THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
THE HONORABLE JOCELYN NEWMAN
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2025-001923
CIVIL ACTION NO. 2020-CP-40-05532

Marion Katrell Campbell, on behalf of himself and all others similarly situated,

RESPONDENT,

versus

South Carolina Department of Corrections,

APPELLANT,

AND

Wardell Williams, Harry Simmons, Jr., and Isiah Rollins,

RESPONDENTS,

versus

South Carolina Department of Corrections,

APPELLANT,

AND

Larry Hampton, Christopher McDowell, David Payton, Jr., and Michael Smoak,

RESPONDENTS,

versus

South Carolina Department of Corrections,

APPELLANT,

AND

Henry Belton,

RESPONDENT,

versus

South Carolina Department of Corrections,

APPELLANT.

RECORD ON APPEAL
VOLUME II (pp. 487-786)

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTH JUDICIAL CIRCUIT**
COUNTY OF RICHLAND	)	

Marion Katrell Campbell, on behalf of himself and all other similarly situated, **Plaintiff,** **v.** **South Carolina Department of Corrections,** **Defendant.**	**C/A No. 2020-CP-40-05532**
Wardell Williams, Harry Simmons, Jr., and Isiah Rollins, **Plaintiffs,** **v.** **South Carolina Department of Corrections,** **Defendant.**	**C/A No.: 2020-CP-40-04701**
Larry Hampton, Christopher McDowell, David Payton, Jr., and Michael Smoak, **Plaintiffs,** **v.** **South Carolina Department of Corrections,** **Defendant.**	**C/A No. 2020-CP-40-05660**

Henry Belton, **Plaintiff,** **v.** **South Carolina Department of Corrections,** **Defendant.**	**C.A. No. 2017-CP-40-00556**

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF DEFENDANT SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Plaintiffs respectfully oppose the Motion for Summary Judgment of Defendant South Carolina Department of Corrections (hereinafter "SCDC"), as follows:

INTRODUCTION

Rarely a day goes by without headline news of the deplorable conditions of South Carolina prisons. Riots, assaults, gang activity, death, and corruption are endemic. South Carolina Legislators, more than a decade ago, recognized that prolonged prison sentences for non-violent drug offenders, served in insufferable conditions, with overcrowding and gang violence, were not producing results in terms of better criminal justice outcomes.

In 2010, recognizing the tremendous waste of state funds pouring into the unproductive detention of these non-violent offenders and to reduce overcrowding, the General Assembly passed the Omnibus Crime Reduction and Sentencing Reform Act of 2010, Act No. 273, 2010 S.C. Acts 1937 (hereinafter "the Omnibus Act" or simply "the Act"). Among other reforms, §§ 37 and 38 of the Act (now codified at South Carolina Code § 44-53-370 & -375) sought to dramatically shorten the sentences of hundreds of non-violent drug offenders by removing an eighty-five (85%) percent service requirement and granting them work release, work credits, education credits, and good conduct credits to further shorten the time necessary to "max out" their sentences.

SCDC, faced with recalculating max-out release dates and releasing impacted non-violent drug offenders much earlier, chose to ignore the Legislature and adopt an unsound and illogical interpretation of the Omnibus Act. Instead of applying the plain language of the Act, SCDC created a bizarre "parolable no-parole" category of offense that did virtually nothing to move non-violent offenders out of confinement sooner, thereby thwarting the manifest goals of the Legislature and the purpose and intent of the Omnibus Act.

Plaintiffs and the class are former inmates who were forcibly confined in South Carolina prisons for a collective total of almost 200,000 days beyond their proper and lawful max-out dates, losing more than five hundred (500) collective years of liberty and freedom. Plaintiffs have alleged causes of action for negligence/gross negligence/recklessness and false imprisonment.

OVERVIEW OF SCDC'S MOTION

SCDC has moved for Summary Judgment on all claims of the Plaintiffs and absent class members. SCDC's argument in support of Summary Judgment is, for the most part, an effort to convince this Court that, rather than exercising its own learned judgment and analysis, it should simply adopt the reasoning contained in the report and recommendation of Magistrate Judge Kevin McDonald, issued when Plaintiff Marion Campbell's case was pending in Federal Court.[1] Magistrate Judge McDonald's recommendation, however, was just that. His analysis of the state law claims was neither considered nor adopted by the District Court Judge. When the Honorable Mary Lewis held the state law claims in abeyance and then declined to exercise supplemental

[1] SCDC quotes Magistrate Judge McDonald's R&R on virtually every page of its Memorandum. At one point, in an over-zealous attempt to support the unsupportable, it even mis-states the Magistrate Judge's conclusions through selective editing of a quote from his R&R. See p. 16, *infra*.

jurisdiction after the Fourth Circuit appeal, the R&R of Magistrate Judge McDonald became a nullity.

SCDC also relies on a handful of other federal magistrate judge recommendations and federal trial court orders having no precedential value or binding effect on this Court. In addition, other than Magistrate Judge McDonald's recommendation, the prolonged detention cases SCDC cites involving random mistakes in sentencing forms or one-off miscalculations are in no way comparable to this action. The present matter involves more than four hundred (400) former SCDC inmates —non-violent offenders who were compelled to serve, at a tremendous cost to the state, months and often years beyond their lawful sentence max-out dates because of SCDC's "patently erroneous" and "unreasonable"[2] application of the Omnibus Act over a period of more than five (5) years.

In opposing Plaintiffs' false imprisonment claim and in support of its claims of immunity to any tort pursuant to S. C. Tort Claims Act exemptions, SCDC insists that the detentions of Plaintiffs and the class members were at all times lawful. It relies virtually in whole on its supposed "compliance" with its <u>own</u> interpretation the Omnibus Act and an erroneous ruling from an Administrative Law Court for authority to incarcerate these prisoners through April 1, 2016, the remittitur date in *Bolin v. S.C. Dep't of Corr.*, 415 S.C. 276, 781 S.E.2d 914 (Ct. App. 2016).

ARGUMENT IN RESPONSE

[2] *Bolin v. S.C. Dep't of Corr.*, 415 S.C. 276, 280, 284, 781 S.E.2d 914, 916, 918 (Ct. App. 2016). In *Bolin* the Court of Appeals refrained from according any deference to the decision of the Administrative Law Judge. Such deference would have been mandatory had the Court not concluded that SCDC and the ALJ's interpretations of the Omnibus Act were patently erroneous.

A. Unlawful Detention

SCDC seeks summary judgment as to Plaintiffs' False Imprisonment claim on the ground that, as a matter of law, there was no unlawful restraint. The central theme of SCDC's argument is that its restraint of the inmates impacted by the Omnibus Act was lawful and in accordance with the Act until the Court of Appeals remittitur issued in *Bolin* on April 1, 2016. Def. Memo. at 12-14. SCDC has the temerity to claim that these Plaintiffs and the class members, many of whom served years beyond their lawful max-out dates, "have nothing to complain about, because if SCDC had sought certiorari, they could have validly been held for at least as long as it would have taken for the Supreme Court to decide SCDC's Petition." Def. Memo. at 13. Again, SCDC misunderstands how the American legal system works —just because you have the procedural ability to appeal a judicial determination does not mean that your legal position is "valid"—particularly when your position involves restraining hundreds of human beings contrary to the plain mandates of a clear statute.

SCDC argues "SCDC's actions were in conformity with the interpretation of the statute in effect since its enactment and that was confirmed and declared by the Administrative Law Judge." Def. Memo. at 9. It asserts that it "was enforcing or complying with the law as interpreted by the agency in 2010 and as ratified by the ALC in 2014." Def. Memo. at 16. SCDC claims that it was complying with the Omnibus Act "as it understood it prior to April 1, 2016, when the *Bolin* court's view became law." *Id.*

SCDC quotes Magistrate Judge McDonald's R&R adopting SCDC's argument:

> It was not until the *Bolin* decision was issued by the Court of Appeals <u>five years later</u> that the defendant's interpretation of the Act was found to be incorrect.

Def. Memo. at 13-14 (emphasis added by SCDC).

SCDC's argument is factually and legally flawed for the reasons stated herein, as well as in Plaintiffs' Motion for Summary Judgment.

1. *The Administrative Law Court in the Fowler case —which SCDC ignores —found SCDC's arguments to be specious.*

SCDC details at length the history and rulings in the *Bolin* case, noting repeatedly that its conduct complied with that Administrative Law Court's ruling. However, its cloak of compliance is an illusion. Michael Bolin was not the only inmate who contested SCDC's blatant noncompliance with the Omnibus Act. Inmate Kevin Fowler also filed grievances based on the Omnibus Act. He succeeded where Michael Bolin initially failed.

Fowler filed his first grievance against SCDC on September 13, 2013, asserting, as Michael Bolin had, that his sentence was not subject to the eighty-five (85%) percent service requirement pursuant to the Omnibus Act. After SCDC denied Fowler's Step 1 and Step 2 Grievances, the matter was heard by Administrative Law Judge, S. Phillip Lenski. Judge Lenski issued his order on August 28, 2014, strongly disapproving of what he termed SCDC's "specious argument:"

> The court finds specious the argument put forth in SCDC's brief that nothing in the 2010 amendment to § 44-53-370(b)(1) is incompatible with the Department's interpretation that after 2010, an offender convicted of distribution of a controlled substance pursuant to the subsection must still serve 85% of his sentence before he is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good time credits. Prior to the amendment, inmates convicted of no-parole offenses pursuant to § 44-53-370 were eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good time credits after they served the requisite 85% of their sentence. To accept SCDC's interpretation of the §44-53-370(b)(1) amendment would be to hold that the General Assembly amended the statute for no purpose whatsoever. Such an interpretation is unreasonable.

Ex. A: ALC Decision in *Fowler*, at 3-4, fn. 1 (emphasis added).

Judge Lenski concluded:

> The court agrees that it appears from the plain language of the statute [the Omnibus Act] that the General Assembly intended to allow inmates convicted of drug

> offenses to be eligible for parole, removing certain drug offenses from the "no parole" category. Based on the language of S.C. Code Ann § 44-53-370(b)(1) Distribution of Heroin is no longer intended to be a "no parole" offense and work credits and conduct credits should be applied for the entirety on an inmate's sentence when he is sentenced under § 44-53-370(b)(1).

Id. at 3 (emphasis added).

It is unclear whether Judge Lenski was aware of the *Bolin* ALJ decision which preceded his. Whether he was aware of the decision or not, his blistering rejection of SCDC's arguments should have been a wake-up call. Instead of reconsidering its bizarre "parolable no-parole" application of the Omnibus Act that impacted the right to early release of hundreds of inmates, SCDC reacted by continuing to misapply the Act while appealing the *Fowler* decision. The matters were argued together and on November 12, 2015, in separate decisions, the Court of Appeals affirmed the ruling in *Fowler* and reversed the ruling in *Bolin*. Rehearing was denied in *Fowler* on February 18, 2016 and in *Bolin* on February 24, 2016.

SCDC urges, through its quotations from the R&R penned by Judge McDonald, that it had no prior notice that its conduct could be deemed unlawful because "no such notice existed prior to the Court of Appeals' decision in *Bolin*." Def. Memo. at 13, quoting the R&R. SCDC even convinced Magistrate Judge McDonald that releasing Plaintiff Campbell and others "while the ALC decision was in effect . . . would have been in contravention of the statute as interpreted by the ALC and arguably would have been a reckless act on the part of SCDC." *Id.*

SCDC tries mightily to convey the image of a good faith litigant following the law as declared by an Administrative Law Court. It cannot, however, escape the converse of its own reasoning. It continued to detain Plaintiffs and other impacted inmates while the ruling of Judge Lenski was in effect, in contravention of the Act as interpreted by Judge Lenski, whose interpretation of the Omnibus Act was the decision that was affirmed. The bottom line is that by

August 2014, a ruling of equal weight and import as the ALC decision in *Bolin* directly informed SCDC of the manifest flaws in its analysis of the Omnibus Act.

As of November 12, 2015, SCDC had been castigated in multiple court rulings for its failure to comply with the "plain" meaning of the Omnibus Act. Despite the judicial characterizations of its conduct and arguments as unreasonable, patently erroneous and specious, SCDC continued its dogged efforts to justify the unlawful detention of hundreds of impacted inmates and took no steps to prepare for a mass release, instead pursuing futile petitions for rehearing that it knew were meritless.

2. *SCDC's detention of the Plaintiffs and the class members after their lawful max-out dates was, <u>at all times,</u> unlawful.*

Plaintiffs' rights under the Omnibus Act were established on July 1, 2010. SCDC's entire argument that detention of the Plaintiffs and the class was lawful until the remittitur date in *Bolin* represents a fundamental misunderstanding of how statutory interpretation works. The requirements imposed on SCDC by the Omnibus Act were not somehow suspended until the Court of Appeals told SCDC what was plainly intended by the Omnibus Act and what it had already been told by Judge Lenski —that it was "unreasonable to characterize an offense for which the offender is eligible for parole as a no-parole offense . . . ." *Bolin v. S.C. Dep't of Corr.*, 415 S.C. 276, 284, 781 S.E.2d 914, 918 (Ct. App. 2016).

As detailed previously in Plaintiffs' Memorandum in Support of Motion for Summary Judgment as to False Imprisonment (hereinafter "Plt. Memo."), the *Bolin* court's "view," as Defendant calls the Court of Appeals' learned and well-reasoned opinion, did not magically "become law" as of April 1, 2016 as SCDC states. Def. Memo. at 16; *see* Plt. Memo. at 14-16, 20-21. Law-making is a legislative function and the South Carolina General Assembly exercised that function through enactment of the Omnibus Act, effective July 1, 2010. The Omnibus Act went into effect on that date, as written, not some six years later when the South Carolina Court of Appeals told SCDC what the plain language of the Act meant.

Judicial decisions, unlike non-remedial statutory enactments, are generally retroactive in application. That is because courts do not make, but merely find, the law.

> [T]he 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 are applied retrospectively." *McCaskey v. Shaw,* 295 S.C. 372, 368 S.E.2d 672, 673 (Ct. App. 1988) citing *Bartlett v. Nationwide Mutual Fire Ins. Co.,* 290 S.C. 154, 157, 348 S.E.2d 530, 532 (Ct. App. 1986). "Prospective application is required when liability is created where formerly none existed." *Hupman v. Erskine College,* 281 S.C. 43, 44, 314 S.E.2d 314, 315 (1984).

Simmons v. S.C. Farm Bureau Mut. Ins. Co., 301 S.C. 267, 269–70, 391 S.E.2d 560, 562 (1990).

Plaintiffs' rights under the Omnibus Act were established by the Legislature when that law passed. The impacted inmates had a right as of June 2, 2010 —the effective date of the Omnibus Act —to a proper calculation of their sentences under its terms. The *Bolin/Fowler* decisions did not create new rights for these impacted inmates but merely vindicated their existing rights as to proper credit for service reduction credits and determination of their max-out release dates uninhibited by a non-applicable 85% service requirement. The Court of Appeals' decisions in *Bolin* and *Fowler* interpreting the Act merely observed and confirmed that fact and ordered SCDC to comply with the Act as written. In doing so, the Court of Appeals ordered a remedy to vindicate a right that had existed since 2010. *See Miranda C. v. Nissan Motor Co.*, 402 S.C. 577, 586, 741 S.E.2d 34, 39 (Ct. App. 2013) (citing *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 95–96, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993)) (discussing the "presumptively retroactive effect" of civil decisions); *see also* 20 Am.Jur.2d *Courts* § 150 (2013) ("[I]t is said that, unlike legislation, which is presumptively prospective in operation, judicial decisions are presumptively retrospective.").

This presumptive retroactivity of judicial decisions has been stated in many different contexts. *See, e.g.*, *Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, 391 S.C. 429, 433–34, 706 S.E.2d 501, 503 (2011) (finding that a judicial decision should be applied retroactively when it created no new right or cause of action but rather abandoned a former test and restated the focus for what a landowner must prove to entitle him to damages in an inverse condemnation action); *Osborne v. Adams*, 346 S.C. 4, 12–13, 550 S.E.2d 319, 323–24 (2001) (finding retroactive application of case law clarifying which professional relationships created a non-delegable duty in common law negligence cases because the case law neither created a new cause of action nor abolished any existing immunities).

The *Bolin/Fowler* Court did not overrule long-standing precedent. The decisions did not create new liability for SCDC where none previously existed —false imprisonment has been a viable claim against the state for decades. The *Bolin* decision merely reversed an Administrative Law Judge's erroneous conclusions, which were plainly at odds with the correctly decided ruling in the *Fowler* matter. Neither the *Bolin* decision nor the *Fowler* decision declared a law unconstitutional. Neither decision modified any rights or relationships that arose under the Omnibus Act. Rather, the *Bolin/Flower* Court confirmed the meaning of a six-year-old statute that had been misapplied since its inception in an unreasonable and patently erroneous fashion by SCDC ignoring the explicit Legislative intent in enacting the Omnibus Act.

For the reasons stated herein, and as described in Plaintiffs' Memorandum in Support of Summary Judgment as to False Imprisonment, the prolonged detention of the class members, some for as long as five years beyond the max-out sentence dates accorded by the Omnibus Act, was unlawful. SCDC has stated no basis for summary judgment in its favor, and none exists.

B. Negligence and Gross Negligence

1. *SCDC is liable to the same extent as a private party, under like circumstances, subject only to the specific limitations of the S.C. Tort Claims Act.*

The South Carolina Tort Claims Act provides:

> The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.

S.C. Code Ann. § 15-78-40.

Defendant has the burden of proof to establish as affirmative defenses the applicability of one or more of the tort claims act exemptions. *Niver v. S.C. Dep't of Highways & Public Transp.*, 302 S.C. 461, 395 S.E.2d 728 (Ct. App. 1990). To the extent that SCDC fails to establish applicability of its claimed Tort Claims Act exemptions, it is liable in tort to the same extent as any citizen of the state.

2. *Defendant's asserted Tort Claims Act exemptions, if deemed applicable, are governed by a gross negligence standard.*

South Carolina courts hold that when a Tort Claims Act exemption containing a gross negligence standard is implicated, that gross negligence standard must be read into any other Tort Claims Act exemptions found to be applicable. *Steinke v. S. C. Dep't of Labor, Licensing and Regul.*, 336 S.C. 373, 520 S.E.2d 142, 153 (1999).

S.C. Code Ann. § 15-78-60(25) provides that the State is exempt from liability for acts or inaction relating to a "responsibility or duty including but not limited to . . . confinement or custody of any . . .prisoner, inmate, <u>**except**</u> when the responsibility or duty is exercised in a grossly negligent manner." (emphasis added). The exemption may also be stated as the converse ––that the State <u>is</u> liable for actions or inaction relating to "a responsibility or duty including but not limited to . . . confinement or custody of any . . . prisoner, inmate" when the plaintiff proves the responsibility or duty was exercised in a grossly negligent manner.

South Carolina courts hold that "[i]f a defendant is grossly negligent under Section 15-78-60(25), it cannot claim immunity under any of § 15-78-60's other subsections because 'the exception to the normal rule of immunity applies.'" *Etheredge v. Richland Sch. Dist. I*, 330 S.C. 447, 466–67, 499 S.E.2d 238, 248 (Ct. App. 1998), *rev'd sub nom. Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 534 S.E.2d 275 (2000). According to the holding in *Etheredge*, all other Tort Claims Act exemptions are subsumed if § 15-78-60(25) applies. *Id.* In that event, the other immunities within the Tort Claims Act "must be read in conjunction with subsection twenty-five." *Duncan v Hampton School Dist. #2*, 335 S.C. 535, 517 S.E.2d 449 (Ct. App. 1999).

SCDC argues that it did not plead the Tort Claim Act exemption found in § 15-78-60(25), containing the gross negligence standard. Def. Memo. at 18. It also argues that the exemption is not applicable to the facts of this case. *Id.*

First, Defendant SCDC actually pled the entirety of the Tort Claims Act as a defense. For example, in *Rollins v. SCDC* (one of the consolidated cases herein), SCDC pled for its Fourth Defense: "Plaintiffs' claims are barred by the terms, conditions and limitations of the South Carolina Tort Claims Act." Ex. B: Def. Answer. S.C. Code Ann. § 15-78-60(25) is a "limitation" of the Tort Claims Act. The broad language of SCDC's Fourth Defense clearly incorporates this Tort Claims Act exemption.

Also, a state entity is not allowed to scuttle imposition of a gross negligence standard by intentionally pleading around it. This Court should consider the applicability of § 15-78-60(25), whether specifically pled or not, in determining if a gross negligence standard should be read into the other exemptions SCDC did plead. In *Plyler v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007), the plaintiff argued the applicability of two Tort Claims Act exemptions containing a gross negligence standard, neither of which were pled by the defendant. The South Carolina Supreme Court engaged in a detailed analysis regarding the applicability of those exemptions, ultimately concluding the exemptions did not apply. The court's analysis would have been entirely unnecessary if the legal standard required consideration only be given to exemptions containing a gross negligence standard that were specifically pled. The South Carolina Supreme Court typically does not waste its time with pointless endeavors.

More recently, the Court of Appeals and Supreme Court have made crystal clear that if an exemption containing a gross negligence standard applies at all, it is read into all other exemptions, whether the defendant raised the defense in its answer or not. *See Repko v. Cnty. Of Georgetown*, 424 S.C. 494, 507, 818 S.E.2d 743, 750 (2018) (holding that "in order for the gross negligence standard from one immunity provision to be read into an immunity provision that does not contain a gross negligence standard, the immunity provision containing the gross negligence standard must first apply to the case."); *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 320, 723 S.E.2d 109 (Ct. App. 2013) ("We hold that when an exception containing the gross negligence standard applies, that same standard will be read into any other applicable exception."). Accordingly, whether the Defendant has raised an exemption in its answer or not has no legal significance in this context, and the only meaningful analysis is whether an exemption is applicable.

SCDC claims that S.C. Code Ann. § 15-78-60(25) is not applicable to the facts of this case. Def. Memo. at 18. This exemption sets forth governmental immunity as follows:

> Responsibility or duty, including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner.

SCDC argues that the issues in this case relate to the "release, discharge, parole or furlough" of inmates, not to their "confinement." Def. Memo at 18. SCDC urges the court to find that the exemption contained in § 15-78-60(21) relating to the release of prisoners applies to the exclusion of § 15-78-60(25).

Plaintiffs' claims arise not from their release by SCDC but from their unlawful restraint. Manifestly, each Plaintiff's damages were incurred during his or her confinement beyond the lawful max-out date. Thus, it is the <u>confinement</u> that was unlawful. It is the confinement that forms the basis for the claims herein. As stated by the South Carolina Supreme Court in *Plyler* regarding § 15-78-60(25):

> The section is usually applied in situations where a governmental entity is responsible for the actual physical accountability for the person.

Plyler v. Burns, 373 S.C. 637, 652, 647 S.E.2d 188, 196 (2007).

No more profound circumstance involving "physical accountability for the person" can be imagined than unlawfully restraining a person by force behind prison walls.

In addition, SCDC's position that § 15-78-60(21) applies goes directly against long-standing precedent. The South Carolina Supreme Court in *Faile v. South Carolina Department of Juvenile Justice* stated regarding § 15-78-60(21):

> The language of the exemption indicates **the custodial entity must make a conscious, if not formal, decision to terminate the relationship before this immunity is triggered**.

350 S.C. 315, 566 S.E.2d 536, 545 (2002) (emphasis added).

The clear meaning and intent of section § 15-78-60(21), based on the language of the Supreme Court in *Faile*, is to exempt the State from liability for torts arising **<u>post-release</u>** based on claims that a release, parole, discharge, or furlough was improper. The crux of Plaintiffs' claims is not that SCDC terminated its custodial relationship with Plaintiffs and the class members, but rather that it unlawfully **maintained** that relationship when release was required by the Omnibus Act.

In addition, the plain language of § 15-78-60(21), as interpreted by the Supreme Court in *Faile*, requires that the governmental entity have some decision-making power over the release of an inmate for it to apply. This case involves the extended confinement of Plaintiffs and the class members beyond their max-out dates —i.e., the point at which SCDC was required to release them pursuant to the application of the Omnibus Act. There was no decision-making power at that point. The Plaintiffs and the class members had fully served their sentences and their entitlement to release was absolute. The Tort Claims Act exemption stated in § 15-78-60(21) simply does not apply.

Accordingly, SCDC is not entitled to blanket immunity under any of the Tort Claims Act exemptions.[3] At best, any exemptions the court or a jury deems applicable must be viewed through the prism of a gross negligence standard pursuant to S.C. Code Ann. § 15-78-60(25).

3. SCDC is not entitled to summary judgment on gross negligence.

It is the law of the case that Plaintiff Marion Campbell was unable to meet the heavy burden of establishing deliberate indifference as to various SCDC officials in their individuals capacities. It was on that basis that the Fourth Circuit reversed District Court Judge Mary Lewis's denial of summary judgment as to that Plaintiff's constitutional claims. Whether SCDC's conduct amounted to gross negligence or actionable false imprisonment has never been decided by a court in this matter.

[3] Plaintiffs' additional arguments regarding Defendant's claimed Tort Claims Act exemptions are stated *infra.*, at p. 18-24.

Gross negligence and conscious indifference are not the same concept. While proof of conscious indifference might also prove gross negligence, the converse is not true. Yet, SCDC goes to great lengths to equate the two. It resorts to deceptive editing of the Magistrate Judge's findings to equate Plaintiff's failure to prove deliberate indifference with a failure to prove gross negligence, stating:

> The McDonald R & R therefore correctly concluded that because "these officials' conduct was not deliberately indifferent to [the plaintiff's] rights, it logically follows that their conduct did not exhibit gross negligence . . ."

Def. Memo. at 19.

Magistrate Judge McDonald "concluded" no such thing. The full passage from the R&R reads as follows:

> Under the substantive due process clause or the Eighth Amendment, the plaintiff has failed to show deliberate indifference or conscience-shocking conduct on the part of these defendants as discussed above. *Harris v. Magnusson* C.A. No. 1:1-cv-472-GZS, 2012 WL 3960172, at *5 (D. Maine Aug. 3, 2012) ("Because I have concluded that on these facts, these officials' conduct was not deliberately indifferent to [the plaintiff's] right, it logically follows that their conduct **did not exhibit gross negligence or arbitrariness that would shock the conscience**.")

Def. Memo., Ex. 5 at 11 (emphasis added).

Magistrate Judge McDonald made a finding regarding deliberate indifference and conscience-shocking conduct only, not gross negligence. By purposefully stopping the language quoted from the *Harris* case at "gross negligence" and omitting the modifying phrase " that would shock the conscience," SCDC's argument is blatantly misleading.

None of the findings by the Magistrate Judge, the District Court Judge, or the Fourth Circuit regarding deliberate indifference in any way support SCDC's Motion for Summary Judgment on the issue of gross negligence.[4] Gross negligence requires a lesser showing than deliberate indifference. *Battle v. S.C. Dep't of Corr.*, No. 9:19CV01729, 2021 WL 4699-97, at *17 (D.S.C. Apr. 16, 2021) ("Deliberate indifference requires a much higher standard of fault than mere negligence or even gross negligence . . . .") quoting *A.P. ex rel. Bazerman v. Feaver*, No. 04-15645, 2008 WL 3870697, at *12 (11th Cir. Aug. 21, 2008).

District Court Judge Mary Lewis concluded that the facts in evidence in the Marion Campbell case met the standard of proof for deliberate indifference on the part of Defendant SCDC's officials. Ex. C: Mar. 21, 2019 District Court Order, at 4-6. The Fourth Circuit disagreed and concluded that the facts shown were not sufficient to meet the very heavy burden deliberate indifference requires. Those same facts are, however, certainly sufficient to create a jury issue on the far lesser standard of gross negligence, a point SCDC made no effort to counter in any substantive way. Judge Lewis enumerated the following facts as particularly persuasive concerning SCDC's misconduct:[5]

- SCDC attorneys Florian and Tatarsky knew the General Assembly was contemplating a "significant" bill to alter inmate release dates by making non-parolable offenses parolable; the consequence for treating a parolable offense as non-parolable was significant; hundreds of inmates would be affected by the reform; and their decision would implicate the "fundamental" right to be free from incarceration. Ex. D: Tatarsky Depo. at 17:16-25; 18:10–19, 18:24–19:19, 21:5-9; 22:25–23:24; 32:13-15; Ex. E: Florian Depo., 29:15-20; 23:8-24:3.

- Florian conceded the potential risk to inmates and acknowledged uncertainty in the position SCDC took based on his decision. In Florian's view, Act 273 "didn't actually say one way or another whether they were now considered to be no-parole offenses for purposes of the 85 percent[,]" a conclusion the Court of Appeals found contrary to the plain language and the legislative intent as expressly stated in § 1 of Act 273. Ex. E: Florian Depo. 64:14–65:9; 66:12–67:4; 45:24-46:20; 70:7-21; *Bolin v. S.C. Dep't of Corr.*, 781 S.E.2d 914, 918 (S.C. Ct. App.), *reh'g denied* (Feb. 24, 2016)).

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[4] Any comments or commentary in the Fourth Circuit opinion unnecessary to its analysis of qualified immunity and conscious indifference are mere dicta.
[5] Ex. C: Judge Lewis Order, at 5-6.

- Tatarsky never bothered to review junior attorney Florian's[6] pronouncements prior to issuance and neither man took prophylactic steps to ensure the policy was correct, but both men also conceded the obligation to timely release inmates was a "clearly recognized" one that ensured a guaranteed liberty interest was not infringed. Ex. D: Tatarsky Depo. 32:1-4; 36:9-25; 22:7–24; 35:5-18; Ex. E: Florian Depo. 9:14-22; 23:8–24:8.

- Notwithstanding the import of their actions and their uncertainty concerning how to implement Act 273, as evidenced by the Florian Memo, Tatarsky and Florian nevertheless disseminated instructions to SCDC that resulted in the incarceration of Plaintiff Campbell and the inmate class beyond their lawful terms of detention. Def. Memo. Ex. 1: Florian Memo; Ex. D: Tatarsky Depo. 33:13-21; 34:8-11; 34:19-23; Ex. E: Florian Depo. 36:23-37:6.

South Carolina Courts recognize that "[i]n most cases, gross negligence for which a government entity can be liable under the Tort Claims Act, is a factually controlled concept whose determination best rests with the jury." *Proctor v. Dep't of Health & Env't Control*, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006). Gross negligence must be presented to the jury unless the evidence supports only one reasonable inference. *Clyburn v. Sumter County Sch. Dist., No. 17*, 317 S.C. 50, 451 S.E.2d 885 (1994). Such is the case here. SCDC has made no showing of entitlement to summary judgment on the factual record in this case. If the Court decides to deny Plaintiffs' motion for summary judgment and determines that a gross negligence standard applies, the jury should be left to evaluate the evidence and determine whether Plaintiffs have established gross negligence on the part of SCDC. [7]

C. Tort Claims Act Exemptions

Plaintiffs incorporate herein their arguments regarding the lack of applicability of S.C. Code Ann. § 15-78-60(3),(4),(5), and (21) as set forth in their Memorandum in Support of

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[6] Florian become a member of the Bar in 2007, just three years before SCDC entrusted to him this hugely consequential task of interpreting the Omnibus Act. Ex. E: Florian Depo. 9:17-22; 11:24-12:3.

[7] Plaintiffs incorporate herein the evidentiary filings in support of Class Certification.

Summary Judgment as to False Imprisonment. In addition, Plaintiffs respond to SCDC's arguments as follows:

1. *S.C. Code Ann.* § *15-78-60(3) is not applicable as the Plaintiffs' claims do not arise from any order of the Court.*

SCDC alleges that it was merely implementing or enforcing sentencing orders and that it is, therefore. immune from suit pursuant to § 15-78-60(3). This Tort Claims Act exemption relates to "execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process."

First, SCDC declares that the South Carolina District Court in *Jackson v. S.C. Dep't. of Corr*., No. CV 3:14-2262-SVH, 2106 WL 403588 (D.S.C. Jan 12, 2016) "held that S.C. Code § 15-78-60(3) bars false imprisonment claims against SCDC for overdetention." Def. Memo. at 12. This non-binding District Court Order made no such blanket finding. While *Jackson* was a prolonged incarceration case, the issue related directly to a mistake in an inmate's sentencing sheet, giving rise to the inmate's excess detention. *Jackson* is readily distinguishable.

In *Jackson*, SCDC argued that it had merely implemented the incarceration based on the terms in the sentencing sheet. The Court concluded that the sentencing sheet memorialized the order of the court and that SCDC was allowed to assume that it was accurate. On that basis the Court found that the Tort Claims Act exemption contained in § 15-78-60(3) applied, stating SCDC had "executed the order of the state court, as memorialized in the sentencing sheet." *Id.* at *2.

The claims of Plaintiffs herein do not arise from their sentencing forms or any orders at all. The claims arise from SCDC's egregious misinterpretation of a remedial statute, the Omnibus Act, that was intended by the Legislature not only to alleviate prolonged incarceration of the non-violent offenders covered by the Act, but to save the state the high costs of such prolonged and pointless incarceration. Even if *Jackson* had some precedential impact, which it does not, the ruling was based on entirely disparate facts.

SCDC also claims support from another District Court decision, *Kifayatuthelezi v. S.C. Dep't of Corr.*, No. 8:17CV03139TLW-JDA, 2019 WL 4675355 (D.S.C. Mar 4, 2019). The inmate's claim in *Kifayatuthelezi* also directly related to the manner in which SCDC implemented the specific terms of a sentencing order. The court described the Form 9, reflecting the sentencing order, as stating: "In parentheses beneath the second sentence, the form reads, 'split sentence time and/or partial revocation time.'" The initial PCR Court interpreted the split sentence language to deprive the inmate of credit for certain pre-trial time served that he believed was due. The Court of Appeals reversed the PCR Court's findings regarding implementation of the split sentence. It was on this basis that the District Court held that the claims the inmate stated under the Tort Claims Act were barred by § 15-78-60(3). In so ruling, the Court noted that the claim was based on SCDC's implementation and enforcement of the order imposing the inmate's sentence.

Just as in *Jackson*, the gravamen of the claim in *Kifayatuthelezi* harkens back to the specific terms of the original sentencing order. In this case, Plaintiffs' claims all derive from rights accorded them under the Omnibus Act. Their sentencing orders or sentencing forms have no bearing. Parole eligibility in the context of this case is governed by statute, not court order. The gravamen of the within action is SCDC's gross misapplication of statutory changes that created rights to release from incarceration ignored by SCDC. The plain language of §15-78-60(3) demonstrates that it is not applicable in this case.

2. *S.C. Code Ann. § 15-78-60(4) is not applicable to SCDC's failure to comply with the Omnibus Act.*

The basis for SCDC's liability herein is its failure to comply with the Omnibus Act. The exemption stated in §15-78-60(4) grants immunity for "<u>adoption, enforcement, or compliance</u> with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies." (emphasis added). The Legislature did not provide immunity for a failure to comply with the law. The overt omission in statutory language cannot be cast aside —the Legislature plainly intended there be no immunity for state entities' failure to comply with statutes as written, which is exactly what SCDC did in this case. Accordingly, SCDC's conduct falls outside the plain language of the exemption.

SCDC relies on Magistrate Judge McDonald's finding:

> [P]laintiff is ultimately complaining about SCDC's enforcement or compliance with the Act. By its plain language, this subsection also provides immunity for the failure to enforce a law, which is precisely what the plaintiff blames for his alleged prolonged detention

SCDC, as did the Magistrate Judge, chooses to ignore the clear distinction between enforcement and compliance. Compliance in this context, very simply means "conformity in fulfilling official requirements." *See*, https://www.merriam-webster.com/dictionary/compliance. Enforcement, with regard to a law or official requirement, means "to compel." *See*, https://www.merriam-webster.com/dictionary/enforcement

Viewed at an even more basic level, compliance involves conduct of the party while enforcement involves a party's actions *vis-à-vis* others. The Omnibus Act governed the actions of SCDC not others. SCDC was charged with complying with the law. It did not comply. Enforcement is not at issue.

SCDC also asserts, as described above, that it did comply with the Omnibus Act as it understood it. Def. Memo. at 16. That "understanding" by SCDC has been termed "specious," "patently erroneous," and "unreasonable." What SCDC claims to have "understood" does not alter its liability for wrongfully depriving hundreds of human beings of almost 200,000 days of liberty and freedom, thereby frittering away untold millions of state dollars. SCDC failed to comply with the Omnibus Act for years. Its noncompliance is not subject to immunity pursuant to § 15-78-60(4).

3. S.C. Code Ann. § 15-78-60(5) is not applicable as SCDC did not arrive at its "patently erroneous" interpretation of the Omnibus Act by utilizing "accepted professional standards."

SCDC argues that "how to apply the 2010 statute as to sentences for certain crimes constituted the quintessence of a discretionary decision by governmental officials." Def. Memo. at 17. SCDC asks this Court to conclude, as a matter of law, that its staff acted in accordance with "accepted professional standards" and to accord it "the right to be wrong." [8] Def. Memo. at 17.

SCDC shows remarkable hubris in characterizing its interpretation of the Omnibus Act as merely "wrong." The Administrative Law Judge in *Fowler* concluded that SCDC's arguments as to how the Act should be applied were "specious." The South Carolina Court of Appeals affirmed *Fowler* and found in *Bolin* that SCDC pursued a "patently erroneous" interpretation of the Omnibus Act. An outcome deemed "patently erroneous" (i.e. obviously wrong) is clearly anathema to behavior actually governed by "accepted professional standards."

In addition, the Court of Appeals in *Bolin* concluded that SCDC "ignore[d] the purpose of the [Omnibus] Act." *Bolin v. S.C. Dep't of Corr.*, 415 S.C. 276, 285, 781 S.E.2d 914, 918 (Ct. App. 2016). In doing so, SCDC strayed from the foremost "accepted professional standard" mandated by long-standing rules of statutory interpretation:

> The cardinal rule of statutory interpretation is to determine the intent of the legislature. *Bass v. Isochem,* 365 S.C. 454, 459, 617 S.E.2d 369, 377 (Ct. App. 2005); *Georgia–Carolina Bail Bonds, Inc. v. County of Aiken,* 354 S.C. 18, 22, 579

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[8] Summary Judgment is patently inappropriate on this point. The evaluation of "accepted professional standards" in this context "is inherently factual" as noted in *Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 304, 578 S.E.2d 16, 22 (Ct. App. 2002), *aff'd*, 362 S.C. 377, 608 S.E.2d 573 (2005).

> S.E.2d 334, 336 (Ct. App. 2003); *Smith v. S.C. Ins. Co.,* 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct. App. 2002); *see also Gordon v. Phillips Utils., Inc.,* 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("The primary purpose in construing a statute is to ascertain legislative intent."). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. *McClanahan v. Richland County Council,* 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002); *Ray Bell Constr. Co. v. Sch. Dist. of Greenville County,* 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998); *State v. Morgan,* 352 S.C. 359, 365–66, 574 S.E.2d 203, 206 (Ct. App. 2002); *State v. Hudson,* 336 S.C. 237, 246, 519 S.E.2d 577, 581 (Ct. App. 1999).

See, also, State v. Sweat, 379 S.C. 367, 374, 665 S.E.2d 645, 649 (Ct. App. 2008), *aff'd as modified*, 386 S.C. 339, 688 S.E.2d 569 (2010). ***See also***, *Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 363, 798 S.E.2d 555, 558 (2017) ("The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible.").

While SCDC argues that the steps attorneys Florian and Tatarsky took in interpreting the Omnibus Act were discretionary acts and exempt under Tort Claims Act exemption S.C. Code Ann. § 15-78-60(5), discretion does not override the requirement that legislative intent must be effectuated, not ignored.

The current standard regarding discretionary acts of public officials (unlike pre-Tort Claims Act cases), requires that public officials act within accepted professional standards. To prevail on the discretionary immunity exemption, the state entity must prove three matters: that it "weighed competing considerations, utilized professional standards, and made a conscious choice." *White v. City of N. Charleston*, No. 2017-001930, 2020 WL 4516091, at *2 (S.C. Ct. App. Aug. 5, 2020). It must also show the following:

> "The governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards **appropriate to resolve the issue before them**." *Id.* (quoting *Foster v. S.C. Dep't of Highways & Pub. Transp.*, 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992)).

Wright v. S.C. Dep't of Transportation, 437 S.C. 184, 202, 877 S.E.2d 788, 797 (Ct. App. 2022), *reh'g denied* (Sept. 23, 2022), *cert. denied* (May 24, 2023) (emphasis added).

The burden is not just of proof, but of persuasion:

> Moreover, given the standard a governmental entity must meet to establish discretionary immunity, we find that the burden of proof must be one of persuasion. In *Foster,* the Court mandated that when a governmental entity was claiming discretionary immunity, it "*must show* that in weighing the competing considerations and alternatives, it utilized *accepted professional standards* appropriate to resolve the issue before them." *Foster,* 306 S.C. at 525, 413 S.E.2d at 35 (emphasis added). This standard is inherently factual. To allow the DOT to shield itself with only a showing of "some evidence" would eviscerate the standard enunciated by this Court. Certainly, a governmental entity should not be entitled to discretionary immunity as a matter of law merely by creating an issue of fact.
>
> We hold that when a governmental entity asserts the affirmative defense of discretionary immunity under the Tort Claims Act, the burden of proof is on the governmental entity and this burden is one of persuasion by a preponderance of the evidence.

Pike v. S.C. Dep't of Transp., 343 S.C. 224, 231–32, 540 S.E.2d 87, 91 (2000).

SCDC focuses its argument on the discretionary exemption by reciting that its staff weighed considerations and made a choice in how to apply the Omnibus Act. Those acts are not enough. SCDC, to meet the standard of conduct required by this Tort Claims Act exemption, must have acted in accordance with "accepted professional standard appropriate to resolve the issue before them." The fact that SCDC chose to ignore Legislative intent and applied the Act in a manner that the Court of Appeals deemed "patently erroneous" and the ALC deemed "specious" negates any inference that SCDC applied accepted professional standards.

D. The Omnibus Act's Retroactive Application

SCDC argues that inmates sentenced prior to the effective date of the Omnibus Act fell outside the purview of the statute and were not entitled to have the onerous effects of their no-parole status remedied. It claims that it ultimately released this group of inmates in June 2016, even though the Omnibus Act did not apply to them.[9]

SCDC's entire argument is based on case law detailing the impact of legislation repealing or lessening criminal penalties. SCDC's argument ignores the fact that nothing in the Omnibus Act alters the sentences duly imposed on Plaintiffs or the class. SCDC cites no case law recognizing the principle of law they urge in the context of parole.

Under South Carolina law, "[a] statute is remedial and applies retroactively when it creates new remedies for existing rights or enlarges rights of persons under disability. . . ." *Wiesart v. Stewart*, 665 S.E.2d 187, 379 S.C. 300 (Ct. App. 2008) (citing *Hercules Inc. v. South Carolina Tax Commission*, 262 S.E.2d 45, 274 S.C. 137 (S.C. 1980)).

A number of courts looking at the question have concluded that statutes relating to parole are remedial and should apply to antecedent events. *See, e.g.*, *State v. Cannon*, No. 1 CA-CR 14-0498 PRPC, 2016 WL 3884902, at *2 (Ariz. Ct. App. July 14, 2016), referencing its holding in *Tyree v. Moran*, 113 Ariz. 275, 277, 550 P.2d 1076, 1078 (1976):

> In *Tyree,* an inmate sought the "temporar[y] release[ ]" afforded by an amended parole statute that did not take effect until after he had been sentenced. *Id.* at 276–77, 550 P.2d at 1077–78. In rejecting the argument that the amendment applied only to inmates sentenced after its effective date, the court reasoned, "The amendment is remedial in nature, and such statutes do not normally come within the rule against retrospective operation." *Id.* In addition, the court observed the amendment "[did] not alter the penalty which was attached to any offense, nor create a new penalty, nor change the sentence imposed" and concluded it "was meant to be effective as to all prisoners irrespective of the date of imposition of sentence."

State v. Vera, 235 Ariz. 571, 576, 334 P.3d 754, 759 (Ct. App. 2014).

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[9] It is curious that SCDC urged Magistrate Judge McDonald to find that it would have been reckless to release inmates under the Omnibus Act while one ALC had affirmed SCDC's interpretation of the Act yet felt no compunction in releasing 230 inmates it now claims were not entitled to be released under the Act.

The court in *Tyree* noted, "the construction sought by respondents is too restrictive and not in harmony with the legislative purpose." *Tyree v. Moran*, 113 Ariz. at 277, 550 P.2d at 1078 (1976). The exact same reasoning as espoused by the Arizona Court of Appeals in *Tyree* and *Vera* applies here. To preclude application of the Omnibus Act to inmates already sentenced and within the prison system in no way would have furthered the goals enumerated by the General Assembly but would have delayed any beneficial impact far into the future. The class data shows that under a <u>non</u>-retroactive application of the Omnibus Act, the first inmate who could have taken advantage of an early release date —had SCDC actually implemented the Act —would have been inmate #309956 whose release date would have been 11/27/2013. The next inmate who would have been released under SCDC's non-retroactive view would have been inmate #307969 on 2/4/14. Thereafter, inmates would have been released in a trickle commencing on 4/10/2014. As of the fourth anniversary date of the Omnibus Act, on June 2, 2014, a grand total of nine (9) inmates would have been released under SCDC's view of retroactivity.[10] White there may be some inmates who had already been released prior to March 2021 for whom data was not provided by SCDC, the available data profoundly supports the conclusion that the Legislature intended the Omnibus Act be fully retroactive.

In April, 2016, after SCDC had implemented the initial mass release of prisoners wrongfully incarcerated under its non-implementation of the Omnibus Act, the Department of Probation, Parole and Parson Services (hereinafter "PPP") produced a memorandum discussing the question of retroactivity of the Act, as referenced in an email of Matthew Buchanan, its General

[10] Of course, no inmates were released until March 2016 irrespective of retroactivity because SCDC preferred a frivolous construction of the Act that kept inmates behind bars for as long as possible in utter derogation of legislative intent.

Counsel, dated April 26, 2016. Ex. F: Buchanan Email. Mr. Buchanan informed SCDC that based on "an exhaustive analysis" of the Omnibus Act, PPP had decided to treat the Act as fully retroactive. He stated that the conclusion was based on "[t]he stated intent of the Act to reduce prison populations; the use of the phrase 'Notwithstanding any other provision of law' in the relevant section; and the Savings Clause exception for when 'the repealed or amended provision shall so expressly provide.'" *Id.*

The Memorandum referenced by General Counsel Buchanan stated in support of a finding that the Omnibus Act was retroactive:

> Note that the Act refers to a *current* state of affairs that it has determined is *currently* unacceptable. Here, as in the remaining direct declarations of the General Assembly's intent contained in the Act, "it is the intent of the General Assembly" obviously means its *present* intent to better preserve public safety, reduce crime, etc.

Ex. G: PPP Memo, at 2 (emphasis added).

The Omnibus Act would have been rendered entirely toothless if interpreted as non-retroactive. The analysis of the PPP is compelling and sound. Its analysis gave due deference to the intent of the Legislature.

The 230 inmates released on June 2, 2016 fell within the purview of the Omnibus Act. Their claims for unlawful detention are valid and SCDC's Motion for Summary Judgment as to that group is without merit.

CONCLUSION

Defendant South Carolina Department of Corrections has not met its burden to show entitlement to summary judgment and its motion should be denied.

Respectfully submitted,

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September 12, 2023
Columbia, South Carolina.

ATTORNEYS FOR PLAINTIFFS

EXHIBIT A

(ALC DECISION IN *FOWLER V. SOUTH CAROLINA DEPARTMENT OF CORRECTIONS*)

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Kevin L. Fowler, 222318, Appellant, vs. South Carolina Department of Corrections, Respondent.	Docket No. 14-ALJ-04-0355-AP **ORDER**

This matter is before the South Carolina Administrative Law Court ("ALC" or "court") pursuant to the Notice of Appeal filed April 10, 2014 by Kevin L. Fowler ("Appellant"), who is incarcerated with the South Carolina Department of Corrections ("SCDC").

Appellant filed a Step One Grievance on September 11, 2013, claiming his sentence is not subject to the requirement that Appellant serve Eighty-Five percent (85%) of his sentence before he becomes eligible for release. This grievance was denied. Appellant then filed a Step Two Grievance on November 3, 2013. This grievance was investigated and denied. Appellant filed his Notice of Appeal on April 10, 2014 claiming that his offense of Distribution of Heroin, second offense should not be considered a "no parole" offense and therefore, the Appellant's work credits and good conduct credits should be applied to his entire sentence, not just the remainder of his sentence after he has served 85% of his sentence.

STANDARD OF REVIEW

The ALC's jurisdiction to hear this matter is derived from the decision of the South Carolina Supreme Court in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). The ALC's appellate jurisdiction in inmate appeals is limited to state-created liberty interests typically involving: (1) cases in which an inmate contends that prison officials have erroneously calculated his/her sentence, sentence-related credits, or custody status; and (2) cases in which an inmate has received punishment in a major disciplinary hearing as a result of a serious rule violation. Id.

When reviewing the SCDC's decisions in inmate grievance matters, the ALC sits in an appellate capacity. Id. at 380, 527 S.E.2d at 756. Consequently, the review in these cases is limited to the record presented. An Administrative Law Judge may not substitute her judgment for that of an agency "as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1

23-380(5). The ALC will not disturb the findings of an administrative agency if its findings are supported by substantial evidence on record as a whole. Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 489 S.E.2d 219 (Ct. App. 1997). "Substantial evidence" is evidence which, considering the record as a whole, would allow a reasonable mind to reach the conclusion reached by the administrative agency. Trimmier v. S.C. Dep't of Labor, Licensing & Regulation, 405 S.C. 239, 246, 746 S.E.2d 491, 494 (Ct. App. 2013) (quoting Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998)). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995) (quoting Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)).

LAW/ANALYSIS

On October 4, 2012, the Appellant plead guilty to Distribution of Heroin, second offense and was sentenced to a terms of ten years' incarceration. Distribution of Heroin, second offense is in violation of S.C. Code Ann. § 44-53-370(b)(1).

The requirement that an inmate convicted of a "no parole" offense serve 85% of the sentence is found in S.C. Code Ann. § 24-13-150(A), which reads:

> Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, an inmate convicted of a "no parole offense" as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections, including an inmate serving time in a local facility pursuant to a designated facility agreement authorized by Section 24-3-20 or Section 24-3-30, is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed. This percentage must be calculated without the application of earned work credits, education credits, or good conduct credits, and is to be applied to the actual term of imprisonment imposed, not including any portion of the sentence which has been suspended. Nothing in this section may be construed to allow an inmate convicted of murder or an inmate prohibited from participating in work release, early release, discharge, or community supervision by another provision of law to be eligible for work release, early release, discharge, or community supervision.

Under S.C. Code Ann. § 24-13-100, a "no parole" offense is defined as "a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more." Distribution of

Heroin, second offense is a Class A felony. See S.C. Code. Ann. § 16-1-90(A).

The Appellant contends that his conviction is not subject to the requirement that an inmate serve 85% of the sentence. Appellant relies upon language added to S.C. Code Ann. § 44-53-370(b)(1) by the Omnibus Crime Reduction and Sentencing Reform Act of 2010, which reads:

> Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.

See S.C. Act No. 273 (June 2, 2010). The Appellant contends that with the enactment of the Omnibus Crime Reduction, the General Assembly's intention was to lessen the punishment for drug offenses, and to provide for probation and parole for offenders who were previously ineligible for probation and parole. The court agrees that it appears from the plain language of the statute that the General Assembly intended to allow inmates convicted of drug offenses to be eligible for parole, therefore removing certain drug offenses from the "no parole" category. Based on the language of S.C. Code Ann. § 44-53-370(b)(1), Distribution of Heroin is no longer intended to be a "no parole" offense and work credits and good conduct credits should be applied to the entirety of an inmate's sentence when he is sentenced under § 44-53-370(b)(1).

In this case, the Department has calculated the Appellant's sentence as if he was convicted of a "no parole" offense and is not applying work credits being earned by the Appellant to the initial 85% of his sentence, and is only using them to reduce the portion of his sentence remaining after he has served the initial 85%. If the Appellant had been sentenced prior to the 2010 Omnibus Crime Reduction and Sentencing Reform Act, the Department's calculation of his sentence would be correct. However, as stated above, this court finds that the 2010 amendment to § 44-53-370(b)(1) removed the Appellant's crime from the "no parole" category. Because the Appellant committed his crime and was sentenced subsequent to § 44-53-370(b)(1)'s revision, the Department should calculate the Appellant's sentence by applying his earned work credits and good conduct credits towards the entirety of his sentence.[1]

[1] The court finds specious the argument put forth in SCDC's brief that nothing in the 2010 amendment to §44-53-370(b)(1) is incompatible with the Department's interpretation that after 2010, an offender convicted of distribution of a controlled substance pursuant to the subsection must still serve 85% of his sentence before he is eligible for parole, supervised furlough,

Based on the foregoing

IT IS HEREBY ORDERED that the appeal is **REMANDED** for the Department to calculate the Appellant's sentence without applying the "no parole" offense requirements found in S.C. Code Ann. § 24-13-150(A).

AND IT IS SO ORDERED.

S. Phillip Lenski
S.C. Administrative Law Court

August 28, 2014
Columbia, South Carolina

community supervision, work release, work credits, education credits, and good time credits. Prior to the amendment, inmates convicted of no-parole offenses pursuant to §44-53-370 were eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good time credits after they had served the requisite 85% of their sentence. To accept SCDC's interpretation of the §44-53-370(b)(1) amendment would be to hold that the General Assembly amended the statute for no purpose whatsoever. Such an interpretation is unreasonable.

EXHIBIT B

(SCDC'S ANSWER IN WILLIAMS, *ET AL.* V. OF SOUTH CAROLINA DEPARTMENT OF CORRECTIONS)

STATE OF SOUTH CAROLINA	**)**	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF RICHLAND	**)**	
	)	
	)	
Wardell Williams, Harry Simmons, Jr.,	)	
and Isiah Rollins,	)	Civil Action No. 2020-CP-40-04701
	)	
Plaintiffs,	)	**ANSWER**
	)	
v.	)	**(Jury trial demanded)**
	)	
South Carolina Department of	)	
Corrections,	)	
	)	
Defendant.	)	
	)	

The Defendant, South Carolina Department of Corrections, answering the Complaint herein, alleges the following:

<u>FOR A FIRST DEFENSE</u>

1. The Complaint fails to state a claim upon which relief can be granted.

<u>FOR A SECOND DEFENSE</u>

2. Defendant denies each and every allegation of the Complaint not hereinafter specifically admitted, qualified, or explained.

3. Answering Paragraph 1, it is admitted on information and belief that Plaintiff Williams is a resident and citizen of Sumter County, South Carolina. The remaining allegations of Paragraph 1 are denied.

4. Answering Paragraph 2, it is admitted on information and belief that Plaintiff Simmons is a resident and citizen of Charleston, South Carolina. The remaining allegations of Paragraph 2 are denied.

5. Answering Paragraph 3, it is admitted on information and belief that Plaintiff Rollins is a resident and citizen of Charleston County, South Carolina. The remaining allegations of Paragraph 3 are denied.

6. The first sentence of Paragraph 4 sets forth legal conclusions which can neither be admitted nor denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant denies same and demands strict proof thereof. The second sentence of Paragraph 4 is admitted.

7. Paragraphs 5 and 6 sets forth legal conclusions which can neither be admitted nor denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant denies same and demands strict proof thereof.

8. Paragraph 7 is denied.

9. Paragraph 8 is admitted.

10. Paragraph 9 sets forth legal conclusions and/or speculation, which can neither be admitted nor denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant denies same and demands strict proof thereof.

11. Paragraph 10 sets forth legal conclusions which can neither be admitted nor denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant denies same and demands strict proof thereof.

12. Paragraph 11 sets forth legal conclusions which can neither be admitted nor denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant denies same and demands strict proof thereof.

13. Answering Paragraph 12, Defendant admits that the Office of General Counsel for the Defendant provided advice and input on the implementation of the Omnibus Act to the staff. Any remaining allegations of Paragraph 12 are denied.

14. The first sentence of Paragraph 13 is denied. Answering the second and third sentences of Paragraph 13, Defendant would refer the Court to the depositions cited therein for the best evidence of the matters alleged therein. The last sentence of Paragraph 13 is denied.

15. Paragraphs 14 and 15 are denied.

16. Answering Paragraph 16, Defendant would advise the Court that Plaintiffs are referring to *Bolin v. S.C. Dep't of Corr.*, No. 2014-000461, 2015 WL 7008581 (S.C. Ct. App. Nov. 12, 2015), opinion withdrawn and superseded, 415 S.C. 276, 781 S.E.2d 914 (Ct. App. 2016). Defendants would refer the Court to the *Bolin* case itself for the best evidence of its holding. Defendant specifically denies that the *Bolin* case applies to the present Plaintiffs, or that it supports any claim for relief by the Plaintiffs in the present case.

17. Paragraph 17 is denied.

18. Answering Paragraphs 18 through 20, Defendant would refer the Court to the *Bolin* case itself for the best evidence of its holding.

19. Paragraph 21 is denied.

20. Answering Paragraph 22, it is admitted that certain inmates were released on June 1, 2016. The remainder of Paragraph 22 is denied.

21. Answering Paragraphs 23 through 27, Defendant would refer the Court to the pertinent public records regarding Plaintiff Williams for the best evidence of the matters alleged therein.

22. Paragraph 28 is denied as stated, because the statutory interpretation to which that paragraph alludes was not adopted by a court until well after July 1, 2015.

23. Answering the first sentence of Paragraph 29, Defendant would refer the Court to the pertinent public records regarding Plaintiff Williams for the best evidence of the matters alleged therein. The second sentence of Paragraph 29 is denied. The third sentence of Paragraph 29 is admitted.

24. Paragraph 30 is denied.

25. Answering Paragraphs 31 through 35, Defendant would refer the Court to the pertinent public records regarding Plaintiff Simmons for the best evidence of the matters alleged therein.

26. Paragraph 36 is denied as stated, because the statutory interpretation to which that paragraph alludes was not adopted by a court until well after December 14, 2015.

27. Answering the first sentence of Paragraph 37, Defendant would refer the Court to the pertinent public records regarding Plaintiff Simmons for the best evidence of the matters alleged therein. The second sentence of Paragraph 37 is denied. The third sentence of Paragraph 37 is admitted.

28. Paragraph 38 is denied.

29. Answering Paragraphs 39 through 43, Defendant would refer the Court to the pertinent public records regarding Plaintiff Rollins for the best evidence of the matters alleged therein.

30. Paragraph 44 is denied as stated, because the statutory interpretation to which that paragraph alludes was not adopted by a court until well after April 27, 2011.

31. Answering the first sentence of Paragraph 45, Defendant would refer the Court to the pertinent public records regarding Plaintiff Rollins for the best evidence of the matters alleged therein. The second sentence of Paragraph 45 is denied. The third sentence of Paragraph 45 is admitted.

32. Paragraph 46 is denied.

33. Answering Paragraph 47, Defendant reiterates and realleges each and every paragraph and affirmative defense of this Answer as if set forth herein verbatim.

34. Paragraph 48 is admitted.

35. The first sentence of Paragraph 49 is admitted. The second sentence of Paragraph sets forth legal conclusions which can neither be admitted nor denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant denies same and demands strict proof thereof.

36. Paragraphs 50 through 52 set forth legal conclusions which can neither be admitted nor denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant denies same and demands strict proof thereof.

37. The first sentence of Paragraph 53 is denied as stated. The second sentence of Paragraph 53 is denied. The third sentence of Paragraph 53 sets forth legal conclusions which can neither be admitted nor denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant denies same and demands strict proof thereof.

38. Paragraphs 54 through 58 are denied.

39. Answering Paragraph 59, Defendant reiterates and realleges each and every paragraph and affirmative defense of this Answer as if set forth herein verbatim.

40. Paragraphs 60 through 62 set forth legal conclusions which can neither be admitted nor denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant denies same and demands strict proof thereof.

41. Paragraphs 63 through 68 are denied.

42. Any remaining allegations of the Complaint, including the Prayer for Relief on p. 13, are denied.

FOR A THIRD DEFENSE

43. This action is barred by the applicable statute of limitations.

FOR A FOURTH DEFENSE

44. Plaintiffs' claims are barred by the terms, conditions and limitations of the South Carolina Tort Claims Act.

FOR A FIFTH DEFENSE

45. The Defendant is immune from suit pursuant to the terms, conditions and limitations of the South Carolina Tort Claims Act, §15-78-10 et seq. of the Code of Laws of the State of South Carolina, 1976 as amended, including §15-78-60 (1)(2)(3)(4)(5)(21) and (23).

FOR A SIXTH DEFENSE

46. The Defendant is immune from suit pursuant to §15-78-20, §15-78-30(f), §15-78-40, and §15-78-50(b) of the Code of Laws of the State of South Carolina, 1976 as amended.

FOR A SEVENTH DEFENSE

47. The Complaint fails to state a claim for interest, attorney's fees, or costs, and such claims are not properly recoverable against the Defendant.

FOR AN EIGHTH DEFENSE

48. The Defendant is immune from suit with regard to any discretionary decisions made in good faith.

FOR A NINTH DEFENSE

49. To the extent that exhaustion of administrative remedies is required the Plaintiff has not exhausted such remedies.

WHEREFORE, having fully answered the Complaint of the Plaintiffs, Defendant prays that the Complaint be dismissed with prejudice, for the costs of this action, and for such other and further relief as the Court deems just and proper.

DAVIDSON, WREN & DEMASTERS, P.A.

BY: *s/ Kenneth P. Woodington*

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Counsel for Defendant

Columbia, South Carolina

January 4, 2021

EXHIBIT C

(MAR. 21, 2019 ORDER OF THE HON. MARY LEWIS IN CAMPBELL V. SCDC, ET AL.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

MARK KATRELL CAMPBELL,	§	
Plaintiff,	§	
	§	
vs.	§	CIVIL ACTION 6:16-3265-MGL-KFM
	§	
SOUTH CAROLINA DEPARTMENT OF	§	
CORRECTIONS, BRIAN P. STIRLING,	§	
CHRIS FLORIAN, and DAVID TATARSKY,	§	
Defendants.	§	

ORDER REJECTING THE REPORT AND RECOMMENDATION AND DENYING FLORIAN AND TATARSKY'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Mark Katrell Campbell (Campbell) initially filed this putative class action lawsuit in the Charleston County Court of Common Pleas. He alleged constitutional violations and state law causes of action of false imprisonment and negligence/gross negligence/recklessness.

The defendants who were then named in the complaint removed the case to this Court, after which Campbell amended his complaint to add additional defendants. In Campbell's amended complaint, he brings the following claims: (1) false imprisonment and negligence/gross negligence/recklessness as to the South Carolina Department of Corrections (SCDC), and (2) violations of the Eighth and Fourteenth Amendments against Brian P. Stirling, the Director of the SCDC, Chris Florian (Florian), Deputy General Counsel for the SCDC, and David Tatarsky (Tatarsky), head General Counsel for the SCDC (collectively, Defendants). The Court has federal-question jurisdiction over Campbell's constitutional claims under 28 U.S.C. § 1331; and it has supplemental jurisdiction over his state claims pursuant to 28 U.S.C. § 1367.

The matter is before the Court for review of the Report and Recommendation (Report) of the United States Magistrate Judge suggesting SCDC and Stirling's motion for summary judgment be granted, Florian and Tatarsky's motion for summary judgment be granted, Campbell's motion for summary judgment on his false imprisonment claim be denied, and Defendant SCDC and Stirling's motion to stay consideration of Campbell's motion to certify be granted. The Report was made in accordance with 28 U.S.C. § 636 and Local Civil Rule 73.02 for the District of South Carolina.

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270 (1976). The Court is charged with making a de novo determination of those portions of the Report to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

The Magistrate Judge filed the Report on October 1, 2018, Campbell filed his objections on October 25, 2018, and Defendants filed their replies on November 8, 2018.

II. FACTUAL HISTORY

Campbell is a former inmate of the SCDC. He was convicted on a drug charge in state court on December 2, 2011, and sentenced to a twenty-five-year term of imprisonment, suspended to service of seven years and five years of probation.

The drug offense Campbell was convicted of and sentenced for was considered a "no parol offense." As such, he was ineligible for "early release, discharge, or community supervision" until he had "served at least eighty-five percent of the actual term of imprisonment imposed." S.C. Code Ann. § 24-13-150 (the eighty-five percent rule). In addition,

> (1) no-parole offenders are given significantly less credits for good conduct, work, or education than other offenders, (2) no-parole offenders are required to participate in a community supervision program before their sentences are considered completed, and (3) no-parole offenders are required to serve eighty percent of their sentences before they are eligible for work release

Bolin v. S.C. Dep't of Corr., 781 S.E.2d 914, 916 (S.C. Ct. App. 2016) (footnote omitted).

After Campbell's arrest, but before his conviction and sentencing, the South Carolina General Assembly passed the Omnibus Crime Reduction and Sentencing Reform Act of 2010 (the Act). It became effective on June 10, 2010. The Act provided, in pertinent part, "Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits." 2010 Act No. 273, § 38.

Florian was charged with reviewing the Act to determine its applicability to the inmates incarcerated by the SCDC. In a memorandum Florian drafted setting forth his interpretation of the Act, he concluded that, although the Act served to make certain no parole offenses parole eligible, if an inmate was denied parole, the eighty-five-percent rule still applied.

Michael Bolin, an inmate of the SCDC, challenged the SCDC's application of the eighty-five-percent rule for what was, at the time of his sentencing, a no parole drug offense. The Act, however, made Bolin's offense parole eligible.

After Bolin completed the SCDC grievance process without success, he appealed to the Administrative Law Court (ALC). It agreed with Florian's interpretation of the Act that the eighty-five-percent rule still applied to Bolin's sentence. He next appealed the ALC's decision to the South

Carolina Court of Appeals, however, and it reversed the ALC's decision and held the Act made the eighty-five-percent rule inapplicable to Bolin's prison sentence. *Bolin*, 781 S.E.2d at 919.

As a result of the *Bolin* decision, the SCDC released over 200 inmates, including Campbell. His claims here arise out of the fact that, as a result of Florian's misinterpretation of the Act and SCDC's misapplication of it, he and other similarly situated individuals were incarcerated longer than they should have been. As noted above, the Magistrate Judge recommends the Court grant Defendants' motions for summary judgment on all of Campbell's claims. With that background in mind, the Court turns to Campbell's objections to the Report.

III. DISCUSSION AND ANALYSIS

A. Whether Florian and Tatarsky were deliberately indifferent

First, Campbell objects to the Magistrate Judge's recommendation "Campbell has failed to show deliberate indifference under the Eighth Amendment because Florian and Tatarsky's conduct is, at most, negligence." Objections 2.

The Eight Amendment forbids cruel and unusual punishment. "Detention beyond the termination of a sentence could constitute cruel and unusual punishment if it is the result of deliberate indifference to the prisoner's liberty interest[.]" *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985).

"Deliberate indifference entails something more than mere negligence, but is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Shakka v. Smith*, 71 F.3d 162, 166 (4th Cir. 1995) (citation omitted) (internal quotation marks omitted) (alteration omitted). "It requires that a prison official know of and disregard the objectively serious . . . risk of harm." *Id.*

"With deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with recklessness." *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (collecting cases) "It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." *Id.*

In arguing Florian and Tatarsky were deliberately indifferent, Campbell states "Florian and Tatarsky knew the General Assembly was contemplating a 'significant' bill to alter inmate release dates by making non-parolable offenses parolable; the consequence for treating a parolable offense as non-parolable was significant; hundreds of inmates would be affected by the reform; and their decision would implicate the 'fundamental' right to be free from incarceration." Objections 2 (citation omitted).

He also claims, and Florian and Tatarsky admit, they "were uncertain concerning how to implement [the Act], as evidenced by the Florian Memo, but nevertheless disseminated instructions to SCDC resulting in the incarceration of . . . Campbell and the inmate class beyond their lawful terms of detention." *Id.* (citations omitted).

Campbell further maintains, "Florian conceded the potential risk to inmates and acknowledged uncertainty in the position SCDC took based on his decision." *Id.* at 3. In addition, he faults Tatarsky for allegedly failing "to review Florian's pronouncement prior to issuance and neither man took prophylactic steps to ensure the policy was correct, [although] both men also conceded the obligation to timely release inmates was a clearly recognized one that ensured a guaranteed liberty interest was not infringed." *Id.* (citations omitted) (internal quotation marks omitted) (alteration omitted).

In addition, Campbell complains that, "[a]ccording to . . . Campbell's expert, Robert Daly, SCDC's policy was so obviously wrong that only an incompetent policymaker would have implemented such an illogical policy." *Id*. (citation omitted) (internal quotation marks omitted). Campbell also faults Florian and Tatarsky's failure to seek a declaratory judgment for an interpretation of the Act. *Id*. n.2.

Given the facts of this case, a jury might well find Florian's and Tatarsky's actions and inactions regarding their misinterpretation of the Act amounted to deliberate indifference to a substantial risk of serious harm to Campbell and others similarly situated to him. Put a different way, a jury could reasonably conclude they recklessly disregarded that risk. Therefore, the Court will sustain Campbell's first objection.

B. Whether Campbell's Fourteenth Amendment claim can go forward

In Campbell's second objection, he argues the Magistrate Judge's "recommendation to reject . . . Campbell's substantive due process claim fails to confront the merits of the theory," Objections 5, which, according to Campbell, "is viable here." *Id*.

Campbell contends the Magistrate Judge neglected to adequately consider his Fourteenth Amendment claim. He also claims "there is evidence to support [his substantive due process claim] because the constitutionally shocking' aspect of Florian and Tatarsky's conduct in their knowledge of the risk, uncertainty about the Act, and failure to take any meaningful action, which directly caused the harm." Objections 6. "[S]ubstantive due process prevents the government from engaging in conduct that shocks the conscience[.]" *United States v. Salerno*, 481 U.S. 739, 746 (1987).

But, as the Magistrate Judge recognized, "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998). Because the Eighth Amendment "provides an explicit textual source of constitutional protection against a particular sort of government behavior," *id*., the Court employs it, and "not the more generalized notion of substantive due process," *id.*, to guide it in analyzing Campbell's constitutional claims. Consequently, the Court will overrule Campbell's second objection.

C. Whether Florian and Tatarsky are entitled to qualified immunity

Campbell maintains in his third objection the Magistrate Judge erred in concluding "that even if [he] and the class had viable deliberate indifference and substantive due process claims, Florian and Tatarsky are entitled to qualified immunity because those rights were not clearly established at the time of the prolonged detentions at issue here." Objections 6-7.

"Qualified immunity shields . . . state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). "The plaintiff bears the burden of proof on the first question—i.e., whether a constitutional violation occurred." *Henry v. Purnell*, 501 F.3d 374, 377–78 (4th Cir. 2007) (citation omitted). And, "[t]he defendant bears the burden of proof on the second question—i.e., entitlement to qualified immunity. *Id.* (citation omitted).

Having determined a jury could reasonably find Campbell has established Florian and Tatarsky violated his constitutional rights, the Court turns to the question of "whether the contours of the right were sufficiently clear that a reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 136 S. Ct. 305, 314 (2015) (citation omitted) (internal quotation marks omitted) (alteration omitted).

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court held in *Malley v. Briggs*, 475 U.S. 335 (1986), that an officer sued in a civil suit will be entitled to immunity if reasonably competent officers could disagree as to the reasonableness of the defendant officer's response. *Id* at 341. Thus, "the relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

"This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition[.]" *Id* at 201. Thus, "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

"Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). It "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft*, 563 U.S. at 743 (citation omitted) (internal quotation marks omitted).

Broadly speaking, there is no question it was clearly established when the Act became effective that "[d]etention beyond the termination of a sentence could constitute cruel and unusual punishment if it is the result of deliberate indifference to the prisoner's liberty interest[.]" *Haygood*, 769 F.2d at 1354. The more specific question here is whether it was clearly established on the effective date of the Act that the Act relieved Campbell and others similarly situated to him from the eighty-five percent rule such that their prison sentences were shortened.

As the Court has already noted, the Act states, in relevant part, "Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits." 2010 Act No. 273, § 38. After the Court of Appeals' detailed discussion and analysis of the Act, it concluded both the plain meaning and the legislative intent of the Act made clear the effect of the Act was to change Bolin's no-parole offense into a parolable one such that the eighty-five percent rule no longer applied to his sentence.

Turning to the question of whether that law was clearly established on the effective date of the Act, as opposed to when the *Bolin* decision was issued, the Court is mindful of the fact that, although it "must avoid ambushing government officials with liability for good-faith mistakes made at the unsettled peripheries of the law, [it] need not—and should not—assume that government officials are incapable of drawing logical inferences, reasoning by analogy, or exercising common sense." *Williams v. Strickland*, — F.3d ---, No. 18-6219, 2019 WL 1030673, at *4 (4th Cir. Mar. 5, 2019); *see also Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 926 (11th Cir. 2000) (law is clearly established when official "had to know he was violating the Constitution even without caselaw on point."). Florian and Tatarsky's misinterpretation of the Act shows they failed to exercise any of the reasoning techniques set forth in *Williams*.

The *Bolin* court rejected Florian and Tatarsky's misinterpretation of the Act and characterized it as being "unreasonable." *Bolin*, 781 S.E.2d at 918. It also commented that, although "the interpretation of a statute by the agency charged with its administration will be accorded the most respectful consideration, an agency's interpretation affords no basis for the perpetuation of a patently erroneous application of the statute." *Id* at 916 (citation omitted) (internal quotation marks omitted). The Court agrees with the *Bolin* court.

Nevertheless, Florian and Tatarsky attempt to find cover in the ALC's decision agreeing with their misinterpretation of the Act. But, the ALC fails to aid them in the manner they seek. After all, the fact that the ALC concurred with their "unreasonable" misinterpretation and "patently erroneous application of the statute"does not make it any less "unreasonable" and "patently erroneous."

In sum, it is both axiomatic and elementary that the plain meaning of the Act, coupled with the legislature's intent, leads to the unmistakable conclusion the Act transformed the no parole offenses of Bolin, Campbell and others similarly situated into parolable ones. As such, the eighty-five percent rule was no longer applicable to their sentences. Florian and Tatarsky's interpretation of the Act to the contrary was "unreasonable" and their application of it was "patently erroneous."

As the Court noted above, "qualified immunity balances . . .the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson* , 555 U.S. at 231. Inasmuch as Florian and Tatarsky failed to perform their duties reasonably, they are not entitled to qualified immunity on Campbell's Eighth Amendment claim. Accordingly, the Court will deny their motion for summary judgment and sustain Campbell's third objection.

D. Remaining matters

By separate order, the Court has adjudicated the other motions referenced above.

IV. CONCLUSION

After a thorough review of the Report and the record in this case pursuant to the standard set forth above, the Court sustains Campbell's first and third objections, overrules his second one, and rejects the Report. Therefore, it is the judgment of the Court Florian and Tatarsky's motion for summary judgment is **DENIED**.

. **IT IS SO ORDERED**.

Signed this 21st day of March, 2019, in Columbia, South Carolina.

s/ Mary Geiger Lewis
MARY GEIGER LEWIS
UNITED STATES DISTRICT JUDGE

EXHIBIT D
(DEPOSITION OF D. TATARSKY)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

MARION KATRELL CAMPBELL,)
on behalf of himself and)
all others similarly)
situated,)
)
Plaintiffs,)
) C.A. No. 6:16-cv-03265-MGL
vs.)
)
SOUTH CAROLINA DEPARTMENT)
OF CORRECTIONS, BRIAN P.)
STIRLING, CHRIS FLORIAN,)
and DAVID TATARSKY,)
)
Defendants.)

VIDEOTAPED DEPOSITION OF DAVID TATARSKY
TAKEN ON BEHALF OF THE PLAINTIFF MARION KATRELL CAMPBELL
AND THE CLASS

NOVEMBER 16, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CHRISTOPHER McDOWELL,)
)
Plaintiff,)
vs.) C.A. No. 2:16-CV-03379-TLW-MGB
)
BRYAN P. STIRLING,)
SOUTH CAROLINA)
DEPARTMENT OF)
CORRECTIONS, CHRIS)
FLORIAN and DAVID)
TATARSKY,)
)
Defendants.)
____
HENRY BELTON,)
)
Plaintiff,)
vs.)
)
BRYAN P. STIRLING,)
SOUTH CAROLINA)
DEPARTMENT OF)
FLORIAN and DAVID)
TATARSKY,)
)
Defendants.)
____
LARRY HAMPTON,)
)
Plaintiff,)
vs.)
)
BRYAN P. STIRLING,)
SOUTH CAROLINA)
DEPARTMENT OF)
CORRECTIONS, CHRIS)
FLORIAN and DAVID)
TATARSKY,)
)
Defendants.)
____

DAVID PAYTON, JR.,)
)
Plaintiff,)
vs.)
)
BRYAN P. STIRLING,)
SOUTH CAROLINA)
DEPARTMENT OF)
CORRECTIONS, CHRIS)
FLORIAN and DAVID)
TATARSKY,)
)
Defendants.)
____
MICHAEL SMOAK,)
)
Plaintiff,)
vs.)
)
BRYAN P. STIRLING,)
SOUTH CAROLINA)
DEPARTMENT OF)
CORRECTIONS, CHRIS)
FLORIAN and DAVID)
TATARSKY,)
)
Defendants.)

VIDEOTAPED DEPOSITION OF DAVID TATARSKY, produced, sworn and examined on November 16, 2017, between the hours of 8:59 in the forenoon and 10:32 in the forenoon of that day, at the Kansas City Airport Marriott, 775 Brasilia Avenue, Kansas City, Missouri 64153, before Karen Crossley, a Certified Shorthand Reporter, a Certified Court Reporter (MO), within and for the State of Missouri, in a certain cause now pending in the United States District Court for the District of South Carolina, Greenville Division and in the United States District Court for the District of South Carolina, Charleston Division, between MARION KATRELL CAMPBELL, et al., Plaintiffs, vs. SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, et al., Defendants; CHRISTOPHER McDOWELL, et al., Plaintiffs, vs. BRYAN P. STIRLING, et al., on behalf of the Plaintiffs MARION KATRELL CAMPBELL, et al.

A P P E A R A N C E S

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Court Reporter:
Karen Crossley, CSR/CCR
Missouri CCR #912

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the Plaintiffs and counsel for the Defendants that this deposition may be taken in shorthand by Karen Crossley, a Certified Court Reporter, Certified Shorthand Reporter, and afterwards transcribed into typewriting; and the signature of the witness is expressly reserved.

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THE VIDEOGRAPHER: We're now going on the record. Today's date is November 16th, 2017, the time is 8:59. This is the videotaped deposition of David Tatarsky in the case of Marion Katrell Campbell, et al., versus South Carolina Department of Corrections, et al., case No. 6:16-cv-03265-MGL in the United States District Court for the District of South Carolina, Greenville Division. Would counsel please state their appearance for the record.

MR. WHETSTONE: My name is Charles Whetstone and I represent the plaintiffs.

MS. PERKINS: My name is Cheryl Perkins and I represent the plaintiffs in the Campbell case.

MR. WHITE: My name is Kyle White and I represent the plaintiffs in the McDowell, et al. case.

MR. ROLLINS: My name is Cliff Rollins and I represent the defendants Chris Florian and David

Tatarsky.

MR. DAVIDSON: My name is Will Davidson and I represent the Department of Corrections, and for the record, I believe the deposition is also being taken in the McDowell case, combined McDowell case, am I right?

MR. WHETSTONE: That's correct.

MS. PERKINS: Correct.

THE VIDEOGRAPHER: Will the court reporter please swear in the witness.

* * * * *

(WHEREIN, Tatarsky Exhibit 1 was marked for identification by the Court Reporter.)

DAVID TATARSKY,

of lawful age, produced, sworn and examined on behalf of the Plaintiffs, deposes and says:

(Starting time of the deposition: 8:59 a.m.)

MR. ROLLINS: Charles, before you start asking questions, can I just note for the record this is taken under the Federal Rules of the District of South Carolina and all objections are reserved save as to the form of the question, and also would it be agreeable with you folks if the objection of one serves as the objection for all attorneys for either side plaintiffs or defendants?

MR. WHETSTONE: That's fine with us.

MR. ROLLINS: All right. Thank you.

EXAMINATION

QUESTIONS BY MR. WHETSTONE:

Q. Mr. Tatarsky, my name is Charles Whetstone and I represent the plaintiffs in the Campbell case and I'm going to be asking you some questions today.

A. Yes, sir.

Q. Before we start this process the rules of the United States District Court in South Carolina require that I tell you that now that we have started the deposition, if you have questions about something, you need to direct those questions to me. You cannot consult with your counsel. If you do consult with your counsel, I'll have the opportunity to ask you what you all talked about. Do you understand?

A. I understand.

Q. We're taking this deposition today in Kansas City, Missouri by videotape. Tell me your full name, please, sir.

A. David Michael Tatarsky.

Q. Mr. Tatarsky, what is your date of birth?

A. [redacted].

Q. And what is your social security number?

A. [redacted]

Q. What is your current address?

A. 3404 Ellie Lane, E-l-l-i-e, and that's in Lawrence, Kansas, 66049.

Q. Are you under the influence of anything today?

A. No, sir.

Q. Is there anything today, whether it be a prescribed medication, alcohol, drugs, anything else that interferes with your ability to understand the questions and to answer the questions you are asked today?

A. No, sir.

Q. I don't know whether you've been deposed before or not, but this is not an endurance contest. We can take a break any time you want one. If you want a break, just let me know and we can take one. I don't think we'll be here that long, but you're certainly entitled to take a break any time you choose to.

A. Okay. Thank you.

Q. Please do your best to let me finish my questions before you answer so we won't be talking over each other. That makes it difficult for the court reporter to take things down. This is not like television. I can't cut you off with a yes or a no. If you give an answer, you have a right to explain that answer. If you give an answer early in the deposition and we get a little further down the road and you want to back up and

say Charles, you asked me something awhile a little while ago and I want to change or modify that answer, you're entitled to do that until the deposition has ended. Do you understand?
A. Yes, sir.
Q. Mr. Tatarsky, where are you employed now?
A. My employer is Kansas University Medical Center.
Q. How long have you been in that particular employment?
A. Since September of this year.
Q. What is your position there?
A. My title is compliance auditor.
Q. What all does that entail?
A. Well, the office I work in is called the office of health care services and it is sort of a hybrid entity. We do a number of things. One is that we oversee the contract at the Kansas Department of Corrections, the outside medical provider, we oversee that contract and make sure the care being provided is appropriate. We are also now involved with assisting one of the state hospitals, Osawatomie State Hospital with running their business. They're in the process of getting recertified by CMS. We also have some involvement with state worker's compensation law as well. My primary involvement right now is what I just

mentioned is with the Osawatomie State Hospital.
Q. Are you an attorney?
A. Yes, sir.
Q. Are you licensed in Missouri?
A. No, sir.
Q. Where are you licensed?
A. State of South Carolina.
Q. Are you acting as an attorney in your current employment?
A. No, sir.
Q. Up until a few months ago, you lived in South Carolina, is that correct?
A. Yes, sir.
Q. And were you employed by the South Carolina Department of Corrections up until the time you left the state?
A. Yes, sir.
Q. How long have you been a licensed attorney in South Carolina?
A. Since 1993.
Q. Is that when you graduated from law school?
A. Yes, sir.
Q. Give me a brief employment history, please, sir, from the time you left law school.
A. Certainly. I graduated law school in Delaware

Widener University and I immediately moved to South Carolina and I was hired by a plaintiffs firm in Greenwood, South Carolina called Callison, Dorn, Thomason, Knott. I worked for them for approximately seven years. During that time, one of the things I did was some insurance reserve fund defense work and a couple of times that included the department -- defending the Department of Corrections when they had multiple defendants with conflicts. I liked that work so much that eventually I thought I would like to work for the Department of Corrections, and in 2000, I applied for a position there and I was hired as a deputy general counsel. I did that for -- from 2000 until approximately 2003 and the then general counsel had decided to retire. He recommended me for the general counsel position. I was interim general counsel for approximately a year and a half and then the interim was removed I believe it was in the summer of 2005, and then from that time until I left, I served as the general counsel. I was also in that time at Callison, Dorn, Thomason, Knott, I also served as Saluda County attorney for three years.
Q. For the time period 2005 until you left the Department of Corrections, you were the general counsel for the Department of Corrections?

A. Yes, sir.
Q. As general counsel for the Department of Corrections, describe for me your role there.
A. The role is when I talk to other groups, I basically describe it as just like a big corporation. We usually have an in-house legal department. A big agency like the South Carolina Department of Corrections has an in-house legal department and we basically do everything involving legal matters. The difference is, of course, we have inmates, so that brings a unique slant to some of the legal matters we deal with, but we also deal with employment matters, contract matters, legislative matters. Really just any legal issue that comes up in the department, they're going to come to us.
Q. Was your department known as a legal department or the office of the general counsel?
A. I believe it was formerly -- I'm sorry. I believe it was formerly known as the office of general counsel.
Q. I think you described for me the role of the legal department, but as general counsel, what was your role with the Department of Corrections?
A. Well, my role was oversight of that office. That included managing I believe five junior attorneys, the office also -- the chief of the policy branch was a

direct report to me, the inmate grievance coordinate -- yes, the inmate grievance coordinator for the entire agency was a direct report to me. For a certain period of time the legislative liaison was a direct report to me, the agency creator coordinator was a direct report to me, and then we had various administrative staff as well, so I was running that office and that's -- that's the job.

Q. What was the chain of command then for the general counsel's office?

A. Well, I would be the final authority on most things. Really everything ultimately. I delegated a lot of authority, but obviously people would always come to me and sometimes they needed a final decision from the person who was in charge of the whole office. Sometimes they didn't if it wasn't that big of a decision, but the chain of command would be me, and then of the five attorneys, the most senior was a gentleman named Bart Vincent who is now, I believe, the general counsel there. He was the senior deputy and then from 2003 to '16, there were a lot -- we had a lot of attorneys, but there were always several deputies and always several staff attorneys as well.

Q. Who did you answer to?

A. For the majority of the time I was there, I would

answer directly to the agency director, immediately -- about a year or so before I left, another attorney was hired. Her name is Sally Elliott and I can't remember what her title was, but for the last period of time that I was there, I answered to her and she answered directly to the director.

Q. Did the number of lawyers junior to you at the Department of Corrections, particularly from the time frame of 2010 to 2016, stay pretty much at five lawyers?

A. Yes, it did. There was turnover obviously over that time, but I believe there were five positions there and obviously whenever we had somebody leave, we would try to fill that position as soon as possible. We had periods of time where we were short, but the goal was to keep those positions filled at all times.

Q. As the general counsel, was it your responsibility to manage the attorneys who were in your department?

A. Ultimately yes, although in our office, the way we structured things informally was that the -- I mentioned staff attorneys and generally the staff attorneys would report to Mr. Vincent for day-to-day matters, but all of the attorneys were free to come to me. I would interact with certain attorneys more than others depending on the nature of what their duties

were. For example, there were usually two attorneys in the office who handled what I call El Shabazz matters, matters before the administrative law court. There wasn't a need that often for me to interact with them for example, but the attorney who might handle the most serious litigation I would interact with a lot more often, so...

Q. So were you responsible for assigning work for these attorneys to do, then monitoring what the attorneys under you did?

A. Yes, sir. Yes.

Q. And when you engaged in that monitoring function, were you required to exercise your own independent judgment?

A. Yes, sir.

Q. And were you there as the general counsel to provide advice, assistance and guidance concerning all legal matters under the purview of your office?

A. Yes, sir.

Q. And were you responsible for the oversight of the attorneys under you?

A. Yes, sir.

Q. Were you expected and required to provide appropriate review of the work the attorneys did that you were supervising?

A. Yes, sir.

Q. When your department confronted legal issues on either policy issues or law issues for the Department of Corrections as general counsel, you had the final say on how that was handled, didn't you?

A. I had the final say within the general counsel's office, but we are advisors, so depending on the nature of the decision, it might involve having to go to the director of the agency to make a decision on some matters, but I was the final authority within the office of general counsel.

Q. So within the office of general counsel, the buck stopped with you, didn't it?

A. Yes, sir.

Q. Tell me what the phrase max out date means?

A. It gets thrown around a lot, but it's sort of a shorthand that we use within the Department of Corrections. I think different DOCs have different words -- phrases for it, but it basically means the date on which the inmate is going to get out of prison.

Q. So is it a term then that is a term of art in the corrections business that has to do with determining the correct amount of time an inmate serves?

A. Yes, sir. In our agency, that would be a term of art with us, and again if I was speaking to somebody in

a different Department of Corrections, another state that might use a different term, but they would have a term of art that they would all know what it meant, meaning the day the inmate was good to be released.
Q. When an inmate reaches his or her max out date, that is the date they have served their full time, is it not?
A. Yes, sir.
Q. And when an inmate reaches his or her max out date, they have paid their debt to the society, have they not?
A. Yes, sir.
Q. If an inmate has reached their max out date, they're entitled to be released, are they?
A. Yes, sir.
Q. At that point, that is when an inmate reaches a max out date, they have earned their right to freedom and liberty again, isn't that correct?
A. That's correct.
Q. Freedom and liberty are rights guaranteed under the state and U.S. Constitution, are they?
A. That's correct.
Q. Aren't those basic constitutional rights that can't be impaired?
A. That's correct.

Q. Would you agree with me that a prison inmate has the absolute right to be released when they have completed their time served?
A. Yes, sir.
Q. For each prisoner, is there a calculation that is made that takes the sentence and applies the various credits and other items that an inmate might be entitled to to establish a max out date?
A. Yes, sir.
Q. At some point during your role as general counsel for the Department of Corrections, did you become aware or were you made aware that South Carolina legislature was considering a bill that would significantly alter South Carolina's sentencing regulations?
A. Yes, sir.
Q. Was that law which ultimately passed known as the Omnibus Crime Reduction and Sentencing Reform Act of 2010?
A. I believe so, yes.
Q. Was the Omnibus Act that I -- I won't use the whole name. I'll call it Omnibus Act. That's okay with you? You'll understand what I'm talking about?
A. Yes, sir.
Q. Was the Omnibus Act a comprehensive restructuring of how sentencing worked on many criminal laws in the

state of South Carolina?
A. I don't know whether I would debate comprehensive. I mean it was a significant bill for purposes of sentencing. I mean I don't think there have really been anything that significant for several years. So comprehensive, I suppose you could say comprehensive. Well, my question is, and I don't know, I don't have the statute in front of me. I would consider comprehensive to basically means could overhaul the entire system. It touched on a lot of things. I mean it was a big bill, so...
Q. Do you recall anything about the legislative history of the Omnibus Act?
A. No, sir, I do not.
Q. Do you recall when you were first made aware of the Omnibus Act?
A. No, not specifically. Sometime before it became law, but beyond that, no, I couldn't be any more specific than that.
Q. So were you aware of the Omnibus Act as it worked its way through the legislature?
A. Yes, sir. I was aware that it was there and it was being debated, yes.
Q. Did your department or did you as general counsel follow the progress of the Act in the legislature?

A. No, sir. I think my recollection from that time I think was 2010, I think that primarily our director at the time was Director Ozmint who I think was intimately involved with it and who was also an attorney and I think that he was the one that was primarily involved with following the Act. We really didn't get involved in it until after it became law and had to look about what kind of an effect it would have.
Q. Did Director Ozmint keep you abreast of how it was progressing or seek your input about anything to do with Omnibus Act?
A. I do not recall him asking for my input on it. As far as the status of the Act going through the legislature, I don't recall discussing that with him. We do have -- did have a legislative liaison at the time who I may have spoken with about it, but I don't have a specific recollection of that.
Q. Who was your legislative liaison at the time?
A. In 2010, it would either be Susan Montgomery or if she had retired, it would be Dexter Lee.
Q. Did Director Ozmint give you a heads-up that significant changes are coming down the road, you need to be ready to implement?
A. I don't recall him specifically saying that to me, but again we knew the bill was out there and we

certainly whenever we know that legislation is out there that's going to touch on sentencing in any way, we're going to keep our eyes on it, but I don't recall specific discussion with Director Ozmint about it.
Q. But did you know that there were significant changes coming in the way release dates would be calculated for a large portion of the population at SCDC?
A. Yes. Yes, I think that's fair to say.
Q. In general, once a criminal defendant is convicted and sentenced, assuming they get jail time, they are turned over to the Department of Corrections. That would be you, right?
A. Depending on the amount of jail time. If they got 91 days or more, they would be in the custody of the Department of Corrections; otherwise, they would remain in the detention center.
Q. Once a defendant is convicted and becomes incarcerated with you at SCDC, do they go into the SCDC computer system?
A. Yes, sir.
Q. It's my understanding that that computer system is programmed to automatically calculate and recalculate release dates or max out dates for inmates based on a number of parameters, is that correct?

A. Yes, sir.
Q. So should the computer system have been programmed to appropriately calculate release dates giving the appropriate reductions for work credits, educational credits, good times, etc.?
A. Yes, sir.
Q. And would you agree with me that South Carolina Department of Corrections was responsible for insuring that inmates were not wrongfully incarcerated when they were entitled to be released?
A. Yes, sir.
Q. That's an important functions -- function of the Department of Corrections, isn't it?
A. Yes, sir.
Q. Is it the duty and responsibility of the Department of Corrections under state and federal law to grant release and freedom to inmates when they have done their time?
A. Yes, sir.
Q. And we talked earlier about the right to liberty as a fundamental right, isn't it?
A. Yes, sir.
Q. And it's a clearly recognized right?
A. Yes, sir.
Q. Given these fundamental rights and issues for the

inmates to be free from incarceration when they were supposed to be free from -- free from incarceration in implementing the Omnibus Act, the Department of Corrections certainly was charged with getting it right, weren't they?
A. Yes, sir.
Q. Did South Carolina Department of Corrections have to insure the decisions impacting release calculations were made strictly in conformity with the letter of the law?
A. Yes, sir.
MR. DAVIDSON: Object to the form.
Q. (By Mr. Whetstone) Did SCDC have a fundamental duty and responsibility to implement the intent of the legislature in carrying out the mandates of the Omnibus Act once it was signed?
A. To the best of its ability --
MR. DAVIDSON: Object to form.
A. -- yes, sir.
Q. (By Mr. Whetstone) That would be important, wouldn't it, because the decisions made by SCDC in regard to the Omnibus Act were going to impact hundreds of prisoners, isn't that correct?
A. Yes, sir.
Q. Would you describe for me, please, sir, what you

know about South Carolina Department of Corrections' preparations to make the coding changes necessary to its computer system to carry out the letter and intent of the Omnibus Act?
A. To the extent you're asking about IT and how they did it, almost none. I don't have any real knowledge of that. They're completely separate part of the Department of Corrections. I'm not a programmer of any kind and I don't know -- I don't know anything about how programming works. They would get -- we would interpret laws and then they were tasked with doing the coding and running the program, but that's all I know about that.
Q. By they, who do you mean?
A. It -- the acronym for it was RIM. I believe it stands for Resource and Information Management. They were a sub branch of, I believe, the deputy director of administration I think.
Q. So would that department make their coding changes based on what you told them the new law meant?
A. Yes, sir. They would -- I mean they would rely on us to tell them what the code meant. We couldn't give them any input -- I mean they would rely on us to tell them what we thought the law meant. We obviously wouldn't give them any input in terms of how to code because we don't know that.

Q. Once the Omnibus Act passed, how soon did the Department of Corrections start having meetings to discuss the effect of the Act?
A. Specific -- I don't have any specific recollection of when at all. I mean I think we were -- no, I don't have any specific recollection of exactly when. I mean it was seven years ago, so...
Q. Were you involved in any meetings where the effect of the Act were discussed and relayed to others?
A. I don't have a specific recollection that I was. It would probably have been Mr. Chris Florian would have been the one in those meetings. He was the deputy -- well, he was at one point a staff attorney and then a deputy general counsel that worked for me.
Q. Was there any kind of set of instructions or memorandum circulated about the effect of this new Act and how to implement it?
A. Yes, sir. I believe that Mr. Florian wrote some either memoranda or -- and/or some e-mail messages as well.
Q. Once this law passed, what was your role?
A. My role was primarily just we really didn't talk about how my office was set up, but in my office, there's always an attorney who is what I call sort of the guru of sentencing and that person has changed over

the years, but there needs to be somebody who is in that role because we're getting calls all the time from judges and criminal defense attorneys and solicitors on a daily basis, so our goal is to always have one person in there who has developed the expertise to answer those questions. It was that way before I got in the office there was someone in that role, and at the time of the passage of the sentencing reform act, the person in that role was Mr. Florian.
Q. So when this Omnibus Act passed, did it first come to you to be implemented and you assigned it to Mr. Florian?
A. Yes.
Q. Or did it go directly to him to be interpreted?
A. Well, I mean we -- we had a very informal structure in our office, so I -- by the time that Act was passed, I don't know that I had to formally assign it to Mr. Florian. I mean Mr. Florian knew on the front end before the Act even passed that in his role as the sentencing guru that this was going to be in his lap to handle.
Q. So did he in any way participate or assist the legislature in passing the Act by giving them input in any manner?
A. Not that I'm aware of, no, sir.

Q. So I guess I go back to my question. Did you assign the task to him or did he just -- he, Mr. Florian just assume since he was the guru of sentencing, he'd be charged with implementing it?
A. It's difficult -- I mean it was -- I would have to say it was both. I mean certainly I wanted him to handle it. He was who I expected to handle it, but again the way that I ran my office, I don't recall that I would have needed to bring Chris into my room and say I am officially assigning this to you. Maybe if he was brand new in the firm -- in the office, but he was clearly established as a sentencing attorney at that time. There would have been no question that he would have been the one to handle it. He was the one described in that role answering questions from everybody throughout the state, giving presentations to the various solicitors and public defenders and that sort of thing, so I didn't -- I didn't need to tell Chris it was his. I don't recall if I ever did, but there was absolutely no question that it was his.
Q. How long had Mr. Florian been with the general counsel's office when he took this assignment to interpret the Omnibus Act?
A. I don't know. Don't have a specific recollection.

Q. At that point in time, he was a deputy general counsel?
A. Well, again he came to us as a staff attorney and he eventually was promoted to deputy general counsel, but I don't have a specific recollection of when that title change occurred.
Q. Had he been with the office about a year when he got this assignment?
A. I don't know.
Q. Do you know how long he had been out of law school when he got this assignment?
A. No. I know that before he came to me, he was an attorney with the state supreme court, but I don't know how long that was, so I don't know how long he was out of law school at that point.
Q. Were you Mr. Florian's direct supervisor?
A. No. I would again -- well, again I would say that for day-to-day purposes, his direct supervisor would probably be Bart Vincent, but depending on the issue that he was dealing with, he might come to me directly. The way the office was set up, each of the attorneys had developed certain areas of expertise and depending on the nature of what they were doing, they might come to me. They might go to Mr. Vincent, for example. It would just depend, so in a day-to-day

sense, no, I don't think I was his direct supervisor, at least until he became a deputy and really even then I think he was primarily reporting to Bart Vincent.
Q. Well, when Mr. Florian was assigned the task of interpreting and implementing the Omnibus Act, did you instruct him on what you wanted him to do?
A. Again a lot of it would be he was smart enough to know what he needed to do I think, but about the only specific instruction I think was that once the Act became law, he needed to go through the Act from start to finish and prepare a document saying what, if anything, he thought SCDC needed to do as a result. I think he -- I recall seeing a document of that sort.
Q. Did Mr. Florian meet with you on a daily basis to discuss the Omnibus Act?
A. A daily basis to discuss the Omnibus Act, I don't -- I don't think I would say a daily basis. We met frequently. He had other matters to deal with as well. My door was always open, so many days that was my entire job from start to finish was a steady chain of people coming in the door and talking to me, so I'm sure we talked about the Act, but I don't think we talked about it on a daily basis. As I say, I would not micromanage. He would come to me if he thought there was something that he needed me to weigh in on. He would certainly be

free to talk to the other attorneys in the office. We all talked a lot informally, but no, I would not say he came to me on a daily basis about the Act.
Q. You are aware that Mr. Florian was deposed in this case earlier?
A. Yes, sir.
Q. And were you actually on the phone and participated in that, or at least listened to that deposition, did you not?
A. Yes, sir.
Q. Is there anything you recall about his testimony that you disagree with?
A. No, sir. Not that I recall.
Q. And do you agree with him when he testified that you were well aware of everything he was doing in regard to the Omnibus Act?
A. Yes, sir. I think he did a good job of keeping me aware of what he was doing. Again he had a lot of leeway. Once I'm confident in my attorney's ability, I don't expect him to come to me every day on every little thing you're doing. At a certain point, there would be no point to have them there if they're going to do that, so -- but certainly he would come to me whenever he had something that he thought merited a discussion.
Q. Did he discuss his research with you?

A. I don't recall him discussing specifically his research on the sentencing format with me, no, sir.
Q. Do you recall discussing any of his conclusions with him?
A. Specific discussions, no, sir. No.
Q. Do you agree with Mr. Florian's testimony that issues of any significance he would talk through with you?
A. Yes, sir.
Q. In terms of interpretations by Mr. Florian and guidance and memoranda Mr. Florian was issuing, you were fully aware at every stage of what he was doing, weren't you?
A. He kept me informed of everything he was doing. I certainly don't think he would ever keep any secrets from me. Again he wouldn't report to me on a daily basis giving me chapter and verse on everything he was doing, but certainly he kept me abreast of how he was handling the matter, yes.
Q. Were you aware of how he was interpreting the Act?
A. I was aware of it -- well, certainly I was aware of it when I saw his -- when he came to his final conclusions. I wasn't involved in his formulation of that opinion.

Q. As the general counsel, you had the duty to oversee and to exercise independent judgment and review his work, didn't you?
A. Certainly, yes.
Q. If you had a disagreement with some conclusion he reached, you'd certainly let him know that, correct?
A. Absolutely. We would have discussed it thoroughly, probably brought in other lawyers if we had a disagreement. That's how we handled all matters. If we had disagreements, that was the good part about the office. It was very open and we were very free to talk to one another about it and to work it out.
Q. You would agree, wouldn't you, that the Omnibus Act created issues of great significance?
A. Yes, sir.
Q. Mr. Florian testified in his deposition to the following. This is an excerpt from page 30. Mr. Florian testified under oath, I certainly would have discussed it with him, referring to you, Mr. Tatarsky, as I was interpreting it letting him know some of the issues I was encountering and my initial thoughts on how those issues should be confronted. I would certainly talk to him about lots of novel legal mechanisms being created by the Act. Would you agree that --
MR. DAVIDSON: Object to the form.

MR. WHETSTONE: I hadn't asked the question yet, but that's good. Okay. Objection noted.
Q. (By Mr. Whetstone) Would you agree with me that Mr. Florian talked with you if not daily, at least several times a week about his work with the Act?
MR. DAVIDSON: Same objection.
A. Again it was very difficult for me to quantify, but I mean all the lawyers in the office talked to me on a regular basis, so I can't really dispute. I don't know how many times per week, but they all talked to me whenever they felt they needed to. That's just the way the office was run.
Q. (By Mr. Whetstone) Did Mr. Florian make you aware that he felt a number of aspects of the Omnibus Act were unclear?
A. I believe -- I don't remember specific discussions, but I think I -- I'm trying to remember whether -- I thought either in some e-mails or some other memos that he had expressed some concerns about certain parts of it being unclear, but I don't remember specific discussions.
Q. Are you aware that Mr. Florian felt that the Omnibus Act was inconsistent in many respects?
A. I'm trying to remember if he specifically said that. I don't specifically remember one way or another,

no, sir.
Q. In talking through issues with the Omnibus Act with Mr. Florian, whether you all met daily or weekly, part of those discussions were aimed at working out perceived inconsistencies, isn't that correct?
A. Yes, sir. Certainly if there were inconsistencies, we would want to work them out.
Q. What did you do to help him clear up some things that were concerning him?
A. I don't -- as I say, I don't recall any specific discussions with him about clearing up an inconsistency. I mean he would come to me and I believe he had done the memo talking about the various provisions of the Act and we would discuss his conclusions. If there was any reason to discuss anything, talk to anybody else, we may have discussed that, but again as far as specifics go, I'm sorry, I just don't have any specific recollections of those discussions.
Q. It would be part of your job, wouldn't it, if he had problems resolving some part of the Act of dealing with what he conceived as inconsistencies, to help him work through those issues, isn't that correct?
A. Certainly. Yes, sir.
Q. Were there areas of the Omnibus Act that were puzzling to you or didn't quite make sense to you?

A. I'm trying to remember specifically. I'm trying to remember if I had any specific recollections of inconsistencies. I don't have any specific recollection, no, sir. I'm sorry.
Q. Did you ever consider getting an independent or outside counsel to do an opinion letter on the meaning of the Act or how to implement it?
A. No, sir. I don't recall ever considering that.
Q. Did you ever consider recommending that a declaratory judgment action be filed to make sure that the Department of Corrections got it right in terms of calculating release dates for inmates?
A. I don't specifically recall us discussing that. I mean any time we're dealing with statutory interpretation, a DJ action is something that could be done, but I don't recall that. I think my recollection is that -- no, that's not right. No. I don't have a specific recollection of talking about a DJ action, no.
Q. Was the Omnibus Act project to get it implemented and interpreted the largest project you had ever given to Chris Florian to do?
A. Before or after or just up to that point?
Q. Up to that point.
A. Up to that point. I'm trying to recall if he had argued. I allowed him to argue a case in state supreme

court, which was also a very large undertaking to me as -- for a young attorney. I offered to argue it myself, but if he wanted to do it, he could. Up to that point, I would think that that was the other one, but I don't remember if he handled the supreme court -- the state supreme court case before or after the Omnibus Act, but other than that, yes, I would agree it was the biggest project I had given him.
Q. At some point, did Mr. Florian produce several memoranda concerning the Omnibus Act?
A. Yes, sir.
Q. Were you involved at all in drafting any of those memoranda?
A. No, sir.
Q. Did Mr. Florian share drafts of those memoranda with you before he finalized them?
A. Not to my recollection, no, sir.
Q. Do you recall any PowerPoint presentations being prepared to present his findings with regard to the Omnibus Act?
A. I've seen them I believe as part of the discovery in this case. That's really the only specific recollection I have of them. I know he had done one because I have seen it, but beyond that, nothing further, no.

Q. Do you know who they were prepared to be presented to?

A. No, I do not recall. He -- I don't know if the PowerPoint that I saw was for presentations outside the agency to solicitors or public defenders or judges or whether it was for inside the agency talking to our classification and inmate records people. It would have been one of those two sources I would think, but...

Q. So is it your testimony that you didn't see those presentations or even knew they existed before you became involved in this case?

A. I just can't specifically tell you one way or another. I don't have a specific recollection of sitting down and reviewing a PowerPoint presentation other than looking at it in discovery. I very well may have, but I don't have any specific recollection beyond that.

Q. What did you do to prepare for this deposition?

A. I looked at the list of documents. I think you had provided a list you said you might ask me about, so I looked at that list of documents. I met with Mr. Rollins at one point. That would be about it.

Q. Did you review any of Mr. Florian's research or review his memoranda?

A. I believe so. I believe some of them were on

that document list.

Q. Did you review his presentations?

A. Yes. I looked at it. I think at least one was on that list as well.

Q. Did you go back and read Mr. Florian's deposition or any other depositions that have been taken in this case?

A. No, sir.

Q. Have you reviewed any other documents related to this lawsuit for the purpose -- for any purpose other than this deposition?

A. No, sir. I read the summons and complaint, I've been copied on discovery responses that were submitted. Beyond that, no, sir, and no, I did not read -- I believe when the lawsuit was first filed, I think I reread the Bolin opinion, but beyond -- no, sir, that was it.

Q. You have read the complaint in this case?

A. Yes, sir, back when it was first filed or served.

Q. Do you understand the nature of the allegations?

A. I believe so, yes, sir.

Q. Have you read the answer that's filed on behalf of you and Mr. Florian?

A. I read it at the time it was filed, yes, sir. I have not read it since.

Q. Would you agree that a central purpose of the Omnibus Act was to make a whole range of previously no parole offenses parolable?

MR. DAVIDSON: Objection to form.

A. I knew -- I believe it was to make some. The whole range part, I don't remember specifically how many offenses were addressed. I certainly knew it was going to address some offenses and some offenses that were not parolable, were going to be paroled.

Q. (By Mr. Whetstone) Wasn't the driving force behind the Act to save the state tax dollars?

MR. ROLLINS: Object to the form.

A. With -- I've read the intent section of the Act and I believe there's part of it in there that says that it was in some way to save money. I don't know what was going through the mind of the people as far as debating the Act, but I know I've read something about cost savings in the intent section of the Act.

Q. (By Mr. Whetstone) The legislature was pretty explicit and up front in passing this Act in that it -- the purpose of the Act was to cause the release of prisoners who otherwise would have been incarcerated for longer periods of time, isn't that correct?

MR. ROLLINS: Object to form.

MR. DAVIDSON: Objection to form.

A. That sounds like either a direct quote or paraphrase of what was in the intent section.

Q. (By Mr. Whetstone) Would you agree with me that that is correct?

MR. ROLLINS: Object to form.

A. I mean without looking at it, I don't know if it's a verbatim quotation or not, but...

Q. (By Mr. Whetstone) Whether it's a verbatim quotation or not, would you agree with me that that was the intent of the legislature in passing the Act?

MR. ROLLINS: Object to form.

A. The only way I can interpret intent, because I don't know anything about what was going on, is looking at what they put in the statute for the intent section and I would stand by whatever it says there. I assume that is their intent, but I don't have a specific recollection of exactly what it says. I do remember there's a cost saving component to it.

Q. (By Mr. Whetstone) But you did know this Act was coming down the pike, didn't you?

A. Yes, sir.

Q. And you knew the purpose of the Act was to save the state money and to let prisoners go early --

MR. DAVIDSON: Object to form.

MR. ROLLINS: Object to form.

Q. (By Mr. Whetstone) -- so it could save money for the state, isn't that correct?
MR. DAVIDSON: Object to the form.
A. No, sir. I mean I really can't say what the purpose was except when I saw it in the final version when they had the intents action.
Q. (By Mr. Whetstone) Your goal at SCDC should have been to apply the law of the state of South Carolina fairly and accurately and in accordance with the intent of the legislature, correct?
A. Yes, sir.
Q. As well as an offense is parolable or non-parolable or no parole has a great deal of significance, doesn't it?
A. Yes, sir.
Q. And whether an offense is parolable or no parole has a great deal of significance beyond just parole eligibility too, doesn't it?
MR. ROLLINS: Object to form.
A. I'm not exactly sure I understand the question. Maybe...
Q. (By Mr. Whetstone) Whether an offense is parolable or no parole has a great deal of significance beyond just parole eligibility, doesn't it?
MR. ROLLINS: Object to the form.

A. I'm not trying to be -- I mean I don't understand. I mean obviously the decision about whether our interpretation of whether an offense is parolable or not is an important factor, but I'm not sure what you mean by beyond that exactly.
Q. Parole offenses and no parole offenses treated differently in regard to how they give credit for educational credits and time served and different things like that?
A. Yes, sir. I understand. Yes.
Q. So wouldn't that be significant?
A. Yes, sir.
Q. That was the case even before the Omnibus Act, wasn't it?
A. Yes, sir.
Q. Is there an 85 percent rule on no parole offenses under the law in the state of South Carolina?
A. An 85 percent rule? I mean there are statutes that talk about, I mean, the service -- again I'm not sure I understand. There are statutes that address no parole offenses and 85 percent, yes.
Q. Well, explain to me what the 85 percent means, what 85 percent rule means.
A. That my recollection is that there was a certain category of offenses that for those purposes, the inmate

had to serve at least 85 percent of the sentence before they could be released, and as you mentioned, it also had implications for rates of credits they could earn, things like that as compared to a regular sentence in which the inmates typically would not have to serve 85 percent before they would become eligible for parole and they would earn higher credits potentially.
Q. So someone who is serving time has to do 85 percent, they still get some credits that are calculated, but those credits cannot reduce that 85 percent, can they?
A. That's correct.
Q. Does the Omnibus Act create specific categories of non violent offenses that it converted from no parole offenses to parolable offenses?
A. I'm not -- I'm not sure. I mean I can remember specific offenses that were converted I think from non-parolable to parolable, but I don't recall if they were statutorily violent or non violent, so that part I don't know.
Q. Well, the legal opinion issued by the office of general counsel for the Department of Corrections in 2010, based on Mr. Florian's research, was to create a new category of offense, wasn't it? Sort of a hybrid creation called parolable/no parolable offenses?

MR. DAVIDSON: Object as to form.
A. I know what you're talking about in Mr. Florian's memo, yes.
Q. (By Mr. Whetstone) So you agree with that?
A. Yes, sir, I think so.
Q. That was an opinion that was reviewed and approved by you, isn't that correct?
A. That's correct.
Q. That buck stops with you, doesn't it?
A. Yes, sir. In the legal office, yes, sir.
Q. So throughout the implementation of the Omnibus Act, the department of general counsel coined the term of 85 percent parolable offenses, isn't that correct?
A. According to term, like I say, as you said, I think Chris used it in his memos. I don't -- I don't remember if it became sort of a term of art like you were talking about with max out date earlier, but I am familiar with the phrase. We probably used it as a shorthand at least.
Q. Doesn't that create a whole new category?
A. Well, as I say, we -- certainly, yeah, in our office, yeah. It is a new category of offense, yes.
Q. So in essence, would that create -- what that meant was you created parolable/no parole offenses?
A. Now I mean we interpreted the law to the best of

our ability to try and get -- do what it wanted us to do and that was the result was our interpretation of those offenses you're saying are parolable/non-parolable.
Q. Isn't that kind of an absurd result?
MR. ROLLINS: Object to form.
A. I don't think so, but -- if I thought it was absurd, I would have said so when it was first presented to me.
Q. (By Mr. Whetstone) So you weren't just applying the 85 percent requirement to newly parolable offenses, but you were also limiting good time credits, work credits and other credits as though those parolable offenses were no parole offenses, isn't that correct?
A. Yes, sir. I believe the -- they were earning at those rates that 85 percenters (sic) would earn at, yes.
(WHEREIN, Tatarsky Exhibit 2 was marked for identification by the Court Reporter.)
MR. WHETSTONE: Will, we're marking SCDC 1082. That's a resource and information management division memo.
Q. (By Mr. Whetstone) I'll ask you to take a look at that for me, please, sir. Do you recognize what that is?
A. Yes, sir. It was on that -- it was one of the documents that I reviewed prior to the deposition.

Q. Is that a memorandum signed by you?
A. No. I mean it may be splitting hairs. I've signed off to acknowledge on the through line that I saw it and that it went through me, so I wouldn't consider that one that I signed, but it certainly went through me and I reviewed it and that's why I put my name on it. I would consider the sender of it to be Mr. Florian, but it was through me.
Q. Who drafted this memo?
A. I believe that it was Mr. Florian.
Q. How were you involved in the drafting of the memo?
A. I had -- I don't have any recollection of how I was involved at all to be honest with you one way or another.
Q. But it certainly has your signature up at the top right, doesn't it?
A. Yes, sir.
Q. Did you read this memo before you signed it?
A. I'm sure I did, yes, sir.
Q. Did you make yourself sufficiently familiar with the content of the memo to conclude that you agreed with it?
A. I believe so, yes, sir.
Q. The memo is dated July 27, 2011. Is that about a

year after the Omnibus Act was enacted?
A. I think so. I know it was 2010, yes.
Q. What did you do to determine whether you agreed with the conclusion and directives contained in the memo before you signed off on it?
A. I don't have any specific recollections of what I did. I don't have any specific recollections of what I did. I mean I could assume what I did, but I don't have specific recollections.
Q. Over the years from 2010 to 2016, SCDC forced inmates convicted of offenses made explicitly parolable by the Omnibus Act to serve 85 percent of their sentences irrespective of the credits that should have reduced the sentence unless prior to that a parole board granted parole, isn't that correct?
MR. ROLLINS: Objection to form.
MR. DAVIDSON: Object to form.
A. I would disagree with your characterization of it. We interpreted the Act to the best of our ability and tried to implement it that way. I wouldn't agree with the word forced, but...
Q. (By Mr. Whetstone) Your interpretation of the Act forced inmates to serve more time than they were supposed to serve, didn't it?
MR. ROLLINS: Object to the form.

MR. DAVIDSON: Object to the form.
A. I don't agree with that characterization of it, no.
Q. (By Mr. Whetstone) You don't think inmates would have voluntarily stayed beyond max out, would you?
MR. ROLLINS: Object to form.
A. No, sir.
Q. (By Mr. Whetstone) The effect of one of your interpretation of the Omnibus Act forced inmates to stay incarcerated longer than they would have if the Act had been properly applied, didn't it?
MR. ROLLINS: Object to form.
A. I mean I don't agree with the use of the word force. As I say, we interpreted the Act to the best of our ability and the South Carolina Supreme Court disagreed with our interpretation.
Q. (By Mr. Whetstone) Your interpretation of the Act caused the inmates to serve more time than they were required to serve under the Omnibus Act, isn't that correct?
A. Well, that's the interpretation --
MR. ROLLINS: Object to the form.
A. -- of the South Carolina Supreme Court, yes, sir.
Q. (By Mr. Whetstone) You don't differ with their interpretation, do you?

A. Yeah, I mean I do differ with their interpretation, but I accept it as the law of the state.
Q. It was an interpretation by the South Carolina Court of Appeals, wasn't it, not supreme court?
A. Yes, my mistake. Court of appeals.
Q. Were you with SCDC when the Bolin decision was issued?
A. I believe so, yes, sir.
Q. Did you review the decision?
A. Yes, sir, I'm sure I read it. Yes.
Q. Make sense to you?
MR. DAVIDSON: Object to the form.
A. I understood what they said, yes.
Q. (By Mr. Whetstone) Was the first decision issued by the court of appeals in November of 2015?
A. Without seeing it, I don't know. I'm sorry.
Q. In that first opinion, did the court of appeals find that the South Carolina Department of Corrections had completely misinterpreted the Omnibus Act?
MR. DAVIDSON: Object to the form.
A. Without -- I mean they disagreed with our interpretation. Without seeing the opinion in front of me, I don't know if they used that specific language, but I know they disagreed with our interpretation.
Q. (By Mr. Whetstone) Didn't the court of appeals

find that SCDC had acted unreasonably in characterizing an offense for which the offender is eligible for parole as a no parole offense?
A. I don't know. If you're reading from the opinion, then I obviously wouldn't disagree with that.
Q. At the point that opinion was issued, SCDC was on notice that it had in custody a large number of inmates who if the decision stood were way past their max out point, isn't that correct?
MR. DAVIDSON: Object as to form.
A. I don't -- I think we would know obviously if that decision stood and was not reversed and altered in any way that it was going to affect a bunch -- a lot of inmates' sentences, yes.
Q. (By Mr. Whetstone) And the way -- the effect it would have on inmates would be that they would stay in jail longer than they were supposed to, isn't that correct?
A. They would stay in prison longer than was originally expected under their original max out date, yes.
Q. In making its decision to move for a rehearing after that first court of appeals decision, did South Carolina Department of Corrections take any steps to prepare for the release of those prisoners should the

opinion stand?
A. I -- I don't recall one way or another, no, sir.
Q. So even in the face of an opinion that you know is going to affect a lot of inmates and make them be released early, your department didn't do anything to look into how are we going to get these people out as quick as we can because they aren't supposed to be here any longer?
MR. ROLLINS: Objection to form.
A. I'm sorry, what I said was I don't recall one way or another. I didn't say no, we didn't. I just don't have a specific recollection one way or another.
Q. (By Mr. Whetstone) If your office didn't do anything to react to that opinion, did anybody else in the Department of Corrections do anything?
MR. ROLLINS: Object to the form.
A. Again as I say, I don't have a recollection one way or another.
Q. (By Mr. Whetstone) We've been going about an hour. Are you comfortable, do you want to take a short break?
A. No, sir, I'm fine.
MR. WHETSTONE: Everybody good?
Q. (By Mr. Whetstone) Isn't it true that when the Bolin case was decided on rehearing in late February of

2016, the conclusions of the court of appeals did not change?
A. That's correct.
Q. Isn't it true that the court of appeals again stated that SCDC had interpreted the Act unreasonably?
A. Again if that's --
MR. DAVIDSON: Object as to form.
A. If that's a quote, I have no reason to argue with it.
Q. (By Mr. Whetstone) Based on documents provided to us in discovery, the e-mails and other communications, we've been provided with, SCDC moved pretty quickly and pretty quickly made the decision that it would not petition or assert or continue to appeal the ruling of the court of appeals, didn't it?
A. Yes, sir, that decision was made.
Q. I believe that decision was confirmed around February the 29th of 2016. Does that sound about right to you?
A. Sounds about right, yes, sir.
Q. And in discussing that decision, SCDC acknowledged that there were hundreds of inmates in custody who were past their max out dates, isn't that correct?
A. I don't remember the numbers, but certainly a

significant number, yes, sir.
Q. And South Carolina Department of Corrections acknowledged that inmates impacted by the Bolin decision were due immediate release, isn't that correct?
A. I believe that's correct, yes, sir.
Q. Immediate means now, doesn't it?
MR. DAVIDSON: Object to the form.
A. I mean immediate means -- immediate means as soon as possible, yes.
Q. (By Mr. Whetstone) Immediate certainly doesn't mean two or three weeks or several months, does it?
MR. ROLLINS: Object to form.
MR. DAVIDSON: Object as to form.
A. I know what you're getting at, but I mean there's -- now there's no way that an inmate would be -- I mean the process of releasing an inmate is not something that can happen just in the blink of an eye.
Q. (By Mr. Whetstone) The Department of Corrections was aware of this decision and its potential effect a year before the second -- before the court of appeals affirmed it, didn't it?
A. Yes.
Q. And in that whole year to prepare for the release of inmates who are being held unreasonably, the Department of Corrections did nothing to prepare for

that?
A. No, sir.
MR. DAVIDSON: Object as to form.
A. As I previously stated, I don't have recollection one way or another. I don't know if they did or didn't.
Q. (By Mr. Whetstone) At that point in time, SCDC had no legal basis to continue to imprison these prisoners, did it?
A. At which point in time?
Q. February 29th, 2016 when they decided not to appeal the decision of the court of appeals.
A. Once the opinion became final and mandate was issued, we needed to get them out as soon as we could, yes.
Q. Was an arbitrary date eventually picked for a mass release of these prisoners?
A. I don't know the basis for the date, so I don't know if it was arbitrary or what the basis was for it, so I can't really say.
Q. Would you agree with me that as of February the 24th of 2016 when the Bolin decision came down, there was no legal impediment to setting these prisoners free?
MR. DAVIDSON: Object to the form.
A. Other than complying with all the laws that apply to release of prisoners, no, sir.

Q. (By Mr. Whetstone) Your agency SCDC acknowledged that these prisoners were being held without authority of law, isn't that correct?
MR. DAVIDSON: Object as to form.
A. No, sir, I don't know where we acknowledged that.
Q. (By Mr. Whetstone) And every day these prisoners were continued to be incarcerated was another day they were denied their freedom and liberty under the constitution, wasn't it?
MR. ROLLINS: Object to form.
COURT REPORTER: Did you answer?
A. No, I'm sorry, I didn't. I got distracted by the objection. What was the question again?
MR. WHETSTONE: Can you read it back.
(WHEREIN, the requested portion of the record was read by the Court Reporter.)
MR. ROLLINS: I repeat the objection.
A. No, sir, I mean I disagree, but I think that's an interpretation for a court to make about whether or not their constitutional rights were denied.
MR. WHETSTONE: I think I'm about through. Can we take a short break and let us confer and then we'll continue.
THE VIDEOGRAPHER: We're now going off the record. The time is 10:11.

(WHEREIN, a recess was taken.)
THE VIDEOGRAPHER: We're now going back on the record. The time is 10:17.
Q. (By Mr. Whetstone) In February of 2016 when the Department of Corrections was aware that it was not going to appeal the Bolin decision, what did the department do to get ready to release prisoners?
A. Specific recollections, I don't really have any, but I know from looking at the documents in preparation for this deposition, I know there was a lot of back and forth e-mails with the division of classification and made records about how they were going to do things. I think there were some communications with the entity I called RIM before, but how they were going to do things, but specific recollections of nuts and bolts and how they were going to do it, I don't have any memory of that.
Q. Did you bring in any additional staff to try to move things along any quicker?
A. No, sir.
Q. Did you in your department or any other departments, the coding department, anybody stay overtime to try to implement this departure of prisoners?
A. Overtime, I mean in my department, we all -- I

mean we're not hourly employees. We work extra hours all the time, so that doesn't really stand out. I don't know if -- I don't know if classification of inmate records or the resource and information management people worked overtime or not. I just don't know.

Q. Do you recall putting in extra time of staying longer days to implement the release of prisoners?

A. Me specifically, I don't recall spending extra hours in the office involved in release of prisoners, no, sir.

Q. Did you give the directive to your staff attorneys to get this done expeditiously and get these prisoners out of here, they're entitled to be released?

A. Well, yes and no. I mean the -- once we give our interpretation of what needs to be done and that was the agencies agreed that's what they're going to do, we don't have, in my office at least, hands-on involvement in terms of the process of releasing an inmate or any of the coding, so there would be nothing for us to do. When I talk about the releasing, I mean for example, there's -- gosh, there's victim/witness notifications, there's all kinds of checking on if there's any detainers, all those sorts of things and that's stuff that's done by the classification inmate records.

Q. A lot of all of that that needed to be done in

February of 2016 could have been done back a year earlier when the first Bolin opinion came out, couldn't it?

A. No, sir. No. Specifically --

MR. DAVIDSON: Object to form.

A. In fact I mean some of it specifically definitely not. The victim notification couldn't be done, the detainers have to be checked at the last minute before the inmate is released, so no.

Q. (By Mr. Whetstone) If we're only talking about November to February, we aren't talking that lengthy period of time and the Department of Corrections didn't do anything to start the process?

A. I told you, I don't know if we did or not, but if you're asking me about things we could do in advance, I'm just telling you there are certain things we can't do in advance. I don't know if there are things they can do, but I know there are things they can't do.

Q. So do -- so to your knowledge, the Department of Corrections did not do anything staffing-wise or work-wise out of the ordinary to expedite the release of the prisoners who were being unreasonably detained?

MR. ROLLINS: Object to the form.

MR. DAVIDSON: Object to the form.

A. To my knowledge, I have no knowledge they brought

on extra staff, no, sir.

Q. (By Mr. Whetstone) So you and your staff were able to go home and have dinner with your families while these inmates continued to be wrongfully incarcerated, isn't that right?

MR. ROLLINS: Object to the form.

MR. DAVIDSON: Object to the form.

A. We went home at the end of the day.

Q. (By Mr. Whetstone) How important is it to you to not have to spend one day in jail?

MR. ROLLINS: Object to the form.

MR. DAVIDSON: Object to the form.

A. I don't know. I heard that in Mr. Florian's deposition. I'm not sure. There might be a dollar value. You said to me a million dollars maybe or something, I don't know. I mean I wouldn't want to go back -- go back. I've never been in prison. I wouldn't want to go to prison, but there might be a dollar figure that would make it --

Q. Like a million dollars would do it?

A. I don't know. Just as I say, I think that -- I just don't think that I can say there's no amount of money that would cause me to go -- to not be willing to go to prison.

Q. Regardless of what the number is, it would be a

pretty high number for you to spend one day in prison, wouldn't it?

A. Sure.

MR. DAVIDSON: Objection to the form.

A. Absolutely.

MR. WHETSTONE: I don't have any other questions. Ask any questions Mr. White has, please.

EXAMINATION

QUESTIONS BY MR. WHITE:

Q. Mr. Tatarsky, my name is Kyle White and I represent several individuals that we'll discuss in a minute. Are you okay to continue?

A. Yes, sir. Sure.

Q. All right. I represent a gentleman named Christopher McDowell. Do you know anything about Mr. McDowell?

A. No, sir.

Q. Also represent an individual named Henry Belton. Do you know anything about Mr. Belton?

A. No, sir.

Q. Same question as to Mr. Larry Hampton. Do you know anything about Mr. Hampton?

A. No, sir.

Q. I also represent a gentleman named David Payton, Jr. Do you know anything about Mr. Payton, Jr.?

A. No, sir.
Q. And finally I represent someone named Michael Smoak. Do you know anything about Michael Smoak?
A. No, sir.
Q. All right. If these -- if I told you that these individuals at one time were incarcerated in the South Carolina Department of Corrections, would you agree with me that when the law said they were to be released, the SCDC was required to release these individuals?
A. Yes, sir.
Q. These individuals that I've mentioned, they -- at the time they were incarcerated, they had a clearly established constitutional right to be released when the law said they were to be released, correct, sir?
A. Yes, sir.
MR. DAVIDSON: Object to the form.
Q. (By Mr. White) If the law determined when they were supposed to be released was clear and unambiguous, neither you nor Mr. Florian or anyone else at SCDC had the discretion to deviate from that law, correct, sir?
MR. DAVIDSON: Object as to form.
A. Correct.
Q. (By Mr. White) And from February -- I want to direct your attention back to February 24, 2016 when the Bolin opinion became final. Do you recall that date?

A. In general, yes, sir.
Q. And just so the jury understands, there was a lag in time between February 24th, 2016 and the time the inmates were actually released, correct?
A. Yes, sir.
Q. And for some, that was a period of a few months and for some that was a few months longer, correct?
A. I believe so, yes, sir.
Q. And during that period of time, I don't want to replow all the ground because Mr. Whetstone has covered some of this, but during that period of time -- sorry. Let me back up. How many employees do you figure SCDC had while you were employed with the South Carolina Department of Corrections?
A. The entire agency?
Q. Yes.
A. Ballpark somewhere between five and six thousand I believe.
Q. And all those employees between February 24, 2016 and the time that my clients were released from prison, all those employees could leave work at the end of the day, at the end of their shift and go home to their family as Mr. Whetstone discussed, correct?
A. Yes, sir.
Q. All those thousands of employees could leave

their post at the end of their shift, they could get in their car and drive wherever they wanted to, right?
A. Yes, sir.
Q. They could go eat at whatever restaurant they felt like eating at, right?
A. Yes, sir.
Q. They could go to Chili's or Applebee's or McDonald's or wherever they felt like eating at the time, correct?
A. Yes.
Q. They could hug their children, right, if they had some?
A. Yes, sir.
Q. They could go home and have dinner with their family, right?
A. Yes, sir.
Q. And the inmates that I have mentioned, during that period of time between February 24th, 2016 and the time they were ultimately released, those inmates could not leave the facility in which they were incarcerated to do any of those things, correct?
A. That's correct.
MR. DAVIDSON: Object to form.
Q. (By Mr. White) What would that have been called had one of those -- what would that have been called by

SCDC had one of those inmates attempted to leave the facility in which they were incarcerated during that period of time?
A. If they attempted to leave? It would be called an escape.
Q. And SCDC -- if they attempted to leave after the Bolin opinion in February, 2016, would SCDC have taken any measures necessary to prevent those individuals from leaving?
A. If they decided on their own and just tried to leave the institution?
Q. Yes.
A. Yes, sir. We would have stopped that.
Q. And what measures are taken by SCDC, if you know, in order to prevent an inmate from leaving a facility in which they're incarcerated?
A. Well, I mean it can be anything up to and including lethal force.
Q. And explain for the jury what you mean by lethal force.
A. Lethal force, for example, if an inmate in a fenced institution had actually hit the fence and was climbing over the fence trying to escape, the correctional officers would be within their power and policy to shoot that individual.

Q. Okay. And shoot them to kill, right?
A. That's the only kind of shooting they're trained in, yes, sir.
Q. And that applies -- what you're saying, what you've explained to the jury about this deadly force and shooting to kill, that's something that would have been used by SCDC to keep any of the affected inmates from escaping as SCDC would have termed it between February 24th, 2016 and the time they were released. Fair, sir?
A. Yes, sir.
MR. WHITE: I think those are all the questions I have. I appreciate your time today, sir. Please answer any questions anyone else in the room has or on the phone.
A. Okay.
MR. ROLLINS: I don't have anything. Will, do you have any questions?
EXAMINATION
QUESTIONS BY MR. DAVIDSON:
Q. I just have a couple. Mr. Tatarsky, am I right there's a great deal of discussion about the court of appeals opinion? In the Bolin case, am I correct that the administrative law court found in favor of the department's interpretation?

A. For Mr. Bolin, yes, sir.
Q. All right. Would I be correct that Mr. Bolin then appealed his decision to the court of appeals?
A. That's correct.
Q. Eddie Nelson. Okay. Would I also be correct, this was all handled under the Shabazz procedure?
A. Yes, sir.
Q. Would I also be correct that in this case, what the decisions being made by the legal staff and the Department of Corrections and the interpretation of the 2010 statute dealt with the decision on the release or discharge of inmates from the Department of Corrections?
MR. WHITE: Object to the form.
MR. WHETSTONE: Object to the form of the question.
A. Yes, sir.
Q. (By Mr. Davidson) It also dealt with how the department would implement those releases, correct?
A. Yes, sir.
Q. Would I also be correct that at some point there was some question about whether or not the Bolin opinion should be considered and should -- the interpretation as handed down by the court in the Bolin opinion should be handled in a retrospective or retroactive manner?
A. Yes, sir.

Q. And was that a joint decision between PPP Pardon and Parole Board and the Department of Corrections?
A. Yes, sir. There was communication back and forth about that.
Q. All right. And as a result of that, the department went along with the interpretation of PPP and released some inmates in June of 2016 I believe?
MR. WHETSTONE: Object to the form of the question.
A. I believe that's correct, yes, sir.
Q. (By Mr. Davidson) Those would be the individuals that were given the benefit of the retroactive interpretation of the opinion and the statute, correct?
A. Yes, sir.
MR. DAVIDSON: All right. That's all I have. Thank you, sir.
MR. WHETSTONE: Nothing further. Thank you.
EXAMINATION
QUESTIONS BY MR. WHITE:
Q. I just have one more quick question. Mr. Tatarsky, if the law on retroactive application of the statute is clear and unambiguous, that's another law that you and Mr. Florian and any other attorneys at SCDC are required to follow, correct?
A. Yes, sir.

MR. DAVIDSON: Object as to form.
Q. (By Mr. White) There's no discretion to deviate from the law regarding retroactive application of a statute if that law is clear and unambiguous, correct?
A. Correct.
MR. DAVIDSON: Object to form.
MR. WHITE: Those are all the questions I have. Thank you.
THE VIDEOGRAPHER: We are now going off the record. The time is 10:32.
COURT REPORTER: What do you want to order on this, Mr. Davidson?
MR. DAVIDSON: I want to get an e-tran with any exhibits that were marked as PDFs.
(WHEREIN, the deposition was concluded at 10:32 a.m.)

CERTIFICATE OF REPORTER

I, Karen Crossley, Certified Shorthand Reporter (KS), Certified Court Reporter (MO), within and for the State of Missouri, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

____

Karen Crossley, CSR, CCR #912

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EXHIBIT INDEX

EXHIBIT E
(DEPOSITION OF C. FLORIAN)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

MARION KATRELL CAMPBELL, on behalf of himself and all others similarly situated,
Plaintiff,
) CIVIL ACTION NO.
V.) 6:16-cv-03265-MGL

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, BRIAN P. STIRLING, CHRIS FLORIAN, and DAVID TATARSKY,
Defendants.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CHRISTOPHER McDOWELL,
Plaintiff,
) CIVIL ACTION NO.
V.) 2:16-cv-03379-TLW-MGL

BRYAN P. STIRLING, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, CHRIS FLORIAN, and DAVID TATARSKY,
Defendants.) (Caption continues)

VIDEO-RECORDED DEPOSITION
- of -
CHRISTOPHER D. FLORIAN

taken on behalf of the Plaintiffs on Thursday, October 19, 2017, at the offices of Paul Frank Collins P.C., One Church Street, Burlington, Vermont, commencing at 9:04 AM.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

HENRY BELTON,
Plaintiff,
) CIVIL ACTION NO.
V.) 2:16-cv-03379-TLW-MGL

BRYAN P. STIRLING, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, CHRIS FLORIAN, and DAVID TATARSKY,
Defendants.

LARRY HAMPTON,
Plaintiff,
V.
BRYAN P. STIRLING, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, CHRIS FLORIAN, and DAVID TATARSKY,
Defendants.

DAVID PAYTON, JR.,
Plaintiff,
V.
BRYAN P. STIRLING, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, CHRIS FLORIAN, and DAVID TATARSKY,
Defendants.

MICHAEL SMOAK,
Plaintiff,
V.
BRYAN P. STIRLING, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, CHRIS FLORIAN, and DAVID TATARSKY,
Defendants.

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VIDEO TECHNICIAN: GEORGE DOUD, CLVS
COURT REPORTER: JOHANNA MASSÉ, RMR, CRR

THURSDAY, OCTOBER 19, 2017
9:04 AM

(Florian Exhibit No. 1 was marked for identification prior to the commencement of the proceedings.)

THE VIDEOGRAPHER: We are now on the record. Today's date is October 19th, 2017. The time is approximately 9:04 AM. This is the video deposition of Chris Florian taken by the counsel for the plaintiff. The location is Paul Frank + Collins, One Church Street, Burlington, Vermont. My name is George Doud, legal videographer, representing A. William Roberts, Jr. & Associates. The court reporter is Johanna Massé, also representing A. William Roberts, Jr. & Associates.

I am familiar with the provisions of Rule 30(h) pertaining to videotaped depositions. This deposition is taken in the matter of Marion Katrell Campbell vs. South Carolina Department of Corrections, et al., Case No. 6:16-cv-03265-MGL.

Counsel, please introduce yourselves for the record.

MR. WHETSTONE: My name is Charles Whetstone, and I represent the plaintiffs.

MS. PERKINS: Cheryl Perkins, and I represent the plaintiffs.
MR. ROLLINS: Cliff Rollins for the defendants Chris Florian and David Tatarsky.
MR. WHITE: And Kyle White --
MR. DAVIDSON: Will Davidson --
MR. ROLLINS: On the phone, whoever's on the phone, you need to mute your microphone. We're getting spillover.
MR. WHITE: Kyle White of the White, Davis & White Law Firm for plaintiffs Christopher McDowell; Henry Belton; Larry Hampton; David Payton, Jr.; and Michael Smoak in a similar case to the one that led on the notice in this deposition.
MR. ROLLINS: All right, Will.
MR. DAVIDSON: Will Davidson on behalf of South Carolina Department of Corrections and Director Brian Stirling. And just for the record, it's my understanding we've all agreed that this deposition will be used in all cases. Correct?
MR. ROLLINS: That's my understanding.
MR. WHITE: Correct.
MR. WHETSTONE: Correct.
MR. ROLLINS: And also housekeeping, I understand this deposition is being taken pursuant to

the South Carolina Rules of Civil Procedure with all objections save to the form of the question being reserved.
MS. PERKINS: I think it would be the federal rules.
MR. ROLLINS: Thank you for that correction.
THE VIDEOGRAPHER: Okay. And according to --
MR. DAVIDSON: Would it be all right -- would it be all right with everybody that one objection applies to all?
MR. ROLLINS: That's agreeable to me.
Is that okay with you all?
MR. WHETSTONE: Okay with us.
MR. WHITE: Yes.
MS. PERKINS: That would make a cleaner record.
THE VIDEOGRAPHER: Okay.
MR. WHETSTONE: Everybody agrees.
THE VIDEOGRAPHER: In accordance with Rule 30(h)(3), the witness has the right to be shown the videotaped deposition unless waived by the witness and the parties.
Would the court reporter please swear in the witness.
/ / /

CHRISTOPHER D. FLORIAN,
having been first duly sworn, testified as follows:
EXAMINATION
BY MR. WHETSTONE:
Q. Mr. Florian, my name's Charles Whetstone. I'm going to be asking you some questions. Federal rules of South Carolina, specifically Rule 30.04, require that I tell you that if you have any questions now that we've started this deposition, you need to direct those questions to me. Do you understand?
A. Yes, I do.
Q. Okay. We are taking this deposition today by -- as a videotaped deposition in Burlington, Vermont.
Would you tell me your full name, please, sir.
A. My full name is Christopher D. Florian.
Q. And what is your date of birth, Mr. Florian?
A. I was born [redacted].
Q. What is your Social Security number?
A. [redacted].
Q. What is your address?
A. 432 Texas Hill Road, Hinesburg, Vermont 05461.
Q. Are you under the influence of anything today, whether it be legal or illegal drugs, medications, or any other substance that might interfere with your

ability to understand the questions and to answer them today?
A. No, sir.
Q. If you don't understand something that I ask you, please let me know that and I'll try to ask a better question. Okay?
A. Yes, sir.
Q. And let's do our best not to talk over each other. Let me finish my question and then you give your answer. It's not television. I cannot cut you off with a yes or a no, so if you want to explain an answer, you certainly have the right to do that.
If during the course of this deposition you want to change an answer, you can do that. Say, Charles, you know, you asked me something 15 minutes ago and this will be a more appropriate response to that than what I gave you the first time. You're certainly entitled to do that if you choose to. Do you understand that?
A. Yes, I do.
Q. It's not an endurance contest, so we can take a break anytime you choose. Just let me know if you want a break. Typically I'll go for an hour or so and offer you a break if you want one. Okay?
A. Yes, sir.

Q. Have you ever been deposed before?
A. No, sir, I have not.
Q. Have you ever taken a deposition before?
A. No, sir.
Q. All right. Tell me where you're employed, please, sir.
A. I am employed at U.S. Immigration and Customs Enforcement.
Q. And how long have you been employed in that job?
A. Almost exactly three years.
Q. What is your position?
A. I am an associate legal adviser.
Q. Where are you licensed to practice law?
A. I am licensed to practice in Vermont. I am also inactive in South Carolina.
Q. And how long have you been a licensed practicing attorney?
A. I was first licensed in 2007, so I have been licensed for ten years now.
Q. When did you graduate from law school?
A. Graduated in 2007.
Q. And did you take the bar exam and pass the bar exam in South Carolina?
A. Yes, sir.

Q. And when did you take the bar exam in Vermont?
A. I did not. I was admitted by motion in Vermont.
Q. Have you had any other jobs in Vermont other than the one you already told me about?
A. No, sir.
Q. Prior to becoming employed in Vermont, where were you employed?
A. Prior to that I was employed in South Carolina as an attorney for the South Carolina Department of Corrections.
Q. What was your position with the Department of Corrections?
A. I started out as a staff attorney, and I finished as deputy general counsel.
Q. What was your first full-time permanent employment out of law school?
A. My first full-time employment out of law school was a staff attorney for the South Carolina Supreme Court.
Q. Who did you work for at the Supreme Court, or were you a staff attorney and able to work with all the justices?
A. That's correct. I was a staff attorney such that I worked with all the justices, and my direct

supervisor was Betsy Goodale.
Q. Once you left the position as a staff attorney for the Supreme Court, did you go directly from there to the Department of Corrections?
A. Yes, sir.
Q. And were you a staff attorney when you joined the Department of Corrections?
A. Yes, sir, I was.
Q. And you eventually became assistant general counsel?
A. I'm not sure whether it was assistant or deputy general counsel, but essentially that position regardless.
Q. What is the difference between being a staff attorney and being assistant general counsel -- or deputy general counsel? Excuse me.
A. Yes. For practical purposes, I wouldn't say there was a great deal of difference except that it represented a certain level of experience with the Department.
Q. Do you remember when you became deputy counsel?
A. I couldn't say for sure. I'm not sure.
Q. In all, how many years did you spend working for the Department of Corrections?

A. I think it was about five years. I finished my work there in 2014, and I had started in 2009, so it was five years and some months.
Q. Who did you answer to or who was your direct supervisor at the Department of Corrections?
A. My direct supervisor would have been David Tatarsky. I also considered Bart Vincent a supervisor of sorts.
Q. Who was that again?
A. Barton Vincent.
Q. Who is that?
A. He -- he is a deputy general counsel within the office as well.
Q. So was he senior to you when you arrived?
A. Yes, sir.
Q. When you were hired by the South Carolina Department of Corrections, did you undergo any type of orientation or training?
A. Yes, sir. I underwent a one-week training with the Department at the Department's training academy.
Q. And who conducted that training for you?
A. Various officers with the Department as well as other staff members. It was -- it was run by the training academy, so they had several speakers come in

from various parts of the Department.
Q. Was there -- were there other people in the class, in that training class, besides you?
A. Yes, sir. Correctional officers. All -- all employees of the Department went through that same training, so --
Q. So describe for me what -- what you were taught in that training class.
A. I would consider it the basics of being a South Carolina Department of Corrections employee. They covered such things as appropriate interactions with inmates, some basic safety protocols, basic security protocols. Some of it was more applicable to being a correctional officer than being an attorney, I would certainly say, but some of it was relevant to all employees within the Department.
Q. How would you describe your role at South Carolina Department of Corrections?
A. I would say that I was an attorney for the Department. I provided legal advice.
Q. When you were confronted with a legal issue or a policy issue at SCDC, did you have the final say on answering that legal question or that policy question?
A. I had a great deal of independence in answering questions, and if the question was of the

sort that I could answer with confidence, I was -- I could certainly answer it independently. If it was a question of great significance to the Department, I would definitely loop in my supervisors to make sure they were aware of the question. So I would say it would depend on the level of analysis required and the question and the relative seriousness of the issue.
Q. Okay. How often did you seek guidance from your superiors when you had to answer a question?
A. Well, I talked with David and -- David Tatarsky and Bart Vincent on at least a daily basis. We would have very collegial interaction. So they were aware of issues that I was working on.
Q. So anytime you had a question, you always ran it by somebody else?
A. No, sir. A lot of times I would answer the questions myself, but we interacted frequently enough to where if it was an issue of significance, we might talk it through. It would vary.
Q. Was your department at the South Carolina Department of Corrections known as the legal department or the Office of General Counsel, or did it have another name?
A. It was officially known as the Office of General Counsel.

Q. What was the chain of command through the General Counsel's Office?
A. There were several staff attorneys at that level. Bart Vincent was considered, at least by me, to be the person who sort of interacted with the staff attorneys in terms of administrative issues, such as employee evaluations and so forth. David Tatarsky was the general counsel, and he was aware of all legal issues of significance for the Department, although he gave us considerable independence to be able to provide legal advice and do our jobs.
Q. So where did you fall in the chain of command?
A. I would say I was at the bottom of the chain of command. I was a staff attorney and then -- even when I was a deputy general counsel, I was not in a supervisory role.
Q. Who is Christine Bigelow?
A. I am not aware of Christine Bigelow.
Q. So you didn't have any interactions with her?
A. Not to my knowledge.
Q. Well, who were the other staff attorneys that had a position similar to yours? Just tell me who -- tell me who all was on the legal staff.
A. Um-hum.
Q. General counsel staff.

A. There was some turnover in the office. When I started out, I was a staff attorney along with Rob Peele. Robert Peele, I think, III was his name; Bart Vincent; Harry -- I can't remember Harry's last name, but Harry was there; David Tatarsky. I think that was the staff at that point. Later on we had other people come through. Shanika Johnson came in as a staff attorney at one point. We had various people come in as staff -- in the staff attorney position and frequently move on. Brad -- Bradford -- I can't remember Brad's last name, either. But there were quite a few attorneys that came through.
Q. Was there a protocol or a policy on how issues were assigned to you for review or analysis?
A. I would say that we had areas of subject matter expertise that we became familiar with. So if it was an issue that fell within our subject matter expertise, it would be something that we would handle.
Q. What did you consider your area of expertise?
A. Well, I was a subject matter expert in sentencing law as well as some other issues that we dealt with day to day, such as legal libraries. At one point I was working on inmate correspondence as the subject matter expert.
Q. How and when did you become an expert on

sentencing and sentencing law?
A. There was nobody filling that role when I first started at the Department, so it was assigned to me within the first few weeks, and I built up an area -- I built up my expertise over time, I would say.
Q. And who assigned you to that area?
A. Mr. Tatarsky.
Q. Who was the general counsel for the Department of Corrections during the time frame you were there?
A. David Tatarsky.
Q. And he was the general counsel the entire time you were at Department of Corrections?
A. Yes, sir.
Q. Did Mr. Tatarsky assign you the issues that you worked on?
A. Yes. To some extent. I would also get assignments from Bart Vincent, who was handling employee issues, and so I would sometimes be assigned to work on those. Many people in the office would work on that particular type of issue. Some issues would come directly to me after a while. We would have -- I would have familiarity with the individuals who would raise questions, for instance, in sentencing law, and they would contact me directly.
Q. And give me an example of who that would be

and how that contact would be made.
A. Um-hum. Michael Stobbe, for instance, was with the Inmate Records office. He might be confronted with a question of sentencing law and he would frequently contact me by telephone, just call my direct line.
Q. Anybody else?
A. Jim Brennan was with that office. Stephanie Willis. There were other -- of course, other people with other offices raising other questions directly to me. I worked with the Youthful Offender Division for some time, so people with that division would also contact me directly. We tried to be accessible as attorneys, and so people would feel comfortable contacting us directly.
Q. So is it fair to say, then, that you were involved in producing legal opinions on South Carolina Department of Corrections policy or legal interpretations and how they might impact SCDC?
A. Yes, sir.
Q. At any time during your employment, did you become aware or were you made aware that the South Carolina Legislature was considering a bill that would significantly alter South Carolina sentence calculation?

A. I first recall becoming aware of it after it had been enacted.
Q. And so you would have been aware of it in 2010?
A. Correct.
Q. And that bill, I think, that passed was the Omnibus Crime Reduction and Sentencing Reform Act of 2010; is that correct?
A. Yes, sir.
Q. Can we agree that during this deposition we'll refer to it as the Omnibus Act for short?
A. Yes, sir.
Q. That's okay with you? All right.
Was the Omnibus Act a comprehensive restructuring for sentencing for many of the criminal laws in the state of South Carolina?
A. Yes, sir.
Q. Do you recall anything about the history of the Omnibus Act, the legislative history of it?
A. Not without reviewing it at this point, sir.
Q. Well, did you or anybody in your department monitor the act as it worked its way through the legislature?
A. Not to my knowledge. I'm sure that other people within the Department were aware of it. We had

somebody whose responsibility it was to maintain relations with the legislature, a legislative liaison. He was probably aware of it, but I -- I can't speak to what he would -- he knew about. Jon Ozmint was connected with the reform process, I believe, as well, so he would have been aware of it, but again, I'm not sure to what extent his awareness.
Q. Who was the legislative liaison for the Department of Corrections?
A. Dexter -- I believe his last name was Lee, but I'm not positive.
Q. Do you know whether you or anybody else on the general counsel staff at Department of Corrections had any input into the Omnibus Act?
A. I certainly did not have any input. I can't speak to what anybody else might have had.
Q. Was Mr. Lee, the legislative liaison that you just mentioned, was he considered a lobbyist for the Department of Corrections?
A. I wouldn't consider him a lobbyist. I think -- I looked at his position as providing information in response to requests from legislators. It was not so much lobbying for a particular outcome so much as responding to informational requests.
Q. Did the Department of Corrections have a

lobbyist in the legislature?
A. Not to my knowledge.
Q. When did you realize the effect that the Omnibus Act might have on the South Carolina Department of Corrections prison population and how their sentences were calculated?
A. Well, when I was first assigned to review it, it was clear to me that there were going to be numerous changes to sentencing law, and so that would have an effect on many department policies and implementation of -- of sentences, so it was upon my first reading of it. I'm not sure exactly when that happened, but it would have been within a few days of it becoming law.
Q. Would it be fair to say that once an inmate is -- once an individual is convicted of a crime and sentenced to jail time, then he is -- he or she is turned over to the Department of Corrections at that point; isn't that correct?
A. Generally so. The Department has jurisdiction over -- over the custody of offenders who are sentenced to a term of imprisonment for 90 days or more, I believe. I can't remember the exact number of days, but fewer than 90 days they would remain in the custody and jurisdiction of local law enforcement.
Q. So a sentence of longer than 90 days, they

make it into your system and get into your computer system; is that correct?
A. That's -- I believe it's 90 days.
Q. That's your Department of Corrections computer system, correct?
A. Correct.
Q. All right. Is the Department of Corrections computer system programmed to automatically calculate and recalculate release dates or max-out dates for inmates based on a number of parameters?
A. Yes, sir.
Q. And that computer system was or should have been programmed to appropriately calculate release dates given such things as work credits, education credits, good-time credits, and any and everything else that factored into a prisoner's sentence?
A. Yes, sir.
Q. And that's an important function that SCDC has, isn't it?
A. It is, yes.
Q. South Carolina Department of Corrections is not there just to incarcerate, are they?
A. The Department --
MR. ROLLINS: Object to the form.
A. I think the Department has a mission statement

that speaks to various purposes, and it certainly goes beyond incarceration.
Q. And isn't -- isn't it the duty and responsibility of the Department of Corrections under both state and federal law to grant release and freedom to inmates who have done their time?
A. Yes, sir.
Q. The right to liberty is a fundamental right granted under the U.S. Constitution, isn't it?
A. Yes, sir.
Q. And it's a clearly recognized right, isn't it?
A. Yes, sir.
Q. And that's the Fifth Amendment, isn't it?
A. Yes, sir.
Q. And life, liberty, and property are absolute rights even to criminal defendants once they've done their time, aren't they?
A. Yes, sir.
Q. Given those fundamental rights at issue for inmates and the fact that inmates should be freed from incarceration on the appropriate and lawful release date, it's important that the Omnibus Act was implemented properly; isn't that correct?
A. Yes, sir.
Q. And SCDC was certainly charged with

implementing that act correctly, weren't they?
A. Yes, sir. Along with other law enforcement entities.
Q. And wasn't it South Carolina Department of Corrections' obligation to ensure that decisions impacting release calculations were made strictly in conformity with the letter of law?
A. Yes, sir.
Q. And that computer system that SCDC has that we talked about earlier is only as good as the parameters of the inputs that are put in the system; isn't that correct?
A. Of course. Yes.
Q. Doesn't the South Carolina Department of Corrections and didn't they back in 2010 have the fundamental duty and responsibility to implement the intent of the legislature in carrying out the mandates of the Omnibus Act once it was signed into law?
A. Yes, sir.
Q. And that's because the decisions that the Department of Corrections made in regard to the act were going to impact hundreds or possibly thousands of inmates going forward; isn't that correct?
A. That duty would have applied regardless of the number of inmates, sir. The Department's duty was to

carry out the law and the sentences as imposed by the judicial system regardless of the number of inmates impacted.

Q. Can you describe for me what you know about what South Carolina Department of Corrections did to prepare to make the coding changes necessary to its computer system to carry out the letter and intent of the Omnibus Act?

A. As far as changing the computer system, the technical staff would have been involved with that. My role was strictly with the -- the legal interpretation. When it came to reprogramming the computer system, that would have fallen to the Resource and Information Management Division.

Q. Well, as part of the General Counsel's Office, it was -- wasn't it your job to inform the coding people on what went into the system?

A. My job was to explain what the law was and how it should be interpreted, and when -- if they had questions as to the legal interpretation and how -- how that played out, I would provide that information, so --

Q. Are you aware of any meetings that were had to discuss how those changes would be implemented?

A. Yes, sir. There were numerous meetings with

various technical staff and other experts within the Department.

Q. Were you involved in any of those meetings?

A. Yes, sir. Yes, sir.

Q. Were there instructions that were circulated?

A. There were. I provided I think two memoranda explaining the legal interpretation of various parts of the act; that is, the 2010 Omnibus Act, and I believe other memoranda were circulated by other individuals as well.

Q. Can you tell me who circulated memorandums besides you?

A. I think I've seen a memoranda from Jannita Gaston, who was with the classification area of the Department. That's the only one I can think of offhand, but I'm -- there may be others.

Q. Who were the technical experts that you would have communicated with to make the necessary changes to the computer system?

A. Within the Resource and Information Management Division - we just know them as RIM - that would have been Trevis Shealy, Joey Moss. Other experts within the Department who handled sentencing issues would have been Michael Stobbe, Stephanie Willis. Other parts of the act impacted things other than strictly sentences,

such as classification issues and work release, reentry supervision. All of those different areas had different experts, so if you take into account the whole act, there would have been quite a large number of people involved.

Q. Did all of these people have meetings together, or did you all meet separately? How was all that done? How was this accomplished?

A. We met -- early on in the act, I think in implementing the act, we had a couple of larger meetings with many of the people who would be involved, but maybe not all of them. And following up on that, there were meetings on more of an individual or small-group basis with -- focusing on the narrow issues each group was working through.

Q. What role were you assigned when that law -- the Omnibus Act was passed?

A. My role was to interpret the law and provide legal guidance to the various department -- the various divisions within the Department of Corrections.

Q. And who assigned that role to you?

A. It was assigned to me by Mr. Tatarsky.

Q. Was it your understanding that any interpretation or explanation of the Omnibus Act that you drafted would be reviewed or checked or corrected

by any other person before it became the policy of the South Carolina Department of Corrections?

A. No, sir. There wouldn't be --

MR. DAVIDSON: Object to the form.

A. No, sir. There wouldn't be any layer of review beyond that. It would -- my legal advice was -- I was given independence in this regard, and while I would certainly have informed my colleagues and my superiors of how I was interpreting the act and they would have been aware of it and they would have been free to let me know if they disagreed, there wouldn't have been a layer of review to where there would just be a blanket review and correction. They -- they trusted me to be independent and make that decision.

Q. Do you agree that the Omnibus Act created -- created issues of great significance?

A. Yes.

MR. ROLLINS: Object to form.

A. Yes, sir. I would say that the -- there were significant issues raised by the act.

Q. Did you think it was anybody else's job other than yours to get the correct decision on how the constitutional rights of liberty of multiple inmates were affected by the act?

A. No, sir. It was my decision to interpret the

act -- my responsibility to interpret the act, I should say.
Q. Well, tell me how you went about that. How did you figure out how the new law, the Omnibus Act, would affect the South Carolina Department of Corrections and how it would affect the release date calculation and those kind of things.
A. I began by reading the act itself. It was some -- I would say 60 to 90 pages depending on how you printed it out, and so I began just by reading it, and then I set about outlining it and seeing what the various sections -- what impact they would have and whether they impacted the Department of Corrections or -- or whether they were impacting other areas of South Carolina law that wouldn't have a direct impact. So I focused on what areas would be relevant to the Department, in other words.
Q. When you made your outline, did you take notes and write it down and put it in your computer? How did you --
A. I probably typed it into my computer. It would serve as sort of the framework for a document that I would generate later as a memoranda. It was a working document, I would say.
Q. Was that document still in your computer when

you left the Department of Corrections?
A. In a revised form, most likely. The way I worked generally within my computer files is when I build an outline, I use that as a starting place, so I probably built upon that outline to actually turn it into some of the memoranda that were distributed eventually. So it wouldn't be in its original outline form anymore, in other words.
Q. Was it still there when you left?
A. Yes. In that -- in that modified form, it would have been.
Q. So there wouldn't be a red-line version of it where you made changes; it would be an evolving document where you'd strike out sections and add sections?
A. Correct. It would be modified.
Q. Did you ever sit down with Mr. Tatarsky regarding any specific section of the Omnibus Act and ask him questions?
A. I don't think I would have asked him questions. I certainly would have discussed it with him as I was interpreting it, letting him know some of the issues I was encountering and -- and my initial thoughts on how those issues should be confronted. I would have certainly talked to him about lots of the

novel legal mechanisms being created by the act.
Q. Do you know how many times you and he talked?
A. We talked on a daily basis at least about this and other issues, so I couldn't total up over the years how many times we talked about the Omnibus Reform Act because it was an issue the Department dealt with for quite some time.
Q. Did you memorialize your conversations with Mr. Tatarsky? Did you note them in your computer, write them down anywhere, keep a journal, anything like that?
A. No, sir. They weren't that kind of formal conversation. They were collegial conversations.
Q. So did you talk to Mr. Tatarsky about the Omnibus Act on a daily basis while you were drafting your opinions on it?
A. I would say if not on a daily basis, at least several times a week I would keep him informed of what I was thinking about and the issues I was working on. Yes.
Q. Once you read the Omnibus Act, were you immediately of the belief that you understood it?
A. No, sir. There were certainly areas of the act that were unclear to me upon reading it.
Q. What areas do you recall that puzzled you when

you were studying the law?
A. Well, there were -- there were multiple areas where I felt the act could have been more clear. I remember seeing that it was creating a new program called reentry supervision, for example. This was an entirely new concept in terms of an early release mechanism, and the act was not clear in terms of how that mechanism would play out if an inmate had a sentence that had probation following a term of incarceration. There were many other issues that were unclear to me and required further research before I -- I could give a final legal interpretation of them. The act posed numerous questions.
Q. Well, tell me about how you went about researching the areas that you had questions about.
A. Well, I would begin by looking in Westlaw and researching the issues as you would any other legal issue; looked for relevant sections of the South Carolina code that might shed some light on the -- on the issues being presented, court decisions, any other legal authorities that might speak to the -- the legal issues. So just beginning the research process and trying to build a framework of knowledge to where I could produce a legal analysis.
Q. Where did you compile your legal research?

A. I would just research it on Westlaw. So Westlaw would track my history, and I was able to review what I was looking at. I wouldn't print everything out. I view that as a waste of paper when I can just look at it on-line. And basically read cases and, you know, build knowledge in that way.
Q. Did you add any of the cases to your research file on your computer, or you just read them and moved on and didn't make any notation of what you looked at?
A. I wouldn't add them to my research file. I didn't -- I wasn't the sort of person who generated a lot of extra paper in doing research. I would just review them on-line. I could always look at them again on Westlaw if I wanted to go back and review them again.
Q. What kind of cases did you look at?
A. I would look at cases from the South Carolina Court of Appeals and the South Carolina Supreme Court focusing on sentencing issues or issues of implementation of an inmate's sentence, such as community supervision or no-parole sentences or various other sentencing issues that were presented by the -- by the act.
Q. Do you recall what your Westlaw log-in was when you were with the Department of Corrections?

A. No, sir. I have a new log-in now, and I couldn't tell you what my old one used to be.
Q. At the time that you got this assignment in 2010 to work on the Omnibus Act and to work on the sentencing portion of it, you'd been out of law school three years. Was that the biggest project you'd ever been tasked to do?
A. In terms of scope, it was a big project. I'd certainly worked on serious projects of large scope prior to that, and with the Supreme -- South Carolina Supreme Court I was frequently confronted with the challenge of researching novel legal issues and building an understanding of them. So I was not a stranger to large projects, but this was certainly a large project.
Q. Did you pull any cases or do any research in regard to the rules of statutory construction?
A. Yes, sir. I would have reviewed some case law on statutory construction in this process. Of course, I'd worked with a lot of those cases before, so they were familiar territory.
Q. Did you pull the existing statutes that the Omnibus Act would have impacted and review those as part of your research?
A. Yes, sir. One of the -- one of the versions

of the act that I was working with included red-line changes to the language of the -- of the relevant South Carolina code provisions, so I would have been able to also see the changes in the code in that way.
Q. Did you -- when you were researching on Westlaw, did you look up cases on legislative intent?
A. Yes, sir.
Q. Which cases did you look up on that?
A. I couldn't tell you for sure, but again, it would have been within my framework of -- of researching statutory interpretation, and so -- statutory construction, so I couldn't cite the South Carolina cases for you at this point. I haven't worked with them in quite some time, but I did research those.
Q. Did you ever consider getting outside or independent counsel to do an opinion letter in regard to the meaning of the act or how to implement?
A. No, sir. This was an area where we really had the expertise. We were the attorneys for the Department of Corrections, and we construed sentencing law on a daily basis. There wasn't an outside authority we could turn to to do our job for us.
Q. Now, when you say "we," who are you referring to?
A. The lawyers of the Department of Corrections.

Q. So that would be you and Mr. Tatarsky and the rest of the staff --
A. Correct.
Q. -- in the General Counsel's Office?
A. Correct.
Q. Did you or Mr. Tatarsky ever consider recommending that a declaratory judgment action be filed to make sure Department of Corrections got it correct in determining or in calculating the terms of the release dates of inmates?
A. I don't think we would have looked at that as a realistic option. To go -- to get a declaratory judgment, you would need such things as an opposing party to have a case in court; you'd need an active controversy with that party to have standing to get a court to make that ruling. These were components that you can't just fabricate because you want a legal opinion from a court. You would have to wait for the controversy to actually exist before you can get a judgment from the court, and at that point we didn't have such a controversy. We didn't have an ability to have a declaratory judgment.
Q. At any point did you say or say to yourself this law is not consistent?
A. Yes, sir, I would say that the law seemed to

be inconsistent in its use of some terms and -- and more fundamentally in its intent. At times the law seemed to be intending to reduce inmate sentences, but other places you would see it actually increasing penalties. I would say the law was inconsistent in many respects.

Q. So what did you do to resolve what you saw as inconsistencies in the law?

A. I would focus on interpreting the -- each provision of the statute and understanding it in the context with which it was being -- in the context in which the act was written. So I would look at how those terms were used elsewhere in the South Carolina code and I would look to try and synthesize the act with existing law and to basically apply the law as -- as a court looking at the law would interpret it.

Q. Did you generate several memoranda about the Omnibus Act?

A. Yes, sir.

Q. And what was the purpose of having those memorandum?

A. The purpose of those memoranda was to inform other employees of the Department of Corrections of our interpretation of the law.

Q. Okay. I want to mark a couple exhibits. I've

marked the notice as Exhibit 1, and then we have four memoranda. I'll let you identify them before we mark them and see if these are the memoranda that you generated.

A. Thank you.

MR. DAVIDSON: Can we -- can we get the Bates numbers on those, too?

MR. WHETSTONE: Yes, sir. I'm going to let him identify them and then I'll read the numbers into the record.

MR. DAVIDSON: All right. That's great. Thank you, Charles.

MR. WHETSTONE: Yes, sir.

A. Okay. So the first document I've been handed is Bates numbers 10033-R-1. This is a memorandum from me to State Classification and Inmate Records dated June 22nd, 2010.

The next document I've been handed is a memorandum from me to Jon Ozmint, Bates number SCDC000947. This is dated August 30, 2010. Subject: "Reentry Supervision Program."

Next memorandum I've been handed, this is SCDC000949, memorandum from me to State Classification and Inmate Records dated February 7th, 2011. Subject: "Remaining Issues from the Sentencing Reform Act of

2010."

And finally, I have a memorandum, Bates number SCDC001080. This is from me to the Resource and Information Management Division, RIM. Subject: "Whether an" -- sorry, "Whether an Offense is Parole Eligible Should Now Be Determined Based on Sentencing Date for Offenses Changed by 2010 Omnibus Reform Act" dated July 19th, 2011.

MR. WHETSTONE: Let's mark those in the order that you read them in as Exhibits 2, 3, 4, and 5.

MR. DAVIDSON: Charles, can you give me 5 again?

MR. WHETSTONE: Yes, sir. 5 is SCDC 1080 and 1081, and it is dated July the 19th, 2011. It's to Resource and Information Management Division from Chris Florian.

MR. DAVIDSON: Okay. Thank you.

MR. WHETSTONE: Yes, sir. We're going to let the court reporter mark these before we -- before I ask any more questions.

(Florian Exhibit Nos. 2-5 were marked for identification.)

BY MR. WHETSTONE:

Q. Mr. Florian, if you would look through those memoranda again for me, please, sir, and tell me if

those are all of the memoranda that you generated in your review of the Omnibus Act.

A. Yes, sir, they are.

Q. Did you prepare any other drafts of any other memoranda besides those?

A. No, sir. Not to my knowledge.

Q. Did you do preliminary drafts before you issued those final drafts?

A. No, sir. I would have, of course, had working documents as I built these drafts, but I wouldn't have preserved those prior drafts. I would have made the changes on these documents.

Q. Would those drafts have all been maintained on your computer rather than in printout form?

A. Yes, sir. To the extent that they continue to exist. They -- the final versions may be all that was maintained as a result of me changing the document as I went along.

Q. Did you prepare these memoranda yourself or did you prepare them and then have a paralegal or an assistant review them and make changes or check them over at all, or are they strictly your document?

A. These are strictly my documents. We didn't have paralegals, so --

Q. Did you have an assistant or anybody else that

might help you with that?
A. No, sir.
Q. That was entirely up to you?
A. Yes, sir.
Q. To your knowledge, did these memoranda get distributed to anybody other than those listed on the top as the recipients of it, the "To" line?
A. Not to my knowledge. People within the Department may have distributed them to their staffs respectively, but to my knowledge, they were distributed to the people addressed on the "To" line.
Q. A little bit earlier you mentioned there was a memoranda done by Jannita Gaston. Is this the memoranda that she generated?
A. Yes, sir. And for those on the phone, this is Bates number 10033-R-7, a memorandum from Stephanie Willis through Jannita Gaston to Trevis Shealy dated July 29th, 2010. "Programming Needed in Response to New Legislation" is the subject line.
Q. Are you aware of any other memoranda that Ms. Gaston might have generated besides that one?
A. No, sir. And to be honest, I -- I'm not sure whether I saw this one before becoming involved in this case or whether I just saw it as -- as it was exchanged in this case.

MR. WHETSTONE: All right. Let's mark that as Exhibit 6, please.
(Florian Exhibit No. 6 was marked for identification.)
BY MR. WHETSTONE:
Q. Did you prepare a PowerPoint as part of your duties to explain the Omnibus Act?
A. Yes, sir.
Q. I've got it here. I want you to identify it. It's hard to see the Bates number because of the way it's copied, but it appears to me to be SCDC 829 through 844.
A. Yes, sir. This -- this appears to be the PowerPoint presentation I prepared.
MR. WHETSTONE: Let's mark that as Exhibit 7.
(Florian Exhibit No. 7 was marked for identification.)
BY MR. WHETSTONE:
Q. What was the purpose of this PowerPoint?
A. This PowerPoint would have been prepared as -- as a training document. I'm not clear on whether this would have been done for internal training or for training for an external audience, but it would have been a training document regardless.
Q. Did someone ask you to prepare this

PowerPoint?
A. Yes, sir. I wouldn't have prepared this on my own without being asked to do it.
Q. Do you know who asked you to prepare it?
A. I do not. Not at this point.
Q. How many times did you present this PowerPoint at meetings?
A. I'm not sure. I explained the act to numerous people and in numerous meetings, and I couldn't tell you at what point I would have used this PowerPoint.
Q. Do you know how many times you used it or who was present when you used it?
A. I do not. I -- I don't remember what context this was prepared in.
Q. Do you know when it was prepared?
A. Unfortunately, it doesn't seem to have a date, so it -- it would have been fairly soon after the act was -- the Omnibus Reform Act was enacted, I'm thinking, but I'm not sure.
Q. I want you to look at this document here, which is Bates number -- it's a DEFPROD document 10033-R-14 through SCDC 1079. I had two documents together there. The last page of that document is 10033-R-18. I'd ask you if you'd look at that and tell me what it is, please, sir.

A. This appears to be a PowerPoint presentation. I'm not familiar with it beyond that. This -- this is not a document that I prepared.
Q. Do you know who prepared it?
A. I do not. I don't think I've seen this before.
MR. WHETSTONE: All right. Let's mark that as the next exhibit. I believe 8, please. It's four pages.
(Florian Exhibit No. 8 was marked for identification.)
BY MR. WHETSTONE:
Q. On the PowerPoint that you prepared, which I think was Exhibit 7, did anyone besides you have input on what went into that PowerPoint?
A. No, sir. I would have prepared this on my own. I wouldn't have -- I would -- I don't think I would have had input from others.
Q. Can you look at that PowerPoint and present it as you would have presented it as a -- at a meeting?
A. I think that would be a challenge at this point because I would have -- when I prepare a presentation, I look at the PowerPoint as sort of something for the audience to have as a visual aid. If I were to present this at a meeting, I would have -- I

would have in my mind what I was going to say in connection with this and I would have prepared that in advance. I would be very familiar with my presentation. At this point I haven't presented this in, you know, probably about six years, I'm thinking, and so I can go through this document with you, but it would not look like the presentation I would have given at the time.

Q. I'd still like for you to go through it and do the best you can with it, please, sir.

A. Very well. So the purpose of this presentation would be to cover some of the significant changes enacted as part of the 2010 Omnibus Sentencing Reform Act. I would have introduced myself. I'll skip over that for purposes of time.

I would start with talking about sections 6 and 7 of the act. The act abolishes a number of old offenses: Assault offenses, assault and battery with intent to kill, assault with intent to kill, assault and battery of a high and aggravated nature, assault of a high and aggravated nature - that would be ABHAN and AHAN - aggravated assault, simple assault and battery, and simple assault.

So the purpose of that was to do away with this confusing old structure of assault offenses and

replace them with a new set of offenses. I believe this is done in section 7 of the act.

Confusingly, they continued to use the same language of "assault and battery of a high and aggravated nature." Despite that, under the act this is a new offense. It has a different classification. It's now classified as violent, whereas previously assault and battery of a high and aggravated nature was not considered to be a violent offense under South Carolina law.

This is a new offense. It's got new attributes, and despite the fact that it has the same name, it should be considered to be a different offense. Assault and battery in the first degree, second degree, and third degree, all of those are replacing those prior offenses that they've gotten rid of. That's section 6 and 7 of the act.

The next part of the act -- and I'm just hitting -- in this PowerPoint I would just be hitting areas of the law where there is potential confusion. I'm not going to cover every section of the act because there are numerous sections that speak for themselves. However, if there were people in the audience who had questions about them, I would invite them to bring those to the attention of me and I'd provide my contact

information.

So section 13, this is sentence reduction for inmates who assist SCDC employees. This provision allowed the State, the solicitor, presumably, to move for the Court to reduce an offender's sentence if the offender provided aid to the Department of Corrections, to an employee who is in danger of being seriously injured or killed. There's going to be a policy update at this time. I would -- I would expect after this time there probably was a policy update. There was going to be a policy update to implement this section. Ultimately the decision of whether to ask for this relief belongs to a solicitor, so just because an inmate provides assistance doesn't mean they're guaranteed that reduction. It's going to ultimately be a decision by a person outside of the Department.

New work release eligibility provisions. Under the act, now work release eligibility is available for certain violent offenses. There's a list of offenses that now have work release eligibility. There are additional requirements in connection with that: No sexual offenses or additional violent crimes for that offender, and inmate has to be within three years of the projected max-out date. Importantly for this provision, the offense date has to be on or after

June 2nd, 2010. That's the effective date for this act.

And then I go through the list of offenses that have that eligibility: Voluntary manslaughter, kidnapping, carjacking. I wouldn't have read all these out because the audience can see them, but there they are in the slides.

Next up I would talk about sections 27 through 30. This is the South Carolina -- SCDC policy implementation for -- bear with me a moment. Let me understand what this slide is about. So this appears to be the SCDC policy implementation for that work release eligibility, and for level 1A, which is the least-secure custody within the Department of Corrections, the policy apparently provided that no prior -- I'm sorry, no category 4 or 5 offenses except certain violent offenses pursuant to the Sentence Reform Act of 6/2/2010, so that's just implementing that legal provision.

Section 31 deals with Youthful Offender Act and burglary second degree, nonviolent. Under the act, and I only vaguely recall this, I believe there was a three-year mandatory minimum term required by the statute. At least that's what it seems to say on this slide show. Many attorneys and judges were not aware of this, and I think it was causing unexpected sentencing consequences. Typically within the Youthful Offender Act, when a person receives a YOA sentence, as we called them, they would expect to be released on a much shorter time frame, typically six months to 13 months, I would say, and with this three-year mandatory minimum term, that would have looked a lot different to people than what they might have expected.

Sections 37 and 38, these are the changes to certain drug offenses, parole eligibility. Under the act it creates a new set of -- basically a new type of offense, a parole-eligible 85 percent. These CDR codes would have corresponded with those offenses. Under the act if an offender is serving a sentence for one of those offenses, they're going to become parole eligible after one quarter or one third of their sentence depending on whether the offense is classified as violent under South Carolina law, and if the offender does not -- is not paroled, they would then end up serving 85 percent of their sentence before being released under community supervision. Per the South Carolina Department of Probation, Pardon and Parole Services, we've been informed their interpretation is that this act is going to affect all offenders with a sentence date on or after June 2nd, 2010.

Q. Let me ask you at this point --
A. Um-hum.
Q. -- how did you come to all the conclusions that you made in that PowerPoint?
A. This would have been the culmination of researching -- reading through each of these sections within the act and researching relevant law connected with it, the law as it stood before the act came into effect, cases that interpreted that law, and reading through the language, and also looking at contextually how those terms inside the statute are used elsewhere in the South Carolina code. Basically going through the act and trying to implement it in accordance with what it says and -- and what was intended.
Q. Did anybody have input into that besides you?
A. I would say that I had the vast majority of input. I certainly would have discussed this as anyone would discuss a legal issue with their colleagues, but this was my work product. Ultimately the research and the decisions were made by me and I would have kept people informed of, you know, what I was working on and my thoughts on it.
Q. Okay.
A. Would you like --
MR. WHETSTONE: We've been going about an hour

and 15 minutes. Are you comfortable? We can go on and take a short break.
A. I'm comfortable. I think some people are kind of warm.
MR. ROLLINS: Madam Reporter looks a little warm there.
MR. WHETSTONE: All right. Why don't we stop here and take a five-minute break. We'll get the air adjusted and cool things off a little bit, maybe open the door. All right?
THE WITNESS: That sounds good.
THE VIDEOGRAPHER: Okay. We're going off the record. The time is 10:11.
(A recess was taken.)
THE VIDEOGRAPHER: We're back on the record. The time is 10:19.
MR. WHETSTONE: Will, are you and David there?
MR. TATARSKY: Yup.
MR. DAVIDSON: Yes, sir.
MR. WHETSTONE: Okay. We're back on the record.
BY MR. WHETSTONE:
Q. Mr. Florian, if you will pick up where you left off reading your PowerPoint presentation there, please, sir.

A. Certainly. Okay. So we -- we left off partway talking through sections 37 and 38. Along with the changes to parole eligibility, one of the other changes implemented by the act under sections 37 and 38 for these specific drug offenses was a new work release eligibility for violent drug offenses, specifically manufacturing/distribution of methamphetamine. For an inmate to be eligible for work release under the act for that -- for that offense, they still have to meet all the requirements listed in the classification policy: The offense date must be on or after June 2nd, 2010; the crime cannot involve any sexual conduct; the inmate must be within three years of max-out; and they would have to be within 80 percent of -- they would have to have served 80 percent of their sentence.

The next area under the act that I wanted to cover was reentry supervision. This is a new program under the act. It creates a time of supervision in the community, something akin to probation following an inmate's sentence, for inmates who are serving sentences that perhaps didn't have a probationary term. It basically applies to offenders who are not serving an 85 percent sentence, which is a fairly broad sweep of inmates. They have to be -- have been incarcerated at least two years, so that's going to diminish the number of inmates impacted by this. And the term of reentry supervision is diminished by any probationary term that has been ordered, so in other words, since this is a 180-day program, if the offender has pending probation of 180 days or more, they're not going to have reentry supervision because they already have that probationary term. It's going to wipe out that reentry supervision term. This is going to apply to offenses that occurred on or after January 1st, 2011, so it's important to be aware of the different effective date for this provision.

This program is mandatory for inmates who meet the requirements, so an inmate is not able to opt out of this program. Release dates, basically the inmate's released 180 days from their projected max-out date - that includes credits, in other words - 180 days minus any term of probation. It's pretty rare that you have a probationary term of less than a year, but it's possible if you had a probationary term of -- of 90 days or something, you would basically have 90 days of reentry supervision followed by 90 days of probation.

The terms of -- terms and conditions of supervision are based on the assessment by SCDPPPS. We would just call them Triple P at SCDC because that was the shorthand for them. That's the South Carolina

Department of Probation, Pardon and Parole Services. Anyway, they would set the assessment -- they would assess the inmate's needs and risks and set the terms of that supervision program.

Finally, I would like to dispel some myths connected with the act. There's some misinformation that it's important to be able to distinguish the true -- the true interpretation of the act from the misinformation that's -- that you may have heard. The 2010 Act will result in the early release of existing inmates. The fact is the way the act has been written, including its savings clause and its effective dates, all of the new sentencing provisions, those are going to apply to new offenses, offenses occurring on or after the date the act was enacted, on or after June 2nd, 2010, and as we saw with reentry supervision, some provisions have later effective dates than that.

New offense classifications. One myth you may have heard is that the 2010 Act retroactively changed statutorily violent classification of some violent offenses. So the fact on this is a little bit more subtle. For offenses that became statutorily violent, basically changes to the statutory nature of an offense came about on the effective date of the act, June 2nd, 2010. That's statutorily violent. Within South

Carolina Department of Corrections, of course, we also have the concept of violent for classification purposes. This is a different concept. Offenses that are now listed as violent are violent for classification purposes regardless of whether the offense occurred before the effective date of the act.

One other myth, and this is the final myth, I'd like to dispel with this presentation, that the 2010 Act changed some truth in sentencing offenses - these are the 85 percentences -- 85 percent sentences - to normal parolable sentences. The fact is that some -- under the act, some 85 percent sentences are now parolable, but if the inmate is not paroled, the inmate still has to serve 85 percent. And again, this provision is only applicable to offenses occurring on or after June 2nd, 2010.

Q. And that turned out to be misinformation, didn't it?

MR. ROLLINS: Object to form.

A. It turned out that the court disagreed with that interpretation.

Q. In other words, that was misinformation?

MR. ROLLINS: Object to the form.

Q. Correct?

A. At the time it was the best information we

had.

Q. But the Court of Appeals found that to be misinformation, didn't they?

MR. ROLLINS: Object to the form.

A. The Court of Appeals found that these offenses were in fact not subject to 85 percent.

Q. All right. Let me have you identify one other document. This is SCDC 942 through 1079.

A. Okay. This appears to be -- bear with me a moment. I'm just going to review the document.

Okay. So this is a document entitled "2010 Reform Act Significant Changes." This would have been a working document I produced for my own purposes as sort of an outline of some of the provisions of the act.

Q. When did you produce that document?

A. This would have been very soon in my -- early on in my review process. This would have been a working document for me to -- it's sort of the equivalent of notes.

Q. Did it have any other drafts or did it morph into anything else after that, or was that a final document?

A. This would have been what served as the basis for the memoranda that -- that we've already marked as exhibits. It would have -- it would have predated this June 22nd memorandum, for instance, June 22nd, 2010, which is marked as Exhibit 2. So it would have morphed into that document and perhaps I would have referred to it in drafting further documents as well. It's sort of just a framework of some of the provisions of the act.

MR. WHETSTONE: Let's mark that as Exhibit 9, please.

(Florian Exhibit No. 9 was marked for identification.)

BY MR. WHETSTONE:

Q. Mr. Florian, did you read the memoranda or anything else related to this matter to prepare for this deposition?

A. I did. I reviewed many of the documents that had been listed as documents that may -- might be subject to our discussion today.

Q. All right, sir. Would you tell me -- list for me, please, specifically what you reviewed.

A. I reviewed all of the memoranda that we have marked as exhibits here as well as this outline. So that's our Exhibits 2 through 9. I'd reviewed that. As well as the PowerPoint presentations that are marked as exhibits here. I reviewed some e-mails that were also listed. I couldn't tell you all of their dates

without looking at them or who they were from. Many of them were not from me or to me, so this was the first time I had seen them.

I also saw maybe one or two e-mails that I had sent. Again, I couldn't tell you the dates without looking at them, but I think they were part of message traffic that was dated later. By "later," I mean after I had left the Department of Corrections.

I think that's all. But there may have been additional documents that I'm forgetting.

Q. Have you talked to anybody to prepare for this deposition other than your attorney?

A. No, sir.

Q. Have you read the complaint?

A. Yes, sir.

Q. Do you understand the nature of the allegations?

A. Yes, sir.

Q. Have you read the answer that's been filed on behalf of you and Mr. Tatarsky?

A. Yes, sir.

Q. Have you read any of the depositions that have been taken in this case?

A. No, sir.

Q. You haven't read the depositions of Mr. Haile,

Mr. Stobbe, or Mr. Moss?

A. No, sir.

Q. Would you agree that the sole or central purpose -- the central purpose of the Omnibus Act was to make a whole range of previously no-parole offenses parolable?

A. I think it would be a step too far to say that the act had a central purpose. It -- it made -- it was called the Omnibus Act I think for the reason that it made such numerous changes to the South Carolina code's treatment of criminal offenses.

Q. Would you agree that one of the purposes of the Omnibus Act was to make a whole range of previously no-parole offenses parolable?

A. I would certainly say that they were making -- yes, that the -- one of the provisions of the act, specifically sections 37 and 38 within the act, made previously no-parole offenses parolable, and that -- that's clear from the act.

Q. And was one of the other purposes of the act to save the State tax dollars?

A. I believe that that may have been a stated intent that was referenced by the Court of Appeals.

Q. And was the -- do you disagree that the legislative history and intent of the act supports that

point?

A. Which point, sir?

Q. In regard to the purpose of -- one of the purposes of the act was to be to save the State tax dollars?

A. No, sir. I think if the legislature said that in the act - and I couldn't tell you for sure if they did without looking at the text of the act, but I believe they did say that - I don't disagree with it.

Q. Wasn't the legislature pretty explicit in passing the law that the purpose was to cause the release of prisoners who would otherwise be incarcerated for longer times?

A. As I recall, the legislature -- when they stated the intent, it goes on for pages, to be honest, but one of the provisions was to base sentencing law on evidence-based analysis of what works for offenders. I think conserving tax -- tax dollars was another purpose. There were numerous purposes in enacting this law, so --

Q. Would that goal of the legislature to save tax dollars in any way conflict with the policy or philosophy of SCDC?

A. The -- I don't know that SCDC has a philosophy other than its mission, which is to carry out the law

and the sentences imposed on the inmates, provide rehabilitation, see to public safety. I think all of those philosophical matters are completely compatible with conserving resources and that public safety yields better use of resources in the long run.
Q. Well, whether an offense is parolable or no-parole has a great deal of significance beyond just parole eligibility, doesn't it?
MR. ROLLINS: Object to the form.
A. Can you -- can you restate the question, please?
Q. Whether an offense is parolable or no-parole has a great deal of significance beyond just parole eligibility, doesn't it?
MR. ROLLINS: Object to the form.
A. So whether an offense is no-parole or parolable, no-parole offenses are -- is a defined term. No-parole offense is defined within the South Carolina code under a specific section of the South Carolina code. Under the South Carolina code, no-parole offense means any felony classified as a felony A, B, or C. Whether an offense is parolable or not parolable is the question of whether an offense -- offender is eligible for parole. In both of those, whether an offender is eligible for parole or not and whether an offender is

subject to 85 percent or not, both of those have consequences for the offender. Absolutely.
Q. So the 85 percent rule on -- there's an 85 percent rule on no-parole offenses; is that correct?
A. Correct. Under the South Carolina code.
Q. And explain the 85 percent rule for me, please.
A. Certainly. The 85 percent rule is called the 85 percent rule because it requires an offender subject to that rule to serve 85 percent of their sentence before they are eligible for release from incarceration. Once -- they get to that 85 percent through the accrual of good-time credits, earned work credits, earned education credits potentially, so if they don't earn those credits, if they lose their good-time credits or fail to earn them in the first place, they may serve more than 85 percent.
Once an offender has completed their term of 85 percent, they're then released; they're subject to a program called the community supervision program, which is supervision by Triple P for a period of years. I believe it's two years depending on the length of the sentence; and if they violate the terms of that program, they can be then reincarcerated.
Q. No-parole offenses can receive certain

credits, but they don't get the same credits that parolable offenses do, do they?
A. Correct. They earn -- they earn the same kinds of credits, but they earn them at a lower rate. For example, an offender serving -- let's just call it a regular sentence, an offense not subject to 85 percent. They earn credits at the rate of 20 days a month for good-time credits, whereas an offender serving an 85 percent sentence earns three days per month, so there's the difference there. Similar differences apply to earned work credits and education credits.
Q. And there are some other significant consequences to no-parole offenses, too, aren't there?
A. There -- there are. The community supervision program, as I mentioned before, that's -- that's very different from what happens when an offender is serving an offense that's not subject to 85 percent. When they max out, if they don't have probation afterwards, then they are -- or reentry supervision, they've served their time. In contrast, 85 percent offenders have that period of supervision built in. As well, an offender subject to 85 percent may impact their classification within SCDC. It may have other impacts going forward in the minds of a sentencing judge as

well, I suppose, but that's a bit speculative.
Q. And the Omnibus Act created categories of nonviolent offenses that it converted from no-parole offenses to parole offenses, didn't it?
A. It made certain offenses eligible for parole that were formerly not eligible for parole. And under the Court of Appeals' interpretation of the law in Bolin we now know that those offenses are not subject to 85 percent.
Q. But in -- in -- and according to Bolin, they are not no-parole offenses; isn't that correct?
A. Right. Right. In other words, they're not subject to 85 percent.
Q. And in your legal opinion that you issued on behalf of SCDC in 2010, you kind of created a hybrid of parolable/no-parolable offenses, didn't you?
MR. ROLLINS: Object to the form.
A. I don't think I created it. That was my interpretation of what the act had done.
Q. That's what made sense to you at the time?
A. Well, that is my -- that was my legal interpretation of what had been -- what was ordered as part of the act, what the legislature had intended.
Q. So in your view those offenders were eligible for parole but received no benefit of having -- that

would normally have been received under parolable offenses?
A. Well, they were -- that's not exactly right. They were eligible for parole. They were eligible for certain other -- certain other benefits, let's say, that other 85 percent offenders might not be eligible for, such as work release. I believe in my memo I get into the laundry list of -- of what basically the act put in place for these offenders.
Q. Your conclusion was based on just your reading of the statute, correct?
A. No, sir. It was based on reading the statute as well as case law as well as contextually other areas of -- of the South Carolina code.
Q. What attention did you pay to the language in the Omnibus Act that begins with "Notwithstanding any other provision of law"?
A. Well, to me that -- that phrase means that if there is an area of the law -- if there is a conflicting provision of law, then the intention was that this provision -- the phrase that follows "notwithstanding" would be controlling.
Q. And did you research that phrase on how it had been interpreted?
A. I'm certain I did. I was familiar with that

phrase from my prior work as well, so it wouldn't have been a new thing to me.
Q. So did you pull any cases that analyzed that language?
A. I can't say for sure whether I did, but I suspect that I did.
Q. And you learned probably back in law school that statutes should be read by their plain and ordinary meaning and not given a forced construction; you understand that concept, don't you?
A. Yes, sir.
Q. And making an offense parolable is pretty clear language that the offense is no longer a no-parole offense, don't you think?
A. I wish it was that simple. The South Carolina code is not built that way. It does not simply use terms in their ordinary meaning that way. They're instead defined within a series of areas of the law. So while the provisions of section 36 -- 36 and 37 made the offenses eligible for parole, it didn't actually say one way or another whether they were now considered to be no-parole offenses for purposes of 85 percent. It didn't answer that question. If it had come out -- if the legislature had come out and said that these offenses are -- will no longer be subject to 85

percent, will no longer be subject to that specific section of the code, if they had said that they are not considered no-parole offenses, all of those would have been more clear. That's not what the legislature did.
Q. You had left South Carolina Department of Corrections when the Bolin case came out, hadn't you? You'd already gone?
A. Yes, sir.
Q. Did you read the Bolin opinion?
A. Yes, sir, I did.
Q. Did you read it before preparing for this deposition?
A. Yes, sir.
Q. So was it your view and your interpretation of the Omnibus Act that the only thing the Omnibus Act did was give the inmates the right to ask for parole rather than those -- those offenses becoming parolable offenses?
A. It made the offenses eligible for parole. It also gave the inmates other benefits: Again, work release, other enumerated benefits under the act.
Q. But under your interpretation of the act, the 85 percent rule stayed in effect?
A. Correct. Correct.
Q. Can you explain to me how you planned to

implement your opinion in regard to how these offenses were treated?
A. Well --
MR. ROLLINS: Object to the form.
A. Implementation wasn't -- wasn't exactly my role. My role was to provide legal advice to the team at South Carolina Department of Corrections who would be charged with implementation. So my role was to make the people who would be charged with implementing the act aware of the legal interpretation of the act so they could go forth and implement it by adjusting programming, by changing policy as needed, by doing whatever was necessary to actually carry out the implementation.
Q. How did you explain to the people who were implementing this new law that no-parole offenses were parolable but they really weren't?
MR. ROLLINS: Object to the form.
A. That wouldn't be how I presented it to them. I would explain, similar to how I did in this PowerPoint presentation that we did earlier, that we now had offenses that would be eligible for parole under this act, specific offenses. I would provide them with the list, as you've seen in these memos. Those offenses were going to be eligible for parole.

However, if the offender did not -- was not granted parole, the offender would then be subject to the 85 percent requirement, just as under -- under the law as it existed before the act.

Q. Well, if the 85 percent rule is still in effect, that's no-parole, right?

A. Correct. In the sense that the statute defines no-parole offenses -- 85 percent offenses are those listed as no-parole offenses; in other words, felonies punishable by -- felonies class A, B, and C.

Q. Even though the Omnibus Act eliminated the no-parole provisions as to some offenses?

A. Well, it didn't eliminate -- in my view, it didn't eliminate the no-parole provisions. It merely made the offenses eligible for parole.

Q. But -- in your review -- in your view, but your view was incorrect; isn't that correct?

A. As we understand now, the Court of Appeals has ruled that my view was incorrect.

MR. ROLLINS: Let me break in for a second here. One of our people on the phone has lost the connection. Can we take a short break --

MR. WHETSTONE: Sure.

MR. ROLLINS: -- and see if I can get him back on?

THE VIDEOGRAPHER: Okay. We're going off the record. The time is 10:47.

(A recess was taken.)

THE VIDEOGRAPHER: We're back on the record. The time is 10:49.

BY MR. WHETSTONE:

Q. In your PowerPoint presentation, you seem to avoid the phrase "no-parole offenses" and instead using "85 percent offenses"; is that correct?

A. That is correct. I -- I believe that the -- using the phrase "no-parole offenses," it wasn't what anybody called 85 percent offenses to begin with, and it also would have just promoted more confusion.

Q. So you would agree with me, then, that saying that there are no-parole offenses but in the same -- at the same time saying they are parolable offenses makes no sense at all?

A. No, sir, I wouldn't agree with you on that, but I would say that if you were explaining it to a nonlegal audience, they would find that to be confusing.

Q. I want to look through your memorandum for a minute. Can you get that exhibit, the -- I think it was the Bates number 10033-R-1 through 6. Your June 22nd, '10 --

A. Yes.

Q. -- 2010, memo.

A. Yes, sir.

Q. And that memo was written to the State Classification and Inmate Records, correct?

A. Correct.

Q. And what specifically is that?

A. That's a division within the South Carolina Department of Corrections, State Classification and Inmate Records.

Q. So who would have gotten this memo?

A. It would have gone to the head of the Inmate Records office. In 2010 I'm thinking that was probably Stephanie Willis. It would have gone to State Classification. That would be Ann Gaston -- Jannita Gaston. And it may have also gone to Joette Scarborough with Classification as well. It would be up to them to disseminate within their areas beyond that if they needed to.

Q. And sections -- under the section heading -- headed 1 through 5, you state, "These sections do not appear to require interpretation beyond the language of the statute," and you have that same statement under several other of the headings.

A. Correct.

Q. Tell me what you meant by that.

A. For those sections of the act, I felt that a person in State Classification and Inmate Records reviewing the act would be able to review those sections and wouldn't have any legal questions as to what they meant.

Q. And in sections 37 and 38, you say "nothing in the text of these sections ... addresses the issue of whether inmates convicted of these offenses are still required to serve 85 percent of their sentences before early release, discharge, or community supervision." Is that correct?

A. Yes, that's correct.

Q. And in the next sentence you appear to conclude that the lack of direct language on that means that these are still 85 percent offenses; is that correct?

A. Yeah. I would just read -- for me the language speaks for itself. "Consequently, reading" those sections "in conjunction with South Carolina Code Annotated 24-13-150(A), inmates convicted of these offenses are apparently still required to serve 85 percent of their sentences before release, unless they are granted parole."

Q. So what methodology did you use to come to

that conclusion?
A. Well, I read the -- the text of the act; I read the existing provisions of the South Carolina code; I looked at how the 85 percent rule had been interpreted by the South Carolina courts, including the Supreme Court and the Court of Appeals; and after reading through, you know, the language of the act, what was, you know, provided in those sections, section 37 and 38, in light of what I was reading in the case law, I reached the legal conclusion that those offenses were still subject to 85 percent.
Q. So your analysis concludes that the offenses made parolable by the Omnibus Act are still no-parole offenses; is that correct?
A. For purposes of whether they were subject to 85 percent, that is correct.
Q. So the offenses are parolable and no-parole at the same time pursuant to your analysis?
MR. ROLLINS: Objection. Form.
A. They were subject to the 85 percent rule, which is because they were within the definition of no-parole offenses, they were class A, B, and C felonies --
Q. So is your answer, then, yes, the offenses are parolable and no-parolable at the same time?

A. Yes. I was just explaining why that was. Yes. And that's because they are subject to 85 percent because they are class A, B, and C felonies, and nothing in the language of the act directly addressed whether or not the 85 percent rule was still applicable to these offenses.
Q. And that -- that is -- you came to that conclusion even in the face of the -- the language in the statute that said no -- notwithstanding any law?
A. Correct. I was aware of that language, and I didn't see anything in sections 37 and 38 that would conflict with that. So in other words, if there had been something in 37 and 38 that would have made the 85 percent rule no longer applicable, then the "notwithstanding" provision I think would have been controlling, but there was no such language in 37 and 38.
Q. And on page 1033-R-5 [sic], right above the heading section 39 through 47, you mention needing further technical guidance on an issue. What do you mean by that?
A. Bear with me a moment. I'm just going to read the paragraph before it to get some context.
Okay. So the act contained a provision for certain offenses. The two offenses listed on that

page, 1033-R-5, manufacturing/distribution of schedule IV narcotics, third offense, and distribution schedule V, third offense, the act made those offenses eligible for parole, supervised furlough, community supervision, and work release, but only if the prior offenses are among a subset of offenses. And I wasn't sure at the time of writing this memorandum whether SCDC's computer system was capable of making that determination about prior offenses or not. So the technical guidance that was needed was whether it would be possible for SCDC to make the determination that the -- that the act was indicating.
Q. So who did you turn to for that technical guidance?
A. Well, this memo would have been directed to Classification and Inmate Records, and they would have had the expertise in that. They may have also relied on RIM. I can't remember exactly what RIM stands for at the moment, but -- Resource and Information Management, let's say. They might have also turned to them.
Q. Did you -- as part of your reviewing and implementing the Omnibus Act, did you contact or consult South Carolina Probation and Parole?
A. Yes, sir. I -- I spoke with my counterpart

there, Mr. Ben Aplin.
Q. And how many times did you consult with him?
A. We probably spoke a few times over the course of -- in the month following enactment of the act - I would say maybe two or three times. Just guessing, because it's been a little while - about interpretation of the act.
Q. Do you have any individual malpractice insurance separate from the Insurance Reserve Fund?
A. No, sir.
Q. Would you agree with me that incarcerating an individual beyond their max-out date would violate that person's constitutional right to liberty?
MR. DAVIDSON: Object as to form.
MR. ROLLINS: Same objection.
A. I believe that an offender has a right to be released on their max-out date in compliance with the law.
Q. So would you agree with me that incarcerating a person beyond their max-out date would violate their constitutional right to liberty?
MR. ROLLINS: Same objection.
MR. DAVIDSON: Objection.
A. I believe that they would be -- well, clearly they would be entitled to be released. To the extent

that that's a constitutional violation I think would be a question of -- of -- question of law that I would want to look at, but I think -- I think that an inmate would be entitled -- of course would have the right to be released on their release date, on their properly calculated release date.

MR. WHETSTONE: Okay. I don't have any other questions.

MR. ROLLINS: Let's take about a five-minute break. Let me think about if I want to ask -- do you have anything you want?

MR. WHITE: I'm going to have some, but we can take a quick break.

MR. ROLLINS: All right.

THE VIDEOGRAPHER: Okay. Going off the record. The time is 11:02.

(A recess was taken.)

THE VIDEOGRAPHER: Okay. We're back on the record. The time is 11:09.

EXAMINATION

BY MR. WHITE:

Q. Mr. Florian, my name's Kyle White. We met earlier. I represent several plaintiffs in a -- in a related case to the one in which you've been questioned prior to this.

Are you --

MR. DAVIDSON: Hello?

MR. ROLLINS: Yes, Will. We can hear you.

MR. DAVIDSON: I couldn't -- I couldn't hear Kyle.

MR. WHITE: Will, let me move closer so you can hear.

(There was a discussion off the record.)

MR. WHITE: Will, can you hear okay now?

MR. DAVIDSON: Yeah.

MR. WHITE: All right.

BY MR. WHITE:

Q. Mr. Florian, are -- we've been going for a while now. Are you okay to proceed?

A. Yes, sir.

Q. All right. There was some discussion earlier about how others would be looped in if you were looking into a matter of -- I think the term you used was "great significance." Do you recall that?

A. Yeah. I can't remember the exact words, but I know what you're talking about.

Q. And I -- and there were situations in which you would loop in, I guess, people higher up than you in the organization in order to help evaluate the issues; is that correct?

A. No, that's not exactly correct. What I was referring to there was more informal. I would simply -- as anyone working on a legal issue I think in a lot of offices would do, I would just talk with, you know, my supervisor, say, Here -- here's what I'm working on today, and just kind of, you know, briefly describe the issue I'm looking at and sort of my thoughts on it and maybe get some informal back-and-forth discussion. It's nothing so formal as getting somebody else's review -- legal review of a matter. More just discussing ideas.

Q. Okay. And it's my understanding that as opposed to that, as opposed to spit-balling off of someone higher up in the organization, as to this issue as to how the Omnibus Crime Act affected sentencing, this was one of these issues that you kept the responsibility for yourself for, correct?

MR. ROLLINS: Object to the form.

A. I was certainly the one responsible for interpreting the law, and -- and in the process of doing that, I would have, as you said, spit-balled the issues. I would have talked through some of the issues with -- with, you know, other -- other lawyers in SCDC.

Q. Okay. So was there any formal criteria for an issue that would be -- I guess would prompt someone

higher up to be looped in, or was it sort of an informal judgment call by yourself?

A. It was just an informal judgment call, and it was just a matter of discussing what I'm working on in a day.

Q. Okay. And are there -- I know that the question was posed as to whether outside counsel was consulted for an opinion on the application of the Omnibus Crime Act, and I think the answer was no. Am I right on that?

A. That's correct.

Q. Were there situations in which you -- you or someone else in the legal department at SCDC did bring in outside counsel to provide an outside opinion on the interpretation of a law, for example?

A. No. Not to my knowledge. I never brought in outside counsel on any legal question I looked at in my time there. The questions of law we looked at were within our area of expertise, and we were unlikely to get any additional expertise by bringing in outside counsel. We were more familiar with this law than anyone else.

Q. Was there anything preventing you that you're aware of from bringing in outside counsel to provide another look at the interpretation of the law?

A. Well, I don't think I -- I would have had authority to pay outside counsel on my own. I -- I never even would have considered having outside counsel, because I couldn't just hire a lawyer to make my legal decisions for me. That was my job.
Q. Well, SCDC does hire outside counsel under certain circumstances, correct?
MR. ROLLINS: Object to form.
A. Well, for instance, in this case we have an Insurance Reserve Fund which is -- which provides outside counsel for the Department as well as its employees, so yeah, under certain circumstances, in litigation especially, you see outside counsel providing assistance on cases. That's different from researching legal issues. I don't -- in my time at the Department, I can't say I saw us bring in outside counsel to research a legal issue.
Q. Right. And -- and this is -- the legal issues that we've discussed, the application of the Omnibus Crime Act sentencing calculations, that was a question that the answer dictated whether certain people would spend more or less time in prison, fair?
A. Yes. I think that's accurate.
Q. Okay. And that -- that was a situation in which SCDC did not feel like outside counsel was needed

in order to effectuate the right outcome, right?
A. We felt we had the expertise in that area of law and it wasn't the type of question that we would -- it wasn't the type of issue where we would bring in outside counsel.
Q. Right. But now that a lawsuit has been filed against SCDC, SCDC has made the decision that it was important enough to bring in outside counsel to effectuate the right outcome, right?
MR. ROLLINS: Object to the form.
A. As a matter of practice within the South Carolina Department of Corrections while I was there, and I suspect still, when litigation is filed seeking monetary damages, the Insurance Reserve Fund will fund outside counsel to handle litigation. That's a common practice throughout the state. It has nothing to do with the importance or lack of importance of a case. It has everything to do with what's -- whether litigation has been filed and whether that litigation seeks money damages.
Q. Okay. Did you become familiar with another state agency -- I'll just refer to them as Probation and Parole. Are you familiar with that agency?
A. Yes, sir. Yes, sir.
Q. All right. And did you ever interact with

Probation and Parole during your time at SCDC?
A. Yes, sir, I did. I had -- I worked with an attorney by the name of Ben Aplin, who was my counterpart at -- I'd refer to them as Triple P, but Probation and Parole.
Q. Okay. And just so the jury who may be watching this video understands what we're talking about when we say "Probation and Parole," what is that?
A. So they are the agency responsible for supervising offenders who are serving sentences that are not incarcerative sentences; in other words, offenders who are on probation, offenders who have been paroled. All of those offenders are still serving a sentence, but they're serving it in the community. So they're -- they're being supervised by probation officers, employees of Triple P, and that's Triple P's area of responsibility is offenders who are still serving their sentences in the community context as opposed to the incarcerative context.
Q. So, then, I guess -- I'm obviously not an expert in this area, but based on my understanding of what Probation and Parole does and what SCDC does, at times you all would be responsible for interpreting essentially the same laws, correct?
A. Correct. I mean, you -- for instance, you

would have an offender -- it wouldn't be uncommon to have an offender who had a term of incarceration followed by a term of probation or to have an offender who's serving a sentence who gets paroled, and implementation of those sentences carries over -- the same laws apply to implementation of the sentences whether they're within the community or -- or incarcerated.
Q. Right. So if you had an issue with interpreting a particular law that Probation and Parole was also tasked with interpreting, would there be anything preventing you from reaching out to Probation and Parole and getting an idea of how they're interpreting it?
A. No, sir. I think we -- I -- as I said, in this case I talked to Ben Aplin about the same act that he was looking at, so there's nothing preventing that.
Q. Okay. So you talked to him about the -- the portion of the Omnibus Crime Act that converted 85 percent sentences to parolable offenses?
A. Yes, sir, we did.
Q. Okay. Now, under what circumstances would you be prompted to reach out to Probation and Parole? Were there any formal criteria for when you would do that, or was that just sort of an informal judgment call?

A. It was an informal judgment call. I tried to cultivate a working relationship with my colleagues at -- at Probation and Parole, and if it was an issue that affected, you know, something that they were working on as well as something I was working on, I thought it was appropriate to just pick up the phone and talk.

Q. All right. I want to transition a little bit to a different topic here. Now, we discussed earlier some of the legal research that you did in order to interpret any impact on the sentencing rules imposed by the Omnibus Crime Act. Do you recall that?

A. Yes, sir.

Q. And we looked at several research memos that I guess was the result of your research, correct?

A. Correct.

Q. Now, in general, I guess we -- everybody learns in law school that one of the first things you look for is the general rule that applies to a certain scenario. Right? Is that fair?

A. I don't know if that's the first thing I look for in researching a problem.

Q. Well, what does the general rule mean to you?

A. I guess the general rule would mean to me sort of what's the rule and then what are the exceptions.

So the general rule would be, for instance, that it's generally -- it's generally hot in South Carolina in the summer, but the exceptions are, you know, maybe it's -- you've got a cold front that came through.

Q. Right. So if you're standing in a foot of snow, the general rule that it's usually warm in South Carolina doesn't do you any good, right?

A. Right. Exactly.

Q. And so in any situation, when you're looking at what the rule is, you've got to understand the general rule plus any exceptions to that rule, correct?

MR. ROLLINS: Object to the form.

A. Correct. If you're looking at something that's built on the structure of a general rule plus exceptions, that's correct.

Q. Because if you ignore any exceptions to the rule, you're essentially ignoring the law, right?

A. Well, you can't ignore anything in the law.

Q. Exactly. And exceptions to the general rule would be one of those things, right?

A. If there are exceptions, then you would have to follow those just as you would the general rule.

Q. Okay. What I want to talk about with you is retroactive application of a statute specifically.

A. Okay.

Q. What does that mean?

A. Retroactive application would mean application to -- in the context of sentencing law, it would mean application to offenses that occurred before the act was placed into law.

Q. Right. So for the jury, that means - correct me if I'm wrong - that when the legislature passes a law it applies not only in the future but also to folks who are already sentenced for the offenses that it applied to, right?

A. Yeah. That's retroactive applicability, yeah.

Q. So it's pretty important when determining whether an act affects sentencing rules to look at whether it applies forward and backwards, right?

A. Yes.

Q. Because you could have a bunch of people affected by a statute if it is meant to apply retroactively, correct?

A. I think you would have a large number regardless, but you would have more of -- the impact would be more immediate, let's say.

Q. And, for example, if a statute that required a change from people who are incarcerated for a certain offense to have their sentence changed from 85 percent to parolable and that was to apply retroactively, that

could affect a large number of people in terms of when they were able to be released from prison, correct?

A. It would have an immediate effect, too, because if you didn't -- if it's something applied retroactively -- say that change were to apply retroactively, it's going to take 85 percent offenders and make them no longer 85 percent, and you apply that retroactively to the beginning of time, you're going to have offenders sentenced in, I don't know, let's say 19- -- the 1990s, 1980s who would have substantial changes in their max-out date.

Q. Right. And that would be a bunch of people who if the statute's applied retroactively would get their freedom back, right, presumably?

A. If the statute were to be applied retroactively to that extent, yes.

Q. And that would also get a lot of inmates off the taxpayers' dime in terms of having to pay to have them incarcerated, correct?

A. It would. Overall the taxpayer impact on releasing that number of people without preparing them for release, I don't know whether there's a net gain there, because those individuals wouldn't have the sort of mechanisms that would be ordinarily put into place for release.

Q. Right. But I guess what I'm getting at is the taxpayers would no longer have to pay to incarcerate those folks if they're released from prison, right?
A. Right.
Q. Okay. So it -- again, it's important to -- as far as the impact on taxpayers and to -- the impact on potentially affected inmates to determine whether a statute that changes sentencing rules is to apply retroactively, correct?
A. Yes.
Q. And that's for all the reasons we've discussed, right?
A. Yes.
Q. And one of the things that you looked at as to the Omnibus Crime Act was whether it was to apply retroactively, right?
A. Correct.
Q. And specifically you also looked at whether the portion that -- that converts 85 percent sentences to parolable offenses was meant to apply retroactively, right?
A. Yes.
Q. Okay. Do me a favor and get out Exhibit No. 2, Mr. Florian.
A. Okay.

Q. And just so we can get reoriented, is this the memorandum that you prepared on June 22nd, 2010, to State Classification and Inmate Records?
A. That's correct.
Q. All right. Now, turn with me to Bates number 10033-R-3 at the top of the page.
A. Okay.
Q. All right. That -- as far as retroactive application of the statute, that portion there at the top, which is -- it begins on the previous page under sections 27 through 30. That's all I see in terms of any case law cited for the retroactive application of these provisions unless I'm missing something. Do you see anything else that I'm missing?
A. No, I don't see any other case law cited.
Q. Okay. Now, what -- and as far as the portion of the Omnibus Act that converts the second drug offense from an 85 percent sentence to a parolable offense, would that be under sections 37 and 38 in terms of your analysis in this memo?
A. That's correct.
Q. All right. And do you cite any case law under that section for the proposition that the statute -- as to whether the statute -- that portion of the statute is to apply retroactively?

A. No. There's no case law cited in that section.
Q. Okay. So do me a favor and just hold up for the jury that piece of paper that you're looking at right there.
MR. WHITE: And, Videographer, could you do us a favor and zoom in on the part that says "Sections 37 and 38."
And if he could give us a thumbs up once he's in on it.
THE VIDEOGRAPHER: Okay.
Q. All right. So just so the jury understands, what they're looking at in this piece of paper is the entirety of your analysis as far as what to put down on paper as to whether the statute -- that portion of the statute was to apply retroactively, correct?
A. As far as in this memo, yes.
Q. Right. And that -- there's not even a single case cited under that section, correct?
A. True. But it would be the same case -- if -- yes, that's correct.
Q. Right. And what -- I think -- sorry. I didn't mean to cut you off, but I think what you were about to say is that you were referring back to the Wiesart case that is cited under sections 27 and 30,

correct? You can put that paper down.
A. All right. I was going to say two things. I was going to first say, yeah, the Wiesart case is generally going to give you the principle of when something is retroactive or not. I was also going to add, general purpose of this memo is not to provide exhaustive legal citations for the rules that are being explained here. It was to explain the results of the legal analysis to a nonlegal audience. So there isn't a lot of citation case law in this document.
Q. Well, you do cite a case for the proposition that the statute was not to apply retroactively in one of the prior sections, correct?
A. Yes, that's correct.
Q. So you did cite some case law, right?
A. Yeah. I think that's the only case cited in this document.
MR. WHITE: All right. I want to mark that Wiesart case.
If you'd pass that to her after you look at it, Cliff.
(Florian Exhibit No. 10 was marked for identification.)
BY MR. WHITE:
Q. Mr. -- Mr. Florian, does this appear to be the

Wiesart case that you cited for the proposition that the -- that portion of the statute was not to apply retroactively?
A. It does.
Q. Okay.
A. Yes.
Q. This is the case when you were doing your research that you arrived upon that told you that the statute was not to apply to all those folks sentenced before the Omnibus Act was passed, correct?
A. This is one of the cases I looked at.
Q. But it's the only one that you cited in your memorandum, right?
A. Correct.
Q. If there were other cases that you looked at, we don't have a record of that because the only one we have is a citation to Wiesart, fair?
A. I can't speak to what records other people have, but I don't have any records of other cases I looked at.
Q. Right. So as far as what we have, we don't have any reference to any other cases that you looked at or any proof that you looked at any other cases besides that one reference to the Wiesart case that you're now looking at, fair?

A. I still can't speak to what other people have, and "we" is a lot of people in this room. I can tell you what I -- I have, and I don't have any other records referring to other cases.
Q. Okay. So you're not able to point us to anything else as we sit here today that would prove that you looked at anything beyond the Wiesart case?
A. Yes. That's correct.
Q. All right. So look -- turn with me to the second page of the exhibit. And if you look under the Law and Analysis section. Go to that second paragraph for me.
A. Um-hum.
Q. Just to get us oriented.
A. Okay.
Q. And did you derive the rule that you cited in your memorandum from that paragraph?
A. Yeah. I think I'm -- yes. I'm quoting the first sentence of this paragraph here.
Q. All right. How many sentences total are in that paragraph?
A. Three sentences and a footnote.
Q. All right. So -- and what's in our memorandum is a citation of this case and then essentially a quote of the -- of one of the three sentences in this

paragraph, right?
A. That's correct.
Q. Okay. And we talked earlier about general rules and exceptions to the general rule. Do you see a -- which one of these sentences in this paragraph would -- would constitute the general rule in this situation?
A. That would be the first sentence.
Q. All right. And what does that say?
A. The first sentence says, "Generally, 'statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision in the enactment or clear legislative intent to the contrary.'"
Q. Okay.
A. So to be fair, if we're talking generalities and exceptions, I think the first phrase would be the generality and then after the "unless" you've got an exception.
Q. Okay. And the second sentence, what does that say?
A. So the second sentence says, "Statutes that are remedial or procedural in nature, however, operate retroactively." And then they have a footnote citing to S.C. Juris- -- S.C. Jurisprudence.

Q. Okay. Sorry. Do -- do any one of those three sentences in that paragraph tell us what "remedial" means?
A. No. This case doesn't go into remedial, what that means in this context.
Q. What does the third sentence of the paragraph say, sir?
A. Oh, okay. So here we go. "A statute is remedial and applies retroactively when it creates new remedies for existing rights or enlarges rights of persons under disability." So that expounds upon what's considered remedial.
Q. Okay. So that -- in fairness, the statute gives us a general rule; then it gives us an exception that says that a statute is to apply retroactive when it's remedial in nature, and it tells us what remedial means, correct?
A. Yeah. That's correct.
Q. And the -- would you agree, sir, that a person who is incarcerated is a person under disability?
A. For purposes of whether something is remedial?
Q. No. Just -- it says "enlarges rights of persons under disability" in that third sentence. Correct? That's the sentence you just read to us.
A. That's what it says. I would have to research

whether in this context a person under -- person who's incarcerated is considered a person under disability for purposes of -- of this exception.

Q. Did you research that when you were doing the research as to this issue?

A. I would have looked at whether this statute was remedial in the sense that it created new remedies for existing rights or enlarges rights of persons under disability, and I would have concluded that it was not remedial in nature.

Q. Okay. And do we have any record that -- of that at all?

A. I don't believe so. I mean, aside from that cite in section 30 that we talked about before.

Q. Right. And that in the statute -- I mean, sorry, the -- the citation in the memorandum quotes the general rule but does not reference in any way the exception to the rule that we just talked about, correct?

A. Well, it quotes the general rule and it quotes the exception when there is a specific provision in the enactment or clear legislative intent to the contrary.

Q. Okay. So what the -- what I want to talk to you about here is the -- that third sentence. What does it mean to enlarge rights? Just the plain

language. I mean, do you need to research to understand what "enlarges rights" means?

A. Potentially, but generally what "enlarging rights" means in the context of remedial statutes means if you already have some sort of existing right and it expands upon that right. So, for example, if you had somebody who was entitled to recover a certain amount for civil liability and then you had a statute that expanded the types of damages that could be recovered, that would be expanding that remedy, expanding what could be recovered by that person. So that's an example of a statute operating in a remedial sense.

Q. Okay. And in general terms, do people who are incarcerated have limitations on their rights?

A. Yes.

Q. Okay. They have -- their movements are restricted, fair?

A. Yes.

Q. You know, what they can do is limited by the folks who -- who they are under the control of in prison, correct?

A. Yes.

Q. They can't leave the prison and go do whatever anybody else does in public, fair?

A. Some inmates can be released on work release,

so to some extent they do leave prison facilities, but they aren't free to just go anywhere in public.

Q. Exactly. Even the work release people have limitations on what they're allowed to do when they're under the work release program, correct?

A. Correct. Yes.

Q. And when folks are released from prison and they're no longer under the control of the SCDC, they get at least some portion of the rights back that they didn't have when they were in prison, correct?

A. Yes. That's correct.

Q. So obviously to -- to the jury who's -- who may be watching this at some point, you would agree that when you get more rights, that's an enlargement of rights, correct?

A. Yeah. So here's where you start getting into slippery territory if you start just using an intuitive understanding of what these words mean. When you expand upon rights given under a statute, that's something different from a person's intuitive understanding of my right to move about freely. Does that make sense?

Q. I'm not sure I understand that answer.

MR. WHITE: Could you please read that back.

(The record was read as requested.)

BY MR. WHITE:

Q. Okay. So you would not agree, sir, that an enlargement of someone's rights to liberty or speech or whatever they would get back when they're released to prison, you would disagree that that is an enlargement of a person's rights?

A. I think where we have a disconnect is looking at these criminal penalties as remedial statutes. These are criminal penalties. They're -- the statute that puts forth penalties for drug offenses, 44-53-370(b)(1) and all the other subsections, that's not creating rights; that's creating penalties. And so modifications to those penalties would not be remedial in nature. They're not giving rights. They're setting forth penalties.

In addition to that, the act actually contains a savings clause, which sets forth what offenses it applies to. So here we have in that first sentence specific provision in the enactment, clear legislative intent. We have that.

Q. Sir, this -- the case that we're looking at right now, just to get us reoriented, this is the case you went to in trying to determine whether the sentencing rules that were changed by the Omnibus Act applied retroactively, correct?

A. Well, I was looking there at section 30.
Q. Well, no. What -- I see what you're saying. You're going back to the savings clause. What I'm getting us to here is I just want to make sure that everyone understands that the case that we're talking about, the -- the case you have in front of you, the Wiesart case --
A. Um-hum. Yes.
Q. -- that's the case that you went to to determine what the answer was on whether the Sentencing Act changes applied retroactively, correct?
A. It's the case I used when I was explaining section 27 to 30 to --
Q. And then what you incorporated by reference when discussing sections 37 and 38, correct?
A. I don't refer to it in sections 37 and 38. I mean, I looked at whether this law was retroactive, but I don't incorporate by reference anything into this document. It's not intended as a legal document in the sense of one incorporating by reference into a contract or a complaint.
Q. So which case did you look at or which rule did you look at, which legal opinion did you look at apart from the Wiesart case to determine whether the sentencing changes applicable to the second drug

offense were meant to apply retroactively or not?
A. So I would have looked at Wiesart.
(Interruption by the reporter.)
MR. DAVIDSON: Objection to the form.
THE WITNESS: Sorry.
I would have looked at the Wiesart case. I would have looked at other cases connected with this in Westlaw, potentially. I would have basically done a search in Westlaw on retroactivity and looked at its exceptions. And I would have looked at the act itself and what the legislature intended. I mean, you can see that in -- in the Wiesart case, which is also citing other cases here, where they indicate that legislative intent is something that you need to consider in whether something's retroactive. So I would have looked at the act itself as a -- as a starting place.
BY MR. WHITE:
Q. Okay. And I think I understand now. What I thought you were saying was that Wiesart only applied to whether criminal penalties were retroactive as opposed to anything that affected sentencing rules, and I think I now believe we're on the same page that the principles in Wiesart do apply to the retroactivity of sentencing rules, which is why you, I guess, looked at Wiesart for insight into what the rule was. Is that

correct?
A. I think I looked at Wiesart because I was explaining -- I do want to explain this, because I think it's unclear in our questioning. When I cite Wiesart, it's in the section where I talk about creating eligibility for work release. That's what sections 27 through 30 talk about. It's creating an additional entitlement to work release. It's that context I'm citing Wiesart in, because expanding a person's entitlement to work release is something that's more akin to expanding a right rather than changing a criminal penalty.
Q. So it would give someone the right to work release, which is a right that they ordinarily would not have before the law was passed?
A. Correct. I mean, well, right, it changed the laws as it applies to work release. Yeah.
Q. Okay. And work release, if someone is eligible for work release when they weren't eligible for it before, that would be an enlargement of that person's rights, correct?
A. Yes.
Q. All right. So the parole eligibility for section 37 and 38 offenses would then also be a new remedy for those people -- or in other words, it would

be a new right for those people they didn't have before the law was passed, correct?
A. It -- it would be a new eligibility. It would change the punishment for that offense by making them eligible for parole.
Q. Right. Which would be an enlargement of those people's rights, correct, sir?
A. Parole is not a right. I'm struggling on that, because -- eligibility for parole is a right. So to that extent, yes.
Q. Now, back to the language of Wiesart. And I don't -- I understand what you're saying, is that when you see the word "remedial" it means something to you -- other than something in this context, it means something that suggests that it deals with criminal penalties. I understand that. My questioning is going to be limited to essentially the plain language of this case. So go with me back to Wiesart.
A. Okay.
Q. I only want to confirm that when you read the third sentence of the paragraph that we've been talking about, "A statute is remedial and applies retroactively when," that it's clear to you as a trained lawyer that that is going to tell you what "remedial and applies retroactively" means if you read the rest of the

sentence. Is that fair?
A. Yes. But if I were to -- if I were researching remedial, I would want something that was an example of that to expand on it. For instance, this case in the next paragraph continues by holding a specific amendment was procedural in nature and expands on why. So if you were researching whether something was remedial or not, you would want a similar case that expanded on that, that one sentence, which gives it some context in a factual situation, when is something remedial.
Q. And you would -- and we've already talked -- we don't have that other case in this scenario if we're looking only at cases you cited in the process of explaining to people the results of your research, correct?
A. Right. We don't have another case in front of us to look at right now, but if I were researching this, as I was for purposes of understanding this act, I would have looked at that.
Q. All right. Now, all I want to do is continue reading the rest of page 3, and basically what I want to -- to do is to determine whether the words that complete sentence number three are confusing at all. "Creates new remedies for existing rights or enlarges

rights of persons under disability."
Now, what I want to talk about is -- and you would agree that there are two scenarios where something could be remedial and apply retroactively. The first is if it creates new remedies for existing rights, and the second is if it enlarges rights of persons under disability. That's what "or" means in this sentence, right?
A. Yes.
Q. All right. So the first scenario in which the exception to the general rule, the statute would apply retroactively, that would kick in if the statute creates new remedies for existing rights, correct?
A. Correct.
Q. That's when we would conclude --
MR. DAVIDSON: Objection to the form.
Q. All right. The -- the second scenario, if we were reading just the plain language of this sentence, that would indicate that the statute would be retroactive is if the statute enlarges rights of persons under disability, correct?
A. Correct.
Q. So if either one of those things are true about the statute, then it is to apply retroactively?
A. Yes.

Q. And I have -- are you familiar with Black's Law Dictionary?
A. Of course, yes.
Q. Have you ever gone to Black's Law Dictionary to determine what a word means in a legal context?
A. Sure. Yes.
Q. I'll -- I'll represent to you that I just looked up the word "disability" under Black's Law Dictionary, and if you want to look at my computer, you can, but I'll just first ask you if you agree or disagree with the definition that I have here. What I have for the definition of disability is "The want of legal ability or capacity to exercise legal rights ... or to do certain acts with proper legal effect or to enjoy certain privileges or powers of free action."
Do you agree with that definition or do you disagree with that definition of disability?
A. Well, I'm not going to argue with Black's Law Dictionary as to what a word means.
Q. Okay. So if you were to go to Black's Law Dictionary and find that definition of the word "disability" had you wanted to know what it means, that's -- that is a source that would have given you information that you could have relied on in determining what that word meant, correct?

A. Yes. But I would also want to know what it means in a South Carolina court in this context.
Q. All right. And if we're just looking at the plain language of this sentence, enlarging rights of people, you would agree that if a person is given liberty rights that they wouldn't have had otherwise, if they're released from prison and they can exercise all the rights they didn't have on the inside that they now have on the outside, that, sir, would be an enlargement of those people's rights, correct, if we're just going with the plain language of the sentence?
A. Again, it would expand their ability to move around freely, yes. But again, I would want to know what this -- what a South Carolina court would -- how a South Carolina court would construe this phrase "enlarges rights of persons under disability," because the interpretation of -- anytime you change sentencing law, anytime you change sentencing law, you're going to change the rights of a person sentenced, and if you read it that broadly, then all changes to penalties -- all changes to criminal penalties, sorry, would be retroactive, remedial in nature, and that would -- that proves too much, because we intuitively know that most changes to criminal penalties are not remedial. So I'm cautious about your interpretation. I would do more

research before I -- I took the position that you're taking here.

Q. Right. And I'm -- I mean, I'm literally reading the words of the third sentence in this paragraph, and --

A. I -- go ahead.

Q. Sorry. I was just going to say, if we're relying on just the plain language of the end of this third sentence in the -- you know, this three-sentence paragraph in the case you relied on, if we're relying on just that plain language, that would tell you exactly what you said, that the changes to this Omnibus -- or the changes to the sentencing rules imposed by the Omnibus Act were to apply retroactively, correct?

A. I would not rely on one paragraph, in this case what lawyers refer to as dictum, because this case isn't actually examining whether this particular statute that they're talking about is remedial. I wouldn't rely on this to reach that conclusion. I think you would have to do more research.

Q. Well, let's say you do more research and you don't find anything beyond the plain language of this sentence. This sentence, if you rely on only the plain language of this sentence for the reasons we've talked

about, the portions of the Omnibus Crime Act that could potentially cause people to be released sooner than they would otherwise be released is to be applied retroactively, fair?

A. I have a hard time with your assumption, because it's unrealistic. It's unrealistic that there's no other case law in South Carolina on what -- when a statute is remedial.

Q. Right. And -- and I want to get to that in a second. But -- but what I'm saying is as far as the plain language of this statute -- or the plain language of this sentence, if that's all we're relying on, we have to conclude that the changes to the sentencing rules under sections 37 and 38 were meant to apply retroactively, which I understand why you're saying that wouldn't be realistic and that would cause maybe some logistical problems and would have a broader effect on a bunch of different statutes, but what I'm getting at is, If we are only applying the statute based on these -- the plain language of the words at the end of that third sentence, we have to conclude that the statute is to apply retroactively, correct, sir?

MR. ROLLINS: Object to the form.

MR. DAVIDSON: Object as to the form.

A. A cautious lawyer would never rely on this one sentence. A cautious lawyer would see this and have questions, have other issues that need to be researched, and if they came to the conclusion that this was the one sentence that existed in South Carolina Jurisprudence, I think I would conclude that the research was insufficient, because there is more out there. The questions that I -- I would ask if you were just relying on this one sentence, okay, we have "unless there is a specific provision in the enactment or clear legislative intent to the contrary." Okay. Well, we -- here we have some indication of legislative intent. We have a savings clause. How does that play out in this context?

Q. Does the savings clause say that sections 37 and 38 are not meant to apply retroactively?

A. It says -- I don't have it in front of me, but it says essentially that existing penalties and offenses are saved as of the date of the enactment of this law.

Q. Okay. Well, the -- so under -- under your memo on section 37 and 38, you indicate -- and feel free to look back at it, Bates label 10033-R-3. If you look at that first paragraph as -- you know, the last sentence in that paragraph, "As with many other

sections of the Act, because nothing in the language of this section indicates the changes apply [sic] retroactively, this change should only be applied to offenses occurring after June 2, 2010." Do you see that?

A. Yes.

Q. And obviously if there was a savings clause in the act that said sections 37 and 38 are not to apply retroactively, you of course would have included that in your analysis, correct?

A. Not necessarily. There is a savings clause, and I don't cite it here, and this is not a legal audience. I'm just telling them how the act should be construed. So I wouldn't necessarily cite to them all the authority that I reached -- that I looked at or researched to reach my conclusion. I'm setting forth the conclusion. This is, you know -- this is a nonlegal audience. I'm presenting information for them, and I've already got a six-page legal memorandum on what they've got to do. The last thing they want to wade through is a bunch of legal citations to figure out what they have to do.

Q. All right. So I'll move on past the plain language in this sentence, but I just want to make sure that your testimony today, sir, is that "enlarges

rights of persons under disability" does not -- does not mean a scenario when people get more rights as a result of the passage of a statute than they had before the statute was passed.
A. Can you -- can you repeat your question? I'm not sure I followed.
Q. No, that's fine. I want to make sure I understand your testimony, because what -- what I was asking you is if when someone is entitled to freedom earlier than they would have before the passage of the act --
A. Right.
Q. -- if that was an enlargement of their rights, and my understanding of your testimony is that you disagree with that, that that would not be an enlargement of their rights. Am I wrong about that?
A. I think what I'm saying is I would want to research that question further.
Q. Okay. So what did you research to determine whether -- whether the rule is that this act applies retroactively because it enlarges rights of persons under disability or whether there's case law out there that says that that doesn't apply in this case? Where -- where is that case law?
A. So I think I would have looked at two issues.

I would have looked at given the specific language of this act, including the savings clause, would that -- what impact does that savings clause have on whether the statute applies only prospectively or retroactively. That's one thing.
And then the second thing I would have looked at is, okay, we have a general rule and then we have two exceptions. We're talking about the remedial exception. I would have looked at that. I would have looked at the procedural section. And I would have looked at both -- both of those exceptions, and I would have looked at those to see how they play out in this context. I would have looked at case law in both of those.
What cases I looked at I don't know at this point. It's been more than seven years, and those cases are lost to time, but those would have been the issues that I would have looked at.
Q. All right. So in terms of your research on this issue, we have the Wiesart case, right?
A. We do.
Q. Okay. That's what you've got in your hands right there, correct?
A. Yes.
Q. All right. Now, the -- the first issue that

you would have looked at as far as whether the savings clause in the Omnibus Act applies to other sections in the Omnibus Act, including sections 37 and 38, you're not -- as far as what was in your research file that you looked at, was there any evidence that you actually performed any research on that first issue that you indicated you would have looked at?
A. The point of my research file was just to -- they happened to be documents that I printed because I needed to carry them with me, so no, there wasn't, but that's not surprising. I didn't print cases as I looked at them.
Q. Right. So as far as documents we have and documents you're going to be able to show this jury who could be ultimately watching this video, you're not going to be able to point them to any such documents that are evidence that you researched that first issue at all, correct?
A. Right. I don't have any documents that show that I researched that issue, but I did research it.
Q. Okay. And that's -- and do you -- and -- and again, that's based on your recollection as we sit here today based on what you did six years ago right, or however many years ago?
A. Yes. More like seven years.

Q. Okay. And you can't -- you can't recall off the top of your head exactly any of those cases that you researched, fair?
A. Right. That's correct.
Q. Okay. On the second issue that you indicated that you would have researched after reading this paragraph, similarly you're not going to be able to point this jury to any evidence or documents that you looked into that second issue whatsoever?
A. Well, I can tell you that that would have been my practice, and to me my existing practice as a lawyer would be evidence, but as far as documents, I don't have any documents.
Q. But we know -- we know you looked at the Wiesart case because you -- and you held that up for the jury earlier, right?
A. Right. We know I looked at it because I cite to it here.
Q. Yeah. We have proof of that. Correct?
A. Yes.
Q. We do not have any such similar proof or any documents or evidence suggesting that you looked into the second issue that you said that you would have looked at, correct?
MR. ROLLINS: Object to the form.

A. Again, I don't -- I can't speak for what documents other people have, but I don't have any such documents.
Q. Right. You personally, Mr. Florian, can't point the jury to any such documents, correct?
A. Right. Right. Exactly.
Q. I'm almost done. Give me just a second here.
Mr. Florian, I believe you -- you were mentioning earlier sort of the general orientation that you went through when you first started with SCDC. Do you recall that?
A. I do.
Q. And you mentioned that a lot of it was safety, interaction with inmates, things like that, right?
A. Yup. That's correct.
Q. And it's important for folks who are going to be working in a prison to understand how to safely deal with inmates and how to make sure that they're protected, I guess. That's the purpose of the training, right?
A. Yes. It's -- I would say it's protecting inmates and protecting security and generally being able to respect rights of inmates. It's wide-ranging training. It's -- you know, it's 40 hours of training.
Q. Right. And -- and I guess what I'm getting to

here is that a prison oftentimes is not a pleasant place, right?
A. I think that's fair.
Q. And, I mean, you've got criminals that are in prison for all sorts of offenses ranging from murder to drug offenses to whatever, right?
A. Correct.
Q. And a lot of times or some degree of the time those prisoners decide to harm each other, right?
A. Certainly inmates are assaulted sometimes, yes.
Q. Right. It's not unusual for you to see inmate-on-inmate assaults with weapons, right?
A. I don't have any firsthand experience with this, so -- I was based at the headquarters. I didn't work in prisons day to day. I never witnessed any assaults. I know that assaults occurred.
Q. Yeah. That's what I'm getting at. I mean, I realize you weren't there boots on the ground in the prisons, but you were aware that inmates would at times assault each other with weapons, right?
A. Yes. I'm aware that occurred.
Q. Inmates, you know, could sexually assault each other, right?
A. Yes, I'm aware that that -- that occurred from

time to time as well.
Q. Inmates are known to have murdered each other -- murdered another inmate. Obviously not each other, but --
A. Right. Yes.
Q. So prison, I guess, for folks who are incarcerated can be a very dangerous place, right?
A. Well, it's the Department's responsibility to ensure the safety of those people within its custody.
Q. Right. And even if the Department does everything that they can to try to make things as safe as possible for the inmates, these bad things still can happen, right?
A. Yes. It's possible -- I mean, the Department is attempting to create a safe environment, and bad things will still happen sometimes.
Q. And so folks -- I guess all I'm trying to make sure the jury understands is that prison can be a very dangerous place, right, for folks who are incarcerated there?
A. Yeah. I just don't want to overplay that. I mean, sure, people have been assaulted in prison from time to time, but by the same token, I -- I've been in many of the prisons within the state. I walked around. I -- I was safe while I was doing that, and there are

plenty of inmates who are -- serve their time and are not assaulted, so --
Q. Right. But there -- and there are dangers in prison that are not present when someone is released from prison and just a normal member of the public, fair?
A. It's different, yes.
Q. Okay. And when someone is entitled to be released from prison, that, I guess, takes them out of the situation where those dangers are present and puts them back in the public and -- where those dangers are not present, right?
A. So it changes their situation. In some respects people have different, you know, challenges that they must face in the outside world. We all confront risk in our day-to-day lives. The risks of being incarcerated look a little different from the risks of being out in the world.
Q. Exactly. I think we're saying the same thing. And what I'm getting at is, If someone isn't -- if SCDC is, you know, ordered by a court or the legislature or, you know, whatever body with authority to release an inmate into the public and allow them to become a member of the public, SCDC's required to do that, right?

A. That's correct.
Q. And by doing that, SCDC would take the -- would make that person a member of the public and take them out of that dangerous situation, right?
A. So it would take -- basically by releasing somebody from prison, you're taking them out of the prison population and you're putting them in -- into whatever their situation is going to be at large, and for different people that looks different.
Q. And if SCDC fails to release someone when they're supposed to, that would be placing the affected individual in needless danger, correct?
MR. ROLLINS: Object to the form.
A. It would be keeping them in custody longer. Again, I don't want to overplay the risks of being incarcerated. It depends on an individual's circumstances.
Q. So you disagree that keeping someone in longer than they're supposed to be in places that individual in needless danger?
A. I think it depends. I mean, I think, you know, the Department's responsible for keeping people safe, and they -- they do their best to achieve that goal. When a person is released from custody, keeping yourself safe becomes the responsibility along with

whatever public protections you would -- you have. To some extent your safety as a member of the public varies with what you can provide for yourself.
Q. Right. But certainly SCDC would never be entitled to needlessly endanger any member of the public, fair?
A. Well, no one's entitled to needlessly endanger members of the public.
Q. Right. And if -- if someone does needlessly endanger the public, then that person should obviously be punished, correct?
A. Yes. If -- it's an expansive term, "needlessly endangering." It may impose civil liability. It may impose criminal liability. But it would have repercussions.
Q. Right. In any event, that's something that should be discouraged, needlessly endangering the public, right?
A. I think that's fair.
Q. And I've just got a couple more questions here. I represent a gentleman named Christopher McDowell. Do you know anything about Christopher McDowell?
A. I do not.
Q. Do you -- I represent another individual named

Henry Belton. Do you know anything about Henry Belton?
A. No, I do not.
Q. I also represent someone named Larry Hampton. Do you know anything about Larry Hampton?
A. No.
Q. I also represent an individual named David Payton, Jr. Do you know anything about Mr. Payton?
A. No, sir.
Q. I also represent a gentleman named Michael Smoak. Do you know anything about Mr. Smoak?
A. No, sir.
Q. But any of those guys, whenever they're entitled to be released from prison, SCDC does not have the right to keep them any longer than they're supposed to be in, correct?
A. Correct. The Department's role is to carry out the sentences that have been imposed in accordance with the law.
Q. And if you -- if those gentlemen -- if any of those gentlemen that I named were kept in too long because of something that SCDC did, should those individuals be fully compensated?
A. I can't --
MR. DAVIDSON: Object as to form.
A. I can't speak to any compensation that they

would be entitled to receive. They would -- they should -- people should be released on their release dates in accordance with the law.
Q. Right. But are -- if someone is -- is wronged, should they be compensated less than full compensation, or are they entitled to full compensation?
MR. DAVIDSON: Object as to form.
A. I think a person is entitled to whatever compensation is provided for under the law.
Q. Okay. And if the law is that they should be fully compensated, would you agree that they should be fully compensated?
MR. DAVIDSON: Object to the form.
A. I can't really speak to what compensation a person would be entitled to receive. It's not up to me, essentially.
Q. If it were up to you, would you want -- would you believe that someone should be compensated something less than full compensation, or would you expect that they would be entitled to full compensation if they were wronged as we've discussed?
MR. ROLLINS: Object to the form.
MR. DAVIDSON: Same objection.
A. So from my perspective a person is entitled to

whatever remedies they're entitled to under the law. I don't think it's a judgment call.
Q. All right. And, Mr. Florian, how much money would it take to get you to spend a year in general population in one of SCDC's prison facilities?
MR. ROLLINS: Object to the form.
MR. DAVIDSON: Same objection.
A. I wouldn't spend a year in the general population.
Q. There's no amount of money that would get you to spend a year in general population in SCDC, fair?
MR. ROLLINS: Object to the form.
A. That's correct.
Q. I mean, a million dollars wouldn't do it, right?
MR. ROLLINS: Object to the form.
A. I -- I'm not -- I wouldn't -- I'm not interested in money. I'm interested in -- in my time, and I wouldn't want to spend my time that way.
MR. WHITE: All right. I do not think I have any further questions at this time. Mr. Florian, please answer any questions that any other lawyers in the room have.
MR. ROLLINS: And this is Cliff Rollins.
MR. DAVIDSON: You all want to take a break --

you all want to take a break or you all want to go ahead?
MR. ROLLINS: Well, I'm going to ask one or two and then we can take a break if you want.
MR. DAVIDSON: Okay. All right.

EXAMINATION

BY MR. ROLLINS:
Q. This is Cliff Rollins. As you know, I represent you in this case, Chris. Just -- just a few things.
Mr. White just talked with you extensively about the Wiesart case, and he referenced -- you were asked a large number of questions about the plain language that was set forth in that case. Were you asked to do sort of a layman's analysis of the act, or were you asked to do a legal analysis of the act?
A. I was asked --
MR. WHETSTONE: Object to the form of the question.
A. I was asked to do a legal analysis of the act.
Q. Okay. And with regards to the questions about whether -- what amount of money you would or would not accept to do time in SCDC's custody, whether you do custody in SCDC's time [sic] is based on whether you have been convicted of a criminal offense or not; is

that correct?
MR. WHETSTONE: Object to the form of the question.
MR. WHITE: Join.
A. That is correct.
MR. ROLLINS: All right. I don't have anything further.
All right. Will, the -- I think we would like to take a short break.
MR. DAVIDSON: That's fine.
MR. ROLLINS: All right.
THE VIDEOGRAPHER: Okay. We're going off the record. The time is 12:12.
(A recess was taken.)
THE VIDEOGRAPHER: We're back on the record. The time is 12:17.

EXAMINATION

BY MR. DAVIDSON:
Q. Mr. Florian, my name's Will Davidson, and I represent the Department of Corrections and Director Stirling.
My understanding from your testimony is that when you began to work at the Department of Corrections Mr. Tatarsky charged you with the task or duty of becoming familiar with the sentencing laws in the state

of South Carolina. Is that correct?
A. Yes, sir.
MR. WHETSTONE: Object to the form.
Q. Would I also be correct that over a period of time as the person charged with -- with reviewing the sentencing laws and interpreting those sentencing laws, you received calls from outside sources asking questions about such laws?
MR. WHETSTONE: Object to the form.
A. Yes, that's correct.
Q. Who all would call you and ask you questions or ask for your assistance in interpreting statutes dealing with sentencing?
A. I received calls from attorneys for offenders; I received calls from solicitors and assistant solicitors; I received calls from sentencing judges who needed to make sure that their orders were going to be -- that they were drafting an order that would be understood by the Department of Corrections.
Q. All right. And you said you actually did some training. Is that correct?
A. That's correct.
Q. Did you appear before any outside groups and give them training or overviews of the various sentencing laws that were in effect in the state of

South Carolina?
A. Yes, sir. I presented at the solicitors' conference; I presented for the public defenders' conference on multiple occasions; I presented CLEs in Columbia for members of the bar in general; I believe I may have even presented at one of the judicial conferences.
Q. All right. Now, part of the duties of the Department of Corrections is to implement the sentences handed down by the judiciary; is that correct?
MR. WHETSTONE: Object to the form.
A. That is correct.
Q. Part of that duty is to be able to interpret and implement the various statutes that deal with such sentencing?
MR. WHETSTONE: Object to the form.
A. That's correct.
Q. Is that correct?
A. Yes, that's correct.
Q. Now, do you happen to have the red-line version of S. 1154, which I believe is SCDC000846, the Omnibus Act, with you?
MR. ROLLINS: Hang on a minute. Give me that number again, please, Will.
MR. DAVIDSON: It's your Bates number, Cliff,

846.
MR. ROLLINS: 846 through -- how far do we go, Will?
MR. DAVIDSON: 846 all the way through 940, although I'm not going to use the whole thing.
MR. ROLLINS: All right.
MR. DAVIDSON: 941.
MR. ROLLINS: Do you want it marked?
MR. DAVIDSON: All I want marked is page 846.
MS. PERKINS: Can we review that since we don't have a copy?
MR. ROLLINS: Sure. Pass it down the line. These are your designated deposition exhibits.
MS. PERKINS: Okay. Oh, I do have that.
MR. ROLLINS: Yeah.
MS. PERKINS: Okay.
MR. ROLLINS: This is number 4 in your designated set.
MS. PERKINS: I gotcha. I thought he was giving the -- that weird Bates number.
(Florian Exhibit No. 11 was marked for identification.)
BY MR. DAVIDSON:
Q. Mr. Florian, this is the actual bill that was what we've been referring to as the Omnibus Act,

correct?
A. Correct.
Q. All right. And section I sets forth the title and also the intent of the legislature, does it not?
MR. WHETSTONE: Object to the form.
A. Yes, sir.
Q. All right. And if you don't mind, read what the legislature set forth as the intent of this act.
A. It says the legislature says, "It is the intent of the General Assembly to preserve public safety, reduce crime, and use correctional resources most effectively."
Q. All right. And then the last sentence, if you don't mind, sets forth what the purpose of the act is, does it not?
A. Yes, sir.
Q. What does it say?
A. "It is, therefore, the purpose of this act to reduce recidivism, provide fair and effective sentencing options, employ evidence-based practices for smarter use of correctional funding, and improve public safety."
Q. Fine. Would you agree with me that in implementing this act and for that matter in implementing the sentencing statutes of the State of

South Carolina, that the Department of Corrections is performing a public duty to the citizens of the state of South Carolina.
MR. WHETSTONE: Object to the form of the question.
A. Yes, sir.
Q. All right. Now, my understanding also is that when you were tasked with essentially reviewing this statute, the Omnibus Act, you read the existing laws, the new act, and then began doing legal research?
MR. WHETSTONE: Object.
Q. Is that correct?
MR. WHETSTONE: Object to the form.
A. Yes, sir, that's correct.
Q. All right. And as a result of that, you analyzed the various legal documents and came up with what your opinion of the act meant in regard to what we've been referring as the 85 percent rule; is that correct?
MR. WHETSTONE: Object to the form.
A. Yes, sir, that's correct.
Q. And during that process, you would have analyzed the various statutory sections and interpreted the various case law in regard to those statutes, correct?

MR. WHETSTONE: Object to the form.
A. Yes, sir, that's correct.
Q. When you did that, were you using your legal judgment?
MR. WHETSTONE: Object to the form.
A. Yes, sir.
Q. Okay. Were you exercising your analytical abilities in coming up with the opinions you had?
MR. WHETSTONE: Object to the form.
A. Yes, sir.
Q. And during that process, you essentially made the judgment call that the act that we've been talking about had certain implications for the Department and the inmates in regard to the 85 percent rule, correct?
MR. WHETSTONE: Object to the form.
A. Yes, sir, that's correct.
Q. Do you -- I think Mr. White asked you about knowing his inmates. Do you know Mr. Marion Campbell?
A. No, sir.
Q. Do you know any of the inmates that were ultimately implicated in the Bolin decision?
A. No, sir, I do not.
Q. When Mr. Tatarsky tasked you with reviewing this act, you had the ability to come up with what you felt was right about the statute in your

interpretation?
MR. WHETSTONE: Object to the form.
A. Yes, sir, that's correct.
Q. In coming up with the opinions regarding the Omnibus Act, were you attempting to assist the Department to be in compliance with the new statute?
MR. WHETSTONE: Object to the form.
A. Yes, sir.
Q. Did the decisions regarding the Omnibus Act have implications in regard to the release or discharge of inmates who were in the custody of the Department?
MR. WHETSTONE: Object to the form.
A. Yes, sir, they did.
Q. How?
A. Various parts of the Omnibus Act changed how offenses would be interpreted and implemented for affected offenses.
Q. Just one second.
MR. DAVIDSON: That's all the questions I have. Thank you.
MR. WHETSTONE: Nothing further from me.
MR. WHITE: I have a couple follow-ups based -- I just have a couple follow-ups based on Mr. Davidson's questioning.
/ / /

EXAMINATION
BY MR. WHITE:
Q. Mr. Florian, Mr. Davidson asked you if -- I think -- I don't recall the exact wording of the question, but it was something to the effect of the legislative intent of the Omnibus Act was -- was to carry out a public duty to the citizens of South Carolina, correct?
A. So he asked me to read from section I of the act, which sets out the intent, which I -- I read for him.
Q. Actually, I think I was mashing two things together. I think what he -- what I'm referring to is he asked that part of what SCDC does is they carry out a duty to the citizens of South Carolina. Correct?
A. I think -- I think he referred to that public duty.
Q. Yes.
A. Is that what you're referring to?
Q. Yes.
A. Yes.
Q. Exactly.
A. Yes.
Q. And when folks are incarcerated, are they still citizens of the state of South Carolina?

A. Yes, sir.
Q. They don't have their citizenship revoked because they're in the custody of SCDC, correct?
A. No, sir.
Q. So if SCDC has a public duty to the citizens of South Carolina, that would extend to individuals who were in their custody as inmates, correct?
A. Yes, sir.
Q. And if someone is entitled to be released from prison and out into the public, obviously SCDC is not entitled to keep them there any longer than they're supposed to be, right?
A. Correct.
Q. And basically you have a duty to release that individual out into the normal public once they're no longer supposed to be incarcerated, correct?
A. To release them to whatever -- in compliance with the law. They may be released on a detainer or something like that.
Q. And -- and at the time that you were tasked with evaluating the application of the Omnibus Act on sentencing rules, the -- the affected inmates had a clearly existing constitutional right to be released by SCDC at the time they were supposed to be released in general, right?

A. Right.
MR. DAVIDSON: Object as to form.
A. So just -- I think -- I think I agree with you, but I want to make sure -- I'm going to restate it. So inmates are entitled to be released on their release date as ordered by the sentencing judge and in compliance with the law.
Q. Exactly. And what I'm getting at is that's true today and that was true at the time that you were tasked with researching the application of the Omnibus Act, correct?
A. Yes, sir.
Q. And those inmates had -- they have today and they had at that time a clearly existing constitutional right to be released on their release date, correct?
MR. DAVIDSON: Object as to form.
A. Yes, they have a -- they have a right to be released on their release date.
Q. Okay. And "have" implies present. That also was true at the time you were tasked with researching the issue, correct?
A. Correct.
Q. And if someone is supposed to be released pursuant to applicable law, you don't have the discretion -- you neither anyone else at SCDC has the

discretion to say that that person can't be released, correct?
A. Correct.
Q. And if the words of a statute are clear and they say that a person is to be released, you don't have the discretion to go against that -- the plain words of the statute and keep someone longer than they're supposed to be, correct?
MR. ROLLINS: Object to the form.
A. Correct.
MR. DAVIDSON: Object as to form.
Q. And if the -- let's say that the applicable law -- well, let me back up.
For the jury, there's a -- there's a few different sources of law. There's statutes, which are passed by the legislature, right?
A. Correct.
Q. And another source of law is law that's made by judges which is written down in black and white and it's judicial opinions that also tell us what the law is, correct?
A. Correct.
Q. And if a holding in a -- or if the words in a judicial opinion say this is the law and what the judicial opinion says is clear and unambiguous, you

don't have the discretion to deviate from that clear and unambiguous law, right?
A. Correct.
MR. DAVIDSON: Object as to form.
A. Although you would need to ensure that the judicial opinion was still good law in that judicial opinions can be -- rulings in judicial opinions can be modified by subsequent rulings or legislative enactments.
Q. Right. Absent the exceptions, you would agree that if the case is still good law and the holding is clear and unambiguous, you don't have the discretion to deviate from that clear and unambiguous holding, correct?
A. Correct.
Q. So really if the law is clear and unambiguous, there is no discretion involved for you or anyone else at SCDC; you're just -- you just have to follow the law, right?
A. Correct.
MR. DAVIDSON: Object to the form.
Q. And -- and so if the clear and unambiguous law says that someone has to be released on a certain date, neither you nor anyone else at SCDC has the discretion to go against that, correct?

A. Correct.
MR. DAVIDSON: Object to the form.
MR. WHITE: Okay. I don't think I have any more questions. Thank you, Mr. Florian.
THE WITNESS: Yes.
MR. ROLLINS: We're done.
THE VIDEOGRAPHER: All set? Okay. That concludes the -- this deposition of Chris Florian. We're going off the record, and the time is 12:37.
THE REPORTER: Counsel, would you state your transcript orders on the record, please.
MR. DAVIDSON: This is Will Davidson in Columbia. I would like to receive a copy of the transcript by E-Tran and with the exhibits PDF'd.
MR. ROLLINS: I'll duplicate Will's order.
MR. DAVIDSON: And I'll let -- I'll let Cliff get a copy of the video and I will -- okay?
MR. ROLLINS: All right.
MR. WHITE: I just want E-Trans right now and then also I guess we'll take a synced copy of the video.
MS. PERKINS: We would like a bound with exhibits and an E-Tran and the synced video.
(The deposition concluded at 12:37 PM.)
(Review of the transcript was not requested.)

CERTIFICATE

I, Johanna Massé, RMR, CRR, Court Reporter and Notary Public, do hereby certify that the foregoing pages, numbered 4 through 140, inclusive, are a true and accurate transcription of my stenographic notes of the Deposition of Christopher D. Florian, who was first duly sworn by me, taken before me on Thursday, October 19, 2017, commencing at 9:04 AM, in the matter of Marion Katrell Campbell, etc. v. South Carolina Department of Corrections, et al., C.A. No. 6:16-cv-03265-MGL, and Christopher McDowell, et al. v. Bryan P. Stirling, et al., C.A. No. 2:16-cv-03379-TLW-MGL, as to which a transcript was duly ordered. Review of the transcript was not requested

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties to the action in which this transcript was produced, and further that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in this action.

JOHANNA MASSÉ, RMR, CRR
Comm. expires: 2/10/19

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REQUESTED INFORMATION INDEX

(No Information Requested)

EXHIBITS

EXHIBITS
(Continued)

(The original exhibits were included with the original transcript.)

EXHIBIT F

(EMAIL OF GEN. COUNSEL BUCHANAN)

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South Carolina Department of Corrections
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Phone: (803) 896-1738
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3-23-16 E-mail from Matthew Buchanan, General Counsel at PPP:

Christie:

I'm going to try to sum up the various conversations and events that led PPP to decide to treat the changes to S.C. Code 44-53-370 and -375 as retroactive regarding parole eligibility.

As I told you earlier, I had not been aware that it had previously been decided to treat the sentencing date as the relevant date when determining parole eligibility. So when I saw parole eligible cases that had offense dates prior to the Act, then I had assumed the change had been applied retroactively. Furthermore, while I later learned that SCDC had set up their system to reflect the initial change, PPP had not memorialized that initial decision anywhere that I could see.

So as a result, inmates were being determined by PPP to be parole eligible despite SCDC's categorization and were given parole hearings. This entire issue came to light around June of 2015, when Inmate Gregory Brookins (SCDC #295747) was awarded parole by the Board. PPP was prepared to issue a parole certificate, but the system balked because he was listed as being a no-parole offense. After some searching (and contacting Ben Aplin, who didn't recall what was decided, though he leaned toward thinking it was retroactive), Dan Crooks was able to find Chris Florian's memo outlining the retroactivity based on sentencing date. Although initially decided to stick with the ruling, I anticipated Mr. Brookins would appeal (because he was given parole but then rescinded because of this). I instructed my office to do an exhaustive analysis of the Sentencing Reform Act to decide whether this should be considered fully retroactive.

The result was the memo I've attached to this email, concluding that most likely the parole eligibility part of the Act was meant to be retroactive. The conclusion was based on several factors: The stated intent of the Act to reduce prison populations; the use of the phrase, "Notwithstanding any other provision of law" in the relevant section; and the Savings Clause exception for when "the repealed or amended provision shall so expressly provide."

After serious deliberation, PPP decided to treat the Act as fully retroactive for the drug offenses under Sections 44-53-370 and -375. This meant that Mr. Brookins would need to be paroled out, and after some technical issues with the system being willing to produce a parole certificate, he was released to parole in November, 2015.

After Mr. Brookins was released, I worked with Dan to have the full changes implemented in both agency systems. (See the email exchange with Dan attached.) The next step was to identify the inmates who needed parole hearings scheduled. Out of an initial list of 246 inmates, 102 were identified as needing parole hearings. However, before any further changes were made to the system, the Bolin and Fowler decisions came down and pushed this to the back burner.

As of now, we are extremely reluctant to go back to the original 2011 interpretation of the retroactivity. We have inmates whose sentence dates are before the Act who are receiving parole hearings, and others that are still in the process of being identified. We have already released at least one person to parole. We are also processing the offenders on CSP for case closure, and this will be one more variable that will have to be checked against.

I hope this puts some perspective on the issue. Let me know if you have any questions.

Matthew C. Buchanan
General Counsel
SC Department of Probation, Parole and Pardon Services
(803) 734-9012
(803) 734-9324 (fax)

EXHIBIT G

(MEMO OF S.C. DEPT. OF PROBATION, PAROLE AND PARDON SERVICES)

MEMO

RE: Retroactive Application of S.C. Code Ann. §§ 44-53-370 and -375 (Supp. 2010).

From: Thomas

To: Legals

Do S.C. Code Ann. §§ 44-53-370 and -375 as amended in 2010 apply retrospectively? This will depend on whether the General Assembly intended for the amended laws to apply retrospectively or, if the intent is not clear, whether the amendments are remedial or procedural in nature and are therefore presumptively retroactive in their effect.

I think our strongest case that the amendments apply retroactively is that the amendments are indeed remedial in nature and presumptively retroactive in effect. [See Part III (B)(1) of this memo, below.]

However, after reviewing the General Assembly's statements of intent in the enabling act, and the amendments to the laws themselves, it is hard to see how the amendments could have the maximum effect they were intended to have unless they applied retroactively.

PPP and SCDC interpreted the amendments to the law as applying prospectively on the date it was signed by the Governor, and applicable to prisoners who were sentenced on that date and forward. However, as discussed below, this is not a purely prospective application of the new law because it focuses on the date of sentencing rather than date the crime occurred. This application has the practical effect of treating the amendments as retroactively effective changes to procedural rules. That itself is probably not a valid interpretation of the amended statutes, but I don't think further analysis of that issue is necessary.

I. THE LEGISLATION

South Carolina Code Sections 44-53-370 and -375 were amended by provisions contained within 2010 S.C. Acts 273 (the Act), an omnibus bill amended multiple statutes in the state's criminal code and related statues. Two of the statues amended were S.C. Code §§ 44-53-370 and 44-53-375. However the Act also contains other provisions setting forth the General Assembly's purpose and intent in passing the Act, and other substantial declarations.

A. Act Citation.

SECTION 1. This bill may be cited as the "Omnibus Crime Reduction and Sentencing Reform Act of 2010". **It is the intent** of the General Assembly to preserve public safety, reduce crime, and use correctional resources most effectively. **Currently**, the South Carolina correctional system incarcerates people whose time in prison does not result in improved behavior and who often return to South Carolina communities and commit new crimes, or are returned to prison for violations of supervision requirements. **It is, therefore, the purpose of this act** to reduce recidivism, provide fair and effective sentencing options, employ evidence-based practices for smarter use of correctional funding, and improve public safety.

Note that the Act Citation refers to a *current* state of affairs that it has determined is *currently* unacceptable. Here, as in the several remaining direct declarations of the General Assembly's intent contained in the Act, "it is the intent of the General Assembly" obvious means its *present* intent to better preserve public safety, reduce crime etc.

B. General Assembly's Intent, Part I of the Act.

Sections 44-53-370 and -375 were amended under Part I of the act, subtitled "Criminal Offenses Revisions".

> SECTION 2. **It is the intent** of the General Assembly that the provisions in PART I of this act shall provide consistency in sentencing classifications, provide proportional punishments for the offenses committed, and reduce the risk of recidivism.

C. General Assembly's Intent, Part II of the Act.

The General Assembly amended statutes more directly related to SCDPPPS under Part II of the Act, "Release and Supervision Revisions".

> SECTION 44. **It is the intent** of the General Assembly that the provisions in PART II of this Act shall provide cost-effective prison release and community supervision mechanisms and cost-effective and incentive-based strategies for alternatives to incarceration in order to reduce recidivism and improve public safety.

D. General Assembly's findings, "One Subject Declaration."

Though it would seem Part I and Part II have differing intents, at Part IV the Act contains the following:

> SECTION 63. The General Assembly finds that all the provisions contained in this act relate to one subject as required by Section 17, Article III of the South Carolina Constitution in that each provision relates directly to or in conjunction with other sections to the subject of sentencing reform as stated in the title. The General Assembly further finds that a common purpose or relationship exists among the sections, representing a potential plurality but not disunity of topics, notwithstanding that reasonable minds might differ in identifying more than one topic contained in this act.

Though the amendments to Sections 44-53-370 and -375 were under Part I of the Act, the "one subject declaration" will reasonably allow the intent expressed for Part II of the Act to be applied to Part I. Therefore the intention of the amendments to Sections 44-53-370 and -375 can also be said to be to "provide cost-effective prison release and community supervision mechanisms and cost-effective and incentive-based strategies for alternatives to incarceration in order to reduce recidivism and improve public safety," as intended for Part II.

E. Savings Clause.

> SECTION 65. The repeal or amendment by the provisions of this act or any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release, or extinguish

> any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

F. Time Effective.

> SECTION 66. The provisions of Section 15 for implementation of a driver's license reinstatement payment plan and the provisions of Section 18 for implementation of route restricted licenses shall become effective January 1, 2011, or six months after the signature of the Governor, whichever event occurs later in time. **The remaining provisions of Part I become effective upon signature of the Governor**. The provisions of Part II take effect on January 1, 2011, for offenses occurring on or after that date. Regulations required pursuant to this act shall be submitted to the General Assembly no later than January 11, 2011, or six months after enactment, whichever event occurs later in time. All other provisions become effective upon signature of the Governor. Cases and appeals arising or pending under the law as it existed prior to the effective date of this act are saved.

Note the split effective dates. The act was ratified the 1st day of June, 2010, and approved June 2, 2010. Sections 44-53-370 and -375 were amended under Part I. This is presumably why SCDC chose June 2, 2010 as the "effective" date of statute.

Note also that the General Assembly delayed implementation of Part II, but with one exception intended Part I, to go into effect upon signature of the Governor – in other words, as soon as the political process would allow.

Why PPP and SCDC decided that the amended statutes applied to prisoners *sentenced* on June 2, 2010 and forward is not clear. The language added to the laws refers to those "convicted and sentenced" under the subsections that are amended; perhaps the agencies interpreted that language as bearing on exactly what point the new law should be applied. I do not think the General Assembly intended it to have that meaning.

PPP's and SCDC's interpretation also seems inconsistent with an entirely prospective application of the amended statues, because if the statues were truly intended to have only prospective application, then it would only apply to prisoners *charged* with crimes occurring on the effective date and after. (See Part III (B)(4) of this memo).

II. THE AMENDMENTS TO S.C. CODE ANN. §§ 44-53-370 AND 44-53-375 (SUPP. 2010).

S.C. Code § 44-53-370: Section 44-53-370 was amended at Subsections -370(b)(1) through -370(b)(4) by adding the following text:

> *Notwithstanding any other provision of law*, a person convicted and sentenced *pursuant to this item* for a first offense or second offense may have the sentence suspended and

> probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. *Notwithstanding any other provision of law*, a person convicted and sentenced *pursuant to this subsection* for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsections (c) and (d), may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. In all other cases, the sentence must not be suspended nor probation granted.

Subsections -370(d)(1) through -370(d)(4) were amended with this language:

> *Notwithstanding any other provision of law*, a person convicted and sentenced *pursuant to this item* may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.

These subsections of § 44-53-370 were otherwise unchanged from their previous versions. The definitions of the crimes and sentencing for the crimes did not change. The amendments consisted entirely of additional text. Note that they do not distinguish between persons convicted and sentenced before and after the extra test was added, merely persons convicted and sentenced "pursuant to this subsection" or "pursuant to this item".

S.C. Code § 44-53-375: Section 44-53-375 was amended at Subsection -375(A) by the addition of this text:

> *Notwithstanding any other provision of law*, a person convicted and sentenced *pursuant to this subsection* may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.

Subsection 44-53-375(B)(3) was amended by the addition of this text:

> *Notwithstanding any other provision of law*, a person convicted and sentenced pursuant to this *subsection* for a first offense or second offense may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. *Notwithstanding any other provision of law*, a person convicted and sentenced pursuant to this *subsection* for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsection (A), may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. In all other cases, the sentence must not be suspended nor probation granted.

As is the case with the amended § 44-53-370, the amendments to the above subsections in § 44-53-375 consisted entirely of additional text and the subsections did not otherwise change; nor do does the amended language distinguish between persons convicted and sentenced before and after the amendment.

III. CASE LAW

"The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons. Even so, an administrative construction "affords no basis for the perpetuation of a patently erroneous application of the statute." State v. Sweat, 688 S.E.2d 569, 576, 386 S.C. 339, 351 (2010), citing Dunton v. S.C. Bd. of Exam'rs in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987); quoting Monroe v. Livingston, 251 S.C. 214, 217, 161 S.E.2d 243, 244 (1968).

State v. Brown, 740 S.E.2d 493, 402 S.C. 119 (2013) sets forth a concise summary of current case law on the prospective and retroactive effect of statutes [the following italicized block quotes are all from Brown and omit internal citations and quotations]:

> *The cardinal rule of statutory construction is to ascertain and effectuate legislative intent whenever possible. The Court should give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation*.

Here then, for SCDPPPS to apply the amendments to Sections 44-53-370 and -375 retroactively, we may not do so if we must "resort to subtle or forced construction to limit or expand the statute's operation".

> *A statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt. The statute must contain express words evincing intent that it be retroactive or words necessarily implying such intent.*

Therefore, the intent for the amendments to Sections 44-53-370 and -375 to apply retroactively must be "so clearly compelled as to leave no room for doubt", and "words necessarily implying such intent" should not be made to do so by "subtle or forced construction".

> *The only exception to this rule is a statutory enactment that effects a change in remedy or procedure. Our decisions recognize a presumption that statutory enactments are to be given prospective rather than retroactive effect. An exception to this presumption arises when the enactment is remedial or procedural in nature.*

If the General Assembly's intent for the amendments to apply retroactively is not "so clearly compelled as to leave no room for doubt", then the amendments may still apply retroactively if they "[effect] a change in remedy or procedure", that is, they are either remedial or procedural in nature. However, even if the amendments appear to be remedial or procedural in nature, they still have to survive any restrictions on retroactivity expressed by the savings clause included in the act:

> *A savings clause is a restriction in a repealing act, intended to save rights, pending proceedings, penalties, etc., from the annihilation which would result from an unrestricted appeal. Generally, the repeal of a statute without the inclusion of a savings clause operates retroactively to expunge pending claims, but the inclusion of a proper savings clause will have the effect of preserving a pending suit.*

A. **Did the General Assembly Clearly Intend that the Amendments to Sections 44-53-370 and -375 Would Apply Retroactively**?

First, note that there is no language in the act that states that the amendments to Sections 44-53-370 and -375 should not apply retroactively. The only language that might be said to do so is that in the savings clause at Section 65, discussed below. However, there are no express words in the enabling act making the amendments retroactive. The question will be whether there are words necessarily implying such intent. See Brown, supra.

1. Intent Expressed in the Enabling Act, 2010 S.C. Acts 273.

The General Assembly's statement of intent for the entire act (See Section 1 of 2010 S.C. Acts 273 (quoted above)), referred to a *current* state of affairs that is not acceptable. The General Assembly's *present* intent was to use correctional resources more effectively, because the State was jailing persons "whose time in prison does not result in improved behavior and who often return to South Carolina communities and commit new crimes". Given that the then *current* status of the law was unacceptable and causing immediate harm, it does not make sense that the General Assembly intended that the old law continue to apply to prisoners already in the jail system and thus continue to cause harm. It is more likely that the General Assembly intended for the new law to apply to the maximum number of prisoners currently incarcerated as soon as possible so that the problems the General Assembly had identified would be ameliorated as soon as possible.

There are two further separate statements of intent for Parts I and II of the Act. Code Sections 44-53-370 and -375 were amended under Part I of the Act:

> It is the intent of the General Assembly that the provisions in PART I of this act shall provide consistency in sentencing classifications, provide proportional punishments for the offenses committed, and reduce the risk of recidivism.

2010 S.C. Acts 273, § 2

> It is the intent of the General Assembly that the provisions in PART II of this Act shall provide cost-effective prison release and community supervision mechanisms and cost-effective and incentive-based strategies for alternatives to incarceration in order to reduce recidivism and improve public safety

2010 S.C. Acts 273, § 44

In the statement of intent for Part I, the General Assembly sought *consistent sentencing classifications and proportional punishments* for offenses to reduce the *present* rate of recidivism. If the General Assembly was seeking consistency in these matters, particularly by way of punishment, it does not make sense that the old law would apply to one set of prisoners in the State's prisons while the new law would apply to another, especially when the number of prisoners the new law applied to would at first be zero.

In the short term, prospective application of the law would only ensure that the old law would continue to consistently apply to the majority of the prison population until such time that offenders convicted and sentenced under the new law began to populate the prison system. This would only ensure that the prisons failed to successfully rehabilitate prisoners for years into the future, exactly the opposite result intended by the General Assembly

Because of the "one subject declaration" at Section 63 of 2010 S.C. Acts 272,[1] the intent expressed for Part II can be fairly imputed to Part I. Therefore, Part I was also intended to provide cost effective prison release mechanisms and alternatives to in incarceration to reduce recidivism and improve public safety. As before, it is not likely that the General Assembly intended the new law to preserve for years into the future prison release mechanisms that it found were not cost-effective and did not reduce recidivism and improve public safety.

Further, note that under Section 66, the Act intended that the amendments to Part I would go into effect as soon as possible - upon signature by the Governor. Where it did not intend the Act to go into immediate effect (Part II), it said so (I presume this was to enable the various affected agencies to prepare to implement the changes to the law). Clearly the General Assembly was mindful that in their administration some provisions could not be reasonably put into effect at once. However, everything else should go into effect at once to maximize the Act's intended effect.

Given the problems identified that new law was clearly intended to remedy, it does not seem likely that the General Assembly could have meant to bind both the probation and correctional systems to laws, policies and procedure it had already identified as causing harm. It is more likely that the GA intended for the new law to apply to the maximum number of prisoners as soon as possible in order to remedy the present problem as quickly as possible. Retroactive application of Sections 44-53-370 and -375 be more likely to achieve the General Assembly's stated goals sooner that would prospective application.

Even if the General Assembly did not explicitly state that the amendments would apply retroactively, retroactive application of the amendments would not be contrary to the General Assembly's declared intent. But do the General Assembly's several statements of intent "necessarily imply" the intent that it *should* apply retroactively, as <u>Brown</u> would require? It is hard to see how the changes to the law would have their maximum intended effect *unless* they applied retroactively.

2. <u>Intent Expressed in the Language Amending S.C. Code §§ 44-53-370 and -375</u>.

The amendments to Sections 44-53-370 and -375 added language relating to parole eligibility and did not otherwise alter the definitions or penalties for the crimes described. At each instance where the subsections are amended, the new language states that it applies to "a person convicted and sentenced pursuant to this subsection" or "a person convicted and sentenced pursuant to this item".

The new language does not distinguish between those convicted before or after the language was added. Given that the definitions and penalties for the crimes did not change, anybody "convicted and sentenced" pursuant to those subsections before the new law went into effect would have faced the same potential penalty as those "convicted and sentenced" after the law was effective. The only change to the law was to provide a *post-conviction* opportunity for parole that did not exist before.

[1] The General Assembly stated that "all the provisions contained in this act relate to one subject . . . in that each provision relates directly to or in conjunction with other sections to the subject of sentencing reform . . . ." The General Assembly also found that "a common purpose or relationship exists among the sections, representing a potential plurality but not disunity of topics."

Because the new language does not distinguish between persons convicted before and after the amendment, and because the definition and penalties for the crimes did not change, the amendments to the statutes regarding parole appear to apply to anybody "convicted and sentenced" under those provisions, no matter when that happened.

In other words, there is nothing here that implies that the new language *ought not* to apply to those convicted sentenced before the laws were amended.

3. Intent Expressed in the Savings Clause.

Does the savings clause at Section 65, 2010 S.C. Acts 273 bar retroactive application of the amendments to Sections 44-53-370 and -375?

> The repeal or amendment by the provisions of this act or any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, *unless the repealed or amended provision shall so expressly provide*. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

2010 S.C. Acts 273, § 65

Do the amendments to Sections 44-53-370 and -375 contain express provisions that override the effect of the savings clause? In each instance where Sections 44-53-370 and -375 were amended, the added text begins with, and sometimes restates, that it applies "[n]otwithstanding any other provision of law", which would presumably include the savings clause. If the General Assembly intended the new laws to apply retroactively, then these words may be interpreted to expressly negate any effect the savings clause might have to limit the amendments to prospective application.

Further, the amendments to Sections 44-53-370 and -375 did not repeal those statutes. The definition of the crimes and their penalties remained the same. The only difference is that the amendments added an expanded post-conviction opportunity for parole (and other rehabilitative opportunities) for persons convicted and imprisoned under the statutes. Though this obviously expanded a prisoner's opportunity to be paroled, it did not extinguish or alter the punishment for the crimes.

Also, even though the amendments created a new right to be considered for parole, prisoners were not granted an absolute right to be paroled, just to be considered for it.

If the General Assembly can be fairly said to have intended the new law to apply retroactively, then the savings clause should not prevent Sections 44-53-370 and -375 from applying retroactively.

B. Are the Amendments to Sections 44-53-370 and -375 Remedial or Procedural in Nature and Thus Presumed To Be Retroactive?

"Our decisions recognize a presumption that statutory enactments are to be given prospective rather than retroactive effect. An exception to this presumption arises when the enactment is remedial or procedural in nature." Brown, supra. Procedural statutes set out a mode of procedure for courts to follow, or require a specific method for enforcing rights. Edwards v. State Law Enforcement Division, 720 S.E.2d 462, 467, 395 S.C. 571, 580 (2011). When a statute is procedural, it ordinarily will be accorded a retroactive application in the sense that it will be applied to pending actions and proceedings. State v. Davis, 309 S.C. 334 (1992).

A statute is remedial where it creates new remedies for existing rights or enlarges the rights of persons under disability. Edwards v. State Law Enforcement Division, 720 S.E.2d 462, 466, 395 S.C. 571, 580 (2011). However if the statute violates contractual obligations, creates a new right, or divests a vested right, the statute will not be applied prospectively. Hooks v. Southern Bell and Telegraph Co., 291 S.C. 41, 43. 351 S.E.2d 900, 902 (COA 1986).

1. Are Prisoners "Persons Under A Disability?

If prisoners are "persons under a disability", then the amendments to Sections 44-53-370 and -375 clearly enlarge the rights of persons under disability. However, I have been unable to find clear S.C. statutory or case law defining what a person *under* a disability currently is. There are statutes tolling the statute of limitation for various civil torts for persons "under a disability" where the person is a minor or insane. These statues used to include prisoners, but the law has been amended to exclude them from protection.

Black's Law Dictionary (5th ed. 1979) states that a disability is:

> "The want of legal capability to perform an act. Term is generally used to indicate an incapacity for the full enjoyment of ordinary legal rights; **thus, persons under age, insane persons, and convicts are said to be under disability**".

In the same edition under "Civil Disabilities", Black's states:

> "**Apart from the sentence which is imposed upon a convicted offender**, **numerous civil disabilities are also often imposed.** Theses disabilities, which adversely affect an offender both during his incarceration and after his release, include denial of such privileges as voting, holding public office, obtaining many jobs and occupational licenses, entering judicially-enforced agreements . . . ."

Black's Law Dictionary, abridged 7th ed. (2000) states that a "civil disability" is:

> "the condition of a person who has had a legal right or privilege revoked as a result of a criminal conviction, as when a person's driver's license is revoked after a DWI conviction."

These definitions encompass both the imprisonment of the person and the deprivation of the person's civil rights and privileges. I think it is proper to conclude that prisoners in S.C. are "persons under a disability". If so, then the amendments to Sections 44-53-370 and -375 clearly enlarge the rights of persons under a disability because they provide persons imprisoned under those statutes an opportunity to be paroled that they did not enjoy before. Therefore, the amendments to the statutes were remedial and presumptively retroactive in effect.

2. Do the Amendments Create a New Remedy for an Existing Right?

When no-parole prisoners have served 85% of their sentences, they are automatically released and enter CSP. This is not technically "parole", but they are released earlier than the end of their sentences. You could argue that they have an existing right to get out of jail early, and the amendments to Sections 44-53-370 and -375 create a new remedy (parole) for an existing right (the right to get our early). This argument probably isn't necessary to explore further, because I think it's pretty clear that prisoners are persons "under a disability" and the analysis above this paragraph applies.

3. Do the Amendments Create a New Right, and Thus Are Not Presumptively Retroactive?

If a statute violates contractual obligations, creates a new right, or divests a vested right, the statute will not be applied prospectively. Hooks v. Southern Bell and Telegraph Co., 291 S.C. 41, 43. 351 S.E.2d 900, 902 (COA 1986). I do not believe this and related cases apply to this situation. They seem to focus on contractual rights or rights to various civil benefits such as worker's compensation. Further, the amendments to Sections 44-53-370 and -375 may arguably create a new right to parole that did not exist before, but they do so in a context where the person given the new right to parole is already subject to a disability that did not exist before – the constraint of freedom. The opportunity for parole is more in character of an opportunity to restore a right the prisoner had lost under due process of law. I think it's pretty clear that prisoners are persons "under a disability" and the analysis of that term at Subsection A above applies.

4. Are the Amendments Procedural In Nature?

Procedural statutes set out a mode of procedure for courts to follow, or require a specific method for enforcing rights. Edwards, supra. Ordinarily a procedural statute will apply retroactively in that it will be applied to currently pending actions and proceedings. State v. Davis, 309 S.C. 334 (1992).

I do not think the amendments Sections 44-53-370 and -375 are procedural, insofar as they apply to parole. Perhaps if the right to parole already existed, and the amendments altered the terms of how prisoners would be reviewed for parole, or how often, the amendments might be procedural. But the amendments only apply to persons who have been convicted and sentenced under the sections, so procedurally they cannot apply to prosecutions that are no longer pending.

However, it is interesting that the earlier determination that the amendments apply to prisoners *sentenced* on and after the date the amendments to Sections 44-53-370 and -375 went into effect and not to those who committed crimes on that day or after. It seems as though the initial interpretation implicitly treats the amendments as a procedural change and that, in actual effect, apply it retroactively. If the amendments were only to have prospective effect, it seems they should have only applied the law to those who committed the covered crimes on the day it went into effect or after. That PPP and SCDC intended to apply the law to those who had already been charged or convicted of the amended crimes, but only upon their sentencing, is essentially a *retroactive procedural* application of the amended statutes, because they apply it to *pending* actions – prosecutions for crimes that necessarily must have occurred before the new law went into effect.

EXHIBIT 7

Additional excerpts from Florian deposition

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

MARION KATRELL CAMPBELL, on behalf of himself and all others similarly situated,
Plaintiff,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, BRIAN P. STIRLING, CHRIS FLORIAN, and DAVID TATARSKY,
Defendants.

CIVIL ACTION NO. 6:16-cv-03265-MGL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CHRISTOPHER McDOWELL,
Plaintiff,

v.

BRYAN P. STIRLING, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, CHRIS FLORIAN, and DAVID TATARSKY,
Defendants.

CIVIL ACTION NO. 2:16-cv-03379-TLW-MGL

(Caption continues)

VIDEO-RECORDED DEPOSITION
- of -
CHRISTOPHER D. FLORIAN

taken on behalf of the Plaintiffs on Thursday, October 19, 2017, at the offices of Paul Frank Collins P.C., One Church Street, Burlington, Vermont, commencing at 9:04 AM.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

HENRY BELTON, Plaintiff,

v.

BRYAN P. STIRLING, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, CHRIS FLORIAN, and DAVID TATARSKY, Defendants.

CIVIL ACTION NO. 2:16-cv-03379-TLW-MGL

LARRY HAMPTON, Plaintiff,

v.

BRYAN P. STIRLING, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, CHRIS FLORIAN, and DAVID TATARSKY, Defendants.

DAVID PAYTON, JR., Plaintiff,

v.

BRYAN P. STIRLING, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, CHRIS FLORIAN, and DAVID TATARSKY, Defendants.

MICHAEL SMOAK, Plaintiff,

v.

BRYAN P. STIRLING, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, CHRIS FLORIAN, and DAVID TATARSKY, Defendants.

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COURT REPORTER: JOHANNA MASSÉ, RMR, CRR

South Carolina, that the Department of Corrections is performing a public duty to the citizens of the state of South Carolina.

MR. WHETSTONE: Object to the form of the question.

A. Yes, sir.

Q. All right. Now, my understanding also is that when you were tasked with essentially reviewing this statute, the Omnibus Act, you read the existing laws, the new act, and then began doing legal research?

MR. WHETSTONE: Object.

Q. Is that correct?

MR. WHETSTONE: Object to the form.

A. Yes, sir, that's correct.

Q. All right. And as a result of that, you analyzed the various legal documents and came up with what your opinion of the act meant in regard to what we've been referring as the 85 percent rule; is that correct?

MR. WHETSTONE: Object to the form.

A. Yes, sir, that's correct.

Q. And during that process, you would have analyzed the various statutory sections and interpreted the various case law in regard to those statutes, correct?

MR. WHETSTONE: Object to the form.
A. Yes, sir, that's correct.
Q. When you did that, were you using your legal judgment?
MR. WHETSTONE: Object to the form.
A. Yes, sir.
Q. Okay. Were you exercising your analytical abilities in coming up with the opinions you had?
MR. WHETSTONE: Object to the form.
A. Yes, sir.
Q. And during that process, you essentially made the judgment call that the act that we've been talking about had certain implications for the Department and the inmates in regard to the 85 percent rule, correct?
MR. WHETSTONE: Object to the form.
A. Yes, sir, that's correct.
Q. Do you -- I think Mr. White asked you about knowing his inmates. Do you know Mr. Marion Campbell?
A. No, sir.
Q. Do you know any of the inmates that were ultimately implicated in the Bolin decision?
A. No, sir, I do not.
Q. When Mr. Tatarsky tasked you with reviewing this act, you had the ability to come up with what you felt was right about the statute in your

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Marion Katrell Campbell, on behalf of himself and all other similarly situated,

Plaintiff,

v.

South Carolina Department of Corrections,

Defendant.

C/A No. 2020-CP-40-05532

Wardell Williams, Harry Simmons, Jr., and Isiah Rollins,

Plaintiffs,

v.

South Carolina Department of Corrections,

Defendant.

C/A No.: 2020-CP-40-04701

Larry Hampton, Christopher McDowell, David Payton, Jr., and Michael Smoak,

Plaintiffs,

v.

South Carolina Department of Corrections,

Defendant.

C/A No. 2020-CP-40-05660

Henry Belton, Plaintiff, v. South Carolina Department of Corrections, Defendant.	C.A. No. 2017-CP-40-00556

SUPPLEMENTAL AUTHORITIES IN SUPPORT OF SCDC'S MOTION FOR SUMMARY JUDGMENT

SCDC calls the Court's attention to certain supplemental authorities for a contention SCDC has already made in connection with one subgroup of plaintiff-inmates, that is, the ones who were convicted and sentenced before the 2010 statutory amendments on which Plaintiffs' claim are based.[1] SCDC has previously noted, citing *State v. Varner*, 310 S.C. 264, 423 S.E.2d 133 (1992) and other cases that "[t]he correct penalty is the one in effect at the time of sentencing. . . ." 310 S.C. at 265, 423 S.E.2d at 134. SCDC's Memorandum in Support of Motion for Summary Judgment at 14. In this case, that means that inmates convicted and sentenced prior to the enactment of the 2010 Omnibus Crime Act are not entitled to the relief they seek in this case.

SCDC would further advise that this result is also dictated by the terms of the 2010 Omnibus Crime Act itself. That Act is the statute on which Plaintiffs' claims are based. The Act contains a "savings clause" expressly containing the longstanding rule set forth in *Varner* and many other cases. Section 65 of the 2010 Act provides as follows:

[1] These contentions are made in the alternative to SCDC's immunity arguments, which are sufficient in themselves to bar the claims of all plaintiff inmates.

> **Savings clause**
>
> SECTION 65. The repeal or amendment by the provisions of this act or any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

Act No. 273 of 2010, § 65 (emphases added).

The emphasized language is substantially identical to the federal General Savings Statute, 1 U.S.C. § 109, which provides that:

> The repeal of any statute shall not have the effect to release or extinguish any penalty ... incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty....

(Emphases added.)

The Fourth Circuit, construing this language in a sentencing context similar to that of the inmates in the present case who were convicted and sentenced prior to the enactment of the Omnibus Act in 2010, held that the later ameliorative amendments did not apply to persons sentenced prior to the amendments' passage:

> This rule fully applies in the sentencing context and bars "application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense," absent an express statement that the law is intended to be applied retroactively. *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 661 (1974).

United States v. Bullard, 645 F.3d 237, 248 (4th Cir. 2011). The Fourth Circuit noted that the same result had been reached by all of the eight other circuits that had ruled on the issue at the time. *Id.*

CONCLUSION

For the foregoing reasons, SCDC respectfully submits that the language of the 2010 Omnibus Crime Act provides additional support for SCDC's contention that the correct penalty is the one in effect at the time of sentencing. As a result, any plaintiff inmate convicted and sentenced prior to the effective date of the 2010 Act is not entitled to relief in this case, both as a matter of common law and by the terms of the statute itself.[2]

Respectfully submitted,

DAVIDSON & WREN, P.A.

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ATTORNEYS FOR DEFENDANT SCDC

COLUMBIA, SOUTH CAROLINA

February 11, 2025

[2] Regarding the other class of inmates, that is, the group who were convicted and sentenced after the Act took effect, SCDC has previously pointed out that those inmates were released before April 1, 2016, the date of the issuance of the remittitur in *Bolin v. South Carolina Dep't of Corrections*, 415 S.C. 276, 781 S.E.2d 914, 916–17 (Ct. App. 2016). SCDC's Memorandum in Support of Motion for Summary Judgment at 14. In other words, because they were released prior to the effective date of the Court of Appeals decision in that case, they were never unlawfully restrained any more than the ones convicted and sentenced before the effective date of the 2010 Act.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Marion Katrell Campbell, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

South Carolina Department of Corrections,

Defendant.

C.A. NO. 2020-CP-40-05532

Wardell Williams, Harry Simmons, Jr., and Isiah Rollins,

Plaintiffs,

vs.

South Carolina Department of Corrections,

Defendant.

C.A. No. 2020-CP-40-04701

Larry Hampton, Christopher McDowell, David Payton, Jr., and Michael Smoak,

Plaintiffs,

vs.

South Carolina Department of Corrections,

Defendant.

C.A. No. 2020-CP-40-05660

Henry Belton,	)	**C.A. No. 2017-CP-40-0556**
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
	)	
South Carolina Department of Corrections,	)	
	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN RESPONSE
TO DEFENDANT'S "SUPPLEMENTAL MEMORANDUM"

At the 11th hour, just 24 hours before a hearing on motions that have been fully briefed for a year and a half, Defendant South Carolina Department of Corrections [SCDC] chose to submit a "supplemental" memorandum. SCDC contends the "Savings Clause" of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 [the Omnibus Act] precludes recovery for the class members who were released in June 2016 [June Releasees], arguing they were not subject to the Omnibus Act and were released early by the SCDC for no legal reason.

First, Defendant SCDC has already admitted that the June Releasees were entitled to have their sentences recalculated under the Act. Admission #6 in Plaintiff's Second Requests to Admit (filed as Exhibit F to Plaintiffs' Motion for Summary Judgment) references an Exhibit B, which is a list of inmates released on June 1, 2016, together with the "new date" for each calculated by SCDC in accordance with the Omnibus Act:

6. The max-out sentence release dates for the inmates listed in Ex. B, properly calculated pursuant to the Omnibus Crime Reduction and Sentencing Reform Act of 2010, is listed under the Column "NEW DATE."

RESPONSE #6

Admitted.

Per the above Admission, SCDC admitted the max-out release dates for the June Releasees, was "properly calculated" pursuant to the Omnibus Act as a NEW DATE.

SCDC further admitted the specific number of days each June Releasee was incarcerated beyond his or her properly calculated max-out date in response to Request #52 of Plaintiff's First Requests to Admit (which is filed as Exhibit E to Plaintiffs' Motion for Summary Judgment):

52. SCDC incarcerated the following inmates for the stated number of days (counting the day of release) beyond their maxout or supervised re-entry dates:

SCDC#	LAST NAME	FIRST NAME	DAYS UNLAWFULLY INCARCERATED

Request #52 was followed by a list of the June Releasees with the specific number of days each was incarcerated after his or her max-out date.

SCDC's response was:

RESPONSE: To the extent that Plaintiff contends that the stated period of additional detention was unlawful, denied. Otherwise admitted.

Based on these admissions, SCDC contests that the "additional detention" was unlawful (since it claims the detention only became unlawful when the Court of Appeals told it so) but did not contest that the additional detention was beyond the inmates' max-out dates.

In addition, the retroactivity of the Omnibus Act, the implications of the Act's Savings Clause, and the potential release of more inmates in June 2016, were issues addressed at length in an email from Michael Buchanan, General Counsel for the South Carolina Probation, Parole and Pardon Board [SCPPP] to SCDC, with memorandum attached. See attached Exhibit A. The consensus of the involved parties who examined the issue exhaustively, was that the Omnibus Act was retroactive. SCPPP made this compelling finding:

> In the short term, prospective application of the law would only ensure that the old law would continue to consistently apply to the majority of the prison population until such time that offenders convicted and sentenced under the new law began to populate the prison system. This would only ensure that the prisons failed to successfully rehabilitate prisoners for years into the future, exactly the opposite result intended by the General Assembly

SCDC apparently agreed and the additional inmates were released on June 1, 2016.

Respectfully submitted,

<u>/s Charles W. Whetstone, Jr</u>.
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February 12, 2025
Columbia, South Carolina.

EXHIBIT A

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3-23-16 E-mail from Matthew Buchanan, General Counsel at PPP:

Christie:

I'm going to try to sum up the various conversations and events that led PPP to decide to treat the changes to S.C. Code 44-53-370 and -375 as retroactive regarding parole eligibility.

As I told you earlier, I had not been aware that it had previously been decided to treat the sentencing date as the relevant date when determining parole eligibility. So when I saw parole eligible cases that had offense dates prior to the Act, then I had assumed the change had been applied retroactively. Furthermore, while I later learned that SCDC had set up their system to reflect the initial change, PPP had not memorialized that initial decision anywhere that I could see.

So as a result, inmates were being determined by PPP to be parole eligible despite SCDC's categorization and were given parole hearings. This entire issue came to light around June of 2015, when Inmate [redacted]) was awarded parole by the Board. PPP was prepared to issue a parole certificate, but the system balked because he was listed as being a no-parole offense. After some searching (and contacting Ben Aplin, who didn't recall what was decided, though he leaned toward thinking it was retroactive), Dan Crooks was able to find Chris Florian's memo outlining the retroactivity based on sentencing date. Although I initially decided to stick with the ruling, I anticipated [redacted] would appeal (because he was given parole but then rescinded because of this). I instructed my office to do an exhaustive analysis of the Sentencing Reform Act to decide whether this should be considered fully retroactive.

The result was the memo I've attached to this email, concluding that most likely the parole eligibility part of the Act was meant to be retroactive. The conclusion was based on several factors: The stated intent of the Act to reduce prison populations; the use of the phrase, "Notwithstanding any other provision of law" in the relevant section; and the Savings Clause exception for when "the repealed or amended provision shall so expressly provide."

After serious deliberation, PPP decided to treat the Act as fully retroactive for the drug offenses under Sections 44-53-370 and -375. This meant that [redacted] would need to be paroled out, and after some technical issues with the system being willing to produce a parole certificate, he was released to parole in November, 2015.

After [redacted]s was released, I worked with Dan to have the full changes implemented in both agency systems. (See the email exchange with Dan attached.) The next step was to identify the inmates who needed parole hearings scheduled. Out of an initial list of 246 inmates, 102 were identified as needing parole hearings. However, before any further changes were made to the system, the Bolin and Fowler decisions came down and pushed this to the back burner

MEMO

RE: Retroactive Application of S.C. Code Ann. §§ 44-53-370 and -375 (Supp. 2010).

From: Thomas

To: Legals

Do S.C. Code Ann. §§ 44-53-370 and -375 as amended in 2010 apply retrospectively? This will depend on whether the General Assembly intended for the amended laws to apply retrospectively or, if the intent is not clear, whether the amendments are remedial or procedural in nature and are therefore presumptively retroactive in their effect.

I think our strongest case that the amendments apply retroactively is that the amendments are indeed remedial in nature and presumptively retroactive in effect. [See Part III (B)(1) of this memo, below.]

However, after reviewing the General Assembly's statements of intent in the enabling act, and the amendments to the laws themselves, it is hard to see how the amendments could have the maximum effect they were intended to have unless they applied retroactively.

PPP and SCDC interpreted the amendments to the law as applying prospectively on the date it was signed by the Governor, and applicable to prisoners who were sentenced on that date and forward. However, as discussed below, this is not a purely prospective application of the new law because it focuses on the date of sentencing rather than date the crime occurred. This application has the practical effect of treating the amendments as retroactively effective changes to procedural rules. That itself is probably not a valid interpretation of the amended statutes, but I don't think further analysis of that issue is necessary.

I. THE LEGISLATION

South Carolina Code Sections 44-53-370 and -375 were amended by provisions contained within 2010 S.C. Acts 273 (the Act), an omnibus bill amended multiple statutes in the state's criminal code and related statues. Two of the statues amended were S.C. Code §§ 44-53-370 and 44-53-375. However the Act also contains other provisions setting forth the General Assembly's purpose and intent in passing the Act, and other substantial declarations.

A. Act Citation.

> SECTION 1. This bill may be cited as the "Omnibus Crime Reduction and Sentencing Reform Act of 2010". **It is the intent** of the General Assembly to preserve public safety, reduce crime, and use correctional resources most effectively. **Currently**, the South Carolina correctional system incarcerates people whose time in prison does not result in improved behavior and who often return to South Carolina communities and commit new crimes, or are returned to prison for violations of supervision requirements. **It is, therefore, the purpose of this act** to reduce recidivism, provide fair and effective sentencing options, employ evidence-based practices for smarter use of correctional funding, and improve public safety.

Note that the Act Citation refers to a *current* state of affairs that it has determined is *currently* unacceptable. Here, as in the several remaining direct declarations of the General Assembly's intent contained in the Act, "it is the intent of the General Assembly" obvious means its *present* intent to better preserve public safety, reduce crime etc.

B. General Assembly's Intent, Part I of the Act.

Sections 44-53-370 and -375 were amended under Part I of the act, subtitled "Criminal Offenses Revisions".

> SECTION 2. **It is the intent** of the General Assembly that the provisions in PART I of this act shall provide consistency in sentencing classifications, provide proportional punishments for the offenses committed, and reduce the risk of recidivism.

C. General Assembly's Intent, Part II of the Act.

The General Assembly amended statutes more directly related to SCDPPPS under Part II of the Act, "Release and Supervision Revisions".

> SECTION 44. **It is the intent** of the General Assembly that the provisions in PART II of this Act shall provide cost-effective prison release and community supervision mechanisms and cost-effective and incentive-based strategies for alternatives to incarceration in order to reduce recidivism and improve public safety.

D. General Assembly's findings, "One Subject Declaration."

Though it would seem Part I and Part II have differing intents, at Part IV the Act contains the following:

> SECTION 63. The General Assembly finds that all the provisions contained in this act relate to one subject as required by Section 17, Article III of the South Carolina Constitution in that each provision relates directly to or in conjunction with other sections to the subject of sentencing reform as stated in the title. The General Assembly further finds that a common purpose or relationship exists among the sections, representing a potential plurality but not disunity of topics, notwithstanding that reasonable minds might differ in identifying more than one topic contained in this act.

Though the amendments to Sections 44-53-370 and -375 were under Part I of the Act, the "one subject declaration" will reasonably allow the intent expressed for Part II of the Act to be applied to Part I. Therefore the intention of the amendments to Sections 44-53-370 and -375 can also be said to be to "provide cost-effective prison release and community supervision mechanisms and cost-effective and incentive-based strategies for alternatives to incarceration in order to reduce recidivism and improve public safety," as intended for Part II.

E. Savings Clause.

> SECTION 65. The repeal or amendment by the provisions of this act or any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release, or extinguish

> any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

F. Time Effective.

> SECTION 66. The provisions of Section 15 for implementation of a driver's license reinstatement payment plan and the provisions of Section 18 for implementation of route restricted licenses shall become effective January 1, 2011, or six months after the signature of the Governor, whichever event occurs later in time. **The remaining provisions of Part I become effective upon signature of the Governor**. The provisions of Part II take effect on January 1, 2011, for offenses occurring on or after that date. Regulations required pursuant to this act shall be submitted to the General Assembly no later than January 11, 2011, or six months after enactment, whichever event occurs later in time. All other provisions become effective upon signature of the Governor. Cases and appeals arising or pending under the law as it existed prior to the effective date of this act are saved.

Note the split effective dates. The act was ratified the 1st day of June, 2010, and approved June 2, 2010. Sections 44-53-370 and -375 were amended under Part I. This is presumably why SCDC chose June 2, 2010 as the "effective" date of statute.

Note also that the General Assembly delayed implementation of Part II, but with one exception intended Part I, to go into effect upon signature of the Governor – in other words, as soon as the political process would allow.

Why PPP and SCDC decided that the amended statutes applied to prisoners *sentenced* on June 2, 2010 and forward is not clear. The language added to the laws refers to those "convicted and sentenced" under the subsections that are amended; perhaps the agencies interpreted that language as bearing on exactly what point the new law should be applied. I do not think the General Assembly intended it to have that meaning.

PPP's and SCDC's interpretation also seems inconsistent with an entirely prospective application of the amended statues, because if the statues were truly intended to have only prospective application, then it would only apply to prisoners *charged* with crimes occurring on the effective date and after. (See Part III (B)(4) of this memo).

II. THE AMENDMENTS TO S.C. CODE ANN. §§ 44-53-370 AND 44-53-375 (SUPP. 2010).

S.C. Code § 44-53-370: Section 44-53-370 was amended at Subsections -370(b)(1) through -370(b)(4) by adding the following text:

> *Notwithstanding any other provision of law*, a person convicted and sentenced *pursuant to this item* for a first offense or second offense may have the sentence suspended and

> probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. *Notwithstanding any other provision of law*, a person convicted and sentenced *pursuant to this subsection* for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsections (c) and (d), may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. In all other cases, the sentence must not be suspended nor probation granted.

Subsections -370(d)(1) through -370(d)(4) were amended with this language:

> *Notwithstanding any other provision of law*, a person convicted and sentenced *pursuant to this item* may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.

These subsections of § 44-53-370 were otherwise unchanged from their previous versions. The definitions of the crimes and sentencing for the crimes did not change. The amendments consisted entirely of additional text. Note that they do not distinguish between persons convicted and sentenced before and after the extra test was added, merely persons convicted and sentenced “pursuant to this subsection” or “pursuant to this item”.

S.C. Code § 44-53-375: Section 44-53-375 was amended at Subsection -375(A) by the addition of this text:

> *Notwithstanding any other provision of law*, a person convicted and sentenced *pursuant to this subsection* may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.

Subsection 44-53-375(B)(3) was amended by the addition of this text:

> *Notwithstanding any other provision of law*, a person convicted and sentenced pursuant to this *subsection* for a first offense or second offense may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. *Notwithstanding any other provision of law*, a person convicted and sentenced pursuant to this *subsection* for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsection (A), may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. In all other cases, the sentence must not be suspended nor probation granted.

As is the case with the amended § 44-53-370, the amendments to the above subsections in § 44-53-375 consisted entirely of additional text and the subsections did not otherwise change; nor do does the amended language distinguish between persons convicted and sentenced before and after the amendment.

III. CASE LAW

"The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons. Even so, an administrative construction "affords no basis for the perpetuation of a patently erroneous application of the statute." State v. Sweat, 688 S.E.2d 569, 576, 386 S.C. 339, 351 (2010), citing Dunton v. S.C. Bd. of Exam'rs in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987); quoting Monroe v. Livingston, 251 S.C. 214, 217, 161 S.E.2d 243, 244 (1968).

State v. Brown, 740 S.E.2d 493, 402 S.C. 119 (2013) sets forth a concise summary of current case law on the prospective and retroactive effect of statutes [the following italicized block quotes are all from Brown and omit internal citations and quotations]:

> *The cardinal rule of statutory construction is to ascertain and effectuate legislative intent whenever possible. The Court should give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation*.

Here then, for SCDPPPS to apply the amendments to Sections 44-53-370 and -375 retroactively, we may not do so if we must "resort to subtle or forced construction to limit or expand the statute's operation".

> *A statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt. The statute must contain express words evincing intent that it be retroactive or words necessarily implying such intent.*

Therefore, the intent for the amendments to Sections 44-53-370 and -375 to apply retroactively must be "so clearly compelled as to leave no room for doubt", and "words necessarily implying such intent" should not be made to do so by "subtle or forced construction".

> *The only exception to this rule is a statutory enactment that effects a change in remedy or procedure. Our decisions recognize a presumption that statutory enactments are to be given prospective rather than retroactive effect. An exception to this presumption arises when the enactment is remedial or procedural in nature.*

If the General Assembly's intent for the amendments to apply retroactively is not "so clearly compelled as to leave no room for doubt", then the amendments may still apply retroactively if they "[effect] a change in remedy or procedure", that is, they are either remedial or procedural in nature. However, even if the amendments appear to be remedial or procedural in nature, they still have to survive any restrictions on retroactivity expressed by the savings clause included in the act:

> *A savings clause is a restriction in a repealing act, intended to save rights, pending proceedings, penalties, etc., from the annihilation which would result from an unrestricted appeal. Generally, the repeal of a statute without the inclusion of a savings clause operates retroactively to expunge pending claims, but the inclusion of a proper savings clause will have the effect of preserving a pending suit.*

A. **Did the General Assembly Clearly Intend that the Amendments to Sections 44-53-370 and -375 Would Apply Retroactively**?

First, note that there is no language in the act that states that the amendments to Sections 44-53-370 and -375 should not apply retroactively. The only language that might be said to do so is that in the savings clause at Section 65, discussed below. However, there are no express words in the enabling act making the amendments retroactive. The question will be whether there are words necessarily implying such intent. See Brown, supra.

1. Intent Expressed in the Enabling Act, 2010 S.C. Acts 273.

The General Assembly's statement of intent for the entire act (See Section 1 of 2010 S.C. Acts 273 (quoted above)), referred to a *current* state of affairs that is not acceptable. The General Assembly's *present* intent was to use correctional resources more effectively, because the State was jailing persons "whose time in prison does not result in improved behavior and who often return to South Carolina communities and commit new crimes". Given that the then *current* status of the law was unacceptable and causing immediate harm, it does not make sense that the General Assembly intended that the old law continue to apply to prisoners already in the jail system and thus continue to cause harm. It is more likely that the General Assembly intended for the new law to apply to the maximum number of prisoners currently incarcerated as soon as possible so that the problems the General Assembly had identified would be ameliorated as soon as possible.

There are two further separate statements of intent for Parts I and II of the Act. Code Sections 44-53-370 and -375 were amended under Part I of the Act:

> It is the intent of the General Assembly that the provisions in PART I of this act shall provide consistency in sentencing classifications, provide proportional punishments for the offenses committed, and reduce the risk of recidivism.

2010 S.C. Acts 273, § 2

> It is the intent of the General Assembly that the provisions in PART II of this Act shall provide cost-effective prison release and community supervision mechanisms and cost-effective and incentive-based strategies for alternatives to incarceration in order to reduce recidivism and improve public safety

2010 S.C. Acts 273, § 44

In the statement of intent for Part I, the General Assembly sought *consistent sentencing classifications and proportional punishments* for offenses to reduce the *present* rate of recidivism. If the General Assembly was seeking consistency in these matters, particularly by way of punishment, it does not make sense that the old law would apply to one set of prisoners in the State's prisons while the new law would apply to another, especially when the number of prisoners the new law applied to would at first be zero.

In the short term, prospective application of the law would only ensure that the old law would continue to consistently apply to the majority of the prison population until such time that offenders convicted and sentenced under the new law began to populate the prison system. This would only ensure that the prisons failed to successfully rehabilitate prisoners for years into the future, exactly the opposite result intended by the General Assembly

Because of the "one subject declaration" at Section 63 of 2010 S.C. Acts 272,[1] the intent expressed for Part II can be fairly imputed to Part I. Therefore, Part I was also intended to provide cost effective prison release mechanisms and alternatives to in incarceration to reduce recidivism and improve public safety. As before, it is not likely that the General Assembly intended the new law to preserve for years into the future prison release mechanisms that it found were not cost-effective and did not reduce recidivism and improve public safety.

Further, note that under Section 66, the Act intended that the amendments to Part I would go into effect as soon as possible - upon signature by the Governor. Where it did not intend the Act to go into immediate effect (Part II), it said so (I presume this was to enable the various affected agencies to prepare to implement the changes to the law). Clearly the General Assembly was mindful that in their administration some provisions could not be reasonably put into effect at once. However, everything else should go into effect at once to maximize the Act's intended effect.

Given the problems identified that new law was clearly intended to remedy, it does not seem likely that the General Assembly could have meant to bind both the probation and correctional systems to laws, policies and procedure it had already identified as causing harm. It is more likely that the GA intended for the new law to apply to the maximum number of prisoners as soon as possible in order to remedy the present problem as quickly as possible. Retroactive application of Sections 44-53-370 and -375 be more likely to achieve the General Assembly's stated goals sooner that would prospective application.

Even if the General Assembly did not explicitly state that the amendments would apply retroactively, retroactive application of the amendments would not be contrary to the General Assembly's declared intent. But do the General Assembly's several statements of intent "necessarily imply" the intent that it *should* apply retroactively, as Brown would require? It is hard to see how the changes to the law would have their maximum intended effect *unless* they applied retroactively.

2. Intent Expressed in the Language Amending S.C. Code §§ 44-53-370 and -375.

The amendments to Sections 44-53-370 and -375 added language relating to parole eligibility and did not otherwise alter the definitions or penalties for the crimes described. At each instance where the subsections are amended, the new language states that it applies to "a person convicted and sentenced pursuant to this subsection" or "a person convicted and sentenced pursuant to this item".

The new language does not distinguish between those convicted before or after the language was added. Given that the definitions and penalties for the crimes did not change, anybody "convicted and sentenced" pursuant to those subsections before the new law went into effect would have faced the same potential penalty as those "convicted and sentenced" after the law was effective. The only change to the law was to provide a *post-conviction* opportunity for parole that did not exist before.

[1] The General Assembly stated that "all the provisions contained in this act relate to one subject . . . in that each provision relates directly to or in conjunction with other sections to the subject of sentencing reform . . . ." The General Assembly also found that "a common purpose or relationship exists among the sections, representing a potential plurality but not disunity of topics."

Because the new language does not distinguish between persons convicted before and after the amendment, and because the definition and penalties for the crimes did not change, the amendments to the statutes regarding parole appear to apply to anybody "convicted and sentenced" under those provisions, no matter when that happened.

In other words, there is nothing here that implies that the new language *ought not* to apply to those convicted sentenced before the laws were amended.

3. Intent Expressed in the Savings Clause.

Does the savings clause at Section 65, 2010 S.C. Acts 273 bar retroactive application of the amendments to Sections 44-53-370 and -375?

> The repeal or amendment by the provisions of this act or any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, *unless the repealed or amended provision shall so expressly provide*. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

2010 S.C. Acts 273, § 65

Do the amendments to Sections 44-53-370 and -375 contain express provisions that override the effect of the savings clause? In each instance where Sections 44-53-370 and -375 were amended, the added text begins with, and sometimes restates, that it applies "[n]otwithstanding any other provision of law", which would presumably include the savings clause. If the General Assembly intended the new laws to apply retroactively, then these words may be interpreted to expressly negate any effect the savings clause might have to limit the amendments to prospective application.

Further, the amendments to Sections 44-53-370 and -375 did not repeal those statutes. The definition of the crimes and their penalties remained the same. The only difference is that the amendments added an expanded post-conviction opportunity for parole (and other rehabilitative opportunities) for persons convicted and imprisoned under the statutes. Though this obviously expanded a prisoner's opportunity to be paroled, it did not extinguish or alter the punishment for the crimes.

Also, even though the amendments created a new right to be considered for parole, prisoners were not granted an absolute right to be paroled, just to be considered for it.

If the General Assembly can be fairly said to have intended the new law to apply retroactively, then the savings clause should not prevent Sections 44-53-370 and -375 from applying retroactively.

B. Are the Amendments to Sections 44-53-370 and -375 Remedial or Procedural in Nature and Thus Presumed To Be Retroactive?

"Our decisions recognize a presumption that statutory enactments are to be given prospective rather than retroactive effect. An exception to this presumption arises when the enactment is remedial or procedural in nature." Brown, supra. Procedural statutes set out a mode of procedure for courts to follow, or require a specific method for enforcing rights. Edwards v. State Law Enforcement Division, 720 S.E.2d 462, 467, 395 S.C. 571, 580 (2011). When a statute is procedural, it ordinarily will be accorded a retroactive application in the sense that it will be applied to pending actions and proceedings. State v. Davis, 309 S.C. 334 (1992).

A statute is remedial where it creates new remedies for existing rights or enlarges the rights of persons under disability. Edwards v. State Law Enforcement Division, 720 S.E.2d 462, 466, 395 S.C. 571, 580 (2011). However if the statute violates contractual obligations, creates a new right, or divests a vested right, the statute will not be applied prospectively. Hooks v. Southern Bell and Telegraph Co., 291 S.C. 41, 43. 351 S.E.2d 900, 902 (COA 1986).

1. Are Prisoners "Persons Under A Disability?

If prisoners are "persons under a disability", then the amendments to Sections 44-53-370 and -375 clearly enlarge the rights of persons under disability. However, I have been unable to find clear S.C. statutory or case law defining what a person *under* a disability currently is. There are statutes tolling the statute of limitation for various civil torts for persons "under a disability" where the person is a minor or insane. These statues used to include prisoners, but the law has been amended to exclude them from protection.

Black's Law Dictionary (5th ed. 1979) states that a disability is:

> "The want of legal capability to perform an act. Term is generally used to indicate an incapacity for the full enjoyment of ordinary legal rights; **thus, persons under age, insane persons, and convicts are said to be under disability**".

In the same edition under "Civil Disabilities", Black's states:

> "**Apart from the sentence which is imposed upon a convicted offender**, **numerous civil disabilities are also often imposed.** Theses disabilities, which adversely affect an offender both during his incarceration and after his release, include denial of such privileges as voting, holding public office, obtaining many jobs and occupational licenses, entering judicially-enforced agreements . . . ."

Black's Law Dictionary, abridged 7th ed. (2000) states that a "civil disability" is:

> "the condition of a person who has had a legal right or privilege revoked as a result of a criminal conviction, as when a person's driver's license is revoked after a DWI conviction."

These definitions encompass both the imprisonment of the person and the deprivation of the person's civil rights and privileges. I think it is proper to conclude that prisoners in S.C. are "persons under a disability". If so, then the amendments to Sections 44-53-370 and -375 clearly enlarge the rights of persons under a disability because they provide persons imprisoned under those statutes an opportunity to be paroled that they did not enjoy before. Therefore, the amendments to the statutes were remedial and presumptively retroactive in effect.

2. Do the Amendments Create a New Remedy for an Existing Right?

When no-parole prisoners have served 85% of their sentences, they are automatically released and enter CSP. This is not technically "parole", but they are released earlier than the end of their sentences. You could argue that they have an existing right to get out of jail early, and the amendments to Sections 44-53-370 and -375 create a new remedy (parole) for an existing right (the right to get our early). This argument probably isn't necessary to explore further, because I think it's pretty clear that prisoners are persons "under a disability" and the analysis above this paragraph applies.

3. Do the Amendments Create a New Right, and Thus Are Not Presumptively Retroactive?

If a statute violates contractual obligations, creates a new right, or divests a vested right, the statute will not be applied prospectively. Hooks v. Southern Bell and Telegraph Co., 291 S.C. 41, 43. 351 S.E.2d 900, 902 (COA 1986). I do not believe this and related cases apply to this situation. They seem to focus on contractual rights or rights to various civil benefits such as worker's compensation. Further, the amendments to Sections 44-53-370 and -375 may arguably create a new right to parole that did not exist before, but they do so in a context where the person given the new right to parole is already subject to a disability that did not exist before – the constraint of freedom. The opportunity for parole is more in character of an opportunity to restore a right the prisoner had lost under due process of law. I think it's pretty clear that prisoners are persons "under a disability" and the analysis of that term at Subsection A above applies.

4. Are the Amendments Procedural In Nature?

Procedural statutes set out a mode of procedure for courts to follow, or require a specific method for enforcing rights. Edwards, supra. Ordinarily a procedural statute will apply retroactively in that it will be applied to currently pending actions and proceedings. State v. Davis, 309 S.C. 334 (1992).

I do not think the amendments Sections 44-53-370 and -375 are procedural, insofar as they apply to parole. Perhaps if the right to parole already existed, and the amendments altered the terms of how prisoners would be reviewed for parole, or how often, the amendments might be procedural. But the amendments only apply to persons who have been convicted and sentenced under the sections, so procedurally they cannot apply to prosecutions that are no longer pending.

However, it is interesting that the earlier determination that the amendments apply to prisoners *sentenced* on and after the date the amendments to Sections 44-53-370 and -375 went into effect and not to those who committed crimes on that day or after. It seems as though the initial interpretation implicitly treats the amendments as a procedural change and that, in actual effect, apply it retroactively. If the amendments were only to have prospective effect, it seems they should have only applied the law to those who committed the covered crimes on the day it went into effect or after. That PPP and SCDC intended to apply the law to those who had already been charged or convicted of the amended crimes, but only upon their sentencing, is essentially a *retroactive procedural* application of the amended statutes, because they apply it to *pending* actions – prosecutions for crimes that necessarily must have occurred before the new law went into effect.

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTH JUDICIAL CIRCUIT**
COUNTY OF RICHLAND	)	

Marion Katrell Campbell, on behalf of himself and all other similarly situated, Plaintiff, v. South Carolina Department of Corrections, Defendant.	C/A No. 2020-CP-40-05532
Wardell Williams, Harry Simmons, Jr., and Isiah Rollins, Plaintiffs, v. South Carolina Department of Corrections, Defendant.	C/A No.: 2020-CP-40-04701
Larry Hampton, Christopher McDowell, David Payton, Jr., and Michael Smoak, Plaintiffs, v. South Carolina Department of Corrections, Defendant.	C/A No. 2020-CP-40-05660

Henry Belton, Plaintiff, v. South Carolina Department of Corrections, Defendant.	C.A. No. 2017-CP-40-00556

NOTICE AND MOTION TO RECONSIDER

TO: The Honorable Jocelyn Newman

and

Cheryl F. Perkins, Charles W. Whetstone, Jr., Andrew R. Hand, James Andrew Bradshaw, Richard A. Harpootlian, Kyle Jason White, Counsel for Plaintiffs

YOU WILL PLEASE TAKE NOTICE that Defendant South Carolina Department of Corrections ("SCDC"), by and through its undersigned counsel, shall at such time and place as the Court may direct, move for an Order pursuant to Rule 59(e), SCRCP.

The grounds for this motion are as follows:

1. **In denying immunity under Section 15-78-60(4)(precluding liability for losses resulting from the "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law. . . ."), the Court applied an incorrect definition of "enforce" or "enforcement."**

This subsection is arguably the plainest and simplest reason for granting summary judgment to SCDC based on immunity. In rejecting this subsection as a basis for immunity, the Order erroneously relied on the third-tier definition of the term "enforcement" (i.e., "to compel") in the Merriam-Webster online dictionary. Order at 21, citing https://www.merriam-webster.com/

dictionary/enforcement. In defining "enforce" as meaning "to compel." however, the Order skipped over several preferred definitions of "enforce," and gave the term an overly limited meaning. Order at 21. Had the Order cited the primary definition, that is, "to give force to," the Order would have adopted the more common and accurate definition of the term "enforce." In this context, Plaintiffs are claiming precisely that prior to Bolin and Fowler, SCDC failed to "give force to" the interpretation of the Omnibus Crime Act, that was ultimately interpreted by the Court of Appeals in 2016.

The Supreme Court has held, in the context of a case specifically involving § 15-78-60(4), that "the words [of the statute] must be given their plain and ordinary meaning without resort to a subtle or forced construction which limits or expands the statute's operation," and that so viewed, "[t]he provisions of Section 15–78–60(4) are clear and unambiguous on their face. . . ." Adkins v. Varn, 312 S.C. 188, 191, 439 S.E.2d 822, 824 (1993).[1] The Order, in rejecting this basis for immunity, therefore erred in adopting a less-common dictionary definition, resulting in "a subtle or forced construction which limits . . . the statute's operation," Adkins v. Varn, supra, and in overlooking Adkins and the reasoning of the McDonald R & R on this specific issue.[2]

[1] To the same effect is the McDonald R & R, which held that "a common sense reading of the allegations in this case shows that the plaintiff is ultimately complaining about SCDC's enforcement of or compliance with the Act," and that 15-78-60(4) "provides immunity for the failure to enforce a law, which is precisely what the plaintiff blames for his alleged prolonged detention. . . ." , 2018 WL 7820956, at *12, citing Adkins v. Varn, supra.

[2] The Order focuses more on the use of the term "comply" in § 15-78-60(4), Order at 20-21, but acknowledges that SCDC "focuses its argument on 'enforcement' versus 'compliance.'" Even if the Order is correct in its interpretation of the word "comply" in this subsection, which SCDC does not concede, the statute uses the disjunctive word "or," so that even if compliance is not an issue, SCDC still is immune under the "enforcement" exemption.

2. In rejecting SCDC's claim of discretionary immunity, the Order disregarded all of the evidence, discussed by the Fourth Circuit, of the careful review that SCDC officials gave to the statutory construction issue.

In holding that SCDC was not entitled to immunity for the discretionary actions of its counsel, Florian and Tatarsky, the Order did not review or discuss any of the undisputed facts pertaining to the actions of Florian and Tatarsky, as extensively discussed by the Fourth Circuit and raised by SCDC.[3] The Order is devoid of any discussion or conclusions regarding the nature of those attorneys' review and the extent to which such review comported with "accepted professional standards" Instead, the 35-page Order devotes only a few sentences to this key issue, concluding only that because one ALJ (but not the other one that considered the issue) and the Court of Appeals in Bolin v. South Carolina Dep't of Corrections, 415 S.C. 276, 781 S.E.2d 914 (Ct. App. 2016), used the term "unreasonable," a term not necessary to deciding the criminal law issue before those courts, SCDC's actions could not have been the result of the application of "accepted professional standards." Order at 24.

In so holding, the Order did not mention or discuss, the Fourth Circuit's holding in this very case that "Florian acted reasonably" in reaching his conclusions about the Omnibus Crime Act, even though the South Carolina Court of Appeals ultimately disagreed with SCDC. Campbell v. Florian, 972 F.3d 385, 395 (4th Cir. 2020), as amended (Aug. 28, 2020). The Fourth Circuit reached that conclusion after an extensive discussion of the actions of Florian and Tatarsky. 972 F.3d at 389-390, 395-398. In addition, the Fourth Circuit carefully pointed out that the mere use of

[3] On pp. 7-8, the Order, relying on certain Requests to Admit, does list certain "undisputed facts," but those matters apply primarily to computations of dates, and are not dispositive of the defenses raised by SCDC. Moreover, SCDC always denied in those responses (see Exhibit E, ¶¶ 50, 52) that any detention was unlawful.

the term "unreasonable" by a court in deciding a case does not translate into a conclusion that a legal opinion reached after careful consideration was therefore also "unreasonable:"

> An incorrect legal opinion often occurs without some negligent (much less reckless) act or omission. In our adversarial legal system, roughly 50% of litigants lose—and thus have pressed an incorrect legal opinion. Competent administrative agencies and lower courts are often overturned despite careful and thoughtful legal interpretations. Indeed, the South Carolina Administrative Law Court (an independent body) first upheld Florian's reading of the Omnibus Act. <u>And even at the highest levels of the law, four colleagues at times share an "incorrect" or "unreasonable" opinion.</u>

972 F.3d at 396–97.

SCDC contended that when the Court of Appeals in <u>Bolin</u> used such terms as "patently erroneous" and "unreasonable" to characterize SCDC's interpretation, those statements should not govern this case, because they were "statements in an opinion that merely constitute the reasoning, arguments, references, illustrations, and analogies" and therefore were "generally not precedents." 21 C.J.S. Courts § 227 (emphasis added). The Order posits that that those characterizations by the Court of Appeals were necessary to "overcome the deferential standard it otherwise would have accorded the ALC decision." Order at 12. However, the supposed "patently erroneous" standard for reversing an agency interpretation has also been described as including merely a "clearly erroneous" interpretation of a statute. <u>Davis v. S.C. Dep't of Pub. Safety</u>, 328 S.C. 578, 582, 493 S.E.2d 871, 873 (Ct. App. 1997), rev'd, 335 S.C. 51, 515 S.E.2d 761 (1999), and overruled by <u>Thompson v. S.C. Dep't of Pub. Safety</u>, 335 S.C. 52, 515 S.E.2d 761 (1999).[4] The Court's holding

[4] It is interesting that in <u>Davis</u>, the Court of Appeals held that DMV's interpretation of a statute was "clearly erroneous," citing several different canons of construction. The Supreme Court of South Carolina then unanimously disagreed, as the subsequent history of <u>Davis</u>, listed above, indicates. This is as good an illustration as any as to how some lawyers or judges can regard a point as clear beyond doubt, only to have another group of lawyers or judges reach the completely opposite conclusion. This series of South Carolina cases reaffirms, as SCDC has previously

on this point therefore incompletely or erroneously addressed SCDC's contention that the language in Bolin cited by the Order was not central to the decision. That language in Bolin therefore should not form the basis for holding that SCDC's legal conclusions did not reflect a review that comported with "accepted professional standards."

Further, the McDonald R & R, while not binding on this Court, concluded that

> The evidence in this case shows that the SCDC meets this standard [i.e., the need to use "accepted professional standards."] As defendant Florian testified at his deposition, he reviewed the 2010 statute, did legal research, and reached a legal opinion about how the 2010 statute interacted with the so-called 85% rule (doc. 72-3, Florian dep. 132-33). Further, the ALC agreed with the SCDC attorney's interpretation of the Act. While the Court of Appeals ultimately concluded that the SCDC's interpretation was in error, the evidence does not show that the SCDC's interpretation fell outside "accepted professional standards."

2018 WL 7820956, at *12.[5]

Neither the Plaintiffs nor the Order have in any way disputed the many detailed facts set forth in the Fourth Circuit's opinion in support of its opinion that "Florian acted reasonably to confront the interpretive problem before him." 972 F.3d at 395. Nor do the Plaintiffs or the Order contest the federal courts' detailed descriptions of Florian's careful activities and those courts' conclusions regarding them. SCDC therefore respectfully submits that the Order erred in not addressing or considering the undisputed facts concerning the work done by SCDC's counsel. The Order also erred in overlooking the Fourth Circuit's well-reasoned conclusion that the mere

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argued, (9/12/23 Mem. in Opp. at 7) that "'plain meaning' is often in the eye of the beholder." Washington Legal Found. v. U.S. Sentencing Comm'n, 17 F.3d 1446, 1449 (D.C. Cir. 1994).

[5] The Order does not address or discuss the reasoning or substance of the McDonald R & R, but instead simply dismisses it on the ground that it was "not adopted." Order at 9 n. 2. The Order also notes, though, that the R & R was not rejected, even by the district court, on the state law claims. *Id.* Both the R & R and the Fourth Circuit's opinion, as thoroughly-reasoned analyses of the facts in this very case, should have received careful discussion by the Order.

labeling of a lawyer's conclusion as "unreasonable" (and in a context that did not turn on reasonableness, but only on correctness) does not equate to a determination that the lawyer's review, viewed in hindsight and in the context of discretionary immunity, did not apply "accepted professional standards." [6]

SCDC incorporates by reference all of its previous contentions regarding discretionary immunity. SCDC would again call attention to the key point made by McCall v. Batson, 285 S.C. 243, 246, 329 S.E.2d 741, 742 (1985), which is that "discretionary activities [of state executive officials] cannot be controlled by threat of tort liability by members of the public who take issue with the decisions made by public officials. We expressly decline to allow tort liability for these discretionary acts. The exercise of discretion includes the right to be wrong."[7] The Court's decision is directly contrary to this principle, because it would expose agencies to tort damage liability for their attorneys' conclusions about statutory construction, in this case, the construction of the statute labeled by the Fourth Circuit as rife with "confusion," 972 F.3d at 389, or marked by "contradictions," *id.* at 390, and about which two Administrative Law Judges reached opposite conclusions.

The issue here goes to the very heart of the nature of sovereign immunity for executive functions, as Batson recognized when it declined to abrogate that immunity (which was then later codified as S.C. Code Ann. § 15-78-60(5)). Executive agencies and their counsel are frequently called upon to make decisions about how to construe statutes that are "rarely draft[ed] . . . as clearly

[6] Plaintiffs have not cited a case in which the term "accepted professional standards" has been applied to legal opinions. Most of the cases cited by Plaintiffs involved engineering standards, which are much more clear-cut than the standards that apply to legal work.

[7] Although the Order might be read as suggesting that the Tort Claims Act abrogated the "right to be wrong" standard, Order at 18, that standard has been reiterated after the Act's passage. Giannini v. S.C. Dep't of Transp., 378 S.C. 573 at 581 n.1, 664 S.E.2d 450 at 454 n. 1 (2008).

as courts would like. . . ." 972 F.3d at 398. The Order holds in effect that the State can be subjected to damage claims whenever a court disagrees with an agency's considered legal opinion.[8] But in a case such as this, where SCDC is called upon to sentencing interpretations, that result could lead to SCDC, out of fear of liability, always resolving any statutory contradictions or confusions in favor of shortening the sentences of prisoners. Such a result would not be consistent with the public interest in ensuring that crimes are punished in accordance with legislative intent, even when that intent is not stated "as clearly as courts would like." Id.

3. Application of the 2010 Omnibus Act to persons convicted and sentenced prior to the Act's passage.

Although SCDC respectfully submits that SCDC's immunities completely bar this action, there are alternative reasons, not related to immunity, why the claims of the two sets of inmates (sentenced before and after the Act's effective date) are barred. With regard to "June Releasees," that is, the persons convicted and sentenced prior to the Act's taking effect in 2010, and released on June 1, 2016, the Order overlooked two separate controlling principles.

First, the Order did not address SCDC's contention about the savings clause of the statute itself. Order at 17. As SCDC has previously pointed out, the savings clause of the Act provides as follows:

> **Savings clause**
>
> SECTION 65. The repeal or amendment by the provisions of this act or any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or

[8] The Fourth Circuit rejected this argument, characterizing it as "a res ipsa loquitur argument—that is, coming to an 'unreasonable' legal determination is the kind of thing that does not happen without deliberate indifference." 972 F.3d at 396 (4th Cir. 2020). The argument should be rejected in the present context as well, especially since South Carolina does not recognize the doctrine of res ipsa loquitur. Graham v. Town of Latta, 417 S.C. 164, 789 S.E.2d 71 (Ct. App. 2016).

> amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

Act No. 273 of 2010, § 65 (emphases added). Clearly, the General Assembly did not intend for the Act to affect pre-Amendment convictions and sentences, because the amendments on which Plaintiffs rely do not "so expressly provide." Instead, those amendments are silent regarding their application to pre-Act convictions and sentences.[9]

The Order, p. 16, cites several Arizona cases that arguably apply a different rule, the Order did not consider SCDC's contention that those cases turned on specific language in Arizona statutes that is not present in the Omnibus Crime Act. Specifically, the Arizona statute in Tyree v. Moran, 113 Ariz. 275, 550 P.2d 1076 (1976) required all prisoners to be under some form of supervision for six months after their release from prison, As a tradeoff, and presumably to prevent an ex post facto problem, the statute also ordered all inmates to be released, albeit with supervision, 6 months earlier than their original maxout dates. The other Arizona cases cited by the Order involved changes in state law that were applied to earlier convictions solely in order to address

[9] The Order, citing but incompletely quoting a response by SCDC to Plaintiffs' Request for Admission No. 52, holds that SCDC effectively admitted that the statute applied retroactively to the June Releasees. Order at 15. The cited Request to Admit, (Ex. E to Plaintiff's Motion for Summary Judgment, ¶ 52). asserted that "SCDC incarcerated the following inmates for the stated number of days (counting the day of release) beyond their maxout or supervised re-entry dates." SCDC admitted only the revised computations of the stated numbers of days, but made clear the limited nature of that admission by stating that "To the extent that Plaintiff contends that the stated period of additional detention was unlawful, denied." (Request 5 of the second set, also cited by the Court, also only involved the computation of maxout dates.) As a result, there is nothing in SCDC's responses to the Requests for Admission that would support Plaintiffs' claim that persons sentenced prior to the effective date the of the 2010 Omnibus Act were unlawfully detained, or that the statute's clear terms concerning retroactivity should be disregarded.

perceived problems with the requirements of Miller v. Alabama, 567 U.S. 460 (2012), which held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes was unconstitutional.

Second, the Order erred in disregarding State v. Varner, 310 S.C. 264, 423 S.E.2d 133 (1992), which sets forth the longstanding rule that "In the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced, unless it is greater than the punishment provided for when the offense was committed." 310 S.C. at 265, 423 S.E.2d at 133–34 (1992) (emphasis added). The Order held that "Varner is readily distinguishable as it dealt with sentencing, not parole." Order at 16. In so holding, however, the Court did not address or consider SCDC's references to the overwhelming weight of authority to the effect that a prohibition against parole under a general parole statute was a "penalty, forfeiture, or liability" saved from release or extinguishment by the federal saving clause in the U.S. Code (identical in all pertinent respects to the Omnibus Act's saving clause quoted above). See Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 659-664 (1974) and related authorities cited by SCDC.

The Order further held that:

> Also, the Court in Varner specifically stated: "[i]n the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced unless it is greater than the punishment provided for when the offense was committed." Varner, 310 S.C. at 265, 423 S.E.2d at 133 (emphasis added). In this case, the controlling statute is the Omnibus Act.

Order at 16-17. This, again, overlooks the fact that the Omnibus Act contains a saving clause barring such retroactive application to existing convictions. The broad references in the Act to such matters as an intent to conserve taxpayer dollars by allowing earlier release dates for inmates convicted of less serious offenses, cited in the Order at 4, 29 do not expressly specify whether the pertinent amendments should apply retroactively. As a result, the Omnibus Act, which contains no express language making the pertinent amendments mandatory is expressly not "controlling" on the issue of retroactivity of its application.

4. Application of the 2010 Omnibus Act to persons convicted and sentenced after to the Act's passage, but released prior to the date of the remittiturs in Bolin and Fowler.

This contention pertains to the other set of inmates, the "March Releasees," that is, those who were convicted and sentenced after the enactment of the Omnibus Act, but who were all released on March 21, 2016, prior to the issuance of the remittiturs in Bolin and Fowler. SCDC has argued previously that under established principles, those cases did not take effect until the issuance of the remittiturs. See, e.g., SCDC's proposed Order at 11-12.[10] The Order, without mentioning any of the cases cited by SCDC in this regard, concludes that "SCDC cannot substitute the appellate remittitur date in Bolin for the effective date set forth in the Omnibus Act. . . . " Order at 14.[11]

The Order, with no citation of authority specifically on point, holds that "courts, unlike legislatures, do not make but merely find the law. Order at 12 (emphasis in original). Regardless of whether this principle is a correct statement of legal philosophy, it provides no assistance in determining what a party must do in the meantime before the law is eventually "found." That issue involves the separate principle concerning the extent, if any, to which a judicial decision will be applied retroactively. On that point, the Court apparently concludes, citing only civil cases that did

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[10] The McDonald R & R held that until the remittitur in Bolin was issued, the continued restraint of Campell in the meantime was lawful. 2018 WL 7820956, at *11.

[11] In a footnote, the Order, again ignoring settled principles about the effective date of a judicial decision, concludes that "Plaintiffs and class members were not parties to the Bolin proceeding. Their rights were governed solely by the Omnibus Act commencing on its effective date." Order at 14 n. 7. It is unclear how this confers any rights on these Plaintiffs.

not involve criminal law in any way, that Bolin and Fowler should apply retroactively. Order at 12-14. When the issue is whether a newly-declared interpretation of a statute involving criminal law or procedure should be given retroactive effect, the law is to the contrary. For instance, the U. S. Supreme Court has held that the Constitution does not require a state's highest court "to make retroactive its new construction of [a criminal] statute." Wainwright v. Stone, 414 U.S. 21, 23–24 (1973). Nevertheless, and as the Fourth Circuit noted, 972 F.3d at 391 n.4, SCDC applied Bolin and Fowler retroactively, at least to the extent that SCDC released both the March Releasees (releasing those inmates before the issuance of the remittiturs in those cases), and the June Releasees (whose entitlement to be early-released at all was not ordered by any court, whether by implication or otherwise). Neither Plaintiffs nor the Order cite any authority supporting a damage claim under these circumstances. Given that under Wainwright, supra, and its progeny, there is no authority mandating that the decisions of the Court of Appeals in Bolin and Fowler should support retroactive damage claims, the Order erred in applying those two cases in a way that would create liability in damages.[12]

5. Other immunity defenses.

SCDC raised several other immunity defenses, in addition to those discussed above. In rejecting all of the immunity defenses raised by the SCDC, the Order overlooked the guiding principle, contained in the Tort Claims Act itself, that "The provisions of this chapter establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees . . . must be liberally construed in favor of limiting the liability of the State." S.C. Code Ann. § 15-

[12] In holding that "[t]he Bolin decision did not create new liability for SCDC where none previously existed," the Court erred, because here, as in Wainwright and similar cases, Bolin set forth a new construction of a criminal statute that would create new liability for SCDC if Plaintiffs' claims were to be accepted.

78-20(f)(emphasis added). SCDC incorporates all contentions previously made on all cited subsections, including §§ 15-78-60(3) and 15-78-60(21).

6. While SCDC disagrees that Plaintiffs should have been granted partial summary judgment on one claim, in any event, the claim to which the Court's grant of summary judgment should have applied would be the simple negligence claim in Plaintiffs' Second Cause of Action.

Although describing this as a false imprisonment claim, Plaintiffs have effectively presented it as a simple negligence claim, sustainable under their Second Cause of Action, which includes a simple negligence claim. In support of their Motion for Summary Judgment on the false imprisonment cause of action, Plaintiffs admit that "Under the South Carolina Tort Claims Act, a plaintiff is limited to a recovery of $300,000.00 per occurrence pursuant to section 15-78-120(a)(4). An occurrence is defined as 'an unfolding sequence of events which proximately flow <u>from a single act of negligence.</u>' S.C. Code Ann. § 15-78-30(g)." Plaintiffs' Memorandum in Support of Motion for Summary Judgment as to Count One—False Imprisonment (8/9/23) at 27 (emphasis added).

The Order, pp. 25-26, also applies § 15-78-30(g), defining occurrence in the context of "a single act of negligence," and thereby implicitly holds that the "false imprisonment" claim was one sounding in simple negligence. In addition, the Order, accepting contentions made by Plaintiffs, reviewed issues about whether SCDC weighed the competing considerations and alternatives and utilized accepted professional standards. Order at 23, citing <u>Strange v. S.C. Dep't of Highways & Pub. Transp.</u>, 314 S.C. 427, 445 S.E.2d 439 (1994). <u>Strange</u> and all of the other cases cited on p. 23 of the Order involved negligence claims. The determination of whether the agencies did or did not weigh the competing considerations and alternatives and use accepted professional standards is essentially an inquiry into whether the agencies did or did not act negligently, at least where, as here, the state actor is governed by some form of professional standards.

SCDC raises this point because the Tort Claims Act provides for a waiver of sovereign immunity against state agencies only for losses "recoverable in actions for negligence. . . ." S.C. Code Ann. § 15-78-30(f). Plaintiffs' First Cause of Action is a claim for false imprisonment, which is clearly an intentional tort. Jones by Robinson v. Winn-Dixie Greenville, Inc., 318 S.C. 171, 175, 456 S.E.2d 429, 432 (1995). When a claim involves "intent to harm," only the individual employee may be named as a defendant. § 15-78-70(b). Flateau v. Harrelson, 355 S.C. 197, 208, 584 S.E.2d 413, 418–19 (Ct. App. 2003). Accordingly, the false imprisonment claim should be dismissed for this reason alone. However, for the reasons set forth immediately above, this point is merely a matter of conforming the holding of the Order to the claims actually presented, regardless of how they were labeled, and does not change the nature of the proof Plaintiffs must make or the effectiveness of the defenses SCDC has raised. This point simply ensures that the definition of "occurrence" set forth in § 15-78-30(g) applies to all claims by Plaintiffs, a point that Plaintiffs have already admitted and that the Court has adopted. SCDC nevertheless asserts below, as it always has asserted, that even if it is found liable, there was still only one "occurrence" affecting all of the Plaintiffs

7. The Order overlooked the legal test for gross negligence, as well as the absence of a showing by Plaintiffs of evidence from which a jury could so conclude.

The portion of the Order from pp. 27 through 33 denied summary judgment on SCDC's motion for summary judgment on the negligence/gross negligence/recklessness claims, holding that a jury issue exists. However, the Order does not address SCDC's contentions regarding the legal standard for the establishment of gross negligence, as argued by SCDC in its proposed Order, that is, "the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do [i.e.,] the failure to exercise slight care." Clyburn v. Sumter Cnty. Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). The Order simply does not contain any reference to these or any other statements of the legal tests for gross negligence. As a result, the Order did not consider the tests necessary in order to conclude that a jury issue exists as to gross negligence. Moreover, the Order did not address the issue of how Florian's careful review, held by the Fourth Circuit to have been reasonable, could at the same time have involved a failure to exercise even slight care, and in fact, it is impossible to reach such a contradictory conclusion. The thorough review of the statute by Florian and Tatarsky was more than sufficient to clear the low hurdle of a need to show "slight care." As in Clyburn, supra, summary judgment should be granted for the defendant because "the only reasonable inference that can be drawn from these facts is that the [defendant], at the very least, exercised 'slight care.'" 317 S.C. at 54, 451 S.E.2d at 888. Again, the mere fact that SCDC reached a conclusion that a court subsequently deemed "unreasonable" does not equate to a showing that its legal review fell short of exercising even "slight care."[13]

The Order also holds that the gross negligence provision of § 15-78-60(25) applies to all other immunities claimed by SCDC. Order at 30-33. Given that there has been no evidence or legal conclusion that SCDC failed to exercise slight care or otherwise failed to clear the gross negligence hurdle, this issue should not need to be addressed. In any event, the Order erred in holding that by pleading the entirety of the Tort Claims Act as a defense in at least some of the consolidated cases, SCDC brought in the gross negligence standard. Order at 31. However, SCDC did not plead the Tort Claims Act exemption found in § 15-78-60(25). The Supreme Court has unequivocally held

[13] At pp. 28-30, the Order lists facts cited by Plaintiffs, but again, reaches no conclusion as to how or why any of these facts would meet the legal tests for gross negligence.

that when a defendant "never raised an affirmative defense that contained a gross negligence standard . . .[,] the gross negligence standard is not interpolated into" any other subsection actually pled as a defense. Jones v. Lott, 387 S.C. 339, 348, 692 S.E.2d 900, 904 (2010), abrogated in part on other grounds by Repko v. Cnty. of Georgetown, 424 S.C. 494, 818 S.E.2d 743 (2018). (Nothing in Repko affected or abrogated this holding in Jones.)[14] As a result, there is no basis for inserting the gross negligence standard into this case, although again, this should not matter, because there has been no conclusion of law holding that there was any evidence that would enable a jury to conclude that SCDC failed to exercise slight care or otherwise acted or failed to act in a way that meets the definition of gross negligence.

8. Even if SCDC is liable at all in any way, which SCDC denies, only one occurrence took place.

S.C. Code Ann. § 15-78-30(g) provides that an occurrence is "an unfolding sequence of events which proximately flow from a single act of negligence." However, the Supreme Court has held several times that "the burden to prove more than one occurrence rested on the plaintiff." Boiter v. S.C. Dep't of Transp., 393 S.C. 123, 133, 712 S.E.2d 401, 406 (2011), citing Chastain v. AnMed Health Foundation, 388 S.C. 170, 694 S.E.2d 541 (2010). Plaintiffs have produced no evidence that "SCDC made a conscious and deliberate decision" (as Plaintiffs have argued) regarding the nature of the determination of the sentences of each of the 413 inmate class members. To prove such an argument, Plaintiffs would need to show that SCDC reconsidered Florian's interpretation of the 2010 amendments for every inmate sentenced under §§ 44-53-370, -375(A) & (B). This was simply not the case, and Plaintiffs have not tried to argue otherwise, and have

[14] The Order, p. 31, cites Plyler v. Burns, 373 S.C. 637, 647 S.E.2d 188 (2007) as indicating that "a state entity may not bypass imposition of a gross negligence standard by intentionally pleading around it," but Plyler did not so hold. It merely elected to consider subsection 60(25), concluding that it not apply.

agreed that the Florian Memo "is the key document in this dispute." Campbell v. Florian, supra, 972 F.3d at 390 n. 3. Instead, Plaintiffs can show only that SCDC made one decision, embodied in the Florian Memo, regarding the interpretation of the 2010 amendments and then applied that single decision to the sentences of each of the 413 inmates. Each of the sentences of the affected inmates flowed from that single decision regarding how the Omnibus Act would be interpreted.

The Order, p. 34, sets forth a bare conclusion that "The jury has ample basis to find that each application by SCDC of a 'patently erroneous' interpretation of the Omnibus Act to each individual class member, resulting in excess confinement, was a separate occurrence." However, the Supreme Court has made it clear that it is erroneous to tie "the number of occurrences to the number of injuries. . . ." *Boiter,* 393 S.C. at 134, 712 S.E.2d at 406. At the conclusion of the Order, the Court held that it "grants Plaintiffs' Motion for Summary Judgment as to false imprisonment and finds that the unlawful imprisonment of each class member was a separate occurrence under the South Carolina Tort Claims Act." Order at 34-35. SCDC respectfully submits that there is no evidence that would create a jury question as to the number of occurrences, and that if this last provision of the Order is read as holding as a matter of law that there were 431 separate occurrences, it is without evidentiary support.

Again, the Order does not suggest that SCDC reinvented the wheel of the Florian memo in computing the sentences of each of the 400-plus Plaintiff-inmate, and no such showing has been made. Instead, the Order holds that "Each separate and distinct breach of each inmate's right to release, separated by space and time from every other impacted inmate, caused new and independent damage to each inmate." Order at 26. In so holding, the Order erroneously would base liability on the number of injuries, which is precisely the conclusion rejected by the Supreme Court in Boiter.

CONCLUSION

For the foregoing reasons, SCDC respectfully submits that the Court should reconsider and vacate its Order of April 15, 2025, and dismiss this case in its entirety.

Respectfully submitted,

DAVIDSON & WREN, P.A.

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ATTORNEYS FOR DEFENDANT SCDC

COLUMBIA, SOUTH CAROLINA

April 24, 2025

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Marion Katrell Campbell, on behalf of himself and all other similarly situated,

Plaintiff,

v.

South Carolina Department of Corrections,

Defendant.

C/A No. 2020-CP-40-05532

Wardell Williams, Harry Simmons, Jr., and Isiah Rollins,

Plaintiffs,

v.

South Carolina Department of Corrections,

Defendant.

C/A No.: 2020-CP-40-04701

Larry Hampton, Christopher McDowell, David Payton, Jr., and Michael Smoak,

Plaintiffs,

v.

South Carolina Department of Corrections,

Defendant.

C/A No. 2020-CP-40-05660

Henry Belton, Plaintiff, v. South Carolina Department of Corrections, Defendant.	C.A. No. 2017-CP-40-00556

AMENDED
NOTICE AND MOTION TO ALTER OR AMEND ORDER AND/OR TO RECONSIDER

TO: The Honorable Jocelyn Newman

and

Cheryl F. Perkins, Charles W. Whetstone, Jr., Andrew R. Hand, James Andrew Bradshaw, Richard A. Harpootlian, Kyle Jason White, Counsel for Plaintiffs

YOU WILL PLEASE TAKE NOTICE that Defendant South Carolina Department of Corrections ("SCDC"), by and through its undersigned counsel, shall at such time and place as the Court may direct, move for an Order pursuant to Rule 59(e), SCRCP. Specifically, SCDC asks that the Court alter, amend or reconsider its Order of April 15, 2025, written notice of which was received by SCDC on April 15, 2025, by vacating that Order and dismissing this action in its entirety, based on the grounds and reasons set forth herein.

This motion is based upon the April 15, 2025 Order, prior filings in this case, the rules of court; and such other matters as may be properly presented to the Court at the time of the hearing.

1. In denying immunity under Section 15-78-60(4)(precluding liability for losses resulting from the "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law. . . ."), the Court applied an incorrect definition of "enforce" or "enforcement."

This subsection is arguably the plainest and simplest reason for granting summary judgment to SCDC based on immunity. In rejecting this subsection as a basis for immunity, the Order erroneously relied on the third-tier definition of the term "enforcement" (i.e., "to compel") in the Merriam-Webster online dictionary. Order at 21, citing https://www.merriam-webster.com/dictionary/enforcement. In defining "enforce" as meaning "to compel." however, the Order skipped over several preferred definitions of "enforce," and gave the term an overly limited meaning. Order at 21. Had the Order cited the primary definition, that is, "to give force to," the Order would have adopted the more common and accurate definition of the term "enforce." In this context, Plaintiffs are claiming precisely that prior to Bolin and Fowler, SCDC failed to "give force to" the interpretation of the Omnibus Crime Act, that was ultimately interpreted by the Court of Appeals in 2016. Alternatively, Plaintiffs effectively claim that SCDC actually was. albeit erroneously, enforcing, i.e., giving force to, the amendments as SCDC understood them prior to April 1, 2016, when the Bolin court's view became law. In any event, and regardless of whether SCDC's actions are regarded as "enforcing" the amendments, i.e. giving force to them, or not enforcing or giving force to them, Section 15-78-60(4) provides immunity.

The Supreme Court has held, in the context of a case specifically involving § 15-78-60(4), that "the words [of the statute] must be given their plain and ordinary meaning without resort to a subtle or forced construction which limits or expands the statute's operation," and that so viewed, "[t]he provisions of Section 15–78–60(4) are clear and unambiguous on their face. . . ." Adkins v.

Varn, 312 S.C. 188, 191, 439 S.E.2d 822, 824 (1993).[1] The Order, in rejecting this basis for immunity, therefore erred in adopting a less-common dictionary definition, resulting in "a subtle or forced construction which limits . . . the statute's operation," Adkins v. Varn, supra, and in overlooking Adkins and the reasoning of the McDonald R & R on this specific issue.[2]

2. In rejecting SCDC's claim of discretionary immunity, the Order disregarded all of the evidence, discussed by the Fourth Circuit, of the careful review that SCDC officials gave to the statutory construction issue.

In holding that SCDC was not entitled to immunity for the discretionary actions of its counsel, Florian and Tatarsky, the Order did not review or discuss any of the undisputed facts pertaining to the actions of Florian and Tatarsky, as extensively discussed by the Fourth Circuit and raised by SCDC.[3] The Order is devoid of any discussion or conclusions regarding the nature of those attorneys' review and the extent to which such review comported with "accepted professional standards" Instead, the 35-page Order devotes only a few sentences to this key issue, concluding only that because one ALJ (but not the other one that considered the issue) and the Court of Appeals in Bolin v. South Carolina Dep't of Corrections, 415 S.C. 276, 781 S.E.2d 914 (Ct. App. 2016), used the term "unreasonable," a term not necessary to deciding the criminal law

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[1] To the same effect is the McDonald R & R, which held that "a common sense reading of the allegations in this case shows that the plaintiff is ultimately complaining about SCDC's enforcement of or compliance with the Act," and that 15-78-60(4) "provides immunity for the failure to enforce a law, which is precisely what the plaintiff blames for his alleged prolonged detention. . . ." , 2018 WL 7820956, at *12, citing Adkins v. Varn, supra.

[2] The Order focuses more on the use of the term "comply" in § 15-78-60(4), Order at 20-21, but acknowledges that SCDC "focuses its argument on 'enforcement' versus 'compliance.'" Even if the Order is correct in its interpretation of the word "comply" in this subsection, which SCDC does not concede, the statute uses the disjunctive word "or," so that even if compliance is not an issue, SCDC still is immune under the "enforcement" exemption.

[3] On pp. 7-8, the Order, relying on certain Requests to Admit, does list certain "undisputed facts," but those matters apply primarily to computations of dates, and are not dispositive of the defenses raised by SCDC. Moreover, SCDC always denied in those responses (see Exhibit E, ¶¶ 50, 52) that any detention was unlawful.

issue before those courts, SCDC's actions could not have been the result of the application of "accepted professional standards." Order at 24.

In so holding, the Order did not mention or discuss, the Fourth Circuit's holding in this very case that "Florian acted reasonably" in reaching his conclusions about the Omnibus Crime Act, even though the South Carolina Court of Appeals ultimately disagreed with SCDC. Campbell v. Florian, 972 F.3d 385, 395 (4th Cir. 2020), as amended (Aug. 28, 2020). The Fourth Circuit reached that conclusion after an extensive discussion of the actions of Florian and Tatarsky. 972 F.3d at 389-390, 395-398. In addition, the Fourth Circuit carefully pointed out that the mere use of the term "unreasonable" by a court in deciding a case does not translate into a conclusion that a legal opinion reached after careful consideration was therefore also "unreasonable:"

> An incorrect legal opinion often occurs without some negligent (much less reckless) act or omission. In our adversarial legal system, roughly 50% of litigants lose—and thus have pressed an incorrect legal opinion. Competent administrative agencies and lower courts are often overturned despite careful and thoughtful legal interpretations. Indeed, the South Carolina Administrative Law Court (an independent body) first upheld Florian's reading of the Omnibus Act. <u>And even at the highest levels of the law, four colleagues at times share an "incorrect" or "unreasonable" opinion.</u>

972 F.3d at 396–97.

SCDC contended that when the Court of Appeals in Bolin used such terms as "patently erroneous" and "unreasonable" to characterize SCDC's interpretation, those statements should not govern this case, because they were "statements in an opinion that merely constitute the reasoning, arguments, references, illustrations, and analogies" and therefore were "generally not precedents." 21 C.J.S. Courts § 227 (emphasis added). The Order posits that that those characterizations by the Court of Appeals were necessary to "overcome the deferential standard it otherwise would have accorded the ALC decision." Order at 12. However, the supposed "patently erroneous" standard for reversing an agency interpretation has also been described as including merely a "clearly erroneous" interpretation of a statute. Davis v. S.C. Dep't of Pub. Safety, 328 S.C. 578, 582, 493 S.E.2d 871, 873 (Ct. App. 1997), rev'd, 335 S.C. 51, 515 S.E.2d 761 (1999), and overruled by Thompson v. S.C. Dep't of Pub. Safety, 335 S.C. 52, 515 S.E.2d 761 (1999).[4] The Court's holding on this point therefore incompletely or erroneously addressed SCDC's contention that the language in Bolin cited by the Order was not central to the decision. That language in Bolin therefore should not form the basis for holding that SCDC's legal conclusions did not reflect a review that comported with "accepted professional standards."

Further, the McDonald R & R, while not binding on this Court, concluded that

> The evidence in this case shows that the SCDC meets this standard [i.e., the need to use "accepted professional standards."] As defendant Florian testified at his deposition, he reviewed the 2010 statute, did legal research, and reached a legal opinion about how the 2010 statute interacted with the so-called 85% rule (doc. 72-3, Florian dep. 132-33). Further, the ALC agreed with the SCDC attorney's interpretation of the Act. While the Court of Appeals ultimately concluded that the SCDC's interpretation was in error, the evidence does not show that the SCDC's interpretation fell outside "accepted professional standards."

2018 WL 7820956, at *12.[5]

[4] It is interesting that in Davis, the Court of Appeals held that DMV's interpretation of a statute was "clearly erroneous," citing several different canons of construction. The Supreme Court of South Carolina then unanimously disagreed, as the subsequent history of Davis, listed above, indicates. This is as good an illustration as any as to how some lawyers or judges can regard a point as clear beyond doubt, only to have another group of lawyers or judges reach the completely opposite conclusion. This series of South Carolina cases reaffirms, as SCDC has previously argued, (9/12/23 Mem. in Opp. at 7) that "'plain meaning' is often in the eye of the beholder." Washington Legal Found. v. U.S. Sentencing Comm'n, 17 F.3d 1446, 1449 (D.C. Cir. 1994).

[5] The Order does not address or discuss the reasoning or substance of the McDonald R & R, but instead simply dismisses it on the ground that it was "not adopted." Order at 9 n. 2. The Order also notes, though, that the R & R was not rejected, even by the district court, on the state law claims. *Id.* Both the R & R and the Fourth Circuit's opinion, as thoroughly-reasoned analyses of the facts in this very case, should have received careful discussion by the Order.

Neither the Plaintiffs nor the Order have in any way disputed the many detailed facts set forth in the Fourth Circuit's opinion in support of its opinion that "Florian acted reasonably to confront the interpretive problem before him." 972 F.3d at 395. Nor do the Plaintiffs or the Order contest the federal courts' detailed descriptions of Florian's careful activities and those courts' conclusions regarding them. SCDC therefore respectfully submits that the Order erred in not addressing or considering the undisputed facts concerning the work done by SCDC's counsel. The Order also erred in overlooking the Fourth Circuit's well-reasoned conclusion that the mere labeling of a lawyer's conclusion as "unreasonable" (and in a context that did not turn on reasonableness, but only on correctness) does not equate to a determination that the lawyer's review, viewed in hindsight and in the context of discretionary immunity, did not apply "accepted professional standards." [6]

SCDC incorporates by reference all of its previous contentions regarding discretionary immunity. SCDC would again call attention to the key point made by McCall v. Batson, 285 S.C. 243, 246, 329 S.E.2d 741, 742 (1985), which is that "discretionary activities [of state executive officials] cannot be controlled by threat of tort liability by members of the public who take issue with the decisions made by public officials. We expressly decline to allow tort liability for these discretionary acts. The exercise of discretion includes the right to be wrong."[7] The Court's decision is directly contrary to this principle, because it would expose agencies to tort damage liability for their attorneys' conclusions about statutory construction, in this case, the construction of the statute

[6] Plaintiffs have not cited a case in which the term "accepted professional standards" has been applied to legal opinions. Most of the cases cited by Plaintiffs involved engineering standards, which are much more clear-cut than the standards that apply to legal work.

[7] Although the Order might be read as suggesting that the Tort Claims Act abrogated the "right to be wrong" standard, Order at 18, that standard has been reiterated after the Act's passage. Giannini v. S.C. Dep't of Transp., 378 S.C. 573 at 581 n.1, 664 S.E.2d 450 at 454 n. 1 (2008).

labeled by the Fourth Circuit as rife with "confusion," 972 F.3d at 389, or marked by "contradictions," *id.* at 390, and about which two Administrative Law Judges reached opposite conclusions.

The issue here goes to the very heart of the nature of sovereign immunity for executive functions, as Batson recognized when it declined to abrogate that immunity (which was then later codified as S.C. Code Ann. § 15-78-60(5)). Executive agencies and their counsel are frequently called upon to make decisions about how to construe statutes that are "rarely draft[ed] . . . as clearly as courts would like. . . ." 972 F.3d at 398. The Order holds in effect that the State can be subjected to damage claims whenever a court disagrees with an agency's considered legal opinion.[8] But in a case such as this, where SCDC is called upon to sentencing interpretations, that result could lead to SCDC, out of fear of liability, always resolving any statutory contradictions or confusions in favor of shortening the sentences of prisoners. Such a result would not be consistent with the public interest in ensuring that crimes are punished in accordance with legislative intent, even when that intent is not stated "as clearly as courts would like." Id.

3. Application of the 2010 Omnibus Act to persons convicted and sentenced prior to the Act's passage.

Although SCDC respectfully submits that SCDC's immunities completely bar this action, there are alternative reasons, not related to immunity, why the claims of the two sets of inmates (sentenced before and after the Act's effective date) are barred. With regard to "June Releasees,"

[8] The Fourth Circuit rejected this argument, characterizing it as "a res ipsa loquitur argument—that is, coming to an 'unreasonable' legal determination is the kind of thing that does not happen without deliberate indifference." 972 F.3d at 396 (4th Cir. 2020). The argument should be rejected in the present context as well, especially since South Carolina does not recognize the doctrine of res ipsa loquitur. Graham v. Town of Latta, 417 S.C. 164, 789 S.E.2d 71 (Ct. App. 2016).

that is, the persons convicted and sentenced prior to the Act's taking effect in 2010, and released on June 1, 2016, the Order overlooked two separate controlling principles.

First, the Order did not address SCDC's contention about the savings clause of the statute itself. Order at 17. As SCDC has previously pointed out, the savings clause of the Act provides as follows:

> **Savings clause**
>
> SECTION 65. The repeal or amendment by the provisions of this act or any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

Act No. 273 of 2010, § 65 (emphases added). Clearly, the General Assembly did not intend for the Act to affect pre-Amendment convictions and sentences, because the amendments on which Plaintiffs rely do not "so expressly provide." Instead, those amendments are silent regarding their application to pre-Act convictions and sentences.[9]

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[9] The Order, citing but incompletely quoting a response by SCDC to Plaintiffs' Request for Admission No. 52, holds that SCDC effectively admitted that the statute applied retroactively to the June Releasees. Order at 15. The cited Request to Admit, (Ex. E to Plaintiff's Motion for Summary Judgment, ¶ 52). asserted that "SCDC incarcerated the following inmates for the stated number of days (counting the day of release) beyond their maxout or supervised re-entry dates." SCDC admitted only the revised computations of the stated numbers of days, but made clear the limited nature of that admission by stating that "To the extent that Plaintiff contends that the stated period of additional detention was unlawful, denied." (Request 5 of the second set, also cited by the Court, also only involved the computation of maxout dates.) As a result, there is nothing in SCDC's responses to the Requests for Admission that would support Plaintiffs' claim that persons sentenced prior to the effective date the of the 2010 Omnibus Act were unlawfully detained, or that the statute's clear terms concerning retroactivity should be disregarded.

The Order, p. 16, cites several Arizona cases that arguably apply a different rule, the Order did not consider SCDC's contention that those cases turned on specific language in Arizona statutes that is not present in the Omnibus Crime Act. Specifically, the Arizona statute in Tyree v. Moran, 113 Ariz. 275, 550 P.2d 1076 (1976) required all prisoners to be under some form of supervision for six months after their release from prison, As a tradeoff, and presumably to prevent an ex post facto problem, the statute also ordered all inmates to be released, albeit with supervision, 6 months earlier than their original maxout dates. The other Arizona cases cited by the Order involved changes in state law that were applied to earlier convictions solely in order to address perceived problems with the requirements of Miller v. Alabama, 567 U.S. 460 (2012), which held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes was unconstitutional.

Second, the Order erred in disregarding State v. Varner, 310 S.C. 264, 423 S.E.2d 133 (1992), which sets forth the longstanding rule that "In the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced, unless it is greater than the punishment provided for when the offense was committed." 310 S.C. at 265, 423 S.E.2d at 133–34 (1992) (emphasis added). The Order held that "Varner is readily distinguishable as it dealt with sentencing, not parole." Order at 16. In so holding, however, the Court did not address or consider SCDC's references to the overwhelming weight of authority to the effect that a prohibition against parole under a general parole statute was a "penalty, forfeiture, or liability" saved from release or extinguishment by the federal saving clause in the U.S. Code (identical in all pertinent respects to the Omnibus Act's saving clause quoted above). See Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 659-664 (1974) and related authorities cited by SCDC.

The Order further held that:

> Also, the Court in Varner specifically stated: "[i]n the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced unless it is greater than the punishment provided for when the offense was committed." Varner, 310 S.C. at 265, 423 S.E.2d at 133 (emphasis added). In this case, the controlling statute is the Omnibus Act.

Order at 16-17. This, again, overlooks the fact that the Omnibus Act contains a saving clause barring such retroactive application to existing convictions. The broad references in the Act to such matters as an intent to conserve taxpayer dollars by allowing earlier release dates for inmates convicted of less serious offenses, cited in the Order at 4, 29 do not expressly specify whether the pertinent amendments should apply retroactively. As a result, the Omnibus Act, which contains no express language making the pertinent amendments mandatory is expressly not "controlling" on the issue of retroactivity of its application.

4. Application of the 2010 Omnibus Act to persons convicted and sentenced after to the Act's passage, but released prior to the date of the remittiturs in Bolin and Fowler.

This contention pertains to the other set of inmates, the "March Releasees," that is, those who were convicted and sentenced after the enactment of the Omnibus Act, but who were all released on March 21, 2016, prior to the issuance of the remittiturs in Bolin and Fowler. SCDC has argued previously that under established principles, those cases did not take effect until the issuance of the remittiturs. See, e.g., SCDC's proposed Order at 11-12.[10] The Order, without mentioning any of the cases cited by SCDC in this regard, concludes that "SCDC cannot substitute

[10] The McDonald R & R held that until the remittitur in Bolin was issued, the continued restraint of Campell in the meantime was lawful. 2018 WL 7820956, at *11.

the appellate remittitur date in Bolin for the effective date set forth in the Omnibus Act. . . . " Order at 14.[11]

The Order, with no citation of authority specifically on point, holds that "courts, unlike legislatures, do not make but merely find the law. Order at 12 (emphasis in original). Regardless of whether this principle is a correct statement of legal philosophy, it provides no assistance in determining what a party must do in the meantime before the law is eventually "found." That issue involves the separate principle concerning the extent, if any, to which a judicial decision will be applied retroactively. On that point, the Court apparently concludes, citing only civil cases that did not involve criminal law in any way, that Bolin and Fowler should apply retroactively. Order at 12-14. When the issue is whether a newly-declared interpretation of a statute involving criminal law or procedure should be given retroactive effect, the law is to the contrary. For instance, the U. S. Supreme Court has held that the Constitution does not require a state's highest court "to make retroactive its new construction of [a criminal] statute." Wainwright v. Stone, 414 U.S. 21, 23–24 (1973). Nevertheless, and as the Fourth Circuit noted, 972 F.3d at 391 n.4, SCDC applied Bolin and Fowler retroactively, at least to the extent that SCDC released both the March Releasees (releasing those inmates before the issuance of the remittiturs in those cases), and the June Releasees (whose entitlement to be early-released at all was not ordered by any court, whether by implication or otherwise). Neither Plaintiffs nor the Order cite any authority supporting a damage claim under these circumstances. Given that under Wainwright, supra, and its progeny, there is no authority mandating that the decisions of the Court of Appeals in Bolin and Fowler should support

[11] In a footnote, the Order, again ignoring settled principles about the effective date of a judicial decision, concludes that "Plaintiffs and class members were not parties to the Bolin proceeding. Their rights were governed solely by the Omnibus Act commencing on its effective date." Order at 14 n. 7. It is unclear how this confers any rights on these Plaintiffs.

retroactive damage claims, the Order erred in applying those two cases in a way that would create liability in damages.[12]

5. Other immunity defenses.

SCDC raised several other immunity defenses, in addition to those discussed above. In rejecting all of the immunity defenses raised by the SCDC, the Order overlooked the guiding principle, contained in the Tort Claims Act itself, that "The provisions of this chapter establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees . . . must be liberally construed in favor of limiting the liability of the State." S.C. Code Ann. § 15-78-20(f)(emphasis added). SCDC incorporates all contentions previously made on all cited subsections, including §§ 15-78-60(3) and 15-78-60(21).

6. While SCDC disagrees that Plaintiffs should have been granted partial summary judgment on one claim, in any event, the claim to which the Court's grant of summary judgment should have applied would be the simple negligence claim in Plaintiffs' Second Cause of Action.

Although describing this as a false imprisonment claim, Plaintiffs have effectively presented it as a simple negligence claim, sustainable under their Second Cause of Action, which includes a simple negligence claim. In support of their Motion for Summary Judgment on the false imprisonment cause of action, Plaintiffs admit that "Under the South Carolina Tort Claims Act, a plaintiff is limited to a recovery of $300,000.00 per occurrence pursuant to section 15-78-120(a)(4). An occurrence is defined as 'an unfolding sequence of events which proximately flow from a single act of negligence.' S.C. Code Ann. § 15-78-30(g)." Plaintiffs' Memorandum in

[12] In holding that "[t]he Bolin decision did not create new liability for SCDC where none previously existed," the Court erred, because here, as in Wainwright and similar cases, Bolin set forth a new construction of a criminal statute that would create new liability for SCDC if Plaintiffs' claims were to be accepted.

Support of Motion for Summary Judgment as to Count One—False Imprisonment (8/9/23) at 27 (emphasis added).

The Order, pp. 25-26, also applies § 15-78-30(g), defining occurrence in the context of "a single act of negligence," and thereby implicitly holds that the "false imprisonment" claim was one sounding in simple negligence. In addition, the Order, accepting contentions made by Plaintiffs, reviewed issues about whether SCDC weighed the competing considerations and alternatives and utilized accepted professional standards. Order at 23, citing Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994). Strange and all of the other cases cited on p. 23 of the Order involved negligence claims. The determination of whether the agencies did or did not weigh the competing considerations and alternatives and use accepted professional standards is essentially an inquiry into whether the agencies did or did not act negligently, at least where, as here, the state actor is governed by some form of professional standards.

SCDC raises this point because the Tort Claims Act provides for a waiver of sovereign immunity against state agencies only for losses "recoverable in actions for negligence. . . ." S.C. Code Ann. § 15-78-30(f). Plaintiffs' First Cause of Action is a claim for false imprisonment, which is clearly an intentional tort. Jones by Robinson v. Winn-Dixie Greenville, Inc., 318 S.C. 171, 175, 456 S.E.2d 429, 432 (1995). When a claim involves "intent to harm," only the individual employee may be named as a defendant. § 15-78-70(b). Flateau v. Harrelson, 355 S.C. 197, 208, 584 S.E.2d 413, 418–19 (Ct. App. 2003). Accordingly, the false imprisonment claim should be dismissed for this reason alone. However, for the reasons set forth immediately above, this point is merely a matter of conforming the holding of the Order to the claims actually presented, regardless of how they were labeled, and does not change the nature of the proof Plaintiffs must make or the effectiveness of the defenses SCDC has raised. This point simply ensures that the definition of "occurrence" set forth in § 15-78-30(g) applies to all claims by Plaintiffs, a point that Plaintiffs have already admitted and that the Court has adopted. SCDC nevertheless asserts below, as it always has asserted, that even if it is found liable, there was still only one "occurrence" affecting all of the Plaintiffs

7. The Order overlooked the legal test for gross negligence, as well as the absence of a showing by Plaintiffs of evidence from which a jury could so conclude.

The portion of the Order from pp. 27 through 33 denied summary judgment on SCDC's motion for summary judgment on the negligence/gross negligence/recklessness claims, holding that a jury issue exists. However, the Order does not address SCDC's contentions regarding the legal standard for the establishment of gross negligence, as argued by SCDC in its proposed Order, that is, "the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do [i.e.,] the failure to exercise slight care." Clyburn v. Sumter Cnty. Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). The Order simply does not contain any reference to these or any other statements of the legal tests for gross negligence. As a result, the Order did not consider the tests necessary in order to conclude that a jury issue exists as to gross negligence. Moreover, the Order did not address the issue of how Florian's careful review, held by the Fourth Circuit to have been reasonable, could at the same time have involved a failure to exercise even slight care, and in fact, it is impossible to reach such a contradictory conclusion. The thorough review of the statute by Florian and Tatarsky was more than sufficient to clear the low hurdle of a need to show "slight care." As in Clyburn, supra, summary judgment should be granted for the defendant because "the only reasonable inference that can be drawn from these facts is that the [defendant], at the very least, exercised 'slight care.'" 317 S.C. at 54, 451 S.E.2d at 888. Again, the mere fact that SCDC reached a conclusion that a court subsequently deemed "unreasonable" does not equate to a showing that its legal review fell short of exercising even "slight care."[13]

The Order also holds that the gross negligence provision of § 15-78-60(25) applies to all other immunities claimed by SCDC. Order at 30-33. Given that there has been no evidence or legal conclusion that SCDC failed to exercise slight care or otherwise failed to clear the gross negligence hurdle, this issue should not need to be addressed. In any event, the Order erred in holding that by pleading the entirety of the Tort Claims Act as a defense in at least some of the consolidated cases, SCDC brought in the gross negligence standard. Order at 31. However, SCDC did not plead the Tort Claims Act exemption found in § 15-78-60(25). The Supreme Court has unequivocally held that when a defendant "never raised an affirmative defense that contained a gross negligence standard . . .[,] the gross negligence standard is not interpolated into" any other subsection actually pled as a defense. Jones v. Lott, 387 S.C. 339, 348, 692 S.E.2d 900, 904 (2010), abrogated in part on other grounds by Repko v. Cnty. of Georgetown, 424 S.C. 494, 818 S.E.2d 743 (2018). (Nothing in Repko affected or abrogated this holding in Jones.)[14] As a result, there is no basis for inserting the gross negligence standard into this case, although again, this should not matter, because there has been no conclusion of law holding that there was any evidence that would enable a jury to conclude that SCDC failed to exercise slight care or otherwise acted or failed to act in a way that meets the definition of gross negligence.

[13] At pp. 28-30, the Order lists facts cited by Plaintiffs, but again, reaches no conclusion as to how or why any of these facts would meet the legal tests for gross negligence.

[14] The Order, p. 31, cites Plyler v. Burns, 373 S.C. 637, 647 S.E.2d 188 (2007) as indicating that "a state entity may not bypass imposition of a gross negligence standard by intentionally pleading around it," but Plyler did not so hold. It merely elected to consider subsection 60(25), concluding that it not apply.

8. Even if SCDC is liable at all in any way, which SCDC denies, only one occurrence took place.

S.C. Code Ann. § 15-78-30(g) provides that an occurrence is "an unfolding sequence of events which proximately flow from a single act of negligence." However, the Supreme Court has held several times that "the burden to prove more than one occurrence rested on the plaintiff." Boiter v. S.C. Dep't of Transp., 393 S.C. 123, 133, 712 S.E.2d 401, 406 (2011), citing Chastain v. AnMed Health Foundation, 388 S.C. 170, 694 S.E.2d 541 (2010). Plaintiffs have produced no evidence that "SCDC made a conscious and deliberate decision" (as Plaintiffs have argued) regarding the nature of the determination of the sentences of each of the 413 inmate class members. To prove such an argument, Plaintiffs would need to show that SCDC reconsidered Florian's interpretation of the 2010 amendments for every inmate sentenced under §§ 44-53-370, -375(A) & (B). This was simply not the case, and Plaintiffs have not tried to argue otherwise, and have agreed that the Florian Memo "is the key document in this dispute." Campbell v. Florian, supra, 972 F.3d at 390 n. 3. Instead, Plaintiffs can show only that SCDC made one decision, embodied in the Florian Memo, regarding the interpretation of the 2010 amendments and then applied that single decision to the sentences of each of the 413 inmates. Each of the sentences of the affected inmates flowed from that single decision regarding how the Omnibus Act would be interpreted.

The Order, p. 34, sets forth a bare conclusion that "The jury has ample basis to find that each application by SCDC of a 'patently erroneous' interpretation of the Omnibus Act to each individual class member, resulting in excess confinement, was a separate occurrence." However, the Supreme Court has made it clear that it is erroneous to tie "the number of occurrences to the number of injuries. . . ." *Boiter,* 393 S.C. at 134, 712 S.E.2d at 406. At the conclusion of the Order, the Court held that it "grants Plaintiffs' Motion for Summary Judgment as to false imprisonment and finds that the unlawful imprisonment of each class member was a separate occurrence under the South Carolina Tort Claims Act." Order at 34-35. SCDC respectfully submits that there is no evidence that would create a jury question as to the number of occurrences, and that if this last provision of the Order is read as holding as a matter of law that there were 431 separate occurrences, it is without evidentiary support.

Again, the Order does not suggest that SCDC reinvented the wheel of the Florian memo in computing the sentences of each of the 400-plus Plaintiff-inmate, and no such showing has been made. Instead, the Order holds that "Each separate and distinct breach of each inmate's right to release, separated by space and time from every other impacted inmate, caused new and independent damage to each inmate." Order at 26. In so holding, the Order erroneously would base liability on the number of injuries, which is precisely the conclusion rejected by the Supreme Court in Boiter.

CONCLUSION

For the foregoing reasons, SCDC respectfully submits that the Court should alter, amend reconsider and vacate its Order of April 15, 2025, and dismiss this case in its entirety.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT SCDC

COLUMBIA, SOUTH CAROLINA

April 25, 2025

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

Marion Katrell Campbell, on behalf of himself and all others similarly situated,) **C.A. NO. 2020-CP-40-05532**

Plaintiff,

vs.

South Carolina Department of Corrections,

Defendant.

Wardell Williams, Harry Simmons, Jr., and Isiah Rollins,) **C.A. No. 2020-CP-40-04701**

Plaintiffs,

vs.

South Carolina Department of Corrections,

Defendant.

Larry Hampton, Christopher McDowell, David Payton, Jr., and Michael Smoak,) **C.A. No. 2020-CP-40-05660**

Plaintiffs,

vs.

South Carolina Department of Corrections,

Defendant.

Henry Belton,) **C.A. No. 2017-CP-40-00556**

Plaintiffs,	)
vs.	)
South Carolina Department of Corrections,	)
Defendant.	)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S AMENDED MOTION TO ALTER OR AMEND ORDER AND/OR FOR RECONSIDERATION

Plaintiffs and the class respectfully submit this Memorandum in Opposition to the Motion to Alter or Amend Order and/or for Reconsideration of Defendant South Carolina Department of Corrections [hereinafter "SCDC"].

As a general matter, an AI legal bot could not have produced a more scattershot attack on this Court's comprehensive and well-reasoned Order. SCDC finds fault with virtually every individual finding and conclusion contained in the Order, including repeated attacks for what it claims should have been included in the Order. Yet it provides no authority for its position that the Court must specifically address, distinguish and reject every argument and every case that a non-prevailing litigant puts forth.

SCDC's Motion is voluminous, but without merit.

A. THE COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO THE PLAINTIFFS AS TO FALSE IMPRISONMENT.

1. The Court Correctly Denied SCDC Immunity Under S.C. Code Ann. § 15-78-60(4) (Precluding Liability for Losses Resulting from the "Adoption, Enforcement, or Compliance with any Law or Failure to Adopt or Enforce any Law . . .").

SCDC argues it is exempt from Plaintiffs' claims because they arise from its alleged failure to enforce relevant provisions of the Omnibus Crime Reduction and Sentencing Reform

Act, Act No. 273, 2010 S.C. Acts 1937 [hereinafter "the Omnibus Act" or "the Act"]. Plaintiffs contend that the claims arise not from SCDC's enforcement or failure to enforce the Omnibus Act, but from its failure to comply with the Omnibus Act—conduct not included in subsection 4 of § 15-78-60(4). This Court agreed.

SCDC criticizes the Court for adopting the definition of "enforce" as meaning "to compel," despite this being the sole definition in harmony with the context and remaining language of that exception to the South Carolina Tort Claims Act [hereinafter "TCA"]. SCDC asks the Court instead to adopt what it terms the "primary definition" of enforce, which it states is "give force to." SCDC Mtn. at 3. SCDC omits a critical part of the Merriam Webster Dictionary's entry upon which it relies:

> **enforced; enforcing; enforces**
>
> Synonyms of *enforce* >
>
> *transitive verb*
>
> **1** : to give force to : **STRENGTHEN**
>
> **2** : to urge with energy
>
> *enforce* arguments
>
> **3** : **CONSTRAIN**, **COMPEL**
>
> *enforce* obedience

See, https://www.merriam-webster.com/dictionary/enforcement

The TCA's usage of "enforcement" and "enforce" is clearly not synonymous with "strengthen," the synonym Merriam-Webster lists for the "primary" definition.

SCDC's attempt to read the word "enforce" as "to give force to" and apply that definition to its conduct in this case would essentially cause "failure to enforce" to also mean "failure to comply." When interpreting the meaning of a statute, courts will "avoid a reading [that] renders some words altogether redundant." Young v. S.C. Dep't of Corr., No. 2018-001293, 2021 WL

5919112, at *3 (S.C. Ct. App. Dec. 15, 2021) (quoting Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 574 (1995)).

SCDC cites to Adkins v. Varn, 312 S.C. 188, 439 S.E.2d 822 (1993), which held that "the words [of the statute] must be given their plain and ordinary meaning without resort to a subtle or forced construction which limits or expands the statute's operation." SCDC Mtn. at 4. It claims that this Court's reading of "enforcement" to mean "to compel" resulted in "a subtle or forced construction which limits" the operation of S.C. Code Ann. § 15-78-60(4). Id. In fact, SCDC's stated position would require this Court to adopt a "subtle or force construction that. . . expands the statute's operation." Adkins, 439 S.E.2d at 824.

In Adkins, a local ordinance specifically charged Greenville County with the duty to enforce an animal control ordinance to secure compliance by pet owners with the mandates of the ordinance. The ordinance dictated a standard of conduct to be followed by Greenville County residents and vested authority in the governmental entity, Greenville County, to enforce compliance. Here, the Omnibus Act addressed the standard of conduct by SCDC—i.e., altering the method by which SCDC was required to calculate release dates of impacted prison inmates. The Omnibus Act was self-executing.[1] SCDC was required to comply with the mandates of the Omnibus Act.

Applying established rules of statutory construction, South Carolina appellate courts note that "the legislature intends to accomplish something by its choice of words and would not do a futile thing." Gordon v. Phillips Utilities, Inc., 362 S.C. 403, 406, 608 S.E.2d 425 (2005). "The canon of construction 'expression unius est exclusion alterius' or 'inclusion unius est exclusio

[1] No enforcement was necessary other than through the courts, such as the Court of Appeals decision in Bolin compelling SCDC to comply with the plain meaning of the Act.

alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578 (2000). In other words, "[w]here there is an express exception in a statute, all other exceptions which are not expressly set forth are excluded. The inclusion of one exception amounts to an affirmation of the applicability of the statute's provision to all other cases which are not excepted." Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 157, 135 S.E.2d 841, 844 (1964).

"The court has no right to add the words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy." Consumer Advoc. for State v. S.C. Dep't of Ins., 397 S.C. 599, 602, 725 S.E.2d 708,710 (Ct. App. 2012). When the Legislature passed the TCA, it carefully drafted the language of subsection 4 of § 15-78-60 as follows:

> (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies[.]

SCDC would have this Court rewrite the SCTCA to read:

> (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce **[or comply with]** any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies[.]

The Legislature's failure to include the word "comply" in the phrase "failure to adopt or enforce" simply cannot be read as a mistake without violating the basic tenets of statutory construction in South Carolina.

2. The Court Correctly Rejected SCDC's Claim of Discretionary Immunity from the False Imprisonment Claim Under S.C. Code Ann. § 15-78-60(5).

a. SCDC's Focus on the McDonald Report and Recommendation and on the Fourth Circuit Court of Appeals Decision on Qualified Immunity is Misplaced.

SCDC hectors this Court for what it perceives to be a failure to sufficiently "discuss," "mention," or "address" Magistrate Judge McDonald's Report and Recommendation [hereinafter "the R & R" or "the McDonald R & R"] or the Fourth Circuit Court of Appeals decision on the 42 U.S.C. § 1983 federal claim which was decided on the issue of qualified immunity. SCDC Mtn. at 4, 5, 6, 7.

As this Court noted, the McDonald R & R was a recommendation to District Judge Mary Lewis, no more and no less. See F. R. Civ. P. 72. The R & R was outright rejected as to the Plaintiffs' federal claims and became a nullity when Judge Lewis did not adopt it as to the state law claims.[2] As SCDC acknowledges, the R & R has no binding or precedential effect. The fact that SCDC prefers the conclusions of the null R & R over this Court's careful analysis is not a sound basis to ask this Court to alter and amend the Order at issue.

This Court, sitting as a South Carolina state tribunal adjudicating state claims pursuant to governing state law and authority, is fully equipped to rule on the extensive record based on its own findings and conclusions. This Court is not required to explain to a litigant why its ruling was not in accord with that of a federal magistrate judge.

The Fourth Circuit Court of Appeals found that Plaintiffs could not overcome the heavy burden imposed by the qualified immunity of the state actors on the federal §1983 claim. The Fourth Circuit's analysis supporting that decision has no bearing on the claims now before this

[2] "The Magistrate Judge only makes a recommendation to the Court. The Recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court." Mathews v. Weber, 423 U.S. 261, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976). The Court may accept, reject, or modify, in whole or in part, the recommendation of the magistrate judge. 28 U.S.C. § 636(b)(1)." Newkirk v. Enzor, 240 F. Supp. 3d 426, 431 (D.S.C. 2017). Thus, a non-adopted Report and Recommendation from a magistrate judge has no weight. In this case, after Judge Lewis rejected the R & R as to the federal claims, she dismissed SCDC's Motion for Summary Judgment as to the state law claims with leave to refile. When the federal case was dismissed by the Fourth Circuit, Judge Lewis declined supplemental jurisdiction over the state law claims and remanded the case to this state court.

Court. That opinion is not precedent and is not the law of the case on these state law claims. This Court is not required to distinguish apples and oranges just because SCDC insists it must.

Irrespective of SCDC's view of the Fourth Circuit decision and the R & R, this Court's decision is correct that discretionary immunity under § 15-78-60(5) did not bar the false imprisonment claim.

b. Section 15-78-60(5) and the Case Law Thereunder Preclude the Application of Discretionary Immunity to Bar Plaintiffs' False Imprisonment Claims.

McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985) was decided prior to the implementation of the TCA and explicitly left it to the Legislature to set forth exceptions to the abrogation of sovereign immunity. The Legislature did so in passing the TCA in 1986. McCall is specifically annotated by Westlaw as "superseded by statute."

Yet, SCDC persists in citing the language of *McCall* that "[t]he exercise of discretion includes the right to be wrong." That right to be wrong in present day South Carolina extends solely to acts that fall within the purview of § 15-78-60(5). It is the case law arising under the TCA which articulates the meaning and extent of discretionary immunity under § 15-78-60(5). Moreover, nothing in this Court's Order is, in fact, contrary to any holding in McCall. SCDC also cites to Giannini v. S.C. Dep't of Transp., 378 S.C. 573, 664 S.E.2d 450 (2008) as stating the same principal. SCDC Mtn. at 7, n.7. Giannini, however, stated the principal with a caveat, that "the right to be wrong is not perpetual." Giannini, 664 S.E.2d at 458.

SCDC mischaracterizes the Court's order, claiming it "holds in effect that the State can be subjected to damage claims whenever a court disagrees with an agency's considered legal opinion." SCDC Mtn. at 8. In reality, the Order concludes that S.C. Code Ann. § 15-78-60(5) does not apply in this case because SCDC applied a statute in a manner that ignored legislative intent, was patently erroneous and unreasonable, and thereby was not in accordance with accepted professional standards.

c. SCDC's Duty to Recalculate Sentences Under the Omnibus Act Was Ministerial and Not Discretionary.

First, this Court correctly found that "[n]o state agency has the discretion to ignore legislative intent in interpreting a statute. SCDC was under an absolute and imperative duty to recalculate the sentences of impacted inmates in accordance with the Omnibus Act so as to effectuate the early releases and cost savings intended by the Legislature." Order at 24. "[M]ere room for discretion on the part of the governmental entity [is] not sufficient to invoke the discretionary immunity provision." Foster v. S.C. Dep't of Highways & Pub. Transp., 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1991).

"[A] duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts. . . ." Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 330, 566 S.E.2d 536 (2002) (quoting Jenson v. Anderson Cty. Dep't of Soc. Servs., 304 S.C. 195, 202, 403 S.E.2d 615, 619 (1991)). Likewise, as stated by the Second Circuit Court of Appeals: "[t]he governmental 'function involved' here—prison officials' implementation of an inmate's sentence—was essentially ministerial." Francis v. Fiacco, 942 F.3d 126, 144 (2d Cir. 2019). See also, Kurtz v. State, 369 S.C. 15, 19, 630 S.E.2d 472, 474 (2006).

With respect to prison authorities' duties to release a prisoner on the correct date, courts have held:

> Ignorance and alibis by a jailer should not vitiate the rights of a man entitled to his freedom. A jailer, unlike a policeman, acts at his leisure. He is not subject to the stresses and split second decisions of an arresting officer, and his acts in discharging a prisoner are purely ministerial. Moreover, unlike his prisoner, the jailer has the means, the

freedom, and the duty to make necessary inquiries.

Whirl v. Kern, 407 F.2d 781, 792 (5th Cir. 1968) (emphasis added).

SCDC failed to address this Court's finding that "SCDC was under an absolute and imperative duty to recalculate the sentences of impacted inmates in accordance with the Omnibus Act so as to effectuate the early releases and cost savings intended by the Legislature." SCDC was not entitled to discretionary immunity because its recalculations under the Omnibus Act were ministerial, not discretionary.

d. The Application of the Omnibus Act by SCDC Was Not the Product of Weighing Competing Considerations and Making a Choice Based on Accepted Professional Standards.

Even if the actions of SCDC in applying the Omnibus Act were not ministerial, SCDC was not entitled to discretionary immunity from the false imprisonment claims pursuant to subdivision 5 of § 15-78-60.

As noted by this Court, "[t]he governmental entity must show that when faced with alternatives, it weighed competing considerations and made a conscious choice, and that it used professional accepted standards to make that choice." Creech v. S.C. Wildlife & Marine Resources Dep't, 328 S.C. 24, 28, 491 S.E.2d 571, 573 (1997). Discretionary immunity requires proof that "accepted professional standards" were actually used to weigh the appropriate factors.

First, SCDC was tasked by the Legislature with recalculating parole eligibility and release dates in accordance with the Omnibus Act. It was not "faced with alternatives." It was faced with a statute with which it was mandated to comply directing conduct on its part. As stated in Groce v. Horry Cnty., No. 2011-UP-125, 2011 WL 11733611, at *11 (S.C. Ct. App. Mar. 24, 2011):

> "Ignorantia juris quod quisque tenetur scire, neminem excusat " denotes "Ignorance of the [or a] law, which everyone is bound to know, excuses no man." Black's Law Dictionary 747 (6th ed.1990).

SCDC was bound to know the law and apply the law. Irrespective of how laboriously Chris Florian supposedly toiled[3] to arrive at a meaning in the Omnibus Act to support continued incarceration of impacted inmates, there were no competing considerations to weigh and no choices to be made. A patently erroneous application of law is not a "competing consideration." Nor is ignoring legislative intent a "competing consideration."

The Court of Appeals rightly concluded that SCDC "ignore[d] the purpose of the [Omnibus] Act." Bolin, 415 S.C. at 285, 781 S.E.2d at 918 (emphasis added).[4] The paramount factor in the interpretation of a statute by an agency is that legislative intent must prevail:

> "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); see also McClanahan v. Richland Cnty. Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.").

Amazon Servs., LLC v. S.C. Dep't of Revenue, 442 S.C. 313, 328, 898 S.E.2d 194, 201 (Ct. App. 2024), reh'g denied (Mar. 18, 2024), cert. granted (Oct. 3, 2024).

No state agency has the discretion to ignore legislative intent in interpreting a statute. SCDC was required to recalculate the sentences of impacted inmates in accordance with the Omnibus Act so as to effectuate the early releases and cost savings intended by the Legislature.

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[3] This Court was not required to look beyond the clear language of the Omnibus Act to focus on how SCDC staff arrived at such an "unreasonable" and "patently erroneous" application of the statute in order to conclude that the application of the statute was unlawful and without lawful justification. Otherwise, any false imprisonment/false arrest case is nothing more than a negligence claim.

[4] Just like the other holdings in Bolin, the conclusion that SCDC ignored the purpose of the Omnibus Act binds SCDC.

Further, the Court of Appeals has also already concluded that SCDC acted unreasonably in its application of the Omnibus Act. "Accepted professional standards" clearly must incorporate objective standards of reasonableness. An action simply cannot be both unreasonable and in accordance with accepted professional standards.

This Court concluded that "SCDC decided to ignore the express legislative intent of the Omnibus Act and adopted an unreasonable and patently erroneous application of the Omnibus Act rather than an application reflecting utilization of the accepted professional standards appropriate to the issue before it. SCDC is not entitled to discretionary immunity." Order at 24.

SCDC tries to side-step the findings of the South Carolina Court of Appeals ruling in Bolin by urging a distinction between "patently erroneous" and "clearly erroneous." It claims this Court's ruling "incompletely or erroneously addressed SCDC's contention that the language in Bolin cited by the order was not central to the decision." SCDC Mtn. at 6. In so arguing, SCDC uses the phrase "**merely** clearly erroneous" to imply that it is somehow a lesser finding than patently erroneous. SCDC Mtn. at 5-6 (emphasis added). This attempt to downgrade "clearly erroneous" to a lesser standard than "patently erroneous" is belied by the very case that SCDC cites. In Davis v. S.C. Dep't of Pub. Safety,[5] the Court of Appeals stated that an agency's interpretation of a statute "will not be overturned absent compelling reasons." The Court then found that "such compelling reasons exist, however, if the agency's construction of the statute is 'clearly erroneous.' Monroe v. Livingston, 251 S.C. 214, 217, 161 S.E.2d 243, 244 (1968) (finding an agency's consistent construction of a statute "affords no basis for the perpetuation of

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[5] 328 S.C. 578, 582, 493 S.E.2d 871, 873 (Ct. App. 1997), rev'd, 335 S.C. 51, 515 S.E.2d 761 (1999), and overruled by Thompson v. S.C. Dep't of Pub. Safety, 335 S.C. 52, 515 S.E.2d 761 (1999).

a patently erroneous application of the statute")." Davis, 328 S.C. at 582, 493 S.E.2d at 873. (emphasis added).

The terms "patently erroneous" and "clearly erroneous" are used interchangeably throughout the case law and mean exactly the same thing. SCDC's argument is incomprehensible and meritless.

SCDC, citing 21 CJS Courts § 227, also argues that the Court of Appeals' use of the words "unreasonable" and "patently erroneous" were "statements in an opinion that merely constitute the reasoning, arguments, references, illustrations and analogies" of the court and were dicta. SCDC Mtn. at 5. In fact, the cited CJS section also notes: "The reasoning of the court that furnishes the exclusive basis for the conclusion reached is not obiter dictum." 21 CJS Courts § 227. The Court of Appeals overruled the ALJ's denial of Mr. Bolin's grievance based solely on its conclusion that SCDC miscalculated his sentence by applying the Omnibus Act in an unreasonable and patently erroneous fashion. Those findings allowed the Court of Appeals to "reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). Further, the Court of Appeals rejected having to accord any deference to the ALJ decision on the basis of its conclusion that the decision "perpetuat[ed] a patently erroneous application of the statute [the Omnibus Act]. Bolin, 781 S.E.2d at 916. The Court of Appeals' findings were not dicta.

SCDC also urges this Court to adopt the view of the Fourth Circuit that Plaintiffs' arguments on deliberate indifference raised concerns of res ipsa loquitor. First, deliberate indifference is not the standard here and the Fourth Circuit's analysis has no place in resolving the issues before this Court. Second, the actual Court of Appeals finding was: "Thus, it is unreasonable to characterize an offense for which the offender is eligible for parole as a no-parole offense." Bolin, 415 S.C. at 284, 781 S.E.2d at 918 (Ct. App. 2016). This finding directly concludes that SCDC's characterization was unreasonable. It assumes nothing. Further, the Fourth Circuit also failed to mention the companion finding by the Bolin court that SCDC'S interpretation was patently erroneous. Patently means "obvious, apparent." Black's Law Dictionary, 6th Pocket Ed. (2016). This Court's Order in no way implicates res ipsa loquitor.

SCDC also appears to argue that because its patently erroneous application of the Omnibus Act derived from its legal department, "accepted professional standards" need not be shown for it to assert discretionary immunity. It contends that because several of the cases Plaintiffs cite involve engineers, there is no basis to apply the same analysis to lawyers. SCDC Mtn. at 7, n.6. A review of the case law discloses a variety of examples of South Carolina appellate courts applying this test in analyzing discretionary immunity, not just in engineering cases. See, e.g., White v. City of N. Charleston, No. 2017-001930, 2020 WL 4516091, at *2 (S.C. Ct. App. Aug. 5, 2020) (false arrest claim against city officer); Clark v. S.C. Dep't of Pub. Safety, 353 S.C. 291, 304, 578 S.E.2d 16, 23 (Ct. App. 2002), aff'd, 362 S.C. 377, 386, 608 S.E.2d 573, 578 (2005) (trooper's decision to initiate or continue pursuit); Sabb v. S.C. State Univ., 350 S.C. 416, 428, 567 S.E.2d 231, 237 (2002) (university's supervision of employee); Faile v. S.C. Dep't of Juv. Just., 350 S.C. 315, 566 S.E.2d 336 (2002) (decisions by probation counselor); Etheredge v. Richland Sch. Dist. I, 330 S.C. 447, 465, 499 S.E.2d 238, 247 (Ct. App. 1998), rev'd sub nom. Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 534 S.E.2d 275 (2000) (supervision by school district).

It is manifest that "accepted professional standards" mandate that governmental staff, whether they be lawyers, engineers, teachers, or case workers, look at what is there to be seen and give attention to what is patent, obvious and apparent. Accepted professional standards mandate deference to legislative intent that the Court of Appeals concluded was ignored by SCDC.

Finally, in spectacularly ironic fashion, SCDC states that failure to impose discretionary immunity in this case could lead SCDC, "out of fear of liability, to resolving sentencing issues in favor of shortening sentences. Such a result would not be consistent with the public interest in ensuring that crimes are punished in accordance with legislative intent." SCDC Mtn. at 8. SCDC's argument, presented by an entity which incarcerated hundreds of citizens of South Carolina for more than 190,000 days, or 500 collective years, in direct contravention to the intent expressed by the Legislature in passing the Omnibus Act, does not pass the smell test.

3. The Court Appropriately Applied the 2010 Omnibus Act to Those Persons Convicted and Sentenced Prior to the Act's Passage.

First, SCDC claims that this Court incompletely quoted its responses to Plaintiff's Request for Admissions [hereinafter "R/A"] in support of its ruling. The Court did not. It is SCDC that incompletely or inaccurately quotes from this Court's Order and from the materials cited by the Court.

In the portion of the Order SCDC ignores, the Court found that "SCDC admitted that "[t]he max-out sentence release dates for the inmates listed in Ex. B [the June releasees], <u>properly calculated pursuant to the Omnibus Crime Reduction and Sentencing Reform Act of 2010</u>, is listed under the column 'NEW DATE.'" (Ex. F to Plaintiff's Motion for Summary Judgment, ¶ 6 (emphasis added))." Order at 7. SCDC's actual response was as follows:

> 6. The max-out sentence release dates for the inmates listed in Ex. B, properly calculated pursuant to the Omnibus Crime Reduction and Sentencing Reform Act of 2010, is listed under the Column "NEW DATE."
>
> **RESPONSE #6**
>
> **Admitted.**

Ex. F to Plaintiff's Motion for Summary Judgment, ¶ 6.

There is nothing omitted or incomplete in the Court's recitation of this admission. The admission quite clearly requests that SCDC admit that the listed dates are release dates "properly calculated pursuant to the Omnibus Crime Reduction and Sentencing Reform Act of 2010." The Request for Admission and Response do not, as SCDC represents, merely relate to the "computation of days." [6] If, as SCDC now claims, the Omnibus Act did not apply to the June releasees, SCDC could have denied the Request for Admission or qualified its Response to deny that the dates were "properly calculated" pursuant to the Omnibus Act. It did neither. On its face, this is an admission by SCDC that the June releasees had their sentences "properly recalculated" under the Omnibus Act to reflect the new dates. SCDC is bound by its admission. Its current claims to the contrary are without merit.

SCDC also contends with regard to R/A #52 that SCDC "admitted only the revised computations of the stated number of days." SCDC Mtn. at 9, n.9. This is the admission and response:

[6] SCDC mistakenly refers to R/A #5 which is substantively identical but refers to the March releasees (Ex. A), not the June releasees (Ex. B). SCDC Mtn. at 9, n.9.

52. SCDC incarcerated the following inmates for the stated number of days (counting the day of release) beyond their maxout or supervised re-entry dates:

SCDC#	LAST NAME	FIRST NAME	DAYS UNLAWFULLY INCARCERATED

RESPONSE: To the extent that Plaintiff contends that the stated period of additional detention was unlawful, denied. Otherwise admitted.

The pertinent part of SCDC's admissions, which is the basis for this Court's citation to it, is the phrase "beyond their max-out or supervised release dates." (emphasis added). In neither admission, #6 nor #52, did SCDC qualify or contest in any way the stated maxout dates by denying the Omnibus Act applied to the listed inmates. The caveat SCDC raised in #52, that it did not admit the detention was unlawful, is the same as it stated with regard to the March releasees as well in response to R/A #50:

50. SCDC incarcerated the following inmates for the stated number of days (counting the day of release) following their max-out or supervised release dates:

SCDC#	LAST NAME	FIRST NAME	DAYS UNLAWFULLY INCARCERATED

RESPONSE: To the extent that Plaintiff contends that the stated period of additional detention was unlawful, denied. Otherwise admitted.

This Court properly found that SCDC is bound by its admissions. Its admissions, particularly the admission to R/A #6, fly in the face of its current claims that the Omnibus Act did not apply to the June releasees even though SCDC recalculated those inmates' release dates in accordance with the Omnibus Act and discharged them from custody.

SCDC also asserts that this Court "overlooked" its contention that the Omnibus Act's Savings Clause rendered its failure to apply the Omnibus Act to inmates convicted and sentenced prior to the Act's passage lawful. SCDC again misrepresents the Court's Order. This Court did not ignore the Savings Clause but rather reviewed and cited to the extensive analysis contained in the memorandum prepared by the legal department of the Department of Probation, Parole and Pardon [hereinafter "DPPP"] to reach its decision that this group of inmates should be released. The DPPP based its conclusion on "[t]he stated intent of the Act to reduce prison populations; the use of the phrase 'notwithstanding any other provision of law' in the relevant section; and the Savings Clause exception for when 'the repealed or amended provision shall so expressly provide.'" Order at 17, quoting the DPPP memorandum. The DPPP further concluded that case law supported retroactive application of the Omnibus Act by finding that the inmates were persons under disability. It also mentioned that the Omnibus Act could be viewed as an enactment that was remedial in nature.

Without question, this Court's Order appropriately addressed SCDC's contentions concerning the Savings Clause. It found those contentions to be without merit and instead adopted the reasoning of the state agency involved in making such determinations.

In addition, "[s]tatutes apply retroactively when they are "remedial or procedural in nature." <u>Edwards v. State Law Enforcement Div.</u>, 395 S.C. 571, 579, 720 S.E.2d 462 (2011). A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." <u>Georgia-Carolina Bail Bonds, Inc. v. County of Aiken</u>, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003).

In this case, the legislative intent expressed in the Omnibus Act mandates the conclusion that the Act is remedial in nature:

> It is the intent of the General Assembly to preserve public safety, reduce crime, and use correctional resources most effectively. Currently, the South Carolina correctional system incarcerates people whose time in prison does not result in improved behavior and who often return to South Carolina communities and commit new crimes or are returned to prison for violations of supervision requirements. It is, therefore, the purpose of this act to reduce recidivism, provide fair and effective sentencing options, employ evidence-based practices for smarter use of correctional funding, and improve public safety.

Act No. 273, South Carolina General Assembly 118th Session, 2009-2010, June 2, 2010, Part 1, Section 1.

"A statute is remedial where it creates new remedies for existing rights or enlarges the rights of persons under disability." Edwards v. State Law Enforcement Division, 395 S.C. 571, 580, 720 S.E.2d 462, 466 (2011). The DPPP analyzed whether inmates are persons under disability and concluded that they were.

Also, the impacted inmates at SCDC at the time the Omnibus Act was passed had a vested right to release at the end of their properly calculated max-out sentence dates. Prior to the passage of the Act, inmates were not allowed to seek earlier release through parole prior to completion of 15% of their sentences. As the Court of Appeals noted in Bolin: "[h]ence, one of the Act's objectives is to conserve taxpayer dollars by allowing earlier release dates for inmates convicted of less serious offenses." Bolin, 415 S.C. at 285, 781 S.E.2d at 918 (emphasis added). Accordingly, the Omnibus Act granted these inmates in the impacted categories the right to seek parole and also expanded their ability to secure earlier release by allowing the enhanced accrual of sentence reduction credits denied no-parole inmates. These provisions are clearly remedial.

SCDC also claims that this Court disregarded State v. Varner, 310 S.C. 264, 423 S.E.2d 133 (1992). SCDC Mtn. at 10. It did not. This Court correctly noted that the Court in Varner ruled that "[i]n the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced, unless it is greater than the punishment provided for when the offence was committed." Varner, 310 S.C. at 265, 423 S.E.2d at 133. This Court devoted a lengthy section of the Order to its analysis concluding that the June releasees fell within the purview of Omnibus Act, making it the "controlling statute."

> In the short term, prospective application of the law would only ensure that the old law would continue to consistently apply to the majority of the prison population until such time that offenders convicted and sentenced under the new law began to populate the prison system. This would only ensure that the prisons failed to successfully rehabilitate prisoners for years into the future, exactly the opposite result intended by the General Assembly. [emphasis added]

Order at 7, quoting from Ex. G to Plt. Mtn. for S.J. (emphasis in original).

The June inmates were finally released, three months after the initial mass release in March, as a result of the "exhaustive research" and conclusions by DPPP that the Omnibus Act was retroactive and applied to inmates convicted and sentenced prior to its effective date. In an email to DPPP's Deputy General Counsel, the General Counsel of DPPP, Matthew Buchanan, noted:

> I instructed my office to do an exhaustive analysis of the Sentencing Reform Act to decide whether this should be considered fully retroactive.
>
> The result was the memo I've attached to this email, concluding that most likely the parole eligibility part of the Act was meant to be retroactive. The conclusion was based on several factors: The stated intent of the Act to reduce prison populations; the use of the phrase, "Notwithstanding any other provision of law" in the relevant section; and the Savings Clause exception for when "the repealed or amended provision shall so expressly provide."

Ex. F to Plt. Motion for S.J.

SCDC has chosen to ignore the fact that this Court's Order adopted the reasoning of DPPP which was based on its own "exhaustive research" on the issue by senior staff.

In addition, this Court correctly distinguished Varner as dealing with sentencing—i.e., the punishment imposed. In Varner, the inmate was asking to be resentenced under an amended statute which would have made him ineligible for the death penalty. Thus, a substantial change in sentencing was the issue in Varner. Here the Omnibus Act effected a change in parole eligibility. The term of the sentence, which equates to the "punishment," remains the same:

> Probation, a suspension of the period of incarceration, is clearly part of a criminal defendant's "term of imprisonment", as is actual incarceration, parole, and the suspended portion of a sentence, e.g., Mims v. State, 273 S.C. 740, 259 S.E.2d 602 (1979); Sanders v. MacDougall, 244 S.C. 160, 135 S.E.2d 836 (1964), or "supervised furlough." Crooks v. State, 326 S.C. 171, 485 S.E.2d 374 (1997).

Thompson v. S.C. Dep't of Pub. Safety, 335 S.C. 52, 55–56, 515 S.E.2d 761, 763 (1999).

The remedy of parole eligibility simply expands the manner in which the sentence may be served. If parole or supervised release is granted, the sentence remains unaltered. As the Fourth Circuit has aptly observed, parole "is not a release of the prisoner from all disciplinary restraint but is rather merely 'an extension of the prison walls'; and the prisoner while on parole remains 'in the legal custody and under the control of' the Parole Board." United States ex rel. Rowe v. Nicholson, 78 F.2d 468, 469–70 (4th Cir. 1935), cert. denied, 296 U.S. 573; Alvarado v. McLaughlin, 486 F.2d 541, 544 (4th Cir. 1973).

SCDC also complains that this Court did not specifically address Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 94 S. Ct. 2532, 41 L. Ed. 2d 383 (1974). That decision, however, was driven at least in part by a review of the statutory history of the specific narcotics statute at issue, noting:

> . . . [T]he legislative history of s 7237(d) reveals that Congress meant ineligibility for parole to be treated as part of the punishment for the narcotics offenses for which respondent was convicted. Section 7237(d) was enacted as part of the Narcotic Control Act of 1956. The statute embodied congressional acceptance of the approach that effective combat against the contagion of drug addiction required the imposition of severe penalties for certain narcotics offenses. Congress therefore enacted lengthy

> mandatory minimum sentences as a means of decreasing both drug addiction and trafficking. See, e.g., S.Rep.No.1997, 84th Cong., 2d Sess., 5 (1956); H.R.Rep.No.2388, 84th Cong., 2d Sess., 10 (1956). But Congress believed that longer sentences would not achieve the desired results unless the offender remained imprisoned for his full term.
>
> 'In evaluating the effectiveness of the presently prescribed penalties, it must be recognized that special incentives in our penal system serve to decrease the actual time spent in a penal institution under a sentence imposed by a court. The violator is eligible for parole after serving one-third of his sentence. . . . Available data from the Bureau of Prisons, indicates that a narcotics violator actually serves an average of less than two-thirds of the sentence imposed by the court. This mitigation of sentence tends to defeat the purposes of (existing legislation) . . .' Id., at 10–11, 1956 U.S. Code Cong. & Admin. News, p. 3284.

Marrero, 417 U.S.at 662 (emphasis added).

The Court in Marrero was faced with legislative intent which was diametrically opposed to that expressed by the South Carolina Legislature in enacting the Omnibus Act. The South Carolina Legislature was seeking to ameliorate the harsh impact of draconian drug sentencing statutes that had proven ineffective in stemming the flow of narcotics and that were not cost effective.

The same analysis is true of United States v. Bullard, 645 F.3d 237, 248 (4th Cir. 2011), addressed in SCDC's proposed order. In Bullard, the Court was analyzing the retroactivity of changes to the Federal Sentencing Act and, looking to legislative intent, found there was "no express statement of retroactivity, nor can any such intent be inferred from its language." Bullard and Marrero and cases referenced by Bullard were decided under federal law and authority, not South Carolina state law. The legislative intent expressed by the South Carolina Legislature does reasonably infer an intent to apply its terms retroactively.

SCDC also claims that Tyree v. Moran, 113 Ariz. 275, 550 P.2d 1076 (1976) and the other Arizona cases cited in the Order "arguably apply a different rule." SCDC Mtn. at 10. SCDC is incorrect. Arizona had an express statute that clearly stated: "No statute is retroactive unless expressly declared therein." A.R.S. § 1-244. The Court in Tyree held:

> The construction sought by respondents is too restrictive and not in harmony with the legislative purpose. The amendment does not alter the penalty which was attached to any offense, nor create a new penalty, nor change the sentence imposed. The fact that the amendment may in application relate to antecedent events does not make it retroactive in application. The amendment is remedial in nature, and such statutes do not normally come within the rule against retrospective operation. In our view the 1974 amendment was meant to be effective as to all prisoners irrespective of the date of imposition of sentence.

Tyree, 550 P.2d at 1078 (1976) (citations omitted).

4. The Court Appropriately Found that the 2010 Omnibus Act Applied to Persons Convicted and Sentenced After the Act's Passage but Released Prior to the Date of the Remittiturs in Bolin and Fowler.

SCDC claims this Court was wrong to find that the Omnibus Act applied to the March releasees, contending, in essence, that the Act did not take effect until the issuance of the remittiturs in Bolin and Fowler. SCDC Mtn. at 11–13. Rather than analyzing the vast litany of case law supporting the Court's Order, SCDC simply concludes that the cases are civil cases, not involving criminal statutes and do not apply to the rulings regarding the Omnibus Act. SCDC, however, cited no authority even arguably comparable to this case. The best it could come up with was Wainwright v. Stone, 414 U.S. 21 (1973), relating to a Florida sodomy statute. In that case, the Supreme Court held that the Constitution did not "require" the Florida Supreme Court to apply its "new" construction of the sodomy statute retroactively. In so ruling, the Court specifically noted that "when the appellees committed the acts with which they were charged, they were on clear notice that their conduct was criminal under the statutes as then construed."

SCDC does not make a distinction between judicial decisions in criminal cases which often deal with ex post facto concerns or are overruling prior judicial interpretations of the law as was the case in Wainwright, which specifically mentioned the lower court's "new" interpretation of the statute. In this case, the Bolin decision was not a "new" interpretation of the Omnibus Act—the Court was not altering prior precedent.

SCDC complains that this Court did not cite to any authority for the proposition that "courts, unlike legislatures, do not make but merely find the law." SCDC Mtn. at 12. Yet, this has long been black letter law in South Carolina. The South Carolina Supreme Court held in 1936 that "[t]he declaration by an appellate court as to what constitutes or is the law does not make the law but merely calls into application and gives expression to what has always been the law from its earliest days. Such law together with its inferences and constructions is presumed to have always existed and is not the declaration of a new theory." Corley v. Atlantic Life Ins. Co., 179 S.C. 95, 183 S.E. 596, 598 (1936). Looking even further back into South Carolina jurisprudence, the South Carolina Supreme Court stated its view in Roof v. Charlotte, C. & A.R. Co. 4 S.C. 61, 63 (1872) that the court's role is not "to pronounce a new law, but to maintain and expound the old one, jus dicere et non jus dare." While the words of these rulings vary slightly, the concept is the same to that stated in the Order.

5. Other Immunity Defenses.

SCDC claims that the Court "overlooked" the principle that the provisions of the TCA are to be liberally construed in favor of limiting liability of the State. The Court's findings and conclusions are well supported and in accordance with the statutes and case law of South Carolina.

6. Plaintiffs Have Not Presented their False Imprisonment Claim as a Claim of Simple Negligence and Summary Judgment was Appropriate.

In truly incomprehensible fashion, SCDC asserts Plaintiffs' claims are now converted to simple negligence claims because the Court cited to the TCA damages cap on occurrences. It is difficult to discern if SCDC is proposing that the TCA does not contain a damages cap on false imprisonment claims or rather contends that false imprisonment claims are not covered by the TCA at all despite abundant case law to the contrary.

SCDC also argues that the false imprisonment claim is converted to a simple negligence claim because the Court analyzed the TCA exemptions SCDC pled. Certainly, if SCDC concedes that it is not asserting the TCA exemptions as defenses to false imprisonment or is claiming that the TCA damages cap does not apply, this Court should appropriately alter and amend the Order to reflect those concessions.

In fact, this Court appropriately considered the TCA cap on occurrences by quoting the exact language used in the statute. While the provision does refer to "acts of negligence," the remainder of the TCA refers to "torts."

> The Tort Claims Act governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees. <u>See Murphy v. Richland Mem'l Hosp.</u>, 317 S.C. 560, 455 S.E.2d 688 (1995); <u>Wells v. City of Lynchburg</u>, 331 S.C. 296, 501 S.E.2d 746 (Ct.App.1998). "The remedy provided by [the Tort Claims Act] is the exclusive civil remedy available **for any tort** committed by a governmental entity, its employees, or its agents except as provided in § 15–78–70(b)." S.C. Code Ann. § 15–78–20(b) (Supp.2002) (emphasis added). "[The Tort Claims Act] constitutes the exclusive remedy **for any tort** committed by an employee of a governmental entity." S.C. Code Ann. § 15–78–70(a) (Supp.2002) (emphasis added). According to the Act, "[n]otwithstanding any provision of law, this chapter, the 'South Carolina Tort Claims Act,' is the exclusive and sole remedy **for any tort** committed by an employee of a governmental entity while acting within the scope of the employee's official duty." S.C. Code Ann. § 15–78–200 (Supp.2002) (emphasis added).

<u>Flateau v. Harrelson</u>, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (Ct. App. 2003) (applying the TCA to outrage, invasion of privacy and civil conspiracy claims) (emphasis in original).

The language of the damages cap provision could have been worded with more clarity; however, that does not alter the fact that the TCA as a whole clearly embodies a waiver of <u>tort</u> liability <u>in general</u> except as specifically limited.

SCDC also argues that this Court should dismiss the false imprisonment claim because it is an intentional tort. The case law demonstrates otherwise. The TCA makes a governmental entity immune from liability for conduct that constitutes "actual fraud, actual malice, intent to harm, or moral turpitude." As an intentional tort, the intention element of false imprisonment relates to intent to restrain, not intent to harm. See, Argoe v. Three Rivers Behav. Health, L.L.C., 392 S.C. 462, 473, 710 S.E.2d 67, 73 (2011) (noting element of false imprisonment is "restraint was intentional"). See also, McBride v. Sch. Dist. of Greenville Cty., 389 S.C. 546, 698 S.E.2d 845, 855 (2010) ("[O]ne need not show actual malice in order to successfully maintain an action for malicious prosecution.") The terms "actual fraud, actual malice, intent to harm, or moral turpitude," as used in the TCA, "cannot be fairly construed to encompass every instance of any intentional tort." Newkirk v. Enzor, 240 F.Supp.3d 426, 437 (D.S.C. 2017). The Court in Newkirk specifically found that intentional torts such as false arrest, false imprisonment, malicious prosecution and outrage can be "committed without actual malice or intent to harm." Id.

Accordingly, SCDC states no valid ground for this Court to dismiss Plaintiffs' false imprisonment claims. As the Court found and concluded, all elements of false imprisonment were established, and the entry of summary judgment was appropriate.

B. THE COURT DID NOT OVERLOOK THE LEGAL TEST FOR GROSS NEGLIGENCE AND CORRECTLY FOUND THAT THE ISSUE IS FOR THE JURY.

Gross negligence "has also been defined as 'the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do.'" Doe v. Greenville Cnty. Sch. Dist., 375 S.C. 63, 71, 651 S.E.2d 305, 309 (2007) (quoting Steinke, 336 S.C. 373, 395, 520 S.E.2d 142, 153). "Gross negligence 'is a relative term and means the absence of care that is necessary under the circumstances.'" Id. It is also defined as "the failure to exercise slight care." Id.

SCDC challenges this Court's Order denying it summary judgment on gross negligence, basically asking the Court to "show your work." Apparently, its position is that a Circuit Court Judge in South Carolina, having reviewed voluminous submissions on summary judgment and concluded that there is an issue for the jury, must recite in a written order all of the evidence and explain to the losing party's satisfaction why a jury issue exists. That is not the standard in South Carolina. Otherwise, the judiciary in this state would grind to a halt.

As an initial matter, this Court did recite almost a dozen discrete facts in evidence from which gross negligence could be inferred. Order at 28–30. SCDC, to counter the facts recited by this Court, touts the self-serving testimony from SCDC's junior attorney, Chis Florian, who claims he researched case law before opining on the meaning of the Omnibus Act. But Florian could not produce that research when asked. Ex. F. to Plt. Mtn. for S.J.: Florian Depo., pp. 29–35, 40, 45, 93–94, 97, 114–17. Florian testified he may have made computer notes but they would have morphed into a later outline. Id. He agreed there were multiple drafts of his final opinion memorandum, but those were not preserved. Id. Florian admitted there is no documentary evidence of the "thorough review" that SCDC touts. Id.

Florian also testified that no one monitored him or checked his work, leaving the analysis of this monumental piece of legislation up to him alone. There was "no layer of review." Ex. F. to Plt. Mtn. for S.J.: Florian Depo., pp. 27–28, 50. He stated "[t]hey trusted me to be independent and make that decision." Id. at 28. David Tatarsky acknowledged that, as General Counsel, "he had the duty to oversee and to exercise independent judgment and review his [Florian's] work." Ex. D. to Plt. Mtn. for S.J.: Tatarsky Depo., p. 32. Yet Tatarsky could remember virtually nothing about what that supervision entailed. He left the analysis to Florian, did not discuss Florian's research with him, did not review any initial drafts of Florian's opinion memo, did not know Florian's interpretation until he saw the final memo, and was not involved in formulating the interpretative opinion at all. Id. at 16–17, 31–32, 36. Florian was the most junior attorney in the legal department, three years out of law school, and was at the "bottom of the chain of command."[7] Ex. F. to Plt. Mtn. for S.J.: Florian Depo., pp. 9, 11–12, 15.

In assessing the degree of malfeasance by SCDC in applying a patently erroneous interpretation of the Omnibus Act, not only will the jury consider specific acts of Chris Florian and his credibility, but they will consider the manifest inaction of David Tatarsky and the overall cavalier treatment of SCDC in coming to terms with the Omnibus Act. The jury will also consider the fact that SCDC knew during the pendency of the Bolin/Fowler appeals that an adverse ruling would impact the release dates of hundreds of inmates, most of whom at that point were already serving excess periods of incarceration. The jury will hear that SCDC did nothing to prepare for a potential mass release during that time period and did nothing to prepare when the Court of Appeals issued its initial opinion in November 2015 slamming SCDC for its "patently erroneous" interpretation of the Omnibus Act. The jury will consider that SCDC did not begin to prepare for mass releases until after it decided to abandon further appeals of the final Bolin decision in February 2016. The first group of inmates were then released more than a month later and the final group more than two months after that, in June 2016. The final release was several months after the DPPP had concluded that the Omnibus Act was fully retroactive.

[7] Florian had been at SCDC just one year when he issued his memorandum opinion impacting the lives and liberty of hundreds of non-violent South Carolina inmates.

The conclusions of the Court of Appeals, including the finding that SCDC ignored legislative intent, will also aid the jury in deciding whether SCDC was grossly negligent.

SCDC makes much of the Fourth Circuit's statement that Florian acted reasonably in his interpretation of the Act. That finding was unnecessary to its ruling that qualified immunity applied because it found conscious indifference had not been shown. As such, this statement is an example of actual obiter dictum. In addition, the Fourth Circuit was looking solely at specific conduct by Florian and Tatarsky to determine whether there was evidence of conscious indifference. It made no finding of reasonableness with regard to David Tatarsky's conduct, or regarding the overall malfeasance by SCDC in failing to comply with the mandates of the Omnibus Act. In other words, the Fourth Circuit did not analyze the conduct of SCDC from an institutional perspective.

"In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party." Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997). Summary judgment is not proper when further inquiry into the facts is necessary "to clarify the application of the law." USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008).

As this Court astutely explained in the Order denying SCDC's Motion for Summary Judgment on Plaintiffs' gross negligence claim:

> South Carolina Courts recognize that "[i]n most cases, gross negligence for which a government entity can be liable under the Tort Claims Act, is a factually controlled concept whose determination best rests with the jury." Proctor, 368 S.C. at 294, 628 S.E.2d 504 (Ct. App. 2006). Gross negligence must be presented to the jury unless the evidence supports only one reasonable inference. Clyburn v. Sumter County Sch. Dist., No. 17, 317 S.C. 50, 451 S.E.2d 885 (1994).

There is a jury issue on gross negligence and this Court properly denied SCDC's motion for summary judgment on this claim.

1. The Gross Negligence Standard in S.C. Code Ann. § 15-78-60(25) is Read into all Other Immunities Claimed by SCDC.

SCDC also argues that the gross negligence standard of § 15-78-60(25) should not have been read into the TCA exemptions it pled.

SCDC acknowledges that it pled the entirety of the TCA in defense of Plaintiffs' claims in at least some of the consolidated cases. SCDC consented to consolidation of all the cases, meaning its defenses are now consolidated.

SCDC, illogically, claims that it did not plead § 15-78-60(25) when it pled the entire Tort Claims Act as a defense. Yet it asserted immunity, as a separate affirmative defense, pursuant to "the terms, conditions and, limitations of the South Carolina Tort Claims Act" and made no exception for §15-78-60(25). SCDC cannot have it both ways. The defense, as stated, includes subsection 25 and, the gross negligence standard, accordingly, is read into the immunities claimed by SCDC as this Court held. Order at 31–32.

SCDC also claims that "there is no basis for inserting the gross negligence standard in this case . . . because there has been no conclusion of law holding that there was any evidence from which a jury could find that SCDC failed to exercise slight care or otherwise acted or failed to act in a way that meets the definition of gross negligence." SCDC Mtn. at 16. This statement is false. This Court, after reciting a litany of undisputed facts, found that there are issues of fact for the jury on gross negligence.

C. OCCURRENCES.

SCDC claims that this Court could not find that the false imprisonment of each inmate in the class was a separate occurrence. It claims that the Court's analysis was based solely upon the injury to each inmate. SCDC's position ignores the Court's finding that each inmate suffered "a separate breach of their right to release, separated from each other inmate by space and time." In terms of false imprisonment, is it the restraint that is the substantive element of the tort. SCDC's citation to Boiter v. S.C. Dep't of Transp.[8] is unavailing. In Boiter, the analysis involved multiple, simultaneous injuries occurring as the result of one act.

This is a class action consisting of several hundred individuals. Each endured a separate tort, with the requisite unlawful restraint commencing for each on a different date and sustained for a different length of time. SCDC had an inherent and statutory responsibility to release each one of these inmates when their sentences were completed. A new and distinct false imprisonment claim arose from its failure to do so inuring to the benefit of each inmate when their properly calculated maxout date passed.[9] To hold otherwise would mean that SCDC was absolved of its responsibility to conduct itself in accordance with the governing law with respect to each inmate in its care.

Also, with regard to gross negligence, it is true that SCDC made a monumental series of global errors in its interpretation of the Omnibus Act. But it also made the decision to perpetuate those errors as to each one of these inmates on multiple occasions up until the March and June 2016 releases. For example, each time an impacted inmate accrued sentence reduction credits, through good conduct for example, SCDC posted the credits in the wrong amount (in the vastly reduced amount accorded no-parole inmates). Each inmate's max-out date would be altered

---

[8] 393 S.C. 123, 712 S.E.2d 401 (2011).

[9] Each day SCDC retained custody of an inmate in violation of the Omnibus Act could, in fact, be viewed broadly as a new deprivation of that inmate's freedom of movement and, thus, a separate and distinct occurrence of false imprisonment.

incorrectly throughout the years of his or her sentence, or not altered at all when it should have been.

This Court noted the absurdity of SCDC's position:

> To accept SCDC's analysis would lead to absurd results. For example, a state agency could be grossly negligent in hiring an unqualified physician but would have its liability capped at one occurrence no matter how many patients were ultimately harmed by different instances of malpractice over different periods of time. A grossly negligent school district, purchasing a shipment of patently inappropriate playground equipment, could limit its liability to a single occurrence cap no matter how many children were injured at different schools over different time periods. This Court does not believe such outcomes were intended by the Legislature.

Order at 33, n.1.

Finally, this Court has made no finding on occurrences with respect to the gross negligence claim, appropriately deferring to the jury.

CONCLUSION

This Court's Order is well-reasoned and the product of extensive briefing on the part of all parties as well as extended oral argument. SCDC's criticisms are without merit and its Motion should be denied.

Respectfully submitted,

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May 30, 2025
Columbia, South Carolina.

ATTORNEYS FOR PLAINTIFFS

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Marion Katrell Campbell, on behalf of himself and all other similarly situated,

Plaintiff,

v.

South Carolina Department of Corrections,

Defendant.

C/A No. 2020-CP-40-05532

Wardell Williams, Harry Simmons, Jr., and Isiah Rollins,

Plaintiffs,

v.

South Carolina Department of Corrections,

Defendant.

C/A No.: 2020-CP-40-04701

Larry Hampton, Christopher McDowell, David Payton, Jr., and Michael Smoak,

Plaintiffs,

v.

South Carolina Department of Corrections,

Defendant.

C/A No. 2020-CP-40-05660

Henry Belton, Plaintiff, v. South Carolina Department of Corrections, Defendant.	C.A. No. 2017-CP-40-00556

SCDC's REPLY MEMORANDUM IN SUPPORT OF AMENDED NOTICE AND MOTION TO ALTER OR AMEND ORDER AND/OR TO RECONSIDER

Plaintiffs have filed a 32-page response to SCDC's Amended Motion to Alter or Amend or reconsider the Court's April 15, 2025, Order in this matter. Most of the matters asserted therein have already been discussed in either the previous filings of the parties. This Reply therefore consists of several short responses to matters raised in Plaintiffs' Memorandum in Opposition.

1. Section 15-78-60(4)(precluding liability for losses resulting from the "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law. . . .").

SCDC has previously pointed out that the primary dictionary meaning of the term "enforce" is to "give force to." In this case, this primary and common sense reading of the term renders SCDC immune from liability, because Plaintiffs' claim is that precisely that SCDC failed to "give force to" the changes to sentencing laws that were made by Omnibus Crime Act regarding parole eligibility, as interpreted by the Court of Appeals five years after the statute's enactment.(Conversely and alternatively, SCDC was immune from liability because it "gave force to" its original view of the meaning of those changes). SCDC was the entity tasked with giving force to the changes as they were eventually interpreted by the Court of Appeals. SCDC either gave force to the *Bolin* court's 2016 interpretation of the 2010 amendments or it didn't. Either way, SCDC is immune under §15-78-60(4). Although Plaintiffs devote several pages to this issue, they cannot realistically deny that what they are complaining about is SCDC's failure to give effect to the changes to the Omnibus Crime Act as ultimately interpreted by the Court of Appeals in 2016. For this reason alone, this action should be dismissed.

2. Discretionary immunity (S.C. Code Ann. § 15-78-60(5).

In order to invoke the discretionary immunity provision of § 15-78-60(5), the governmental agency must present "[p]roof that the governmental employees faced with alternatives, actually weighed competing considerations and made a conscious choice. . . ." *Foster v. S.C. Dep't of Highways & Pub. Transp.*, 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992). The two federal tribunals which in this action examined SCDC's review of the statutory changes both concluded, expressly or impliedly, that SCDC met this requirement, as well as the requirement that SCDC used accepted professional standards in the course of exercising its discretion.[1]

As the McDonald R&R held,

> The evidence in this case shows that the SCDC meets this standard. As defendant Florian testified at his deposition, he reviewed the 2010 statute, did legal research, and reached a legal opinion about how the 2010 statute interacted with the so-called 85% rule (doc. 72-3, Florian dep. 132-33). Further, the ALC agreed with the SCDC attorney's interpretation of the Act. While the Court of Appeals ultimately concluded that the SCDC's interpretation was in error, <u>the evidence does not show that the SCDC's interpretation fell outside "accepted professional standards</u>."

[1] Plaintiffs argue a point not made in the Order, namely, that SCDC "was not 'faced with alternatives,'" Opposition Memorandum at 9. Obviously, though, the agency had to decide whether the 2010 amendments did or did not change the effect of the existing 85% rule for certain convictions. As the Fourth Circuit held, SCDC's task was "to sort through the new law in all its contradictions." *Campbell v. Florian*, 972 F.3d 385, 390 (4th Cir. 2020).

Campbell v. S.C. Dep't of Corr., No. 6:16-CV-3265-MGL-KFM, 2018 WL 7820956, at *12 (D.S.C. Oct. 1, 2018), report and recommendation rejected, No. CV 6:16-3265-MGL-KFM, 2019 WL 1297005 (D.S.C. Mar. 21, 2019), *rev'd sub nom. Campbell v. Florian*, 972 F.3d 385 (4th Cir. 2020), as amended (Aug. 28, 2020).

It is noteworthy that Plaintiffs cannot, and do not, deny that Florian, as he testified in his deposition, "reviewed the 2010 statute, did legal research, and reached a legal opinion about how the 2010 statute interacted with the so-called 85% rule. . . ." *Id.* This, in and of itself, effectively concedes that SCDC has made the necessary showing.

The Fourth Circuit described Florian's actions in more detail:

> To fulfill its responsibilities—including determining parole eligibility and calculating release dates based on earned credits—<u>the SCDC needed to sort through the new law in all its contradictions.</u> The task fell to Chris Florian, the SCDC's deputy general counsel. <u>Florian pored over the South Carolina caselaw on statutory interpretation and legislative intent</u>. And based on his review, he concluded that South Carolina law required the SCDC to adopt a legal interpretation that harmonized potentially contradictory provisions of a statute, if possible. *See, e.g., Justice v. Pantry,* 330 S.C. 37, 496 S.E.2d 871, 874 (Ct. App. 1998) (citing *State v. Hood*, 181 S.C. 488, 188 S.E. 134, 136 (1936)). Applying this principle, Florian drafted a memorandum describing how he believed the Omnibus Act should be interpreted.3
>
> In his memo, Florian <u>proceeded through the Omnibus Act section by section, and he summarized the changes that each section made</u>.

Campbell v. Florian, *supra,* 972 F.3d at 390 (emphases added).

As with the McDonald R&R, Plaintiffs do not claim that any of the conclusions set forth by the Fourth Circuit are incorrect. Instead, they purport to rely on an alleged distinction between the standards for qualified immunity and discretionary immunity, as well as other arguments that do not challenge the substance of the Fourth Circuit's conclusions. Again, the effect is to leave the substance of the Fourth Circuit's conclusions unchallenged by Plaintiffs. It is therefore unquestioned that SCDC weighed competing considerations and made a conscious choice, using accepted professional standards in the course of exercising its discretion.[2]

3. June Releasees.

A. Requests for Admissions.

SCDC has contended that the June Releasees had no legal right to the benefit of the 2010 amendments because they were sentenced prior to the effective date of those amendments. Plaintiffs continue to parse the words of their Requests for Admission and SCDC's responses thereto, hoping to contend that SCDC admitted Plaintiffs' primary claim in this case, that is, that Plaintiffs were unlawfully confined. However, this attempt by Plaintiffs is plainly futile, because in the Requests pertaining to the June Releasees, Pl. Ex. E, Requests 49-52, SCDC fully and completely denied that the incarceration of <u>any</u> of the Plaintiff inmates was unlawful.[3] The issue of whether the sentences were "properly calculated" (after the *Bolin* and *Fowler* decisions) is a different matter from whether the Plaintiff were unlawfully confined, an issue that SCDC has always denied. The reasons why no unlawful confinement occurred include the release of the March releasees before the remittiturs in *Bolin* and *Fowler* were issued, and the absence of an entitlement of the June releasees to early release at all, as SCDC has argued elsewhere.

[2] Plaintiffs argue that SCDC did not address the Court's conclusion that "SCDC was under an absolute and imperative duty to recalculate the sentences of impacted inmates in accordance with the Omnibus Act. . . ." However, SCDC has argued throughout this case that "[t]he decision of how to apply the 2010 statute to the sentences for certain crimes constituted the quintessence of a discretionary decision by governmental officials." *See, e.g.,* SCDC's Memorandum in Support of Summary Judgment, filed 8/9/23 at 17. In any event, any duty to recalculate sentences only became "absolute and imperative" once the remittiturs were issued in *Bolin* and *Fowler*, and even then, only for the March releasees.

[3] SCDC's responses to subsequent requests, such as the ones in Plaintiffs' Second Set, Ex. F, Requests 5 and 6, which pertain to re-calculations of sentences, but not the lawfulness of confinement, must be read in light of SCDC's total denials that any Plaintiffs were unlawfully confined.

B. Absence of a legal right of the June Releasees to the provisions of the 2010 Amendments

SCDC has pointed out that the Court did not address SCDC's contention about the savings clause of the statute itself. Amended Motion to Alter, etc., at 9. Plaintiffs note that the Order did discuss the DPPPS memo of March 2016 in which that agency addressed the savings clause. SCDC stands by its contention that the General Assembly did not intend for the Act to affect pre-Amendment convictions and sentences, because the amendments on which Plaintiffs rely did not "so expressly provide." Instead, those amendments are completely silent regarding their application to pre-Act convictions and sentences.[4] Neither the Order nor the DPPPS memorandum cited in the Order can point to any express language in the Act that makes its changes retroactive, because no such language exists. It would have easy enough for the General Assembly to insert an express provision to the effect that any sentencing changes authorized by the Act would apply to persons convicted and sentenced before its effective date, but no such provision is to be found in the Act.[5]

Finally, Plaintiffs argue that "The legislative intent expressed by the South Carolina Legislature does reasonably infer [presumably meaning "imply"] an intent to apply its terms retroactively." Memorandum in Opposition at 21. This effectively concedes this point, though, because an implied legislative intent falls short of the need for the statute to make express provision for its retroactive application.

[4] As a matter of analytical clarity, the finding of *Bolin* that there was a legislative intent to make certain inmates parole-eligible is not the same thing as the need for a showing that the amending statutes "expressly . . . provides" that it shall apply retroactively. *Bolin* did not address retroactivity.

[5] The DPPPS memorandum brought up such points as the fact that "the stated intent of the law was to reduce prison populations," Order at 17 (although the Act contains no such language), or that the inmates were persons under disability or that the statute was "remedial in nature." None of these tangential points can serve as a substitute for express language relating to retroactive application of the statute.

Plaintiffs' remaining arguments on this point have already been sufficiently addressed in SCDC's motion.

4. March Releasees.

Regarding the March 2016 Releasees, SCDC would simply refer to its contention, previously made, that it is the issuance of the remittitur, and not the issuance of the opinion of the appellate court, that constitutes the final disposition of a case. *See, e.g., McDowell v. S.C. Dep't of Soc. Servs.*, 300 S.C. 24, 26, 386 S.E.2d 280, 281 (Ct. App. 1989). It therefore follows that since Campbell and others sentenced after the amendments' effective date were released before *Bolin* and *Fowler* became final, that is, prior to the date of the remittiturs in those cases, they were never unlawfully incarcerated. Neither the Order nor the Plaintiffs have ever directly addressed this point and SCDC respectfully submits that it controls the question of whether the March Releasees were ever unlawfully incarcerated.

Plaintiffs would prefer to shift the issue to one concerning "retroactivity" of *Bolin* and *Fowler*, but that contention is unavailing. As SCDC and the Fourth Circuit (*Campbell,* 972 F.3d at 391 n.4) have already pointed out, SCDC did apply *Bolin* and *Fowler* retroactively, by releasing the March Releasees (even before the issuance of the remittiturs in those cases), and the June Releasees (whose entitlement to be released early was not presented in, and never addressed by, *Bolin, Fowler,* or any other court).

5. False Imprisonment Claim.

Plaintiffs have conceded that the false imprisonment claim is one to which the caps of the Tort Claims Act apply. Plaintiffs' Opposition Memo at 24. As a result, this point asserted by SCDC is withdrawn.

6. The Order overlooked the test for gross negligence, of which there was no evidence.

SCDC has contended that the portion of the Order from pp. 27 through 33, denying SCDC's motion for summary judgment on the negligence/gross negligence/recklessness claims, did not refer at all to the legal standard for the establishment of gross negligence, that is, "the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do [i.e.,] the failure to exercise slight care." *Clyburn v. Sumter Cnty. Sch. Dist. No. 17,* 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). In other words, there are no conclusions in the Order stating why or how any of the facts listed on pp. 28-30 of the Order amounted to a failure to exercise slight care. Nor, despite having been given another chance to bolster this part of the Order, have Plaintiffs offered any statement as to why or how any of the facts listed on pp. 28-30 of the Order amounted to a failure to exercise slight care.

Plaintiffs appear to contend, Plaintiffs' Opposition Memo at 26, that as long as the Order contained a list of facts "from which gross negligence could be inferred," even though lacking any reference to a legal standard, the list of facts sufficed, and that for SCDC to assert that more is required amounts to asking the Court to "show your work." *Id.* But SCDC must respectfully point out that an Order must at least provide some sort of tie between the facts and the law, by doing more than merely listing certain acts of the defendant and then summarily asserting that a jury question exists, omitting all reference to the legal standard for gross negligence.

7. Inapplicability of the gross negligence standard to other immunities.

Neither the Order nor the Plaintiffs assert that the gross negligence provision of § 15-78-60(25) was specifically pled. However, Plaintiffs claim that the gross negligence standard must be applied to other immunities because SCDC, in some of its Answers, referred generally to "the terms, conditions and, limitations of the South Carolina Tort Claims Act."

The Order holds that the gross negligence provision of § 15-78-60(25) applies to all other immunities claimed by SCDC. Order at 30-33. Given that there has been no evidence or conclusion that SCDC failed to exercise slight care, this issue should not need to be addressed. In any event, the Order erred in holding that merely by pleading the entirety of the Tort Claims Act as a defense in at least some of the consolidated cases, SCDC brought in the gross negligence standard. Order at 31. The Order acknowledges that SCDC did not expressly plead the Tort Claims Act exemption found in § 15-78-60(25).

Even though SCDC may have made a broad passing reference in an Answer to the entirety of the Tort Claims Act, SCDC has never specifically asserted §15-78-60(25) as a defense. In other words, SCDC has never claimed immunity under §15-78-60(25) by asserting that SCDC was immune because the loss resulted from "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity. . . ," as that subsection provides. To the contrary, during the briefing of this case, SCDC specifically pointed out that it had <u>not</u> raised that subsection as a defense. SCDC's Memorandum in Support of Summary Judgment, filed 8/9/23 at 17. Plaintiffs do not argue, and the Order does not hold, that SCDC ever actually asserted that it was immune under the terms of § 15-78-60(25).

The Supreme Court has clearly held that when a defendant "never raised an affirmative defense that contained a gross negligence standard . . .[,] the gross negligence standard is not interpolated into" any other subsection actually pled as a defense. <u>Jones v. Lott</u>, 387 S.C. 339, 348, 692 S.E.2d 900, 904 (2010), <u>abrogated in part on other grounds by Repko v. Cnty. of Georgetown</u>, 424 S.C. 494, 818 S.E.2d 743 (2018).[6] As a result, there is no basis for inserting the gross negligence standard into this case. Again, though, this should not matter, because there has been no specific finding that there is any evidence that would enable a jury to conclude that SCDC failed to exercise slight care or otherwise acted with gross negligence.

8. Definition of "occurrence."

SCDC's motion points out that SCDC made only one decision regarding the interpretation of the 2010 amendments and then applied that single decision to the sentences of each of the 413 plainitff-inmates. Each of the sentences of the affected inmates flows from the single decision regarding how the Omnibus Act would be interpreted. The Supreme Court has made it clear that it is erroneous to tie "the number of occurrences to the number of injuries. . . ." *Boiter v. S.C. Dep't of Transp*., 393 S.C. 123, 134, 712 S.E.2d 401, 406 (2011).

Plaintiffs argue in response that the Court's finding was that "each inmate suffered 'a separate breach of their right to release, separated from each other inmate by space and time.'" Pls.' Response at 30, paraphrasing the Order at 26. But this is just another way of saying that SCDC's interpretation of the statutes led to a separate injury to each plaintiff, the very conclusion prohibited by *Boiter*. There were not 413 different decisions to interpret the statute as SCDC interpreted it, but just one interpretive decision, from which unfolded a separate alleged injury to each Plaintiff. As a result, even if Plaintiffs were to prevail on all or part of their substantive claims, they still will have proven only one occurrence.

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[6] The Order, p. 31, cites Plyler v. Burns, 373 S.C. 637, 647 S.E.2d 188 (2007) as indicating that "a state entity may not bypass imposition of a gross negligence standard by intentionally pleading around it," but Plyler did not so hold. It merely elected on its own to consider subsection 60(25), concluding that it did not apply. In any event, even if subsection (25) applied here, which it does not, a party cannot be forced to assert a defense that it does not want to assert.

CONCLUSION

For the foregoing reasons, SCDC respectfully submits that the Court should reconsider and vacate its Order of April 15, 2025, and dismiss this case in its entirety.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT SCDC

COLUMBIA, SOUTH CAROLINA

June 6, 2025

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)

**************************** 2020-CP-40-05532

Marion Katrell Campbell,)
on behalf of himself and)
all other similarly situated)

Plaintiff,)
)
v)
)
South Carolina Department)
of Corrections)
)
Defendant.)

****

February 12, 2025

Columbia, South Carolina

B E F O R E:

The Honorable Jocelyn J. Newman, Judge

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On behalf of the Plaintiff

Will Davidson, Esquire
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Ken Woodington, Esquire
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Brandi J. Berry, CVR
Judicial Circuit Court Reporter

I N D E X

E X H I B I T S

No.	Description	I.D.	Ev.

There are no exhibits.

P R O C E E D I N G S

THE COURT: Number two on the roster is: 2020-CP-40-05532, Campbell versus SCDC what are your cross motions for summary judgment -- excuse me...

(Looking through documents).

All right, everybody ready?

Mr. Harpootlian, will you forgive my Texas joke a moment ago, apparently you didn't even hear it when I said it, so that really ruined it (laughing.)

MR. HARPOOTLIAN: (Laughing).

I think it is a extraordinary -- you and I know what's going on. I'm not sure everybody else does. You and I have a special relationship with forge.

(Laughing).

THE COURT: Absolutely! So that was for your benefit. But, anyway.

MR. HARPOOTLIAN: Thank you.

THE COURT: All right, which was filed first? I don't know that it really matters where we start, but let's start with the Plaintiffs motion for summary judgment, and then I'll hear the Defendants response, which is also the same as their motion for summary judgment and ---

MR. WHITE : That's correct.

THE COURT: Yeah. Okay.

MR. WHITE: May it please the Court. Kyle White for the Plaintiff class. I'll wait on summary before I kind of launch into the -- point by point.

The 2010 Omnibus Crime Reduction Sentencing Reform Act was passed for the purpose of reducing sentences for hundreds of -- reducing sentences for hundreds of current and former inmates at the time it was passed.

SCDC violated that law until the Court of Appeals issued the Bold opinion in 2016 and as a result, all three elements of the false imprisonment tort are met in a way that is not genuinely disputable by a SCDC.

They intentionally -- restrained the place, and they did it in a way that was unlawful. And despite SCDC's assertion to the contrary, the government is not allowed to unlawfully imprison these hundreds of inmates until the court tells them they got to stop doing it.

And also, as we'll talk about the kinds of detail later, the Tort Claims Act exemptions raised by the Defendant are inapplicable here. And the Defendant certainly cannot meet their burden of proof on those exemptions.

As a result, we'll ask that the Court grant the claims motion for summary judgment, as there's no genuine issue of material fact as to the false imprisonment claims.

I want to talk about all that in more detail. Before I do, I think it's important for the Court to understand that we are talking about real people here, the class members, or, sorry, the class representatives.

David Payton served 1,873 extra days in prison within the South Carolina Department of Corrections.

Isaiah Rollins served 1,862 extra days within the South Carolina Department of Corrections.

Christopher McCall served 1,793 days extra in the South Carolina Department of Corrections.

Larry Hampton 1,303 days.

Michael Smoak 956 days.

Marion Campbell 552 days.

Wardell Williams 264 days.

Larry Simmons 98 days.

Those are just the class representatives, Your Honor. Hundreds of inmates gave thousands of days, numerous years in extra or gave up numerous years of freedom because of what South Carolina Department Corrections did in violating this 2010 Act here.

So I think it's a good place to start on the analysis with the preamble of the actual 2010 Omnibus Crime Reduction and Sentencing Reform Act in 2010, which also called 2010 Omnibus Act for simplicity sake.

The preamble makes it clear that the purpose of this act was to reduce the sentences of certain classes of non-violent offenders by making -- by converting those sentences from 85 percent sentence to a paroleable offense.

And the reason that the legislature passed this law in 2010 was because the way we were sentencing these non-violent drug offenders wasn't accomplishing anything. It wasn't reducing recidivism. It was a toll on taxpayers. It was not serving the community as a whole.

So the legislature passed this law, as it's clear in the preamble, to reduce not only future sentences, but also in the sentences of those who were already incarcerated for these crimes that the 2010 Act had done.

It is undisputed in this case that SCDC did not apply the 2010 Omnibus Act to class representatives and class members until after the Court of Appeals in the *Bolin* case determined that SCDC had been breaking the law since 2010 in a way that was patently erroneous or, or obviously wrong.

In other words, in 2016 the *Bolin* court determined that SCDC had been breaking the law since 2010 and only then, Your Honor, did SCDC decide to finally follow the law.

The legal standard on a false arrest, or, I'm sorry, a false imprisonment case, has three elements: That the defendant restrain the plaintiff, that's the first one;

The restraint was intentional, that's the second one;

The third one, is that the restraint was unlawful.

In this case, there doesn't appear to be any genuine dispute that elements one and two are not met. SCDC certainly intentionally incarcerated all these hundreds of inmates, and again, they were also restrained and it was intentional.

So, really, the dispute lies in the third element -- that the restraint was unlawful. And really, this is not genuinely in dispute either.

The *Bolin* court decided in 2016 that SCDC had been breaking the law since 2010, like I said, in a way that was patently erroneous.

In other words, obviously wrong. And SCDC actually recalculated all the sentences after the *Bolin* decision to comply with the law. And we have answers to requests to admit from the defense in this case that showed that it's really undisputed that all the inmates in the Plaintiff class were held too long -- you know, in line with the 2010 Omnibus Act.

Do you have those request to admit answers?

THE COURT: That was "Defendant's joint responses Exhibit E" to your memorandum?

MR. WHITE: That's right, Your Honor.

THE COURT: I have it.

MR. WHITE: I've got -- we've got kind of a paired down version that deals with just the, just this particular issue, if you want it or, or we can just rely on the one since you already have it.

THE COURT: Sure. I'll take whatever you got.

MR. WHITE: So, in these requests to admit answers, Your Honor, the defense has admitted that, once the sentences were recalculated following the *Bolin* opinion to comply with the 2010 Act like, they should have been all along, these affected inmates had been held varying degrees of days too long.

But anywhere from, I believe, five plus years to a few weeks, which is a tremendous amount of time that was taken away from these folks.

So, really, it's undisputed that -- I know it's now, there is, some -- technically, a dispute that the restraint was unlawful, but we know that at least, pursuant to the way SCDC began calculating sentences after the *Bolin* opinion, these folks were all clearly held too long in prison.

So, what is the defense response to the unlawful element? As I understand it, SCDC's argument is essentially that it is entitled to break a law until the court tells it, it can't do it anymore.

That's essentially SCDC's argument. The problem with this argument is that under South Carolina law, judicial decisions are retroactive. And we've cited the *Roof versus Charlotte* case that go all the way back to 1872 that judicial decisions in South Carolina are retroactive in application also the *Simmons versus SC Farm Bureau* case 301 SC 267, under South Carolina law, it is clear that the courts our trust -- they don't make laws.

The judicial branch enunciates the law as it has always been since the passage of the law, essentially.

So what -- contrary to what SCDC would have court believe. What the Court of Appeals did in 2016 was not to say, "From here on out, you gotta do it this way."

The Court of Appeals decided that SCDC has been breaking the law in a patently erroneous way since 2010.

So that argument failed, Your Honor. SCDC's other argument as to unlawfulness is that -- as I understand it, that it only applies to the June releases.

So we had an initial batch of releases that were folks who were sentenced after the 2010 Act was went into effect. And then we had a June release, which was another batch of folks who had been sentenced before 2010.

So this argument, as I understand it by SCDC, only applies to the June batch of releases. And that argument, as I understand it, is that the passage of the 2010 Act was not retroactive in application.

Um, the problem with that argument is that, under South Carolina law, a statute is remedial and applies retroactively when it creates new remedies for existing rights, or enlarges rights of persons under disability. And that's the *Wiesart versus Stewart* case that we've cited 665 S.E. 2nd 187, and we've also found case law, and we cited in our briefing, but specifically cases dealing with parole, are, remedial, and that's the *State versus Cannon* case out of Arizona

-- 2016, West Law 3884902, at page two.

So, and interestingly, SCDC has raised this argument essentially at the 11th hour prior to this hearing. That as to the June batch, the Act doesn't apply to them because of the retroactive application issue.

But as you can see in the request to admit number -- Exhibit E and then ones that we paired down, handed up.

SCDC prior to taking this 11th hour position, admitted that it had -- that this law applied to these sentences after the *Bolin* opinion, and that had it been applied correctly, they would have had these certain sentences and then, as applied to those inmates, they were held past their local restate.

So actually, the South Carolina law on this issue, is consistent with their prior admissions, but inconsistent with this 11th hour position that SCDC has taken.

It is also, Your Honor, South Carolina law is consistent with the purpose of the Act, the 2010 Omnibus Act, in the first place.

Because if the purpose of the Act is to get people out of prison for nonviolent drug offenses, it wouldn't make any sense that it would only apply from that point on.

Because it would have essentially minimal effect on taxpayers, on individuals. There would be very few people affected by the passage of that Act from the point that it was passed onward.

So in order to comply with the very purpose of the Act, it would have to apply retroactively. And so we filed a brief today in response to SCDC's memorandum filed yesterday, and if the Court has access to that brief and can turn to page, really, this would be page four of the five.

THE COURT: Yes, sir.

MR. WHITE: Our position is also consistent with the internal memoranda from Triple P that was disseminated back in the 2015 timeframe on this issue.

Where, if you look at the language there within it, within Triple P, as they analyzed the 2010 Act, their analysis was in the short-term prospective. Application of the law would only ensure that old law will continue to consistently apply to the majority of the prison population until such time that offender's convicted and sentenced under the new law began to populate the prison system.

This would only ensure that the prisons failed to successfully rehabilitate prisons for years into the future, exactly the opposite result intended by the General Assembly.

So, retroactive application of the statute is consistent with South Carolina law. It's consistent with the prior admission of SCDC and is completely square with Triple P's analysis that was disseminated within that agency during the same timeframe.

So, for these reasons, Your Honor, the third element of false arrest is also met as a matter of law as to the false imprisonment claims, and the Court should grant Plaintiff's motion for summary judgment as to those claims.

Now, SCDC also raises certain affirmative defenses. The starting point, as Your Honor knows, for exemptions to the Tort Claims Act, which would be the affirmative defenses raised by SCDC, is that, essentially, the state is liable to the same extent under the same circumstances as a private individual, that's the default.

So, that unless there's a limitation within the Tort Claims Act that applies, SCDC raises four exemptions to the Tort Claims Act. It has a burden to prove. The first one will be 15-78-60 subsection 3, specifically the execution enforcement, implementation of orders of any court, or execution enforcement or lawful implementation of any process.

This case, this Campbell Class Action case, does not deal with the execution, enforcement or implement -- implementation of orders in any court; it deals with the violation of the 2010 Omnibus Act. Period. SCDC broke the law by not applying that Act to these affected inmates and releasing them on time.

The *Jackson versus SCDC* case cited by SCDC, that is a horse of a different color, deals with a mistake on sentencing sheet that does not provide any guidance and support in this situation. It certainly does not provide support for SCDC having the benefit of exemption three.

The *Kaffeia Tupelepi* [ph], case dealt with a manner in which SCDC implemented a sentencing order. So you have a sentencing order, it's got information on it.

SCDC implements it, causes the individual to be kept too long in prison and, and exemption three would -- it was held to apply that case. I don't necessarily agree with it. It was held to apply to the case.

That's a completely different situation than SCDC's failure to release people on time pursuant to the 2010 Omnibus Act.

So, this case, as it's a completely different situation, the Court should not be persuaded by SCDC's argument on exemption three. And should not apply that in this case.

The next affirmative defense that SCDC raises, 15-78-60 (4), which deals with the adoption enforcement or compliance with any law or failure to adopt or enforce any law.

Again, the issue here is not the enforcement of a law. It is rather or SCDC's compliance. It is the failure to comply with the law that is the issue. The 2010 Act was passed as it was binding on SCDC and SCDC failed to comply with that law to the detriment of these hundreds of inmates.

The *Bolin* court held that SCDC's failure was patently erroneous. In the administrative law court the *Fowler* case, which was the companion case to the *Bolin* case, the judge found that the failure to comply with the 2010 Act was specious and unreasonable.

This exemption just simply doesn't apply, Your Honor. It's a different issue that does not apply to this specific case involving the mechanical class action.

The next -- the third exemption, raised by SCDC, is 15-78-60(5), which deals with discretionary immunity to, to get the benefit of discretionary immunity. SCDC has the burden to prove that weighed competing alternatives and, importantly, utilized accepted professional standards in making the decision.

And that's the *Wright versus SCDOT* case, 437 SC 184. Importantly, it does not apply when SCDC's choice was determined by a Court of Appeals to be patently erroneous and in violation of state law. SCDC isn't entitled to immunity when it has essentially a devil on one shoulder saying, break the law and an angel on one shoulder saying, follow the law, and it decides to go with the devil's recommendation to break the law. That's not what is contemplated by discretionary immunity.

And when one choice involves following the law passed by the legislature, one does not -- that is not winning, competing interests using acceptable professional standards. That's making a decision to break the law. As a result, Your Honor, discretionary immunity does not apply here.

Now, exemption 21 is the last one raised by SCDC, which is the decision or implementation of release, discharge, parole or furlough of any person, etc, etc.

Again, this arises out of this case, the Campbell

Class Action case, arises out of a failure to release, as the Court may declare. The *Phil versus SC DOT* case, 350 SC 315 this exemption number 21 only applies when the enemy makes a conscious, if not formal, decision to terminate the custodial relationship.

In this case, it's completely the opposite of that. The SCDC kept people too long, as opposed to terminating the custodial relationship when the law said it had to.

The last thing that I'll touch on, Your Honor, is the issue of occurrences. As Your Honor knows, under the Tort Claims Act, there is a cap of $300,000 per person, per occurrence.

What we've asked for in the motion for summary judgement is that each inmate is a separate occurrence under Tort Claims Act, we dropped a footnote that said, certainly a jury could find more than that if it gets to that point.

But for the purposes what we're asking for, we're asking for a separate attorney's current inmate. The reason is that the elements of false imprisonment are met separately and uniquely as to each separate class member.

They're sentenced on different days. Their proper release dates were different. Each one was entitled -- each one is entitled to separate compensation for a different amount of days.

So what we have here is we have elements one, two and three met separately and distinctly as to each one of these inmates.

Each one was entitled to be released on a specific date. Each one was kept past that date. Your Honor, as a result, we believe that as a matter of law, each Plaintiff is entitled to at least their own separate occurrence.

And again, that's all we're asking for right now, as opposed -- we reserve the right, if it gets to that, if the Court decides not to rule as a matter of law, and each one has their own separate occurrence. That the jury could determine more than that based on the facts.

So, Your Honor, for these reasons, we would ask on behalf of the Plaintiff class who's lost all this 1000s of days of freedom, that the Court grant the Plaintiff motions for summary judgment; as to the Plaintiffs' false imprisonment claim. And unless Your Honor has any questions, that's all I have right now.

THE COURT: I don't have any. We're going to take just a little bit of a break five minutes before I hear from you.

MR. WHITE: Thank you, Your Honor.

(A short break was taken.)

THE BAILIFF: Please, remain seated. Court come to order.

THE COURT: All right. So, (speaking to the defense team) you're going to tell me it was unlawful because they thought it was lawful, and it did become unlawful until court said it's unlawful and you're immune anyway. Let me hear the final points of all this.

MR. DAVIDSON: The final points. I don't know if there are any final points. Your Honor, there are obviously two groups of inmates involved in this case, and I don't want to, I don't want to kind of mix and match. I want to keep them separate issues, and it all does along with Omnibus Crime Act 2010.

At the point that, that Act was passed, the Department of Corrections legal team or legal staff and General Counsel did a review of the Act, and I think this is all in the record.

And obviously we incorporate all of our arguments in our record, in this record, whatever may come.

The lawyers in the department, Mr. Florian, who was the one that dealt with sentencing issues, and I believe even in his deposition talked about he at times, got a call from solicitors, judges, about sentencing.

He reviewed the Act and prepared a memorandum, which is part of the record, where he outlined what he thought the effects of the Omnibus Act was, and he did not find as plaintiff's counsel to state that the department had to consider recalculating sentences for what, what are called non-parole inmates, or 85 percenters.

And for the courts, for lack of edification, because I didn't understand all this in the very beginning, it basically means there are a class of individuals who were sentenced, who would not be eligible for parole or early release until they Hit 85 percent of their sentence.

And, at that point, they would be eligible and would be able to earn more credits, but they were what we call 85 percenters.

He did not believe that the Act affected other than if an individual who was an 85 percenter or non-parole was able to get parole. Fine.

If they applied for parole and didn't get it, then they still had their 85 percent they had to take care of.

And he prepared that memo, and that memo went out to the department on how to deal with these sentences, not just for the 85 percenters, but for the whole class of individuals that were part of the Omnibus Crime Act. And amazingly, the department has a computer which does the calculations of sentences, not an individual stuck in a back room to get something that tries to figure it out. They have a computer.

And they sent that memo to computer people, and obviously it was entered into the system. Prior to that memo being sent out, he was reviewed by Mr. Florian's senior attorney or the general counsel, which was David Tartarsky.

Mr. Tartarsky read the memo, read the Act and agreed with its interpretation. And all of this will come into play in some of the immunities, Your Honor.

Subsequent to that, two inmates file grievances claiming that their sentences should be shorter. On the Omnibus Act, one was Mr. Fowler and one was Mr. Bolin. The AOJ's heard both the cases.

There were different administrative law court judges. In the *Fowler* case, the administrative law court judge disagreed with the department's interpretation.

In the *Bolin* case, the administrative law court judge agreed with the department's interpretation.

So now we have conflicted AOJ appeals, and it was decided, I think, always had the appeal, and it went up to the Court of Appeals.

Now, all of those individuals that are what I call the first group, post 610, or post Crime, Omnibus Crime Act individuals, were sitting at the Department of Corrections on valid sentences handed down by the various courts and the state of South Carolina.

They had not been on the term. There was no final order, but it was appealed, and it went to the *Court of Appeals*, and despite what Mr. White has said, basically the holding was the department misinterpreted the statute and the 85% rule didn't apply to certain class of individuals who were housed at the Department of Corrections on criminal charges dealing with narcotics, and they should be released.

Well, the department, in fact, asked for a rehearing because they needed some clarification on the opinion, which the court did, and the court as well as I remember. They issued their first opinion November of 15. They didn't issue the corrected version until February of 16.

At that point, Your Honor, the department had a ruling it wasn't filed because the Court knows the Court of Appeals you can appeal in the Supreme Court, if you so desire. And there, you know, I've had cases go to the Court of Appeals.

They've overturned what I've gotten in the lower court, appeal it to the Supreme Court. The Supreme Court says, Court of Appeals got it wrong. You win, me win.

Oh, that was, you know, I've given up trying to predict what any *Appellate Court* will do with any case this day and age.

But in the meantime, the department had their computer staff. This is all in the record, and it's actually, I think, in the Fourth Circuit record because they go into excruciating detail in their opinion about what Mr. Florian went through to come up with his opinion.

But in this instance, the department had gone ahead and gotten the list of individual inmates that would be subject to release if the Omnibus Crime Act in 2010 applied to me, and they, as of March 21, before the remittitur came down, before any appeal to the Supreme Court took place, they released that group.

That group, at that point, was still subject to the sentence they had been sentenced on because until the remittitur comes down, the order of the Court of

Appeals is not final.

So our position -- and we, obviously, you're right, we can kind of move to summary judgment, propose there's something.

As to the first class of individuals, Your Honor, until such time as the Court of Appeals opinion became final, those individuals were lawfully held at the Department of Corrections.

Now the individual thing that's interesting is you have cases all the time where they get appeal. Criminal cases get appealed. And the Appellate Court may say "wrong", and based on the opinion the individual is determined that he should be released while they determine.

And I remember there was a case where a lady out of Beaufort, unfortunately, I was tangentially involved, was involved in a question of whether or not she committed child abuse by administering certain medications to the child, and there was problems with the evidence, and the court said, "No, she's not guilty", and they released her.

Well, very similar to what we have here. We have the court making the decision the evidence wasn't sufficient and released.

Now, do you hold in that instance because the

Department of Corrections is holding that individual as being unlawful, because the court has found that they're being held was unlawful?

I don't think so. Because until the court, as in this case, determined that that determination or decision made by Mr. Florian, Mr. Tarski and the department, was wrong, they were not unlawfully held.

THE COURT: Well, I think your analogy is a bit off.

MR. DAVIDSON: Well, maybe.

(Laughing)

I've been trying to think of one, and I've come up with several, some of which Mr. Harpootlian was involved in. We don't want to go down that rabbit hole.

THE COURT: Well, but I think it's more -- can -- even if we just want to keep it in the criminal sentencing context, it's not the same as trial -- due process happening here and a sentence ordered, and then that's overturned.

I don't know that that's unlawful detention. It's more similar to, I write on the sentencing sheet 10 years, and someone at SCDC looks at it and thinks it says 70 years, because there's a little tail on the front of my one.

Isn't it more similar to that? And, and if, in fact, the, and y'all thought it was 30, the mistakes on your part, it was a lawful 10 year sentence, and the rest of those 60 years that you got the person, hopefully you'll figure it out sooner than that, is unlawful detention, is it not?

MR. DAVIDSON: Well, that's that's a little bit different, because you have somebody who's interpreted what you've written on sentencing sheet. And I have, I have complained in regard to sentencing sheets before, because they can be very misleading.

THE COURT: They can be, and we try to electronic version that didn't work very well. We'll have to revisit that. But is it not similar to you -- you misinterpreted what's on the sentencing sheet just the same way you misinterpreted what the legislature wrote in the law.

MR. DAVIDSON: Yeah, but we didn't we -- we made a conscious decision. We reviewed it; we had lawyers determine what the Act said.

THE COURT: Well, they can be wrong, too.

MR. DAVIDSON: Well, I know they ---

THE COURT: Yeah, they're wrong a lot.

MR. DAVIDSON: We, we all are wrong. I suspect you know, in my career, Mr. Harpootlian's career ---

MR. WHITE: Never been wrong.

ALL PARTIES: (Laughter).

THE COURT: He has never been wrong. The rest of us, yes.

MR. DAVIDSON: We can talk war stories later (laughter).

They're always cases where lawyers disagree. That's why we're here. Okay. They take one side and you take it up. I've interpreted it this way. They've interpreted it that way.

You may not agree with any of our interpretations. Okay. That's what law is about. That's what the decision making process is. What Mr. Florian went through; what Mr. Tartarski went through.

They went through the process of saying, in this instance, the 2010 Omnibus Act had, had changes to the 85 percenters, but it didn't apply to all of these people, okay.

And they made that determination until the court told them, you're wrong in the *Bolin* case. And remember, we've got two different opinions. We've got the *Fowler* case where the department lost it, and the *Bolin* case, we won it.

And so even in that instance, you have administrative law judges coming up with different decisions.

So until the Court of Appeals made the decision and handed it down that the interpretation was wrong. In that instance, those individuals who were asked to say the first inmate release were held under a valid sentence until the court said no.

Now, there's a second group, that's the group that deals with the June release, and I can't remember how many, there were, 200 something I believe. That was precipitated by Triple P thinking that the Act was retroactive.

And there were memos that Triple P did, Mr. Buchanan did, where he outlined this analysis. Same thing. Somebody, some lawyer, reviewing the Act and coming up with some determination that the 2010 Omnibus Act was retroactive in effective sentences prior to 2010.

Well, there's a case in South Carolina called *State v Varner*, which basically says, if you're sentenced to a newly enacted Act doesn't affect your sentence unless your sentence hadn't been handed down and the Act came into play.

And that's the *Varner* case. It's not retroactive. Now, they won't say it was, but the *Varner* case is pretty clear that in this instance, it was not retroactive.

Mr. Buchanan, who I have known for years, was wrong, but the department went along with it and released those individuals, and that's your second group.

Now, they were released after *Bolin*. So, in that instance, my argument that they were held on but released before *Bolin* went into final effect doesn't apply.

But what does apply is the immunities. And the immunities apply to all of it. You've got the discretionary immunity under subsection five, the decision making process.

Clearly legal standards of Mr. Tartarsky reviewed it; Mr. Florian reviewed it. They want to say that, you know, well, that it's not of professional standards.

They're lawyers, you know, they act within the professional standards of code of ethics, and they review things, and they make determinations.

But in this instance, it's truly a decision making process, which would be an immune function. But then if you look at and I know you're scowling at me, which is fine. You scowl at me all the time. I take no personal offence to it.

THE COURT: (Laughter).

MR. DAVIDSON: But the other thing too, Your Honor, if you look at the other immunities, one of them is subsection 21. In subsection 21 which applies to all of this, in fact, along with the discretionary immunity.

Subsection 21 says immunity is not weighed when the issue of the case involves the decision to or implementation of release discharge or low or furlough of any person in the custody of any government release, discharge, decision.

That's an absolute immunity for the department, applies to both number one and number two. You know, even -- Mr. Woodington pointed this out. It's true.

There's an old case called *McCall versus Batson*. It's the case that overruled the sovereign immunity. And in that opinion, it says that the decision-making process, you have to understand there is the right to be wrong in the decision- making process. The decision to release is an absolute defense.

Discretionary immunity is an absolute defense. We also raise formal liability from adopt enforcement of any law or failure to adopt an enforce law.

Again, that's what we're doing in this session. We're enforcing or adopting, dealing with the law in this case liability from the execution, enforcement, implementation orders of any court.

That's what they're doing -- they're implementing an order of the court, Court of Appeals. Think about it. Yeah, you could scowl at me, but think about it.

THE COURT: (Laughter).

MR. DAVIDSON: They are implementing the order of the Court of Appeals by virtue of recalculating the sentences.

THE COURT: But the Court of Appeals is just telling them what they were supposed to do to begin with.

MR. DAVIDSON: Well, the problem is with that argument Your Honor, supposed -- with all due respects to the former senator. The legislature is renowned to write statutes that make absolutely no sense. I've got a case right now.

They passed a statute, and they established it some way for a department, I wonder what, to make some ruling about whether or not somebody was intentionally violating the statute.

And they said, once you make that decision, report it to SLED. They didn't include anything in it about hearing, appeal, anything, nothing.

Now, I don't know if a clerk, somebody would sleep at the wheel, but there should have been something in there that says you have a hearing, you make this determination, and they can appeal it to wherever.

They didn't do that.

So, I suspect there are times that you sit in the back and you read the statute and go, "huh", and then you read it again, and you come up with your interpretation of what that statute is.

You make a ruling, and it goes to the hither lands. The hither lands may agree with you, and they may not because they have their own interpretation of the statute.

And that's what, in this instance, the department was following the execution of a court order that deemed an order of the court of court who clarified what that statute meant. There had been no court case before the *Bolin* case to clarify how the Omnibus Crime Act of 2010 applied to individuals who we call 85 percenters.

THE COURT: Doesn't that make the enaction of any law a two-step process?

MR. DAVIDSON: What do you mean by that?

THE COURT: They've got it enacted. And then, of course, that would help y'all interpret it, and until the court interprets it, then the law...

MR. DAVIDSON: The law is the law until the court interprets it.

THE COURT: Well, but wasn't "the law is the law" here?

MR. DAVIDSON: But the problem is, the law was interpreted by the department. They made some decision about what it meant, just like if they had gone to the Attorney General's office and asked for an opinion, and the opinion had come down this, this and this. Or they had brought some type of conservatory judgment action, although I don't think they can, to say: "What does this mean?" Okay. There are times that, until the court rules what the law says, nobody knows exactly.

THE COURT: That doesn't mean it's not the law though.

MR. DAVIDSON: What do you mean? It's not the law. THE COURT: Right? In that period when you're waiting for the court to rule, the law is still in effect.

MR. DAVIDSON: Yes, yes.

THE COURT: Because, as we've been over, the court doesn't enact laws, right? They are a whole separate branch of government.

MR. DAVIDSON: But you interpret them.

THE COURT: Sure.

MR. DAVIDSON: And until you interpret them, and you may be right or wrong with your interpretation of the statute, and it goes to the Court of Appeals, and it goes to the Supreme Court, that's the final arbitrator of what the meaning of that statute is.

THE COURT: But not the effective date of the statute. MR. DAVIDSON: What do you mean the effective date?

THE COURT: Well, every statute goes to effect on a date.

MR. DAVIDSON: Has an effective date. So we get an inmate in, in 2010, okay, we're not sure what his sentence is, okay. What do you do? You use your best judgment, your best decision-making process, if what the statute means in regard to the statute and the sentence being imposed.

THE COURT: Sure, that supports your immunity argument, but not the element of false imprisonment as to whether the detention was, in fact, the law. Those are related, but two separate arguments.

MR. DAVIDSON: It's not -- kind of interesting, because false imprisonment is a potential for you have to intend to falsely imprison someone.

THE COURT: You have to intend to detain someone.

MR. DAVIDSON: Well, okay.

THE COURT: You can't, you know, if no one knew the door was locked, then okay it's false imprisonment, but if they locked the door ---

MR. DAVIDSON: But in this instance, they were interpreting a statute and coming up what they best believed the statute meant in regard to the sentence of the 85 percenters.

They made that decision, and yes, it was wrong based on the Court of Appeals opinion, and the department released it.

THE COURT: That's the only opinion there is, though, right? That is what the law is on this issue.

MR. DAVIDSON: As of April 1, 2016, I believe, because that's when our remittitur went into effect.

THE COURT: Right? But there's been nothing since that time.

MR. DAVIDSON: There's nothing since that time, right. *Bolin* was the one case decided, reading the conflicts between two AOJ's -- one who said we were right, one who said we were wrong -- and the Court of Appeals made a decision.

The department decided ultimately they weren't gonna appeal it, and they let them out before the remittitur date.

THE COURT: So when a newly enacted statute requires or calls for judicial interpretation, then that statute cannot be effective.

Despite what the legislature says, despite what the governor says, that statute is not, in fact, effective until however long it takes an Appellate Court to review the matter, issue a decision, and issue the remittur.

MR. DAVIDSON: You made -- you made a bad choice of a word: "effective".

THE COURT: Okay.

MR. DAVIDSON: It's still effective. Okay. The statute still has effective. Well, still has duties that have to be performed under that statute, okay. But somebody may not like what decision's being made dealing with that statute and then bring an action. Maybe get arrested, they don't like what happened. They bring a case and say, "We are not guilty under this statute." Or somebody says the statute is not constitutional.

Okay, and brings a case claiming that the statute should be found null and void. But even during the period of time, that's until that decision by that court is made, okay, that statute's still affected unless there's an injunction to prevent the implementation of that statute. Okay, so if *Bolin* had never appealed, okay, there would be no final determination.

The Act would have still been interpreted and applied just like it had been when Mr. Florian came up with his opinion.

THE COURT: And so you could still have -- I don't know if anybody's sentence or max out date, but conceivably, you could still have Mr. Campbell, Mr. Belton and all those people, they could be in SCDC today if Mr. Bolin hadn't appealed.

MR. DAVIDSON: That's right. And...

THE COURT: And that would be lawful.

MR. DAVIDSON: It would be lawful because it was based on a lawful interpretation of the Act and a sentence handed down pursuant to that Act. Mr. Bolin brought the case and said -- brought a grievance and said, "You've miscalculated my sentence", that was all time, and department looks at him and decides, did they or didn't they.

Well, Mr. Bolin said, "No, I shouldn't be considered an 85 percenter or a non-parolee. I should get the benefit of good time credits and things like that". Okay. And he basically brought his grievance, just like Mr. Fowler, went to the AOJ because it's a Al Shabazz issue, and the court -- not the court, the AOJ basically made the decision and filed with the Department of Law in *Bolin*, the Department of Right.

And so, you had conflicting opinions that went up, and the Court of Appeals decided. Until the Court of appeals decided and the remittitur went in effect, they were still properly sentenced at the Department of Corrections.

Because clearly, we could have appealed to the Supreme Court. Supreme Court could have said, "No, we agree with your interpretation, we don't agree with the Court of Appeals," and, yes, they would still be there. Well, they may have passed, yeah.

THE COURT: Right.

MR. DAVIDSON: But they -- some of them may still and that's the way the system works.

THE COURT: No. And it shouldn't ---MR. DAVIDSON: Well it may not, you know -- I -- you know, whatever, okay. In this instance, okay, Al Shabazz allows for them to bring these issues.

Okay, the Court of Appeals ultimately, or the Supreme Court, gets to make a decision whether the department was right or wrong in the way they interpreted something that deals with liberty. If they agree with the department, okay, they disagree with the department, department follows their order. It's what they did in this instance -- they follow the Court of Appeals order saying, "You miscalculated, go back and do it," and they let these people out.

The first group, what I call the before 2010, okay, those individuals in *Varner* shouldn't have been left out. Pardon and parole board was wrong. Much as I like Mr. Buchanan, they were wrong, because *Varner* says, basically, "Okay, if you are sentenced today for a crime and five years later a statute goes into effect that changes that the way you were maybe should have been interpreted, it doesn't go back and fix it. You're still sentenced under *Varner*," And then you have the immunities that apply to all of this, the discretionary immunity, immunity dealing with following a court order, with the decision to release.

And that's what this clearly was: the decision to release, and it was a decision which flows into even the qualified immunity decision, because that's what they're doing. They're making that determination. The court, the General Assembly, and this is also something -- the legislature, when they adopted the Tort Claims Act, basically said the state should be held liable for the same type things private citizens are. I don't know any private citizen that deals with releases of inmates.

I don't know any private citizen that has to make the decision, "Am I going to release this individual or not?" from the Department of Corrections or from a correctional facility. That's part and parcel of why these and some of these immunities were adopted. But clearly, the court, the General Assembly, said, "Release", you know.

In essence, Your Honor, until the Court of Appeals, Mr. White wanted to say we were breaking the law. The court said we were breaking the law until the Court of Appeals said we were wrong.

We weren't breaking anything the Court of Appeals could have done exactly what the *Bolin* case did and affirmed the AOJ in that decision.

The decision to, or implementation of, a release of any person in the custody of any governmental entity absolutely immune. Applies across the board to all these cases.

The other case, the first group, the 2010 people that were sentenced after that had the argument, Your Honor, we did that until the Court of Appeals said we were wrong. They were being held under a valid sentence.

May not like it, but that's what it is every time a statute is interpreted, criminal statutes interpreted, and there's some question about what it really means, what the sentence may be.

Okay, then somebody has got to make that determination. And in this instance, the department has to make that determination. Just like they do on sentencing sheets, which I hate because number one, can't read them; and number two, with all due respect to judges, you know, they write gibberish, and you can't tell what they mean.

They talk about time served, and it may not be time served, and it may be this, and it may be that. Then somebody's gotta figure out what they mean, and you're not supposed to go back and call the judge and say, "What in the world did you mean?"

THE COURT: I get letters from classification all the time.

MR. DAVIDSON: Well, I hope they, hope they copy the other side when they did that.

THE COURT: I don't know if they do.

MR. DAVIDSON: If not, if not, I will talk to them, okay.

THE COURT: Yes, sir.

MR. DAVIDSON: But, I've been down that rabbit hole, in a case. But clearly, in this instance, until the Court of Appeals ruled, that we were wrong, okay, the sentences were in effect.

They may not like it, but they were because clearly we could have appealed to the Supreme Court. They could have said Court of Appeals is wrong, which they do once or twice a session, okay, and we could have won it.

THE COURT: Okay.

MR. DAVIDSON: Thank you, Your Honor.

THE COURT: Yes, sir. Is this a joint effort? Nothing Mr. Woodington?

MR. WOODINGTON: Can I just cover one or two points very quickly, Your Honor?

THE COURT: Yes, sir.

MR. WOODINGTON: One, is picking up on what Mr. Davidson said about the difference between the Tort Claims Act and then what, what you can do with a private citizen.

What can the Tort Claims Act applies in the same way it applies to private citizens. You know, the whole philosophy of Tort Claims Act, and the reason it sends discretionary decisions with the government, which was in governmental unit before that is to distinguish between when an SCDC officer takes the car out and ran into somebody else with it, that's a tort that a normal person, a private person can do when they're acting in their official capacity and making discretionary governmental decisions about how the governor should operate.

The Tort Claims Act never intended for that kind of thing to be covered as a regular in the same way as a car wreck or a regular tort gets. That's why they have discretionary immunity common law in South Carolina as well as in the Tort Claims Act.

So, as long as they exercise actually exercise their discretion and the Fourth Circuit, as you said, painstakingly points out just how much trouble it was before, as long as they did that and that actually gave it serious consideration, which they clearly did, undisputedly did, they had their right to be wrong, the government doesn't get sued if you care if you decide it can't be sued -- you're immune because I think one case, I can't remember whether it's a South Carolina case or not, when lawyers are in lawsuits 50 percent of every lawyer and every lawsuit loses, does that mean he was unprofessional or something?

No, that means it's just you have a right to be wrong as a governmental entity, and the other thing that covers all the claims.

The other thing, I'll be very brief, pertains only to the inmates who was -- who were convicted and sentenced before 2010 -- before the Omnibus Act was effective.

It's about a 50/50 split 20 -- about half the 200 and something were sentenced after the 2010 Amendment, and they were let out, the other 200 and something were not released right away.

But, you know, as he said, we think PPP was wrong, but it did it and the only thing that the Plaintiffs have really said they don't even mention *Varner* or anything that was written because *Varner* is pretty clear: at the time -- the time you were sentenced, you were subjected to the law as it was when you were sentenced.

To the law as it was prior to the Omnibus Act, was that you were in any part of the sentence, you didn't get out of.

They've come up later with the idea that, well, you know, some Arizona cases that hold that that's not part of the sentence, but those are outliers the Supreme Court. I'll hand this case we cited for something else. It's called *Warden the Lewisburg Penitentiary against Marrero*, and the head notes are easier to read than the actual statute -- I mean the actual case. I'll hand up after I find the hand note myself.

(A document handed to the Court.)

Like I said, the head notes are a lot easier to read than the body that I have given you.

THE COURT: (Reading document) Okay. Yes, sir.

MR. WOODINGTON: Basically, just you know, as against the contention that, well, the things like this, 85 percent are part of the penalty and can be changed retroactively without it expressively being done.

This court -- the Supreme Court said that a parole provision is indeed a felony forfeiture or liability that is saved by that -- by a saving clause from taking effect.

And then all you have to think about practically, as a trial judge, if you sentence somebody to 10 years virtually without parole and you know they're not gonna get parole sentenced one way, if you want to keep them in, and they know, and you know they're gonna be sentenced and have parole, you send them, sentenced them to something else.

They'll guarantee they get 15 years or 10 years or whatever, and that goes, then the Supreme Court has said and other courts have said it too. That's what goes into the computation.

So, if the legislature changes that retroactive -- retroactively without being expressed about it, you can't imply that they didn't do that because the normal rule is when somebody is sentenced by a judge, that Judge takes into account everything that's part of what's going to happen, including the parole eligibility and everything else.

I think I'm sure he must do that, and you know, to change it retroactively without expressly saying that, hey, these people now we're changing the laws for them.

That's one thing, but that's precisely what the legislature did not do in this case. Use the same language. I just wanted to cover those two quick points, Your Honor.

THE COURT: Yes, sir. Thank you. All right. Mr. White?

MR. WHITE: Yes, Your Honor. As Your Honor pointed out, the effectiveness of the 2010 Omnibus Act was not a two-step process. It went into effect when it was passed.

And interestingly, I said when I was first up that there, there appeared to be no dispute as to the element one and two of false imprisonment, and no dispute as to number three.

I just wanted to point out, Mr. Davidson indicated, he described how they went back and forth on the decision- making process, and ultimately, they were wrong.

And what he meant, what he was talking about, was as the Court of Appeals said in the *Bolin* case, despite your decision- making process, despite what you had, whoever looked at it SCDC, you were wrong. What you did was not in compliance with 2010 Act.

So, Your Honor, none of the three elements of false imprisonment are in dispute, and that's precisely why the court should decide, as a matter of law that the plans to prevail on the false imprisonment cause of action.

And there was some mention of, you know, the private citizens are not in the business of releasing inmates, and you know, all that.

Whether you're the government, whether you're a shopkeeper, whether you're a private citizen, if you intentionally restrain somebody unlawfully, you are subject to the tort penalties that go along with committing that tort, and that's exactly what SCDC is subject to in this situation.

THE COURT: Well, the difference there is --

sure, I mean, that's what the Tort Claims Act is. But private citizens can't be wrong. Doesn't the government have the right to be wrong about their decisions?

MR. WHITE: No, Your Honor, I'm glad you brought that up because the case that was cited by the Defense on that point in *McCall versus Batson*, is, first of all, a Pre- Tort Claims Act case.

That, that case came down before the passage of the South Carolina Tort Claims Act. South Carolina Tort Claims Act changed everything. It was a limited waiver of sovereign immunity, as Your Honor knows. And the default again, under the South Carolina Tort Claims Act, is the government is liable just like everybody else.

So no, Your Honor, I don't agree with the Defense that the government has the right to be wrong. And another reason why the government doesn't have a right to be wrong is that we don't have this quasi-super qualified immunity under state law, where the government gets to do something until the court says they can't do it anymore.

So we don't have that principle under South Carolina law, thankfully, Your Honor.

And I don't also agree with the defense that,

that's how the system works. I think that the way the system works is that if you commit a tort, even if a court hasn't said you can't do that, and you go through this appellate process like the -- like SCDC did and ultimately the Court of Appeals says that what you were doing was patently erroneous and in violation of law, you have gone through that appellate process, and you have broken the law at your own risk.

And you gotta suffer the consequences when you lose at the Court of Appeals. And that's exactly what SCDC did here, and they are subject to the consequences just like any other litigant that did something illegal for six years until the court said you can't do it anymore.

So another point on this is the reason why none of the -- none of the stuff that Mr. Davidson said matters in terms of how the nuts and bolts and how the sausage was made, and how they ended up doing something illegal.

The reason why none of that matters is that the false imprisonment cause of action is an objective standard. It is whether those three elements were met or not. So it's important to examine it within that lens. It doesn't matter if you had a lawyer who did something wrong, you had a janitor who did something wrong, you had a race car driver employed by SCDC who did something wrong. All that matters is whoever did it and whoever broke the law and whoever caused somebody to be intentionally restrained in violation of the law made SCDC liable for it.

Discretionary immunity was a large focus of the Defense's argument, and it's important to reiterate that a key point on discretionary immunity is that these options that are being weighed it has to be done in comport with acceptable professional standards. And what I didn't hear from the Defense is any pushback on the fact that it can't, by definition, be an acceptable professional standard if it is illegal and the Court of Appeals determines it is illegal as a matter of law -- as a matter of law.

And in so holding, they find that what you were doing was patently erroneous when compared to the plain language of those laws.

You don't get to discretionary immunity in that situation, Your Honor. Thankfully, that is not how the system works.

Another thing I didn't hear from the defense on the point of exemption number 21 was any response whatsoever to the *Fale versus SC DOT* case, which completely undermines the argument that just because the exemption says the word "release", it exempts the state from any liability whatsoever from failing to release somebody.

The *Fahle versus SC DOT* case makes it clear that, for that exemption to apply, there has to be a termination of the custodial relationship.

No response from the Defense, because there is no response to that, because that's what the case law says, Your Honor.

And we already talked about the *McCall versus Batson* case, Pre-Tort Claims Act. The government doesn't have the right to break the law until the Court of Appeals says they can't do it anymore.

So, another sort of undertone of the Defense's argument is that the SCDC, this government agency within the executive branch, had the right to violate the 2010 Omnibus Act until an inmate grieved, filed a grievance, went through the process, went through the administrative law process, and then ultimately took it up to the Court of Appeals.

And then SCDC argues with a straight face that it has immunity from implementing a court order because after the Court of Appeals said what you've been doing for six years is illegal and patently erroneous, that they then follow the Court of Appeals instructions, recalculated sentences, and started releasing people. That's not how it works, Your Honor.

That's not how that exemption works, and it does not immunize SCDC for keeping all of these hundreds of inmates for hundreds and thousands days too long in violation of the 2010 Omnibus Act.

And my co-counsel makes a very good point that there was one there - were one party to the -- one inmate -- or one inmate who was a party to the *Bolin* case, one inmate who was a party to the *Fowler* case.

All the other hundreds of inmates were not parties to the *Bolin* case or the *Fowler* case. But what they were a party to, and what they were -- what their sentences were governed by, was the 2010 Omnibus Act. Period.

SCDC was not appealing a case in which they were a party but what they did have the benefit of was the 2010 Omnibus Act.

THE COURT: Now, I think their intentions were legal because they never sought a court opinion about it, because until you do apparently your sentence is -- I mean you can be detained, but until you reach out to the court and get to the highest court you can and get that remittitur everything is legal up until that point.

So they could still be there. I'm not sure.

MR. WHITE: And that is, that is an extremely dangerous precedent that SCDC would have this court set, Your Honor. And I don't want to live in a state where that precedent is set. And I don't think any of us do.

THE COURT: I guess I should clarify that that was tongue in cheek, since there will be a tight record and not a video of this.

MR. WHITE: Also, the *Varner* case, the actual -- I pulled it up on my phone. The actual citation was *State versus Varner* 310 SC 264, it's a 1992 case. The important distinction between that *Varner* case and our case is that Omnibus Act specifically says, notwithstanding any other provision of law.

When you square that with the preamble of the Act, which clearly says that the purpose of this to get people out of prison who shouldn't be there because it's not serving the benefit of society at all and costing taxpayers money.

It is clear that that Act, when you square the *Wiesart*, and the other cases on point under South Carolina law, that Act was intended to apply retroactively, or as the Triple P memo that we encourage Your Honor to read if you haven't already was attached as an exhibit to what we filed today.

As they astutely pointed out, the Act would never accomplish what it was intended to accomplish, if it wasn't applied retroactive.

In fact, to highlight the ridiculousness of the proposition that this Act only applied prospectively. If you look at that position as applied to reality, only nine people in the first four years would have been let out any earlier than if the Act applied retroactively, which would obviously not accomplish the purpose of the Act, Your Honor.

And so not only does that position by the Defense conflict with their own request to admit that we handed up to the Court, not only does it conflict with the actual language of the notwithstanding any other provision of law portion of the Act, not only does it conflict with the memorandum that was disseminated within Triple P around 2015,2016 timeframe, but it completely undermines and nullifies the express purposes.

So for that reason, Your Honor, that argument simply does not hold water. So for these reasons, Your Honor, the False Imprisonment Tort is objective standard. All the elements are met in this case. None of the arguments raised by the Defendants change anything about that.

For that reason, Your Honor, we'd ask that the Court grant the Plaintiffs motion for summary judgment on false imprisonment cause of action. And also we'd be, I think we discussed with the Defense the possibility of whether the Court wants us to submit competing proposed orders within a certain amount of time.

If the Court would be open to that, we would be happy to do that. If that's something the Court would be open to.

THE COURT: Absolutely, that would make my job much easier. How much time do you need?

MR WHITE: 10 days.

MR. WOODINGTON: I'll be out of town most of next week, Your Honor. 15 or 20 would be better. 20, considering the age of the case anyway.

THE COURT: Sure. 20 days, perfect. Yes, sir.

MR. DAVIDSON: Probably, Mr. Harpootlian and I, I'm not sure of Mr. Whetstone's age. But we were probably around when *McCall versus Batson* came out. It's what court said, and *McCall* abolished sovereign and invited the legislature to adopt a Tort Claims Act, and that's how it came about. But this is what they said, "We hold that the abrogation of the rule of sovereign immunity will not extend to" -- guess what, "legislative, judicial and executive acts by individuals acting in their official capacity. This is these discretionary activities cannot be controlled by the threat of tort liability by members of the public who take issues with the decisions made by public officials.

We expressly decline to allow tort liability for those discretionary acts. The exercise and discretion includes the right to be wrong. And that sums it all up, Judge.

You have the right to be wrong; you have judicial immunity. The legislature has the right to be wrong. The executives, the individual public servants, based on what the Tort Claims Act ultimately codified, has the right to be wrong, because they make decisions, Judge. They may not like it. They make decisions on a daily basis.

THE COURT: Sure.

MR. DAVIDSON: That may or may not be right.

THE COURT: But you have the right to be wrong in the exercise of discretion on discretionary matters right? Like ---

MR. DAVIDSON: The decision to release somebody or not release somebody.

THE COURT: That's not discretionary.

MR. DAVIDSON: Well, when you're interpreting a statute to determine whether or not they should or should not be released, is discretionary. Mr. Florian could have come up with a totally different decision, just like Triple P did.

THE COURT: But discretionary is paper straws versus plastic straws. Maybe that's discretionary (Laughing).

I don't know paper straws.

MR. DAVIDSON: I do not think that's discretionary. Not unless you use paper straws. I think it was not discretionary, it was mandatory. (Laughing).

THE COURT: Well, it depends on what day you were talking about. But if you have choices, you can choose.

When you don't have a choice to follow the law or not follow the law.

MR. DAVIDSON: But the problem is you've gotta interpret the law. And to make that interpretation of the law, you have to make a decision. When I read a statute and I try to make some determination of whether or not it is or is not applicable to my case, I make a decision.

It may not be, I may be wrong, it may be.

THE COURT: And if it's clearly erroneous, then your client's going to sue me and want payment.

MR. DAVIDSON: Well, but I'm a lawyer, and that's different, because in this instance, you have public officials who, by virtue of what *McCall* versus *Batson* said, what the Court of Appeals has said, what Supreme Court has said in *Fale,* it doesn't say that.

What Mr. White is saying is wrong under that. And I'll briefly go into that in one second, but, but they have the right to be wrong.

They have to make determination of what things need to carry out their duties, just like the Department of Agriculture has to determine and interpret what the federal laws are dealing with agricultural acts they have the right to make that -- those decisions, just like the Department of Corrections has the right to make decisions about what sentencing is based on new statutes that come out on a probably a yearly basis.

Now, I'm gonna jump to *Fahle* for just one second. Unfortunately, *Fahle* was my case, and it was not a DOT case. It was a DJJ case. What it dealt with was whether or not the basics and probationary ops.

There were a lot of issues in that case. Whether or not, in that instance, the probationary officer should have allowed a juvenile to go into a home to stay.

Basically, if you want to call it, we tried to say it was release, released the child into a home to stay, and the court said that's not what we're talking about here, because he's still in the custody of DJJ at that point, even though we may, quote, unquote, released him to go to a home placement, and then he got out of the home and injured somebody.

Okay, that's what that was all about, and the court did not agree with our amazingly interpretation, even though we made the decision to raise that issue. But that's what that was about. Didn't have a thing to do with...

And it dealt with a kid that the department had problems with. My probationary officer, got him, put him in a home temporarily -- placed him in a home, released him in a home, whatever you want to say it.

He got out and injured somebody in Chester, and they said that didn't apply, and that's what that was about. It was a case that, oh, my heavens, we won on some in judgment and lost on appeal. Gee, that doesn't happen, does it? More times than not.

In this instance, we had the same situation. We won it in *Bolin*, he appealed it, and we lost. And based on that, we had the interpretation of the court of the statute, and we released it.

THE COURT: Okay.

MR. DAVIDSON: And I'm glad you gave us 20 days, because I'm sure your Law Clerk will be very pleased to get all these orders.

THE COURT: She's gonna love it. She can't wait. Anything else from anyone else. Mr. White?

MR. WHITE: Nothing, Your Honor.

THE COURT: All right, I'll look for those orders in the next three days, and then I'll let you know something.

ALL PARTIES: Thank you!

(The hearing concluded at 3:15 p.m.)

-- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED BRANDI J. BERRY, CERTIFIED COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 12TH DAY OF FEBRUARY, 2025.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/*Brandi J. Berry*, CVR

COLUMBIA, SOUTH CAROLINA

DECEMBER 28, 2025

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kevin L. Fowler, Respondent,

v.

South Carolina Department of Corrections, Appellant.

Appellate Case No. 2014-002040

Appeal From The Administrative Law Court
S. Phillip Lenski, Administrative Law Judge

Unpublished Opinion No. 2015-UP-517
Submitted September 1, 2015 – Filed November 12, 2015

AFFIRMED

Daniel John Crooks, III, of the South Carolina Department of Corrections, of Columbia, for Appellant.

Tommy Arthur Thomas, of Irmo, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: S.C. Code Ann. § 44-53-370(b)(1) (Supp. 2014) (specifying a person convicted of distribution of heroin, second offense, "is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits," "[n]otwithstanding any other provision of law" (enacted by 2010 S.C. Acts No. 273, § 37)); 2010 S.C. Acts No. 273, § 66 (providing an effective date of June 2, 2010); *Barton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 404 S.C. 395, 416 n.9, 745 S.E.2d 110, 121 n.9 (2013) (stating courts construe statutes that are penal in nature "strictly in favor of the defendant and against the State" (internal quotation marks and citation omitted)); *Spectre, LLC v. S.C. Dep't of Health & Envtl. Control*, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010) ("Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect."); *Ventures S.C., LLC v. S.C. Dep't of Revenue*, 378 S.C. 5, 9, 661 S.E.2d 339, 341 (2008) ("[T]he [c]ourt will reject the plain meaning of the words used in a statute if it would lead to an absurd result and will construe the statute so as to escape the absurdity and carry the intention into effect." (internal quotation marks and citation omitted)); *Hair v. State*, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991) ("The law clearly provides that if two statutes are in conflict, the latest statute passed should prevail so as to repeal the earlier statute to the extent of the repugnancy.").

AFFIRMED.[1]

SHORT, GEATHERS, and MCDONALD, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

KeyCite Yellow Flag
Distinguished by McCoy v. South Carolina Department of Corrections, S.C.App., May 5, 2021

415 S.C. 276
Court of Appeals of South Carolina.

Michael Heath BOLIN, # 341806, Appellant,
v.
SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, Respondent.

Appellate Case No. 2014–000461.
|
No. 5361.
|
Heard Sept. 8, 2015.
|
Decided Nov. 12, 2015.
|
Withdrawn, Substituted and Refiled Feb. 24, 2016.
|
Rehearing Denied Feb. 24, 2016.

Synopsis
Background: Inmate brought action challenging a determination of Department of Corrections (DOC) that he was required to serve 85% of his sentence before being eligible for early release, discharge, or community supervision. The Administrative Law Court (ALC), Carolyn C. Matthews, Administrative Law Judge, upheld that determination. Inmate appealed.

The Court of Appeals, Geathers, J., held that inmate's convictions for second-offense conspiracy to manufacture methamphetamine and second-offense possession with intent to distribute methamphetamine were no longer no-parole offenses following effective date of Omnibus Crime Reduction and Sentencing Reform Act.

Reversed.

Procedural Posture(s): On Appeal.

West Codenotes

Recognized as Repealed by Implication
Code 1976, § 24–13–100

Attorneys and Law Firms

****914** Trent Neuell Pruett, of Pruett Law Firm, of Gaffney, for appellant.

Christina Catoe Bigelow, of the South Carolina Department of Corrections, of Columbia, for respondent.

Opinion

GEATHERS, J.

***278** Appellant Michael Bolin (Inmate) challenges a decision of the South Carolina Administrative Law Court (ALC) upholding a determination of the South Carolina Department of Corrections (DOC) that Inmate must serve eighty-five percent of his sentence before he is eligible for early release, discharge, or community supervision. Inmate argues that the eighty-five-percent requirement of section 24–13–150 of the South Carolina Code (Supp.2015) does not apply to any of the ****915** offenses to which he pled guilty because they are not considered "no-parole offenses." We reverse the ALC's decision.

FACTS/PROCEDURAL HISTORY

On May 15, 2012, Inmate pled guilty to possession of methamphetamine, second offense (possession), possession of methamphetamine with intent to distribute, second offense (intent to distribute), conspiracy to manufacture methamphetamine, second offense (conspiracy), and unlawful possession of a pistol. He was sentenced to five years' imprisonment on each methamphetamine offense and one year of imprisonment for the weapon offense, to run concurrently.

Curiously, after Inmate began serving his sentence, DOC informed him that he was eligible for parole on his conspiracy conviction and intent to distribute conviction under section 44–53–375(B) of the South Carolina Code (Supp.2015) but if he was not granted parole, these offenses would thereafter be treated as no-parole offenses under section 24–13–100 of the South Carolina Code (2007) and ***279** section 24–13–150 of the South Carolina Code (Supp.2015).[1] Section 24–13–150 requires an inmate convicted of a no-parole offense to serve at least eighty-five percent of his sentence before he is eligible for early release, discharge, or community supervision.[2] Section 24–13–100 defines the term "no-parole offense," in pertinent part, as "a class A, B, or C felony."[3] Whether a felony is a Class A, B, or C felony depends on the maximum sentence for the felony—a Class A felony is a felony punishable by not more than thirty years, a Class B felony is a felony punishable by not more than twenty-five years, and a Class C felony is a felony punishable by not more than twenty years. S.C. Code Ann. § 16–1–20 (2003).[4]

Subsequently, Inmate filed a Step 1 grievance form with DOC, stating that DOC incorrectly calculated his projected release date by requiring him to serve eighty-five percent of his sentence and, thus, treating his conspiracy and intent to distribute offenses as no-parole offenses under section 24–13–100. Inmate asserted that the amended provisions of section 44–53–375(B) preclude DOC from treating these offenses as no-parole offenses.[5] After this grievance was denied, Inmate filed a Step 2 grievance form, which was also denied.

***280** Inmate appealed DOC's determination to the ALC, and the ALC upheld the determination. This appeal followed.

ISSUE ON APPEAL

Did the ALC err in concluding that Inmate must serve at least eighty-five percent of his sentence before he is eligible for early release, discharge, or community supervision?

STANDARD OF REVIEW

Section 1–23–610(B) of the South Carolina Code (Supp.2015) sets forth the standard of review when this court is sitting in review of a decision by the ALC on an appeal from an administrative agency. Specifically, section 1–23–610(B) allows this court to reverse the ALC's decision if it violates a constitutional or statutory provision or is affected ****916** by any other error of law.[6] Here, the sole issue on review involves a question of statutory interpretation, which is a question of law "subject to de novo review." *Barton v. S.C. Dep't of Prob. Parole & Pardon Servs.,* 404 S.C. 395, 414, 745 S.E.2d 110, 120 (2013).

Further, while the interpretation of a statute by the agency charged with its administration "will be accorded the most respectful consideration," an agency's interpretation "affords no basis for the perpetuation of a patently erroneous application of the statute." *State v. Sweat,* 386 S.C. 339, 351, 688 S.E.2d 569, 575–76 (2010) (quotation marks omitted).

LAW/ANALYSIS

Inmate contends that the eighty-five-percent requirement of section 24–13–150 does not apply to his conspiracy and intent to distribute convictions because they are no longer considered no-parole offenses by virtue of the 2010 amendment to section 44–53–375(B), which addresses the possession, manufacture, or trafficking of methamphetamine. We agree.

As previously stated, section 24–13–150 requires an inmate who has been convicted of a no-parole offense to serve eighty-five percent of his sentence before he is eligible for ***281** "early release, discharge, or community supervision."[7] In addition to the eighty-five-percent requirement, at least three additional consequences attach to a conviction for an offense categorized as "no-parole": (1) no-parole offenders are given significantly less credits for good conduct, work, or education than other offenders, (2) no-parole offenders are required to participate in a community supervision program before their sentences are considered completed, and (3) no-parole offenders are required to serve eighty percent of their sentences before they are eligible for work release.[8]

Prior to June 2, 2010, conspiracy to manufacture methamphetamine, second offense, and possession with intent to distribute methamphetamine, second offense, were in fact considered no-parole offenses. In other words, section 44–53–375(B) imposed a maximum sentence of thirty years for a second ***282** offense of possession with intent to distribute methamphetamine or conspiracy to manufacture methamphetamine. *See* Act No. 127, 2005 S.C. Acts 1497 (increasing the maximum sentence from twenty-five to thirty years). Accordingly, these offenses were considered Class A felonies and, thus, no-parole offenses. *See* S.C.Code Ann. § 16–1–20(A) (2003) (stating that a person convicted of a Class A felony must be imprisoned for "not more than thirty years"); S.C. Code Ann. § 24–13–100 (2007) (including a Class A felony in the definition of no-parole offense).

****917** However, on June 2, 2010, the Omnibus Crime Reduction and Sentencing Reform Act of 2010 (the Act) became effective. While the Act did not amend the definition of the term "no-parole offense" in section 24–13–100 or decrease the maximum sentence for a second offense of possession with intent to distribute methamphetamine or conspiracy to manufacture methamphetamine, it added the following language to section 44–53–375(B): "*Notwithstanding any other provision of law,* a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and *is eligible for parole,* supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits." 2010 Act No. 273, § 38 (emphases added). Similar language was added to subsection (A) of section 44–53–375 and various provisions in section 44–53–370 covering controlled substances.

The legislature's use of the phrase "Notwithstanding any other provision of law," in the amendments to sections 44–53–375 and –370 expresses its intent to repeal section 24–13–100 *to the extent* it conflicts with amended sections 44–53–375 and –370. *See Stone v. State,* 313 S.C. 533, 535, 443 S.E.2d 544, 545 (1994) (holding that when two statutes "are in conflict, the more recent and specific statute should prevail so as to repeal the earlier, general statute"); *Hair v. State,* 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991) ("The law clearly provides that if two statutes are in conflict, the latest statute passed should prevail so as to repeal the earlier statute to the extent of the repugnancy."); *Strickland v. State,* 276 S.C. 17, 19, 274 S.E.2d 430, 432 (1981) ("[S]tatutes of a specific nature are not to be considered as repealed in whole or in part by a later general statute *unless* there is a direct reference to the former ***283** statute or *the intent of the legislature to do so is explicitly implied therein.*" (emphases added)).

Even if the language of section 24–13–100 could be considered more specific than the amendment to section 44–53–375(B), the intent to repeal section 24–13–100 to the extent it conflicts with the amendments to sections 44–53–370 and –375 is "explicitly implied" in the language of the amendments stating, "Notwithstanding any other provision of law." *See Strickland,* 276 S.C. at 19, 274 S.E.2d at 432 ("[S]tatutes of a specific nature are not to be considered as repealed in whole or in part by a later general statute *unless* there is a direct reference to the former statute or *the intent of the legislature to do so is explicitly implied therein.*" (emphases added)). Without this implicit repeal, the amendments themselves would be meaningless. *See State v. Long,* 363 S.C. 360, 364, 610 S.E.2d 809, 811 (2005) ("The legislature is presumed to intend that its statutes accomplish something.").

DOC admits that amended section 44–53–375(B) allows a person convicted of a second offense to be eligible for parole. However, according to DOC, a second offense under section 44–53–375(B) is still considered a no-parole offense unless the inmate is granted parole. During oral arguments, DOC asserted that the terms "parole eligible" and "no-parole offense" are defined differently. DOC argued, "a no-parole offense, as defined in [section] 24–13–100, is not defined by whether or not someone is eligible for parole." DOC further argued that the determination of parole eligibility and the application of good conduct, work or education credits to a sentence for a no-parole offense are two separate "parallel courses and both of those interpretations of [the] statutes do not conflict with one another." We disagree.

It is without doubt that the statutory definition for the term "no-parole offense" in section 24–13–100, i.e., "a class A, B, or C felony ...," simply describes the types of offenses for which the offender is not eligible for parole.[9] This interpretation is ***284** consistent with provisions in related statutes stating that a no-parole offender is not eligible for ****918** parole.[10] Thus, it is unreasonable to characterize an offense for which the offender is eligible for parole as a no-parole offense pursuant to section 24–13–100, even if the maximum sentence for the offense places it within a classification encompassed by section 24–13–100.[11] This is the situation with a second offense under amended section 44–53–375(B), which still carries a maximum sentence of thirty years, rendering the offense a class A felony. Therefore, the definition of no-parole offense in section 24–13–100 conflicts with the legislative intent of the Act to exempt a second offense under section 44–53–375(B) from all the consequences of a no-parole offense.

In addition to the plain language of the amendment itself, legislative intent is expressly stated in Section I of the Act, which provides, in pertinent part,

> It is the intent of the General Assembly to preserve public safety, reduce crime, and *use correctional resources most effectively.* Currently, the South Carolina correctional system ***285** incarcerates people whose time in prison does not result in improved behavior and who often return to South Carolina communities and commit new crimes, or are returned to prison for violations of supervision requirements. It is, therefore, *the purpose of this act* to reduce recidivism,*provide fair and effective sentencing options, employ evidence-based practices for smarter use of correctional funding,* and improve public safety.

2010 Act No. 273, § 1 (emphases added). Hence, one of the Act's objectives is to conserve taxpayer dollars by allowing earlier release dates for inmates convicted of less serious offenses.

DOC ignores the purpose of the Act and argues that amended section 44–53–375 does not conflict with sections 24–13–100 and –150 because offenders can be afforded each item listed in the amendment, i.e., parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits, without altering an eighty-five-percent service requirement for those not granted parole. DOC explains that none of the items in this list are incompatible with a requirement that an offender not granted parole serve eighty-five percent of his sentence. In support of this argument, DOC cites the following provisions: S.C. Code Ann. § 24–13–210(B) (Supp.2015) (providing for good conduct credits at the rate of three days for each month served for no-parole offenders subject to the eighty-five-percent requirement); S.C. Code Ann. § 24–13–230(B) (Supp.2015) (providing for work or education credits at the rate of six days for every month of employment or enrollment for no-parole offenders); S.C. Code Ann. § 24–21–560(A) (2007) (requiring no-parole offenders to participate in a community supervision program).

However, as we previously indicated, *supra,* there is a stark contrast between the credits allowed for inmates convicted of parolable offenses and the credits allowed for no-parole offenders. *See* S.C. Code Ann. § 24–13–210(A), (B) (Supp.2015) (allowing twenty days of good conduct credits for each ****919** month served for inmates convicted of parolable offenses versus three days for each month served for no-parole offenders); S.C. Code Ann. § 24–13–230(A), (B) (Supp.2015) (allowing zero to one day of work or education credit for every two days of employment or enrollment for inmates convicted of parolable ***286** offenses versus six days for every month of employment or enrollment for no-parole offenders).

Further, DOC has not explained away the following language from the amendment: "[A] person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted...." S.C.Code Ann. § 44–53–375(B) (Supp.2015) The incongruity between this express allowance and the eighty-five-percent requirement that applies to no-parole offenses makes it unlikely that the legislature intended for this requirement to apply to the amended provisions of section 44–53–375(B).

DOC also argues that Inmate's interpretation of the amendment would render the language referencing community supervision meaningless because "only offenders serving sentences for 'no[-]parole offenses' are required to participate in community supervision." That may have been true before the amendments to sections 44–53–370 and –375 were enacted, but these amendments now *expressly allow* offenders to participate in community supervision as an alternative to the use of taxpayer funds to house them in prison. *See* S.C.Code Ann. § 44–53–375(B) (Supp.2015) ("Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a first offense or second offense ... is eligible for ... community supervision...."); 2010 Act No. 273, § 1 ("It is, therefore, the purpose of this act to reduce recidivism, *provide fair and effective sentencing options, employ evidence-based practices for smarter use of correctional funding,* and improve public safety." (emphasis added)).

Based on the foregoing, we hold that a second offense under section 44–53–375(B) is no longer a no-parole offense. *See Sweat,* 386 S.C. at 350, 688 S.E.2d at 575 ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." (quotation marks omitted)). Therefore, the ALC erred in rejecting Inmate's interpretation of the statutes in question.

***287 CONCLUSION**

Accordingly, we reverse the ALC's decision.

REVERSED.

SHORT and McDONALD, JJ., concur.

All Citations

415 S.C. 276, 781 S.E.2d 914

Footnotes

1 Inmate committed these offenses on April 7, 2011, and July 12, 2011, respectively. Both parties agree that Inmate's other offenses, simple possession of methamphetamine, second offense, and possession of a pistol, are not subject to the eighty-five-percent requirement.

2 Section 24–13–150(A) states, in pertinent part, “Notwithstanding any other provision of law, ... an inmate convicted of a ‘no[-]parole offense’ ... is not eligible for early release, discharge, or community supervision ... until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed.”

3 Section 24–13–100 was enacted in 1995. *See* Act No. 83, 1995 S.C. Acts 551.

4 *See also* S.C.Code Ann. § 16–1–30 (2003) (“All criminal offenses created by statute after July 1, 1993, must be classified according to the maximum term of imprisonment provided in the statute and pursuant to Sections 16–1–10 and 16–1–20, except as provided in Section 16–1–10(D).”); S.C.Code Ann. § 16–1–10(D) (Supp.2015) (listing offenses that are exempt from classification).

5 Inmate also complained that DOC incorrectly classified his conspiracy offense as a violent offense. DOC ultimately resolved this particular part of Inmate's grievance in his favor.

6 S.C.Code Ann. § 1–23–610(B)(a), (d) (Supp.2015).

7 In contrast, most inmates who have been convicted of a parolable, nonviolent offense are required to serve only twenty-five percent of their sentences before becoming eligible for parole. *See* S.C.Code Ann. § 24–21–610 (2007) (requiring a prisoner convicted of a parolable, nonviolent offense to serve “at least one-fourth of the term of a sentence” before the Parole Board “may ... parole” the prisoner). Of course, an inmate's eligibility for parole merely gives the Parole Board the *authority* to grant parole—the decision to grant or deny parole is within the Parole Board's discretion, as indicated by the legislature's use of the word “may” in section 24–21–610. *See Robertson v. State,* 276 S.C. 356, 358, 278 S.E.2d 770, 771 (1981) (“Ordinarily, ‘may’ signifies permission and generally means the action spoken of is optional or discretionary.”). Notably, if the Parole Board denies parole to an eligible inmate, it must review the inmate's case on a yearly basis. *See* S.C.Code Ann. § 24–21–620 (2007) (“Upon an affirmative determination, the prisoner must be granted a provisional parole or parole. Upon a negative determination, the prisoner's case shall be reviewed every twelve months thereafter for the purpose of such determination.”).

8 *See* S.C.Code Ann. § 24–13–125(A) (Supp.2015) (requiring no-parole offenders to serve eighty percent of their sentences before becoming eligible for work release); S.C.Code Ann. § 24–13–210(A), (B) (Supp.2015) (allowing twenty days of good conduct credits for each month served for inmates convicted of parolable offenses versus three days for each month served for no-parole offenders); S.C.Code Ann. § 24–13–230(A), (B) (Supp.2015) (allowing zero to one day of work or education credit for every two days of employment or enrollment for inmates convicted of parolable offenses versus six days for every month of employment or enrollment for no-parole offenders); S.C.Code Ann. § 24–21–560(A) (2007) (requiring no-parole offenders to participate in a community supervision program).

9 *See Sweat,* 386 S.C. at 350, 688 S.E.2d at 575 (“The Court should give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.” (quotation marks omitted)); *id.* (“A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” (quotation marks omitted)).

10 *See* S.C.Code Ann. § 24–21–30(A) (2007) (“A person who commits a ‘no [-]parole offense’ as defined in Section 24–13–100 on or after the effective date of this section is not eligible for parole consideration....”); § 24–21–30(B) (“Nothing in this subsection may be construed to allow any person who commits a ‘no[-]parole offense’ as defined in Section 24–13–100 on or after the effective date of this section to be eligible for parole.”); *Beaufort Cnty. v. S.C. State Election Comm'n,* 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) (“[I]t is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result.”).

11 *See Sweat,* 386 S.C. at 350, 688 S.E.2d at 575 (“All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.” (quotation marks omitted)); *id.* (“A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.”); *id.* at 351, 688 S.E.2d at 575 (“Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention.”); *State v. Johnson,* 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct.App.2011) (“In interpreting a statute, the court will give words their plain and ordinary meaning, and will not resort to forced construction that would limit or expand the statute.”).

End of Document

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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