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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

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Appellate Case No. 2021-001143

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Quincy Allen,.....Petitioner,

v.

South Carolina Department of Corrections,.....Respondent.

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**PETITION FOR WRIT OF CERTIORARI**

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## CERTIFICATION OF COUNSEL

The Court of Appeals denied Quincy Allen's Petition for Rehearing (A. 8-13) by written order dated September 8, 2021 (A. 7).

### QUESTION PRESENTED

Does Quincy Allen, a death sentenced inmate confined to the South Carolina Department of Corrections, have a liberty interest in rehabilitation and visitation with members of the general public?

### STATEMENT OF CASE

Quincy Allen is a death-sentenced inmate confined to the South Carolina Department of Corrections ("SCDC") at the Kirkland Reception and Evaluation Center. On March 15, 2018, Mr. Allen sent a Request to Staff Member stating:

I'm requesting that you stop disapproving visitation applications just because the person didn't know me before my incarceration in August 2002. It's prejudicial and discriminating! The people that want to see [me] are my friends, and they have never been arrested and they don't have a criminal record. You're arbitrarily denying law abiding citizens the opportunity to take time out of their weekend, to come and see me, because they love and support me.

R. 13.<sup>1</sup> On March 19, 2019, the SCDC responded:

Be advised that All previous visitation applications have asked, "Did you know the inmate prior to incarceration?" We consider not knowing an inmate but wanting to visit a security concern. Therefore, I recommend that you communicate with them by mail/phone/messaging.

R. 13.

On March 21, 2018, Mr. Allen submitted a Step 1 Inmate Grievance Form stating:

I'm requesting that the SCDC Visitation Department Branch Chief's Office stop denying law abiding citizens the opportunity to visit me for the simple

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<sup>1</sup> A blank copy of the SCDC Request for Visiting Privileges is found at R. 27-28.

reason that we didn't know each other prior to August 2002. I've met people since August 2002 that have said that they'd now like to visit me.

R. 15. On March 30, 2018, the SCDC responded, "SCDC feels that not knowing an inmate prior to incarceration is a security concern." The SCDC once again suggested, "You still has [sic] the option to communicate with them by mail and phone." R. 16.

On March 26, 2018, while the Step 1 Grievance was still pending, Mr. Allen sent a Request to Staff Member stating:

A couple of my former attorneys are going to submit applications so that they can visit me as friends on the weekends. Will their applications be approved, even though they didn't know me before my incarceration, but they did get to know me since my incarceration, while they were representing me in the South Carolina court system, since 2002?

R. 18. On March 28, 2018, the SCDC responded, "Again, if an individual didn't know you before incarceration, they are not eligible." The response added, "If they request to see you as an attorney, they go through a different office." R. 18.

On April 4, 2018, Mr. Allen submitted a Step 2 Inmate Grievance Form pointing out:

As a Death Row inmate, I'm not allowed to have contact visits, so SCDC's feeling of someone not knowing me, before August 2002, being a security concern, is null and void, in addition to being nonsensical. My former attorney, Michael Siem, and his wife Audrey were denied on their application to visit me on the weekend. We had contact visits when he was my attorney and now he's my good friend. SCDC's current practice is inhumane.

R. 20. On May 8, 2018, the SCDC denied Mr. Allen's grievance and cited to its policy:

SCDC Policy OP-22.09, "Inmate Visitation," states that "Inmate visitation is considered to be a privilege and is not considered a guaranteed right. Therefore, the SCDC reserves the right to suspend, restrict, deny, or terminate an inmate's or visitor's visitation privilege and/or telephone privilege due to legitimate concerns regarding the security and safety of the institution." Although you may wish to have certain persons of your choice to be eligible to visit you, your incarceration at SCDC has limitations that

must be followed for a number of reasons included but not limited to security.

R. 20.<sup>2</sup>

Mr. Allen appealed to the Administrative Law Court. He raised four issues on appeal:

1. The South Carolina Department of Corrections (SCDC) is using arbitrary and capricious unwritten policies and procedures to disapprove law-abiding citizens from visiting inmates.
2. The SCDC is disregarding and overlooking their written policies and procedures regarding visitation of inmates.
3. The SCDC is misapplying written policies and procedures in an overly broad and equivocal manner.
4. The SCDC deprived me of my right to due process in a fair grievance resolution.<sup>[3]</sup>

R. 5 (footnote added).

In his first argument, Mr. Allen argued the SCDC's prohibiting visitors he did not know before his incarceration "is arbitrary and capricious because it is not addressed in *any written policy or procedure* promulgated by the SCDC, which is legally significant because all of their other concerns dealing with visitation approval are addressed in writing." Mr. Allen pointed out that Mr. Siem was one of his prior attorneys, has known him "for over 7 ½ years," lives in Brooklyn, New York, and would prefer to visit "on weekends during personal visitation hours." Mr. Allen further pointed out:

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<sup>2</sup> A copy of the SCDC Policy OP-22.09 is found at R. 36-57.

<sup>3</sup> On May 18, 2018, Mr. Allen inquired of the Office of General Counsel, "Why was Alice Marcio allowed to deny my informal resolution and then allowed to decide my Step 2 grievance final decision? She was not going to overrule herself, after Warden Willie Davis upheld her informal resolution response to me." R. 23.

Brie Russell is a lawyer in Columbia, SC and I have gotten to know her family. Her mother and sister send me words of encouragement and books to keep my mind busy. I do not have a lot of family or friends in my life and rely on my current and former legal teams for friendship and support. They help me strive to continue to grow as a person even under my current circumstances. The conditions on death row do not allow for much human interaction and we do not even have a window to see outside. Ms. Russell's mother, father and sister would like to be able to visit me during regular visitation hours.

Each of the individuals noted above are law-abiding, productive citizens and simply because I was not fortunate enough to have met them prior to my incarceration, the SCDC has denied the approval to be added to my visitation list. It should be noted that as a death row inmate I am not even permitted to have contact visitation with friends and family. All of my personal visits are in glass booths with telephone receivers.

R. 6-7 (emphasis original).<sup>4</sup> Mr. Allen then argued, “Because Question 6 [inquiring whether the person applying for visitation knew the inmate prior to his incarceration] is not addressed in any written policy or procedure, as the other 5 questions are, this should not be the sole basis for denying an individual the ability to be an approved visitor for an inmate.” Mr. Allen informed the administrative law court that the SCDC denying these visitors negatively impacts his “attitude,” “mental health” and “outlook on life and [his] rehabilitation.” R. 7-8.

Mr. Allen addressed the SCDC written policy. In his first argument, Mr. Allen pointed out the SCDC policy encourages inmates to visit with friends and family and pledges to conduct visitation “in an accommodating manner.” In his second argument, Mr. Allen pointed out the SCDC policy allows visitors to “be added to an inmate’s visitation approved list at any time, provided that the addition of the visitor(s) does not cause the

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<sup>4</sup> Eighteen death row inmates sued the SCDC in the United States District Court for the District of South Carolina regarding the conditions of confinement on death row. *Northcutt v. South Carolina Department of Corrections*, C/A 4:17-cv-03301-BHH-TER.

inmate to exceed the 15 visitor limit.” Mr. Allen then pointed out that written policy allows the SCDC to “suspend, restrict, deny, or terminate an inmate’s or visitor’s privileges and/or telephone privileges due to **legitimate concerns** regarding the security and safety of the institution.” Mr. Allen then argued:

The SCDC has no legitimate basis, nor any evidence whatsoever, for postulating that my proposed visitors are a threat to the security of the institution, staff, or others. None of them have a criminal record nor have they ever been arrested. In fact each of them is a pillar within her/his community. The fact that they did not know me prior to my incarceration is not a legitimate concern for safety. This is entirely too broad to be the sole basis for a denial of a visitor being added to an inmate’s approved visitor list.

R. 7-9 (emphasis supplied in ALJ brief).

The SCDC did not address the merits of Mr. Allen’s arguments, but rather moved to dismiss pursuant to *Slezak v. S.C. Dep’t of Corr.*, 361 S.C. 327, 605 S.E.2d 506 (2004) and *Skipper v. S.C. Dep’t of Corr.*, 370 S.C. 267, 633 S.E.2d 910 (Ct. App. 2006) because Mr. Allen “has no liberty interest in having visitors that he did not know prior to incarceration.” R. 62-64.

Mr. Allen replied, pointing out his right to “rehabilitation” is “a state created liberty interest,” pursuant to S.C. Const. Art. XII, § 2. *See also Sullivan v. S.C. Dep’t of Corr.*, 355 S.C. 437, 586 S.E.2d 124 (2003). He argued one of the “primary goals” of the SCDC policy of “providing visitation to inmates is rehabilitation.” He pointed out, “Many inmates, including [himself], are serving lengthy, sometime lifetime, sentences. Denying their ability to create and foster relationships over the course of their lives flies in the face of the stated Constitutional right to rehabilitation opportunities.” R. 65-66.

The Administrative Law Judge granted the SCDC’s motion to dismiss, relying in large part, on *Kentucky Dep’t of Corr. v. Thompson*, 490 U.S. 454 (1989), to conclude

“there is no state-created liberty interest in visitation, much less visitation with a specific persons of his choosing.” The administrative law court reasoned:

Here, [Mr. Allen] has not been denied visitation. He has only been denied visitation with persons [he] did not know prior to his incarceration; however, he may communicate with these persons via telephone or letter. Therefore, a state-created liberty interest has not been implicated in this case, and this Court takes a hand off approach to internal prison matters.

R. 1-3.

Mr. Allen appealed to the Court of Appeals of South Carolina. He raised the following issue:

Does Quincy Allen, a death sentenced inmate confined to the South Carolina Department of Corrections, have liberty interests in rehabilitation and visitation with members of the general public?

A. 18. On May 5, 2021, the Court of Appeals convened and oral argument. On August 4, 2021, the Court of Appeals affirmed the Administrative Law Court in a published opinion “because there was no state-created liberty interest in visitation.” *Allen v. S.C. Dep’t of Corr.*, \_\_\_ S.C. \_\_\_, \_\_\_, 862 S.E.2d 268, 272 (S.C. Ct. App. 2021). A. 1-6. On August 19, 2021, Mr. Allen petitioned for rehearing, pointing out the court below failed to consider the significance of Justice Kennedy’s concurring opinion identifying this limitation of the holding in *Thompson*:

I concur fully in the opinion and judgment of the Court. I write separately to note that this case involves a denial of prison access to particular visitors, not a general ban on all prison visitation. Nothing in the Court’s opinion forecloses the claim that a prison regulation permanently forbidding all visits to some or all prisoners implicates the protections of the Due Process Clause<sup>5</sup> in a way that the precise and individualized restrictions at issue here do not.

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<sup>5</sup> U.S. Const. Am. XIV; *see also* S.C. Const. Art. I, § 3.

A. 8-13. On September 8, 2021, the Court of Appeals denied the petition. This petition follows.

### STANDARD OF REVIEW

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

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

S.C. Code Ann. §1-23-610(B); *see also Howard v. S. Carolina Dep’t of Corr.*, 399 S.C. 618, 625, 733 S.E.2d 211, 215 (2012).

### ARGUMENT

**Does Quincy Allen, a death sentenced inmate confined to the South Carolina Department of Corrections, have a liberty interest in rehabilitation and visitation with members of the general public?**

The Administrative Law Judge relied on *Thompson* in upholding the SCDC’s unwritten policy of denying inmates visitation with an entire class of visitors—anyone Mr. Allen did not know prior to his incarceration. The Court of Appeals cited *Thompson* in passing, by noting, “[S]tate law may create enforceable liberty interests in the prison

setting.” *Allen*, \_\_\_ S.C. at \_\_\_, 862 S.E.2d at 270 (citing *Thompson*, 490 U.S. at 461). In his petition for rehearing, Mr. Allen acknowledged the Court of Appeals brief citation to *Thompson*, argued the court below failed to consider “the distinction between the facts before the Court in *Thompson* and the issue presented” by Mr. Allen, and requested the court below consider Justice Kennedy’s concurring opinion in *Thompson* which warned “a general ban on all prison visitation” might “implicate[] the protections of the Due Process Clause in a way that the precise and individualized restrictions at issue [in *Thompson*] do not. A. 8-13.

Therefore, it is important to understand the holding in *Thompson*, including the limitations of that holding. Justice Blackmun, writing for the majority, described the issue before the High Court:

This particular litigation was prompted in large part by two incidents when applicants were denied the opportunity to visit an inmate at the reformatory. The mother of one inmate was denied visitation for six months because she brought to the reformatory a person who had been barred for smuggling contraband. Another inmate’s mother and woman friend were denied visitation for a limited time when the inmate was found with contraband after a visit by the two women. In both instances the visitation privileges were suspended without a hearing. The inmates were not prevented from receiving other visitors.

490 U.S. at 458. The issue before the Court in *Thompson*, accordingly, involved “[t]he denial of prison access to a particular visitor” which has long been held to be “well within the terms of confinement ordinarily contemplated by a prison sentence.” *Id.* at 461 (quoting *Hewitt v. Helms*, 459 U.S. 460, 468 (1983)). Justice Kennedy, in his concurring opinion, identified the limitations of the holding in *Thompson*:

I concur fully in the opinion and judgment of the Court. I write separately to note that this case involves a denial of prison access to particular visitors, not a general ban on all prison visitation. Nothing in the Court’s opinion forecloses the claim that a prison regulation permanently forbidding all

visits to some or all prisoners implicates the protections of the Due Process Clause<sup>[6]</sup> in a way that the precise and individualized restrictions at issue here do not.

490 U.S. at 465 (Kennedy, J. concurring) (footnote added).

Mr. Allen’s appeal involves neither a “denial of prison access to a particular visitor” nor “a general ban on all prison visitation.” On the continuum between these two extremes, a permanent and complete ban on a broad category of visitors—anyone Mr. Allen did not know prior to his incarceration—is much closer to “a general ban on all prison visitation” than a “denial of prison access to a particular visitor,” thereby implicating the due process clause.

As argued in the Administrative Law Court and the Court of Appeals, Mr. Allen has a right to “rehabilitation” that is “a state created liberty interest,” pursuant to S.C. Const. Art. XII, § 2. A. 23-25, 118-19. This constitutional provision mandates the SCDC provide rehabilitation for inmates, which includes visitation. The SCDC policy, in fact, is “to enable and encourage inmates, consistent with security and classification requirements, to visit with family and friends. . . . in an accommodating manner.” R. 7. In his appeal to the Administrative Law Court, Mr. Allen identified five people he believes qualify as visitors under the SCDC’s written policy. The relief requested by Mr. Allen would merely prohibit the SCDC from “disapproving visitation applications just because the person didn’t know [him] before [his] incarceration.” R. 6, 10. The individual visitors still would be subject to the ordinary visitor application process and the SCDC visitation policy. The visitors still would be subject to the SCDC’s security measures, and the visitation would be in accordance with Mr. Allen’s classification as a death row inmate. The SCDC still

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<sup>6</sup> U.S. Const. Am. XIV; *see also* S.C. Const. Art. I, § 3.

would be able to “suspend, restrict, deny, or terminate an inmate’s or visitor’s privileges and/or telephone privileges due to legitimate concerns regarding the security and safety of the institution.” *See* R. 37. Rather than categorically banning a class of visitors, the SCDC would be required to make the “individualized” determination that was at issue in *Thompson*, 490 U.S. at 465 (Kennedy, J. concurring).<sup>7</sup>

In the court below, the SCDC argues its policy is not arbitrary and capricious because “Alice Mascio explained her reasoning for denying these visitors in her response to [Mr. Allen’s] Request to Staff Member stating, ‘not knowing an inmate but wanting to visit [is] a security concern.’”<sup>8</sup> Brief of Respondent at 7-8. Two hypotheticals illustrate exactly why this policy is arbitrary and capricious.

First, many people sentenced to the SCDC associated with people who engaged in criminal conduct prior to their incarceration. They might have committed crimes together. They might have consumed illegal drugs together. Sadly, family members sometimes introduce a person to criminal activity or illicit drug use. The SCDC could conclude that knowing an inmate prior to the inmate’s incarceration and wanting to visit that inmate is a security concern and, therefore, prohibit visitors that knew the inmate prior to incarceration. If the SCDC decides to combine such a policy with the policy at issue in Mr. Allen’s case, then the SCDC would effectively ban all visitation.

Second, the SCDC policy involved in Mr. Allen’s case does not operate as a complete ban of the proposed visitor from visiting the institution. For example, Inmate A

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<sup>7</sup> As seen, Mr. Allen’s litigation regarding this issue commenced prior to the COVID-19 pandemic. Mr. Allen does not challenge the special procedures implemented in response to the pandemic.

<sup>8</sup> This policy is not a written policy.

knew Visitor A prior to his incarceration. Inmate B did not know Visitor A prior to his incarceration. Under the SCDC's policy, Visitor A is allowed to visit Inmate A but not Inmate B. There is no rational reason to believe Visitor A poses a security risk for wanting to visit Inmate B while still allowing Visitor A entry to the institution to visit Inmate A.

Additionally, the policy at issue in Mr. Allen's case is at odds with the SCDC's values expressed by its volunteer program. A copy of the SCDC website for "Volunteers" is attached to this brief.<sup>9</sup> The website states:

Winston Churchill once said, "We make a living by what we do, but we make a life by what we give." Volunteers are special people who unselfishly donate their time and energy towards inmates in need. They are the cherished resources of the South Carolina Department of Corrections. They supplement staff, provide programs and services that might not otherwise be available, and bridge the gap between the community and the correctional setting. There are no special education, race, sex, religion, or marital status requirements — just a desire to work with those less fortunate and a willingness to learn and follow the rules.

The SCDC volunteers provide inmates counseling, education, mentoring, pre-release preparation, recreation, and religious programs. Volunteers instruct seminars and sponsor Alcoholic Anonymous and Narcotics Anonymous groups. In essence, volunteers are a part of inmates' rehabilitation. Volunteers must "[s]ubmit an application" and "[a]bide by all Agency policies, in particular, the contraband policy."<sup>10</sup>

That Mr. Allen has met people that take an active interest in his personal growth, development, and rehabilitation speaks well of both Mr. Allen and his new friends. Mr. Allen acknowledges his proposed visitors must submit applications for visitation,

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<sup>9</sup> Found at <http://www.doc.sc.gov/programs/volunteers.html> (last viewed October 9, 2021).

<sup>10</sup> *Id.*

otherwise qualify for visitation, and abide by all Agency policies. Mr. Allen merely asks this Court to require the SCDC to make that individualized determination.

### **CONCLUSION**

For the foregoing reasons, this Court should grant the writ and consider the question.

Respectfully Submitted,

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