of judicial decisions.

Retrospective, or retroactive, is defined as "extending in scope or effect to matters that have occurred in the past." Black's Law Dictionary (9th ed. 2009). Conversely, prospective is defined as "[e]ffective or operative in the future." *Id.* The practical effect of applying *Adkins* and *Wicker* retroactively to the Appellants' pre-existing wage prison industries pay claims may be best explained by a review of the following precedent.

[42] *See* Appellants' Brief, pp. 7 – 11, 21 – 25 and 44 – 48.

[43] *Id.*, pp. 26 – 27.

[44] *Id.*, pp. 44 – 48.

[45] *See* note 7 above.

As explained by the ALC (ALC 3/10/11 Order, p. 9), in "South Carolina, the general rule regarding retroactive application of judicial decisions is that 'decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights applied retrospectively." *Toth v. Square D Co.*, 377 S.E.2d 584, 587 (S.C. 1989) (holding that the breach of contract action based on an employee handbook that the court announced in *Small v. Springs Industries, Inc.*, 357 S.E.2d 452 (S.C. 1987) applied retroactively "to causes of action arising prior to the date it was filed."). *See also Simmons v. S.C. Farm Bureau Mutual Ins. Co.*, 391 S.E.2d 560 (S.C. 1990) (holding that because "actions to reform insurance policies have long been available to insureds [and the *State Farm Mutual Auto Ins. v. Wannamaker*, 354 S.E.2d 555 (S.C. 1987) decision] merely provide[d] a method for determining whether a policy should be reformed," the *Wannamaker* decision did not create any new substantive rights, and, therefore, it applied retroactively).

Conversely, our state's appellate courts reserve prospective application of prior judicial rulings to decisions which create new causes of action or abolish a previously available immunity doctrine. For instance, appellate courts in our state have determined that the following decisions created new causes of actions, and, therefore, applied only to the facts then before the court and prospectively to future cases: *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 508 S.E.2d 565 (S.C. 1998) (abolishing the assumption of the risk doctrine as a complete defense to a plaintiff's negligence action); *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213 (S.C. 1985) (creating public policy exception to the at-will employment doctrine); *McCormick v. England, M.D.*, 494 S.E.2d 431 (S.C. Ct. App. 1997) (creating the common law tort of breach of a physician's duty of confidentiality); *McCaskey v. Shaw*, 368 S.E.2d 672 (S.C. Ct. App. 1988) (holding that Supreme Court's decision in *Kinard v. Augusta*

*Sash & Door Co.*, 336 S.E.2d 465, 467 (S.C. 1985) created a new substantive right for negligent infliction of emotional distress).

At best, the Appellants' arguments that they were barred or effectively barred from exercising their grievance and appeal rights before the issuance of *Adkins* and *Wicker* or that their due process rights would be violated by applying any limitations period to their pre-existing prison industries pay claims are more akin to prospectively applied decisions than to decisions which fall under *Toth* or *Simmons*.

Unlike prospectively applied decisions, however, the decision by the *Wicker* Court, which affirmed the ALC's decision that SCDC owed Inmate Wicker back pay attributable to a higher hourly rate for the labor performed by Inmate Wicker during the first 320 hours he participated in a prison industries project operated by SCDC, does not suggest in any way, shape or form that SCDC was immune from prison industries pay claims prior to the issuance of the decisions in *Adkins* and *Wicker* by our Supreme Court or that *Adkins* and *Wicker* created a new substantive right. Rather, the Appellants argued to the ALC that neither *Adkins* nor *Wicker* created new substantive rights, and the ALC agreed. (ALC 3/10/11 Order, pp. 4 – 5).

As in *Toth, Small, Simmons*, and *Wannamaker*, our Supreme Court in *Adkins* and *Wicker* recognized that Policy GA-01.12 was not some kind of novel mechanism by which inmates, such as the Appellants, could challenge "conditions which directly affect" them, such as the rate at which SCDC paid them for their prison industries labor. In its analysis of the Appellants' argument on this point in the "Level One" phase of its review, the ALC correctly observed that Policy GA-01.12 has existed in some form since May 1, 1996. (ALC 3/10/11 Order, p. 6). The ALC further observed that its 2001 decision in *Wicker*, which our Supreme Court affirmed in 2004, concluded that inmate wage disputes fall under this policy. (ALC 3/10/11 Order, p. 7).

Thus, the ALC's application of our Supreme Court's decision in *Wicker* to the Appellants' pre-existing prison industries pay claims is no different than the manner in which our Supreme Court applied prior judicial decisions to the operative facts in *Toth*, *Small*, *Simmons*, and *Wannamaker*. Thus, the ALC correctly determined in its "Level One" order that "prior to the Supreme Court's decisions in *Adkins* and *Wicker*, inmates could have submitted a grievance relating to their prevailing wage claims." (ALC 3/10/11 Order, p. 7).

**2. *Adkins* and *Wicker* cannot and do not apply both retrospectively and prospectively.**

Contrary to the analysis they provided, the Appellants cannot support, either legally or logically, their argument that *Adkins* and *Wicker* retrospectively created grievance remedies by which they could seek vindication of past wrongs purportedly committed by SCDC regarding their prison industries pay but any limitations period associated with such grievance remedies, namely the fifteen day filing deadline from ¶13.1 of Policy GA-01.12 (ALC 1st Supp. ROA, p. 328), applies only prospectively. Stated another way, *Adkins* and *Wicker* cannot apply both retrospectively and prospectively to the Appellants' prison industries pay claims.

In addition, as the ALC's ruling that *Adkins* and *Wicker* apply retrospectively, which the Appellants do not appeal, is the law of the case, SCDC respectfully submits that this Court may dispense with the Appellants' first, third, fourth, and ninth arguments, because the Appellants, in each of these arguments, asserted that retrospective application of the fifteen day filing deadline from ¶13.1 of Policy GA-01.12 would be unfair.

### C. THE ALC CORRECTLY RULED ON EACH OF THE NINE (9) ISSUES IDENTIFIED BY THE APPELLANTS

#### 1. The ALC correctly ruled that *Adkins* and *Wicker* did not create new grievance and appeal remedies in the Appellants' favor.

As demonstrated above,[46] the ALC correctly ruled that the decisions issued by our Supreme Court on August 22, 2004 in *Adkins* and *Wicker* created no new grievance and appeal remedies in the Appellants' favor. Accordingly, under the applicable legal standard articulated above,[47] this Court should affirm the ALC's ruling on this issue.

#### 2. The ALC correctly ruled that the Appellants' grievances did not concern "policies/procedures" under ¶13.9 from Policy GA-01.12.

In the second and eighth issues from their brief,[48] the Appellants assert that the ALC erred when it concluded the following: (1) their wage claims did not concern "policies/procedures" as defined and used in ¶13.9 (ALC 7/26/12 Order, pp. 5 – 10); (2) their wage claims constituted "incident" grievances that must be filed within fifteen day time frame set forth in ¶13.1 (ALC 7/26/12 Order, pp. 5 – 10); and (3) their wage claims were not timely filed if they were filed within fifteen days of the completion of a term of employment (ALC 7/26/12 Order, pp. 24 – 25.).

The ALC, after recognizing the long-standing legitimacy of Policy GA-01.12, determined that the fifteen day filing deadline from ¶ 13.1 is a statute of creation. (ALC 7/26/12 Order, pp. 5 – 6). The ALC found that the Appellants' interpretation of the term "policies/procedures" as used in ¶13.9 was overly broad, because under their construction, ¶13.9's exception for "policies/procedures" would swallow the fifteen day deadline from ¶13.1. (ALC 7/26/12 Order,

[46] *See* pp. 13 – 22 above.

[47] *See* pp. 8 – 10 above.

[48] *See* Appellants' Brief, pp. 11 – 20 and 39 – 44.

pp. 6 – 7). The ALC also rejected the Appellants' interpretation of "policies/procedures," because such an interpretation violates public policy.[49] (ALC 7/26/12 Order p. 7).

The ALC then adopted SCDC's interpretation of the term "policies/procedures," as the ALC determined that SCDC's interpretation is reasonable, consistent with SCDC's use of the term throughout Policy GA-01.12, and avoids the public policy problems inherent in the Appellants' construction of the term (ALC 7/26/12 Order, p. 8):

> [T]he terms "policies" and "procedures" constitute approved guidelines for handling the agency's day-to-day operations as well as statements expressing the basic expectations of conduct for agency staff and inmates. More formally stated, the terms "policies" and "procedures" constitute agency directives deemed by the responsible agency officials as "necessary to preserve internal order and discipline, and to maintain institutional security in the prison."

In their arguments to this Court,[50] the Appellants merely repeat their broad interpretation of the terms "policies" and "procedures" without addressing the ALC's rejection of their definitions. Instead, the Appellants attempt to parse the ALC's words from its "Level One" order and discredit the ALC's interpretation of its "Level One" order that it provided in its "Level Two" order.[51] (ALC 3/10/11 Order, p. 6; ALC 7/26/12 Order, p. 9).

For this reason alone, this Court should affirm the ALC's holding that the Appellants' wage claim grievances did not constitute "policy/procedure" grievances, and, as such, their grievances were subject to the fifteen day filing deadline from ¶13.1 (ALC 1st Supp. ROA, p.

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[49] The Appellants reference dictionary definitions of the terms "policy" and "procedure." Specifically, the Appellants define "policy" as "the general principles by which a government is guided in its management of public affairs." They also define "procedure" as "the act or method of proceeding in action." *See* Appellants' Brief, p. 12. In essence, the Appellants contend that SCDC's contracts with private industry sponsors constitute SCDC policy. (ALC 1st Supp. ROA, pp. 360 – 371). Moreover, the Appellants contend that because they included the term "policy" within their grievances, the grievances in which they articulated prison industries pay claims constituted "policy/procedure" grievances.

[50] *See* Appellants' Brief, pp. 11 – 20.

[51] *Id.*, p. 17.

328). *Al-Shabazz*, 527 S.E.2d at 755 (observing that under the APA, inmates must direct the court's attention to errors or abuses allegedly committed by the ALC. A mere expression of dissatisfaction with the ALC's ruling is not sufficient.).

The Appellants also fail to address the ALC's ruling that public policy calls for the application of some limitations period to the Appellants' wage claims, because SCDC has a legitimate interest in investigating grievances while they are still new. (ALC 7/26/12 Order, p. 7). The fifteen day filing limit is the only limitation found within Policy GA-01.12, and, accordingly, it must be the time period applicable to the Appellants' wage claims. (ALC 7/26/12 Order, p. 7). As the ALC explained, "[t]he importance of a filing deadline is underscored by the facts of this case." (ALC 7/26/12 Order, p. 7).

The Record reveals that SCDC began paying some of the Appellants for their participation in the prison industries service project at Lieber in 1999, and it further reveals that no Appellant filed a wage related grievance prior to September 22, 2004, approximately five (5) years *after* SCDC first paid them.[52] (R. pp. ____ - ____). Furthermore, a fifteen day filing period is consistent with other filing periods in this state.[53] Thus, the ALC correctly ruled that applying the fifteen day filing deadline from ¶13.1 to the Appellants' wage claims avoids the public policy problems of requiring SCDC to defend stale claims.

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[52] The Appellants suggest that SCDC is not harmed by their nearly five (5) year filing delay, because the Record consists of 3911 pages of inmate grievances. *See* Appellants' Brief, p. 47. Contrary to this assertion, the Appellants continue to criticize the accuracy and completeness of SCDC's records, and they argue that all ambiguities should be resolved in their favor. *See* Appellants' Brief, pp 39 – 40 ("[I]nmates contend the record does not show multiple terms of work, or at best the evidence is ambiguous.").

[53] *See e.g.* § 40-11-100 ("An entity or individual assessed administrative penalties may appeal those penalties to the board within fifteen days of receipt of the citation."); § 11-35-3220(3) ("The date for submission of information from interested persons or firms in response to an invitation must not be less than fifteen days after publication of the invitation."); § 59-25-470 ("Within fifteen days after receipt of notice of suspension or dismissal, a teacher may serve upon the chairman of the board or the superintendent a written request for a hearing before the board.").

The ALC also correctly determined that pursuant to ¶13.1, the Appellants must submit their grievance within fifteen days of the alleged "incident," and the fifteen day time frame from ¶13.1 began to run when SCDC informed the Appellants of their wage. (ALC 7/26/12 Order, pp. 10, 25). The ALC's determination is consistent with public policy as well as the decision in *Wallace v. Burbury*, 305 F. Supp. 2d 801 (N.D. Ohio 2003).

In *Wallace*, 305 F. Supp. 2d at 806, the federal court considered the timeliness of an inmate's grievance that the inmate filed more than fourteen days after the inmate learned of the prison's decision to deny his religious accommodation. Specifically, the inmate argued that even though he learned the prison denied his religious accommodation request a week before the week-long Passover holiday, his grievance, which he filed eleven days after the last day of Passover, was timely because his rights were continuously violated each day of the Passover event. The *Wallace* Court rejected the inmate's argument because "[t]o allow a filing deadline to toll with a continuous violation ... would undermine the very purpose of the deadline, which is to limit the time to file a claim." *Id.* The *Wallace* Court also determined that the event giving rise to the grievance arose on the date the inmate learned that prison would not honor his request for a religious accommodation.

Like the inmate in *Wallace*, the Appellants should have, under ¶13.1, filed their wage grievances within fifteen days after SCDC informed each of them of its decision to pay them a specific wage, i.e., when SCDC first paid the Appellants. Similar to the operative deadline in *Wallace*, the purpose of ¶13.1's fifteen day deadline is to limit the time to file a claim. (ALC 7/26/12 Order, p. 26).

The Appellants attempt to distinguish *Wallace* by relying on principles from employment and wage law, including *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007),

*superseded by statute,* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. Critically, however, the Appellants failed to raise these arguments before the ALC. *Herron v. Century BMW*, 719 S.E.2d 640, 642 (S.C. 2011), *cert. denied*, 132 S. Ct. 2436 (2012) "(It is axiomatic that an issue cannot be raised for the first time on appeal.") (internal citations omitted); *State v. Dunbar*, 587 S.E.2d 691, 694 (S.C. 2003) ("A party may not argue one ground at trial and an alternate ground on appeal.").

In addition, unlike traditional employment and wage laws, *Adkins*, 602 S.E.2d at 54, held that § 24-3-430 was not enacted for the special benefit of inmates, like the Appellants. As the ALC recognized, Policy GA-01.12 has been approved by our Supreme Court in *Al-Shabazz*. 527 S.E.2d at 752 ("We hold that [SCDC's] disciplinary and grievance procedures are consistent with the standards delineated by the Supreme Court in [*Wolff v. McDonnell*, 418 U.S. 539 (1974)]. We note that [SCDC] also prepared its grievance procedures in compliance with the Civil Rights of Institutionalized Persons Act."). (ALC 7/26/12 Order, p. 5).

Thus, for the reasons articulated above, the ALC correctly concluded the following: (1) the Appellants' wage claims do not constitute grievances concerning "policies/procedures" under ¶13.9 (ALC 7/26/12 Order, p. 10); (2) their wage claims constitute "incident" grievances, and, as such, they must have been filed within the fifteen day timeframe set forth in ¶13.1 (ALC 7/26/12 Order, p. 10); and (3) their wage claims were not timely filed if they were filed within fifteen days of the completion of a term of employment. (ALC 7/26/12 Order, p. 24).

**3. The ALC correctly ruled that the Appellants did not have reasonable cause under ¶13.9 by which they did not have to comply with the fifteen day filing deadline from ¶13.1.**

As demonstrated above,[54] the ALC correctly ruled that the Appellants did not have reasonable cause, as contemplated under ¶13.9 of Policy GA-01.12 (ALC 1st Supp. ROA, p. 330), by which they did not have to comply with ¶13.1's fifteen day filing deadline (ALC 1st Supp. ROA, p. 328). Accordingly, under the applicable legal standard articulated above, [55] this Court should affirm the ALC's ruling on this issue.

**4. The ALC correctly ruled that SCDC did not violate the Appellants' right to due process by applying the fifteen day filing deadline from ¶13.1 to their grievances.**

As demonstrated above,[56] the ALC correctly ruled that SCDC did not violate the Appellants' due process rights when it applied the fifteen day filing deadline from ¶13.1 of Policy GA-01-12 to the Appellants' grievances (ALC 1st Supp. ROA, p. 328). Accordingly, under the applicable legal standard articulated above, [57] this Court should affirm the ALC's ruling on this issue.

**5. The ALC correctly ruled that SCDC did not waive ¶13.1.**

In the fifth issue from their brief,[58] the Appellants assert that the ALC erred when it rejected the all three (3) of their arguments which supporting their assertion that that SCDC waived the fifteen day deadline: (1) the language from ¶ 13.1, from ¶13.9 and from the Step 1 instructions is inconsistent with SCDC's assertion of the fifteen day filing deadline; (2) for 153

[54] *See* pp. 13 – 22 above.

[55] *See* pp. 8 – 10 above.

[56] *See* pp. 13 – 26 above.

[57] *See* pp. 8 – 10 above.

[58] *See* Appellants' Brief, pp. 28 – 29.

of the Appellants, SCDC did not raise the fifteen day deadline in the response it provided to their Step 1 grievance; and (3) SCDC considered the merits of their grievances before it invoked the fifteen day deadline.[59] (ALC 7/26/12 Order, pp. 14 – 18).

As the ALC explained, "[w]aiver is a voluntary and intentional abandonment or relinquishment of a known right." *Eason v. Eason*, 682 S.E.2d 804, 807 (S.C. 2009) (quoting *Parker v. Parker,* 443 S.E.2d 388, 391 (S.C. 1994)). (ALC 7/26/12 Order, p. 14). Waiver may be either express or implied. *Lyles v. BMI. Inc.*, 355 S.E.2d 282, 285 (S.C. Ct. App. 1987). Acts that are inconsistent with the continued assertion of a right may give rise to a waiver. *Provident Life and Acc. Ins. Co. v. Driver*, 451 S.E.2d 924, 928 (S.C. Ct. App. 1994). Waiver is an affirmative defense, and the party asserting it has the burden of proof. *Id.* at 929. (ALC 7/26/12 Order, pp. 14 – 15).

**a) The ALC correctly ruled that the language from ¶13.1, from ¶13.9, and from the Step 1 grievance form is not inconsistent with SCDC's intent to apply the fifteen day filing deadline.[60]**

As explained above, ¶13.1 requires inmates to file grievances within fifteen days of an alleged "incident," but ¶13.9 provides exceptions to the fifteen day deadline from ¶13.1 (ALC 1st Supp. ROA, p. 330):

> Exceptions to the 15 day time limit requirement will be made for grievances concerning policies/procedures. **Exceptions may also be made for incident grievances by the Chief/designee, Inmate Grievance Branch, provided that documented reasonable cause can be demonstrated as to why the original time frame was not met**, e.g., inmate physically unable to initiate grievance due to hospitalization, court appearance, etc. **The waiver must be requested by the grievant.** [emphasis supplied].

[59] *Id.*, pp. 27 – 32.

[60] SCDC respectfully asserts that the Appellants' argument on this point only makes sense if their wage claims constituted "policy/procedure" grievances and then SCDC improperly applied the fifteen day filing deadline to their grievances. Should this Court affirm the ALC's decision on this point and determines that the Appellants' grievances did not concern "policies/procedures," SCDC respectfully submits that it should dismiss the Appellants' instant issue on appeal.

As determined by the ALC, the above provisions of the operative policy and the Step 1 form are clear and unambiguous. *See e.g. Ward v. West Oil Co., Inc.*, 692 S.E.2d 516, 519 (S.C. 2010). (ALC 7/26/12 Order, p. 15). Per the pre-printed form and ¶13.1,[61] inmates must file their Step 1 grievances within fifteen days of any alleged "incident." The only exceptions to this deadline arise under "policy" grievances per the Step 1 form and ¶13.9 or when an inmate requests, and receives, a "reasonable cause" exception per ¶13.9.[62]

Nothing about the interplay between the form's instructions, ¶ 13.1, and ¶ 13.9 was or is confusing, misleading, or contradictory as suggested by the Appellants. SCDC exercised no control or influence over the Appellants' understanding of these provisions. Absolutely nothing in the operative policy or in the language from the pre-printed Step 1 form suggested that an inmate's prison industries pay claims constitute "policy" issues and that a Step 1 grievance presenting such "policy" issues would be exempt from any filing deadline. The Appellants cannot now blame their defective interpretation of these provisions of Policy GA-01.12 on anyone other than themselves.

Thus, the ALC correctly determined that by including the fifteen day filing deadline for incident grievances within the operative policy and Step 1 grievance form,[63] and by "providing

[61] The instructions on the preprinted Step 1 form provided as follows: "State Grievance (include documentation, and date of incident; if SCDC Policy, indicate which policy)." (ALC Abbv. ROA, p. 1). Further instructions on the form provided as follows: "Submit the completed form to the Institutional Grievance Coordinator within fifteen (15) days of an alleged incident; policy grievances at any time." (ALC Abbv. ROA, p. 2).

[62] As explained above, the ALC correctly determined that the Appellants' grievances did not constitute "policy/procedure" grievances, and they did not request, or receive, an exception to the fifteen day filing deadline for this or any other reason.

[63] Policy GA-01.12 and the Step 1 grievance form existed before many of the Appellants began participating in the prison industry project at Lieber. By their argument, SCDC waived its right to assert the fifteen day deadline *before* the Appellants' purported right to the so-called "prevailing wage" accrued. If such an assertion is correct, then, essentially, SCDC could never invoke the fifteen day filing deadline.

an exception to the fifteen-day filing deadline, [SCDC] did not waive its right to invoke the fifteen-day deadline for cases falling outside that exception." (ALC 7/26/12 Order, p. 15).

**b) The ALC correctly ruled that SCDC did not waive the fifteen day deadline by not raising timeliness in some of its responses to the Appellants' Step 1 grievances.**

In the fifth issue from their brief,[64] the Appellants also assert that the ALC erred when it concluded that SCDC did not waive the fifteen day deadline by not raising timeliness in its responses to some of to the Appellants' Step 1 grievances.

The ALC, after reviewing the operative provisions from Policy GA-01.12 (ALC 1st Supp. ROA, pp. 323 – 32), examining *Friends of Potter Marsh v. Peters*, 371 F.Supp. 2d 1115 (D. Alaska 2005) and then distinguishing *Ross v. County of Bernalillo,* 365 F.3d 1181 (10th Cir. 2004),[65] *abrogated in part by Jones v. Bock*, 549 U.S. 1999 (2007), correctly determined that SCDC is an administrative agency, and, as such, it possesses the inherent authority by which to reconsider a prior decision which is not final. 2 Am. Jur., 2d Administrative Law § 468 (updated Nov. 2011). (ALC 7/26/12 Order, pp. 15 – 16).

Step 1 grievances "provide[d] a vehicle for internal solutions at the level having most direct contact with the inmate,[66]" and they were reviewed at the institutional level. Per ¶ 13.1 (ALC 1st Supp. ROA, p. 328), an inmate completed a Step 1 grievance form in which he articulated the basis of his complaint, and he then had to submit that form to the employee

[64] *See* Appellants' Brief, pp. 29 – 30.

[65] The Appellants contend that the ALC misunderstood their reliance on *Ross*. Specifically, they contend that they relied on *Ross* in support of their third, and not their second, waiver argument. *See* Appellants' Brief p. 30. Consequently, the Appellants do not to challenge the ALC's interpretation of *Ross* on their second waiver argument.

[66] The first page of Policy GA-01.12 provided a "Policy Statement" which read as follows (ALC 1st Supp. ROA, p. 323): "At a minimum, the grievance system will be designed to provide inmates with a mechanism by which they may seek formal review of their complaints; provide a vehicle for internal solutions at the level having most direct contact with the inmate [Step 1 level]; and provide a means for management review of staff decisions and policies/procedures that may be the source of a complaint [Step 2 level]."

designated by the Warden within fifteen days of the alleged "incident." Per ¶¶5 and 13.2 (ALC 1st Supp. ROA, pp. 325 and 328), the responsible agency official, upon receipt of the Step 1, conducted a complete investigation and made recommendations to the Warden. Per ¶ 13.3 (ALC 1st Supp. ROA, p. 328), the Warden responded "in writing ... indicating in detail the rationale for the decision rendered and any **recommended remedies.**" [emphasis supplied]. Per ¶ 10 (ALC 1st Supp. ROA, p. 327), the Warden did not have the authority to resolve the claims articulated within the Step 1; instead, the Warden could only made recommendations regarding the remedies sought by the inmate.[67] (ALC 7/26/12 Order, pp. 15 – 16).

If the inmate was unsatisfied with the response he received at the institutional level, he could have appealed, under ¶ 13.4 and ¶ 13.5, by filing a "Step 2" appeal form and sought a final agency decision (ALC 1st Supp. ROA, p. 329):

> 13.4 Appeals to the Responsible Official: If the grievant is not satisfied with the decision of the Warden, **the grievant may next appeal to the *Division Director of Operations* for final resolution of the grievance.** Matters under the administrative jurisdiction of the Department Director and which do not come within the scope of authority/responsibility of an *Division Director of Operations* may be appealed to the appropriate Officer Director or Division Director for final review of the grievance. ...
>
> **13.5 Appeal Process:** The grievant may appeal **by completing the SCDC Form 10-5a, Step 2, and submitting this form,**[68] as well as the completed copies of Step 1, to the Institutional Inmate Grievance Coordinator within five (5) *calendar* days of the receipt of the response by the grievant. ... The Inmate Grievance Branch will confirm receipt of the appeal, conduct any further investigation necessary, prepare a report, and **present all available information to the responsible official. The responsible official will render the final decision on the grievance**

[67] Per ¶9 (ALC 1st Supp. ROA, p. 327), the Warden did not have the authority to determine whether a questionable issue is grievable or not. Furthermore, the Warden did not possess the authority to award the relief demanded by the Appellants, namely back pay, interest, costs and attorney's fees.

[68] The Step 2 appeal form stated as follows (ALC Abbv. ROA, p. 5): "The decision rendered by the responsible official exhausts the appeal process of the Inmate Grievance Procedure. I hereby acknowledge receipt of the official's response and **understand this is the Agency's final response to this matter.**" [emphasis supplied]. Similar language also appeared on the instructions for completing the Step 2 appeal form: "The decision rendered by the responsible official exhausts the appeal process of the SCDC Inmate Grievance Procedure."

> within 60 days from the date that the Institutional Inmate Grievance Coordinator received the appeal of the Warden's decision. ... **The response of the responsible official will be the Department's final response in the matter.** Any action required to implement the Department's final response will require no additional signatures/approval. The Department's final response implies the Department Director's approval. [emphasis supplied].

The ALC, after reviewing ¶¶13.4 and 13.5, concluded that the final decisions concerning the issues associated with the Appellants' grievances were rendered by the responsible official at the agency level, not the Warden. (ALC 7/26/12 Order, p. 16.) The Warden's responses to the Appellants' Step 1 grievances constituted merely a recommendation regarding the disposition of the prison industries pay claims raised therein, and it did not constitute SCDC's final decision. As the Warden's response to the Appellants' Step 1s constituted only a recommendation, the Warden could not and did not "waive" any potential defense, procedural or substantive, held by SCDC. The official's response to the Step 2 appeal constituted the final agency decision. As the appropriate agency official asserted the fifteen day filing deadline in SCDC's final decisions, the Appellants' contention is without merit. (ALC 7/26/12 Order, p. 16.)

In *Peters*, environmental groups challenged the Federal Highway Administration's ["FHWA"] assessment of environmental impacts on recreational trails. Amongst the plaintiffs' challenges was the Secretary of Transportation's waiver of a statutory provision. The government moved to dismiss the complaint, because the FHWA had not issued a final agency action and only final agency actions are subject to review under the federal Administrative Procedures Act. Ultimately, the *Peters* Court agreed and dismissed the action finding that the plaintiffs' action was premature and the court lacked jurisdiction to consider the matter. In reaching its decision, the *Peters* Court observed that prior to the issuance of the agency's final decision, the agency may change or modify its decision. *Peters*, 371 F.Supp. 2d at 1120.

The ALC reasoned that in *Ross*, the Tenth Circuit Court of Appeals concluded that because the prison accepted the inmate's complaint and provided the inmate a requested remedy, the inmate exhausted his administrative remedies. (ALC 7/26/12 Order, p. 17). The *Ross* court relied on the fact that nothing in the record suggests that the prison treated the inmate's complaint as untimely and the inmate received a favorable response to his complaint. The ALC distinguished *Ross*, because unlike in the present case, SCDC did, in fact, raise timeliness as an issue before the Appellants appealed the denial of their grievances to the ALC.[69]

The Appellants attempt to distinguish *Peters*,[70] however, they do not distinguish or call into question the ALC's reliance on *Peters* for the proposition that an administrative agency may amend or modify its decisions before they are final.

As the ALC correctly pointed out, the legislative guidance at issue in *Peters*, like SCDC's responses to the Appellants' the Step 1 grievances, were not final agency decisions. (ALC 7/26/12 Order, p. 17.) As in *Peters*, the ALC lacked jurisdiction over attempts by inmates to appeal SCDC's denial of their Step 1 grievances to the ALC. Thus, similar to the court's observation in *Peters*, SCDC retained the right to change or modify the Step 1 responses before it issued its final agency decision in the form of a Step 2 response.

[69] *See* note 60 above.

[70] *See* Appellants' Brief, pp. 30 – 32.

c) **The ALC correctly ruled that SCDC did not waive the fifteen day deadline by denying some of the Appellants' grievances for timeliness reasons as well as the grievances' merits.**

Within the fifth issue from their brief,[71] the Appellants further assert that the ALC erred when it concluded that SCDC did not waive the fifteen day filing deadline in the 32 Step 1 responses and 136 Step 2 final agency decisions at issue, by both having raised the fifteen day filing deadline and rejecting the merits of the Appellants prevailing wage claims. (ALC 7/26/12 Order, p. 18). Specifically, the Appellants contend that *Ross* and *Pozo v. McCaughtry*, 286 F.3d 1022 (7th Cir. 2002) support their assertions and that the ALC overlooked their arguments related to the issues they raised to the circuit court in *Williams*.

The ALC explained that in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), the U.S. Supreme Court considered whether a state post-conviction petition that the state court had rejected as untimely could nonetheless be considered properly filed for the purposes of the tolling provision of 28 U.S.C. § 2244(d)(2). (ALC 7/26/12 Order, p. 18, n.10.) Ultimately, the *Pace* Court held:

> [T]ime limits, no matter their form, are "filing" conditions. Because the state court rejected petitioner's PCRA petition as untimely, it was not 'properly filed' ..." *Id.*, at 417; *see also Carey v. Saffold*, 536 U.S. 214, 226 (2002) (holding that if a state court clearly ruled that a prisoner's application for collateral review was untimely, then "that would be the end of the matter" for federal purposes, "regardless of whether [the state court] also addressed the merits of the claim, or whether its timeliness ruling was 'entangled' with the merits.").

The ALC rejected the Appellants' invocation of *Pozo* by stating that in light of *Pace*, "it is unwilling to rely upon any federal circuit court decision holding that a document dismissed as both untimely and unmeritorious is properly filed." (ALC 7/26/12 Order, p. 18, n. 10.) The Appellants fail to address the ALC's examination and reliance on *Pace* or its impact on *Pozo* within their brief to this Court.

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[71] *Id.*, pp. 29 – 30.

As to the Appellants' argument that the ALC overlooked the arguments they raised to the circuit court in *Williams,* SCDC respectfully submits that the materials the Appellants cite in support their arguments do not appear in the Record, and, accordingly, both these materials and the argument articulated by the Appellants therefrom are not properly before this Court.[72] SCACR 210(h) ("the appellate court will not consider any fact which does not appear in the Record on Appeal."). SCDC further submits that because the ALC did not rule on or consider the Appellants' argument, this issue is not properly preserved for this Court's review. *Dunbar*, 587 S.E.2d at 693-94 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

For all the reasons articulated above, this Court should affirm the ALC's ruling that SCDC did not waive the fifteen day filing deadline.

**6. The ALC correctly ruled that SCDC was not equitably estopped from applying the fifteen day filing deadline from ¶13.1.**

In the sixth issue from their brief,[73] the Appellants assert that the ALC erred by ruling that SCDC was not equitably estopped from raising the fifteen day filing deadline from ¶13.1 (ALC 1st Supp. ROA, p. 328).

As the ALC explained, the elements of equitable estoppel are divided between the estopped party and the party claiming estoppel. (ALC 7/26/12 Order, pp. 19 – 20). Specifically, the elements related to the party being estopped are: "(1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2)

[72] *See* note 9 above.

[73] *See* Appellants' Brief, pp. 33 – 35.

the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts." *Strickland v. Strickland*, 650 S.E.2d 465, 470 (S.C. 2007). "The party asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped." *Id.*

The ALC, relying on *Kleckly v. Nw. Nat. Cas. Co.*, 526 S.E.2d 218, 220 (S.C. 2000),[74] further explained that "a party may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute was induced by the party's conduct." (ALC 7/26/12 Order, pp. 19 – 20). Inducement "may consist of an express representation that the claim will be settled without litigation or conduct that suggests a lawsuit is not necessary." *Id.* A defendant's conduct may induce "the plaintiff either to believe that an amicable adjustment of the claim will be made without suit or to forbear exercising the right to sue." *Id.*

As observed by the ALC, the Appellants' equitable estoppel argument is based solely on the language in ¶13.9 of Policy GA-01.12 and the instructions printed on the Step 1 grievance form. Specifically, the Appellants contend they and their counsel "believed" that their prevailing wage grievances concerned SCDC's "policies/procedures" and could be filed at any time.[75]

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[74] The Appellants contend that the ALC erred by relying on the elements set forth in *Strickland.* Instead, they assert that *RWE Nukem Corp. v. ENSR Corp.*, 644 S.E.2d 730 (S.C. 2007), and *Kleckly* announce the proper test for considering equitable estoppel in a statute of limitations case. *See* Appellants' Brief, p. 34. The Appellants apparently missed the ALC's explanation of *Kleckly* and the ALC's application of *Kleckly* to their case. (ALC 7/26/12 Order, pp. 19 – 20). Also, the Appellants merely point to the following observation in *RWE Nukem*, 644 S.E.2d at 734, as the purported equitable estoppel test: "A defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct." Moreover, the Appellants fail to identify any aspect of *Strickland* that is inconsistent with *RWE Nukem* or that is otherwise misapplied to their case.

[75] *See* Appellants' Brief, p. 33.

As the ALC correctly explained, the language in ¶13.1 (ALC 1st Supp. ROA, p. 328) and the Step 1 instructions (ALC Abbv. ROA, pp. 1 – 2) informed all inmates, including the Appellants, of the different time periods for filing different types of grievances. (ALC 7/26/12 Order, p. 20). Both ¶13.1 and the Step 1 instructions clearly notified the Appellants that "incident" grievances had to be filed within fifteen days.

No evidence in the Record remotely suggests that SCDC, through its words or actions, influenced in any way the manner in which the Appellants interpreted ¶13.1 or the Step 1 form, induced the Appellants into believing their prevailing wage grievances concerned SCDC policies/procedures and could be filed at any time, or induced the Appellants into believing that filing a grievance was unnecessary. (ALC 7/26/12 Order, p. 20).

The Appellants alone misinterpreted the filing deadline, and they cannot now blame their defective interpretation of the operative materials on anyone other than themselves.[76] Consequentially, their argument fails, and SCDC respectfully submits that the ALC correctly determined that SCDC is not equitably estopped from applying the fifteen day deadline in ¶13.1.

**7. The ALC correctly ruled that the fifteen day filing deadline from ¶13.1 was not tolled when the Appellants filed their class action lawsuit styled as *Williams*.**

In the seventh issue from their brief,[77] the Appellants assert that the ALC erred when it concluded that the fifteen day filing deadline from ¶13.1 was not tolled when the Appellants filed their class action lawsuit, styled as *Williams*, on January 29, 2002. (ALC 7/26/12 Order, p. 23).

The ALC reached this conclusion by the following analysis: (1) *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the case relied upon by the Appellants, was distinguishable from

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[76] No evidence exists that any of the Appellants, or their counsel, ever asked SCDC whether a prevailing wage claim constituted an "incident" grievance or a policy grievance. (ALC 7/26/12 Order, p. 20, n. 11).

[77] *See* Appellants' Brief, pp. 35 – 39.

the facts of this case; (2) South Carolina Rule of Civil Procedure ["SCRCP"] 23 was not applicable to SCDC's inmate grievance system established under Policy GA-01.12; and (3) the fifteen day filing deadline had already passed for a significant number of the Appellants by they filed *Williams*.

In *Crown*, the U.S. Supreme Court held that the running of the ninety-day statutory period within which the plaintiff was required to commence an employment discrimination lawsuit was tolled during the time the class action was pending in which he was a putative class member. The *Crown* Court further held that because the plaintiff did not receive his right to sue notice until after the class action was filed, the plaintiff had the full ninety days to file his lawsuit after the class certification was denied. (ALC 7/26/12 Order, p. 23 – 24). The tolling principle announced in *Crown*, 462 U.S. at 352 – 53, was based upon Federal Rule of Civil Procedure ["FRCP"] 23, which is entitled "Class Actions.[78]"

[78] *Crown* dealt with the prerequisites to filing a Title VII race discrimination lawsuit. Under the Title VII scheme, a complainant must exhaust his administrative remedies before filing a Title VII discrimination lawsuit. Specifically, a complainant must file an administrative charge of discrimination with the EEOC within 180 days of the purported unlawful employment action, or within 300 days in a deferral state. The charge of discrimination determines the scope of any subsequent lawsuit. The complainant cannot file a lawsuit until he receives a right to sue notice from the EEOC, or the state deferral agency. A complainant then has ninety days from his receipt of the right to sue notice to file a lawsuit.

Thus, in *Crown*, the plaintiff had already met the first administrative hurdle of timely filing his administrative charge of discrimination. While waiting for his right to sue notice, which would start the ninety day period to file his lawsuit, the plaintiff joined a class action lawsuit. The *Crown* Court held that because the class action was filed before the right to sue notice was issued (before his right to sue accrued), the ninety day period to file the lawsuit had not begun to run. Thus, the plaintiff in *Crown*, had the full ninety days following the dismissal of the class action lawsuit to file a discrimination lawsuit based on Title VII. The issue in *Crown* was not whether the federal court was the proper forum to consider the plaintiff's claims, but whether, based on the chronology and FRCP 23, the plaintiff's lawsuit was time barred.

Unlike in *Crown*, the Appellants had not begun the process by which they administratively challenged their wages or otherwise preserve their claims. The Record reveals that the first filing of any type by the Appellants by which they challenged their wages was their class action lawsuit styled as *Williams*. The Appellants had not filed a grievance with SCDC, as would typically be required under the Prison Litigation Reform Act, to exhaust their administrative remedies. The plaintiff in *Crown* had a right to file an individual lawsuit in federal court to assert employment discrimination claims once he received his right to sue notice. The Appellants, as recognized in *Adkins*, *Wicker* and *Williams*, never had a right to file a lawsuit in circuit court by which they could challenge their wages. Rather, under Wicker, the proper forum for them to challenge their wage claims is through Policy GA-01.12. The issue in *Adkins* and *Williams* was not whether the circuit court could consider the inmates' claims if they were

The ALC distinguished *Crown* from *Williams*, because the Appellants' class action lawsuit in *Williams* did not fail by a decision from the circuit court which refused to certify the Appellants and other inmates as a class. Instead, the circuit court dismissed the Appellants' class action in *Williams* only after our Supreme Court, in *Adkins*, declared that inmates did not, under § 24-3-430(D), possess a private cause of action by which to assert a prevailing wage claim. (ALC 7/26/12 Order, p. 23). Our Supreme Court, in *Williams*, affirmed the circuit court's dismissal of the entirety of the Appellants' class action. The ALC further concluded that tolling the Appellants' claims "would require the [ALC] to conclude that the Appellants were justified in relying upon the 2002 class action to protect their rights." (ALC 7/26/12 Order, p. 24).

The Appellants apparently do not dispute the ALC's finding that *Crown* is distinguishable from the present case.[79] Instead, they meekly state, without explanation, that tolling principle announced in *Crown* should apply to the grievances they filed with SCDC "to promote the Rule 23 goal of economy of litigation.[80]" SCDC respectfully submits that applying the fifteen day deadline from the date of the incident is consistent with the overall objective of its inmate grievance system. *See e.g. Jones*, 549 U.S. at 219.

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timely, but whether the circuit court could consider the inmates claims at all. Clearly, the facts and legal issues in *Crown* are distinguishable from the present case.

Applying the tolling provisions in *Crown* to the Appellants' case would be analogous to the court in *Crown* holding that the initial time period, whether 180 or 300 days, for the plaintiff to file his initial charge of discrimination, was tolled because he joined a class action lawsuit *after* the deadline to file his charge had past. If *Crown* were to apply to the inmates in *Williams*, it would conceivably allow individual inmates to file individual lawsuits in the circuit court. However, in *Adkins* and later in *Williams*, our Supreme Court ruled that inmates had no private right of action in circuit court, and, therefore, the appropriate forum for the Appellants and other inmates was and remains Policy GA-01.12.

[79] *See* Appellants Brief, p. 37.

[80] *Id.*

The ALC also correctly determined that FRCP 23 does not apply to Policy GA-01.12 and that no similar rule allows inmates to file class grievances with SCDC. (ALC 7/26/12 Order, p. 24). This reality is reflected within the federal and state rules of civil procedure.

Specifically, SCRCP 1 is entitled "Scope of Rules,[81]" and it states as follows:

> These rules govern the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81.[82] They shall be construed to secure the just, speedy, and inexpensive determination of every action.

SCDC's inmate grievance system, comprised by Policy GA-01.2, is not a South Carolina court. *See also Jones*, 549 U.S. at 219. Therefore, the rules of procedure do not apply. Similarly, critical provisions of the ALC Rules of Procedure and the Administrative Procedures Act do not apply to SCDC's inmate grievance system. *Al-Shabazz*, 527 S.E.2d at 753, 757 (declining to apply certain APA provisions and ALC contested case rules to administrative matters decided by SCDC and observing that "Courts traditionally have adopted a 'hands off' doctrine regarding judicial involvement in prison disciplinary procedures and other internal prison matters.").

Therefore, as the rule announced in *Crown* is derived from the federal rules, and the federal rules,[83] like critical provisions of our state rules, are inapplicable to SCDC's inmate

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[81] *Crown* was litigated in federal court, and, thus, the Federal Rules of Civil Procedure applied. The Appellants assert that their class action styled as *Williams* is based upon SCRCP 23, "a rule very similar to FRCP 23." *See* Appellants' Brief, p. 37.

[82] SCRCP 81 is entitled "applicability," and it states as follows:

> These rules, or any of them, shall apply to every trial court of civil jurisdiction within this state, within the limits of the jurisdiction and powers of the court provided by law, and the procedure therein shall conform to these rules insofar as practicable. They shall apply insofar as practicable in magistrate's courts, probate courts, and family courts to the extent they are not inconsistent with the statutes and rules governing those courts. In any case where no provision is made by statute or these Rules, the procedure shall be according to the practice as it has heretofore existed in the courts of this State.

[83] FRCP 1 is entitled "scope and purpose" and, like SCRCP 1, it provides as follows:

grievance system, *Crown* does not impact the applicable time frame by which the Appellants were required to file their grievances.

Furthermore, the ALC accurately recognized that a significant number of the Appellants were paid for their participation in prison industries project long before, in some cases years before, they filed their class action styled as *Williams*.[84] (ALC 7/26/12 Order, p. 24). Thus, the fifteen day filing deadline had already passed by the time the Appellants filed their class action in 2002. SCDC respectfully submits that no component of the decision in *Crown* held or otherwise concluded that the tolling provision from FRCP 23 would revive stale claims. Moreover, applying the tolling provisions discussed in *Crown* to the Appellants' instant grievances would be analogous to the *Crown* Court holding that the initial time period, whether 180 or 300 days, for the plaintiff to file his initial charge of discrimination, was tolled, because he joined a class action lawsuit *after* the deadline to file his charge had passed.

Consequently, this Court should affirm the ALC's conclusions that *Crown* is distinguishable from the present case, that the rules of civil procedure do not apply to SCDC's internal grievance system comprised by Policy GA-01.12, and that the Appellants did not toll the fifteen day filing deadline from ¶13.1 when they filed their class action styled as *Williams* on January 29, 2002.

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> These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

[84] The Appellants conceded the ALC's conclusion by stating "there are some 80 inmates who started work within fifteen days of January 29, 2002 (or after), the effective date of their class action." *See* Appellants' Brief, p. 38.

**8. The ALC correctly ruled that the Appellants were required, under ¶13.1, to file their prison industries pay grievances within fifteen days of their initial pay date.**

As demonstrated above,[85] the ALC correctly ruled that the Appellants were required, under ¶13.1 of Policy GA-01.12 (ALC 1st Supp. ROA, p. 328), to file their prison industries pay grievance within fifteen days of their initial pay date. Accordingly, under the applicable legal standard articulated above, [86] this Court should affirm the ALC's ruling on this issue.

**9. The ALC correctly ruled that the Appellants did not comply with the fifteen day filing deadline established by ¶13.1.**

As demonstrated above,[87] the ALC correctly ruled that the Appellants failed to comply with the fifteen day filing deadline established by ¶13.1 of Policy GA-01.12 (ALC 1st Supp. ROA, p. 328). Accordingly, under the applicable legal standard articulated above, [88] this Court should affirm the ALC's ruling on this issue.

**D. SCACR 208(b)(2) AND 220(c)**

As provided by SCACR 208(b)(2) and 220(c), SCDC also, for the foregoing reasons, respectfully reminds this Court that it may affirm the entirety of the two (2) orders issued by the ALC in the instant consolidated matter "upon any ground(s) appearing in the Record on Appeal."

## CONCLUSION

Therefore, for the foregoing reasons, SCDC respectfully urges this Court to affirm each of the ten rulings issued by the ALC in its "Level One" and "Level Two" orders.

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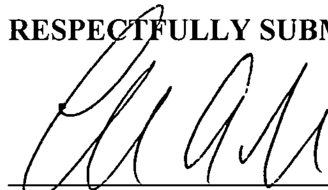
[85] *See* pp. 30 – 32 above.

[86] *See* pp. 8 – 10 above.

[87] *See* pp. 28 – 32 above.

[88] *See* pp. 8 – 10 above.

**RESPECTFULLY SUBMITTED,**

BY: 

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Columbia, South Carolina
November 27, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

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Francis Ackerman, #266928, Malik Aljalil, #219551, Linso Allen, #269378, Michael Benninger, #264212, Frederic Brown, #289602, Timothy Brown, #238461, Terrell Buchanon, #277262, Christopher Buch, #200690, Rudy Cassady, #238732, Sheldon Clark, #264772, Zawaski Cobb, #187136, Kamathene Cooper, #145333, Gladstone Cummings, #267450, Patrick Curtis, #175139, Quintin Daniels, #196284, Curtis Davis, #238776, Heyward Dempsey, #134171, Phillip Denney, #240678, Paul Durham, #219573, Jerome Durham, #270393, Keith Eigner, #299153, Bernard Felder, #122099, Jermaine Garriett, #191274, Fred Gatewood, #289775, Dennis Goff, #177506, Gregory Grant, #109656, Nelson Hampton, #286427, James Hartman, #219770, Gary Hayes, #263985, Michael Hood, #279987, Nikia Law, #260855, Stephen Lease, #137016, Harry Leonard, #249996, Herbert McFadden, #184297, Michael McFarland, #266870, Earl Mack, #216237, John Moultri, #276527, Matin Muntaqim, #266870, Tony Pitts, #280597, Germaine Pringle, #250390, Gene Richardson, #93614, Dennis Richey, #233472, Ignacio Rivera, #300424, Vondell Sanders, #241308, James Sattler, #235043, Joseph Schmitz, #173987, Arthur Scott, #251957, Jerome Scott, #153381, Roosevelt Scott, #275631, Archie Simmons, #161419, Robert Smith, #199324, James Williams, #282929, Gary Bryant, #258972, Harlon Edger, #261866, Johnny Holden, #245199, Don Hughes, #256862, Michael Key, #266890, Archie Lee, #226354, Isaac Richardson, #232574, Larkland Richards, #281768, John Wojcik, #219463, James Bogan, #288111, Larry Burke, #281911, Jammie Gaymon, #208922, David Harrell, #260004, Jeff Stinson, #260047, Ricky Libby, #274681, Alain Lareua, #128014, Quentin Baker, #297868, Frank Corley, #292975, James Jackson, #267718, Quintin Linen, #238553, Thomas Miles, #246763, Chauncy Orr, #177069, Isaiah Scott,

#228008, Eric Youmous, #281091, Derek Carter, #275938, Willie Hare, #256641, Ernest Miller, #235474, Robert Norris, #266101, Ronald Simmons, #267937, Samuel Simmons, #302393, William Thomas, #272501, Anthony Murphy, #295893, Anthony Murray, #237867, Johnny Hayes, #267910, Roy Morris, #288777, Daniel Dewey, #276678, Nehemiah Greene, #243339, Leroy Choice, #113990, James McFadden, #235419, Francis Prioleau, #268813, Darrell Rochester, #146731, Wilbur Jordan, #292264, Alvin Stewart, #278595, Kevin Poston, #266083, Kevin Smith, #272440, Donald Robinson, #277520, Douglas Bude, #263537, Willie Elder, #246208, Rogelio Zavala, #245106, Dennis Knight, #286981, Jacob Beach, #301270, Francis Ackerman, #266928, Darrin Miller, #259593, Edward Bryant, #255998, Sherman Austin, #20028, Michael Baylor, #265682, Taurus Bowman, #252745, Kenneth Carter, #243538, Calvin Drummond, #236322, David Feggins, #287157, Terry Ferguson, #299080, Willie House, #257820, Peter Jenkins, #257321, Percy Martin, #270035, James Murray, #165487, Stephone Simmons, #300422, Larry McClam, #282972, Tyrone Aiken, #244428, Tyrone Aiken, #248367, Frank Anderson, #282800, Ronald Brewer, #285756, Keith Brown, #295762, Pete Bryant, #242370, Michael Busques, #191961, Richard Butler, #162467, Gary Davis, #106144, Anthony English, #238474, Kerlan Etheredge, #236635, James Evans, #267837, Jose Flores, #240563, Robert Garrett, #291096, Reginald Geddis, #183851, Richard Graham, #228235, Gary Grooms, #283860, Wayne Harlan, #245705, Johnny Hayes, #267910, Steven Hickenbottom, #196263, Alfred Joyner, #260442, Donald Lyles, #296135, Henry Baker, #263398, Thomas Carter, #249362, Thomas Butler, #257552, Bobby Williams, #261486, Ray Wells, #173651, Rodney Pressley, #177947, Keith Kelly, #257556, Maxie Gamble, #254413, James Enriquez, #215539, Perry Deveaux, #109601, James Wells, #180458, Cedric Martino, #291396, Donald McAteer, #292961, Robert Wydman, #260331, Anthony Wright, #214007, Derrick

Williams, #272958, Kenneth White, #228409, James Trumper, #247429, Jeffrey Spears, #281697, Timothy Smith, #296539, Davis Sims, #278067, Virgil Simpson, #281888, Edward Simpson, #220017, Kenneth Simmons, #278911, George Shine, #292391, Ralph Sellers, #164295, Laron Richardson, #258786, Frank Patterson, #283098, Tony McNeil, #235864, Larry McClam, #282972, Lavanza Mack, #189340, Raymond Livingston, #277133, Nicholas Lambrose, #215080, Joseph Kelsey, #217218, Keith Eugine, no number, Chuck Jackson, #266425, James Foye, #211523, Timothy Inman, #151123, Marvin Gilbert, #273934, Demetrius Wheeling, #264976, Leon Wilson, #155867, Jeffrey Tevis, #216442, Darryel Beasley, #222388, Curtis Thompson, #266448, Baron Cobbs, #280479, James Tino, #145030, Harold Roberson, #117001, Ray Gadsen, #187527, Tony Witt, #242918, Jonathan Singleton, #287670, Joe Pannell, #89592, Charles Graham, #294453, Lazarus Brannon, #227847, Darrell Williams, #219730, Wilbert Mills, #244004, Howard Grant, #255473, Timothy Wilson, #261971, Rodney Elliott, #251337, Henry Rivers, #219118, Appellants,

v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2012-210588

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**PROOF OF SERVICE**

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I certify that I have served a copy of **Respondent SCDC's Initial Brief** on the above named Appellants by mailing a copy of it to their counsel, first class postage pre-paid, at the following address:

Douglas H. Westbrook, Esquire
Attorney at Law
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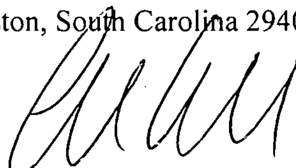

November 27, 2013

LAKE E. SUMMERS

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