THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
J. Michael Baxley, Circuit Court Judge

Case No. 2005-CP-40-02925

T.R., P.R., K.W., and A.M., on behalf of
themselves and others similarly situated; and
Protection and Advocacy for People with Disabilities, Inc., ... Respondents,

v.

South Carolina Department of Corrections; and
William R. Byars, Jr., as Director of the
South Carolina Department of Corrections, ... Appellants.

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF SUPERSEDEAS OR STAY PENDING APPEAL

INTRODUCTION

In this case involving constitutional standards for the treatment of seriously mentally ill inmates in the South Carolina Department of Corrections ("SCDC"), the circuit court issued an Order that, unless stayed on appeal and eventually

reversed, would require SCDC to make a number of extremely costly changes in the absence of factual and legal support of a need for them.

The entire process in the circuit court was profoundly and inherently flawed. The circuit court clearly had the wrong legal standard in mind throughout the five-week trial. That legal error that was still present in the court's mind at the time the court's decision was announced, as shown herein.

In addition, the decision was reached without a transcript of the trial and without briefs from the parties. No cases were cited by the court to support any of the specific findings that comprised 31 pages of the 45-page Order. Other portions of the Order cited only general legal principles, with no attempt to relate those principles to the facts shown at trial.

Another dramatic failing of the Order is that it was entered notwithstanding the absence of a named plaintiff with standing who could show harm in the past or the likelihood of harm in the future. By the time of the trial, there was only one named individual plaintiff, T.R., still in the case. He was not called as a witness. The only evidence in the record at all about T.R. was that he was in the Gilliam Psychiatric Hospital (SCDC's inpatient facility), with no prospect of leaving that facility and no indication that he was either presently being harmed, or likely to be

subjected to future harm.[1] In other words, the entire case was tried and decided in the complete absence of a named plaintiff with standing who could show past harm or present likelihood of future harm.

As will be shown herein, the entire Order is almost completely devoid of the kinds of factual and legal findings that are necessary before injunctive relief can be granted in a lawsuit. Taken as a whole, the Order reads much more like a Legislative Audit Council report than a judicial order.

PROCEDURAL HISTORY

This action was filed in 2005 by certain individual prisoners seeking to represent a class described as seriously mentally ill inmates at SCDC.[2] A number of years of discovery, mostly by Plaintiffs' counsel, resulted in the production by SCDC of well over 250,000 pages of documents, tens of thousands of additional pages of computerized data, and the taking of approximately 117 depositions. In

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[1] This evidence, which was admitted over SCDC's hearsay objection, consisted only of a summary of an expert's interview with T.R. and a brief review of his medical records. The expert never offered any testimony regarding T.R. at trial and, in fact, was never questioned about T.R., his condition or his treatment, although the experts testified about several specific inmates, none of whom were the class representative.

[2] Another plaintiff was the entity Protection and Advocacy for People with Disabilities, Inc. That party never even attempted to show harm to itself, which is a prerequisite for such an entity to have standing in the absence of its advocating for specific named individuals. *See, e.g., Tennessee Protection and Advocacy, Inc. v. Board of Educ. of Putnam County, Tenn.*, 24 F.Supp.2d 808 (M.D. Tenn. 1998) (no standing existed for a P&A organization that showed no harm to itself and where there was no specifically injured plaintiff on whose behalf the P&A group was filing a claim).

early 2012, the case was tried over the course of 25 days by Judge J. Michael Baxley.

On August 23, 2013, Judge Baxley sent a letter to all counsel, in which he announced the court's decision in general terms and requested Plaintiffs' counsel to prepare an Order to conform. (App. 236-250). That Order was prepared by Plaintiffs' counsel in due course. On January 8, 2014, it was filed with the Clerk of Court. (App. 1-45). SCDC filed a Motion to Alter or Amend, which was heard on March 28, 2014, and was denied by Order filed on April 18, 2014. (App. 46-58). SCDC filed a Notice of Appeal on May 16, 2104.

The January 8, 2014 Order held that injunctive relief should issue to address conditions that were, in the court's opinion, deficient. Specifically, the court followed Plaintiffs' remedial proposals, ordering that SCDC, within 180 days of the date of the "Final Order in this case," submit a written plan "for remedying the systemic deficiencies identified by the Court." Order at 37. (App. 37). The court noted that it would retain jurisdiction over the case, and that one or more monitors would be appointed. Order at 38. (App. 38).[3]

The outline of the written plan ordered to be prepared by SCDC was set forth in the Order in extensive detail. In all, the plan as outlined by the Order

[3] After the January and April 2014 Orders were issued, Judge Baxley retired, so the next judge to preside over any further developments in the case will be unfamiliar with the extensive record.

consists of a six-page outline containing six headings, with a total of 58 subheadings. Order at 39-44. (App. 39-44). Some aspects of the extensive remedy ordered by the court are listed below. SCDC was ordered to devise a plan that would accomplish the following, among many other things:

a. Revamp SCDC's screening parameters, including the adoption of a goal of increasing the number of inmates "recognized as mentally ill" by at least two percentage points, so that at least 14.9 percent of the inmate population would be diagnosed as mentally ill. Order at 39, ¶ 1(i). (App. 39).

b. Significantly increase the higher levels of mental health care, that is, those levels of care that are above the outpatient level, with corresponding physical plant additions as necessary. Order at 39, ¶¶ 2(a)(i),(ii). (App. 39).

c. Significantly increase the number of inmates receiving inpatient mental health services, to include either a new inpatient facility or the "substantial renovation and upgrade" of the existing inpatient facility. Order at 39-40, ¶ 2(a)(iii). (App. 39-40).

d. Significantly increase clinical staffing at all levels. Order at 40, ¶ 2(a)(iv). (App. 40).

e. Make extensive alterations to present practices pertaining to inmates in disciplinary segregation in a number of respects. Order at 40, ¶ 2(b). (App. 40).

f. Impose numerous requirements pertaining to use of force, including the addition of many more substantive pre-conditions to the use of force, as well as reporting requirements, data collection, notifications in some instances, and additional training. Order at 41-42, ¶ 2(c). (App. 41-42).

g. Increase staffing levels, including pay grade increases if necessary. Order at 42, ¶ 3. (App. 42).

h. Increase recordkeeping in a large number of areas. Order at 42-43, ¶ 4. (App. 43).

i. Locate all crisis intervention cells in healthcare settings, and make other changes to ways in which crisis intervention cells are managed. Order at 44, ¶ 5. (App. 44).

The report of Plaintiffs' expert, Stephen A. Carter, which was admitted at trial details in part the high cost of the court-ordered improvements. (App. 215-218, 224).[4]

The present motion for supersedeas or stay has been filed because unless the Order is stayed, the Order would require SCDC to begin a course of remedial planning and action, at tremendous expense to the taxpayers, before the underlying merits of the court's Order can be reviewed on appeal. This potentially needless expense, unless stayed, would begin immediately to be incurred given the requirement that SCDC submit a written plan to the court. Because there are many substantive and procedural deficiencies and errors in the Order, SCDC submits that there is a substantial likelihood that the Order will be reversed once this Court has the opportunity to review it fully. Many of the deficiencies in the Order are set forth in summary fashion below.

STANDARD OF REVIEW

There is relatively little reported authority in South Carolina that addresses the standard to be applied to a petition for a stay or supersedeas pending appeal. In

[4] This report was Plaintiffs' Exhibit 11 at the trial.

Graham v. Graham, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990), it was noted that "[t]he purpose of a supersedeas ... is to ... stay proceedings in the trial court, to preserve the status quo pending the determination of the appeal ... and to preserve to appellant the fruits of the meritorious appeal where they might otherwise be lost to him." The standard is well established in other jurisdictions. *See also, Porter v. Lesesne*, 85 S.C. 399, 67 S.E. 453 (1910), in which a single Justice held that a stay should be granted when "the party making the application has just reason to apprehend that without a stay he would be deprived of the benefit of the favorable result of the appeal."

As typically stated in other jurisdictions, the test is as follows:

> Whether a stay pending appeal should be granted depends on (1) whether the issue presented by the appeal is debatable, and (2) whether a stay is necessary to preserve for the movant the fruits of a successful appeal, considering the equities of the situation.

Purser v. Rahm, 104 Wash.2d 159, 177, 702 P.2d 1196, 1206 (1985). Both points are present in this case. As will be shown herein, the circuit court order would impose enormous expense on SCDC and the State itself, based on an analysis that is both cursory and erroneous.[5]

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[5] Although the Order comprised about 45 typewritten pages, it is actually very slender when viewed in light of the number of issues litigated at the trial. The California case that dealt with similar subject matter, *Madrid v. Gomez*, 889 F.Supp. 1146 (N.D.Cal. 1995), was 128 pages long in the Federal Supplement, not counting headnotes. Based on the average word count of a page in the Federal Supplement, the Order in this case would not even have been 20 pages long.

SUMMARY OF ARGUMENT

As set forth in detail below, SCDC respectfully submits that this Court should issue a writ of supersedeas staying any court-ordered relief in this case until this Court has reviewed the merits of the circuit court's decision. The cost of complying with the Order would be enormous. That hugely expensive undertaking, SCDC submits, will prove to be unnecessary after appellate review of the Order occurs.

The Order is deeply flawed, both procedurally and substantively. Prior to review of the Order by an appellate court, SCDC and the State of South Carolina as a whole should not be required to expend many millions of dollars to fix a situation that is not broken on a systemic level. This includes the first remedial step ordered by the circuit court, the preparation of a plan. Unless the Order is stayed pending appeal, even that first step would represent an unnecessary expenditure of time and funding. If Plaintiffs' counsel were to have objections to the plan, there would be additional litigation in the circuit court even during the pendency of the appeal. The sufficiency of the plan would be subject to review by a new circuit judge, who would be generally unfamiliar with the facts of this case, as brought out during the course of the five-week trial. As a result, any requirement for the preparation of a plan, as well as any subsequent remedial relief, should be stayed until after an appellate court has reviewed the circuit court order.

SCDC submits that such appellate review will render unnecessary a remedial plan as ordered.

For purposes of the present motion, the problems and deficiencies in the Order can be summarized as follows:

First, the Order was entered by the court without the benefit of either the transcript of the 25-day trial or of any kind of pretrial or posttrial briefing by the parties.

Secondly, the court clearly ignored the legal standard under which it was supposed to review this case: instead of limiting its review to determining whether mental health conditions constituted cruel and unusual punishment (the only remaining standard alleged by Plaintiffs to have been violated), the court tried the case, and originally proposed to issue an order, using a much broader standard—the issue of whether mental health conditions were minimally adequate under the so-called "Prisons Clause" found at S.C. Constitution Article XII, § 2. The Order ultimately did not mention that provision, but only because Plaintiffs' counsel themselves had to remind the circuit court that they had withdrawn their claim based on it. The "Prisons Clause" claim incidentally was withdrawn by Plaintiffs as a result of the Supreme Court granting a writ of certiorari earlier in the litigation.

Thirdly, by the time the case went to trial, all but one of the individual plaintiff class representatives had been dropped from the case. With respect to the one individual Plaintiff still in the case, T.R., no effort was made to show actual harm, or a likelihood of future harm, to that individual, who is a long term inpatient at the Gilliam Psychiatric Hospital. As a long term inpatient, T.R. is in a situation not typical of almost all other mentally ill inmates. As a result, there was no showing of a likelihood of harm to the sole remaining party in the case with standing, and accordingly, there was no case or controversy actually present as of the time of trial.

Fourthly, the factual findings and other conclusions on pages 8 through 31 of the Order are largely devoid of findings of past harm or the likelihood of future harm to any specific inmates. Moreover, *none of the very few inmates* actually identified or addressed in the Order were named Plaintiffs. Also, these 23 pages of findings and conclusions contain not a single citation of a case. There are scores of federal cases, both from the Fourth Circuit Court of Appeals and the United States District Court for the District of South Carolina, addressing many aspects of mental health services in prisons, including related topics of use of force and use of administrative segregation, but the Order contains analysis of the facts of this case without reference to legal standards or existing precedent. In addition, the Order reflects virtually no discussion of the many facts that were in controversy between

the witnesses for both sides, including both fact witnesses and expert witnesses. The fact finding in the Order consists of little more than a cursory summary of the opinions of Plaintiffs' experts.

Fifthly, SCDC raised a number of legal defenses, discussed below, any one of which would suffice to defeat Plaintiffs' claims. The court refused to address those defenses until finally being persuaded to do so in response to a Rule 59(e) motion.

REASONS FOR THE WRIT OF SUPERSEDEAS OR STAY PENDING APPEAL

1. Absence of a transcript and briefs.

The problems with the Order begin with the fact that it was prepared in the absence of a transcript and briefing on the merits of the case by the parties. The trial transcript, which was not completed until after the Order had been issued, consists of 5,260 pages. However, the Order, having been prepared without the transcript, instead is apparently based on the court's notes or the recollections of Plaintiffs' counsel, who drafted the Order more than 18 months after the trial ended. The result is an Order that is extremely general in nature and does not measure up to the standard that the public and the parties have a right to expect for an order that followed a lengthy and complex trial and that now seeks to form the basis for remedies that would cost taxpayers many millions of dollars.

2. Application of an erroneous legal standard.

Another overarching problem with both the conduct of the trial and the resulting Order is that the court clearly had decided to review the facts of this case under a broad legal standard that Plaintiffs themselves had abandoned. The court clearly viewed the evidence based on the "minimally adequate" standard that the court concluded was embodied in Article XII, § 2 of the South Carolina Constitution.

This can be plainly seen from the court's letter dated August 23, 2013, announcing its decision and requesting that Plaintiffs' counsel prepare a proposed order. There the court stated that six factors considered by the court "would serve as benchmarks for determining whether SCDC provided *minimally adequate* mental health services." *See*, Letter dated August 23, 2013, p. 3. (App. 238). (Emphasis added). Shortly thereafter, the Plaintiffs' counsel were constrained to remind the court in an e-mail dated August 26, 2013, that the Plaintiffs had voluntarily dismissed their Article XII, § 2 "minimally adequate" claim. (App. 251). However, the substance of the Order as issued was unchanged from the version as outlined in the court's August 23, 2013 letter, which was erroneously based upon the Article XII, § 2 standard.

The court had previously held in its 2010 order on constitutional standards that "[t]he plain meaning of the terms 'cruel and unusual' and 'minimally adequate'

connote disparate concepts." *See*, Order filed September 29, 2010, p. 22. (Emphasis added). However, in its August 27, 2013 reply e-mail, the court concluded just the opposite, advising the parties that notwithstanding the court's earlier pronouncement to the contrary, "the evidence in the two constitutional claims is substantially similar." (App. 251). This latter assertion conflicts with the prior positions of the court on this issue, as well as conflicting with the positions of both parties on the point. Without question, a finding of cruel and unusual punishment is much different from and requires a substantially different showing than a tort-like standard of "minimally adequate."

While the court, in denying reconsideration on this point, sought to minimize the effect of this patent misunderstanding, its significance cannot be overstated. The task before the court was to review mental health conditions at SCDC under S.C. Constitution Article I, § 15, the South Carolina equivalent of the federal Eighth Amendment's "cruel and unusual punishment" clause. Under that standard, "only *extreme deprivations* are adequate to satisfy the objective component of an Eighth Amendment claim." *Shakka v. Smith,* 71 F.3d 162, 166 (4th Cir.1995). (Emphasis added). To the same effect is *Rhodes v. Chapman*, 452 U.S. 337 (1981), wherein the United States Supreme Court held that "conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh,

they are part of the penalty that criminal offenders pay for their offenses against society." 452 U.S. at 347.

Rather than examining conditions at SCDC under this standard, which unquestionably was the only standard before the court by the time of trial, the court instead undertook what can only be characterized as a management review of SCDC's mental health operations. The only standard applied was a combination of the opinions of Plaintiffs' experts, the nonbinding standards of the American Correctional Association, and the court's own subjective opinions about what should be required. In fact, the court went so far as to say the following at the hearing on SCDC's motion to reconsider:

> The purpose of the courts to do justice is an old maxim. ... I say that the body of the facts were ... bad facts, and this Court responded, saw wrong. The Court perceived it to be a Constitutional violation.

March 28, 2014 Tr. at 90. (App. 150).[6] Again, however, the Order was devoid of reference to any case applying the state or federal constitution to specific facts. At the same hearing, the court then proceeded even further to sever any connection to legal authority:

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[6] This represents an incomplete and misperceived view of the referenced maxim, which applies in the limited context of not deciding cases in a piecemeal fashion. As noted in C.J.S., "[t]he maxim that equity delights to do justice, and that not by halves, means that it is the aim of equity to have all interested parties in court and to render a complete decree adjusting all rights and protecting the parties against future litigation." C.J.S. Equity § 129.

> *Even taking the Constitution out of it*, the Court just saw a very troubling situation and has remedied it or attempted to, and that is the role of the Courts.

March 28, 2014 Tr. at 90. (App. 150). (Emphasis added). These two quotes, taken together, leave no doubt that the only underlying rationale for the Order was Judge Baxley's view that he was charged with "doing justice," either under the Constitution, which he never cited in any specific fashion, or "[e]ven taking the Constitution out of it," whereby he undertook to remedy the situation simply because he perceived it as "very troubling."

Later in the same hearing, the court again expressed this same combination of emotion and standardlessness. The Order had concluded that a circuit judge, having sentenced an inmate to SCDC custody, "has the inherent power – and responsibility – to see that the imprisonment of that inmate complies with constitutional mandates," and that to "do nothing could be a great miscarriage of justice," although again without ever citing a single specific case. Order at 37. (App. 37).[7] This conclusion, which appears to have been based mostly on emotion, was reiterated at the hearing, when the court noted that:

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[7] In fact, and as SCDC pointed out in its motion to alter or amend, no such inherent authority exists under South Carolina law. To the contrary, S.C. Code Ann. § 24-3-20(A) provides that "[a] person convicted of an offense against this State and sentenced to imprisonment for more than three months is in the custody of the South Carolina Department of Corrections," without reference to any authority of the sentencing court. In addition, it has been held that "the claim of inherent authority to impose conditions of confinement as a part of the sentencing process must fail. ... [E]xcept where specific statutory authority exists, the place and conditions of confinement are in the first instance, matters of executive rather than judicial

> [I]t was a circuit judge's signature that sends someone to the Department of Corrections.
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> * * *
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> [I]t is the responsibility of this Court and the inherent power of this Court to ensure that what happens at the Department of Corrections is constitutional.
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> Thus, I do not -- and for whatever appellate purpose or review there may be here, I cannot accept your theory that this Court does not have the inherent power in circumstances such as these and in a case such as this to do justice.

March 28, 2014 Tr. at 121-122. (App. 181-182). Indeed, the Order opens with a three-page summary that contains more emotion than law, and closes with a conclusion to the effect that the legally-unsupported Order was in effect so correct that an appeal would constitute a waste of funds. The more accurate standard, however, is that "[w]e must always be vigilant to make certain that the rule of law, and not emotion, carries the day." *U.S. v. Goba*, 220 F.Supp.2d 182 (W.D.N.Y. 2002).[8]

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branch authority." *United States v. Huss*, 520 F.2d 598, 602 (2d Cir. 1975). (Emphasis added). *See also, United States. v. Amawi*, 579 F.Supp.2d 923, 924 (N.D. Ohio 2008) ("[t]he defendant has cited no authority, and I know of none, that permits me to enter orders regulating conditions of post-trial confinement. Indeed, the law is to the contrary [citing *United States v. Huss*]").

[8] There are additional instances during the March 28, 2014 hearing where the court demonstrated that its rulings were based on emotion rather than evidence. In fact, Judge Baxley offered that his Order was "straightforward" and "blunt" because SCDC vigorously defended its positions during the discovery phase of the case, which incidentally included unorthodox methods of discovery in contravention of the Rules of Civil Procedure that will be challenged during the course of this appeal. (App. 143-144). Judge Baxley stated that "the strength of this order is based upon the response of the Department from day one in this litigation" and that "[t]his is why you have the hard and direct and comprehensive order that you had." (App. 144).

In contrast to the views of the circuit court in this case, the United States Supreme Court held more than 30 years ago that American Correctional Association standards "do not establish the constitutional minima." *Bell v. Wolfish*, 441 U.S. 520, 543 (1979). The Supreme Court has also held that constitutional standards are not established by "opinions of experts as to desirable prison conditions." *Rhodes v. Chapman*, 452 U.S. 337, 350 (1981). *Accord, Alexander S. By and Through Bowers v. Boyd,* 876 F.Supp. 773, 799 (D.S.C. 1995). Even less are constitutional standards established by a trial judge's own unsupported opinions about what is necessary to "do justice." The decision strayed so far from the "cruel and unusual punishment" standard that amazingly *those words are to be found only once* in the 45-page Order, and then only in a passing reference at its outset. Order at 3. (App. 3).

Moreover, the court's subjective opinions were untethered to any specific case law whatsoever. One would have expected to see for each violation found a discussion of the facts of this case as applicable to a named plaintiff, followed by a review of those facts in light of existing case law on the subject. To cite just one

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Importantly, he also explained that his Order was "not the place to praise" or give credit to "the hardworking folks at the Department of Corrections in the mental health services." (App. 143). This latter comment shows potential bias and certain unfairness in that Judge Baxley admittedly did not credit the evidence of positive efforts made by SCDC in the provision of mental health care. Of course, on appeal, this will be rectified because this Court will review the evidence *de novo* and will make its own findings. However, this does highlight the fundamental unfairness in the process and furthers supports the issuance of a writ of supersedeas to stay all proceedings in the circuit court until this Court may complete its *de novo* review.

example, the use of pepper spray, judicial review of pepper spray incidents has been held to involve "evaluating the totality of the circumstances, including the provocation, the amount of gas used, and the purposes for which the gas was used [to] determin[e] the validity of the use ... in the prison environment." *Bailey v. Turner*, 736 F.2d 963, 969 (4th Cir.1984). However, the Order contains no such discussion. In its two paragraphs discussing the use of pepper spray, the Order simply accepts at face value the testimony of Plaintiffs' expert, Steve Martin, about a handful of instances of use of pepper spray, with only a conclusory summary of those few instances. No cases on use of pepper spray were cited at all.[9]

The court's focus on its own perceptions of best management practices, as opposed to the "cruel and unusual punishment" standard, is also reflected in the level of detail that would be required by the court-ordered remedial plan. If there had actually been findings that cruel and unusual punishment existed, the remedial actions necessary to eliminate it would presumably have been fairly simple, such as an order to stop performing some particular practice held to be violative of the "cruel and unusual punishment" standard.

Unless stayed and ultimately reversed, the Order would result in a return to the days when federal courts routinely undertook to manage all aspects of the

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[9] The same Plaintiffs' expert on the use of pepper spray admitted at trial that he was not offering an opinion as to whether the use of pepper spray constituted cruel and unusual punishment, and that he had not reviewed cases on that issue from the Fourth Circuit, the District of South Carolina, or the state courts of South Carolina. Trial Tr. 1126-1127. (App. 59-60).

operations of state prisons. The resulting federal court orders of the 1970's and 1980's often became so extensively detailed and costly for the states that eventually Congress undertook to remedy the situation by the enactment in 1996 of the Prison Litigation Reform Act (PLRA), P.L. 104-134, § 802. That Act, as it pertains to federal prison conditions litigation, provided that "[p]rospective relief in any civil action with respect to prison conditions shall extend *no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs*." 18 U.S.C.A. § 3626(a)(1)(A). (Emphasis added). Congress noted in the legislative history of the PLRA that this:

> provision stops judges from imposing remedies *intended to effect an overall modernization of local prison systems or provide an overall improvement in prison conditions* by "limit[ing] remedies to those necessary to remedy the proven violation of federal rights."

Plyler v. Moore, 100 F.3d 365, 369 (4th Cir. 1996), quoting H.R. Rep. No. 21, 104th Cong., 1st Sess. 24, n.2. (Emphasis added).[10]

While the PLRA is not binding in this state court litigation, it provides guidance for a properly limited role of courts in deciding how system-wide constitutional issues, if they exist, should be addressed by the courts. The PLRA serves as a model for compliance with what the South Carolina Supreme Court has

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[10] *See also, Taylor v. Freeman*, 34 F.3d 266, 271 (4th Cir. 1994), which was a pre-PLRA case, wherein the Fourth Circuit reversed the trial court's "assumption of extensive managerial control over the prison at Morrison [which] was premised upon conclusory findings that we doubt could support even circumscribed intervention." 34 F.3d at 271.

previously stressed as a "hands-off approach that this Court has taken towards internal prison matters." *Sullivan v. South Carolina Dept. of Corrections*, 355 S.C. 437, 586 S.E.2d 124, 128 (2003), *citing Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (1999).[11]

3. Absence of a showing by a plaintiff with standing.

The court's willingness to order extensive remedies in the absence of a plaintiff with standing is an additional indication that the court's review was a management review, and not an instance of resolving a legitimate case or controversy between parties.

It is undisputed that by the time of trial, only one named plaintiff, T.R. still remained in the case.[12] It is also undisputed that T.R., who did not testify, is housed at the Gilliam Psychiatric Hospital at SCDC, and is unlikely ever to move back into the general population because of his acute schizophrenia. This renders his situation unlike that of the vast majority of the mentally ill inmates who comprise the class. The limited evidence in the record pertaining to T.R. consisted of a brief report by Plaintiffs' experts after their interview of T.R. and a review of his medical records. This evidence was admitted over the hearsay objection of

[11] It is noted that the Order does not rely on – let alone even cites to – *any* South Carolina Supreme Court precedent addressing the role of the judiciary in adjudicating prison-related claims and issues, including such important cases as *Al-Shabazz* and *Sullivan*.

[12] The Plaintiffs P.R. and K.W. were no longer in SCDC custody and were not class representatives at the time of trial. (App. 56, 179-180).

SCDC.[13] Nonetheless, in that report, the experts concluded that T.R.'s "care and treatment appear to be adequate for maintaining him at a fair level of adjustment to the inpatient unit." Pl. Ex. 9 at 14. (App. 203).[14] Despite the fact that T.R. was the only class representative at the time of trial, the Plaintiffs' counsel never questioned any of the experts regarding T.R., his condition, his treatment, any harm that he had previously experienced, or the likelihood of any harm in the future. The experts never testified about T.R. They never cited him as an example of an inmate who had been subjected to any alleged harmful conditions at issue. In short, no testimony was presented regarding T.R. The sole evidence is the two pages included in Plaintiff's Exhibit 9. Clearly, there was no showing made – even considering Plaintiff's Exhibit 9 – that T.R. was subjected to "cruel and unusual punishment."[15]

The core function of litigation seeking injunctive relief, regardless of the number of parties and of claims, is to determine whether there is a likelihood that

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[13] While Plaintiffs' counsel called the hearsay objection "spurious" during the post-trial hearing, it was clearly not. (App. 92). The expert's report on his interview with T.R. and his records review is an out-of-court statement offered in court for the truth of the matter asserted. It is nothing but hearsay. And, if not offered for the truth of the matter, then it provides no basis for any argument that T.R. has standing. *See*, *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91(2011) (admission of expert's written report was held to be inadmissible hearsay and reversible error).

[14] Note that T.R. is designated as "Inmate 7" in the report.

[15] To further illustrate how devoid the evidence at trial was about T.R., there was not even evidence presented that T.R. was still incarcerated at the time of trial. He simply was not mentioned.

one or more specific, named, plaintiffs have been injured, or are likely to be injured, by an action of one or more defendants. As the U.S. Supreme Court held in *Lewis v. Casey*, 518 U.S. 343 (1996):

> It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution. In the context of the present case: It is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims to the courts; it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur.

518 U.S. at 349 (emphases added). *Lewis* sets forth core principles of justiciability that have been recognized many times in South Carolina cases.[16] The law in South Carolina on issues of justiciability and standing has been summarized by the Court of Appeals as follows:

> A threshold inquiry for any court is a determination of justiciability, *i.e.,* whether the litigation presents an active case or controversy." *Lennon v. S.C. Coastal Council,* 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct.App.1998). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial

[16] In *Hendricks v. South Carolina Department of Corrections*, 385 S.C. 625, 686 S.E.2d 191 (2009), the South Carolina Supreme Court cited *Lewis v. Casey* for the following proposition: "The requirement that an inmate alleging a violation of *Bounds* must show actual injury derives ultimately from the doctrine of standing." 686 S.E.2d at 193, *citing Lewis v. Casey*, 518 U.S. 343 (1996). Thus, the South Carolina Supreme Court itself has cited *Lewis*, and the concepts of justiciability and standing discussed in *Lewis* are not foreign to state court jurisprudence.

> determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Byrd v. Irmo High Sch.,* 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." *Graham v. State Farm Mut. Auto. Ins. Co.,* 319 S.C. 69, 71, 459 S.E.2d 844, 845-46 (1995) (holding that ruling was not advisory but was imperative to preserve rights and necessary to determine whether insurance coverage existed and carrier was required to be served); *see also Brown v. Wingard,* 285 S.C. 478, 330 S.E.2d 301 (1985). The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing. *Jackson v. State,* 331 S.C. 486, 490 n. 2, 489 S.E.2d 915, 917 n. 2 (1997).

Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002). (Emphasis added). The original Order in the present case did not even mention the standing of the sole remaining plaintiff, and likewise did not mention *Lewis v. Casey.* The Order denying reconsideration did mention *Lewis*, but reached the unfounded conclusion that its principles had no application in the present state case. In order to so hold, the Order had to, and did, ignore *Hendricks v. South Carolina Department of Corrections. supra,* 385 S.C. 625, 686 S.E.2d 191 (2009), which was expressly based in part on *Lewis v. Casey*, and which did not distinguish that case on the ground that it was a federal case on standing.

Assuming without conceding that the courts of this State may order at least limited injunctive relief in order to prevent injury to a specific prison inmate who shows a likelihood of harm from some specific prison practice, Plaintiffs and the

circuit court moved this case away long ago from any concept that it was intended to address specific claims of specific individuals who may have been similarly situated with other individuals. From the outset of the case, Plaintiffs' counsel sought to use discovery to develop evidence that was not focused on any individual plaintiff, but rather, that would be relevant only if the court conducted a broad-based management review of virtually all aspects of the delivery of mental health services in the Department of Corrections. The court effectively agreed to this litigation plan and indeed encouraged it by its rulings during the discovery phase. This misconception by Plaintiffs' counsel of the role of the courts became apparent at the close of the trial, by which time there was only one named Plaintiff left in the case, and that individual did not even testify nor did anyone testify about him. There was no evidence of present or likely future harm to the one named plaintiff. This litigation accordingly moved away from the proper role of courts, "provid[ing] relief to claimants," *Lewis,* 518 U.S. at 349, and instead ventured solely into the political arena, that is, seeking to have the courts "shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Id.* As *Lewis* holds, however, such "shap[ing] of the institutions of government" is "not the role of the courts, but of the political branches." *Id.*

The trial accordingly was conducted in the absence of any specific, named, inmate plaintiffs who were present or who offered specific proof of past or

threatened injury needing a judicial remedy. The extensive relief ordered by the court was therefore not ordered as a result of litigated issues between SCDC and plaintiffs with standing, but instead was simply an abstract exercise of power by the court in the absence of an actual case or controversy.[17]

4. Absence of analysis of facts and law.

As already noted, the Order is devoid of any discussion of the facts of this case as analyzed under legal principles applied in cases involving similar facts.

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[17] The April 8, 2014, Order denying rehearing also contained a conclusion that the "public importance" standing doctrine, found in such cases as *Sloan v. Dep't of Transportation*; 365 S.C. 299, 618 S.E.2d 876 (2005), could apply in this case. However, that doctrine has only been applied where the issue presented was primarily a legal issue, rather than one involving an intense factual showing pertaining to specific plaintiffs. *See, e.g., Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (whether Governor could hold a commission in the Air Force Reserve); *Davis v. Richland County Council*, 372 S.C. 497, 642 S.E.2d 740 (2007) (method of appointment of the members of county recreation commission); *Sloan v. Department of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005) (interpretation of highway construction bidding statutes); *Thompson v. South Carolina Commission on Alcohol and Drug Abuse*. 267 S.C. 463, 229 S.E.2d 718 (1976) (constitutionality of Uniform Alcohol and Intoxication Treatment Act).

Moreover, the public importance standing doctrine has only been invoked in cases where the court grants declaratory relief or a prohibitory injunction but not a mandatory injunction requiring that corrective action be taken as in this case.

Further, as Justice Pleicones has recognized, "'[p]ublic importance standing should be invoked only where the challenge cannot be otherwise raised, and should not be used to evade the application of other well-established standards." *Bodman v. State of South Carolina*, 403 S.C. 60, 742 S.E.2d 363, 371 (2013) (Pleicones, J., concurring). Yet, Plaintiffs rely on public importance standing only because they failed to present evidence pertaining to the one named plaintiff – the one class representative. Their failure to present evidence of standing of their client does not, however, make reliance on the public importance standing appropriate.

Finally, it is important to note that Plaintiffs never cited public importance standing as a basis for standing in their complaints or in opposition to pre-trial motions challenging standing. Likewise, they did not assert public importance standing for the first time until after the trial was over – when the court requested additional briefing on the standing issue. Certainly, public importance standing was never raised in Plaintiffs' case-in-chief nor was any evidence presented to support the application of that doctrine.

a. Crisis intervention.

One salient example of this is the Order's brief and general discussion of crisis intervention ("CI") cells. Order at 28-29. (App. 28-29). The court ordered SCDC to devise a plan to "[l]ocate all CI cells in a healthcare setting," and make a number of other changes to ways in which such cells are managed. Order at 44, ¶ 6. (App. 44). According to Plaintiffs' expert, Stephen A. Carter, it would cost about $4,000,000 to $5,000,000 to build a 10-cell special CI facility. Pl. Ex. 11 at 6, 9. (App. 215, 218). Mr. Carter anticipated that at least four such units should be constructed, one each at four institutions, Kirkland, Lee, Lieber and Perry, for a total cost of $16-$20 million, plus another million or slightly less for a CI facility at Graham, the women's institution.

The only basis in the Order for this potential expense of $20 million or more is *a single sentence*: "[C]risis intervention cells are located in segregation units, not in a medical setting, and thus lack sufficient medical interaction and treatment." Order at 28-29. (App. 28-29). Aside from a general reference to the testimony of a Plaintiffs' expert (without citation to the transcript), the Order contains no factual or legal support for this multimillion-dollar conclusion. Notably absent is any

citation of legal authority establishing principles that might apply in cases involving crisis intervention facilities.[18]

The remainder of the same paragraph contains a listing of other alleged faults with the cells presently used for crisis intervention, but even assuming without conceding that those faults actually exist, they could all be remedied without the need for new construction. For instance, medical staff could be located near those existing cells. Any problems with temperature, sanitation, or observation practices could be remedied without the need to construct new cells.

b. Staffing increases.

Another example of a very expensive remedy based on slender findings of fact and no legal authority is the Order's requirement that the plan provide for increases in staffing in accordance with such standards as those of the American Correctional Association. Order at 42, ¶ 3(i). (App. 42). Similarly, the Order requires SCDC to devise a plan that would "[s]ignificantly increase clinical staffing at all levels to provide more mental health services at all levels of care." Order at 40. (App. 40). Plaintiffs' expert Carter estimated that the annual cost of the recommended staffing increases (not counting correctional officer staff for any new CI units) would be over $6.6 million annually. Pl. Ex. 11 at 15. (App. 224).

[18] Remarkably, the Order gives substantially more attention to a temporary, unsanctioned and discontinued practice at one institution than it does to CI cells generally. Order at 29-30. (App. 29-30).

The corresponding findings of the Order are devoid of a showing of past harm or likely future harm to even a single inmate as a result of alleged staffing deficiencies. Order at 23-25. (App. 23-25). Moreover, the only semblance of a standard to be found in this part of the Order is "the testimony of [Plaintiffs' experts] Dr. Metzner and Dr. Patterson." Order at 23. (App. 23). No legal authority is cited. As noted previously, the legal error underlying this conclusion is manifest because the United States Supreme Court has held that constitutional standards are not established by "opinions of experts as to desirable prison conditions." *Rhodes v. Chapman*, 452 U.S. 337, 350 (1981). Like many other parts of the Order, this section is clearly in the nature of a management review, not a decision about the constitutional rights of real parties.

c. Administrative segregation.

The Order sets forth seven detailed remedial changes that the circuit court believed necessary to improve the use of administrative segregation, that is, lockup or SMU (Special Management Unit) cells. Order at 40. (App. 40). The alleged basis for these remedial needs is set forth at pages 9-16 of the Order, but the Order cites virtually no evidence that would show systemic deficiencies that led either to

cruel and unusual punishment in the past or a likelihood of cruel and unusual punishment in the future.[19]

The Order holds in effect that long administrative segregation sentences for mentally ill inmates are *ipso facto* unconstitutional. Other than reciting the lengths of a very small number of instances of detention, however, the Order contains no analysis on this point. Order at 11-12. (App. 11-12). Indeed, for the four individual inmates referenced on page 12 of the Order as having long disciplinary sentences, there were no findings that any of the four suffered harm in a constitutional sense as a result of those sentences. In fact, there was not even a finding as to the mental health condition of those inmates. The court, in effect, presumed a constitutional injury based solely on the length of detention.

In addition to this absence of findings of fact, the Order is also devoid of legal analysis. The court should have taken into account such cases as *In re Long Term Administrative Segregration of Inmates Designated as Five Percenters*, 174 F.3d 464, 471 (4th Cir. 1999) (holding that neither the restrictive nature of high-security incarceration nor the length of such incarceration was necessarily unconstitutional). Similarly, in *Williams v. Branker,* 462 Fed.Appx. 348 (4th Cir. 2012), which was not cited in the Order despite frequent references to it by SCDC

[19] The Order contains a detailed discussion of the case of an inmate Jerome Laudman. Order at 15-16. (App. 15-16). Laudman is also mentioned in several other contexts. Order at 28, 30, 33. (App. 28, 30, 33). This extended focus on one inmate at one institution is insufficient to show system-wide deficiencies.

during the trial, the Fourth Circuit held that no federal claim was stated by a mentally ill inmate, confined in segregation for 10 years, and that even if those conditions aggravated the inmate's mental illness, that was:

> an unfortunate but inevitable result of his incarceration. This is particularly so given the twin responsibilities of prison officials to limit the opportunities for Williams to harm both himself and others.

462 Fed.Appx. at 354. It is notable that the Order in this case contains no reference to, or consideration of, the serious and difficult problems cited by the Fourth Circuit, that is, "the twin responsibilities of prison officials to limit the opportunities for [the inmate] to harm both himself and others." *Id.* Instead, the Court once again followed the disapproved practice of citing only ACA Standards for its conclusions regarding administrative segregation. Order at 13. (App. 13).

d. Use of force.

The Order spends five pages discussing the "disproportionate" use of force against mentally ill inmates. Order at 16-21. (App. 16-21). Again, no cases on point are cited, although there is an abundance of case law on this subject from the federal courts. As with the court's other conclusions, the only "authority" cited for these holdings was a combination of unspecified "national standards," manufacturer instructions, and the testimony of Plaintiffs' expert. Order at 17-18. (App. 17-18). There was no discussion at all of the testimony of SCDC's expert, the former head of the Louisiana Department of Corrections, on these issues.

e. Limited involvement of psychiatrists.

At pages 21-22 of the Order, the court concluded that psychiatrists "must be more directly involved in treatment plans." Order at 21. (App. 21). There is not so much of a hint of a suggestion of past or future harm to inmates as a result of the matters cited by the court in this part of the Order, which is focused instead on such matters as whether psychiatrists knew the meaning of acronyms used by SCDC. As is the case with the Order generally, no case law is cited.

f. Limited access to higher levels of care.

The Order at pages 39-40 would require SCDC to devise a plan that would lead to significant expenses in raising the number of inmates in designated levels of care. No showing of a need for such action is to be found in the portion of Order, pages 22-23, that corresponds to this proposed remedy. The only findings by the court are that the numbers of inmates in various levels of care have been reduced over time. Order at 22-23. (App. 22-23). The Order does not hold that these reductions showed that past harm had occurred to inmates, or that future harm was likely to occur. There is no mention at all of a legal standard, or even an ACA standard, in conjunction with this part of the Order.

g. Screening and evaluating inmates.

The Order at page 39 would require a plan to revamp SCDC's screening parameters, including the adoption of a goal of increasing the number of inmates

"recognized as mentally ill" by at least two percentage points, so that at least 14.9 percent of the inmate population would be diagnosed as mentally ill. As with so many other findings in the Order, this one contains nothing to support it. Plaintiffs' counsel and experts reviewed enormous amounts of material provided to them by SCDC, but the Order contains no finding that there existed even a single inmate who was seriously mentally ill, but who had not been classified as such. Not one inmate has been identified as suffering from a serious mental illness who was not on the mental health rolls at SCDC. Instead, the Order, once again, was based on the conclusions of experts that the norm in other states for mentally ill inmates was a higher percentage than that found at SCDC. The Order then reaches the virtually absurd conclusion that SCDC must devise a plan "with the stated goal of increasing the number of inmates recognized as mentally ill ... by a minimum of two percentage points (14.9 percent of the inmate population)." In addition to the self-evident problems with this command to meet an artificial quota of mentally ill inmates, the Order at this point loses sight of the fact that the certified class was limited to the "seriously mentally ill." The Order is therefore particularly deficient in seeking to raise the percentage of all mentally ill inmates, instead of only the seriously mentally ill, but even for those, there is no rational support for the concept that SCDC must determine that an artificial percentage of its inmates is seriously mentally ill.

h. Health records.

The Order at pages 42-43 would require SCDC to devise a plan for a program that would "dramatically improve[ ] SCDC's ability to store and retrieve" ten different categories of documents or reports. (App. 42-43). As with other remedies ordered, the corresponding findings of the Order are devoid of a showing of past harm or likely future harm to even a single inmate as a result of alleged recordkeeping deficiencies. Order at 26. (App. 26). No standards, legal or otherwise, are cited.

i. Administration of psychotropic medications.

The Order at page 43 would require SCDC to devise a plan for a program that would make a number of changes to the manner in which psychotropic medications are administered. (App. 43). The corresponding findings contain precisely one instance in which there was a medication error followed by a suicide, although there is no finding about a connection between those events.[20] Considering the vast amounts of medication data produced by SCDC and presumably reviewed by Plaintiffs' experts and/or counsel, this single instance falls far short of establishing a systemic problem. For still another time, this part of the Order cites no standards, legal or otherwise.

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[20] One other inmate, Jonathan Mathis (not a named Plaintiff), is mentioned by name in connection with an alleged medication error. Order at 27. (App. 27). However, there is no finding that harm occurred to that inmate as a result.

5. Legal defenses.

Finally, the April 8, 2014 Order cursorily discussed, and summarily dismissed, several affirmative defenses raised by SCDC. These include the following which will be discussed in great detail during the course of this appeal and which SCDC submits have great merit:[21]

(1) The absence of a private right of action for a violation of the South Carolina Constitution given the absence of any enabling legislation per the reasoning of the Court of Appeals in *Gibbs v. South Carolina Department of Probation, Parole, and Pardon Services*, Opinion No. 2002-UP-363 (Ct. App. 2002).[22] The circuit court discounted the *Gibbs* decision and the Court's rationale only because it was unpublished and because it involved a money damages claims. However, the court refused to address how, in the absence of enabling legislation, there is no private right of action for money damages but there is a private right of action for injunctive relief.

(2) The application of the separation of powers doctrine, including specifically the application of the law of this case as established by the circuit court's unappealed and now final rulings dismissing the South Carolina General Assembly as a party-defendant in this litigation. The court never explains why the separation of powers doctrine barred suit against one co-equal branch of government, i.e. the legislature, but not the other co-equal branch of government, i.e., the executive branch.

(3) The public policy of the State of South Carolina, including limits on the role of the judiciary as established in such cases as

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[21] For further discussion of these issues, SCDC has included the transcript of the hearing on post-trial motions held on March 28, 2014 in the Appendix, which includes the legal arguments of both sides on these very issues.

[22] The South Carolina Supreme Court denied a petition for writ of certiorari in *Gibbs* on June 25, 2002.

Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999); *Sullivan v. South Carolina Dept. of Corrections*, 355 S.C. 437, 586 S.E.2d 124 (2003); and *Abbeville County School District v. State*, 335 S.C. 58, 515 S.E.2d 535 (1999).

(4) The precedent and public policy of the State of South Carolina as established in *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992), that the punishment of the mentally ill for violations of law (which would be inclusive of disciplinary violations) does not constitute "cruel and unusual punishment" in violation of Article I, § 15 of the South Carolina Constitution.

(5) The Plaintiffs' case gives rise to a non-justiciable political question beyond the control of the South Carolina Department of Corrections, including the budgetary decision-making and priorities made by the General Assembly and the laws requiring the incarceration of the mentally ill, all of which are political decisions made by the General Assembly which was dismissed as a party to this litigation for that very reason.

Additionally, the circuit court refused to address SCDC's argument that Article I, § 15 should be construed and applied in accordance with the federal law that actually governs SCDC per the decisions of the United States Supreme Court, the Fourth Circuit Court of Appeals and the United States District Court for the District of South Carolina. By disregarding the existing authority of the United States Supreme Court, the Fourth Circuit Court of Appeals and the United States District Court for the District of South Carolina, and by citing to case law from other federal circuits in conflict thereof, the circuit court's decision actually has created inconsistency and has established two differing standards for SCDC to follow under the State and Federal Constitutions.

Logically, the same policy or conduct by SCDC should not be deemed constitutional under the Eighth Amendment per federal case law and unconstitutional under Article I, § 15; yet, that is precisely what has occurred given the Orders on appeal. SCDC offered Judge Baxley notebooks with federal case law from within the Fourth Circuit addressing a myriad of mental health issues and such other topics as use of chemical munitions, use of segregation, and use of force including restraint chairs, where no constitutional deprivation was found under the Eighth Amendment. Yet, in his Order, Judge Baxley did not cite to a single such case. Instead, he cites generally to case law from other circuits whose decisional law does not govern SCDC, and Judge Baxley remarkably stated that he was unaware of "any split among the circuits." (App. 55). He refused to consider the case law from the Fourth Circuit Court of Appeals and the United States District Court for the District of South Carolina – the very law that governs SCDC under the Eighth Amendment and which is supposed to apply the same analysis applicable to the Cruel and Unusual Punishment Clause of Article I, § 15 of the South Carolina Constitution. *See*, *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19, 27 (1992) ("the analysis we employ is the same under both constitutions"). This failure to follow, let alone consider, authority from within the Fourth Circuit will be an additional legal issue to be raised on appeal.

EXTRAORDINARY CIRCUMSTANCES EXIST ALLOWING FOR IMMEDIATE APPLICATION TO THIS COURT

Rule 241(d)(1), SCACR, provides that "[e]xcept where extraordinary circumstances make it impracticable, an application for an order ... for supersedeas must first be made to the lower court ... which entered the order or decision on appeal." Rule 241(d)(1), SCACR. As described at length above, SCDC submits that extraordinary circumstances allow for this Court's immediate consideration of this request for a writ of supersedeas or stay pending appeal particularly given the nature of the case, the complex issues involved, the breadth of the injunctive relief awarded, and the tremendous monetary expense required for compliance.

In addition, this action was declared complex and assigned to Judge Michael Baxley. Since issuing his April 8, 2014 Order, Judge Baxley has retired. No successor judge has yet been appointed to this case, and even if one had, that judge would not have the working knowledge of this case to properly consider the request for supersedeas in a timely manner. In short, there is no judge in the lower court to which SCDC could have initially made this petition.

Moreover, based on the circuit court's order, a remedial plan is required to be filed "within 180 days of the date of the Final Order in this case." Order at 38. (App. 38). It is unclear what was intended by the reference to Final Order. If the Final Order is the January 8, 2014 Order, then the remedial plan is due by July 8, 2014. If the Final Order is the April 8, 2014 Order, then the remedial plan is due

by October 6, 2014. In either case, the deadline does not allow for consideration of the supersedeas request in the circuit court by a judge newly appointed to the case.

For these reasons, this Court is respectfully requested to exercise its discretion and find that extraordinary circumstances warrant this Court's immediate consideration of this petition.

CONCLUSION

For the reasons set forth above, the Appellants respectfully submit that once a full appellate review occurs, the conclusions of the court below should be reversed. Accordingly, and in order to prevent large expenditures of public funds on remedies for which no constitutional need has been shown, SCDC respectfully submits that the Order of the circuit court should be superseded or stayed until the merits of this case are finally adjudicated on appeal.

Respectfully submitted,

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June 12, 2014