

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No. 2017-001709

The Honorable Deborah Brooks Durden
Trial Court Case No. 2017ALJ040349AP

RECEIVED
OCT 31 2017
SC Court of Appeals

Leroy A. McKenzie, #300416, Appellant,

v.

South Carolina Department of Corrections, Respondent.

MOTION FOR LEAVE TO REINSTATE APPEAL

COMES NOW, Leroy A. McKenzie, Appellant in the above captioned. Appellant resides at a public institution, indigent pro se, inmate filed a notice of appeal and motion to proceed in forma pauperis. This instant action is pursuant to Rule 260(a). Appellant pursuant to the Court's Order of Dismissal, dated October 13, 2017 and received by Appellant on October 17, 2017 kindly request the Court to reinstate his Appeals process for cause demonstrated below. SC Court of Appeals Order dated September 13, 2017 and received by Appellant on September 15, 2017 Denied the Motion to proceed in forma pauperis pursuant to Ex parte Martin, 321 SC 533, 471 SE2d 134 (1995). . 'effectively barring indigent inmate from petitioning court for "cause of action" of violations of Constitutional rights under the Eighth Amendment proscriptions against cruel and unusual punishment, the Fourteenth Amendment Due Process Clause and The Americans With Disabilities Act (ADA) Title II and prohibition against retaliation for assertion of the same, and First Amendment rights for barring access to petitioning the court by requiring indigent Appelant to prepay a filing to protect these fundamental interest that are at stake.

Appellant's cause of action involves fundamental rights that require waiver of the filing fee. "S.C.A.G. 2005WL2652382, Deshield Smith, October 3, 2005. The Clerk must submit the Motion to a judge. see *McFaddan v. Dunlap*, 2016WL4993406 [IN RE EXHAUSTION]. Title 28USC §1738 State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit. This provision requires federal courts to give the same preclusive effect to state court judgments they would have in rendering jurisdiction. see *Robi v. Five Platters, Inc.*, 828 F2d 318 (9th Cir 1988); *Brown v. Tucci*, 960 Fsupp2d 544, 566-67 (2013).

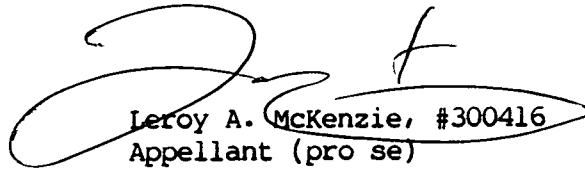
MOREOVER; 42USC §1997e(a) requires mandatory exhaustion of state inmates available grievance remedies for Appellant's Constitutional and ADA claims to the State's highest Court. The State Court precedent *Ex parte Martin* (Supra), does not discuss or express an opinion that addresses the exhaustion concerns that §1997e(a) mandate on state prisoners, nor does it provide waiver of exhaustion when cause of action concerns a fundamental right in instances when an indigent inmate cannot pay a filing fee and the State in comity must have the first opportunity to address Appellant's Constitutional and ADA claims in light of the State's duty to provide medical care to the inmates of its' prisons. (see SC Const. Art. XII, Section 2 and 12; SC Code of Laws §24-1-20, 130 and 140; SCDC Policy HS-18.01(6), HS-18.15(1.1)). These are several provisions in South Carolina which generally concern the custody and care of prisoners. It can be said that existing in South Carolina are provisions of law which express a general intent by Legislature that all convicted prisoners be afforded adequate medical services. (. . .it cannot be seriously questioned that SCDC has the authority and duty in the area of providing health services to inmates.)(S.C.A.G. 1986WL289656).

Appellant, from the very outset and now, hereby, press a claim that he has a fundamental right to due process and access to the court to petition for available redress as a result of alleged SC Const. Art. XII, Sec.2 and Sec. 9; US Const. Eighth Amend. and ADA violations for medical care and treatment and he has suffered actual injury (loss of 30 lbs) deteriorating health, which necessitate a "fee waiver". See *M.L.B. v. S.L.J.*, 519 US 102, 113, 117 SCT 555, 562-64, 136 LEd2d 473 (1996)(indicating fee waivers are required in a "narrow category of civil cases" where litigant has a "fundamental interest" at stake.) Due process rights to access to the courts and the right to petition officials and courts for redress of grievances are fundamental right which cannot be invaded without justification by compelling state interest. (*Goldberg v. Kelly*, 397 US 254, 268-69 (1970)(due process requires that procedures be tailored to "the capacities and circumstances of those who are to be heard")

In this case Appellant's indigency and desire for medical/health care is beyond dispute. The requirement that the Appellant resort to the State process is entirely a state created matter, thus, must afford indigent Appellant access to the means it has prescribed for doing so. The Court of Appeals Order "Denying" *informa pauperis* standing to Appellant had effectively foreclosed access to the courts of South Carolina and will discontinue the action because indigent inmate's (Appellant's) only means of bringing the action was *in forma pauperis* and *pro se*. If indigent Appellant would not be granted leave to proceed *in forma pauperis* to file an appeal to the State's highest court from the prison grievance system as such, further attempts to exhaust pursuant to 42USC §1997e(a) would be futile. (See *Gray v. Zook*, 806 F3d 783, 798; *Knight v. State of WVa*, 921 F2d 1251; *Teague v. Lane*, 498 US 288 (1989); *Snethen v. Nix*, 736 F2d 1241, 1245 (8th Cir 1984); *Wiley v. Stowers*, 647 F2d 642, 647 (6th Cir 1981).

PRAYER FOR RELIEF

Appellant, based on his foregoing proposition in applying such legal principles request his Appeal "Reinstated" and should be granted leave to proceed in forma pauperis and a construction consistent with laws and caselaw should be reviewed by this Court in these circumstances.


Leroy A. McKenzie, #300416
Appellant (pro se)

Lieber Cor. Inst./SA-62
P.O. Box 205
Ridgeville, SC 29472

Dorchester, South Carolina
October 25th, 2017

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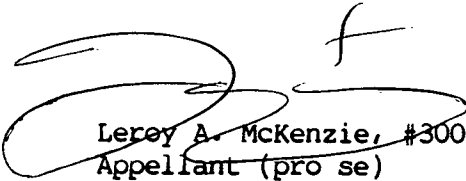
Leroy A. McKenzie, #300416, Appellant,

v.

South Carolina Department of Corrections, Respondent.

PROOF OF SERVICE

I certify that I have served the MOTION FOR LEAVE TO REINSTATE APPEAL on Jenny Abbott Kitchings, Clerk, South Carolina Court of Appeals and David Tatarsky, Esquire, SCDC by depositing a copy of it in the Lieber Cor. Inst. Mailroom (Inter-Agency Mail) on October 25, 2017, addressed to Jenny Abbott Kitchings, Clerk, P.O. Box 11629, Columbia, SC 29211 and David Tatarsky, General Counsel (SCDC), 4444 Broad River Road, P.O. Box 21787, Columbia, SC 29221-1787.


Leroy A. McKenzie, #300416
Appellant (pro se)

Lieber Cor. Inst./SA-62
P.O. Box 205
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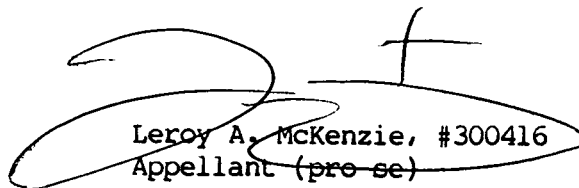
Honorable Jenny Kitchings Abbott, Clerk
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Leroy A. McKenzie, #300416 v. S.C.D.C (Appellate Case No.2017-001709)
Appellant's MOTION FOR LEAVE TO REINSTATE APPEAL

Dear Ms. Abbott,

Please find enclosed Appellant's Original records, MOTION FOR LEAVE TO REINSTATE APPEAL and PROOF OF SERVICE, that was this day served on Respondents and Clerk, SC Court of Appeals.

Sincerely,


Leroy A. McKenzie, #300416
Appellant (pro se)

cc: David Tatarsky, Esquire

Mr. Leroy A. McKenzie, #300416
Lieber Cor. Inst./SA-62
P.O. Box 205
Ridegville, SC 29472

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OCT 26 2017

MAIL ROOM
LIEBER C.I.

FOR LEGAL USE ONLY

Honorable Jenny Kitchings Abbott, Clerk
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

[INTER-AGENCY MAIL]

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THE DEPARTMENT OF CORRECTIONS HAS NOT
INSPECTED OR CENSORED THIS ITEM; THEREFORE,
THE DEPARTMENT DOES NOT ASSUME RESPONSIBILITY
FOR ITS CONTENTS.

LIEBER CORRECTIONAL INSTITUTION
S.C. DEPARTMENT OF CORRECTIONS

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