

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph K. Anderson, III, Administrative Law Judge
Dock. No. 07-ALJ-04-00517-AP

S.C. SUPREME COURT

Opinion No. 5389 (S.C. Ct. App. filed March 9, 2016
App. Case No. 2016-001221

Fred Gatewood, #289775..... Respondent,

v.

South Carolina Department of Corrections..... Petitioner.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Douglas H. Westbrook
23 Broad Street
Charleston, SC 29401
(843) 853-9600
Douglas.h.westbrook@gmail.com
Counsel for Respondent/Petitioner

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Pursuant to SCACR 242(f), Fred Gatewood respectfully submits his Response To Petition For A Writ Of Certiorari filed by the Department of Corrections.

SCDC'S QUESTIONS PRESENTED FOR REVIEW

A. Did the Court of Appeals err by ruling on the second issue that, during July 2007, SCDC should have paid Gatewood the "prevailing wage" per §24-3-430(D) and applied §24-3-40(A)'s deductions from his gross wages?

B. Did the Court of Appeals err by ruling on the fourth issue that Gatewood was deprived of due process?

COUNTER-STATEMENT OF THE CASE

This appeal involves inmate Fred Gatewood's grievance for past due wages under South Carolina law. Gatewood worked in the Lieber/Williams Technologies (WTI) work program between 2004 and at least 2009. When Gatewood worked, S.C. Code §24-3-430(D), the "prevailing wage" statute, had been replaced by a budget proviso which allowed the Department of Corrections (SCDC) to pay inmates a negotiated wage which could be less than the prevailing wage (Statutes at Large, No. 66, §37.31, effective July 2001). Similar provisos were passed each fiscal year until 2007.

Beginning with the 2003-2004 proviso, deductions for restitution and room and board were required to be taken out of inmates' gross wages (Jt. App. p. 368). On June 7 or 8, 2007, S. 182 (§§24-1-290, 295) was ratified by the legislature (Jt. App. pp. 372-374, 386-391). Section 4 of the ratified copy of S. 182 stated an effective date for the statute of August 1, 2007 (Jt. App. p. 391). S. 182 contained language similar to the provisos, and it also changed the list of required deductions and stated they were "in addition to any other

required deductions" (Jt. App. pp. 368, 373).

On June 13, 2007, the Governor signed S. 182 into law (Jt. App. pp. 372-374, 391). On June 27, the Governor vetoed the proviso for 2007-2008, which had an effective date of July 1, 2007 (Jt. App. pp. 370, 372). On June 28 or 29, the legislature sustained the Governor's veto (Jt. App. pp. 372-374).

In 1998, SCDC and WTI entered into a contract to set up this work program (Jt. App. p. 74). The contract established inmates' pay rate at \$4 per hour and contained other work guidelines (Jt. App. p. 79).

On August 23, 2004, the Supreme Court issued decisions in Adkins, et al. v. SCDC 360 S.C. 413, 602 S.E. 2d 51 (S.C., 2004) and Wicker v. SCDC 360 S.C. 421, 602 S.E. 2d 56 (S.C., 2004). These decisions held inmates could file prevailing wage grievances and appeal to the Administrative Law Court (ALC).

On September 27, 2004, Gatewood retained undersigned counsel to file grievance. On or about October 18, 2004, Gatewood filed his step 1 grievance with SCDC (Jt. App. p. 47). On October 28, 2004, SCDC issued its step 1 response, which was received by Gatewood on November 2, 2004 (Jt. App. p. 41). On February 3, 2006 and/or April 19, 2007, Gatewood filed his Amendment/Exhibits to grievance with SCDC (Jt. App. p. 51). On May 14, 2007, SCDC issued its step 2 final decision, which was received by Gatewood on May 22, 2007 (Jt. App. p. 43). Both SCDC decisions denied the grievance as untimely and also on the merits.

On June 5, 2007, counsel filed Gatewood's appeal in the ALC (Jt. App. p. 57). Some 196 other inmates followed this same process. These appeals were consolidated in the ALC under the caption, Francis Ackerman, #266928, et al. v. SCDC Dock. No. 07-ALJ-04-00444, etc.

The ALC ordered the consolidated appeal to be briefed in three levels. After briefing and receiving the ALC's decision for Level One, counsel briefed the Level Two issue of timeliness of Gatewood's and others' grievances. On March 2 and 16, 2012, the ALC issued its decision that Gatewood's grievance was timely filed and should be briefed on the merits. All others were held untimely filed.

On April 16, 2012, Gatewood filed his merits brief in the ALC as ordered. On June 19, 2012, the ALC issued its order that it had no jurisdiction to continue with Gatewood's merits briefing, due to the appeal to the Court of Appeals of all inmates in the Ackerman companion case. On July 18, 2012, Gatewood filed Notice of Appeal in the Court of Appeals of the ALC's June 19 order.

On March 26, 2013, the Court of Appeals dismissed Gatewood's appeal filed on July 18, 2012. On August 26, 2013, the Court of Appeals remitted that appeal back to the ALC.

On February 19, 2014, Gatewood filed his Level Three brief in the ALC (Jt. App. p. 114). On April 7, 2014, SCDC filed its responsive brief (Jt. App. p. 128). On April 17, 2014, Gatewood filed his reply brief (Jt. App. p. 155).

On April 29, 2014, the ALC issued its order affirming SCDC's denial of Gatewood's grievance (Jt. App. p. 30). In its order, the ALC held Gatewood was entitled to the \$4 gross wage as requested. However, the ALC denied back wages by applying §24-1-295's "other required deductions" clause to allow SCDC to deduct from Gatewood's gross wages, costs for security and prison industry overhead, including costs for health, safety and welfare of inmates, for the period 2004 to 2009 (Jt. App. pp. 37-39).

On June 2, 2014, Gatewood filed Notice of Appeal in the Court of Appeals of the ALC's April 29, 2014 order, and one other (Jt. App. p. 186). On December 11, 2014, Gatewood filed his final brief in the Court of Appeals (Jt. App. p. 190). In his brief, Gatewood briefed, among others, statutory basis for deductions, retroactive application of §24-1-295, due process, and the "other required deductions" clause in §24-1-295. On December 22, 2014, SCDC filed its final brief (Jt. App. p. 233).

On March 9, 2016, the Court of Appeals issued its decision affirming in part, reversing in part, and remanding the case to the ALC (Jt. App. p. 292). On March 19, 2016, Gatewood filed his Petition for Rehearing in the Court of Appeals (Jt. App. p. 312). On March 31, 2016, SCDC filed its Petition for Rehearing (Jt. App. p. 319). On June 2, 2016, the Court of Appeals issued its order denying both petitions (Jt. App. p. 395). On June 30, 2016, Gatewood filed his Petition For A Writ Of Certiorari with the Supreme Court. And, on or about July 25, 2016, SCDC filed its Petition For A Writ Of Certiorari with the Supreme Court.

ARGUMENT

- A. The Court of Appeals did not err by ruling that, during July 2007, SCDC should have paid Gatewood the "prevailing wage" per §24-3-430(D) and applied §24-3-40(A) deductions to his gross wages.**

(1) Legislative Intent

SCDC contends the legislature intended for S. 182 (§§24-1-290, 295) to apply to service projects in July 2007 upon expiration of the 2006-2007 proviso and did not intend to create a gap in July 2007. And, the Court of Appeals incorrectly ruled SCDC cannot deduct for security costs and overhead from Gatewood's July 2007 gross wages (SCDC petition, pp. 18-20).

Gatewood contends SCDC's argument is improper for the following reasons. The effective date for §24-1-295 was August 1, 2007 (Jt. App. p. 391). Therefore, in order for §24-1-295 to apply to July 2007, it would have to be applied retroactively. In his Court of Appeals brief, Gatewood contended the ALC's application of §24-1-295's "other required deductions" clause to his pre-August 1, 2007 work was an improper retroactive application of the statute and thus ineffective (Jt. App. pp. 211-212). The Court of Appeals agreed (Jt. App. pp. 303-308). In SCDC's Court of Appeals brief, SCDC stated (Jt. App. p. 252):

Before §24-1-295 was enacted in August 2007, **no statute mandated** SCDC to deduct monies from an inmate's wages that he received due to his voluntary participation in the prison industries project.

..
Accordingly, the ALC **did not apply §24-1-295 retroactively** to the Appellant's pre-August 2007 labor, and this Court should affirm the ALC's ruling that **SCDC was required by contract, not statute**, to deduct security and overhead costs from the wage SCDC negotiated with WTI before §24-1-295 was enacted.

Initially, Gatewood contends SCDC's argument in its petition concerning legislative intent is not a subsidiary question presentable for review under SCACR 242(d)(2). SCDC's Question A is similar to the issues SCDC argued in the Court of Appeals (Jt. App. pp. 247-263). However, SCDC's argument in support of Question A in its petition, that the legislature intended for §24-1-295 to apply to July 2007, is inconsistent or contradictory to its Court of Appeals argument that no statute governed deductions prior to August 2007 and the ALC did not apply §24-1-295 retroactively to Gatewood's work. As a result, Gatewood contends SCDC's petition argument to this Court is not logically a subsidiary question that is fairly comprised within a question presented to the Court of Appeals, and thus not presentable under SCACR 242(d)(2).

In addition, Gatewood notes SCDC's petition argument that the legislature intended for §24-1-295 to apply to July 2007 was not raised in the Court of Appeals until SCDC's petition for rehearing (Jt. App. pp. 247-253, 346-348). An issue not raised in an intermediate appeal cannot be raised in a subsequent appeal (J. Toal, Appellate Practice in South Carolina, Second Edition, p. 82; City of Columbia v. Ervin 330 S.C. 516, 500 S.E. 2d 483 (1998); Steele v. Self Serve, Inc. 335 S.C. 323, 516 S.E. 2d 674 (Ct. App., 1999)). As stated above, Gatewood contends SCDC's arguments in the Court of Appeals and in its petition to this Court, are inconsistent if not contradictory. Thus, Gatewood contends, because SCDC did not raise its current argument in the Court of Appeals, it cannot do so now.

Moreover, Gatewood contends SCDC's resort to the legislative history of §24-1-295 is precluded by the "plain meaning" rule. In Timmons v. S.C. Tri-centennial Commission 254 S.C. 378, 402, 175 S.E. 2d 805, 817 (S.C., 1970), cert. denied, 400 U.S. 986 (1971), the Court stated, if a statute is clear and explicit in its language, there is no need to resort to statutory interpretation or legislative intent to determine its meaning. See also, Sloan v. S.C. Bd. of Physical Therapy Ex'mnrs 370 S.C. 452, 636 S.E. 2d 598, 606 (S.C., 2006) (When a statute's terms are clear and unambiguous, there is no room for statutory construction and the court must apply the statute according to its literal meaning).

Here, SCDC stated in its Court of Appeals brief that §24-1-295's text is "clear and unambiguous" (Jt. App. p. 250). Therefore, Gatewood contends SCDC's resort to legislative history is barred by the plain meaning rule.

On the merits of SCDC's legislative intent argument, the Court of Appeals noted the legislature enacted §24-3-430 in 1995 to require payment of the prevailing wage in prison industries programs (Jt. App. p. 293). On July 20, 2001, the legislature passed the first in a series of provisos, to be effective July 1, 2001, and allow payment of less than the prevailing wage (Jt. App. p. 294). And, similar provisos were enacted for each fiscal year until 2007-2008 (Jt. App. p. 295). On August 1, 2007, §24-1-295 became effective (Id). In footnote 3, the Court stated, in part:

The legislature sustained the Governor's veto of H. 3620, Appropriation Bill 2007-2008, Part IB §37.21, the stated reason for the veto being, "the language is no longer necessary after I signed S. 182, the Prison Industries legislation. This proviso conflicts with the statutory changes and is unneeded". **Therefore, from July 1, 2007 to August 1, 2007, there existed no authorization for SCDC to pay participating inmates below the prevailing wage.**

In Section II of its opinion, the Court of Appeals stated concerning the July 2007 gap created by the Governor's veto of the 2007-08 proviso (Jt. App. p. 300):

Critically, this gap also left a void in deductions specific to service work contracts.

..

Accordingly, section 24-3-40 governed deductions from the gross earnings of inmates from July 1, 2007 until section 24-1-295 became effective on August 1, 2007.

The July 2007 gap was created by the following events. Between June 8-13, 2007, the legislature passed §24-1-295 to be effective August 1, 2007, and the Governor approved it (Jt. App. pp. 372-373, 391). On June 27, the Governor vetoed the 2007-08 proviso, which the legislature sustained (Jt. App. pp. 370, 372-374). The legislature sustained the veto on June 28 or 29 (Jt. App. pp.

372-374). If the Governor had not vetoed the proviso, it would have become effective on July 1, 2007 (Id). The net result was a period between July 1, 2007 and July 31, 2007 when there was no proviso in effect.

The Court of Appeals recognized the general rule that, "(A)bsent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature" (Edwards v. SLED 395 S.C. 571, 579, 720 S.E. 2d 462, 466 (S.C., 2011) (Jt. App. p. 305). Gatewood notes the following other recent cases, State v. Brown 402 S.C. 119, 740 S.E. 2d 493, 496 (S.C., 2013) (Statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt); and S.C. Dept. of Revenue v. Rosemary Coin Machines, Inc. 339 S.C. 25, 528 S.E. 2d 416, 418 (S.C., 2000) (There is a presumption that statutes are considered prospectively rather than retroactively in their operation, unless there is a specific provision or clear legislative intent to the contrary).

The text of a statute is considered the best evidence of the legislative intent (Wigfall v. Tideland Utilities, Inc. 354 S.C. 100, 580 S.E. 2d 100, 105 (S.C., 2003)). Moreover, use of the word "shall" in a statute suggests that the legislature designed it for prospective application only (Am Jur 2d (2012), Statutes, §236). Here, §24-1-295 states, in part (Jt. App. p. 373):

However, the Director of the Department of Corrections shall deduct the following from the gross earnings of the inmates engaged in prison industry service work in addition to any other required deductions.

Moreover, in Department of Revenue v. Rosemary Coin Machines, Inc. the Court stated as follows concerning a statute effective date, 528 S.E. 2d 418:

Finding nothing in this enactment beyond a statement of its 'effective date', we must follow the well-settled rule that a statute may not be applied retroactively in absence of specific provision or clear legislative intent to the contrary.

See also, Pulliam v. Doe 142 S.E. 2d 861, 863 (S.C., 1965), and Am Jur 2d (2012), Statutes, §236 (Inclusion of effective date in statute is inconsistent with legislative intent to apply statute retroactively).

In this case, Section 4 of Act No. 68 (S. 182) states: "Section 4. This act takes effect August 1, 2007" (Jt. App. p. 391). In addition, in the South Carolina Code, §24-1-295, after the text it states: "History: 2007 Act No. 68, §2, eff August 1, 2007". Finally, there is no relevant language in Section 24-1-295 indicating that it should be applied retroactively.

Gatewood contends that the word "shall" in the text, the effective date of August 1, 2007, and the absence of clear legislative intent of retroactive application, all indicate §24-1-295 was intended to apply prospectively only. Finally, SCDC does not contend that §24-1-295 is remedial or procedural.

Gatewood further contends that the legislature's actions suggest it did not intend for §24-1-295 to cover July 2007. S. 182 (§24-1-295) was ratified by the legislature on June 7 or 8, 2007 (Jt. App. pp. 372-373, 386-389). Section 4 of the ratified copy of S. 182 states: "This act takes effect August 1, 2007" (Jt. App. p. 391). Thus, by June 7 or 8, the legislature is presumed to have known of the August 1, 2007 effective date of §24-1-295 (Amisub of S.C., Inc. v. DHEC 407 S.C. 583, 757 S.E. 2d 408, 416 (S.C., 2014) (The Court recognizes a presumption that the legislature is familiar with existing legislation). On June 13, the Governor signed S. 182 into law (Jt. App. pp. 372-373, 391).

On June 27, the Governor vetoed the 2007-08 proviso, which had an effective date of July 1, 2007 (Jt. App. pp. 370, 372-374). On June 28 or 29, the legislature sustained the Governor's veto (Jt. App. pp. 372-374). Thus, the legislature sustained the veto of the proviso when it is presumed to have known of the July 1, 2007 effective date for the proviso, and the August 1, 2007 effective date of §24-1-295 (Amisub of S.C., Inc.). For these reasons, Gatewood contends the legislature's actions do not indicate that it intended for §24-1-295 to be applied to July 2007 or at any time before its effective date of August 1, 2007.

The Court of Appeals summarized its holding that, during July 2007, §24-3-40 governed deductions from the prevailing wage for that month (Jt. App. p. 301). Gatewood contends the Court was correct. In Amisub of S.C., Inc. v. DHEC 407 S.C. 583, 757 S.E. 2d 408, 415 (S.C., 2014), this Court stated the purpose of an appropriations bill:

An appropriations act, though generally temporary in duration, "has equal force and effect as a permanent statute" and may suspend the operation of a permanent statute during the time the appropriations act is in force.

Here, the 2007-08 proviso had an effective date of July 1, 2007, but it was vetoed on June 27 and the legislature sustained the veto on June 28 or 29 (Jt. App. pp. 370, 372-374). Therefore, the 2007-08 proviso was never in force. As a result, the permanent statutes which would have been suspended, §§24-3-40, 430(D), were never suspended and thus applied for July 2007 after the 2006-07 proviso expired on June 30, 2007 (Jt. App. pp. 367-369, 372-374).

This conclusion is supported by language in Williams, et al. v. SCDC, et al.

372 S.C. 255, 641 S.E. 2d 885, 887 (S.C., Feb. 26, 2007) and Torrence, et al. v. SCDC, et al. 373 S.C. 586, 646 S.E. 2d 866, 868 (S.C., May 7, 2007), which clearly stated that §24-3-40(A) governs deductions from prison industry wages. Moreover, Williams involved the Lieber/WTI work program, the same program in which Gatewood participated.

Thus, Gatewood contends the Court of Appeals was correct in holding that §§24-3-40 and 430(D) applied to July 2007.

SCDC states the legislature enacted §§24-1-290, 295 to codify the provisos (SCDC petition, p. 19). However, §24-1-295 also added to the list of proviso deductions, its "other required deductions" clause (Jt. App. p. 373). Section 24-1-295 also changed the listed deductions in the vetoed 2007-08 proviso, as follows: The proviso required deductions for restitution (20% or 10%) and for room and board (10%) (Jt. App. p. 373). However, §24-1-295 required deductions for restitution (20%); child support (35%); if no child support, for room and board (25%); if no child support, inmate incidentals (additional 10%); inmate incidentals (10%); escrow account for inmate (10%); taxes (balance); inmate incidentals (balance) (Jt. App. p. 373).

Therefore, §24-1-295 added substantive provisions which significantly increased the deductions SCDC could take from inmates' wages, which decreased inmates' pay. In his June 30, 2016 petition for certiorari, Gatewood contests application of §24-1-295 to his post-August 1, 2007 work.

(2) Legislative Intent and Section 24-3-40(A)

SCDC contends §24-3-40(A) applied only to projects under Article 3, Chapter 3, of Title 24 for which SCDC must pay prevailing wages. And, SCDC could still

pay less than prevailing wages in July 2007 because the legislature did not intend to create a gap in July 2007. Therefore, §24-3-40(A) did not apply in July 2007 (SCDC petition, p. 18).

First, Gatewood contends SCDC cited no authority for its conclusory statement, and as a result the Court should consider it abandoned on appeal (J. Toal, Appellate Practice in South Carolina, Second Edition, p. 215; S.C. Dept. of Probation, Parole & Pardon Servs. v. Reynolds 343 S.C. 465, 540 S.E. 2d 480, 482, n. 1 (S.C. App., 2000)).

On the merits of SCDC's §24-3-40(A) argument, in Section II of its opinion, the Court of Appeals discussed the two laws covering prison industries deductions when Gatewood started work in 2004, §24-3-40 and the 2004-05 proviso (Jt. App. p. 298). The Court quoted the provision in §24-3-40 which is relevant here (Jt. App. pp. 298-299):

Unless otherwise provided by law, the employer of a prisoner authorized to work at paid employment in the community under Sections 24-3-20 to 24-3-50 **or in a prison industry program provided under Article 3 of this chapter** shall pay the prisoner's wages directly to (SCDC) (emphasis in opinion).

The Court of Appeals further noted that Article 3, Chapter 3, and in particular §24-3-430, created the Prison Industries program and its standards (Jt. App. p. 299). The Court held the July 2007 gap left a void in deductions and, as a result §24-3-40 deductions applied for that month (Jt. App. p. 300).

Gatewood contends the Court of Appeals was correct. By its express language, §24-3-40 applied to prison industries programs under Article 3. As of 1997, Title 24, chapter 3, Article 3 was entitled, "Prison Industries" and covered §§24-3-310 to 24-3-430. Sections 24-3-430(A)(H) state, in part:

The Director of the Department of Corrections may establish a program involving the use of inmate labor in private industry for the **..provision of services..**

..
The earnings of an inmate authorized to work at paid employment pursuant to this section must be paid directly to the Department of Corrections and **applied as provided under Section 24-3-40.**

SCDC concedes that this WTI/Lieber work project was a "service work project" (SCDC petition, p. 17). Gatewood contends this places the project squarely under §24-3-430(A). Section 24-3-430(H), in turn, incorporates §24-3-40(A) as the governing deductions statute for July 2007 due to the void left by the Governor's veto of the 2007-08 proviso.

Gatewood contends the Court of Appeals was correct that the Governor's veto of the 2007-08 proviso left July 2007 without an applicable proviso to allow SCDC to pay less than the prevailing wage and make proviso deductions for that month (Jt. App. pp. 299-301). And further, without the applicable proviso, §§24-3-430(D) and 24-3-40(A) required payment of the prevailing wage and the listed deductions therein, respectively, for July 2007 (Jt. App. p. 301).

In conclusion, Gatewood submits SCDC has not shown special and important reasons why its petition for Question A should be granted. First, SCDC's legislative intent argument is not a subsidiary question presentable under SCACR 242(d)(2). Second, it was not raised in the Court of Appeals until the petition for rehearing. Third, it is precluded by the "plain meaning" rule. Fourth, SCDC has not shown legislative intent to not create the July 2007 gap or to apply §24-1-295 retroactively to that month. Fifth, the Court of Appeals

correctly found a gap in proviso coverage for July 2007 and, as a result, §§24-3-430(D) and 24-3-40(A) governed deductions from the prevailing wage for July 2007.

Finally, Gatewood submits Question A does not raise novel questions of law under SCACR 242(b)(1) (SCDC petition, p. 17). Concerning the prevailing wage, §24-3-430(D) was enacted in 1995, three years before the work program started (Jt. App. p. 74). Moreover, this Court's decisions in Adkins, et al. v. SCDC 360 S.C. 413, 602 S.E. 2d 51, 55 (S.C., 2004) and Wicker v. SCDC 360 S.C. 421, 602 S.E. 2d 56, 58 (S.C., 2004), described §24-3-430(D) as a "mandatory" statute (Adkins) and a statutory "mandate" (Wicker).

As to deductions, §24-3-40(A) has existed in its approximate present form since 1999. Further, this Court in 2007 decided Williams and Torrence, which clearly stated prison industries wages were to be handled as provided in §24-3-40(A). Finally, since 1995 §24-3-430(H) has required prison industries earnings to be applied as provided under §24-3-40. For these reasons, Gatewood submits the application of these statutes presents well established, not novel, questions of law.

B. The Court of Appeals did not err by ruling that Gatewood was deprived of due process.

SCDC contends Gatewood's wage claim sought lawful wages, and the claim predated the ALC's retroactive application of §24-1-295. Therefore, Gatewood failed to preserve the due process claim for review (SCDC petition, p. 20). In effect, SCDC contends Gatewood's 2004 grievances alleged denial of lawful wages and deductions. And, because SCDC deprived Gatewood of due process by paying unlawful wages, he should have alleged the due process claim in his grievances.

Initially, Gatewood contends SCDC's argument in its petition that Gatewood's wage claims inherently sought lawful wages from SCDC, the claims predated the ALC's retroactive application of §24-1-295, and Gatewood failed to preserve his due process claim for ALC review, is not a subsidiary question presentable for review under SCACR 242(d)(2). SCDC argued in the Court of Appeals that Gatewood was not deprived of due process (Jt. App. pp. 252-253). However, SCDC's above stated argument in support of Question B of its petition is different from its argument in the Court of Appeals that due process was not violated because the ALC did not apply §24-1-295 retroactively to Gatewood's wages before August 2007 (Id). As a result, Gatewood contends SCDC's petition argument to this Court is not logically a subsidiary question that is fairly comprised within a question presented to the Court of Appeals, and thus not presentable under SCACR 242(d)(2).

Moreover, Gatewood contends SCDC's petition argument, above summarized, was not raised in the Court of Appeals until its petition for rehearing (Jt. App. pp. 251-253, 348-358). An issue not raised in an intermediate appeal cannot be raised in a subsequent appeal (J. Toal, Appellate Practice in South Carolina, Second Edition, p. 82). As stated above, Gatewood contends SCDC's arguments in the Court of Appeals and in its petition to this Court, are different. Thus, because SCDC did not raise its current argument in the Court of Appeals, Gatewood contends it cannot do so now.

Finally, SCDC's argument was not preserved for review by the Supreme Court on certiorari, for the above reasons (Id, p. 77; Herron v. Century BMW 719 S.E. 2d 640, 644 (S.C., 2011) (petition for rehearing insufficient to preserve issue).

Gatewood contends the current due process claim did not arise until the ALC, in its April 29, 2014 decision, applied §24-1-295 retroactively to Gatewood's pre-August 1, 2007 work (Jt. App. p. 37). As a result, Gatewood could not have asserted the due process claim at anytime before the ALC decision. Moreover, ALC Rule 65 does not permit motions for reconsideration, and Gatewood raised retroactive application of §24-1-295 and due process at the first available opportunity in the Court of Appeals (Jt. App. pp. 191, 211-212).

Gatewood further contends SCDC's preservation argument misapprehends the issue: Whether the ALC applied §24-1-295 retroactively to Gatewood's work from 2004 to August 1, 2007, resulting in divestment of Gatewood's vested right to a higher wage for that period. Our courts have long recognized the due process prohibition on applying a statute retroactively to divest vested rights (Russo v. Sutton 310 S.C. 200, 422 S.E. 2d 750, 753, n. 5 (S.C., 1992); First Presbyterian Church of York v. York Depository 203 S.C. 410, 27 S.E. 2d 573, 579 (S.C., 1943); Dunham v. Davis 91 S.E. 2d 716, 718 (S.C., 1956); Degenhart v. Burriss 360 S.C. 497, 502, 662 S.E. 2d 96 (S.C. App., 2004)).

In its opinion, the Court of Appeals stated in upholding Gatewood's preservation of retroactivity and due process for review (Jt. App. pp. 304-305):

However, the ALC's conclusion that section 24-1-295 applies to Inmate's gross earnings implies section 24-1-295 operates retroactively, given that Inmate began working for the WTI project almost three years before section 24-1-295 became law. Further, the question of whether section 24-3-40 or section 24-1-295 applies to Inmate's gross wages fairly encompasses the question of whether 24-1-295 applies retroactively to the gross wages earned before the statute's effective date.

..

The question of whether applying a statute retroactively violates due process is fairly subsumed within the question of whether the statute in fact operates retroactively. In other words, the very standard for determining whether a statute operates retroactively requires analyzing its potential to divest or limit a vested right.

Gatewood contends the Court of Appeals was correct in ruling that the ALC's application of §24-1-295 implies that it operates retroactively since Gatewood started work almost three years before §24-1-295's August 1, 2007 effective date. That is simply common sense. Gatewood further contends the Court was correct in holding due process was preserved for review, because the standard for determining if a statute operates retroactively requires analysis of its potential to divest vested rights (Dunham v. Davis 229 S.C. 29, 35, 91 S.E. 2d 716, 718 (1956) (Retroactive application of a statute relaxing tax sale procedure to respondents, whose property rights vested before statute's enactment, would be clearly unconstitutional as a deprivation of property without due process)).

Gatewood also contends the Court of Appeals' consideration of retroactive application of §24-1-295 and due process issue preservation is in keeping with the guidance in Herron v. Centry BMW 395 S.C. 461, 719 S.E. 2d 640, 644 (S.C., 2011), to approach issue preservation with a practical eye and not in a rigid, hyper-technical manner.

Finally, Gatewood contends, if the question of issue preservation is subject to more than one interpretation, any doubt should be resolved in favor of preservation (Atl. Coast Builders & Contractors, LLC v. Lewis 398 S.C. 323, 333, 730 S.E. 2d 282, 287 (S.C., 2012) (Toal, J., dissenting)).

On the merits of the due process claim, the Court of Appeals clearly noted that, prior to August 1, 2007, Gatewood had a right to wages under the provisos for the period 2004 to 2007, and for July 2007, under §§24-3-430(D) and 24-3-315. Moreover, Gatewood's right to a certain wage vested when he earned that wage (Bales v. Aughtry 302 S.C. 262,264, 395 S.E. 2d 177, 179 (1990) (Jt. App. p. 306). In addition, the provisos governed deductions for the period 2004 to 2007 (Jt. App. p. 307). And, for July 2007, §24-3-40 governed deductions (Id.).

When §24-1-295 was effective, the "other required deductions" clause supplemented the deductions required in §24-3-40 because §24-3-40 does not contain the catch-all phrase, "other required deductions" (Jt. App. p. 307). Also, §24-3-40 required deductions for taxes, which reduce an inmate's tax debts. Thus, the deductions increase caused by §24-1-295 beginning August 1, 2007 resulted in less income to Gatewood (Jt. App. p. 307, n. 14-15).

The Court of Appeals held that applying the deductions increase authorized by §24-1-295 retroactively to gross wages earned during July 2007 would divest Gatewood's vested right to higher wages for that month, i.e., gross wages less only those deductions authorized by §24-3-40(A), and therefore violate his due process rights (Jt. App. p. 307). In addition, the Court reached the same conclusion for 2004 to 2007 to the extent that §24-1-295 deductions would reduce net wages from what they would have been applying the proviso deductions for that period (Jt. App. p. 307, n. 15).

Gatewood contends the Court of Appeals' ruling on the merits was correct. First, §24-1-295 was effective on August 1, 2007. However, Gatewood worked

from 2004 to 2009. The ALC found that (Jt. App. p. 37):

However, the Court finds that based on the terms of the Contract, security costs and overhead, including costs for health, safety, and welfare, constituted "other required deductions" pursuant to Section 24-1-295.

Second, SCDC claims entitlement under §24-1-295's "other required deductions" clause to deduct from Gatewood's gross earnings the above mentioned costs as approved by the ALC, but reversed by the Court of Appeals for pre-August 1, 2007 work.* These costs were not deductible under §24-3-40 or the provisos before §24-1-295 became law. Thus, these deductions would reduce Gatewood's, or any inmate's, pay below what it would be under pre-§24-1-295 law. As result, Gatewood contends application of §24-1-295 retroactively works a divestment, or taking, of his wages, the right to which vested when they were earned before §24-1-295 became law. This taking, in turn, violates Gatewood's due process rights pursuant to the decisions cited at page 16.

For these reasons, Gatewood contends the Court of Appeals was correct in holding the ALC applied §24-1-295 retroactively to his work, which operated to divest him of vested rights to earned wages, and thus violated due process.

SCDC makes various contentions concerning the Court of Appeals' June 2, 2016 order denying the parties' petitions for rehearing (SCDC petition, p. 21-23). Gatewood contends the June 2, 2016 order and rulings therein are not subject to review in SCDC's petition for certiorari. In SCACR 242(a), it states the Supreme Court may "...issue a writ of certiorari to review a **final**

* In his June 30, 2016 petition for certiorari, Gatewood contests the Court of Appeals' ruling allowing SCDC to deduct for these expenses after the August 1, 2007 effective date of §24-1-295.

decision of the Court of Appeals". Gatewood contends the June 2, 2016 order is not the "final decision" subject to review under the rule.

This conclusion is consistent with SCACR 242(e)(3)(4), which governs contents of the appendix, and clearly distinguishes between the Court of Appeals decision "..on which certiorari is sought", and the "..Court's ruling" on the petition for rehearing.

On the merits concerning the June 2, 2016 order, SCDC contends the Court of Appeals order failed to resolve inconsistent rulings that Gatewood preserved his retroactivity and due process claims while he failed to preserve his overtime claim (SCDC petition, p. 22). Gatewood contends the order is correct that overtime entitlement is a separate question from, and not encompassed by, the evaluation of the proper amount of Gatewood's regular wage (Jt. App. p. 396).

Regarding the Court of Appeals' conclusion that the parties addressed deductions in their ALC briefs and the ALC addressed these arguments in its order, SCDC contends Gatewood's briefs discussed deductions only in the demand portions thereof (SCDC petition, p. 22). For brevity, Gatewood provides the appendix page numbers where the parties and the ALC discussed deductions (Gatewood's main brief, Jt. App. pp. 117, 125-126; SCDC's brief, Jt. App. pp. 135-139, 142-147; Gatewood's reply brief, Jt. App. pp. 157-160, 162-164, 168; and ALC April 29, 2014 order, Jt. App. pp. 34-38). Gatewood did not discuss deductions in his ALC argument because the ALC had stated it could consider Gatewood's entitlement to the \$4 per hour wage, but not back wage calculations (Jt. App. p. 117).

SCDC contends Gatewood never asserted in the ALC application of proviso

deductions instead of §24-3-40(A) deductions (SCDC petition, p. 22). Gatewood relied on §24-3-40(A) primarily because of clear language in Williams and Torrence stating that §24-3-40(A) governed deductions from prison wages (Jt. App. pp. 125-126; 156-160, 163-164). Moreover, Williams involved the Lieber/WTI work program, the same one in which Gatewood participated.

SCDC contends, contrary to the Court of Appeals' order, Gatewood never briefed retroactivity or due process in the ALC regarding deductions assessed by operation of the provisos or §24-1-295 (SCDC petition, p. 23). First, the Court of Appeals did not conclude as SCDC contends. The Court concluded, "(B)oth parties addressed deductions from gross wages in their briefs before the ALC, and the ALC's conclusion that section 24-1-295 governed deductions directly addressed these arguments". (Jt. App. p. 395). The Court's statement was correct (Jt. App. pp. 34-38; 117, 125-126; 135-139, 142-147; 157-160, 162-164, 168).

Second, Gatewood's retroactivity and due process claims obviously did not exist while the parties were briefing in the ALC, but only when the ALC applied §24-1-295 retroactively in its April 29, 2014 order to Gatewood's pre-August 1, 2007 work (Jt. App. pp. 37-38).

In conclusion, Gatewood submits SCDC has not shown special and important reasons why its petition for Question B should be granted. First, the current due process claim did not arise until the ALC's April 29, 2014 decision, and the Court of Appeals correctly considered the issue in its decision because it was preserved for that Court's review. Second, the Court of Appeals was correct in ruling that application of §24-1-295 retroactively to Gatewood's July 2007

wages would violate due process.

Finally, Question B does not raise novel questions of law under SCACR 242(b)(1) (SCDC petition, p. 20). Gatewood contends the due process issue presented is controlled by long established precedent in South Carolina (Russo v. Sutton; First Presbyterian Church of York v. York Depository; Degenhart v. Burriss; and Dunham v. Davis). Thus, the due process issue presented raises long and well established questions, not novel ones.

C. Subsidiary questions of attorney fees, interest and costs

SCDC contends that, if this Court accepts the case for review and reverses the Court of Appeals, the Court of Appeals' remand to the ALC for consideration of attorney fees, interest and costs, and Gatewood's status as prevailing party, would also be reversed (SCDC petition, p. 24). Gatewood contends the Court of Appeals' rulings on the issues SCDC contests were correct, and its remand to the ALC for consideration of attorney fees, interest and costs should be affirmed.

In sum, Gatewood contends the record evidence clearly shows a legislative intent to apply §24-1-295 prospectively, not retroactively. However, assuming for argument purposes that the legislature did intend to apply §24-1-295 retroactively, Gatewood contends the proviso, that even a retroactive statute cannot be applied retroactively **when it operates to divest vested rights**, would trump the legislative intent and prevent its application to Gatewood's pre-August 1, 2007 work (Russo v. Sutton; First Presbyterian Church of York v. York Depository; Degenhart v. Burriss; Dunham v. Davis). SCDC's petition does not dispute, or even address, that applying §24-1-295 retroactively would divest Gatewood's vested right to wages (SCDC petition, pp. 20-21).

CONCLUSION

In conclusion, Gatewood respectfully requests that SCDC's Petition For A Writ Of Certiorari be denied and the Court of Appeals' decision be affirmed.

Respectfully submitted,



Douglas H. Westbrook, #6039

23 Broad St.

Charleston, SC 29401

(843) 853-9600

Attorney For Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph K. Anderson, III, Administrative Law Judge
Dock. No. 07-ALJ-04-00517-AP

Opinion No. 5389 (S.C. Ct. App. filed March 9, 2016)
App. Case No. 2016-001221

Fred Gatewood, #289775..... Respondent,

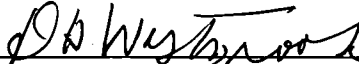
v.

South Carolina Department of Corrections..... Petitioner.

PROOF OF SERVICE

I certify that I have served respondent's Response To Petition For A Writ Of Certiorari on the S.C. Department of Corrections by depositing a copy of it in the U.S. Mail, postage prepaid, on August **23**, 2016, addressed to its attorney of record, Lake Summers, Esquire, Malone, Thompson, Summers & Ott, LLC, 339 Heyward St., Suite 200, Columbia, SC 29201.

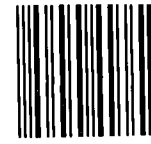
August **23**, 2016



Douglas H. Westbrook, #6039
23 Broad St.
Charleston, SC 29401
(843) 853-9600
Attorney For Respondent



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DOUGLAS H. WESTBROOK
ATTORNEY AT LAW
23 BROAD STREET
CHARLESTON, SOUTH CAROLINA 29401

The Honorable Daniel E. Shearouse
Clerk of Court
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

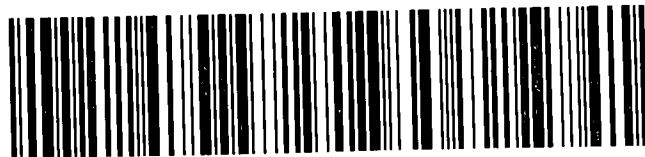


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